BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA

AB-9358
License No. 372799

AMERICAN VINTAGE BEVERAGE, INC.
382 South Jefferson, Suite 1070,
Chicago, IL 60661
Appellant/Licensee
v.
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing:

Appeals Board Hearing: February 6, 2014
Los Angeles, CA

Reconsidered April 3, 2014
Sacramento, CA

ISSUED MAY 9, 2014

American Vintage Beverage, Inc., appeals from a decision of the Department of Alcoholic Beverage Control which rejected its application for approval of malt beverage labels.

Appearances on appeal include appellant American Vintage Beverage, Inc., appearing through its counsel, Morton Siegel and Zubin S. Kammula, and the Department of Alcoholic Beverage Control, appearing through its counsel, Sean Klein.

FACTS AND PROCEDURAL HISTORY

Appellant American Vintage Beverage, Inc. is a nationwide supplier of malt beverages, licensed under an out-of-state beer manufacturer's certificate. Appellant holds a license to use trademarks owned by TGI Friday's of Minnesota in conjunction with the sale of its products.

On March 28, 2013, appellant submitted a Malt Beverage Label Filing Application ("the Application") to the Department. The Application sought approval for four labels: "T.G.I. Friday's ® Frozen Wild Strawberry Daiquiri," "T.G.I. Friday's ® Frozen Tropical Piña Colada," "T.G.I. Friday's ® Frozen Blackberry Long Island Iced Tea," and "T.G.I. Friday's ® Frozen Platinum Margarita." According to the Application, each product would be sold in 10-ounce packages of 5% alcohol by volume.

The record on appeal is limited, and consists of the label application and its attached exhibits as well as communications between appellant and the Department regarding application status.

The Application included images of the front and back of each label. The front of each label bore a circular logo advertising "AUTHENTIC BARTENDER TASTE," and the reverse advertised "AUTHENTIC FROZEN BARTENDER DRINKS."

The reverse of the labels included a sentence in small print noting that "T.G.I. FRIDAY'S is a registered trademark of TGI Friday's of Minnesota, Inc. used and distributed under license by American Vintage Beverage Co., Chicago, IL 60561." The front of the label notes includes a sentence, in equally small print, indicating that the product is "made by Jefferson Beverage Co., LaCrosse, WI."

The Department rejected the Application on April 17, 2013. The rejection is indicated at the bottom of the application, and is signed by Department representative Diana Villanueva. Each label image bears a stamp from the Department noting the rejection and the date. The Department offered a very brief explanation on a sheet of paper attached to the rejected Application: "Attached labels are not accepted for filing because a beer manufacturer can not [sic] provide free advertising for retail licensees."

On April 24, 2013, appellant's general counsel submitted a letter requesting reconsideration. The letter argued that despite use of the TGI Friday's logo, the products "are not being made for the restaurant chain TGI Friday's nor to advertise any of their licensed premises." The request for reconsideration asserted, among other things, that

> AVBI has committed not to sell any of these products at TGI Friday's restaurants in California or anywhere else in the US. AVBI will make these products available through its California wholesaler network to **all** licensed retailers in California, other than TGI Friday's, in accordance with the three-tier system. . . .
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> Further, neither TGI Friday's, nor any of its restaurant licensees in California or anywhere else in the US, have any distribution, sales or marketing control or authority related to these products. . . .
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> In addition, AVBI's other alcohol beverage products (not TGI Friday's branded) are not required to be sold at TGI Friday's restaurants in California or anywhere else in the US, and TGI Friday's is specifically not prevented from selling products that are competitive to AVBI's other products. There is no quid pro quo or unlawful inducement, and no exclusionary practices. There will be no impact or effect on the operation of any licensed TGI Friday's restaurants in California.

(Emphasis in original.) The request for reconsideration also argued that forty-eight other states had already approved the labels (with the exception of one state with a specific regulation prohibiting them), and that the Department has permitted the sale of other TGI Friday's branded products.

The request for reconsideration included no supporting documents.

On June 14, 2013, the Department's Director, Jacob Appelsmith, sent an email to appellant's present counsel. The subject was "Call," and the body of the email indicated that Appelsmith had received a message from appellant's counsel. The email went on to explain:

We have talked over the issue again and agree we are bound by Rule

> 106, which clearly applies to the situation at hand. We are aware that there are some products that are in circulation that should not be, and we are going to look at those going forward -- this one was the first to press the issue given the label-approval requirement the others do not have.

The email closed with an offer to discuss the matter further.

On June 23, 2013, appellant filed a notice of appeal, in which it argued that the trademarks constitute separate and distinct assets which "will be used by AVBI to market and sell its own goods which will not be sold at any T.G.I. Friday's retail location nor used to advertise any specific licensed premises." The notice of appeal also reiterated appellant's position that the Department has permitted other products marketed under the TGI Friday's brand.

Attached to the notice of appeal were four exhibits: the Application, the Request for Reconsideration, the Appelsmith email, and a photograph of a product, TGI Friday's Mudslide, currently marketed in California by another firm.

On September 6, 2013, the Department submitted a letter to this Board requesting remand for an evidentiary hearing. The letter cited the lack of a record on which this Board could rely, pointed to outstanding questions of fact, and asserted that these questions were best addressed by an ALJ, who may take evidence, make formal findings, and issue a declaratory decision. Among other things, the Department took issue with a "Stipulation of Facts"[1] allegedly submitted by appellant:

> American Vintage Beverage cites in its "Stipulation of Facts" an agreement between it and TGI Friday's as to trademarks and licensing of the TGI Friday's name. This agreement was requested by the Department, but never provided. The Department cannot agree to facts contained in a document it has never seen.

Additionally, the Department argued that this Board does not have jurisdiction to

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[1]No Stipulation of Facts was provided to this Board.

hear the appeal because there has been no penalty assessment nor any action regarding the issuance, denial, transfer, suspension, or revocation of a license.

On September 10, 2013, this Board requested briefing from appellant as to why the issue should not be remanded for an evidentiary hearing.

On October 1, 2013, appellant submitted a Memorandum in Support of Notice of Appeal. The Memorandum made reference to the exhibits included with the Notice of Appeal, and then introduced a fifth exhibit: an "Industry Advisory" from the Department purportedly addressing the use of licensed trademarks.

On November 7, 2013, appellant supplied a copy of its Trademark License Agreement to the Department and to this Board. It is undisputed that the Department did not have access to the Agreement when it reached its decision.

Following a hearing on February 6, 2014, this Board requested additional briefing to clarify several matters raised during the course of oral argument but not addressed in the briefs, specifically: (1) Does the federal Tax and Trade Bureau labeling requirements, and a decision of approval for a specific alcoholic beverage label by the federal agency administering it, preempt all but the express provisions of California's Alcoholic Beverage Control Act beer labeling statute not inconsistent with it? (2) Do the beer labeling provisions of the Alcoholic Beverage Control Act (or any other legal authority) permit the Department to reject a proposed label that does not violate the express requirements of that statute but does violate the separate tied-house statute and regulations adopted pursuant to it? If so, why — i.e, under what legal theory and authority? (3) If the Board does not have jurisdiction to review an order of the Department denying a beer label on the ground that it violates the Alcoholic Beverage Control Act, what remedy is available, and under what authority, to the aggrieved applicant? (4) If the Department denies a beer label on the ground that it violates the tied-house statute but approves or allows distribution in California of a distilled spirits label that is in all material respects (except that it involves distilled spirits) the same as the beer label, does this violate the guarantee to equal protection of the law? (5) Is appellant's Trademark Licensing Agreement relevant to an analysis of this case under California's beer labeling statutes and, if so, has the Department undertaken an analysis of the Agreement in making its decision? If the Department has not considered this Agreement in making its decision, may the Board do so?. Both parties submitted an additional brief but declined further oral argument.

Appellant's timely appeal raises the following issues: (1) do federal labeling statutes preempt California's own labeling statutes; (2) does the Department lack authority to reject a label for an apparent violation of tied-house statutes and regulations; (3) do the labels at issue violate section 25500(a)(2) or any other provision of California's tied-house statutes; (4) do the labels violate rule 106(a) or (f); (5) does the Department allow the sale of similar products bearing the TGI Friday's trademarked logos; (6) does it legally matter that forty-eight other states have approved the products with the proposed labels; and (7) is it outcome determinative that a Department Industry Advisory acknowledges licensed trademarks such as this are separate valuable assets? The fifth, sixth, and seventh issues, which the Board is essentially asked to notice as factual propositions relevant to aforementioned remaining legal questions, are addressed together in section VI of this opinion.

DISCUSSION

I

The Department contends this Board lacks jurisdiction. Appellant responds that this Board has jurisdiction to hear this matter, despite the lack of a formal hearing, because the Department's decision denies appellant the ability to sell its products, and therefore effectively revokes appellant's license with regard to the products in question. We agree with appellant.

The Twenty-First Amendment to the U.S. Constitution reserves for the states an unusual degree of regulatory control over the alcoholic beverage industry. (See U.S. Const. Amend. XXI, § 2; see also *Rice v. Alcoholic Beverage Control Appeals Board* (1978) 21 Cal.3d 431 [146 Cal.Rptr. 585].) This Board therefore derives its authority from the California constitution, which provides:

> When any person aggrieved thereby appeals from a decision of the department ordering any penalty assessment, issuing, denying, transferring, suspending or revoking any license for the manufacture, importation, or sale of alcoholic beverages, the board shall review the decision subject to such limitations as may be imposed by the Legislature.

(Cal. Const. art. XX, § 22.) The Board's review is not however, unlimited; it may inquire only

> whether the department has proceeded without or in excess of its jurisdiction, whether the department has proceeded in the manner required by law, whether the decision is supported by the findings, and whether the findings are supported by substantial evidence in the light of the whole record.

(*Ibid*.)

In *Safeway Stores, Inc.*, the court of appeals addressed a largely analogous jurisdictional issue. (See *Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Safeway Stores, Inc.)* (1987) 195 Cal.App.3d 812 [240 Cal.Rptr. 915].) In the course of a corporate reorganization, appellant Safeway Stores transferred over 500 alcoholic beverages licenses to a holding entity and several subsidiaries. (*Id.* at p. 814.) Safeway asserted that the transfers were governed by section 24071 of the Business and Professions Code, which imposed a fee of $50 per license. (*Ibid.*) The Department concluded instead that the transfers fell under section 24072, and that each transfer would therefore entail a fee of $1250. (*Id.* at p. 815.) No hearing took place; there was, however, a record of correspondence between Safeway and the Department, and the facts were undisputed. (*Id.* at pp. 817-818.)

The court of appeals held that the lack of a hearing was immaterial. Safeway had been "aggrieved" by a decision of the Department, and the Board had the authority to review a decision of the Department transferring the license. It concluded that "[t]here is no authority which denies the Appeals Board jurisdiction to review the Department's decision regarding fees for the transfer of Safeway's liquor license, whether the Department conducted a formal hearing or not." (*Id.* at p. 820.)

This case presents similar facts. Safeway was not denied its transfers; instead, the dispute centered on the fees attached to those transfers. In this case, the Department has not denied appellant a license; instead, it has reached a decision restricting appellant's ability to sell its products,[2] a decision of financial consequence for which appellant is "aggrieved." Under the analysis provided in *Safeway Stores*, this Board may review the record considered by the Department in order to determine whether the Department has exceeded its jurisdiction, and whether its decision was

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[2]Appellant's characterization of the Department's decision as a de facto revocation is hyperbole. (See App. Reply Br. at p. 2.) The Department has not denied appellant the ability to market alcoholic beverages; it has only denied appellant the ability to market alcoholic beverages bearing the labels in question.

supported by substantial evidence.

This Board, it should be noted, is not a finder of fact; it "shall not receive evidence in addition to that considered by the department." (Cal. Const. art. XX, § 22.) However,

> in appeals where the board finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department it may enter an order remanding the matter to the department for reconsideration in light of such evidence.

(*Ibid.*)

Several documents, including appellant's trademark licensing agreement, were submitted after the Department had reached its decision. It is not necessary for this Board to consider those documents; the correct outcome is, as a matter of law, apparent from the undisputed facts considered below.

II

At oral argument, appellant asserted that California state labeling statutes are preempted by federal labeling statutes, which regulate only alcohol content and related matters. The issue was not raised in appellant's original brief, and appellant largely conceded the matter in the additional briefing requested by this Board. However, appellant maintains that "the application of the California labeling statutes is subject to AVBI's Federal Certificate of Label Approval (COLA)." (Appellant's Responses to Additional Questions at p. 3.)

The Department replies that because the matter was not raised in initial briefing, it has been waived. We disagree. The question of federal preemption is purely a question of law. (*See Harris v. Alcoholic Bev. Control Appeals Bd.* (1966) 245 Cal.App.2d 919 [54 Cal.Rptr. 346].) Regardless of whether the question was raised in initial briefing, this Board is bound by the law of federal preemption. The party claiming preemption bears the burden of proof. (See, e.g., *McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 422 [106 Cal.Rptr.2d 271].)

Appellant concedes that the federal COLA requirements do not preempt state law, yet insists that application of California labeling statutes is subject to appellant's COLA — effectively, that the issuance of a federal COLA somehow shields appellant. (See Appellant's Reponses to Additional Questions at pp. 2-3.) Appellant cites no law explaining how its federal COLA in any way limits the applicability of state law, and this Board finds none.

The Department, on the other hand, has submitted authority from the California Supreme Court indicating that, in the related area of wine labeling, "the history of the 1935 [Federal Alcohol Administration] Act discloses no intent on the part of Congress to supplant or preempt state efforts to regulate wine labeling." (*Bronco Wine Co. v. Jolly* (2004) 33 Cal.4th 943, 975 [17 Cal.Rptr.3d 180].) Nothing in the FAA Act, the court wrote, "reveals congressional intent to supersede concurrent (or more stringent) regulation of wine labeling by the states under their traditional police powers." (*Id.* at p. 977.)

Though *Bronco Wine* addressed wine labeling and we presently address an issue of beer labeling, the same reasoning applies. There is nothing in the FAA that indicates a Congressional intent for the issuance of appellant's COLA to shield it from compliance with more stringent state law. (See also the extensive discussion on federal preemption in *Farm Raised Salmon Cases* (2009) 42 Cal.4th 1077, 1089-1098 [72 Cal.Rptr3d 112].)

III

Appellant contends that the Department has no authority to reject a malt beverage label due to an apparent tied-house violation. Appellant argues that tied-house statutes are fact-intensive and focused on transactional relationships, and that the Department has merely conducted a cursory examination of the labels in question.

The California constitution, article XX, section 22, grants the Department broad police powers for the protection of the public welfare. Section 25750, subdivision (a), of the Business and Professions Code further defines those powers:

> The Department shall make and prescribe those reasonable rules as may be necessary or proper to carry out the purposes and intent of Section 22 of Article XX of the California Constitution and to enable it to exercise the powers and perform the duties conferred upon it by that section.

Among the regulations passed by the Department in the exercise of its police powers is Rule 130, subdivision (c)(2), which states: "The department may refuse to accept for filing any label or notice that is not in compliance with the provisions of this section *or any provision of the Alcoholic Beverage Control Act*." (Cal. Code Regs., tit. 4, § 130(c)(2), emphasis added.)

The discretion afforded the Department is not unbridled — it may only reject labels for filing if they fail to comply with labeling requirements or with statutes duly passed by the state legislature, such as the tied-house prohibition. The necessity of such a rule is obvious. The Department exists to enforce state alcoholic beverage law and to protect the public welfare. If the Department is faced with a label that accurately represents alcoholic beverage content, but evinces a clear intent to violate other state alcoholic beverage statutes, it is absurd to expect the Department to simply approve the label and unleash the product into the stream of commerce. If the Department observes an impending violation of law at the labeling phase and nevertheless approves the product for sale, it would be remiss in its duty to enforce state laws and protect the public welfare.

Rule 130(c)(2) also guarantees fairness to licensees. We find the Department's argument on this point particularly persuasive:

> If the Department did not have this power . . . the Department would find itself accepting labels for filing whether or not they violated California law and then issuing accusations against licensees once the product with the violative label enters the stream of commerce. The brewer would find themselves in the position of having an entire production run that they couldn't sell as well as the possibility of a substantial fine levied against them for the tied house violation. By discovering that a label violates the law when it is submitted, the brewer's expense involved in bringing the label into compliance is minimal.

(Reply Br. at p. 7.)

Rule 130, subdivision (c)(2), authorizes the Department to reject a label that evidences an impending violation of tied-house provisions. The rule reflects both the Department's constitutional responsibility and good public policy.

IV

Appellant contends the proposed labels do not violate California's tied-house provisions, and argues that there is nothing in the statute or case law that forbids a supplier paying a royalty to a non-licensee for the use of a trademark.

Section 25500 provides, in relevant part:

> (a) No manufacturer, winegrower, manufacturer's agent, rectifier, California winegrower's agent, distiller, bottler, importer, or wholesaler, or any officer, director, or agent of any such person shall:
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>> ¶ . . . ¶
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>> (2) Furnish, give, or lend any money or other thing of value, directly or indirectly, to, or guarantee the repayment of any loan or the fulfillment of any financial obligation of, any person engaged in

> operating, owning, or maintaining any on-sale premises where alcoholic beverages are sold for consumption on the premises.

(Cal. Bus. & Prof. Code § 25500(a)(2).)

In *Schieffelin & Somerset Co.*, the court of appeals applied section 25500(a)(2) to a case involving Chevys restaurant chain and Schieffelin, a wholesale distributor of Grand Marnier products. (See *Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Schieffelin & Somerset Co.)* (2005) 128 Cal.App.4th 1195, 1199 [27 Cal.Rptr.3d 766].) Chevys had contracted with a company called "A Change of Pace" (ACOP) to organize a number of non-educational athletic events for which Chevys would be the title sponsor. (*Id.* at p. 1200.) For this service, Chevys agreed to pay ACOP $10,000 per event. (*Ibid.*) ACOP solicited additional sponsors for the events, including Schieffelin, which supplied Chevys with Grand Marnier products. (*Id.* at p. 1201.) In soliciting Schieffelin's support, "ACOP emphasized that the events would help create brand awareness, promote goodwill within the community, create product loyalty, and increase sales." (*Ibid*.) ACOP summarized its pitch: "In short, a Chevys Fresh Mex Run Series sponsorship offers a platform to sell more Grand Marnier." (*Ibid.*)

Schieffelin accepted the opportunity, and agreed to pay ACOP $6,000 per event to become a sponsor. (*Id.* at p. 1202.) In return, advertisements for the events — including those on licensed premises, as well as at other locations, such as health clubs — would include the Grand Marnier logo.[3] (*Ibid.*)

The Department filed an accusation contending that the arrangement violated

[3]Appellant argues that the proximity of the events to retail establishments was a deciding factor in *Schieffelin*. While activity on the retailer's premises was an element in the court's analysis of section 25503(h), it played no role in the court's holding under section 25500(a)(2). (See *Schieffelin*, *supra*, 128 Cal.App.4th at pp. 1206-1216.)

section 25500(a)(2), among other provisions. (*Id.* at p. 1202.) The ALJ found no violation of that section, though he did find violations of other sections, including 25503(h). (*Id.* at p. 1203.) The Department declined to adopt the ALJ's decision, and instead found a violation of both sections. (*Ibid.*) On appeal, this Board found the athletic events fell under a limited exception provided by rule 106(i)(2). (*Id.* at p. 1204.) The Department appealed. (*Ibid.*) Schieffelin urged the court to sustain the Board's holding. (*Ibid.*)

The court reviewed the Department's decision and held that Schieffelin's sponsorship, among other things, violated rule 25500(a)(2). (*Ibid.*) The court declined to interpret the tied-house provisions "in a vacuum," and instead considered "the policies and purposes of the Alcoholic Beverage Control Act, recognizing that 'the purpose sought to be achieved and evils to be eliminated have an important place in ascertaining legislative intent.'" (*Id.* at p. 1206, quoting *Reimel v. Alcoholic Bev. Control Appeals Bd.* (1968) 263 Cal.App.2d 706, 711 [69 Cal.Rptr. 744].) The court observed that the Alcoholic Beverage Control Act is to intended to protect "the safety, welfare, health, peace, and morals of the people of the State, to eliminate the evils of unlicensed and unlawful manufacture, selling, and disposing of alcoholic beverages, and to promote temperance in the use and consumption of alcoholic beverages." (Bus. & Prof. Code § 23001.) It then took note of the history and purpose of the state's tied-house regulations:

> Tied-house statutes are so named because they were enacted to prevent the return of saloons operated by liquor manufacturers, a practice that had been common in the early 1900's. (*Actmedia, Inc. v. Stroh* (9th Cir. 1986) 830 F.2d 957, 959 (*Actmedia*).) The California Supreme Court has explained that the Legislature enacted the tied-house provisions after the repeal of the 18th Amendment to prevent two particular dangers that had

> been common before Prohibition. (*California Beer Wholesalers Assn., Inc. v. Alcoholic Bev. etc. Appeals Bd.* (1971) 5 Cal.3d 402, 407 [96 Cal.Rptr. 297, 487 P.2d 745] (*California Beer Wholesalers*).) First, the Legislature aimed to prevent "the ability and potentiality of large firms to dominate local markets through vertical and horizontal integration." (*Ibid.*) Second, the Legislature wanted to curb "the excessive sales of alcoholic beverages produced by the overly aggressive marketing techniques of larger alcoholic beverage concerns." (*Ibid.*) The Legislature established a triple-tiered distribution and licensing scheme for alcoholic beverages. (*Ibid.*) Manufacturers were to be separated from wholesalers, and wholesalers were to be separated from retailers. (*Ibid.*) "In short, business endeavors engaged in the production, handling, and final sale of alcoholic beverages were to be kept 'distinct and apart.'" (*Ibid.*, quoting 25 Ops.Cal.Atty.Gen. 288, 289 (1955).) The Legislature intended that firms operating at one level of distribution "were to remain free from involvement in, or influence over, any other level." (*California Beer Wholesalers*, *supra*, 5 Cal.3d at p. 408.)
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> The drafters of the tied-house provisions believed that if manufacturers and wholesalers were allowed to gain influence through economic means over retail establishments, they would then use that influence to obtain preferential treatment for their products and either the exclusion of or less favorable treatment for competing brands. (*Actmedia*, *supra*, 830 F.2d at p. 966.) Legislators were concerned that such practices would lead to an increase in alcohol consumption as retailers adopted aggressive marketing techniques to encourage customers to purchase the alcoholic beverages they stocked. (*Ibid*.; *California Beer Wholesalers*, *supra*, 5 Cal.3d at p. 407, fn. 7.)

(*Id.* at p. 1207.)

The court found that Schieffelin's sponsorship payments, though made to ACOP, effectively subsidized Chevys marketing costs because the payments "provided Chevys with the benefit of ACOP's marketing services and the promotional value of the races for which Chevys otherwise would have had to pay." (*Id.* at pp. 1211-1212.) Moreover, there was substantial evidence indicating that the purpose of the sponsorship agreement, from Schieffelin's perspective, was to sell more Grand Marnier. (*Id.* at p. 1211.) The court noted that "An ongoing relationship between a [supplier] and a retailer such as that between [Schieffelin] and [Chevys] could easily lead to the kind of influence of a supplier over a retailer the statutes were intended to prevent." (*Ibid.*)

It is undisputed that appellant pays a royalty for use of the TGI Friday's trademarks. (App.Br. at p. 4.) Appellant also argues that it is "using the Trademarks for the sole purpose of selling the Products." (App.Br. at pp. 6-7.) Taken together, these two statements facially negate appellant's argument that there is no quid pro quo: in fact, appellant is clearly giving money — indeed, a steady percentage of its profits — for the right to sell products bearing the TGI Friday's logo.

In fact, appellant's business plan depends so heavily on the ability to associate its products with the TGI Friday's brand that it argues the rejection of its label application is tantamount to license revocation.[4] (App. Reply Br. at p. 2.) It is true that its royalty payments are not made directly to any licensed premises in California, but as the court of appeals observed, payment to an intermediary is not dispositive. (*Schieffelin*, *supra*, at p. 1212.) The fact that TGI Friday's of Minnesota, a non-licensee, is the holder of the intellectual property rights is nothing more than a formality. The end result is to establish a visual connection between appellant's products and TGI Friday's restaurants,[5] and thereby increase brand recognition and sales for both — and, as a result, increase royalties paid to TGI Friday's of Minnesota. This outcome — a single firm exerting influence over and deriving profit from two separate tiers of the alcoholic beverage market — is precisely what the tied-house provisions were intended to

[4]Presumably, the same outcome would occur if TGI Friday's of Minnesota revoked appellant's right to use its trademarks. This alone illustrates the degree of power TGI Friday's of Minnesota exerts over appellant.

[5]The labels go so far as to promise an "authentic bartender taste." Coupled with the TGI Friday's logo, this is an unmistakably deliberate evocation of TGI Friday's retail licensees.

prevent. As the *Schieffelin* court observed, "It is the 'the end result, rather than the method of its attainment, that the Legislature exorcised.'" (*Schieffelin*, *supra*, 128 Cal.App.4th at p. 1212, quoting *Cal. Beer Wholesalers*, *supra*, 5 Cal.3d at p. 409.)

By paying a royalty to TGI Friday's of Minnesota, appellant has secured the use of the TGI Friday's trademarks, which it shares with a well-known chain of retail licensees with locations throughout the state of California. The use of these marks will create a visual link between appellant's products and TGI Friday's restaurants, increasing brand recognition — and therefore, sales — for both. This arrangement is a violation of both the letter and spirit of section 25500(a)(2).

V

Appellant contends that the labels in question do not violate rule 106, subdivisions (a) and (f) because that rule is "location specific," and there is no direct connection between appellant and a specific retail location.

Rule 106, however, addresses the advertising and merchandising of alcoholic beverages. It provides, in relevant part:

> (a) Free Goods. No licensee shall, directly or indirectly, give any premium, free goods, or other thing of value in connection with the sale, distribution, or sale and distribution of alcoholic beverages, and no retailer shall, directly or indirectly, receive any premium, gift, free goods or other thing of value from a supplier of alcoholic beverage, except as authorized by this rule or the Alcoholic Beverage Control Act.
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> (f) Cooperative Advertising. No supplier of alcoholic beverages directly or indirectly, shall participate with a retailer in paying for an advertisement placed by the retailer, nor shall any signs, displays, advertising specialties promotional materials or decorations furnished by a supplier as permitted by this rule refer to the retailers name or business, except for exterior signs advertising beer sold pursuant to subdivision (c)(2)(C).

(Cal. Code Regs., tit. 4, § 106.) The rule also offers the following definitions:

> (1) "Supplier" means any manufacturer, winegrower, manufacturer's agent, California winegrower's agent, rectifier, blender, broker, distiller, bottler, importer, wholesaler, or any officer, director, agent or affiliate of any such person.
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> (2) "Retailer" means any on-sale licensee or any holder of a temporary retail permit or interim retail permit.

(*Ibid.*) It is undisputed that appellant is a supplier under the definition provided.

Whether TGI Friday's restaurants fall under the definition of "retailer" is a question of law. It is undisputed that the corporate entity TGI Friday's of Minnesota — the owner of the trademarks — does not itself hold an alcoholic beverage license in the state of California. It is, however, a matter of readily verifiable public knowledge that there are more than 35 separate licensed premises in the state of California operating as franchisees, all of which share the TGI Friday's brand trademarks. (See TGI Friday's Store Locator, http://tgifridays.com/storelocator, accessed December 26, 2013.) This Board may take official notice of the existence of these retail premises in reaching its conclusion. (See Cal. Evid. Code § 452(h); see also Cal. Gov. Code § 11515.) Moreover, there is no dispute that TGI Friday's is, in fact, a widely recognized chain of restaurants serving alcoholic beverages. (See App. Reply Br. at p. 5.) These stores fall squarely under the definition of "retailer" as contemplated by rule 106.

It cannot, therefore, be gainsaid that appellant's proposed labels, as reproduced in its Application, share a recognizable brand name and logo with a chain of retailers as defined under California law, including more than 35 licensed premises in California. The effect of this "sharing" is to create a visual link between the retail licensees and appellant's products, and increase brand recognition for both. This constitutes free advertising for retail licensees in violation of rule 106, subdivision (a), and cooperative advertising in violation of subdivision (f).

We see nothing "location-specific" in the language of the rule. In any event, appellant's proposed interpretation would create an absurdity: a supplier would be forbidden to give free goods directly to a specific licensed premises, but permitted to distribute free goods willy-nilly to every licensed premises in the state, provided the benefit was not directed at any single, specific premises. If appellant were permitted to sell its products with the proposed label, then every TGI Friday's licensee would benefit from the brand recognition created by the presence of a TGI Friday's logo on supermarket shelves. Providing free marketing, statewide, to more than 35 retail licensees would be a far greater violation than any location-specific offense.

The proposed labels also violate rule 106, subdivision (f). Appellant's product name and logo are, by design, identical to those of TGI Friday's retail licensees. Thus, any and all "signs, displays, advertising specialties promotional materials or decorations" it furnishes for any retailer — including the off-sale licensees who will presumably stock its product — will necessarily and explicitly refer to TGI Friday's retail establishments.

The sum of this case is simple: appellant's labels, as proposed, serve to associate its product with other TGI Friday's-branded products, including TGI Friday's retail licensees. This connection runs afoul of California's tied-house statutes, as well as Department rules designed to ensure compliance with those statutes. The facts of this case have not persuaded us to overlook this state's long-established law and policy.

VI

Appellant offers three additional arguments: that the Department permits the sale of similar products bearing the TGI Friday's logo; that forty-eight other states already allow the product with the proposed labels; and that, in a 2011 Industry Advisory, the Department acknowledges the intrinsic value and use of licensed trademarks.

First, appellant argues that the Department allows the sale of other TGI Friday's-branded alcoholic beverages. The Department, on the other hand, argues it does not permit them, that it was simply unaware of them until now, and that it intends to take corrective action. The existence of those products is unpersuasive, as the facts surrounding their sale are not before this Board. We cannot say that with any confidence that their sale is legal, or that the Department has knowingly tolerated their sale. We *can* say, however, that the sale of appellant's products with the proposed labels is *not* legal, for all the reasons stated above.

Second, appellant claims that forty-eight other states have allowed the proposed labels, despite their own tied-house statutes. As appellant is doubtless aware, this Board interprets and applies California law. We are not bound by administrative decisions reached by other states.

Finally, appellant directs us to a 2011 Department Advisory, which it claims allows the use of trademarks proposed here. The Advisory does indeed state that "a trademark holder may generally license the use of its trademark and receive compensation for such a license." (See Industry Advisory: Third Party Providers (October 2011).) However, nowhere in the Advisory does the Department suggest that the existence of a trademark license overrides California law. (See *id.*) More importantly, appellant gives us absolutely no reason to favor its patently unfounded interpretation of a single Department advisory over California statutory and case law.

Indeed, to hold that the creation of ornate systems of trademark licensing serves to excuse such a plain-faced attempt to connect two statutorily separate tiers of the alcoholic beverage market would be to undermine the tied-house provisions entirely.

ORDER

The decision of the Department is affirmed.[6]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[6]This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.