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BEFORE THE IDAHO STATE POLICE, ALCOHOL BEVERAGE CONTROL

IDAHO STATE POLICE,)
ALCOHOL BEVERAGE CONTROL)
Complainant,)
MICHAEL EDDY, Licensee,)
dba ZEN BENTO)
Respondent.)

Case No. 07ABC-COM113
License No. 2008-6408
Premise No. 1A-6408

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
PRELIMINARY ORDER**

This proceeding is conducted pursuant to Idaho Code Title 23 and the Idaho Administrative Procedures Act, Title 67, Chapter 52, Idaho Code.

This matter has now been fully submitted to David E. Wynkoop, the duly appointed Hearing Officer. The parties previously stipulated at a telephonic hearing held on September 19, 2008, that an evidentiary hearing in this matter be waived and that the Hearing Officer make a decision based upon the record and the briefs and affidavits of the parties. No substantive affidavit was submitted by either party.

Having carefully reviewed the record and the briefs of the parties in this matter, the Hearing Officer hereby enters the following Findings of Fact, Conclusions of Law and Preliminary Order.



I.

ISSUE

Should Respondent's liquor license be revoked for: (a) failure of Respondent to place the liquor license into service, and (b) failure of Respondent to be the *bona fide* owner of the business which holds the liquor license?

II.

FINDINGS OF FACT

1. The Respondent is Michael Eddy ("Eddy");
2. The Complainant is the Idaho State Police, Alcohol Beverage Control ("ABC");
3. ABC is the entity with the responsibility pursuant to Idaho Code §23-804 to enforce the Idaho Liquor Act, Idaho Code, Title 23;
4. On April 20, 1998, ABC received a liquor license application for the City of Eagle, Ada County, Idaho, from Eddy. See Agency Record Documents "ee" and "ff". In his personal affidavit, Eddy checked the box entitled "owner" indicating that he would be the owner of the business. *Id.* ff. Eddy did not name any partners or others who would have any kind of interest in the license, or to list them as such on the application. *Id.* ee.
5. On September 5, 2006, ABC sent a notice of availability of liquor license to Eddy. Agency Record "dd."
6. On September 12, 2006, Eddy responded to ABC, accepting the license. Agency Record "bb."

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7. On November 30, 2006, Harold Busmann ("Busmann") sent a letter to ABC requesting an extension of the deadline to move the Rhino, LLC license from Zen Bento to another location. Agency Record "aa."

8. On December 8, 2006, in the confusion of two licenses being placed with Zen Bento, ABC responded to Busmann, granting a 60-day extension with a deadline of February 9, 2007, for the application for Eddy's license to be completed. Agency Record "z".

9. On February 9, 2007, Eddy submitted his application for the license. Included in his application materials was a "Management Agreement." In Paragraph 3 under the compensation clause, Eddy agreed to pay ZB Inc. the sum of \$600.00 per month, plus 50% of the gross profit from alcohol sales for the use of the Eddy liquor license. Agency Record "w".

10. Eddy's application contained the names of those who have access to the licensee's bank account. Those named are Eddy and Busmann. Agency Record "p.". *See also Agency Record "u", "Lease of Restaurant Facilities."*

11. Eddy checked the box on the application indicating that he was "leasing" his license. *Id.* Eddy did not list any other person or entity that would have a financial interest in his liquor license. Agency Record "q."

12. There was no reference in the application to an ownership interest in a restaurant or like business, or that Eddy would be the bona fide owner of Zen Bento. *Id.* Eddy's financial statement indicates that he is an investor in real estate and loaning others money. *Id.*

13. Included in Eddy's application materials was the premises diagram, that is required by law to be submitted along with the application. The diagram does not show where any liquor will be served from. The diagram does not show a "bar" area in which liquor will be

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kept and locked up during the hours when the licensee is not allowed to serve alcohol. Agency Record "r."

14. On March 16, 2007, ABC Investigator, Cpl. Tim Davidson sent a letter to Eddy requesting that Eddy provide documentation of Eddy's interests in Zen Bento. Agency Record "y."

15. On April 30, 2007, ABC received a letter from Busmann, representing Eddy, stating that "Mr. Eddy is not the owner of the restaurant Zen Bento but is the lessee under lease agreement and party to the management agreement";

16. On May 10, 2007, ABC issued a new, City of Eagle, liquor license to Eddy, dba Zen Bento. License Number 1A-6408. Agency Record "o."

17. On June 5, 2007, Busmann requested a 60-day extension to complete placement of Eddy's license at the Zen Bento location.

18. From May 10, 2007 to September 12, 2007 Eddy's license was purportedly used by ZB, Inc., doing business as Zen Bento Restaurant;

19. On June 5, 2007, Eddy executed a power of attorney to Busmann to act as his agent in applying for an Idaho liquor license in his name. Eddy does not refer to himself as an owner of Zen Bento or represent that the liquor license is held by Zen Bento. Agency Record "n."

20. On June 8, 2007, ABC employee Amanda Tasso recognized that there were two liquor licenses scheduled to be placed at the same premises, i.e. Zen Bento, and sent a response to Busmann regarding the matter. *Id.*

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21. On July 12, 2007, ABC employee Amanda Tasso sent another letter to Busmann asking that he contact her with regard to the matter. *Id.*

22. On July 24, 2007, Busmann, without further explanation of why the two separate licenses are being placed in Zen Bento, requested a 60-day extension to place the Rhino liquor license, "at an appropriate premises." Agency Record "k."

23. On August 12, 2007, ABC Licensing Specialist Amanda Tasso was in the Zen Bento Restaurant and observed that the restaurant was not selling liquor by the drink (only sake and beer);

24. On September 12, 2007, ABC Investigator Cpl. Tim Davidson visited Zen Bento Restaurant, located at 342 E. State Street, Eagle, Idaho, arriving at approximately 11:55 a.m. Cpl. Davidson asked Zen Bento staff where the liquor license was. The Zen Bento staff informed Davidson that the restaurant had no liquor license because it was being transferred. Davidson observed that no liquor license was posted on the premises. While Cpl. Davidson was waiting at Zen Bento, a female entered the restaurant through the front door, from outside the business, and handed an envelope to a staff member. Davidson asked to see what was in the envelope and it contained the Eddy liquor license that was issued to him on May 10, 2007. Agency Record "k."

25. On September 12, 2007, another female entered the Zen Bento restaurant at approximately 11:30 a.m. She identified herself to Cpl. Davidson as Rene Iwamasa and advised Davidson that:

- a) She was a part owner of Zen Bento Restaurant;

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- b) Eddy was not a part owner of Zen Bento Restaurant;
- c) ZB, Inc. and Eddy entered into a contract whereby Eddy leased the liquor license to ZB, Inc.;
- d) Liquor bottles were stored in an upstairs office of the restaurant.
- e) Iwamasa paid for deliveries of beer and sake and was later reimbursed by Eddy in an amount equal to 50% of alcohol sales;
- f) Eddy purchased liquor and delivered it to the Zen Bento Restaurant when needed;
- g) Iwamasa had never seen or met Eddy;

26. On September 13, 2007, Cpl. Davidson went to the Secretary of State's web-site to search for ownership documentation of Zen Bento to ZB Eagle, LLC and discovered that ZB Eagle was the entity doing business as Zen Bento. The web-site indicted that ZB Eagle was solely held by members, Jack Hicks II, Christine Hicks and Rene Iwamasa. *Id. See* documents filed with the Secretary of State, naming the members and Articles of Incorporation for ZB Eagle, LLC and ZB Inc., dba Zen Bento.

27. On September 13, 2007, Cpl. Davidson made a report setting forth his findings that Eddy was not the bona fide owner of Zen Bento. *Id.*

28. On October 3, 2007, an administrative violation was issued by ABC Lt. Robert Clements alleging that Eddy's license was in violation of I.C. §§23-905, 23-908 and 23-1010. Agency Record "k."

29. On November 7, 2007, a complaint for the forfeiture of the Eddy liquor license was issued. Agency Record "k."

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30. On November 28, 2007, Eddy filed an answer in response to the complaint for forfeiture. Agency Record "k."

31. On January 31, 2008, as Eddy's agent, Busmann executed a renewal application for Eddy's liquor license, asserting that Eddy is doing business as Zen Bento. Included on the application for renewal, Eddy provided his personal social security number instead of Zen Bento's tax identification number. Agency Record "m".

32. On May 1, 2008, ABC renewed the Eddy liquor license with the dba of Zen Bento, in accordance with I.C. §23-933(4). Agency Record "l."

33. Eddy represented in his liquor license application that the license would be placed into service at Zen Bento Restaurant;

34. Zen Bento Restaurant is owned by ZB, Inc.;

35. ZB, Inc. shareholders are Rene Iwamasa, Jack Hicks and Christine Hicks;

36. Eddy is not a shareholder of ZB, Inc.;

37. On April 23, 1996, ABC received a liquor license application for the City of Eagle, Ada County, Idaho from Rhino, LLC. See Agency Record documents "k." Listed as members of this LLC are John Sheldon, Murray Lodge, Harold Busmann and Scott Ludwig.

38. The Rhino, LLC license was placed in service at Zen Bento restaurant from July 22, 2005 until September of 2007.

39. Rhino, LLC was issued a liquor license on July 22, 2005.

40. On February 13, 2007, Busmann, a member of Rhino, LLC, wrote to ABC requesting approval for a 90-day extension to move the Rhino, LLC license to a new location.

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41. On February 13, 2007, ABC granted Busmann's request and gave Rhino, LLC until May 14, 2007, to move the license to a new location. *Id.*

42. On July 24, 2007, Busmann requested another 60-day extension for the Rhino, LLC license that was placed at Zen Bento. *Id.*

43. August 9, 2007, Busmann writes to ABC to tell ABC that the license, 1A-997 is going to be placed with another entity in Eagle, by September 1, 2007. *Id.*

44. The premises diagram for the Rhino, LLC application is identical to the premises diagram contained in the Eddy application.

45. On December 29, 2006, Eddy and ZB, Inc. entered into an agreement entitled Lease of Restaurant Facilities ("Lease");

46. Pursuant to the Lease, Eddy was entitled to serve liquor and ZB, Inc. reserved the right to serve food;

47. Rent under the Lease was stated to be \$100 per month;

48. On December 29, 2006, Eddy and ZB, Inc. entered into a Management Agreement ("Agreement");

49. Pursuant to the Agreement, Eddy was to be the owner of the liquor license and ZB, Inc. was to be manager of the license for Eddy;

50. Pursuant to the Agreement, ZB, Inc. was required to:

- a) Maintain all alcohol beverage licenses, including processing annual renewal of licenses and payment, from Licensee's (ZB Inc's) own bank account, of all license fees for liquor, beer and wine, required by any governmental entity.
- b) Pay, from its own bank account, all state sales tax obligations of Licensee arising pursuant to this Agreement.

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- c) Purchase and own, and shall pay for from its own bank account, the liquor inventory for sale under this Agreement on the Premises.
- d) Make any and all payments to Manager by Licensee for services provided pursuant to this Agreement from Licensee's bank account.

51. ZB, Inc. was to be paid fifty percent (50%) of the gross compensation from the sales of liquor for managing the liquor sales;

III.

RELEVANT AUTHORITIES

A. The Idaho Liquor Act governs the regulation of the sale of alcoholic beverages including the sale of liquor by the drink and provides, in pertinent part:

Idaho Code §23-514. Nature of permit. A permit shall be a personal privilege, subject to be denied, revoked or canceled for its abuse. It shall not constitute property; nor shall it be subject to attachment and execution; nor shall it be alienable or assignable. Every permit shall be issued in the name of the applicant and no person holding a permit shall allow any other person to use the same. The dispensary, if not satisfied of the integrity and good faith of an applicant for a permit, may refuse to issue the same, or may refuse to issue a renewal thereof. (emphasis added)

Idaho Code §23-902. Definitions. ... (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.

Idaho Code §23-903. License to retail liquor. 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 §23-908. Form of license – Authority ... (1) ... Every license issued under the provisions of this chapter 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 (4) Each new license issued on or after July 1, 1980, shall be placed into actual use by the original

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licensee at the time of issuance and remain in use for at least six (6) consecutive months or be 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 transferable for a period of two (2) years from the date of original issuance, except as provided by subsection (5)(a), (b), (c), (d), or (e) of this section. (emphasis added)

Idaho Code §23-910. Persons not qualified to be licensed

(5) A person who does not hold a retail beer license issued under the laws of the state of Idaho.

Idaho Code §23-1001. Definitions

(1) 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.

Idaho Code §23-1010. License to sell beer at retail – Application procedure and form – Showing of eligibility for license and disqualifications. ... (1)

Every person who shall apply for a state license to sell beer at retail shall tender the license fee to, and file written application for license with, the director. The application shall be on a form prescribed by the director which shall require such information concerning the applicant, the premises for which license is sought and the business to be conducted thereon by the applicant as the director may deem necessary or advisable, and which shall enable the director to determine that the applicant is eligible and has none of the disqualifications for license, as provided for in this section. ...

(2) The application shall affirmatively show:

(a) That the applicant is the bona fide owner of the business which will be engaged in the sale of beer at retail and with respect to which license is sought. ... (emphasis added).

B. The administrative Rules Governing Alcohol Beverage Control provide, in pertinent part:

IDAPA 11.05.01.010. DEFINITIONS.

03. New Licenses. For purposes of Section 23-908(4), Idaho Code, a “new license”: is one that has become available as an additional license within a city’s limits under the quota system after July 1, 1980. The requirement of Section 23-908(4), Idaho Code, that a new license be placed into actual use by the licensee and remain in use for at least six (6) consecutive months is satisfied if the licensee makes actual sales of liquor by the drink during at least eight (8) hours per day, no fewer than six (6) days per week. (3-8-07)

IDAPA 11.05.01.013. PRIORITY LISTS.

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02. Written Notification. When an incorporated city liquor license becomes available Alcohol Beverage Control offers it in writing to the applicant whose name appears first on the priority list. If the applicant does not notify the Alcohol Beverage Control Bureau in writing within ten (10) days of receipt of the notice of his intention to accept the license, the license is offered to the next applicant in priority. An applicant accepting the license shall have a period of one hundred eighty (180) days from the date of receipt of Notice of License Availability in which to complete all requirements necessary for the issuance of the license. Provided, however, that upon a showing of good cause the Director of the Idaho State Police may extend the time period in which to complete the necessary requirements for a period not to exceed ninety (90) days. (3-8-07)

C. Contested cases under the Alcohol Beverage Control Bureau are governed by the rules of administrative procedure of the Attorney General.

IV.

DISCUSSION

The license at issue in this case is one for the sale of liquor by the drink. Eddy, as the applicant for the license, must meet the requirements for both the sale of liquor by the drink and for the sale of beer at retail. *See* I.C. §23-910(5). A license for the sale of beer can only be issued to the bona fide owner of the business applying for the license that will be engaged in the sale of beer. *See* I.C. §23-1010(2)(a). A license issued for the sale of liquor by the drink is issued to one person, which by definition may include a corporation, and the privileges granted by the license can only be exercised by the person the license is granted to. *See* I.C. §23-908(1).

An application for the sale of beer requires that the applicant must affirmatively show that the applicant is "the bona fide owner of the business which will be engaged in the sale of beer at retail and with respect to which [the] license is sought." I.C. §23-1010(2)(a). The phrase "bona fide owner of the business" is not defined in the Idaho Liquor Act. The term "bona fide" is used throughout the Act, without definition, in reference to a bona fide golf course, bona fide overnight accommodations, bona fide chair lift, bona fide equestrian facility, bona fide

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members' guests, bona fide club, bona fide convention center, and bona fide gondola. See I.C. §23-903. The Act instructs that any words or phrases used in the Act and not defined are to be given their ordinary and commonly understood and acceptable meanings. I.C. §§23-902(17) & 23-1001(D).

According to Black's Law Dictionary, "bona fide" is defined as,

In or with good faith; honestly, openly, and sincerely; without deceit or fraud. Truly, actually; without simulation of pretense. Innocently; in the attitude of trust and confidence; without notice of fraud, etc. Real, actual, genuine and not feigned.

Black's Law Dictionary (West 6th Ed. 1999).

Selling liquor by the drink is a privilege granted to a person or entity, in this case Eddy, and that privilege can only be exercised by that person or entity. ABC must satisfy itself that licenses are being granted only to those who ABC trusts with the privileges that go along with licensure. A person wishing to obtain a liquor license must submit an application to ABC, setting forth the applicant's qualifications and statements and information relative to the premises where the liquor is to be sold. See I.C. 23-905. Only after investigation of the applicant and a determination that the contents of the application are true, that the applicant is qualified, and that the premises are suitable, may ABC, in its discretion, issue a license. See I. C. §23-907. This procedure "makes it clear that the legislature painstakingly attempted to ensure that [ABC has] 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." *Uptick v. Ahlin*, 103 Idaho 364, 369, 647 P.2d, 1236, 1241 (1982).

It is well established that a liquor license is a privilege personal to the licensee. See *Nampa Lodge No. 1389 B.P.O.E. v. Smylie*, 71 Idaho 212, 229 P.2d 991 (1951); and see *McBride v. Hopper*, 84 Idaho 350, 372 P.2d 401 (1962). In *Uptick*, *supra* the owners of the

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premises argued that the original licensee intended to transfer the right to renew the license to the premises owners in the event that the original licensee ceased doing business at the premises. The Court held that "all rights in a liquor license are inseverable parts of a single legal interest which may not be transferred away at random or piecemeal." *Uptick*, 103 Idaho at 368 & 370, 647 P.2d at 1240 & 1242. The Court explained, "[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 [ABC] 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.* at 369, 647 P.2d at 1241. In this case the argument is not that Eddy is seeking to formally transfer the License. Rather, the Agreement and Management Agreement Eddy entered into with ZB, Inc. attempts to do that which the *Uptick* Court warns against, i.e., transfer random rights and privileges that are part of the License.

Such delegation of duties and responsibilities in effect attempts to transfer some of the rights and privileges of the liquor license. For example, the license authorizes the licensee to sell liquor by the drink (I.C. §23-903), but under the Agreement the sales are conducted, managed and accounted for by ZB, Inc. The law further requires that the licensee place the license into actual use for a period of six months which means the licensee has to make actual sales of liquor by the drink during at least eight hours per day, no fewer than six days per week (I.C. 23-908(4) & IDAPA 11.05.01.010.03). But under the Agreement, this responsibility was purportedly transferred from Eddy to ZB, Inc.

Under the Agreement, ZB, Inc. is responsible for making sure the business is open for the requisite days and hours; and ZB, Inc. is charged with adhering to the statutes and regulations

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governing the sale of liquor by the drink. ZB, Inc. also is responsible for complying with all statutes, regulations, and laws of the State of Idaho and all applicable city and county ordinances, regulations and laws applicable to the purchase and sale of liquor by the drink.

This arrangement between ZB, Inc. and Eddy is analogous to the arrangement in *Uptick*. Just as the *Uptick* Court was concerned that the agreement struck between the lessor and licensee giving the lessor the right to renew the liquor license, circumvented the scrutiny and approval process of ABC, the above-quoted provisions would allow ZB, Inc. to exercise the rights of a licensee without having submitted to the investigation of ABC, thus circumventing the policy of the legislature to only issue licenses to persons qualified under the act. I.C. §23-901.

When reviewing the entire relationship of Eddy and ZB, Inc. as a whole, it appears that Eddy's role is to get the license while ZB, Inc. runs the business and pays Eddy for the use of the license. Such a relationship is in direct contravention of the statute prohibiting transfer of the liquor license for two years from the date of issuance. Furthermore, in the context of the Idaho Liquor Act, the purpose of the Legislature as set forth in that Act, and the Legislative intent as interpreted by Idaho courts, the arrangement proposed between Eddy and ZB, Inc. appears to be inconsistent with what the Legislature intended, i.e. requiring the original licensee to be the entity actually using the license upon its issuance.

Moreover, the legislative statement of purpose, attached to an amendment made to I.C. 23-908 in 1980, states, "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." 1980 Idaho Sess. Laws Ch. 314. *Citing*, RS 4883C2.

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Eddy quite clearly is not the owner of the business which will be engaged in the sale of beer at retail, nor is he the entity exercising the privileges granted under a license to sell liquor by the drink. Thus, Eddy has not placed the liquor license into service nor is Eddy the bona fide owner of the business which holds the liquor license. He has, in effect, attempted to transfer the liquor license to ZB, Inc.

Finally, Eddy argues that since ABC issued a license to him, it is now estopped from revoking that license. Eddy supplied no legal authority to support this proposition. Also, Eddy argues that ABC has enforced the law against Eddy in a discriminatory manner. Again, Eddy has tendered no evidence or legal authority in support of this argument.

V.

MISCELLANEOUS EVIDENTIARY MATTERS

Eddy makes several evidentiary contentions for the first time in its Licensee's Response to ABC's Memorandum in Support of Forfeiture dated and filed December 5, 2008. Eddy argues that "[t]he allegations in ABC's Complaint, page 3, paragraph 2, are not accurate..." In this paragraph, ABC alleges that Eddy "failed to place the liquor license into actual use and maintain said license as the original license for a period of two years..." Based upon the Findings of Fact as set forth above, it is clear that ABC's allegations contained in paragraph 2 are indeed accurate. Eddy did not place the liquor license into service but rather purported to transfer it, pursuant to the Management Agreement, to ZB, Inc.

Eddy next argues that the exhibits contained in the agency record as Exhibit "k" should not be admitted into evidence in this proceeding. Exhibit "k" includes three classes of documents:

- 1) An Idaho State Police Incident Report by Cpl. Timothy P. Davidson;

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2) Documents relating to a liquor license for Rhino, LLC, including the license applications and membership documentation. This documentation shows that the Rhino, LLC license was placed into service at Zen Bento Restaurant, Eagle, Idaho.

3) Documentation relating to the license application by Eddy for Zen Bento Restaurant, Eagle, Idaho. The identical floor plan diagram was submitted in Eddy's application as was included in Rhino, LLC's application, including the same handwritten notes.

4) The Findings of Fact and Conclusions of Law in the matter of *Last Chance, Inc. v. Idaho State Police, Alcohol Beverage Control*, Case No. 07 ABC-004.

Eddy objects to consideration of the above referenced documents on the grounds that they are "inadmissible hearsay".

Eddy waived his rights to a hearing in this matter. He stipulated that this matter may be decided based upon the agency record and the affidavits and briefs of the parties. Pursuant to the Scheduling Order of September 19, 2008, the parties were ordered to file any objections to the agency record on or before October 10, 2008. Eddy did not object to any documents or file a request for an extension of time on or before October 10, 2008.

Eddy's first objection was contained in his brief filed December 5, 2008. Accordingly, Eddy stipulated to the admissibility of the agency record and failed to make any timely objection.

The Idaho Rules of Evidence are not strictly followed in administrative proceedings. The primary criteria for admissibility in an administrative proceeding is relevancy. Clearly, these documents which comprise Exhibit "k" are relevant to the core issues of this proceeding. Had

timely objection been made at a hearing in this matter, the documents likely would have been admitted as a business exception to the hearsay rule.

The exception to the above is the copy of the Hearing Officer's decision in the *Last Chance, Inc.* matter. This decision should not be considered to be part of the agency record. It is not evidence in this proceeding. Rather, it is persuasive authority from another hearing officer who made findings and conclusions considering the application of the same statutes to similar facts. So as to avoid any confusion, the *Last Chance, Inc.* decision is stricken from the evidentiary record in this matter.

VI.

CONCLUSIONS OF LAW

1. Eddy failed to place his liquor license into service as required by Idaho law.
2. Eddy did not engage in the actual sale of alcohol as required by I.C. §23-908(4) and IDAPA Rule 11.05.01.010.
3. Eddy was not the bona fide owner of the business which holds the liquor license.
4. By entering into the Management Agreement, Eddy attempted to transfer his license in violation of I.C. §23-908(4).

VII.

ATTORNEY FEES

Idaho Code §12-117 provides for the mandatory award of attorney's fees to prevailing parties in administrative hearings as follows:

Unless otherwise provided by statute, in any administrative or civil judicial proceeding involving as adverse parties a state agency, a city, a county or other

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taxing district and a person, the court shall award the prevailing party reasonable attorney's fees, witness fees and reasonable expenses, if the court finds that the party against whom the judgment is rendered acted without a reasonable basis in fact or law.

I.C. §12-117(1).

An administrative tribunal is empowered under this statute to award fees to a litigant who prevails against an agency at the administrative level. *Stewart v. Department of Health and Welfare*, 115 Idaho 820, 771 P.2d 41 (1989). The Idaho Supreme Court has described the purpose of action 117 as follows:

We believe the purpose of that statute is two-fold: (1) to serve as deterrent to groundless or arbitrary agency action; and (2) to provide a remedy for persons who have borne unfair and unjustified financial burdens defending against groundless charges or attempting to correct mistakes agencies should never ha[ve] made.

Bogner v. State Dep't of Rev. & Taxation. 107 Idaho 854, 859, 693 P.2d 1056, 1061 (1984).

Eddy has failed to raise any legitimate question of law in his defense of this proceeding. Nor has Eddy raised any issue of fact to be decided in this forum. Thus, I find that Eddy defended this matter without a reasonable basis in law or in fact. Therefore, ABC is awarded its costs and reasonable attorney's fees for the time expended during this proceeding.

PRELIMINARY DECISION

Eddy's liquor license shall be revoked. ABC is hereby awarded its reasonable costs and attorney's fees. ABC may submit a memorandum of costs and attorney fees directly related to this proceeding together with a proposed order.

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COMPLIANCE WITH IDAPA 04.11.01.730

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.

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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.

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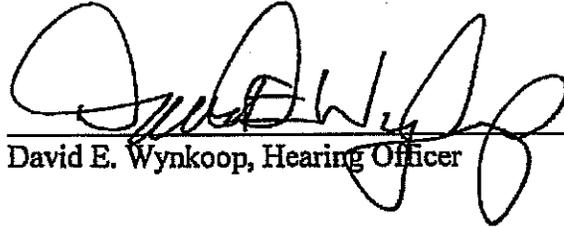
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This appeal must be filed within twenty-eight (28) days of this Preliminary Order becoming final. See Idaho Code §67-5273. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal.

IT IS SO ORDERED.

DATED this 5th day of March, 2009.



David E. Wynkoop, Hearing Officer

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CERTIFICATE OF SERVICE

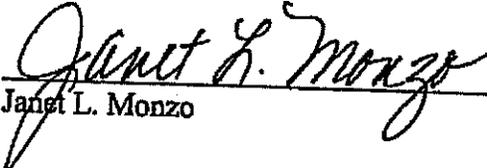
I HEREBY CERTIFY that on this 6th day of March, 2009, I served a true and correct copy of the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW & PRELIMINARY ORDER upon the following, by the method indicated below:

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

XX via U.S. mail, postage prepaid

James R. Gillespie
Attorney at Law
548 North Avenue H
P.O. Box 419
Boise, Idaho 83701-0419

XX via U.S. mail, postage prepaid


Janet L. Monzo

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