

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

IDAHO STATE POLICE, ALCOHOL BEVERAGE CONTROL,	) ) )	
Complainant,	)	CASE NO. 13ABC-COM016
	)	License No. 3991
vs.	)	Premise No. 1A-251
	)	<b>DIRECTOR'S FINAL ORDER</b>
T. CHALLENGER, INC., Licensee, dba, CHINA BLUE/DIRTY LITTLE RODDY'S,	) ) )	
Respondent.	) )	

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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 an administrative Hearing Officer. 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 provisions of title 67, chapter 52, Idaho Code, and IDAPA 04.11.01, the Director hereby enters this Final Order.

**INTRODUCTION**

In June 2013, Complainant, Idaho State Police, Alcohol Beverage Control (hereafter "ABC"), filed an administrative Complaint against Respondent, T. Challenger, Inc., dba China Blue/Dirty Little Roddy's (hereafter "China Blue"). The Complaint sought revocation of China Blue's retail alcohol beverage license based upon an alleged violation of Idaho Code § 23-614(1)(d). ABC claimed that China Blue violated

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the statute by simulating oral copulation in the manner in which a "blow job shot" drink was served to a bar patron at China Blue's establishment.

An evidentiary hearing was conducted before attorney David Wynkoop, duly appointed Hearing Officer. On or about April 24, 2013, the Hearing Officer entered his Preliminary Order concluding that ABC had failed to establish the charged violation by a preponderance of the evidence. ABC filed a timely Petition, pursuant to Idaho Code § 67-5245, requesting that the Director review and reverse the Hearing Officer's decision.

While this is a close case, the Hearing Officer's Findings of Fact, Conclusions of Law and Preliminary Order are, for the most part, well reasoned and fully supported by the contested case record. Therefore, except as they may be expressly rejected, modified, or clarified by comments in this Final Order, the Director adopts those Findings and Conclusions, and the Preliminary Order, in their entirety as his own.<sup>1</sup> A true and correct copy of the Hearing Officer's Preliminary Order is attached hereto as "Exhibit A," and incorporated herein by reference. The comments expressed in this Final Order shall be construed as additional Findings of Fact or Conclusions of Law, as appropriate.

### ISSUES

ABC's brief on review sets forth six issues or arguments it claims support a finding of error by the Hearing Officer requiring the Director to set-aside or reverse the Preliminary Order. However, upon close inspection some of these issues are simply

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<sup>1</sup> An example of typographical or technical "errors" is that throughout his Preliminary Order the Hearing Officer refers to the statutory provision at issue in this case as "Idaho Code § 23-614(d)." The more complete and correct citation is "Idaho Code § 23-614(1)(d)." In addition, at page 8 of the Preliminary Order, the Hearing Officer incorrectly refers to "Idaho Code § 23-902(17)" as "Idaho Code § 23-904(17)." These are, of course, minor and harmless errors and are hereby corrected.

sub-sets of the main issues or merely different ways of arguing the same or closely related points; therefore, they will be grouped together for purposes of discussion.

The issues raised by ABC in this review can effectively be restated as:

1. Did the Hearing Officer apply an incorrect definition of the word "simulate" within the meaning and interpretation of Idaho Code § 23-614(1)(d)?
2. Did the Hearing Officer incorrectly conclude that ABC's interpretation of the word "simulate" was arbitrary and capricious?
3. Did the Hearing Officer incorrectly decide the case by "majority vote" of the witnesses?
4. Did the Hearing Officer incorrectly rely upon irrelevant testimony from China Blue's owner, Ted Challenger?

In addition to these assignments of error raised by ABC, the final issue is:

5. Is either party entitled to an award of attorney fees and costs?

#### DISCUSSION

**ISSUE NO. 1: The Hearing Officer did not incorrectly define the word "simulate."**

China Blue was charged with violating Idaho Code § 23-614(1)(d). In relevant part, that provision prohibits any person from conducting, permitting, or encouraging on a licensed premise the "[e]mployment or use of any person to perform acts . . . which simulate . . . oral copulation . . . ." As the Hearing Officer correctly noted, and the parties agreed, the statute does not define the term "simulate" and there is no agency rule, written guideline or interpretive statement that provides guidance on the correct interpretation. In this vacuum, the parties and the Hearing Officer resorted to dictionary definitions. They also relied upon a provision of a definition statute (Idaho Code § 23-

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902(17)), for the proposition that undefined words and terms "shall be given their ordinary and commonly understood and acceptable meanings."<sup>2</sup>

The Hearing Officer relied upon definitions of the word simulate found in Merriam-Webster's, Wikipedia and Dictionary.com. The Hearing Officer focused on whether the acts of the bartender and bar patron constituted a pretense, an imitation or an act of pretending to commit oral copulation. Using the elements of actual oral copulation agreed to by the parties, the Hearing Officer compared the undisputed facts to those elements and determined that as a matter of law, the facts failed to constitute simulated oral copulation.

At the very heart of ABC's dispute with the Hearing Officer's choice of definition is a claim that it imposes a requirement on ABC to show that the participants (i.e., China Blue or its employees) "intend to deceive" others into believing that they are actually having oral sex. ABC misreads the Hearing Officer's decision.

It is true that in Finding of Fact No. 12 (Preliminary Order, p. 5), the Hearing Officer states that: "There is no evidence that anyone present at China Blue on February 12, 2013 was deceived into believing an act of oral copulation had occurred or believing that the parties were pretending to engage in a sex act." It is also true that later the Hearing Officer states that, "No one in the audience was deceived into

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<sup>2</sup> Idaho Code § 23-902 literally states that "The following words and phrases used in this chapter shall be given the following interpretation: . . . (17) All other words and phrases used in this chapter, the definitions of which are not herein given, shall be given their ordinary and commonly understood and acceptable meanings." (Emphasis added). Clearly this statute is limited to words and phrases used in Chapter 9. Neither the Hearing Officer nor the parties explain how this definition statute applies to words and phrases used in Chapter 6, such as the word "simulate" found in section 23-614(1)(d), and no explanation is readily apparent. However, despite this apparent misplaced reliance on Idaho Code § 23-902(17), the Director agrees that undefined terms used in title 23, chapter 6, Idaho Code should be given their plain, ordinary and commonly understood meanings. This is not only good common sense, but is consistent with the usual treatment of such matters by the courts.

believing that an act of oral copulation occurred;"<sup>3</sup> and "There was not an intent to deceive other patrons into believing that a sex act was being performed." Preliminary Order, pp. 12 and 14.

However, these comments must be put in proper context. In making these comments, the Hearing Officer carefully weighed all the factors for and against simulated oral copulation. One of those factors was whether any patrons were deceived into believing an actual sex act was occurring. Obviously, if ABC had produced evidence that one or more patrons had been so deceived, it would have substantially strengthened the state's case. Therefore, whether anyone believed an actual act of oral copulation happened was relevant and material to the core issue and was the reason the Hearing Officer makes mention of the fact that there was no such showing. However, while intent to deceive is a relevant factor, there is nothing in the Hearing Officer's decision leading to the conclusion that he made it a requirement. Rather, the Hearing Officer just listed it as one of the relevant considerations in a totality of the circumstances analysis.

As stated by the Hearing Officer:

The key to this case is whether a simulation of oral copulation occurred at China Blue on February 12, 2013. ABC is correct that it is not required to prove all the elements of actual copulation. However, ABC must show that there was a pretense or imitation of oral copulation. Thus the elements or characteristics of oral copulation are relevant for purposes of determining whether those elements or characteristics are imitated. In this case, while there were some similarities with the act of oral copulation,

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<sup>3</sup> Although the Hearing Officer stated that, "No one in the audience was deceived into believing that an act of oral copulation occurred," in truth the Hearing Officer would not know this for an absolute fact. Absent polling of the patrons, something that was not done, it is impossible to state that no one was deceived. The point is that someone in the audience, particularly someone more removed from the action and therefore without a clear or close-up view of the event, could have been deceived. Therefore, item number 6, listed on page 12 of the Preliminary Order as one of the factors for concluding that simulated oral copulation did not occur, should have more accurately been stated (as did Finding of Fact No. 12, see, p. 5 of the Preliminary Order), that no evidence was presented at the hearing that anyone was deceived into believing oral copulation had occurred.

most of the elements or characteristics of oral copulation were not imitated. There was no pretense by the female patron or the bartender that they were engaging in oral copulation.

Preliminary Order, pp. 13-14.

In defining the word "simulate," the Hearing Officer focused on the words "imitate" or "pretend" as the closest synonyms. This was a proper assessment and understanding of the term and its definition. The burden on ABC in this case was not to show that a patron was deceived or that China Blue attempted to deceive anyone into believing that oral copulation was occurring. Rather, ABC's burden was to show only that the prohibited act was imitated or pretended. This required a showing that the activities of the bartender and patron contained enough of the elements or characteristics of oral copulation that the demonstration amounted to simulated oral copulation. This showing was not made.

Significant in the analysis is the emcee's announcement to the bar audience that a patron would be served a "blow-job shot"—a drink! With this announcement and the lack of sufficient elements or characteristics of actual oral copulation present, the patrons saw just what they were told would happen.

As the Hearing Officer noted, "This is a close call. China Blue approached the line of what is legally permissible, but did not clearly cross that line." Preliminary Order, p. 14. Indeed, the acts in question were immature, disgraceful, disrespectful and demeaning to the patron. Even Ted Challenger admitted that blow job shots are typically served from the top of the bar, like any other drink. The explanation offered by China Blue for why the drink at issue here was served between the legs of the bartender is simply not credible. A more likely explanation is that by serving the drink

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between the bartender's legs and using an emcee to "hype-up" the event, the purpose was to sell more drinks or at least to attract more attention to the event.

The decision in this case is factually driven and the result could have been very different if even a couple more of the factors or characteristics of oral copulation had been present; or perhaps even if the patron's head had been closer to the bartender's crotch.<sup>4</sup>

Under the totality of the facts in this case, no simulated act of oral copulation occurred within the meaning of Idaho Code § 23-614(1)(d).

**ISSUE NO. 2: ABC's interpretation of the word "simulate" was not arbitrary or capricious.**

ABC argues that the Hearing Officer concluded that the ABC detectives and the agency itself enforced the statute arbitrarily in their definition of the word "simulate." ABC reads too much into the Hearing Officer's decision.

ABC points to comments made by the Hearing Officer at page 11 of his Preliminary Order. What the Hearing Officer said was:

Because there are no regulatory definitions, no statutory definition, or written guidelines, the initial determination of whether the February 12, 2013 blow job shot service event constituted an act which "simulate(s)...oral copulation" must be based upon the ordinary and commonly understood meaning of the phrase. In a close call like this

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<sup>4</sup> This may be an appropriate place to correct a statement made by the Hearing Officer. In listing the factors suggesting that no simulation of oral copulation occurred, the Hearing Officer comments: "The female patron's hands and arms were at her side or behind her back until she raised her hands to her mouth to support the shot glass while she drank it." (Preliminary Order, p. 12, Factor No. 7). This comment is not entirely consistent with the evidence. "State's Exhibit H" and "Respondent's Exhibit H" both clearly show that, at least during a portion of the administration or service of the blow job shot, the patron's hands are not "at her sides" but "off to her sides" and on the bar counter and her arms straddle the bartender's legs. Presumably, the patron's hands and arms are in this position for stabilization and balance purposes. Undoubtedly, the reason the Hearing Officer listed Factor No. 7 as supporting a finding of no violation is because the patron's hands were in full view and were not between the bartender's legs. Had they been near his crotch area or even anywhere between his legs it would have been very problematic for China Blue and would have been a factor in favor of finding that stimulated oral copulation had occurred. Under the circumstances, although the Hearing Officer's statement is not entirely correct, the misstatement is not significant to the conclusion reached but is here mentioned and corrected to more accurately reflect the evidence.

case, there is a concern that different officers may have different interpretations of the same phrase with the result that the definition of "simulate" is left to the interpretation of each law enforcement officer. A determination of whether the law has been violated may depend on which officer or officers observed the event. To revoke a license based upon an individual officer's interpretation of "simulate" risks an arbitrary administration of Idaho's liquor licenses in violation of *Crazy Horse* and *Fuchs*.

Preliminary Order, pp. 10-11.

Contrary to ABC's claim, the Hearing Officer did not make an express finding or conclusion that arbitrary enforcement actually occurred in this case. Rather, he simply raised a very real concern that officers must have clear guidance, direction and understanding of what is and is not illegal. Both law enforcement and those subject to penalties or sanctions for violations of the law are entitled to rely upon statutes and rules that are not vague, unclear or ambiguous. The Hearing Officer merely made an observation that when prohibited conduct is not clear under applicable law, there is a distinct risk that officers might reach differing interpretations. This is certainly a correct observation.

In this case the officers and ABC made a good faith judgment call that the facts constituted simulated oral copulation. That action, although not sustained, cannot be said to be unreasonable or arbitrary under the circumstances. While the Director does not believe the Hearing Officer made such a finding, to the extent the Hearing Officer's Preliminary Order can be interpreted as making any finding of fact or conclusion of law of arbitrary interpretation or action by the officers or ABC, those findings or conclusions are reversed.

**ISSUE NO. 3: The Hearing Officer did not decide the case by "majority" vote.**

ABC called five witnesses at the evidentiary hearing: two ABC detectives and three employees or agents of China Blue. The detectives testified initially that in their

opinions an act of simulated oral copulation occurred on the night in question at China Blue. The other three witnesses had a contrary opinion.

In its briefing, ABC claims that, "On pages 12 and 13 of the FFCLPO, the hearing officer states (albeit incorrectly) because three of the state's witnesses (of the five) allegedly stated that the manner in which the blow job shot was served did not constitute a simulated act of oral copulation, the majority rules." ABC goes on to argue that licensees are not entitled to vote on whether a violation occurred and that only ABC and ultimately the Director are charged with making that decision.

What the Hearing Officer actually said was:

Of the five witnesses called to testify by ABC, two of the five (Officers Coleman and Gripton) testified that it was their opinion that the service of the blow job shot at China Blue on February 12, 2013 constituted a simulated act of oral copulation. Three of the witnesses called by ABC (Damir Delic, Christine Gruber and Paul Valentine, all China Blue employees) testified that it was their opinion that the service of the blow job shot at China Blue on February 12, 2013 did not constitute a simulated act of oral copulation. Thus a majority of the witnesses called by ABC were in agreement that there was not a simulation of oral sex.

Preliminary Order, pp. 12-13.

The Hearing Officer's comments are entirely correct. A majority of the five witnesses did not believe simulated oral copulation occurred. However, the Hearing Officer did not say that "majority rules," and there is nothing in the rationale and statements contained in the Hearing's Officer's Preliminary Order that indicates he decided this case by the simple expedient of "majority rules."

As the presiding officer at the hearing, the Hearing Officer is charged with making credibility determinations and giving such weight as he deems proper to the testimony of each witness or introduced piece of evidence, in accordance with the rules of evidence applicable to contested case proceedings under the Administrative



Procedures Act. Here, the relevant and material facts were not in substantial dispute. It was the application of those facts to the statute that was at issue in determining, as a matter of law, whether a violation occurred.

In reaching his decision that simulated oral copulation did not occur, the Hearing Officer did not simply tabulate the opinions for and against the question and rule in favor of the majority as alleged by ABC. Indeed, it appears that the Hearing Officer really did not give much weight to any of the opinions expressed by any of the witnesses on this legal question. Rather, he located and articulated a definition for the word "simulate" that he felt best applied to the facts and relevant statute and made a ruling.

For the above stated reasons, ABC's argument on this point is rejected.

**ISSUE NO. 4:      The Hearing Officer did not improperly rely on the testimony of Ted Challenger in reaching his decision.**

ABC argues that China Blue owner Ted Challenger was not even present in the bar at the time the blow job shot in question was served. ABC apparently contends that Mr. Challenger's testimony is irrelevant, at least as to the event. However, ABC then argues that Mr. Challenger's testimony is relevant because it supports ABC's position regarding how a blow job shot should properly be administered.

ABC claims that the Hearing Officer rejected the testimony of ABC detectives and focused on Mr. Challenger's testimony in concluding that no violation had occurred.

Apparently the only references to Mr. Challenger's testimony made by the Hearing Officer in the whole Preliminary Order are the two following sentences:

Additionally, Mr. Challenger's testimony was relevant and helpful and should be considered as part of the evidence in this proceeding. Both parties cited to and relied on the testimony of Mr. Challenger in their closing arguments.

Preliminary Order, p. 13.

Based upon the evidentiary record, ABC is correct that Ted Challenger was not in the bar and did not observe the service of the blow job shot that is in dispute in this matter. Therefore, he was not a competent witness to testify regarding that event. However, ABC's claim that the Hearing Officer rejected the testimony of the officers that simulated oral copulation did occur, in favor of accepting Mr. Challenger's testimony to the contrary, is simply not supported by the Hearing Officer's comments. At most, the Hearing Officer states that Mr. Challenger's testimony was relevant and helpful and cited by both parties in their briefs. He does not explain further in what manner Mr. Challenger's testimony is relevant and helpful, or how the Hearing Officer might have relied upon it, if at all, in reaching his conclusion that no simulated oral copulation occurred. Certainly, the Hearing Officer does not expressly state, or necessarily imply, that he rejected the detectives' testimony and accepted Challenger's testimony on this point. ABC simply tries to prove too much from this passing reference in the Hearing Officer's Preliminary Order.

**ISSUE NO. 5:      Neither party is entitled to attorney fees and costs.**

Both parties have requested attorney fees and costs in this action under the authority of Idaho Code § 12-117. In relevant part, this statute provides that an administrative agency shall award attorney fees to the prevailing party, but only when the losing party "acted without a reasonable basis in fact or law."

In this case, the Director has affirmed the Hearing Officer's Preliminary Order, in particular the conclusion that China Blue did not violate Idaho Code § 23-614(1)(d), as charged. Therefore, ABC is not the prevailing party and is not eligible for attorney fees under Idaho Code section 12-117. While China Blue is the prevailing party, it cannot be

said that the agency acted without a reasonable basis in fact or law. In the words of the Hearing Officer:

This is a close call. China Blue pushed the legal limits but ABC has not met its burden to prove that China Blue stepped over the line. China Blue is the prevailing party but ABC has not prosecuted or defended this case without a reasonable basis in fact or law.

Preliminary Order, p. 15.

Neither party has brought or pursued this matter frivolously or without a reasonable basis in fact or law. The case turns upon applying a proper definition of the word "simulate" found in Idaho Code § 23-614(1)(d). Unfortunately, the statute does not define the term, nor do agency rules. Even dictionary definitions differ slightly. This was essentially a case of first impression and reasonable minds could reasonably come to different conclusions under these set of facts as to whether acts simulating oral copulation occurred.

Idaho appellate cases applying Idaho Code § 12-117, that are instructive on this issue include: Wheeler v. Idaho Dept. of Health & Welfare, 147 Idaho 257 (2009) (where driver's license suspension case involved interpretation of a term that had never been addressed before by the courts, no award of attorney fees is proper); Sacred Heart Med. Ctr. v. Boundary County, 138 Idaho 534 (2003) (when appeal required court to interpret a statute for the first time within the context of the facts in the case, neither party entitled to award of attorney fees); Rincover v. State, Dept. of Fin., Security Bureau, 132 Idaho 547 (1999) (where court had not previously interpreted a provision, even though agency's interpretation was inaccurate, no attorney fees would be awarded because state's position was not unreasonable); Idaho Potato Comm'n v. Russett Valley Produce, Inc., 127 Idaho 654 (1995) (no attorney fees proper when agency interpretation of a statute was wrong, but reasonable).

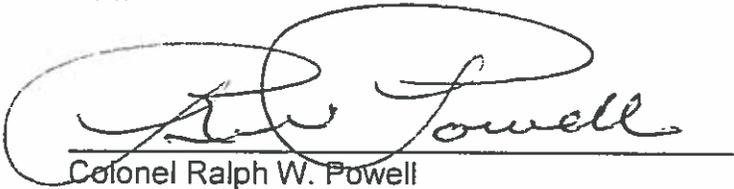
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While China Blue is the prevailing party, under the totality of the circumstances, it cannot be said that ABC acted without a reasonable basis in fact or law. Therefore, the test for the award of attorney fees under Idaho Code § 12-117 is not met and no fees or costs are award to either party.

### CONCLUSION

In accordance with the above, the Hearing Officer's April 24, 2014 Preliminary Order, as modified herein, is affirmed. Each party shall bear its own costs and attorney fees.

Dated this 7<sup>th</sup> day of October 2014.

  
Colonel Ralph W. Powell  
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.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7 day of October, 2014, 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:

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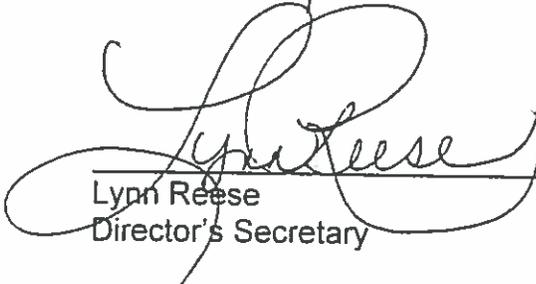
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IDAHO STATE POLICE  
ALCOHOL BEVERAGE CONTROL

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**BEFORE THE IDAHO STATE POLICE, ALCOHOL BEVERAGE CONTROL**

IDAHO STATE POLICE,	)	
ALCOHOL BEVERAGE CONTROL	)	Case No. 13ABC-COM016
	)	
Complainant,	)	License No. 3991
	)	Premise No. 1A-251
T. CHALLENGER, INC., Licensee	)	
dba CHINA BLUE/DIRTY LITTLE RODDY'S,	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW
Respondent.	)	AND PRELIMINARY ORDER

This proceeding has been conducted pursuant to Idaho Code Title 23 and the Idaho Administrative Procedures Act, Title 67, Chapter 52, Idaho Code ("APA"). This case was assigned to David E. Wynkoop to conduct quasi-judicial contested case proceedings pursuant to the APA and the promulgated regulations of the Complainant, Idaho State Police, Alcohol Beverage Control ("ABC"), IDAPA 11.05.01.001, *et seq.* ABC has incorporated into its procedures the regulations of the Idaho Attorney General's office, IDAPA 04.11.01, *et seq.*

An evidentiary hearing was held January 28, 2014 to determine whether Respondent T. Challenger, Inc. ("China Blue") violated Idaho Code §23-614(d). ABC was represented by Cheryl Meade, Deputy Attorney General. Russ Wheatley appeared as ABC's representative. Ted Challenger appeared and testified on behalf of China Blue. China Blue was represented by David H. Leroy. ABC called as witnesses: Gabriel Coleman, Damir Delic, Rocky Gripton,

Christine Gruber, and Paul Valentine. China Blue also elicited testimony from all of the witnesses. The Hearing Officer has received and reviewed the parties' closing statements, briefs and affidavits.

#### FINDINGS OF FACT

1. ABC is the state entity charged under Idaho Code Title 23, Chapters 8, 9 and 10 to enforce and police Idaho's alcoholic beverages statutes.
2. T. Challenger Inc. holds a license to serve beer, wine by the glass and bottle, and liquor by the drink, License Number 3991.
3. T. Challenger, Inc. does business as China Blue, 100 S. 6<sup>th</sup> Street, City of Boise, Ada County, Idaho, and also owns two other bars in the same building.
4. On February 12, 2013, at approximately 9:30 p.m., Idaho State Police Detectives Rooky Gripton, Gabriel Coleman, and Joshua Green, and Sergeant Nate Hansen conducted an investigation at China Blue.
5. On February 12, 2013 China Blue held a promotional event advertised as a Mardi Gras celebration.
6. China Blue hired Paul Valentine to serve as an emcee at China Blue for the Mardi Gras event.
7. There was a large crowd at China Blue on February 12, 2013, likely in excess of 150 patrons.
8. The emcee announced to the patrons at China Blue, by using a microphone connected to a speaker system, that a female patron would be served a "blow-job shot" as part of the female patron's birthday celebration.

9. The emcee encouraged the crowd to gather around the bar to observe the service of the blow job shot to the female patron by the "best looking bartender in Boise."
10. The blow job shot was served to the female patron as follows:
  - a. The male bartender, Damir Delic, a China Blue employee, sat on the bar with his legs hanging down over the front of the bar;
  - b. The bar was approximately 33" tall and 28" wide.
  - c. The bartender was shirtless (apparently for the entire evening, not just for the service of the blow job shot), and was fully clothed from the waist down with blue jeans and underwear showing over the top of his belt.
  - d. The bartender was relatively young, in good physical condition, 6' 4" tall, with relatively long legs.
  - e. The bartender placed the shot glass containing the drink between his legs, toward the front of the bar closer to his knees than to his crotch, and approximately ten inches from his genitals.
  - f. The bartender kept his hands and arms to his side and did not touch the female patrons head.
  - g. The bartender did not actually and did not pretend to unzip his pants, loosen or remove his belt, or loosen or remove his pants or underwear.
  - h. The female patron was fully clothed and was a few inches over five foot tall.
  - i. The female patron was instructed to pick up the drink with only her mouth and without the use of her hands.

- j. The female patron picked up the blow job shot with her mouth from between the bartender's legs.
  - k. The female patron did not come into contact with the bartender's genitals, but likely touched the bartender's legs with her face in her effort to pick up the blow job shot with her mouth.
  - l. Any touching was incidental and was not done in a manner such that either party pretended to engage in oral sex.
  - m. The female patron's hands were initially down at her side or behind her back.
  - n. The female patron did not touch the bartender with her hands or arms but likely used her hands to assist in holding the shot glass so that she could drink the contents of the blow job shot.
  - o. The female patron did not pretend to take the bartender's penis into the patron's mouth;
  - p. There was no kissing, fondling or skin touching;
  - q. There was no up and down movement by the female patron, or thrusting, or sucking.
  - r. When the female patron initially had trouble picking up the blow job shot with her mouth, the emcee commented into the microphone words to the effect that it's too big for her mouth.
  - s. The intent was for the female patron to swallow the contents of the blow job shot once she was able to place the contents in her mouth.
11. The blow job shot service event lasted approximately two minutes.

12. There is no evidence that anyone present at China Blue on February 12, 2013 was deceived into believing an act of oral copulation had occurred or believing that the parties were pretending to engage in a sex act.

13. Detectives Gripton and Coleman observed the blow job shot service event from a distance of approximately ten feet and generally had a good view of the event.

14. Detective Coleman took photographs of the event on his cell phone but they were of poor quality.

15. On February 28, 2013 China Blue posted two photographs of the February 12, 2013 blow job shot service event on the China Blue Facebook page.

16. The China Blue Facebook pictures clearly show the bartender, the female patron and the emcee.

17. Paul Valentine has emceed approximately 100 blow job shot service events during his four years at China Blue in a manner similar to the February 12, 2013 event.

18. The bartender, Damir Delic, served blow job shots to female patrons at China Blue in a manner similar to the February 12, 2013 event on five to ten occasions prior to February 12, 2013.

19. The service of a blow job shot in a manner similar to the February 12, 2013 event occurs at least once per weekend at China Blue.

20. "Blow job shot" is a recognized alcoholic drink in bartender lexicon.

21. The blow job shot served to the female patron on February 12, 2013 at China Blue consisted of Irish Cream and butterscotch and was topped off with whipping cream.

22. The whipping cream may be interpreted as representing male semen.

23. The ABC officers were not in uniform on February 12, 2013 and were not recognized as police officers by anyone at China Blue.
24. The ABC officers did not speak to or interview the owner, manager, bartender, the female patron, or anyone else at China Blue before the officers departure.
25. An Administrative Violation Notice was sent by ABC to China Blue on March 15, 2013.
26. On June 19, 2013 an administrative complaint was filed by ABC against China Blue.
27. On July 8, 2013 China Blue filed an Answer denying that a statutory violation occurred at China Blue on February 12, 2013 as alleged in the administrative complaint.
28. China Blue has not previously been charged with a prohibited act under Idaho's beer, wine and alcohol statutes.

#### APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS

Idaho Code §23-614(d) provides that:

23-614. Prohibited acts -- Misdemeanors -- Penalties. (1) No person, partnership, association or corporation shall conduct, permit, or encourage any of the following acts or activities in or upon premises licensed pursuant to title 23, Idaho Code:

\*\*\*

(d) Employment or use of any person to perform acts of or acts which simulate sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law. (emphasis added)

Article III of the Idaho Constitution provides that:

Section 24. Promotion of temperance and morality. The first concern of all good government is the virtue and sobriety of the people, and the purity of the home. The legislature should further all wise and well directed efforts for the promotion of temperance and morality.

Section 26. Power and authority over intoxicating liquors. From and after the thirty-first day of December in the year 1934, the legislature of the state of Idaho shall have full power and authority to permit, control and regulate or prohibit the manufacture, sale, keeping for sale, and transportation for sale, of intoxicating liquors for beverage purposes.

### BURDEN OF PROOF

ABC must prove its case in this action by a preponderance of the evidence, meaning that it is more likely than not that the statute was violated. *See Northern Frontiers, Inc. v. State of Idaho*, 129 Idaho 437 (1996). If it is such a close call that the decision-maker cannot decide one way or the other, then the party who has the burden of proof cannot prevail. The hearing officer's findings of fact must be supported by substantial and competent evidence. It has been held by the Idaho Supreme Court that "substantial and competent evidence" consists of relevant evidence a reasonable mind might accept as adequate to support a conclusion. *See Creps v. Idaho Dep't of Labor*, 149 Idaho 634 (2010); and *Wohrle v. Kootenai County*, 147 Idaho 267 (2009).

### ISSUE

Did the manner in which China Blue served a blow job shot on February 12, 2013 simulate oral copulation in violation of Idaho Code §23-614(d)?

### ANALYSIS

The ownership of a liquor license is a privilege but not a right. *Nampa Lodge No. 1389 v. Smylie*, 71 Idaho 212, 376 P.2d 710 (1951). However, the liquor law "licensing procedure can

not be administered arbitrarily” *Crazy Horse, Inc. v. Pearce*, 98 Idaho 762 (1977); *Fuchs v. Idaho State Police*, 152 Idaho 626, 271 P.3d 1257 (2012).

ABC contends that a blow job is a well recognized sexual reference. That the manner in which the blow job shot was served by the China Blue bartender and consumed by the female patron was intended to and did in fact simulate oral copulation. ABC concedes no actual sex act occurred and no one who observed the event believed that an actual sex act was occurring. ABC further argues that proof of an actual sex act is not required in order for there to be a simulation of oral copulation in violation of Idaho Code §23-614(b).

China Blue contends that the acts which occurred on February 12, 2013 did not simulate oral copulation in violation of the statute. Rather the drink is a well recognized drink, often served at China Blue and other bars to commemorate an event in the life of a female patron, such as a birthday celebration. China Blue admitted in its Answer that the employment or use of any person to perform or simulate oral copulation would violate Idaho Code §23-614(d). But China Blue urges that no such performance or simulation occurred here.

The important terms in this case, which include *simulation* and *oral copulation*, are not defined by ABC statutes, regulations or written guidelines. Based upon Idaho Code §23-904(17) these terms are to be given their “ordinary and commonly understood and acceptable meanings.”

China Blue points to the following definition of blow job shot:

Blow Job (cocktail) is defined as:

A Blow Job is a shooter mixed drink made by slowly pouring Baileys Irish Cream and Kahlua and topping with whipped cream without mixing. It dates back to at least the early 1990s. It is traditionally consumed without using one’s hands.

[en.wikipedia.org/wiki/Blow\\_Job\\_\(cocktail\)](http://en.wikipedia.org/wiki/Blow_Job_(cocktail)). ABC does not dispute this definition.

At the evidentiary hearing and in their briefing, both parties agreed on the following definition of the term oral copulation (fellatio):

The essential aspect of fellatio (oral copulation) is for a man's sex partner to take his penis into their mouth, and then move their mouth up and down the penis to a rhythm set by them mimicking the thrusting motion of vaginal or anal intercourse, with saliva acting as a lubricant, and being careful not to bite or scratch with the teeth. The man receiving fellatio can slow the rhythm of the stimulation by holding his partner's head. The man's partner may also orally play with his penis by licking, sucking, kissing or otherwise playing with the tongue and lips. Fellatio may also include the oral stimulation of the scrotum, whether licking, sucking or taking the entire scrotum into the mouth.

<http://en.wikipedia.org/wiki/Fellatio>

The key to this case is whether oral copulation was simulated at China Blue on February 12, 2013. The parties differ on the definition of "simulate." The following definitions most accurately reflect the "ordinary and commonly understood" meaning of "simulate".

"Simulate" is defined as:

sim·u·late  
*transitive verb* \sim-yə-lāĭ\  
 : to look, feel, or behave like (something)

sim·u·lat·ed / sim·u·lat·ing

#### Full Definition of *SIMULATE*

1 : to give or assume the appearance or effect of often with the intent to deceive : imitate  
 2 : to make a simulation of (as a physical system)  
 — sim·u·la·tive *adjective*

#### Examples of *SIMULATE*

1. The model will be used to *simulate* the effects of an earthquake.
2. Cosmetics that *simulate* a suntan

<http://www.merriam-webster.com/dictionary/simulate>

**sim·u·late**

verb (used with object), sim·u·lat·ed, sim·u·lat·ing.

1. to create a simulation, likeness, or model of (a situation, system, or the like): to simulate crisis conditions.

2. to make a pretense of; feign: to simulate knowledge.

3. to assume or have the appearance or characteristics of: He simulated the manners of the rich.

adjective

\*\*\*

Synonyms

2. pretend, counterfeit, 3. affect.

simulate. Dictionary.com. *Dictionary.com Unabridged*. Random House, Inc.  
<http://dictionary.reference.com/browse/simulate> (accessed: February 13, 2014).

ABC argues that “simulate” means similar whereas the China Blue argues for a definition of pretending to do something. Based upon the commonly accepted definitions of “simulate”, it must mean something more than “similar”. The terms “imitate” or “pretend” would seem to be the closest synonyms. Based upon the facts as stated above, it can be reasonably argued that an act similar to oral copulation occurred. It cannot be reasonably concluded that the parties were imitating or pretending to engage in an act of oral copulation. Since revocation of a license is being considered, it would seem inappropriate to find a violation of the law based upon the most restrictive statutory interpretation when there are several legitimate alternative interpretations which suggest that the activity was not a violation of the statute.

Because there are no regulatory definitions, no statutory definition, or written guidelines, the initial determination of whether the February 12, 2013 blow job shot service event constituted an act which “simulate(s)...oral copulation” must be based upon the ordinary and commonly understood meaning of the phrase. In a close call like this case, there is a concern

that different officers may have different interpretations of the same phrase with the result that the definition of "simulate" is left to the interpretation of each law enforcement officer. A determination of whether the law has been violated may depend on which officer or officers observed the event. To revoke a license based upon an individual officer's interpretation of "simulate" risks an arbitrary administration of Idaho's liquor licenses in violation of *Crazy Horse* and *Fuchs*.

Factors suggesting that a simulation of oral copulation occurred:

1. The term "blow job shot" is a reference to a sexual act;
2. The manner in which a blow job shot was consumed, with the drink to be consumed by the female patron placed between the male bartender's legs has similarities with an act of oral copulation;
3. The emcee's statement to the effect that it was too big for her mouth appears to be a reference to a female taking a man's penis into her mouth;
4. The drink was served by an attractive, young, in shape, shirtless, male bartender and the emcee emphasized that he was the best looking bartender in Boise;
5. The female patron was instructed to pick up the shot glass with her mouth;
6. The drink was topped off with whipped cream suggesting male semen;
7. The emcee was attempting to titillate the bar crowd by suggesting they gather around to observe a blow job shot.

Factors suggesting that a simulation of oral copulation did not occur:

1. There was no touching or pretend touching of the bartender's genitalia;

2. The shot glass was placed closer to the knees of a bartender with relatively long legs, probably at least ten (10) inches from the bartender's genitalia;
3. The bartender's hands were at his side, not on the patrons head;
4. The bartender was fully clothed with pants and underwear from the waist down;
5. The bartender did not actually, or pretend to, unzip his pants, remove or loosen his belt, or remove or loosen his pants or underwear;
6. No one in the audience was deceived into believing that an act of oral copulation occurred;
7. The female patron's hands and arms were at her side or behind her back until she raised her hands to her mouth to support the shot glass while she drank it;
8. There was no actual or pretend kissing, fondling, skin to skin contact, or sexual touching or stimulation;
9. There was a single lifting action by the female patron, rather than an up and down movement or repeated thrusting or sucking;
10. The female patron did not play with or lick or suck the shot glass or play with the shot glass with her tongue or lips;
11. "Blow job shot" is a well established name for a drink in bartender's lexicon.

Of the five witnesses called to testify by ABC, two of the five (Officers Coleman and Gripton) testified that it was their opinion that the service of the blow job shot at China Blue on February 12, 2013 constituted a simulated act of oral copulation. Three of the witnesses called by ABC (Damir Delic, Christine Gruber and Paul Valentine, all China Blue employees) testified that it was their opinion that the service of the blow job shot at China Blue on February 12, 2013

did not constitute a simulated act of oral copulation. Thus a majority of the witnesses called by ABC were in agreement that there was not a simulation of oral sex. Even ABC Officer Gripton testified that none of the elements of oral copulation as defined in State's Exhibit 1 (the definition of and picture showing an act of oral copulation [fellatio]) occurred that night. He stated, "There's nothing in here (exhibit 1) that has anything to do with that night." T. 124-L, l. 25. Likewise, ABC Officer Coleman admitted that none of the criteria of State's Exhibit 1 occurred at China Blue on February 12, 2013. ABC's witness, Detective Gripton, acknowledged it was not a violation of law for China Blue to serve a blow job shot or to use the term blow job shot, or for a bartender to sit shirtless on the bar.

The above factors suggest that while there may have been actions symbolic of a sex act, there was no pretense or appearance of actually engaging in oral copulation.

At the conclusion of the presentation of ABC's case in chief, China Blue made a motion to dismiss. The motion was taken under advisement and China Blue proceeded with the testimony of its witness Ted Challenger. The motion to dismiss is denied since it was not clear at the conclusion of ABC's case that ABC had failed to establish a violation of Idaho's liquor statutes. Additionally, Mr. Challenger's testimony was relevant and helpful and should be considered as part of the evidence in this proceeding. Both parties cited to and relied on the testimony of Mr. Challenger in their closing statements.

The key to this case is whether a simulation of oral copulation occurred at China Blue on February 12, 2013. ABC is correct that it is not required to prove all of the elements of actual oral copulation. However, ABC must show that there was a pretense or imitation of oral copulation. Thus the elements or characteristics of oral copulation are relevant for purposes of determining whether those elements or characteristics were imitated. In this case, while there

were some similarities with the act of oral copulation, most of the elements or characteristics of oral copulation were not imitated. There was no pretense by the female patron or the bartender that they were engaging in oral copulation. No evidence was presented that anyone who observed the event was deceived into believing that an act of oral copulation occurred.

### CONCLUSION

This is a close call. China Blue approached the line of what is legally permissible, but did not clearly cross that line. China Blue's owner, Ted Challenger, himself acknowledged that "It might offend, it might push people's boundaries of comfort" T 234, l. 1-25. Were there state regulations or written guidelines defining the term "simulate", ABC would likely have a stronger case. Based upon Webster's, Wikipedia, and Dictionary.com definitions, there was no pretense or imitating of a sex act. There was not an intent to deceive other patrons into believing that a sex act was being performed. It is more accurate to characterize the blow job shot service as a symbolic act rather than a simulated act.

As noted above, ABC has the burden to prove that China Blue violated the statute in question. ABC has not met its burden of proof to establish that China Blue committed or encouraged "acts which simulate...oral copulation."

### ATTORNEY FEES

Idaho Code §12-117 provides for an award of attorney fees to the prevailing party if the non-prevailing party acted without a reasonable basis in fact or law. Both parties have requested an award of attorney fees. ABC cannot be awarded attorney fees because it is not the prevailing party.

This case is a close call. China Blue pushed the legal limits but ABC has not met its burden to prove that China Blue stepped over the line. China Blue is the prevailing party but ABC has not prosecuted or defended this case without a reasonable basis in fact or law.

### **PRELIMINARY ORDER**

That the Complaint be and the same is **HEREBY DISMISSED**.

### **APPEAL RIGHTS**

Pursuant to Idaho Code §67-5243 this decision is a **PRELIMINARY ORDER**. It can and will become final without further action of the agency unless either party petitions for reconsideration before the hearing officer issuing this Preliminary Order or appeals to the Director of the Idaho State Police. Either party may file a motion for reconsideration of this Preliminary Order with the hearing officer issuing this 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* I.C. §67-5243(3).

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.

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.

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 for 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.

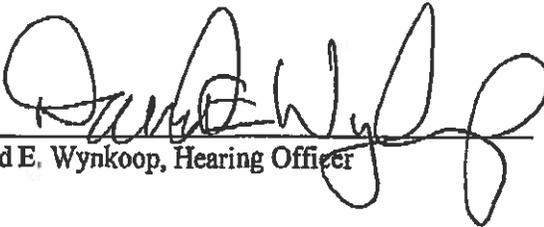
Pursuant to Idaho Code §67-5270 and §67-5272, if this Preliminary Order becomes final, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

- i. A hearing was held;
- ii. The final agency action was taken;
- iii. The party seeking review of the order resides, or operates its principal place of business in Idaho; or
- iv. The real property or personal property that was the subject of the agency action is located.

This appeal must be filed within twenty-eight (28) days of this Preliminary Order becoming final. 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.

IT IS SO ORDERED.

DATED this 24<sup>th</sup> day of April, 2014

  
\_\_\_\_\_  
David E. Wynkoop, Hearing Officer

CERTIFICATE OF SERVICE

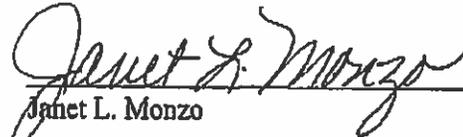
I HEREBY CERTIFY that on this 24<sup>th</sup> day of April, 2014, I served a true and correct copy of the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW AND PRELIMINARY ORDER upon the following, by the methods indicated below:

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Deputy Attorney General  
Alcohol Beverage Control  
P.O. Box 700  
Meridian, Idaho 83680-0700

XX via facsimile to 208-884-7228

David H. Leroy  
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1130 E. State St.  
Boise, Idaho 83712

XX via facsimile to 208-342-4200

  
\_\_\_\_\_  
Janet L. Monzo

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**FAX COVER SHEET**

**DATE:** April 24, 2014

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**ATTN:** Cheryl E. Meade  
Deputy Attorney General

**RE:** 13ABC-COM016 *ISP/ABC v. T. Challenger, Inc., dba China Blue/Dirty Little Roddy's*

- Findings of Fact, Conclusions of Law and Preliminary Order