

4-27-2012

BV Beverage Co., LLC v. State Clerk's Record Dckt.  
39690

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**Recommended Citation**

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IN THE SUPREME COURT OF THE STATE OF IDAHO

BV BEVERAGE COMPANY, LLC, an  
Idaho limited liability company,

Petitioner-Appellant,

v.

THE STATE OF IDAHO, DEPARTMENT  
OF IDAHO STATE POLICE/ALCOHOL  
BEVERAGE CONTROL, G. JERRY  
RUSSELL, in his official capacity as  
Director of Idaho State Police,

Respondent.

Supreme Court Docket No. 39690-2012

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the Fourth Judicial District, in and for the County of Ada.

HONORABLE MIKE WETHERELL

REBECCA A. RAINEY

ATTORNEY FOR APPELLANT

BOISE, IDAHO

CHERYL E. MEADE

ATTORNEY FOR RESPONDENT

BOISE, IDAHO

. BV Beverage Company LLC vs. The State Of Idaho, Department Of Idaho State Police Alcohol Beverage, G Jerry Russell

Date	Code	User		Judge
3/31/2011	NCOC	CCRANDJD	New Case Filed - Other Claims	Kathryn A. Sticklen
	PETN	CCRANDJD	Petition For Judicial Review	Kathryn A. Sticklen
4/5/2011	OGAP	DCTYLENI	Order Governing Judicial Review	Kathryn A. Sticklen
4/12/2011	MOTN	CCDWONCP	Motion to Disqualify without Cause under IRCP 40(d)(1)	Kathryn A. Sticklen
4/20/2011	ORDQ	CCWATSCL	Order Granting Disqualification Without Cause	Kathryn A. Sticklen
	CJWO	CCWATSCL	Notice of Reassignment to Judge Mike Wetherell	Mike Wetherell
4/22/2011	ORDR	DCOATMAD	Order Advising Parties of Deadlines	Mike Wetherell
5/25/2011	NOTC	CCMASTLW	Notice of Lodging of Agency Record	Mike Wetherell
	NOTC	CCMASTLW	Notice of Filing the Agency Record	Mike Wetherell
5/27/2011	MOTN	CCMASTLW	Motion to Augment the Record	Mike Wetherell
	MOTN	CCMASTLW	Motion for Order Staying Agency Action	Mike Wetherell
	AFFD	CCMASTLW	Affidavit of Cortney Liddiard	Mike Wetherell
	MEMO	CCMASTLW	Memorandum in Support	Mike Wetherell
	NOHG	CCMASTLW	Notice Of Hearing	Mike Wetherell
	HRSC	CCMASTLW	Hearing Scheduled (Hearing Scheduled 06/17/2011 11:30 AM) Mo/Stay Agency Action	Mike Wetherell
6/13/2011	STIP	CCHOLMEE	Stipulation to Stay Agency Action	Mike Wetherell
	NOTC	CCHOLMEE	Notice Vacating Hearing	Mike Wetherell
	HRVC	CCHOLMEE	Hearing result for Hearing Scheduled held on 06/17/2011 11:30 AM: Hearing Vacated Mo/Stay Agency Action	Mike Wetherell
6/17/2011	ORDR	TCWEGEKE	Order Granting Stipulation to Stay Agency Action	Mike Wetherell
6/29/2011	BREF	MCBIEHKJ	Petitioners Appellate Brief	Mike Wetherell
7/20/2011	ORDR	DCDANSEL	Order Granting Extension of Time to File Brief	Mike Wetherell
7/21/2011	ORDR	DCDANSEL	CORRECTED Order Granting Extension of Time to File Brief	Mike Wetherell
7/28/2011	BREF	CCHOLMEE	Brief and Request for Dismissal	Mike Wetherell
8/12/2011	NOTC	MCBIEHKJ	Notice of Change of Firm and Address	Mike Wetherell
8/18/2011	BREF	CCRANDJD	Petitioners Appellate Reply Brief	Mike Wetherell
8/24/2011	NOTH	CCWRIGRM	Notice Of Hearing	Mike Wetherell
	HRSC	CCWRIGRM	Hearing Scheduled (Hearing Scheduled 09/22/2011 02:30 PM) Petition for Judicial Review	Mike Wetherell
9/22/2011	DCHH	DCOATMAD	Hearing result for Hearing Scheduled scheduled on 09/22/2011 02:30 PM: District Court Hearing Held Court Reporter: Susan Gambie Number of Transcript Pages for this hearing estimated: Petition for Judicial Review -- less than 50 pgs	Mike Wetherell

BV Beverage Company LLC vs. The State Of Idaho, Department Of Idaho State Police Alcohol Beverage, G Jerry Russell

Date	Code	User	Judge
11/15/2011	CDIS	DCOATMAD	Order Dismissing Petition for Judicial Review -- Civil Disposition entered for: Department Of Idaho State Police Alcohol Beverage, Defendant; Russell, G Jerry, Defendant; The State Of Idaho, Defendant; BV Beverage Company LLC, Plaintiff. Filing date: 11/15/2011
	STAT	DCOATMAD	STATUS CHANGED: Closed
12/6/2011	PETN	MCBIEHKJ	Petitioners Petition for Rehearing
12/20/2011	MISC	CCKHAMSA	Brief In Support Of Petitioner's Petition For Rehearing
1/17/2012	ORDR	DCOATMAD	Order Denying Petition for Rehearing
2/14/2012	APSC	TCWEGEKE	Appealed To The Supreme Court
2/23/2012	MOTN	CCRANDJD	Motion for Order Staying Agency Action During Pendency of Appeal
	AFSM	CCRANDJD	Affidavit In Support Of Motion
	MEMO	CCRANDJD	Memorandum in Support of Motion for Order Staying Agency Action During Pendency of Appeal
3/1/2012	MISC	CCKINGAJ	Consent to Order Staying Agency Action
3/6/2012	ORDR	DCOATMAD	Order Staying Agency Acition Pendency of Appeal
3/29/2012	NOTC	CCLUNDMJ	Notice of Lodging Transcript -- Supreme Ct. Docket #39690

No SMFI

MAR 31 2011

CHRISTOPHER D. RICH, Clerk  
By JERI HEATON  
DEPUTY

Rebecca A. Rainey, ISB No. 7525  
REBECCA A. RAINEY, P.A.  
2627 W. Idaho Street  
Boise, Idaho 83702  
Telephone (208) 559-6434  
Facsimile (208) 473-2952  
rar@rebeccaraineylaw.com

Attorney for Petitioner

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BV BEVERAGE COMPANY, LLC., a Idaho  
limited liability company,

Petitioner,

vs.

THE STATE OF IDAHO, DEPARTMENT  
OF IDAHO STATE POLICE/ALCOHOL  
BEVERAGE CONTROL, G. JERRY  
RUSSELL, in his official capacity as Director  
of Idaho State Police,

Respondent.

Case No. **CV 0C 1106351**

**PETITION FOR JUDICIAL REVIEW**

Cat. L-3

Fee: \$88.00

TO: The Respondent, THE STATE OF IDAHO, DEPARTMENT OF IDAHO STATE  
POLICE/ALCOHOL BEVERAGE CONTROL, G. JERRY RUSSELL,

Notice is hereby given that:

1. The above named Petitioner, BV Beverage Company, LLC ("BV Beverage"), petitions for judicial review of the actions of the Respondent, the State of Idaho, Department of Idaho State Police/Alcohol Beverage Control (the "ABC") in the District Court of the Fourth Judicial District, in and for the County of Ada.
2. BV Beverage has a right to judicial review pursuant to Idaho Code § 67-5270(2) as BV Beverage is a person aggrieved by a final agency action other than an order in a contested case.

AS

3. The agency actions from which review is sought are as follows:

BV Beverage held an interest in liquor license no. 4314 as the lessor of said license, pursuant to the authority of Idaho Code § 23-908(6), in a transaction that the ABC sanctioned, reviewed, investigated, and approved;

Prior to the expiration date of liquor license no. 4314, the ABC recognized and acknowledged BV Beverage's interest in liquor license no. 4314 and, based upon the existence of said interest, granted BV Beverage an extended period of time in which to effectuate a transfer of said liquor license;

Based upon the ABC's representation that BV Beverage would be allowed to transfer liquor license no. 4314, BV Beverage incurred significant time and expense in its efforts to transfer such license;

Notwithstanding the ABC's recognition of BV Beverage's interest in liquor license no. 4314, the ABC failed to fulfill its duty to make available to BV Beverage the renewal paperwork for the renewal of liquor license no. 4314;

Due to the ABC's failure to make such renewal paperwork available to BV Beverage, timely application for renewal was not made and the ABC took the position that liquor license no. 4314 expired by operation of law for failure to timely renew;

The ABC has failed and refused to reinstate such liquor license and advised BV Beverage that it will re-issue the same;

The ABC and BV Beverage have been continuously engaged in informal procedures to resolve this matter since on or about January 7, 2011 when the ABC informed BV Beverage that it was taking the position that such license had expired by operation of law, with it deeming such expiration effective October 31, 2010;

The parties' attempts to resolve this matter informally have been unsuccessful;

Pursuant to Idaho Code § 67-5241(1)(a), (3), and (4), the ABC's actions became final pursuant to letter dated March 15, 2011 wherein the ABC declined to initiate a contested case regarding this matter.

4. This petition is timely pursuant to Idaho Code § 67-5273 as the ABC took its final action by letter dated March 15, 2011, and this Petition has been filed within 28 days of that final agency action. If the letter dated March 15, 2011, wherein the agency refused to initiate a contested case, does not constitute a final agency action, then this appeal is appropriate and timely under Idaho Code § 67-5271(2).
5. Because the parties attempted to resolve this matter informally and because the ABC refused to initiate a contested case, there have been no hearings or oral presentation

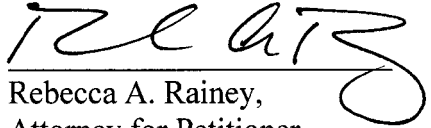
before the agency that were recorded or reported.

6. Venue is proper in the District Court of the Fourth Judicial District, in and for the County of Ada, pursuant to Idaho Code § 67-5257(b), because ABC's final agency action was taken in the county of Ada.
7. The issues BV Beverage intends to assert on judicial review are as follows, provided that, pursuant to I.R.C.P. 84(d)(5), BV Beverage reserves the right to assert other issues that may be later discovered:
  - a. Whether Idaho Code § 23-908(6) creates a leasehold interest in a liquor license.
  - b. Whether the definition of "licensee" found in IDAPA 11.05.01.010.01 includes the holder of a leasehold interest in a liquor license.
  - c. Whether, in fulfilling the statutory duties set forth in Idaho Code § 23-932 and the rules promulgated in IDAPA 11, Title 05, Chapter 01 "Rules Governing Alcohol Beverage Control" the Director of the Idaho State Police, by and through the ABC, assumed the affirmative duty to issue renewal paperwork to all licensees.
  - d. Whether the failure to provide renewal paperwork to a lessor of a liquor license, which license is transferred by lease as authorized by Idaho Code § 23-908(6) and reviewed, sanctioned, and approved by the ABC, is a violation of the statutory and/or constitutional rights of the lessor of such liquor license.
  - e. Whether such statutory and/or constitutional violation prevents the license from expiring by operation of law on the grounds that the renewal application was untimely.
  - f. Alternatively, whether the doctrines of quasi-estoppel and/or equitable tolling preclude the ABC from taking the position that liquor license no. 4314 expired by operation of law.
8. No transcript is requested.

9. I certify that a copy of this petition has been served on the ABC. No payments have been made for preparation of transcripts because no transcripts exist. No payments have been made for preparation of the record because the parties engaged only in informal attempts to settle this matter and, pursuant to IDAPA 04.11.01.100 none of the documents created during these informal proceedings constitute the record and, therefore, no record exists.

DATED THIS 31st day of March, 2011.

REBECCA A. RAINEY, P.A.

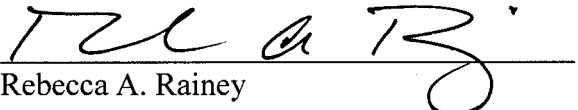
  
Rebecca A. Rainey,  
Attorney for Petitioner

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of March, 2011, I caused a true and correct copy of the foregoing **PETITION FOR JUDICIAL REVIEW** to be served by the method indicated below, and addressed to the following:

Cheryl Meade  
Idaho State Police/Alcohol Beverage Control  
700 S. Stratford  
P.O. Box 700  
Meridian, Idaho 83642  
*Attorney for Respondent*

U.S. Mail, Postage Prepaid  
 Hand Delivered  
 Overnight Mail  
 Facsimile

  
Rebecca A. Rainey



APR 05 2011

CHRISTOPHER D. RICH, Clerk  
By NICOL TYLER  
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BV BEVERAGE COMPANY, LLC, an  
Idaho limited liability company,

Petitioner,

vs.

THE STATE OF IDAHO, DEPARTMENT  
OF IDAHO STATE POLICE/ALCOHOL  
BEVERAGE CONTROL, G. JERRY  
RUSSELL, in his official capacity as  
Director of Idaho State Police,,

Respondents.

Case No. CVOC1106351

ORDER GOVERNING  
JUDICIAL REVIEW

Petition for Judicial Review having been filed herein, and it appearing that the issues presented on appeal are questions of law and fact; and it further appearing that a record/transcript is necessary to process this appeal:

It is ORDERED:

1) That upon completion of the record the agency shall mail or deliver a notice of lodging of transcript and record to all attorneys of record or parties appearing in person and to the district court.

2) That the notice shall inform the parties before the agency that they pick up a copy of the transcript and record at the agency and that the parties have fourteen (14) days from the date of the mailing of the notice in which to file with the agency any

objections, and the notice will further advise the petitioner to pay the balance of the fees for preparation before the transcript and record will be delivered to the petitioner.

3) That the Agency shall transmit the settled transcript and record to the district court within forty-two (42) days of the service of the petition for judicial review.

4) That the Agency, upon filing with the Court the record, shall send notice of such filing to all parties;

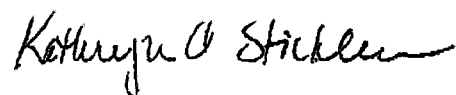
5) That the Petitioner's brief shall be filed and served within thirty-five (35) days of the date the transcript and record are filed with the Court.

6) That the Respondent's brief shall be filed and served within twenty-eight (28) days after service of Petitioner's brief.

7) That Petitioner's reply brief, if any, shall be filed and served within twenty-one (21) days after service of Respondent's brief.

8) That either party may notice the matter for oral argument after all briefs are filed, and that if within fourteen (14) days after the final brief is filed, neither party does so, the Court will deem oral argument waived and decide the case on the briefs and the record.

Dated this 5<sup>th</sup> day of April, 2011.



---

KATHRYN STICKLEN  
Senior District Judge

CERTIFICATE OF MAILING

I hereby certify that on this 5<sup>th</sup> day of April, 2011, I mailed (served) a true and correct copy of the within instrument to:

REBECCA A. RAINEY  
ATTORNEY AT LAW  
2627 W IDAHO ST  
BOISE, ID 83702

CHERYL E. MEADE  
IDAHO ATTORNEY GENERAL'S OFFICE  
700 S STRATFORD DR  
MERIDIAN, ID 83642

CHRISTOPHER D. RICH  
Clerk of the District Court

By: \_\_\_\_\_

  
Deputy Court Clerk

Sticklen  
Appeals  
4/13

RECEIVED  
APR 12 2011  
Ada County Clerk

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. 1:30 P.M. \_\_\_\_\_

APR 12 2011

CHRISTOPHER D. RICH, Clerk  
By PATRICIA A. DWONCH  
DEPUTY

Rebecca A. Rainey, ISB No. 7525  
REBECCA A. RAINEY, P.A.  
2627 W. Idaho Street  
Boise, Idaho 83702  
Telephone (208) 559-6434  
Facsimile (208) 473-2952  
rar@rebeccaraineylaw.com

Attorney for Petitioner

IN THE DISTRICT COURT OF THE FORTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BV BEVERAGE COMPANY, LLC. an Idaho  
limited liability company,

Petitioner,

vs.

THE STATE OF IDAHO, DEPARTMENT  
OF IDAHO STATE POLICE/ALCOHOL  
BEVERAGE CONTROL, G. JERRY  
RUSSELL, in his official capacity as Director  
of Idaho State Police,

Respondent.

Case No. CV-OC-1106351

**MOTION TO DISQUALIFY WITHOUT  
CAUSE UNDER I.R.C.P. 40(d)(1)**

COMES NOW the petitioner BV Beverage Company, LLC, by and through its undersigned counsel of record, hereby moves to disqualify Judge Kathryn A. Sticklen in the above-referenced matter in accordance with Idaho Rule of Civil Procedure 40(d)(1). This motion is made without cause.

**MOTION TO DISQUALIFY WITHOUT CAUSE  
UNDER I.R.C.P. 40(d)(1) - 1**

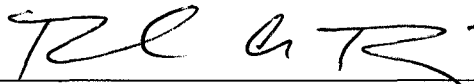
*Handwritten initials*

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Petitioner BV Beverage Company, LLC, is within the twenty-one (21) days of notice of the assignment of the case to Judge Kathryn Sticklen, and therefore, this motion is timely pursuant to I.R.C.P. 40(d)(1)(B).

DATED this 8<sup>th</sup> day of April, 2011.

REBECCA A. RAINEY, P.A.

By   
Rebecca A. Rainey – Of the Firm  
Attorney for Petitioner BV Beverage Company

**CERTIFICATE OF SERVICE**

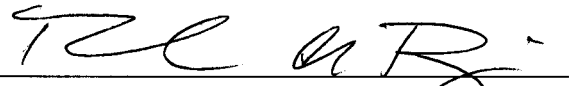
I HEREBY CERTIFY that on this 8th day of April, 2011, I caused a true and correct copy of the foregoing **MOTION TO DISQUALIFY WITHOUT CAUSE UNDER I.R.C.P. 40(d)(1)** to be served by the method indicated below, and addressed to the following:

Cheryl Meade  
Idaho State Police/Alcohol Beverage Control  
700 S. Stratford  
P.O. Box 700  
Meridian, Idaho 83642  
*Attorney for the Respondent*

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile

Judge Kathryn A. Sticklen  
Ada County District Court  
200 W. Front Street, Room 5118  
Boise, Idaho 83702

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile

  
\_\_\_\_\_  
Rebecca A. Rainey

RECEIVED

APR 12 2011

Ada County Clerk

NO. \_\_\_\_\_ FILED P.M. 3:25  
A.M. \_\_\_\_\_

APR 20 2011

CHRISTOPHER D. RICH, Clerk  
By CHARLOTTE WATSON  
DEPUTY

IN THE DISTRICT COURT OF THE FORTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BV BEVERAGE COMPANY, LLC., a Idaho  
limited liability company,

Petitioner,

vs.

THE STATE OF IDAHO, DEPARTMENT  
OF IDAHO STAE POLICE/ALCOHOL  
BEVERAGE CONTROL, G. JERRY  
RUSSELL, in his official capacity as Director  
of Idaho State Police

Respondent.

Case No. CV-OC 1106351

**ORDER GRANTING MOTION TO  
DISQUALIFY WITHOUT CAUSE  
UNDER I.R.C.P. 40(d)(1)**

THIS MATTER having come before the Court on the motion of petitioner BV  
Beverage Company, LLC., for disqualification of the Honorable Judge Kathryn A. Sticklen  
pursuant to Rule 40(d)(1) of the Idaho Rules of Civil Procedure, and the Court being duly  
advised in the premises;

IT IS THEREFORE ORDERED THAT the Honorable Judge Kathryn Sticklen be  
disqualified from serving as judge in the above-entitled action.

DATED this 26<sup>th</sup> day of April, 2011.

By Kathryn A. Sticklen  
District Judge

ORDER GRANTING MOTION TO DISQUALIFY WITHOUT  
CAUSE UNDER I.R.C.P. 40(d)(1) - 1

000014

**CLERK'S CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 20 day of April, 2011, I caused a true and correct copy of the foregoing **ORDER GRANTING MOTION TO DISQUALIFY WITHOUT CAUSE UNDER I.R.C.P. 40(d)(1)** to be served by the method indicated below, and addressed to the following:


Cheryl Meade  
Idaho State Police/Alcohol Beverage Control  
700 Stratford  
P.O. Box 700  
Meridian, Idaho 83642  
*Attorney for the Respondent*

U.S. Mail, Postage Prepaid  
 Hand Delivered  
 Overnight Mail  
 Facsimile

Rebecca A. Rainey  
2627 W. Idaho Street  
Boise, Idaho 83702  
Facsimile (208-473-2952)

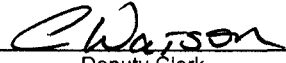
U.S. Mail, Postage Prepaid  
 Hand Delivered  
 Overnight Mail  
 Facsimile

**CHRISTOPHER D. RICH**

  
\_\_\_\_\_  
Deputy Clerk



Filed Wed ay, April 20, 2011 at 03:33 PM  
CHRISTOPHER D. RICH, CLERK OF THE COURT

BY:   
Deputy Clerk

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BV BEVERAGE COMPANY LLC,  
Plaintiff,

vs.

THE STATE OF IDAHO,  
DEPARTMENT OF IDAHO STATE POLICE  
ALCOHOL BEVERAGE,  
G JERRY RUSSELL,  
Defendant.


CASE NO. CV-OC-2011-06351

NOTICE OF REASSIGNMENT

NOTICE IS HEREBY GIVEN that the above-entitled case has been reassigned to the  
Honorable **JUDGE MIKE WETHERELL**.

Dated this 20th day of April, 2011.

Christopher D. Rich  
Clerk of the District Court

By:   
Deputy Clerk

**ANY OTHER HEARINGS CURRENTLY SET WILL HAVE TO BE RESET WITH THE NEWLY  
ASSIGNED JUDGE!**


CERTIFICATE OF MAILING

I hereby certify that on Wednesday, April 20, 2011, I have delivered a true and accurate copy of  
the foregoing document to the following parties in the method indicated below:

Rebecca A. Rainey  
2627 W. Idaho Street  
Boise, Idaho 83702

Cheryl Meade  
Idaho State Police/Alcohol Beverage  
Control  
700 S. Stratford  
PO Box 700  
Meridian, Idaho 83642

CHRISTOPHER D. RICH  
Clerk of the Court

By:   
Deputy Clerk

NOTICE OF REASSIGNMENT

000016

CW

APR 22 2011

CHRISTOPHER D. RICH, Clerk  
JANE OATMAN  
Deputy

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF

THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BV BEVERAGE COMPANY, LLC., an Idaho  
limited liability company,  
  
Petitioner,

vs.

THE STATE OF IDAHO, DEPARTMENT OF  
IDAHO STATE POLICE/ALCOHOL  
BEVERAGE CONTROL, G. JERRY  
RUSSELL, in his official capacity as Director of  
Idaho State Police,  
  
Respondent.

Case No. CV-OC-2011-06351

**ORDER ADVISING PARTIES  
OF DEADLINES**

This matter has been reassigned to this Court after the disqualification without cause of Judge Kathryn Sticklen. Prior to disqualification, Judge Sticklen issued an "Order Governing Judicial Review." This Court advises the parties that the order is a valid order issued by Judge Sticklen while she was still the presiding Judge with jurisdiction over this case and the deadlines established therein remain in force.

**IT IS SO ORDERED.**

**DATED** this 21st day of April, 2011.

  
MIKE WETHERELL  
District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 27<sup>th</sup> day of April, 2011, I mailed (served) a true and correct copy of the within instrument to:

REBECCA A RAINEY  
ATTORNEY AT LAW  
2627 W IDAHO STREET  
BOISE ID 83702

CHERYL MEADE  
IDAHO ATTORNEY GENERAL'S OFFICE  
700 S STRATFORD DRIVE  
MERIDIAN ID 83642

CHRISTOPHER D. RICH  
Clerk of the District Court

By:   
Deputy Court Clerk

LAWRENCE G. WASDEN  
ATTORNEY GENERAL

Cheryl E. Meade  
Deputy Attorney General  
Idaho State Police  
700 S. Stratford Dr.  
Meridian, ID 83642  
Telephone: (208) 884-7050  
Fax No. (208) 884-7228  
[cheryl.meade@isp.idaho.gov](mailto:cheryl.meade@isp.idaho.gov)  
ISB# 6200

NO. \_\_\_\_\_ FILED 3:38  
A.M. \_\_\_\_\_ P.M.

MAY 25 2011

CHRISTOPHER D. RICH, Clerk  
By STEPHANIE VIDAК  
DEPUTY

Attorneys for Respondent

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

B.V. BEVERAG COMPANY, LLC., an Idaho Limited Liability Company	)	Case No. CV-OC- 2011-06351
	)	
Petitioner,	)	<b>NOTICE OF LODGING OF</b>
vs.	)	<b>AGENCY RECORD</b>
	)	
THE STATE OF IDAHO, DEPARTMENT OF IDAHO STATE POLICE/ ALCOHOL BEVERAGE CONTROL, G. JERRY RUSSELL, in his official capacity as Director of Idaho State Police,	)	
	)	
Respondent.	)	

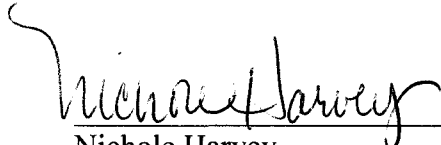
A Petition for Judicial Review was filed in this matter on or about March 31, 2011. There is no estimated fee due at this time due to the fact the record contains only 48 pages.

NOTICE is hereby given that the agency record has been copied and lodged at Idaho State Police, Office of the Director ("Agency"), pursuant to I.R.C.P. 84(f). The record includes all documents filed with the agency that are applicable to the referenced matter.

7

The parties have fourteen (14) days from the date of the service of this notice in which to file with the Agency any objections to the record pursuant to I.R.C.P. 84(f). Once the agency record is settled, it will be lodged/filed with the District Court pursuant to I.R.C.P. 84(k).

DATED This 11<sup>th</sup> day of May, 2011.

  
\_\_\_\_\_  
Nichole Harvey  
Management Assistant  
Alcohol Beverage Control

### CERTIFICATE OF SERVICE

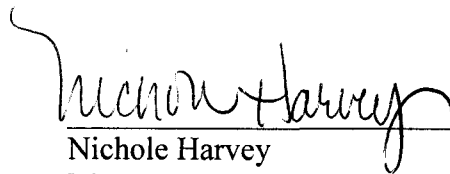
I hereby certify that on this 11<sup>th</sup> day of May 2011, I caused to be served, a true and correct copy of the foregoing NOTICE OF LODGING OF AGENCY RECORD in the above-referenced matter on the following individuals by the method indicated below:

Cheryl E. Meade  
Deputy Attorney General  
Idaho State Police  
700 S. Stratford Drive  
Meridian ID 83642

Interoffice Mail

Rebecca A. Rainey  
Attorney at Law  
2627 W. Idaho St.  
Boise, ID 83702

U.S. Mail, postage pre-paid

  
\_\_\_\_\_  
Nichole Harvey  
Management Assistant  
Alcohol Beverage Control



**Idaho State Police  
Alcohol Beverage Control Bureau**

**Agency Record**

Iggy's Idaho Falls, Inc.

dba Iggy's Idaho Falls

Idaho Falls, ID 83402

Premises #8B-15

May 10, 2011

Certification of Documents:

State of Idaho )  
County of Ada ) ss.

I, Nichole Harvey, a notary public, do certify that on  
May 10, 2011, I carefully compared this copy of  
Agency Record with the original.  
It is a complete and true copy of the original document.



Nichole Harvey  
My commission expires 1.26.13

**AGENCY RECORD**

**IGGY'S LIQUOR LICENSE No. 4314**

**(B.V. BEVERAGE, COURT CASE NO. CVOC1106351)**

**TABLE OF CONTENTS**

- a. 2007 Alcohol Beverage License Lease/Option Agreement.**
- b. Liquor license(s) and renewals by Iggy's Idaho Falls, Inc. 2008, 2009 and 2010.**
- c. 2010, Ninety-Day Notice to Iggy's to find a suitable premise.**
- d. Return of renewal application from Iggy's for 2011 licensing year.**
- e. January 7, 2011, letter and transfer application materials from B.V. Beverage.**
- f. Exhibit A from transfer application materials, showing Iggy's released the liquor license back to B.V. Beverage the day before expiration of the license.**
- g. January 10, 2011, letter and Memorandum Decision and Order from ABC, returning B.V. Beverage's application and materials as untimely.**

a.



**ALCOHOL BEVERAGE LICENSE LEASE/OPTION**

THIS ALCOHOL BEVERAGE LICENSE LEASE/OPTION (this "Lease") is made and entered into effective October 15, 2007, by and between BV BEVERAGE COMPANY, LLC, an Idaho limited liability company ("Lessor"), and IGGY'S IDAHO FALLS, INC., an Idaho corporation ("Lessee").

**RECITALS**

WHEREAS, Lessor is the owner of that certain license to sell alcoholic beverages in the City of Idaho Falls, Idaho (the "License"), a copy of which is attached hereto as **Exhibit 1**; and

WHEREAS, Lessee is in the restaurant business and will construct and operate Iggy's Sports Grill in the City of Idaho Falls; and

WHEREAS, Lessor desires to lease the License to Lessee, and Lessee desires to lease such License from Lessor, for use exclusively at Iggy's Sports Grill.

**AGREEMENT**

NOW, THEREFORE, for valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereby agree as follows:

**ARTICLE 1  
BASIC PROVISIONS**

**1.1 Lease.** Lessor hereby agrees to lease the License to Lessee on the terms and conditions and for the consideration set forth below.

**1.2 Term.** The Lease shall commence upon its full execution below (the "Effective Date") and shall run for a period (the "Lease Term") ending 57 months after the occurrence of the "Rent Commencement Date," as such term is defined in that certain "Restaurant Lease" of equal effective date as this Lease made by and between Lessor's affiliate North Landing Building M, LLC, an Idaho limited liability company, and Lessee's affiliate Rideout, LLC, an Idaho limited liability company, unless Lessee acquires another alcohol beverage license for Iggy's Sports Grill or this Lease is terminated by Lessee pursuant to Section 1.2.1 below.

**1.2.1** Notwithstanding the term of this Lease, Lessee shall have the option at any time to cancel this Lease upon notice to Lessor.

**1.2.2** Unless Lessee acquires another alcohol beverage license for Iggy's Sports Grill or this Lease is terminated by Lessee pursuant to Section 1.2.1 above, Lessee shall have the option to purchase the License on the following terms: (a) written notice of exercise must be provided to Lessor not later than six months prior to the end of the Lease

Term; (b) the purchase price shall be equal to the greater of the three most recent sales of alcohol beverage licenses for the sale of liquor occurring in the City of Idaho Falls prior to the end of the Lease Term; (c) Lessee shall pay all transfer fees and costs charged by any governmental jurisdiction or agency; (d) the closing of the transaction shall occur on the final day of the Lease Term; and (e) the full purchase price shall be paid in cash or other immediately available funds.

**1.2.3** In the event that Lessee does not exercise its option to purchase the License pursuant to Section 1.2.2 and the License is not transferred back into the name of Lessor at the conclusion of the primary term of this Lease, this Lease shall thereupon be converted to a month-to-month basis, upon the same financial and other terms set forth below but at 200% of the Lease Payments (hereinafter defined).

**1.3 Lease Payments.** Lessee shall make successive monthly payments (the "Lease Payments") to Lessor at c/o Ball Ventures, LLC, 901 Pier View Drive, Suite 201, Idaho Falls, Idaho 83402, in the amount of \$600.00 per month. Such payments shall be due on the first day of each month commencing on the first day of the month occurring 21 months after the Rent Commencement Date, as such term is defined in the Restaurant Lease.

**1.4 Additional Consideration.** As additional consideration for this Lease, Lessee shall be solely responsible for the timely payment of all charges, fees, and other amounts payable to governmental agencies in connection with the transfer, possession, use, lease, or renewal of the License. Such responsibility shall include, without limitation, any and all periodic renewal fees charged by the City of Idaho Falls, Bonneville County, the State of Idaho, or the federal government. Lessee shall make such payments, in full, when due and as otherwise directed by Lessor.

## **ARTICLE 2 REPRESENTATIONS AND WARRANTIES OF LESSOR**

Lessor makes the following representations and warranties to Lessee:

**2.1 Authority.** Lessor has full power and authority to enter into, execute, and deliver this Lease and to incur and perform the obligations provided for herein. No further consent or approval of any other person or entity, public or private, is required as a condition to the validity or enforceability of this Lease.

**2.2 Binding Agreements.** This Lease has been duly and properly executed by Lessor, constitutes the valid and legally binding obligations of Lessor, and is fully enforceable against Lessor in accordance with its terms.

**2.3 Litigation.** There is no litigation or proceeding pending or, so far as Lessor knows, threatened, before any court or administrative agency which will materially adversely affect the financial condition of Lessor or the authority of Lessor to enter into, or the validity or enforceability of, this Lease or the ability of Lessor to perform its obligations hereunder.

**2.4 No Conflicting Agreements.** Except as otherwise set forth in this Lease, there is (a) no provision in any existing mortgage, indenture, contract, or agreement binding on Lessor, and (b) no provision of law or order of any court binding upon Lessor which would conflict with or in any way prevent the execution, delivery, or performance of the terms of this Lease or which otherwise would result in default or be violated as a result of such execution, delivery, or performance.

**ARTICLE 3  
REPRESENTATIONS AND WARRANTIES OF LESSEE**

Lessee makes the following representations and warranties to Lessor:

**3.1 Existence.** Lessee has all requisite power and authority to own its properties and to carry on its business as now being or planned to be conducted, and is duly qualified and licensed to do and conduct such business.

**3.2 Authority.** Lessee has full power and authority to enter into, execute, and deliver this Lease and to incur and perform the obligations provided for herein. No further consent or approval of any other person or entity, public or private, is required as a condition to the validity or enforceability of this Lease.

**3.3 Binding Agreements.** This Lease has been duly and properly executed by Lessee, constitutes the valid and legally binding obligations of Lessee, and is fully enforceable against Lessee in accordance with its terms.

**3.4 Litigation.** There is no litigation or proceeding pending or, so far as Lessee knows, threatened before any court or administrative agency which will materially adversely affect the financial condition of Lessee or the authority of Lessee to enter into, or the validity or enforceability of, this Lease or the ability of Lessee to perform its obligations hereunder.

**3.5 No Conflicting Agreements.** Except as otherwise set forth in this Lease, there is (a) no provision in any existing mortgage, indenture, contract, or agreement binding on Lessee, and (b) no provision of law or order of any court binding upon Lessee which would conflict with or in any way prevent the execution, delivery, or performance of the terms of this Lease or which otherwise would result in default or be violated as a result of such execution, delivery, or performance.

**ARTICLE 4  
ADDITIONAL COVENANTS**

Lessor and Lessee covenant and further agree as follows:

**4.1 Interest of Parties.** The License shall be used exclusively in connection with the operation of the Premises, as such term is defined in the Restaurant Lease. Furthermore, and notwithstanding the terms of this Lease, Lessee shall promptly apply for an alcohol beverage license from the State of Idaho for use at Iggy's Sports Grill and

diligently pursue obtaining the same, upon the issuance of which license this Lease shall automatically terminate.

**4.2 Insurance.** Lessee shall maintain in force and effect, at its sole cost and expense, liability insurance relating to Lessee's use of the License, including without limitation so-called "dramshop" or "liquor liability" coverage, during the Lease Term and for a period thereafter sufficient to protect Lessor in connection with occurrences during such term and claims made at any time. Such liability insurance shall (a) provide coverage in an amount not less than \$3,000,000 per occurrence, (b) name Lessor as an additional insured, and (c) provide for not less than 30 days notice to Lessor prior to cancellation. Within ten days of the Effective Date and each annual renewal of such policy, Lessee shall provide Lessor with a certificate of insurance evidencing the foregoing coverage.

**4.3 Compliance by Lessee.** During the term of this Lease, Lessee shall comply fully with all laws and regulations applicable to the License, including without limitation any and all regulations promulgated by the Idaho State Police Alcohol Beverage Control and the United States Bureau of Alcohol, Tobacco and Firearms. Lessee shall notify Lessor in writing immediately upon notice of any violation of such laws or regulations, or upon the occurrence of any facts or circumstances which could result in such violation.

**4.4 Agency Approval.** The parties acknowledge and agree that this Lease is subject to review and approval by various governmental entities. In the event that this Lease does not satisfy the requirements of any such agency, the parties shall use their best efforts to amend the terms hereof in order to meet such requirements and preserve to the greatest extent possible the economic and other effects of this Lease.

**4.5 Further Action.** Upon the reasonable request of either party hereto, the other party shall take all action and shall execute all documents and instruments necessary or desirable to consummate and give effect to the transactions contemplated hereby.

**4.6 Indemnification.** Lessee shall defend, at Lessee's sole cost and expense, and indemnify Lessor and each member, employee, and agent of Lessor (the "Indemnified Parties") for, and hold each Indemnified Party harmless from and against, any and all claims, damages, losses, and other liabilities of any kind, including without limitation judgments and costs of settlement, suffered, incurred, or arising as a result of (a) any inaccuracy of, or any breach by Lessee of, any covenant, representation, or warranty made by Lessee in this Lease, or (b) Lessee's lease or use of the License.

**4.7 Breach by Lessee.** In the event that the Restaurant Lease shall terminate or Lessee breaches the terms of this Lease, including without limitation by failure to make any of the Lease Payments when due or by failure to comply with Section 4.3 above, Lessor shall have the immediate right, in its sole discretion, to terminate this Lease and recover possession and use of the License. In the event of any termination, Lessee shall cooperate fully with Lessor in its efforts to repossess the License, including without limitation by providing any notice or taking any action necessary or appropriate relative to governmental authorities. Notwithstanding the foregoing, an election to terminate shall not

waive or otherwise limit any other rights Lessor may have, including without limitation the right to bring suit for damages or for injunctive relief.

## **ARTICLE 5 MISCELLANEOUS**

**5.1 Amendment and Modification.** Subject to applicable law, this Lease may be amended, modified, or supplemented only by a written agreement signed by the parties.

**5.2 Notices.** All notices, requests, demands, and other communications required or permitted hereunder will be in writing and given in accordance with the terms of Article 22 of the Restaurant Lease.

**5.3 Titles and Captions.** All section titles or captions contained in this Lease are for convenience only and shall not be deemed part of the substantive text, nor affect the interpretation, of this Lease.

**5.4 Attorneys Fees.** In the event a suit or action is brought by any party under this Lease to enforce any of its terms, or in any appeal therefrom, it is agreed that the prevailing party shall be entitled to reasonable attorneys fees to be fixed by the trial court and/or appellate court.

**5.5 Pronouns and Plurals.** All pronouns and any variations thereof shall be deemed to refer to the masculine, feminine, neuter, singular, or plural as the identity of the person or persons may require.

**5.6 Further Action.** The parties hereto shall execute and deliver all documents, provide all information, and take or forbear from all such action as may be necessary or appropriate to achieve the purposes of this Lease. Lessee specifically agrees that, upon the request of Lessor, it will execute a limited power of attorney to Lessor providing for the immediate transfer of the License to Lessor in the event of a breach or default hereunder by Lessee.

**5.7 Parties in Interest.** Nothing herein shall be construed to be to the benefit of any third party, nor is it intended that any provision shall be for the benefit of any third party.

**5.8 Savings Clause.** If any provision of this Lease, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of this Lease, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

**5.9 Assignment.** This Lease shall be freely assignable by Lessor without notice to Lessee. Lessee shall not assign this Lease or attempt to sublease the License without the prior written consent of Lessor, and any such attempted assignment or sublease shall be void.

**5.10 Benefit; Burdens.** This Lease shall inure to the benefit of and shall be binding upon the parties hereto and their respective successors and permitted assigns, but shall not inure to the benefit of any other party.

**5.11 Illegality.** If fulfillment of any provision hereof or any transaction related hereto, at the time performance of such provision shall be due, shall involve transcending the limit or validity prescribed by law, then the obligation to be fulfilled shall be reduced to the limit of such validity; and if any clause or provisions herein contained operates or would prospectively operate to invalidate this Lease in whole or in part, then such clause or provision shall be void, as though not herein contained, and the remainder of this Lease shall remain operative and in full force and effect.

**5.12 Advice of Independent Counsel.** Each party to this Lease understands that the same is legally binding and may affect its rights. Each party hereto represents to the other party that it had the opportunity to receive legal advice from counsel of its choice regarding the meaning and legal significance of this Lease.

**5.13 Judicial Interpretation.** Should any provision of this Lease require judicial interpretation, it is agreed that a court interpreting or construing this Lease shall not apply a presumption that the terms hereof shall be construed against either party by reason of the rule of construction that an ambiguity in a document is to be construed against the party who itself or through its agents prepared such document.

**5.14 Governing Law.** This Lease shall be governed by and interpreted and construed in accordance with the laws of the State of Idaho (exclusive of principles of conflicts of laws), and jurisdiction for any legal proceeding arising out of or related to this Lease is proper only in Idaho, with venue lying exclusively in Bonneville County.

**5.15 Execution of Counterparts.** This Lease may be executed in several counterparts, each of which shall be an original and all of which shall constitute but one and the same instrument.

**5.16 Exhibits.** The exhibits attached hereto and all the terms and conditions therein are hereby incorporated into this Lease by this reference.

**5.17 Other Agreements.** This Lease and the attached exhibit are integrated and contain the entire agreement of the parties, and all oral and written representations, warranties, agreements, and contracts discussed or entered into by the parties hereto or their representatives before the Effective Date relating directly or indirectly to the subject matter of this Lease are merged into and superseded by this Lease.


*[Signature Page Follows]*

IN WITNESS WHEREOF, the parties have executed this Lease as of the date opposite each signature below.

**LANDLORD:**

**BV BEVERAGE COMPANY, LLC,**  
an Idaho limited liability company

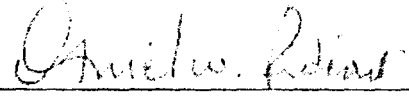
Dated: October \_\_\_\_, 2007

By   
Cortney Liddiard, Manager

**TENANT:**

**IGGY'S IDAHO FALLS, INC.,**  
an Idaho corporation

Dated: October 21, 2007

By   
Daniel W. Rideout, President

**b.**



# State of Idaho

## Idaho State Police

### Retail Alcohol Beverage License

Premise Number: 8B-115

Incorporated City:

This is to certify, that Iggly's Idaho Falls, Inc.

doing business as: Iggly's Idaho Falls

is licensed to sell alcoholic beverages as stated below at:

1430 Milligan Rd, Idaho Falls, Bonneville  
County

License Year: 2010

License Number: 4314

Cycle Tracking Number: 43909  
ISLD ID: 5126

Acceptance of a license by a retailer shall constitute knowledge of and agreement to operate by and in accordance to the Alcohol Beverage Code, Title 23. Only the licensee herein specified shall use this license.

Liquor	Yes	\$750.00
Beer	Yes	\$50.00
On-premise consumption	Yes	\$0.00
Kegs to go	No	
Restaurant	Yes	\$0.00
Wine by the bottle	Yes	\$0.00
Wine by the glass	Yes	\$0.00
<b>TOTAL FEE:</b>		<b>\$800.00</b>

Signature of Licensee, Corporate Officer, LLC Member or Partner

IGGY'S IDAHO FALLS, INC.  
IGGY'S IDAHO FALLS  
1430 MILLIGAN RD  
IDAHO FALLS, ID 83402  
Mailing Address

License Valid: 10/01/2009 - 09/30/2010

Expires: 09/30/2010

*Stacy Howard*

Director of Idaho State Police



# Idaho State Police

## Alcohol Beverage License Renewal Application

Alcohol Beverage Control  
PO Box 700, Meridian, ID 83680-0700  
(208)884-7060, Toll Free (888) 222-1360



### 1. Applicant

**Premise Number: 8B-15**

Applicant Iggy's Idaho Falls, Inc.  
(Applicant Name: Individuals(s), Corporation, LLC or Partnership)

**License #: 4314**

**License Period: 2010**

DBA: Iggy's Idaho Falls

Location: 1430 Milligan Rd

City, County, Zip: Idaho Falls, Bonneville, 83402

Daytime Telephone: 435 770 2546

Nighttime Telephone: \_\_\_\_\_

Tax I.D. Number: 003417147

### 2. License Type and Fees

Liquor	Yes	\$750.00
Beer	Yes	\$50.00
On-premise	Yes	\$0.00
Kegs to go	No	
Restaurant	Yes	\$0.00
Wine by the bottle	Yes	\$0.00
Wine by the glass	Yes	\$0.00

**Total Fee Enclosed: \$800.00**

FEIN: 26-0900373

✓ 2886

IGGY'S IDAHO FALLS, INC.  
IGGY'S IDAHO FALLS  
1430 MILLIGAN RD  
IDAHO FALLS, ID 83402

*Mailing Address*

a. License Type: Incorporated City

b. Name, Address & SSN or Tax I.D. Number of Liquor License Proprietor:

Dan Ridge 84117  
1000 E. Murray, Ball Lake Rd SLC ut 84117

3. Attach a list of all individuals, partners, directors, 10 primary stockholders and LLC/LLP members (Corporations must include an in-state manager). Follow the format below:

(Name) Dan Ridge (Title) owner  
(SSN) \_\_\_\_\_ (JOB) \_\_\_\_\_ (Contact Phone Number) 801-949-3182

4. Does anyone listed above have any direct or indirect interest in any other business licensed for the sale of beer, wine, or liquor by the drink? NO YES (Explain Below)

RECEIVED

SEP 09 2009

License #: 4314

IDAHO STATE POLICE  
ALCOHOL BEVERAGE CONTROL  
License Period: 2010  
000033

5. Has anyone listed above as an individual, a partner, a member (LLC) or while an officer, director of a corporation applicant or licensee ever had an alcohol license denied, suspended or revoked?  NO  YES (Explain below)

6. Has anyone listed above ever been charged with a felony or an alcohol related misdemeanor?  NO  YES (Attach Explanation)

**7. Premise Diagram/Floor Plan**

If you have had any changes in the premise from the previous year:

Attach a sketch of the entire area proposed to be licensed, all entrances, exits, locations of bars, back bars, bar stools, booths, tables, coolers (for off premise), coin operated amusement devises and the place where licenses are regularly displayed. Indicate in the margin the direction and distance to the nearest school, church or other place of worship if within 300 feet.

Include a copy of your permits for health, safety and zoning from the government agency with zoning jurisdiction over the facility's location.

**8. Read the following, Sign and have notarized.**

The applicant hereby affirms that he/she is the bona fide owner of the business, is eligible and has none of the disqualifications for a license as provided by Title 23, Chapter 9, 10, 11, 13, 14, Idaho code or any ammendments thereto. I/we hereby certify that there have been no changes in the above named businesses, ownership, directors, stockholders, partners or members during the past licensed year, except as indicated herein.

An application for and acceptance of a license by a retailer shall constitute consent to, and be authority for, entry by the director or his authorized agents, upon any premises related to the licensee's business, or wherein are or should be, kept, any of the licensee's books, records, supplies or other property related to said business, and to make the inventory, check and investigations aforesaid with relation to said licensee or any other licensee, as per Idaho code section 23-1006.

I/we have also read all of the above and declare under penalty of perjury that each and every statement is true and correct.

David W. Riedel                      owner                      8-31-09  
Applicant Signature                      Title                      Date

David W. Riedel  
Printed Name

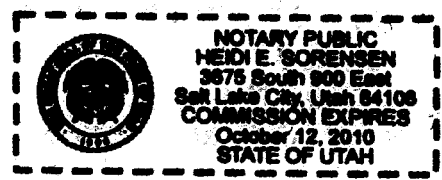
Subscribed and sworn to before me this 3<sup>rd</sup> day of Aug 2009

[Signature]  
Notary Public

Residing Salt Lake

My Commision Expires: 10/12/10

(Seal)



# State of Idaho

## Idaho State Police

Cycle Tracking Number: 37567

Premise Number: 8B-15  
Incorporated City:

Retail Alcohol Beverage License

License Year: 2009  
License Number: 4314

This is to certify, that Iggly's Idaho Falls, Inc. is licensed to sell alcoholic beverages as stated

1430 Milligan Rd, Idaho Falls, Bonneville  
County

Acceptance of a license by a retailer shall constitute knowledge of and agreement to operate by and in accordance to the Alcohol Beverage Code, Title 23. Only the licensee herein specified shall use this license.

Signature of Licensee, Corporate Officer, LLC Member or Partner

IGGY'S IDAHO FALLS, INC.  
IGGY'S IDAHO FALLS  
1430 MILLIGAN RD  
IDAHO FALLS, ID 83402  
Mailing Address

Restaurant	Yes	\$0.00
On-premise consumption	Yes	\$0.00
Beer	Yes	\$50.00
Kegs to go	No	
Wine by the bottle	Yes	\$0.00
Wine by the glass	Yes	\$0.00
Liquor	Yes	\$750.00

TOTAL FEE: \$800.00

License Valid: 10/01/2008 - 09/30/2009

Expires: 09/30/2009

*Greg Russell*

Director of Idaho State Police



**Idaho State Police      Alcohol Beverage Control**  
**Alcohol Beverage Renewal Application**

**1. Applicant Information**

Applicant Name Iggy's Idaho Falls, Inc.  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 D.B.A. Iggy's Idaho Falls  
 \_\_\_\_\_  
 Physical Address \_\_\_\_\_  
 City, County, Zip \_\_\_\_\_  
 Tax I.D. Number \_\_\_\_\_

Premise # 8B-15  
**2. License Types/Fees**  
 On Premise   
 Restaurant   
 Beer \$50.00  
 Kegs to go \_\_\_\_\_  
 Wine by the Bottle \$0.00  
 Wine by the Drink \$0.00  
 Liquor \$750.00  
**Total Fees:** \$800.00

*222*

*Iggy's Sports Grill  
 1430 Milligan Rd.  
 Idaho Falls, Idaho 83402*  
**Mailing Address**

3. List all individuals, officers, members, or partners involved in the operation of the license. If needed to list all officers, please attach an additional piece of paper using the following format:

Name Sam Rideout Title Owner Address [REDACTED]  
 Social Security Number: \_\_\_\_\_ D.O.B. \_\_\_\_\_ Contact No. [REDACTED]

4. Has anyone listed on this application ever had a license revoked, suspended or denied?  
 YES  NO  (If answered YES, please explain) \_\_\_\_\_

**RECEIVED**

**AUG 20 2008**

IDAHO STATE POLICE  
 ALCOHOL BEVERAGE CONTROL  
 000036

5. Has anyone listed on this application ever been charged with a felony or an alcohol related misdemeanor?

YES  NO (If answered YES, please explain) \_\_\_\_\_

6. Does anyone other than those listed on this application have any financial interest in this licensed business?

YES  NO (If answered YES, please explain) \_\_\_\_\_

7. Premise Diagram/Floor Plan (No architectural blue prints)

Attach a sketch showing the entire area proposed to be licensed, all entrances, exits, locations of bars, back bars, bar stools, booths, tables, coolers (for off premise), coin operated amusement devices and the place where the licenses are regularly displayed. Indicate in the margin the direction and distance to the nearest school, church or other places of worship measuring from the nearest entrance of the licensed premises to the school, church or other place of worship if within 300 feet. Also include a copy of your permits for health, safety and zoning from the governmental agency with zoning jurisdiction over the facility's location.

8. Read:

The applicant hereby affirms that he/she is the bona fide owner of the business, is eligible and has none of the disqualifications for a license as provided by Title 23, Chapter 9, 10,11, 13, 14, Idaho code or any amendments thereto. I/we hereby certify that there have been no changes in the above named business, ownership, directors, stockholders, partners or members during the past licensed year, except as indicated herein.

An application for and acceptance of a license by a retailer shall constitute consent to, and be authority for, entry by the director or his authorized agents, upon any premises related to the licensee's business, or wherein are or should be, kept, any of the licensee's books, records, supplies or other property related to said business, and to make the inventory, check and investigations aforesaid with relation to said licensee or any other licensee, as per Idaho code sections 23-1006 & 23-1314.

9. Sign

I/we have also read all of the above and declare under penalty of perjury that each and every statement is true and correct.

David R. Grant owner 8-12-08  
Applicant Signature Title Date

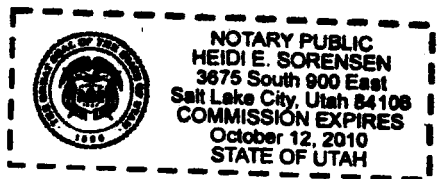
Subscribed and sworn to before me this 12th day of Aug, 20 2008.

[Signature]  
Notary Public

(Seal)

Residing At Salt Lake

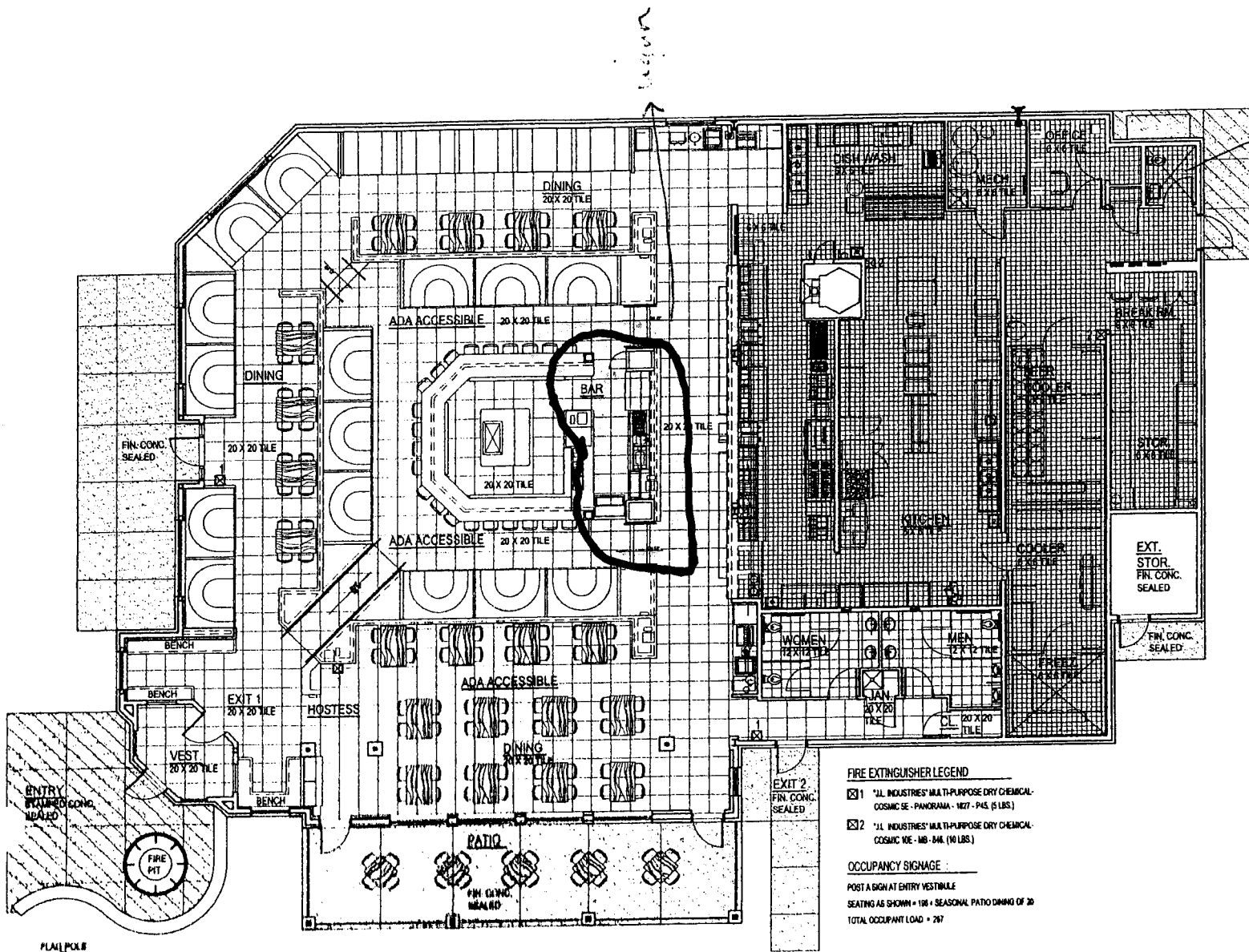
My Commission Expires: 10/12/10



RECEIVED

AUG 20 2008

IDAHO STATE POLICE  
ALCOHOL BEVERAGE CONTROL



**FIRE EXTINGUISHER LEGEND**

- ☒1 'UL INDUSTRIES' MULTI-PURPOSE DRY CHEMICAL - COSMIC SE - PANORAMA - 107 - P43 (5 LBS.)
- ☒2 'UL INDUSTRIES' MULTI-PURPOSE DRY CHEMICAL - COSMIC VE - MB - 846 (10 LBS.)

**OCCUPANCY SIGNAGE**

POST A SIGN AT ENTRY VESTIBULE  
 SEATING AS SHOWN = 106 + SEASONAL PATIO DINING OF 20  
 TOTAL OCCUPANT LOAD = 267

**FURNITURE AND SERVICE EQUIPMENT NOTES:**

1. SEE FINISH SCHEDULE FOR FLOOR COVERING MATERIAL AND TYPE
2. ALL FURNITURE, KITCHEN EQUIPMENT, COMPUTERS, P.B.S., COFFINERS, LOCKERS ETC... BY OWNER
3. ALL STAINLESS STEEL SHELVING AND RACKS PUMPHED AND INSTALLED BY KITCHEN EQUIPMENT SUPPLIER
4. ALL OWNER PROVIDED EQUIPMENT SHALL BE PUMPHED TO JOB WITH COMPLETE WITH ALL GUNINGS AND CONNECTIONS NECESSARY FOR HOOKUPS BY PLUMBER, H.V.A.C., AND ELECTRICAL CONTRACTORS
5. CONSULT WITH ARCHITECT AND ELECTRICAL ENGINEER FOR ALL APPROVED TYPE CHANNELS AND OF ANY EQUIPMENT HANGING FROM PLUMB JOISTS

**RECEIVED**

**AUG 20 2008**

IDAHO STATE POLICE  
ALCOHOL BEVERAGE CONTROL

000038

UNI-SEX R.R.  
6 X 8 TILE

DELIVERY  
FIN. CONC.  
SEALED

EXT. STOR.  
FIN. CONC.  
SEALED

FIN. CONC.  
SEALED

EXIT 2  
FIN. CONC.  
SEALED

EXIT 1  
20 X 20 TILE

VEST  
20 X 20 TILE

FIRE PIT

PLAN 101.8

# EASTERN IDAHO PUBLIC HEALTH DISTRICT **PERMIT - LICENSE**

No. 33206

COUNTIES OF:

- Bonneville
- Clark
- Custer
- Fremont
- Jefferson
- Lemhi
- Madison
- Teton

THIS PERMIT - LICENSE IS NON-TRANSFERABLE AND IS THE PROPERTY OF THE ISSUING AGENCY AND MAY BE REVOKED FOR FAILURE TO MAINTAIN COMPLIANCE WITH THE APPLICABLE HEALTH REGULATIONS OR ANY APPLICABLE STATE AND LOCAL LAWS, ORDINANCES, AND REGULATIONS AS REFERRED TO THEREIN  
IDAHO CODE 39-414 (2)

ISSUED TO: **RIDEOUT ENTERPRISES**

**NON-TRANSFERABLE**

FOR THE OPERATION OF A:  
d.b.a.

**RESTAURANT/FULL SERVICE**

**IGGY'S SPORTS GRILL  
1430 MULLIGAN RD  
IDAHO FALLS ID 83402**

**MENU RESTRICTED TO ITEMS  
ON APPLICATION**

8/13/08  
DATE ISSUED

12/31/08  
DATE EXPIRES

BONNEVILLE  
CITY AND/OR COUNTY

*Kelly L. Ray*  
HEALTH AUTHORITY

**RECEIVED**

**AUG 20 2008**

IDAHO STATE POLICE  
ALCOHOL BEVERAGE CONTROL



# Certificate of Occupancy

This is to Certify that the (description of building or structure):

Class of Job: **IGGY'S SPORTS GRILL**  
Owner: **RIDEOUT ENTERPRISES**  
Address: **1430 MILLIGAN RD IF**  
Location: **SNAKE RIVER LANDING DR L, BEK 1, LOT 18**  
Contractor: **STEED CONSTRUCTION/RCE-2056**

has been inspected and the following occupancy thereon is hereby authorized: 20

## Certificate of Occupancy

Sec. 3073(a) Use of Occupancy. No building or structure of Class A, E, L, H, B or R, Occupancy shall be used or occupied, and no change in the existing occupancy classification of a building or structure or portion thereof shall be made until the building official has issued a Certificate of Occupancy therefor as provided herein.

C.O. Issued By

Approval By

Issued Date: 08/13/2008

RECEIVED

AUG 20 2008

IDAHO STATE POLICE  
ALCOHOL BEVERAGE CONTROL



**ENVIRONMENTAL HEALTH DIVISION**

1250 Hollipark Drive  
Idaho Falls, Idaho 83401  
208.523.5382  
fax 208.528.0857  
[www.idaho.gov/phd7](http://www.idaho.gov/phd7)

Promoting the Health of People & Their Environment

8/13/2008

Dan Rideout  
Rideout Enterprises  
2622 E Murray Holiday Rd  
Holiday, UT 84117

RE: LICENSE APPROVAL

Mr. Rideout.

Congratulations for successfully applying and receiving a food establishment license. Your license is for a full service restaurant.

Your license is based on the available equipment and menu. If there are any changes in the menu, equipment, remodeling, or any changes in the operation, please telephone your local office of the Eastern Idaho Public Health District. For example, cooking in an outdoor setting will not be covered under your restaurant license.

Your License is dependent on compliance with the IDAHO FOOD CODE. Please read section 8-3 PERMIT TO OPERATE for specific conditions to maintain your License.

Please contact me if you have any questions.

Sincerely,

Daniel P Wallace, REHS  
Eastern Idaho Public Health District

Cc. Iggy's Sports Bar, Idaho Falls

**RECEIVED**

**AUG 20 2008**

IDAHO STATE POLICE  
ALCOHOL BEVERAGE CONTROL

**EASTERN IDAHO PUBLIC HEALTH DISTRICT**  
**PERMIT – LICENSE**

No. 33206

COUNTIES OF:

Bonneville  
Clark  
Custer  
Fremont  
Jefferson  
Lemhi  
Madison  
Teton

THIS PERMIT – LICENSE IS NON-TRANSFERABLE AND IS THE PROPERTY OF THE ISSUING AGENCY AND MAY BE REVOKED FOR FAILURE TO MAINTAIN COMPLIANCE WITH THE APPLICABLE HEALTH REGULATIONS OR ANY APPLICABLE STATE AND LOCAL LAWS, ORDINANCES, AND REGULATIONS AS REFERRED TO THEREIN  
IDAHO CODE 39-414 (2)

ISSUED TO: **RIDEOUT ENTERPRISES**

NON-TRANSFERABLE

FOR THE OPERATION OF A:  
d.b.a.

**RESTAURANT/FULL SERVICE**

**IGGY'S SPORTS GRILL  
1430 MULLIGAN RD  
IDAHO FALLS ID 83402**

MENU RESTRICTED TO ITEMS  
ON APPLICATION

8/13/08  
DATE ISSUED

12/31/08  
DATE EXPIRES

BONNEVILLE  
CITY AND/OR COUNTY

*Kelly L. Fog*  
HEALTH AUTHORITY

**RECEIVED**

**AUG 20 2008**

IDAHO STATE POLICE  
ALCOHOL BEVERAGE CONTROL

000042

Cycle Tracking Number: 33980

# State of Idaho

## Idaho State Police

Premise Number: 8B-15  
Incorporated City

Retail Alcohol Beverage License

License Year: 2008

License Number: 4314

This is to certify, that Iggly's Idaho Falls, Inc.

doing business as: Iggly's Idaho Falls

is licensed to sell alcoholic beverages as stated

1430 Milligan Rd, Idaho Falls, Bonneville  
County

Acceptance of a license by a retailer shall constitute knowledge of and agreement to operate by and in accordance to the Alcohol Beverage Code, Title 23. Only the licensee herein specified shall use this license.

Signature of Licensee, Corporate Officer, LLC Member or Partner

IGGY'S IDAHO FALLS, INC.  
IGGY'S IDAHO FALLS  
K. MOODY @ MOFFATT THOMAS  
PO BOX 829  
BOISE, ID 83701  
Mailing Address

Restaurant	Yes	\$0.00
On-premise consumption	Yes	\$0.00
Beer	Yes	\$20.00
Kegs to go	No	
Wine by the bottle	Yes	\$0.00
Wine by the glass	Yes	\$0.00
Liquor	Yes	\$375.00
TOTAL FEE:		\$395.00

License Valid: 07/31/2008 - 09/30/2008

Expires: 09/30/2008

*Stacy Russell*

Director of Idaho State Police



Idaho State Police
Liquor License Application

1. [ ] New [ ] Change [x] Transfer

Premise File Number 8B-15

2. License Type and Fees

Proposed Opening Date June 30, 2008

- [ ] On Premise Consumption [x] Restaurant (Must Qualify)
[ ] Keg Beer (Kegs to Go) \$20 [x] Beer \$50 (\$20 for Transfer)
[x] Liquor by the Drink (Includes Wine) \$ 325.00

2010 - \$746

Total Fee Enclosed \$ 395.00

> Place of business qualifies for a liquor by the drink license per Title 23 Chapter 9, Idaho Code, as listed:

- [x] Incorporated City [ ] Ski Resort [ ] Common Carrier Boat [ ] Equestrian
[ ] Golf Course [ ] Airport Restaurant [ ] Convention Center [ ] Gondola
[ ] Waterfront Resort [ ] Airline [ ] Theme Park [ ] Railroad
[ ] Continuous Operation Facility [ ] X-Country Ski Resort [ ] Split Ownership Facility [ ] Racing Facility
[ ] Club

> Business is located [x] Inside or [ ] Outside of City Limits.

3. Applicant Information

License to be issued to: Iqqy's Idaho Falls, Inc.

(Applicant Name: Individual(s), Corporation, LLC or Partnership)

Doing Business As: Iqqy's Idaho Falls, Inc.
Located At: 1430 Milligan Road
City, County, Zip: Idaho Falls, Idaho 83402
Former Business Name:
Mailing Address:
Daytime Telephone: Nighttime Telephone:

Federal or State Tax I.D. Number: 26-0900373

Liquor License Proprietor: BV Beverage Company, LLC SSN

4. List all individuals, partners, officers, directors, 10 primary stockholders with percentages of stock held and LLC/LLP members. (Corporations must include an in-state manager) Attach additional list as needed. Officer or stockholder updates must include signed meeting minutes.

(Name) Daniel Rideout (Title) Owner (Home Address) Hill, Sandy, Utah 84092
(SSN) (DOB) (Contact Phone Number)
(Name) Jane Rideout (Title) Dir. (Home Address) , Sandy, Utah 84092
(SSN) (DOB) (Contact Phone Number)
(Name) (Title) (Home Address)
(SSN) (DOB) (Contact Phone Number)

(Over)

Alcohol Beverage Control, P O Box 700, Meridian, ID 83680-0700
(208) 884-7060, Toll Free (888) 222-1360

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NOV 20 2007

IDAHO STATE POLICE
ALCOHOL BEVERAGE CONTROL



Idaho State Police
Liquor License Application

1. [ ] New [ ] Change [x] Transfer

Premise File Number 8B-15

2. License Type and Fees Proposed Opening Date June 30, 2008

[ ] On Premise Consumption [x] Restaurant (Must Qualify)

[ ] Keg Beer (Kegs to Go) \$20 [x] Beer \$50 (\$20 for Transfer)

[x] Liquor by the Drink (Includes Wine) \$ 325.00 Total Fee Enclosed \$ 395.00

Place of business qualifies for a liquor by the drink license per Title 23 Chapter 9, Idaho Code, as listed:

- [x] Incorporated City [ ] Ski Resort [ ] Common Carrier Boat [ ] Equestrian
[ ] Golf Course [ ] Airport Restaurant [ ] Convention Center [ ] Gondola
[ ] Waterfront Resort [ ] Airline [ ] Theme Park [ ] Railroad
[ ] Continuous Operation Facility [ ] X-Country Ski Resort [ ] Split Ownership Facility [ ] Racing Facility
[ ] Club

Business is located [x] Inside or [ ] Outside of City Limits.

3. Applicant Information

License to be issued to: lqqv's Idaho Falls, Inc.

(Applicant Name: Individual(s), Corporation, LLC or Partnership)

Doing Business As:

Located At: TBD (Construction in Progress)

City, County, Zip:

Former Business Name:

Mailing Address: 6061 Tonkin Drive

Daytime Telephone: 435-770-2546 Nighttime Telephone: 801-...

Federal or State Tax I.D. Number: 26-0900373

Liquor License Proprietor: Daniel Rideout

SSN

4. List all individuals, partners, officers, directors, 10 primary stockholders with percentages of stock held and LLC/LLP members. (Corporations must include an in-state manager) Attach additional list as needed. Officer or stockholder updates must include signed meeting minutes.

(Name) Daniel Rideout (Title) Owner (Home Address) Hill, Sandy, Utah 84092

(SSN) (DOB) (Contact Phone Number)

(Name) Jane Rideout (Title) Dir. (Home Address)

(SSN) (DOB) (Contact Phone Number)

(Name) (Title) (Home Address)

(SSN) (DOB) (Contact Phone Number)

RECEIVED

(Over)

Alcohol Beverage Control, P O Box 700, Meridian, ID 83680-0700
(208) 884-7060, Toll Free (888) 222-1360

OCT 30 2007

IDAHO STATE POLICE
ALCOHOL BEVERAGE CONTROL
000045

- > Does anyone listed have any direct or indirect interest in any other business licensed for the sale of beer, wine or liquor by the drink?  NO  YES (Explain. Include Premise Number)  
License to sell in Meridian, Idaho. No. 5313.0 Premises No. 1A-970
- > Has anyone listed ever had an alcohol license denied, suspended or revoked?  NO  YES  
Explain: \_\_\_\_\_
- > Has anyone listed ever been convicted of a felony or an alcohol related misdemeanor?  NO  YES  
Explain: \_\_\_\_\_

5. Applicant Financial Information

- > Attach a list of all assets and liabilities of the applicant. You may attach a financial statement as long as the assets and liabilities are clearly listed.
- > Does anyone not previously listed have any financial interest (direct or indirect) in the business?  
 No  Yes (explain)  
(Name) (Address) (Explanation)

- > Business Bank Name and Address: Wells Fargo Bank, 320 A Street, Idaho Falls, Idaho 83402
- > Persons Authorized to sign on bank account: Daniel Rideout
- > Building:  Leased (Attach a copy of the valid lease)  Owned-Purchase Price \_\_\_\_\_
- > Liquor License:  Leased (Attach a copy of the valid lease)  Owned- Purchase Price \_\_\_\_\_
- > Did you pay for Goodwill (Good name, patronage, reputation)? No Purchase Price \_\_\_\_\_

6. Premise Diagram/Floor Plan (No architectural blue prints)

Attach a sketch of the entire area proposed to be licensed, all entrances, exits, locations of bars, back bars, bar stools, booths, tables, coolers (for off premise), coin operated amusement devices and the place where the licenses are regularly displayed. Indicate in the margin the direction and distance to the nearest school, church or other places of worship measuring from the nearest entrance of the licensed premises to the school, church or other place of worship if within 300 feet. Include a copy of your permits for health, safety and zoning from the governmental agency with zoning jurisdiction over the facility's location.

7. Read the following, Sign and have notarized.

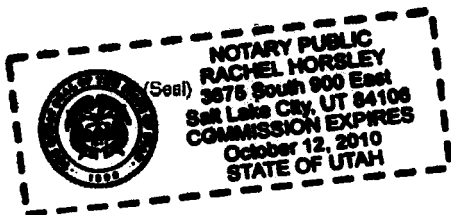
The applicant hereby affirms that he/she is the bona fide owner of the business, is eligible and has none of the disqualifications for a license as provided by Title 23, Chapter 9, 10,11, 13, 14, Idaho code or any amendments thereto. I/we hereby certify that there have been no changes in the above named business, ownership, directors, stockholders, partners or members during the past licensed year, except as indicated herein.

An application for and acceptance of a license by a retailer shall constitute consent to, and be authority for, entry by the director or his authorized agents, upon any premises related to the licensee's business, or wherein are or should be, kept, any of the licensee's books, records, supplies or other property related to said business, and to make the inventory, check and investigations aforesaid with relation to said licensee or any other licensee, as per Idaho code sections 23-1006, 23-907 and 23-1314.

I/we have also read all of the above and declare under penalty of perjury that each and every statement is true and correct.

Daniel W. Rideout owner 10-24-07  
Applicant Signature

Subscribed and sworn to before me this 24 <sup>This</sup> day of October, 2007 <sup>Date</sup>



Rachel Horsley  
Notary Public  
Residing At Salt Lake  
My Commission Expires: 10/12/10

RECEIVED

OCT 30 2007

IDAHO STATE POLICE  
ALCOHOL BEVERAGE CONTROL

C.





Colonel G. Jerry Russell  
Director

# Idaho State Police

Service since 1939



C.L. "Butch" Otter  
Governor

January 8, 2010

Iggy's Meridian, Inc.  
Iggy's Sports Grill  
2622 E Murray Holladay Rd  
Salt Lake City, UT 84117

Re: 90-day Approval  
Premise 8B-15, License Number 4314

To Whom It May Concern:

Our office has become aware that you are not currently opened for business at your licensed premises, 1430 Milligan Road, and therefore the liquor license is no longer in actual use as required by IDAPA 11.05.01.010.02.

You are approved for an initial 90 days to find a suitable premise for your liquor license to be placed into actual use. This time will provide a deadline of **April 8, 2010**. On or before that date, you must either transfer this license or place it into actual use as required by IDAPA 11.05.01.010.02. If you need more time, you must request an additional 60 days in writing. This is the only extension allowed.

If you have any further questions, or if we can be of assistance to you, please do not hesitate to contact our office.

Sincerely,

Lt. Robert Clements, Bureau Chief  
Alcohol Beverage Control Bureau  
Idaho State Police

COPY

700 S. Stratford Drive, Suite 115 • Meridian ID 83642-6202 • (208) 884-7060 • FAX (208)884-7096

EQUAL OPPORTUNITY EMPLOYER

000048

d.

000050

UNITED STATES POSTAGE  
\$ 00.00  
02 1M  
0004270935 JUL 30 2010  
MAILED FROM ZIP CODE 83702

PRESORTED  
FIRST CLASS

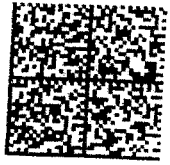
RETURN SERVICE  
REQUESTED



Idaho State Police  
Alcohol Beverage Control  
700 S. Stratford Drive, Suite 115  
Meridian, ID 83642-6202

*Liq.  
8B-15  
Expires 9-30-10*

PRESORTED  
FIRST CLASS



UNITED STATES POSTAGE  
\$ 00.335  
02 1M  
0004270935 JUL 30 2010  
MAILED FROM ZIP CODE 83702

RECEIVED

AUG 04 2010

IDAHO STATE POLICE  
ALCOHOL BEVERAGE CONTROL

NIXIE 841 DE 1 66 66/01/10  
RETURN TO SENDER  
ATTEMPTED - NOT KNOWN  
UNABLE TO FORWARD  
E01 83642625740 12666-02095 01 62

POSTNET



# Idaho State Police

## Alcohol Beverage License Renewal Application

Alcohol Beverage Control  
700 S. Stratford Dr. Ste 115, Meridian, ID  
83642  
(208) 884-7060



### 1. Applicant

**Premise Number: 8B-15**

Applicant: Iggy's Idaho Falls, Inc.  
(Applicant Name: Individuals(s), Corporation, LLC or Partnership)

**License #: 4314**

**License Period: 2011**

DBA: Iggy's Idaho Falls

### 2. License Type and Fees

Location: 1430 Milligan Rd

Liquor	Yes	\$750.00
--------	-----	----------

City, County, Zip: Idaho Falls, Bonneville, 83402

Beer	Yes	\$50.00
------	-----	---------

Business Telephone: 435 770 2546

On-premise	Yes	\$0.00
------------	-----	--------

Idaho State Tax Commission Seller's Permit Number: \_\_\_\_\_

Kegs to go	No	
------------	----	--

**a. License Type:** Incorporated City

Restaurant	Yes	\$0.00
------------	-----	--------

Wine by the bottle	Yes	\$0.00
--------------------	-----	--------

Wine by the glass	Yes	\$0.00
-------------------	-----	--------

**Total Fee Enclosed: \$800.00**

IGGY'S IDAHO FALLS, INC.  
IGGY'S IDAHO FALLS  
1430 MILLIGAN RD  
IDAHO FALLS, ID 83402

*Mailing Address*

### 3. List sole proprietor(s) all partners, corporate officers, directors, ten primary stockholders, LLC/LLP members/partners of the applicant. Please attach additional pages as necessary.

(Name) \_\_\_\_\_ (Title) \_\_\_\_\_  
(SSN) \_\_\_\_\_ (DOB) \_\_\_\_\_ (Contact Phone Number) \_\_\_\_\_

(Name) \_\_\_\_\_ (Title) \_\_\_\_\_  
(SSN) \_\_\_\_\_ (DOB) \_\_\_\_\_ (Contact Phone Number) \_\_\_\_\_

### 4. Does anyone listed above have any direct or indirect interest in any other business licensed for the sale of beer, wine, or liquor by the drink? NO YES (Explain Below)

\_\_\_\_\_

\_\_\_\_\_

5. Has anyone listed above an individual, a partner, a member (C) or while an officer, director of a corporation applicant or licensee ever had an alcohol license denied, suspended or revoked?  NO  YES (Explain below)

6. Has anyone listed above ever been convicted with a felony or an alcohol related misdemeanor?  NO  YES (Attach Explanation)

7. Premise Diagram/Floor Plan No architectural blue prints - On paper no larger than 8.5" x 11"

If you have had any changes in the premise from the previous year:

Attach a sketch showing the entire area proposed to be licensed to sell, serve, dispense or store alcoholic beverages, including patios, decks, etc. Diagram must show all entrances, exits, offices, restrooms, kitchen facilities (if applicable), bar(s), bar backs, liquor cabinets, tables, refrigeration units, partitions, etc. and where license will be prominently displayed.

**8. Read the following, sign and have notarized.**

The applicant hereby swears or affirms under oath that the applicant is the bona fide owner of the business which is applying for this license and will be engaged in the sale or dispensing of liquor by the drink, beer and/or wine by the bottle and/or glass. The applicant hereby affirms that the applicant is eligible and has none of the disqualifications for a license as provided by Title 23, Chapter 9, 10, 11, 12, 13 and

An applicant for the acceptance of a license by a retailer shall constitute consent to, and be authority for, entry by the Director or his authorized agents, upon any premises related to the licensee's business, or wherein are or should be kept, any of the licensee's books, records, ledgers, supplies or other property related to said business, and to make the inventory, check and investigations aforesaid with relation to said licensee or any other licensee. It shall also constitute consent given to the Director or his authorized agents to view, copy or investigate any documents, including state and federal income and sales tax documents, related to the business or person(s) associated with

Applicant hereby acknowledges that falsifying this document or submitting any false documents for record can result in a felony conviction under Idaho Code sections 23-905 or 18-3203.

I/we, the applicant of this license, have read all of the above and declare under penalty of perjury that the information I/we have provide is true and correct to the best of my/our knowledge.

\_\_\_\_\_  
Applicant Signature

\_\_\_\_\_  
Title

\_\_\_\_\_  
Date

\_\_\_\_\_  
Printed Name

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

\_\_\_\_\_  
Notary Public

(Seal)

Residing

My Commision Expires:

e.

# Moffatt Thomas

MOFFATT THOMAS BARRETT ROCK & FIELDS, CHTD.

Boise  
Idaho Falls  
Pocatello  
Twin Falls

John W. Barrett	Christine E. Nicholas	Andrew J. Waldera
Richard C. Fields	Bradley J. Williams	Dylan B. Lawrence
John S. Simko	Lee Radford	Paul D. McFarlane
John C. Ward	Michael O. Roe	Tyler J. Henderson
D. James Manning	Nancy J. Garrett	C. Edward Cather III
David B. Lincoln	David S. Jensen	Benjamin C. Ritchie
Gary T. Dance	James L. Martin	Noah G. Hillen
Larry C. Hunter	C. Clayton Gill	Matthew J. McGee
Randall A. Peterman	Michael W. McGreaham	David J. Dance
Mark S. Prusynski	David P. Gardner	Mindy M. Willman
Stephen R. Thomas	Julian E. Gabiola	
Glenna M. Christensen	Tara Martens	Robert E. Bakes, <i>of counsel</i>
Gerald T. Husch	Kimberly D. Evans Ross	
Scott L. Campbell	Jon A. Stenquist	<i>Willis C. Moffatt, 1907-1980</i>
Robert B. Burns	Mark C. Peterson	<i>Eugene C. Thomas, 1931-2010</i>
Michael E. Thomas	Tyler J. Anderson	<i>Kirk R. Helvie, 1956-2003</i>
Patricia M. Olsson	Jason G. Murray	

January 7, 2011  
*via Hand Delivery*

US Bank Plaza Building  
101 S Capitol Blvd 10th Fl  
PO Box 829  
Boise Idaho 83701 0829

208 345 2000  
800 422 2889  
208 385 5384 Fax  
www.moffatt.com

Jaimy Adams  
Alcohol Beverage Control  
Idaho State Police  
700 S. Stratford Drive, Ste. 115  
Meridian, ID 83642

**Re: Liquor License Transfer to Its Owner by Current Lessee and Lease to New Lessee  
- License Number 4314.0**  
MTBR&F File No. 23-328.6

Dear Mr. Adams:

My former partner Becky Rainey, who has been working with you on the transfers of the liquor license currently leased by Iggy's Idaho Falls, Inc. (d/b/a Iggy's Idaho Falls), has recently left this firm, and I have stepped into her much-missed shoes. Hopefully I haven't omitted anything required to effect the two transfers being requested, but please give me a call should you need anything more. The enclosed documentation supporting the two requested transfers are identified below.

**A. Liquor License Transfer From Current Lessee to Owner, BV Beverage Company, LLC ("BV").**

Enclosed as Exhibit A are the following documents to support the transfer of liquor license number 4314.0 from its current lessee back to its owner, BV:

1. BV's completed Liquor License Application;
2. Current building lease for location of use;
3. BV's Articles of Organization;
4. Affidavit - Release of License by current lessee; and
5. Check in the amount of \$395.00 payable to the State of Idaho.

**RECEIVED**  
**JAN - 7 2011**  
**IDAHO STATE POLICE**  
**ALCOHOL BEVERAGE CONTROL**

Jaimy Adams  
January 7, 2011  
Page 2

**B. Transfer From BV to New Lessee, Screamin' Hot Concepts, LLC ("Screamin' Hot").**

Upon approval of the transfer requested above, BV will immediately lease the license to Screamin' Hot. To facilitate that transfer, I have enclosed the following documents as Exhibit B, in addition to Screamin' Hot's current building lease for location of use (*see* item A.2 above):

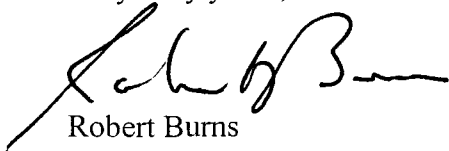
1. Screamin' Hot's completed Liquor License Application;
2. Screamin' Hot's Floor plan and menu;
3. Screamin' Hot's Articles of Organization, with all amendments;
4. Screamin' Hot's Amended and Restated Operating Agreement;
5. Alcohol Beverage License Lease between BV and Screamin' Hot;
6. Affidavit – Release of License by BV; and
7. Check in the amount of \$395.00 payable to the State of Idaho.

The application for transfer of the license to Screamin' Hot was completed by BV's new tenant, Screamin' Hot. Therefore, to verify any information contained therein, please contact Screamin' Hot directly at the numbers listed on its application.

Screamin' Hot has indicated that it would like to open by February 28, 2011, or as soon thereafter as possible.

It is my understanding that you have all of the fingerprint cards on file for both BV and Screamin Hot. Again, however, if there are any issues with this package, please contact me at 385-5412.

Very truly yours,



Robert Burns

RBB/klf

Enclosures

cc: Cheryl Meade (Idaho Attorney General's Office) (w/o encls.)  
Thel W. Casper (w/o encls.)  
Eric Isom (w/o encls.)  
Todd Johnson (w/o encls.)  
Liza Leonard (w/o encls.)

**RECEIVED**  
JAN - 7 2011

IDAHO STATE POLICE  
ALCOHOL BEVERAGE CONTROL



**f.**

EXHIBIT A

Sep-29-2010 09:39 AM Moffatt Thomas 2083855384

3/3



Idaho State Police

Alcohol Beverage Control  
700 S. Stratford Dr. Ste 115  
Meridian, ID 83642  
Phone: (208) 884-7080

AFFIDAVIT - RELEASE OF LICENSE

I/we, the undersigned, regarding herein named license:

Alcohol License No.: 4314; Premises ID No.: 8 B-15

doing business as Tapp's Idaho Falls, located in the city of Idaho Falls

County of Bonneville Co. State of Idaho, transferred on this 29 day of Sept. 2010

2010, the use of said license to the following person(s) or entity (new applicant name(s)):

BY Beverage Company, LLC PO Box 51298, Idaho Falls, ID 83405  
Name Address

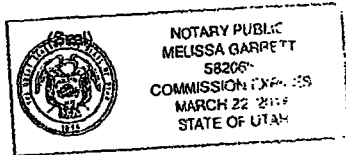
Name Address

Name Address

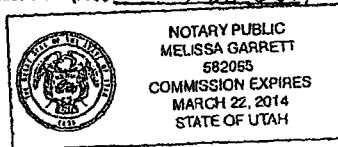
DISCLAIMER: This affidavit cannot be construed to affect any agreements between assignor(s) and assignee(s).

Assignor's Signature(s): Daniel W. Redout

On this 29 day of September 2010, before me, the undersigned, a notary public in and for the State of Utah, personally appeared Daniel Redout known to me to be the person(s) whose name(s) is/are subscribed to the foregoing instrument and acknowledged to me that (s)he/they executed the same.



Melissa Garrett  
Notary Public  
Residing at Salt Lake County, UT  
My Commission Expires 3-22-2014



EH 10.02-07 Affidavit of Release of License

9/2009

PAGE 03/03

BOHNER/LAN

2083768998

09/29/2010 10:23

EXHIBIT A  
ALCOHOL BEVERAGE LICENSE LEASE - 10  
120910 1630

RECEIVED

JAN - 7 2011

Client: 1786028.5  
IDAHO STATE POLICE  
ALCOHOL BEVERAGE CONTROL

000057

g.



# Idaho State Police

Service Since 1939



Colonel G. Jerry Russell  
Director

C.L. "Butch" Otter  
Governor

January 10, 2011

Robert Burns  
Moffatt Thomas  
PO Box 829  
Boise, ID 83701-0829

Re: Transfer of Liquor License  
Premises 8B-15, License No. 4314

Dear Mr. Burns:

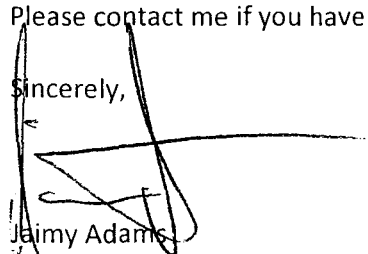
I am in receipt of the two application for the transfer of the above referenced liquor license. At this time, your application cannot be accepted and is being returned to you. The license requested to be transferred, premises 8B-15, no longer exists therefore cannot be transferred.

This is not a denial of your application for transfer. The applications, supporting documents and transfer fees (less the submitted menus for Screamin Hot Concepts, LLC as they were too large to be included in any current envelope available to me – please contact me if you would like me to send these to you) are being returned to you because the license indicated is not transferrable due to it being lost for non-renewal. See Idaho Code §23-908.

Also, I have enclosed a copy of Fourth Judicial District Judge Kathryn A. Sticklen's Order in the case of Cheerleaders Sports Bar & Grill, LLC vs. State of Idaho, Department of Idaho State Police. I am not sure if you are aware of this Order so I wanted to include a copy for your reference. This Order involves very similar circumstances to the ones involved in the transfer applications you have submitted to me.

Please contact me if you have any questions.

Sincerely,

  
Jaimy Adams  
Licensing Specialist  
Alcohol Beverage Control  
Idaho State Police

700 S. Stratford Drive, Suite 115 • Meridian, ID 83642-6202 • (208)884-7060 • Fax (208)884-7096

EQUAL OPPORTUNITY EMPLOYER

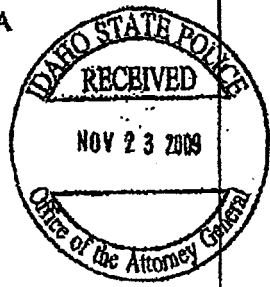
000059

NOV 13 2009

J. DAVID NAVARRO, Clerk  
By: *[Signature]*

**COPY**

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA



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CHEERLEADERS SPORTS BAR &  
GRILL, INC., an Idaho corporation,

Plaintiff,

vs.

THE STATE OF IDAHO,  
DEPARTMENT OF IDAHO STATE  
POLICE, G. JERRY RUSSELL, in his  
official capacity as Director of Idaho State  
Police,

Defendant.

Case No. CV-OC0814425

MEMORANDUM DECISION  
AND ORDER

This matter is before the Court on an appeal from the decision of the Director of the Idaho State Police adopting the hearing officer's recommended findings of fact, conclusions of law and recommended order. Based on the hearing officer's recommendation, the Director found and concluded that Cheerleaders Sports Bar & Grill's (Cheerleaders) liquor license expired on May 1, 2008; that no application for renewal was filed within the thirty-one (31) day grace period following May 1, 2008; and that the Director does not have the authority under Idaho Code §23-908(1) to renew or extend an expired license after the grace period. Cheerleaders asks this Court to find that the Director has discretion under Idaho Code §23-933 to decide whether to reinstate a license and impose a fine for not complying with a provision of chapter 9, title 23 of the Idaho Code, and it also

*MS*

**COPY**

1 asks the Court to vacate the Director's decision and recommend that the liquor license be re-  
2 instated. For the reasons set forth below, the Court affirms the Director's ruling.

### 4 FACTUAL & PROCEDURAL BACKGROUND

5 In February 2005, Cheerleaders Sports Bar & Grill acquired a liquor license from Godzilla,  
6 LLC, which transfer became effective on June 6, 2005. (Recommended Findings of Fact,  
7 Conclusions of Law and Recommended Order ¶ 1.) On the 2005 application for the license, the  
8 designated address for Cheerleaders was listed as "c/o Excell Business, 555 E. 42nd Street, Boise,  
9 Idaho 83714," and the home address for the president of the licensee, Robert E. Godsill, Sr., was  
10 listed as "24799 Lansing Lane, Middleton, Idaho 83644." (Recommended Findings ¶ 3.)

11  
12 The Alcohol Beverage Control Agency (ABC) mailed preprinted renewals to Cheerleaders at  
13 555 E. 42nd Street, Boise, Idaho 83714 in 2006, 2007, and 2008. (Recommended Findings ¶¶ 4-7.)  
14 Mr. Godsill signed and returned the 2006 renewal and was issued a license with a listed expiration  
15 date of April 30, 2007. (Recommended Findings ¶ 5.) He also signed and returned the 2007 renewal  
16 and was issued a license with a listed expiration date of April 30, 2008. (Recommended Findings ¶  
17 6; Agency Record, Adams Aff. Ex. 3.) The renewal mailed by ABC on February 1, 2008 was  
18 returned to ABC as "Unable to Forward." (Recommended Findings ¶ 7.) After receiving the  
19 returned mail, ABC mailed a preprinted renewal application to Mr. Godsill at his listed home  
20 address, 24799 Lansing Lane, Middleton, Idaho 83644. (Recommended Findings ¶ 7.) The  
21 preprinted renewal was not returned to ABC by the United States Post Office or by Mr. Godsill.  
22 (Recommended Findings ¶¶ 7, 11.)

23  
24 Pursuant to Idaho Code §23-908 and IDAPA 11.05.01.011.03, the last liquor license issued  
25 to Cheerleaders expired May 1, 2008. (Recommended Findings ¶ 9.) During the thirty-one (31) days  
26

1 following the license expiration, no license renewal was submitted on behalf of Cheerleaders.

2 (Recommended Findings ¶ 11.)

3 On July 9, 2008, Mr. Godsill called ABC and was informed that his license had expired by  
4 operation of law and that ABC cancelled the license as required by law. (Recommended Findings ¶  
5 12.) Mr. Godsill then presented to ABC a license renewal application for Cheerleaders along with a  
6 check in the amount of \$800 on July 10, 2008. (Recommended Findings ¶ 13.) ABC date stamped  
7 the application but then issued an "Applicant Return Record" noting that the application could not  
8 be accepted because the license had already been cancelled. (Recommended Findings ¶ 13.) At the  
9 time the application was filed and denied, Mr. Godsill had purportedly entered into agreements with  
10 Table 28, Inc. to lease Cheerleaders' liquor license, among other things. (Petitioner's Brief 5.)

11  
12 Cheerleaders filed a Petition for Relief on November 12, 2008 asking the hearing officer to  
13 reinstate the liquor license upon finding that ABC had a duty to provide notice to licensees, that  
14 forfeiture is not mandated by law, and that forfeiture is an unconscionable penalty in this case. The  
15 hearing officer concluded that Cheerleaders' license expired on May 1, 2008 and that the license  
16 could not be renewed after the statutory thirty-one (31) day grace period. The Director of the Idaho  
17 State Police (the Director) adopted the hearing officer's conclusions and recommended order on  
18 March 24, 2009 and denied Cheerleaders' request to renew the license. Cheerleaders timely  
19 appealed.  
20

21  
22 **ISSUES ON APPEAL**

- 23 1. Whether Idaho's statutory provisions and IDAPA's rules governing alcoholic beverages  
24 prevent the Director of the Idaho State Police from renewing an expired liquor license where  
25 the application for renewal was untimely made.  
26

- 1 2. Whether the Director's refusal to re-instate Cheerleaders' liquor license was arbitrary,  
capricious, and an abuse of discretion.
- 2 3. Whether the Director's refusal to re-instate and forfeit Cheerleaders' liquor license imposed  
3 an unconscionable penalty upon Cheerleaders.

4  
5 **STANDARD OF REVIEW**

6 In reviewing an agency's decision, an appellate court may not "substitute its judgment for  
7 that of the agency as to the weight of the evidence on questions of fact." Idaho Code §67-5279(1).  
8 Instead, the court must defer "to the agency's findings of fact unless they are clearly erroneous."  
9 *Price v. Payette County Bd. of County Comm'rs*, 131 Idaho 426, 429, 958 P.2d 583, 586 (1998);  
10 *Bennett v. State*, 147 Idaho 141, 142, 206 P.3d 505, 506 (Ct. App. 2009).

11 Agency action must be affirmed on appeal unless the court determines that the agency's  
12 findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory  
13 provisions; (b) in excess of statutory authority of the agency; (c) made upon unlawful procedure; (d)  
14 not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an  
15 abuse of discretion. Idaho Code § 67-5279(3); *Bennett*, 147 Idaho at 142, 206 P.3d at 506. The party  
16 attacking the agency's decision bears the burden of demonstrating that the agency erred in a manner  
17 specified in section 67-6279(3) and that a substantial right has been prejudiced. *Price*, 131 Idaho at  
18 429, 958 P.2d at 586; *Bennett*, 147 Idaho at 142, 206 P.3d at 506.

20  
21 **ANALYSIS**

22  
23 **A. The Idaho Code does not give the Director the discretion to reinstate a license that expired  
and was not renewed within the statutory grace period.**

24 The Idaho State Legislature has set forth unambiguous rules establishing when a liquor  
25 license expires and when it can be renewed.  
26



1 All licenses shall expire at 1:00 o'clock a.m. on the first day of the renewal month  
2 which shall be determined by the director by administrative rule and shall be  
3 subject to annual renewal upon proper application. The director will determine the  
4 renewal month by county based on the number of current licenses within each  
5 county, distributing renewals throughout the licensing year. . . . [R]enewals will  
6 occur annually on their renewal month. Renewal applications for liquor by the  
7 drink licenses accompanied by the required fee must be filed with the director on  
8 or before the first day of the designated renewal month. Any licensee holding a  
9 valid license who fails to file an application for renewal of his current license on  
10 or before the first day of the designated renewal month shall have a grace period  
11 of an additional thirty-one (31) day in which to file an application for renewal of  
12 the license. The licensee shall not be permitted to sell and dispense liquor by the  
13 drink at retail during the thirty-one (31) day extended time period unless and until  
14 the license is renewed.

9 Idaho Code § 23-908(1). Based upon a plain reading of the statute, it is clear that a liquor license  
10 must be renewed prior to the first day of the designated renewal month because it expires at 1:00  
11 a.m. on the first day of the renewal month if not renewed. *Id.* If a license expires because a licensee  
12 fails to timely file a renewal application (not because the license has been suspended or revoked), a  
13 licensee has a thirty-one (31) day grace period from the time of expiration in which to file an  
14 application. *Id.* However, because the license has already expired, the licensee is not allowed to sell  
15 and dispense liquor by the drink at retail during that thirty-one (31) day period, "unless and until the  
16 license is renewed." *Id.*

18 Nothing in the Idaho Code gives the Director of the Idaho State Police the option of  
19 renewing an expired liquor license after the thirty-one (31) day grace period. The fact that the  
20 Director may chose any month to be the renewal month does not mean that the Director may extend  
21 the grace period for renewing a license once the renewal month is established. Also, the fact that the  
22 director may have discretion in some instances does not mean that there are not strict deadlines that  
23 he must honor and enforce.  
24  
25  
26

1 The Director has discretionary authority to suspend, revoke, or deny renewal of a liquor  
2 license upon a licensee's failure to comply with the provisions of title 23, chapter 9, but the Director  
3 only has this discretionary authority with regard to liquor licenses that have not expired or that fall  
4 within the thirty-one (31) day grace period after expiration. Idaho Code § 23-933. An expired  
5 license cannot be suspended or revoked because it is no longer in effect, and a license can only be  
6 denied renewal where there is a statutory basis for renewal to begin with. Where the statute does not  
7 allow an expired license to be renewed after thirty-one (31) days, there is no room for discretionary  
8 grant or denial of a renewal application after the deadline.

9  
10 This absolute rule applies regardless of whether the Alcohol Beverage Control Agency sends  
11 notice to a licensee regarding expiration and renewal. Although "[t]he right to renew is included  
12 among the privileges appurtenant to a liquor license," *Uptick Corp. v. Ahlin*, 103 Idaho 364, 369,  
13 647 P.2d 1236, 1241 (1982), Idaho Code §23-908 does not require the agency to send out a  
14 reminder notifying the licensee of this right to renew and the upcoming expiration date. To the  
15 extent that the agency has imposed a duty upon itself to send out an annual notice for renewal  
16 pursuant to IDAPA 11.05.01.011.03,<sup>1</sup> the self-imposed rule does not require that the licensee obtain  
17 the notice from the agency regarding the upcoming expiration date before a licensee loses the right  
18 to renew and the license expires. Instead, Idaho Code §23-908 gives notice to the licensee that he is  
19 required to annually renew the license, and the licensee bears the burden of ensuring that his license  
20 does not expire.

21  
22 In this case, the license expired on May 1, 2008, and Mr. Godsill did not file a renewal  
23 application on behalf of Cheerleaders until July 10, 2008, more than thirty-one (31) days after the  
24

25  
26 <sup>1</sup> IDAPA 11.05.01.011.03 contains a table setting forth the notification and renewal months established to renew licenses to sell alcohol. The renewal month for liquor licenses in Ada County is May 1.

1 expiration of the license. Mr. Godsill had notice that the liquor license would expire on May 1, 2008  
2 based upon his previous renewal date of May 1, 2007, IDAPA 11.05.01.011.03, and Idaho Code  
3 §23-908. In addition, the license itself informed Mr. Godsill that it would expire on April 30, 2008,  
4 and the ABC Agency attempted to give notice to Mr. Godsill of the expiration by mailing a notice  
5 first to Excell Business and then to Mr. Godsill's home address, the latter of which was not returned  
6 to the agency. Despite this notice, Mr. Godsill did not timely file a renewal application. Because Mr.  
7 Godsill did not timely file a renewal application and because the Director has no authority to grant  
8 further extensions of time to file a renewal application, the Director had no authority to grant Mr.  
9 Godsill's untimely renewal application.  
10

11  
12 ***B. The Director's decision was not arbitrary, capricious, or an abuse of discretion because the***  
13 ***Director does not have the discretion whether to reinstate a license not timely renewed.***

14       A decision is only arbitrary if it is "done in disregard of the facts and circumstances  
15 presented or without adequate determining principles." *American Lung Ass'n v. State, Dep't of*  
16 *Agriculture*, 142 Idaho 544, 547, 130 P.3d 1082, 1085 (2006). It is capricious if it is "done without a  
17 rational basis." *Id.* In this case, the Director did not act arbitrarily or capriciously because he  
18 considered all the facts and then acted pursuant to the clear language of the statute in determining  
19 that he had no authority to renew the license. The Director had a rational basis for not renewing the  
20 license based upon the statutory language.

21       For an act to be an abuse of discretion, there must be discretionary authority that can be acted  
22 upon. *American Lung Ass'n*, 142 Idaho at 46, 130 P.3d at 1084. Where a Director's factual decision  
23 controls the result, there is no discretion to be abused. *Id.* As discussed above, the Director in this  
24 case had no discretionary authority to renew an expired license beyond the grace-period. Instead, the  
25

1 Director was required to let the facts control the result pursuant to the statutory rules, and the  
2 Director did not abuse any discretion in so doing.

3 Because the Director did not have the authority or the discretion to renew an expired license  
4 after the thirty-one (31) day grace period, the Director's decision to not renew Cheerleaders' expired  
5 license for this very reason was not arbitrary, capricious, or an abuse of discretion.

6  
7 *C. The loss of the liquor license is not an unconscionable penalty for failing to timely renew the*  
8 *license.*

9 The consequence for not timely filing a renewal application pursuant to Idaho Code §23-  
10 908(1) is the loss of a liquor license. Although this loss may have negative repercussions, the loss  
11 resulting from an untimely application is not unconscionable. The applicable statute even provides a  
12 grace period. The licensee's own failure to comply with the statutory requirements does not create  
13 an unconscionable result.

14  
15  
16 **CONCLUSION**

17 For the reasons stated above, the Court affirms the Director's ruling.

18 **IT IS SO ORDERED.**

19 Dated this 12<sup>th</sup> day of November, 2009.

20  
21 Kathryn A. Sticklen  
22 Kathryn A. Sticklen  
23 District Judge  
24  
25  
26

CERTIFICATE OF MAILING

I, J. David Navarro, the undersigned authority, do hereby certify that I have mailed, by United States Mail, one copy of the MEMORANDUM DECISION AND ORDER as notice pursuant to Rule 77(d) I.R.C.P. to each of the attorneys of record in this cause in envelopes addressed as follows:

ED GUERRICABETIA  
DAVISON COPPLE COPPLE & COPPLE  
PO BOX 1583  
BOISE, ID 83701

STEPHANIE A. ALTIG  
IDAHO ATTORNEY GENERAL'S OFFICE  
PO BOX 700  
MERIDIAN, ID 83680-0700

J. DAVID NAVARRO  
Clerk of the District Court  
Ada County, Idaho

Date: 11/16/09

By [Signature]  
Deputy Clerk

**COPY**

LAWRENCE G. WASDEN  
Attorney General

**MAY 25 2011**

CHRISTOPHER D. RICH, Clerk  
By STEPHANIE VIDAK  
DEPUTY

CHERYL E. MEADE  
Deputy Attorney General  
Idaho State Police  
700 S. Stratford Drive  
Meridian, Idaho 83642  
Telephone: (208) 884-7050  
Facsimile: (208) 884-7228  
Idaho State Bar No. 6200  
[cheryl.meade@isp.idahol.gov](mailto:cheryl.meade@isp.idahol.gov)

Attorney for Respondent.

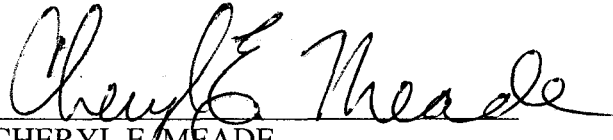
**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

B.V. BEVERAGE COMPANY, LLC, and	)	
Idaho Limited Liability Company,	)	CV-OC—2011-06351
	)	
Petitioner,	)	NOTICE OF FILING
	)	THE AGENCY RECORD
vs	)	
	)	
THE STATE OF IDAHO, DEPARTMENT	)	
OF IDAHO STATE POLICE, ALCOHOL	)	
BEVERAGE CONTROL., G. JERRY	)	
RUSSELL, in his official capacity as Director	)	
of Idaho State Police,	)	
	)	
Respondent.	)	

Comes now, the Idaho Department of Law Enforcement, Alcohol Beverage Control, Respondent in the above matter, and pursuant to I.R.C.P. 84(j) and (k), gives notice that it has been fourteen (14) days since the lodging of the Agency Record and there has been no objection to the agency record.

7

DATED this 25<sup>th</sup> day of May 2011.



CHERYL E. MEADE  
Deputy Attorney General  
Counsel for Respondent

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing NOTICE OF FILING THE AGENCY RECORD was served on the following on this 25<sup>th</sup> day of May, 2011 and by the following method:

Rebecca Rainey  
Attorney at Law  
2627 W. Idaho St.  
Boise, ID 83702  
Facsimile 208-388-0120

- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Facsimile
- Electronic Mail



Cheryl E. Meade

MAY 27 2011 12:07

CHRISTOPHER D. RICH, Clerk  
By [Signature] DEPUTY

Rebecca A. Rainey, ISB No. 7525  
REBECCA A. RAINEY, P.A.  
2627 W. Idaho Street  
Boise, Idaho 83702  
Telephone (208) 559-6434  
Facsimile (208) 473-2952  
rar@rebeccaraineylaw.com

Attorney for Petitioner

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BV BEVERAGE COMPANY, LLC., an Idaho  
limited liability company,

Petitioner,

vs.

THE STATE OF IDAHO, DEPARTMENT  
OF IDAHO STATE POLICE/ALCOHOL  
BEVERAGE CONTROL, G. JERRY  
RUSSELL, in his official capacity as Director  
of Idaho State Police,

Respondent.

Case No. CV-0C-2011-0<sup>6</sup>351

**MOTION TO AUGMENT THE  
RECORD**

COMES NOW, Petitioner BV Beverage Company, LLC, ("BV Beverage") by  
and through undersigned counsel of record, and pursuant to Idaho Rule of Civil  
Procedure 84(l), and hereby moves this Court to augment the Agency Record presented  
by the Idaho State Police/Alcohol Beverage Control Bureau, ("ABC") which record was  
settled on or about May 25, 2011.

3



The specific documents sought to be augmented to the record are as follows:

1. Complaint for Revocation of Retail Alcohol Beverage License filed August 20, 2010 by Cheryl Meade. **Exhibit 1.**
2. Letter dated September 24, 2010 from Rebecca Rainey to Susan Saint regarding revocation proceedings related to License No. 4314 (the "License"). **Exhibit 2.**
3. E-mail dated September 28, 2010 by Cheryl Meade to Rebecca Rainey. **Exhibit 3.**
4. E-mail string dated September 29, 2010 between Rebecca Rainey, Cheryl Meade and Tony Bohner. **Exhibit 4.**
5. Letter dated January 13, 2011 from Rebecca Rainey to Cheryl Meade with enclosures. **Exhibit 5.**
6. Continuation of email string identified in Exhibit 4, above, with e-mails dated January 13 – January 14, 2011 by and between Rebecca Rainey and Cheryl Meade. **Exhibit 6.**
7. Email string dated January 18 – January 19, 2011 by and between Cheryl Meade and Rebecca Rainey. **Exhibit 7.**
8. Letter dated January 19, 2011 from Cheryl Meade to Rebecca Rainey. **Exhibit 8.**
9. Email dated February 4, 2011 by Cheryl Meade to Rebecca Rainey. **Exhibit 9.**
10. Letter dated February 4, 2011 from Cheryl Meade to Rebecca Rainey. **Exhibit 10.**

11. Letter dated March 4, 2011 from Rebecca Rainey to Cheryl Meade.

**Exhibit 11.**

12. Letter dated March 15, 2011 from Cheryl Mead to Rebecca Rainey.

**Exhibit 12.**


The specific grounds for the request to augment the record are that BV Beverage's petition for judicial review is premised upon the fact that BV Beverage holds the owner's interest in the License and, therefore, was (i) entitled to notice of actions taken by the ABC respecting License and (ii) was entitled to the due process consideration of receiving renewal paperwork generated by the ABC for purposes of renewing its interest in the License; and, alternatively, (iii) that equitable theories of tolling and estoppel preclude the ABC from taking the position that BV Beverage does not have any protectable interest in the License and from declaring the License void for non-renewal.

The ABC has taken the position that BV Beverage did not and does not have standing to assert these positions (*see* Exhibit 12 attached hereto). The Agency Record prepared by the ABC reflects only actions taken by the ABC respecting Iggy's lease-hold interest in the License and omitted all evidence of correspondence, communication and actions respecting BV Beverage's ownership interest in the License.

Accordingly, pursuant to the authority of Idaho Rule of Civil Procedure 84(l), BV Beverage respectfully requests that this Court allow the record to be augmented with the documents described above and attached hereto as Exhibits 1 – 12.

DATED THIS 27<sup>th</sup> day of May, 2011.

REBECCA A. RAINEY, P.A.


  
Rebecca A. Rainey,  
Attorney for Petitioner

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 27th day of May, 2011, I caused a true and correct copy of the foregoing **MOTION TO AUGMENT THE RECORD** to be served by the method indicated below, and addressed to the following:

CHERYL A. MEADE  
Idaho State Police/Alcohol Beverage Control  
700 S. Stratford  
P.O. Box 700  
Meridian, ID 83642

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile

  
Rebecca A. Rainey

# **Exhibit 1**

LAWRENCE G. WASDEN  
Attorney General

CHERYL E. MEADE  
Deputy Attorney General  
Idaho State Police  
700 S. Stratford Drive  
Meridian, Idaho 83642  
Telephone: (208) 884-7050  
Idaho State Bar No. 6200

Attorney for the Complainant

**A CONTESTED MATTER BEFORE THE DIRECTOR  
OF THE IDAHO STATE POLICE**

IDAHO STATE POLICE, ALCOHOL BEVERAGE CONTROL,  Complainant,	) Case No. 10ABC-COM018 ) License No. 4314 ) Premise No. 8B-15 ) ) COMPLAINT FOR REVOCATION ) OF RETAIL ALCOHOL BEVERAGE ) LICENSE ) ) ) Respondent.
vs	
IGGY'S IDAHO FALLS, INC., Licensee, dba, IGGY'S IDAHO FALLS,  Respondent.	

Complainant, by and through its attorney, Cheryl E. Meade, Deputy Attorney General,  
hereby alleges and asserts its causes of action as follows:

**I. ALLEGATIONS.**

1. This is an administrative action brought against Respondent pursuant to the provisions of Title 67, Chapter 52 of the Idaho Code.
2. Complainant is the Bureau of Alcohol Beverage Control.

COMPLAINT FOR REVOCATION OF RETAIL ALCOHOL BEVERAGE LICENSE - 1

3. Complainant has the authority to promulgate rules and regulations necessary to carry out the provisions of Idaho Code Title 23, Chapters 6-14, pursuant to Idaho Code §§ 67-2901, 23-932, 23-946(b), 23-1330 and 23-1408.

4. Complainant is the state entity charged under Idaho Code Title 23, Chapters 8, 9, 10 with the authority to enforce and police the Idaho Liquor Act, pursuant to Idaho Code § 23-804.

5. Idaho Code § §23-933, 23-1038 and 23-1331 provides the basis and authority for this Complaint.

6. Respondent currently holds a license to sell beer pursuant to Idaho Code § 23-1010, and wine by the glass and bottle pursuant to Idaho Code § 23-1306, and liquor by the drink pursuant to Idaho Code § 23-903.

7. On January 8, 2010, Idaho State Police Alcohol Beverage Control ("ABC") received notification that Iggy's Idaho Falls, was closed.

8. On January 8, 2010, ABC sent Iggy's a letter authorizing an initial ninety (90) days to put this license into actual use or transfer the license. The licensee was given until April 8, 2010 to do this.

9. To date, ABC has not received any communication from the licensee stating that they have or will put the license into actual use or transfer the license.

10. Attached hereto and incorporated by reference herein is the Administrative Violation Notice, dated August 6, 2010, that liquor license 8B-15 has not been in actual use since at least before January 8, 2010.

**II. CAUSES OF ACTION.**

Respondent violated IDAPA 11.05.01.010.02, a violation for which Complainant may seek revocation of the Respondent's alcohol beverage license.

**III. RESPONDENT'S RESPONSE.**

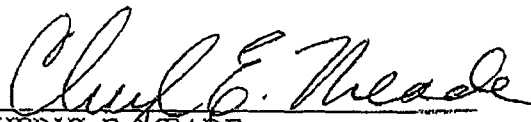
Failure to file a response to this Complaint within twenty-one (21) days will subject the Respondent to default pursuant to IDAPA 04.11.01.270.

**IV. COMPLAINANT'S PRAYER FOR RELIEF.**

WHEREFORE, Complainant prays for relief as follows:

1. That Respondent's retail alcohol beverage license be REVOKED.
2. For any attorney fees and costs associated with the prosecution of this case.
3. For such other relief as deemed just and proper.

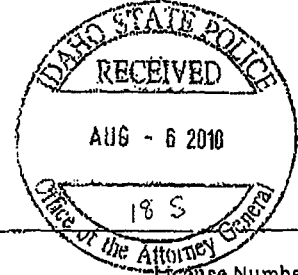
DATED this 20 day of August 2010.



CHERYL E. MEADE  
Deputy Attorney General  
Counsel for Complainant



State of Idaho  
Idaho State Police  
Alcohol Beverage Control  
700 S. Stratford Dr. Ste 115  
Meridian, ID 83642



ADMINISTRATIVE VIOLATION NOTICE

I. Notice of Violation

Licensee		License Number		
Iggy's Idaho Falls Inc		4314		
Business Name	Address	City	County	Premises Number
Iggy's Idaho Falls	1430 Milligan Rd	Idaho Falls	Bonneville	8B-15
Mailing Address	City	State	Zip	
1430 Milligan Rd	Idaho Falls	ID	83402	
Violation of Idaho Code Section(s): IDAPA 11.05.01.010.02				
Liquor license 8B-15 has not been in actual use since at least before January 8, 2010. On January 8, 2010 ABC sent a letter to licensee approving a request for 90 days to find a suitable premises to place this license in actual use. The deadline was April 8, 2010. To date ABC has not received any information stating the license has been placed into actual use.				
Under the Provisions of Idaho Code 23-933 and 23-1037, the proposed action for this violation is:				
<input checked="" type="checkbox"/> Revocation		<input type="checkbox"/> Suspension _____ days		

STATE OF IDAHO  
IDAHO STATE POLICE,

Dated: \_\_\_\_\_

8/6/10

by: \_\_\_\_\_

Lt. Robert Clements, Bureau Chief,  
Alcohol Beverage Control Bureau

Dated: \_\_\_\_\_

by: \_\_\_\_\_

Defendant's or Agent or Representative

State of \_\_\_\_\_ )

) ss.

County of \_\_\_\_\_ )

On this \_\_\_\_\_ day of \_\_\_\_\_, in the year of \_\_\_\_\_, before me, \_\_\_\_\_, personally appeared \_\_\_\_\_, proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to within instrument, and acknowledged that he/she executed the same.

Notary Public

Residing in \_\_\_\_\_

Commission expires on: \_\_\_\_\_

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing COMPLAINT FOR REVOCATION OF RETAIL ALCOHOL BEVERAGE LICENSE was served on the following on this 23<sup>rd</sup> day of August 2010 by the following method:

A J Bohner  
Iggy's Idaho Falls  
6061 Tonkin Dr.  
Boise, ID 83704

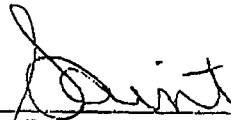
- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Facsimile
- Electronic Mail

Iggy's Idaho Falls  
1430 Milligan Road  
Idaho Falls, Idaho 83402

- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Facsimile
- Electronic Mail

Lt. Robert Clements  
Bureau Manger  
Alcohol Beverage Control  
700 S. Stratford Drive  
Meridian, Idaho 83642  
(208) 884-7060

- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Facsimile
- Electronic Mail



Susan Saint  
Administrative Assistant

# **Exhibit 2**

# *Moffatt Thomas*

MOFFATT THOMAS BARRETT ROCK & FIELDS, CHTD.

Boise  
Idaho Falls  
Pocatello  
Twin Falls

John W. Barrett	Christine E. Nicholas	Andrew J. Walden
Richard C. Fields	Bradley J. Williams	Dylan B. Lawrence
John S. Simko	Lee Radford	Rebecca A. Rainey
John C. Ward	Michael O. Roe	Paul D. McFarlane
D. James Manning	Nancy J. Garrett	Tyler J. Henderson
David B. Lincoln	David S. Jensen	C. Edward Cathet III
Gary T. Dance	James L. Martin	Benjamin C. Ritchie
Larry C. Hunter	C. Clayton Gill	Noah G. Hillen
Randall A. Peterman	Michael W. McGreeham	Matthew J. McGee
Mark S. Prusynski	David P. Gardner	David J. Dance
Stephen R. Thomas	Julian B. Gablola	Mindy M. Willman
Glenna M. Christensen	Tara Marrens	
Gerald T. Husch	Kimberly D. Evans Ross	Robert B. Bakes, of counsel
Scott L. Campbell	Jon A. Stenquist	
Robert B. Burns	Mark C. Peterson	Willis C. Moffatt, 1907-1980
Michael E. Thomas	Tyler J. Anderson	Eugene C. Thomas, 1931-2010
Patricia M. Olsson	Jason G. Murray	Kirk R. Helvie, 1956-2003

September 24, 2010

US Bank Plaza Building  
101 S Capitol Blvd 10th Fl  
PO Box 829  
Boise Idaho 83701 0829

208 345 2000  
800 422 2889  
208 385 5384 Fax  
www.moffatt.com

Susan Saint  
Idaho State Police  
Alcohol Beverage Control  
700 S. Stratford  
P.O. Box 700  
Meridian, ID 83642

Re: **Iggy's Idaho Falls, Inc., License 4314, Premise No. 8B-15**  
MTBR&F File No. 23328.0006

Dear Ms. Saint:

Thank you for taking the time to speak with me this morning regarding the complaint filed by the Idaho State Police, Alcohol Beverage Control (hereafter, the "ABC") against Iggy's Idaho Falls, Inc.; Licensee, dba, Iggy's Idaho Falls (hereafter, "Iggy's"). As discussed in our conversation, the purpose of this letter is to give you and Cheryl E. Meade an understanding of the relationship between Iggy's and my client, BV Beverage Company, LLC ("BV Beverage"), which is the owner of liquor license 8B-15 (the "License").

As discussed, my client, BV Beverage, is the owner of the License and Iggy's has used the License pursuant to a Lease Agreement between BV Beverage and Iggy's that was submitted to and approved by the ABC. Enclosed herewith is the paperwork accompanying the initial application packet whereby the License was transferred by sale from Donna Ritz to BV Beverage and subsequently transferred, by lease, from BV Beverage to Iggy's.

Due to Iggy's default under both its restaurant lease with North Landing Building M, LLC and its liquor license lease with BV Beverage, another tenant has been identified to take over Iggy's former restaurant space and to whom BV Beverage intends to lease the License, pending submission of proper applications and approval of the same by the ABC. Upon request from my client to prepare the paperwork necessary to recover the lease from Iggy's and prepare the application to the ABC to lease the License to the new lessee, I contacted Iggy's counsel and learned, for the first time, that the ABC served Iggy's with a letter approving a request for 90 days to find a suitable premise to place the License into "actual use," a notice of violation for

Client:1782380.1

000084

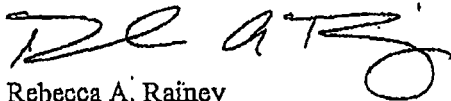
Susan Saint  
September 24, 2010  
Page 2

not complying with such letter, and the complaint for revocation of the License, discussed above.

Given that Iggy's used the license pursuant to a lease agreement that was (i) disclosed on Iggy's application for the License, and (ii) approved by the ABC, I was surprised to learn that the ABC had initiated these revocation proceedings without giving any notice of the same to my client, BV Beverage, the owner of the License. I take the fact that the ABC did not provide any notice to BV Beverage as an indication that the ABC intends only to revoke Iggy's interest in the license as lessee and does not intend to revoke BV Beverage's interest as the owner of the license. However, I do not want to make any incorrect assumptions regarding the ABC's position and seek to discuss the same with Ms. Meade to gain an accurate understanding of the ABC's position regarding BV Beverage's ownership interest in the License, insofar as it relates to the complaint for revocation against Iggy's.

I hope that the forgoing provides sufficient information to understand the nature of the lease transaction between Iggy's and BV Beverage in order to facilitate further discussion with Ms. Meade regarding the same. Please contact me as soon as possible to discuss this matter as my clients are eager to continue with the process of transferring the license to a new lessee.

Sincerely,



Rebecca A. Rainey

RAR/jrm

Enclosures

# **Exhibit 3**

**Jamie Miller**

---

**From:** Meade, Cheryl [cheryl.meade@isp.idaho.gov]  
**Sent:** Tuesday, September 28, 2010 10:28 AM  
**To:** Rebecca Rainey  
**Subject:** Alcohol Beverage Control Vs. Iggy's  
**Importance:** High

Rebecca,

Sorry for the delay in getting back with you, my client was out of the office until this morning and I wanted to talk with him about the documents you sent. I would like to set up a three way phone call with you and the attorney who is representing Iggy's for sometime this afternoon if possible. Would you happen to know this gentleman's name and phone number? Thank you.

**Cheryl E. Meade**  
Deputy Attorney General  
Idaho State Police  
700 S. Stratford Drive  
Meridian ID 83642  
Phone: (208) 884-7050  
Facsimile: (208) 884-7228

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# **Exhibit 4**

**Jamie Miller**

---

**From:** Meade, Cheryl [cheryl.meade@isp.idaho.gov]  
**Sent:** Wednesday, September 29, 2010 1:55 PM  
**To:** Rebecca Rainey; ktlaw@cableone.net  
**Subject:** RE: Iggy's Liquor License

Rebecca and Tony,

Thank you for your cooperative efforts. Once the license has been transferred and the license is placed back into use, I will have the administrative action complaint/action dismissed by the agency.

Again, my client would like to see this use happen within 30-90 days (and in consideration of the time it takes for background checks, if applicable and other matters).

Thank you too for keeping me informed.

Regards,  
Cheryl

---

**From:** Rebecca Rainey [mailto:RAR@moffatt.com]  
**Sent:** Wednesday, September 29, 2010 9:06 AM  
**To:** Meade, Cheryl  
**Subject:** Iggy's Liquor License

Cheryl,

I just wanted to thank you for working with me and counsel for Iggy's yesterday to resolve the issues related to the revocation proceedings initiated against Iggy's with respect to the liquor license owned by BV Beverage Company and leased to Iggy's. As discussed, I am currently working with Iggy's counsel to have Iggy's execute an affidavit of release of license, transferring its interest in the license back to BV Beverage Company and we are further preparing the paperwork necessary for BV Beverage Company to lease the license to a new national tenant. I will keep you apprised of the status of the transfers and the application process and we move towards getting the license re-issued in the name of the new tenant.

Please feel free to contact me at the number below should you have any questions regarding our progress on this matter and thank you again for your assistance.

Regards,

Rebecca A. Rainey  
Moffatt, Thomas, Barrett, Rock & Fields, Chtd.  
101 S. Capitol Blvd., Tenth Floor  
Boise, ID 83702  
Direct dial (208) 385-5460  
Facsimile (208) 385-5384

---

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5/26/2011

000089

# **Exhibit 5**

**REBECCA A. RAINEY, P.A.**

2627 W. Idaho Street  
Boise, Idaho 83702  
Telephone: (208) 559-6434  
Facsimile: (208) 473-2952  
rar@rebeccaraineylaw.com

January 13, 2011

Dear Cheryl:

I am writing on behalf of BV Beverage Company, LLC ("BV Beverage"), owner of Idaho State liquor license number 4314, premise number 8B-15 for the City of Idaho Falls. This is the license that was the subject of revocation proceedings initiated by the Idaho State Police (the "ISP/ABC") on or about August 20, 2010, Case No 10ABC-COM018. The basis for the revocation proceedings was that the lessee of the license, Iggy's Idaho Falls, Inc. had ceased operations and, therefore, violated the terms of use of the license.

At the time BV Beverage learned of the revocation proceedings, I immediately contacted the ISP/ABC on behalf of BV Beverage and made an inquiry regarding the revocation proceedings and expressed concerns over the fact that BV Beverage, the owner of the license, pursuant to a lease agreement which was reviewed and approved by the ISP/ABC was not given any notice that such revocation proceedings were underway. My September 24, 2010 letter to Ms. Susan Saint is enclosed herewith.

Following such letter, on September 29, 2010, a telephone conference was conducted with Mr. Tony Bohner, attorney for Iggy's Idaho Falls, Inc., you and me regarding the revocation proceedings. At that time, you agreed, on behalf of the ISP/ABC, to suspend the revocation proceedings and dismiss the same on the condition that BV Beverage find a location to put the license into actual use, as required by the administrative code. The agreement to allow BV Beverage additional time to transfer the license to a new tenant that was reached in that telephone conversation was confirmed through e-mails between you and me dated September 29, 2010.

In reliance on the representations made during that September 29, 2010 phone conference and subsequent e-mails, BV Beverage continued working with Screamin' Hot Concepts, d/b/a Buffalo Wild Wings in the negotiation of a restaurant lease and an associated liquor license lease. An extraordinary amount of time and effort was expended on both sides in an attempt to get these agreements in place as quickly as possible so that the license transfer applications could be submitted to the ISP/ABC.

On or about January 7, 2011, through counsel at Moffatt Thomas, BV Beverage submitted the license transfer application which requested the transfer of the license from Iggy's Idaho Falls, Inc. back to BV Beverage and the associated lease from BV Beverage to Screamin' Hot Concepts. On January 11, 2011, BV Beverage received the enclosed rejection of the application on the grounds that the subject license had "expired," by operation of law. Mr. Jaimy Adams of the ABC enclosed Memorandum Decision and Order related to Case No. CV-OC0814425, *Cheerleaders Sports Bar & Grill, Inc., v. The State of Idaho, Department of Idaho State Police, G. Jerry Russell* entered by the Honorable Kathryn Sticklin, in support of his position that the subject license had "expired" and there was nothing left to transfer. Given the agreement that BV Beverage had reached with the ISP/ABC regarding the transfer of this license and the fact that no one from the ISP/ABC had contacted BV Beverage regarding the renewal requirement and/or subsequent revocation, BV Beverage was understandably shocked to learn that the ISP/ABC was taking this position with respect to the license.

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Reviewing the file, it appears as though the present situation is distinguishable from the *Cheerleaders* matter in several material respects, and that the *Cheerleaders* decision need not control the ISP/ABC's decision with respect to transfer the license. The most significant distinction, as discussed above, is that prior to the expiration deadline the ISP/ABC represented to BV Beverage that, so long as they endeavored to get the license transferred as quickly as possible, the revocation proceedings would be placed on hold and no adverse action would be taken with respect to the license. At the time the ISP/ABC agreed to allow BV Beverage additional time to transfer the license, such license was set to expire the following day.

Notwithstanding the reasonable reliance that BV Beverage placed on the ISP/ABC's representations regarding its ability to transfer the license, there were additional practical and legal reasons that prevented BV Beverage from being able to renew the license. First, because the license was still in the name of Iggy's Idaho Falls, Inc. at the time renewal notices were sent out, BV Beverage had no notice of the need to renew at that time and, further, was not in possession of the renewal application – which application is generated by the ISP/ABC and provided to the license owner. In fact, upon learning that the license had expired for non-renewal, we contacted Jaimy Adams of the ABC and learned that renewal notices had been sent to Iggy's Idaho Falls, Inc. on or about July 30, 2010, but returned as undeliverable on or about August 4, 2010. Accordingly, at the time of our discussions wherein the ISP/ABC agreed to allow BV Beverage additional time to transfer the license, BV Beverage was not in possession of any of the renewal paperwork that is necessary to effect renewal and could not have complied with this renewal requirement.

Moreover, even if BV Beverage had been in possession of the renewal paperwork, it could not have completed the same because BV Beverage was unable, at that time, to swear under oath that the license would be put into "actual use" and/or to submit the required floor plans that are necessary for the renewal of the license. All of these facts were known to the ISP/ABC when, on September 29, 2010 – the day before the license was set to expire – the ISP/ABC agreed to allow additional time to allow BV Beverage to transfer to the license.

In short, BV Beverage's position is that, at the time the ISP/ABC agreed to allow BV Beverage additional time to transfer the license, it was legally impossible for BV Beverage to renew the license, due to facts and circumstances that the ISP/ABC was well aware of, which were the subject of the then pending revocation proceedings. Given these facts, BV Beverage believes that the *Cheerleaders* decision relied upon by Mr. Jaimy Adams in rejecting the transfer application does not control this case and that the ISP/ABC is well within its authority, based on the representations made and agreements reached in September of 2010 to process the transfer of this license as previously agreed.

BV Beverage would like to thank you in advance for your consideration and cooperation on this issue. BV Beverage has been working diligently with the new tenant, Screamin' Hot Concepts, d/b/a/ Buffalo Wild Wings to negotiate the transfer of this liquor license. Also, because the successful transfer of this license is critical to bringing the Buffalo Wild Wings to Idaho Falls, BV Beverage has relied very heavily on the representations previously made by the ISP/ABC in securing an agreement with this tenant.

With this letter, I have enclosed documentation that may be relevant to your consideration of this matter. After you have had a chance to review the enclosed documentation, I will contact you this afternoon to discuss further.

Sincerely,

Rebecca A. Rainey

# Moffatt Thomas

MOFFATT THOMAS BARRETT ROCK & FIELDS, CHTD.

Boise  
Idaho Falls  
Pocatello  
Twin Falls

John W. Barrett	Christine E. Nicholas	Andrew J. Waldera
Richard C. Fields	Bradley J. Williams	Dylan B. Lawrence
John S. Simko	Lee Radford	Rebecca A. Rainey
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Michael B. Thomas	Tyler J. Anderson	Eugene C. Thomas, 1931-2010
Patricia M. Olsson	Jason G. Murray	Kirk R. Helvie, 1956-2003

September 24, 2010

US Bank Plaza Building  
101 S Capitol Blvd 10th Fl  
PO Box 829  
Boise Idaho 83701 0829

208 345 2000  
800 422 2889  
208 385 5384 Fax  
www.moffatt.com

Susan Saint  
Idaho State Police  
Alcohol Beverage Control  
700 S. Stratford  
P.O. Box 700  
Meridian, ID 83642

Re: **Iggy's Idaho Falls, Inc., License 4314, Premise No. 8B-15**  
MTBR&F File No. 23328.0006

Dear Ms. Saint:

Thank you for taking the time to speak with me this morning regarding the complaint filed by the Idaho State Police, Alcohol Beverage Control (hereafter, the "ABC") against Iggy's Idaho Falls, Inc., Licensee, dba, Iggy's Idaho Falls (hereafter, "Iggy's"). As discussed in our conversation, the purpose of this letter is to give you and Cheryl E. Meade an understanding of the relationship between Iggy's and my client, BV Beverage Company, LLC ("BV Beverage"), which is the owner of liquor license 8B-15 (the "License").

As discussed, my client, BV Beverage, is the owner of the License and Iggy's has used the License pursuant to a Lease Agreement between BV Beverage and Iggy's that was submitted to and approved by the ABC. Enclosed herewith is the paperwork accompanying the initial application packet whereby the License was transferred by sale from Donna Ritz to BV Beverage and subsequently transferred, by lease, from BV Beverage to Iggy's.

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Client:1782380.1

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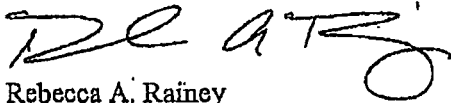
Susan Saint  
September 24, 2010  
Page 2

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Given that Iggy's used the license pursuant to a lease agreement that was (i) disclosed on Iggy's application for the License, and (ii) approved by the ABC, I was surprised to learn that the ABC had initiated these revocation proceedings without giving any notice of the same to my client, BV Beverage, the owner of the License. I take the fact that the ABC did not provide any notice to BV Beverage as an indication that the ABC intends only to revoke Iggy's interest in the license as lessee and does not intend to revoke BV Beverage's interest as the owner of the license. However, I do not want to make any incorrect assumptions regarding the ABC's position and seek to discuss the same with Ms. Meade to gain an accurate understanding of the ABC's position regarding BV Beverage's ownership interest in the License, insofar as it relates to the complaint for revocation against Iggy's.

I hope that the forgoing provides sufficient information to understand the nature of the lease transaction between Iggy's and BV Beverage in order to facilitate further discussion with Ms. Meade regarding the same. Please contact me as soon as possible to discuss this matter as my clients are eager to continue with the process of transferring the license to a new lessee.

Sincerely,



Rebecca A. Rainey

RAR/jrm

Enclosures

**Rebecca Rainey**

---

**From:** Meade, Cheryl [cheryl.meade@isp.idaho.gov]  
**Sent:** Wednesday, September 29, 2010 1:55 PM  
**To:** Rebecca Rainey; ktlaw@cableone.net  
**Subject:** RE: Iggy's Liquor License  
Rebecca and Tony,

Thank you for your cooperative efforts. Once the license has been transferred and the license is placed back into use, I will have the administrative action complaint/action dismissed by the agency.

Again, my client would like to see this use happen within 30-90 days (and in consideration of the time it takes for background checks, if applicable and other matters).

Thank you too for keeping me informed.

Regards,  
Cheryl

---

**From:** Rebecca Rainey [mailto:RAR@moffatt.com]  
**Sent:** Wednesday, September 29, 2010 9:06 AM  
**To:** Meade, Cheryl  
**Subject:** Iggy's Liquor License

Cheryl,

I just wanted to thank you for working with me and counsel for Iggy's yesterday to resolve the issues related to the revocation proceedings initiated against Iggy's with respect to the liquor license owned by BV Beverage Company and leased to Iggy's. As discussed, I am currently working with Iggy's counsel to have Iggy's execute an affidavit of release of license, transferring its interest in the license back to BV Beverage Company and we are further preparing the paperwork necessary for BV Beverage Company to lease the license to a new national tenant. I will keep you apprised of the status of the transfers and the application process and we move towards getting the license re-issued in the name of the new tenant.

Please feel free to contact me at the number below should you have any questions regarding our progress on this matter and thank you again for your assistance.

Regards,

Rebecca A. Rainey  
Moffatt, Thomas, Barrett, Rock & Fields, Chtd.  
101 S. Capitol Blvd., Tenth Floor  
Boise, ID 83702  
Direct dial (208) 385-5460  
Facsimile (208) 385-5384

---

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1/13/2011

000095





# Idaho State Police

Service Since 1939



Colonel G. Jerry Russell  
Director

C.L. "Butch" Otter  
Governor

RECEIVED

JAN 11 2011

MOFFATT, THOMAS, BARRETT.  
ROCK & FIELDS, CHTD.

January 10, 2011

Robert Burns  
Moffatt Thomas  
PO Box 829  
Boise, ID 83701-0829

Re: Transfer of Liquor License  
Premises 8B-15, License No. 4314

Dear Mr. Burns:

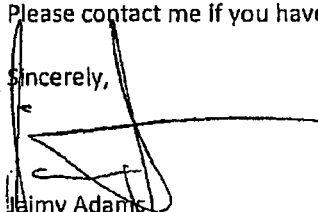
I am in receipt of the two application for the transfer of the above referenced liquor license. At this time, your application cannot be accepted and is being returned to you. The license requested to be transferred, premises 8B-15, no longer exists therefore cannot be transferred.

This is not a denial of your application for transfer. The applications, supporting documents and transfer fees (less the submitted menus for Screamin Hot Concepts, LLC as they were too large to be included in any current envelope available to me – please contact me if you would like me to send these to you) are being returned to you because the license indicated is not transferrable due to it being lost for non-renewal. See Idaho Code §23-908.

Also, I have enclosed a copy of Fourth Judicial District Judge Kathryn A. Sticklen's Order in the case of Cheerleaders Sports Bar & Grill, LLC vs. State of Idaho, Department of Idaho State Police. I am not sure if you are aware of this Order so I wanted to include a copy for your reference. This Order involves very similar circumstances to the ones involved in the transfer applications you have submitted to me.

Please contact me if you have any questions.

Sincerely,

  
Jeremy Adams  
Licensing Specialist  
Alcohol Beverage Control  
Idaho State Police

700 S. Stratford Drive, Suite 115 • Meridian, ID 83642-6202 • (208)884-7060 • Fax (208)884-7096

EQUAL OPPORTUNITY EMPLOYER

000096

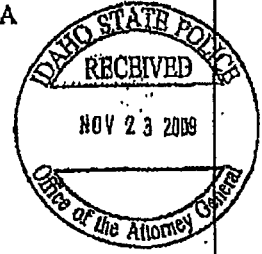
NO. 0 FILED 3:35  
A.M. P.M.

NOV 13 2009

J. DAVID NAWAERIO, Clerk  
By [Signature]

**COPY**

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA



CHEERLEADERS SPORTS BAR &  
GRILL, INC., an Idaho corporation,

Plaintiff,

Case No. CV-OC0814425

vs.

MEMORANDUM DECISION  
AND ORDER

THE STATE OF IDAHO,  
DEPARTMENT OF IDAHO STATE  
POLICE, G. JERRY RUSSELL, in his  
official capacity as Director of Idaho State  
Police,

Defendant.

This matter is before the Court on an appeal from the decision of the Director of the Idaho State Police adopting the hearing officer's recommended findings of fact, conclusions of law and recommended order. Based on the hearing officer's recommendation, the Director found and concluded that Cheerleaders Sports Bar & Grill's (Cheerleaders) liquor license expired on May 1, 2008; that no application for renewal was filed within the thirty-one (31) day grace period following May 1, 2008; and that the Director does not have the authority under Idaho Code §23-908(1) to renew or extend an expired license after the grace period. Cheerleaders asks this Court to find that the Director has discretion under Idaho Code §23-933 to decide whether to reinstate a license and impose a fine for not complying with a provision of chapter 9, title 23 of the Idaho Code, and it also

1 asks the Court to vacate the Director's decision and recommend that the liquor license be re-  
2 instated. For the reasons set forth below, the Court affirms the Director's ruling.

### 4 **FACTUAL & PROCEDURAL BACKGROUND**

5 In February 2005, Cheerleaders Sports Bar & Grill acquired a liquor license from Godzilla,  
6 LLC, which transfer became effective on June 6, 2005. (Recommended Findings of Fact,  
7 Conclusions of Law and Recommended Order ¶ 1.) On the 2005 application for the license, the  
8 designated address for Cheerleaders was listed as "c/o Excell Business, 555 E. 42nd Street, Boise,  
9 Idaho 83714," and the home address for the president of the licensee, Robert E. Godsill, Sr., was  
10 listed as "24799 Lansing Lane, Middleton, Idaho 83644." (Recommended Findings ¶ 3.)

12 The Alcohol Beverage Control Agency (ABC) mailed preprinted renewals to Cheerleaders at  
13 555 E. 42nd Street, Boise, Idaho 83714 in 2006, 2007, and 2008. (Recommended Findings ¶¶ 4-7.)  
14 Mr. Godsill signed and returned the 2006 renewal and was issued a license with a listed expiration  
15 date of April 30, 2007. (Recommended Findings ¶ 5.) He also signed and returned the 2007 renewal  
16 and was issued a license with a listed expiration date of April 30, 2008. (Recommended Findings ¶  
17 6; Agency Record, Adams Aff. Ex. 3.) The renewal mailed by ABC on February 1, 2008 was  
18 returned to ABC as "Unable to Forward." (Recommended Findings ¶ 7.) After receiving the  
19 returned mail, ABC mailed a preprinted renewal application to Mr. Godsill at his listed home  
20 address, 24799 Lansing Lane, Middleton, Idaho 83644. (Recommended Findings ¶ 7.) The  
21 preprinted renewal was not returned to ABC by the United States Post Office or by Mr. Godsill.  
22 (Recommended Findings ¶¶ 7, 11.)

24 Pursuant to Idaho Code §23-908 and IDAPA 11.05.01.011.03, the last liquor license issued  
25 to Cheerleaders expired May 1, 2008. (Recommended Findings ¶ 9.) During the thirty-one (31) days  
26

1 following the license expiration, no license renewal was submitted on behalf of Cheerleaders.

2 (Recommended Findings ¶ 11.)

3 On July 9, 2008, Mr. Godsill called ABC and was informed that his license had expired by  
4 operation of law and that ABC cancelled the license as required by law. (Recommended Findings ¶  
5 12.) Mr. Godsill then presented to ABC a license renewal application for Cheerleaders along with a  
6 check in the amount of \$800 on July 10, 2008. (Recommended Findings ¶ 13.) ABC date stamped  
7 the application but then issued an "Applicant Return Record" noting that the application could not  
8 be accepted because the license had already been cancelled. (Recommended Findings ¶ 13.) At the  
9 time the application was filed and denied, Mr. Godsill had purportedly entered into agreements with  
10 Table 28, Inc. to lease Cheerleaders' liquor license, among other things. (Petitioner's Brief 5.)

11  
12 Cheerleaders filed a Petition for Relief on November 12, 2008 asking the hearing officer to  
13 reinstate the liquor license upon finding that ABC had a duty to provide notice to licensees, that  
14 forfeiture is not mandated by law, and that forfeiture is an unconscionable penalty in this case. The  
15 hearing officer concluded that Cheerleaders' license expired on May 1, 2008 and that the license  
16 could not be renewed after the statutory thirty-one (31) day grace period. The Director of the Idaho  
17 State Police (the Director) adopted the hearing officer's conclusions and recommended order on  
18 March 24, 2009 and denied Cheerleaders' request to renew the license. Cheerleaders timely  
19 appealed.  
20

21  
22 **ISSUES ON APPEAL**

- 23 1. Whether Idaho's statutory provisions and IDAPA's rules governing alcoholic beverages  
24 prevent the Director of the Idaho State Police from renewing an expired liquor license where  
25 the application for renewal was untimely made.  
26

- 1 2. Whether the Director's refusal to re-instate Cheerleaders' liquor license was arbitrary,  
2 capricious, and an abuse of discretion.  
3 3. Whether the Director's refusal to re-instate and forfeit Cheerleaders' liquor license imposed  
4 an unconscionable penalty upon Cheerleaders.

#### 5 STANDARD OF REVIEW

6 In reviewing an agency's decision, an appellate court may not "substitute its judgment for  
7 that of the agency as to the weight of the evidence on questions of fact." Idaho Code §67-5279(1).  
8 Instead, the court must defer "to the agency's findings of fact unless they are clearly erroneous."  
9 *Price v. Payette County Bd. of County Comm'rs*, 131 Idaho 426, 429, 958 P.2d 583, 586 (1998);  
10 *Bennett v. State*, 147 Idaho 141, 142, 206 P.3d 505, 506 (Cl. App. 2009).

11 Agency action must be affirmed on appeal unless the court determines that the agency's  
12 findings, inferences, conclusions, or decisions are: (a) in violation of constitutional or statutory  
13 provisions; (b) in excess of statutory authority of the agency; (c) made upon unlawful procedure; (d)  
14 not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an  
15 abuse of discretion. Idaho Code § 67-5279(3); *Bennett*, 147 Idaho at 142, 206 P.3d at 506. The party  
16 attacking the agency's decision bears the burden of demonstrating that the agency erred in a manner  
17 specified in section 67-6279(3) and that a substantial right has been prejudiced. *Price*, 131 Idaho at  
18 429, 958 P.2d at 586; *Bennett*, 147 Idaho at 142, 206 P.3d at 506.  
19  
20

#### 21 ANALYSIS

22  
23 *A. The Idaho Code does not give the Director the discretion to reinstate a license that expired  
24 and was not renewed within the statutory grace period.*

25 The Idaho State Legislature has set forth unambiguous rules establishing when a liquor  
26 license expires and when it can be renewed.

MEMORANDUM DECISION AND ORDER - PAGE 4

1 All licenses shall expire at 1:00 o'clock a.m. on the first day of the renewal month  
2 which shall be determined by the director by administrative rule and shall be  
3 subject to annual renewal upon proper application. The director will determine the  
4 renewal month by county based on the number of current licenses within each  
5 county, distributing renewals throughout the licensing year. . . . [R]enewals will  
6 occur annually on their renewal month. Renewal applications for liquor by the  
7 drink licenses accompanied by the required fee must be filed with the director on  
8 or before the first day of the designated renewal month. Any licensee holding a  
9 valid license who fails to file an application for renewal of his current license on  
10 or before the first day of the designated renewal month shall have a grace period  
11 of an additional thirty-one (31) day in which to file an application for renewal of  
12 the license. The licensee shall not be permitted to sell and dispense liquor by the  
13 drink at retail during the thirty-one (31) day extended time period unless and until  
14 the license is renewed.

9 Idaho Code § 23-908(1). Based upon a plain reading of the statute, it is clear that a liquor license  
10 must be renewed prior to the first day of the designated renewal month because it expires at 1:00  
11 a.m. on the first day of the renewal month if not renewed. *Id.* If a license expires because a licensee  
12 fails to timely file a renewal application (not because the license has been suspended or revoked), a  
13 licensee has a thirty-one (31) day grace period from the time of expiration in which to file an  
14 application. *Id.* However, because the license has already expired, the licensee is not allowed to sell  
15 and dispense liquor by the drink at retail during that thirty-one (31) day period, "unless and until the  
16 license is renewed." *Id.*

18 Nothing in the Idaho Code gives the Director of the Idaho State Police the option of  
19 renewing an expired liquor license after the thirty-one (31) day grace period. The fact that the  
20 Director may chose any month to be the renewal month does not mean that the Director may extend  
21 the grace period for renewing a license once the renewal month is established. Also, the fact that the  
22 director may have discretion in some instances does not mean that there are not strict deadlines that  
23 he must honor and enforce.  
24

1 The Director has discretionary authority to suspend, revoke, or deny renewal of a liquor  
2 license upon a licensee's failure to comply with the provisions of title 23, chapter 9, but the Director  
3 only has this discretionary authority with regard to liquor licenses that have not expired or that fall  
4 within the thirty-one (31) day grace period after expiration. Idaho Code § 23-933. An expired  
5 license cannot be suspended or revoked because it is no longer in effect, and a license can only be  
6 denied renewal where there is a statutory basis for renewal to begin with. Where the statute does not  
7 allow an expired license to be renewed after thirty-one (31) days, there is no room for discretionary  
8 grant or denial of a renewal application after the deadline.

9  
10 This absolute rule applies regardless of whether the Alcohol Beverage Control Agency sends  
11 notice to a licensee regarding expiration and renewal. Although "[t]he right to renew is included  
12 among the privileges appurtenant to a liquor license," *Uptick Corp. v. Ahlin*, 103 Idaho 364, 369,  
13 647 P.2d 1236, 1241 (1982), Idaho Code §23-908 does not require the agency to send out a  
14 reminder notifying the licensee of this right to renew and the upcoming expiration date. To the  
15 extent that the agency has imposed a duty upon itself to send out an annual notice for renewal  
16 pursuant to IDAPA 11.05.01.011.03,<sup>1</sup> the self-imposed rule does not require that the licensee obtain  
17 the notice from the agency regarding the upcoming expiration date before a licensee loses the right  
18 to renew and the license expires. Instead, Idaho Code §23-908 gives notice to the licensee that he is  
19 required to annually renew the license, and the licensee bears the burden of ensuring that his license  
20 does not expire.

21  
22 In this case, the license expired on May 1, 2008, and Mr. Godsill did not file a renewal  
23 application on behalf of Cheerleaders until July 10, 2008, more than thirty-one (31) days after the  
24

25  
26 <sup>1</sup> IDAPA 11.05.01.011.03 contains a table setting forth the notification and renewal months established to renew licenses to sell alcohol. The renewal month for liquor licenses in Ada County is May 1.

1 expiration of the license. Mr. Godsill had notice that the liquor license would expire on May 1, 2008  
2 based upon his previous renewal date of May 1, 2007, IDAPA 11.05.01.011.03, and Idaho Code  
3 §23-908. In addition, the license itself informed Mr. Godsill that it would expire on April 30, 2008,  
4 and the ABC Agency attempted to give notice to Mr. Godsill of the expiration by mailing a notice  
5 first to Excell Business and then to Mr. Godsill's home address, the latter of which was not returned  
6 to the agency. Despite this notice, Mr. Godsill did not timely file a renewal application. Because Mr.  
7 Godsill did not timely file a renewal application and because the Director has no authority to grant  
8 further extensions of time to file a renewal application, the Director had no authority to grant Mr.  
9 Godsill's untimely renewal application.  
10

11  
12 ***B. The Director's decision was not arbitrary, capricious, or an abuse of discretion because the***  
13 ***Director does not have the discretion whether to reinstate a license not timely renewed.***

14 A decision is only arbitrary if it is "done in disregard of the facts and circumstances  
15 presented or without adequate determining principles." *American Lung Ass'n v. State, Dep't of*  
16 *Agriculture*, 142 Idaho 544, 547, 130 P.3d 1082, 1085 (2006). It is capricious if it is "done without a  
17 rational basis." *Id.* In this case, the Director did not act arbitrarily or capriciously because he  
18 considered all the facts and then acted pursuant to the clear language of the statute in determining  
19 that he had no authority to renew the license. The Director had a rational basis for not renewing the  
20 license based upon the statutory language.

21 For an act to be an abuse of discretion, there must be discretionary authority that can be acted  
22 upon. *American Lung Ass'n*, 142 Idaho at 46, 130 P.3d at 1084. Where a Director's factual decision  
23 controls the result, there is no discretion to be abused. *Id.* As discussed above, the Director in this  
24 case had no discretionary authority to renew an expired license beyond the grace-period. Instead, the  
25

26  
MEMORANDUM DECISION AND ORDER - PAGE 7



1 Director was required to let the facts control the result pursuant to the statutory rules, and the  
2 Director did not abuse any discretion in so doing.

3 Because the Director did not have the authority or the discretion to renew an expired license  
4 after the thirty-one (31) day grace period, the Director's decision to not renew Cheerleaders' expired  
5 license for this very reason was not arbitrary, capricious, or an abuse of discretion.

6  
7 ***C. The loss of the liquor license is not an unconscionable penalty for failing to timely renew the***  
8 ***license.***


9 The consequence for not timely filing a renewal application pursuant to Idaho Code §23-  
10 908(1) is the loss of a liquor license. Although this loss may have negative repercussions, the loss  
11 resulting from an untimely application is not unconscionable. The applicable statute even provides a  
12 grace period. The licensee's own failure to comply with the statutory requirements does not create  
13 an unconscionable result.  
14

15  
16 **CONCLUSION**

17 For the reasons stated above, the Court affirms the Director's ruling.

18 **IT IS SO ORDERED.**

19 Dated this 12<sup>th</sup> day of November, 2009.

20  
21   
22 Kathryn A. Sticklen  
23 District Judge  
24  
25  
26

CERTIFICATE OF MAILING

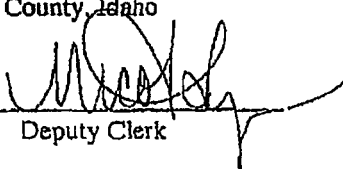
I, J. David Navarro, the undersigned authority, do hereby certify that I have mailed, by United States Mail, one copy of the MEMORANDUM DECISION AND ORDER as notice pursuant to Rule 77(d) I.R.C.P. to each of the attorneys of record in this cause in envelopes addressed as follows:

ED GUERRICABEITIA  
DAVISON COPPLE COPPLE & COPPLE  
PO BOX 1583  
BOISE, ID 83701

STEPHANIE A. ALTIG  
IDAHO ATTORNEY GENERAL'S OFFICE  
PO BOX 700  
MERIDIAN, ID 83680-0700

J. DAVID NAVARRO  
Clerk of the District Court  
Ada County, Idaho

Date: 11/16/09

By   
Deputy Clerk

**Jamie Miller**

---

**From:** Meade, Cheryl [cheryl.meade@isp.idaho.gov]  
**Sent:** Wednesday, September 29, 2010 1:55 PM  
**To:** Rebecca Rainey; ktlaw@cableone.net  
**Subject:** RE: Iggy's Liquor License

Rebecca and Tony,

Thank you for your cooperative efforts. Once the license has been transferred and the license is placed back into use, I will have the administrative action complaint/action dismissed by the agency.

Again, my client would like to see this use happen within 30-90 days (and in consideration of the time it takes for background checks, if applicable and other matters).

Thank you too for keeping me informed.

Regards,  
Cheryl

---

**From:** Rebecca Rainey [mailto:RAR@moffatt.com]  
**Sent:** Wednesday, September 29, 2010 9:06 AM  
**To:** Meade, Cheryl  
**Subject:** Iggy's Liquor License

Cheryl,

I just wanted to thank you for working with me and counsel for Iggy's yesterday to resolve the issues related to the revocation proceedings initiated against Iggy's with respect to the liquor license owned by BV Beverage Company and leased to Iggy's. As discussed, I am currently working with Iggy's counsel to have Iggy's execute an affidavit of release of license, transferring its interest in the license back to BV Beverage Company and we are further preparing the paperwork necessary for BV Beverage Company to lease the license to a new national tenant. I will keep you apprised of the status of the transfers and the application process and we move towards getting the license re-issued in the name of the new tenant.

Please feel free to contact me at the number below should you have any questions regarding our progress on this matter and thank you again for your assistance.

Regards,

Rebecca A. Rainey  
Moffatt, Thomas, Barrett, Rock & Fields, Chtd.  
101 S. Capitol Blvd., Tenth Floor  
Boise, ID 83702  
Direct dial (208) 385-5460  
Facsimile (208) 385-5384

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5/26/2011

000106

**Jamie Miller**

---

**From:** Rebecca Rainey  
**Sent:** Tuesday, September 28, 2010 10:35 AM  
**To:** 'Meade, Cheryl'  
**Subject:** RE: Alcohol Beverage Control Vs. Iggy's

Thank you Cheryl. I am available this afternoon, save for a client conference which will begin at 3:00 and last approximately an hour and a half. Accordingly, if we could schedule the call prior to 3:00, I would appreciate it.

To the best of my knowledge, the attorney representing Iggy's Idaho Falls is Tony Bohner, who is also listed as their registered agent with the Secretary of State. His telephone number is (208) 376-5595.

---

**From:** Meade, Cheryl [mailto:cheryl.meade@isp.idaho.gov]  
**Sent:** Tuesday, September 28, 2010 10:28 AM  
**To:** Rebecca Rainey  
**Subject:** Alcohol Beverage Control Vs. Iggy's  
**Importance:** High

Rebecca,

Sorry for the delay in getting back with you, my client was out of the office until this morning and I wanted to talk with him about the documents you sent. I would like to set up a three way phone call with you and the attorney who is representing Iggy's for sometime this afternoon if possible. Would you happen to know this gentleman's name and phone number? Thank you.

Cheryl E. Meade  
Deputy Attorney General  
Idaho State Police  
700 S. Stratford Drive  
Meridian ID 83642  
Phone: (208) 884-7050  
Facsimile: (208) 884-7228

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**Jamie Miller**

---

**From:** Rebecca Rainey  
**Sent:** Wednesday, September 29, 2010 9:06 AM  
**To:** 'Meade, Cheryl'  
**Subject:** Iggy's Liquor License

Cheryl,

I just wanted to thank you for working with me and counsel for Iggy's yesterday to resolve the issues related to the revocation proceedings initiated against Iggy's with respect to the liquor license owned by BV Beverage Company and leased to Iggy's. As discussed, I am currently working with Iggy's counsel to have Iggy's execute an affidavit of release of license, transferring its interest in the license back to BV Beverage Company and we are further preparing the paperwork necessary for BV Beverage Company to lease the license to a new national tenant. I will keep you apprised of the status of the transfers and the application process and we move towards getting the license re-issued in the name of the new tenant.

Please feel free to contact me at the number below should you have any questions regarding our progress on this matter and thank you again for your assistance.

Regards,

Rebecca A. Rainey  
Moffatt, Thomas, Barrett, Rock & Fields, Chtd.  
101 S. Capitol Blvd., Tenth Floor  
Boise, ID 83702  
Direct dial (208) 385-5460  
Facsimile (208) 385-5384

# **Exhibit 6**

**Rebecca Rainey**

---

**From:** Meade, Cheryl [cheryl.meade@isp.idaho.gov]

**Sent:** Friday, January 14, 2011 7:54 AM

**To:** rar@rebeccaraineylaw.com

**Subject:** Re: Iggy's Liquor License

That would be fine. I have my bickbry with me but headed to grandview here in a few and the cell service out there is almost non existent unless you find a hot spot in town, look forward to speaking with you Tuesday. C

---

**From:** Rebecca Rainey

**To:** Meade, Cheryl

**Sent:** Thu Jan 13 16:58:51 2011

**Subject:** RE: Iggy's Liquor License

I thought you might have been so busy as to not have realized the holiday; my apologies for catching you at such a bad time. Tuesday would be fine, though I am scheduled to attend a hearing in Missouri Tuesday morning at 9:00 a.m. (which would be 8:00 local time). I am not sure how long to anticipate for that hearing. Would it be acceptable if I called you late morning/early afternoon on Tuesday to discuss?

---

**From:** Meade, Cheryl [mailto:cheryl.meade@isp.idaho.gov]

**Sent:** Thursday, January 13, 2011 4:52 PM

**To:** Rebecca Rainey

**Subject:** RE: Iggy's Liquor License

That's how busy I've been, I completely forgot Monday was a holiday, so no... Is Tuesday ok?

---

**From:** Rebecca Rainey [mailto:rar@rebeccaraineylaw.com]

**Sent:** Thursday, January 13, 2011 4:48 PM

**To:** Meade, Cheryl

**Subject:** RE: Iggy's Liquor License

Cheryl,

Of course it can wait until Monday, if necessary. I will make myself available to discuss at your earliest convenience as this is a very important issue for my client. With Monday being a state holiday, do you still plan to be in the office?

Thank you again for your time and consideration of this matter. If there is anything else that I can provide to you, please don't hesitate to ask.

Regards,

Becky

---

**From:** Meade, Cheryl [mailto:cheryl.meade@isp.idaho.gov]

**Sent:** Thursday, January 13, 2011 4:29 PM

**To:** Rebecca Rainey

**Subject:** RE: Iggy's Liquor License

000110

5/26/2011

Rebecca,

I am pretty swamped to talk about this right now. I have a deadline I'm trying to beat for tomorrow and I'll be out of the office tomorrow. Can this wait till Monday perhaps? Thanks.

---

**From:** Rebecca Rainey [mailto:rar@rebeccaraineylaw.com]  
**Sent:** Thursday, January 13, 2011 11:49 AM  
**To:** Meade, Cheryl  
**Subject:** RE: Iggy's Liquor License

Cheryl,

It has recently come to my attention that the Idaho State Police, Alcohol Beverage Control Bureau has recently rejected the transfer application of liquor license no. 4314, premises no. 8B-15, which was the subject of the e-mails below. Attached hereto, for your review and consideration, is a letter and supporting documents discussing the ISP/ABC's rejection of such transfer application.

It is my sincere hope that, based upon the representations set forth below, you and I will be able to work through this issue and allow this license transfer to be processed as previously agreed. Both my client, BV Beverage, and the proposed transferee have been working very hard over the last several months to get this transfer application, with all of the required supporting documents, in order.

Thank you in advance for your consideration and review of this matter. After you have had an opportunity to review, I will contact you this afternoon to discuss further. Alternatively, please feel free to contact me at 559-6434 to discuss at your earliest convenience.

Regards,

Becky Rainey

---

**From:** Meade, Cheryl [mailto:cheryl.meade@isp.idaho.gov]  
**Sent:** Wednesday, September 29, 2010 1:55 PM  
**To:** Rebecca Rainey; ktlaw@cableone.net  
**Subject:** RE: Iggy's Liquor License

Rebecca and Tony,

Thank you for your cooperative efforts. Once the license has been transferred and the license is placed back into use, I will have the administrative action complaint/action dismissed by the agency.

Again, my client would like to see this use happen within 30-90 days (and in consideration of the time it takes for background checks, if applicable and other matters).

Thank you too for keeping me informed.

Regards,  
Cheryl

---

**From:** Rebecca Rainey [mailto:RAR@moffatt.com]  
**Sent:** Wednesday, September 29, 2010 9:06 AM  
**To:** Meade, Cheryl  
**Subject:** Iggy's Liquor License

Cheryl,

000111

5/26/2011



I just wanted to thank you for working with me and counsel for Iggy's yesterday to resolve the issues related to the revocation proceedings initiated against Iggy's with respect to the liquor license owned by BV Beverage Company and leased to Iggy's. As discussed, I am currently working with Iggy's counsel to have Iggy's execute an affidavit of release of license, transferring its interest in the license back to BV Beverage Company and we are further preparing the paperwork necessary for BV Beverage Company to lease the license to a new national tenant. I will keep you apprised of the status of the transfers and the application process and we move towards getting the license re-issued in the name of the new tenant.

Please feel free to contact me at the number below should you have any questions regarding our progress on this matter and thank you again for your assistance.

Regards,

Rebecca A. Rainey  
Moffatt, Thomas, Barrett, Rock & Fields, Chtd.  
101 S. Capitol Blvd., Tenth Floor  
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# **Exhibit 7**

**Rebecca Rainey**

---

**From:** Meade, Cheryl [cheryl.meade@isp.idaho.gov]  
**Sent:** Wednesday, January 19, 2011 4:36 PM  
**To:** rar@rebeccaraineylaw.com  
**Subject:** RE: Iggy's  
**Importance:** High

Becky,

Sorry it's taken longer to get you an answer on this. Please read the enclosed letter regarding this matter. I'm headed out for the day, but if you have any further questions, please feel free to call me tomorrow.

Cheryl

---

**From:** Rebecca Rainey [mailto:rar@rebeccaraineylaw.com]  
**Sent:** Tuesday, January 18, 2011 2:15 PM  
**To:** Meade, Cheryl  
**Subject:** Re: Iggy's

Thank you Cheryl. I look forward to hearing from you. Again, I will be available to discuss until about 4:00, when my flight is scheduled to take off, and by the time I land in Denver it will be after five. If we aren't able to touch base today I will be back in the office first thing in the morning.

Regards

Becky

Sent from my Verizon Wireless BlackBerry

---

**From:** "Meade, Cheryl" <cheryl.meade@isp.idaho.gov>  
**Date:** Tue, 18 Jan 2011 13:40:03 -0700  
**To:** Rebecca Rainey <rar@rebeccaraineylaw.com>  
**Subject:** Iggy's

Becky,

I wanted to catch up with you so you would know that your client's problem is on my mind. I am waiting for an opportunity with my client to speak with him about this matter. He has been of the office since Thursday of last week. He has a meeting downtown with the legislature this afternoon as well. I don't normally have the kind of "Monday" I am having today... I have a 2:00 pm meeting and one at 3:00 this afternoon, so it's my hope by the time I am finished he will have returned to his office and we can talk. I'll give you a call once I have a chance to speak with him. Thanks for your patience.

**Cheryl E. Meade**  
Deputy Attorney General  
Idaho State Police

700 S. Stratford Drive  
Meridian ID 83642  
Phone: (208) 884-7050  
Facsimile: (208) 884-7228

**CONFIDENTIALITY NOTICE:** The information in this message is privileged and confidential. It is intended only for the use of the recipient named above (or the employee or agent responsible to deliver it to the intended recipient). If you received this in error, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this message in error, please notify us by telephone immediately. Thank you.

# **Exhibit 8**

January 19, 2011

Rebecca A. Rainey, PA  
Attorney at Law  
2627 W. Idaho St.  
Boise, ID 83702  
[rar@rebeccaraineylaw.com](mailto:rar@rebeccaraineylaw.com)

via email

Re: BV Beverage Company, LLC and Iggy's Idaho Falls

Dear Becky,

I have had a chance to not only review the letter you sent, the previous email exchanges but to also speak with my client about the issues you raise. I'm afraid the news isn't good for your client. A transfer or seeking the placement of a liquor license to a new person or entity is wholly a different matter from that of renewing a liquor license.

The reason ABC agreed to extend the time-limitation on the transfer is because ABC statutes and ABC's IDAPA rules allow for such an extension when a party seeks to place an alleged inactive license in another location or with another person. This is what the administrative violation notice and accompanying complaint was for as you may recall.

On the other hand, the time limitation of the renewal of a liquor license is statutorily set in I.C. Section 23-908(1). Upon reviewing our correspondence, the issue of renewal was never discussed, only the matter at hand involving the transfer and/or relocation of the license.

I would never have agreed to extend the time limitation for renewal, nor would I have advised my client to violate the law by allowing it to forego this requirement for the licensee in this case. These licenses themselves have an expiration date stamped in big letters on the front of them. It is incumbent upon a licensee to continue its renewal until the time of transfer. Therefore the Cheerleader's case to which ABC's Jaimy Adams referred to, in his letter to Mr. Burns, does apply to this issue.

Sincerely,

Cheryl E. Meade  
Deputy Attorney General  
Idaho State Police

000117

# **Exhibit 9**

**Rebecca Rainey**

---

**From:** Meade, Cheryl [cheryl.meade@isp.idaho.gov]  
**Sent:** Friday, February 04, 2011 1:15 PM  
**To:** Rebecca Rainey  
**Subject:** BV Beverage licensing issue.  
**Importance:** High

Becky,

Per my earlier response, attached is the determination for the above. Thank you (and your client) once again for meeting with us.

**Cheryl E. Meade**

Deputy Attorney General  
Idaho State Police  
700 S. Stratford Drive  
Meridian ID 83642  
Phone: (208) 884-7050  
Facsimile: (208) 884-7228

**CONFIDENTIALITY NOTICE:** The information in this message is privileged and confidential. It is intended only for the use of the recipient named above (or the employee or agent responsible to deliver it to the intended recipient). If you received this in error, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this message in error, please notify us by telephone immediately. Thank you.



# **Exhibit 10**



STATE OF IDAHO  
OFFICE OF THE ATTORNEY GENERAL  
LAWRENCE G. WASDEN

February 4, 2011

Rebecca A. Rainey, PA  
Attorney at Law  
2627 W. Idaho St.  
Boise, ID 83702  
rar@rebeccaraineylaw.com

via email

Re: Liquor License Issue Involving BV Beverage Company, LLC

Dear Becky,

Please thank your clients for meeting with ABC to discuss the above matter. I have reviewed the case that you provided regarding equitable tolling and find as follows:

The underlying principle of equitable tolling requires a party to not only exercise due diligence with regard to a claim, but there also must be some way that a party could not or did not discover the injury until after the expiration of the limitations period.

In the case cited, the Massachusetts Supreme Judicial Court narrowly held, where a party was appealing to extend the statutory period to determine the use of a variance, that tolling would be allowed so long as the party had not engaged in some form of wrongdoing or intentional delay to advance some other purpose (i.e. waiting for the market to improve in order to gain a better price on the piece of property).

The Idaho Supreme Court however has repeatedly discouraged the use of equitable tolling in Idaho, especially in instances where a statute does not specifically provide for tolling. See, Wilhelm v. Frampton, 144 Idaho 147, 149 (2007). As seen by Idaho Code §23-908, the expiration of a liquor license occurs when a licensee fails to renew a license within the statutory period of time. There is no tolling exception allowed in this code provision.

If there were such a tolling provision, one would expect it see it setting forth an exception for lessors and lessees who are involved in lease agreements. In the case of Uptick v. Ahlen, the Idaho Supreme Court held, the right to renew is included among the privileges appurtenant to a liquor license and is a privilege which is to be exercised *exclusively* by the named licensee. 103 Idaho 364 (1982). In this immediate case, the named licensee was Iggy's. Therefore, ABC's attempt to notify the licensee of the renewal requirement was properly made.

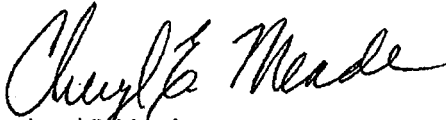
Even if one were to consider the aspect of equitable tolling on behalf of B.V. Beverage, it appears that B.V. Beverage did in fact have a repossession clause in its contract with Iggy's. According to the Post Register in Idaho Falls, Iggy's closed its doors on or shortly before December 9, 2009. The renewal for this license did not become due until September 30, 2010. As ABC records indicate, B.V.

Beverage holds two other liquor licenses in the Idaho Falls area, through A&R Food and Beverage, dba The Hilton Garden and Hard Hat Management, LLC, dba The Hard Hat Steakhouse. Because liquor licenses for one county are all renewed in the same month, in this case Bonneville County, B.V. Beverage knew or should have known that the Iggy's license was due to be renewed at the same time its other licenses were up for renewal.

Because it appears that B.V. Beverage is so active in the Idaho Falls business community, it is reasonable to conclude that B.V. Beverage would also be aware of Iggy's default in late 2009. Had B.V. Beverage foreclosed its right to repossess the liquor license from Iggy's in a more timely fashion, it could have been determined much sooner, to your client's benefit that the renewal issue is a separate a distinct issue from that of transferring a license.

It is unfortunate that B.V. Beverage will be unable to fulfill its commitment to Buffalo Wild Wings because Iggy's failed to timely renew the license as provided by statute. It may be that B.V. Beverage should seek its remedy against Iggy's in a civil action, if Iggy's failed to comply with the terms of the contract. The Iggy's liquor license has been voided and will now be offered by ABC to the next person or entity on the priority list sometime in July.

Sincerely,



Cheryl E. Meade  
Deputy Attorney General  
Idaho State Police

# **Exhibit 11**

**REBECCA A. RAINEY, P.A.**

2627 W. Idaho Street  
Boise, Idaho 83702  
Telephone: (208) 559-6434  
Facsimile: (208) 473-2952  
rar@rebeccaraineylaw.com

March 4, 2011

Cheryl Meade  
Idaho State Police/Alcohol Beverage Control  
700 S. Stratford  
P.O. Box 700  
Meridian, Idaho 83642

**RE: BV Beverage, LLC, Liquor License No. 4314; Premises No. 8B-15.**

Dear Cheryl:

I am writing in response to your letter dated February 4, 2011 regarding the decision of the ABC to revoke Liquor License No. 4314, Premises No. 8B-15 for non-renewal. After consulting with my client, they have determined that they wish to appeal such decision. The basis for such appeal will be (i) the existence of the agreement between the ABC and BV Beverage, LLC to allow for the transfer of the liquor license following the expiration date and (ii) the ABC's failure to provide the necessary and proper paperwork to BV Beverage, LLC to allow for renewal of the license prior to its expiration date.

While we appreciate the agency's position that the ABC did not have discretion to extend the renewal term under the facts and circumstances that existed in this matter, as well as the agency's position that, pursuant to the case of *Uptick v. Ahlen*, 103 Idaho 364 (1982) the agency was not under a duty to provide renewal paperwork to BV Beverage, as they were not the named licensee during the renewal period, BV Beverage respectfully disagrees with these legal conclusions.

Prior to taking an appeal from this action, BV Beverage needs to be able to demonstrate that it has exhausted its administrative remedies and that it is taking the appeal from a "final order in a contested case." I believe that your letter informing BV Beverage that the subject license has been "voided" constitutes an informal determination of the agency action and BV Beverage wishes to cooperate with the agency in order to make that determination a final, formal order from which an appeal can be taken.

To that end, we propose the following options:

- The ABC could draft another similar letter which clearly states that the agency has reached an "informal determination" that will become final in the absence of further action" as contemplated by IDAPA 04.11.01.104; or
- The ABC and BV Beverage could enter a stipulation as to the facts of this case, reserving the right to appeal to a court of competent jurisdiction on the issues of law, in accordance with Idaho Code § 67-5241(d)

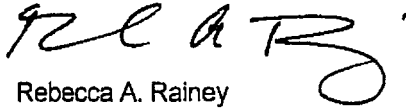
If the agency is not inclined to take either of these actions, BV Beverage will initiate formal proceedings in accordance with the Idaho Rules of Administrative Procedure. BV Beverage would like to initiate whatever actions are necessary to move forward with the appeal as soon as possible. Accordingly, please advise by March 18, 2011 if the agency is willing to resolve this matter via the informal

March 4, 2011

disposition methods outlined above or if the agency would prefer for BV Beverage to initiate formal proceedings.

Thank you in advance for you cooperation on this matter. Should you have any questions regarding the forgoing, please feel free to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read 'R A Rainey', with a stylized flourish at the end.

Rebecca A. Rainey

# **Exhibit 12**



STATE OF IDAHO  
OFFICE OF THE ATTORNEY GENERAL  
LAWRENCE G. WASDEN

March 15, 2011

Rebecca A. Rainey, PA  
Attorney at Law  
2627 W. Idaho St.  
Boise, ID 83702  
[rar@rebeccaraineylaw.com](mailto:rar@rebeccaraineylaw.com)

via email

Re: BV Beverage Company, LLC and Iggy's Idaho Falls

Dear Becky,

I have been out of the office and have just returned and read your email and letter regarding the above matter. I offer the following response to your client's request.

1. Because BV Beverage had transferred this license to Iggy's sometime ago, the only licensee named on Liquor License No. 4314, was Iggy's. Iggy's was the only party with standing to seek a timely remedy from the agency with regard to renewal.

According to Idaho Code § 23-908, "...[e]very license issued under the provisions of this chapter is separate and distinct and **no person except the licensee therein named (on the license)** shall exercise any of the privileges granted thereunder." This includes renewal of the license by the named licensee.

Idaho Case law has long supported this code provision in numerous rulings over the years.

2. Even Iggy's lost its standing, by operation of law, on November 1, 2010.

According to Idaho Code § 67-5240, there is no contested case. Iggy's was required to renew its license by October 31, 2010. By operation of law, ABC was statutorily prohibited from renewing the license at the end of that business day, because Iggy's failed to renew its license.

As the case law indicates, such non-renewal on Iggy's part, does not amount to a contested case on the part of BV Beverage. ABC has no legal authority, to extend the 31-day grace period to Iggy's allowing it to renew its liquor license after October 31, 2010. *See, Westway Construction Inc. v. Idaho Transp. Dept.*, 139 Idaho 107 (2003). Likewise, ABC also has no legal authority to extend the 31-day grace period to another entity, allegedly acting on behalf of a licensee.

3. Your client's claim that ABC *revoked* Iggy's liquor license is not based in law or fact. This is a clear mischaracterization of the collateral consequences attributed to this license due to the licensee's own failure to renew its liquor license in a timely fashion as required by law.



4. While ABC and BV Beverage may have had an agreement to allow time for a transfer to occur from BV Beverage to another entity, such agreement does not include or apply to the existing licensee's (Iggys) obligation to timely renew its own liquor license as required by Idaho Code §23-908(1).

Any claim by BV Beverage that an agreement to extend a time for transfer somehow transforms into a renewal issue, shows a clear lack of understanding of extensions associated with a transfer. The law requires that a transferee apply for the liquor license and to also submit to fingerprinting and a background check. ABC does not have control over the finger printing nor the background check process, as this is done by the Federal Bureau of Investigation. The FBI does not provide these services according to strict guidelines, therefore ABC cannot rely on the FBI to conduct such investigations within a time certain. In turn, ABC is allowed flexibility to accommodate for these investigations, among other reasons.

The reason for allowing for an extension of time in a transfer scenario is clearly different from those of renewing a liquor license. A renewal deadline was set in stone by the legislature to allow for the orderly re-issuance of those licenses, to licensees who had already been approved. Had such renewal deadlines been foregone by law, an absurd result would arise and the reality would have been that licensees would not be required to timely renew, if at all.


5. Furthermore, any claim by BV Beverage that ABC failed to provide it with the necessary and proper paperwork to allow for renewal prior to its expiration date is made without a legal or factual foundation.

ABC is not statutorily, nor required by regulation to give a notice of renewal to a licensee, much less an entity that is not the named licensee.

A studied reading of both Idaho Code Section 23-908(1) and IDAPA Rule 11.05.01.012.03, clearly shows, the obligation to make an application to renew falls squarely upon the shoulders of the licensee or the transferee. It appears that BV Beverage failed, due to its own oversight, to exercise its option to repossess and transfer the license back to itself. BV Beverage had a contractual right to engage in this action once it had determined that Iggys was in default of its contractual obligations. Had BV Beverage taken this step, BV Beverage would have known, long before Iggys' license expired, when the license was due to be renewed. BV Beverage should have applied for renewal then, according to IDAPA Rule 11.05.01.012.03, but failed to do so.

In conclusion, this is strictly a matter where no contested case exists because of BV Beverage's lack of legal standing. Therefore, there will be no other letter or any kind of determination by the agency for which an appeal can be taken or contested case may be initiated.

Sincerely,



Cheryl E. Meade  
Deputy Attorney General  
Idaho State Police

N . \_\_\_\_\_ FILED 1037  
A.M. \_\_\_\_\_ P.M.

MAY 27 2011

CHRISTOPHER D. RICH, Clerk  
By LARA AMES  
DEPUTY

Rebecca A. Rainey, ISB No. 7525  
REBECCA A. RAINEY, P.A.  
2627 W. Idaho Street  
Boise, Idaho 83702  
Telephone (208) 559-6434  
Facsimile (208) 473-2952  
rar@rebeccaraineylaw.com

Attorney for Petitioner

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BV BEVERAGE COMPANY, LLC., a Idaho  
limited liability company,

Petitioner,

vs.

THE STATE OF IDAHO, DEPARTMENT  
OF IDAHO STATE POLICE/ALCOHOL  
BEVERAGE CONTROL, G. JERRY  
RUSSELL, in his official capacity as Director  
of Idaho State Police,

Respondent.

Case No. CV-OC-2011-0<sup>6</sup>351

**MOTION FOR ORDER STAYING  
AGENCY ACTION**

COMES NOW Petitioner, BV Beverage, LLC, (BV Beverage) by and through undersigned counsel of record, and hereby moves this Court for an order staying any action by the Idaho State Police/Alcohol Beverage Control Bureau ("ABC") respecting the re-issuance of Liquor License No. 4314 until a final order on the merits respecting the present petition for judicial review has been entered by this Court.

To the extent that the ABC takes the position that it does not intend to re-issue License No. 4314, but rather that it intends to make a "new license" available to the next

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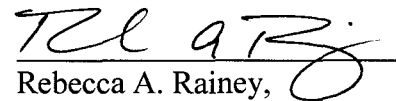
person or entity on the priority list (which would have the effect of issuing all license available in the City of Idaho Falls, pursuant to the quota system, thereby preventing the ABC from renewing, reviving, or otherwise recognizing the validity of License No. 4314 and BV Beverage's right to use the same), BV Beverage respectfully requests that an order be entered restricting the ABC from issuing and/or making available such "new license."

This motion is based on the Memorandum in Support of Petitioner's Motion for Order Staying Agency Action and the Affidavit of Cortney Liddiard in Support of Motion for Order Staying Agency Action filed concurrently herewith.

Oral argument is requested.

DATED THIS 27<sup>th</sup> day of May, 2011.

REBECCA A. RAINEY, P.A.

  
Rebecca A. Rainey,  
Attorney for Petitioner

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 27th day of May, 2011, I caused a true and correct copy of the foregoing **MOTION FOR ORDER STAYING AGENCY ACTION** to be served by the method indicated below, and addressed to the following:

CHERYL A. MEADE  
Idaho State Police/Alcohol Beverage Control  
700 S. Stratford  
P.O. Box 700  
Meridian, ID  
83642

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile

  
Rebecca A. Rainey

MAY 27 2011

CHRISTOPHER D. RICH, Clerk  
By LINDA JAMES  
DEPUTY

Rebecca A. Rainey, ISB No. 7525  
REBECCA A. RAINEY, P.A.  
2627 W. Idaho Street  
Boise, Idaho 83702  
Telephone (208) 559-6434  
Facsimile (208) 473-2952  
rar@rebeccaraineylaw.com

Attorney for Petitioner

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BV BEVERAGE COMPANY, LLC., a Idaho  
limited liability company,  
  
Petitioner,

vs.

THE STATE OF IDAHO, DEPARTMENT  
OF IDAHO STATE POLICE/ALCOHOL  
BEVERAGE CONTROL, G. JERRY  
RUSSELL, in his official capacity as Director  
of Idaho State Police,  
  
Respondent.

Case No. CV-OC-2011-06351

**AFFIDAVIT OF CORTNEY LIDDIARD  
IN SUPPORT OF PETITIONER'S  
MOTION FOR ORDER STAYING  
AGENCY ACTION**

STATE OF IDAHO                    )  
  ) ss.  
COUNTY OF BONNEVILLE)

I, CORTNEY LIDDIARD, being duly sworn, testify as follows:

1. I am the president of BV Management Services, Inc., which is the manager of BV Beverage Company, LLC, which is the owner of Idaho State Liquor License No. 4314, premise number 8B-15, the license at issue in the above-captioned litigation, and I make this affidavit based upon matters within my own personal knowledge.

AFFIDAVIT OF CORTNEY LIDDIARD SUPPORTING PETITIONER'S MOTION 1  
FOR ORDER STAYING AGENCY ACTION

37

2. BV Beverage Company, LLC holds an ownership interest in three seasoned Idaho State liquor licenses (including the at-issue liquor license), the most recent of which was purchased for \$175,000.00, in addition to the legal fees and investment of time associated with each acquisition, application, and transfer.

3. BV Beverage Company, LLC provides a valuable service to the growth and development of the Idaho Falls, Idaho metropolitan area through acquisition, use, and management of seasoned liquor licenses, which BV Beverage Company, LLC makes available through lease (often with the option to purchase) to restaurant owners in immediate need of a liquor license.

4. BV Beverage Company, LLC does not acquire these licenses for purposes of speculating. Rather, BV Beverage Company, LLC makes very substantial investment and expenditures of money and time in the acquisition of these liquor licenses in order to provide a value added service to prospective restaurant owners in the Idaho Falls area by providing them access to a seasoned liquor license upon start-up of their restaurant venture. This allows BV Beverage Company, LLC's parent company, BV Properties, LLC, the ability to attract national restaurant franchises into the Idaho Falls area, which franchises often require and have an immediate need for a license for liquor by the drink.

5. Often times, these business opportunities – as well as the associated benefits they bring to the local economy – would be lost if these prospective restaurant owners were made to wait, indefinitely, to acquire a liquor license through the process of the priority waiting list that is in place for issuance of a new liquor license.

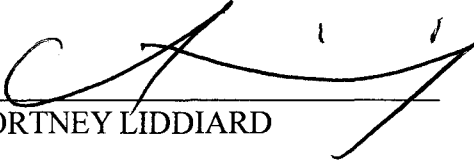
6. This business model benefits the Idaho Falls region by helping to bring in restaurants that bring much needed jobs and growth to the area. For example, the

economic impact of the intended recipient of the liquor license at issue in the present litigation was estimated to be as follows:

- a. The addition of approximately 20 full-time and 60 part-time jobs to operate the restaurant;
- b. Estimated annual payroll in the amount of \$900,000.00;
- c. Expenditure of approximately \$1.6 million for remodeling of the space, providing jobs to local contractors, subcontractors, vendors, suppliers, etc;
- d. Estimated annual sales revenue of \$2.5 million - \$3 million; and
- e. Sales tax generation of \$150k - \$185k annually.

7. The lost business opportunities associated with losing the at-issue liquor license are difficult to measure and constitute irreparable harm, not only to BV Beverage Company, LLC, but to the entire Idaho Falls community.

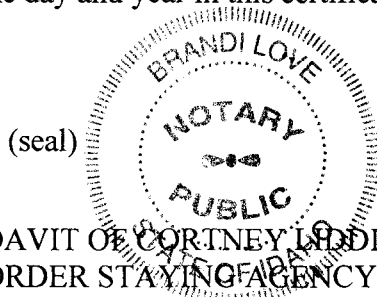
DATED THIS 20<sup>th</sup> day of May, 2011.

  
CORTNEY LIDDIARD

STATE OF IDAHO )  
)ss.  
County of Bonneville )

On the 20<sup>th</sup> day of May, 2011, before me, the undersigned, a notary public in and for said State, personally appeared Cortney Liddiard, known or identified to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.



Brandi Love  
Notary Public for Idaho  
Residing at Idaho Falls, Idaho  
My Commission Expires: 4-12-2014

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 21<sup>st</sup> day of May, 2011, I caused a true and correct copy of the foregoing **AFFIDAVIT OF CORTNEY LIDDIARD** to be served by the method indicated below, and addressed to the following:

CHERYL A. MEADE  
Idaho State Police/Alcohol Beverage Control  
700 S. Stratford  
P.O. Box 700  
Meridian, ID  
83642

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile

  
Rebecca A. Rainey



Rebecca A. Rainey, ISB No. 7525  
REBECCA A. RAINEY, P.A.  
2627 W. Idaho Street  
Boise, Idaho 83702  
Telephone (208) 559-6434  
Facsimile (208) 473-2952  
rar@rebeccaraineylaw.com

Attorney for Petitioner

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BV BEVERAGE COMPANY, LLC., a Idaho  
limited liability company,

Petitioner,

vs.

THE STATE OF IDAHO, DEPARTMENT  
OF IDAHO STATE POLICE/ALCOHOL  
BEVERAGE CONTROL, G. JERRY  
RUSSELL, in his official capacity as Director  
of Idaho State Police,

Respondent.

Case No. CV-OC-2011-0<sup>6</sup>351

**MEMORANDUM IN SUPPORT OF  
PETITIONER'S MOTION FOR ORDER  
STAYING AGENCY ACTION**

COMES NOW Petitioner, BV Beverage Company, LLC ("BV Beverage), by and through  
undersigned counsel of record, and hereby submits this Memorandum in Support of Petitioner's  
Motion for Order Staying Agency Action.

3

## **FACTUAL AND PROCEDURAL BACKGROUND**

BV Beverage holds an owner's interest in that certain liquor license number 4314 for the City of Idaho Falls, Idaho (the "License").<sup>1</sup> During the normal course of its business, BV Beverage entered into a lease agreement with Iggy's Idaho Falls, Inc. (hereafter, "Iggy's"), wherein BV Beverage would lease the License to Iggy's on the terms and conditions set forth in said lease.<sup>2</sup> Such lease was made under the authority of and in accordance with Idaho Code Section 23-908(6) and such lease agreement was reviewed and approved by Respondant Idaho State Police/Alcohol Beverage Control ("ABC").<sup>3</sup> BV Beverage paid good and valuable consideration to the ABC in order to transfer a leasehold interest in the License to Iggy's. Idaho Code Section 23-908(6).

Iggy's stopped using the License sometime in January of 2010. The ABC delivered a notice to Iggy's informing Iggy's that Iggy's had 90 days in which to find suitable premises to put the License into actual use, as required by IDAPA 11.05.01.010.02.<sup>4</sup> No such notice was sent to BV Beverage, owner of the License. On or about July 30, 2010, the ABC sent renewal paperwork to Iggy's for renewal of the License for the 2011 license year.<sup>5</sup> No renewal paperwork was sent to BV Beverage, owner of the License. On or about August 20, 2010, the ABC instituted judicial proceedings to revoke the License on the grounds that Iggy's was not

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<sup>1</sup> See Agency Record for Iggy's Liquor License No. 4314 ("Record") at A.

<sup>2</sup> Record at A; *see, generally*, Affidavit of Cortney Liddiard in Support of Petitioner's Motion for Order Staying Agency Action ("Liddiard Aff.").

<sup>3</sup> Record at A & B

<sup>4</sup> Record at C.

<sup>5</sup> Record at D.

making “actual use” of the License.<sup>6</sup> BV Beverage was not named in said revocation proceedings.

Upon learning of the revocation proceedings, BV Beverage immediately contacted the ABC and expressed concern that BV Beverage, the owner of the License (which had only been leased to Iggy’s), had not been notified of the revocation proceedings.<sup>7</sup> As a result of the conversations and communications that transpired between BV Beverage and the ABC at that time, the ABC agreed to allow BV Beverage additional time to transfer the License to another prospective tenant.<sup>8</sup>

In reliance on the ABC’s representation that it would allow BV Beverage additional time to transfer the License to a new lessee, BV Beverage continued negotiations with said lessee and incurred substantial costs and attorneys fees negotiating a liquor license lease for the License with the new tenant.<sup>9</sup> On or about January 7, 2011, BV Beverage submitted transfer application paperwork to the ABC.<sup>10</sup> BV Beverage was then notified that the transfer application would not be approved because the License had expired, by operation of law, for BV Beverage’s failure to timely renew said liquor license.<sup>11</sup>

Immediately upon learning that the ABC was taking the position that the License had expired by operation of law, BV Beverage initiated informal proceedings to resolve this matter

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<sup>6</sup> Motion to Augment the Record (“Augmented Record”), Exhibit 1.

<sup>7</sup> Augmented Record, Exhibit 2.

<sup>8</sup> Augmented Record, Exhibit 4.

<sup>9</sup> Augmented Record, Exhibit 5.

<sup>10</sup> Record at E.

<sup>11</sup> Record at G.

with the ABC.<sup>12</sup> BV Beverage and the ABC were unable to resolve their differences through informal proceedings and, on or about February 4, 2011, the ABC notified BV Beverage that it considered the License to be void and notified BV Beverage that the License would be offered to the “next person or entity on the priority list sometime in July [2011].”<sup>13</sup>

On March 31, 2011, BV Beverage filed the Petition for Judicial Review in this matter. BV Beverage now moves this Court for entry of an order staying any agency action respecting the License including, but not limited to, re-issuing or attempting to re-issue the License to another person or entity and/or issuing sufficient “new licenses” to applicants on the priority list, which would have the effect making the License somehow unavailable to BV Beverage by virtue of the quota system, before the present action is decided on its merits.

#### **APPLICABLE LEGAL STANDARD**

Idaho Code Section 67-5274 provides “[t]he filing of the petition for review does not itself stay the effectiveness or enforcement of the agency action. The agency may grant, or the reviewing court may order, a stay upon appropriate terms.” While no Idaho Appellate Court has explained or defined the phrase “appropriate terms” as used under Idaho Code Section 67-5274, the Supreme Court determined that it is proper to issue an injunction when an irreparable injury is actually threatened by non-movant or when the movant would suffer an irreparable injury should the court refuse an injunction. *O’Boskey v. First Federal Savings & Loan Ass’n*, 112 Idaho 1002, 1005, 739 P.2d 301, 306 (1987) (deciding it was proper to issue permanent injunction when injury had been threatened and other party was capable of continuing conduct);

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<sup>12</sup> Augmented Record, Exhibits 5 – 12.

<sup>13</sup> Augmented Record, Exhibit 10.

*Harris v. Cassia County*, 106 Idaho 513, 518, 681 P.2d 988, 993 (1984) (affirming refusal to grant temporary injunction seeking payment of back benefits because county had brought benefits current). BV Beverage submits that the same standard is applicable to the present motion.

Additionally, in instances where a controversy is likely to become moot based on agency action, it is appropriate to stay the agency action.<sup>14</sup> See *Committee for Rational Predator Management v. Dep't of Agriculture*, 129 Idaho 670, 673, 931 P.2d 1188, 1191 (1997) (noting it is the proper course of action for a party with a claim likely to become moot to seek a stay after filing a petition for review).

The entry of an order granting a motion to stay agency action is left to the sound discretion of the court. *Newell v. Newell*, 77 Idaho 355, 365, 293 P.2d 663, 670 (1956).

### **ARGUMENT**

A stay of the agency's action is appropriate in this matter because, if the License is re-issued to another person or entity, or if new licenses are issued which fill the quota of available licenses, BV Beverage will suffer irreparable injury.<sup>15</sup> The ABC has already declared that it deems the License void by operation of law. The ABC has further indicated that it will

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<sup>14</sup> The ABC has already taken the position that BV Beverage does not have standing to request the relief sought by the petition for judicial review because it does not hold an ownership interest in the License. Augmented Record, Exhibit 12. However, that very position begs the question: What property right does the lessor of a liquor license have and what process is due to said lessor before revoking a license and/or taking the position that such license has become void by operation of law. The very purpose of the present action for judicial review of the agency's actions is to determine what, if any, legal standing the lessor of liquor license has and, based thereon, what notice such lessor is entitled to receive.

<sup>15</sup> See, generally, Liddiard Aff.

offer the License to another person or entity in July 2011.<sup>16</sup> If the ABC does offer the License to another person or entity before this Court has an opportunity to determine the merits of the present petition for judicial review, BV Beverage will be deprived of its property rights and interest in the License.

An ownership interest in a liquor license is a unique and valuable property right.<sup>17</sup> Idaho Code Section 23-903 provides that the number of liquor licenses per city is determined by the population of that city; accordingly, there are a limited number of licenses available for the ABC to issue. By administrative rule, the ABC maintains a priority waiting list for applicants who wish to obtain a liquor license. IDAPA 11.05.01.013.01. When a license becomes available, the ABC offers the license to the person or entity at the top of the priority list. IDAPA 11.05.01.013.02. Because the ABC takes the position that the License has become void by operation of law, the ABC has informed BV Beverage that the License will be offered to the next person and/or entity on the priority list.

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<sup>16</sup> Augmented Record, Exhibit 10.

<sup>17</sup> See, e.g., *Bundo v. Walled Lake*, 395 Mich. 679, 694-95, 238 N.W.2d 154 (1976) (recognizing the property rights of an owner of a liquor license as the type of rights that are entitled to due process protection) *c.f.* *Uptick v. Ahlin*, 103 Idaho 364, 647 P.2d 1236 (1982) (denying to recognize property rights of the lessor of a liquor license where such liquor license lease was (i) not authorized by Idaho statute and (ii) not approved by the licensing authority). For reasons that will be more fully explained during the hearing on the merits of this petition for judicial review, the present action is distinguishable from *Uptick* because the Idaho legislature amended Idaho Code Section 23-908 while the *Uptick* matter was moving through the judicial process to allow for transfer of a liquor license by lease. Accordingly, the process and procedures used by BV Beverage and Iggy's respecting the lease of the License were (i) authorized by statute (distinguishing the present facts from *Uptick*) and (ii) the transaction was reviewed and approved by the ABC (distinguishing the legal framework within which the lease was executed, reviewed and approved from the facts cited and principles enunciated by the Idaho Supreme Court in support of the *Uptick* decision).

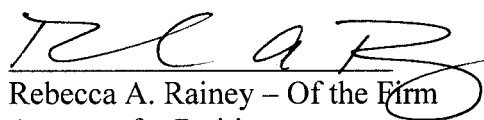
If the License is re-issued to a new person or entity, said License will no longer be available to BV Beverage and BV Beverage will be forced to rely on the priority list in order to become eligible for issuance of another liquor license. Even then, due to its transferability, the value of a “seasoned license,” such as the one at issue in the present action, is significantly greater than the value of a new license.<sup>18</sup> This value is a critical component to BV Beverage’s business model, the loss of which is impossible to measure, thereby resulting in irreparable harm.<sup>19</sup>

### CONCLUSION

Based on the foregoing, BV Beverage respectfully requests that this Court enter an order staying the agency’s action and restricting the ABC from offering the License to the next person or entity on the priority list, issuing sufficient new licenses to persons on the priority list that would, somehow, have the effect of making the License unavailable to BV Beverage should it prevail in this action, and/or taking any other action which might divest BV Beverage of its ownership interest in the License during the this judicial review.

DATED THIS 27<sup>th</sup> day of May, 2011.

REBECCA A. RAINEY, P.A.

  
Rebecca A. Rainey – Of the Firm  
Attorney for Petitioner

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<sup>18</sup> Liddiard Aff., ¶¶ 4-6.

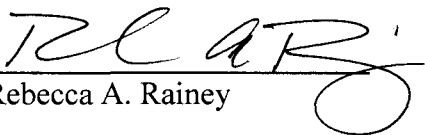
<sup>19</sup> Liddiard Aff., ¶ 7.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 27th day of May, 2011, I caused a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF PETITIONER'S MOTION FOR ORDER STAYING AGENCY ACTION** to be served by the method indicated below, and addressed to the following:

CHERYL A. MEADE  
Idaho State Police/Alcohol Beverage Control  
700 S. Stratford  
P.O. Box 700  
Meridian, ID  
83642

U.S. Mail, Postage Prepaid  
 Hand Delivered  
 Overnight Mail  
 Facsimile

  
Rebecca A. Rainey



NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. 1235

MAY 27 2011

CHRISTOPHER D. HIGH, Clerk  
By LARA JAMES  
DEPUTY

Rebecca A. Rainey, ISB No. 7525  
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2627 W. Idaho Street  
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Facsimile (208) 473-2952  
rar@rebeccaraineylaw.com

Attorney for Petitioner

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BV BEVERAGE COMPANY, LLC., a Idaho  
limited liability company,

Petitioner,

vs.

THE STATE OF IDAHO, DEPARTMENT  
OF IDAHO STATE POLICE/ALCOHOL  
BEVERAGE CONTROL, G. JERRY  
RUSSELL, in his official capacity as Director  
of Idaho State Police,

Respondent.

Case No. CV-OC-1106351

**NOTICE OF HEARING**

NOTICE IS HEREBY GIVEN that Petitioner BV Beverage Company, LLC, by and through its attorney of record, Rebecca A. Rainey, P.A., will call up for hearing its Motion to Stay Agency Action before the above entitled court at the Ada County Courthouse on June 17<sup>th</sup>, 2011 at 11:30 a.m., or as soon thereafter as counsel may be heard.

3

DATED THIS 27<sup>th</sup> day of May, 2011.

REBECCA A. RAINEY, P.A.

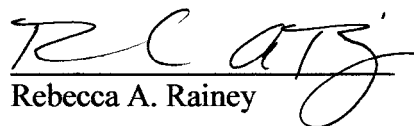
RECA R  
Rebecca A. Rainey,  
Attorney for Petitioner

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 27<sup>th</sup> day of May, 2011, I caused a true and correct copy of the foregoing **NOTICE OF HEARING** to be served by the method indicated below, and addressed to the following:

CHERYL A. MEADE  
Idaho State Police/Alcohol Beverage Control  
700 S. Stratford  
P.O. Box 700  
Meridian, ID  
83642

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 Facsimile

  
Rebecca A. Rainey

**JUN 13 2011**

**CHRISTOPHER D. RICH, Clerk**  
By **ELYSHIA HOLMES**  
DEPUTY

Rebecca A. Rainey, ISB No. 7525  
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Attorney for Petitioner

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
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BV BEVERAGE COMPANY, LLC., a Idaho  
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Petitioner,

vs.

THE STATE OF IDAHO, DEPARTMENT  
OF IDAHO STATE POLICE/ALCOHOL  
BEVERAGE CONTROL, G. JERRY  
RUSSELL, in his official capacity as Director  
of Idaho State Police,

Respondent.

Case No. CV-0C-2011-~~00~~351

**STIPULATION TO STAY AGENCY  
ACTION**

COME NOW Petitioner BV Beverage Company, LLC ("BV Beverage") and  
Respondent The State of Idaho, Department of Idaho State Police/Alcohol Beverage  
Control ("ABC"), by and through their respective counsel of record, and hereby stipulate  
and agree as follows:

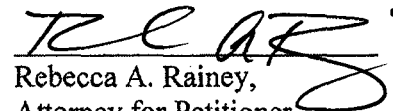
1. The ABC will not re-issue Liquor License No. 4314 until a final order on  
the merits respecting the present petition for judicial review has been  
entered by the District Court.

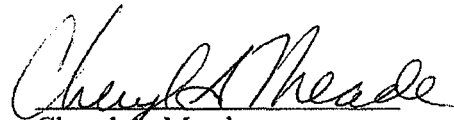
**STIPULATION TO STAY AGENCY ACTION - PAGE 1**

2. The ABC will not take any action respecting the issuance of new license in the City of Idaho Falls which would have the effect of making the present appeal moot by virtue of the State of Idaho quota system on liquor licenses; but will reserve sufficient space within the quota system such that the at issue liquor license will be available for use by BV Beverage in the event that the District Court in this proceeding rules in favor of BV Beverage.

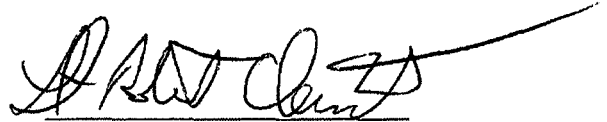
DATED THIS 13<sup>th</sup> day of June 2011.

REBECCA A. RAINEY, P.A.

  
Rebecca A. Rainey,  
Attorney for Petitioner



Cheryl A. Meade  
Deputy Attorney General  
Counsel for Respondent



~~G. Jerry Russell~~  
~~Director, Idaho State Police~~

Lt. Robert Clements  
Alcohol Beverage  
Control

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 13<sup>th</sup> day of June, 2011, I caused a true and correct copy of the foregoing **STIPULATION TO STAY AGENCY ACTION** to be served by the method indicated below, and addressed to the following:

CHERYL A. MEADE  
Idaho State Police/Alcohol Beverage Control  
700 S. Stratford  
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Rebecca A. Rainey

Rebecca A. Rainey, ISB No. 7525  
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NO. \_\_\_\_\_  
A.M. \_\_\_\_\_ FILED 103 P.M. \_\_\_\_\_

**JUN 13 2011**  
CHRISTOPHER D. RICH, Clerk  
By ELYSHIA HOLMES  
DEPUTY

Attorney for Petitioner

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BV BEVERAGE COMPANY, LLC., a Idaho  
limited liability company,

Petitioner,

vs.

THE STATE OF IDAHO, DEPARTMENT  
OF IDAHO STATE POLICE/ALCOHOL  
BEVERAGE CONTROL, G. JERRY  
RUSSELL, in his official capacity as Director  
of Idaho State Police,


Respondent.

Case No. CV-OC-1106351

**NOTICE VACATING HEARING**

PLEASE TAKE NOTICE that Petitioner will vacate the hearing on its Motion to Stay  
Agency Action before the above entitled court at the Ada County Courthouse on June 17, 2011  
at 11:30 a.m.

DATED THIS 13<sup>th</sup> day of June, 2011.

REBECCA A. RAINEY, P.A.  
  
Rebecca A. Rainey,  
Attorney for Petitioner

*ay*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 13<sup>th</sup> day of June, 2011, I caused a true and correct copy of the foregoing **NOTICE VACATING HEARING** to be served by the method indicated below, and addressed to the following:

CHERYL A. MEADE  
Idaho State Police/Alcohol Beverage Control  
700 S. Stratford  
P.O. Box 700  
Meridian, ID  
83642

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- Hand Delivered
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- Facsimile

  
Rebecca A. Rainey



RECEIVED

JUN 13 2011

ADA COUNTY

Rebecca A. Rainey, ISB No. 7525  
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A.M.

JUN 17 2011

CHRISTOPHER D. RICH, Clerk  
By DIANE OATMAN  
Deputy

Attorney for Petitioner

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BV BEVERAGE COMPANY, LLC., a Idaho  
limited liability company,

Petitioner,

vs.

THE STATE OF IDAHO, DEPARTMENT  
OF IDAHO STATE POLICE/ALCOHOL  
BEVERAGE CONTROL, G. JERRY  
RUSSELL, in his official capacity as Director  
of Idaho State Police,

Respondent.

Case No. CV-0C-2011-06351

**ORDER GRANTING STIPULATION  
TO STAY AGENCY ACTION**

Petitioner and respondent's Stipuation to Stay Agency Action, having duly come  
before the Court, and the Court having considered the same, and good cause appearing  
therefore:

IT IS HEREBY ORDERED AND THIS DOES ORDER that the parties'  
Stipulation should be and is hereby GRANTED.

The hearing on the motion to stay the agency action, currently set for June 17,  
2011 at 11:30 is hereby vacated.

DATED THIS 16<sup>th</sup> day of June, 2011.



Michael E. Wetherell  
District Judge

**CERTIFICATE OF SERVICE**


I HEREBY CERTIFY that on this 17<sup>th</sup> day of June, 2011, I caused a true and correct copy of the foregoing **ORDER GRANTING STIPULATION TO STAY AGENCY ACTION** to be served by the method indicated below, and addressed to the following:

CHERYL A. MEADE  
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- Facsimile

  
deputy Clerk

Wetherell  
DIANE  
6/30/11  
SK

no memo  
7/8/11

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. 2:21

JUN 29 2011

CHRISTOPHER D. RICH, Clerk  
By KATHY BIEHL  
Deputy

Rebecca A. Rainey, ISB No. 7525  
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Attorney for Petitioner

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
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BV BEVERAGE COMPANY, LLC., a Idaho  
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vs.

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BEVERAGE CONTROL, G. JERRY  
RUSSELL, in his official capacity as Director  
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Respondent.

Case No. CV-OC-2011-06351

**PETITIONER'S APPELLATE BRIEF**

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## I. STATEMENT OF THE CASE

This petition for judicial review asks this Court to consider whether the state system for renewal of a liquor license adequately protects the property rights of lessors of state liquor licenses. Respondent, the Idaho State Police, Alcohol Beverage Control (the “Agency”) has historically taken the position that a lessor of a liquor license has no protectable property interest in such liquor license, is not entitled to notice of any actions respecting such license, and, likewise, shall not be afforded the opportunity to renew such license. Petitioner, BV Beverage Company, LLC (“BV Beverage”) is the lessor of a liquor license; its property interest as the lessor of a liquor license includes the right to renew the same and the Agency is required to establish minimum procedural safeguards, adequate to protect such property interest from unconstitutional takings.

BV Beverage respectfully requests that this Court recognize the broad proclamation issued by the Idaho Supreme Court in *Uptick Corp. v. Ahlin*, that “[t]he right to renew is included among the privileges appurtenant to a liquor license and is a privilege which is to be exercised exclusively by the named licensee,” 103 Idaho 364, 369, 647 P.2d 1236, 1241 (1982), be re-evaluated in light of the factual context of this case and the guidance handed down by the United States Supreme Court regarding the property interests that arise from and are associated with government benefits and/or privileges. Based on proper application of these constitutional principals, lessors of a liquor license have a legitimate property interest in the right to renew a liquor license and such interest must be protected by minimum due process safeguards that do not exist under the Agency’s current renewal system.

## II. ISSUES PRESENTED ON APPEAL

- A. Whether the lessor of a liquor license has a property interest in the right to renew such license.
- B. Whether the established state system which does not give a lessor the opportunity to exercise its right to renew the license results in an unconstitutional taking.

## III. FACTUAL AND PROCEDURAL BACKGROUND

### A. OVERVIEW OF IDAHO'S LIQUOR LICENSING PROCEDURES

Idaho state liquor licenses are issued for one-year terms. They are renewed as a matter of course if the applicant timely submits the renewal application and a proper fee. I.C. § 23-908.

It is the Director's statutory duty to promulgate forms regarding liquor licensing procedures. I.C. § 23-932; IDAPA 11.05.01.00. This has been interpreted to include and does include the forms required for renewing a liquor license. The Director has delegated this statutory duty to the Agency. IDAPA 11.05.01.11.02.

Several of the forms are available on the Agency's website, which any member of the public may access at any time. *See* <http://www.isp.idaho.gov/abc/>. However, the renewal application is a customized form that is not available to the general public. *See id.* Rather the Agency mails the renewal applications to only the named licensee two months prior to the renewal deadline. *See* IDAPA 11.05.01.11.03; *see also* Agency R. at d.

A transferee may apply for the renewal of a license contemporaneously with the transfer application by submitting the renewal application of the transferor along with an Authorization to Transfer and Assignment of Privilege to Renew. IDAPA 11.05.01.12.03.

Idaho state liquor licenses may be transferred by sale, lease, through testate or intestate succession, and other commercially recognized methods. I.C. § 23-908(5)-(6). When transferred by sale, the transferee must submit a bill of sale and pay a transfer fee of 10 % of the purchase price. I.C. § 23-908(5). The transferor must also submit an application and undergo the scrutiny of the Director to determine the applicant's fitness to hold an Idaho state liquor license. I.C. § 23-908(2).

When a liquor license is transferred by lease, both the owner (lessor) and the licensee (lessee) must pay a transfer fee of 50% the annual renewal fee and each must submit a transfer application. *See*, e.g. Agency R. at e. The lessor and lessee must include the liquor license lease agreement with each application. *Id.* The Agency must review and approve this lease agreement. Agency R. at. e.; I.C. § 23-908(2).

During the term of the lease, the Agency takes the position that the owner of the license has no legally enforceable interest in the license *vis-à-vis* the state and that the state is not required to afford the owner of the license any safeguards and protections respecting its interest in the license. Aug. R. Ex. 12. Rather, in order to be recognized by the Agency, the lessor of the license must submit a new transfer application and the requisite fee in order to have the license transferred back into its name. Aug. R. Ex. 12. Until the license is transferred back to the lessor, the Agency takes the position that the lessor is not entitled to notice of any adverse actions taken against the license and is not entitled to receive an application to renew the license. Aug. R. Ex. 12.

If the lessee fails to timely renew the license, the Agency takes the position that the license expired, by operation of law, as against both the lessor and lessee, and thereafter refuses to recognize any interest in the license. *See* Agency R. at g.

## **B. FACTS SPECIFIC TO THIS CASE**

BV Beverage owns and is the lessor of liquor license number 4314 (the license). Aug. R. at Ex. 1-4; Agency R. at f. During its normal course of business, BV Beverage leased the license to Iggy's Idaho Falls, Inc. (Iggy's). Agency R. at a. This lease was reviewed and approved by the Agency, who then approved the transfer of the license to Iggy's. Agency R. at b.

On or about July 30, 2010, the Agency sent Iggy's a renewal application for the license, but this was returned to the Agency. Agency R. at d. The Agency did not send a copy of this renewal application to BV Beverage. Aug. R. at Ex. 5.

On or about September 24, 2010, BV Beverage learned that the Agency had initiated revocation proceedings against its lessee for failing to keep the license in "actual use" as regulated by IDAPA 11.05.01.10.02. BV Beverage immediately contacted the Agency and expressed concern that it had not been notified of the revocation proceedings. Aug. R. at Ex. 2.

BV Beverage then conducted a telephone conference with the Agency, who agreed to allow BV Beverage additional time to transfer the license to another lessee and further promised that it would not take any adverse action regarding the license during that time. Aug. R. at Ex. 3-4. The Agency also agreed that once the license had been transferred, it would dismiss the complaint for revocation. Aug. R. at Ex. 4. The Agency did not inform BV Beverage that the renewal paperwork sent to Iggy's had been returned as undeliverable, nor did it provide a renewal application to BV Beverage.

In reliance on the Agency's representations that BV Beverage could have additional time to find a new lessee, BV beverage continued negotiating with a national

restaurant chain as a potential lessee. Aug. R. at Ex. 5-7. It then submitted transfer application paperwork to the Agency on or about January 7, 2011. Agency R. at e. On or about January 10, 2011, the Agency rejected BV Beverage's transfer application on the grounds that the license had not been timely renewed and, therefore, expired by operation of law. Agency R. at g; Aug. R. at Ex. 3-7.

BV then began informal proceedings to resolve this matter. Aug. R. at Ex. 5-12. When informal procedures were unsuccessful, BV Beverage filed a petition for judicial review.

#### **IV. STANDARD OF REVIEW**

The district court shall affirm the agency's action unless the agency's decision was: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3). In addition to proving one of the enumerated statutory grounds for overturning an agency action, the challenging party must also show prejudice to a substantial right. I.C. § 67-5279(4); *Laughy v. Idaho Dep't of Trans.*, 149 Idaho 867, 869-70, 243 P.3d 1055, 1057-58 (2010).

#### **V. ARGUMENT**

The Agency's action in deeming the license to be expired by operation of law was made upon unlawful procedure and in violation of BV Beverages constitutional rights.

Both the United States Constitution and the Idaho Constitution provide that the State shall not deprive "any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV; Idaho Const. art. 1, § 13. Determining procedural due

process rights involves a two-step analysis: first, determining whether a governmental decision deprived an individual of a liberty or property interest within the meaning of the due process clause, and second, if a liberty or property interest is implicated determining what process is due. *Thompson Creek Mining Co. v. Idaho Dep't of Water Res.*, 148 Idaho 200, 213, 220 P.3d 318, 331 (2009) (citing *State v. Rogers*, 144 Idaho 738, 740, 170 P.3d 881, 883 (2007) (citing *Mathews v. Eldridge*, 424 U.S. 319, 333-35 (1976))).

BV Beverage, as lessor of an Idaho state liquor license, has a protectable property interest in the right to renew such liquor license. The established state system implemented by the Agency refuses to recognize this property right and, accordingly, does not afford the lessor of a liquor license the opportunity to renew the license. However, because the State has created a market place for the transfer of liquor licenses by lease which give rise to property rights, it has a constitutional obligation to allow lessors of liquor licenses minimum due process protections necessary to protect their valuable property rights from expiring by operation of law. Accordingly, it must afford lessors the opportunity to submit renewal applications.

**A. The Agency's use of *Uptick Corp. v. Ahlin* to disavow the property rights of lessors who have submitted to the Agency's application, review, and approval process is misplaced and the established state system should be rejected by this Court as it is unconstitutional.**

The Agency maintains that it is not required to allow lessors the opportunity to renew liquor licenses because under the Idaho Supreme Court's holding in *Uptick Corp. v. Ahlin*, 103 Idaho 364, 647 P.2d 1236 (1982), the right to renew a liquor license is a privilege which may only be exercised by the named licensee. *See* Aug. R. Ex. 10. Because the holding of *Uptick Corp.*, can and should be restricted to the narrow factual context in which it was entered, the Agency's use of this narrow decision to disavow the

property rights of lessors who have submitted to the Agency’s application, review, and approval process is misplaced and should be rejected by this Court. Likewise, because the established state system put in place in reliance on *Uptick Corp.* systematically deprives lessors of liquor licenses of their constitutional right to notice and opportunity to renew their valuable property right in an Idaho state liquor license, this Court should declare the state system unconstitutional.

In order to move beyond the holding in *Uptick Corp.*, it is first necessary to understand why such holding should be limited to the narrow factual context within which it was decided.

In *Uptick Corp.*, the Ahlins, owners of a building known as the “Alpine Lounge,” attempted to create for themselves a “premises interest” in a state liquor license that had been granted and issued to Echevarria, the lessor’s of that building.<sup>1</sup> 103 Idaho at 367, 647 P.2d at 1239. The Ahlins never applied to the Agency for any interest in the liquor license. *Id.* at 365, 647 P.2d at 1237. Rather, the Ahlins relied exclusively on the contractual rights created by and between them and each successive lessee for the proposition that the liquor license owned by each successive lessee could never be used anywhere but the Alpine Lounge. *Id.* at 366-67, 647 P.2d at 1238-39.

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<sup>1</sup> Between the initial issuance of the license and the *Uptick Corp.* lawsuit, the at-issue license changed hands a number of times. This factual history, which was not necessary for the court’s holding, is summarized here to simplify review of that decision: the original license was issued to Echevarria, who leased the “Alpine Lounge” from the Ahlins. Echevarria then transferred his business interest, including the license, to his partner, Ares, who then transferred it to Ball. Ball then transferred the business, including the liquor license, to Evans, who was president of the Alpine Corp. The Alpine Corp. transferred the business and liquor license to Uptick Corp. During each of these successive transfers, the Ahlins – owners of the “Alpine Lounge” – caused the lessor of the building to execute a lease that contained a clause restricting that tenant from ever transferring the liquor license away from the Alpine Lounge. By this restrictive covenant in the lease agreement, the Ahlins attempted to create or reserve a “premises interest” in the liquor license for themselves. When the business and the liquor license were transferred to Uptick Corporation, it sued the Ahlins to determine whether such restrictive clause was enforceable.



The question before the Idaho Supreme Court in *Uptick Corp.* was whether private parties could create a “premises interest” in a liquor license. *Id.* at 367-68, 647 P.2d at 1239-40. Reviewing the policies behind Idaho’s liquor by the drink act, the Idaho Supreme Court decided that a private party could not – without review and approval from the state – create a “premises interest” in a liquor license. *Id.* at 368-69, 647 P.2d at 1240-41.

In reaching this decision, the Idaho Supreme Court commented that as “[a] matter of legislative grace, no one has an absolute or inherent right to sell intoxicating liquor.” *Id.* at 368, 647 P.2d at 1240. The Court then went on to discuss the application process established by Idaho Code § 23-901, *et. seq.* and noted that the overriding public policy of the state is that “the department have complete control over who may own a liquor license, and that only persons who could be depended upon to advance the policies of the act were entitled to a license.” *Id.* at 369, 647 P.2d at 1241. Following from that, the Court noted:

[t]he right to renew is included among the privileges appurtenant to a liquor license and is a privilege which is to be exercised exclusively by the named licensee. **To hold otherwise would enable persons who have not subjected themselves to the scrutiny and approval of the director of the Department of Law Enforcement to acquire an interest in a license and circumvent the policy of the act that only qualified persons own licenses and exercise rights thereunder.**

*Id.* (emphasis added).

The instant case can and should be distinguished from *Uptick Corp.*’s narrow factual context because, while *Uptick Corp.* was working its way through the judicial system, the Idaho State Legislature amended Idaho’s liquor by the drink act and added

section 23-908(6), which specifically allowed for transfers of liquor licenses by lease. In putting subsection (6) in place, the Agency requires that both the lessor and lessee subject themselves to the application, review, and approval process of the Agency and both parties must pay the requisite transfer application fee.

Because the Idaho legislature has sanctioned the transfer of a liquor license by lease, the policy justification for restricting the right to renew to the named licensee only is no longer applicable. Because both the lessee and lessor have “subjected themselves to the scrutiny and approval of the Director of the Department of Law Enforcement to acquire [their respective] interest[s] in a license” the lessor of a liquor license does not “circumvent the policy of the act that only qualified persons own licenses and exercise the rights thereunder.” Once a lessor has satisfied the Director that it is fit to exercise the rights associated with a liquor license, the lessor must be afforded the opportunity to renew the license. BV Beverage holds its lessor’s interest in the state liquor license pursuant to this state sanctioned process. Accordingly, there is no legitimate basis to apply the *Uptick Corp.* rationale to disavow BV Beverage’s property rights.

**B. THE OWNER OF A LIQUOR LICENSE TRANSFERRED BY LEASE HAS A PROTECTABLE PROPERTY RIGHT IN RENEWING SUCH LIQUOR LICENSE.**

The Supreme Court of the United States’ constitutional jurisprudence expressly recognizes that where a state creates a marketplace for the transfer of a privilege – such as a liquor license – that privilege acquires certain property rights and the state cannot thereafter disavow those property rights. Here, the State of Idaho created a system that gives rise to property rights associated with the privilege of owning a liquor license, and the State must protect those property rights through constitutionally adequate procedural safeguards. Because the Agency has failed to provide any procedural safeguards to

protect a lessor's interest in a liquor license, this Court should vacate the "deemed expiration" of BV Beverage's liquor license and direct the Agency to give BV Beverage a reasonable opportunity to renew.

**1. The Supreme Court of the United States' rejection of the wooden distinction between privileges and property rights allows for the recognition of property interests in liquor licenses.**

Rather than relying on the wooden distinction between "rights" and "privileges," constitutional jurisprudence requires courts to undertake a more studied analysis of the relationship at issue between the state and the party alleging a property right in a liquor licenses. For many years, courts across the country held that the use of a state liquor license was a "privilege" to which no property rights could attach. *See, e.g., Uptick Corp. v. Ahlin*, 103 Idaho 364, 369-70, 647 P.2d 1236, 1241-42 (1982) (citing authority from Arizona, Delaware, Mississippi, Montana, and Wyoming). However, by the time *Uptick Corp.* was decided, the Supreme Court of the United States had "fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 571 (1972).

Relying on *Roth* in another context, the Idaho Supreme Court noted that property rights and their dimensions are "are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Viking Constr., Inc. v. Hayden Lake Irrigation. Dist.*, 149 Idaho 187, 198, 233 P.3d 118, 129 (2010) (quoting *Roth*, 408 U.S. at 577). Thus, while the Court may have appropriately refused to recognize property rights in *Ahlin* based on the narrow factual context of *Uptick Corp.*,

the same analysis is not appropriate for those who have complied with the State's rules for obtaining their interest in a state liquor license.

Moreover, the Supreme Court of the United States has declared that *Roth* and *Perry v. Sindermann*, 408 U. S. 593 (1972), provide the appropriate framework to determine whether property rights can arise from a state liquor license. *City of Kenosha v. Bruno*, 412 U.S. 507, 515 (1973). Since this decision, courts have begun to re-evaluate the rights/privilege distinction as it applies to a liquor license. *See, e.g., Manos v. City of Green Bay*, 372 F. Supp. 40, 48-49 (E.D. Wis. 1974) (recognizing that the holder of a liquor license had a protectable property interest in the right to renew a liquor license).

For instance, relying on the guidance of *Bruno* and the framework set forth in *Perry* and *Roth*, the Michigan Supreme Court, reversed its longstanding position that a liquor license was a “privilege” granted by the state that could not carry any property rights. *See, generally, Bundo v. City of Walled Lake*, 395 Mich. 679, 238 N.W.2d 154 (1976). Specifically, the Michigan Supreme Court considered the right of renewal (the property rights at issue in this petition for review) and asked “whether the renewal of an existing liquor license ... involves a private ‘interest’ which is either ‘liberty’ or ‘property’ within the meaning of the due process clause of the United States and Michigan Constitutions.” *Id.* at 688, 238 N.W.2d at 158.

Rejecting its prior holdings that a liquor license was a “privilege” to which no property rights could attach, the Michigan Supreme Court made the following comments:

[D]efendant in this case has misplaced its reliance on those Michigan cases which have held that a liquor license is not a ‘property right’ because it is a ‘privilege granted by the state’. Whatever viability the ‘rights/privilege’ doctrine had in Michigan jurisprudence in the past, under the holdings of the United States Supreme Court the mere fact

that an interest exists by the grace of the government no longer precludes that interest from being treated as a 'property' right. Those Michigan cases which have relied upon this doctrine in finding no property interests in liquor licenses no longer can be followed for this purpose.

*Id.*, at 691-92, 238 N.W. 2d at 160.

The court then went on to consider that (i) license holders, having already been issued a license, have a reasonable expectation that a liquor license would be renewed; (ii) license holders invest substantial time and money in liquor licenses based on the reasonable expectation of renewal; and (iii) license holders could not get a new license quickly and easily if the license were lost. *Id.*, at 693-695, 238 N.W.2d at 160-61. Based on these factors, the court determined that the holder of a liquor license had a property interest in the right to renew and held that the right to renew was subject to constitutional due process safeguards. *Id.*

**2. Where the state creates a marketplace for the transfer, exchange, sale, or lease of a license, the property rights associated with a liquor license may be held by one other than the named licensee.**

After rejecting the wooden distinction between the privilege of using a liquor license and the property rights associated with owning and renewing such license, courts began to recognize that property rights associated with owning a license can be held by someone other than the named user of the license. More specifically, where the state creates a marketplace for the transfer, exchange, sale, or lease of a license, anyone holding an interest in a license pursuant to the state sanctioned transaction also has property interest in such license that is subject to constitutional protections. *See, e.g., State v. Saugen*, 283 Minn. 402, 405, 169 N.W. 2d 37, 40 (1969) (noting that while a liquor license may be a privilege granted by the government, the ability to assign or

transfer the license is a property right entitled to due compensation in eminent domain proceedings).

In *Saugen*, the Minnesota Supreme Court considered the value of a liquor license as it related to the “going concern value” of a business for purposes of eminent domain. The state argued that, because a liquor license was a privilege, no property rights could attach and, therefore, no compensation was due. *Id.*, at 405, 169 N.W.2d at 40. While observing that the several states differed as to whether a liquor license is properly characterized as property or a privilege, *vis-à-vis* third parties, the court noted:

This difference of opinion as to the legal nature of a liquor license is apparently due to the fact, not always recognized by the courts, that such license, while a mere privilege as far as the relation between the government and the licensee is concerned, nevertheless constitutes a definite economic asset of monetary value for its owner.

*Id.*, at 405-06, 169 N.W.2d at 40 (quoting Annotation, 148 A.L.R. 492.). Where the state sanctions the marketplace that exists for the transfer and exchange of a license, the state has a duty to recognize and protect the property thereby created:

It is submitted that wherever the legislature has made licenses assignable or transferable, and the transfer can be effected with the consent of the authorities to anyone qualifying under the statute, the property element of the license is sufficiently recognized to warrant its exposure to seizure by the creditors of the licensee.

*Id.*, at 406, 169 N.W.2d at 40; *see also Boonstra v. City of Chicago*, 214 Ill. App.3d 379, 386-87, 574 N.E.2d 689, 694 (1991).

Accordingly, unless the state is acting within its “police power” for purposes of determining if an applicant is fit to exercise the privileges associated with the license, (i.e., use the license to operate a liquor by the drink establishment), the license must be treated as a property interest for all other purposes: “While it is true that liquor

businesses are appropriately subject to more scrutiny and control than most businesses when the government is acting pursuant to its police power, they have the same rights as any other business when the government is not acting pursuant to such police power....” *Saugen.*, at 409, 169 N.W.2d at 42. (emphasis added).

The dual cases of *Barr v. Pontiac City Comm’n*, 90 Mich. App. 446, 282 N.W.2d 348 (Mich. App. 1979) and *Bunn v. Michigan Liquor Control Comm’n*, 125 Mich. App. 84, 335 N.W.2d 913 (Mich. App. 1983) specifically considered the property rights of persons other than the named licensee who hold an interest in a liquor license. In *Barr* the license owner sold his interest in land, a building, and the liquor license to Epps, but retained for himself a security interest in the license. 90 Mich. App. at 448-49, 282 N.W.2d at 349-50. When Barr applied to have the license transferred back to himself, the licensing authority disapproved the transfer and refused to grant Barr a due process hearing regarding its decision. *Id.* at 449, 282 N.W.2d at 449. The licensing authority maintained that Barr – holder of a “reversionary interest” in the license – was not entitled to a “due process hearing because he had no property right in the license renewal” and “at best [Barr] had a mere unilateral expectation as an applicant for a license.” *Id.* at 451, 282 N.W. 2d at 350.

Both the trial court and the Court of Appeals disagreed with the licensing authority’s decision, finding that the holder of a reversionary interest in a license has a greater property right than a new applicant: “While [Barr’s] interest in the license is not ‘title’ *per se*, it is a much stronger interest than that of a new applicant or proposed transferee.” *Id.* at 453, 282 N.W.2d at 351. The court then held that Barr’s reversionary

interest in the liquor license gave him a property interest in the renewal of the license and he was entitled to minimum due process protections. *Id.*

Relying on *Barr*'s recognition of property rights in one holding a security interests in a liquor license, the Michigan Court of Appeals held that the state cannot take adverse actions respecting the named licensee that would work to undermine the property rights of another holding an interest in that liquor license without proper due process safeguards. *Bunn*, 125 Mich. App. 84, 88, 335 N.W. 2d 913, 915.

In *Bunn*, Bunn sold his liquor license to Lawson and reserved the right to have the license transferred back to him in the event of default. *Id.*, at 87, 335 N.W.2d at 914. Lawson defaulted and Bunn attempted to foreclose on Lawson's property, including the liquor license, and to have the license transferred back into his name. *Id.*, at 87-88, 335 N.W.2d at 915. While the court held that Bunn did not have a sufficient interest in the license to entitle him to due process notice of the adverse actions against Lawson,<sup>2</sup> *Id.*, at 92, 335 N.W.2d at 917, it went on to hold that the adverse actions against Lawson could not impact Bunn's interest in the liquor license:

However, once [Bunn] foreclosed upon the property, he held a reasonable and legitimate claim of entitlement to the liquor licenses. The trial court in the foreclosure action provided in its judgment and order that plaintiff regain all of his liquor licenses from Lawson. We are of the opinion that Lawson's loss of the licenses should not affect plaintiff's legitimate claims to them.

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<sup>2</sup> The concurring opinion disagreed with the court's conclusion that Bunn did not have sufficient interest in the liquor license to give him the right to notice of the adverse proceedings pending against Lawson, stating: "I would hold that [Bunn] did have a property right in the license in question sufficiently great so as to entitle him to notice of the hearing before the city council as well as the MLCC revocation proceeding involving Lawson's liquor license. The giving of such notice would not present any undue burden, in that the MLCC is aware of the identity of persons having such interest in licensed establishments." *Bunn*, 125 Mich. App. at 95-96, 335 N.W.2d at 918 (E.A. Quinnell, J. concurring).



*Id.* The court specifically noted that the State's approval of the contractual arrangement between Bunn and Lawson gave Bunn the legitimate expectation of retransfer of the license to him, should any problems arise with Lawson:

[B]ecause [Bunn's] sale of the business, including the underlying contractual arrangements, was approved by the MLCC, his expectation of retransfer, should any problems arise, was legitimate. As the Court noted in *Perry v. Sindermann, supra*, [a] person's interest in a benefit is a property interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit that he may invoke at a hearing." 408 U.S. 601.

Based on [Bunn's] legitimate understanding that his security arrangements were legitimate and recognized by the MLCC, [Bunn] is entitled to rudimentary due process as provided by the Court in *Barr v. Pontiac City Comm, supra*, p. 449.

*Id.* at 93, 335 N.W. 2d at 917.

**3. The legitimate expectation of the right to renew and the existence of a marketplace for the transfer of a liquor license by lease, give rise to a lessor's protectable property interest in the right to renew.**

The State has created a marketplace for liquor licenses, and it has a concurrent responsibility to extend due process protections to the property rights arising from such marketplace. Where the licensing authority creates a marketplace for licenses, the licenses become more than

just [a] mere personal permit [] granted by a governmental body to a person to pursue some occupation or carry on some business subject to regulation under the police power. Black's Law Dictionary 829 (5th ed. 1979). In a functional sense, the [] licenses embrace[] the essence of property in that they [are] securely and durably owned and marketable.

*Boonstra v. City of Chicago*, 214 Ill. App.3d 379, 386-87, 574 N.E.2d 689, 694 (1991).

That is to say the privilege of use of a license regulated pursuant to the state's police powers may carry hallmarks of ownership and marketability that are subject to due process protections. Idaho state liquor licenses carry all of the characteristics of marketability and, because these characteristics are products of the state's licensing scheme, the state has the responsibility to ensure adequate procedural safeguards.

Idaho's Retail Sale of Liquor-by-the-Drink Act (the Act), I.C. §§ 23-901 *et seq.*, and the Rules Governing Alcohol Beverage Commission (the Rules), IDAPA 11.05.01 *et seq.*, create a legitimate expectation of renewal, create a marketplace for the sale and exchange of liquor licenses, and support BV Beverage's claimed property interest in the liquor license.

In Idaho, the State has created a legitimate expectation of renewal of all issued and outstanding liquor licenses because such licenses are renewed as a matter of course. I.C. § 23-908(1). Even if the Director has initiated revocation proceedings against the licensees, he must still renew the license during the course of those proceedings. I.C. § 23-933(4). Like renewals, transfers are also approved as a matter of course, unless the transfer applicant does not qualify under the provisions of the Act. Licenses may be transferred by sale, in bankruptcy, through testate or intestate succession, and by lease. I.C. § 23-908(5)-(6).<sup>3</sup> Because the state allows for only a limited number of licenses, I.C. § 23-903, they are a valuable asset to every person who holds an interest in one. The

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<sup>3</sup> Idaho Code Section 23-908(6) was added by the legislature at the time *Uptick Corp.* was making its way through the courts. The Legislature specifically noted that the State was missing out on a lot of "revenue generation" because license holders were leasing their liquor licenses and avoiding the 10% fee for selling liquor licenses. The state expressly acknowledged the value created by limiting the number of liquor licenses and creating an active leasing marketplace. It then sanctioned transfers by lease and added the 50% fee for the stated purpose of increasing state revenue. H.B. 98, Idaho Sess. Laws, Ch. 74, p. 108 (1981); Statement of Purpose & Fiscal Impact, RS 6291 (1981); State Affairs Committee Minutes, Jan. 27, 1981, Feb. 17, 1981, and Mar. 10, 1981. Attached as Appendix A for the Court's convenience.

State, by creating a legitimate expectation of renewal and sanctioning, has created a very active marketplace for liquor licenses.

**4. The Agency’s refusal to allow a lessor to renew a liquor license does not bear a substantial relation to the exercise of its police power and infringes on the lessor’s fundamental property rights.**

As between the licensee and the State in the exercise of its police power, a liquor license is a privilege, *see, e.g. Alcohol Bev. Control v. Boyd*, 148 Idaho 944, 947, 231 P.3d 1041, 1044 (2010), but even the Court in *Uptick Corp.* noted and recognized that a liquor license was a valuable, marketable asset. 103 Idaho 364, 365 n.1, 647 P.2d 1236, 1237 n.1 (1982). Accordingly, a distinction must be recognized: when the state is not acting pursuant to its police power, the holders of liquor licenses owners of state issued licenses have the same property rights as any other property owner. *State v. Saugen*, 283 Minn. 402, 409, 169 N.W.2d 37, 42 (1969).

Where the state’s purported exercise of its “police powers” are not reasonable and do not have “some direct, real and substantial relation to the public object sought to be accomplished” then “it is incumbent upon the judicial department to examine the [regulation] and determine whether or not the legislatures have overreached their prerogative and impinged the fundamental law.” *Rowe v. City of Pocatello*, 70 Idaho 343, 350, 218 P.2d 695, 699 (1950). “[I]f an individual has important interests which otherwise would be entitled to the protection of procedural due process, he cannot be denied this constitutional safeguard because the business in which he is engaged happens to involve alcoholic beverages.” *Bundo v. City of Walled Lake*, 395 Mich. 679, 687, 238 N.W.2d 154, 157 (1976).

The State does not exercise its police powers with respect to the renewal of a liquor license. Once a person has been approved to own a liquor license, the Agency is

required to approve the renewal application if it is timely and accompanied by the proper fee. I.C. § 23-908. Even if revocation proceedings are underway, the Agency must still approve renewal applications. I.C. § 23-933(4). Because BV Beverage has subjected itself to the Agency's application, review and approval process, the evils to be guarded against in *Uptick Corp.* do not exist. In *Uptick Corp.*, the Idaho Supreme Court rejected the Ahlin's claimed property right in the liquor license because Ahlin had not subjected himself to the scrutiny of the State for a determination of whether he was fit to hold a liquor license. The Court reasoned that the purpose of the Act was to protect the health and safety of Idahoans and to promote temperance. *Uptick Corp. v. Ahlin*, 103 Idaho 364, 369, 647 P.2d 1236, 1240 (1982). The structure of the Act, including the "application procedure and the procedure to be followed in transferring [by sale] liquor licenses, see I.C. § 23-908, makes it clear that the legislature painstakingly attempted to ensure that the department have complete control over who may own a liquor license." *Uptick Corp.* at 370, 647 P.2d at 1241.

Here, BV Beverage has cured the fatal defect that precluded Ahlin from asserting a property interest in a liquor license. BV Beverage did subject itself to the scrutiny of the Agency: it submitted an application, a transfer fee, fingerprints, and its principals underwent background checks. The Agency declared that BV Beverage was fit to own a liquor license and approved issuance of the license to BV Beverage and, contemporaneously with such approval, approved the transfer of that license by lease to a third party. Agency R. at a & b. Because the State has exercised its police power in determining that BV Beverage is fit to own an interest in an Idaho State liquor license, the State can gain nothing more in the exercise of its police powers by denying

BV Beverage the right to renew and otherwise protect that interest. Accordingly, the Agency's refusal to recognize BV Beverage's property rights in the license and refusal to allow BV Beverage to renew the license does not bear a "direct, real, and substantial relation to the public object sought to be accomplished." It is therefore unreasonable and should not be condoned.

**C. THE ESTABLISHED STATE SYSTEM IS UNCONSTITUTIONAL BECAUSE IT DEPRIVES LESSORS OF THEIR PROPERTY RIGHTS BY OPERATION OF LAW AND FAILS TO PROVIDE LESSORS WITH EVEN MINIMAL DUE PROCESS PROTECTIONS.**

The State has created a marketplace for state liquor licenses, so it cannot deprive the lessor of its property rights in its liquor license without the minimum protections and safeguards required by the due process clause of the Idaho Constitution and United States Constitution: notice and an opportunity to be heard.

Under Idaho Code § 23-932, the Director of the Idaho State Police has the statutory duty "to prescribe forms to be used in the administration of this act." Idaho Code § 23-908(1) provides that those seeking to renew a license must submit a "proper application" and submit a "renewal application" and fee on a schedule set by the Director. Pursuant to these two sections, the Director must promulgate forms to be used in the renewal of liquor licenses.

In carrying out its statutory duty to make forms available for the renewal of a liquor license, the Agency sends renewal notices and applications for renewal to the named licensee only. Because the Agency does not recognize any property rights in the lessor of a liquor license, the Agency maintains that the lessor has no right to renew the license and does not provide renewal applications to lessors of liquor licenses. Likewise, the Agency does not notify the owner of the liquor license if the lessee has failed to timely submit its renewal application. If a lessor wishes to renew the liquor license it

must go through the same transfer application process as a person who holds no interest, whatsoever, in the license: it must submit a transfer application (to recover the license back from the lessee) along with the lessee's renewal application and an Authorization to Transfer and Assignment of Privilege to Renew. IDAPA 11.05.01.12.03. In effect, the Agency treats the lessor as a complete stranger to the license.

It is anticipated that the Agency will argue that a lessor does not have a legitimate expectation of the right to renew because the renewal system has never extended such rights to lessors. However, the Agency cannot rely on an established state system that violates the due process rights of lessors for the proposition that such lessors have no due process rights. The State's actions have created a marketplace for the lease of a liquor license. The State has created property rights in the lessor. The State cannot now disavow such property interest and fail to provide adequate constitutional protections:

Each of our due process cases has recognized, either explicitly or implicitly, that because "minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official actions." (citations omitted). **Indeed, any other conclusion would allow the State to destroy at will virtually any state-created property interest.** The Court has considered and rejected such an approach: "While the legislature may elect not to confer a property interest, ... it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.... **[T]he adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms.**"

*Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982) (emphasis added).

Idaho's own due process jurisprudence recognizes the need for the same type of procedural safeguards:

Due process of law is not necessarily satisfied by any process which the legislature may by law provide, but by such process only as safeguards and protects the fundamental, constitutional rights of the citizen. Where the state confers a license upon an individual to practice a profession, trade or occupation, such license becomes a valuable personal right which cannot be denied or abridged in any manner except after due notice and a fair and impartial hearing before an unbiased tribunal.

*Abrams v. Jones*, 35 Idaho 532, 546, 207 P. 724, 727 (1922).

The Supreme Court of the United States explained in *Logan* that where the established state system itself deprives the claimant of his constitutional rights by operation of law, such system is unconstitutional. *Logan*, 455 U.S. at 432. In *Logan*, a state agency's failure to take action within the statutory timeframes caused a claimant to be deprived of his constitutional rights. *See, generally, Id.* There, an employee had the right to file claim respecting employment discrimination, but under established state procedure, a pre-requisite to filing a claim was for the fair employment practices commission to initiate an investigation within 120 days of the incident. *Id.*, at 424. The commission failed to timely commence the investigation and then refused to allow the employee to file a claim. *Id.*, at 426. The trial court held that the commission's failure to timely institute the investigation deprived the claimant of the right to bring his claim as a matter of law. *Id.*, at 436. The Supreme Court of the United States disagreed and found that "it [was] the state system itself that destroys a complainant's property interest, by operation of law" and held the system to be unconstitutional. *Id.*, at 436-38.

The instant case is similar to *Logan* because both established state systems can work to deprive an individual of its property rights, as a matter of law, through an agency's inaction. Under the Act, all state liquor licenses shall expire by operation of law

at 1:00 o'clock a.m. on the first day of the renewal month. I.C. § 23-908(1).<sup>4</sup> However, in order to renew a license, the renewal applicant must first receive a renewal application from the Agency. The Agency does not provide renewal application to lessors of liquor licenses. Accordingly, if the lessee fails to timely renew, the Agency then deems the lessor's interest expired by operation of law and without giving the lessor the opportunity to protect its rights.

The established state system created by the Agency creates an unconstitutional taking. As a matter of constitutional law, because the State has created a marketplace for the lease of liquor licenses, liquor license lessors have an interest in their respective liquor licenses that are subject to minimum due process protections. The Agency cannot, therefore, require lessors to rely exclusively on their lessees to timely renew. Likewise, the Agency cannot treat lessors as complete strangers to the license and require the lessor to complete a transfer from the lessee back to the lessor as a precondition to allowing the lessor the right to renew. Without proper notice and opportunity to renew given to the lessor in its capacity as lessor, adverse actions taken against the lessee (even if they occur by operation of law) cannot impact the lessor's property rights. The lessor must be afforded the opportunity to protect its own interest.

**D. THE STATE MUST AFFORD BV BEVERAGE THE OPPORTUNITY TO RENEW THE LICENSE.**

Because the established state system lacks adequate constitutional safeguards to protect lessors' property interests, the next inquiry for this Court is what process is due. *Thompson Creek Mining Co. v. Idaho Dep't of Water Res.*, 148 Idaho, 200, 213, 220 P.3d, 318, 331 (2009). This inquiry involves an investigation and balancing of the

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<sup>4</sup> The statute provides for a 30-day grace period to submit late applications to renew, on the condition that liquor cannot be sold by the late filing renewal applicant until the renewed license is received.



seriousness of the deprivation of the property right at issue against the governmental interest involved. *Bundo v. City of Walled Lake*, 395 Mich. 679, 696, 238 N.W.2d 154, 162 (1976).

Weighing the property rights to be protected against the governmental interest involved, it is reasonable for the Agency to be required to provide the lessor of a liquor license with reasonable access to a renewal application. If the liquor license is not timely renewed, the lessor stands to lose a real and valuable property interest, in which it has invested substantial time and money, and which is not easily replaced. Because the lessor's fitness to hold a liquor license has already been reviewed and approved by the Director, the government interest at stake is quite low. Indeed, the primary interest at stake appears to be generating revenue, an interest that would be better served by affording the lessor the opportunity to renew the license.

Additionally, the burden on the government in providing the lessor notice and opportunity to renew is extremely low. The Agency knows, by virtue of the lease agreement that it has previously reviewed and approved, the identity of all parties having an interest in the leased liquor license. It would cause very little hardship for the Agency to send out an additional renewal application to liquor license lessors at or near the time for renewal. Alternatively, the Agency could simply make renewal applications available via the internet or other reasonably available public medium so that lessors are not dependent on the Agency providing them with the paperwork necessary to timely renew the liquor license.

Given the magnitude of the property interest that lessors stand to lose if a license is not timely renewed, the minimum governmental interest to be protected by the renewal

process, and the minimum intrusion on the government that would be required to protect a lessor's property interest, this balancing test weighs heavily in favor of requiring the Agency to make some form of renewal application available to lessors of a liquor license.

**E. THE AGENCY'S VIOLATION OF BV BEVERAGE'S DUE PROCESS RIGHT PREVENT IT FROM VOIDING OR REVOKING THE LICENSE PRIOR TO AFFORDING BV BEVERAGE AN OPPORTUNITY TO RENEW THE LICENSE.**

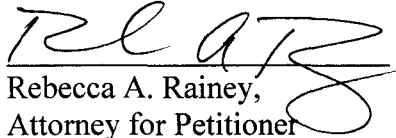
The established state system did not afford BV Beverage, the lessor of a liquor license, a reasonable opportunity to renew its license. In the absence of the reasonable opportunity to renew, and by the failure of the lessee exercising its right to renew, the Agency declared BV Beverage's liquor license to be expired by operation of law. Because the "deemed expiration" of the liquor license was the result of an established state system that lacked constitutionally adequate safeguards, such "deemed expiration" must be vacated and the Agency should be directed to provide BV Beverage with a reasonable opportunity to renew the liquor license.

**VI. CONCLUSION**

BV Beverage respectfully requests that this Court declare that the liquor license is not expired by operation of law and direct the Agency to provide BV Beverage with the opportunity to apply for the renewal of such license.

DATED THIS 29<sup>th</sup> day of June, 2011.

REBECCA A. RAINEY, P.A.

  
Rebecca A. Rainey,  
Attorney for Petitioner

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 29<sup>th</sup> day of June, 2011, I caused a true and correct copy of the foregoing **PETITIONER'S APPELLATE BRIEF** to be served by the method indicated below, and addressed to the following:

CHERYL A. MEADE  
Idaho State Police/Alcohol Beverage Control  
700 S. Stratford  
P.O. Box 700  
Meridian, ID 83642

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile

  
Rebecca A. Rainey

# **Appendix A**

SECTION 2. That Section 23-908, Idaho Code, be, and the same is hereby amended to read as follows:

23-908. FORM OF LICENSE -- AUTHORITY -- EXPIRATION -- LIMITATIONS. (1) Every license issued under this act shall set forth the name of the person to whom issued, the location by street and number or other definite designation, of the premises, and such other information as the director shall deem necessary. If issued to a partnership, the names of the persons constituting such partnership shall be set forth. If issued to a corporation or association, the names of the principal officers and the governing board shall be set forth. Such license shall be signed by the licensee and prominently displayed in the place of business at all times. Every license issued under the provisions of this act is separate and distinct and no person except the licensee therein named except as herein otherwise provided, shall exercise any of the privileges granted thereunder. All licenses shall expire at 1:00 o'clock A.M. on January 1st of the following year and shall be subject to renewal upon proper application. Renewal applications for liquor by the drink licenses accompanied by the required fee must be filed with the director on or before January 1st of the following year, provided, however, any licensee holding a valid license who fails to file an application for renewal of his current license on or before January 1st of the following year shall have a grace period of an additional thirty-one (31) days in which to file an application for renewal of his license and during which time he shall not be permitted to sell and dispense liquor by the drink at retail. No person shall be granted more than one (1) license in any city for any one (1) year; and no partnership, association or corporation holding a license under this act shall have as a member, officer or stockholder any person who has any financial interest of any kind in, or is a member of, another partnership or association or an officer of another corporation holding a license in the same city for the same year; provided that this section shall not prevent any person, firm or corporation, owning two (2) or more buildings on connected property in a city from making application for and receiving licenses permitting the sale of liquor by the drink in such building.

(2) An application to transfer any license issued pursuant to chapter 9, title 23, Idaho Code, shall be made to the director. Upon receipt of such an application, the director shall make the same investigation and determinations with respect to the transferee as are required by section 23-907, Idaho Code, and if the director shall determine that all of the conditions required of a licensee under chapter 9, title 23, Idaho Code, have been met by the proposed transferee, then the license shall be indorsed over to the proposed transferee by said licensee for the remainder of the period for which such license has been issued and the director shall note his approval thereof upon such license.

(3) Each new license issued on or after July 1, 1980, shall be placed into actual use by the original licensee at the time of issuance and remain in use for at least six (6) consecutive months or

forfeited to the state and be eligible for issue to another person by the director after compliance with the provisions of section 23-907, Idaho Code. Such license shall not be transferrable for a period of two (2) years from the date of original issuance, except as provided by subsections (a), (b), (c), (d) or (e) of subsection (4) of this section.

(4) The fee for transferring a liquor license shall be ten per cent (10%) of the purchase price of the liquor license or the cost of good will, whichever is greater; except no fee shall be collected in the following events:

(a) The transfer of a license between husband and wife in the event of a property division; or

(b) The transfer of a license to a receiver, trustee in bankruptcy or similar person or officer; or

(c) The transfer of a license to the heirs or personal representative of the estate in the event of the death of the licensee;

or

(d) The transfer of a license arising out of the dissolution of a partnership where the license is transferred to one or more of the partners.

(e) The transfer of a license within a family whether an individual, partnership or corporation.

(5) The controlling interest in the stock ownership of a corporate licensee shall not be, directly or indirectly, sold, transferred, or hypothecated unless the licensee be a corporation, the stock of which is listed on a stock exchange in Idaho, or in the city of New York, state of New York, or which is required by law to file periodic reports with the securities and exchange commission. Provided, however, that in the event of the transfer of more than twenty-five per cent (25%) of the authorized and issued stock of the corporation, it shall create a rebuttable presumption that such transfer constitutes a transfer of the controlling interest of such corporation.

SECTION 3. An emergency existing therefor, which emergency is hereby declared to exist, this act shall be in full force and effect on and after its passage and approval.

Approved April 2, 1980.

CHAPTER 314  
(S.B. No. 1304)

AN ACT

RELATING TO EXEMPTION FROM MOTOR VEHICLE OPERATING FEES; AMENDING CHAPTER 1, TITLE 49, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 49-134A, IDAHO CODE, TO PROVIDE THAT VEHICLES OVER THIRTY YEARS OF AGE WHICH DO NOT QUALIFY AS AN "IDAHO OLD TIMER" MAY, UNDER CERTAIN CONDITIONS, BE REGISTERED AS AN "IDAHO CLASSIC," AND PRESCRIBING THE REQUIREMENTS FOR SUCH REGISTRATION.

STATEMENT OF PURPOSE

RS 4883C2

The purpose of this bill is to discourage speculation in liquor licensing by requiring the original holder of the license to put it into use immediately upon its receipt and to continue its use for six consecutive months and by providing that the license will not be transferable for two years after its original issuance.

The bill further provides for payment to the state of a transfer fee of 10% of the purchase price of the liquor license, with some specific exemptions.

It specifies that the transfer of 25% of the stock of a corporation shall be presumed to be the transfer of the controlling interest of the corporation.

FISCAL IMPACT

Estimated revenue of \$900,000 per year.

1392

RS 5428 RELATING TO THE SERVICE OF LEGISLATIVE SUBPOENAS.

Senator Risch: A bill to do this has already been printed in Judiciary and Rules.

Senator Budge asked this bill be held.

S 5408 RELATING TO SALARIES OF MEMBERS OF THE INDUSTRIAL COMMISSION.

Paul Boyd, attorney for the Commission was present to speak on behalf of this legislation. The Commission handles cases on Workman's Compensation. He stated 44,000 cases were handled last year and no decrease is expected. The salaries are low and feel they merit an increase.

Bill Roden, speaking as a private attorney, also felt the salaries were low and an increase was merited.

MOTION: Senator Risch moved and Senator Chase seconded this be sent for print. Motion carried.

S 4883-C3 RELATING TO LIQUOR LICENSES: RESALE OF.

Senator Dabler was present to speak on behalf of this legislation. The purpose of the bill is to discourage speculation in liquor licensing by requiring the original holder of the license to put it into use immediately upon receipt and to continue its use for six months and by providing that the license will not be transferable for two years after its original issuance. There would also be a transfer fee of 10% of the purchase price of the liquor license.

Senator Hartvigsen: I don't see why the state sells these licenses so cheaply and then the people turn around and sell them for a large sum. I would like to see the fee at 50%.

Senator Dabler: The 10% fee would bring in approximately \$900,000 a year for the general fund.

MOTION: Senator Chase moved and Senator Merrill seconded this be sent to print. Motion carried.

Senator Chase asked unanimous consent an emergency clause be added to the RS before printing.



2-29-80

S 1392 AMENDS EXISTING LAW TO CHANGE REQUIREMENTS FOR THE TRANSFER OF A LIQUOR LICENSE.

Senator Dobler briefed the committee regarding the implications of each section of the bill, and stated that the overall purpose was to eliminate or discourage speculation. The Chairman pursued questioning regarding the dangerous precedent this bill would set establishing full disclosure in any transfer of real estate. Mr. Bill Roden said that they presently require disclosure of the sales price of the license. Representative McDermott questioned Mr. Roden regarding Section 5, which she felt would make legitative transfers difficult. Mr. Roden admitted that it would in some instances. Mr. Dick Cade addressed the committee. Senator Dobler made mention of the fact that the Innkeeper's Association supported the bill. Representative McDermott expressed additional concern over Section 3 on Page 3.

MOTION A motion was made by Representative Fitz and seconded by Representative Braun that S 1392 be sent to the floor with a "do pass" recommendation. Representative McDermott submitted an amended motion that S 1392 be held for further study and consideration. Representative Chatburn seconded the motion. THE AMENDED MOTION FAILED. THE ORIGINAL MOTION CARRIED. The Chairman opposed the original motion, due to the legitamate problems evidenced.

MOTION A motion was made by Representative Little and seconded by Representative McDermott that the committee consider H 359 and H 641 together. There was no objection.

H 359 AMENDS EXISTING LAW TO PROVIDE FOR APPROVAL, BY AFFECTED ELIBIBLE VOTERS, OF COMPREHENSIVE LAND-USE PLANS.

H 641 AMENDS EXISTING LAW TO PROVIDE FOR THE QUESTION OF CITY AND COUNTY PLANNING AND ZONING AT AN ELECTION AND TO PROVIDE FOR PETITIONS FOR SUCH AN ELECTION BY THE QUALIFIED VOTERS OF A CITY OR COUNTY.

Representative Little passed out hand-outs showing that the initiative and referendum is available to citizens through 31717, regarding counties and county law.

Wayne Stolfus spoke in support of H 641, voicing advantages including the application of land use planning for individual counties, no effect unless voted on by majority, the simplicity of the bill - the low cost mechanism, the fact that no election is necessary unless it is requested, and that it allows the governing authority to place it on the ballot voluntarily.

Doris Oliason told committee members that there was statewide unrest regarding the lack of land use planning control by citizens. She voiced opposition to H 359.

Walter Gerlach said he was opposed to the comprehensive plan implementing the Land Use Bill because it allowed the control of the peoples' capitol investments.

Mr. Clyde SMart told members that he had polled a portion of the registered electorate, and found that 97% of them felt that they should be able to vote on zoning. He felt that H 641 would allow them to do that.

Rex Moyle told committee members that he was against "monetary slavery."

Paul Wise asked the committee for their favorable vote for H 641.

Sandra De Klotz, representing the League of Women Voters, opposed the bills because she felt they would make the process "unwieldy", and that the people had the responsibility to participate in the planning process.

Gene Bailey, rancher, spoke against restrictions, and stated that the public needs broad representation - through H 641.

Mr. Don Chance supported H 641, since it gives the people the right of decision.

MOTION

A motion was made by Representative Little and seconded by Representative Harris that S 1437 be sent to the floor with a "do pass" recommendation. THE MOTION CARRIED.

S 1276

ADDS TO AND AMENDS EXISTING LAW TO CLARIFY PROCEDURES GOVERNING PROMULGATION, PUBLICATION, AND INCORPORATION BY REFERENCE OF ADMINISTRATIVE RULES OF STATE AGENCIES.  
Dawn Stalum from Health & Welfare, told members that S 1276 contains beneficial "housekeeping" provisions.

MOTION

A motion was made by Representative Danielson and seconded by Representative Braun that S 1276 be sent to the desk with a "do pass" recommendation. THE MOTION CARRIED.

S 1392

DISCOURAGE SPECULATION IN LIQUOR LICENSING BY REQUIRING THE ORIGINAL HOLDER OF THE LICENSE TO PUT IT INTO USE IMMEDIATELY UPON ITS RECEIPT AND TO CONTINUE ITS USE FOR SIX MONTHS, AND PROVIDING THAT THE LICENSE WILL NOT BE TRANSFERABLE FOR TWO YEARS.

Senator Dobler addressed the committee, telling them that the changes included "clean-up" language, and the setting of the deadline for reporting. She said that it also adds the exception regarding transfer of licenses within a family.

MOTION

A motion was made by Representative Little and seconded by Representative Kennevik that S 1392 be held one legislative day, so that Representative MCDermott could be present. An Amended Motion was made by Representative Miller and seconded by Representative Bunting that S 1392 be sent to the desk with a recommendation that it be placed on General Orders. THE MOTION CARRIED.

S 1438

REPEALS AND ADDS TO EXISTING LAW TO PROVIDE A RECODIFICATION OF THE BOATING LAWS FOR THE STATE OF IDAHO.

Representative Miller explained the bill briefly for the committee. He turned the remainder of the time over to Pat Riceci, who said that the bill had been redrafted so that the marine deputies can locate what they are looking for in the Idaho Code. Representative Ingram pursued a series of questions regarding what specific changes the bill would implement. Mr. Riceci hesitated in answering, explaining that there were as many as 40 changes. A few of them were reviewed.

MOTION

A motion was made by Representative Ingram and seconded by Representative Lewis that S 1438 be held for further consideration and study. An amended motion was made by Representative Miller and seconded by Representative Scanlin that S 1438 be held for one legislative day. THE AMENDED MOTION FAILED. THE ORIGINAL MOTION CARRIED.

The meeting was adjourned.

  
John Reardon, Chairman

  
Rhonda Putnam, Secretary

JUL 20 2011

CHRISTOPHER D. RICH, Clerk  
By LUCILLE BANSEREAU  
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BV BEVERAGE COMPANY, LLC., a Idaho  
limited liability company,

Petitioner,

vs.

THE STATE OF IDAHO, DEPARTMENT OF  
IDAHO STATE POLICE/ALCOHOL  
BEVERAGE CONTROL, G. JERRY  
RUSSELL, in his official capacity as Director of  
Idaho State Police,

Respondent.

Case No. CV-OC-2011-06351

**ORDER GRANTING EXTENSION  
OF TIME TO FILE BRIEF**

Counsel for the State, Cheryl Meade, has requested an extension of time to 5:00 p.m. on Friday, July 20, 2011, to file her brief in this matter. The Court advised her through the Clerk of the Court to attempt to reach opposing counsel.

Later in the day, the Court was contacted by Judge Peter McDermott who advised this Court that counsel for the State was conducting a hearing before him in Pocatello and if the extension could not be granted, he would be required to continue his hearing in Bannock County. The Court had Judge McDermott put counsel for the State on the phone and this Court inquired as to the efforts she had made to contact opposing counsel. She advised this Court that she had called and left messages for opposing counsel, but the calls had not been returned at this time.

Given the inconvenience to Plan B Judge McDermott, the cost to the State and Court, as

well as the inconvenience to witnesses if the hearing had to be re-scheduled, the Court granted the continuance *ex parte* after being assured efforts had been made to reach opposing counsel but were unsuccessful.

The State is hereby granted an extension to 5:00 p.m. on Friday, July 20, 2011, to file their brief. The Court sees no prejudice to opposing counsel or his client in granting such a short continuance to allow the State to file its brief and believes this to be a scheduling matter not involving issues on the merits pursuant to Canon 3, subpart 7(a) of the Idaho Code of Judicial Conduct.

**IT IS SO ORDERED.**

**DATED** this 20th day of July, 2011.



MIKE WETHERELL  
District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 20<sup>th</sup> day of July, 2011, I mailed (served) a true and correct copy of the within instrument to:

REBECCA A RAINEY  
ATTORNEY AT LAW  
2627 W IDAHO STREET  
BOISE ID 83702

CHERYL A MEADE  
IDAHO ATTORNEY GENERAL'S OFFICE  
700 S STRATFORD DR  
MERIDIAN ID 83642

CHRISTOPHER D. RICH  
Clerk of the District Court

By:   
Deputy Court Clerk

JUL 21 2011

CHRISTOPHER D. RICH, Clerk  
By ~~LUCILLE GANSEREAU~~  
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BV BEVERAGE COMPANY, LLC., a Idaho  
limited liability company,

Petitioner,

vs.

THE STATE OF IDAHO, DEPARTMENT OF  
IDAHO STATE POLICE/ALCOHOL  
BEVERAGE CONTROL, G. JERRY  
RUSSELL, in his official capacity as Director of  
Idaho State Police,

Respondent.

Case No. CV-OC-2011-06351

***CORRECTED ORDER  
GRANTING EXTENSION  
OF TIME TO FILE BRIEF***

Counsel for the State, Cheryl Meade, has requested an extension of time to 5:00 p.m. on Friday, July 29, 2011, to file her brief in this matter. The Court advised her through the Clerk of the Court to attempt to reach opposing counsel.

Later in the day, the Court was contacted by Judge Peter McDermott who advised this Court that counsel for the State was conducting a hearing before him in Pocatello and if the extension could not be granted, he would be required to continue his hearing in Bannock County. The Court had Judge McDermott put counsel for the State on the phone and this Court inquired as to the efforts she had made to contact opposing counsel. She advised this Court that she had called and left messages for opposing counsel, but the calls had not been returned at this time.

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The State is hereby granted an extension to 5:00 p.m. on Friday, July 29, 2011, to file their brief. The Court sees no prejudice to opposing counsel or his client in granting such a short continuance to allow the State to file its brief and believes this to be a scheduling matter not involving issues on the merits pursuant to Canon 3, subpart 7(a) of the Idaho Code of Judicial Conduct.

**IT IS SO ORDERED.**

**DATED** this 21st day of July, 2011.

  
MIKE WETHERELL  
District Judge

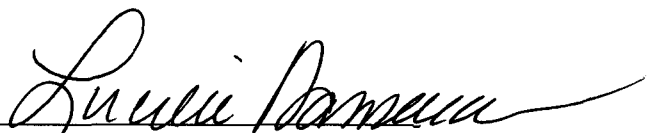
CERTIFICATE OF MAILING

I hereby certify that on the 21<sup>st</sup> day of July, 20 11, I mailed (served) a true and correct copy of the within instrument to:

REBECCA A RAINEY  
ATTORNEY AT LAW  
VIA FAX: 473-2952

CHERYL A MEADE  
IDAHO ATTORNEY GENERAL'S OFFICE  
VIA FAX: 884-7228

CHRISTOPHER D. RICH  
Clerk of the District Court

By:   
Deputy Court Clerk



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NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. *July*

JUL 28 2011

CHRISTOPHER D. RICH, Clerk  
By ELYSHIA HOLMES  
DEPUTY

**ORIGINAL**

LAWRENCE G. WASDEN  
Attorney General

CHERYL E. MEADE  
Deputy Attorney General  
Idaho State Police  
700 S. Stratford Drive  
Meridian, Idaho 83642  
Telephone: (208) 884-7050  
Facsimile: (208) 884-7228  
Idaho State Bar No. 6200  
cheryl.meade@isp.idaho.gov

Attorney for Respondent.

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA**

B.V. BEVERAGE COMPANY, LLC, an )  
Idaho Limited Liability Company, )

Petitioner, )

vs. )

THE STATE OF IDAHO, DEPARTMENT )  
OF IDAHO STATE POLICE, ALCOHOL )  
BEVERAGE CONTROL, G. JERRY )  
RUSSELL, in his official capacity as Director )  
of Idaho State Police, )

Respondent. )  
)  
)  
)  
)

CV-OC-2011-06351

ALCOHOL BEVERAGE'S  
RESPONSIVE BRIEF AND  
REQUEST FOR DISMISSAL

*ML*

 ORIGINAL

LAWRENCE G. WASDEN  
Attorney General

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700 S. Stratford Drive  
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Idaho State Bar No. 6200  
[cheryl.meade@isp.idaho.gov](mailto:cheryl.meade@isp.idaho.gov)

Attorney for Respondent.

**IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
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B.V. BEVERAGE COMPANY, LLC, an	)	
Idaho Limited Liability Company,	)	CV-OC-2011-06351
	)	
Petitioner,	)	ALCOHOL BEVERAGE'S
	)	RESPONSIVE BRIEF AND
vs.	)	REQUEST FOR DISMISSAL
	)	
THE STATE OF IDAHO, DEPARTMENT	)	
OF IDAHO STATE POLICE, ALCOHOL	)	
BEVERAGE CONTROL, G. JERRY	)	
RUSSELL, in his official capacity as Director	)	
of Idaho State Police,	)	
	)	
Respondent.	)	
	)	
	)	
	)	
	)	

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## I. STATEMENT OF THE CASE

Petitioner (BV Beverage) asks this Court to consider whether a third-party lessor, based upon existing constitutional mandate and statutory law, has a protected property right in the renewal of an alcohol beverage license (license). Albeit the liquor license, expired by operation of law, prior to the completion of a transfer of the license from Iggy's, Idaho Falls Inc. (Iggy's) to BV Beverage. The facts and law show that this Court must first consider the issue of dismissal for either a lack of subject matter jurisdiction or failure to state a claim for which relief can be granted.

The two (2) facts that determine whether this Court has subject matter jurisdiction, or even if BV Beverage has a claim for relief are: 1) The license at issue, expired by operation of law pursuant to IDAHO CODE § 23-908(1); and 2) BV Beverage was not the named licensee at the time Iggy's license expired as required by IDAHO CODE § 23-908(1). As a mere lessor, BV Beverage's assertion that it has enough of a property interest to trigger due process, suffers a fatal blow on both fronts.

These two facts, coupled with the state of the law in Idaho, are irrefutable and undisputable. Should this Court find that dismissal is inappropriate, the need to re-evaluate Idaho's long standing case law is still unnecessary. This is so, because even under the Idaho Administrative Procedures Act, guiding a Petition for Judicial Review, ABC had no discretion to abuse by initially refusing to renew Iggy's alcohol beverage license by BV Beverage. This is especially true when: 1) One also compares the factual similarities of this case to those cited herein; 2) The very narrow scope of rulings found in the U.S. Supreme Court cases that BV



Beverage cites to, and 3) There is no contested case to support BV Beverage's initial Petition for Judicial Review.

In support of its request for dismissal and in the interest of judicial economy, ABC submits the affidavits of Alcohol Beverage Control's, Bureau Chief, Lt. Robert Clements (Lt. Clements) and Technical Records Specialist 2, Jaimy Adams and their exhibits and incorporates them in full with ABC's Responsive Brief.

## **II. ALTERNATIVE ISSUES PRESENTED FOR REVIEW**

A. If the Director of Idaho State Police lacks discretion or jurisdiction over a liquor licensee, when that licensee allows its license to expire by operation of law, does the director and this Court then also lack subject matter jurisdiction over a third-party lessor?

B. Because IDAHO CODE § 23-908(1) provides for a statutory deadline, by which a licensee may renew its alcohol beverage license and that deadline passes, should this Court dismiss this matter because the underlying cause of action for which relief is being sought has ceased to exist, even as to a third-party lessor?

C. Alternatively, if this Court denies ABC's request to dismiss; does BV Beverage who was not the licensee, as required by IDAHO CODE § 23-908(1) at the time the license expired, have a sufficient property right to make a claim of due process?

## **III. UNDISPUTED FACTS AND PROCEDURAL BACKGROUND**

ABC handles over six-thousand, five hundred (6,500) various alcohol beverage licenses in a given year. Affidavit of Jaimy Adams, p. 2. ABC has an automated database that generates renewal notices to alcohol beverage licensees, notifying them that their license is due to be renewed in accordance with IDAPA 11.05.01.011.03. *Id.* In compliance with IDAHO CODE § 23-908(1), these notices are sent to ABC's licensees approximately sixty (60) days from the first date of expiration. *Id.*

Licensees are actually given a total, of almost ninety (90) days to renew their license before the last date of expiration. *Id.* These notices are sent to the licensee's last known address, given by them to ABC. *Id.* ABC has two (2) staff positions to process these renewal applications statewide, which includes conducting the majority of the investigations for new applications and renewals. *Id.* These same staff members are also expected to field alcohol beverage licensing questions from the general public and licensees, through phone calls (which are in excess of 50 per day), emails and in person at the ABC office. *Id.* at 3. They also assist in the development of ABC policy and procedure; and are also required to appear on a regular basis in legal actions. *Id.*

ABC renews alcohol beverage licenses (including liquor, beer and wine) according to IDAHO CODE § 23-908(1). Said renewals may be subject to approval as provided by IDAHO CODE §§ 23-905, 23-907 and 23-1010. Affidavit of Lt. Robert Clements, p. 2. The only person lawfully allowed to exercise the privilege of holding an alcohol beverage license is the licensee. *Id.* The privilege to renew a license is also held exclusively by the licensee according to law. *Id.*

The renewal of all alcohol beverage licenses, located in the city of Idaho Falls, Idaho (Bonneville County), are due for renewal by October 1 of each year, according to IDAPA Rule 11.05.01.011.03. *Id.* at 3. ABC is not authorized by law to notify third-party lessors of renewal dates. *Id.* On the other hand, IDAHO CODE § 23-908(5), along with IDAPA 11.05.01.012 deals strictly with how an alcohol beverage license transfer is to take place. *Id.* Even though a renewal and a transfer may occur concurrently, the statutory provisions for each action are separate and apart from one another and both must be complied with. *Id.* The law does not provide for an

exception of additional time for renewal in instances where transfers are occurring. *Id.* ABC has received favorable rulings, in three recent opinions, regarding the renewal issue similar to this one. *Id.*

In those opinions, a hearing officer or a court has ruled that the director is without authority to prolong the renewal period of an alcohol beverage license past the statutory thirty-one (31) day grace period. One such case even states, that a contested case hearing is not required in this instance. *See, R. d. See also, Cheerleaders Sports Bar and Grill, Inc. v State of Idaho, Department of Idaho State Police, Memorandum Decision and Order; Sagebrush Inn, Inc. v. Idaho State Police, Bureau of Alcohol Beverage Control, Order Dismissing Amended Petition for Judicial Review and Request for Stay (May 10, 2011); and Ronald Abraham, v. Idaho State Police, Alcohol Beverage Control, Finding of Fact, Conclusions of Law and Preliminary Order (December 29, 2010) and Director's Final Order (June 17, 2011), p. 15, Exhibit h, attached and incorporated herein.*

While some forms are provided online, ABC does not make the renewal form available in this forum. Affidavit of Jaimy Adams, p. 3. This is due to the fact that licensees have been known to misappropriate and manipulate this form to reflect an inaccurate business profile of the licensee. *Id.* This type of activity requires additional and increased oversight by ABC personnel when renewal applications are being submitted. *Id.*

According to IDAHO CODE § 23-908(2), ABC must investigate the transferee and if the transferee meets the qualifications of holding an alcohol beverage license, then ABC can issue said license to a transferee. *Id.* and Affidavit of Lt. Clements, p. 3. This statute does not provide

ABC with the authority to approve any lease agreements between a lessor and lessee. *Id.* Nor does ABC engage in such approval. *Id.*

On November 20, 2007, BV Beverage transferred Alcohol Beverage License Number 4314 to Iggy's Idaho Falls, Inc. (Iggy's). Affidavit of Jaimy Adams, p. 3. and Exhibit i, attached and incorporated herein. Said transfer was completed through Alcohol Beverage Control (ABC), after Iggy's submitted its application materials and fees, and passed the necessary background check(s) to become qualified to hold the privileges of the license. *Id.* and R. a. and b. Included in this paperwork, was BV Beverage's letter indicating that it was aware of the expiration of this license and wanted to ensure that renewal occurred and the license was issued. *Id.* at Exhibit i.

Thereafter, as the licensee, Iggy's was solely responsible to renew its license according to IDAHO CODE § 23-908(1) with ABC, which it did for the years 2008, 2009 and 2010. *Id.* at 3-4.

On January 8, 2010, ABC learned that Iggy's was no longer using its alcohol beverage license because Iggy's had gone out of business. *Id.* p.4. A letter was sent to Iggy's stating it would be given 90 days to place its license back into use. *Id.* and R. c.

On August 4, 2010, ABC received the return of Iggy's alcohol beverage license renewal application (for the licensing year of 2011). *Id.* and R. d. There was no forwarding address given. *Id.* and R. d.

On August 20, 2010, ABC filed a complaint to revoke Iggy's license because it was no longer exercising the privilege of the license as required. Affidavit of Lt. Clements, p. 3. This revocation proceeding applied solely to the issue of non-use, and not that of renewal. *Id.*

On September 29, 2010, Iggy's released its interest in its alcohol beverage license back to

BV Beverage. Affidavit of Jaimy Adams, p. 5, and Agency R. e. and f. However, BV Beverage waited almost four (4) months to notify ABC that BV Beverage was in possession of this document on September 29, 2010. *Id.* To ABC's knowledge at the time, Iggy's was still in possession of the alcohol beverage license. *Id. See also*, BV Beverage Exhibits 5 and 6. *See also* January 7, 2011, facts below.

On September 30, 2010, Iggy's Alcohol Beverage License Number 4314 expired. Affidavit of Lt. Clements, p. 4.

On October 31, 2010, the thirty-one (31) day grace period that applied to Iggy's Alcohol Beverage License Number 4314, during which the license could have been renewed, also lapsed. *Id.*

On January 7, 2011, BV Beverage attempted to transfer (the expired license) back to itself from Iggy's and then to a national restaurant chain called Screamin' Hot Concepts, LLC. Affidavit of Jaimy Adams, p. 5, and Agency R. e and f. Included in these application materials was a faxed copy of the Affidavit (of) Release of License from Iggy's Idaho Falls to BV Beverage Company, LLC. *Id.* The posted date and times of the fax shown it was sent by Iggy's and received by BV Beverage's attorney on the same day, September 29, 2010. *Id.* The day before the license was first due to expire. *Id.*

On January 10, 2011, BV Beverage's application materials were returned to BV Beverage because Iggy's Alcohol Beverage License Number 4314 had expired and the grace period had also lapsed. *Id.* and Agency R. g.

Because Iggy's alcohol beverage license expired by operation of law, neither formal nor

informal proceedings as provided by the Idaho Administrative Procedures Act, were warranted. Affidavit of Lt. Clements, p. 4, and Director's Final Order, *Ronald Abraham, v. Idaho State Police, Alcohol Beverage Control*, Exhibit h, p. 15.

On or about March 31, 2011, BV Beverage filed a Petition for Judicial Review.

On May 25, 2011, the Agency Record was filed with this Court.

On or about May 27, 2011, BV Beverage filed a Motion for Order Staying Agency Action, along with a supporting Memorandum and Affidavit of Courtney Liddiard. Therein, it was stated that not only had BV Beverage had suffered a substantial loss, but that irreparable harm done. BV Beverage implied that it suffered harm because Iggy's alcohol beverage license could not be transferred to it or to some national restaurant chain. *See*, Affidavit of Courtney Liddiard Supporting Petitioner's Motion for Order Staying Agency Action.

However, according to ABC records on April 26, 2011, BV Beverage was able to transfer another alcohol beverage license it held, through The Hard Hat Steakhouse, to itself and then to the national restaurant chain, Screamin Hot Concepts, dba Buffalo Wild Wings. Affidavit of Jaimy Adams, p. 6. ABC records show the next person on the priority waiting list to be offered an alcohol beverage license is Daniel Fuchs. *Id.* and Exhibit j, attached and incorporated herein.

The parties stipulated to a stay on the offering of this license to Mr. Fuchs, pending the decision of this Court. (Court record).

BV Beverage also filed a Motion to Augment the Record. Included in BV Beverage's Exhibits 5 and 6 was email correspondence between the parties' respective attorneys. The issue of renewal or an extension of the renewal deadline was never discussed. *Id.* In fact, there was

no further correspondence between the parties between September 29, 2010, and January 13, 2011, even though ABC's attorney was assured that it would be kept apprised of the status of the transfers taking place. *See*, BV Beverage's Exhibit 5, email from Rebecca Rainey to Cheryl Meade, dated September 29, 2010, and following email dated January 13, 2011.

#### IV. STANDARD OF REVIEW FOR DISMISSAL

I.R.C.P. 84(o) is the only provision to move the district court, sitting in an appellate capacity, to review an action for subject matter jurisdiction or to review a failure to state a claim upon which relief could be granted. In the interest of judicial economy, ABC incorporates such motions into its responsive argument to BV Beverage's Petition for Judicial Review and Appellate Brief. *See*, I.R.C.P. 12(b)(1) and 12(b)(6).

The lineage of law that controls a motion to dismiss (per I.R.C.P. 12(b)(1)) based upon a lack of subject matter jurisdiction, and ultimately the availability of judicial review in this action, begins with Idaho's Constitution limiting a district court's appellate jurisdiction. *See*, Idaho Const. art. V § 20; (stating, [t]he district court shall have original jurisdiction in all cases, both at law and in equity, and such appellate jurisdiction as may be conferred by law). The Idaho Supreme Court applied this constitutional mandate in determining if subject matter jurisdiction lies, where a petition for judicial review of an agency action was sought. *See, Laughy v. Idaho Department of Transportation*, 243 P.3d. 1055, 1058 (2010) (holding courts are obligated to ensure their own subject-matter jurisdiction and must raise the issue *sua sponte* if necessary.)

In the second instance, where a motion to dismiss based upon a party's failure to state a claim upon which relief can be granted is at issue, and matters outside the pleadings for such a

motion are considered, the motion must be treated as a motion for summary judgment.

*Hellickson v. Jenkins*, 796 P.2d 150 (Ct. App. 1990).

Rule 56(c), Idaho Rules of Civil Procedure, provides that “summary judgment shall be granted if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *DBSI/TRI v. Bender*, 948 P.2d 151, 156 (1997) (citing *Mutual of Enumclaw Ins. Co. v. Roberts*, 912 P.2d 119, 121 (1996)).

When assessing the motion for summary judgment, all controverted facts are to be liberally construed in favor of the nonmoving party. Furthermore, the trial court must draw all reasonable inferences in favor of the party resisting the motion. *Litz v. Robinson*, 955 P.2d 113, 114 (Ct. App. 1998) (citing *G&M Farms v. Funk Irrigation Co.*, 808 P.2d 851, 854 (1991) and *Sanders v. Kuna Joint School Dist.*, 876 P.2d 154, 156 (Ct. App. 1994)). However, “where the evidentiary facts are not disputed and the trial court, rather than a jury, will be the finder of fact, summary judgment is appropriate, despite the possibility of conflicting inferences because the court alone will be responsible for resolving the conflict between those inferences.” *Riverside Development Co. v. Ritchie*, 650 P.2d 657, 661 (1982). “If reasonable people could reach different conclusions based on the evidence, the motion must be denied.” *Farm Credit Bank of Spokane v. Stevenson*, 869 P.2d 1365, 1367 (1994); *Olsen v. JA Freeman Co.*, 791 P.2d 1285, 1299 (1990).

The nonmoving party may not rest upon the mere allegations or a denial of that party’s pleading, but the party’s response, by affidavits or as otherwise provided . . . , must set forth



specific facts showing that there is a genuine issue for trial. I.R.C.P. 56(e). In attempting to establish such facts, “a mere scintilla of evidence or only slight doubt as to the facts” is insufficient to create a genuine issue of material fact. *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 996 P.2d 303, 306 (2000). In other words, “the party opposing the motion must present more than a conclusory assertion that an issue of fact exists.” *Coghlan v. Beta Theta Pi Fraternity*, 987 P.2d 300, 313 (1999).

## V. ARGUMENT

BV Beverage brings its cause of action pursuant to the Idaho Administrative Procedures Act, Title 67, Chapter 52, Idaho Code. The Idaho Administrative Procedures act governs the judicial review of *contested cases* for the actions of Idaho’s administrative agencies. (emphasis added).

BV Beverage further asks this Court to engage in not only judicial legislation, but the redrafting of the United States’ and Idaho’s Constitutional provisions. BV Beverage essentially wants this Court to override these authorities that give the state its power to regulate the licensing and sale of alcoholic beverages.

But before this Court proceeds down that path, it must first address the issue of subject matter jurisdiction and whether BV Beverage has a cause of action, prior to any determination of the remaining issue(s) that BV Beverage asserts.

It has recently been determined time and again that the director (ABC) has no discretion to extend the thirty-one (31) day renewal deadline when a liquor licensee misses that deadline and the license expires by operation of law. *See, Cheerleaders Sports Bar and Grill, Inc. v State*

*of Idaho, Department of Idaho State Police, Memorandum Decision and Order, R. g., pp. 4-6* (holding [w]here the statute does not allow an expired license to be renewed after thirty-one (31) days, there is no room for discretionary grant or denial of a renewal application after the deadline.) *See also, Sagebrush Inn, Inc. v. Idaho State Police, Bureau of Alcohol Beverage Control, Order Dismissing Amended Petition for Judicial Review and Request for Stay* (pp. 9-11, May 10, 2011) (holding ABC has no discretion to renew a liquor license after the 31-day grace period following a license's expiration) Affidavit of Lt. Clements, Exhibit h. *See also, Ronald Abraham, v. Idaho State Police, Alcohol Beverage Control, Finding of Fact, Conclusions of Law and Preliminary Order* (pp. 10-11, December 29, 2010) and Director's Final Order (pp. 14- 16, June 17, 2011) (finding: when licensee fails to submit either a timely or sufficient application for renewal... a contested case hearing [is] not required...Director did not take action to refuse to continue [licensee's] license. Rather, his license expired by operation of law pursuant to IDAHO CODE § 23-908(1), without any affirmative action by the Director). *See, Affidavit of Lt. Clements, Exhibit h.*

While these orders are not controlling, they are instructive as to when and to whom due process is extended to. These same decisions are based upon the same constitutional provision and current laws cited to in Section B of this responsive brief below.

Therefore, if this Court determines that ABC (through the director) has no discretion to renew an expired liquor license, then this Court must dismiss the Petition for Judicial Review, for lack of subject matter jurisdiction, as there is no matter or controversy left to decide.

If this Court determines that the only person entitled to exercise an interest is the licensee,

then this Court must dismiss the matter because BV Beverage has no underlying cause of action or claim for which it can be granted relief.

**A. If the Director (ABC) of Idaho State Police lacks discretion over a liquor licensee, when a licensee allows its license to expire by operation of law, does the director and this Court then also lack subject matter jurisdiction over a third-party lessor?**

BV Beverage rests its claim before this Court on IDAHO CODE § 67-5279 of the Idaho Administrative Procedures Act. But before BV Beverage can bring such a claim, it must meet the requirements of IDAHO CODE § 67-5240 of a contested case; which is defined as “a proceeding by an agency...that may result in the issuance of an order, and is governed by the provisions of this chapter...” In this case, a letter was merely sent from ABC’s legal counsel to BV Beverage’s legal counsel, outlining or explaining why ABC could not re-issue a license that had expired by operation of law. This does not constitute either an agency action or an order.

Further support for dismissal is found in IDAHO CODE § 67-5254, which requires a licensee to comply with a timely renewal prior to seeking relief. Support for ABC’s position, can even be found in simple definitions. The common meaning of the word “expire” is defined as “to become void through the passage of time.” While the word “cancel” denotes “the act of annulling or rescinding.” *Webster’s Third New International Dictionary*, 801 and 325 ( Philip Babcock Gove, Ph.D. ed., unabridged, Merriam-Webster, Inc. 1993)

ABC did not engage in an act to cancel Iggy’s alcohol beverage license, nor did ABC issue an order cancelling the Iggy’s alcohol beverage license. Neither the law, nor the regulations, that guide ABC in licensing authorizes it to issue an order when a license expires by

operation of law. To hold that there is such a requirement would result in an absurd application of law. If anything, Iggy's, who was technically the named licensee at the time the license expired, failed to apply (act) for the renewal as required by law. Iggy's license lapsed on its own, because the licensee failed to take affirmative action to renew within the statutory deadline.

BV Beverage admits that it was and is not the licensee, but a third-party lessor in this instance. *See* Petitioner's Appellate Brief, p. 4. BV Beverage admits that Iggy's alcohol beverage license expired. *Id.* at 5. BV Beverage incorrectly alleges that ABC approved the parties' lease agreement. *Id.* at 4. Pursuant to IDAHO CODE § 23-908(2), ABC's only real legal authority, in a transfer action, is to ensure that a transferee is qualified by law to exercise the privileges as an alcohol beverage licensee. *See*, Affidavit of Lt. Robert Clements, p. 3, #16 and Affidavit of Jaimy Adams, p. 3, # 11.

In this case, while BV Beverage would like to point the finger and blame ABC for its loss, BV Beverage is the one responsible for the loss. Said loss was due to a lack of diligence on its own part. According to the authority cited above, if there is no contested case, this Court has no subject matter jurisdiction under the Idaho Administrative Procedures Act. Therefore, this Court must dismiss the matter accordingly.

**B. Because IDAHO CODE § 23-908(1) provides for a statutory deadline, by which a licensee may renew its alcohol beverage license and that deadline passes, should this Court dismiss this matter because the underlying cause of action for which relief is being sought has ceased to exist, even as to a third-party lessor?**

IDAHO CODE § 23-908(1) provides in relevant part:

[a]ll licenses shall expire at 1:00 o'clock a.m. on the first day of the renewal month which shall be determined by the director by

administrative rule and shall be subject to annual renewal upon proper application. The director will determine the renewal month by county... distributing renewals throughout the licensing year... [R]enewals **will** occur annually on their renewal month. **Renewal applications** for liquor by the drink licenses **accompanied by the required fee must be filed with the director on or before the first day of the designated renewal month.** Any licensee holding a valid license **who fails to file an application for renewal** of his current license on or before the first day of the designated renewal month **shall have a grace period of an additional thirty-one (31) days in which to file an application for renewal** of the license. (emphasis added).

The law, as stated, provides for no exceptions once the thirty-one (31) day grace period has lapsed. There is no exception written, even in instances where a transfer is occurring. It is the duty of a business owner to keep himself apprised of the rules and regulations which affect his business. IDAHO CODE § 23-932 states, “[e]very licensee shall advise himself of such rules and regulations, and ignorance thereof shall be no defense.” In this case, BV Beverage implies that it was ignorant of Iggy’s impending licensing renewal date because ABC did not notify BV Beverage of the same. Such an assertion is disingenuous. BV Beverage has failed to inform this Court of a previous brush it has had with the expiration of this very same license. *See*, Affidavit of Jaimy Adams, p. 3 and Exhibit i.

ABC asks this Court to note, that BV Beverage had either actual or constructive notice of when Iggy’s alcohol beverage license was due to be renewed in three ways;

1) At the same time in 2010, when the Iggy’s license was due for renewal in Bonneville County, BV Beverage also processed the renewal of two other alcohol beverage licenses that it possessed; also in Bonneville County. *See* IDAPA Rule 11.05.01.011.03 and Affidavit of Jaimy Adams p. 5, # 22.

2) BV Beverage had previously possessed the Iggy's alcohol beverage license itself and had also dealt with the issue of the license going into expiration back in 2007. *See*, Affidavit of Jaimy Adams p. 3, and attached Exhibit i, letter dated October 30, 2007, from BV Beverage paralegal, Keri Moody to ABC, p. 2; and,

3) The expiration date of each license is stamped upon the face of the license in bold large letters. *See*, R. b.

BV Beverage asserts its claim that it should be entitled to due process, because it was without notice that Iggy's license was due for renewal. Because BV Beverage had plenty of either actual or constructive notice that the Iggy's license was due for renewal, it cannot now seek relief (in good faith) from this Court as it alleges.

It is undisputed that Iggy's was the licensee of Alcohol Beverage License No. 4314. R. b. It is undisputed that ABC attempted to notify the named licensee, Iggy's of the renewal date. That renewal notice was returned to ABC as undeliverable. R. d. It is undisputed that an alcohol beverage license has stamped on the face of it, the expiration date in bold letters. R. b. It is undisputed that Iggy's failed to submit a renewal application, along with the required fee, before the final grace period deadline as provided by law. It is undisputed that BV Beverage had actual or constructive knowledge that Iggy's license was due for renewal. Exhibit i and R. b. On October 31, 2010, Iggy's Alcohol Beverage License No. 4314 expired or lapsed by operation of law and not by any action taken by ABC.

While Idaho has no case law on point regarding the matter, other jurisdictions, including a jurisdiction cited to by BV Beverage, offers valuable insight. *See, Arens v. Village of Rogers*,

61 N.W.2d 508, 518-519 (Minn. 1953) (holding that [a liquor] license is a privilege as to the licensor, not vis-à-vis third parties). *See also, Vars v. Citrin*, 470 F.3d 413, 414 (R.I. 2006) holding [s]ecured parties with an interest in expired liquor license cease[d] to have a protectable property interest in the license upon its expiration).

As a matter of law, dismissal of BV Beverage's Petition for Judicial Review is appropriate; as the underlying cause of action, for which BV Beverage seeks a claim of relief, is *functus officio*. In other words ABC cannot lawfully extend the statutory deadline to renew the alcohol beverage license that BV Beverage seeks to have returned to it; and in an intact manner. ABC respectfully requests this Court for an order dismissing BV Beverage's Petition for Judicial Review accordingly.

**C. Alternatively, if this Court denies ABC's request to dismiss; does BV Beverage, who was not the licensee, as required by IDAHO CODE § 23-908(1) at the time the license expired, have a sufficient property right to make a claim of due process?**

If this Court should decide that it has subject matter jurisdiction and a cause of action lies, then ABC presents the following argument. In response to BV Beverage's Appellate Brief, ABC will address in this section the issues (respectively in turn) that BV Beverage asserts should be reviewed. ABC will attempt to respond only once to any repeated assertion(s) made by BV Beverage, unless noted otherwise below.

The first issue BV Beverage asserts is that this Court should overrule ABC's application of *Uptick v. Ahlin*, 647 P.2d 1236 (1982). However, BV Beverage fails to concede that the *Uptick* decision was founded upon IDAHO CODE § 23-908. The gravamen of BV Beverage's claim is that it essentially seeks to have this Court declare IDAHO CODE § 23-908(1) as

unconstitutional. The party challenging a statute on constitutional grounds bears the burden of establishing that the statute is unconstitutional and “must overcome a strong presumption of validity.” *See, State v. Bennett*, 125 P.3d 522, 525 (2005) (citing, *Olsen v. J.A. Freeman Co.*, 791 P.2d 1285, 1288 (1990)). An appellate court is obligated to seek an interpretation of a statute that will uphold its constitutionality. *State v. Cobb*, 969 P.2d, 244, 246 (1998).

Additionally, “it is a general rule that ‘a legislative act should be held to be constitutional until it is shown beyond a reasonable doubt that it is not so, and that a law should not be held to be void for repugnancy to the Constitution in a doubtful case.’ ” *Bradbury v. Idaho Judicial Council*, 28 P.3d 1006, 1011 (2001) (quoting *Sanderson v. Salmon River Canal Co.*, 263 P. 32, 35 (1927)). “The rational relationship test is applied under both the substantive due process clause... in determining the constitutionality of a law that does not deal with a fundamental right.” *Id. See, Cecelia Packing Corp. v. U.S. Dept. of Agriculture Agricultural Mktg. Serv.*, 10 F.3d 616 (9th Cir.1993). “Legislative acts that do not impinge on fundamental rights or employ suspect classifications are presumed valid, and this presumption is overcome only by a ‘clear showing of arbitrariness and irrationality.’ ” *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1234 (9th Cir.1994).

Moreover, “in a substantive due process challenge, we do not require that the [government's] legislative acts actually advance its stated purposes, but instead look to whether “ ‘the governmental body *could* have had no legitimate reason for its decision.’ ” *Id.* Additionally, “[i]f it is ‘at least fairly debatable’ that the [government's] conduct is rationally related to a legitimate governmental interest, there has been no violation of substantive due



process.” *Halverson v. Skagit County*, 42 F.3d 1257, 1262 (9th Cir.1994) (quoting *Kawaoka*, 17 F.3d at 1234).

Idaho’s courts have long held that a liquor license is a mere privilege (i.e. not a fundamental right) to do that what would be otherwise unconstitutional. The courts in Idaho have also historically stated there is no property interest as between a licensee and the state, therefore this Court should apply the rational relationship test in determining if IDAHO CODE § 23-908(1) is unconstitutional. ABC’s interpretation of the parentage-case-law prior to *Uptick* and then its progeny, based upon IDAHO CODE § 23-908(1), is rationally related to ABC’s statutory and constitutional mandate to control and license those who sell alcoholic beverages. BV Beverage’s assertion that ABC’s refusal to send renewal notices to third-party lessors, based upon *Uptick v. Ahlin*, should be declared unconstitutional misses the mark by a mile. This is particularly notable, when one considers the law clearly provides who may exclusively exercise the privilege of an alcohol beverage license.

As stated in BV Beverage’s Appellate Brief, the Respondent (ABC) has historically taken the position that a lessor of a liquor license has no protectable property interest in a liquor license. *See*, Petitioner’s Appellate Brief, p. 1. Not only does IDAHO CODE § 23-908(1) support ABC’s stance, but the courts in Idaho have consistently implicated the rational relationship test of the state’s authority to regulate the licensing and sale of alcoholic beverages against the rights of licensees in its decisions. *See, Nims v. Gilmore*, 107 P. 79 (1910), *O’Connor v. City of Moscow*, 202 P. 2d 401, 405 (1949), *Northern Frontiers v. State ex rel. Cade*, 926 P.2d 213 (Ct. App. 1996), and *Alcohol Beverage Control. v. Boyd*, 231 P. 3d 1041 (2010).

Cases such as those just named above, are the springboard upon which *Uptick* is founded; *Uptick v. Ahlin*, 647 P. 2d 1236, 1241 (1982) (holding, the right to renew is included among the privileges appurtenant to a liquor license and is a privilege which is to be exercised *exclusively by the named licensee*); *McBride v. Hopper*, 372 P.2d 401, 403 (1961) (holding, an applicant was not entitled to the issuance or transfer of a liquor license based upon the submission of an improper form submitted to ABC); *Schieche v. Pasco*, 395 P.2d 671 (1964) (holding ... the purchaser, whoever he may be, must be able to qualify as a liquor licensee under the laws of this state before he can assert any right as a purchaser of the license (at a sheriff's sale). [And] that [n]othing said in the opinion of this case should be construed as in any way limiting or interfering with the powers and duties of the commissioner of law enforcement with respect to the issuance or renewal of retail liquor licenses) find their support.

Furthermore, these court opinions were not determined in a vacuum, but are based upon the Twenty-First Amendment to the United States' and Idaho's Constitution, art. III, §§ 24 and 26; conferring broad powers to the states over the sale and regulation of liquor. This police power is the most comprehensive and least limitable of governmental powers.<sup>1</sup> Police power may be defined generally as the state's power to make laws and regulations, within the bounds of constitutional restrictions, to govern, restrict, and regulate the conduct of individuals, and businesses for the promotion and protection of the public health, safety, morals and welfare.<sup>2</sup> Police power inheres in the state, without the necessity of constitutional grant or reservation,<sup>3</sup>

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1 *Rowe v. City of Pocatello*, 70 Idaho 343, P.2d 695 (1950).

2 *Winther v. Village of Weippe*, 91 Idaho 798, 430 P.2d 698 (1967).

3 *Foster's Inv. V. Boise City*, 63 Idaho 201, 118 P.2d 721 (1941)

and is exclusive to the state.<sup>4</sup> It is well settled that the matter of liquor control is within the powers of the states.<sup>5</sup>

The state's police power with respect to intoxicating liquors exists as a correlative of the state's duty to support paupers, to protect the community from crime, and to confine and maintain the criminal, since the liquor traffic is frequently a source of pauperism and crime.<sup>6</sup> In *State v. Calloway*, 112 Idaho 719, 84 P.2d 27 (1906), the Idaho Supreme Court stated:

The business of selling intoxicating liquors is not considered as of equal dignity, respectability, and necessity of that of the grocery, dry goods, or clothing business, or many other occupations that might be mentioned, and from time immemorial its prohibition or regulation has been to be within legislative power under what is known as police power.

It is universally accepted that no one has an inherent or constitutional right to engage in a business of selling or dealing in intoxicating liquors.<sup>7</sup> The terms and conditions under which a liquor license is granted are subject to the pleasure of the legislature.<sup>8</sup> A liquor license is a grant or permission under government authority to the licensee to engage in the business of selling liquor. Such a license is a temporary permit to do that which would otherwise be unlawful.<sup>9</sup> A liquor license is not private property between the licensee and the state. *Id.* FN 7, 8, and 9.

Even in the states of Minnesota, a jurisdiction cited to by BV Beverage, and Rhode Island, the courts have held: it is doubtful whether a liquor licensee whose license has lapsed are deprived of any property without due process of law as no person has a vested property right to

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<sup>4</sup> *Crazy Horse, Inc., v. Department of Law Enforcement*, 98 Idaho 762, 572 P.2d 865 (1977).

<sup>5</sup> *Adams Express Co. v. Commonwealth of Kentucky*, 214 U.S. 218, 29 S. Ct. 633, 53 L.Ed. 972 (1909).

<sup>6</sup> 45 *Am.Jur.* 2<sup>nd</sup> *Intoxicating Liquors* §19.

<sup>7</sup> *Uptick Corporation v. Ahlin*, 103 Idaho 364, 647 P.2d 1236 (1982); *Gartland v. Talbott*, 72 Idaho 125, 237 P.2d 1067 (1951).

<sup>8</sup> *Department of Law Enforcement v. Pierandozzi*, 117 Idaho 1, 784 P.2d 331 (1989).

<sup>9</sup> *Nampa Lodge No. 1389 v. Smylie*, 71 Idaho 212, 229 P.2d 991 (1951).

engage in or continue to engage in the liquor business. *State v. Saugen*, 169 N.W. 2d 37, 41-42 (Minn. 1969) (citing *George Benz Sons, Inc. v. Ericson*, 34 N.W.2d 725, 730 (Minn. 1948); See also, *Paron v. City of Shakopee*, 32 N.W.2d 603 (Minn. 1948) (holding [o]ne who is merely an applicant for a liquor license has no vested interest which the courts are able to protect).

One cannot also ignore that the facts in *Uptick* are very similar to those now before this Court, despite BV Beverage's assertions to the contrary. BV Beverage even goes so far as to state that *Uptick* (1982), was going through the court system as IDAHO CODE § 23-908(6) was going thru legislature and the reasons for that amendment. Not only is this a fact not contained in the record, but it is an inaccurate representation. In looking at the Idaho Code, it appears there were no amendments to IDAHO CODE § 23-908 in 1982, but instead amendments were passed in 1981, and then not again until 1991.

BV Beverage's credibility is further put at issue when it also goes so far as to state that IDAHO CODE § 23-908(6) stands for the proposition that the "Agency requires that both the lessor and lessee subject themselves to the application, review, and approval process of the Agency and both parties must pay the requisite transfer application fee." Petitioner's Appellate Brief, p.9. If one actually reads IDAHO CODE § 23-908(6), there is no mention of both parties subjecting themselves to any approval process of the ABC. Again this is a complete misstatement of the law.

Even if BV Beverage alleges this is some type of error, the fact cannot be ignored that there was no amendment to the statute in 1982, and even the language in IDAHO CODE §§ 23-908(2) (or 23-908(6)) does not provide for the kind of ABC oversight and approval, purported by

BV Beverage. As to Section A of the Petitioner's Appellate Brief, BV Beverage has no basis in fact nor is its assertion, that a third-party lessor is entitled to due process, supported by law. Therefore, its request for relief under this assertion must be denied.

As to Section B's introductory paragraph of the Petitioner's Appellate Brief, BV Beverage's claim is but a mere assertion and it is certainly not based upon any supporting law, and therefore, should be disregarded as unreviewable. *See*, I.R.C.P. 56(e), *supra* p. 10, and *Coghlan v. Beta Theta Pi Fraternity*, 987 P.2d 300, 313 (1999), "the party opposing the motion must present more than a conclusory assertion that an issue of fact exists."

As to Section B-1 of the Petitioner's Appellate Brief, BV Beverage's interpretation of *Perry v. Sniderman*, 408 U.S. 593 (1972) and *Bd. Of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972) is overly-broad in its application to this case. Most importantly, BV Beverage fails to discern one important and singular fact that itself lacks before this Court; the status of a named licensee. As a lessor, BV Beverage still does not possess any privilege granted to it as a licensee.

Both the *Perry* and *Roth* cases are employment cases, wherein the employee is employed by a state governmental entity. As such, even in Idaho, state employees have long been found to have a protectable interest in their jobs as it is personal to that individual.<sup>10</sup> Thus, if one were to apply (by analogy) BV Beverage's assertion that a lessor is entitled to due process, per *Perry* and *Roth*, arguably one's spouse, child, or even mother or father would be entitled to bring a claim against the state for the loss of their loved one's job. Such a ruling applied to this case, would have an absurd result and also be in direct conflict with Idaho's Liquor Control Act.

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<sup>10</sup> *Cf.* Idaho's long standing case law citing, no such heightened interest or right extends to liquor licensees. *Supra* pp. 18-20.

BV Beverage further overstates the weight of the *Roth* case to its own action. The U.S. Supreme Court in *Roth*, determined Roth had no protectable interest or due process right in his position, i.e. he did not possess a vested interest in that position. Unlike *Roth*, Perry was able to maintain his right to due process, because the university he worked for had a tenure policy to continue its contracts with those who had been employed for a specific period of time. Notably, these cases do not hold that anyone, other than the employee, may be entitled to due process in that particular employee's position.

BV Beverage cannot prevail in this case, based upon these facts. First, like *Roth*, BV Beverage as no privilege granted to it, i.e. no vested right in something it cannot do unless authorized by the state to do it. And BV Beverage, unlike *Perry*, cannot rely on any policy or regulation to give BV Beverage the necessary status required to achieve due process.

In a similar case, which has yet to be decided by the Idaho Supreme Court, ABC argued that the only person under Idaho law, entitled to exercise the privileges of a license (including due process) is the licensee. *See, Fuchs v. State of Idaho, Alcohol Beverage Control*, 2010 WL 3874677 and 2010 WL 3497358 (Idaho).

The non-jurisdictional case law cited to by BV Beverage in support of its Section B-1 assertion, clearly shows the lack of understanding of how these cases apply to BV Beverage.

These cases stand for the proposition that if one is a **licensee** or the “**holder of a liquor license**,” (emphasis added) then due process is owed (even when it comes to renewal). Petitioner's Appellate Brief, pp. 11-12.

In Idaho, even though a person has no absolute right to engage in the sale of alcohol, the

licensee is still given a measure of due process through IDAHO CODE § 23-933 and the Idaho Administrative Procedures Act. But even then, a licensee must have complied with IDAHO CODE § 67-5254(1) in order to obtain relief under the act. Again, as one reads even this code provision, there is no mention of a lessor being able to submit an application to renew a license.

Because BV Beverage's assertion lacks an adequate legal basis upon which this Court can grant its claim, ABC urges this Court to dismiss BV Beverage's Petition for Judicial Review as to Section B-1.

As to Section B-2 of the Petitioner's Appellate Brief, BV Beverage's interpretations of the case law it cites to, BV Beverage fails to discern the important facts between itself and those cases, and the reasons upon each decision is based. In a brief review of these cases, ABC points out that in the case of *State v. Saugen*, 169 N.W. 2d 37 (Minn. 1969), the owner of a liquor license faced eminent domain proceedings against him, which is unlike this case, where the liquor license was not taken by agency action, but merely expired by operation of law. *Id.* at 41, 42 citing *Arens v. Village of Rogers*, 61 N.W.2d 508, 518-519, appeal dismissed, 347 U.S. 949 (Minn. 1953) for the proposition that "[i]t would be inconceivable to say that any moral obligation would be owed to a private liquor licensee who license was not renewed upon its normal expiration."

*Saugen* is further distinguishable in the Court's narrow (holding that, liquor businesses have the same rights as any other business when the government is **not acting pursuant to such police power**, in cases of eminent domain. ) *State v. Saugen* at 42.<sup>11</sup> (emphasis added). As provided previously, ABC is clothed with a great deal of police power when it comes to

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<sup>11</sup> Cf. Minnesota alcohol beverage licensing Statutes 340.401 *et seq.*

controlling the issuance of alcohol beverage licenses. Without argument, when ABC is acting in this capacity and even in the renewal of a license, it is engaged in its police power to ensure that only those who are responsible enough to comply with the licensing statutes are those who are issued a license. *See* case law cited pp. 18-20 *supra*. *See also*, Affidavit of Lt. Clements p. 2 # 9.

Other indicia that ABC is acting in its police power are found because ABC is ensuring that licensees comply with the renewal of their license in a timely and efficient manner. Otherwise, the purpose of IDAHO CODE § 23-908(1) would be made moot and licensees could renew if and whenever they felt obligated to do so. ABC believes this absurd result can be avoided upon this Court's ruling that ABC was acting within its police power.

As to the dual cases of *Barr v. Pontiac City Comm'n*, 282 N.W.2d 348 (Mich App. 1979), and *Bunn v. Michigan Liquor Control Comm'n*, 335 N.W.2d 913 (Mich. App. 1983), cited by BV Beverage, ABC argues the following: While these cases appear to make a valid point in favor of BV Beverage, appearances can be deceiving.

The facts of *Barr*, upon which the court rested its decision, vary widely from those in this case. Matthew Barr's family had actually owned and personally operated their bar in the same location from 1930 until 1961. The Barr family sold the business to Robert Epps. Epps defaulted on the purchase and sale agreement in 1973. Barr sought foreclosure to transfer the licenses back to himself. Barr agreed that there is no protected interest in a mere expectation a new license applicant or transferee might possess. The *Barr* Court went on to base its finding upon the *Roth* decision that stated in relevant part:



[p]roperty interests...are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as **state law rules** or understandings that secure certain benefits and that support claims of entitlement to those benefits. *Board of Regents v. Roth*, 408 U.S. at 577. (emphasis added).

Comparing the facts and law of *Barr* against this case, BV Beverage never personally used the Iggy's license itself at the premises location. Instead, when BV Beverage transferred the license from the Stardust Lounge, it then turned around and immediately leased the license to Iggy's. Affidavit of Jaimy Adams, p. 3, and Exhibit i. In the October 30, 2007, letter to ABC, BV Beverage states that it "is merely a liquor license holding entity. As such, it does not maintain a building where the license will be issued, nor does it have a menu ... BV Beverage will lease the license to Iggy's Idaho Falls Inc." *Id.* In the *Barr* case, Epps was purchasing Barr's entire business, including the liquor license. When Epps defaulted, Barr sought to foreclose to take the liquor license back. BV Beverage didn't initiate any foreclosure proceedings against Iggy's. In fact it didn't attempt to retrieve its license from Iggy's until the license was actually due to expire. *See*, Agency R. f.

Unlike *Roth's* holding cited above, IDAHO CODE § 23-908(1) and IDAPA Rule 11.05.01.011.03 provides no expectation of a lessor to act or do anything. The law is clear when it states; it is the licensee who will get a renewal notice and who is required to file a renewal application along with the required fee. Lessors therefore have no statutory expectation nor is there any ABC procedure allowing a lessor to believe it is entitled to receive a notice from ABC. Any such expectation is not only unilateral on the part of BV Beverage, but non-existent. If anything, BV Beverage's appropriate recourse is to seek damages against Iggy's for not releasing

the license back to BV Beverage in a more timely fashion so that BV Beverage could renew the license within the prescribed deadline.

In the case of *Bunn v. Michigan Liquor Control Comm'n*, again the facts and the law upon which the court made its decision are quite different from this immediate case. Joe Bunn, sold his bar business to David Lawson. Included in the agreement was a provision for Lawson to reassign the licenses back to Bunn in the event of default. This sale agreement was actually approved by the Michigan Liquor Control Commission (MLCC), per Michigan law. The Hartford City Council took action and voted to revoke Lawson liquor license.

The recommendation for revocation was then turned over to the MLCC. The MLCC upheld the city council's recommendation and took action by issuing an order of revocation. During the interim, Bunn sought to foreclose on Lawson and petitioned to intervene. Lawson then also filed a petition of judicial review in the matter. The court in this case never issued a ruling *per se* but remanded the matter back to the circuit court to order the city council to issue a decision based upon the underlying reasons for its action. *Id.* at 917, 918.

In this immediate case, BV Beverage again merely leased the license to Iggy's. BV Beverage never personally used Iggy's liquor license. Also there was no purchase agreement between the parties. Affidavit of Jaimy Adams, pg. 3, Exhibit i, and R. a-f. During the time that Iggy's was the licensee, it submitted the renewal application as required by law. *Id.* The record is devoid of any indication that BV Beverage came forward to vehemently insist that it also receive notice of the renewal deadline, when Iggy's was in possession. It was only after Iggy's defaulted and the license had already expired that this issue arose.

The more important differences between *Bunn* and this case are as follows: In *Bunn*, one sees two agencies first a municipality, and then the MLCC, take affirmative action to revoke the liquor licenses that Lawson had obtained from Bunn. ABC has taken no affirmative action such as revocation. Instead, the license in this immediate case lapsed.

Moreover, the MLCC was required by Michigan law to approve such transfers like that between Bunn and Lawson. *See* M.C.L.A. §§ 436.17 and 436.19b. In Idaho, ABC's authority is limited to investigate a transferee to ensure their qualification prior to issuance. *See* Affidavit of Jaimy Adams, p. 3 & 4, and Affidavit of Lt. Clements, p.3 # 16. The law guiding renewals is considerably different from that of a transfer. *cf.* IDAHO CODE §§ 23-908(1); and 23-908(2), (3), (4), (5) and (6). However, the laws for both must be complied with according to the terms and conditions of each. *See*, Affidavit of Lt. Clements, p. 3, # 14.

BV Beverage fails to discern that there is a marked difference between the statutory requirement(s) for renewal and the statutory requirement(s) for transfer of an alcohol beverage license. And, it further attempts to muddy the waters by disregarding the two distinct legal protocols that must be followed for each. *See*, Petitioner's Appellate Brief, p. 9. BV Beverage wants this Court to ignore the fact that the discussion(s), between BV Beverage and ABC, was solely limited to the transfer issue. *See*, BV Beverage's Exhibits 3, 4, 5, 6 and 7.

BV Beverage now alleges that because ABC agreed to allow a transfer to take place between BV Beverage and its lessee, Iggy's, that somehow the renewal issue was assimilated into the transfer issue. *See*, Petitioner's Appellate Brief, p. 9. Such an assertion is not supported by the facts before this Court, nor is it supported by law. Nowhere in any of the documents

provided to this Court by ABC or BV Beverage, is there a discussion to be found of what should be done about renewing Iggy's alcohol beverage license. *See* BV Beverage Exhibits 5 and 6, E-mail string of September 28 and 29, 2010.

BV Beverage on September 29, 2010, stated it was in the process of executing an affidavit of release of license... and that it would keep ABC apprised of the status of the transfers. *Id.* There was no further correspondence from BV Beverage until January 7, 2011, when BV Beverage submitted its transfer paperwork to ABC. *Id.*

Not only does ABC lack the manpower to ride herd over 6,500 alcohol beverage licenses, but for all ABC knew, BV Beverage could have changed its mind about making any transfer of the license back to itself. *See*, Affidavit of Jaimy Adams, p. 2, # 8 and p. 4 # 19. *See also*, Exhibit 6, email string wherein the correspondence dates jump from September 29, 2010 to January 13, 2011.

Arguably, if BV Beverage is granted the relief it seeks, it would be unrealistic to expect ABC to keep track of each licensee and a possible lessor (or lessors). *See*, Affidavit of Lt. Clements, p. 2, # 3; and Affidavit of Jaimy Adams, p. 2, # 8. Such expectations would be further complicated by implication, should this Court grant relief and require ABC to regulate and monitor the contractual provisions (of the duties and responsibilities) as between a lessor and its lessee. Including who is to receive a notice of renewal. Arguably, the Idaho legislature suffered the collywobbles that such an implication would bring, and therefore did not intend that ABC be required to act as hall-monitor in this manner.

If one were to believe that a corporation's officers were also able to seek a right to notice

of renewal, this nightmare grows exponentially. *See* IDAHO CODE § 23-905(4), requiring notification to ABC. The scenario that such a decision creates, paints a picture of an agency snarled in a mountain of paperwork, and oversight. And just to determine who is ultimately responsible to submit the fee and written application for renewal?

Once more, the legislature exercised a great deal of wisdom, when it drafted IDAHO CODE § 23-908(1), to avoid such a state of confusion. By narrowly placing the target of responsibility squarely upon the licensee, as the party to whom ABC could look to in the licensing process, the Idaho legislature got it right. Therefore, as to Section B-2 of Petitioner's Appellate Brief, ABC respectfully requests this Court to give deference to the legislature's wisdom in the matter, thereby dismissing BV Beverage's Petition for Judicial Review.

As to Section B-3, of the Petitioner's Appellate Brief, BV Beverage's assertion that it has a legitimate expectation of the right to renew is mooted by the following facts: 1) BV Beverage itself, failed to be diligent in exercising its contractual right to foreclose against Iggy's on the license and 2) BV Beverage also had actual and/or constructive knowledge of Iggy's renewal deadline.

With respect to BV Beverage's lack of due diligence, the record clearly shows that Iggy's had closed its doors and was in default in December 2009. BV Beverage Exhibit 10. Nearly ten (10) months passed before the Iggy's alcohol beverage license came upon its first renewal deadline. Surely an astute business owner would act diligently in such matters as ensuring that renewal would be completed. *See* Exhibit i, attached to the Affidavit of Jaimy Adams.

As noted above, BV Beverage's claim, that it should be entitled to receive a renewal

notice from ABC, is disingenuous. BV Beverage has failed to inform this Court of a previous close call it has had in the recent past, concerning the very licensing issue before this Court today. *Id.* and *supra* pp. 14-16.

Because BV Beverage had actual and/ or constructive notice of when Iggy's alcohol beverage license was due to be renewed, BV Beverage's assertion as to the state creating a legitimate expectation of renewal of Iggy's liquor license, is nothing more than a bare assertion. Without any facts in the record to support its assertion, and the assertion being also unsupported by Idaho case-law, it is obvious as to its lack of merit and should be disregarded.<sup>12</sup> *Supra* ABC's responses to Section(s) B-1 and B-2 above.

BV Beverage further states that, "like renewals, transfers are also approved as a matter of course." If this statement is taken to mean that transfers are not subject to approval, then BV Beverage's claim is plainly without legal support in light of I.C. § 23-908(2). An applicant, who is a transferee, must qualify for its license prior to obtaining it. This is accomplished through fingerprinting, a background check and numerous other provisions. I.C. §§ 23-903, 23-905, 23-907, 23-910, 23-911, 23-912. Considering all these provisions must be met, it can hardly be ignored that an application is approved as a matter of course. Even if this Court were to pass approvingly on such a declaration, one would have to view such approval in the proper context; i.e. that those who do not qualify need not apply, since the law visibly announces who is disqualified and for what reason(s). *Id.*

Likewise, BV Beverage also assumes that renewals are not subject to approval. This is a gross misstatement unfounded upon any fact in the record or law. Again, an application for

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<sup>12</sup> finding no person has an expectation or right to engage in something that would otherwise be unlawful to do.

renewal is subject to the same laws found in the code provisions stated above. Thus, if one doesn't qualify, then one would be denied the renewal of their license. Arguably, ABC would not issue a renewal of a license to someone who is disqualified because they became a manufacturer of liquor or; were convicted of an alcohol beverage related crime; or had a liquor license revoked for some nefarious reason.

Once more, BV Beverage had ample actual or constructive notice that the Iggy's license was due for renewal, it cannot now seek relief (in good faith) from this Court as it alleges. As to Section B-3, ABC respectfully asks this Court to apply the doctrine of laches against BV Beverage.

As to Section B-4 of the Petitioner's Appellate Brief, BV Beverage cites but a mere portion of *Alcohol Beverage Control v. Boyd*, 231 P.3d 1041, 1044 (2010) without going further to discuss how the Court came to the decision it did. This well reasoned case is based upon the long line of cases ABC has already cited in support of its position. *Supra*, pp. 18-21. To wit, ABC in the exercise of its police powers must be able to ensure that those who apply for and are offered an alcohol beverage license, whether it is newly issued or by renewal, can be depended upon to comply with the laws and regulations that control the sale of alcoholic beverages. To require the licensee to comply with the renewal statute is manageable, to invite a lessor or others into the mix is to invite trouble. *Supra pp. 28-29*.

Again, BV Beverage had in its possession the Affidavit of Release of License, it knew the license was due for renewal, yet it failed to act with diligence to comply with IDAHO CODE § 23-908(1). It didn't do so because it didn't want the responsibility of engaging in the actual sale

of alcoholic beverages itself. *See* letter dated October 30, 2007, attached to the Affidavit of Jaimy Adams. Such a business practice is likely the impetus for the long-standing case history we now see before this Court, and that BV Beverage would like to be declared unconstitutional.

BV Beverage's antagonistic view of *Uptick v. Ahlin*, 647 P.2d1236, 1240 (1982), continues to miss the mark. Not only does *Uptick* stand for the proposition, that only a licensee can exercise the privileges of the license, including the privilege to renew, but IDAHO CODE § 23-908(1) obviously states it. BV Beverage attempts to get a foot in the door by stating that it cured the fatal defect that precluded Ahlin from asserting a property interest in a liquor license. *See*, Petitioner's Appellate Brief, p. 19. BV Beverage also asserts that it had subjected itself to the scrutiny of the agency etc. *Id.* Both assertions are without merit.

BV Beverage concedes the police power of ABC is legitimate when it engages in such activities as investigations and back ground checks. *Id.* However, BV Beverage's assertion falls flat, when it attempts to limit ABC's exercise of police power over those who have not been approved to exercise the privileges of the license.

ABC concedes that BV Beverage submitted to ABC's police power all right, but that was over three (3) years ago, when it first transferred the license from the Stardust Lounge to itself, and then immediately transferred it to Iggy's. Again, BV Beverage misses the entire point of IDAHO CODE § 23-908(1), that an application for renewal (not transfer) that misses the renewal deadline is still untimely and the damage cannot be undone by casual business practices.

Finally, BV Beverage applies the incorrect test when it comes to ABC exercising its police power over those who wish to continue to be granted the privilege to sell alcoholic



beverages. *See*, Petitioner's Appellate Brief, p. 20. In the interest of judicial economy, ABC would direct this court to ABC's previous argument, applying the rational relationship test in determining if IDAHO CODE § 23-908(1) is unconstitutional. *Supra*, pp. 16-22. As to Section B-4, ABC respectfully asks this Court to find that *Uptick v. Ahlin* is still valid law as against BV Beverage because the state has a legitimate purpose in regulating alcohol beverage licensees and that purpose is based upon constitutional authority and IDAHO CODE § 23-908(1).

As to Section C, of the Petitioner's Appellate Brief, BV Beverage appears to be making many of the same arguments in previous sections of its brief. For the sake of judicial economy, ABC will only address those items that do not appear to be a repeat of those previous assertions.

BV Beverage once more asserts that the state has created a marketplace for the lease of liquor licenses that give rise to a property right. For this assertion, BV Beverage cites to yet another employment (discrimination) case. Once again, BV Beverage is trying to fit a square peg in a round hole. In the case cited to, *Logan v. Zimmerman Brush Co.* 455 U.S. 422 (1982), the commission failed to follow its own established rules, rules which gave rise to an expectation of due process for a claimant. Understandably, the Court found that because the state failed to follow its own rules, the system itself destroyed a complainant's property interest.

There are no such ABC laws or rules that allow a lessor to have such an expectation in Idaho. In fact, IDAHO CODE § 23-908(1) specifically addresses who is to make an application for renewal, i.e. the licensee. *See, supra* pp. 22-24. BV Beverage's request for relief in Section C, must also be denied.

As to Section D, of the Petitioner's Appellate Brief, BV Beverage alleges that the Agency

would not face a hardship in sending out additional renewal notices to lessors. Such an assumption is without a basis in fact. As stated previously, ABC has two (2) staff members to manage the licensing (renewal) of over six-thousand, five-hundred (6,500) alcohol beverage licenses statewide. If one were to assume, as BV Beverage does, that even 50% of those licensees have one (1) lessor, the number of renewal notices that must be issued/tracked increases to nine thousand, seven-hundred, fifty (9,750). However, if that same 50% of licensees were to have two lessors involved, the number of notices being issued/tracked, then doubles to 13,000.

If according to IDAHO CODE § 23-905(4) where all named corporate officers, were to also seek a notice of renewal in the same manner, the number of renewal notices being issued becomes more than just a mere hardship as envisioned by BV Beverage. It becomes a tracking/accountability nightmare.

As stated earlier, Iggy's alcohol beverage license expired due to the lack of diligence on the part of Iggy's and/or BV Beverage. While the expiration of a license is a difficult thing to see happen, it could have all been avoided had; 1) BV Beverage sought the release of the license from Iggy's much earlier than it did and 2) had BV Beverage notified ABC much sooner as well, once it did receive the Affidavit of Release of License from Iggy's.

Considering the same balancing test that BV Beverage argues for, the test does not weigh as heavily on a lessor or lessors to act diligently in their care of their business. Something as easy as the lessor marking their calendar yearly, near the time of renewal, to make a quick phone call to its lessee is relatively simple. A lessor could verify that its lessee has timely submitted the

renewal application and required fee.

It is far easier for the lessor to make a phone call to its lessee as well, should the need arise for the lessee to release the license back to the lessor. BV Beverage is quick to forget that many heavy burdens and responsibilities come with exercising the privileges of an alcohol beverage license, and arguably a lessee may be relieved to be freed from that burden in cases such as this one.

BV Beverage also overlooks the fact that if a lessee/lessor relationship goes south, as it may have in this case, ABC should not and cannot be placed in the middle of such a brawl just to chase after who will be submitting the renewal application and when. ABC's statutory duty is to regulate and control who has access to its alcohol beverage licenses. The nightmarish landslide of paperwork that two (2) staff positions would have to take care of, as part of BV Beverage's solution to the issue, is far more overwhelming than if a lessor is required to be more fastidious in his/her own affairs. Affidavit of Jaimy Adams, p. 2 # 8. As to Section D, ABC respectfully requests this Court to find that BV Beverage's solution is no solution at all, but only creates a nightmare of outlandish proportions.

As to Section E, this issue has been addressed previously in full under previous sections.

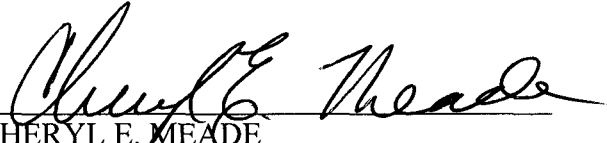
## **VI. CONCLUSION**

ABC respectfully requests that this Court enter an order dismissing BV Beverage's

Petition for Judicial Review and further order that the stay be set aside.

Dated this 28<sup>th</sup> day of July, 2011.

OFFICE OF THE ATTORNEY GENERAL  
FOR THE STATE OF IDAHO

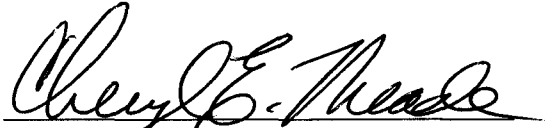
  
\_\_\_\_\_  
CHERYL E. MEADE  
DEPUTY ATTORNEY GENERAL  
Alcohol Beverage Control

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing ALCOHOL BEVERAGE'S RESPONSIVE BRIEF AND REQUEST FOR DISMISSAL was served on the following on this 28<sup>th</sup> day of July, 2011 and by the following method:

Rebecca Rainey  
Attorney at Law  
2627 W. Idaho St.  
Boise, ID 83702  
Facsimile 208-388-0120

- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Facsimile
- Electronic Mail



Cheryl E. Meade  
Deputy Attorney General



3. ABC currently has two (2) staff positions to handle thousands of alcohol beverage licenses across the state. It would be impractical to expect ABC to regulate lessors as well as licensees with two (2) staff positions and is not supported by law or regulation.

4. ABC has been delegated the authority to carry out the legislative purpose of the control of the sale of liquor by the drink as set forth in I.C. §§ 23-901, 23-903 and 23-908. ABC's enabling statutes do not specifically allow ABC to extend the deadline for alcohol beverage licensees to renew the licenses after the thirty-one (31) day grace period. Accordingly, ABC would be in violation of its own statutes and IDAPA Rules if a license,

- i. that has expired, by operation of law;
- ii. and becomes available in that incorporated city;
- iii. is not offered to the next person (or entity) on the priority waiting list.

5. Under delegation of authority by the Director of the Idaho State Police, ABC is tasked with the ability to interpret ABC statutes, regulations and case law to carry out the legislative intent and purpose of Title 23, Chapters 1-14.

6. An alcohol beverage licensee is the only person or entity allowed to exercise any of the privileges granted by law. This includes the exercise to renew an alcohol beverage license.

7. In this case, BV Beverage LLC had transferred alcohol beverage license (No. 4314) to Iggy's Idaho Falls, Inc. in 2007. See Agency Record E.

8. From this point forward, through 2010, ABC renewed alcohol beverage license No. 4314, (solely) with Iggy's Idaho Falls, Inc., through ABC's IDAPA Rule 11.05.01.011.03.

9. ABC renews alcohol beverage licenses (including liquor, beer and wine) according to I.C. § 23-908(1), and may be subject to approval as provided by I.C. §§ 23-905, 23-907 and 23-1010.

10. The only person who is lawfully allowed to exercise the privilege of holding an alcohol beverage license is the licensee, including the privilege to renew a license. ABC's laws or regulations do not require it to send renewal notices to a third party or a lessor.

11. It has been my experience in the past to have an alleged owner/lessor come out of the woodwork so to speak, but only after an administrative violation has occurred and the license is about to be revoked.

12. The renewal of all alcohol beverage licenses, located in Idaho Falls, Idaho (Bonneville County), are due for renewal by October 1 of each year according to IDAPA Rule 11.05.01.11.03.

13. Idaho Code §23-908(5) and IDAPA Rule 11.05.01.12 deals with how an alcohol beverage license transfer takes place.

14. While a renewal and a transfer may occur at the same time, the law for each is separate and apart from one another. Both laws must be complied with. Alcohol beverage law does not provide for an exception of additional time for renewal, where transfers are occurring.

15. To date, ABC has received three recent rulings by either a court or a hearing officer stating that the director has no discretion to extend the renewal period of a liquor license. Attached as Exhibit h and incorporated herein. They are *Cheerleaders Sports Bar and Grill, Inc. v State of Idaho, Department of Idaho State Police*, Memorandum Decision and Order (Nov. 13, 2009). *See*, Agency Record, D. *See also, Sagebrush Inn, Inc. v. Idaho State Police, Bureau of Alcohol Beverage Control*, Order Dismissing Amended Petition for Judicial Review and Request for Stay (May 10, 2011), and *Ronald Abraham, v. Idaho State Police, Alcohol Beverage Control*, Finding of Fact, Conclusions of Law and Preliminary Order (December 29, 2010) and Director's Final Order (June 17, 2011).

16. ABC must investigate the transferee and if the transferee meets the qualifications of holding an alcohol beverage license, then ABC can issue said license to a transferee. The law does not give ABC the authority to approve any lease agreements between a lessor and lessee. Nor does ABC engage in such approval. *See*, I.C. § 23-908(2).

17. On August 20, 2010, ABC sought to revoke Iggy's license because it was no longer exercising the privilege of selling alcoholic beverages; this revocation proceeding applied solely to the issue of non-use. It did not involve the issue of non-renewal.



18. Iggy's alcohol beverage license expired by operation of law, so a contested case never occurred.

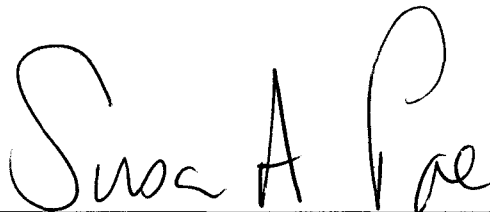
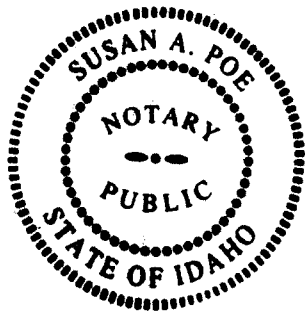
This concludes my affidavit.

DATED this 14 day of July 2011.



Lt. Robert Clements  
Alcohol Beverage Control

Subscribed and swore to before me this 14<sup>th</sup> day of July, 2011.



Notary Public for Idaho  
Residing at: Ada County  
Commission expires: 07-06-2016

**h.**

DISTRICT COURT  
GOODING CO. IDAHO  
FILED

2011 MAY 10 AM 8:03  
GOODING COUNTY CLERK

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF GOODING

BY: [Signature]  
DEPUTY

SAGEBRUSH INN, INC., dba, )  
THE LINCOLN INN, )  
)  
)  
Petitioner, )  
)  
vs. )  
)  
IDAHO STATE POLICE, BUREAU OF )  
ALCOHOL BEVERAGE CONTROL, an )  
Agency of the government of the State of )  
Idaho, )  
)  
Respondent. )  
\_\_\_\_\_ )

Case No. CV2011-0000053

**ORDER DISMISSING  
AMENDED PETITION FOR  
JUDICIAL REVIEW AND  
REQUEST FOR STAY**



This matter is before the Court on Petitioner's Amended Petition for Judicial Review and Request for Stay and Respondent's response thereto. The Court convened oral argument on April 29, 2011. Petitioner was represented by James C. Meservy, Attorney at Law, and Respondent was represented by Stephanie A. Altig, Deputy Attorney General. Having considered the record and oral argument of counsel, the Court enters its Order as follows.

**I. STANDARD OF REVIEW.**

Judicial review of agency actions is governed by the Idaho Administrative Procedures Act, Title 67, Chapter 52, IDAHO CODE. In reviewing an agency's decision, an appellate court may not "substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." IDAHO CODE § 67-5279(1). Instead, the court must defer "to the agency's findings of fact unless they are clearly erroneous." *Price v.*

ORDER DISMISSING AMENDED PETITION FOR JUDICIAL REVIEW  
and REQUEST FOR STAY- 1

*Payette County Bd. Of County Comm'rs*, 131 Idaho 426, 429, 958 P.2d 586 (1998);

*Bennett v. State*, 147 Idaho 141, 142, 206 P.3d 505, 506 (Ct.App. 2009).

Agency action must be affirmed on appeal unless the court determines that the agency's findings, inferences, conclusions or decision are: (a) in violation of constitutional or statutory provisions; (b) in excess of statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. IDAHO CODE § 67-5279(3); *Bennett*, 147 Idaho at 142, 206 P.2d at 506. The party attacking the agency's decision bears the burden of demonstrating that the agency erred in a manner specified in section 67-6279(3) and that a substantial right has been prejudiced. *Price*, 131 Idaho at 429, 958 P.2d at 586; *Bennett*, 147 Idaho at 142, 206 P.2d at 506.

## II. UNDISPUTED MATERIAL FACTS.

The following undisputed material facts are derived from the Agency Record, which was filed with the Court on February 22, 2011.

1. On July 7, 2010, ABC received Petitioner's Alcohol Beverage License Renewal Application. The applicant was Sagebrush Inn, Inc., dba, The Lincoln Inn. The license number was 3367 for premises number 2G-22 and up for renewal in June of 2010 for issuance of a 2011 license. The application was signed by James Hohnhorst, President, and Penny Hohnhorst, Director, of Sagebrush Inn, Inc. Agency Record ("AR"), n.

2. The renewal fee for Petitioner's license was \$820.00. AR, n.

3. Petitioner included a personal check for the renewal fee, which was returned "NSF" on July 21, 2010. AR, m.

4. On July 21, 2010, the same day ABC learned of Petitioner's NSF check, ABC employee Nichole Harvey sent a letter to Petitioner advising of the NSF check and instructing Petitioner to submit a money order or cashier's check by July 31, 2010. AR, l.

5. Ms. Harvey sent the letter to Petitioner by certified mail, but it was returned to ABC "Return to Sender, Unclaimed, Unable to Forward" on August 9, 2010. AR, k.

6. On September 8, 2010, Lt. Robert Clements, the Bureau Chief for ABC, sent a letter to Petitioner advising that "the liquor license which was issued to The Sagebrush Inn, Inc., doing business as The Lincoln Inn...has been cancelled due to the non-renewal of the license within the allowed time frame. See IDAHO CODE § 23-908." AR, j.

7. Lt. Clements' letter to Petitioner also recited the series of events that led to the cancellation of the license and advised further: "All alcohol sales on the premises must immediately cease." He instructed Petitioner: "You are to immediately return the original 2011 license to my office within five (5) business days of receipt of this letter." AR, j.

8. Lt. Clements' letter was also sent by certified mail; and as with Ms. Harvey's letter, it was returned: "Return to Sender, Unclaimed, Unable to Forward." AR, i.

9. On December 17, 2010, ABC employee Jaimy L. Adams submitted an Idaho State Police Incident Report. This Incident Report summarized the events set forth in paragraphs 1-8, *supra*, and reported further that between August 9 and September 8, 2010, Mr. Adams "attempted numerous times to contact the licensee via telephone but each time he was unable to talk to an officer of Sagebrush Inn, Inc. Numerous messages were left requesting a return call but nothing was received." AR, h.

10. Mr. Adams' report stated further: "The 2010 license issued to Sagebrush Inn, Inc., expired on June 30, 2010. On July 1, 2010 Sagebrush Inn, Inc. began the 31-day grace period in which to renew the license before it was cancelled at the end of the grace period. On July 31, 2010 the 31-day grace period expired. Since Sagebrush Inn, Inc. failed to completely renew the alcohol license by paying for the renewal of the license, as required by Idaho Code [sic] ?23-908(1) which states in relevant part 'Renewal applications for liquor by the drink licenses accompanied by the required fee must be filed with the director on or before the first day of the designated renewal month.' To date, ABC has not received a replacement check from the licensee." AR, h.

11. ABC issued the actual Retail Alcohol Beverage License in good faith to Petitioner before learning that Petitioner's check was returned "NSF." AR, g.

12. On December 12, 2010, Lt. Clements issued an "Order to Cease and Desist and Notice of Cancelled Retail Alcohol Beverage License" against Petitioner. Lt. Clements' Order carefully identified the authority under which he issued the order, explained the factual basis for the order, entered his conclusion of law based on the facts and applicable law, and ordered Petitioner to cease and desist selling alcoholic beverages in the state of Idaho. AR, f.

13. On January 6, 2011, ABC received Petitioner's Request for Reconsideration. The Request for Reconsideration was based on Mr. Hohnhorst's assertions that he was not aware that the renewal fee check had been returned for non-sufficient funds, that he was not aware that certified letters had been mailed but not claimed or accepted, that there had been a substantial lack of communication between Mr. Hohnhorst and his bookkeeper, and that he was not aware of the lack of communication until he received Lt.

Clements' Order to Cease and Desist and Notice of Cancelled Retail Alcohol Beverage License. AR, d.

14. Mr. Hohnhorst's Request for Reconsideration was accompanied by a money order payable to ABC "in the sum of \$840 for the renewal fee amount of \$820 and a separate money order payable to [ABC] in the sum of \$20 to cover the non-sufficient funds handling fee." Mr. Hohnhorst apologized for the "inconvenience his lack of communication with his bookkeeper has caused" and asked that "his Retail Alcohol Beverage License be reinstated without delay." AR, b, c and d.

15. Lt. Clements responded to Mr. Hohnhorst's Request for Reconsideration by letter dated January 7, 2011. Lt. Clements explained: "the renewal fees for license number 3376 which expired on 06/30/2010 were not paid as the result of your returned check due to non-sufficient funds. Once a license expires, a thirty-one (31) day grace period is permitted to renew the license with required fees. However, no alcoholic beverages may be sold or served until the license is renewed (Idaho Code 23-908). Once this grace period has passed the license cannot be renewed. The grace period to renew this license passed on 07/31/2010. Under Idaho Code 23-908, this license cannot be renewed and ABC must offer the available license to the next applicant on the priority list for Gooding as required in IDAPA 11.05.01.013.02. Therefore, your request for reconsideration is denied. Enclosed are your returned checks." AR, a.

### III. ANALYSIS.

The Twenty-First Amendment to the United States Constitution confers broad powers upon the states over the sale of liquor. This police power is the most comprehensive and least limitable of governmental powers. *Rowe v. City of Pocatello*, 70 Idaho 343 P.2d 695 (1950). Police power may be defined generally as the state's power to make laws and regulations, within the bounds of constitutional restrictions, to govern, restrict, and regulate the conduct of individuals, and businesses for the promotion and protection of the public health, safety, morals and welfare. *Winther v. Village of Weippe*, 91 Idaho 798, 430 P.2d 698 (1967). Police power inheres in the state, without the necessity of constitutional grant or reservation, *Foster's Inv. v. Boise City*, 63 Idaho 201, 118 P.2d 721 (1941), and is exclusive to the state. *Crazy Horse, Inc., v. Department of Law Enforcement*, 98 Idaho 762, 572 P.2d 865 (1977). It is well settled that the matter of liquor control is within the powers of the states. *Adams Express Co. v. Commonwealth of Kentucky*, 214 U.S. 218, 29 S. Ct. 633, 53 L.Ed. 972 (1909).

The state's police power with respect to intoxicating liquors exists as a correlative of the state's duty to support paupers, to protect the community from crime, and to confine and maintain the criminal, since the liquor traffic is frequently a source of pauperism and crime. *45 Am. Jur. 2<sup>nd</sup> Intoxicating Liquors § 19*. In *State v. Calloway*, 112 Idaho 719, 84 P.27 (1906), the Idaho Supreme Court stated:

The business of selling intoxicating liquors is not considered as of equal dignity, respectability, and necessity as that of the grocery, dry goods, or clothing business, or many other occupations that might be mentioned, and from time immemorial its prohibition or regulation has been to be within legislative power under what is known as police power.



It is universally accepted that no one has an inherent or constitutional right to engage in a business of selling or dealing in intoxicating liquors. *Uptick Corporation v. Ahiln*, 103 Idaho 364, 647 P.2d 1236 (1982); *Gartland v. Talbott*, 72 Idaho 125, 237 P.2d 1067 (1951). The terms and conditions under which a liquor license is granted are subject to the pleasure of the legislature. *State of Idaho, Department of Law Enforcement v. Pierandozzi*, 117 Idaho 1, 784 P.2d 331 (1989). A liquor license is a grant or permission under government authority to the licensee to engage in the business of selling liquor. Such a license is a temporary permit to do that which would otherwise be unlawful. *Nampa Lodge No. 1389 v. Smylie*, 71 Idaho 212, 229 P.2d 991 (1951).

Article III of the Idaho Constitution charges the state legislature to direct “efforts for the promotion of temperance and morality.” IDAHO CONSTITUTION, Article III, § 26. The Idaho legislature has “full power and authority to permit, control and regulate or prohibit the manufacture, sale and transportation for sale of intoxicating liquors for beverage purposes.” *Id.*

Pursuant to its constitution authority, the Idaho legislature passed the initial “Idaho Liquor Act” in 1934 in the exercise of the police power of the state. IDAHO CODE § 23-102. Also pursuant to its constitutional authority and responsibility for the enforcement of the police powers of the state of Idaho, the Idaho legislature exercised its authority when it enacted IDAHO CODE § 23-908, the statute that primarily controls the outcome of the present case.

The Idaho legislature established a quota system for issuance of incorporated city liquor licenses. “No license shall be issued for the sale of liquor on any premises outside the incorporated limits of any city except as provided in this chapter and the number of

licenses so issued for any city shall not exceed one (1) license for each one thousand five hundred (1,500) of population of said city or fraction thereof..." IDAHO CODE § 23-903.

The license at issue in this case is an incorporated city license for the city of Gooding.

The Idaho legislature also established liquor licensing requirements.

Under IDAHO CODE § 23-903:

The director of the Idaho state police is hereby empowered, authorized, and directed to issue licenses to qualified applicants, as herein provided, whereby the licensee shall be authorized and permitted to sell liquor by the drink at retail and, upon the issuance of such license, the licensee therein named shall be authorized to sell liquor at retail by the drink, but only in accordance with the rules promulgated by the director and the provisions of this chapter.

IDAHO CODE § 23-904 sets forth the fees for liquor licensing:

Each licensee licensed under the provisions of this act shall pay an annual license fee to the director as follows:

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(3) For each license in a city having a population of more than three thousand (3,000), seven hundred fifty dollars (\$750) per annum.

IDAHO CODE § 23-907 addresses investigation into license applicants and how the Director of the Idaho State Police is to determine whether to issue a license and what he is to do if he finds a applicant is not qualified for some reason:

If the director shall determine that the contents of the application are true, that such applicant is qualified to receive a license, that his premises are suitable for the carrying on of the business, and that the requirements of this act and the rules promulgated by the director are met and complied with, he shall issue such license; otherwise the application shall be denied and the license fee, less the costs and expenses of investigation, returned to the applicant.

Licenses expire on the first day of their renewal month and are subject to renewal upon proper application. IDAHO CODE § 23-908. The renewal month is determined by

the Director<sup>1</sup> of the Idaho State Police by administrative rule, which the Director has done. IDAPA 11.05.01.011.03. License renewals occur annually on their renewal month.

The Idaho legislature obviously anticipated that on occasion, a licensee may miss the renewal deadline because it also provided a 31-day grace period for a licensee who fails to file his renewal application on or before the first day of his renewal month.

IDAHO CODE § 23-908. If the licensee does not renew the license by the end of the 31-day grace period, and if the license is an incorporated city liquor license, which the license at issue here is, the license then becomes available and ABC offers it in writing to the applicant whose name appears first on the priority list for that city, which in this case is the city of Gooding. IDAPA 11.05.01.013.02.

There is no other means or mechanism by which a liquor license can be renewed outside the 31-day grace period. In other words, ABC has no agency discretion to renew a liquor license after the 31-day grace period following a license's expiration. The relevant text of IDAHO CODE § 23-908, is very clear in this regard:

All licenses shall expire at 1:00 o'clock a.m. on the first day of the renewal month which shall be determined by the director by administrative rule and shall be subject to annual renewal upon proper application. The director will determine the renewal month by county based on the number of current licenses within each county, distributing renewals throughout the licensing year. The director may adjust the renewal month to accommodate population increases. Each licensee will be issued a temporary license to operate until their renewal month has been determined. Thereafter, renewals will occur annually on their renewal month. Renewal applications for liquor by the drink licenses accompanied by the required fee must be filed with the director on or before the first day of the designated renewal month. Any licensee holding a valid license

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<sup>1</sup> The Director of the Idaho State Police has delegated his authority to the Alcohol Beverage Control Bureau and all applications and inquiries concerning alcoholic beverage licenses must be directed to the Alcohol Beverage Control Bureau. IDAPA 11.05.01.011.02.

who fails to file an application for renewal of his current license on or before the first day of the designated renewal month shall have a grace period of an additional thirty-one (31) days in which to file an application for renewal of the license. The licensee shall not be permitted to sell and dispense liquor by the drink at retail during the thirty-one (31) day extended time period unless and until the license is renewed.

Agency action must be affirmed on appeal unless the court determines that the agency's findings, inferences, conclusions or decision are: (a) in violation of constitutional or statutory provisions; (b) in excess of statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; or (e) arbitrary, capricious, or an abuse of discretion. IDAHO CODE § 67-5279(3). In this case, the Court finds that subsections (a) – (d) do not apply. If there is any application, it would be subsection (e). With that in mind, the Court turns to *Cheerleaders Sports Bar & Grill, Inc. v. The State of Idaho, Department of Idaho State Police, G. Jerry Russell*,<sup>2</sup> in which District Judge Kathryn A. Sticklen analyzed a failure to timely renew case on judicial review. Although this Court is not bound by Judge Sticklen's decision, the Court finds it instructive. She concluded: "Nothing in the Idaho Code gives the Director of the Idaho State Police the option of renewing an expired liquor license after the thirty-one (31) day grace period...Also, the fact that the Director may have discretion in some instances does not mean that there are not strict deadlines that he must honor and enforce." *Id.*, p. 5. Judge Sticklen also found that: "Because the Director did not have the authority or discretion to renew an expired license after the thirty-one (31) day grace period, the Director's decision to not renew Cheerleaders'

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<sup>2</sup> Case No. CV-OC0814425, Fourth Judicial District of the State of Idaho, Ada County, Memorandum Decision and Order (November 13, 2009). Respondent includes a true and correct copy of this decision and asks that the Court take judicial notice of the same, pursuant to IRE 201(d).

expired license for this very reason was not arbitrary, capricious, or an abuse of discretion.” *Id.*, p 8.

From this Court’s perspective, the Director cannot be found to have abused his discretion because in the context of timelines to renew the liquor license at issue, he simply had no discretion to abuse. The legislature enacted renewal requirements that are mandatory, and if not, the Director cannot renew the license.

Petitioner’s renewal application accompanied by the required fee mandated by law was not filed with the ABC on or before its renewal month nor within the 31-day grace period. His check was NSF, ABC tried to advise him of the problem to no avail, and the fee was not tendered again until approximately four months after the license expired and the 31-day grace period had run. For those reasons, the license has been lost and cancelled as to Petitioner and cannot be reinstated.

#### IV. CONCLUSION.

Based on the foregoing, the Court having carefully considered this matter and being fully advised in the premises, IT IS HEREBY ORDERED that the Amended Petition for Judicial Review and Request for Stay in this matter be, and hereby is, DISMISSED.

Dated this 10 day of May 2011.

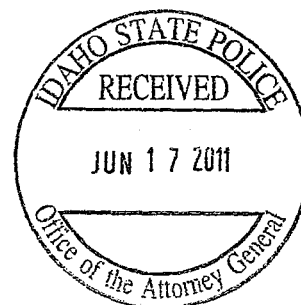
  
\_\_\_\_\_  
JOHN K. BUTLER  
District Judge

**A CONTESTED MATTER BEFORE THE DIRECTOR  
OF THE IDAHO STATE POLICE**

RONALD ABRAHAM, Licensee, )  
d.b.a., SPORTSMAN CLUB, )  
) )  
Applicant/Petitioner, )  
) )  
vs. )  
) )  
IDAHO STATE POLICE, )  
ALCOHOL BEVERAGE CONTROL, )  
) )  
Agency/Respondent. )  
\_\_\_\_\_ )

CASE NO. 10-ABC002

**DIRECTOR'S FINAL ORDER**



This matter is before the Director of the Idaho State Police on review of the Findings of Fact, Conclusions of Law and Preliminary Order (hereafter, "Preliminary Order") entered by the duly appointed Hearing Officer on December 29, 2010. The parties have been given an opportunity to submit briefing to the Director on all disputed issues and the Director has reviewed the contested case record filed in this matter. In accordance with the contested case provisions of title 67, chapter 52, Idaho Code, and IDAPA 04.11.01, the Director hereby enters this Final Order.

**I.  
INTRODUCTION**

Applicant/Petitioner, Ronald Abraham, dba Sportsman Club (hereafter "Abraham"), had been for several years the holder of a liquor license issued by Agency/Respondent, Idaho State Police, Alcohol Beverage Control (hereafter "ABC"). Liquor licenses are required to be renewed annually in accordance with a schedule for Idaho counties. Abraham's license was scheduled to expire at the end of November each year, subject to a statutory "grace period" of an additional thirty-one (31) days.

This case concerns whether Abraham renewed his liquor license for his assigned 2010 renewal year (December 1, 2009 - November 30, 2010). Abraham claims he renewed his license in a timely fashion; ABC claims that no completed application form was received prior to expiration of the grace period and, therefore, the license expired by operation of law and could not be renewed.

On or about April 12, 2010, Abraham filed a pleading requesting renewal of the license. The matter was assigned to Edward C. Lockwood, a duly appointed Hearing Officer.

Both parties moved for summary judgment before the Hearing Officer. On or about December 29, 2010, the Hearing Officer entered his Preliminary Order concluding that as a matter of law ABC was entitled to summary judgment. From this Order, Abraham filed a timely Petition, pursuant to Idaho Code § 67-5245, requesting that the Director review and reverse the Hearing Officer's decision.

Except as expressly modified below, the Hearing Officer's Findings of Fact, Conclusions of Law and Preliminary Order granting ABC summary judgment is adopted and incorporated herein in full.

## II. ISSUES

In his "Appeal Taking Exception to Preliminary Order," filed on or about February 16, 2011, Abraham does not state the grounds or basis for his appeal.<sup>1</sup> However, in a "Memorandum in Support of Appeal" (hereafter "Abraham's Brief"), filed on or about April 1, 2011, Abraham lists three (3) issues on appeal:

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<sup>1</sup> Abraham's pleading is not in complete compliance with the Idaho Administrative Procedures Act. Idaho Code § 67-5245(4) states that, "The basis for review [of a Hearing Officer's Preliminary Order] must be stated on the petition." (Emphasis added.) No objection having been lodged by ABC and there appearing no prejudice from this technical non-compliance, Abraham's failure to follow the literal requirement of the statute is not significant or at issue in the Director's review.

1. The Alcohol Bureau failed to comply with the Administrative Procedures Act's requirements for rulemaking.
2. The Alcohol Bureau acted in excess of its statutory authority.
3. The Alcohol Bureau's failure to renew the license was arbitrary and capricious.

Each of these issues was raised by Abraham before the Hearing Officer. However, when the Hearing Officer granted ABC summary judgment based on a finding that Abraham had not filed a timely renewal application, he concluded that these issues were moot and therefore did not need to be addressed. Preliminary Order, p. 10. Because the issues were raised below and have been extensively briefed by both parties on this review, the Director will address them in this Final Order.

While not listed as a separate issue on appeal, Abraham does argue in his briefing that the Hearing Officer erred in awarding summary judgment to ABC because he claims there were disputed issues of material fact that needed to be resolved at evidentiary hearing. Whether or not summary judgment was available and properly granted does appear to be the threshold issue and will be discussed first.

### III. STANDARDS APPLICABLE FOR SUMMARY JUDGMENT

Summary judgment is proper "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), I.R.C.P.; *Cristo Viene Pentecostal Church v. Paz*, 144 Idaho 304, 160 P.3d 743 (2007).

In this case both parties moved for summary judgment and the trier of fact was the Hearing Officer, not a jury. In such circumstances, summary judgment can be awarded, even though there are conflicting inferences from the evidence, assuming the



parties move for summary judgment on the same evidentiary facts, and the same legal theories and issues. *AID Ins. Co. (Mut.) v. Armstrong*, 119 Idaho 897, 811 P.2d 507 (1991). Where the evidentiary facts are not disputed and the trial court, rather than a jury, will be the trier of fact, summary judgment is appropriate despite conflicting inferences because the court alone will be responsible for resolving the conflict between the inferences. *Riverside Dev. Co. v. Ritchie*, 103 Idaho 515, 650 P.2d 657 (1982). However, the mere fact that both parties move for summary judgment does not demonstrate that there is no disputed material issue of fact. *Currie v. Walkinshaw*, 113 Idaho 586, 746 P.2d 1045 (1987). When the judge is the trier of fact, although he can draw those inferences he deems most probable from undisputed facts, on a summary judgment motion he is required to view conflicting evidence in favor of the losing party. *Argyle v. Slemaker*, 107 Idaho 668, 691 P.2d 1283 (1984).

#### IV. DISCUSSION AND ANALYSIS

##### A. Summary Judgment Was Properly Granted Since There Are No Disputed Issues of "Material" Fact.

The Hearing Officer correctly and thoroughly articulated the "Uncontroverted Facts." Preliminary Order, pp. 4-5. The Hearing Officer also correctly articulated the "Disputed Allegations." Preliminary Order, pp. 5-6. The propriety of resolving this case on summary judgment turns upon whether any of those "disputed allegations" are genuine issues of material fact.

Construing the facts in the light most favorable to Abraham and drawing those inferences that are most probable from those facts (*Argyle*), yields the following:

On or about September 1, 2009, ABC license renewal applications begin requiring licensees to supply their "Idaho Seller's Permit Number" issued by the Idaho

State Tax Commission. Unless renewed, Abraham's liquor license was scheduled to expire on November 30, 2009. Idaho Code § 23-908(1) gave Abraham a thirty-one (31) day "grace period" (that is, until December 31, 2009) to file a late application.

Abraham was mailed his liquor license renewal application packet in early October 2009. The application included an affidavit section where Abraham was to state, under oath and penalty of perjury, that the responses given and the information supplied were true and correct. Abraham partially completed the application and mailed it, along with his renewal fee, to ABC on or about October 19, 2009. Missing from the application was the Idaho Seller's Permit Number and some personal information Abraham was required to supply concerning himself and his wife.

On or about October 26, 2009, the application and fee were returned to Abraham as incomplete.

On November 23, 2009, Abraham and his wife flew to Boise with the stated purpose of submitting a new or amended application. According to Abraham, upon being notified by ABC personnel that Idaho Seller's Permit Numbers were issued by the Idaho Tax Commission, Abraham went to the Commission and applied for a number. Abraham further testified that he then went back to ABC, argued with a clerk about his application, but finally prevailed upon her to accept a renewal check and a copy of his previous application with the word "Pending" written in the space reserved for disclosing his Idaho Seller's Permit Number.

There is no dispute that Abraham was issued an Idaho Seller's Permit Number by the Tax Commission on December 10, 2009. See Exhibit 8 to Abraham's Deposition. While Abraham initially claimed that he phoned ABC and spoke with and conveyed the Seller's Permit Number to an ABC employee on or about December 14,

2009, the parties stipulated to the authenticity of ABC's phone records showing that the only phone call received from Abraham on that date went to ISP's voicemail system.

ABC witnesses all testified that none of them accepted a second application from Abraham. These witnesses, without exception, further testified that they would not and could not accept an application without the required Idaho Seller's Permit Number nor would they accept any oral information over the phone to supplement or amend a written renewal application. ABC witnesses further testified that the last they saw of the original renewal application and renewal fee were when they were returned to Abraham around October 26, 2009. ABC has no record of Abraham's renewal application—original or otherwise—on file in its offices.

Abraham acknowledges that the second renewal fee he says he submitted to ABC has never been cashed.

In granting summary judgment to ABC, the Hearing Officer stated: "Given the totality of the evidence presented by the parties and the reasonable inferences that can be drawn from that evidence, the hearing officer must conclude that Abraham did not file a renewal application before the license expired by operation of law on December 31, 2009." Preliminary Order, p. 10.

It is entirely understandable how the Hearing Officer could reasonably conclude that Abraham failed to file a renewal application subsequent to the rejected incomplete application returned to him on October 26, 2009. As mentioned, without exception the evidence presented by ABC demonstrates that it is ABC policy not to accept incomplete applications; the witnesses uniformly testified that they did not accept any application from Abraham; Abraham submitted different versions of the identity of the ABC person he claims accepted his application on November 24, 2009; Abraham's testimony

regarding speaking to an ABC representative on December 14, 2009 was discredited by ABC phone records; the renewal fee check Abraham claims he submitted was never cashed by ABC; and, it is extremely unlikely that a misfiled application would not have surfaced and been discovered because Boundary County licensing files had been handled several times since Abraham claims he filed his renewal papers.

However, notwithstanding how “far-fetched” or improbable Abraham’s version of the facts appear to be, Abraham’s testimony is sufficient to create a genuine issue of fact regarding whether he submitted a renewal application on November 24, 2009.<sup>2</sup> Therefore, the question becomes: Assuming Abraham submitted another application on November 24, 2009, is this fact “material,” thereby precluding summary judgment?

According to Abraham, after applying for an Idaho Seller’s Permit Number from the Tax Commission, he wrote “Pending” on the application line for the Permit Number and convinced an ABC employee to accept the form. He then phoned-in the Permit Number within the grace period.

First, it is significant that Abraham does not claim that ABC “approved” his renewal application. Rather, he claims that after arguing with an ABC clerk, she “accepted” his application. Abraham’s Brief, p. 6. While it is strongly contested by ABC witnesses that any ABC employee accepted his application, even if one had, accepting an application to diffuse an argumentative and volatile situation is not the same as approving an application. There is no evidence that ABC approved any application.

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<sup>2</sup> A mere scintilla of evidence is not sufficient to create a genuine issue of fact. *Edwards v. Conchemco Inc.*, 111 Idaho 851, 727 P.2d 1279 (1986). Creating a slight doubt as to the facts will not defeat a summary judgment motion; summary judgment is warranted whenever reasonable minds can not disagree as to the facts. *Snake River Equip. Co. v. Christensen*, 107 Idaho 541, 691 P.2d 787 (1984). This case may call into play these legal principles; however, it is unclear whether the Hearing Officer relied upon this case law in granting summary judgment. Therefore, for purposes of discussion, we will assume there does exist a genuine factual dispute on this issue. However, though “genuine” it also needs to be “material.”

Second, even giving Abraham the benefit of the doubt and accepting his testimony, he has failed to show that he submitted a completed written application to ABC within the requisite time-frame for renewal. Although writing "Pending" on the form might have been a truthful answer at the time it was given, it was not a sufficient, complete answer. ABC was asking for and entitled to know Abraham's Idaho Seller's Permit Number. That he did not have one was not ABC's problem—it was Abraham's.

Finally, Abraham's subjective belief or desire that leaving a verbal message on a voicemail system is adequate to modify or complete an insufficient written renewal application does not change the undisputed fact that ABC policy and procedure is to not accept oral amendments to applications.

Applications are submitted under oath; and for good reason. This requirement assures that applicants take seriously their obligation to submit complete and accurate information. Upon executing an affidavit of authenticity and compliance, that particular application cannot be amended. To supplement, correct, delete or otherwise change any information contained on a filed application, a licensee would need to supplant the filed application with a new renewal application, signed under oath attesting to the changed information. No one claims that happened here. ABC's testimony on this point is clear and unrefuted. As such, whether Abraham wants to acknowledge it or not, the evidence in the record establishes that he failed to submit a completed written application as required to renew his liquor license.

It was Abraham's responsibility and burden to submit a completed written application in a timely fashion. Even giving Abraham the benefit of the doubt the he submitted another written application on November 24, 2009, that fact, in and of itself, is not "material" since by Abraham's own admission the application did not contain an

Idaho Seller's Permit Number and therefore was not "complete." Because no complete written renewal application was received by ABC prior to the end of the grace period, it was appropriate to grant ABC summary judgment.

**B. ABC Was Not Required to Promulgate Rulemaking in Order to Require Licensees to Disclose Their Idaho Sellers Permit Number on the Renewal Application Form.**

Abraham argues that ABC could not require him to produce an Idaho Seller's Permit Number absent formal rulemaking under the Idaho Administrative Procedures Act. His argument lacks merit.

ABC correctly points out that the Director's authority to "promulgate" rules and his authority to "prescribe" forms pertaining to the sale of liquor by the drink, although found in the same statute, are distinct and separate.<sup>3</sup> In relevant part, the statute provides:

For the purpose of the administration of this act the director shall make, promulgate and publish such rules and regulations as the said director may deem necessary for carrying out the provisions of this act and for the orderly and efficient administration hereof, . . . Every licensee shall advise himself of such rules and regulations, and ignorance thereof shall be no defense. Without limiting the generality of the foregoing provisions, the said director shall be empowered and it is made his duty to prescribe forms to be used in the administration of this act, the proof to be furnished and the conditions to be observed in the issuance of licenses, . . . prescribing, subject to the provisions of this act, the conditions and qualifications necessary to obtain a license . . . .

Idaho Code § 23-932 (emphasis added).

There can be no question that ABC has the statutory authority to prescribe application forms requiring the disclosure of relevant information for purposes of

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<sup>3</sup> ABC also cites to Idaho Code § 23-1010. In relevant part, that statute grants the Director authority to prescribe application forms for beer licenses. While a liquor licensee must also hold a retail beer license (Idaho Code § 23-910(5)), ABC has not charged Abraham with any violation pertaining to his application for or obtaining of his beer license. Therefore, Idaho Code § 23-1010 does not appear to apply in this case.

determining eligibility for a liquor license.<sup>4</sup> Notwithstanding this authority, Abraham argues that requiring a licensee to obtain and reveal his Idaho Seller's Permit Number on the application constitutes policymaking or imposing substantive obligations which can only be done by rulemaking.

ABC is not requiring a licensee to obtain an Idaho Seller's Permit Number. That obligation is imposed by the Tax Commission. IDAPA 35.01.02.070.01 mandates that all retailers and others required to collect sales tax obtain a Seller's Permit Number before they can do business in Idaho. Abraham does not argue that he is exempt from this Tax Commission requirement and, indeed, he is not. Therefore, contrary to Abraham's claim, ABC is not attempting to require some new, substantive obligation or policy on licensees. That obligation and policy was already formulated and in existence. ABC is simply requesting that Abraham, and all licensees, disclose the permit number they are already required to have under other state law prior to conducting business in Idaho.<sup>5</sup>

Obviously, ABC could not require a licensee to disclose irrelevant or immaterial information. Nor could it require information that conflicted with or clearly exceeded its statutory grant of authority. Requiring a licensee to post a million dollar bond in connection with a renewal application or to maintain a Boise office and give the address of that office on the application form would be examples of substantive requirements not authorized by existing Idaho law. However, here ABC has made a determination that requiring the disclosure of a Seller's Permit Number—a number Abraham should

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<sup>4</sup> The statutes speak to the Director having the authority. Under IDAPA 11.05.01.011.02, the Director has delegated to ABC the authority to issue liquor licenses.

<sup>5</sup> The record indicates that Abraham was not in compliance with the Tax Commission rule for several years. However, whether or not this apparent violation is cause for additional sanction or penalty is not within the jurisdiction or purview of ABC.

already possess under the law—helps ABC establish that a licensee is properly authorized and licensed to do business in the State of Idaho for purposes of obtaining or retaining a liquor license. This is a legitimate state purpose and does not require rulemaking.

**C. ABC Did Not Exceed Its Statutory Authority.**

Abraham argues that ABC does not have the statutory authority to either: (1) ensure that liquor licensees are qualified to do business in Idaho, or (2) enforce the laws of the Idaho Tax Commission. Abraham’s Brief, p. 14.

First, to argue that ABC has no ability to inquire whether a person is qualified to do business in Idaho prior to issuing or renewing a license flies in the face of both common sense and statutory provisions. As discussed earlier in this decision, pursuant to Idaho Code § 23-932, ABC has the authority to request on the application form information relevant and material to an applicant’s qualifications for licensure. Furthermore, Idaho Code § 23-905 requires that prior to issuance of a license, an applicant must provide the Director (ABC) “such information and statements relative to the applicant and the premises where the liquor is to be sold as may be required by the director.” Information expressly required by this statute includes a copy of the articles of incorporation and bylaws or articles of partnership. Idaho Code § 23-905(5). Obviously, this particular information is relevant to whether an applicant (or licensee) is qualified to do business in the State of Idaho.

Interestingly, the statute addressing expiration and renewal of a liquor license (Idaho Code § 23-908) does not specifically discuss what information is required on a license renewal application. However, an existing licensee submitting a renewal application is requesting the extension of his license for another year. In this context, it



is entirely reasonable and appropriate to construe the relevant provisions found at Idaho Code § 23-905 to apply to renewal applications. Information the Director deems relevant and required for an initial licensing decision could easily be just as relevant and required for a renewal application decision. Construing the statutes any other way would eviscerate the Director's authority to require information on a renewal application, would produce an absurd and incongruent result, and could potentially jeopardize public safety. See also *Vickers v. Lowe*, 150 Idaho 439, 247 P.3d 666 (2011) (State agencies have implied or incidental powers that are reasonably necessary to carry out their express powers).

Second, Abraham's contention that it is inappropriate for ABC to enforce a Tax Commission rule is misplaced and does not square with the applicable statute.

Idaho Code § 23-933(1) authorizes the Director to suspend, revoke, or refuse to renew a liquor license where there has been a violation of title 23, chapter 9, Idaho Code, or a rule of the Director or the Tax Commission promulgated pursuant to the terms of the chapter. This statute clearly grants the Director the authority to deny renewal of a license when an applicable Tax Commission rule impacting the liquor license statutes and rules has been violated. There is no question that Abraham violated the Tax Commission rule requiring an Idaho Seller's Permit Number and this violation impacted the liquor license statutes since ABC was requiring this information in processing applications. Although the Director possessed this disciplinary authority, this case never rose to the level of suspension, revocation, or denial of the license because the license expired by operation of law when Abraham failed to provide the requisite information.

**D. ABC Was Not Arbitrary and Capricious.**

Abraham's final argument in his brief on review to the Director is that ABC's conduct was arbitrary and capricious. The argument raises several sub-issues.

First, Abraham contends that there was no way he could know of the requirement to provide an Idaho Seller's Permit Number prior to receiving his renewal packet some two (2) months before his license expiration date. Abraham argues that this was insufficient notice for him to obtain a permit number and that the instructions given were misleading.

Regarding insufficient notice, this assertion is disingenuous because Abraham should have already possessed a Seller's Permit Number if he had been complying with Idaho law. This Tax Commission requirement had been in existence for several years and, absent Abraham's noncompliance, it should have been a routine matter of simply supplying his existing permit number on the application form. Abraham's failure to have a permit number was not due to any fault on the part of ABC, but rather was caused by his own negligent behavior in not securing a Seller's Permit much earlier. And, even after being notified of this requirement and receiving back from ABC his rejected application on or about October 26, 2009, Abraham apparently did absolutely nothing to secure a Seller's Permit Number for almost one month. When Abraham did obtain a permit number from the Tax Commission on December 10, 2009, he had plenty of time to submit a new renewal application form, providing the missing information, to ABC before the end of the grace-period on December 31, 2009. Instead, Abraham phoned ABC and, at most, left the number on a voicemail system. Any tardiness was the result of Abraham's own misconduct, not anything ABC did or did not do. Finally, because

Abraham was already required to hold an Idaho Seller's Permit Number, his claim that he didn't know what the number was or where he could obtain one lacks credibility.

Abraham also claims he was misled by the application instructions because they stated that failure to supply the requested information would result in delay in issuance of the license—not loss of the license. Failure to pay the renewal fee or provide your name or social security number will also delay issuance of a license. However, continued negligence and dilatory conduct in supplying any and all requested materials and information prior to the expiration date (extended through the grace-period) will ultimately result in expiration of the license. This is not only common-sense but mandated by Idaho Code § 23-908(1), and ignorance of these deadlines is no defense. See Idaho Code § 23-932.

Abraham next claims that he has supplied incomplete renewal applications in the past without suffering any negative consequences. This is a poor argument.

There is evidence in the record that on at least one such occasion, ABC required Abraham to supply the missing information on the incomplete application form. As to the other applications, just because ABC apparently waived absolute compliance in the past does not mean it is prevented from requiring complete applications in the present, or future. Despite Abraham's claim to the contrary, there is no showing on this record that ABC's conduct in the past established some sort of expectation on Abraham's part that he could routinely ignore application questions and has now somehow detrimentally relied on a pattern and practice by ABC.

Next, Abraham argues that Idaho Code § 23-933(1) requires due process and notice when the Director decides to refuse to renew a license. His assertion is correct, but misguided.

An agency cannot refuse to renew a license of a continuing nature when the licensee “has made timely and sufficient application for renewal,” unless the licensee is given notice and an opportunity for a contested case proceeding under the Idaho Administrative Procedures Act. See Idaho Code § 67-5254(1). Here, Abraham failed to submit either a timely or a sufficient application for renewal. Therefore, a contested case hearing was not required.<sup>6</sup> Furthermore, the Director did not take action to refuse to continue Abraham’s license. Rather, his license expired by operation of law pursuant to Idaho Code § 23-908(1), without any affirmative action by the Director.

Finally, to the extent that Abraham argues that ABC’s failure to renew his license after December 31, 2009 was an arbitrary and capricious action, the argument lacks merit. This argument is essentially an abuse of discretion claim. While no appellate court decision on point has been located, at least two (2) Idaho district court judges have ruled that the Director (ABC) has no discretion to renew a liquor license after the thirty-one (31)-day grace period, and, therefore, the decision not to renew cannot be arbitrary and capricious. See *Cheerleaders Sports Bar & Grill, Inc. v. State of Idaho, Dep’t of Idaho State Police*, Case No. CV-OC0814425 (Fourth Dist., November 13, 2009, Judge Sticklen presiding) and *Sagebrush Inn, Inc. v. Idaho State Police, Bureau of Alcohol Beverage Control*, Case No. CV2011-0000053 (Fifth Dist., May 10, 2011, Judge Butler presiding).<sup>7</sup>

For the foregoing reasons, there was nothing arbitrary or capricious about any action or inaction taken by ABC in this case.

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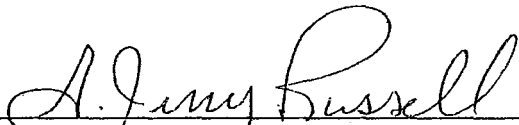
<sup>6</sup> Obviously, Abraham did receive notice and due process in this case. Although this occurred post-expiration of his license, because he did not submit a timely and sufficient renewal application he was not entitled to pre-expiration notice and continuation of the license pending ultimate resolution of the case. See Idaho Code § 67-5254(2).

<sup>7</sup> The *Cheerleaders* case is part of the record presented to the Hearing Officer. The *Sagebrush* decision was entered after this review to the Director was commenced and became part of the record pursuant to motion for official notice filed by ABC and granted by the Director on June 3, 2011.

V.  
**CONCLUSION**

In accordance with the above, the Hearing Officer's December 29, 2010 Preliminary Order, as modified herein, is affirmed. Each party shall bear its own costs and attorney fees.

Dated this 17 day of June 2011.

  
\_\_\_\_\_  
Colonel G. Jerry Russell  
Director, Idaho State Police

**DUE PROCESS AND APPEAL RIGHTS**

This is a final order of the Director. Any party may file a motion for reconsideration of this final order within fourteen (14) days of the service date of this order. The Director will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See Idaho Code § 67-5246(4).

Pursuant to Idaho Code §§ 67-5270 and 67-5272, any party aggrieved by this final order may appeal this final order to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

An appeal must be filed within twenty-eight (28) days (a) of the service date of this final order, (b) of an order denying petition for reconsideration, or (c) the failure

within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. See Idaho Code § 67-5273. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17<sup>th</sup> day of June 2011, I caused to be served, a true and correct copy of the foregoing **DIRECTOR'S FINAL ORDER** in the above-referenced matter on the following individuals by the method indicated below:

Stephanie A. Altig  
Lead Deputy Attorney General  
Idaho State Police  
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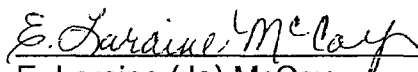
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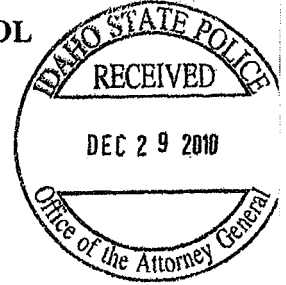
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Idaho State Bar No. 3595

**BEFORE THE IDAHO STATE POLICE, ALCOHOL BEVERAGE CONTROL**

**Ronald Abraham, d.b.a.** )  
**Sportsman Club,** )  
Applicant/Petitioner, )  
 )  
v. )  
 )  
**Idaho State Police,** )  
**Alcohol Beverage Control Bureau,** )  
Agency. )

Case No. 10ABC002

**FINDING OF FACT,  
CONCLUSIONS OF LAW  
AND PRELIMINARY DECISION**



Oral argument was conducted before Edward C. Lockwood, appointed hearing officer for the Idaho State Police (ISP), on December 17, 2010, regarding the parties' cross motions for summary judgment. The Applicant/Petitioner, Ronald Abraham, d.b.a. Sportsman Club (Abraham), was represented by Attorney Daniel K. Sheckler, and the ISP was represented by Deputy Attorney General Stephanie A. Altig. Oral argument was recorded by digital device.

The hearing officer has reviewed the record of the case, considered the arguments advanced by the parties in support of their respective motions for summary judgment, and hereby renders the following Findings of Fact, Conclusions of Law, and Preliminary Decision.

**I. PROCECURAL BACKGROUND**

Abraham, through his attorney, filed a pleading with ISP on April 12, 2010, designated as an "Application/Claim/Petition" requesting renewal of a liquor license and asserting certain claims for damage by the ISP's failure to take such action. ISP filed an Answer to Abraham's pleading on April 13, 2010, asserting that it had acted properly based on Abraham's failure to timely renew the license and asserting the right to an award of costs and reasonable attorney fees. ISP appointed the undersigned to act as the hearing officer in this matter on June 23, 2010.

An informal pre-hearing conference was conducted on August 3, 2010. By agreement of the parties' representatives, the hearing officer issued an order on August 4, 2010, outlining a

**1. FINDINGS OF FACT, CONCLUSIONS OF LAW AND PRELIMINARY DECISION**

schedule for the parties' submission of motions, scheduling oral argument on any motions that may be filed and scheduling an evidentiary hearing to be conducted on January 24, 2011. By agreement of the parties, the date for oral argument was rescheduled to be conducted on December 17, 2010.

ISP filed a Motion for Summary Judgment on November 12, 2010, supported by a memorandum, various attachments and the depositions of Abraham, ISP Lieutenant Robert Clements (Clements), Technical Records Specialist Jaimy Adams (Adams), Licensing Specialist Kelsey Stanley (Stanley), Office Specialist Sharon Inselman (Inselman), and Management Assistant Nichole Harvey (Harvey). ISP's essential position is that Abraham's liquor license expired by operation of law due to his failure to timely file a renewal application.

Abraham filed a Motion for Summary Judgment on November 15, 2010, supported by a memorandum and the same affidavits submitted by ISP in support of its motion. Abraham's essential position is that he submitted a renewal application within the time period required by law, and that the application was complete and accurate to the extent of the information that was available to him at that time. Abraham asserts that he orally supplemented the renewal application before the expiration of the grace period for renewal, and that he is entitled to issuance of the license that he requested. Abraham asserts that ISP's license renewal procedure and application form is flawed by its failure to comply with the Idaho Administrative Procedures Act, that ISP exceeded its statutory authority, and that ISP's failure to renew the license was arbitrary and capricious.

Abraham filed a memorandum opposing ISP's motion for summary judgment on November 29, 2010, that was supported by various attachments. ISP filed a response to Abraham's motion for summary judgment on December 3, 2010, requesting that certain aspects of Abraham's memorandum in opposition to ISP's motion be stricken from the record. ISP's response was supported by affidavits of Adams and Systems Integration Analyst Terry Cargile (Cargile).

Abraham filed an affidavit on December 10, 2010, correcting a portion of his deposition testimony. Abraham also filed an affidavit of his spouse, Margaret Abraham (Margaret), on that same day.

The hearing officer deemed the motions fully submitted at the conclusion of oral argument on December 17, 2010.

2. **FINDINGS OF FACT, CONCLUSIONS OF LAW AND PRELIMINARY DECISION**



## II. STANDARD FOR SUMMARY JUDGMENT

The standard for reviewing a motion for summary judgment is well known, but is worth summarizing in this decision. "Summary judgment is proper when the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Cristo Viene Pentecostal Church v. Paz, 144 Idaho 304, 307, 160 P. 3d 743, 746 (2007), (quoting I.R.C.P. 56(c)). The burden is on the moving party to prove there are no genuine issues of material fact and that the moving party is entitled to a judgment as a matter of law. Cafferty v. State, Dept. of Transp. Div. of Motor Vehicle Servs., 144 Idaho 324, 327, 160 P.3d 763, 766 (2007).

"The [tribunal] should liberally construe the facts in favor of the party opposing the motion, together with all reasonable inferences from the evidence." Mitchell v. Siqueiros, 99 Idaho 396, 582 P.2d 1074 (1978). "Motions for summary judgment should be granted with caution. If the record contains conflicting inferences or reasonable minds might reach different conclusions, a summary judgment must be denied." Bonz v. Sudweeks, 119 Idaho 539, 808 P.2d 876 (1991). Yet, the tribunal ". . . may draw those inferences which he or she deems most probable on uncontroverted facts." Stillman v. First National Bank of North Idaho, 117 Idaho 642, 643, 791 P.2d 23, 24 (Ct.App.1990), citing Argyle v. Slemaker, 107 Idaho 668, 670, 691 P.2d 1283, 1285 (Ct.App. 1984); Riverside Development Co. v. Ritchie, 103 Idaho 515, 650 P.2d 657 (1982).

"A determination of credibility should not be made on summary judgment if credibility can be tested in court before the trier of fact." Lowry v. Ireland Bank, 116 Idaho 708, 779 P.2d 22 (Ct. App.1989). "It is not the place of the [tribunal] to assess the credibility of the parties and then to rule based on that determination; . . . it was error for the [tribunal] to grant summary judgment . . . where the credibility of the parties was the determining issue." Sohn v. Foley, 125 Idaho 168, 868 P. 2d 496 (Ct. App. 1994). "Motions for summary judgment are decided upon facts shown, not upon fact that might have been shown." Verbillis v. Dependable Appliance Co., 107 Idaho 335, 689 P.2d 227 (Ct. App. 1984).

### 3. FINDINGS OF FACT, CONCLUSIONS OF LAW AND PRELIMINARY DECISION

### III. UNCONTROVERTED FACTS

1. The ISP, through its Bureau of Alcohol Beverage Control (ABC), is authorized by the Idaho State Legislature to regulate the sale of alcoholic beverages in the state. That authority includes the authority to license establishments that sell alcoholic beverages by the drink.

2. Abraham has owned and operated the Sportsman Club, located in Bonners Ferry, Idaho, since 2003. Liquor licenses throughout the state expire annually on a staggered schedule depending on the county in which the license is issued. Boundary County licenses expire on November 30<sup>th</sup> of each year. License renewal applications are mailed to existing licensees approximately 2 months prior to the expiration date. In this matter, then, Abraham's license application would have been mailed to him by ABC staff sometime in late September or early October 2009.

3. The type of information requested on renewal applications periodically changes. Beginning in 2009, the application required the applicant to provide an "Idaho Seller's Permit #." Abraham partially completed the renewal application that was mailed to him and dated the application October 19, 2009. The renewal application contains the statement: "I/we have also read all of the above and declare under penalty of perjury that each and every statement is true and correct." Abraham's renewal application did not contain the jurat of a notary public below his signature, and did not contain information regarding his name, title, Social Security number, date of birth or contact telephone number. Personal information regarding Margaret was included on the application with the exception of her Social Security number. Particularly relevant to this proceeding, Abraham's Idaho Seller's Permit # was also not provided on the application.

4. Abraham mailed this partially-completed application, together with a check for filing fees in the amount of \$550, to ABC on a date that was not entirely clear. The application and un-cashed check was returned to Abraham by ABC staff on or about October 26, 2009. The correspondence from ABC to Abraham informed him that the application was returned because he failed to include the Idaho Seller's Permit # and certain personal information about himself.<sup>1</sup>

5. Abraham and Margaret flew to Boise, Idaho, on November 23, 2009, and presented themselves to the ABC offices on the morning of November 24<sup>th</sup>. They were

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<sup>1</sup> The parties agree that the incomplete portions of the application were highlighted before the application was returned to him.

informed that the Idaho Seller's Permit # is issued by the Idaho Tax Commission, and they went to that agency to apply for such a permit number. The ensuing conversations and events between Abraham and ABC staff are disputed, and are discussed in Section IV, below.

6. The Idaho Tax Commission issued correspondence to the Sportsman Club dated December 10, 2009, informing the "taxpayer" of the issuance of the Idaho Seller's Permit.

7. Although liquor licenses expire on the last day of the month that corresponds with the county of issuance, the law provides for a 31-day "grace" period for licensees to complete the renewal process. Licensees may not engage in the sale of alcoholic products during this grace period.

8. ISP took no additional action regarding Abraham's renewal application, including issuance of formal correspondence or notification regarding the status of the liquor license.

9. Abraham filed the "Application/Claim/Petition" with ISP on April 12, 2010, requesting renewal of a liquor license.

#### **IV. DISPUTED ASSERTIONS**

Abraham testified that he returned to the ABC office on the afternoon of November 24, 2009, after he and Margaret completed the Idaho Seller's Permit application at the Idaho Tax Commission office. He testified that he spoke with the same woman with whom he had spoken earlier in the day. He described this woman as being between 45 and 55 years old, with curly blond hair and wearing glasses. Abraham testified that he explained to this woman that he had completed the Idaho Seller's Permit application as she had previously suggested, but that the Tax Commission had not issued a permit number to him. Abraham testified that he had made a photocopy of the renewal application that had been returned to him at some point before leaving for Boise, and that he wrote "pending" on the portion of the application asking for the seller's permit number while he was at the ABC office. He testified that this female employee accepted his application and check for the filing fee, and stamped the application as received.

The only female employee of ABC that resembles the woman Abraham described as assisting him on November 24, 2009, is Inselman. However, Stanley and Harvey were the only female employees working at the ABC office on that day. Harvey, as the management assistant, would not ordinarily observe or interact with the general public who might be at the front desk. If Abraham had attempted to submit the renewal application on that date, Adams or Stanley would have conducted a cursory review of the application for completeness. If either of them

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determined that the application was sufficiently complete to process, that application would have been stamped as received at that time. If either of them determined that the application was not sufficiently complete for processing, the application would have been physically returned to Abraham with an explanation of the deficiency. No particular correspondence would have been issued, nor any particular notation would have been made on the application, to memorialize the attempted submission and the return of the application to him.

Abraham testified that he telephoned the ABC offices a few days after he received the correspondence from the Idaho Tax Commission that provided him with the seller's permit number. He testified that he had a 5- to 10-second conversation with a female during which time he identified himself, and told her the seller's permit number that the Tax Commission had issued to the Sportsman Club.

Clements, Adams, Stanley, Harvey and Inselman universally agreed that ABC staff were not authorized to modify an application based on the oral statement of an applicant, or a person purporting to be the applicant. They universally agreed that information requested on an application must be provided in writing.

A telephone call was placed from Abraham's cellular telephone number to ISP on December 14, 2009. The duration of the call was 1 minute, 11 seconds, and the call was directed to ISP's voice mail system. There is otherwise no record of any telephone call from Abraham's cellular telephone number that was received at ABC on that date.

Abraham testified that he has not seen his application after he gave it to the curly haired woman at the ABC office on November 24<sup>th</sup>, and that the check for filing fees has not been cashed. Abraham's purported submission of the renewal application has not been located by ABC staff.

Abraham amended his deposition testimony via affidavit to state that the person who assisted him worked at the Tax Commission was a blond-haired woman, and the ABC employee who accepted his renewal application was brunette. Margaret submitted a similar affidavit.

## **V. REVELANT AUTHORITIES AND DISCUSSION**

This dispute involves both matters of law and matters of fact. There is no disagreement that Idaho Code Section 23-903 empowers the Director of the ISP to issue licenses to "qualified applicants" who are then authorized and permitted to sell liquor by the drink. This statute does

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not directly define the meaning of a "qualified" applicant, although Idaho Code Section 23-910 does. None of the conditions listed in that latter statute are applicable in this proceeding.

Abraham asserts that ISP's requirement that licensees possess a valid seller's permit is a substantive requirement of licensure that is not directly stated in the licensing statutes. There is no dispute that ISP has the authority to promulgate rules that govern this licensing process. Indeed, the ISP has promulgated rules regulating alcohol beverage control that are found at IDAPA 11.05.01. *et seq.* None of these rules further describe the requirements of licensure that are germane to this proceeding.

Abraham asserts that, if ISP is to require licensees to possess a seller's permit, ISP should have promulgated a rule to that effect, and that the absence of such a rule renders that requirement invalid. ISP responds that it should be accorded deference in the administration of the governmental programs assigned to it by the Legislature, and that that deference includes the authority to interpret statutes necessary to perform its duties. ISP asserts that that legislative deference is reflected in Idaho Code Section 23-908 by permitting the Director to identify the information contained in licenses as the Director deems necessary and, further, that Idaho Code Section 23-932 authorizes the Director to ". . . prescribe forms to be used in the administration of the act. . . ."

Abraham asserts that issuance of a seller's permit is an area regulated by the Idaho Tax Commission, and that ISP exceeds its lawful authority in the area of liquor licensing when it acts to enforce a Tax Commission requirement. The Idaho Tax Commission has promulgated a rule found at IDAPA 35.01.02.070.01 requiring "All retailers, wholesalers and other persons required to collect sales tax [to] obtain a permit from the Tax Commission before engaging in business. . . ." IDAPA 35.01.02.070.06 specifies that a "seller's permit" is required by ". . . persons actively engaged in making retail sales subject to Idaho sales tax." However, Idaho Code Section 23-933 empowers the Director to refuse to renew a license for any violations or failure to comply with the provisions of this chapter and/or rules and regulations promulgated by the Director "*or the state tax commission* [emphasis added] pursuant to the terms and conditions of this chapter. . . ."

Finally, Abraham asserts that ISP has acted arbitrarily and with capriciousness by refusing to renew the 2010 license at issue in this matter. He asserts that ISP's instructions regarding the new requirement of a seller's permit were provided to him unreasonably close to the expiration of his 2009 license and, indeed, that the instructions were misleading by

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suggesting that failure to include the permit number would result in delay, rather than denial, of the license. He asserts that ISP has previously approved his renewal applications that were incomplete, that he has developed a reasonable expectation that ISP would continue that trend, and that ISP's requirement of complete and correct information on this particular application is capricious. Finally, he asserts that ISP acted unreasonably by refusing to accept oral modifications of his written application.

The hearing officer initially observes that the law is applied to the facts that are unique to every circumstance presented for resolution. Before the parties' legal arguments can be fully addressed and applied, the essential and threshold factual question must be answered: Did Abraham timely file a renewal application?

There is no dispute that Abraham mailed a renewal application, together with a check for the appropriate filing fee, to ISP in October 2009. That application lacked the seller's permit number, personal information and the notary's jurat. That application was incomplete, and the application and filing fee were returned to him on or about October 26<sup>th</sup>.

Abraham testified that he re-filed the application and filing fee on the afternoon of November 24<sup>th</sup>, after he had applied for the seller's permit at the Tax Commission. Resolution of this threshold factual question is not simply a matter of weighing the credibility of witnesses but, rather, requires evaluation all of the evidence presented and drawing reasonable inferences from that evidence. In the parlance of the Sohn decision, the credibility of the parties is not the determining issue at this stage of this proceeding.

Abraham testified that he photocopied the application that was returned to him by ABC staff in October. He testified that he added his Social Security number on this photocopy sometime prior to November 24<sup>th</sup>. He testified that he wrote "pending" on the line of the application requesting his permit seller's number while he was standing at the front counter on November 24<sup>th</sup>. However, he offered no evidence regarding the requirement that he presented himself to a notary public to authenticate his signature on the application either before November 24<sup>th</sup> or on that date. He described the woman with whom he twice spoke on November 24<sup>th</sup> as a middle-aged woman with curly blond hair and wearing glasses. The only ABC employee resembling that description is Inselman, and she was not working on that day. After that information was disclosed by ISP in its memorandum in opposition to Abraham's motion for summary judgment, Abraham modified his testimony to state that the woman who had assisted

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him at the ABC office on that day was brunette. Margaret offered similar testimony in that regard.

~~Abraham testified that this ABC employee stamped the application as "received" on the~~ afternoon of November 24<sup>th</sup>. Given Harvey's management position and job responsibilities, the inference is drawn that Stanley was the only female employee who could have spoken with Abraham on the afternoon of November 24<sup>th</sup>. Stanley testified that she has no recollection of speaking with Abraham, nor of accepting the application for the Sportsman Club. If Abraham is nevertheless correct that Stanley stamped the application as received at that time, the application would have been directed to Adams because he was assigned to process liquor licenses for Boundary County. Adams testified that he had no knowledge of any license application filed by Abraham after the original application was returned to him in October 2009.

Neither the application that Abraham asserts was accepted by ABC on November 24<sup>th</sup> has been located, nor has the check for filing fee been cashed. Abraham invites the inference that ISP misfiled these documents. Yet, Abraham testified:<sup>2</sup>

Q. Okay. Did you submit a renewal fee?

A. No.

MR. SHECKLER: Stephanie, what was that question you asked? I couldn't hear it.

MS. ALTIG: If he submitted the renewal fee along with the application.

THE WITNESS: Oh. Oh. That's the check. Yeah, that is- -that's the check.

We wrote a check, yes, for the renewal of the license for 2010. Yes.

By MS. ALTIG:

Q. And was that check cashed?

A. No. That's one thing- - I was reminded it was never cashed. And after that, I lost the check, I lost the application, and I've never seen either one of those anymore. And it's never been cashed. I've been- -that's why I've kind of put a stop to things, because - -just because it hasn't been cashed yet.

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<sup>2</sup> Tr. Ronald Abraham, p 13., ln. 8-24.

If Abraham is nevertheless correct that his application was received by ABC staff on November 24<sup>th</sup> but misfiled, the application would have been filed within the comparatively small number of applications that related to Boundary County licenses. However, Harvey testified that a misfiled application would have likely been discovered because all Boundary County licenses were in the renewal process at that time. If Abraham's application had been misfiled in a folder of a Boundary County licensee who had already completed the process for that year, Harvey testified that it still may have been found since most files are reviewed or "touched" more than once annually. At the time of this oral argument, Boundary County licenses have been through yet another annual application renewal cycle, and no evidence was presented to suggest that Abraham's application has been found.

Abraham testified that he telephoned ABC Bureau after he received confirmation of the seller's permit number from the Tax Commission and, in the course of a 5- to 10-second conversation with an ABC employee, informed her of that number. Abraham's testimony is refuted by ISP telephone records indicating that no calls were received by ABC staff from his cellular telephone number on the date he stated. At most, Abraham may have left a message on ISP's voice mail-system. Abraham's testimony regarding that purported conversation stands in stark contrast to the testimonies of all ABC Bureau employees to the effect that oral amendments to license application would not be accepted by them. The rationale for that policy centers on the fact that the application is in written form, presented as the applicant's statements under oath, and that correction or addition of information on the application by ABC staff would amount to alteration of the applicant's sworn statements.

Licenses expire annually. The burden is on an applicant to demonstrate that he or she is entitled to the license being sought.<sup>3</sup> The standard of proof is by the "preponderance of the evidence" standard. Given the totality of the evidence presented by the parties and the reasonable inferences that can be drawn from that evidence, the hearing officer must conclude that Abraham did not file a renewal application before the license expired by operation of law on December 31, 2009. This factual determination renders further discussion of Abraham's legal arguments moot.

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<sup>3</sup> See generally, Tappen v. Department of Health and Welfare, 98 Idaho 576, 570 P.2d 28; and Tappen v. Department of Health and Welfare, 102 Idaho 807, 641 P.2d 994 for the propositions that applicants bear the burden to establish eligibility for requested benefits and the government bears the burden on an adverse action taken after a benefit is granted.

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## VI. CONCLUSIONS OF LAW

1. The ISP has jurisdiction in this matter pursuant to Idaho Code Section 23-901 *et seq.* and IDAPA 11.05.01.000 *et seq.*

2. Idaho Code Section 23-905 requires that, prior to the issuance of a license, the applicant must file a written application. The application must be signed by the applicant, before a person authorized to administer oaths, verifying the truth of the information contained in the application.

3. In accordance with Idaho Code Section 23-908, all licenses expire at 1:00 a.m. on the first day of the renewal month that shall be determined by the Director and published in administrative rule. In accordance with IDAPA 11.05.01.011.03, Abraham's license for calendar year 2009 expired on November 30, 2009. However, Idaho Code Section 23-908 also provides for a 31-day grace period to complete the renewal application process for calendar year 2010. That grace period expired on December 31, 2009.

4. Abraham failed to submit a sufficiently complete renewal application to ABC by December 31, 2009.

5. Idaho Code Section 23-933 authorizes the Director to refuse to renew a license by Abraham's failure to comply with the licensing requirements.

6. Idaho Code Section 67-5254 requires ISP to give notice and an opportunity to challenge its decision to refuse to renew a license ". . . when the licensee has made timely and sufficient application for renewal. . . ." Abraham's failure to submit a timely and sufficient application for renewal of the license prior to expiration removes the Director's obligation to issue formal notice to Abraham.

## VII. PRELIMINARY DECISION

ISP's Motion for Summary Judgment is hereby **GRANTED**, and Abraham's Motion for Summary Judgment is hereby **DENIED**. The evidentiary hearing scheduled for January 24, 2011, is hereby **VACATED**.

Pursuant to IDAPA 04.11.01.730 this decision is a PRELIMINARY ORDER. In accordance with that provision, the parties are advised:

- a. This order can and will become final without further action of the agency unless any party petitions for reconsideration before the hearing officer issuing it or appeals to the hearing officer's superiors in the agency. Any party may file a

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motion for reconsideration of this preliminary order with the hearing officer issuing the order within fourteen (14) days of the service date of this order. The hearing officer issuing this order will dispose of the petition for reconsideration ~~within twenty-one (21) days of its receipt, or the petition will be considered~~ denied by operation of law. See Section 67-5243(3), Idaho Code. (7-1-93)

b. Within fourteen (14) days after (a) the service date of this preliminary order, (b) the service date of the denial of a petition for reconsideration from this preliminary order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this preliminary order, any party may in writing appeal or take exceptions to any part of the preliminary order and file briefs in support of the party's position on any issue in the proceeding to the agency head (or designee of the agency head). Otherwise, this preliminary order will become a final order of the agency. (7-1-93)

c. If any party appeals or takes exceptions to this preliminary order, opposing parties shall have twenty-one (21) days to respond to any party's appeal within the agency. Written briefs in support of or taking exceptions to the preliminary order shall be filed with the agency head (or designee). The agency head (or designee) may review the preliminary order on its own motion. (7-1-93)

d. If the agency head (or designee) grants a petition to review the preliminary order, the agency head (or designee) shall allow all parties an opportunity to file briefs in support of or taking exceptions to the preliminary order and may schedule oral argument in the matter before issuing a final order. The agency head (or designee) will issue a final order within fifty-six (56) days of receipt of the written briefs or oral argument, whichever is later, unless waived by the parties or for good cause shown. The agency head (or designee) may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. (7-1-93)

e. Pursuant to Sections 67-5270 and 67-5272, Idaho Code, if this preliminary order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which: (7-1-93)

i. A hearing was held, (7-1-93)

ii. The final agency action was taken, (7-1-93)

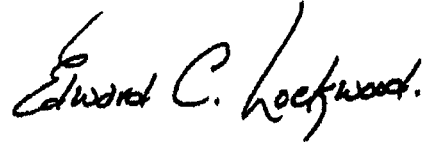
iii. The party seeking review of the order resides, or operates its principal place of business in Idaho, or (7-1-97)

iv. The real property or personal property that was the subject of the agency action is located. (7-1-93)

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f. This appeal must be filed within twenty-eight (28) days of this preliminary order becoming final. See Section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal. (7-1-93)

IT IS SO ORDERED: December 29, 2010.



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Edward C. Lockwood  
Hearing Officer

### CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing Findings of Fact, Conclusions of Law and Preliminary Decision was forwarded to the following parties by the method stated below on December 29, 2010.

FIRST CLASS MAIL, postage prepaid, to:

Stephanie A. Altig  
Lead Deputy Attorney General  
Idaho State Police  
700 S. Stratford Drive  
Meridian, ID 83642

Powell & Reed, P.C.  
Daniel K. Scheckler  
Attorney at Law  
P.O. Box 1005  
Sandpoint, ID 83864

Via ELECTRONIC MAIL:

Susan Saint



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Olive Allison

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2. I have been employed with the Idaho State Police since 2005.
3. I have worked for Alcohol Beverage Control, a bureau of Idaho State Police, since 2006 as an Office Specialist 2.
4. Since September of 2008, I have worked for Alcohol Beverage Control as a Technical Records Specialist 2.
5. The duties I perform as a TRS2 include: processing liquor, beer and wine licenses and wholesale (beer/wine distributors among other types) licenses. This includes receiving and reviewing documentation from applicants who wish to obtain these types of licenses or renew them. My duties also consist of the filing, and care and handling of business records submitted to Alcohol Beverage Control.
6. Alcohol Beverage Control's records include these business type documents contained in the agency record as part of the above-entitled action.
7. I also assist my agency in developing and reviewing licensing forms to ensure that licensees and applicants follow the laws and rules that apply to the sale of alcohol.
8. ABC handles over six-thousand, five hundred (6,500) various alcohol beverage licenses in a given year. ABC has an automated database that generates renewal notices to alcohol beverage licensees, notifying them that their license is due to be renewed in accordance with IDAPA 11.05.01.011.03. In compliance with I.C. § 23-908(1), these notices are sent to ABC's licensees approximately sixty (60) days from the first date of expiration.

Licensees are actually given a total, of almost ninety (90) days to renew their license before the last date of expiration. These notices are sent to the licensee's last known address, given by them to ABC. ABC has two (2) staff positions (including me) to process these renewal applications statewide, which includes conducting the majority of the investigations for new

applications and renewals. We staff members are also expected to field alcohol beverage licensing questions from the general public and licensees, through phone calls (which are in excess of 50 per day), emails and in person at the ABC Office. We also assist in the development of ABC policy and procedure; and are also required to appear on a regular basis in legal actions.

9. ABC does not make renewal forms available on its website. This is due to the fact that licensees have misappropriated and manipulated this form to reflect an inaccurate business/license style or profile of the licensee. This type of activity requires increased oversight by ABC personnel, including me, when renewal applications are being submitted.

10. On November 20, 2007, Iggy's Idaho Falls, Inc. (Iggy's) sought to transfer alcohol beverage license no. 4314 to itself, from BV Beverage Company, LLC (BV Beverage). Included in this paperwork, was BV Beverage's letter indicating that it was including the renewal fees for 2008. The letter also acknowledges that these fees were immediately due as expiration was about to occur. *See* R. a and Exhibit i, attached to this affidavit and incorporated herein. Accordingly, ABC then recognized Iggy's as the sole alcoholic beverage licensee from the date of transfer.

11. ABC does not approve lease agreements. It only receives such documents to assist it in determining what type of transfer is occurring, if a transfer fee is due and to determine if the transferee is qualified to exercise the privileges as an alcohol beverage licensee.

12. Iggy's, the licensee, was solely responsible for the timely payment of all charges, fees and other amounts payable to governmental agencies in connection with the transfer, possession, use, lease or **renewal of the (alcohol beverage) license**. Such responsibility shall

include, without limitation, any and all periodic renewal fees charged by the State of Idaho. *Id.* at 1.4, page 2.

13. As a result of the transfer of license from BV Beverage to Iggy's, alcohol beverage license number 4314 was issued to Iggy's Idaho Falls on July 31, 2008. Agency Record, Exhibit B. Again, ABC recognized Iggy's as the sole alcoholic beverage licensee from the date of transfer through the date of expiration of Iggy's alcohol beverage license.

14. On August 20, 2008, ABC received Iggy's Renewal Application for alcohol beverage license number 4314, for license year 2009. *Id.*

15. Iggy's license for 2009, was renewed on August 20, 2008. *Id.*

16. On September 9, 2009, ABC received Iggy's Renewal Application for its license for license year 2010. *Id.*

17. Iggy's license for 2010, was renewed on September 10, 2009. *Id.*

18. On January 8, 2010, I prepared a letter for Lt. Robert Clements' signature. That letter informed Iggy's that it had 90-days to place its Idaho Falls alcohol beverage license, number 4314, at 1430 Milligan Road back into actual use. This was based upon the fact that ABC had become aware that Iggy's, at this location, had closed. Agency Record, Exhibit C.

19. On August 4, 2010 the Alcohol Beverage License Renewal Application was returned to ABC by the United States Post Office as undeliverable with no known address where it could have been forwarded to. Agency Record, Exhibit D. Iggy's alcohol beverage license was due to expire on September 30, 2010. Agency Record, Exhibit B. The thirty-one day grace period as allowed by I.C. § 23-908(1) was due to expire on Sunday, October 31, 2010. To ABC's knowledge, Iggy's was still in possession of the alcohol beverage license as of October

31, 2010, because ABC had not received either an Affidavit of Release of License or an application for renewal from either Iggy's or BV Beverage by October 31, 2010.

20. On January 7, 2011, ABC received transfer application materials from BV Beverage attorney Robert Burns. Contained in those materials was Iggy's signed release of (alcohol beverage) license from Iggy's to BV Beverage Company, LLC signed and dated September 29, 2010. Agency Record, Exhibit F. According to the fax date stamp shown on this document, Mr. Burns received it on September 29, 2010, the day before expiration and 32 days before the grace period expired. *Id.* Neither Iggy's nor BV Beverage attempted to renew the license as required by law. BV Beverage also failed to inform ABC at the time that BV Beverage had obtained the affidavit of Release of License back from Iggy's. Such notification of a change is also required by law.

21. On January 10, 2011, I returned the transfer application materials to Mr. Burns, due to the fact that Iggy's, the licensee, had failed to timely renew its alcohol beverage license as required by I.C. § 23-908(1). Agency Record, Exhibit G. Had B.V. Beverage at least filed with ABC, the affidavit of release of license from Iggy's back to B.V. Beverage, then ABC would have been able to notify BV Beverage of the impending renewal.

22. At this same time B.V. Beverage was also the licensee of two other alcohol beverage licenses in the same county as the Iggy's license (Bonneville County). Both of those licenses were renewed on October 5, 2010, according to ABC records. The expiration date is stamped in large letters on each alcohol beverage license issued. *See*, Agency Record B.

23. Included with my January 10, 2011, letter to Mr. Burns, was a court decision issued by Fourth Judicial District Judge Kathryn Sticklin.



24. On April 26, 2011, ABC records show that BV Beverage was able to transfer another one of its alcohol beverage licenses in Idaho Falls, (The Hard Hat Steakhouse), to itself and then to the national restaurant chain, Screamin' Hot Concepts, dba Buffalo Wild Wings.

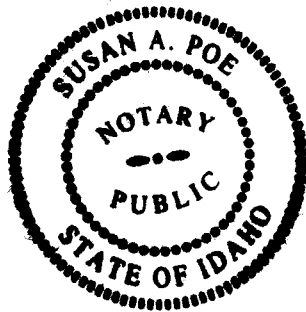
25. According to ABC records the next person on the priority waiting list to be offered an alcohol beverage license for placement into use is Daniel Fuchs. See, Exhibit 1 attached and incorporated herein.

This concludes my affidavit.

DATED this 14 day of July, 2011.

  
\_\_\_\_\_  
JAIMY ADAMS

Subscribed and swore to before me this 14<sup>th</sup> day of July, 2011.



Susan A. Poe

Notary Public for Idaho  
Residing at: Ada County  
Commission expires: 07-06-2016

**i.**

# Moffatt Thomas

MOFFATT THOMAS BARRETT ROCK & FIELDS, CHTD.

Boise  
Idaho Falls  
Pocatello  
Twin Falls

Eugene C. Thomas	Michael E. Thomas	Jon A. Stenquist
John W. Barrett	Patricia M. Olsson	Tyler J. Henderson
R. B. Rock	Christine E. Nicholas	C. Edward Cather III
Richard C. Fields	Bradley J. Williams	Andrew J. Waldera
John S. Simko	Lee Radford	Tyler J. Anderson
John C. Ward	Michael O. Roe	Dylan B. Lawrence
D. James Manning	David S. Jensen	Benjamin C. Ritchie
David B. Lincoln	James L. Martin	Rebecca A. Rainey
Gary T. Dance	C. Clayton Gill	Nathan R. Starnes
Larry C. Hunter	Michael W. McGreaham	Andrew J. Snook
Randall A. Peterman	David P. Gardner	
Mark S. Prusynski	Tara Martens	Robert E. Bakes, <i>of counsel</i>
Stephen R. Thomas	Julian E. Gabiola	
Glenna M. Christensen	Kimberly D. Evans Ross	<i>Willis C. Moffatt, 1907-1980</i>
Gerald T. Husch	Jason G. Murray	<i>Kirk R. Helvie, 1956-2003</i>
Scott L. Campbell	Mark C. Peterson	
Robert B. Burns	Paul D. McFarlane	

October 30, 2007  
*via Hand Delivery*

US Bank Plaza Building  
101 S Capitol Blvd 10th Fl  
PO Box 829  
Boise Idaho 83701 0829

208 345 2000  
800 422 2889  
208 385 5384 Fax  
www.moffatt.com

Alcohol Beverage Control  
700 S. Stratford  
P.O. Box 700  
Meridian Idaho 83642

**Re: Liquor License Ownership Transfer and Lease - License No. 8B-15 (Stardust License)**

MTBR&F File No. 23-328.1

To Whom It May Concern:

Enclosed please find the following documents, all of which relate to Liquor License 8B-15

## **Transfer of Ownership from Donna Ritz to BV Beverage Company:**

The first portion of this transaction relates to the transfer of ownership of the liquor license. Currently, ownership is held by Donna Ritz. For purposes of this transfer, I am enclosing an original, signed and notarized *Liquor License Application* executed by applicant BV Beverage Company, LLC. In addition to the ancillary documents enclosed as required for submission of the application, I am also enclosing an original, signed and notarized *Authorization to Transfer and Assignment of Privilege to Renew* executed by Donna Ritz, the current owner of this liquor license. Finally, enclosed please find two checks, in the amounts of \$15,020 and \$102.00, payable to the State of Idaho. The \$15,020 check represents the fees assessed for transfer of ownership of this liquor license. The \$102.00 check is remitted as payment of fees associated with the processing of fingerprints for Cortney Liddiard, Allen Ball, and Connie Ball.

BV Beverage Company, LLC is merely a liquor license holding entity. As such, it does not maintain a building where the license will be used, nor does it have a menu. In speaking with Jaime about the different issues that were presented with this application, he advised me that because of the purpose of the LLC, no sketch of the subject premises, menu, or building lease need to accompany the application.

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OCT 30 2007

IDAHO STATE POLICE  
ALCOHOL BEVERAGE CONTROL  
BOI MT2-668586.1  
000299

**Lease of Liquor License from BV Beverage by Iggy's Idaho Falls, Inc.:**

The second portion of this transaction relates to the lease of the liquor license. BV Beverage will lease the license to Iggy's Idaho Falls, Inc. For purposes of this lease, I am enclosing an original, signed and notarized *Liquor License Application* executed by applicant Iggy's Idaho Falls, Inc. The ancillary documents are also enclosed to accompany the application. Finally, enclosed please find two checks, in the amounts of \$395.00 and \$68.00, payable to the State of Idaho. The \$395.00 check represents the fees assessed for lease of this liquor license. The \$68.00 check is remitted as payment of fees associated with the processing of fingerprints for Daniel Rideout and Jane Rideout.

This liquor license presented some unique issues. The license expired on September 30, 2007. However, if the necessary renewal or transfer documents were submitted within the 30 day grace period, Amanda Tasso advised me that the license would not revert back to the State of Idaho. The premises where Iggy's Idaho Falls will use this liquor license has yet to be constructed. Amanda advised us that a letter requesting a 90 day forbearance period should accompany the application, which requests that the State of Idaho forbear for a period of 90 days, while a building permit for construction of the premises is issued. Accordingly, enclosed please find a letter requesting a 90 day forbearance period. During the 90 day period, a building permit for construction will be issued, at which time a copy will be forwarded to you. Monthly construction updates will follow thereafter. You will note that a sketch of the premises is enclosed, which details what the finished product is anticipated.

Please feel free to contact me with any questions or concerns. I may be reached at (208) 385-5419.

Sincerely,

Keri A. Moody  
Paralegal

/kad  
cc: Client

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**OCT 30 2007**

IDAHO STATE POLICE  
ALCOHOL BEVERAGE CONTROL



# Idaho State Police

Service since 1939



Colonel G. Jerry Russell  
Director

C.L. "Butch" Otter  
Governor

November 1, 2007

Keri A. Moody  
Paralegal  
Moffat Thomas  
US Bank Plaza Building  
101 S Capitol Blvd 10<sup>th</sup> Fl  
PO Box 829  
Boise, ID 83701-0829

Re: Liquor License Transfer for BV Beverage Company

Dear Mrs. Moody:

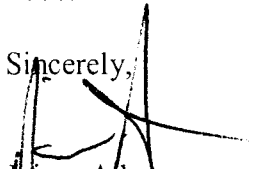
This letter is in response to the transfer application with was received by my office on October 30, 2007 for BV Beverage Company from Donna Ritz.

In order to complete the transfer application process to BV Beverage Company, \$746.00 is required. This fee is the remainder of the renewal fee that must be paid in order to transfer the license. Check #2000 in the amount of \$15,020.00 was received which covers the \$15,000.00 liquor transfer fee based on a sale price of \$150,000.00. The remaining \$20.00 was applied to the renewal fee of \$800.00. Check #2009 in the amount of \$102.00 was received for the fingerprints for Cortney Liddiard, Allen Ball and Connie Ball. Allen Ball was already on file for another license so the \$34.00 for his fingerprints was applied to the renewal fees leaving a balance of \$746.00.

Once we receive the payment for the remainder of the renewal fees, the license can be issued in the name of BV Beverage Company.

If you have any questions about this matter, please do not hesitate to contact me at 208-884-7060.

Sincerely,

  
Jaimy Adams  
Licensing Specialist  
Alcohol Beverage Control Bureau  
Idaho State Police

re: file

P.O. Box 700, Meridian, Idaho 83680-0700

EQUAL OPPORTUNITY EMPLOYER

  
000391



**Idaho State Police  
Liquor License Application**

1.  New  Change  Transfer Premise File Number 8B-15

2. License Type and Fees Proposed Opening Date June 30, 2008

On Premise Consumption  Restaurant (Must Qualify)

Keg Beer (Kegs to Go) \$20  Beer \$50 (\$20 for Transfer) 2000

Liquor by the Drink (Includes Wine)\$ \_\_\_\_\_ Total Fee Enclosed \$ 15,020

➤ Place of business qualifies for a liquor by the drink license per Title 23 Chapter 9, Idaho Code, as listed:

- Incorporated City  Ski Resort  Common Carrier Boat  Equestrian
- Golf Course  Airport Restaurant  Convention Center  Gondola
- Waterfront Resort  Airline  Theme Park  Railroad
- Continuous Operation Facility  X-Country Ski Resort  Split Ownership Facility  Racing Facility

Club

➤ Business is located  Inside or  Outside of City Limits.

**3. Applicant Information**

License to be issued to: BV Beverage Company, LLC

(Applicant Name: Individual(s), Corporation, LLC or Partnership)

Doing Business As: \_\_\_\_\_

Located At: 901 Pier View Drive, Suite 201

City, County, Zip: Idaho Falls, Idaho 83402

Former Business Name: \_\_\_\_\_

Mailing Address: P.O. Box 51298, Idaho Falls, Idaho 83405

Daytime Telephone: (208) 523-3794 Nighttime Telephone: (208) 757-2162

Federal or State Tax I.D. Number: 26-1137450

Liquor License Proprietor: Cortney Liddiard SSN [REDACTED]

**4. List all individuals, partners, officers, directors, 10 primary stockholders with percentages of stock held and LLC/LLP members. (Corporations must include an in-state manager) Attach additional list as needed. Officer or stockholder updates must include signed meeting minutes.**

(Name) Cortney Liddiard (Title) Mgr. (Home Address) [REDACTED]

(SSN) [REDACTED]

(Name) BV Properties LLC (Title) Mbr. (Home Address) 901 Pier View Dr. Ste 201 Idaho Falls, ID 83405

(SSN) [REDACTED] (DOB) N/A (Contact Phone Number) (208) 523-3794

(Name) Ball Ventures LLC (Title) Mbr. (Home Address) 901 Pier View Dr. Ste 201 Idaho Falls, ID 83405

(SSN) [REDACTED] (DOB) N/A (Contact Phone Number) (208) 523-3794

(Over)

Alcohol Beverage Control, P O Box 700, Meridian, ID 83680-0700  
(208) 884-7060, Toll Free (888) 222-1360

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**OCT 30 2007**

IDAHO STATE POLICE  
ALCOHOL BEVERAGE CONTROL

- Does anyone listed have any direct or indirect interest in any other business licensed for the sale of beer, wine or liquor by the drink?  NO  YES (Explain. Include Premise Number)  
License No. 5418.0, purchase of license by BV Beverage from C. Johnson. Transfer in Progress.
- Has anyone listed ever had an alcohol license denied, suspended or revoked?  NO  YES  
Explain: \_\_\_\_\_
- Has anyone listed ever been convicted of a felony or an alcohol related misdemeanor?  NO  YES  
Explain: Allen Ball, Convicted of DUI on May 2, 1996

**5. Applicant Financial Information**

- Attach a list of all assets and liabilities of the applicant. You may attach a financial statement as long as the assets and liabilities are clearly listed.
  - Does anyone not previously listed have any financial interest (direct or indirect) in the business?  
 No  Yes (explain)
- | (Name) | (Address) | (Explanation) |
|--------|-----------|---------------|
|        |           |               |

- Business Bank Name and Address: KeyBank, 702 West Idaho St., Boise, Idaho 83702
- Persons Authorized to sign on bank account: Cortney Liddiard, Allen Ball
- Building:  Leased (Attach a copy of the valid lease)  Owned-Purchase Price \_\_\_\_\_
- Liquor License:  Leased (Attach a copy of the valid lease)  Owned- Purchase Price 150,000
- Did you pay for Goodwill (Good name, patronage, reputation)? No Purchase Price \_\_\_\_\_

**6. Premise Diagram/Floor Plan (No architectural blue prints)**

Attach a sketch of the entire area proposed to be licensed, all entrances, exits, locations of bars, back bars, bar stools, booths, tables, coolers (for off premise), coin operated amusement devises and the place where the licenses are regularly displayed. Indicate in the margin the direction and distance to the nearest school, church or other places of worship measuring from the nearest entrance of the licensed premises to the school, church or other place of worship if within 300 feet. **Include a copy of your permits for health, safety and zoning from the governmental agency with zoning jurisdiction over the facility's location.**

**7. Read the following, Sign and have notarized.**

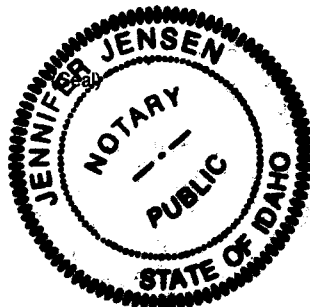
The applicant hereby affirms that he/she is the bona fide owner of the business, is eligible and has none of the disqualifications for a license as provided by Title 23, Chapter 9, 10,11, 13, 14, Idaho code or any amendments thereto. I/we hereby certify that there have been no changes in the above named business, ownership, directors, stockholders, partners or members during the past licensed year, except as indicated herein.

An application for and acceptance of a license by a retailer shall constitute consent to, and be authority for, entry by the director or his authorized agents, upon any premises related to the licensee's business, or wherein are or should be, kept, any of the licensee's books, records, supplies or other property related to said business, and to make the inventory, check and investigations aforesaid with relation to said licensee or any other licensee, as per Idaho code sections 23-1006, 23-907 and 23-1314.

I/we have also read all of the above and declare under penalty of perjury that each and every statement is true and correct.

Applicant Signature: [Signature] Title: Manager Date: OCT. 25, 2007

Subscribed and sworn to before me this 25<sup>th</sup> day of OCTOBER, 2007.



Notary Public: Jennifer Jensen  
Residing At: Idaho Falls, Idaho  
My Commission Expires: 04-28-09

**RECEIVED**  
**OCT 30 2007**  
IDAHO STATE POLICE  
ALCOHOL BEVERAGE CONTROL  
000303





Alcohol Beverage Control  
 PO Box 700  
 Meridian ID 83680  
 Phone: (208) 884-7060

**AUTHORIZATION TO TRANSFER AND ASSIGNMENT OF PRIVILEGE TO RENEW**

I/we hereby certify, that I/we Donna Ritz do hereby authorize the

transfer of my/our rights and interests in and assign my/our privileges to renew Idaho State liquor by the drink

license number 4314.0 to  
BV Beverage Company, LLC

and hereby give consent to said person(s) to apply for the 20 08 liquor license per Director Regulation 012.03.

IN WITNESS WHEREOF, I/we have hereunto set my/our hand(s) this 2<sup>nd</sup> day of  
October, 2007.  
 \_\_\_\_\_  
 (6) (Signature) Donna Ritz

\_\_\_\_\_  
 (6) (Signature)

\_\_\_\_\_  
 (6) (Signature)

On this 2<sup>nd</sup> day of OCTOBER 20 07, before me, the undersigned, a notary public in and for the State of CALIFORNIA, personally appeared DONNA RITZ known to me to be the person(s) whose name(s) is/are subscribed to the foregoing instrument and acknowledged to me that they executed the same.



\_\_\_\_\_  
 Notary Public  
 Residing at 2624 EL PASO LN, SAC, CA 95821  
 My Commission Expires 7/29/2010

\*\*\*\*\*

**INSTRUCTIONS**

- (1) Print name of most recent licensee (corporation, partnership, individual)
- (2) Print most recent state license number
- (3) Print name of new applicant corresponding to the application
- (4) Print year for which new applicant will be applying
- (5) Date of signature
- (6) Signature of each individual, a corporate officer, or each partner of the licensee listed on line 1
- (7) Notary must complete the dates and whose signature(s) notarized, sign, and seal

**RECEIVED**  
 12/2000  
**OCT 30 2007**

IDAHO STATE POLICE  
 ALCOHOL BEVERAGE CONTROL  
 000304

## PURCHASE AND SALE AGREEMENT

THIS PURCHASE AND SALE AGREEMENT (this "Agreement") is made by and between DONNA L. RITZ, an individual ("Seller"), and BV BEVERAGE COMPANY, LLC, an Idaho limited liability company ("Buyer").

### RECITALS

A. Seller is presently the holder of the licensee's interest in State of Idaho Retail Alcohol Beverage License No. 2006-2544 issued to Donna L. Ritz doing business as NA Stardust Lounge, including all present interests and all rights of renewal therein (the "License").

B. Pursuant to the terms of the Assignment of Liquor License, dated February 1, 2006, between Donna L. Ritz, Townsend Investments, LLC, an Idaho limited liability company, and KJ Renwick, LLC, an Idaho limited liability company, as Assignor, and B&T Hotels II, LLC, an Idaho limited liability company, as Assignee (the "Assignment"), the Assignor assigned to Assignee all of Assignor's interest in, to, and under the License.

C. The parties to the Assignment have revoked and annulled the Assignment in order to effectuate the purchase and sale of the License from Seller to Buyer on the terms and conditions set forth herein.

D. Seller wishes to sell and Buyer wishes to purchase the License on the terms and conditions set forth herein.

### AGREEMENT

NOW, THEREFORE, in consideration of the covenants and conditions contained herein and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Buyer and Seller agree as follows:

1. **Purchase and Sale of Rights to License.** Seller shall sell, assign, and transfer to Buyer, and Buyer shall purchase and acquire from Seller, all of Seller's rights arising under the License.

2. **Purchase Price.** The purchase price for Seller's interests with respect to the License has been paid in connection with a prior conveyance of the real property constituting the place of use, and Seller hereby acknowledges that payment has been received in full. Buyer hereby acknowledges that the current value of the License for the purpose of determining applicable transfer fees is One Hundred Fifty Thousand and No/1000's Dollars (\$150,000.00).

PURCHASE AND SALE AGREEMENT - 1  
092007 1100

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BOL MTZ 26551522

OCT 30 2007

IDAHO STATE POLICE  
ALCOHOL BEVERAGE CONTROL  
000305

3. **Transfer Fees.** Buyer shall bear the transfer fees assessed by the Idaho State Police Alcohol Beverage Control (the "ABC") associated with the transfer of the License contemplated by this Agreement.

4. **Seller's Representations, Warranties, and Covenants.** Seller hereby represents, warrants, and covenants to and for the benefit of Buyer as follows:

(a) Seller's execution and performance under this Agreement will not violate or breach any agreement to which Seller is a party;

(b) Other than the Assignment referenced herein, Seller has not heretofore and will not hereafter transfer, assign, pledge, or otherwise convey any interest in the License except as necessary to effect the transaction contemplated by this Agreement;

(c) Seller has not heretofore and will not hereafter create any financial lien or other encumbrance of any nature whatsoever on or burdening the License; and

(d) Seller shall execute such assignments and applications reasonably required by Buyer to obtain the requisite approvals of the ABC for the transfer of the License.

5. **Commissions.** Each party hereto represents and warrants to the other that there are no real estate agents or brokers involved that are owed a commission or finder's fee in connection with this transaction and agrees to indemnify, defend, and hold harmless the other party with respect to any claim made for any commission or finder's fee arising out of the warranting party's conduct.

6. **Integration and Modification.** This Agreement constitutes the final and entire expression of the parties and supersedes all prior agreements, letters, and understandings, either oral or written, regarding the License, and may only be amended by a written agreement signed by both parties.

7. **Assignment/Binding Effect.** This Agreement is binding upon and shall inure to the benefit of the parties and their respective successors and assigns.

8. **Survival of Covenants and Warranties.** All covenants, warranties, and unperformed obligations expressly set forth in this Agreement shall survive the closing and shall not by merger or otherwise be extinguished upon the delivery or recording of any document.

9. **Counterpart Execution.** This Agreement may be executed in counterparts, each of which shall be a fully executed original and all of which together shall constitute one and the same instrument.

10. **Governing Law.** This Agreement shall be governed by, and construed in accordance with, the laws of the State of Idaho.

11. **Effective Date.** The "Effective Date" shall be the date this Agreement is fully executed by the parties.

IN WITNESS WHEREOF, this Agreement has been duly executed by the parties hereto on the respective dates opposite each signature below.

**BUYER:**

**BY BEVERAGE COMPANY, LLC**  
an Idaho limited liability company

Dated: Sept. 24, 2007

By: [Signature]  
Its \_\_\_\_\_

**SELLER:**

Dated: Sept. 20, 2007

Donna L. Ritz  
DONNA L. RITZ

The following parties hereby consent to this Agreement and hereby release any right, title, claims, or interest they may have in the License.

**TOWNSEND INVESTMENTS, LLC**  
an Idaho limited liability company

Dated: Sept. 21, 2007

By: [Signature]  
Its Member

**KJRENWICK, LLC**  
an Idaho limited liability company

Dated: Sept. 21, 2007

By: [Signature]  
Its Member

**B&T HOTELS II, LLC**  
an Idaho limited liability company

Dated: Sept. 21, 2007

By: [Signature]  
Its Member

**BILL OF SALE**

FOR VALUE RECEIVED, DONNA L. RITZ ("Grantor"), does hereby sell, convey, transfer, set over, and assign unto BV BEVERAGE COMPANY, LLC, an Idaho limited liability company ("Grantee"), all of Grantor's interest in and rights arising under Idaho Retail Alcohol Beverage License No. 2006-2544 conveyed by Grantor to Grantee.

**GRANTOR:**

Dated: Sept. 20, 2007

*Donna L. Ritz*  
DONNA L. RITZ

**RECEIVED**

**OCT 30 2007**

IDAHO STATE POLICE  
ALCOHOL BEVERAGE CONTROL

# State of Idaho

## Idaho State Police

Cycle Tracking Number: 33374.0

Premise Number: 8B-15  
Incorporated City

### Retail Alcohol Beverage License

License Year: 2008  
License Number: 4314.0

*This is to certify, that* BV Beverage Company LLC  
*doing business as:* BV Beverage Company LLC  
*is licensed to sell alcoholic beverages as stated*

901 Pier View Dr Ste 201, Idaho Falls,  
Bonneville County

*Acceptance of a license by a retailer shall constitute knowledge of and agreement to operate by and in accordance to the Alcohol Beverage Code, Title 23. Only the licensee herein specified shall use this license.*

Restaurant	No
On-premise consumption	Yes <u>\$0.00</u>
Beer	Yes <u>\$50.00</u>
Kegs to go	No
Wine by the bottle	Yes <u>\$0.00</u>
Wine by the glass	Yes <u>\$0.00</u>
Liquor	Yes <u>\$15,750.00</u>
TOTAL FEE: <u>\$15,800.00</u>	

Signature of Licensee, Corporate Officer, LLC Member or Partner

BV BEVERAGE COMPANY LLC  
BV BEVERAGE COMPANY LLC  
PO BOX 51298

IDAHO FALLS, ID 83405  
Mailing Address

License Valid: 12/17/2007 - 09/30/2008

**Expires: 09/30/2008**

*Jerry Russell*  
Director of Idaho State Police

**j.**

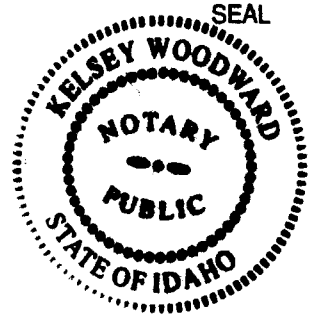
**PRIORITY WAITING LIST**

County	City	Name	Receipt	Date	Fee
County	City		Receipt	Date	Fee
Bonneville	Idaho Falls	Daniel Fuchs	7686	2/14/1995	\$375.00
Bonneville	Idaho Falls	Sizzling Platter Inc	2348	3/20/1997	\$375.00
Bonneville	Idaho Falls	Puerto Vallarta	2399	6/9/1997	\$375.00
Bonneville	Idaho Falls	Samuel R. Long	479	9/14/2005	\$375.00
Bonneville	Idaho Falls	Mongol LLC	943	6/13/2007	\$375.00
Bonneville	Idaho Falls	Robert Utterbeck	979	10/22/2007	\$375.00
Bonneville	Idaho Falls	Teton Peaks Investment Co LLC	980	10/22/2007	\$375.00
Bonneville	Idaho Falls	Laurence Reinhart	981	10/22/2007	\$375.00
Bonneville	Idaho Falls	Debra Reinhart	988	11/5/2007	\$375.00
Bonneville	Idaho Falls	Iron Mule Saloon LLC	989	11/9/2007	\$375.00
Bonneville	Idaho Falls	Humberto Ponce	997	12/10/2007	\$375.00
Bonneville	Idaho Falls	Travis Guse		3/23/2009	\$375.00
Bonneville	Idaho Falls	George Reinhart	21182	4/3/2009	\$375.00
Bonneville	Idaho Falls	Jason Reinhart	21184	4/3/2009	\$375.00
Bonneville	Idaho Falls				
Bonneville	Idaho Falls				
Bonneville	Idaho Falls				

State of Idaho )  
 ) ss.  
 County of Ada )

I, Kelsey Woodward a notary public, do certify that on July 12, 2011 I carefully compared this copy of Priority waiting list with the original.  
 It is a complete and true copy of the original document.

Kelsey Woodward  
 My commission expires July 2014





Weberell  
Diane  
8/15/11  
SK

FILED  
AUG 11 11:50 P.M.

AUG 12 2011

CHRISTOPHER J. ... Clerk

Rebecca A. Rainey ISB No. 7525  
RAINEY LAW OFFICE  
910 W. Main St. Ste. 258  
Boise, Idaho 83702  
Phone: (208) 559-6434  
Facsimile: (208) 473-2952

Attorney for Petitioner

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BV BEVERAGE COMPANY, L.L.C., an Idaho  
limited liability company.

Petitioner.

vs.

THE STATE OF IDAHO, DEPARTMENT  
OF IDAHO STATE POLICE/ALCOHOL  
BEVERAGE CONTROL, G. JERRY  
RUSSELL, in his official capacity as Director  
of Idaho State Police.

Respondent.

Case No. CV-0C-2011-06351

**NOTICE OF CHANGE OF FIRM AND  
ADDRESS**

PLEASE TAKE NOTE that Rebecca A. Rainey, counsel for petitioner BV Beverage Company, L.L.C. hereby provides notice to the Court and to other counsel of record of her change of address and firm.

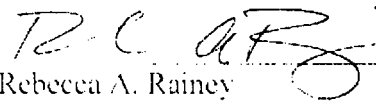
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DATED This 12<sup>th</sup> day of August 2011.

RAINEY LAW OFFICE

  
Rebecca A. Rainey  
Attorney for Petitioner

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this \_\_\_\_ day of August, 2011, a true and correct copy of the within and foregoing was served on the parties to this action in the manner set forth opposite their names:

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Idaho State Police/Alcohol Beverage Control  
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P.O. Box 700  
Meridian, ID 83642

U.S. Mail, Postage Prepaid  
 Hand Delivered  
 Overnight Mail  
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Rebecca A. Rainey

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8/22/2011  
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FILED 4:36  
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Attorney for Petitioner

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BV BEVERAGE COMPANY, LLC., a Idaho  
limited liability company,

Petitioner,

vs.

THE STATE OF IDAHO, DEPARTMENT  
OF IDAHO STATE POLICE/ALCOHOL  
BEVERAGE CONTROL, G. JERRY  
RUSSELL, in his official capacity as Director  
of Idaho State Police,

Respondent.

Case No. CV-OC-2011-05351

**PETITIONER'S APPELLATE REPLY  
BRIEF**

A

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## **I. INTRODUCTION**

In this matter, BV Beverage is asking this Court to review only the established state system for renewal of liquor license applications to determine if it provides adequate procedural safeguards to protect the property rights of liquor licenses owners, when their liquor license has been leased to another. The petition for review, along with the requested relief, is focused on a very narrow set of factual circumstances, which have broad ranging due process implications to Idaho's liquor license owners. To be clear, BV Beverage is not asking that its owners be allowed to renew outside the renewal deadline; BV Beverage is not asking that the Agency be vested with the discretion to allow for the submission of untimely renewals; BV Beverage is not asking this Court to play "hall monitor" to the relationship between lessors and lessee's of liquor licenses; and BV Beverage is not asking this Court to declare Idaho Code § 28-908(1) unconstitutional. Rather, BV Beverage is asking this Court to recognize that it has a legitimate property interest in the liquor license and to remedy BV Beverage's unconstitutional loss of that property interest because the established state system does not provide owners with notice of the renewal status, nor does it allow owners the opportunity to renew such license.

## **II. ARGUMENT**

### **A. THE OWNERS OF A LIQUOR LICENSE ARE ENTITLED TO DUE PROCESS PROTECTIONS.**

BV Beverage asks this Court to recognize that the owner of a liquor license put into actual use through a lease arrangement has a legitimate interest in the liquor license that entitles the owner to minimum due process protections. BV Beverage is entitled to these due process protections because liquor licenses have property rights associated with them, and these property rights are not restricted to the holder of the license if the state has created a marketplace and is not acting within its police power. Here, the Agency's processing of renewals is ministerial. As

such, the current system fails to provide basic constitutional protections, and the Agency cannot apply the doctrine of laches.

**1. The Agency admits that certain property rights are associated with a liquor license.**

The Agency acknowledges that liquor licenses carry certain property rights that are subject to due process protections. In its brief, the Agency conceded:

In Idaho, even though a person has no absolute right to engage in the sale of alcohol, the licensee is still given a measure of due process through Idaho Code § 23-933 and the Idaho Administrative Procedures Act.

Resp. Br. at 23-24. Despite its express recognition that the legislature and administrative regulations governing liquor licenses extend due process protections to a “named licensee,” the Agency attacks the constitutional authority BV Beverage cited in support of the simple, yet fundamental, proposition as it argues:

The non-jurisdictional case law cited to by BV Beverage in support of its section B-1 assertion, clearly shows a lack of understanding of how these cases apply to BV Beverage. These cases stand for the proposition that if one is a licensee or the “**holder of a liquor license**,” (emphasis added) then due process is owed (even when it comes to renewal). Petitioner’s Appellate Brief, pp. 11-12.

Resp. Br. at 23.

BV Beverage respectfully directs this Court’s attention to the B-1 section heading of Petitioner’s Appellate brief which reads: “The Supreme Court of the United States’ rejection of the wooden distinction between privileges and property rights allows for the recognition of property interest in liquor licenses.” The authority cited in section B-1 stands for the narrow proposition that “the holder of a liquor license” – referred to herein as “the licensee” (in this case, Iggy’s) – has property rights associated with such liquor license and that the licensee’s property rights are subject to constitutional due process protections.

That these property rights exist, and that they are entitled to a degree of due process protections, is a fundamental tenant under the Supreme Court of the United States' due constitutional jurisprudence. Because the Agency does not contest the proposition that the named licensee does have property rights that are subject to due process protections, the next issue for the Court to determine is whether these property rights extend beyond the named licensee to other parties also holding an interest in the liquor license: in this case, the owner of the liquor license that has only been leased to the named licensee.

**2. Because the State has sanctioned a marketplace of the sale, exchange, and lease of liquor licenses, the property rights associated with such licenses can be held by a person other than the named licensee.**

*Barr* and *Bunn* instruct that once the state has created and/or sanctioned a marketplace for the transfer of liquor licenses, the state's constitutional duty to afford due process protections extends beyond the named licensee to third parties who also hold an interest in the liquor license. *Bunn v. Michigan Liquor Control Comm'n*, 125 Mich. App. 84, 335 N.W.2d 913 (Mich. App. 1983); *Barr v. Pontiac City Comm'n*, 90 Mich. App. 446, 282 N.W.2d 348 (Mich. App. 1979).

Unable to deny either (i) the existence of a state sanctioned marketplace for the transfers of liquor licenses by lease or (ii) the constitutional obligations arising from such state sanctioned marketplace, the Agency attempts to distinguish *Barr* and *Bunn* on their facts by classifying the type of property interest at-issue and arguing that some property interests are entitled to constitutional protections, whereas other property interests are not.

More precisely, the Agency argues that, while the reversionary or security interests held by the seller of a liquor license (such as those at-issue in *Barr* and *Bunn*) are entitled to constitutional due process protections, the ownership interest of BV Beverage in a liquor license that it has leased to the "named licensee" is not the type of property interest that is entitled to due



process protections.<sup>1</sup> The Agency has not cited any authority in support of the proposition that a reversionary or security interest in property gives rise to a constitutionally protected property right, whereas an owner's interest in leased property does not give rise to a constitutionally protected property right. Indeed, the Agency has not submitted any authority for the proposition that any type of property interest is so insignificant that it is not entitled to constitutional protections.

Conversely, jurisprudence from the Supreme Court of the United States requires the opposite conclusion: a property interest, once created, must be afforded minimum due process protections. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982). The Agency's attempt to distinguish *Logan* on the grounds that it deals with a property right stemming from an employment relationship – rather than a liquor license – suffers from the same logical fallacy discussed above. While the classification of the property interest at stake has a bearing on the degree of due process protections that must be made available, any property interests – regardless of its classification – must be afforded some minimum due process protections: “While the legislature may elect not to confer a property interest, ... it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.... [T]he adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms.” *Id.*

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<sup>1</sup> To the extent the Agency is attempting to create a separate classification between the property rights accruing to owners of liquor licenses and the property rights accruing to users of liquor licenses, the Agency has offered no support for its position that such classification bears a substantial relationship to the police power to be exercised. Such classification is unreasonable, arbitrary, and discriminatory against those holding a state-sanctioned, owner's interest in a liquor license. *See Weller v. Hopper*, 85 Idaho 386, 393, 379 P.2d 792, 796 (1963) (finding that Idaho Code § 23-908 created an unconstitutional classification respecting convicted felons in violation of appellant's equal protection rights).

Contrary to the Agency's attempted reconstruction of constitutional due process jurisprudence, the question is not whether a property interest is sufficient to warrant minimum due process protections; the question is whether the due process protections extended by the established state system are sufficient to meet constitutionally minimal procedural safeguards. Because the Agency cannot reasonably deny that (i) property interests exist in liquor licenses and (ii) the State has sanctioned a marketplace for the sale, transfer, and exchange of liquor licenses that gives rise to property interests existing in persons other than the named licensee, the next question for this Court to determine is whether the existing state system has sufficient procedural safeguards in place to protect the due process rights of persons other than the named licensee from losing their interest in a liquor license without notice and opportunity to be heard.

**3. The Agency's established renewal system is not constitutionally adequate.**

In this matter, BV Beverage is challenging the current renewal system put into place by the Agency. Under the current system, in order to renew the at-issue liquor license BV Beverage was required to comply with the statutory requirements for transfer to (i) find a suitable location to put the license into actual use and (ii) pay a fee to have the license re-issued in BV Beverage's name and, contemporaneously with or subsequent to the transfer application, also submit a renewal application and the appropriate fee. These are the exact steps that a complete stranger to the license would have to take, despite the fact that less than three years ago, BV Beverage paid \$15,000.00 to the Agency to process the transfer of the owner's interest in the liquor license to it and another \$400.00 to transfer a leasehold interest in that same license to Iggy's. The Agency's impervious treatment of liquor license owners with respect to the renewal process is not mandated under Idaho's statutory scheme and is not a valid exercise of the Agency's police powers.

**a. Neither Idaho Code § 23-908, *Uptick*, nor the Agency’s established practices require the renewal applications and fees be submitted by only the named licensee.**

In support of its proposition that it cannot extend renewal rights to liquor license owners if they are not also the named licensee, the Agency cites to *Uptick* and its interpretation of Idaho Code § 23-908. In *Uptick*, the Idaho Supreme Court stated that the right to renew a liquor license was one of the rights associated with the privileges of a liquor license, which may only be exercised by the named licensee. *Uptick Corp. v. Ahlin*, 103 Idaho 364, 369, 647 P.2d 1236, 1241 (1982). However, as noted in B.V. Beverage’s opening brief, the policy justification behind this broad proclamation was based on the Agency’s need to control the issuance of liquor licenses by requiring licensees to submit the review and approval of the Agency.<sup>2</sup> Resp. Br. at 31.

The legislative changes to Idaho Code § 23-908 and BV Beverage’s compliance with the review and approval processes required by the Agency to transfer the ownership interest in the liquor license to it cured the fatal defect discussed in *Uptick*. Additionally, the right to renew was not an issue before the Court in *Uptick* and the statement that the “privilege to renew” was exclusive to the named licensee is properly characterized as dicta. Moreover, the relevant text of Idaho Code § 23-908 does not require the very narrow interpretation imposed upon it by the Agency.

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<sup>2</sup> In its brief, the Agency describes BV Beverage’s characterization of the application process as a “complete misstatement of the law.” Resp. Br. at 21. However, the documents submitted as exhibits to the affidavit of Jaimy Adams show that BV Beverage submitted an application, fingerprint cards, and \$15,000.00 in fees for the transfer of the ownership of the license to BV Beverage, and then an additional application, fingerprint cards, and a \$400.00 fee for transfer of the leasehold interest in the license to Iggy’s. These transactions were simultaneously approved by the Agency and the Agency did not return any of the application fees. If the process used by BV Beverage in its application was incorrect and reflecting a “complete misstatement of the law,” then it would be interesting to know under what legal authority the Agency approved this transaction and retained the more than \$15,000.00 in fees BV Beverage paid it to transfer the license.

Idaho Code § 23-908 provides that “no person except the licensee therein named except as herein otherwise provided, shall exercise any of the privileges granted thereunder.” The statute does not, however, delineate which rights associated with the license are privileges and which rights associated with the license are property rights. As discussed in BV Beverage’s opening memorandum, the right to renew is properly construed as a property right and not one of the privileges of use of the license (i.e., actually engaging in the sale of intoxicating beverages). *See Weller v. Hopper*, 85 Idaho 386, 394, 379 P.2d 792, 796-97 (1963), (rejecting the Agency’s position that the right to transfer could be exercised only by the named licensee and, if that right was not exercised prior to the licensee’s death, then it expired by operation of law). The actual text of 23-908 does not provide that the renewal fees and applications can only be tendered by the named licensee, as it reads: “Renewal applications for liquor by the drink licenses accompanied by the required fee must be filed with the director on or before the first day of the designated renewal month.”

In *Weller*, the Idaho Supreme Court affirmed the trial court’s ruling “that I.C. § 23-908 did not preclude the transfer of decedent's license by the personal representative and that **the license is transferable because it is a property right by reason of the limitation of the license statute, I.C. § 23-908.**” *Id.* at 389, 379 P.2d at 793 (emphasis added). There is no principled reason why the rationale advanced in *Weller* regarding transfers of a liquor license cannot and should not be extended to the property rights associated with renewal of the liquor license and, indeed, Idaho Code § 23-908 can be construed to be constitutional, as written, if this Court would adopt the interpretation advanced by BV Beverage. *Robison v. Bateman-Hall, Inc.*, 139 Idaho 207, 214, 76 P.3d 951, 958 (2003). (“Legislative acts are generally presumed

constitutional and any doubt concerning interpretation of a statute is to be resolved in favor of that which renders the statute constitutional.”)

Finally the Agency does, as a matter of practice, allow someone other than the named licensee to renew a liquor license and, indeed, did so with respect to BV Beverage with this at-issue license at the time it was transferred to BV Beverage as the owner. The Agency correctly points out that BV Beverage is merely a liquor license holding company and typically does not put a license into “actual use” itself, but satisfies that statutory requirement by leasing the license to the named licensee. Accordingly, the at-issue liquor license was never actually issued in the name of BV Beverage, and BV Beverage was never the “named licensee,” even upon approval of its transfer application. Nevertheless, at the time BV Beverage submitted its transfer application, it also submitted renewal fees which were eagerly accepted by the Agency even though such fees did not come from Iggy’s, who was to be the “named licensee.” Accordingly, the Agency’s current suggestion that Idaho Code § 23-908 and *Uptick* preclude it from allowing someone other than the named licensee to exercise the right of renewal is inconsistent with its own internal practices.

**b. The renewal process is strictly a ministerial duty.**

The Agency asks this Court for too much credit and deference with respect to its role in the renewal process. When conducting background checks and other investigations associated with the processing of a transfer application the Agency is appropriately exercising its police power. However, when processing a renewal application, the Agency is simply completing a ministerial act or duty. A ministerial act is defined as:

That which is done under the authority of a superior; opposed to *judicial*. That which involves obedience to instructions, but demands no special discretion, judgment, or skill. [*Citations omitted*]. Official's duty is "ministerial" when it is absolute, certain

and imperative, involving merely execution of a specific duty arising from fixed and designated facts. [*Citation omitted.*]

*Ausman v. State*, 124 Idaho 839, 842, 864 P.2d 1126, 1129 (1993) (quoting *Black's Law Dictionary* 899 (6th ed. 1990)). A ministerial duty is “[o]ne regarding which nothing is left to discretion — a simple and definite duty, imposed by law, and arising under conditions admitted or proved to exist.” *Id.* (quoting *Black's Law Dictionary* 899 (6th ed. 1990)). The hallmark of a ministerial act or duty is when the legislature directs that an act **shall** be done. *See e.g. Total Success Invs., LLC v. Ada County Highway Dist.*, 148 Idaho 688, 692, 227 P.3d 942, 946 (Idaho App. 2010) (noting that the sentence in I.C. § 40-2319(1) using **shall** imposes a ministerial duty). The Agency has explained that the sending of renewal notices is an automated process. And, the Act makes it clear that processing renewal applications involves no discretion whatsoever.

Idaho Code § 23-908(1) provides that renewals **shall** be granted if they are (i) timely and (ii) accompanied by the appropriate fee. Idaho Code § 23-933(4) provides that renewals **shall** be granted during a pending revocation proceeding.

The Agency argues

[R]enewal is subject to the same laws found in the code provisions stated above. Thus, if one doesn't qualify, then one would be denied the renewal of their license. Arguably, ABC would not issue a renewal of a license to someone who is disqualified because they became a manufacturer of liquor or; [sic] were convicted of an alcohol beverage related crime; or had a liquor license revoked for some nefarious reason.”

Resp. Br. at 31-32. The Agency cites no support for its authority to deny a renewal application on these grounds and, indeed, the statutes provide the exact opposition. If the Agency were to comply with the legislative mandate, should it discover that a basis for revocation of a liquor license existed during the renewal period it would be required to renew the license and initiate

revocation proceedings. Accordingly, the Agency's proposition that it can refuse to renew in the exercise of its police power is directly contradicted by Idaho Code §§ 23-908(1) and 23-933(4).

The Agency has no discretion with respect to renewals: It cannot deny a renewal that is timely and accompanied by the appropriate fee, and it cannot grant a renewal that is untimely or not accompanied by the appropriate fee. Despite the simplicity of the renewal process, the Agency argues that if it were not exercising its police powers, then Idaho Code § 23-908 would be moot and the renewal process would run amuck. However, there is no discretion in the process of renewal: It requires no skill, judgment, or discretion to (i) send out an automated renewal notice and, when it is received, determine if such notice is (ii) timely and (iii) accompanied by the correct fee.

**c. The current state system, which does not allow owners notice of the renewal status of the license or an opportunity to renew the same, is not a valid exercise of the Agency's police powers.**

The Agency attempts to protect the established state system for renewals as a necessary and valid exercise of its police powers in controlling the distribution of alcoholic beverages. To be clear, however, BV Beverage – and other owners of liquor licenses that are leased to a named licensee – does not engage in the retail sale of alcoholic beverages. Rather, they own and lease liquor license to persons or entities that, for a myriad of reasons, have a need for their services. They are approved participants (by virtue of their submission to the Agency's scrutiny, review, and approval process) in a state-created, state-sanctioned marketplace for the transfer of liquor licenses by lease.

The Agency maintains that its refusal to allow owners, such as BV Beverage the right to renew liquor licenses is a valid exercise of its police power to review and approve all named licensees. However, that police power function is exercised exclusively in the initial transfer

process. With respect to renewals, there is no additional examination, review, or approval of the renewal applicant that must occur. Indeed, if the renewal applicant has engaged in conduct that would subject the license to revocation, the Agency must still renew the license and then proceed with revocation proceedings. I. C. § 23-933. While the Agency argues, on one hand, that it “would not issue a renewal to someone who has become disqualified because they became a manufacturer of liquor or; were convicted of an alcohol beverage related crime or; had a liquor license revoked for some nefarious reason[,]” Resp. Br. at 32, it offers no authority for that proposition. Additionally, Idaho Code § 23-933(4) stands in direct contrast to the Agency’s claims that it may exercise discretion in the renewal process, as it specifically provides that renewals shall be granted even while revocation proceedings are pending. Accordingly, there is no support for the proposition that the Agency is exercising any type of discretionary authority in the carrying out of its police powers when it elects not to provide liquor license owners with notice of the status of renewal of their license or the opportunity to renew such licenses.

Moreover, police power involves the power of the government to make laws to regulate persons or businesses “for the promotion and protection of the public health, safety, morals, and welfare.” Resp. Br. at 19 (citing *Winther v. Village of Weippe*, 19 Idaho 798, 430 P.2d 698 (1967)). While this power is broad, it is not unfettered and cannot be used to infringe upon fundamental rights. *See, e.g. Weller*, 85 Idaho at, 391, 379 P.2d at, 795 (holding that Idaho Code § 23-908 was an unconstitutional exercise of the state’s police power as it violated the equal protection rights of those convicted of a felony during the time they were named licensees). The Agency has not provided any explanation regarding how the public health, safety, morals, and welfare are advanced by its refusal to provide notice of renewal status to liquor license owners and to afford them the opportunity to renew such license. Rather, the Agency has merely



submitted that it would be mired in an avalanche of administrative and ministerial duties if it was required to send out additional renewal notices. But, the Agency has not cited any authority for the proposition that if it is “too much administrative work” for the State to protect the fundamental constitutional rights of its citizens, then such undesirable work can be avoided by the Agency declaring the work to be a discretionary function in furtherance of the state’s police powers.

**4. The current system is unconstitutional because it fails to afford lessors minimal due process protections: the opportunity to renew the license.**

BV Beverage cited the case of *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), for the proposition that if a state system gives rise to certain property rights, the state must thereafter protect those property rights. If it does not protect such property rights through adequate minimum procedural safeguards, then the system is unconstitutional. The fact that *Logan* dealt with employment law, does not change the underlying principle: once the State creates a property right, it must afford lessors due process protections.

The Agency turns this constitutional jurisprudence on its head by arguing that because it does not provide constitutionally adequate safeguards to its citizen’s rights, the citizen has no rights. Resp. Br. at 34. The Agency argues that because it has refused to recognize the rights of lessors, they have no rights. *Id.* The Agency’s unilateral determination of who does or does not have property rights is not the controlling factor. Rather, the Court must independently examine the statutory scheme, in light of the applicable case law, to determine whether the statutory scheme adequately addresses and protects the property rights arising within such scheme:

“minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action.”

(citations omitted). Indeed, any other conclusion would allow the State to destroy at will virtually any state-created property interest.

*Logan*, 455 U.S. at 432. Because the legislature and the Agency have created a marketplace for the lease of liquor licenses that give rise to certain property rights, *Logan* instructs that the Court must examine whether constitutionally adequate procedural safeguards are in place to protect those rights.

“While the legislature may elect not to confer a property interest, ... it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.... [The] adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms.”

*Id.* Creating a system which gives rise to property rights in an owner of a liquor license, put into use through lease to the third party licensee, but which does not afford the owner (i) notice of the renewal status of such license or (ii) the opportunity to renew such license, creates a statutory procedure for the deprivation of that owner’s statutorily created property interest in violation of that owner’s fundamental due process rights. Because the procedures implemented by the Agency do not have adequate minimum safeguards to protect the owner’s rights, they are unconstitutional. BV Beverage’s loss of the liquor license due failure to comply with and/or work around this unconstitutional system cannot be upheld.

##### **5. The doctrine of laches is not a viable defense to constitutional violations.**

In an effort to avoid its constitutional obligation to provide procedural safeguards adequate to protect the constitutional rights of owners of a liquor license, the Agency argues that had BV Beverage been more diligent in its business practices the liquor license would not have expired. Then, without citing to any authority, the Agency asks this Court to apply the doctrine of laches to dismiss BV Beverage’s petition. Resp. Br. at 32.

As a threshold matter, the equitable doctrine of laches does not preclude a court from reviewing the constitutionality of the government's actions. *Sprague v. Casey*, 520 Pa. 38, 47, 550 A.2d 184, 188 (1988) (refusing to apply laches when plaintiff had failed to bring claim arguing placement of judicial officers on general election ballot was unconstitutional for six months). Secondly, the Agency has failed to support its laches argument with any legal authority. If an argument is mentioned only in passing or is not supported by authority, it violates I.A.R. 35 and the Court cannot consider it. *Bach v. Bagley*, 148 Idaho 784, 790, 229 P.3d 1146, 1152 (2010).

Finally, the Agency's attempted laches defense fails as a matter of simple logic. The Agency argues that had BV Beverage been more diligent in its business practices and simply complied with the in-place system, regardless of whether it is constitutionally sound, then the matter would not be before the Court today. Resp. Br. at 30-31. In essence, the Agency argues that failure to conform to an unconstitutional system precludes a party from challenging the unlawful deprivation of a property right under that unconstitutional system. If this Court were to adopt the Agency's laches defense and hold that a party who failed to conform its actions to an unconstitutional system cannot then challenge the constitutionality of such system, any party deprived of fundamental rights at the hands of that system would be left without a remedy. That cannot be the case.

#### **B. THE COURT HAS THE AUTHORITY TO REDRESS CONSTITUTIONAL VIOLATIONS.**

In this matter, BV Beverage claims that the established state system is unconstitutional in that it does not provide the owner of a liquor license with notice of the license's renewal status and opportunity to timely renew such license. The Agency argues that (1) because the renewal deadline passed, the case is moot and there is no remedy available, and (2) because there was no

contested case below, this Court lacks subject matter jurisdiction over this issue. Both arguments must fail because each presupposes that owners of a liquor license have no property rights.

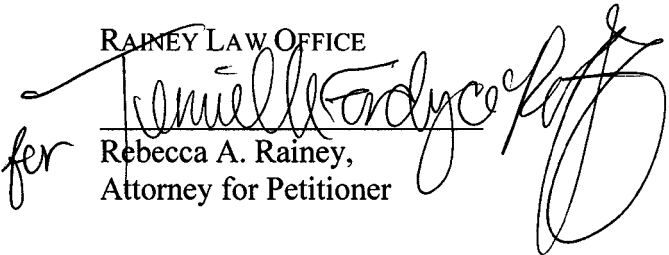
The Agency's position that BV Beverage is not entitled to judicial review because the Agency refused to initiate a contested case in this instance (Resp. Br. at 13) ignores both the law governing judicial review of agency actions other than contested cases and the jurisdictional authority relied upon by BV Beverage in bringing this case. Idaho law does not restrict a district court's review of agency actions to contested cases. Rather, Idaho Code § 67-5270(2) provides that "[a] person aggrieved by final agency action other than an order in a contested case is entitled to judicial review under this chapter if the person complies with the requirements of sections 67-5271 through 67-5279." I.C. § 67-5270(2) (emphasis added). Idaho Code § 67-5241(1)(a), (3), and (4) expressly provide that the Agency's refusal to initiate a contested case constitutes a final agency action other than an order in a contested case from which a petition for judicial review may lie. Thus, the Agency's assertion that this Court lacks subject matter jurisdiction because the Agency refused to initiate a contested case is an incorrect statement of Idaho law.

The Agency also argues that because the Agency has no discretion respecting a license that has expired for non-renewal, this Court must lack jurisdiction in this matter. Resp. Br. at 13-15. In essence, the Agency is arguing that because there is nothing that the Agency can do to remedy this constitutional violation, then there is nothing that the Court may do to remedy the same constitutional violation. Again, much like the laches argument, this puts the established state system for renewal above this Court's power of judicial review. If the license had been timely renewed, the question of whether BV Beverage should be given notice of the fact of non-renewal as well as the opportunity to renew would not be an actual case or controversy.

### III. CONCLUSION

BV Beverage respectfully requests that this Court find that the established state system fails to provide minimum constitutional safeguards necessary to protect the interests of owners of liquor license and, without such safeguards, the result that the at-issue liquor license expired by operation of law cannot be upheld. BV Beverage further requests that this Court remedy that deprivation of a fundamental property right by declaring that the at-issue license is not expired and ordering the Agency allow BV Beverage the opportunity to renew the same.

Dated this 19<sup>th</sup> day of August 2011.

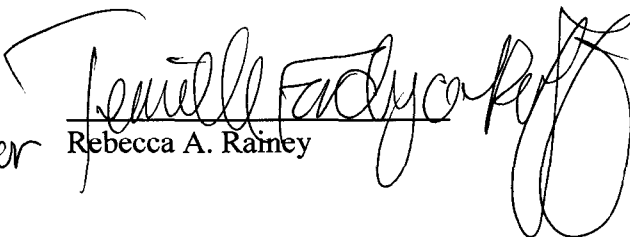
RAINEY LAW OFFICE  
for   
Rebecca A. Rainey,  
Attorney for Petitioner

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 19 day of August, 2011, I caused a true and correct copy of the foregoing **PETITIONER'S APPELLATE REPLY BRIEF** to be served by the method indicated below, and addressed to the following:

CHERYL A. MEADE  
Idaho State Police/Alcohol Beverage Control  
700 S. Stratford  
P.O. Box 700  
Meridian, ID 83642

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile

for   
Rebecca A. Ramey

Wetherell  
Diane  
8/2/11  
SK

Rebecca A. Rainey, ISB No. 7525  
RAINEY LAW OFFICE  
910 W. Main Street, Ste. 258  
Boise, Idaho 83702  
Telephone (208) 559-6434  
Facsimile (208) 473-2952  
rar@rebeccaraineylaw.com

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. 235

**AUG 24 2011**

**CHRISTOPHER D. RICH, Clerk**  
By **JAMIE RANDALL**  
DEPUTY

Attorney for Petitioner

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BV BEVERAGE COMPANY, LLC, a Idaho  
limited liability company,

Petitioner,

vs.

THE STATE OF IDAHO, DEPARTMENT  
OF IDAHO STATE POLICE-ALCOHOL  
BEVERAGE CONTROL, G. JERRY  
RUSSELL, in his official capacity as Director  
of Idaho State Police,

Respondent.

Case No. CV-OC-2011-06351

**NOTICE OF HEARING**

PLEASE TAKE NOTICE that oral argument on Petitioner BV Beverage Company, LLC's PETITION FOR JUDICIAL REVIEW will be heard on the 22<sup>nd</sup> day of September at 2:30 p.m., or as soon thereafter as counsel may be heard before the Honorable Michael E. Wetherell at the Ada County Courthouse located at 200 W. Front St., Boise, Idaho 83702.

DATED THIS 24<sup>th</sup> day of August, 2011.

RAINEY LAW OFFICE



Rebecca A. Rainey,  
Attorney for Petitioner

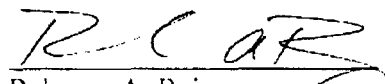


**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 24<sup>th</sup> day of Aug., 2011, I caused a true and correct copy of the foregoing **NOTICE OF HEARING** to be served by the method indicated below, and addressed to the following:

CHERYL A. MEADE  
Idaho State Police/Alcohol Beverage Control  
700 S. Stratford  
P.O. Box 700  
Meridian, ID 83642

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile

  
Rebecca A. Rainey

Time	Speake	Note
<u>1:39:48 PM</u>	M Wethe rell	Ct calls case; Tenielle Fordyce-Ruff; Rebecca Rainey present on behalf of BV Beverage-- Cheryl Meade counsel present on behalf of State
<u>1:39:48 PM</u>	R Rainey	argument re: opportunity of BV beverage to renew liquor license
<u>3:01:43 PM</u>	M Wethe rell	Ct inquires re: lapse before any action taken -- response
<u>3:06:19 PM</u>	M Wethe rell	Ct inquires re: State knows who owns license as well as who leases license -- no notice of renewal status -- cont'd argument
<u>3:08:02 PM</u>	M Wethe rell	Ct notes correcting system is to address issue w/Idaho State legislator -- Ct does not feel he has the power to tell the State what to do w/reference licensing notices
<u>3:09:57 PM</u>	C Meade	response argument -- notes argument in brief and reqt's relieve to amend
<u>3:13:10 PM</u>	C Meade	Privilege versus property right
<u>3:18:39 PM</u>	M Wethe rell	Inquiry re: during 3 or 4 months was ABC made aware of issues related to renewal
<u>3:19:20 PM</u>	Meade	response -- licensee required to renew liquor license
<u>3:27:38 PM</u>	M Wethe rell	Ct inquires re: background check before issuing license -- response
<u>3:29:13 PM</u>	M Wethe rell	Ct inquires as to jurisdictional issue -- no action taken by dept -- response burden up to licensee
<u>3:32:35 PM</u>	M Wethe rell	Ct inquires re: giving notice to licensee that it would be up to them to renew the address that ABC would sent application for renewal to address provided -- response
<u>3:46:05 PM</u>	Rainey	rebuttal
<u>3:52:28 PM</u>	M Wethe rell	Expiration date not at issue in this case -- response
<u>3:53:37 PM</u>	Rainey	No remedy after expiration of license
<u>3:58:00 PM</u>	M Wethe rell	Estimated value of license
<u>3:58:14 PM</u>	Rainey	15 percent fee -- \$150,000
<u>3:58:43 PM</u>	M Wethe rell	Ct takes under advisement
<u>3:58:53 PM</u>		End of Case



(Agency Record, exh. b). Per the printed expiration date on its face, the renewed license was to expire on September 30, 2010. *Id.*

In a letter postmarked July 30, 2010, ABC sent Iggy's the renewal forms for the liquor license issued in its name. (Agency Record, exh. d). The letter was returned as undeliverable on August 4, 2010. *Id.* Shortly thereafter, ABC began proceedings to revoke the liquor license. (Record Augment, exh. 1). On September 29, 2010, at the request of BV Beverage, however, ABC agreed to stay the revocation proceedings on the condition that BV Beverage work to put the license into actual use. (Record Augment, exh. 5).

BV Beverage submitted to ABC the paperwork necessary to transfer its liquor license to a new lessee on January 7, 2011. *Id.* In response, BV Beverage was informed that its liquor license had expired by operation of the law and that ABC's position was that there was no license to transfer. *Id.* Following correspondence between counsel for BV Beverage and counsel for ABC in which ABC took the position that it could not take any action to reverse the expiration of BV Beverage's license, ABC ultimately declined to initiate a contested case. (Record Augment, exh. 12).

BV Beverage now petitions this Court to review the expiration of BV Beverage's liquor license.

### **MOTION TO DISMISS**

As best as this Court can discern, ABC advances three arguments in support of its motion to dismiss for lack of subject matter jurisdiction: 1) the district court may only review contested cases; 2) BV Beverage is a "third-party lessor" and is therefore not an aggrieved person within the meaning of section 67-5270, Idaho Code; and 3) there was no agency action here for the Court to review. The Court will address each of these arguments in turn.

ABC's first argument, that only contested cases are reviewable by the courts, has no support in the law. Idaho law provides that "A person aggrieved by a final agency action other than an order in a contested case is entitled to judicial review . . . ." I.C. § 67-5270(2). Because the Idaho Code specifically provides for review of action "other than an order in a contested case," the courts clearly may review actions other than those taken in contested cases.

The Court is also not persuaded by ABC's argument that BV Beverage, as the lessor of a liquor license, is a third party, and thus is not an aggrieved person within the meaning of the statute. The Idaho Administrative Procedures Act provides that "a person aggrieved by final agency action other than an order in a contested case is entitled to judicial review . . . ." I.C. § 67-5270. Thus, to be entitled to judicial review, a person must be aggrieved by some agency action.

Idaho law provides for transfers "other than a sale." I.C. § 23-908(6). The transfers "other than sale" include leases. *See* (Agency Record exh. b) (application form includes check box for leased liquor licenses). A lease is "a contract by which the rightful possessor of property conveys the right to use that property in exchange for consideration." *Black's Law Dictionary* (9<sup>th</sup> ed.), at p. 970. Thus, a lease is, by definition, a transfer in which an owner conveys less than all its interest in its property; the owner retains some interest.

Here, BV Beverage leased its liquor license to Iggy's, and thus retained some of its interest in the liquor license. Because BV Beverage retained some of its interest in the liquor license at issue here, its rights were negatively affected by the expiration of the license in this case. Consequently, the Court cannot find that BV Beverage is a third party to this dispute. The Court finds that BV Beverage is an aggrieved person.

However, the Court finds that under the facts in this case, ABC took no action that was reviewable. An agency action is “an agency’s performance of, or failure to perform, any duty placed upon it by law.” I.C. § 67-5201(3)(c). Idaho Code provides that “[a]ll licenses shall expire at 1:00 o’clock a.m. on the first day of the renewal month . . . .” I.C. § 23-908(1). Thereafter, a licensee “holding a valid license who fails to file an application for renewal of his current license on or before the first day of the designated renewal month shall have a grace period of an additional thirty-one (31) days in which to file an application for renewal of the license.” *Id.* Thus, liquor licenses expire by operation of the law, and ABC has no duties to perform in relation to the expiration, except to process applications for renewal. Because ABC has no duties to perform, the expiration of the license is not an agency action within the meaning of the Idaho Administrative Procedures Act, and therefore, under the facts of this case, the expiration is not reviewable.<sup>1</sup> Therefore, the Court **GRANTS** ABC’s motion to dismiss.

#### **PETITION FOR JUDICIAL REVIEW**

Even assuming that the Court had jurisdiction over this matter, the Court would deny BV Beverage’s petition.

The United States Constitution provides that states may not “deprive any person of . . . property, without due process of law . . . .” US Const. amend XIV. Procedural due process requires “meaningful notice and a meaningful opportunity to be heard” *State v. Doe*, 147 Idaho 542, 544, 211 P.3d 787, 789 (Ct. App. 2009) (citing *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972)). Thus, where a person has a property interest in something, that person must be afforded meaningful notice and a meaningful opportunity to be heard.

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<sup>1</sup> The Court does not find that license expirations are never reviewable. The Court can imagine situations where ABC’s actions or failures to act in relation to a license expiration could be considered agency action within the meaning of the statute.

The Constitution's "procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits." *Board of Regents of State Colleges v. Roth*, 408 U.S. 565, 576, 92 S.Ct. 2701, 2708, 33 L.Ed.2d 548, 560 (1972). "To have a property interest in a benefit, a person must clearly have more than an abstract need or desire for it. He must instead have a legitimate claim of entitlement." *Viking Construction, Inc. v. Hayden Lake Irrigation District*, 149 Idaho 187, 198, 233 P.3d 118, 129 (2010). In *Roth*, the Court gave specific examples of property interests. *Roth*, 408 U.S. at 576, 92 S.Ct. at 2708, 33 L.Ed.2d at 560. These examples include the receipt of welfare benefits and a college professor's tenure. *Id.* The Court held that these were property rights because the statutes governing these benefits created a genuine expectation of continuing receipt of benefits. *Id.* at 577, 92 S.Ct. at 2709, 33 L.Ed.2d at 561.

Here, just as the examples cited to in *Roth*, the rights appurtenant to the possession of a liquor license are statutorily created. Among the rights created by the statute is the right to transfer a liquor license by sale or lease. *See* I.C. § 23-908. Furthermore, liquor license owners have the right to renew their licenses. *Id.* The Idaho Code, therefore, creates in the owner of the liquor license an economic benefit that may not be revoked arbitrarily. Given the statutory scheme governing liquor licenses, the Court finds that the owner of a liquor license has a property interest in the license, and is therefore entitled to notice and the opportunity to be heard.

ABC argues, relying on *Uptick Corp. v. Ahlin*, 103 Idaho 364, 647 P.3d 814 (1982), that the owner of a liquor license who subsequently leases the license to another, is a third party, and therefore does not have a property interest in the liquor license. The Court does not find that *Uptick* controls here. While the court in *Uptick* rejected any form of equitable ownership that a lessor of a liquor license may have, the decision was made prior to amendment of the Idaho Code

to provide for the leasing of liquor licenses. In other words, at the time *Uptick* arose, Idaho Code did not provide for leasing liquor licenses. Consequently, the Court finds that *Uptick* does not govern on the facts of this case. For the same reasons that the Court found that BV Beverage is an aggrieved person within the meaning of the Idaho Administrative Procedures Act, the Court is not persuaded that BV Beverage does not have a property interest in the license.

Despite the potential violations that the Court sees potentially stemming from ABC's procedures, the Court cannot ignore the fact that BV Beverage had actual notice of the expiration date of the liquor license at issue in this case. There is no evidence that BV Beverage ever wrote a letter or picked up the phone to inquire about the renewal status of its liquor license. Consequently, the Court could not find, even if it denied ABC's motion to dismiss, that BV Beverage's due process rights have been violated. BV Beverage had actual notice that its liquor license would expire, and failed to seek an opportunity to be heard. Consequently, the Court would deny BV Beverage's petition on the merits.

### CONCLUSION

For the foregoing reasons, the ABC's motion to dismiss is hereby **GRANTED**.

SO ORDERED AND DATED this 15<sup>th</sup> day of November 2011.

  
MIKE WETHERELL  
District Judge



**CERTIFICATE OF MAILING**

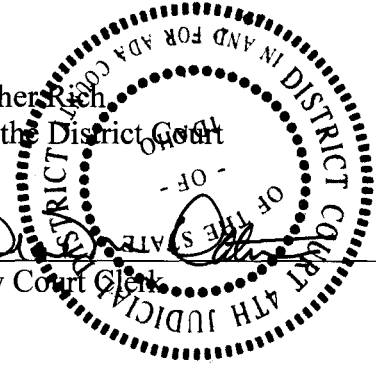
I hereby certify that on this 15 day of November, 2011, I mailed (served) a true and correct copy of the within instrument to:

REBECCA RAINEY  
910 W. MAIN ST.  
BOISE, ID 83702

CHERYL MEADE  
700 S. STRATFORD DR  
MERIDIAN, ID 83642

Christopher Rich,  
Clerk of the District Court

By   
Deputy Court Clerk



DEC 06 2011

CLERK OF DISTRICT COURT, Clerk  
By KATHY BIEHL  
Deputy

Rebecca A. Rainey, ISB No. 7525  
Tenielle Fordyce-Ruff, ISB No. 6998  
RAINEY LAW OFFICE  
910 W. Main Street, Ste. 258  
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Facsimile (208) 473-2952  
rar@raineylawoffice.com  
tfr@raineylawoffice.com

Attorneys for Petitioner

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BV BEVERAGE COMPANY, LLC., a Idaho  
limited liability company,

Petitioner,

vs.

THE STATE OF IDAHO, DEPARTMENT  
OF IDAHO STATE POLICE/ALCOHOL  
BEVERAGE CONTROL, G. JERRY  
RUSSELL, in his official capacity as Director  
of Idaho State Police,

Respondent.

Case No. CV-OC-2011-0<sup>6</sup>351

**PETITIONER'S PETITION FOR  
REHEARING**

COMES NOW, Petitioner, BV Beverage Company, LLC, by and through its counsel of record, and hereby petitions this Court for rehearing pursuant to Rule 84(r), Idaho Rules of Civil Procedure, and Rule 42(a), Idaho Appellate Rules. Pursuant to Rule 42(b), Idaho Appellate Rules, Petitioner will file a brief supporting this Petition for Rehearing within fourteen days of the filing date of this Petition.

15

DATED THIS 6th day of December, 2011.

RAINEY LAW OFFICE

A handwritten signature in black ink, appearing to read 'REAR', is written over a horizontal line.

Rebecca A. Rainey, of the firm  
Attorney for Petitioner

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 6th day of December, 2011, I caused a true and correct copy of the foregoing **PETITIONER'S PETITION FOR REHEARING** to be served by the method indicated below, and addressed to the following:

CHERYL A. MEADE  
Idaho State Police/Alcohol Beverage Control  
700 S. Stratford  
Meridian, ID 83642

U.S. Mail, Postage Prepaid  
 Hand Delivered  
 Overnight Mail  
 Facsimile

  
Rebecca A. Rainey

DEC 20 2011

CHRISTOPHER D. RICH, Clerk  
By LARA AMES  
DEPUTY

Rebecca A. Rainey, ISB No. 7525  
Tenielle Fordyce-Ruff, ISB No. 6998  
RAINEY LAW OFFICE  
910 W. Main Street, Ste. 258  
Boise, Idaho 83702  
Telephone (208) 258-2061  
Facsimile (208) 473-2952  
rar@raineylawoffice.com  
tfr@raineylawoffice.com

Attorneys for Petitioner

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BV BEVERAGE COMPANY, LLC., a Idaho  
limited liability company,

Petitioner,

vs.

THE STATE OF IDAHO, DEPARTMENT  
OF IDAHO STATE POLICE/ALCOHOL  
BEVERAGE CONTROL, G. JERRY  
RUSSELL, in his official capacity as Director  
of Idaho State Police,

Respondent.

Case No. CV-OC-2011-0<sup>6</sup>351

**BRIEF IN SUPPORT OF  
PETITIONER'S PETITION FOR  
REHEARING**

COMES NOW, Petitioner, BV Beverage Company, LLC, by and through its counsel of  
record, and files this brief in support of its petition for rehearing.

**ARGUMENT**

This Court should grant BV Beverage Company, LLC's (BV Beverage) Petition for  
Rehearing because the Court did not address the precise question of whether the Alcohol  
Beverage Commission's (ABC) procedures for renewal of a liquor license were constitutionally

SK

adequate when they failed to allow a mechanism for the lessor of a liquor license to renew its interest therein.

Because this precise question bears on the correctness of that portion of the order granting ABC's motion to dismiss, as well as the correctness of this Court's alternative order finding that no due process violation occurred, BV Beverage respectfully requests re-hearing on this narrow question.

**I. ABC violated BV Beverage's due process rights by failing to provide BV Beverage with an opportunity to renew the liquor license.**

In the memorandum decision and order granting ABC's motion to dismiss BV Beverage's petition for judicial review, this Court found that because BV Beverage had "actual notice of the expiration date of the liquor license at issue in this case" and "failed to seek an opportunity to be heard,"<sup>1</sup> the ABC did not violate BV Beverage's due process rights. Order Dismissing Petition for Review at 6. This legal conclusion does not comport with the due process jurisprudence of the United States Constitution.

The due process clause of the United States Constitution places a two part duty on the state to protect the property interests of its citizens: it requires that the state provide both notice

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<sup>1</sup> While BV Beverage concedes that it had actual notice of the expiration date promulgated by administrative rule which applied to liquor licenses in Bonneville County, the record does not support this Court's finding that BV Beverage had actual notice of the fact that the liquor license at issue in this case had not been renewed. Indeed, the Complaint for Revocation of the Liquor License made no mention of the fact that the renewal paperwork sent by the ABC to Iggy's had been returned as undeliverable. *See, generally*, Complaint for Revocation of Retail Alcohol Beverage License filed August 20, 2010 by Cheryl Meade, Exhibit 1 to BV Beverage's Motion to Augment the Record; *Compare* Exhibit d. to Agency Record filed by the Agency, which document is a copy of envelope enclosing renewal paperwork to Iggy's, which was returned to sender as undeliverable and marked as received by the ABC on August 4, 2010.

BV Beverage's lack of actual knowledge as to the renewal status of the at issue license is further supported by this Court's order wherein it stated that "There is no evidence that BV Beverage ever wrote a letter or picked up the phone to inquire about the renewal status of its liquor license." Order Dismissing Petition for Review at 6. However, because this fact is not relevant to the legal issues subject to the present motion for rehearing, this particular factual finding is not subject to the present petition for rehearing.

and opportunity. The principle issue presented to this Court was that the state did not provide an **opportunity** for the lessor to renew its interest in the liquor license:

The established state system did not afford BV Beverage, the lessor of a liquor license, a **reasonable opportunity to renew** its license. In the absence of the **reasonable opportunity to renew** ... the Agency declared BV Beverage's liquor license expired by operation of law.

*Petitioner's Appellate Brief* at 25 (emphasis added). By its determination that ABC did not violate BV Beverage's due process rights because BV Beverage "failed to seek an opportunity to be heard" (Order Dismissing Petition for Review at 6), this Court improperly shifted the due process burden of providing an opportunity to protect property rights from the state to its citizen. Regardless of whether BV Beverage had actual or constructive notice of the expiration date of the license, because the established state system did not provide BV Beverage with the opportunity to renew such license, the established state system violated BV Beverage's due process rights.

**II. The Agency's failure to promulgate constitutionally adequate procedures that provide an opportunity for a lessor to renew its interest in a liquor license is the proper subject of judicial review.**

In its order granting ABC's motion to dismiss, this Court found that the "ABC has no duties to perform in relation to the expiration [of a liquor license], except to process applications for renewal." Order Dismissing Petition for Review at 4. This finding ignores the statutory duty to "promulgate and publish such rules and regulations as the said director may deem necessary for carrying out the provisions of this act..." and that "it is made his duty to prescribe forms to be used in the administration of this act ...." This finding also ignores that the director delegated this statutory authority to the ABC. IDAPA 11.05.01.011.02. ("The Alcohol Beverage Control Bureau provides forms for all applications and inquiries.").

Under this statute and its related administrative regulations, the ABC was required to provide forms to be used in the renewal process. It was the ABC's failure to provide and/or make forms available that could be used by the lessor of a liquor license to renew its interest in the liquor license that is the subject of BV Beverage's petition for judicial review, without having to first go through the same license transfer process which a stranger to a license is required to undertake.

BV Beverage's petition for judicial review did not challenge the Agency's position that the at-issue license expired by operation of law. Rather, BV Beverage's petition for judicial review challenged the ABC's underlying procedures—procedures that do not afford an opportunity for a lessor to renew its property interest in a liquor license—as unconstitutional. As discussed above, the Agency's failure to provide an opportunity for BV Beverage to renew its interest in the liquor license violated BV Beverage's due process rights.

The end result of this constitutional violation was that the license expired by operation of law. However, that end result is not the agency action BV Beverage petitioned to have reviewed; rather, the agency action BV Beverage sought to have reviewed is the ABC's failure to provide constitutionally adequate procedures pursuant to which BV Beverage could comply with the statutory mandate of I.C. § 23-906 and actually submit renewal paperwork. The ABC cannot refuse to make renewal paperwork available and then fault the property owner for failing to timely renew. As noted in the case of *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982), “any other conclusion would allow the State to destroy at will virtually any state-created property interest” by simply not enacting constitutionally adequate procedures.

Because the agency action BV Beverage petitioned to have reviewed is the ABC's failure to promulgate a constitutionally adequate procedure that allowed the opportunity for




BV Beverage to renew its interest in the liquor license (not the fact of expiration as a matter of law), this Court has jurisdiction to consider the petition for review and the petition should not have been dismissed.

### CONCLUSION

For the foregoing reasons, BV Beverage respectfully requests that this Court grant BV Beverage's Petition for Rehearing.

DATED THIS 20th day of December, 2011.

RAINEY LAW OFFICE



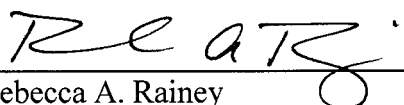
Rebecca A. Rainey, of the firm  
Attorney for Petitioner

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 20th day of December, 2011, I caused a true and correct copy of the foregoing **PETITIONER'S PETITION FOR REHEARING** to be served by the method indicated below, and addressed to the following:

CHERYL A. MEADE  
Idaho State Police/Alcohol Beverage Control  
700 S. Stratford  
Meridian, ID 83642

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile

  
\_\_\_\_\_  
Rebecca A. Rainey



**CERTIFICATE OF MAILING**

I hereby certify that on this 18<sup>th</sup> day of January, 2012,

I mailed(served) a true and correct copy of the within  
instrument to:

REBECCA RAINEY  
910 W. MAIN ST.  
BOISE, ID 83702

CHERYL MEADE  
700 S. STRATFORD  
MERIDIAN, ID 83642

Christopher Rich  
Clerk of the District Court

By   
Deputy Court Clerk

**FEB 14 2012**

**CHRISTOPHER D. RICH, Clerk**  
By **JERI HEATON**  
DEPUTY

Rebecca A. Rainey, ISB No. 7525  
Tenielle Fordyce-Ruff, ISB No. 6998  
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tfr@raineylawoffice.com

Attorney for Petitioner/Appellant

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BV BEVERAGE COMPANY, LLC., a Idaho  
limited liability company,

Petitioner/Appellant,

vs.

THE STATE OF IDAHO, DEPARTMENT  
OF IDAHO STATE POLICE/ALCOHOL  
BEVERAGE CONTROL, G. JERRY  
RUSSELL, in his official capacity as Director  
of Idaho State Police,

Respondent.

Case No. CV OC 2011-06351

**NOTICE OF APPEAL**

TO: The Respondent, THE STATE OF IDAHO, DEPARTMENT OF IDAHO STATE  
POLICE/ALCOHOL BEVERAGE CONTROL, G. JERRY RUSSELL,

NOTICE IS HEREBY GIVEN THAT:

1. The above named Appellant, BV Beverage Company, LLC  
("BV Beverage"), appeals against the above named Respondent, the State of Idaho,  
Department of Idaho State Police/Alcohol Beverage Control (the "ABC") from the Order

KW

Dismissing Petition for Judicial Review, entered in the above entitled action on November 15, 2011, Honorable Judge Michael Wetherell, presiding. Appellant timely filed a petition for rehearing, and an order denying such petition for rehearing was entered in the above entitled action on January 17, 2012.

2. BV Beverage has a right to appeal to the Idaho Supreme Court, and the orders described in paragraph 1 are appealable orders under and pursuant to Idaho Appellate Rule 11(f).

3. A preliminary statement of the issues Appellant intends to assert on appeal are as follows:

- a. Whether an owner's interest in a liquor license put into use pursuant to a lease agreement approved by the Alcohol Beverage Control is a protected property right under the United States and Idaho Constitution.
- b. Whether such property right includes the right to renew such license.
- c. Whether, in fulfilling the statutory duties set forth in Idaho Code § 23-932 and the rules promulgated in IDAPA 11, Title 05, Chapter 01 "Rules Governing Alcohol Beverage Control" the Director of the Idaho State Police, by and through the ABC, assumed the affirmative duty to issue renewal paperwork to all licensees.
- d. Whether the failure to provide renewal paperwork to the owner of a liquor license put into use pursuant to a lease agreement approved by the Alcohol Beverage Control, is a violation of the statutory and/or constitutional rights of the lessor of such liquor license.
- e. Whether such statutory and/or constitutional violation prevents the license from expiring by operation of law on the grounds that the renewal application was untimely.
- f. Whether the established state system which does not give a lessor the opportunity to exercise its right to renew the license results in an unconstitutional taking.

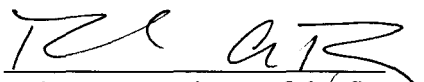
Provided that, in accordance with Idaho Appellate Rule 17, the foregoing list of issues on appeal shall not prevent the Appellant from asserting other issues on appeal.

4. No order has been entered sealing any portion of the record.
5. Appellant requests a standard reporter's transcript of the hearing held on September 22, 2011, in both electronic and hard copy.
6. Appellant requests that the clerk of the district court scan the entire district court file as the record, pursuant to Idaho Appellate Rule 27(b).
7. I certify:
  - a. That a copy of this petition has been served on Susan Gambee at  

Ada County Courthouse  
Attn: Susan Gambee  
200 W. Front Street  
Boise, ID 83702
  - b. That the clerk of the district court has been paid the estimated fee for preparation of the reporter's transcript.
  - c. That the appellate filing fee has been paid.
  - d. That service has been made upon all parties required to be served pursuant to Rule 20 and the Attorney General pursuant to I.C. § 67-1401(1).

DATED THIS 14<sup>th</sup> day of February, 2012.

RAINEY LAW OFFICE

  
Rebecca A. Rainey, of the firm,  
Attorney for Petitioner/Appellant

**CERTIFICATE OF SERVICE**


I HEREBY CERTIFY that on this 14<sup>th</sup> day of February, 2012, I caused a true and correct copy of the foregoing **NOTICE OF APPEAL** to be served by the method indicated below, and addressed to the following:

Cheryl Meade  
Idaho State Police/Alcohol Beverage Control  
700 S. Stratford  
Meridian, Idaho 83642  
*Attorney for Respondent*

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile

Office of the Attorney General  
700 W. Jefferson St. #210  
Boise, Idaho 83720-0001

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile

  
\_\_\_\_\_  
Rebecca A. Rainey



Rebecca A. Rainey, ISB No. 7525  
Tenielle Fordyce-Ruff, ISB No. 6998  
RAINEY LAW OFFICE  
910 W. Main Street, Ste. 258  
Boise, Idaho 83702  
Telephone (208) 258-2061  
Facsimile (208) 473-2952  
rar@raineylawoffice.com  
tfr@raineylawoffice.com

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. \_\_\_\_\_

FEB 23 2012

CHRISTOPHER D. RICH, Clerk  
By JAMIE RANDALL  
DEPUTY

Attorney for Petitioner

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BV BEVERAGE COMPANY, LLC., a Idaho  
limited liability company,

Petitioner,

vs.

THE STATE OF IDAHO, DEPARTMENT  
OF IDAHO STATE POLICE/ALCOHOL  
BEVERAGE CONTROL, G. JERRY  
RUSSELL, in his official capacity as Director  
of Idaho State Police,

Respondent.

Case No. CV-OC-2011-06351

**MOTION FOR ORDER STAYING  
AGENCY ACTION DURING  
PENDANCY OF APPEAL**

COMES NOW Petitioner, BV Beverage, LLC, (BV Beverage) by and through undersigned counsel of record, and pursuant to Rule 13(g), Idaho Appellate Rules, hereby moves this Court for an order staying any action by the Idaho State Police/Alcohol Beverage Control Bureau ("ABC") respecting the re-issuance of Liquor License No. 4314 until a final decision on the merits respecting the present appeal has been issued by the Idaho Supreme Court.

**MOTION FOR ORDER STAYING AGENCY ACTION DURING PENDANCY OF  
APPEAL - 1**

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To the extent that the ABC takes the position that it does not intend to re-issue License No. 4314, but rather that it intends to make a “new license” available to the next person or entity on the priority list (which would have the effect of issuing all license available in the City of Idaho Falls, pursuant to the quota system, thereby preventing the ABC from renewing, reviving, or otherwise recognizing the validity of License No. 4314 and BV Beverage’s right to use the same), BV Beverage respectfully requests that an order be entered restricting the ABC from issuing and/or making available such a “new license.”

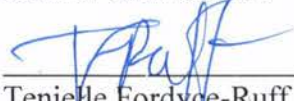
This motion is based on the Memorandum in Support of Appellant’s Motion for Order Staying Agency Action During Pendency of Appeal and the Affidavit of Cortney Liddiard in Support of Motion for Order Staying Agency Action filed on May 27, 2011 and the Affidavit of Tenielle Fordyce-Ruff in Support of Motion for Order Staying Agency Action During Pendency of Appeal, filed concurrently herewith.

Oral argument is not requested.

A proposed order is submitted contemporaneously herewith.

DATED THIS 22<sup>nd</sup> day of February, 2012.

RAINEY LAW OFFICE

  
\_\_\_\_\_  
Tenielle Fordyce-Ruff  
Attorney for Petitioner

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 22 day of February, 2012, I caused a true and correct copy of the foregoing **MOTION FOR ORDER STAYING AGENCY ACTION DURING PENDANCY OF APPEAL** to be served by the method indicated below, and addressed to the following:

CHERYL A. MEADE  
Idaho State Police/Alcohol Beverage Control  
700 S. Stratford  
Meridian, ID 83642

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile

  
\_\_\_\_\_  
Tenielle Fordyce-Ruff

Approved  
2/24/12

RECEIVED

FEB 23 2012

Ada County Clerk

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. \_\_\_\_\_

FEB 23 2012

CHRISTOPHER D. RICH, Clerk  
By JAMIE RANDALL  
DEPUTY

Rebecca A. Rainey, ISB No. 7525  
Tenielle Fordyce-Ruff, ISB No. 6998  
RAINEY LAW OFFICE  
910 W. Main Street, Ste. 258  
Boise, Idaho 83702  
Telephone (208) 258-2061  
Facsimile (208) 473-2952  
rar@raineylawoffice.com  
tfr@raineylawoffice.com

Attorney for Petitioner

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BV BEVERAGE COMPANY, LLC., a Idaho  
limited liability company,

Petitioner,

vs.

THE STATE OF IDAHO, DEPARTMENT  
OF IDAHO STATE POLICE/ALCOHOL  
BEVERAGE CONTROL, G. JERRY  
RUSSELL, in his official capacity as Director  
of Idaho State Police,

Respondent.

Case No. CV-OC-2011-06351

**MEMORANDUM IN SUPPORT OF  
PETITIONER'S MOTION FOR ORDER  
STAYING AGENCY ACTION DURING  
PENDENCY OF APPEAL**

COMES NOW Petitioner, BV Beverage Company, LLC ("BV Beverage), by and through undersigned counsel of record, and hereby submits this Memorandum in Support of Petitioner's Motion for Order Staying Agency Action during Pendency of Appeal.

**MEMORANDUM IN SUPPORT OF PETITIONER'S MOTION FOR ORDER STAYING  
AGENCY ACTION DURING PENDENCY OF APPEAL - 1**

1

## FACTUAL AND PROCEDURAL BACKGROUND

BV Beverage holds an owner's interest in that certain liquor license number 4314 for the City of Idaho Falls, Idaho (the "License").<sup>1</sup> During the normal course of its business, BV Beverage entered into a lease agreement with Iggy's Idaho Falls, Inc. (hereafter, "Iggy's"), wherein BV Beverage would lease the License to Iggy's on the terms and conditions set forth in said lease.<sup>2</sup> Such lease was made under the authority of and in accordance with Idaho Code § 23-908(6) and such lease agreement was reviewed and approved by Respondant Idaho State Police/Alcohol Beverage Control ("ABC").<sup>3</sup> BV Beverage paid good and valuable consideration to the ABC in order to transfer a leasehold interest in the License to Iggy's. Idaho Code § 23-908(6).

Iggy's stopped using the License sometime in January of 2010. The ABC delivered a notice to Iggy's informing Iggy's that Iggy's had 90 days in which to find suitable premises to put the License into actual use, as required by IDAPA 11.05.01.010.02.<sup>4</sup> No such notice was sent to BV Beverage, owner of the License. On or about July 30, 2010, the ABC sent renewal paperwork to Iggy's for renewal of the License for the 2011 license year.<sup>5</sup> No renewal paperwork was sent to BV Beverage, owner of the License. On or about August 20, 2010, the ABC instituted judicial proceedings to revoke the License on the grounds that Iggy's was not

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<sup>1</sup> See Agency Record for Iggy's Liquor License No. 4314 ("Record") at A.

<sup>2</sup> Record at A; *see, generally*, Affidavit of Cortney Liddiard in Support of Petitioner's Motion for Order Staying Agency Action ("Liddiard Aff.").

<sup>3</sup> Record at A & B

<sup>4</sup> Record at C.

<sup>5</sup> Record at D.

making “actual use” of the License.<sup>6</sup> BV Beverage was not named in these revocation proceedings.

Upon learning of the revocation proceedings, BV Beverage immediately contacted the ABC and expressed concern that BV Beverage, the owner of the License (which had only been leased to Iggy’s), had not been notified of the revocation proceedings.<sup>7</sup> As a result of the conversations and communications that transpired between BV Beverage and the ABC at that time, the ABC agreed to allow BV Beverage additional time to transfer the License to another prospective tenant.<sup>8</sup>

In reliance on the ABC’s representation that it would allow BV Beverage additional time to transfer the License to a new lessee, BV Beverage continued negotiations with the prospective tenant and incurred substantial costs and attorneys fees negotiating a liquor license lease for the License with the new tenant.<sup>9</sup> On or about January 7, 2011, BV Beverage submitted transfer application paperwork to the ABC.<sup>10</sup> ABC then notified BV Beverage that the transfer application would not be approved because the License had expired by operation of law due to BV Beverage’s failure to timely renew the License.<sup>11</sup>

Immediately upon learning that the ABC was taking the position that the License had expired by operation of law, BV Beverage initiated informal proceedings to resolve this matter with the ABC.<sup>12</sup> BV Beverage and the ABC were unable to resolve their differences through

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<sup>6</sup> Motion to Augment the Record (“Augmented Record”), Exhibit 1.

<sup>7</sup> Augmented Record, Exhibit 2.

<sup>8</sup> Augmented Record, Exhibit 4.

<sup>9</sup> Augmented Record, Exhibit 5.

<sup>10</sup> Record at E.

<sup>11</sup> Record at G.

<sup>12</sup> Augmented Record, Exhibits 5 – 12.

informal proceedings and, on or about February 4, 2011, the ABC notified BV Beverage that it considered the License to be void and notified BV Beverage that the License would be offered to the “next person or entity on the priority list sometime in July [2011].”<sup>13</sup>

On March 31, 2011, BV Beverage filed a Petition for Judicial Review in this matter. On May 27, 2011, BV Beverage filed a motion for order staying agency action and the Affidavit of Cortney Liddiard in Support of Motion for Order Staying Agency Action.<sup>14</sup> ABC then stipulated to a stay, and this Court entered an Order Granting Stipulation to Stay Agency Action on June 17, 2011.<sup>15</sup> The parties fully briefed the issues; this Court then heard oral argument and issued its Order Dismissing Petition for Judicial Review on November 15, 2011.<sup>16</sup> BV Beverage filed a petition for rehearing, which this Court denied.<sup>17</sup> BV Beverage then filed a notice of appeal.<sup>18</sup>

Pursuant to Rule 13, Idaho Appellate Rules, any action is automatically stayed for fourteen days. BV Beverage has attempted to contact ABC in an effort to extend the stipulation for stay the parties entered.<sup>19</sup> However, BV Beverage was unable to contact ABC’s counsel, as she is currently out of town.<sup>20</sup>

BV Beverage now moves this Court for entry of an order staying any agency action respecting the License including, but not limited to, re-issuing or attempting to re-issue the License to another person or entity and/or issuing sufficient “new licenses” to applicants on the priority list, which would have the effect making the License somehow unavailable to

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<sup>13</sup> Augmented Record, Exhibit 10.

<sup>14</sup> *See generally* ROA.

<sup>15</sup> *See generally* ROA.

<sup>16</sup> *See generally* ROA.

<sup>17</sup> *See generally* ROA.

<sup>18</sup> *See generally* ROA.

<sup>19</sup> Affidavit of Tienielle Fordyce-Ruff in Support of Motion for Order Staying Agency Action During Pendency of Appeal at ¶ X (Fordyce-Ruff Aff.).

<sup>20</sup> Fordyce-Ruff Aff. at ¶ X.

BV Beverage by virtue of the quota system, before the present appeal is decided on its merits and the Idaho Supreme Court's decision becomes final.

### **APPLICABLE LEGAL STANDARD**

Idaho Appellate Rule 13(a) provides that filing of a notice of appeal automatically stays all proceedings for 14 days. Rule 13(g) provides that in an appeal from a district court, the party desiring a stay must apply to the district court prior to filing an application for stay to the Supreme Court.

In turn, Idaho Code § 67-5274 provides “[t]he filing of the petition for review does not itself stay the effectiveness or enforcement of the agency action. The agency may grant, or the reviewing court may order, a stay upon appropriate terms.” While no Idaho Appellate Court has explained or defined the phrase “appropriate terms” as used under Idaho Code § 67-5274, the Supreme Court determined that it is proper to issue an injunction when an irreparable injury is actually threatened by non-movant or when the movant would suffer an irreparable injury should the court refuse an injunction. *O’Boskey v. First Federal Savings & Loan Ass’n*, 112 Idaho 1002, 1005, 739 P.2d 301, 306 (1987) (deciding it was proper to issue permanent injunction when injury had been threatened and other party was capable of continuing conduct); *Harris v. Cassia County*, 106 Idaho 513, 518, 681 P.2d 988, 993 (1984) (affirming refusal to grant temporary injunction seeking payment of back benefits because county had brought benefits current). BV Beverage submits that the same standard is applicable to the present motion.



Additionally, in instances where a controversy is likely to become moot based on agency action, it is appropriate to stay the agency action.<sup>21</sup> See *Committee for Rational Predator Management v. Dep't of Agriculture*, 129 Idaho 670, 673, 931 P.2d 1188, 1191 (1997) (noting it is the proper course of action for a party with a claim likely to become moot to seek a stay after filing a petition for review).

The entry of an order granting a motion to stay agency action is left to the sound discretion of the court. *Newell v. Newell*, 77 Idaho 355, 365, 293 P.2d 663, 670 (1956).

### **ARGUMENT**

A stay of the agency's action is appropriate in this matter because, if the License is re-issued to another person or entity, or if new licenses are issued which fill the quota of available licenses, BV Beverage will suffer irreparable injury.<sup>22</sup> The ABC has already declared that it deems the License void by operation of law. The ABC has further indicated that it will offer the License to another person or entity.<sup>23</sup> If the ABC does offer the License to another person or entity before the Idaho Supreme Court has an opportunity to determine the merits of the present appeal, BV Beverage will be deprived of its property rights and interest in the License.

---

<sup>21</sup> The ABC has already taken the position that BV Beverage does not have standing to request the relief sought because BV Beverage does not hold an ownership interest in the License. Augmented Record, Exhibit 12. However, that very position begs the question: What property right does the lessor of a liquor license have and what process is due to said lessor before revoking a license and/or taking the position that such license has become void by operation of law. Moreover, in its Order Dismissing Petition for Judicial Review, this Court determined that BV Beverage did hold an ownership interest in the liquor license. However, because the Court dismissed BV Beverage's petition for judicial review on other grounds, that portion of its decision does not bind the agency with respect to the license. The very purpose of BV Beverage's appeal is to determine what, if any, legal standing the lessor of liquor license has and, based thereon, what notice such lessor is entitled to receive.

<sup>22</sup> See, generally, *Liddiard Aff.*

<sup>23</sup> Augmented Record, Exhibit 10.

An ownership interest in a liquor license is a unique and valuable property right.<sup>24</sup> Idaho Code § 23-903 provides that the number of liquor licenses per city is determined by the population of that city; accordingly, there are a limited number of licenses available for the ABC to issue. By administrative rule, the ABC maintains a priority waiting list for applicants who wish to obtain a liquor license. IDAPA 11.05.01.013.01. When a license becomes available, the ABC offers the license to the person or entity at the top of the priority list. IDAPA 11.05.01.013.02. Because the ABC takes the position that the License has become void by operation of law, the ABC has informed BV Beverage that the License will be offered to the next person and/or entity on the priority list.

If the License is re-issued to a new person or entity, said License will no longer be available to BV Beverage and BV Beverage will be forced to rely on the priority list in order to become eligible for issuance of another liquor license. Even then, due to its transferability, the value of a “seasoned license,” such as the one at issue in the present action, is significantly greater than the value of a new license.<sup>25</sup> This value is a critical component to BV Beverage’s

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<sup>24</sup> See, e.g., *Bundo v. Walled Lake*, 395 Mich. 679, 694-95, 238 N.W.2d 154 (1976) (recognizing the property rights of an owner of a liquor license as the type of rights that are entitled to due process protection) *c.f.* *Uptick v. Ahlin*, 103 Idaho 364, 647 P.2d 1236 (1982) (denying to recognize property rights of the lessor of a liquor license where such liquor license lease was (i) not authorized by Idaho statute and (ii) not approved by the licensing authority). For reasons that will be more fully explained during the hearing on the merits of this petition for judicial review, the present action is distinguishable from *Uptick* because the Idaho legislature amended Idaho Code Section 23-908 while the *Uptick* matter was moving through the judicial process to allow for transfer of a liquor license by lease. Accordingly, the process and procedures used by BV Beverage and Iggy’s respecting the lease of the License were (i) authorized by statute (distinguishing the present facts from *Uptick*) and (ii) the transaction was reviewed and approved by the ABC (distinguishing the legal framework within which the lease was executed, reviewed and approved from the facts cited and principles enunciated by the Idaho Supreme Court in support of the *Uptick* decision).

<sup>25</sup> Liddiard Aff., ¶¶ 4-6.

business model, the loss of which is impossible to measure, thereby resulting in irreparable harm.<sup>26</sup>

**CONCLUSION**

Based on the foregoing, BV Beverage respectfully requests that this Court enter an order staying the agency's action and restricting the ABC from offering the License to the next person or entity on the priority list, issuing sufficient new licenses to persons on the priority list that would, somehow, have the effect of making the License unavailable to BV Beverage should it prevail in this action, and/or taking any other action which might divest BV Beverage of its ownership interest in the License during the appeal.

DATED THIS 22 day of February, 2012.

RAINEY LAW OFFICE

  
\_\_\_\_\_  
Tenielle Fordyce-Ruff – Of the Firm  
Attorney for Petitioner

---

<sup>26</sup> Liddiard Aff., ¶ 7.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 22 day of February, 2012, I caused a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION FOR ORDER STAYING AGENCY ACTION DURING PENDENCY OF APPEAL** to be served by the method indicated below, and addressed to the following:

CHERYL A. MEADE  
Idaho State Police/Alcohol Beverage Control  
700 S. Stratford  
Meridian, ID 83642

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile

  
\_\_\_\_\_  
Tenielle Fordyce-Ruff

RECEIVED  
FEB 23 2012

Ada County Clerk

Rebecca A. Rainey, ISB No. 7525  
Tenielle Fordyce-Ruff, ISB No. 6998  
RAINEY LAW OFFICE  
910 W. Main Street, Ste. 258  
Boise, Idaho 83702  
Telephone (208) 258-2061  
Facsimile (208) 473-2952  
rar@raineylawoffice.com

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. 1111 P.M.

FEB 23 2012

CHRISTOPHER D. RICH, Clerk  
By JAMIE RANDALL  
DEPUTY

Attorney for Petitioner

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BV BEVERAGE COMPANY, LLC., a Idaho  
limited liability company,

Petitioner,

vs.

THE STATE OF IDAHO, DEPARTMENT  
OF IDAHO STATE POLICE/ALCOHOL  
BEVERAGE CONTROL, G. JERRY  
RUSSELL, in his official capacity as Director  
of Idaho State Police,

Respondent.

Case No. CV-OC-2011-06351

**AFFIDAVIT OF TENIELLE  
FORDYCE-RUFF IN SUPPORT OF  
MOTION FOR ORDER STAYING  
AGENCY ACTION DURING  
PENDANCY OF APPEAL**

STATE OF IDAHO            )  
  ) ss.  
COUNTY OF ADA)

I, TENIELLE FORDYCE-RUFF, being duly sworn, testify as follows:

1. I am an attorney with Rainey Law Office, attorneys of record for BV Beverage Company, LLC, in the above captioned case. I make this affidavit based upon my own personal knowledge.

**AFFIDAVIT OF TENIELLE FORDYCE-RUFF IN SUPPORT OF MOTION FOR  
ORDER STAYING AGENCY ACTION DURING PENDANCY OF APPEAL - 1**

2. On February 21, 2012, I placed a telephone call to Cheryl E. Meade, attorney of record for the State of Idaho, Department of Idaho State Police/Alcohol Beverage Control.
3. The receptionist who answered the telephone informed me that Ms. Meade was out of town until Thursday, February 23, 2012, and would be unable to return my call until that date.
4. I left a message on Ms. Meade's voicemail, requesting that she contact me to discuss a stay of the agency's action during the appeal of the above captioned case.
5. Further your affiant sayeth naught.

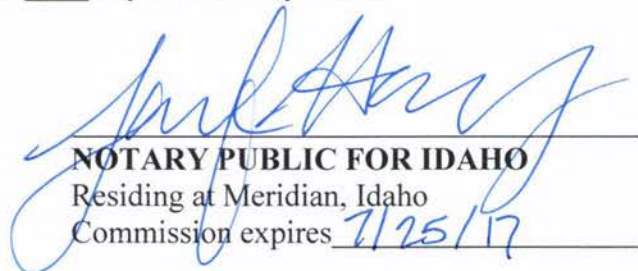
DATED this 22 day of February, 2012.

RAINEY LAW OFFICE

By   
Tenielle Fordyce-Ruff – Of the Firm  
Attorneys for Plaintiff

SUBSCRIBED AND SWORN to before me this 22<sup>nd</sup> day of February, 2012.



  
NOTARY PUBLIC FOR IDAHO  
Residing at Meridian, Idaho  
Commission expires 7/25/17

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 22 day of February, 2012, I caused a true and correct copy of the foregoing **AFFIDAVIT OF TENIELLE FORDYCE-RUFF IN SUPPORT OF MOTION FOR ORDER STAYING AGENCY ACTION DURING PENDANCY OF APPEAL** to be served by the method indicated below, and addressed to the following:

CHERYL A. MEADE  
Idaho State Police/Alcohol Beverage Control  
700 S. Stratford  
Meridian, ID 83642

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile

  
\_\_\_\_\_  
Tenielle Fordyce-Ruff

RECEIVED

MAR 01 2012

LAWRENCE G. WASSDEN  
Attorney General  
Ada County Clerk

Cheryl E. Meade (ISB# 6200)  
Deputy Attorney General  
Idaho State Police  
700 S. Stratford Dr.  
Meridian, ID 83642  
Telephone: (208) 884-7050  
Facsimile (208) 884-7228

cheryl.meade@isp.idaho.gov

Attorney for Respondent

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. 2:10

MAR 01 2012

CHRISTOPHER D. RICH, Clerk  
By STEPHANIE VIDAK  
DEPUTY

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

B.V. BEVERAGE COMPANY, LLC., an  
Idaho Limited Liability Company

Petitioner,

vs.

THE STATE OF IDAHO, DEPARTMENT  
OF IDAHO STATE POLICE/ ALCOHOL  
BEVERAGE CONTROL, G. JERRY  
RUSSELL, in his official capacity as Director  
of Idaho State Police,

Respondent.

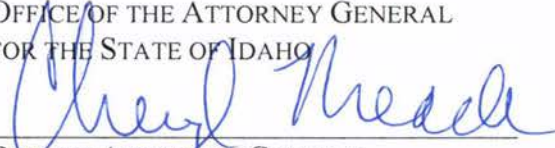
)  
) Case No. CV-OC- 2011-06351  
)  
)

) **CONSENT TO ORDER**  
) **STAYING AGENCY ACTION**  
)  
)

COMES NOW, Respondent, Alcohol Beverage Control, by and through its attorney of  
record, Cheryl E. Meade, Deputy Attorney General and hereby consents to the entry of a temporary  
stay during the pendency of the Petition for Judicial Review set before this Court.

DATED This 28 day of February 2011.

OFFICE OF THE ATTORNEY GENERAL  
FOR THE STATE OF IDAHO

  
DEPUTY ATTORNEY GENERAL  
IDAHO STATE POLICE  
ALCOHOL BEVERAGE CONTROL

CONSENT TO ORDER STAYING AGENCY ACTION - 1

000375

*Weyhall  
3-2-12  
Stephanie*

*Ar*

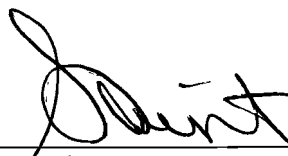


**CERTIFICATE OF SERVICE**

I hereby certify that on this 29<sup>th</sup> day of February 2012, I caused to be served, a true and correct copy of the foregoing CONSENT TO ORDER STAYING AGENCY ACTION in the above-referenced matter on the following individuals by the method indicated below:

Rebecca A. Rainey  
Attorney at Law  
2627 W. Idaho St.  
Boise, ID 83702

U.S. Mail, postage pre-paid



---

Susan Saint  
Administrative Assistant

RECEIVED

FEB 23 2012

Ada County Clerk

NO. \_\_\_\_\_ FILED \_\_\_\_\_  
A.M. \_\_\_\_\_ P.M. \_\_\_\_\_

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

MAR 06 2012

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

CHRISTOPHER D. RICH, Clerk  
By DAINE OATMAN  
Deputy

BV BEVERAGE COMPANY, LLC., a Idaho  
limited liability company,

Petitioner,

vs.

THE STATE OF IDAHO, DEPARTMENT  
OF IDAHO STATE POLICE/ALCOHOL  
BEVERAGE CONTROL, G. JERRY  
RUSSELL, in his official capacity as Director  
of Idaho State Police,

Respondent.

Case No. CV-0C-2011-06351

**ORDER STAYING AGENCY ACTION  
DURING PENDENCY OF APPEAL**

THIS MATTER, having come before the Court on BV Beverage Company, LLC's ("BV Beverage") Motion for an Order Staying Agency Action During Pendency of Appeal, and good cause appearing, it is hereby ordered, and this does ORDER:

1. Respondent The State of Idaho, Department of Idaho State Police/Alcohol Beverage Control ("ABC") shall not re-issue Liquor License No. 4314 until an order on the merits respecting the appeal filed by BV Beverage on February 14, 2012, in this matter has become final.
2. The ABC will not take any action respecting the issuance of new license in the City of Idaho Falls which would have the effect of making the present appeal moot by virtue of the State of Idaho quota system on liquor licenses, but will reserve sufficient space within the quota system such that

the at issue liquor license will be available for use by BV Beverage in the event that BV Beverage prevails on its appeal.

DATED THIS 6<sup>th</sup> day of ~~February~~ <sup>March</sup>, 2012.

  
Michael E. Wetherell  
District Judge

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 6<sup>th</sup> day of March, 2012, I caused a true and correct copy of the foregoing **ORDER STAYING AGENCY ACTION DURING PENDENCY OF APPEAL** to be served by the method indicated below, and addressed to the following:

CHERYL A. MEADE  
Idaho State Police/Alcohol Beverage Control  
700 S. Stratford  
Meridian, ID 83642

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile

TENIELLE FORDYCE-RUFF  
910 W. Main Street, Ste. 258  
Boise, ID 83702

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile

*deputy*  
  
Clerk of the Court

TO: Clerk of the Court  
Idaho Supreme Court  
451 West State Street  
Boise, Idaho 83720  
(208) 334-2616

**MAR 29 2012**

**CHRISTOPHER D. RICH, Clerk**  
By **MARGARET LUNDQUIST**  
DEPUTY

**IN THE SUPREME COURT OF THE STATE OF IDAHO**

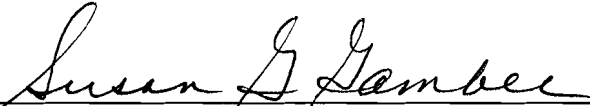
-----	x	Docket No. 39690-2012
	:	
BV BEVERAGE, LLC,	:	
	:	
Petitioner-Appellant,	:	
	:	
vs.	:	
	:	
ALCOHOL BEVERAGE CONTROL,	:	
	:	
Respondent-Respondent.	:	
	:	
-----	x	

**NOTICE OF TRANSCRIPT OF 62 PAGES LODGED**

Appealed from the District Court of the  
Fourth Judicial District of the State of  
Idaho, in and for the County of Ada,  
Michael Wetherell, District Court Judge.

This transcript contains hearing held on:  
September 22, 2011

DATE: March 1, 2012

  
 \_\_\_\_\_  
 Susan G. Gamber, Official Court Reporter  
 Official Court Reporter,  
 Judge Deborah Bail  
 Ada County Courthouse  
 Idaho Certified Shorthand Reporter No. 18  
 Registered Merit Reporter

*me*

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BV BEVERAGE COMPANY, LLC, an  
Idaho limited liability company,

Petitioner-Appellant,

v.

THE STATE OF IDAHO, DEPARTMENT  
OF IDAHO STATE POLICE/ALCOHOL  
BEVERAGE CONTROL, G. JERRY  
RUSSELL, in his official capacity as  
Director of Idaho State Police,

Respondent.

Supreme Court Docket No. 39690-2012

CERTIFICATE OF EXHIBITS

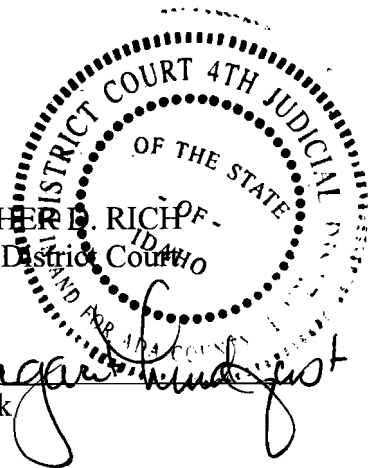
I, CHRISTOPHER D. RICH, Clerk of the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Ada, do hereby certify:

There were no exhibits offered for identification or admitted into evidence during the course of this action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 29th day of March, 2012.

CHRISTOPHER D. RICH  
Clerk of the District Court

By *Margaret Lindquist*  
Deputy Clerk



CERTIFICATE OF EXHIBITS

000381

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BV BEVERAGE COMPANY, LLC, an  
Idaho limited liability company,

Petitioner-Appellant,

v.

THE STATE OF IDAHO, DEPARTMENT  
OF IDAHO STATE POLICE/ALCOHOL  
BEVERAGE CONTROL, G. JERRY  
RUSSELL, in his official capacity as  
Director of Idaho State Police,

Respondent.

Supreme Court Docket No. 39690-2012

CERTIFICATE OF SERVICE

I, CHRISTOPHER D. RICH, the undersigned authority, do hereby certify that I have personally served or mailed, by either United States Mail or Interdepartmental Mail, one copy of the following:

CLERK'S RECORD AND REPORTER'S TRANSCRIPT

to each of the Attorneys of Record in this cause as follows:

REBECCA A. RAINEY

ATTORNEY FOR APPELLANT

BOISE, IDAHO

CHERYL E. MEADE

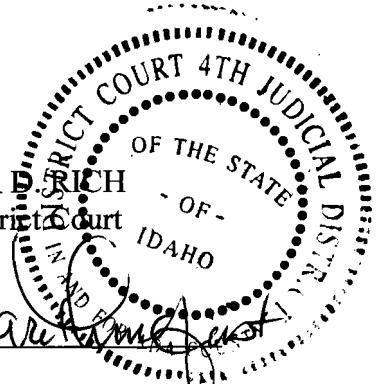
ATTORNEY FOR RESPONDENT

BOISE, IDAHO

Date of Service: MAR 29 2012

CHRISTOPHER D. RICH  
Clerk of the District Court

By Margaret [Signature]  
Deputy Clerk



CERTIFICATE OF SERVICE

000382

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BV BEVERAGE COMPANY, LLC, an  
Idaho limited liability company,

Petitioner-Appellant,

v.

THE STATE OF IDAHO, DEPARTMENT  
OF IDAHO STATE POLICE/ALCOHOL  
BEVERAGE CONTROL, G. JERRY  
RUSSELL, in his official capacity as  
Director of Idaho State Police,

Respondent.

Supreme Court Docket No. 39690-2012

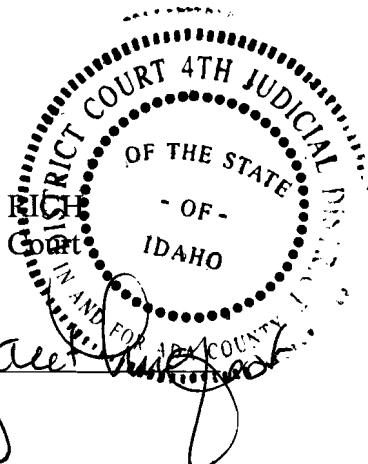
CERTIFICATE TO RECORD

I, CHRISTOPHER D. RICH, Clerk of the District Court of the Fourth Judicial District of the State of Idaho, in and for the County of Ada, do hereby certify that the above and foregoing record in the above-entitled cause was compiled under my direction as, and is a true and correct record of the pleadings and documents that are automatically required under Rule 28 of the Idaho Appellate Rules, as well as those requested by Counsels.

I FURTHER CERTIFY, that the Notice of Appeal was filed in the District Court on the 14th day of February, 2012.

CHRISTOPHER D. RICH  
Clerk of the District Court

By Margaret [Signature]  
Deputy Clerk



CERTIFICATE TO RECORD

000383