CHRIS CHRISTIE
GOVERNOR

KIM GUADAGNO
LT. GOVERNOR

STATE OF NEW JERSEY

OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF ALCOHOLIC BEVERAGE CONTROL
P.O. BOX 087
TRENTON, NJ 08625-0087
PHONE: (609) 984-2830 FAX: (609) 633-6078
WWW.NJ.GOV/OAG/ABC

JOHN J. HOFFMAN
ACTING ATTORNEY GENERAL

MICHAEL I. HALFACRE
DIRECTOR

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Michael I. Halfacre, Director

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0172-13T3

DIVISION OF ALCOHOLIC
BEVERAGE CONTROL,

Petitioner-Respondent,

v.

DAVEJOE, L.L.C., t/a
KASHMIR GENTLEMEN'S CLUB,

Respondent-Appellant.

Submitted April 8, 2014 – Decided June 27, 2014

Before Judges Messano and Hayden.

On appeal from the Department of Law and Public Safety, Division of Alcoholic Beverage Control, Docket No. S-11-35334.

Stark & Stark, P.C., attorneys for appellant (Joel R. Rosenberg, on the brief).

John J. Hoffman, Acting Attorney General, attorney for respondent (Kevin Marc Schatz, Senior Deputy Attorney General, and Marita A. Kosek, Deputy Attorney General, on the briefs).

PER CURIAM

Defendant DaveJoe, L.L.C., the owner and operator of the Kashmir Gentlemen's Club (Kashmir), appeals from a final determination of the Director of the Division of Alcoholic Beverage Control (the Division) revoking Kashmir's plenary

retail consumption license after two of its underage patrons died in an automobile accident shortly after leaving the club. We affirm.

We glean the following facts from the record. On June 27, 2011, Mandy Caudill and her eighteen-year-old boyfriend Jonathan Rothschild drank alcoholic beverages together at Caudill's home beginning at approximately 7:00 p.m. before going to a local restaurant where they had several rounds of alcoholic drinks. Twenty-year-old Ian Drebes, who had also been drinking alcohol, joined them at 10:00 p.m. The three had more drinks together before leaving the restaurant at around midnight and proceeding to Kashmir, where they arrived around 12:30 a.m.

Upon their arrival at Kashmir, the club's bouncer only asked for identification from Drebes, but not Rothschild, whom he recognized from an earlier visit. Both Drebes and Rothschild had fake driver's licenses, which showed their ages to be twenty-three and twenty-one respectively.

Once inside the club, the three friends headed directly to the bar, where the bartender served the two men alcoholic drinks at about 12:35 a.m.[1] Over the course of the next hour and a half, the bartender served Rothschild and Drebes a total of five alcoholic drinks each.

[1] Caudill did not drink while at Kashmir.

The three friends left Kashmir at about 2:00 a.m. At 2:13 a.m., Rothschild and Drebes died in a single-car accident. At the time of death, Rothschild had a blood-alcohol content (BAC) of .162%, and Drebes had a BAC of .157%.

In the wake of the accident, the Division opened an investigation into the circumstances leading to the two deaths. The Division interviewed the bartender, the two dancers who interacted with the decedents, the bouncer, the disc jockey, Caudill, and Kashmir's co-owner about the events of June 27-28, 2011.

According to Caudhill, on the way out of the restaurant before they went to Kashmir, Rothschild was incoherent, argumentative, and slurring his words. Caudill drove Rothschild as, in her opinion, he was too intoxicated to drive. Drebes backed his car into a parked truck and made a cursory examination of the damage before driving away.

Caudill recounted that Kashmir's bouncer did not ask for identification from any of them upon arrival. The bouncer initially contended that he inspected all of their identifications, but later admitted that he only examined Drebes' license. The bouncer further conceded that when he looked at Drebes' license, he did not hold it up to Drebes' face to compare the photo for likeness. Instead, the bouncer stated

that he simply used the light on his cell phone to illuminate the license, concluded that "they looked like they were old enough," and allowed all three individuals to enter on that basis.

When questioned by the Division on his training and knowledge on spotting fake driver's licenses, the bouncer had difficulty articulating the telltale characteristics of bona-fide licenses. The bouncer also reported that management had not issued him an ultraviolet light to undertake proper inspection of its patrons' driver's licenses. He admitted that he was "not educated on fake ID's," and "probably need[ed] to learn more."

When interviewed by the Division, the bartender claimed that both Rothschild and Drebes seemed "fine" to her, and that neither appeared to have been drinking previously. She elaborated that the two men "seemed like they loosened up some, like they were having fun," and denied that there were any "red flags" that would have indicated to her that they were becoming intoxicated. At the same time, the bartender recalled asking Drebes whether the group had a designated driver because she observed him "stumbling over his words," even before she served him his last round of drinks. She tempered this explanation,

conjecturing that Drebes was probably simply "nervous with the girls that were half naked standing around him."

The two Kashmir dancers who interacted with Rothschild and Drebes also described the young men as appearing sober. For example, one dancer stated that "they didn't look drunk" to her. She explained that there was nothing in their mannerisms, either in speech or facial appearance, that would have indicated intoxication. Later in her interview, the dancer conceded that there was a point in the night at which Drebes appeared "f*cked up or not looking too good." She also asked who was the designated driver for the group. Like the bartender, she tempered her statement, explaining: "I would say like after the lap dance [Drebes] was fired up."

The other dancer provided the investigators with equally contradictory narratives of her evening with the two young men. She explained that the young men did not "seem drunk to [her]," and suggested that they had never been to a strip club and were simply over-excited by the girls. However, she indicated that the young men looked very young and had "baby faces." She also noted that at one point in the night, one of the two men had a strong odor of alcohol on his breath, and began mumbling. She reported being "really worried" and noticed "the alcohol is starting to kick in." The dancer also asked who was driving

because "[t]hey seemed a little tipsy." Twice she offered to drive them herself.

On August 6, 2012, John Brick, Ph.D., a nationally recognized expert on the pharmacological, physiological, and behavioral effects of alcohol, prepared a report for the Division regarding the incident. Dr. Brick noted that at the time of death, Rothschild and Drebes had BACs over the legal limit. Dr. Brick was able to extrapolate the rate of alcohol metabolism in both Rothschild's and Drebes' bodies. The doctor concluded:

> Messrs. Drebes' and Rothschild's blood alcohol level increased steadily throughout the evening and early morning hours so that by about 9:20 p.m. (Rothschild) or 10:20 p.m. (Drebes) reached the concentration that by law, defines alcohol intoxication. Since both decedents were less than the legal age (<21), the applicable legal definition of intoxication is 0.01% . . . . With continued drinking and/or absorption of alcohol, Messrs. Drebes' and Rothschild's blood alcohol level increased further, reaching a concentration of .15% before the service of the last drink (Rothschild) [or] at about the time of service (Drebes).

From this data, Dr. Brick determined that when Rothschild and Drebes arrived at Kashmir that evening, both young men had already surpassed the legal limit of intoxication. Dr. Brick also concluded,

> given the nature of [the] accident, namely high speed driving, failure to make the

> necessary observations, process and respond to roadway conditions, failure to maintain control of [the] vehicle and high blood alcohol levels, it is also my opinion that alcohol intoxication was a significant contributing factor to if not the primary cause of this double fatal crash.

On August 22, 2012, the Division issued a notice of charges against defendant, charging it with four counts of violating the provisions of the Alcoholic Beverage Control Act, N.J.S.A. 33:1-1 to -97, and its related regulations. Specifically, it charged defendant with two counts of serving intoxicated persons, N.J.A.C. 13:2-23.1(b), and two counts of serving persons under the legal age, N.J.A.C. 13:2-23.1(a). Defendant denied the charges.

On February 14, 2013, Joseph Vasil, the Coordinator of the New Jersey Motor Vehicle Commission's Fraudulent Document Training Unit, prepared a certification for the Division analyzing Drebes' and Rothschild's fake driver's licenses. He opined that if Rothschild or Drebes had presented their fake driver's licenses, "Kashmir's employees should have immediately recognized these documents to be counterfeit." Vasil identified six distinct areas in which Kashmir's security should have been able to quickly identify that Rothschild's and Drebes' licenses were not genuine: (1) the licenses' transaction codes did not contain numbers that corresponded to the licenses' dates of

issue; (2) the signatures did not overlap with portions of the photographs, as a genuine license's signature would; (3) the ultraviolet images on the main photographs were misaligned; (4) the fraudulent licenses lacked proper lamination on the reverse side; (5) the fraudulent licenses did not emit the correct color of light when a flashlight was shone through them; and (6) the holographic images were inaccurate. Based on these obvious signs in Rothschild's and Drebes' licenses, Vasil reached an expert opinion to a reasonable degree of certainty "that a liquor licensee could not reasonably rely on either of the aforementioned fictitious identifications as a basis upon which to believe that either Messrs. Drebes and/or Rothschild were of legal age to consume alcoholic beverages."

The Division filed a motion for summary decision on February 28, 2013. The parties convened for oral arguments on June 6, 2013, before Division Director Michael I. Halfacre. On August 6, 2013, the Director granted the Division's motion for summary decision, and simultaneously revoked defendant's liquor license.

The Director determined, based on the observations of all the witnesses interviewed, that both Rothschild and Drebes were apparently intoxicated at the time they were served their last round of drinks, if not sooner. Moreover, even if they did not

appear intoxicated, there was no dispute that they were actually intoxicated at Kashmir. Thus, the Director found that defendant was guilty of the first two counts of serving intoxicated persons, N.J.A.C. 13:2-23.1(b).

Next, the Director determined that defendant was guilty of serving persons under the legal age, N.J.A.C. 13:2-23.1(a), and not entitled to the affirmative defense established by N.J.S.A. 33:1-77. The Director found that the affirmative defense was not available as to Rothschild because the bouncer did not ask for his identification. Additionally, the Director determined that defendant's security was impermissibly lax, and that it failed to equip its bouncer with the proper tools or training for counterfeit identification detection. As a result, the Director noted, the bouncer was unable to discern even the most rudimentary hallmarks of fraudulent driver's licenses. Defendant's care in screening underage patrons had been so lax, the Director concluded, that it could not be found to have acted "in good faith" in relying upon Drebes' identification card.

Thus, the Director granted summary decision to the Division finding that "even with all legitimate inferences in [defendant's] favor, [it] failed to raise a genuine issue of material fact." The Director opined that the tragic events that resulted in the loss of two young lives could have been

prevented if the bouncer was properly trained and equipped because they would have been turned away at the door, or if the bartender had ceased to serve them, as they were already intoxicated.

In setting the revocation penalty, the Director found the deaths of Rothschild and Drebes and defendant's cavalier enforcement policies to be aggravating factors. He rejected all of the proffered mitigating factors, explaining that defendant's lack of prior offenses was no defense because of the severity of this incident; defendant's minimal training was unavailing because it was clearly ineffective; and defendant's full cooperation in the Division's investigation was not a mitigating factor, because it was the duty of any licensee. This appeal ensued.

On appeal, defendant raises the following contentions:

> POINT I: SUMMARY DECISION IS INAPPROPRIATE AS TO CHARGES 1 AND 2 BECAUSE ISSUES OF MATERIAL FACT EXIST AS TO WHETHER DECEDENTS WERE "INTOXICATED" IN VIOLATION OF N.J.A.C. 13:2-23.1(b).
>
> POINT II: SUMMARY JUDGMENT IS INAPPROPRIATE AS TO CHARGES 3 AND 4 BECAUSE OF THE EXISTENCE OF MATERIAL DISPUTES OF FACT CONCERNING THE GOOD FAITH AND REASONABLENESS OF KASHMIR'S INSPECTION.
>
> POINT III: REVOCATION IS AN ILLEGAL TAKING BARRED BY THE FIFTH AMENDMENT OF THE U.S. CONSTITUTION (NOT RAISED BELOW).

POINT IV: THE DIRECTOR'S ORDER IS A VIOLATION OF DUE PROCESS BECAUSE REVOCATION IS ARBITRARY, CAPRICIOUS, AND UNRELATED TO ANY LEGITIMATE PURPOSE.

POINT V: THE DIRECTOR COMMITTED REVERSIBLE ERROR BY FAILING TO ADEQUATELY CONSIDER MITIGATING FACTORS.

The scope of our review in an appeal from a final decision of an administrative agency is limited. Circus Liquors, Inc. v. Governing Body of Middletown Twp., 199 N.J. 1, 9 (2009). We must sustain the agency's action in the absence of "a 'clear showing' that it is arbitrary, capricious, or unreasonable, or . . . lacks fair support in the record[.]" Id. at 9-10 (citing In re Herrmann, 192 N.J. 19, 27-28 (2007)). In reviewing an agency's action, we consider:

> (1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.
>
> [Mazza v. Bd. of Trs., Police & Firemen's Ret. Sys., 143 N.J. 22, 25 (1995).]

In weighing these considerations, we must recognize, when appropriate, an "agency's 'expertise and superior knowledge of a particular field.'" Circus Liquors, supra, 199 N.J. at 10

(quoting Greenwood v. State Police Training Ctr., 127 N.J. 500, 513 (1992)).

In particular, we must accord "substantial deference" to a determination of the Director of the Division enforcing the State's regulations on the sale of alcoholic beverages. Ibid. "[T]he 'Director has powers of supervision and control which set him apart from any other formal appellate tribunal.'" Ibid. (quoting Blanck v. Mayor & Borough Council of Magnolia, 38 N.J. 484, 491 (1962)). Moreover, because the State's regulation of liquor "'is a subject by itself,'" we cannot indiscriminately apply principles we otherwise apply when we review actions of administrative agencies. Ibid. (quoting Blanck, supra, 38 N.J. at 490).

Similar to summary judgment, summary decision is granted upon a showing "that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b); see also E.S. v. Div. of Med. Assistance & Health Servs., 412 N.J. Super. 340, 350 (App. Div. 2010). If the moving party properly supports its motion for summary decision, the "adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." N.J.A.C. 1:1-12.5(b).

In deciding a summary judgment motion, the evidence must be viewed "in the light most favorable to the non-moving party." Henry v. N.J. Dep't of Human Servs., 204 N.J. 320, 329 (2010) (citing Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)).

In New Jersey, establishments that are granted liquor licenses are held strictly liable for violations of the Alcoholic Beverage Control Act, N.J.S.A. 33:1-1 to -97. Div. of Alcoholic Beverage Control v. Maynards Inc., 192 N.J. 158, 180-81 (2007).

> It has long been the law in New Jersey that, in the context of the regulation of alcoholic beverages, "the word 'suffer' . . . imposes responsibility on a licensee, regardless of knowledge, where there is a failure to prevent the prohibited conduct by those occupying the premises with his authority."
>
> [Id. at 180 (alteration in original) (emphasis omitted) (quoting Essex Holding Corp. v. Hock, 136 N.J.L. 28, 31 (Sup. Ct. 1947)).]

Defendant argues that the Director improperly granted summary decision regarding the charges for violation of N.J.A.C. 13:2-23.1(b), which provides:

> No licensee shall sell, serve or deliver or allow, permit or suffer the sale, service or delivery of any alcoholic beverage, directly or indirectly, to any person actually or apparently intoxicated, or permit or suffer

> the consumption of any alcoholic beverage by any such person in or upon the licensed premises.

Specifically, defendant contends that material factual disputes existed as to whether Drebes and Rothschild were actually or apparently intoxicated. While we agree that a factual dispute existed as to the apparent intoxication of the young men based on the inconsistent observations of Kashmir's staff, there is no factual dispute that they were actually intoxicated. Defendant presented no competent evidence to contradict Dr. Brick's expert opinion that when both young men arrived at Kashmir, they had already surpassed the legal limit of intoxication and Kashmir's bartender served them at least five drinks each. Additionally, it is uncontroverted that at the time of their deaths less than fifteen minutes after leaving the club, Rothschild's BAC was .162% and Drebes' was .157%, well over the legal limit for adults. As actual intoxication is all that is needed to satisfy a finding of guilt under N.J.A.C. 13:2-23.1(b), we find no reason to overturn the Director's grant of summary decision, which was supported by substantial credible evidence in the record. See Circus Liquors, supra, 199 N.J. at 9-10.

Defendant also argues that the Director improperly granted summary decision regarding the charges under N.J.A.C. 13:2-23.1(a), which provides:

> No licensee shall sell, serve or deliver or allow, permit or suffer the sale, service or delivery of any alcoholic beverage, directly or indirectly, to any person under the legal age to purchase or consume alcoholic beverages, or allow, permit or suffer the consumption of any alcoholic beverage by any such person in or upon the licensed premises.

It is well settled that "[s]trict regulation of the distribution of alcoholic beverages, particularly to young people, has repeatedly and emphatically been approved by our courts[.]" N.J. Div. of Alcoholic Beverage Control v. H & H Wine & Spirit Shop, Inc., 216 N.J. Super. 532, 537 (App. Div. 1987). Nevertheless, the inadvertent sale of alcoholic beverages to those under the legal age of consumption can be shielded from liability if the licensee fulfills all parts of the following three-part inquiry:

> (a) that the purchaser falsely represented in writing, or by producing a driver's license bearing a photograph of the licensee . . . that he or she was of legal age to make the purchase, (b) that the appearance of the purchaser was such that an ordinary prudent person would believe him or her to be of legal age to make the purchase, and (c) that the sale was made in good faith relying upon such written representation, or production of a driver's license bearing a photograph of the licensee, . . . and

> appearance and in the reasonable belief that the purchaser was actually of legal age to make the purchase.
>
> [N.J.S.A. 33:1-77.]

Here, it is undisputed that Kashmir sold alcohol to persons under the legal drinking age, resulting in a violation of N.J.A.C. 13:2-23.1(a). Moreover, we are satisfied that there is sufficient credible evidence in the record to support the Director's finding that defendant did not satisfy the requisite elements of the affirmative defense under N.J.S.A. 33:1-77. First, the bouncer admitted that he did not card Rothschild, making the affirmative defense of good faith totally unavailable as to the third charge, which concerned Rothschild.

As to Drebes, at the summary decision stage, the first two prongs arguably could be satisfied since he presented identification that he was over twenty-one, and there was a factual dispute as to whether Drebes appeared to an ordinary prudent person to be twenty-one. That said, we are in accord with the Director that no factual dispute existed as to the final prong. The record reveals that the bouncer gave only a cursory glance at Drebes' fake license, and the club had a lax enforcement policy as well as an absence of training or proper equipment to effectively screen underage patrons. Finally, defendant has presented no competent evidence to contradict

Vasil's report, which concluded that Kashmir employees should have immediately recognized that the license was fake and could not reasonably rely on it as proof of age. Thus, as no genuine dispute existed concerning the absence of good faith, we discern no reason to disturb the Director's decision, which was not arbitrary, capricious, or unreasonable. See Circus Liquors, supra, 199 N.J. at 9-10.

Defendant also contends that the revocation was "extremely severe" and did not properly account for mitigating factors. We disagree.

"[A]ppellate review of an agency's choice of sanction is limited. Courts generally afford substantial deference to the actions of administrative agencies . . . because of the expertise and superior knowledge of agencies in their specialized fields, and because agencies are executive actors[.]" In re Suspension or Revocation of License Issued to Zahl, 186 N.J. 341, 353 (2006) (internal quotation marks and citations omitted). We "'will modify a sanction only when necessary to bring the agency's action into conformity with its delegated authority.'" Maynards, supra, 192 N.J. at 183 (quoting Zahl, supra, 186 N.J. at 353-54). "Distilled to its essence, then, 'the test in reviewing administrative sanctions is whether such punishment is so disproportionate to the

offense, in light of all the circumstances, as to be shocking to one's sense of fairness.'" Id. at 184 (quoting Zahl, supra, 186 N.J. at 354).

The penalty for a first-time violation of N.J.A.C. 13:2-23.1(a) and (b) is ordinarily a fifteen- or thirty-day license suspension for each charge. N.J.A.C. 13:2-19.11(i). However, the Director may adjust that penalty based on a finding of aggravating or mitigating factors. N.J.A.C. 13:2-19.13. The possible penalties available to the Director includes license revocation, even for a first-time offense, in cases where the violation was sufficiently egregious. Indeed, the regulation makes clear that

> if death or serious injury occurred as a result of the incident that gave rise to the violation, the Director may revoke the license, even if it is a first violation. The licensee has the burden of demonstrating mitigating circumstances.
>
> [N.J.A.C. 13:2-19.13(c).]

In this case, the Director considered and rejected defendant's proffered mitigating factors. In setting the penalty, the Director emphasized the deaths of two young men, the egregiously derelict enforcement procedures at Kashmir, and the lack of training and equipment. The resulting decision revoking appellant's liquor license, although severe, was not, in light of all the circumstances, so inconsistent with the

offense as to shock our sense of fairness. See Maynards, supra, 192 N.J. at 184. Therefore, we decline to modify it.

Defendant's remaining arguments do not warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). It is well-settled that defendant did not have a protectable property interest in its liquor license, and thus no violation of the Takings Clause, U.S. Const. amend. V, occurred. See In re Xanadu Project at Meadowlands Complex, 415 N.J. Super. 179, 198 (App. Div.), certif. denied, 205 N.J. 96 (2010). Additionally, while due process protections attach to the revocation, suspension, or denial of a liquor license, defendant's due process rights were satisfied here by the notice the Division gave it and the opportunity it had to contest the charges. See id. at 198-99.

In sum, we conclude that there is sufficient evidence in the record to support the Director's conclusion that defendant failed to operate its business in the manner required by N.J.A.C. 13:2-23.1(a) and (b) and that the penalty was appropriate.

Affirmed.

STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF ALCOHOLIC BEVERAGE CONTROL

LIC. NO. 0614-33-019-007

AGENCY DKT. NO.: S-11-35334

DIVISION OF ALCOHOLIC BEVERAGE CONTROL Petitioner, v. DAVEJOE, LLC, t/a KASHMIR, Respondent.	)	FINAL CONCLUSION AND ORDER GRANTING SUMMARY DECISION

Kevin Marc Schatz, Senior Deputy Attorney General, Attorney for Petitioner

Brian M. Thorn, Esq., Attorney for Respondent (White, Fleischner & Fino, LLP)

BY THE DIRECTOR:

On June 28, 2011, 18 year old Jonathan Rothschild and 20 year old Ian Drebes were killed in a one-car accident after consuming alcohol at DaveJoe LLC, t/a Kashmir ("Kashmir"). When they died, Rothschild had a blood alcohol concentration ("BAC") of .162, and Drebes had a BAC of .157.

On May 22, 2012, the Division of Alcoholic Beverage Control's Enforcement Bureau (Enforcement Bureau) provided Kashmir with a copy of its investigation report in an effort to settle this matter without litigation. However, no settlement was reached. Consequently, on

August 22, 2012, the Enforcement Bureau issued a Notice of Charges, under Agency Docket No. S-11-35334, which contained four charges. In Charges 1 and 2, the Enforcement Bureau alleged that Kashmir allowed, permitted or suffered the sale, service or delivery of alcohol to, or consumption by, Ian Drebes and Jonathan Rothschild, who were actually or apparently intoxicated, in violation of N.J.A.C. 13:3-23.1(b). In Charges 3 and 4, the Enforcement Bureau alleged that Kashmir sold alcohol to Drebes and Rothschild, each of whom was under the legal age, in violation of N.J.A.C. 13:3-23.1(a)(ABC722-725).[1] The Notice of Charges advised Kashmir that the Enforcement Bureau sought revocation of its license.

By letter dated February 28, 2013, the Enforcement Bureau filed a Motion for Summary Decision, also consenting to a fourteen (14) day extension for Respondent to submit their brief in opposition to the motion. In this letter, the Enforcement Bureau also requested oral argument. Kashmir, by letter dated March 5, 2013 from Peter M. Rhodes, Esq. of Cahill, Wilinski, Rhodes & Joyce, requested the above mentioned fourteen (14) day extension. Subsequently, on March 26, 2013, a Substitution of Attorney was executed, and Brian M. Thorn, Esq. became the substituting attorney for Respondent. By letter dated March 28, 2013, Brian M. Thorn, Esq. requested an extension of time to file Respondent's opposition to Petitioner's motion. Senior Deputy Attorney General Schatz consented to the extension, and the extension was granted on April 2, 2013.

By letter dated April 19, 2013, Kashmir's brief in opposition to the Enforcement Bureau's motion for summary decision was submitted. By letter dated April 24, 2013, the Enforcement Bureau requested a two week extension to file their reply brief, with the consent of Brian M.

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[1] "ABC" followed by a number refers to ABC Enforcement Bureau's appendix.

Thorn, Esq. This extension was later granted on April 29, 2013. By letter dated May 6, 2013, the Enforcement Bureau submitted their reply brief. Having been requested, oral arguments were conducted before me on June 6, 2013. Kevin Marc Schatz, Senior Deputy Attorney General, appeared on behalf of Petitioner. Brian M. Thorn, Esq., appeared on behalf of Respondent. Kashmir's owner David Glassman was also present.

After a thorough examination of the entire record, I find the following facts to be UNDISPUTED:

Kashmir holds Plenary Retail Consumption License 0614-33-019-007 (ABC707), which is sited at 3926 North Delsea Drive, Vineland, New Jersey (ABC717). On June 27, 2011 Jonathan Rothschild was 18 years old, and Ian Drebes was 20 years old (ABC396). Drebes and Rothschild were both in possession of fictitious New Jersey drivers' licenses on the night in question (ABC 406). Drebes's fictitious license said he was 23 years old, and Rothschild's fictitious license said he was 21 years old (ABC 662; ABC 664).

At approximately 7:00 p.m. on the night of the fatal accident, Rothschild was picked up by his girlfriend Mandy Caudill (ABC 514).[2] Caudill and Rothschild had been dating roughly four months, and she had seen him drinking two times and had seen him intoxicated (ABC 57). They went to Caudill's home, where Rothschild drank vodka mixed with cranberry-grape juice in a 16-ounce plastic cup (ABC516-517). Rothschild had not eaten since he and Caudill had a mid-afternoon lunch sometime around 2:00 p.m. (ABC514). The drink contained approximately three inches of vodka, which occupied about a quarter or a third of the cup. However, after tasting it, he added more juice, because it was too strong (ABC518).

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[2] Ms. Caudill is incorrectly referred to as "Cordell" in some documents (ABC509).

Caudill and Rothschild then went to Taylor's Grill and Bar ("Taylor's"), arriving at about 8:45 p.m. (ABC520).[3] While at Taylor's, Rothschild consumed between one and three Coors Light beers and one "Dirty Girl Scout" shot (ABC523-524; ABC531).[4] At approximately 10:00 p.m., Drebes joined Caudill and Rothschild at Taylor's (ABC526). Drebes told Caudill that he had been drinking Captain Morgan rum and Coca-Cola ("Captain and Coke") while at work and then continued to consume another Captain and Coke at Taylor's (ABC527). As they were getting ready to leave Taylor's around midnight, Rothschild gave Caudill's friend, Danielle Horan, a "huge hug goodbye, which [she] thought was a little strange... because [she] didn't know him" (ABC649) and it was, therefore, inappropriate (ABC658).[5]

Rothschild and Drebes were arguing in Taylor's parking lot, and Caudill stated that she knew, and anyone who was not his girlfriend would know, that Rothschild was intoxicated (ABC 534). According to Caudill, when Rothschild was drunk he "typically slurs his words a little bit and gets all aggressive [and] thinks everyone's out to get him..." (ABC534). Drebes and Rothschild agreed to meet at Kashmir. Rothschild was driven by Caudill because he was unable to drive due to his intoxication. However, Caudill stated that Drebes may have felt the effects of his alcohol "a little bit, but..." was better to drive than Rothschild was (ABC536). When Drebes

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[3] "Taylor's" refers to Monroe Restaurant, Inc., t/a Taylor's Grill & Bar, which holds Plenary Retail Consumption License No. 0811-33-010-004. It is located at 2021 North Black Horse Pike, Williamstown, New Jersey (ABC727). ABC is prosecuting Taylor's for its service of alcohol to Drebes and Rothschild under Agency Docket No. S-11-35349 (Ibid.).

[4] A Dirty Girl Scout contains vodka, Kahlua, Bailey's Irish Cream and white creme de menthe (http://www.drinksmixer.com/drink3191.html).

[5] Horan thought that Rothschild may have had seven drinks at Taylor's (ABC648). Horan's statement was inadvertently omitted from the Kashmir investigation report. It is included, because Dr. Brick's report references Horan's statements.

was leaving the Taylor's parking lot, he backed his car into a truck in a parking spot (ABC532). Drebes then drove away alone in his vehicle after making a cursory examination of the damage and failing to notify the truck's owner or the police (ABC536).

On June 28, 2011 at approximately 12:30 a.m., Drebes, Caudill and Rothschild entered Kashmir (ABC 174). The group exited at approximately 2:00 a.m., with Drebes and Rothschild consuming 4-6 alcoholic beverages each during their stay (ABC160; ABC320; ABC289; ABC160-166).[6] Kashmir's bouncer, Tom Ballone II, initially stated that he checked both Rothschild's and Drebes' identification as soon as they walked in the front door (ABC212). However, when questioned further, he indicated that he knew one of the youths (Rothschild) from a previous night, and therefore he did not ask to see his identification (ABC214). In another statement, Ballone clarified that he only saw Drebes' identification, but not Rothschild's nor Caudill's and admitted he "[s]hould have checked all three of them" (ABC227; ABC230). Kashmir's owner David Glassman agreed that Ballone only checked Drebes' identification on the night of the accident (ABC325).

Ballone stated that when he checks IDs, he uses the light on his cell phone to check the expiration date because "it's bright enough," but he did not have a flashlight (ABC215-216).

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[6]With the exception of statements provided by Caudill, the facts regarding the events at Kashmir are based exclusively on the interviews of Kashmir employees conducted by ABC Investigator Christopher Gancy, the sworn statement of Kashmir's owner, S. David Glassman, and evidence provided by Kashmir to ABC. The statements of Kashmir's employees are legally competent evidence pursuant to N.J.R.E. 803(b)(4). Nobero Co. v. Ferro Trucking, Inc., 107 N.J. Super. 394, 403 (App. Div. 1969). Bartender Billie Jo Jennings' admission is also admissible pursuant to N.J.R.E. 803(c)(24) as a declaration against interest because her admission was contrary to any defense she could have raised to a criminal charge of selling alcohol to a person under the legal age. Notably, her attorney, Michael Kouvatas, Esquire, was present when she gave her statement (ABC150). Finally, the evidence which formed the factual basis of the Enforcement Bureau's experts' opinions is admissible pursuant to N.J.R.E. 703.

Ballone went on to say he spent "a few seconds, maybe...[f]our or five" looking at Drebes' license (ABC240). He "glanced" at Drebes' face as he entered the bar, but did not compare it to the photograph on the license he presented (ABC215-216; ABC240). In his statement, Ballone said he thought the IDs showed Rothschild and Drebes to be 24 and 25 respectively (ABC215); however, the counterfeit licenses indicated they were in fact 21 and 23(ABC662; ABC664). When asked if they looked 24 and 25 years old, Ballone said "...they looked like they were old enough" (ABC215).

When discussing how to identify counterfeit identification, Ballone admitted he did not know that the last four digits of a genuine driver's license number matches the person's date of birth. He said that he "found that out later on" admitting "[he] probably need[s] to learn more" about identifying fake IDs (ABC218). When asked if he knew how to identify fake IDs, he mentioned that he knows that with a black light certain symbols appear, but he did not have a black light (ABC218). Ballone did not know that Drebes had shown a counterfeit driver's license until the next evening when his manager told him. In fact, Ballone believes it was the first fake identification he has ever seen (ABC229).

Kashmir's dancer Shannon Hoover (stage name "Kamaro") doubted that Rothschild and Drebes were 21 years old. Hoover observed, "[t]hey did look young" (ABC278). She stated, "I told him [Drebes] he looked like a baby...You's guys all looks like little kids'" (ABC277). She went on to say:

> They did look a little young. And that's why I asked him, I said, 'How old...?' I'm like, 'Not to be ignorant," I said, 'But you's guys have such a baby face, how old are you?" [Drebes] said he was 24, and the other kid said he was 23... (ABC277).

Hoover went on to say "[t]hey were really cool kids, you know? Now I can say, 'kids,' because they're...babies to me (ABC282).

Kashmir's bartender Billie Jo Jennings had never attended a formal bartending class, but took the online TIPS class and received a certification (ABC130; ABC156).[7] Jennings served Rothschild and Drebes each a Blue Moon beer, their first drinks at Kashmir, at approximately 12:30 a.m. (ABC160). Jennings stated that she did not see Caudill drink anything, not even water, which was also confirmed by Caudill (ABC160; ABC541-542). According to Caudill, when Drebes ordered his second drink (a Captain and Coke) about 15-25 minutes after ordering his first, "he asked the bartender what he could drink to get him messed up quicker and cheaper" (ABC540). Jennings also relayed this statement to Kashmir's owner Glassman after the fact. (ABC 319). Despite this statement, Jennings served both Drebes and Rothschild a Captain and Coke (ABC540-541; ABC161-162). Jennings also commented that she "hate[s] serving people that just turned 21, 22...Because they act so young at the bar. They want the cheapest drinks, they won't tip." When asked that she made the observation that Drebes and Rothschild were acting young she said "Yeah" based on "[h]ow they asked for what drinks we have, and the specials, and the cheapest drink" (ABC180).

At approximately 1:15 a.m. Jennings served Drebes another Captain and Coke, his third drink at Kashmir (ABC164-165). Approximately 15 minutes later, around 1:30 a.m., before Drebes and Rothschild received couch dances, Drebes ordered four shots of Jose Cuervo; one for

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[7] Training for Intervention ProcedureS ("TIPS") and Techniques of Alcohol Management ("TAM") are two recognized programs that provide education and training to alcoholic beverage servers throughout the industry in the United States.

himself, one for Rothschild, and two for two of Kashmir's dancers.[8] At the same time, Drebes also ordered two more Captain and Cokes for himself and Rothschild (ABC165; ABC166). Drebes and Rothschild finished their shots and their drinks at or around 1:45 a.m. (ABC174). Kashmir's couch log confirms that they received a couch dance from 1:38-1:42 a.m. (ABC252)[9]. Glassman also confirmed that he watched Drebes and Rothschild each drink five to six drinks during their time at Kashmir (12:30 a.m to approximately 1:45 a.m.) (ABC320). Dancer Hoover also estimated that Drebes and Rothschild had "five or six" drinks, because she remembered having "[f]our or five shots...with them" (ABC279). The number of drinks that the witnesses estimated is consistent with the record prepared by Kashmir's manager Tom Watson (at Glassman's request) based on their surveillance video (ABC322-323; ABC254).

There were several eye witnesses at Kashmir on the night of the accident who observed Drebes and Rothschild exhibiting signs of intoxication. Dancer Shannon Hoover, aka "Kamaro" noted that

> ...about 20 minutes to a half hour after them getting there they started getting a little rowdy or whatever...They just seemed like they were speeding a little bit...just rambling. And I couldn't even make out half the shit they were... like [Drebes] was saying, just going on, and on, and on (ABC279).

Hoover stated that they had 5-6 drinks because:

> [she] remember[ed] having four with them and ...after about like the fourth or fifth drink of mine, I started feeling a little tipsy (ABC279). So I asked them who was driving when ...when BJ

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[8]The shots contained 1.25 ounces of alcohol (ABC327).

[9]Kashmir's Couch Dance Log is admissible pursuant to N.J.R.E. 803(c)(6), because it is a business record of dances that included the names of each dancer, the time of each dance and the amount collected for the dance (ABC252).

> [Jennings] came back over to get us another shot. I said, "Well, who's driving," I said, "Because I don't want you's guys to get too twisted and not be able to get home"(ABC279).

When asked why she would ask about their ride, Hoover stated "[t]hey seemed a little tipsy, that's why I asked them who was driving," further clarifying that she asked this question around 1:00-1:15 a.m. (ABC280). When discussing the level of their intoxication she stated "he didn't really seem completely drunk or obliviated to...to my recollection. I mean, I would have noticed that he was getting trashed..." She did however say that their speech was affected and they were "mumbling" (ABC281).

When Hoover was giving Drebes a lap dance she asked him:

> "... you're sure [Caudill's] driving?" He said, "Yeah, I'm positive." I said, "All right, but if not, wait, I'll drive you." Twice I asked him. Because while I was giving him the lap dance [at approximately 1:38 a.m.], I could severely smell the alcohol on him by that point, and just his mumbling. I was really worried (ABC285).

Hoover noted "...at that point is when I started to notice, 'Okay the alcohol is starting to kick in'"(ABC286). She stated that it was too dark to see if they were wobbling, but they were talking really fast (ABC286).

When dancer Lauren Geer (stage name Dutchess) was asked if Drebes and Rothschild ever appeared drunk or "not looking too good" she replied, "I mean, the kid I was talking to, he was a bit fired up" (ABC192). Even going so far as to ask Caudill if she was taking them home because they were drinking, to which Caudill said she was the designated driver (ABC192). When asked what prompted her question, Geer stated "[w]ell, I guess like Ian was a little bit fired up. Like, the other guy looked fine" (ABC192). When asked about their level of intoxication she stated they were "[n]ot like trashed. He looked buzzed...he wasn't like slouched over...He

seemed like fired up..." (ABC193). But stated they were "...drinking hyper" (ABC193). She went on to say "[t]hey didn't look drunk to me," despite video suggesting that Ian almost fell over when he crossed his legs while talking to her outside Kashmir before departing (ABC195).

Bartender Jennings stated that when Drebes and Rothschild entered the bar, "[t]hey didn't seem like they were drinking before" (ABC162). After they were served their second drink, a Captain and Coke, Jennings stated "[t]hey still seemed fine but they seemed like they loosened up some, like they were having fun" (ABC163). She states that only Drebes consumed the next round which was another Captain and Coke (ABC165). Then, at approximately 1:30 a.m., she served them four shots of Jose Cuervo tequila and two Captain and Cokes, this was a few minutes before last call (ABC166). At that time she stated that she "...had to ask Ian at that time if he had a designated driver before I have him the shots or the Captain and Coke, and he said that the girl was the designated driver for him" (ABC166). She purportedly asked him this question because they showed signs of intoxication "[a] little bit but not much" he "loosened up some" (ABC 167). She went on to say "[m]y dancers heard him stumbling over his words..." "[a]nd so he was stumbling over his words." And I said, "Do you have a designated driver?" (ABC168). When asked what exactly made her ask about the driver she said, "[b]ecause he was stumbling over his words." An ABC investigator clarified "[b]efore the four shots were served?" to which Jennings responded "[y]es" (ABC169).

Therefore, Rothschild and Drebes each demonstrated visible signs of intoxication before they were served their last alcoholic beverages at Kashmir (ABC167-168; ABC171; ABC198; ABC280; ABC509-510) and these signs were apparent enough to Jennings to arouse her concern for how they were getting home. Notably, during her TIPS training, Jennings was taught that

when patrons are "drunk, slurring words, [or] stumbling" she should "get a bouncer, give the customer water, call a cab" and stop serving them alcohol (ABC157).

Caudill also noticed that Drebes was showing signs of intoxication, because "[h]e was getting loud and tried to kiss me" (ABC544). He was "bugging" Caudill for money to buy additional drinks and dances (ABC545) and getting "rowdy" and "loud" (ABC548). She agreed that Rothschild and Drebes were "both pretty much drunk" (ABC555). Caudill confirmed Jennings' account that Kashmir served Rothschild and Drebes more alcoholic drinks after they appeared intoxicated (ABC510).

Rothschild, Drebes and Caudill left Kashmir at approximately 2:00 a.m. (ABC160). Kashmir's Disc Jockey ("DJ") Joseph Pastorino indicated that the passenger (Rothschild) was stumbling (ABC139). Caudill "pleaded" with Drebes and Rothschild not to drive, because "[Rothschild] was drunk and [she] believed [Drebes] was intoxicated to the point that he should not be driving" (ABC436; ABC529). In the parking lot outside Kashmir, Drebes and Rothschild were "ranting" and Rothschild was " a little off balance" and was walking down the road shouting "[a]rrest me...arrest me" (ABC436; ABC558; ABC554).

Pastorino observed Rothschild, Drebes and Caudill in the parking lot as they left Kashmir, describing Rothschild as "obviously" intoxicated and Drebes as "not heavily intoxicated, but ...by the driver [Drebes'] behavior it would appear...that, yes, he was [intoxicated]..." (ABC146). Describing that "...as they left they did pull out of the parking lot... parking spot rather quick and actually almost clipped the car next to them, which two girls were in" (ABC139). He then "flew to the end of the parking lot and didn't even stop, made a left spinning his tires" (ABC140). Bouncer Ballone was also in the parking lot at this time, taking

out the trash, and he observed Drebes and Rothschild leave "like a bat out of hell...Just burn out, tires squealing" (ABC246). Kashmir's owner Glassman further confirmed the manner of their departure (ABC323).

Caudill followed behind Drebes and Rothschild in her car (ABC436; ABC53) as they traveled westbound on Weymouth Road, also known as County Road 690 (ABC400). Police reports describe how the accident unfolded: After approximately one mile, "the roadway has a moderate curve to the left and is clearly marked with paint lines and street signs that indicate the roadway's curvature ... the weather at the time of the crash was hot and humid, with clear skies and a dry roadway" (ABC398). Drebes failed to maintain control of his Acura (ABC400), which left the westbound lane to the right and began to yaw. The vehicle then crossed over the center line into the eastbound lane, stuck the guardrail located south of the eastbound lanes, ripped up a post which had secured the guardrail into the ground and impaled it into a tree (ABC400; ABC480).

The Acura then rotated counter clockwise, overturned and traveled west along the guard rail (ABC400). The vehicle crossed the centerline again before coming to an uncontrolled final rest on the bridge facing southwest within the westbound lane of the roadway (ABC400). At this point, the Acura was lying on its roof and was severely damaged (ABC467-476). Drebes and Rothschild were not wearing seat belts and they were ejected during impact (ABC400). Rothschild was found lying on his back in the eastbound lane (ABC400; ABC491-495). Drebes "landed down a ravine in the woods" (ABC420). He had been thrown so far from the vehicle that it was not until the Willow Grove Volunteer Fire Department arrived with an infrared

camera that the police found his body in the woods near the eastbound shoulder (ABC398; ABC 485-489) at 2:53 a.m. (ABC440).

Joseph Giocondo, a local resident, was awakened at 2:00 a.m. by a car racing down Weymouth Road at a high rate of speed and a subsequent loud sound (ABC400). He went to the accident scene and observed Caudill standing over Rothschild's mangled body (ABC400). She was "hysterical and in shock" (ABC436).[10] He called 911 at 2:13 a.m. (ABC436), which was less than a half-hour after the boys had finished their last drinks and just 13 minutes after leaving the Kashmir parking lot. Drebes and Rothschild were pronounced dead at the accident scene. (ABC430). State Police discovered real and fake identifications bearing Drebes' and Rothschild's names on their persons (ABC46-49; ABC661-673).

The autopsy of Jonathan Rothschild was performed on June 28, 2011. Rothschild was 65 inches tall and weighed 130 pounds (ABC454). The medical examiner noted that "There is a gaping 8 inch defect on the right side of the head with a large portion of the skull avulsed from an area 6x2 inches [and] multiple abrasions [were] on the face, chest, abdomen and extremities" (ABC454). He, therefore, declared that Rothschild died of blunt head trauma (ABC453). The toxicology report revealed that at the time of his death, Rothschild had a BAC of .162% (ABC456).

The autopsy of Ian Drebes was also performed on June 28, 2011. Drebes was 65 inches tall and weighed 160 pounds (ABC417). The medical examiner noted, "There is a fracture of cervical vertebra C-6 with a surrounding 2 inch contusion" (ABC417). He declared that Drebes

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[10] Caudill's statements to the police immediately after the accident were made while she was suffering from the trauma of seeing her boyfriend's dead body lying in the road. Therefore, these statements are legally competent evidence under the Excited Utterance Rule. N.J.R.E. 803(c)(2).

died of a cervical spine fracture (ABC416). The toxicology report revealed that at the time of his death, Ian Drebes had a BAC of .157%. (ABC 419).[11]

[11] The police and autopsy reports are legally competent evidence pursuant to N.J.R.E. 703, 803(c)(6) and 803(c)(8).

A significant amount of attention in the Enforcement Bureau's brief was paid to the expert opinions of John Brick, Ph.D.[12] and Joseph Vasil[13]. Suffice it to say that their findings were undisputed, and I therefore find them to be credible, and their conclusions justified.

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[12] Dr. Brick is a nationally recognized expert on the pharmacological, physiological and behavioral effects of alcohol and other drugs. His qualifications are summarized as follows: He holds a doctorate degree in biological psychology, including a minor in neuroscience behavior, and a Masters Degree in psychology, both from the State University of New York, at Binghamton. He has authored more than 100 scientific publications on the biobehavioral effects of alcohol and other drugs including the Handbook of the Medical Consequences of Alcohol and Drug Abuse (Hawthorn Press, Taylor & Francis Group (2d ed. 2008)(editor/co-author), Pharmacology of Ethanol (International Encyclopedia of Pharmacological Therapeutics, Pergamon Press), both editions of Drugs, The Brain and Behavior: The Pharmacology of Abuse and Dependence and Alcohol: Use, Abuse, Tolerance and Dependence (Wiley Encyclopedia of Forensic Science). He was the Chief of Research and Associate Director of the Advanced School of Alcohol and Drug Studies for the Rutgers University Center of Alcohol Studies, Education and Training Division and Forensic Alcohol/Drug Consultant to Rutgers University. He has served as an expert consultant to the National Institute on Alcohol Abuse and Alcoholism, the National Institute on Drug Abuse, the White House Office of National Drug Control Policy, the New Jersey Attorney General's Office, ABC and several different county prosecutors' offices. He has been qualified numerous times to testify in New Jersey courts as an expert in alcohol pharmacology, physiology of alcohol and stress interactions, behavior, pharmacological and physiological effects of alcohol and drug intoxication, the measurement and calculation of alcohol and other drugs in blood and other issues related to the neuropharmacology of drugs of abuse. See, ABC572; ABC588-589.

[13] Mr. Vasil is currently the Coordinator of MVC's Fraudulent Document Training Unit. He heads the New Jersey Attorney General/MVC Document Fraud Taskforce. He is certified by the New Jersey Police Training Commission to instruct a counter-terrorism document fraud course, which he created and authored, at approved police academies. He has provided this training to, and consulted with, the New Jersey Attorney General's Office, ABC, the Federal Bureau of Investigation, New Jersey State Police, New Jersey Department of Homeland Security, New York Police Department, New York/New Jersey Port Authority Police Department, Coast Guard, local law enforcement agencies and New Jersey liquor licensees to help them to recognize fictitious identifications. He has conducted more than 400 investigations involving the use of false identification to illegally secure driver's licenses over the past 20 years. He has been recognized as an expert on the subject of genuine and fictitious identifications in numerous trials in federal, state and municipal courts. In the past decade, he has prepared forensic reports for law enforcement proceedings in all of these courts.

John Brick, Ph.D., a nationally recognized expert on the pharmacological, physiological and behavioral effects of alcohol and other drugs concluded that "signs of visible intoxication (e.g., decreased inhibitions, psychomotor impairment) were also present and detectable by witnesses prior to the service of the last drink by the bartender at Kashmir..." (ABC584). Furthermore, "given the nature of this incident, namely high speed driving, failure to make the necessary observations, process and respond to roadway conditions, failure to maintain control of his vehicle, and high blood alcohol levels, it is also my opinion that alcohol intoxication was a significant contributing factor to if not the primary cause of this double fatal crash" (ABC584-585).

Joseph Vasil, the State of New Jersey's foremost expert in fraudulent driver's licenses explained, assuming arguendo "Messrs. Drebes or Rothschild had produced either of these documents, Kashmir's employees should have immediately recognized these documents to be counterfeit" (ABC681). Mr. Vasil concluded that "it is my expert opinion to a reasonable degree of certainty that a liquor licensee could not reasonably rely on either of the aforementioned fictitious identifications as a basis upon which to believe that either Messrs. Drebes and/or Rothschild were of legal age to consume alcoholic beverages" (ABC677).

The record was closed at the conclusion of Oral Argument on June 6, 2013.[14] The Enforcement Bureau has moved before me for summary decision on all four charges: two violations of N.J.A.C. 13:2-23.1(b) (sale of alcohol to an intoxicated patron) and two violations of N.J.A.C. 13:2-23.1(a) (sale of alcohol to an underage person) all occurring on June 28, 2011.

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[14] At oral argument, I asked for, and subsequently viewed, the video tape that was referred to during the oral arguments. I found the video to be of little value, and this decision does not rely upon my viewing of the video in any way.

N.J.A.C. 1:1-12.5(a) states that "[a] party may move for summary decision upon all or any of the substantive issues in a contested case." The standard to be applied in deciding summary judgment motions was explained by the Supreme Court in Brill v. Guardian Life Ins. Co. Of America, 142 N.J. 520 (1995). Disputed facts "of an insubstantial nature" (citation omitted), Id. at 529, will not defeat a motion for summary judgment. The test to be applied is whether the evidence "is so one-sided that one party must prevail as a matter of law" (citation omitted). Id. at 533, 540. The Brill Court noted that "[i]f there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a 'genuine' issue of material fact for the purposes of R. 4:46-2." (citation omitted). Brill,142 N.J. at 540. Pursuant to R. 4:46-2(c)

> [a]n issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.

As evidenced by the foregoing, the Brill Court emphasized that "[t]he thrust of today's decision is to encourage the trial courts not to refrain from granting summary judgment when the proper circumstances present themselves." Id. at 541.

When a movant demonstrates a prima facie right to summary judgment, the burden shifts to the opponent to show through evidence that a genuine issue of material fact exists. Robbins v. Jersey City, 23 N.J. 229. 241 (App. Div. 1957); James Talcott, Inc., v. Schulman, 82 N.J. Super. 438, 443 (App. Div. 1964). "It is not sufficient for the party opposing...[a summary] motion merely to deny the fact in issue...." Heljon Management Corp. v. DiLeo, 55 N.J. Super. 306, 313 (App. Div. 1959) (referring to summary judgment). "Competent opposition requires 'competent

evidential material' beyond mere 'speculation' and 'fanciful arguments." Hoffman v. Asseenontv.com, Inc., 404 N.J. Super. 415, 426 (App. Div. 2009)(citation omitted). Therefore, in the absence of "legally competent evidence" demonstrating specific material facts in dispute, no evidentiary hearing is required, and summary judgment will be granted. Contini v. Bd. of Ed. Of Newark, 286 N.J. Super. 106, 116-121 (App. Div. 1995), certif. denied, 145 N.J. 372 (1996).

"An evidentiary hearing is mandated only when the proposed administrative action is based on disputed adjudicatory facts." Contini, 286 N.J. Super. at 120, quoting In re: Farmer's Mut. Fire Assurance Ass'n of N.J., 256 N.J. Super. 607, 618 (App. Div. 1992). Thus, pursuant to N.J.A.C. 1:1-12.5(b), summary decision must be granted

> ...if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law.

Therefore, there is no need for an evidentiary hearing in a contested case when there are no disputed issues of material fact. Frank v. Ivy Club, 120 N.J. 73, 98 (1990). See also Conti v. Bd. of Ed. Newark, 286 N.J. Super. 106, 120 (App. Div. 1995), certif. den. 245 N.J. 372 (1996) (evidentiary hearing is mandated only where there are disputed adjudicatory facts). In the present matter, I find that Respondent has selectively chosen portions of witness statements that further Respondent's position, but which do not, taken in the context of the whole of the record, create disputed material facts.

The motion judge must apply the evidentiary standard of proof that would apply at trial on the merits. Brill, 142 N.J. at 533-4. "... [T]he usual burden of proof for establishing claims before state agencies in contested administrative adjudications is a fair preponderance of the

evidence." In re Polk, 90 N.J. 550, 560 (1982). Liquor licensees are "strictly and vicariously liable for any transactions on its licensed premises involving its employees...," Div. Of A.B.C. v. Maynards, Inc., 192 N.J. 158, 181 (2007).

Kashmir is charged with violating N.J.A.C. 13:2-23.1(b), which provides, in relevant part, that:

> No licensee shall sell, serve or deliver or allow, permit or suffer the sale, service or delivery of any alcoholic beverage, directly or indirectly, to any person actually or apparently intoxicated, or permit or suffer the consumption of any alcoholic beverage by any such person in or upon the licensed premises.

"Apparent" means "appearing as such but not necessarily so." Webster's II New College Dictionary at 54 (2001). The term "apparently intoxicated" refers to "observable manifestations or symptoms of excessive indulgence in alcoholic beverages," Div. Of A.B.C. v. Zane, 99 N.J. Super. 196, 201 (App Div. 1968), regardless of the individual's actual intoxication.

"[A]cceptance of the privileges and benefits of a liquor license in this State carries with it the burden that licensees are held to an exacting standard of conduct ..." Maynards, Inc., 192 N.J. at 181. The "duty of a [licensee] ... reflects ... the higher standard of care imposed as a policy matter on licensed servers, both legislatively and by the courts." Steele v. Kerrigan, 148 N.J. 1, 25 (1997). Licensees must provide their servers with extensive training so they can determine when a person "has reached a point where he ought not be served alcoholic beverages." Zane, 99 N.J. Super. at 201. It is appropriate to hold liquor licensees strictly liable due to their "'increased ability to assess the progression of intoxication' by visual means unknown to [an] average

person." Salemke v. Sarvetnick, 352 N.J. Super. 319, 326 (App. Div. 2002), quoting Fisch v. Bellshot, 135 N.J. 374, 390-91 (1994).

Throughout the record, there are numerous examples of Kashmir employees describing their observations of Rothschild's and Drebes' behavior. Rothschild's girlfriend Caudill stated that Drebes was inappropriately affectionate as he "tried to kiss [her]" (ABC544). Also describing him as becoming "rowdy" and "loud" (ABC548). Caudill went on to conclude that Rothschild and Drebes were "both pretty much drunk" (ABC555). Kashmir's Dancer Geer described that "the kid I was taking to...was a bit fired up" (ABC192). Saying they were "[n]ot like trashed. He looked buzzed..." which goes to the *level* of their apparent intoxication, but nonetheless shows they were apparently intoxicated.

Kashmirs Dancer Hoover noted that "...about 20 minutes to a half hour after them getting there they started getting a little rowdy or whatever...They just seemed like they were speeding a little bit...just rambling. And I couldn't even make out half the shit they were... like [Drebes] was saying, just going on, and on, and on"(ABC279). She went on to say that she "could severely smell the alcohol on [Drebes]" and that he was "mumbling" (ABC285). She went on to ask them if they had a ride around 1:00-1:15 a.m. because they were "a little tipsy" (ABC280).

Then, at approximately 1:30 a.m., after Dancer Hoover described the youths as "tipsy," Bartender Jennings served them four shots of Jose Cuervo tequila and two Captain and Cokes, only a few minutes before last call (ABC166). She stated that *before* she served them the shots, she "...had to ask Ian at that time if he had a designated driver before I gave him the shots or the Captain and Coke, and he said that the girl was the designated driver for him" (ABC166; ABC169). She purportedly asked him this question because they showed signs of intoxication

"[a] little bit but not much" he had "loosened up some" (ABC167). She went on to say "[m]y dancers heard him stumbling over his words..." "[a]nd so he was stumbling over his words (ABC 168). It can not be disputed that Jennings observed Rothschild and Drebes having visible manifestations of intoxication prior to her serving them their last round of drinks.

In summary, there is little question as to the "apparent intoxication" of Rothschild and Drebes during their short service at Kashmir. Given the descriptions of witnesses, as well as the bartender herself, it is clear that both Rothschild and Drebes were apparently intoxicated *at least* for the service of their last round of drinks at approximately 1:30 a.m., if not before then. (In fact, Hoover had been so concerned with their level of intoxication that she offered to drive them home prior to the service of their last drink)(ABC285). Additionally, both youths had reached the prohibited BAC of .08% by approximately 9:20 p.m. (Rothschild) and 10:20 p.m. (Drebes) according to Dr. Brick's report (ABC580). Furthermore, I find there is no dispute that their BAC continued to climb to .157% (Drebes) and .162% (Rothschild) at the time of the fatal crash. This leads to the conclusion that *even if* they were not apparently intoxicated at Kashmir, they were in fact *actually* intoxicated, thus meeting the prohibition of N.J.A.C. 13:2-23.1(b). Therefore, it is clear that Kashmir is guilty of a two-count violation of N.J.A.C. 13:2-23.1(b), found in Charges 1 and 2.

Kashmir is charged with violating N.J.A.C. 13:2-23.1(a), which provides, in relevant part, that:

> No licensee shall sell, serve or deliver or allow, permit or suffer the sale, service or delivery of any alcoholic beverage ... to any person under the legal age to purchase or consume alcoholic beverages, or allow, permit or suffer the consumption of any alcoholic beverage by any such person in or upon the licensed premises.

Drebes and Rothschild were 20 and 18 respectively, and under the legal age to purchase or consume alcohol (ABC661; ABC663; ABC355). Therefore, because Drebes and Rothschild were underage at the time of service and consumption of alcohol on Kashmir's licensed premises, Kashmir is guilty of violating N.J.A.C. 13:2-23.1(a).

The affirmative defense to the criminal charge of selling alcohol to a person under the legal age applies to N.J.A.C. 13:2-23.1(a), and is set forth in N.J.S.A. 33:1-77 as follows:

> Anyone who sells any alcoholic beverage to a person under the legal age for purchasing alcoholic beverages is a disorderly person; provided, however, that the establishment of all of the following facts by a person making any such sale shall constitute a defense to any prosecution therefor: (a) that the purchaser falsely represented ... by producing a driver's license bearing a photograph of the licensee ... issued pursuant to the laws of this State ... that he or she was of legal age to make the purchase, (b) that the appearance of the purchaser was such that an ordinary prudent person would believe him or her to be of legal age to make the purchase, and (c) that the sale was made in good faith relying upon such ... production of a driver's license bearing a photograph of the licensee ... and appearance and in the reasonable belief that the purchaser was actually of legal age to make the purchase.

The provision "establishment of all of the following facts" means that in order "to constitute the statutory defense to such a prohibited sale, the accused [licensee] must establish not some but *all* of the factual elements enumerated in the enactment relating thereto." Sportsman 300 v. Nutley, 42 N.J. Super. 488, 493 (App. Div. 1956). Therefore, if the licensee fails to establish even one element, the defense fails and they will be held strictly liable for the sale.

In State v. Conner, 149 N.J. Super. 319, 321 (Mun. Ct. 1977), minors presented false identification cards they had obtained through advertisements appearing in a magazine or

newspaper. Former Municipal Court Judge Philip Carchman, now an Appellate Division Judge, found that the licensee failed to satisfy N.J.S.A. 33:1-77(a). He noted, "A peculiar result would follow if a defendant were able to establish the elements of N.J.S.A. 33:1-77(a) merely by the presentation of a bogus identification ..." Conner, 149 N.J. Super. at 324-325 (referring to county-issued identification cards). He further stated:

> ... While the results are sometimes harsh when it appears, as in both cases here, that defendants acted in good faith and relied upon what they felt was a reasonable means of establishing age, the intent and purpose of the alcoholic beverage laws are to restrict the use of alcohol rather [than] to provide a means of increasing its consumption. With that public policy clearly in mind, **an individual engaged in the sale or dispensing of alcoholic beverages must operate within the restrictions and rigors of the law, notwithstanding his good faith attempts to comply in a manner which he personally may deem reasonable.** [Id. at 325 (emphasis added), quoted with approval in Faces, Inc., 185 N.J. Super. at 122].

Thus, a licensee's subjective good faith is insufficient to satisfy the requirement under N.J.S.A. 33:1-77(c).

Here, Kashmir's bouncer Thomas Ballone stated that he examined only Drebes' identification. Thus, Kashmir cannot assert the N.J.S.A. 33:1-77 defense to its service of alcohol to Rothschild, because they failed to meet any element of the defense. However, *even if*, Rothschild had provided his counterfeit identification to Ballone, Kashmir would not be protected by the affirmative defense.

The first requirement of the affirmative defense set out in N.J.S.A. 33:1-77, is "that the purchaser falsely represented ... by producing a driver's license bearing a photograph of the licensee ... issued pursuant to the laws of this State ... that he or she was of legal age to make the

purchase." This provision suggests that the minor would have produced a validly issued identification. For example, if an underage individual presented the validly issued driver's license of their of-age sibling, this could potentially meet the first prong of this defense. However, this provision does not encompass the presentation of a counterfeit identification, and therefore Kashmir cannot meet this requirement for either Drebes or Rothschild (assuming arguendo that Rothschild had presented his counterfeit identification to Ballone).

The second requirement is "that the appearance of the purchaser was such that an ordinary prudent person would believe him or her to be of legal age to make the purchase." In the record, there are numerous references to statements which serve to defeat this prong of the defense. For example, Kashmir's dancer Hoover observed, "[t]hey did look young" (ABC278). She stated "I told him [Drebes] he looked like a baby...You's guys all looks like little kids'" (ABC277). Thus, it does not seem that an ordinarily prudent person would believe that Rothschild or Drebes was of legal age to purchase alcohol.

Lastly, the third requirement is "that the sale was made in good faith relying upon such ... production of a driver's license bearing a photograph of the licensee ... and appearance and in the reasonable belief that the purchaser was actually of legal age to make the purchase." Kashmir cannot establish objective good faith as they placed an unjustifiable reliance on their untrained bouncer. Ballone only knew to look for the expiration date on a driver's license, did not have the appropriate flashlight or black light, and indicated that this was the first time he had ever encountered a counterfeit ID (ABC229).

As noted in Joseph Vasil's report, it does not take technical skill to perform the tests required to expose a counterfeit identification. Two examples contained within the expert report

are: to place a flashlight against a driver's license to see if the light transmitted through the other side is reddish-purple (counterfeit) or amber (genuine), and to look at the UV images under a black light to see if they were aligned on the left edge of the picture (counterfeit) or offset by 1/4 inch (genuine). During oral argument, Senior Deputy Attorney General Kevin Schatz placed a flashlight at the back of each counterfeit identification, and the light came through a reddish-purple color. This showed the ease with which these counterfeit licenses could have been exposed.

An aggravating factor to this failure to identify the licenses as counterfeit was that Kashmir's owner Glassman stated "[w]e have... infrared penlights as well as...books issued that we keep in the office..." to use as a reference when checking identifications (ABC326). He also said that bouncers generally "carry LED flashlights," but in this case, Ballone did not even have that, nor did he consult the available resources that are kept in the office (ABC326). Therefore, it is clear that Kashmir is guilty of a two-count violation of N.J.A.C. 13:2-23.1(a), found in Charges 3 and 4.

Summary judgment is appropriate in regards to all four charges in this case, as the non-moving party, even with all legitimate inferences in their favor, failed to raise a genuine issue of material fact. Respondent's brief makes many references to the record, but touches primarily on immaterial facts, and often takes the quotes of witnesses out of context in an attempt to create a genuine issue of fact. (Using only one of Ballone's contradictory statements for example, and omitting Hoover's statements entirely) (See Respondent's Brief at 7,8) However, after a thorough review of the record and all briefs, it is clear that no genuine issue of material fact exists.

Absent aggravating or mitigating circumstances, the presumptive penalty for the sale, service or delivery of an alcoholic beverage to a person under the legal age is a 15-day suspension of the licensee's liquor license for each violation. N.J.A.C. 13:2-19.11(i). The same presumptive penalty applies to the service of alcohol to an actually or apparently intoxicated patron. Ibid. However, if "death or serious injury occurred as a result of the incident that gave rise to the violation, the Director may revoke the license, even if it is a first violation." N.J.A.C. 13:2-19.13(c). Accord, Butler Oak Tavern v. Div. of A.B.C., 20 N.J. 373, 381 (1956).

ABC has revoked liquor licenses for similar violations resulting in death. In Cheerleaders Gentlemen's Club, supra., ABC revoked the license because the licensee served an intoxicated person leading to a head-on collision killing two on-coming motorists. The patron had a .26% BAC at the time of last service. Similarly, in Div. of A.B.C. v. UHR, LLC, t/a Hooters & Side Pockets, Agency Dkt. No. S-07-33988 (June 18, 2010), appeal withdrawn and dismissed, App. Div. Dkt. No. A-5718-09T3 (January 25, 2011)(unpublished)(ABC593), ABC revoked the license because the licensee served alcohol to a person under the legal age who was intoxicated at the time of last service. She died in a one-car accident within minutes of leaving the licensed premises. The youth had a .302% BAC at the time of last service.

Respondent put forth several mitigating factors, which I weighed in making my decision. First, Respondent argues the fact that Kashmir has no prior violations is a mitigating factor to be considered. However, as discussed above, if the violation results in death or serious injury, the Director may revoke the license, even on a first offense. N.J.A.C. 13:2-19.13(c). Accord, Butler, 20 N.J. at 381. Second, Respondent puts forth that Kashmir has a strict policy that "everyone who enters must show that he/she has ID on them" (Respondent's Brief p.24).

However, this policy was not enforced in this case. Third, Respondent states that there are regular bartender meetings to educate bartenders on the need to refuse service to intoxicated persons. Again, the bartender in this case failed to recognize the signs of apparent intoxication, and continued to serve Rothschild and Drebes, and thus this cannot be a mitigating factor. Lastly, Respondent argues that a mitigating factor to be considered is their full cooperation with the Enforcement Bureau's investigation. This is not a mitigating factor, but rather the duty of every licensee.

Although I find there are no mitigating factors, there are significant aggravating factors that I have considered. There can be no more egregious result from the service of alcohol to a person under the legal age than the death of either the patron or another victim. In this case, I am presented with the deaths of two persons under the legal age. I have no doubt that the only proper penalty is revocation of the license.

Kashmir's irresponsible behavior "was a significant contributing factor to if not the primary cause of this double fatal crash" (ABC581). Kashmir could have easily prevented the tragic events that unfolded, simply by training their bouncer to examine the IDs of patrons, to recognize counterfeit identifications and by equipping them to do so. If Bouncer Ballone had been properly trained and equipped, Drebes and Rothschild would have been immediately turned away at the door. Furthermore, the amount of liquor that was served, despite the apparent intoxication of both youths, serves as an aggravating factor. Even Kashmir's owner Glassman, who sat across from the youths during part of their stint at the bar, confirmed that Drebes and Rothschild drank more than Kashmir's patrons normally do (ABC 320). Kashmir's glaring failures relate to the most important and fundamental obligations of all liquor licensees, and

resulted in the gruesome and untimely deaths of an 18 and a 20 year old. Thus, the only appropriate penalty is revocation of Kashmir's liquor license.

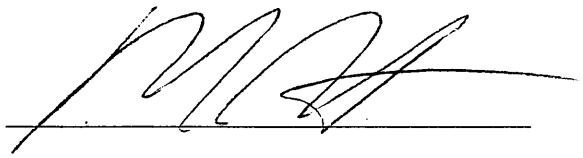
Accordingly, it is on this 6th day of August, 2013,

ORDERED that Kashmir is guilty of violating both N.J.A.C. 13:3-23.1(b) and N.J.A.C. 13:3-23.1(a) on June 28, 2011; and it is further

ORDERED that Plenary Retail Consumption License Number 0614-33-019-007, issued by the governing body of Vineland City, is revoked, effective 2:00 a.m. on September 5, 2013; and it is further

ORDERED that all persons with a direct or indirect interest in the subject license, as defined in N.J.S.A. 33:1-31, must divest themselves by August 6, 2014 of any other interests they may have in any other liquor licenses; and it is further

ORDERED that the premises located at 3926 North Delsea Drive, Vineland, New Jersey shall be barred from being the site of any future liquor license for a period of two years from the date of revocation, pursuant to N.J.S.A. 33:1-31.



MICHAEL I. HALFACRE

DIRECTOR

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3707-11T4
A-3721-11T4
A-3722-11T4
A-3724-11T4

IN RE: APPLICATION OF
SHELLEY NOVICK-LEIGHTON FOR
WAIVER OF N.J.A.C. 13:2-16.11

IN RE: APPLICATION OF
RORY McCORMICK FOR WAIVER
OF N.J.A.C. 13:2-16.11

IN RE: APPLICATION OF
DONNA McADAM FOR WAIVER
OF N.J.A.C. 13:2-16.11

IN RE: APPLICATION OF
KERRY CANAL FOR WAIVER
OF N.J.A.C. 13:2-16.11

Argued March 19, 2014 – Decided March 31, 2014

Before Judges Fuentes, Simonelli and Haas.

On appeal from the New Jersey Department of Law and Public Safety, Division of Alcoholic Beverage Control, Docket Nos. WA-10-006, WA-10-005, WA-10-004, and WA-10-001.

Justin A. Marchetta argued the cause for appellant Shelley Novick-Leighton (Inglesino, Wyciskala & Taylor, LLC, attorneys; John P. Inglesino and Mr. Marchetta, of counsel and on the briefs).

Scott N. Silver argued the cause for appellants Rory McCormick, Donna McAdam and Kerry Canal (Scott N. Silver and John F. Vassallo, Jr., attorneys; Mr. Silver, Mr. Vassallo, and Anne Marie Vassallo, of counsel and on the briefs).

Kevin Marc Schatz, Senior Deputy Attorney General, argued the cause for respondent Division of Alcoholic Beverage Control (John J. Hoffman, Acting Attorney General, attorney; Lorinda Lasus, Deputy Attorney General, of counsel; Mr. Schatz, on the brief).

PER CURIAM

In these consolidated appeals, appellants Shelley Novick-Leighton, Rory McCormick, Donna McAdam, and Kerry Canal appeal from the February 3, 2012 final administrative decision and order of the Director of the Division of Alcoholic Beverage Control (the Division) denying their petitions for a waiver from an amendment to N.J.A.C. 13:2-16.11 which precludes them from selling alcohol products to retail establishments owned by their immediate family members. Appellants also appeal from the March 21, 2012 order, which denied their motion for reconsideration. We affirm.

The history of this litigation and the facts relevant to this appeal are set forth at length in the 123-page, February 3, 2012 written opinion of former Division Director Jerry Fischer and need not be repeated in detail here. Each appellant works as a salesperson for a liquor wholesaler. In order to hold

these positions, they are each required to possess a valid "solicitor's permit" issued by the Division Director. N.J.A.C. 13:2-16.1. A solicitor's permit "authorizes the permittee to make offers and solicit for such sales of alcoholic beverages on behalf of the licensee represented by the solicitor and designated in the permit." N.J.A.C. 13:2-16.2.

In 1993, the Division, together with the New Jersey Attorney General's Office, conducted an investigation into a number of different practices wholesalers and solicitors were using to secure retailer accounts. The investigation revealed that

> wholesalers were illegally rebating or "kicking back" a percentage of solicitors' commissions to retailers who regularly purchased from them. This practice was most prevalent with high volume retailers and the result was that the retailers' incomes were subsidized by these illegal rebates or "kickbacks." Complaints by industry members further evidenced a trend whereby some of the large-volume retailers would request that a wholesaler hire the retailer's relative as the solicitor to that retailer's accounts [thereby creating the possibility that the relative-solicitor's commissions were indirectly subsidizing the retailer].
>
> [41 N.J.R. 2436 (June 15, 2009).]

Because this latter practice gave retailers, whose relatives worked as solicitors for their purchases, an advantage with which other retailers could not compete, the Division Director

published an order on September 30, 1997, directing that, as of January 1, 1998, no solicitor would be permitted to service a retail account in which an immediate family member[1] had an interest.

Appellant Canal and her employer Allied Beverage Group, LLC (Allied) filed separate appeals with the Appellate Division challenging the order. In a December 12, 1997 Notice and Order sent to Canal's and Allied's attorneys, the Division Director stated that he had "determined to withdraw the September 24, 1997 order to enable [the Division] to freshly consider the issues and concerns raised by the industry." The order also stated that, "[u]pon completion of [the Division's] review, [it would] determine whether regulatory action in the form of rulemaking is necessary and appropriate." Canal and Allied then withdrew their appeals. The December 12, 1997 order made no mention of, and did not include, a permanent grandfather clause that would permit Canal and other currently licensed solicitors to continue to sell products to retail establishments owned by their immediate family members.

Over a year later, on February 16, 1999, the Division amended N.J.A.C. 13:2-16.11 as follows:

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[1] An "immediate family member" was defined as a "spouse, child, father, mother, brother or sister or the children of any son, daughter, brother and sister."

> (c) As of February 16, 1999, no holder of a solicitor's permit shall offer for sale or solicit any order for the purchase or sale of any alcoholic beverage to any retail licensee in which an immediate family member of the solicitor has any direct or indirect financial interest or participates in the operation of the retail licensee.
>
> (d) The term immediate family member as used in this chapter means husband, wife, son, daughter, grandson, granddaughter, brother, sister, father, mother, brother-in-law, sister-in-law, father-in-law, mother-in-law, son-in-law, or daughter-in-law.
>
> (e) The provisions of (c) and (d) above do not apply to any solicitor who has been issued a solicitor's permit on or before February 16, 1999.
>
> [31 N.J.R. 547 (February 16, 1999) (emphasis added).]

Thus, N.J.A.C. 13:2-16.11(e) "grandfathered" solicitors who had been engaged in the newly prohibited activity prior to the effective date of the regulation. "Since the number of grandfathered solicitors was small, [the Division] believed that the practice of solicitors selling to relative-retailers would eventually extinguish itself."

Unfortunately, a subsequent Division investigation commenced in 2007 uncovered new and continued abuses. Among other things, "[t]his investigation established that certain solicitors, who were permitted to service retail accounts held by a member of the solicitor's immediate family pursuant to the

grandfather clause of N.J.A.C. 13:2-16.11[(e)], performed no services for their relative's retail accounts but were paid commissions for sales made to those accounts." 41 N.J.R. 2436 (June 15, 2009). The Division also found that

> [m]any large-volume retailers do not even need or want a solicitor assigned to their accounts because they have sophisticated ordering systems in place. Paying commissions to a solicitor when no services are rendered is a violation of N.J.A.C. 13:2-24.2. The fact that the relative solicitors did not render services in exchange for the commissions paid to them further establishes that the commissions paid were no more than rebates or "kickbacks" to the large volume retailers.
>
> This activity created a competitive advantage for the wholesalers employing those relatives because it ensured the retailers would purchase from them. The retailers whose relatives were employed as solicitors also gained a competitive advantage because the commissions could subsidize their household incomes and allow them to lower their prices. As a result, other wholesalers and retailers sought out ways to compete with these subsidies. In sum, the Division's recent investigation demonstrated that further restrictions are necessary to continue to prevent illegal rebates, maintain trade stability and foster a competitive three-tier system of distribution in the liquor industry.
>
> [Ibid.]

Based upon these findings, on August 2, 2010, the Division amended N.J.A.C. 13:2-16.11, effective October 1, 2010, to provide in pertinent part as follows:

> (c) No holder of a solicitor's permit shall offer for sale or solicit any order for the purchase or sale of any alcoholic beverage, or receive any commission or compensation, directly or indirectly, based on sales to any retail license in which an immediate family member of the solicitor has any direct or indirect financial interest or participates in the operation thereof.
>
> (d) No holder of a solicitor's permit whose immediate family member has any direct or indirect interest or participates in the operation of a retail license shall offer for sale or solicit any order for the purchase or sale of any alcoholic beverage, or receive any commission or compensation, directly or indirectly, based on sales to any retail license in which an immediate family member of another solicitor employed by the same wholesaler has any direct or indirect financial interest or participates in the operation thereof.

The Division also amended N.J.A.C. 13:2-16.3, which governs eligibility for a solicitor's permit, to provide in pertinent part as follows:

> (b) No solicitor's permit shall be issued to any person whose immediate family member has any direct or indirect interest or participates in the operation of a retail license. This prohibition shall apply to all persons hired as solicitors by any wholesaler, except as provided in (c) below.
>
> (c) A solicitor who has held a solicitor's permit and has been employed by a wholesaler prior to October 1, 2010 and whose immediate family member has any direct or indirect interest or participates in the operation of a retail license shall be permitted to remain a solicitor and submit annual renewal applications for his or her solicitor's

> permit as long as the solicitor is in compliance with all the provisions of N.J.A.C. 13:2-16.1.
>
> (d) "Immediate family member" as used in this section means husband, wife, son, daughter, grandfather, grandmother, grandson, granddaughter, brother, sister, father, mother, aunt, uncle, niece, nephew, brother-in-law, sister-in-law, father-in-law, mother-in-law, son-in-law and daughter-in-law.
>
> (e) For purposes of this section, "bona fide solicitor" means a solicitor who performs substantial duties and responsibilities for each retail account assigned to the solicitor. . . .

In explaining its reasons for amending the regulations, the Division stated:

> The Division's recent investigation . . . has established the dangers of allowing immediate family members of retailers to become solicitors. If such practices are permitted to continue, wholesalers will seek to hire more and more relatives of retailers in an effort to gain a competitive edge. Instead of competition being driven by prices, services and product catalogs, purchasing decisions will be based on which wholesaler hires the retailer's relatives. The wholesalers for which it is not economically feasible to hire relatives of retailers will be at a competitive disadvantage and will seek out other illegal methods of competition, such as free goods, extended or favorable credit terms, or other forms of "kickbacks." Small-volume retailers not offered the opportunity to have a relative hired as a solicitor will seek other methods to increase their income, such as purchasing from prohibited sources, selling below cost, or demanding "kickbacks"

> or illegal credit terms. Lastly, solicitors not related to a retailer will be pressured by retailers to provide illegal incentives in order to retain retail accounts. This practice, unless stopped, will affect both tiers of the industry, change buying patterns and threaten the stability of the industry. Moreover, this practice will deprive the marketplace of the benefits of free competition as contemplated by the Alcoholic Beverage Control Act.
>
> [41 N.J.R. 2437 (June 15, 2009).]

In response to the amendments, appellants, who as solicitors had been selling alcohol products to retailers which were owned by their immediate family members, filed petitions for waiver or relaxation of N.J.A.C. 13:2-16.11 pursuant to N.J.A.C. 13:2-9.1. Each was required to demonstrate that: (1) absent relaxation, the solicitor would suffer undue hardship; (2) waiver of the rule would not unduly burden any affected party; and (3) waiver would be consistent with Title 33 and its implementing regulations. N.J.A.C. 13:2-9.1. The Division provided appellants with all of the evidence it had collected and the opportunity to present documentary evidence and argument in support of their petitions.

In his February 3, 2012 decision, Director Fischer found that none of the appellants had satisfied the three criteria for a waiver under N.J.A.C. 13:2-9.1. The Director explained the reasons for this conclusion at length and provided detailed

findings supporting his denial of each appellant's waiver petition. The Director found that appellants would suffer no undue hardship if they were required to comply with N.J.A.C. 13:2-16.11. Each would continue to earn sizable incomes by serving the clients they had who were not their immediate family members. The Director also found that appellants had not demonstrated that they were in any danger of losing their jobs as solicitors or that they would not be able to obtain additional accounts.

With regard to the second prong of N.J.A.C. 13:2-9.1, the Director noted that requiring the family member who owned the retail establishment to use a different solicitor would not affect the retailer's operations or sales volume. Finally, as to the third prong, furthering the goal of N.J.S.A. 33:1-3.1b(6) "[t]o provide a framework for the alcoholic beverage industry that recognizes and encourages the beneficial aspects of competition[,]" the Director found that, if the retailers were no longer able to place orders with a solicitor who was a family member associated with a single wholesaler, they would be more likely to purchase products from other wholesalers. This would obviously enhance competition.

The Director rejected appellant Canal's claim that the December 12, 1997 order was a "settlement" that included a

permanent grandfather provision. He found that the order said nothing about a permanent grandfather provision, and Canal presented no evidence that the Division ever agreed to such a provision.

The Director also rejected appellants' due process and deprivation of property rights arguments. He found that N.J.A.C. 13:2-16.11 did not impair appellants' right to work as solicitors, but merely prevented them from soliciting business at their relatives' establishments. The Director further found that, by providing appellants with all of the evidence in the Division's possession and the opportunity to address and rebut it, the Division ensured that appellants were afforded due process in the waiver proceeding in which they participated.

Appellant Novick-Leighton claimed that N.J.A.C. 13:2-16.11 discriminated against her based upon her marital status. However, in concluding that this argument lacked merit, Director Fischer adopted our reasoning in an unpublished opinion, In re Sobczak, No. A-3286-03 (App. Div. Mar. 16, 2005), certif. denied, 184 N.J. 212 (2005), which found that the regulation did not interfere with a solicitor's right to marry as protected by the Fourteenth Amendment and Article I, ¶ 1 of the State Constitution.

Appellants each moved for reconsideration. In a March 21, 2012 comprehensive written decision that painstakingly set forth the factual basis for each of his conclusions, Acting Director Halfacre denied appellants' motions. This appeal followed.[2]

On appeal, appellants raise the same arguments that were presented to the Division Directors. Appellants contend that: (1) the Division's promulgation of N.J.A.C. 13:2-16.11 violated the terms of an alleged settlement in 1997 under which the Division agreed to permanently grandfather all current solicitors from any prohibition against selling products to their family members; (2) the Division acted arbitrarily in amending N.J.A.C. 13:2-16.11; (3) the Division should have afforded them a plenary hearing; (4) the regulation improperly deprived them of a property right; and (5) Director Fischer's decision to deny their petitions was arbitrary and capricious.[3]

Established precedents guide our task on appeal. Appellate review of an administrative agency decision is limited. In re Herrmann, 192 N.J. 19, 27 (2007). A "strong presumption of reasonableness attaches" to the Director's decision. In re

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[2] On June 4, 2012, we denied appellants' motion for a stay pending appeal.

[3] Appellant Novick-Leighton's contention that the regulation discriminates against her on the basis of gender and marital status is without sufficient merit to warrant further discussion. R. 2:11-3(e)(1)(D) and (E).

Carroll, 339 N.J. Super. 429, 437 (App. Div.), certif. denied, 170 N.J. 85 (2001). Appellants have the burden to demonstrate grounds for reversal. McGowan v. N.J. State Parole Bd., 347 N.J. Super. 544, 563 (App. Div. 2002); see also Bowden v. Bayside State Prison, 268 N.J. Super. 301, 304 (App. Div. 1993) (holding that "[t]he burden of showing the agency's action was arbitrary, unreasonable or capricious rests upon the appellant"), certif. denied, 135 N.J. 469 (1994).

Appellate courts generally defer to final agency actions, only "reversing those actions if they are 'arbitrary, capricious or unreasonable or [if the action] is not supported by substantial credible evidence in the record as a whole.'" N.J. Soc'y for the Prev. of Cruelty to Animals v. N.J. Dep't of Agric., 196 N.J. 366, 384-85 (2008) (alteration in original) (quoting Henry v. Rahway State Prison, 81 N.J. 571, 579-80 (1980)). Under the arbitrary, capricious, and unreasonable standard, our scope of review is guided by three major inquiries: (1) whether the agency's decision conforms with relevant law; (2) whether the decision is supported by substantial credible evidence in the record; and (3) whether in applying the law to the facts, the administrative agency clearly erred in reaching its conclusion. In re Stallworth, 208 N.J. 182, 194 (2011).

When an agency decision satisfies such criteria, we accord substantial deference to the agency's fact-finding and legal conclusions, acknowledging "the agency's 'expertise and superior knowledge of a particular field.'" Circus Liquors, Inc. v. Governing Body of Middletown Twp., 199 N.J. 1, 10 (2009) (quoting Greenwood v. State Police Training Ctr., 127 N.J. 500, 513 (1992)). We will not substitute our judgment for the agency's even though we might have reached a different conclusion. Stallworth, supra, 208 N.J. at 194; see also In re Taylor, 158 N.J. 644, 656-57 (1999) (discussing the narrow appellate standard of review for administrative matters).

Applying these principles here, we discern no basis for disturbing the Directors' decisions concerning appellants' waiver petitions and we conclude that none of appellants' arguments have merit. We therefore affirm substantially for the reasons expressed by the Directors in their comprehensive and well-reasoned written opinions. We add the following brief comments.

There is no evidence in the record to support appellants' contention that the Division ever agreed to a permanent grandfather clause. In addition, the 1999 amendment, N.J.A.C. 13:2-16.11(e), does not state that the grandfathering provided for therein would be permanent. More importantly, as our

Supreme Court has observed, New Jersey's "liquor control laws and regulations must be administered in the light of changing conditions. Prior measures of enforcement may have failed their mark. Recurrent instances of particular violations must be dealt with accordingly." Butler Oak Tavern v. Div. of Alcoholic Beverage Control, 20 N.J. 373, 382 (1956). Thus, the Division was clearly authorized to amend the regulation in 2010.

Appellants also failed to demonstrate that the Division acted arbitrarily in promulgating N.J.A.C. 13:2-16.11. The agency's action fully comports with the "express or implied legislative policies" underlying Title 33 and, as outlined in detail in the Director's final decision, "there is substantial evidence in the record to support the findings on which the [Division] based its action[.]" N.J. Ass'n of Sch. Adm'rs v. Schundler, 211 N.J. 535, 548 (2012) (quoting In re Petitions for Rulemaking, N.J.A.C. 10:82-1.2 & 10:85-4.1, 117 N.J. 311, 325 (1989)).

Appellants were not entitled to a plenary hearing as part of the Director Fischer's consideration of their waiver applications. Appellants were afforded access to all of the information relied upon by the Director and he fully considered all of their arguments and documentary submissions in his comprehensive decision. Appellants have not identified any

statute or constitutional provision which required a hearing. In re Xanadu Project at Meadowlands Complex, 415 N.J. Super. 179, 193 (App. Div.), certif. denied, 205 N.J. 96 (2010); N.J.S.A. 52:14B-2(b).

Like Director Fischer, we reject appellants' argument that they were unconstitutionally deprived of a "property right" when they were no longer permitted to sell products to their family members. Pursuant to N.J.S.A. 33:1-26, a liquor license is merely a temporary permit or privilege, rather than a property right. Xanadu, supra, 415 N.J. Super. at 198. Moreover, this case did not involve the suspension, revocation, or non-renewal of appellants' solicitor permits. They still hold the permits and they may still sell alcohol products to non-family members.

Finally, the Director's decision denying appellant's waiver petitions was fully supported by substantial and credible evidence in the record and was neither arbitrary nor capricious.

Affirmed.

STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF ALCOHOLIC BEVERAGE CONTROL

AGENCY DKT. NOS. WA-10-001, WA-10-004,
WA-10-005 and WA-10-006

IN RE: APPLICATIONS FOR
WAIVERS OF N.J.A.C. 13:2-16.11

ORDER ON MOTIONS
FOR RECONSIDERATION

John P. Inglesino, Esq., attorney for Shelley B. Novick-Leighton (WA-10-006)
(Inglesino, Pearlman, Wyciskala & Taylor, LLC, attorneys)

Scott N Silver, Esq., attorney for Kerry Lynn Canal (WA-10-001)

Scott N Silver, Esq., attorney for Donna McAdam (WA-10-004)

Scott N Silver, Esq., attorney for Rory McCormick (WA-10-005)

BY THE ACTING DIRECTOR

On February 3, 2012, former Director Jerry Fischer entered a Final Conclusion and Order denying the applications for waivers of N.J.A.C. 13:2-16.11 that were submitted by Shelley B. Novick-Leighton, Kerry Lynn Canal, Donna McAdam and Rory McCormick.

By letter dated February 14, 2012, counsel for Kerry Lynn Canal, Donna McAdam and Rory McCormick requested an extension of time in which to file Motions for Reconsideration, based on a previously planned vacation. By letter dated February 20, 2012, I granted an extension until March 12, 2012. By letter dated February 27, 2012, counsel for Shelley B. Novick-Leighton also requested an extension until March 12, 2012. By letter dated February 28, 2012, I granted that request.

I received a Motion for Reconsideration from Kerry Lynn Canal on March 9, 2012. On March 12, 2012, I received Motions for Reconsideration from Donna McAdam, Rory McCormick and Shelley B. Novick-Leighton.

Before reaching the motions filed by the named solicitors, I must emphasize that the Division undertook an extensive inquiry to thoroughly evaluate the waiver applications, as evidenced by a 123-page decision. ABC reviewed information from two prior investigations, as well as the legislative history of the Solicitor Regulation, the waiver applications submitted by the applicants, 16 sworn statements from the solicitors and the affected retailers and information requested from the solicitors and the wholesalers. This information included solicitor compensation and sales data.

As part of its analysis of the waiver applications, the Division amassed a large body of information. By letter dated September 8, 2011, the Division provided each of the waiver applicants with a list of documents and a disc containing those documents, to allow the applicants to submit a response, if any, no later than September 26, 2011. Thereafter, the record was closed and decisions rendered on each of the waiver applications. Mrs. Leighton made no additional submission. After receiving extensions of time, Ms. Canal, Mrs. McAdam and Mrs. McCormick all made submissions. Therefore, all of the affected solicitors were provided with multiple opportunities to submit what they deemed to be relevant information, to respond to the information collected by the Division and to make any additional arguments before the February 3, 2012 decision was issued. It is against this backdrop that the Motions for Reconsideration will be addressed.

The standards for Motions for Reconsideration are set forth in R. 1:7-4 and 4:49-2. R. 1:7-4 states, in pertinent part:

> (b) ... On motion made ... , the court may grant a rehearing or may, on the papers submitted, amend or add to its findings and may amend the final order or judgment accordingly ... The motion to

> amend the findings ... shall state with specificity the basis on which it is made, including a statement of the matters or controlling decisions that counsel believes the court has overlooked or on which it has erred ...

R. 4:49-2 states, in pertinent part:

> ... a motion for rehearing or reconsideration seeking to alter or amend a judgment or order ... shall state with specificity the basis on which it is made, including a statement of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred.

In Capital Fin. Co. v. Asterbadi, 398 N.J. Super. 299 (App. Div. 2008), certif. den. 195 N.J. 521 (2008), the Appellate Division elaborated on the function of reconsideration:

> ... "A litigant should not seek reconsideration merely because of dissatisfaction with a decision of the [c]ourt." D'Atria v. D'Atria, 242 N.J. Super. 392, 401, 576 A.2d 957 (Ch. Div. 1990). "Reconsideration should be utilized only for those cases . . . that fall within that narrow corridor in which either 1) the [c]ourt has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the [c]ourt either did not consider, or failed to appreciate the significance of probative, competent evidence." Ibid.
>
> Reconsideration cannot be used to expand the record and reargue a motion. Reconsideration is only to point out "the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred." R. 4:49-2. A motion for reconsideration is designed to seek review of an order based on the evidence before the court on the initial motion, R. 1:7-4, not to serve as a vehicle to introduce new evidence in order to cure an inadequacy in the motion record. Cummings v. Bahr, 295 N.J. Super. 374, 384, 685 A.2d 60 (App. Div. 1996). [Id. at 310]. [emphasis added].

In Capital Finance, the Appellate Division reversed the trial court's denial of reconsideration. It found that the additional documents submitted should have been considered, because they showed an incorrect basis for the trial court's decision on an issue that had never been raised or

argued. Id. at 310-311. Similarly, in Calcaterra v. Calcaterra, 206 N.J. Super. 398, 403-404 (App. Div. 1986), the Appellate Division held that reconsideration was appropriate on an issue which the trial judge decided without giving reasons and on which the parties had never been heard. Thus, "a litigant must initially demonstrate that the [Director] acted in an arbitrary, capricious or unreasonable manner, before [he] should engage in the actual reconsideration process." D'Atria, 242 N.J. Super. at 401.

I will address the Motions for Reconsideration in the order that I received them. On March 9, 2012, I received Ms. Canal's motion. It consists of a letter memorandum, a certification from Edwin T. Ferren, III, Esq., an affidavit from Edward G. D'Alessandro, Esq., a certification from Margaret A. Canal and a certification from Kerry Canal. I note that much of the information in Ms. Canal's certification has already been provided or could have been provided during the process leading up to the February 3, 2012 order and, therefore, will not be considered on the Motion for Reconsideration.

Ms. Canal again argues that her prior litigation resulted in a permanent grandfathering of her ability to service the Canal's account. She made this argument throughout the initial waiver process and in her final submission, after receiving a copy of the entire record for comment before the February 3, 2012 decision was made. The additional certification from Edwin T. Ferren, III, Esq., and the affidavit from Edward G. D'Alessandro, Esq., could have been provided at that time. Thus, this argument, and the information submitted to support it, falls within the proscription of Capital Fin. Co., 398 N.J. Super. at 299. Reconsideration on this issue is denied.

Nevertheless, I will address this argument in order to finally put it to rest. Ms. Canal does not provide a single case for the proposition that any grandfather provision is permanent. She

refers to three statutes with grandfather provisions. However, these statutes do not support a conclusion that the Legislature is barred from eliminating the grandfather provisions if it finds the elimination to be in the public interest. Similarly, the Director was not precluded from eliminating the grandfather provision of N.J.A.C. 13:2-16.11, because of the numerous problems in the alcoholic beverage industry that resulted from that provision. The history of the Division's experience with solicitors and the evolution of the regulation were set forth in detail at pages 2-14 of the February 3, 2012 decision and I need not repeat them here.

Ms. Canal also suggests that there was an agreement that her grandfathering would be permanent as a result of her previous litigation with the Division. She bases this argument on statements from Mr. Ferren and Mr. D'Alessandro. Mr. Ferren indicates that a December 15, 1997 letter from Deputy Attorney General Lisa R. Ellison "set forth our agreement." However, that letter, which is the only written evidence of what occurred,[1] merely indicates that, based upon Director Holl's December 12, 1997 order, the appeal would be withdrawn as moot. Moreover, nothing in Director Holl's December 12, 1997 order indicated that Ms. Canal would have permanent grandfather status. Director Holl determined that ABC would withdraw his September 24, 1997 order, conduct a regulatory review and, if appropriate, promulgate a regulation. Director Holl's December 12, 1997 order does not even mention the word grandfather.[2] In fact, ABC conducted a regulatory review, as stated by Director Holl, and

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[1]All other statements regarding any claimed agreements are merely hearsay, since they were never reduced to writing.

[2]Attached to Mr. D'Alessandro's certification is a similar letter that Deputy Attorney General Ellison sent to his office regarding Allied's appeal.

thereafter issued the 1999 version of the Solicitor Regulation, which included the Grandfather Clause.[3]

Mr. Ferren also indicates that he worked with Mr. D'Alessandro, Allied's attorney, to negotiate settlements of both Ms. Canal's lawsuit and a second lawsuit filed by Allied. Mr. D'Alessandro indicates that he had settlement discussions with Deputy Attorney General Sapienza and perhaps Deputy Attorney General Ellison. He states that "[a]t no time did either Deputy Attorney General, Sapienza or Ellison, suggest that the new regulation to be promulgated would not be permanent." Mr. D'Alessandro's statements do not support Ms. Canal's permanency argument. First, he is not sure that he even spoke to Deputy Attorney General Ellison. Second, assuming that grandfather status would be permanent simply because no one said anything to the contrary was not a guarantee that the regulation would be permanent. Finally, even if Deputy Attorney General Sapienza did make such a promise, he could not bind the agency and foreclose the Director from acting on his statutory responsibilities to regulate the alcoholic beverage industry. See In re Club "D" Lane, Inc., 112 N.J. Super. 577, 580 (App. Div. 1971). Thus, Ms. Canal's arguments fail regarding her claim that she is permanently grandfathered as to the Canal's accounts and reconsideration on this issue is denied.

Ms. Canal's next argument is that she should have been given the opportunity to cross examine Martin Zachery, or his testimony should not have been considered. This is another argument that she made in her final submission, after receiving a copy of the entire record for comment before the February 3, 2012 decision was issued. The documents she submitted on the

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[3]Notably, there was nothing in the plain language of the Grandfather Clause that indicated that it was permanent and could not be eliminated. Moreover, no comments were received on this issue. 31 N.J.R. 545(a).

instant motion, her mother's certification[4] and checklist questionnaires completed by some other Canal's solicitors, could have all been submitted at that time, but they were not. Thus, this is not a proper issue for reconsideration. More significantly, however, the February 3, 2012 decision states that "[e]ven without Mr. Zachary's testimony, there is ample testimony from both Ms. Canal's mother and her brother to support the conclusion that the vast majority of non-exclusive product sales are made through her because she is a daughter/sister." Thus, although Mr. Zachery's statements were summarized in the decision for purposes of completeness, they were not the basis for denying Ms. Canal's waiver application. Thus, reconsideration based on this issue is denied. It is not an appropriate subject for reconsideration under the case law and, even if it were, it was not the basis of the denial of her waiver application.

Ms. Canal's next argument is addressed to certain statements in the February 3, 2012 order indicating that she provided pricing information beyond the 30-day period contemplated by the post-and-hold regulation and that this was a potential violation of N.J.S.A. 33:1-3.1b(10). However, these statements were also not the reason her waiver application was denied. Rather, her application was denied for other reasons set forth at considerable length in the February 3, 2012 order. Thus, reconsideration on this issue is denied.

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[4]According to Ms. Canal's memorandum, at her sworn interview, Margaret A. Canal, her mother, declined to comment on Mr. Zachery's termination as a Canal's solicitor, because it was a personal, family matter. In her certification, Margaret A. Canal now states that Mr. Zachery has a gambling problem and she loaned him money. If the money was not repaid by a fixed date, he would be terminated as a Canal's solicitor. She attached a signed copy of a note memorializing this agreement to her certification. This type of issue is a good reason why business-family relationships should not be permitted. The Enforcement Bureau is directed to investigate and review the admitted loan to determine whether it constitutes a Tied-House violation.

I note, however, that the suggestion of a potential violation arose out of statements made by Ms. Canal's brother. John T. Canal, manager of Canal's Pennsauken, indicated that he trusts his sister because she will tell him that a "product [is] going off [price] for three months, ... [he] can trust that." If his sister did not provide this type of information to him, he would be placed on par with the other package goods stores against whom he competes. Thus, his testimony suggested that the information may have provided him with a competitive advantage.

In her Motion on Reconsideration, Ms. Canal provides a packet of documentary information that she states "are typical notices made available to solicitors concerning advance pricing by wholesalers and manufacturer/brand owners" and that "it is information that a good solicitor will acquire and share with all the accounts he or she services ..." New Jersey has actively supervised its trade practices regulations, including post-and-hold, since de-regulation in the 1980's. The documentary information provided by Ms. Canal suggests that wholesalers and suppliers may be engaged in conduct that violates New Jersey regulations. This, however, is not the forum in which to decide these issues, which require further review by the Division.

Ms. Canal's next argument is that the February 3, 2012 order "unconstitutionally deprives [her] of a property interest, a liberty interest, due process and equal protection." The only case cited for these broad propositions is Sea Girt Restaurant and Tavern Owners Association, Inc. v. Borough of Sea Girt, New Jersey, 625 F.Supp. 1482, 1487-1488 (D.N.J. 1986), aff'd 802 F.2d 445, 448 (3d Cir. 1986). She previously raised this argument and it was addressed in the February 3, 2012 order at page 68. She has not explained why the conclusions reached therein are erroneous, but has merely ignored them. Thus, reconsideration on this issue is denied.

Finally, Ms. Canal makes two arguments that are inextricably intertwined. She argues that the February 3, 2012 order "under-assessed the hardship" she will suffer if the waiver is denied and that the methodology used in the February 3, 2012 order is flawed. Since Mrs. McAdam and Mrs. McCormick make the similar arguments, I will address their arguments together.

The solicitor-applicants argue, to varying degrees, that ABC's methodology was inappropriate, because it considered the overall context in which their waiver applications arose. They assert that I should ignore that they service far fewer accounts, spend much less time with, and make far fewer sales calls, while receiving disproportionately more business, than do solicitors who are not related to retailers.

The solicitors have asked to be exempted from the normal operation of the rules as they exist. The only regulation authorizing relaxation, N.J.A.C. 13:2-9.1, states that an ABC regulation may be relaxed or waived, if the applicant can demonstrate that: (1) absent relaxation, the applicant would suffer undue hardship; (2) waiver of the rule would not unduly burden any affected party; and (3) the waiver would be consistent with Title 33 and its implementing regulations. Accordingly, once the repeal of the Grandfather Clause became effective on October 1, 2010, it became the burden of those who seek to be exempted from N.J.A.C. 13:2-16.11 to satisfy all three of the waiver elements. They failed to carry their burden. Thus, their waiver applications were denied.

Ms. Canal, Mrs. McAdam and Mrs. McCormick all cite the following statement from the February 3, 2012 decision: "[Thomas Harris's] volume is not significant enough to entice competitor wholesalers or solicitors to violate the rules." They protest that "this is not truly

about [them]." Thus, they argue, for example, that the "decision should be about [them] and the fact that [they have] consistently complied with all requirements of law in performing [their] duties as ... solicitors." In other words, the applicants would limit my inquiry to the first prong (i.e., the impact on them),[5] as though Title 33 was designed for them alone, and not an entire industry. They miss the point.

The applicants seek to maintain the status quo ante repeal of the Grandfather Clause. To ascertain whether maintaining the status quo ante would adversely affect other parties and be consistent with the overall regulatory scheme envisioned by the ABC Act, an examination of what these solicitors do, the value of their familial relationship, and the effect on competition were examined. Thus, if the measurables indicated, for example, that the applicants (or their employers) received no appreciable advantage in light of the number of accounts they service, the value they add during the sales process and commissions derived compared to their competitors, then it would be clear that maintaining the status quo ante would be appropriate. On the other hand, if they (or their employers) received disproportionate advantages in terms of overall sales and commissions for less responsibility and fewer value-added services than do their competitors, then it would be an indication that the waiver applications would not satisfy the

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[5]The February 3, 2012 order recites that the Collective Bargaining Agreement between Allied and the UFCW recognizes Allied's authority to assign and re-assign solicitors to accounts. Thus, if a waiver application is denied, Allied has within its contractual authority the ability to re-assign an affected solicitor to an account or accounts of similar size. The order did not assume that Allied would do so. Thus, the statements of Ms. Canal and Mrs. McAdam that Allied has refused to re-assign them does not support reconsideration of the denials of their waiver applications. This is a matter between the individual solicitors, their union and Allied. Mrs. McCormick's argument about replacement accounts was previously raised and was addressed in the February 3, 2012 order. Moreover, the denial of her waiver did not assume that Fedway would assign replacements accounts to her. Thus, this argument does not support reconsideration.

waiver prongs that require me to consider the impact on other parties and the industry as a whole. Put another way, " ... [i]n order to evaluate the waiver requests, ABC's analysis included an attempt to ascertain how much of an applicant's success is due to his/her familial relationship with the retailer(s)."

To do so, ABC used objective data to determine the attributes of non-relative solicitors in the typical solicitor-retailer relationship. This data was then compared to the same data developed for the relative-solicitors. The differences in these attributes provided an indication of how much of an applicant's success is due to his/her familial relationship with the retailer(s).

Here, all four solicitors whose applications were denied had significantly fewer total accounts, spent considerably less time servicing them and received disproportionately high percentage of non-exclusive product purchases from their relatives and commissions in light of the efforts they expended compared to the solicitors against whom they "competed." The determinative factor was recited by multiple sources and was the same for all rejected waiver applicants - - it was due solely to the fact that the solicitors were relatives, not that they, or their employers, provided more value, either in terms of products or services. This fact was admitted by the solicitors themselves and their relatives. Therefore, it was clear that these solicitors dominated the purchase of non-exclusive products because of their relationships. Thus, rather than free competition forces being the differentiating factor, it became apparent that the advantages were all due to their familial relationships. Therefore, continuing to allow these solicitors to service the accounts of their relative-retailers would be antithetical to the ABC Act and the regulations promulgated thereunder.

Perhaps the enormity of the advantage enjoyed by the relative-solicitors is best demonstrated by the inability of the solicitor-applicants to develop other significant accounts. This is particularly evident for Mrs. Leighton and Mrs. McAdam, because nearly all of their commissions emanated from their relatives' accounts. Mrs. Leighton received 96.6 percent and Mrs. McAdam received nearly 100 percent of their commissions from their relatives' accounts. That Mrs. McCormick, the solicitor-applicant with the most non-relative accounts, averaged only half as many accounts as non-relative solicitors from 2007-2010, and Ms. Canal never had more than nine accounts (or less than one-fifth of the number serviced by non-relative solicitors) during this period, further underscores this conclusion.

Moreover, it is equally clear that granting the waivers under these circumstances would adversely affect competing solicitors and wholesalers. This conclusion is irrefutable, because each of the solicitor-applicants (or their relatives) admitted that competing solicitors and wholesalers would be prevented from effectively competing if the waivers were granted - - a result directly contrary to the ABC Act and its regulations.

For example, Mrs. McAdam conceded that, if her waiver application is granted, R&R and Fedway will not be able "to effectively compete for non-exclusive sales," but she somehow concluded that this "does not unduly burden R&R and Fedway." Similarly, Mrs. McCormick stated that, if her waiver application is granted, R&R and Allied will not be able "to effectively compete for approximately $965,000 in non-exclusive sales [per year]," but "[t]hat is a minuscule price to pay for having engaged in practices that brought this matter to its current status." Likewise, Ms. Canal admitted that R&R and Fedway will have an "inability to effectively compete for approximately $4.4 million in non-exclusive sales [per year]" and "[t]hat

[is] not an inappropriate price [for them] to pay for having engaged in practices that created the problem in the first instance and brought this matter to its current status." Lastly, Saul Leighton stated, "[the Grandfather Clause] was a win, win, win for everybody, maybe not for Fedway [and its solicitors], but a win, win, win for everybody other than that." Although the applicants are understandably focused on their own lost commissions, they are completely indifferent to the impact that granting their waiver applications would have on others. For example, Ms. Canal opines that "[i]t is respectfully submitted that [competing solicitors and wholesalers] are not 'affected parties'. And, even if they are, any 'burden' that might fall on them ... is not undue." (emphasis added).

To minimize the use of subjective criteria, former Director Fischer developed a staggering record of empirical data and analysis upon which his order is based. To do otherwise might give rise to a claim of arbitrariness. In fact, to the limited extent that subjective measures were used, the solicitor-applicants now complain that he was arbitrary. The fact is that there is no bright line test short of granting or denying all of the waiver applications, which he deemed to be inappropriate. I agree with his conclusion. See Circus Liquors, Inc. v. Governing Body of Middletown Tp., 199 N.J. 1, 12 (2009) ("The grant of an express power is always attended by the incidental authority fairly and reasonably necessary or appropriate to make it effective .... Authority delegated to an administrative agency should be construed so as to permit the fullest accomplishment of the legislative intent.").

Although they will suffer financial loss (prong 1) if their waiver applications are denied,[6] the solicitor-applicants have failed to appreciate the importance of satisfying prongs 2 and 3. That they try to excise these prongs from the analysis by claiming this proceeding is about them only, without consideration of the impact of their requests on other parties and the regulatory scheme as a whole, not only verifies their failure to carry their burden, but also indicates a fundamental misunderstanding of these proceedings and the role of the Director of ABC.

The Grandfather Clause was repealed due to ever-evolving abuses by solicitors, their employers and the retailers to whom they are related. Clearly, this repeal was a conscious effort to rid the industry of specific practices that have violated Title 33, induced others to commit violations, and consumed enormous amounts of ABC's resources for two decades. Over that period, moderate measures proved ineffective. Hence, repeal, the unavoidable option of last resort, was necessary to protect and promote the underlying purposes of the ABC Act, set forth in N.J.S.A. 33:1-3.1, and elsewhere in Title 33. See Fanwood v. Rocco, 33 N.J. 404, 411 (1960) (The State "may prohibit [the liquor business] entirely or may permit it to continue under prescribed restrictions.").

The solicitor-applicants' claim that the analysis was inappropriate ignores the fact that, at the time they filed their waiver applications, it was their burden to provide an analysis that took into account all three prongs of N.J.A.C. 13:2-9.1. They failed to do so, likely due to the fact that no reasonable alternative analysis would support their applications. As a result, former Director Fischer brought to bear the full measure of ABC's experience, knowledge and expertise

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[6]I note that the magnitude of their financial loss is a direct reflection of the advantage they have received simply by being the spouse or child of the identified retailers.

in the development and analysis of the factual record. The methodology was reasonable, and I find no reason to reconsider the method he employed. Thus, reconsideration based on an under-assessment of the hardship to the individual solicitor and flawed methodology is denied.

On March 12, 2012, I received Mrs. McAdam's motion. It consists of a letter memorandum and a certification from Donna McAdam.

Mrs. McAdam's first argument is that she is permanently grandfathered, since, as a solicitor, she is a beneficiary of Allied's settlement of its 1997 appeal. This is the first time that Mrs. McAdam has raised this argument. Thus, it is not an appropriate issue for reconsideration. Second, as set forth above, there was no guarantee that the grandfather provisions would be permanent. Therefore, reconsideration on this issue is denied.

Mrs. McAdam's also argues that the February 3, 2012 order "under-assessed the hardship" she will suffer if the waiver is denied and that the methodology used in the February 3, 2012 order is flawed. These arguments were previously addressed above.

Finally, Mrs. McAdam again argues that the February 3, 2012 order "unconstitutionally deprives [her] of a property interest, a liberty interest, due process and equal protection." The only case cited for these broad propositions is Sea Girt Restaurant and Tavern Owners Association, Inc. v. Borough of Sea Girt, New Jersey, 625 F.Supp. 1482, 1487-1488 (D.N.J. 1986), aff'd 802 F.2d 445, 448 (3d Cir. 1986). She previously raised this argument and it was addressed in the February 3, 2012 order at pages 68 and 86. She has not explained why the conclusions reached therein are erroneous, but has merely ignored them. Thus, reconsideration on this issued is denied.

On March 12, 2012, I also received Mrs. McCormick's motion. It consists of a letter memorandum and a certification from Rory McCormick.

Mrs. McCormick's first argument is that she is permanently grandfathered, since, even as a Fedway solicitor, she is a beneficiary of Allied's settlement of its 1997 appeal. This is the first time that Mrs. McCormick has raised this argument. Thus, it is not an appropriate issue for reconsideration. Second, as set forth above, there was no guarantee that the grandfather provisions would be permanent. Third, Mrs. McCormick is a Fedway solicitor. Thus, it is unlikely that she was an intended beneficiary of Allied's litigation, because these two wholesalers are two of the three major competitors in the wine and spirits segment of the industry. Therefore, reconsideration on this issue is denied.

Mrs. McCormick's next argument is addressed to certain statements in the February 3, 2012 order indicating that she provided pricing information beyond the 30-day period contemplated by the post-and-hold regulation and that this was a potential violation of N.J.S.A. 33:1-3.1b(10).[7] However, these statements were not the reason her waiver application was denied. Rather, her application was denied for other reasons set forth at considerable length in the February 3, 2012 order. Thus, reconsideration on this issue is denied.

In her memorandum on reconsideration, Mrs. McCormick indicates that good solicitors share future pricing information "with each of his or her accounts, to help those accounts maximize profitability." She also indicates that the documentary information provided by Ms. Canal is "typical of [that] distributed by all wholesalers to their solicitors ..." The potential regulatory concern surrounding this type of information are discussed above.

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[7]This conclusion was based on testimony given by her husband.

Mrs. McCormick also argues that the February 3, 2012 order "under-assessed the hardship" she will suffer if the waiver is denied and that the methodology used in the February 3, 2012 order is flawed. These arguments were previously addressed above.

Finally, Mrs. McCormick again raises the argument that the February 3, 2012 order "unconstitutionally deprives [her] of a property interest, a liberty interest, due process and equal protection." The only case cited for these broad propositions is Sea Girt Restaurant and Tavern Owners Association, Inc. v. Borough of Sea Girt, New Jersey, 625 F.Supp. 1482, 1487-1488 (D.N.J. 1986), aff'd 802 F.2d 445, 448 (3d Cir. 1986). She previously raised this argument and it was addressed in the February 3, 2012 order at pages 68 and 100. She has not explained why the conclusions reached therein are erroneous, but has merely ignored them. Thus, reconsideration on this issued is denied.

On March 12, 2012, I also received Mrs. Leighton's motion. It consists of a brief, a certification from Shelley Novick-Leighton, a certification from Saul Leighton and a copy of the same affidavit of Edward G. D'Alessandro, Esq., that was submitted by Ms. Canal.

Mrs. Leighton's first argument is that she is permanently grandfathered, since, as a solicitor, she is a beneficiary of Allied's settlement of its 1997 appeal.[8] This is the first time that Mrs. Leighton has raised this argument. Thus, it is not an appropriate issue for reconsideration.

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[8]In fact, in the cover letter submitting her motion and in her brief on reconsideration, Mrs. Leighton states that she should not have been required to apply for a waiver, based on her argument that she is permanently grandfathered. She asserts that the repeal does not apply to her. However, it clearly applies to all solicitors.

Second, as set forth above, there was no guarantee that the grandfather provisions would be permanent.[9] Therefore, reconsideration on this issue is denied.

Mrs. Leighton's next argument is that the February 3, 2012 order contains "significant mistakes of law." However, in reviewing this argument, I note that she merely repeats the previous arguments about the claimed settlement agreement, which I have already addressed, or attacks the regulation itself. This is the first time that Mrs. Leighton has raised the latter argument. Thus, it is not an appropriate issue for reconsideration and reconsideration on this issue is denied.

Mrs. Leighton's next argument is that the February 3, 2012 order contains "several significant mistakes of fact." Despite Mrs. Leighton's suggestion, the order did not state that she was hired solely because she was Saul Leighton's wife. It stated only that Mr. Leighton asked Jeffrey Altschuler to hire her. Mrs. Leighton next explains at length how she reported alleged attempts by retailers to obtain kickbacks to her boss. However, the February 3, 2012 order addressed her failure to provide details of these alleged kickbacks to the Division for investigation, except in passing (without supporting testimony or other evidence), when she was

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[9]Interestingly, according to Allied's attorney, the claimed settlement was reached in December 1997, not 1998, as stated in the Leighton certifications. If the Leightons were not married or even planned to marry at that time, it is disingenuous for Mrs. Leighton to argue that she was an intended beneficiary of the claimed 1997 agreement.

The Grandfather Clause did not require Mrs. Leighton to marry, as she suggests. If she had not married Mr. Leighton, she would not have been barred from servicing the Bayway account, something that Mrs. Leighton readily admits in her certification. Moreover, Saul Leighton asserts that he spoke with Deputy Attorney General Charles Sapienza about how the Leightons could avail themselves of the Grandfather Clause and that Deputy Attorney General Sapienza told them they should get married before February 16, 1999 to do so. If this information is correct, Deputy Attorney General Sapienza provided the Leightons with an opportunity to enjoy more than 13 years of Mrs. Leighton's commissions. If they married after that date, she would have been barred from servicing the Bayway account.

questioned as part of the 2007 investigation. And while Mrs. Leighton testified that she has a schedule and services other accounts, as she argues in her brief on reconsideration, she also testified that requests for alleged kickbacks make her unable to do business with many other retail accounts. Finally, no matter who owns the house in which the Leightons reside, there can be no dispute that Mr. Leighton benefits from his wife's income and that her income almost exclusively results from purchases made by Bayway.

As stated in the February 3, 2012 order, in her 2007 statement, Mrs. Leighton testified that she spent approximately three hours per week at Bayway and that her husband would tell her what he wanted to purchase and she would call in the orders. In her 2011 statement, she stated that she spent between 8-15 hours per week there. Those statements are not inconsistent with the hours spent at Bayway asserted by Mrs. Leighton in her brief on reconsideration. And while Mrs. Leighton testified as to various tasks she performs while at Bayway, which are set forth in the February 3, 2012 order and in her brief on reconsideration, she also testified that she is "just kind of a fail-safe double check." What is most significant, however, and is ignored by Mrs. Leighton throughout her motion, is that she received average annual commission for 2007-2009 (on all sales) of $538,268 and that 96.6 percent of her annual average commissions, or $520,225, was paid on purchases made by Bayway, despite the limited number of hours she spent there and the tasks she performed. Since Mrs. Leighton has not pointed out any factual errors in the February 3, 2012 order, but has merely provided additional information, reconsideration is denied.

Finally, Mrs. Leighton argues that the February 3, 2012 order "discriminates against Mrs. Leighton on the basis of her marital status in violation of her equal protection rights." This argument was previously raised and argued by Mrs. Leighton and addressed in that order at pages

48-49. The Appellate Division rejected similar arguments in IMO Denise L. Sobczak, Dkt. No. A-3286-03T5 (unreported) (App. Div. 2005). This case was cited in the February 3, 2012 order. Mrs. Leighton simply ignores this case in her brief on reconsideration. Thus, reconsideration of this issued is denied.

Accordingly, it is on this 21st day of March, 2012,

ORDERED that the Motion for Reconsideration filed by Kerry Lynn Canal is denied; and it is further

ORDERED the Motion for Reconsideration filed by Donna McAdam is denied; and it is further

ORDERED that the Motion for Reconsideration filed by Rory McCormick is denied; and it is further

ORDERED that the Motion for Reconsideration filed by Shelley B. Novick-Leighton is denied; and it is further

ORDERED that, as a result of stay requests submitted by each of the affected solicitors, the date by which Kerry Lynn Canal must cease serving Canal's Pennsauken, t/a Canal's Discount Liquor Mart, and Canal's Camden as a solicitor and the date by which Donna McAdam must cease serving Richard McAdam, Inc., t/a Stirling World of Liquors, and David McAdam, Inc., t/a Roselle Park Liquors, as a solicitor and the date by which Rory McCormick must cease serving Anthony Prisco, Inc., t/a Spirits Unlimited, and Square Liquors, Inc., t/a Spirits Unlimited, as a solicitor and the date by which Shelley B. Novick-Leighton must cease serving Leiham Corp., t/a Bayway World of Liquors, as a solicitor, is extended until April 30, 2012, in

order to provide time for the affected solicitors to file timely Notices of Appeal,[10] if they decide to do so, as well as to first make application for a stay pending appeal to me (with briefs addressing the legal standards for a stay), as required by R. 2:9-5(b), and finally to make application for a stay pending appeal to the Appellate Division, if a stay is requested from me and denied.

MICHAEL I. HALFACRE
ACTING DIRECTOR

[10]There are several affected solicitors, with different receipt of order and motion filing dates. Thus, I wish to make the matter of timeliness perfectly clear. The February 3, 2012 decision was received by Kerry Lynn Canal on February 8, 2012 and her Motion for Reconsideration was received by the Division 30 days thereafter, on March 9, 2012. Therefore, she has 15 days from receipt of this order to file a timely Notice of Appeal. The February 3, 2012 decision was received by Donna McAdam on February 8, 2012 and her Motion for Reconsideration was received by the Division 33 days thereafter, on March 12, 2012. Therefore, she has 12 days from receipt of this order to file a timely Notice of Appeal. The February 3, 2012 decision was received by Rory McCormick on February 8, 2012 and her Motion for Reconsideration was received by the Division 33 days thereafter, on March 12, 2012. Therefore, she has 12 days from receipt of this order to file a timely Notice of Appeal. Finally, the February 3, 2012 decision was received by Shelley B. Novick-Leighton on February 6, 2012 and her Motion for Reconsideration was received by the Division 35 days thereafter, on March 12, 2012. Therefore, she has 10 days from receipt of this order to file a timely Notice of Appeal.

STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF ALCOHOLIC BEVERAGE CONTROL

AGENCY DKT. NOS. WA-10-001, WA-10-002,
WA-10-003, WA-10-004, WA-10-005,
WA-10-006 and WA-10-007

IN RE: APPLICATIONS FOR WAIVERS OF N.J.A.C. 13:2-16.11

FINAL CONCLUSION AND ORDER

John P. Inglesino, Esq., attorney for Shelley B. Novick-Leighton
(Inglesino, Pearlman, Wyciskala, LLC, attorneys)

Scott N Silver, Esq., attorney for Kerry Lynn Canal

Scott N Silver, Esq., attorney for Donna McAdam

Scott N Silver, Esq., attorney for Rory McCormick

Frank T. Luciano, Esq., attorney for Thomas Harris

Marc Keal, pro se

Martin D. Zachary, pro se

BY THE DIRECTOR:

Pursuant to N.J.A.C. 13:2-9.1, seven solicitors[1] have filed timely applications for relaxation of N.J.A.C. 13:2-16.11 (the "Solicitor Regulation"), because amendments to the Solicitor Regulation prohibit them from continuing to receive commissions on purchases of alcohol made by retail licensees owned by their immediate family members, starting October 1, 2010. The effective date of the Solicitor Regulation was stayed for these applicants, so a record

[1]A solicitor is an individual holding a valid solicitor's permit. A solicitor's permit authorizes the permittee to make offers and to solicit for sales of alcoholic beverages to retailers on behalf of a licensed wholesaler designated in the permit. See N.J.A.C. 13:2-16.2.

could be developed to facilitate review of their applications. Thus, the applicants have continued to receive commissions on their relatives' accounts while their waiver applications are pending.[2]

HISTORY OF THE DIVISION'S EXPERIENCE WITH SOLICITORS AND DEVELOPMENT OF THE REGULATION

The first investigation into the solicitor segment of the industry, known as "Operation Dolus," commenced in 1993. This investigation involved the Divisions of Criminal Justice, State Police and Alcoholic Beverage Control and revealed that major wholesalers had engaged in a pattern of cash kickbacks, free warehousing, extensions of credit and free goods to some of the largest retailers in the State. The investigation revealed that a number of solicitors illegally rebated or kicked back a percentage of their sales commissions to certain retailers so that the retailers would purchase more exclusive and non-exclusive products from the wholesaler. 30 N.J.R. 4316(a) and 31 N.J.R. 545(a).[3]

One of the retailers that received these kickbacks was Leiham Corp., t/a Bayway World of Liquors ("Bayway"). Bayway was one of the largest, if not the largest, retailer in New Jersey. At that time, 50 percent of Bayway was owned by Saul Leighton, husband of Shelley Novick-

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[2]Although there is a slight variation in compensation components between the union (Allied Beverage Group and R&R Marketing) and non-union (Fedway Associates) wholesalers, all solicitors receive commissions, prizes and awards based on sales, as well as expense reimbursements and/or vehicle allowances. Prizes and awards can be significant. For example, from 2007-2009, Shelley Novick-Leighton received $228,545 in prizes and awards. Allied Exhibit 1.

[3]The terms "exclusive" and "non-exclusive" are used to differentiate between products sold by only one wholesaler (exclusive) and those sold by more than one wholesaler (non-exclusive). Exclusive products include: Jose Cuervo Tequila, Smirnoff Vodka, Grey Goose Vodka and Captain Morgan Spiced Rum. Non-exclusive products include: Dewar's Scotch, Hennessy Cognac, Johnnie Walker Scotches and Absolut Vodka.

Leighton, one of the solicitors who is seeking a waiver.[4] The kickbacks included cash, free goods and free warehousing. Leighton Exhibit 9 at 20-19 to 20 and Leighton Exhibit 10 at 12-12 to 18-14. From some wholesalers, the kickbacks would be equal to "4 percent plus whatever warehousing and other extras might have been involved." Leighton Exhibit 10 at 19-20 to 22.

In addition, the investigation uncovered "requests" by retailers that wholesalers hire members of the retailers' immediate families to act as solicitors for their specific accounts. The Division of Alcoholic Beverage Control ("ABC" or "the Division") found "that this practice [was] most prevalent with certain high volume retailers and the profit of these retailers was subsidized by the rebate." 30 N.J.R. 4316(a). This practice established a financial inducement for certain large retailers to increase their purchases from the wholesaler employing the retailer's immediate family member, at the expense of wholesalers who did not. In effect, the commissions paid to the family members of the retailers could be an indirect subsidy of their retail operations. Thus, these retailers received an advantage, with which other retailers could not compete.

The investigation also demonstrated that

> ... when retailers request that a family member be hired as a solicitor for the retail account, it can result in the undermining of competition, trade stability and the independence of the three tiers of distribution. This conduct fosters illegal rebates or the appearance thereof. Competition among wholesalers is stifled by

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[4]As a result of the settlement in Operation Dolus, Mr. Leighton was required to divest his interest in Bayway. His two children, Frederick Leighton and Andrea Weeden, currently own 60 percent and 40 percent of Bayway, respectively. Leighton Exhibit 3. Mr. Leighton remains the general manager of Bayway, having primary responsibility for purchasing wine and spirits. Leighton Exhibit 11 at 5-17 to 18. See also Leighton Exhibit 1 at 3; Leighton Exhibit 4 at 11-21 to 23.

> these relationships and consumers lose the benefits which open competition provides. [30 N.J.R. 4316(a)].

In this way, the level playing field that ABC is mandated to maintain was tilted in favor of those retailers who could leverage their purchasing volume to gain an unfair economic advantage and those wholesalers who acquiesced to their demands. Free competition, at both the wholesaler-to-retailer and retailer-to-consumer levels, was adversely affected. 30 N.J.R. 4316(a) and 31 N.J.R. 545(a). Thus, the conclusion that this practice would hinder free competition and, thereby, undermine trade stability was inescapable.

As a result of Operation Dolus, Director John G. Holl issued a Notice and Order to Solicitor Permittees. A.B.C. Bull. 2474, Item 1 (September 30, 1997)(the "First Order"). Director Holl noted that, pursuant to N.J.S.A. 33:1-43, "it is unlawful for any person having any interest whatsoever in any supplier to be directly or indirectly interested in the retailing of alcoholic beverages." Id. at 1. He also noted that N.J.A.C. 13:2-16.12 "prohibits the employment of a solicitor in any business capacity with any retail licensee." Ibid. He explained that the legislative purposes underlying these prohibitions include

> provid[ing] a frame work for the alcoholic beverage industry that recognizes and encourages the beneficial aspects of competition; [maintaining] trade stability and a three-tier distribution system and; [prohibiting] discrimination in the sale of alcoholic beverages to retail licensees. [Id. at 1-2].

Director Holl concluded that "the 'immediate family member' relationship in th[is] context does not support and is, in fact, in contradiction to the legislative goals enunciated in the Alcoholic Beverage Control Act, N.J.S.A. 33:1-1 et seq." (the "ABC Act"). Id. at 2. To ensure compliance with the above provision and to limit damage to free competition, Director Holl ordered, inter

alia, that "where any [immediate family member] relationship exists between a solicitor and retailer, the solicitor shall not service or call upon that account ..." Ibid.

On December 12, 1997, Director Holl issued a second Notice and Order to Solicitor Permittees (the "Second Order"). This Notice and Order began by reciting the First Order, but then went on to state, in pertinent part, that:

> [ABC] has since received numerous inquiries from industry members, and has received Notices of Appeal from two affected parties.
>
> We have determined to withdraw the September 24, 1997 order to enable us to freshly consider the issues and concerns raised by the industry. Accordingly, [ABC] will commence a review of the issues involving solicitors with immediate family members holding an interest in a retail license. Upon completion of our review, we will determine whether regulatory action in the form of rulemaking is necessary and appropriate.
>
> Accordingly, it is on this 12th day of December 1997,
>
> ORDERED that the Notice and Order to Solicitor Permittees dated September 24, 1997 is hereby VACATED, effective immediately. [Second Order].

Thereafter, N.J.A.C. 13:2-16.11 was amended, effective February 16, 1999.[5] The amendment, as adopted, provided, in pertinent part, that:

> (c) As of February 16, 1999, no holder of a solicitor's permit shall offer for sale or solicit any order for the purchase or sale of any alcoholic beverage to any retail licensee in which an immediate family member of the solicitor has any direct or indirect financial interest or participates in the operation of the retail licensee.

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[5]Two unpublished Appellate Division decisions have upheld the amendments to N.J.A.C. 13:2-16.11 against ultra vires and equal protection challenges. Voter v. Div. of A.B.C., Dkt. No. A-1296-00T5 (unreported) (App. Div. 2001) and IMO Denise L. Sobczak, Dkt. No. A-3286-03T5 (unreported) (App. Div. 2005).

> (d) The term immediate family member as used in this chapter ... [includes] brother ... .
>
> (e) The provisions of (c) and (d) above do not apply to any solicitor who has been issued a solicitor's permit on or before February 16, 1999.

The Director explained:

> Th[e] proposed amendment will regulate individuals who are issued solicitor's permits, after the effective date of this amendment, to refrain from offering for sale or soliciting any order for the sale of alcoholic beverages to any retail licensee in which an immediate family member of the solicitor has any direct or indirect financial interest in the ... license. [30 N.J.R. 4316(a)].

Subsequently, Director Holl emphasized:

> ... [ABC's] experience with the regulation of alcoholic beverages is that competition that advances the public interest, within a stable marketplace, is best achieved when a retailer's buying decisions are based upon consumer demand for a particular product, the price that the supplier charges for that product and the service that accompanies such purchase. On the other hand, when a retailer's buying decisions are based upon whether he will receive a prohibited rebate or some other benefit that cannot be passed along to the consumer, competition is suppressed and marketplace stability is jeopardized. Solicitors hired by a wholesaler to call upon retail accounts in which an immediate family member has an interest, in the experience of [ABC], are less likely to resist demands by those family members for illegal rebates than solicitors who are independent of such ties. [31 N.J.R. at 545-546].

In order to avoid lengthy litigation, the Solicitor Regulation grandfathered solicitors who had been engaged in the newly prohibited activity prior to the effective date of the regulation.[6] Since the number of grandfathered solicitors was small, ABC believed that the practice of

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[6]The Appellate Division rejected the appeal of a solicitor who challenged the regulation by arguing equitable estoppel and that he was grandfathered as to all accounts, even new ones, because he held a solicitor's permit prior to February 16, 1999. In re: Joseph Maro, Holder of Solicitor's Permit No. 14369, Dkt. No. A-002516-08T1 (unreported) (App. Div. 2009).

solicitors selling to relative-retailers would eventually extinguish itself. However, in late 2006, ABC received information that, instead of shrinking, the practice was expanding.

On or about February 6, 2007, ABC commenced two related investigations to ascertain the nature and extent of certain trade practices in the alcoholic beverage industry in New Jersey. IMO: Investigation of Allied Beverage Group, LLC, Investigation No. 2007-8575 ("IMO: Allied") and IMO: R&R Marketing, Investigation No. 2007-8574 ("IMO: R&R").[7] The focus of these investigations was to discover violations of, or compliance with, the prohibitions against tied-houses (N.J.S.A. 33:1-43), discrimination in terms of sale (N.J.A.C. 13:2-24.1), restrictions on the holders of solicitor's permits (N.J.A.C. 13:2-16.11) and other issues related to wholesaler-retailer relationships.

During the 2007 investigation, ABC learned for the first time that, whenever Allied and its predecessor members (collectively "Allied") were asked by a large retailer to hire the retailer's relative, Allied performed a cost-benefit analysis.[8] If that analysis indicated that the benefits of hiring the relative outweighed the costs, it would hire the relative. Allied would then assign that solicitor to the retail account owned by the solicitor's relative. Allied Exhibit 6 at 122-3 to 123-15. This practice evolved over time to the point that Allied began hiring relative-solicitors with the understanding that they would be "no-shows", i.e., they would perform no services whatsoever, but would be paid commissions based upon the purchases made by their relative's account(s)." Order Requiring Allied Beverage Group, L.L.C., and R&R Marketing to Cease

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[7]At that time, ABC was unaware that Fedway employed two immediate family members of alcoholic beverage retailers to service those accounts.

[8]This practice began in the early 1990's, before the Solicitor Regulation was adopted.

Employment of Certain Solicitors and Requiring all New Jersey Alcoholic Beverage Wholesalers to Desist Hiring New Solicitors Related to Alcoholic Beverage Retailers, dated May 27, 2008, at 4-5 ("Cease and Desist Order"). "[I]t seems to be a waste, what are you paying for if a person is not doing certain duties and so on ... the only benefit to the company [was] that because of a relationship that [was] favored by the buyer, that they buy ..." Allied Exhibit 6 at 114-20 to 115-16. Thus, because the commission went directly to the immediate family of the owners of the licensed entity, the practice represented little more than a monetary inducement to the retailer to funnel sales to Allied, even if the commissions did not flow back to the licensed entity itself.

Allied admitted that it engaged in the above-described pattern and practice of hiring the relatives of large retailers to maintain and/or increase its business with the aforementioned accounts. Because N.J.S.A. 33:1-93.6 and N.J.A.C. 13:2-24.1 prohibit suppliers from discriminating in the sale of wines and spirits to wholesalers, every wholesaler of non-exclusive products has nearly identical product acquisition costs. N.J.A.C. 13:2-24.8 prohibits wholesalers from selling below cost. Thus, no matter how much competitor wholesalers discounted non-exclusive products, their prices could never be lower than Allied's prices, adjusted for the 4.5-5 percent commissions it paid to the retailers' family members. Allied's practice of hiring "no-show" relative-solicitors was so effective that R&R Marketing, LLC ("R&R") could not compete in the sales of non-exclusive products to those retailers. Cease and Desist Order at 5.[9]

In an effort to compete with Allied, R&R hired five solicitors solely because their relatives had interests in large alcoholic beverage retail accounts. IMO: R&R at 2. However, by

[9]ABC did not consider whether these practices violated N.J.A.C. 13:2-24.3, which prohibits any "contract ... or conspir[acy] in restraint of trade or commerce in alcoholic beverages."

this time, the 1999 amendments to N.J.A.C. 13:2-16.11 were in effect. Because R&R could no longer pay solicitors commissions on their relatives' accounts, it developed a plan to circumvent the amendment's prohibitions. R&R would hire the relative from one account and assign the relative to be the solicitor to another account of approximately equal value to the newly-hired solicitor's relative's account. A relative of the second retailer would then be hired as the solicitor for the account of the first solicitor's family.

Like other solicitors, the relative-solicitors received commissions on purchases made by their retailer customers. Unlike its other solicitors, however, R&R hired many of the relative-solicitors based on the agreement (between wholesaler, retailer and solicitor) that these solicitors would be "no-shows," just as Allied had done. Thus, a financial incentive was created for retailers to purchase products from the wholesaler employing the relative; the more the retailer purchased from that wholesaler, the greater the commission the retailer's family member would receive.

For example, one of the "no-show" solicitors hired by R&R was Elizabeth Leighton (wife of one of Bayway's current owners, Frederick Leighton, and daughter-in-law of Saul Leighton). During the year-and-a-half that she was employed by R&R, R&R paid her more than $92,000 in commissions, based on the purchases made by the Bottle King accounts, owned by Kenneth Friedman. In exchange, R&R hired Mr. Friedman's brother-in-law, Alan Packer, and paid him more than $45,000 on purchases made by Bayway. Cease and Desist Order at 6; IMO: R&R at 3-4.[10] R&R's crisscross scheme, like Allied's practice, was successful.

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[10]Notably, before R&R could implement this plan, it had to obtain the approval of Saul Leighton. Leighton Exhibit 11 at 51-1 to 5 ("... I had to approve it, which I did. ...").

This swapping of accounts between the solicitors created an incentive for the retail accounts to purchase larger quantities of products, while intentionally circumventing the prohibition contained in N.J.A.C. 13:2-16.11. By this action, R&R intended that the retailers, though unrelated to the solicitors assigned to their accounts, would increase their purchases from R&R because of the anticipated commissions to be paid to their relatives for purchases made by other retail accounts. Cease and Desist Order at 6-7.

The sum of money paid to the "no-show" solicitors by Allied and R&R was significant. Over a three-year period, Allied paid its "no-show" solicitors in excess of $1.8 million, plus approximately $50,000 in automobile allowances and medical benefits. Likewise, in the latter half of 2005 and 2006, R&R paid its "no-show" solicitors more than $380,000, simply because their relatives held alcoholic beverage retail licenses. These solicitors also received automobile allowances and medical benefits as a result of their affiliation with R&R. Cease and Desist Order at 5 and 8. This impermissible entanglement between these wholesalers and retailers created a threat to trade stability, free competition and the three-tier system.

Thus, ABC was compelled to take more extensive measures than those adopted in 1999. As explained in the Cease and Desist Order, dated May 27, 2008:

> When the Division promulgated N.J.A.C. 13:2-16.11, it noted that, in its experience, solicitors hired by a wholesaler to call upon retail accounts in which an immediate family member has an interest "are less likely to resist demands by those family members for illegal rebates than solicitors who are independent of such family ties." 31 N.J.R. 545(a). However, the situation uncovered by the most recent investigation is equally problematic. The wholesaler cannot fire, or discipline, the relative-solicitor without potentially alienating the relative-retailer, which could adversely impact purchases made by that retailer.

As recognized by [ABC] a decade ago, the most recent investigation has confirmed that employment of relative-solicitors deprives the marketplace of free competition at the wholesaler-to-retailer level. It is clear that the commissions paid to the relative-solicitor provide an inducement to the retailer to purchase from a specific wholesaler -- the greater the purchases, the greater the commissions paid to the relative. Thus, the compensation provided to these no-show solicitors are little more than a thinly veiled, albeit indirect, kickback to the relative retailer. This investigation establishes that the Division's earlier concerns were justified and that its more moderate response proved inadequate to address the problems as they were then, and are now, identified.

Continuation of the practice of hiring relatives, especially in non-working capacities, could have several adverse impacts on the alcoholic beverage industry. First, in order for wholesalers to compete, they will have to offer solicitor positions to more relatives of retailers. However, because there is a limited number of spouses or relatives, wholesalers which do not, or cannot, hire relatives will be forced to offer other programs to retailers in order to lure business away from competitor wholesalers. This problem could eventually lead to practices discovered in the prior investigation including, but not limited to, free goods, extended credit and illegal cash kickbacks.

As a result, retailers who currently do not have relatives who are solicitors will seek employment with wholesalers for their own relatives in order to supplement their (the retailer's) income. The retailer's purchasing decisions will be based upon who employs the retailer's relative, rather than based upon free market considerations related to the goods and/or services rendered by competing wholesalers. Moreover, retailers, whose purchases do not reach the volume necessary to make it economically feasible for a wholesaler to hire a relative, will be forced to engage in unlawful practices to meet competition. Such practices could include purchasing from prohibited sources, selling below cost and requesting cash kickbacks or illegal rebates.

Furthermore, non-related solicitors will come under increasing pressure from retailers in order to obtain and/or retain accounts. If they are unwilling to acquiesce to the retailer's demands, solicitors could lose those accounts which generate greater purchases. Because these retailers generate greater commissions, there is a

> greater incentive for the retailer to purchase from the wholesaler which employs the retailer's relative, rather than the wholesaler which does not. Moreover, because large accounts now order electronically and either do not need or allow solicitors onto the retailers' premises, the number of accounts serviced by working solicitors will decrease even more dramatically. Thus, the total pool of commissions generated by accounts will decrease for the non-related solicitors. As a result, those surviving unrelated solicitors will be forced to engage in illegal practices in order to survive. Ultimately, the number of working non-related solicitors will decrease.
>
> This practice, unless stopped, will affect both tiers of the industry, change buying patterns and threaten the stability of the industry. Moreover, this practice will deprive the marketplace of the benefits of free competition as contemplated by the Alcoholic Beverage Control Act. [Cease and Desist Order at 8-10].

When ABC commenced its 2007 investigation, it believed that all of the grandfathered solicitors were bona fide solicitors, who performed the normal activities required of all solicitors. However, the investigation revealed that this belief was incorrect. Several of the highest paid solicitors performed no services and were in essence paid as "no-show" employees. One "solicitor" was a full-time accountant who lived in Florida; another maintained a psychotherapy practice. Cease and Desist Order at 5. Thus, this order required the termination of eight "no-show" solicitors employed by Allied and R&R. Id. at 11.

The 2007 investigation also revealed that the financial ties forged between certain retailers and wholesalers (i.e., the commissions paid to the relative-solicitor) made it almost impossible for other wholesalers to legally compete in these large accounts. R&R explained that,

as a direct result of the Grandfather Clause, it was forced to violate the rules governing the industry.[11]

For the aforementioned reasons and because the relationship between solicitors and their relative-retailers restricts free competition, discriminates in favor of large wholesalers and threatens trade stability, ABC concluded that it was necessary to repeal grandfather status once and for all. Thus, N.J.A.C. 13:2-16.11 was amended, effective August 2, 2010 (operative October 1, 2010). 42 N.J.R. 1733(a). The relevant amendments to the regulation were the following:

> (c) No holder of a solicitor's permit shall offer for sale or solicit any order for the purchase or sale of any alcoholic beverage, or receive any commission or compensation, directly or indirectly, based on sales to any retail license in which an immediate family member of the solicitor has any direct or indirect financial interest or participates in the operation thereof.[12]
>
> (d) No holder of a solicitor's permit whose immediate family member has any direct or indirect interest or participates in the operation of a retail license shall offer for sale or solicit any order for the purchase or sale of any alcoholic beverage, or receive any commission or compensation, directly or indirectly, based on sales to any retail license in which an immediate family member of another solicitor employed by the same wholesaler has any direct or indirect financial interest or participates in the operation thereof. [N.J.A.C. 13:2-16.11].

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[11]Some of these violations included extending credit beyond 30 days, in violation of N.J.A.C. 13:2-24.4, and sales on terms contrary to terms contained in wholesalers' current price lists, in violation of N.J.A.C. 13:2-24.6.

[12]Pursuant to N.J.A.C. 13:2-16.3(d) and 16.11(e), "immediate family member" is defined as a husband, wife, son, daughter, grandfather, grandmother, grandson, granddaughter, brother, sister, father, mother, aunt, uncle, niece, nephew, brother-in-law, sister-in-law, father-in-law, mother-in-law, son-in-law and daughter-in-law.

Notably, N.J.A.C. 13:2-16.3 Eligibility for permit, was also amended, to include the following:

> (b) No solicitor's permit shall be issued to any person whose immediate family member has any direct or indirect interest or participates in the operation of a retail license. This prohibition shall apply to all persons hired as solicitors by any wholesaler, except as provided in (c) below.
>
> (c) A solicitor who has held a solicitor's permit and has been employed by a wholesaler prior to October 1, 2010 and whose immediate family member has any direct or indirect interest or participates in the operation of a retail license shall be permitted to remain a solicitor and submit annual renewal applications for his or her solicitor's permit as long as the solicitor is in compliance with all the provisions of N.J.A.C. 13:2-16.1.

Thus, anyone holding a valid solicitor's permit prior to October 1, 2010 who has a relative-retailer can continue to work as a solicitor, but cannot service the relative-retailer's account(s). However, no new solicitor's permits will be issued to those with a relative-retailer.

THE DIVISION'S REVIEW OF THE WAIVER APPLICATIONS

As a result of the amendments, seven solicitors filed applications for relaxation of N.J.A.C. 13:2-16.11, pursuant to N.J.A.C. 13:2-9.1. In order to conduct a thorough analysis, ABC reviewed information from two prior investigations, as well as the legislative history of the Solicitor Regulation, the waiver applications submitted by the applicants, 16 sworn statements from the solicitors and the affected retailers and information requested from the solicitors and the wholesalers. This information included solicitor compensation and sales data. ABC's analysis is limited to the three largest wholesalers, Allied, Fedway Associates ("Fedway") and R&R, because their combined sales accounted for approximately 89.6 percent of all spirits, and 80.1

percent of all wine and spirits (collectively), sold in New Jersey in 2009. Tax Exhibit 2; Fedway Exhibit 4. [13,14]

In support of their waiver requests, the applicants presented various instances of personal hardship that would occur if relief is denied. They also stated that they performed or provided various value-added services that the retailers might not otherwise receive. However, this assertion was not confirmed, because no retailer gave any testimony that its business would suffer any notable loss if their relative-applicant could not service the account.

Some applicants also admitted, and the relative-retailers confirmed, that they receive a large majority of their commissions and sales to those accounts because of their familial relationships. This was especially true when the relationship was husband-wife or parent-child. These retailers admitted that, due to the pricing structure of the industry, there was little, if any, economic reason to purchase non-exclusive brands from a relative's employer, except for their familial relationship to the solicitor.[15] In some cases, this yielded personal economic benefits.[16]

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[13] Because this review commenced in the fall of 2010, 2009 represents the last full year of data examined by ABC.

[14] ABC's licensing files indicate that, although there are 218 holders of wholesaler licenses, only 164 wine and spirits wholesalers currently file Current Price Lists.

[15]The situation between wholesalers is somewhat different with exclusive products. When wholesalers compete to sell different brands of similar products (i.e., exclusive products), product sales may be affected by qualitative product differences or consumer perceptions. Thus, retailer purchases of exclusive products are mainly driven by consumer demand, not by the relationship between retailer and solicitor. Therefore, the wholesaler selling an exclusive product will always make its sale, because no other wholesaler can offer that product. However, with exclusive products, when multiple solicitors from the same wholesaler service a retailer, the familial relationship has the potential to affect which solicitor gets the sale.

[16]Clearly, in situations where the solicitor "shares" commissions with the related retailer, either through the licensed entity or the owner of that entity, this may be viewed as a "kickback"

The only notable change in the buying patterns of the affected retailers that occurred subsequent to the solicitor investigation of 2007, which focused on "no-show" solicitors, was that Bayway switched some of its purchases to Allied from R&R, when ABC terminated R&R's crisscross scheme in 2008. See footnote 31.

As noted, these grandfathered relationships predate the 1999 amendment. However, a review limited to the past four years reveals just how significant these practices were. For example, Shelley Novick-Leighton, one of the waiver applicants, now receives more than $500,000 in commissions per year on purchases made from Allied by her husband and stepson on behalf of Bayway. Thus, during the three-year period 2007-2009, Allied paid her more than $1.5 million, on Bayway purchases alone, not including prizes and awards. Similarly, each year (2007, 2008 and 2009), Allied paid Kerry Lynn Canal, another of the waiver applicants, commissions in the range of $235,000 - $280,000 on purchases placed by her brother for her mother's account, nearly $800,000 in total. Allied paid Donna McAdam, another waiver applicant, an average of $174,071 in commissions yearly between 2007-2009, on her husband's accounts.[17] In other words, Allied paid millions of dollars in commissions as the vendor of non-

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which has the potential to affect competition between retailers. Thus, this may constitute an "inducement," within the meaning of N.J.S.A. 33:1-90 (prohibiting, in part, any "inducement over and above discount, rebate, free goods, allowance or other inducement available to any other retailer purchasing from [a wholesaler of] alcoholic beverages ... .").

[17]In contrast, an analysis of Allied's solicitor compensation reports indicates that its average solicitor (excluding the applicant solicitors) earns approximately $105,288 in commissions. Allied Exhibit 1. In 2009, the median commission paid to non-applicant solicitors by Allied was $84,802. Ibid. It is worth noting that Mrs. Leighton, Ms. Canal and Mrs. McAdam carry average portfolios of 10, 9 and 16 accounts, respectively, but the average non-applicant Allied solicitor's portfolio is 52 accounts. Allied Exhibit 3.

exclusive products to these related retailers. It is against this backdrop that the applicants seek relaxation of the Solicitor Regulation.

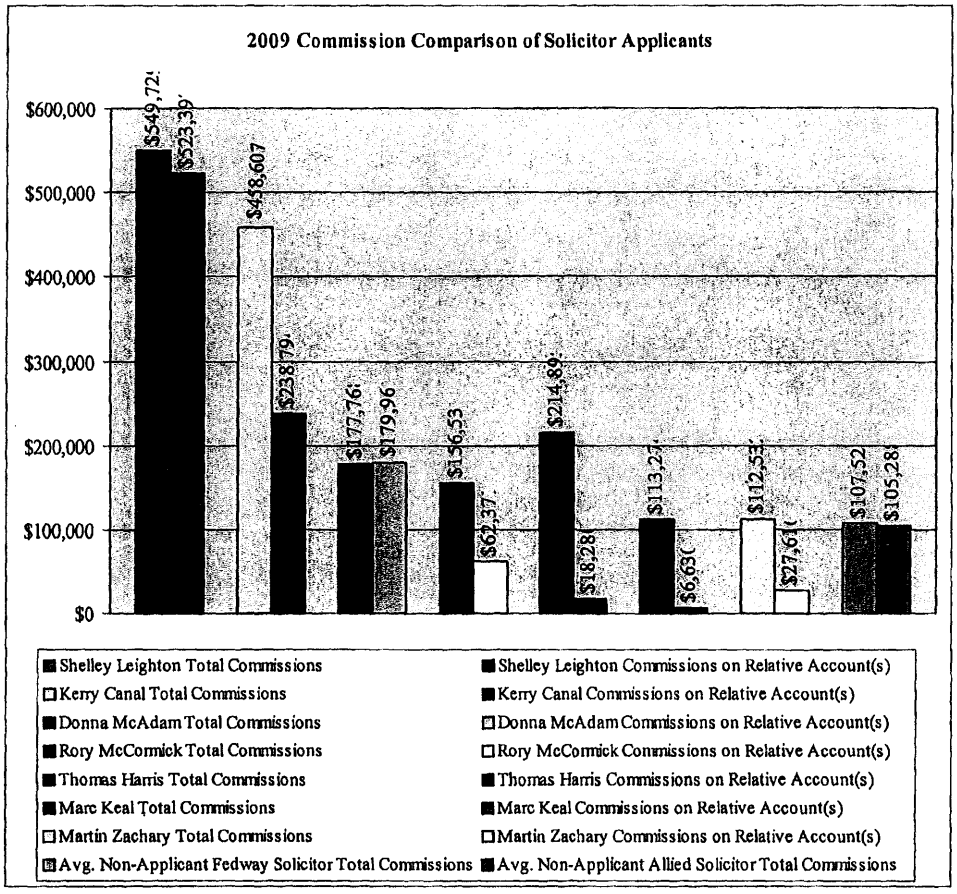
Pursuant to N.J.A.C. 13:2-9.1, a regulation may be relaxed or waived, if the applicant can demonstrate that: (1) absent relaxation, the applicant would suffer undue hardship; (2) waiver of the rule would not unduly burden any affected party; and (3) the waiver would be consistent with Title 33 and its implementing regulations. Because N.J.A.C. 13:2-9.1 expressly uses the conjunctive term "and," an application for relaxation must satisfy all three of these elements.

1. **Undue Hardship**

During the review of the applications, sworn statements were taken from the applicants. Each solicitor was asked to explain how repeal of the grandfather provision caused them to suffer undue hardship. Although the individual responses are set forth in more detail below, the solicitors generally indicated that the repeal would cause them to lose significant commissions. For example, Mrs. Leighton would lose more than $500,000 per year and Ms. Canal would lose more than $200,000 per year, if they were no longer able to receive commissions on the purchases made by their relatives.

In order to evaluate the waiver requests, ABC's analysis included an attempt to ascertain how much of an applicant's success is due to his/her familial relationship with the retailer(s). To do so, the amount of commissions paid to the solicitor on his/her relatives' account(s) was compared with the total amount of commissions paid to the solicitor on all accounts. The graph

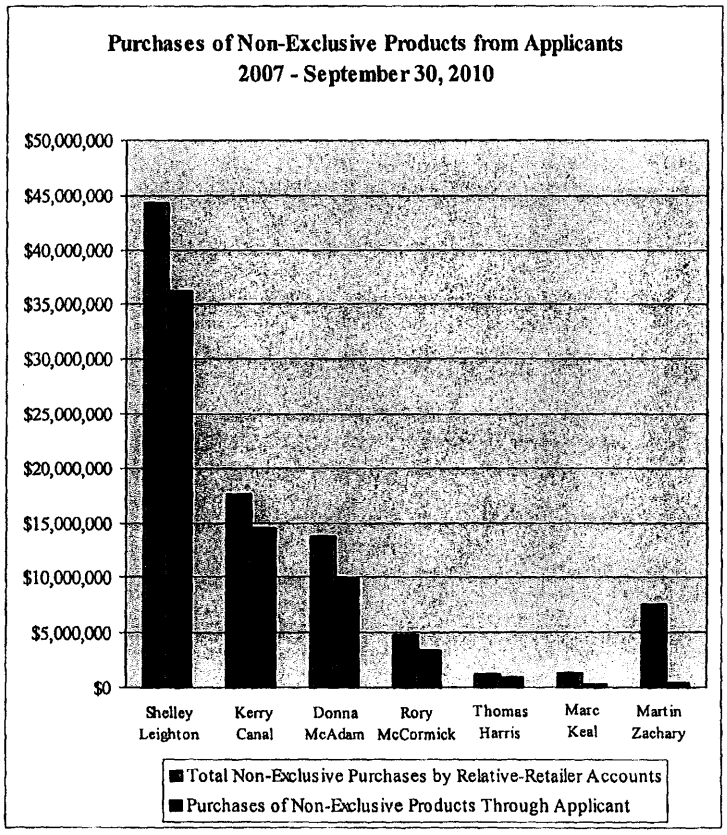
below illustrates the total commissions paid to each of the solicitor-applicants and the commissions they received based upon purchases made by their relatives in 2009:[18]



[18]Allied's Commission Statements for Richard McAdam, Inc. (Stirling World of Liquors) and David McAdam, Inc. (Roselle Park Liquors) indicate that, in 2009, Allied paid Donna McAdam $110,128 in commissions on Stirling World of Liquors and $69,833 in commissions on Roselle Park Liquors, for a total of $179,961 in commissions. However, in the 2009 Solicitor Compensation Report, also submitted by Allied, Allied indicates that it paid her $177,768, a difference of $2,193. Compare Allied Exhibit 1 and Allied Exhibit 2.

Allied Exhibits 1&2; Fedway Exhibits 1&2. Notably, in 2009, Mrs. Leighton was paid $523,297 in commissions on purchases made by Bayway alone, but the average non-applicant Allied solicitor earned $105,288 on all of their accounts. Allied Exhibit 1. In 2009, the median commission paid to non-applicant solicitors by Allied was $84,802. Ibid. Furthermore, in 2009, the average Allied solicitor maintained a portfolio of 52 accounts, but Mrs. Leighton had only 10 accounts. Allied Exhibit 3.

The following chart compares the non-exclusive purchases made by the accounts for which a waiver is sought, for the period January 1, 2007-September 30, 2010, with the amount of the non-exclusive purchases awarded to the relative solicitor submitting the application for a waiver:



See Allied Exhibit 7; Fedway Exhibit 2. As illustrated, the spouses (Mrs. Leighton, Mrs. McAdam, Mrs. McCormick and Mr. Harris) and the child (Ms. Canal) all received disproportionately high amounts of non-exclusive product purchases from their relatives during the examined period.

Significantly, the denial of a waiver does not require that the applicant be fired. It merely means that the solicitor can no longer sell to the relative's retail account(s). Insofar as the Allied solicitors (five of the seven applicants) are concerned, the Collective Bargaining Agreement ("CBA") between Allied and the U.F.C.W. Local 2-D (the "Solicitor's Union"), which governs the contractual relationship between Allied and its solicitors, recognizes Allied's authority to re-assign solicitors to other retail accounts of similar purchasing size.[19] Allied Exhibit 4. It is beyond the scope of this inquiry, whether the CBA requires Allied to re-assign its solicitors to other accounts if their waiver applications are denied, but Allied could certainly choose to do so, thereby providing an opportunity for solicitors whose waiver applications are denied to earn compensation from other sources. Similarly, it appears that non-union Fedway also retains the authority to do the same for its two waiver applicants (Mrs. McCormick and Mr. Zachary). In addition, nothing prevents the solicitors from developing their own replacement accounts.

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[19]Specifically §10:01, provides, in part, that:

> ... The Employer shall have the right to assign and re-assign accounts based upon sound business judgment, provided, however, that the Sales Representative so affected shall be assigned other accounts with substantially equal volume, and further provided that the Employer shall not exercise this right in an arbitrary, capricious or discriminatory manner ... [Allied Exhibit 4 at §10:01].

2. **Effect on Other Parties**

It was apparent that a quantitative analysis could not be the sole criterion for examining the effect on other parties. Thus, testimonial evidence was obtained from the solicitors seeking the waivers and the retailers for whom the waivers are sought.

None of the retailers identified any significant or long-term harm they would suffer if the waivers are denied. For example, both Saul and Frederick Leighton agreed that Bayway would not suffer if Mrs. Leighton's waiver application is denied. Leighton Exhibit 11 at 55-1 to 7.

Similarly, although Margaret Canal described the impact of a denial of her daughter Kerry's waiver application as having a "major effect," her claim was undermined by her explanation that the effect would simply require her "to start all over again and train somebody ... ***and who wants to be bothered with that.***" Canal Exhibit 7 at 52-6 to 9 (emphasis added). She also acknowledged that Fedway and R&R would probably gain business, if the waiver application is denied. Canal Exhibit 7 at 54-22 to 24.

Kevin McCormick, husband of waiver applicant Rory McCormick, initially described her potential loss as "irreplaceable," McCormick Exhibit 3 at 39-3 to 8, but conceded that "business would be the same ..." McCormick Exhibit 3 at 50-4 to 8. Vance Prisco, Mrs. McCormick's brother, admitted that, if someone just as qualified took her place, Square Liquors, Inc. would not be disadvantaged. McCormick Exhibit 4 at 46-2 to 6.

3. **Consistency with Regulatory Scheme**

Applicants must demonstrate that a waiver is consistent with the underlying purposes of Title 33 and the implementing rules. Every solicitor of wine and spirits is paid on a commission basis of up to five percent of the total amount of individual sales to retail accounts. Over the past

15-20 years, ABC has conducted investigations that have resulted in suspension and seven-figure settlements at both the wholesaler and retailer levels for illegally kicking back or splitting these commissions between the solicitor/wholesaler and the retailer.

The regulatory scheme governing wholesaler-to-retailer sales of wines and spirits is broad. N.J.S.A. 33:1-3.1b provides, in pertinent part, that:

> .. [T]he legislative purpose of Title 33 [is] the following:
>
> ...
>
> (6) To provide a framework for the alcoholic beverage industry that recognizes and encourages the beneficial aspects of competition.
>
> (7) To maintain trade stability.
>
> (8) To maintain a three tier ... distribution system.
>
> ...
>
> (10) To prohibit discrimination in the sale of alcoholic beverages to retail licensees.

To these ends, N.J.S.A. 33:1-93.6 prohibits discrimination by wholesalers in the sale of wines and spirits to retail licensees. N.J.S.A. 33:1-90 prohibits wholesalers from discriminating against retailers through the use of discounts, rebates or other allowances. N.J.A.C. 13:2-24.1 prohibits different prices and credit terms. N.J.A.C. 13:2-24.2 prohibits discrimination in services, facilities or equipment provided by wholesalers to retailers. N.J.A.C. 13:2-24.4 requires wholesalers to offer the same credit terms to all of their retail customers. N.J.A.C. 13:2-24.6 requires every wholesaler to file its prices, maintaining those prices for one month, and prohibits wholesalers from deviating from those posted prices. N.J.A.C. 13:2-24.3 prohibits agreements which restrain trade. Therefore, it is clear that the predominant purpose underlying this

regulatory scheme is to establish a level playing field in which all wholesalers and retailers have an equal opportunity to compete by promoting free competition and proscribing practices that injure competition between the discriminating wholesaler and its direct competitors.

In terms of discrimination, it is undeniable that commissions paid to family members constitute a benefit bestowed on the families of select retailers. To the extent that these commissions are significant and have the potential to indirectly subsidize the retailer's licensed business or family, the grant of a waiver may undermine the validity, not only of the Solicitor Regulation, but every component of this regulatory scheme.

In the present context, free competition is best understood by examining retailer purchases of non-exclusive products. From the perspective of the employing wholesaler, the purpose of the relative-solicitor practice was to either maintain or increase the amount of non-exclusive purchases made by the chosen retailers. Allied Exhibit 6 at 121-17 to 124-2. Thus, the effect of the practice on free competition among wholesalers is best demonstrated by the manner in which the relative-retailer purchases non-exclusive products. The closeness of the relationship between the individual waiver applicants and their relatives determines the manner in which retailers purchase non-exclusive products. In other words, as demonstrated in the following chart, the closer the relationship, the more the relative-retailer will purchase through the wholesaler employing the relative-solicitor:

January 1, 2007-September 30, 2010 Purchases of Non-Exclusive Products

Solicitor-Applicant	Total Non-Exclusive Purchases by Relative-Retailer	Applicant's Non-Exclusive Sales to Relative-Retailer	Applicant's Share of Non-Exclusive Purchases
Shelley Leighton (wife)	$44,319,979	$36,289,526	81.9%
Kerry Canal (daughter)	$17,638,286	$14,426,972	81.8%
Donna McAdam (wife)	$13,816,149	$9,939,764	71.9%
Rory McCormick (wife)	$5,084,137	$3,481,300	68.5%
T. Harris (husband/brother)	$1,124,846	$965,574	85.8%
Marc Keal (brother-in-law)	$1,332,370	$254,317	19.1%
Martin Zachary (uncle)	$7,492,401	$454,700	6.1%

See Allied Exhibit 7; Fedway Exhibit 2; R&R Exhibit 1. Thus, spouses Shelley Novick-Leighton, Donna McAdam, Rory McCormick and Thomas Harris, and daughter Kerry Canal, along with their employing wholesalers, all overwhelmingly control the market for non-exclusive products sales to these licensees. Thus, competition at the wholesaler-to-retailer level is significantly injured. Conversely, brother-in-law Marc Keal and uncle Martin Zachary receive only a small percentage of non-exclusive product purchases. Given their significantly lower percentages and the fact that other solicitors employed by competing wholesalers receive greater purchases of non-exclusive products, the impact of their familial relationship on competition is insignificant.

As part of its analysis of the waiver applications, the Division amassed a large body of information. By letter dated September 8, 2011, the Division provided each of the waiver applicants with a list of documents and a disc containing those documents, to allow the applicants to provide a response, if any, no later than September 26, 2011. Thereafter, the record would be closed and decisions rendered on each of the waiver applications.

By letter dated September 16, 2011, John P. Inglesino, Esq., attorney for Shelley B. Novick-Leighton, indicated that the letter he received did not contain a copy of the disc.

Thereafter, by letter dated September 19, 2011, the Division forwarded a second copy of the disc and extended the time for an response, if any, to October 7, 2011. No response was received.

By letter dated September 22, 2011, Scott N Silver, Esq., attorney for Kerry Lynn Canal, Donna McAdam and Rory McCormick, requested an extension of time to respond until October 3, 2011. By letter dated September 26, 2011, this request was granted. By letters dated September 30, 2011, responses were filed on behalf of Donna McAdam and Rory McCormick. Mr. Silver advised that several documents relating to Kerry Lynn Canal were not included on the disc. By letter dated October 5, 2011, hard copies of these documents were provided and the time to respond was extended to October 13, 2011. By letter dated October 7, 2011, a response was submitted on behalf of Kerry Lynn Canal.

No responses were received from Thomas Harris, Marc Keal or Martin D. Zachary.

THE APPLICANT SOLICITORS

A. Overview

For the period 2007-2009, the three waiver applicants who were paid the most in commissions each received more than half of those commissions from purchases made by their relatives' accounts. For example, 96.6 percent of the $1,614,805 in commissions that Allied paid to Shelley Novick-Leighton were generated by purchases made by Bayway, owned by her two stepchildren and managed by her husband and 81.3 percent of all non-exclusive products purchased by Bayway were credited to Mrs. Leighton.

Similarly, nearly all of the $522,212 in commissions that Allied paid to Donna McAdam were generated by purchases made by the two accounts (Richard McAdam, Inc. and David

McAdam, Inc.) owned, in whole or in part, by her husband and 72 percent of all non-exclusive products purchased by those retailers were credited to Mrs. McAdam.

Further, 55.6 percent of the $1,435,267 in commissions that Allied paid to Kerry Canal were generated by purchases made by Canal's Pennsauken, owned by Ms. Canal's mother and 81.8 percent of all non-exclusive products purchased by that account were credited to Ms. Canal.

Lastly, 38.7 percent of the $469,740 in commissions that Fedway paid to Rory McCormick were generated by purchases made by her husband's and father's accounts. However, 75.4 percent of all non-exclusive products purchased by those accounts were credited to Mrs. McCormick.

For this same period, three of the highest paid waiver applicants, all of whom are employed by Allied, serviced significantly fewer accounts (Mrs. Leighton -11; Mrs. McAdam - 16; Ms. Canal - 9), than the average number of accounts (52) serviced by Allied solicitors who are not seeking waivers of the Solicitor Regulation.

Although Thomas Harris received 86.3 percent of all non-exclusive products purchased by the account owned by his wife and brother, the total commissions he received on these accounts during 2007-2009 were less than $50,000. Moreover, he serviced an average of 58 accounts during that period, more than the three aforementioned solicitors combined, and more than the average number of accounts serviced by Allied solicitors who are not seeking waivers of the Solicitor Regulation.

The following tables were derived from the Solicitor Compensation Reports and Commissions Statements submitted by Allied and Fedway. Allied Exhibits 1 &2; Fedway Exhibits 1&2 for the period of 2007-2009:[20]

Solicitor	Relationship	Total Commissions Received on Relatives' Accounts during 2007-2009	Total Commissions Received on All Accounts during 2007-2009	Commissions on Relatives' Accounts as % of Total Commissions during 2007-2009
Shelley Leighton	Wife	$1,560,676	$1,614,805	96.6%
Kerry Canal	Daughter	$798,200	$1,435,267	55.6%
Donna McAdam	Wife	$523,251	$522,212	100.1%[21]
Rory McCormick	Wife/Daughter	$181,810	$469,740	38.7%
Martin Zachary	Uncle	$88,135	$357,384	24.6%
Thomas Harris	Husband/Brother	$49,625	$512,377	9.6%
Marc Keal	Brother-in-law	$22,113	$329,819	6.7%

In addition, the information contained in the table below was obtained from sales data provided by the three major wholesalers:

[20]2009 is the last full year for which data was submitted in support of the applications. Similar information is set forth for the entire period examined, i.e. 2007-September 30, 2010. See The Division's Review of the Waiver Applications, p. 14. A comparison of these two tables indicates that the trends for 2007-2009 continued in 2010.

[21]The commission information that Allied submitted to ABC reveals an anomaly. According to its Solicitor Compensation Reports for 2007-2009, Allied paid Donna McAdam more in total commissions on her husband's two accounts ($523,251), than the $522,212 in total commissions she was paid on all of her accounts for that same period. Compare Allied Exhibit 2 with Allied Exhibit 1. ABC has not attempted to reconcile this inconsistency.

Solicitor	Total Amount of Non-Exclusive Products Purchased by Relatives' Account(s) during 2007-2009	Amount of Non-Exclusive Products Purchased by Relatives' Account(s) Credited to Solicitor during 2007-2009	Percent of Non-Exclusive Products Purchased by Relatives' Account(s) Credited to Solicitor during 2007-2009	Average Number of Accounts Serviced by Solicitor during 2007-2009
Shelley Leighton	$37,493,659	$30,485,407	81.3%	11
Kerry Canal	$14,549,096	$11,964,294	81.8%	9
Donna McAdam	$11,086,512	$7,977,395	72%	16
Rory McCormick	$3,864,891	$2,912,417	75.4%	28
Martin Zachary	$6,365,370	$408,074	6.4%	48
Thomas Harris	$908,758	$784,043	86.3%	58
Marc Keal	$1,113,900	$213,722	19.2%	68

See Allied Exhibits 3 and 7; Fedway Exhibits 2 and 3; R&R Exhibit 1. The preceding two charts make it clear that the closer the relationship between the solicitor and the retailer, the more non-exclusive product will be purchased from the relative-solicitor.

Account Number Comparison of Allied Solicitors

	2007	2008	2009	2010
Kerry Canal	9	9	9	9
Thomas Harris	59	59	57	55
Marc Keal	65	70	70	65
Shelley Leighton	13	9	10	10
Donna McAdam	14	15	18	16
Average Allied Non-Applicant Solicitor	53	52	52	49

See Allied Exhibit 3. Thus, non-applicant Allied solicitors maintain an average portfolio of 52 accounts per year. The account portfolios of Shelley Novick-Leighton, Kerry Lynn Canal and Donna McAdam were significantly smaller.

Account Number Comparison of Fedway Solicitors

	2007	2008	2009	2010
Rory McCormick	29	28	27	25
Martin Zachary	48	46	50	44
Average Fedway Non-Applicant Solicitor	58	58	58	50

See Fedway Exhibit 3. Thus, non-applicant Fedway solicitors maintain an average portfolio of 56 accounts per year.[22] Rory McCormick's account portfolio was significantly smaller.

B. Shelley B. Novick-Leighton

1. Account for Which Relaxation is Sought

Shelley B. Novick-Leighton ("Mrs. Leighton") seeks relaxation of N.J.A.C. 13:2-16.11 so she can continue to receive commissions on purchases made by Bayway. Leighton Exhibit 1 at 2. Bayway is the largest of her accounts. Ibid. She acknowledges that more than 90 percent of the commissions she receives from Allied relate to purchases made by Bayway. Ibid. Mrs. Leighton's combined commissions from her other accounts "does not provide a source of income which would enable her to support herself and her children." Id. at 3.

Relaxation of the Solicitor Regulation is required because Mrs. Leighton's husband, Saul, "works as general manager of Bayway Liquors." Ibid. He is the primary buyer of wines and spirits for Bayway. See Leighton Exhibit 4 at 11-21 to 23 ("... Saul Leighton ... ultimately makes

[22]Both Allied and Fedway have solicitors who maintain less than the average number of accounts, but the commissions paid to these solicitors is commensurate with the reduced number of accounts.

the decision as to how much is to be purchased."). Also, according to its last-filed long-form license renewal application, Bayway is owned by Frederick Leighton (60 percent) and Andrea Wedeen (40 percent). Leighton Exhibit 3 at 10a (2005-2006 License Renewal Application). Frederick Leighton is Mrs. Leighton's stepson; Ms. Wedeen is Mrs. Leighton's stepdaughter. Leighton Exhibit 4 at 5-17 to 18.[23,24] Her average annual commission for 2007-2009 (on all sales) was $538,268 and 96.6 percent of her annual average commissions, or $520,225, was paid on purchases made by Bayway. Allied Exhibit 1; Allied Exhibit 2.

2. Background

Prior to becoming a solicitor, Mrs. Leighton was a full-time tenured teacher in the Marlboro Township School District. Leighton Exhibit 1 at 1; Leighton Exhibit 5. In approximately 1997, Saul Leighton asked Jeffrey Altschuler of F&A Distributors ("F&A"), which would later become a division of Allied, to hire Shelley Novick. Allied Exhibit 5 at 95-7 to 9; Leighton Exhibit 11 at 21-7 to 8. This is the same Saul Leighton to whom F&A gave free goods, resulting in a substantial monetary penalty to F&A, as a result of Operation Dolus. Allied Exhibit 5 at 95-19 to 21.

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[23]In her Initial Questionnaire and Document Production, Mrs. Leighton omitted her stepdaughter Andrea Weeden as having an ownership interest in Bayway, the retailer for which she seeks a waiver. Leighton Exhibit 1, Initial Questionnaire and Document Production at 4.

[24]Saul Leighton and Harry Hammer owned Bayway during Operation Dolus. They were required to divest themselves of their interests in this license by October 2005, as a result of a consent order and their subsequent criminal convictions. Leighton Exhibit 6. Mr. Leighton received a Pardon from Acting Governor Donald T. DiFrancesco on January 8, 2002. Leighton Exhibit 7. Thereafter, on August 9, 2005, the consent order was amended to permit Mr. Leighton to continue his employment in a management capacity with Bayway. Leighton Exhibit 8. Mr. Leighton financed his children's 1996 acquisition of Bayway's stock. To date, they have not paid any principal on the loan, because it is an interest-only loan. Leighton Exhibit 12 at 46-16 to 47-9.

In 1997, F&A hired Mrs. Leighton as a solicitor. Leighton Exhibit 2 at 11-10 to 18. As it did when it hired other solicitors related to large retail accounts, Allied did so "to enhance or maintain [its] positions in the marketplace." Allied Exhibit 5 at 93-9 to 13. Saul Leighton acknowledged that it was reasonable to assume that Mr. Altschuler believed that by hiring Saul's fiancée, it would be good for Allied's business. Leighton Exhibit 11 at 23-11 to 16. As Mr. Leighton stated, "... it was my wife and she's working there, and I'm living with her, you would assume that they would get more business. ... because she is family." Leighton Exhibit 11 at 23-17 to 24-14.

She "resigned from [her] teaching position ... [in reliance] upon the ... ABC regulation which allowed [her] to work ***for a store*** with which [her] soon-to-be husband was involved." Leighton Exhibit 5 (emphasis added). At that time, she was not yet married to Mr. Leighton. Leighton Exhibit 2 at 11-8 to 9. In order to take advantage of the Grandfather Clause of the Solicitor Regulation, Saul Leighton and Shelley Novick were married twice. Saul Leighton explained that the January 1999 "... wedding was because of the Grandfather Clause and we had to do it before the Grandfather Clause [became effective]." Leighton Exhibit 11 at 19-23 to 20-6. The April 11, 1999 wedding "was the wedding for the family and friends." Leighton Exhibit 11 at 20-2 to 9.

Allied started Mrs. Leighton with approximately 35 accounts, Leighton Exhibit 2 at 15-7 to 8, on which Allied paid her several hundred thousand dollars a year in commissions. Leighton Exhibit 11 at 47-23 to 25. However, as of 2007, she retained only 5 of those accounts. Leighton Exhibit 2 at 17-23 to 25. As of 2010, she had a total of 10 accounts, Leighton Exhibit 1, Initial Questionnaire and Document Production at Attachment B. As set forth in the following table,

Mrs. Leighton services significantly fewer accounts than the average Allied non-applicant solicitor:

Account Number Comparison

	2007	2008	2009	2010
Shelley Leighton	13	9	10	10
Average Allied Non-Applicant Solicitor	53	52	52	49

See Allied Exhibit 3. Thus, according to information provided to ABC, from 2007 through September 2010, Mrs. Leighton has maintained an average portfolio of 11 accounts per year, whereas the average Allied solicitor maintained an average of 52 accounts.

In 2007, Mrs. Leighton would go to Bayway twice per week. Leighton Exhibit 2 at 47-2 to 3. She would meet with her husband, Saul Leighton, who "instruct[ed her] as to what he want[ed to] purchase[ ] for that week, and [Mrs. Leighton] handle[d] the calling in of the orders." Leighton Exhibit 2 at 47-4 to 9. She would spend approximately three hours per week at Bayway. Leighton Exhibit 2 at 47-15 to 19. She would "meet with Saul and ... review the RIP schedule and prices and so forth, and he [would make] the ultimate determination as to what he wants brought in."[25] Leighton Exhibit 2 at 48-14 to 16. Frederick Leighton does not do any of the ordering through his stepmother, Mrs. Leighton. Leighton Exhibit 2 at 47-13 to 14.

However, Mrs. Leighton asserts that she currently spends more time, between 8 and 15 hours per week, at Bayway. Leighton Exhibit 4 at 41-10 to 19. She explained that "what's changed is the number of products that [she has] become responsible for ..." Leighton Exhibit 4

[25]"RIP" is an acronym for "Retailer Incentive Program," authorized by N.J.A.C. 13:2-24.1.

at 41-10 to 17.[26] In other words, her husband has increased the number of products he orders from Allied on which his wife receives commissions.

She runs a report and goes through each item on it. Leighton Exhibit 4 at 41-21 to 22. The report is approximately 80 pages long, each page containing 10-12 items. Id. 41-22 to 23. She discusses the report with her husband and makes suggestions to her husband. Leighton Exhibit 4 at 41-21 to 25. She puts up point-of-sale materials and rebates. Leighton Exhibit 4 at 42-1 to 10. At Bayway, she has "particular ... items that [she is] responsible for." Leighton Exhibit 4 at 43-19 to 21. However, she admitted that she is "just kind of a fail-safe double check." Leighton Exhibit 4 at 46-11 to 13.

In her first half-year as a solicitor, Mrs. Leighton received approximately $100,000 in commissions. Leighton Exhibit 2 18-12 to 16. Even though the number of accounts assigned to her has decreased from 35 to 10 since she started with Allied, her commissions have increased to more than $500,000 per year. Leighton Exhibit 1, Initial Questionnaire and Document Production at 4. She acknowledged that, if she had remained a teacher, she probably would be earning less than 20 percent of what Allied currently pays her. Leighton Exhibit 4 at 52-9 to 17.

As a member of the UFCW, Mrs. Leighton receives health benefits, that also cover her husband Saul. Leighton Exhibit 2 at 27-4 to 8; Leighton Exhibit 4 at 35-1 to 9. She and her husband file joint tax returns and, in 2007, shared joint bank accounts. Leighton Exhibit 2 at 27-

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[26]The total amount of Bayway purchases attributed by Allied to Mrs. Leighton in 2009 is little changed from 2007. The sales attributed to her were $11,547,847 (2007) and $11,366,346 (2009). Leighton Exhibit 1, Initial Questionnaire and Document Production at 4. These sales figures might suggest that the overall number of products for which she is responsible has also remained constant. However, the sales of non-exclusive products attributed to her has actually increased from 78.6 percent in 2007 to 90.7 percent in 2009. Id. at Attachment B. Thus, the ability of competing wholesalers to obtain orders for non-exclusive products has decreased.

11 to 14 and 30-4 to 31-6. Her commissions were deposited directly into a Sovereign Savings Bank account, which she shared with her children and husband. Leighton Exhibit 2 at 29-18 to 30-1. However, by 2011, she and her husband stopped having joint bank accounts, other than an investment account. Leighton Exhibit 4 at 36-19 to 20.

On at least two occasions, she loaned money to Bayway from a joint account. In 2007, she referenced a $100,000 loan. Leighton Exhibit 2 at 32-12 to 22. In 2011, she testified to a second loan of between $350,000 - $400,000. Leighton Exhibit 4 at 100-21 to 101-13.

3. Waiver Standards

a. Undue Hardship

During the period from January 2007 through September 30, 2010, Allied paid Mrs. Leighton more than $500,000 in commissions per year. Leighton Exhibit 4 at 78-10 to 15. Mrs. Leighton asserts that a failure to grant her a waiver will cause her to suffer undue economic hardship, because she will "lose her largest retail account, resulting in [her] losing in excess of 90% of her income." Leighton Exhibit 1 at 4. Further, her "job at Allied Beverage has been her only source of income since 1997." Ibid. She uses her commissions to support herself and her children. Leighton Exhibit 1 at 3. Her children are 2008 graduates of Columbia University and the University of Pennsylvania. Leighton Exhibit 4 at 8-22 to 9-11. Mrs. Leighton provides her daughter, the Columbia University graduate, with $40,000 - 50,000 per year in support, and she purchased a new $28,000 car for her in 2009. Leighton Exhibit 4 at 56-20 to 57-24. She and Saul live together in her house, which has a mortgage that is paid with the commissions she receives from Allied. Leighton Exhibit 4 at 36-8 to 16. Her husband Saul "pays the majority of

the bills." Leighton Exhibit 4 at 55-5 to 8. She pays the phone, water, lawn maintenance and cable bills. Id. at 55-11 to 13.

She contends that "retail accounts are **not** interchangeable." Leighton Exhibit 1 at 4. She states that she "does not write all of the business at Bayway Liquors that she could write." Leighton Exhibit 1 at 4. She explained that she is unable to do business with other accounts, because she will not give them kickbacks.[27] She specifically identified the Buy-Rites in Union and Bound Brook as taking kickbacks. Leighton Exhibit 4 at 60-10 to 22. According to Mrs. Leighton, kickbacks are "rampant in the industry." Leighton Exhibit 4 at 61-5 to 62-1. She testified that:

> A. ... [Saul] was severely punished for [taking kickbacks] and paid his dues, paid the fine. And I can tell you moving forward every penny is accounted for. It is a totally clean account. The salespeople make their money. They make their commission. They keep it all. And it's one of the few accounts that I'm aware of that that's the case. [Leighton Exhibit 4 at 62-13 to 19].

Mrs. Leighton initially argued that "[w]ithout this waiver, [her] ability to make anywhere near what [she is] making or a liveable wage ... would be virtually impossible in this industry." Leighton Exhibit 4 at 70-7 to 10. However, she later conceded that, "I'm not saying it's impossible, but it could take years to do... ." Leighton Exhibit 4 at 76-17 to 18. Notably, a "liveable wage" is "a wage that enables [her] to continue living the life-style that [she is]

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[27]She admits that she never reported these attempts by retailers to obtain kickbacks, except in 2007, when she was deposed as part of the "no-show" solicitor investigation. Leighton Exhibit 4 at 88-14 to 22. In 2007, her only mention of inappropriate practices was a cryptic reference to accounts that "wanted to do business in a way that I wasn't going to do business." Leighton Exhibit 2 at 16-24 to 25. Since mentioning them in 2007, she has offered no supporting testimony or other evidence of the alleged kickbacks. Thus, the allegations merely appear to be self-serving and without factual support.

currently living." Leighton Exhibit 4 at 77-8 to 12. That is, a lifestyle supported by more than $500,000 a year in commissions.

Allied pays Mrs. Leighton more than $500,000 per year, Leighton Exhibit 1, Initial Questionnaire and Document Production at 4, even though she only spends between 8 and 15 hours per week at Bayway in her capacity of a solicitor. Leighton Exhibit 4 at 41-10 to 19. Bayway is undoubtedly Mrs. Leighton's largest account. She acknowledges that more than 90 percent of the commissions she receives are on purchases made by Bayway. Leighton Exhibit 4 at 54-9 to 15. In fact, from 2005 through September 20, 2010, Bayway purchases generated, on average, 96 percent of the commissions that Allied paid to her.

Shelley Leighton Sales to Account for Which Waiver is Sought

	2005	2006	2007
Bayway Liquors	$10,390,990	$10,114,927	$11,547,847
Total Sales to All Accounts	$10,862,453	$10,648,440	$12,032,127
Relative Accounts as % of Total	95.7%	95.0%	96.0%

	2008	2009	2010
Bayway Liquors	$10,895,502	$11,366,346	$6,157,123
Total Sales to All Accounts	$11,267,233	$11,800,325	$6,403,561
Relative Accounts as % of Total	96.7%	96.3%	96.2%

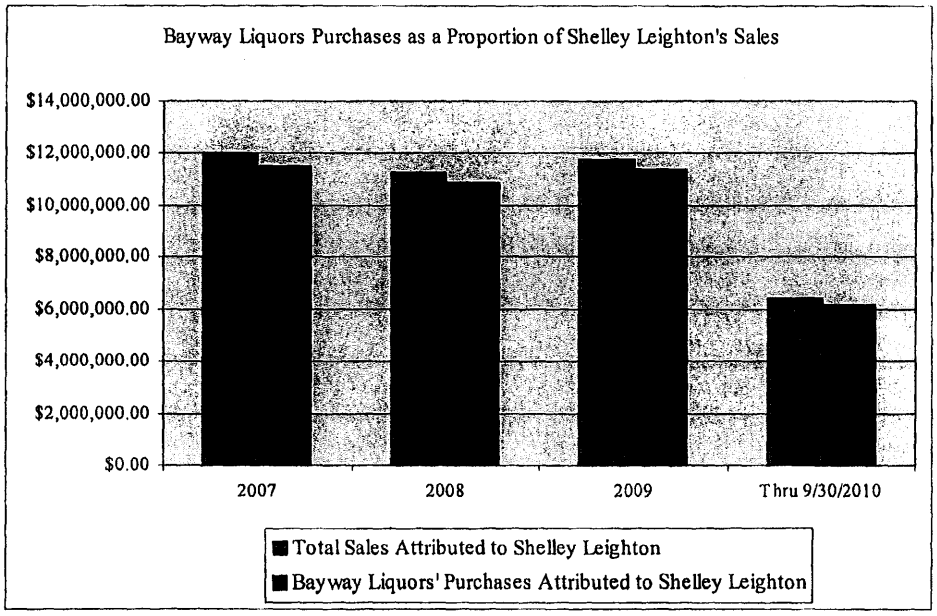
Total Sales to Relative Accounts for Period	$60,472,736
Total Sales for Period	$63,014,140
Relative Accounts as % of Total Sales for Period	**96.0%**

Source:
Response to Initial Questionnaire and Document Production (September 29, 2010)

See Leighton Exhibit 1, Initial Questionnaire and Document Production at Attachment B;[28]

[28]In response to the Initial Questionnaire and Document Production, each applicant submitted tax returns. However, they were not used in ABC's analysis.

Allied Exhibit 7. The following chart demonstrates Bayway's purchases as a percentage of Mrs. Leighton's total sales:



See Allied Exhibit 7 and Leighton Exhibit 1, Initial Questionnaire and Document Production at Attachment B. Thus, nearly all of Mrs. Leighton's commissions are generated by the account operated by her relatives.

Mrs. Leighton stated that she does not actively solicit accounts other than Bayway, in part because of the rampant demand for kickbacks by retailers. However, when asked whether there is a difference between a solicitor paying a kickback to her husband or Allied hiring his wife for a 5 percent commission on everything that he buys, she responded this way:

> A. ... the commissions I make are solely my money. ... they are not Saul's monies. In fact, Saul pays many of the bills. ...
>
> Q. So what's the difference between him getting an envelope in the medicine cabinet in the office or a payment to his wife? I mean, ... there is nobody closer to someone than their spouse, so the next

best thing to giving it to him directly would be to give it to you. So how do we answer that question?

A. ... the money that he may have been getting in the medicine cabinet, if, in fact, that was the case, was money he received. The money I make as a commissioned salesperson is my money. He does not have access to that money.

Q. ... it seems more than coincidental that he's the one that does the bulk of the buying, you're the one that gets the bulk of the purchases, you're the one that gets five percent commission, the more he purchases through you the more money his wife gets?

A. Correct . . . [I]f I was not making this money, someone else would be making the money.

Q. But it wouldn't be his spouse ...

A. He doesn't receive any financial benefit ...

Q. He receives an indirect financial benefit in the fact that his wife is apparently fairly well to do, there is no dispute about that, you are making more than half a million dollars a year and have done for at least ten years, correct?

A. Correct, but he has received no financial benefit for that.

Q. But he doesn't have to support you either.

A. That's correct. ... I'm not denying the fact that he's allowed me to make [nearly $1.9 million from 2007-September 30, 2010],[29] and in doing so it's also allowed me to take care of my children, family members, my charities, in a way that I would not have been able to do.

Q. And those are all financial burdens he doesn't have to pick up because you have an income, correct?

A. Correct.

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[29]According to Mrs. Leighton, the actual amount of commissions Allied paid to her on Bayway purchases, from 2007-September 30, 2010, was $1,877,106. Leighton Exhibit 1, Initial Questionnaire and Document Production at 4.

Q. And that income is directly dependent upon the amount of business he throws to Allied through you? ... And the more business he throws to Allied, the better you do, the more Saul enjoys it and the less he has in terms of financial obligations of supporting you, correct?

A. Correct. [Leighton Exhibit 4 at 63-2 to 66-18].

The repeal of the Grandfather Clause does not bar Mrs. Leighton from being a solicitor in the alcoholic beverage industry. Instead, it only prevents her from servicing one account. She may continue in this profession. Moreover, pursuant to the CBA, §10:01, Allied and the UFCW clearly recognize Allied's authority to re-assign solicitors to other accounts of similar size. Allied Exhibit 4. Thus, if her waiver application is denied, Allied has within its contractual authority the ability to re-assign Mrs. Leighton to an account or accounts of similar size. She is also free to develop other retail accounts on her own. In this way, she would have the opportunity to recoup commissions lost as a result of the denial of the waiver.

b. Effect on Other Parties

Reciting the language of N.J.A.C. 13:2-9.1, Mrs. Leighton asserts that the grant of her waiver application "will not unduly burden any parties." Leighton Exhibit 1 at 4. She supports this statement by indicating: (1) she "does not write all of the business at Bayway Liquors that she could write;" (2) three other Allied salespeople service Bayway; and (3) "Bayway Liquors is loyal to those salespeople who first introduced them to unique or exclusive products." Leighton Exhibit 1 at 4. She provided no evidence to support these statements. To Mrs. Leighton, the "significance is [her husband] is sharing some of the business with [other solicitors] that, in fact, [Mrs. Leighton] could write." Leighton Exhibit 4 at 94-8 to 10. However, her family makes more than 81 percent of all non-exclusive product purchases through her. Moreover, loyalty to

someone who sells an "exclusive" product, which she does not have the ability to sell, demonstrates nothing.

Saul Leighton explained his motivation in placing his wife, then fiancée, with Allied as a solicitor this way:

> ... It was an opportunity for us to make more money, for my wife to make more money, and we did it. There was no shifting or anything. It wasn't because [Operation Dolus] was ending. It was just there. We were completely out of the kickback world. We were never going back into it after 1996. And we wanted to try to make more money. It was an opportunity to make more money legally, no kickbacks, full payment of taxes, every penny, it was a win, win, win for everybody, maybe not for Fedway, but a win, win, win for everybody other than that. [Leighton Exhibit 11 at 66-15 to 25]

Mrs. Leighton maintains that her husband receives no financial benefit from her position as a solicitor for the Bayway account, despite admitting that she assumes many financial obligations that relieve him of the burden of having to pay them. However, Saul Leighton implicitly acknowledged that the placement of Mrs. Leighton as an Allied solicitor not only benefits him ("us" and "we"), but also that it works to the detriment to at least one of the three major wine and spirits wholesalers.

Moreover, both Saul and Frederick Leighton concede that denial of Mrs. Leighton's application would not adversely affect Bayway's ability to remain competitive and to function as a going concern. Leighton Exhibit 11 at 55-1 to 7. Frederick Leighton gave the following responses to the following questions:

> Q. ... if [Mrs. Leighton] were not to get the waiver how would that affect Bayway?

A. I don't think it would affect it, I mean, not at all. I mean, there would be an effect that she wouldn't be there, but it would be - - after that it would be a very minimal effect. I mean, she is labor, it's her book, it's her money, and she just wouldn't be there.

Q. So Bayway would not be adversely affected at all?

A. No. [Leighton Exhibit 12 at 34-1 to 13].

c. Purposes of Title 33 and the Implementing Rules

(1) Free Competition: With regard to free competition, Mrs. Leighton admits that "all the sales reps ... have ... computer[s and] run [their] own report[s] under [their] own name[s] and ... conduct business in the same way that [Mrs. Leighton] do[es]." Leighton Exhibit 4 at 44-9 to 13. According to her, when it comes to purchasing, "[p]rice is not the issue ... unless a deal has been broken." Leighton Exhibit 4 at 96-11 to 12. Finally, she contends that, "if I was no longer selling to Bayway, because Bayway appears to enjoy the relationship with Allied because of their professionality and so forth, there is nothing to say that Allied wouldn't continue to get the business even if I wasn't there." Leighton Exhibit 4 at 85-18 to 22.

Mr. Leighton admitted that, since she was hired, Mrs. Leighton's division of Allied receives "a lot more business ... than ... before she was hired," because "she is [his] wife." Leighton Exhibit 11 at 28-1 to 7. According to the sales figures provided to ABC by Allied, Fedway and R&R, the following is the distribution of non-exclusive purchases made by Bayway:

Shelley Leighton (Allied Beverage Group)
Sales of Non-Exclusive Products
to Account for Which Waiver is Sought

	2007	2008	2009	Thru 9/30/2010
Shelley Leighton (Allied)	$11,138,561	$9,513,046	$9,833,800	$5,804,119
Other Allied Solicitors	$920,614	$456,237	$454,513	$296,655
R&R Marketing, LLC	$1,884,635	$1,279,537	$671,777	$481,317
Fedway Associates	$407,056	$438,546	$495,337	$244,229
Total Sale of Non-Exclusives	$14,350,866	$11,687,366	$11,455,427	$6,826,320
Shelley Leighton as Percentage	**77.62%**	**81.40%**	**85.84%**	**85.03%**
All Other Solicitors as Percentage	**22.38%**	**18.60%**	**14.16%**	**14.97%**

Note: Elizabeth Leighton, Frederick's wife, was hired by R&R Marketing as a "no-show" solicitor in 2005, she was terminated in June 2008

Sources:
Information Provided by Allied Beverage Group, Fedway Associates and R&R Marketing for 2007 through September 30, 2010

See Allied Exhibit 7; Fedway Exhibit 2; R&R Exhibit 1. Although he could not state that the above numbers were specifically correct, Saul Leighton confirmed their general accuracy. Leighton Exhibit 11 at 82-19 to 83-25. Thus, the overwhelming amount of purchases of non-exclusive products made by Bayway were through Allied and credited to Mrs. Leighton.[30] During this period, Mrs. Leighton was credited with a low of 78 percent (2007) to a high of 86 percent (2009) of all non-exclusive purchases.[31] Both Saul and Frederick Leighton made it clear

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[30]One of the arguments raised by Mrs. Leighton in support of her claim that granting a waiver "will not unduly burden any parties" is that there are three other Allied solicitors who service the Bayway account. However, Mrs. Leighton's share of non-exclusive products is 12 times greater than the other three Allied solicitors combined. Thus, her continuation as a Bayway solicitor harms competing solicitors from Allied, because these purchases of non-exclusive products are beyond their reach.

[31]Mrs. Leighton's 2007 sales figures may be skewed lower by the fact that Elizabeth Leighton (Saul Leighton's daughter-in-law and the wife of Bayway owner Frederick Leighton) was a "no-show" solicitor paid by R&R pursuant to its crisscross scheme. Elizabeth Leighton was terminated in 2008. Cease and Desist Order. As a result, in 2008 and 2009, R&R's share of non-exclusive products diminished, but Allied's share, through Shelley Novick-Leighton,

that the only reason these purchases were made through Shelley Leighton is because she is Saul Leighton's wife. Leighton Exhibit 12 at 26-25 to 27-2 (Shelley Leighton gets "[t]he vast majority" of the business, because "[s]he is my father's wife."); Leighton Exhibit 11 at 50-13 to 17 (Saul Leighton explains why he places such a high percentage of non-exclusive purchases with Mrs. Leighton: "She is my wife. It's as simple as that. She is my wife. I live with her. I love her.").

Moreover, Saul Leighton explained the additional leverage that a spouse-solicitor has that a non-spouse-solicitor does not have. When asked about a two-month period in which he had placed orders for Chivas Regal with another solicitor, he said: " ... Could have happened I must have slept in a different house for those two months." Leighton Exhibit 11 at 80-1 to 2.

Mrs. Leighton responded this way regarding her position as Allied's solicitor for Bayway and its effect on free competition:

> Q. [I]t doesn't seem as though there is any free competition in [Bayway], is that an incorrect perception? ... [C]ertainly the wholesalers aren't vying neck and neck for non-exclusive products ... because overwhelmingly you get more than 90 percent of non-exclusive products?
>
> A. That would be fair to say. [Leighton Exhibit 4 at 97-23 to 98-6].

Thus, even Mrs. Leighton admits that, because she is the wife of Saul Leighton, the general manager and primary purchaser for Bayway, there is no free competition in the wholesaler-to-Bayway segment of the market.

Another aspect of Bayway's purchasing behavior is also worth noting. Prior to 2007, Elizabeth Leighton, wife of Frederick Leighton and daughter-in-law to Saul Leighton, was one of

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increased.

the "no-show" solicitors employed by R&R. See IMO: R&R at 3-4; Leighton Exhibit 11 at 50-18 to 19. She was assigned to service the Bottle King accounts, with the understanding that Alan Packer, another "no-show" solicitor (IMO: R&R at 4), would be assigned to Bayway. Leighton Exhibit 11 at 51-6 to 14. Saul Leighton had to give his approval for R&R to hire Elizabeth Leighton as part of the scheme. Leighton Exhibit 11 at 78-1 to 3. As a result of the 2007 investigation, both Elizabeth Leighton's and Mr. Packer's employment with R&R was terminated in June 2008. Cease and Desist Order at 11. Thus, as Elizabeth Leighton's solicitor activities wound down, as indicated in the above chart, the amount of Bayway's purchases of non-exclusives from R&R declined, while purchases made from Allied through Shelley Novick-Leighton increased. Saul Leighton explained this phenomenon this way:

> A. I didn't have Alan Packer. The arrangement is you give some business to one which you knew that's why Liz is not there any more didn't have to be done anymore. Alan Packer was fired by R&R and there was no business to be given to him.
>
> Q. And the result of that ... more business in terms of non-exclusive products went to Shelley; is that correct?
>
> A. Yes, which was the business she had before Alan Packer came. [Leighton Exhibit 11 at 52-8 to 23].

In other words, the placement of Bayway's non-exclusive product purchases is dictated by whether or not there is an arrangement for commissions to be paid to a Leighton family member, unless a wholesaler breaks price. Leighton Exhibit 11 at 59-21 to 60-21. Saul Leighton explained, "It's all about the family." Leighton Exhibit 11 at 58-5. Thus, in order to make up for lost family income as a result of Elizabeth Leighton's termination, Bayway increased its purchases from Allied, through Shelley Novick-Leighton.

(2) **Tied-House:** Another of the purposes underlying the Solicitor Regulation is protecting the integrity of the three tiers, or tied-house. See N.J.S.A. 33:1-43. Simply put, the tied-house statute was enacted to prevent vertical integration in the alcohol distribution tiers. In 2007, Mrs. Leighton testified that she issued a check to Bayway for $100,000, from the joint account she had with Saul Leighton, to cover a cash shortage. Leighton Exhibit 2 at 32-12 to 22. In 2011, she testified to another loan in the amount of $350,000 - $400,000, also from a joint account. Leighton Exhibit 4 at 100-21 to 101-13. Bayway paid this loan back with interest. Id. at 101-14 to 20. This action may be a violation of N.J.S.A. 33:1-43. See IMO Disciplinary Proceedings Against Lewis LoPresti and Allamuchy Liquors, Inc., A.B.C. Bull. 2100, Item 6 at 9-10 (May 23, 1973), which is discussed below. Mrs. Leighton still maintains the ability to write checks or make withdrawals from Mr. Leighton's accounts. Leighton Exhibit 11 44-21 to 45-3. They also share an investment account. Leighton Exhibit 11 at 46-8 to 9.

Saul Leighton explained, that Bayway "do[es] not use the advantage to help our business ..." Leighton Exhibit 11 at 67-22 to 23. But, he admitted that his wife's income from Allied is a personal advantage. Leighton Exhibit 11 at 68-9 to 16. That advantage has relieved him of financial obligations, such as financial support of his stepchildren, including college. Leighton Exhibit 11 at 49-5 to 9. Being relieved of these obligations, Saul Leighton is able to fund Bayway's operations with a revolving $500,000 loan, on which he receives nine percent interest. Leighton Exhibit 12 at 39-16 to 40-22. See Leighton Exhibit 11 at 58-8 to 10 ("My income would be less ... I don't know directly, indirectly, it would hurt Freddie but not directly."). Therefore, the commissions Allied pays to Mrs. Leighton may potentially finance, albeit

indirectly, Bayway's ability to compete in the marketplace, because the commissions allow Saul Leighton to extend a $500,000 revolving loan to Bayway, which it uses for inventory purchases, as well as to extend an interest-only loan to his children for the acquisition of Bayway's stock from him and Harry Hammer.

IMO Disciplinary Proceedings Against Lewis LoPresti and Allamuchy Liquors, Inc., A.B.C. Bull. 2100, Item 6 (May 23, 1973), involved a husband, who held a Solicitor's Permit, and his wife, the owner of a retail licensee. The record disclosed that the funds Mrs. LoPresti used for the purchase of the business were hers, with the exception of a check for $1,000 from Mr. LoPresti, which was contributed due to the haste of the closing and the requirement for certified funds. Id. at 8. Mr. and Mrs. LoPresti owned the realty on which the license was sited. Ibid. Mrs. LoPresti denied that her husband "had anything to do with the business, but admitted that she lean[ed] upon him for advice because of his fifteen years experience as a permittee." Ibid. Director Robert E. Bower stated:

> Even a well intentioned solicitor finding one of his licensee customers momentarily overwhelmed by business may not "pitch in" to lend a gratuitous helping hand without being in violation. ... In addition to being barred from actual employment therein, the solicitor is forbidden to loan money or to arrange for such a loan to a retailer. ... The mere business assistance of aiding a retailer to pay bills and supporting that aid with a transition cash loan was likewise forbidden.
>
> Solicitors whose relatives are licensees often find themselves in difficulty when they attempt to assist in the licensed premises. ...
>
> The law is clear that its strict enforcement must depend upon separation of wholesalers and their solicitors from retailers. [Id. at 9-10 (citations omitted)].

Thus, Director Bower recognized the necessity of separation and independence of the three tiers in the alcoholic beverage distribution system.

After the 2007 investigation, the ABC's rule proposal recognized that:

> ... [ABC's] recent investigation established that the wholesalers were only offering or agreeing to hire the ... immediate family members of large-volume retailers. ... [T]his practice is antithetical to free competition. In addition, the ability to have a[n] immediate family member hired by a wholesaler to reap the benefits of commissions on that retailer's purchases was not offered to all retailers, but rather only to high-volume retailers on a cost benefit analysis. This practice is discriminatory and placed the lower volume retailers at a competitive disadvantage, in violation of N.J.S.A. 33:1-89 and 33:1-90. [41 N.J.R. 2436(a)].

By amending N.J.A.C. 13:2-16.11, ABC acted to minimize the influence that major liquor retailers held over the business operations and marketing decisions of liquor wholesalers. It did so by preventing wholesalers from hiring retailers' immediate family members to act as sales representatives to the particular retail accounts. By repealing the Grandfather Clause, ABC has taken further steps to ensure that the playing field between competing wholesalers and competing retailers is level. In this way, retailers will make liquor purchasing decisions based upon price, service and other legitimate business criteria rather than upon which wholesaler "plays ball" with the retailer. The benefit conferred by a wholesaler that employs an immediate family member of the holder of a retail license is such that it stifles free competition among wholesalers.

d. Other Arguments

(1) Regulation Places a Stigma on Mrs. Leighton's Reputation

Mrs. Leighton also contends that,

> Failure to grant this waiver will send a strong message to the industry that [she] must have done something wrong. Why else would the government use its vast power to deny [her] the right to service an account she has serviced without incident for 13 years? ... An unjust stigma will attach to [her] and follow her everywhere she goes for the rest of her career. [Leighton Exhibit 1 at 6].

However, when asked to explain, she admitted that the so-called stigma would only "be a question as to what [she] did to cause that to happen." Leighton Exhibit 4 at 68-20 to 21.

Explaining that she is no longer able to solicit her family's account due to a change in the Solicitor Regulation is simply part of the selling process. Everyone in sales must be able to "sell" themselves and overcome any preconceptions a potential buyer may have. Given her admission that the "stigma" is really only a "question," it does not appear that this argument provides a sufficient basis upon which to issue a waiver of the Solicitor Regulation.

(2) Repeal of the Grandfather Clause an Affront to Marriage

Two years after Saul Leighton secured the position of Allied solicitor for Shelley Novick, they married. Mrs. Leighton argued that,

> I wouldn't be sitting here if I chose to live with him as opposed to marry him. So, in a sense, we are talking about this being a front [sic] to marriage, ... Because if I chose to live with him and not marry him, I guess I would not be sitting here. [Leighton Exhibit 4 at 69-20 to 25].

This is similar to the argument posited by Denise Sobczak in IMO Denise L. Sobczak, Dkt. No. A-3286-03T5 (unreported) (App. Div. 2005). The Appellate Division restated Mrs. Sobczak's

argument as follows: "If the ABC does wish to prevent her from servicing those accounts now, this would encourage dissolution of the marriage in order for her to keep accounts and to keep her livelihood." Id. at 4. Mrs. Sobczak challenged the Solicitor Regulation on several grounds, including a claim that the regulation interfered with her right to marry protected by the Fourteenth Amendment of the Federal Constitution and Article I, ¶1 of the State Constitution. The Appellate Division noted that the purpose of ABC's regulation "... was to prevent unfairly maintaining business relationships, promote trade stability and prohibit discrimination in the sale of alcoholic beverages to retail licensees." Id. at 5. The court held that the Director "rationally concluded that '[c]ompetition among wholesalers is stifled by these relationships and consumers lose the benefits which open competition provides.'" Id. at 9. It found that the regulation had a rational basis and, therefore, did not violate the Equal Protection Clause of the Fourteenth Amendment or Article 1, ¶1 of the New Jersey Constitution. Id. at 11-12. Thus, the Appellate Division has already considered and rejected the argument raised by Mrs. Leighton.

As previously indicated, Shelley Novick-Leighton submitted no response to the documents referenced in the Division's September 8, 2011 letter.

4. **Decision on Shelley Novick-Leighton's Waiver Application**

Shelley Novick-Leighton's waiver application is denied, because she has failed to satisfy all three of the criteria in N.J.A.C. 13:2-9.1. Although her commissions have increased to more than $500,000 per year, she admits that she only spends between 8 and 15 hours per week at Bayway. In 2007, she spent about three hours per week there. In that same time period, the number of accounts she services has decreased from 13 to 10. In contrast, the average non-

waiver applicant Allied solicitor makes approximately $105,288 in commissions, with a median commission for 2009 of $84,802, and has 52 accounts.

Mrs. Leighton concedes that more than 90 percent of her commissions are generated by Bayway. Examining her relationship with Bayway, Mrs. Leighton, her husband Saul Leighton, the manager of Bayway, and her stepson Frederick Leighton, the owner of Bayway, all concede that she gets more business because she is married to Mr. Leighton. And Mr. Leighton admits that, in order to take advantage of the Grandfather Clause, they were first married in January 1999, "before the Grandfather Clause [became effective]," and later had a second wedding in April 1999 for "the family and friends." Both Mr. and Mrs. Leighton concede that he financially benefits from her income.

With regard to the waiver criterion of "undue hardship," Mrs. Leighton argues that she will be unable to continue to live her current lifestyle, based on an income in excess of $500,000 per year. While this might result in some degree of personal hardship, Mrs. Leighton ignores the CBA provision and the fact that she could work to develop other retail accounts on her own. Understandably, that might require Mrs. Leighton to work more than the 8 to 15 hours per week she works at Bayway, during which she concedes she is only a "double check" on what her husband has already decided to order. However, in this way, she would have the opportunity to recoup commissions lost as a result of the denial of the waiver.

With regard to the waiver criterion of "effect on other parties," Mrs. Leighton asserts that granting the waiver application "will not unduly burden any parties." However, her family makes more than 81 percent of its purchases of non-exclusive products through her. Mr. Leighton concedes that this is to the detriment of Fedway. Moreover, Mrs. Leighton has a

significantly greater share of non-exclusive products than the other three Allied solicitors who sell to Bayway combined and their share has decreased markedly during the time period in question. Thus, the grant of a waiver would continue to adversely affect competition both between wholesalers and between other solicitors from the same wholesaler. In addition, both Saul Leighton and Frederick Leighton agree that a denial of the waiver application will not adversely affect Bayway.

Finally, with regard to the waiver criterion of "consistent with the underlying purposes of Title 33 and the implementing rules," the negative effects of granting the waiver on competition are discussed above. Moreover, the three-tier system may be undermined by the grant of a waiver. Mrs. Leighton admits to making two loans to Bayway, which may be a violation of the Tied-House Statute. N.J.S.A. 33:1-43. Mrs. Leighton also pays the mortgage, certain other household expenses and covers Mr. Leighton on her health insurance. Thus, her income relieves Mr. Leighton of many financial obligations, which enables him to make a revolving $500,000 loan to Bayway for inventory purchases, on which he receives nine percent interest, as well as an interest-only loan to his children for the acquisition of Bayway's stock from him and Harry Hammer. This results in an indirect "subsidy" of a retailer by a solicitor.

Since Shelley Novick-Leighton has failed to satisfy all three of the criteria for a waiver, her application for a waiver must be denied. In addition, the Enforcement Bureau is directed to investigate and review the admitted loans to Bayway to determine whether they constitute Tied-House violations and take appropriate action.

C. Kerry Lynn Canal

1. Accounts for Which Relaxation is Sought

Kerry Lynn Canal ("Ms. Canal") seeks a waiver of N.J.A.C. 13:2-16.11 regarding a retail license owned by her mother, Canal's Pennsauken, and its affiliated warehouse, Canal's Camden (collectively, "Canal's Pennsauken").[32] Canal Exhibit 2 at 3-4. Canal's Pennsauken was owned by Ms. Canal's father when she was hired by Allied as a solicitor.[33] When he died, Margaret Canal, her mother, became the sole stockholder. Canal Exhibit 7 at 17-23 to 25. Canal's Pennsauken trades under the "Canal's Discount Liquor Mart" franchised trade name. Ibid.[34] Ms. Canal's brother, John, is the manager of the Canal's Pennsauken. Canal Exhibit 8 at 11-12 to 14.

Ms. Canal has a unique relationship to Canal's Pennsauken. She continually refers to that operation in the first-person. For example, when asked whether the use of computers cut down on the time she spent in that account, she stated, "*we* don't do purchase orders. My Dad never

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[32]Canal's Camden does not hold a retail distribution license. It is used solely to warehouse products ordered by Canal's Pennsauken that cannot be stored at the Canal's Pennsauken premises. Canal Exhibit 6 at 8-10 to 9-5.

[33] There are two trading names which include the name "Canal's." They have both been franchised. One franchised trading name is "Joe Canal's" and the other is simply "Canal's." Although Ms. Canal is related to both, she is unable to service the "Joe Canal's" stores due to a family feud. Canal Exhibit 5 at 18-4 to 8. She explained that, "[t]hey franchised out like *we* have ..." Id. at 16-6 (emphasis added).

[34]Gary Brady is a manager of Canal's Pennsauken. Canal Exhibit 7 at 79-1 to 6; Canal Exhibit 8 at 12-15 to 20. He orders wine and liquor for Canal's Pennsauken from his brother James Brady, an Allied solicitor. Canal Exhibit 8 at 49-16 to 25; Canal Exhibit 7 at 20-8 to 10. James Brady did not disclose Gary Brady or Canal's Pennsauken in response to Question 3 on his Solicitor Permit Renewal Application for 2010-2011 (asking whether any family member, including brother, participates in the operation of a retail alcoholic beverage license in New Jersey). Canal Exhibit 4. The Enforcement Bureau is directed to investigate and review whether James Brady is in violation of N.J.A.C. 13:2-16.11 and take appropriate action.

liked it. My brother doesn't like it. ..." Canal Exhibit 6 at 17-11 to 15 (emphasis added). When asked why the account does not prepare its inventory by computer, she responded, "... I am sure my brother or Carol could tell me. She is ***our*** office manager." Canal Exhibit 6 at 17-17 to 18-1 (emphasis added).

When the previous Allied solicitor, Burt Gordan died, Allied tried to put an F&A solicitor into the account, but, as Ms. Canal stated, "***our*** wine guy was like I don't want to see another salesman." Canal Exhibit 5 at 55-17 to 21 (emphasis added). She later explained that she used the first-person possessive, "because it's my family, it's familiar, so I might have said we." Canal Exhibit 6 at 22-6 to 7.

Ms. Canal stated that she spends "at least four days a week" at Canal's Pennsauken. Canal Exhibit 6 at 21-17 to 18. According to her brother, John, Ms. Canal generally comes in three days a week, except at holiday times, for a total of at least six hours per week. Canal Exhibit 8 at 31-4 to 13. While being paid as a full-time Allied solicitor, Ms. Canal also had time to work part-time as a model at QVC, in West Chester, Pennsylvania. Canal Exhibit 6 at 66-25 to 67-5.

2. Background

Ms. Canal became a solicitor in 1996. Canal Exhibit 3. In part, Ms. Canal was hired by Allied because she was a Canal. Canal Exhibit 6 at 42-4 to 5.

When she was first hired, Al Glander (R&R) and Burt Gordan (Allied) wrote most of the non-exclusive business. Canal Exhibit 6 at 26-13 to 22. When Gordan died and Glander retired, Ms. Canal became the "favored solicitor." Canal Exhibit 6 at 26-10 to 27-25. Canal's Pennsauken gave most of the non-exclusive business to Ms. Canal. Canal Exhibit 6 at 27-23 to

25. Ms. Canal explained that this occurred for two reasons: (1) the R&R solicitor was so pre-occupied with the products Canal's Pennsauken was ordering through her that he could not "remember to send" Bacardi and Courvoisier and (2) because she was the daughter of the owner. Canal Exhibit 6 at 28-1 to 29-11; 47-1 to 12. Ms. Canal has been making "six figures" since her second year as an Allied solicitor. Canal Exhibit 5 at 28-5 to 8.

Ms. Canal acknowledged that having Canal's Pennsauken assigned to her was "good for [Allied's] business." Canal Exhibit 6 at 26-4 to 9. She is, after all, the favored solicitor at that account. Canal Exhibit 6 at 26-10 to 12. As demonstrated in the chart on page 63, Canal's Pennsauken places significantly more purchases for non-exclusive products through Allied, for which Ms. Canal is paid commissions, than through either of the other two major wholesalers combined.

The number of accounts serviced by Ms. Canal is significantly less than the average Allied solicitor, as set forth in the following table:

Account Number Comparison

	2007	2008	2009	2010
Kerry Canal	9	9	9	9
Average Allied Non-Applicant Solicitor	53	52	52	49

See Allied Exhibit 3. Thus, according to information provided to ABC, from 2007 through September 2010, Ms. Canal never had more than 9 accounts per year, whereas the average non-applicant Allied solicitor maintained an average of 52 accounts.

3. Waiver Application

a. Undue Hardship

Ms. Canal argues that she will suffer undue economic and emotional hardships if this solicitor-retailer relationship is terminated. Specifically, Ms. Canal argues that the severance of her solicitor relationship with her mother's accounts is "undue," because she "has not engaged in any of the 'unfair trading practices' that the proposed Amendments are trying to abolish." Canal Exhibit 9 at 2.

Ms. Canal asserts that if she loses the Canal's Pennsauken account, she will suffer undue hardship, because her last name prevents her from selling to any other package goods stores. Canal Exhibit 6 at 41-4 to 42-12. She explained:

> Q. Well, so why can't you compete further up in North Jersey?
>
> A. Number one, I don't know the market up there. I don't know any of the stores. I have no contacts up there.
>
> Q. So you start out like anyone else.
>
> A. Well, I don't think I should have to give up this one because I'm good at what I do and I've earned my right to be in this store.
>
> Q. All right. So that's the nub of the application? ...
>
> A. Yes. [Canal Exhibit 6 at 48-21 to 49-9].

The basis for her "economic hardship" claim is the following passages:

> If I am not granted this waiver regarding the adoptive Amendments, ... I will lose my job. It's a fact that I will not be able to get any other accounts because my last name is Canal. I will only be seen as working for the competition. This Amendment overwhelmingly devastates my husband's and my financial welfare. I am the primary money earner in my marriage and our future plans for a family are dependent upon my earning

> capability. [Letter from Canal to Jerry Fischer, Director, Division of Alcoholic Beverage Control at 1 (August 11, 2010)].[35]
>
> Being a "Canal" in this industry has been both a blessing and a curse. It is impossible to think I would be able to sell to another high volume account because of my last name. Any large account in South Jersey is in direct competition with *Canal's*. No retailer that competes with a *Canal's* store on a daily basis would take me in as their salesman, knowing that I would have access to their pricing strategies, inventory, "buy-ins" and advertising schedule. I have always known and sometimes feared that my livelihood relies on the successes and failures of the *Canal's* chain. [Letter, from Canal to Jerry Fischer, Director, Division of Alcoholic Beverage Control at 4 (July 31, 2009)(emphasis added)].

Paul Canal (Canal's Marlton) acknowledged the challenge faced by his cousin, Kerry Canal, because of her last name. Zachary Exhibit 5 at 60-2 to 5 ("I think it's very tough for [Kerry to] make a business, a living ... with the last name Canal.").

The following colloquy explored her claim:

> Q. In fact, even without the Canal's in Pennsauken, you would be making in excess of $200,000 a year, is that correct?
>
> A. Well, that's right now. Things always change. ... Yes, I agree [with] that. I would still make money, but not like I'm used to.
>
> Q. Okay. But that's a far cry from being devastated financially, correct?
>
> A. Not true.
>
> Q. Not true? You would still be making over $200,000 a year and that is devastating?

---

[35]Ms. Canal's claim of economic devastation must be viewed in the context of the compensation she received from Allied, which is as follows: $354,026 (2010, through September 17, 2010); $477,546 (2009); $568,625 (2008); and $512,797 (2007). Canal Exhibit 2 at 3. Thus, for the period of January 2007 through September 17, 2010, Ms. Canal received more than $1.9 million in compensation from Allied.

A. I pay all of my bills.

Q. We all do.

A. I want to have kids. ... Which, you know, living where we live means private schools. I mean, it is a lot of - - I'm thinking about the future too, and just because I have these accounts now, I mean, things always change. So you know, [if] Maglio wants to sell his store in three years, that doesn't mean the next person that buys it will take me in or keep me as their salesman, so that can change. ...

Q. When salespeople lose accounts they go out and fight to get other accounts.

A. I told you how hard that is for me because I've given my card a lot and I get either why do you need to work, because people think I'm loaded because of my family name, or they think that, well, we compete with her family, why would we want to hire her. [Canal Exhibit 6 at 53-21 to 55-8].

Therefore, Ms. Canal admits that, while her relationship with other accounts may change, she can rely on the Canal's Pennsauken account as long as her mother owns it.

Ms. Canal also posited that she will also suffer an "emotional hardship," if she is no longer able to be the solicitor for her mother's accounts. She explained:

> ... Becoming a salesman was a perfect compromise of me having my financial and ideological independence, yet still learning the business my parents, and especially my dad so surreptitiously wanted me to be a part of. ... My becoming a salesman allowed him to show off all his knowledge and strengths while letting me find mine. It is breaking my heart to think I would not be able to sell to this account. I want that account where I saw him everyday. The one I cut my teeth in. The one I [m]ade mistakes in. The one I got yelled at in. The one that is falling apart, that is too small, too old, that has workers there since I was born, that I feel at home in and that I became who I am in. His passing has not become easier with the passing of time; it has become harder because I realize he really isn't coming back. And I just want him back. I feel I have a little bit of that when I am at that store and doing my job, knowing

> that he was proud of me and all that I had proved to my company and colleagues. [Canal Exhibit 1 at 2].

Ms. Canal also contends that, "If I am not granted this waiver ..., I will lose my job." Canal Exhibit 1 at 1. When asked to explain her statement, the following colloquy took place:

> A. I am not going to be able to get other accounts.
>
> Q. But you'll maintain the accounts that you have, right?
>
> A. As of right now, yes. ...
>
> Q. So you will lose some of your income, but you won't really lose your job, correct?
>
> A. Well, I lose my right to work, yes, that is my job.
>
> Q. To one account?
>
> A. It's my whole job. That is my biggest account. It makes the majority of my income. ... To take that away, yes, I am losing my job. ... there is no account that does the volume like that. [Canal Exhibit 6 at 61-23 to 62-19].

Subsequently, she admitted that she would still have her job, but she would not make as much money. Canal Exhibit 6 at 62-24 to 63-1.

Ms. Canal's annual sales to her mother's accounts falls within the range of 49.3 percent - 57.3 percent of her total sales, with an average of 53.3 percent for 2005-2010. The following chart sets forth the actual numbers based upon her submissions:

Kerry Canal's Total Sales to Accounts for Which Waiver is Sought

	2005	2006	2007
Canal's Pennsauken	$1,384,704	$1,216,770	$1,274,572
Canal's Camden	$3,320,535	$4,013,594	$4,768,332
Sales to Relative Accounts	$4,705,239	$5,230,364	$6,042,904
Total Sales to All Accounts	$9,539,893	$10,003,659	$10,545,299
Relative Accounts as % of Total	**49.3%**	**52.3%**	**57.3%**

	2008	2009	2010
Canal's Pennsauken	$1,035,638	$961,156	$711,089
Canal's Camden	$5,035,911	$4,267,151	$2,078,474
Sales to Relative Accounts	$6,071,550	$5,228,306	$2,789,563
Total Sales to All Accounts	$10,845,309	$9,917,549	$5,509,615
Relative Accounts as % of Total	**56.0%**	**52.7%**	**50.6%**

Total Sales to Relative Accounts for Period	$30,067,926
Total Sales for Period	$56,361,324
Relative Accounts as % of Total Sales for Period	**53.3%**

Source:
Response to Initial Questionnaire and Document Production, Schedule A (September 22, 2010)

See Canal Exhibit 2 at Schedule A. Thus, the impact of not being able to sell to her mother's accounts, although clearly significant, does not support her claim that it would be tantamount to losing her job. She would still retain 46.7 percent of her commissions (generating $221,592 in commissions in 2009), plus whatever commissions she could generate from sales to new accounts.

Moreover, Ms. Canal's claims of undue hardship and financial devastation cannot be viewed in a vacuum. For example, her waiver application is based, in part, upon her belief that the average Allied solicitor makes between $200,000 - $400,000 per year. Canal Exhibit 6 at 68-20 to 69-1. However, excluding the solicitors who applied for waivers of the Solicitor Regulation, the average non-applicant Allied solicitor was paid $105,288. Allied Exhibit 1. In 2009, the median commission paid to non-applicant solicitors by Allied was $84,802. Ibid. By

comparison, nearly half of the $460,000 (approximately $239,000) in commissions Ms. Canal received from Allied in 2009 resulted from purchases made by Canal's Pennsauken. Canal Exhibit 6 at 68-2 to 10. Placed in context, Allied paid Ms. Canal more than twice as much in commissions on the Canal's Pennsauken account alone than it does in total commissions to its average solicitor on all accounts. Moreover, if the waiver application is denied, Allied could re-assign to her other accounts of similar size, pursuant to the CBA, and she can pursue new accounts on her own.

Ms. Canal further explained the undue hardship this way:

> Q. So if you lost the Pennsauken store and got no store to replace it, you would still be making a substantial income, correct?
>
> A. Well, ***not compared to what I'm used to***, no. [Canal Exhibit 6 at 68-11 to 14 (emphasis added)].

Nevertheless, Ms. Canal would be paid more than double the commission of an average Allied non-waiver applicant solicitor on her remaining accounts. Allied Exhibit 1.

In addition, the harm envisioned by Ms. Canal is speculative, at best. She has nine accounts, Canal Exhibit 6 at 70-14, compared to the average non-applicant Allied solicitor, who carried approximately 52 accounts in 2009. Allied Exhibit 3. She has not tried to sell to a non-Canal franchise-name account since at least 1999. Canal Exhibit 6 at 60-6 to 18. In the past three years, the only new account she picked up was the Canal's in Mt. Ephraim. Canal Exhibit 6 at 63-2 to 7. Thus, because she has made no appreciable efforts in almost 15 years to obtain new accounts, her claim that she cannot sell to other accounts is merely speculative. Finally, she emphasized that accounts in South Jersey will not deal with her because her name is Canal and Canal stores compete with them. However, there are many potential retail accounts in North

Jersey. The fact that she does not know the market or has no contacts there simply means that she would have to start out like any solicitor with a new account or accounts in an unfamiliar area.

b. Effect on Other Parties

Regarding the effect of a waiver on other parties, Ms. Canal made the following statement:

> A. Well, there is no guarant[ee] - - I don't know who they're going to give the business to if I'm not in there. So, yes, maybe Allied does suffer. Maybe R&R does suffer. Maybe Fedway does suffer.
>
> Q. ... But how would Fedway and R&R suffer?
>
> A. They still get some products that I sell, so who knows, I don't know. [Canal Exhibit 6 at 86-5 to 13].

According to Margaret Canal, the denial of her daughter's waiver application would have a "major effect," Canal Exhibit 7 at 51-24, because she would have "to start all over again and train somebody and teach somebody, and who wants to be bothered with that. You've got enough to do." Canal Exhibit 7 at 52-6 to 9. See also Canal Exhibit 8 at 42-21 to 25. However, she conceded that Canal's Pennsauken would still be able to obtain all the products it needs, it would just be "a question of who [she] buy[s] it from." Canal Exhibit 7 at 54-15 to 21. Both Fedway and R&R would probably pick up business. Canal Exhibit 8 at 48-12 to 14. Moreover, there would be no change in Canal's Pennsauken's sales volume. Canal Exhibit 7 at 54-22 to 24.

Finally, Margaret Canal admitted that, if her daughter's waiver application is denied, other solicitors would be able to perform the tasks performed by her daughter. She said, "I'm

sure anybody could pick it up, I think," Canal Exhibit 7 at 72-20 to 21, in a relatively short period of time. Canal Exhibit 7 at 73-7 to 13.

John T. Canal, manager of Canal's Pennsauken, indicated that he trusts his sister because she will tell him that a "product [is] going off [price] for three months, ... [he] can trust that." Canal Exhibit 8 at 43-1 to 4. If his sister did not provide this type of information to him, he would be placed on par with the other package goods stores against whom he competes. Canal Exhibit 8 at 44-17 to 21. In fact, this is an admission of an improper practice that demonstrates discrimination between retailers, in violation of N.J.S.A. 33:1-3.1b(10).

c. Purposes of Title 33 and the Implementing Rules

(1) Free Competition: Regarding the effect of a waiver on free competition, Ms. Canal made the following statement:

> A. You have to give the business to somebody and whether you give it to me or give it to someone else personally I don't think it's any of your business. It's got to go to somebody. So if it goes to me because my parents owned the store, I mean, if I was a stockbroker, I would hope they would invest their money with me ... [Canal Exhibit 6 at 71-24 to 72-5].

John Canal admitted that the fact that Kerry is his sister plays a "large role" in the placement of orders. Canal Exhibit 8 at 28-5 to 9. So much so, that 95 percent of all non-exclusives ordered through Allied were placed with Kerry Canal. Canal Exhibit 8 at 41-11 to 16. Therefore, her brother summed it up by saying, "you can't discount the fact that she's family, that's obviously part of it." Canal Exhibit 8 at 41-22 to 23.

Sales for the period of January 1, 2007 through September 30, 2010, clearly show that Allied has a virtual lock on the sale of non-exclusive products to Canal's Pennsauken, as

demonstrated in the following chart.[36] Her average annual commissions for 2007-2009 was $478,422, but the commissions she was paid on purchases made by her mother's account averaged $266,067, or 55.6 percent of her annual average commissions. Allied Exhibits 1&2.

Kerry Canal Compared to All Other Solicitors
Sales of Non-Exclusive Products to Accounts for Which Waiver is Sought
(Canal's Pennsauken & Camden Combined)

	2007	2008	2009	Thru 9/30/2010
Kerry Canal	$2,357,047	$5,096,901	$4,445,815	$2,527,209
Other Allied Solicitors	$94,913	$292,970	$215,797	$137,890
R&R Marketing, LLC	$481,470	$433,766	$458,046	$301,162
Fedway Associates	$195,163	$247,738	$164,938	$122,930
Total Sale of Non-Exclusives	$3,128,594	$6,071,375	$5,284,596	$3,089,190
Kerry Canal as Percentage	**75.3%**	**83.8%**	**84.2%**	**81.8%**
All Other Solicitors as Percentage	**24.7%**	**16.2%**	**15.8%**	**18.2%**

Sources:
Information Provided by Allied Beverage Group, Fedway Associates and R&R Marketing from 2007 through September 30, 2010

See Allied Exhibit 7; Fedway Exhibit 2; R&R Exhibit 1. Thus, it is clear that, because her mother owns Canal's Pennsauken, Kerry Canal receives a disproportionate amount of that retailer's purchases of non-exclusive products.[37] Margaret Canal confirms, "Why wouldn't you [order more from your child] ... she's my daughter." Canal Exhibit 7 at 38-11 to 12.[38]

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[36]There are other Allied solicitors who service the Canal's Pennsauken account. However, Ms. Canal has a significantly greater share of non-exclusive products than the other Allied solicitors combined.

[37]As noted above, Allied solicitor James Brady is the brother of the wine buyer for Canal's Pennsauken, which appears to be a violation of N.J.A.C. 13:2-16.11. Mr. Brady did not request a waiver. When the amount of non-exclusive product business routed to Mr. Brady is added to Ms. Canal's total, Allied's percentage of all non-exclusive purchases made by this account jumps to 77.7 percent (2007), 87 percent (2008), 87.6 percent (2009) and 85.2 percent (2010). Thus, unless a wholesaler breaks price, the single factor considered by Canal's Pennsauken when choosing the wholesaler from whom it will purchase non-exclusive products appears to be familial relationship, and not other free market factors.

[38]Mrs. Canal also added, "And she knows what she's doing ..." Canal Exhibit 7 at 38-20 to 21.

Thus, insofar as sales of non-exclusive products are concerned, Ms. Canal's familial relationship to the Canal's Pennsauken has been an insurmountable impediment to free competition. The point cannot be made any more poignantly that the summary proffered by Fedway solicitor Martin Zachary,

> Q. ... did you ever feel that the fact that Kerry Canal was an Allied solicitor in that account ... hamper[ed] your ability to get any non-exclusive business?
>
> A. Yep, because everything went to Kerry. .... there were brands that Allied picked up and I no longer was able to sell them to [Canal's] Pennsauken because Kerry now had them. ***She got it all.*** [Zachary Exhibit 3 at 34-1 to 10 (emphasis added)].

Ms. Canal concurred with Mr. Zachary's assessment. Canal Exhibit 6 at 87-8 to 9 ("certain people get jobs because of who they know"). Her brother, John Canal, also made it clear that there is nothing that any of the competing solicitors can do to break Kerry Canal's lock on Canal's Pennsauken's purchases of non-exclusive products "unless Kerry does something to mess that up, yes." Canal Exhibit 8 at 51-4 to 52-8. See also Canal Exhibit 8 at 53-22 to 24 (... "I don't think there's anything they can do ..."). In addition, Margaret Canal stated that both Fedway and R&R would get more of the non-exclusive product purchases, if her daughter's waiver application is denied. Canal Exhibit 7 at 76-24 to 77-3.

(2) Tied-House: Regarding tied-house, there is evidence that Kerry Canal's role goes beyond the arm-length's activities expected of solicitors. For example, Martin Zachary testified that before Margaret Canal terminated him as Fedway's solicitor at Canal's Pennsauken, he only saw Kerry Canal there "[o]nce in a blue moon." Zachary Exhibit 3 at 34-11 to 12. Furthermore, unlike other solicitors, who only had access to the warehouse inventory

screen, Kerry Canal had access to both the business office and the desk computer Canal's Pennsauken uses to run its retail business. Zachary Exhibit 3 at 35-4 to 36-5. Thus, by virtue of her familial relationship to Canal's Pennsauken, Allied had access to the retailer's business computer. This access gave Allied an informational advantage and, when combined with the first-person possessive references made by Ms. Canal vis-a-vis Canal's Pennsauken, makes it appear that her familial relationship allows her to act in ways that other solicitors cannot.

d. Other Arguments

Ms. Canal claims that, as the result of a settlement of her 1997 appeal of the First Order, the repeal of the Grandfather Clause, formerly contained in N.J.A.C. 13:2-16.11, cannot be applied to her. She explained:

> A. As far as I'm concerned, I won this settlement to keep my job and now the fact that it's being all brought up again, you know, I mean, it is upsetting, but it really aggravates me that, you know, basically people who don't know who I am can make assumptions about me and say I don't work, or ***oh, it's not fair because you get all of the business***. Well, it's like that in any industry. Certain people get jobs because of who they know. ... ***I think it's people that are jealous that want my job or want my accounts***, that's what I think it is. [Canal Exhibit 6 at 87-1 to 13 (emphasis added)].

The basis of Ms. Canal's argument began on November 6, 1997, when she filed an appeal of the First Order. Canal Exhibit 10. She raised these three issues in her appeal:

1. Did the Director Division of Alcoholic Beverage Control err in promulgating an order without proceeding through the rule making process N.J.S.A. 52:14B-1;

2. Did the Director err in failing to strictly construe a penal statute; and

3. Does the Director's order violate a person's right to work which remains a 14th Amendment liberty interest and is protected against arbitrary government interference. [Canal Exhibit 11 at 1].

To place Ms. Canal's "settlement" argument in perspective, a brief synopsis of the pertinent facts related to the claimed settlement is necessary. In response to industry comments and two appeals filed by affected parties, Director Holl issued the Second Order. He stated:

> We have determined to withdraw the September 24, 1997 order to enable us to freshly consider the issues and concerns raised by the industry. Accordingly, [ABC] will commence a review of the issues involving solicitors with immediate family members holding an interest in a retail license. Upon completion of our review, we will determine whether regulatory action in the form of rulemaking is necessary and appropriate. [Second Order (emphasis added)].

By letter dated December 15, 1997, Lisa R. Ellison, Deputy Attorney General, transmitted the Second Order to Ms. Canal's attorney. Her letter stated that "[b]ased upon this Order, it has been agreed that you shall withdraw your appeal as moot. [Letter from Lisa R. Ellison, Deputy Attorney General to Edwin T. Ferren, III, Esq. (December 15, 1997)]. By order dated January 7, 1998, the Appellate Division dismissed the appeal as withdrawn. Kerry L. Canal v. Division of Alcoholic Beverage Control, Docket No. A-1488-97T5 (January 7, 1998).

Ms. Canal provides no evidence that ABC ever agreed to grant her permanent grandfather status. Nothing in the Second Order or the December 15, 1997 letter indicated that Ms. Canal would have permanent grandfather status. Director Holl determined that ABC would withdraw the First Order, conduct a regulatory review and, if appropriate, promulgate a regulation. In fact, ABC conducted such a review and issued the 1999 version of the Solicitor Regulation, which included the Grandfather Clause.

As noted, in 1997, Ms. Canal also asserted in her appeal that Director Holl "err[ed] in failing to strictly construe a penal statute." However, N.J.S.A. 33:1-73 specifically provides that

"[The ABC Act] is intended to be remedial of abuses inherent in liquor traffic and shall be liberally construed." Thus, Ms. Canal's strict construction argument is without merit.

Lastly, Ms. Canal asserts that denial of her waiver application would violate her right to work under the Fourteenth Amendment. In this case, denial of the waiver application is not a denial of the right to work. In fact, as her attorney stated in his certification in support of her application for the waiver, "No mention of [Ms. Canal] is made in the Consent Order" requiring the termination of specific solicitors. Canal Exhibit 12 at ¶12. If her waiver application is denied, she will be free to work as a solicitor with other retail licensees, in accordance with N.J.A.C. 13:2-16.11, just not her mother's accounts. Moreover, pursuant to the CBA, Allied may assign an account or accounts of similar volume to her after her mother's accounts are re-assigned to an unrelated solicitor or solicitors. She may also develop other accounts on her own.

4. **Additional submission on Behalf of Kerry Lynn Canal**

By letter dated September 8, 2011, the Division provided each of the waiver applicants with a list of documents and a disc containing those documents, to allow the applicants to provide a response, if any, no later than September 26, 2011. Thereafter, the record would be closed and decisions rendered on each of the waiver applications. By letter dated September 22, 2011, Scott N Silver, Esq., attorney for Kerry Lynn Canal, requested an extension of time to respond until October 3, 2011. By letter dated September 26, 2011, this request was granted. Thereafter, Mr. Silver advised that several documents relating to Kerry Lynn Canal were not included on the disc. By letter dated October 5, 2011, these documents were provided and the time to respond was extended to October 13, 2011. By letter dated October 7, 2011, a response was submitted on behalf of Kerry Lynn Canal.

Ms. Canal first points out that Circus Liquors v. Governing Body of Middletown Township, 199 N.J. 1 (2009), stands for the proposition that the Director has broad equitable powers to fashion remedies to deal fairly with parties and that Township Committee of the Township of Lakewood v. Brandt, 38 N.J. Super. 462 (1955), stands for the proposition that, once a person holds a license or permit, that person has an interest which is worthy of protection. In a footnote, Ms Canal raises, but does not provide support for, the argument that the denial of her waiver application "would constitute an unconstitutional deprivation of a liberty interest and an impermissible taking." While I agree that I am charged with dealing fairly with those in the regulated community, I must point out that Circus Liquors involves renewal of a retail liquor license and Brandt involves the transfer of a retail liquor license. Neither of these cases have any factual similarities with the instant matter, which affects trade stability, competition and discrimination in the industry I am charged with regulating. Moreover, N.J.S.A. 33:1-12.40 clearly states that "participation in the alcoholic beverage industry ... is deemed a revocable privilege."

A District Court has held that a liquor license is an interest in property for purposes of a federal due process analysis. Sea Girt Restaurant and Tavern Owners Association, Inc. v. Borough of Sea Girt, New Jersey, 625 F.Supp. 1482, 1487-1488 (D.N.J. 1986), aff'd 802 F.2d 445, 448 (3d Cir. 1986). However, that case dictates that the holder is entitled to due process before a license is revoked. The denial of a waiver is not a revocation of Ms. Canal's permit. It would merely preclude her from selling to her mother's retail accounts. Moreover, the waiver process has accorded her with full due process of law. Finally, Ms. Canal argues that, apart from

alcoholic beverage control law, there are "equitable principals" (sic) that support the granting of a waiver.

Ms. Canal next recites the standards for "relaxation" or a "waiver." Since they have been set forth above, I will not repeat them here.

With regard to "undue hardship," Ms. Canal argues that she has been a bona fide solicitor for 15 years and is the third generation of her family to work in the industry. About 50 percent of Ms. Canal's 2009 income, or $239,000, resulted from purchases made by the retail account owned by her mother and managed by her brother. Ms. Canal argues that Allied is under no obligation to give her comparable accounts if she can no longer service the two accounts in question, since the contract states that "accounts with 'substantially equal volume' must be reassigned only when a solicitor is removed from an account as a result of the exercise of a discretionary 'business judgement' action by the employer" and not by a change in the law. Also, there is no limitation on the number or location of accounts to be reassigned. Finally, she believes that her name would cause her difficulty, since any large retailer in South Jersey is in competition with the retail account owned by her family or other retail accounts with the "Canal" name, which she does not service, and which would not accept her due to a longstanding family dispute.

Ms. Canal argues that the testimony of Mr. Zachary, also related to the Canal family, "regarding Ms. Canal and why Canal's Pennsauken refused to allow him to continue as a solicitor servicing its account" should not be considered, since he was not subject to cross-examination. Even without Mr. Zachary's testimony, there is ample testimony from both Ms. Canal's mother and her brother to support the conclusion that the vast majority of non-exclusive

product sales are made through her because she is a daughter/sister. Thus, her argument regarding Mr. Zachary's testimony is unpersuasive.

Ms. Canal argues that almost everyone interviewed indicated that most retailers have a "favored solicitor," either based on family relationships or other factors. Below the "favored solicitor" are the others, generally ranked by length of service. When one solicitor leaves, the non-exclusive sales are usually split among the others according to their rankings and are not given to a new solicitor. Thus, assigning her to "comparable accounts" would not make her whole. However, ABC is not obligated to "make her whole." ABC is charged with regulating the alcoholic beverage industry in ways that insure competition and trade stability and prevent discrimination.

Ms. Canal argues that "[she] may have gotten the opportunity to be the 'favored' solicitor or 'top writer' at the Pennsauken store because of her familial relationship - but she waited her turn to become the 'top writer' and earned it by devoting most of her time and energy to it." After her lawsuit in 1997, Ms. Canal believed that her grandfather status was safe. She bought a home, is renovating it and is the primary breadwinner in her marriage. She hopes to start a family someday and continue working. She has rising medical bills due to several chronic problems and the loss of this account would greatly affect the financial assumptions on which she based her plans for the future.

With regard to the "not unduly burden affected parties prong," Ms. Canal questions who these parties are. Since there is nothing in the record showing that retailers' prices to consumers are affected by solicitors who are immediate family members, consumers cannot be the "affected parties."

She also argues that retailers not serviced by immediate family members who are solicitors are not affected parties either. She states that allowing immediate family members to service certain retail accounts does not result in those retailers selling at artificially low prices, to the detriment of retailers not serviced by immediate family members. However, this does not address her brother's concession that he trusts his sister because she will tell him that a "product [is] going off [price] for three months, ... [he] can trust that." Canal Exhibit 8 at 43-1 to 4. If his sister did not provide this type of information to him, he would be placed on par with the other package goods stores against whom he competes. Canal Exhibit 8 at 44-17 to 21. This pricing information not generally available to retail licensees may result in better inventory practices that enable him to sell at a lower price or to make a greater profit on sales. See N.J.A.C. 13:2-24.6. In either case, it may demonstrate discrimination between retailers, in violation of N.J.S.A. 33:1-3.1b(10).

Ms. Canal further argues that solicitors who do not service the retail accounts of immediate family members are not affected parties either. And, even if they are, the effect is de minimis, because only a very small percentage of all retail licensees are serviced by immediate family members who are solicitors. She argues that "ensuring 'fairness' between individual solicitors is not a stated rationale of the regulation [from which Ms. Canal seeks a waiver]." However, in order to be eligible for a waiver, Ms. Canal must show that her waiver request is "consistent with the underlying purposes of Title 33 and the implementing rules." Two of the stated purposes of Title 33 are '[t]o provide a framework for the alcoholic beverage industry that recognizes and encourages the beneficial aspects of competition" and "[t]o maintain trade stability." N.J.S.A. 33:1-31.b(6) and (7).

Finally, with regard to wholesalers, Ms. Canal admits that R&R and Fedway will have an "inability to effectively compete for approximately $4.4 million in non-exclusive sales" and "[t]hat [is] not an inappropriate price to pay for having engaged in practices that created the problem in the first instance and brought this matter to its current status." This argument fails to recognize that Allied was not an innocent party in the Division's prior investigations. Moreover, it is an admission by Ms. Canal that her position as a solicitor to her mother's accounts has a negative impact on market competition between wholesalers, followed by her own self-serving conclusion that the ongoing adverse impact on others is not nearly as significant as the adverse effect on her would be if her waiver application is denied.

With regard to the "consistent with the underlying purposes of Title 33 and the implementing rules" prong, Ms. Canal argues that she and her mother are separate and independent economic units, so there is no "subsidy" present. The income she makes does not benefit any immediate family member in the alcoholic beverage industry. Ms. Canal argues that the recent amendments were caused by the actions of Allied and R&R. There were no allegations of wrongdoing on the part of either Ms. Canal or Canal's Pennsauken and Ms. Canal should not suffer due to the actions of others or she will become "a 'classic case of collateral damage.'"

I previously set forth the history of the Division's experience with solicitor issues. As the Division became aware of overt violations and patterns of abuse that undermined the purposes of Title 33, it enacted new or modified regulations to end those problems. The latest amendments to the Solicitor Regulation were intended to address the anti-competitive nature of sales by certain solicitors to immediate family members with retail licenses. Waivers are available to

those solicitors who demonstrate that they do not undermine the stated purposes of Title 33. Thus, Ms. Canal is not a case of "collateral damage," but a solicitor with a relationship to a family member's retail accounts that the regulation was intended to address.

Finally, Ms. Canal repeats her argument that, after she filed an appeal in 1997, she and ABC "entered into a settlement agreement by which she would be permitted to continue to serve family-owned retail accounts." According to Ms. Canal, the failure to grant a waiver would constitute a breach of this agreement.

As explained above, this argument fails. Ms. Canal provides no evidence that ABC ever agreed to grant her permanent grandfather status. Rather, Director Holl determined that ABC would withdraw the First Order, conduct a regulatory review and, if appropriate, promulgate a regulation. In fact, ABC conducted such a review and issued the 1999 version of the Solicitor Regulation, which included the Grandfather Clause. As a result of subsequent investigations, the Division adopted the 2010 version of the Solicitor Regulation, which eliminates the Grandfather Clause.

5. **Decision on Kerry Lynn Canal's Waiver Application**

Kerry Lynn Canal's waiver application is denied, because she has failed to satisfy all three of the criteria in N.J.A.C. 13:2-9.1. Ms. Canal indicates that her commissions from 2007-2009 (last full years of reporting) have been $512,797 - $477,546. She has maintained an average of nine accounts. In contrast, the average non-waiver applicant Allied solicitor makes approximately $105,288 in commissions and has 52 accounts. In 2009, the median commission paid to non-applicant solicitors by Allied was $84,802. While she stated that she spends "at least four days a week" at Canal's Pennsauken, her brother stated that she generally comes in three

days a week, except at holiday times, for a total of at least six hours per week. Ms. Canal, her mother and her brother all concede that she gets more business due to her family relationship.

With regard to the waiver criterion of "undue hardship," Ms. Canal argues that her income will not be "what [she's] used to," even though her accounts that are not affected by her waiver application generated $221,592 in commissions in 2009. While the loss of the Canal's accounts may result in a decrease in income, Ms. Canal may be reassigned to other accounts pursuant to the CBA provision and she could also work to develop other retail accounts on her own, albeit in locations where she does not know the market or does not currently have connections. Understandably, that might require Ms. Canal to service more accounts, like other Allied solicitors, and to work more hours per week. However, in this way, she would have the opportunity to recoup some or all of the commissions lost as a result of the denial of the waiver. Finally, her novel claim of "emotional hardship," due to her attachment to Canal's, cannot support the grant of a waiver unless all of the other criteria are met.

With regard to the waiver criterion of "effect on other parties," Ms. Canal questions who these other people are. That argument has previously been discussed at length. Ms. Canal had 75.3 percent (2007), 83.8 percent (2008), 84.2 percent (2009) and 81.8 percent (through 9/30/2010) of all non-exclusive sales to Canal's. Her mother conceded that, if the waiver application is denied, both Fedway and R&R would get more of the non-exclusive product purchases. Even Ms. Canal admits that, if the waiver is granted, R&R and Fedway will have an "inability to effectively compete for approximately $4.4 million in non-exclusive sales." In addition, she has a significantly greater share of non-exclusive products than the other Allied solicitors who sell to Canal's combined. Her brother stated that 95 percent of all orders of non-

exclusives from Allied were placed with Ms. Canal. Thus, the grant of a waiver would adversely affect competition both between wholesalers and between other Allied solicitors. Competing solicitors will continue to be deprived of sales they might otherwise make, but for Ms. Canal's familial relationship. Moreover, Ms. Canal's mother admits that, while it will be annoying "to start all over again and train somebody and teach somebody," Canal's Pennsauken would still be able to obtain all the products it needs.

Finally, with regard to the waiver criterion of "consistent with the underlying purposes of Title 33 and the implementing rules," the negative effects of granting a waiver on competition are discussed above. According to Ms. Canal's brother, she provides him with pricing information not generally available to retail licensees. This has also been discussed above. This information could result in better inventory practices, enabling Canal's to sell at a lower price than competing retailers or make a greater profit on sales than competing retailers. In either case, it may demonstrate discrimination between retailers, in violation of N.J.S.A. 33:1-3.1b(10).

Since Kerry Lynn Canal has failed to satisfy all three of the criteria for a waiver, her application for a waiver must be denied. Given that I have denied Ms. Canal's waiver application, the Division will take no further action against her solicitor's permit for the seeming violation of N.J.S.A. 33:1-3.1b(10).

D. Donna McAdam

1. Accounts for Which Relaxation is Sought

Donna McAdam ("Mrs. McAdam") seeks relaxation of N.J.A.C. 13:2-16.11 so she can continue to receive commissions on purchases made by Richard McAdam, Inc., t/a Stirling

World of Liquors ("Stirling Liquors") and David McAdam, Inc., t/a Roselle Park Liquors ("Roselle Park Liquors"). McAdam Exhibit 1 at 2. Her husband, Richard, is the sole shareholder of Stirling Liquors and 50 percent shareholder of Roselle Park Liquors. McAdam Exhibit 1 at 2. Her total sales to her husband's businesses from 2005 through September 30, 2010, are as follows:

Donna McAdam's Sales to Accounts for Which Waiver is Sought

	2005	2006	2007
Roselle Park Liquors	$1,758,545	$1,481,395	$1,601,646
Stirling Liquors	$1,978,978	$1,846,203	$2,133,126
Sales to Relative Accounts	$3,737,524	$3,327,598	$3,734,771
Total Sales to All Accounts	$3,788,805	$3,377,091	$3,788,480
Relative Accounts as % of Total	**98.7%**	**98.5%**	**98.6%**

	2008	2009	2010
Roselle Park Liquors	$1,527,334	$1,540,967	$895,394
Stirling Liquors	$2,260,730	$2,407,837	$1,466,493
Sales to Relative Accounts	$3,788,063	$3,948,805	$2,361,888
Total Sales to All Accounts	$3,886,870	$4,031,823	$2,418,518
Relative Accounts as % of Total	**97.5%**	**97.9%**	**97.7%**

Total Sales to Relative Accounts for Period	$20,898,649
Total Sales for Period	$21,291,586
Relative Accounts as % of Total Sales for Period	**98.2%**

Source:
Donna McAdam's Response to Initial Questionnaire and Document Production, Schedule A (September 16, 2010)

McAdam Exhibit 7. Thus, approximately 98 percent of the commissions she receives from Allied relate to purchases from her husband's two licenses. McAdam Exhibit 1 at 2.

2. Background

Mrs. McAdam became a solicitor in 1997. McAdam Exhibit 1 at 1. Before then, she was employed as an Executive Assistant for the New Jersey Savings League. She left that position to

raise her children. When her children were old enough to attend school, she decided to re-enter the work force. She considered various careers, as well as potentially going back to college. McAdam Exhibit 1 at 1-2.

Mrs. McAdam's experience in the liquor industry was limited to assisting her husband at Roselle Park Liquors. Her duties at the store were administrative, such as bookkeeping and ordering product. McAdam Exhibit 4 at 7-2 to 4, 11-12 to 17. She also assisted her husband with the cash register and made ice for the store. McAdam Exhibit 3 at 44-15 to 46-12.

Mr. McAdam tried to have her work as a bookkeeper, but "[s]he wasn't great with the books ... Donna would double pay the Budweiser bill and forget to pay the water bill, so we said we'll find something else for you to do." McAdam Exhibit 3 at 45-4 to 10. Although Mrs. McAdam stated that she would order product for Roselle Park Liquors, her husband stated she was not involved in ordering product there. McAdam Exhibit 3 at 47-24 to 48-2.

In 1997, a position with Baxter, which later merged into Allied, became available when the solicitor who serviced Roselle Park Liquors, Sean Kull, was going on leave and was ultimately fired. Mr. McAdam stated he discussed this open position with William Kull (Sean's father), who was a Baxter manager at the time. William Kull offered Mrs. McAdam the job, "because, you know, she wasn't the type of person who was sitting home." McAdam Exhibit 3 at 41-18 to 42-8. Mrs. McAdam interviewed with William Kull, Jerry Lamberti and met with Eric Perlmutter, Baxter's owner at the time. McAdam Exhibit 2 at 6-22 to 8-13. She accepted the position as a Baxter solicitor. Ibid.

Initially, Mrs. McAdam was assigned only one account ... Roselle Park Liquors. McAdam Exhibit 1 at 1-2; McAdam Exhibit 2 at 10-11 to 11-16. At that time, Mr. McAdam

was the sole shareholder of Roselle Park Liquors. McAdam Exhibit 5. Mrs. McAdam did not want to have just the one account. She wanted to make a "bona fide run." She went through a list of non-active accounts, mainly restaurants, and called on them to see if they could use her services. McAdam Exhibit 2 at 9-2 to 16.

When Mr. McAdam acquired Stirling Liquors in January 1998, it became Mrs. McAdam's account. McAdam Exhibit 2 at 13-16 to 14-13. Mrs. McAdam indicated that through her entire career, she has maintained her level of sales to Roselle Park Liquors and Stirling Liquors, if not increased her sales numbers throughout the years. McAdam Exhibit 2 at 38-1 to 39-5. Anthony Pellegrino, 50 percent owner of Roselle Park, corroborated that Mrs. McAdam was the solicitor doing the most business with Roselle Park Liquors when Mr. McAdam brought him in as a partner, and that Roselle Park Liquors has maintained that level of business with her. McAdam Exhibit 6 at 33-8 to 34-9.

Mrs. McAdam stated that she "generally devote[s] in excess of 40 hours per week to [her] duties as a solicitor." McAdam Exhibit 1 at 3. Her duties in servicing her husband's accounts consist of letting him know when the delivery truck is coming, putting up point-of-sale information, providing him with price and RIP forecasts, and looking at inventory sheets. She also spends many hours traveling to her accounts in Basking Ridge, Colonia, Bloomfield, and Roselle Park. McAdam Exhibit 2 at 30-15 to 32-3. She estimates that she logs more than 30,000 business miles a year on her car. McAdam Exhibit 2 at 32-15 to 32-25.

Mrs. McAdam services significantly fewer accounts than the average Allied solicitor, as set forth in the following table:

Account Number Comparison

	2007	2008	2009	2010
Donna McAdam	14	15	18	16
Average Allied Non-Applicant Solicitor	53	52	52	49

See Allied Exhibit 3. Thus, according to information provided to ABC, from 2007 through September 2010, Mrs. McAdam has maintained an average portfolio of 16 accounts per year, whereas the average Allied solicitor maintained an average of 52 accounts.

Mr. McAdam stated that his wife is at Stirling Liquors approximately five hours a week. McAdam Exhibit 3 at 71-7 to 11. He describes his wife's duties while at Stirling as follows:

> A. I try not to talk to her. We are close because, I mean, she can't tell me anything I don't know. Paul will deal with her, and then she will hit me with something when she comes into the office to talk to Debbie. I'm very quiet until she leaves. Not that we are mad at her, but, I mean, you know, I'm looking to get through my paper work and get out on the floor and make sure the shelves look good. I'm a working owner. [McAdam Exhibit 3 at 71-11 to 19].[39]

Mr. Pellegrino estimates that Mrs. McAdam stops by Roselle Park Liquors probably one or two times per week. McAdam Exhibit 6 at 26-22 to 24. Mrs. McAdam's visits to Roselle Park Liquors do not last long, approximately 20 minutes to half an hour. McAdam Exhibit 6 at 28-7 to 10. He stated, "I usually ... give the order to my manager who will put it on the purchase order, and then when [the solicitors] come in we just hand them the purchase order." McAdam Exhibit 6 at 24-4 to 12.

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[39]"Paul" is a manager at Stirling Liquors.

Mr. Pellegrino explained how he prepares orders this way:

A. The computer will give you a printout of sales and you see a product you're low on it will show you how much you sold over the course of a month–usually four to five weeks, and then you look at that, you'll look at how many cases you have to buy the deal for the top RIP and just we put it together; ten of this, five of that, to try to get you to that same point when you're going to run out, you know.

Q. So you pretty much know what you need before your salesman even walks in the door?

A. Oh, yes. [McAdam Exhibit 6 at 24-13 to 25-4].

This practice is unchanged for Roselle Park's orders given to Mrs. McAdam. McAdam Exhibit 6 at 26-22 to 27-7. He said that Mrs. McAdam will "look around and she'll mention things, but overall I make the decision on it, whether we bring something new in or I need it or I order more of it or whatever." McAdam Exhibit 6 at 27-20 to 28-1.

Mr. Pellegrino described her visits as consisting of the following:

Q. And that includes, like you said, getting the order, if she had a new product in to see, picking up checks, administrative things like that?

A. Yes. I mean sometimes what we'll do is we'll just fax the order over, she'll come in to pick up her check or she'll stop by to see if everything is going, you know, talk a while. ... [S]he talks a tremendous amount when she's in there, so its just a little bit of a – ties you up time wise and, you know, to give a salesman an order sometimes it's easier, we'll put it on a purchase order, fax it over to the company and this way we have a record of what we ask for and when it comes, if it comes wrong we can say no, we ordered it this way, you know, for that reason. [McAdam Exhibit 6 at 28-11 to 25].

As a member of the UCFW, Mrs. McAdam receives health benefits, which also cover her husband and children. McAdam Exhibit 4 at 31-9 to 15; McAdam Exhibit 2 at 61-12 to 20.

Since she became a solicitor, she and her husband keep their money separate. She files separate tax returns and keeps a separate bank account for business purposes. McAdam Exhibit 4 at 14-2 to 5. However, her paycheck goes into a savings account that is in both of their names. McAdam Exhibit 4 at 30-17 to 22. Moreover, the McAdamses share a checking account that is used to pay bills. Her husband takes a salary in the form of a paycheck that is deposited into a joint checking account. McAdam Exhibit 4 at 30-22 to 31-8; McAdam Exhibit 2 at 61-21 to 24.

3. Waiver Application

a. Undue Hardship

Mrs. McAdam asserts that "a loss of the ability to service [her husband's] two accounts will have a devastating impact on my income." McAdam Exhibit 1 at 2-3. Without the commissions from her husband's accounts, she would not be able to pay her mortgage. McAdam Exhibit 2 at18-13 to 15.

According to Allied, Mrs. McAdam's average annual commissions for 2007-2009 (on all accounts) were $174,071. Allied Exhibit 1. But according to the information attached to her Initial Questionnaire and Document Production, she received average annual commissions of $174,418, solely on purchases made by her husband's accounts. McAdam Exhibit 7.[40] Regardless of the exact commission figures, it is clear that nearly all of her commission income is derived from the accounts for which she seeks a waiver. By comparison, her average annual commissions on all her other accounts combined is $3,648, during the same three-year period. Ibid.

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[40]According to Mr. McAdam, "nobody deserves to make [a] hundred thousand dollars a year out of one account." McAdam Exhibit 3 at 79-10 to11.

Mrs. McAdam is 50 years old, with no college degree. She stated she would have gone back to school 15 years ago if she didn't take this job and at this point has no marketable skills. McAdam Exhibit 2 at 16-20 to 25. She also is paying for a daughter in college and has a son who just graduated and whom she is supporting. McAdam Exhibit 2 at 51-24 to 52-3.

Mrs. McAdam's understanding of the solicitor union's contract is that, if she loses an account, Allied has to make up for the lost account. However, she fears Allied could give her multiple accounts to make up for losing one and they do not have to give her new accounts right away. McAdam Exhibit 2 at 17-2 to 14 and 51-6 to 23. She also claims she would be unable to make up the difference from any lost accounts, because most larger stores only want one salesperson and where there are multiple salesmen usually one salesperson will write most of the business. McAdam Exhibit 2 at 14-6 to 11. Mr. McAdam believes one reason why his wife cannot build accounts is that she does not want to take someone else's business. McAdam Exhibit 3 at 51-16 to 52-3. He claims that, when stores find out she is married to the owner of Stirling Liquors, they throw her out of their store. McAdam Exhibit 3 at 57-12 to 22.

Mr. McAdam also thinks she puts in more effort than she should for small accounts. For example, she prints up napkins for an account where she gets $4,000-$5,000 worth of business. She has an account where she has not received any business for three months, and he believes will not give her future business, but she goes there every other week despite the fact that it is a 45-minute trip one way. McAdam Exhibit 3 at 59-11 to 61-4. Additionally, they will go to a restaurant because it is an account where she may do $150 worth of business and they spend that much on the meal. McAdam Exhibit 3 at 61-19 to 62-4.

Mrs. McAdam has been diagnosed with chronic lymphatic leukemia, which she stated is not life threatening, but has caused her to have a suppressed immune system and she eventually will need chemotherapy. She believes if she left Allied she would lose her insurance and become uninsurable. McAdam Exhibit 2 at 17-24 to 18-8; McAdam Exhibit 1 at 4.

b. Effect on Other Parties

Mr. McAdam believes that, in the event his wife's waiver application is denied, there would be a direct personal financial impact. He stated that, if she lost the account, it would not put him "in the poor house, but it's going to be a hit." McAdam Exhibit 3 at 83-20 to 84-2. However, beyond the personal impact, denial of her waiver application will have no detrimental impact on Stirling Liquors' operations. He would still be able to get all the products he needs if his wife could not solicit the accounts, especially if his wife were replaced with a good salesman that took care of things. McAdam Exhibit 3 at 77-7 to 78-22. Although he believes his wife is a good solicitor, others can provide this service as well. McAdam Exhibit 3 at 43-16 to 20. Furthermore, there would be no impact on the operations of Roselle Park Liquors if Mrs. McAdam's waiver application is denied, because he would still have the ability to buy products regardless of which salesperson is selling them to Roselle Park Liquors. McAdam Exhibit 6 at 48-8 to 50-11. If Mrs. McAdam's waiver application is denied, other solicitors may see an increase in business. McAdam Exhibit 3 at 78-15 to 16.

c. Purposes of Title 33 and the Implementing Rules

Mrs. McAdam asserts that "servicing of the two retail establishments owned by my immediate family members has not resulted in any unfair competitive advantage to them, or to any instability in the retail alcoholic beverage marketplaces." McAdam Exhibit 1 at 3. Mrs.

McAdam stated that, although she may get more business than other solicitors, her husband does not give everything to her. McAdam Exhibit 2 at15-16 to 16-11. She claims that she writes 20 percent of the total non-exclusive products ordered by the two familial accounts and that the other 80 percent goes to other solicitors. McAdam Exhibit 7, Attachment 2. However, the chart below, derived from sales figures provided by Allied, Fedway and R&R, indicates that, insofar as non-exclusive products are concerned, the percentages are nearly the opposite. Thus, Mrs. McAdam's attempt to minimize the anti-competitive effect her spousal relational to the owner of these accounts has on competing solicitors is unpersuasive.

Donna McAdam (Allied Beverage Group)
Comparison of Sales of Non-Exclusive Products
to Accounts for Which Waiver is Sought
(Roselle Park Liquors and Stirling Liquors, Combined)

	2007	2008	2009	Thru 9/30/2010
Donna McAdam (Allied)	$1,620,870	$3,137,119	$3,219,406	$1,962,369
Other Allied Solicitors	$128,614	$605,799	$576,274	$288,483
R&R Marketing, LLC	$158,442	$157,808	$214,307	$224,457
Fedway Associates	$434,654	$451,709	$381,511	$254,328
Total Sale of Non-Exclusives	$2,342,580	$4,352,435	$4,391,498	$2,729,637
	2007	2008	2009	Thru 9/30/2010
Donna McAdam as Percentage	**69.2%**	**72.1%**	**73.3%**	**71.9%**
All Other Solicitors as Percentage	**30.8%**	**27.9%**	**26.7%**	**28.1%**

See Allied Exhibit 7; Fedway Exhibit 2; R&R Exhibit 1. Thus, for 2007 through September 30, 2010, Mrs. McAdam consistently received approximately 70 percent of all non-exclusive product purchases made by her husband's two businesses.

Mr. McAdam explained the reason that his wife receives such a high proportion of his non-exclusive purchases this way:

> A. Well, it is my wife, like as I told you before, probably that 400,000 there, a couple hundred thousand is Timmy Griffith, because she can sell the same item as he does, but I still give him because he has been my salesman for a lot of years. **And to be honest with you, if things got really bad and I**

> **couldn't send my kids to college, I would have to talk to Tim and give [the business] to Donna, but that's honest, you know.** ... You can't cut the pie up so much. I do a lot of business, if you take a look, with a lot of small wine companies, 200,000 a year, 100,000 a year, 300,000 a year, and these guys come in the store with a smile. I can't make the whole state right. But, I mean–you know, it's funny, but I try not to take a lot of this–but I've been very fair with everybody. [McAdam Exhibit 3 at 55-22 to 57-16 (emphasis added)].

Thus, although he does not make all of his non-exclusive purchases through his wife, he admitted that he would increase them if his personal finances required it.

Mr. McAdam orders more non-exclusive products from Allied than his other suppliers, partly because Fedway's service has not been as good since his wife became his Allied solicitor. He explained:

> A. Because to be truth[ful], she is–well, it's kind of a natural thing.
>
> Q. Because she is your wife.
>
> A. And because I'm closer with Allied Beverage than I am with Fedway. I'm closer with B&D. I mean, personalities, I'm friends with a lot of people, but I don't know if I get as good as service from [Reitman] and Fedway since Donna took the job. I'm still close with some of those guys over there, but, I mean, it's not like they are calling me up and saying, hey would you like to go to the World Series game, I don't get those things. [McAdam Exhibit 3 at 50-6 to 51-10].

Mr. Pellegrino confirmed that, at Roselle Park Liquors, Mrs. McAdam gets the bulk of its business, because that was the way it was once he became Mr. McAdam's partner. McAdam Exhibit 6 at 33-8 to 21. Mr. Pellegrino elaborated that the reason he buys so much from Mrs. McAdam is because she is his partner's wife: "so if I've got to give it to somebody I would give it to somebody I know rather than somebody I don't know. Just like buying from a family member, you know." McAdam Exhibit 6 at 32-7 to 13. Another reason Mr. Pellegrino buys

most of his non-exclusive products through Mrs. McAdam is out of respect for Mr. McAdam. McAdam Exhibit 3 at 80-25 to 82-14.

Mr. McAdam agreed that people may rightly claim it is not fair for him to buy from his wife solely because he financially benefits from her commissions. McAdam Exhibit 3 at 68-13 to 69-14. However, he believes this fact is evened out because she is not the main salesperson elsewhere, and only gets minimal business from other accounts. Id. at 74-20 to 25. Therefore, there appears to be no reason to believe that Mr. McAdam's purchasing habits would change if his wife's waiver application is granted.

4. **Additional Submission on Behalf of Donna McAdam**

By letter dated September 8, 2011, the Division provided each of the waiver applicants with a list of documents and a disc containing those documents, to allow the applicants to provide a response, if any, no later than September 26, 2011. Thereafter, the record would be closed and decisions rendered on each of the waiver applications.

By letter dated September 22, 2011, Scott N Silver, Esq., attorney for Donna McAdam, requested an extension of time to respond until October 3, 2011. By letter dated September 26, 2011, this request was granted. By letter dated September 30, 2011, a response was filed on behalf of Donna McAdam.

Donna McAdam begins her submission with the same case citations as does Kerry Lynn Canal, the suggestion that denial of the waiver would be an impermissible taking, that, even if there is no basis in alcoholic beverage control law to allow her to continue servicing these accounts, a waiver should be granted based on "equitable principals" (sic), and a list of the standards for the grant of a waiver.

With regard to "undue hardship," Donna McAdam states that she has been a bona fide solicitor for about 14 years, and there are two accounts she services in which her "immediate family members" hold an interest. The commissions from those two accounts made up about 98 percent of her income from 2005-2010. She was given the route of a solicitor who was terminated due to substance abuse. She argues that her failure to cultivate additional accounts is not attributable to a lack of effort. She devotes a full 40 hours a week to solicitor activities, including attending weekly solicitor briefings at Allied's headquarters. Her other accounts are small, but she has more accounts than two of the other Allied solicitors seeking waivers.

She argues that Allied is under no obligation to replace her husband's accounts under the union contract and that it is unlikely that she could acquire similar accounts on her own. She repeats Kerry Lynn Canal's argument about "favored" solicitors and what happens when a solicitor ceases to service an account.

Donna McAdam testified that she is 50 years old, does not have a college degree and has no marketable skills other than shorthand. If she loses these accounts, she will lose about 97% of her income. She would then no longer meet the minimum sales quota imposed by Allied and would likely lose her job, along with her health benefits. This would be problematic, because she has chronic lymphatic leukemia and may need to undergo chemotherapy at some point in the future. She has not yet confirmed if she could obtain health coverage through her husband's business. In her view, these factors constitute undue hardship if a waiver is not granted.

With regard to the "not unduly burden affected parties prong," Mrs. McAdam repeats Kerry Lynn Canal's question as to whom the affected parties are and her arguments explaining why they are not consumers, not competing retailers and not competing solicitors (and even if

they are, they are affected in only a small way). Finally, Mrs. McAdam concedes that, if her waiver application is granted, R&R and Fedway will not be able "to effectively compete for non-exclusive sales," but argues that this "does not unduly burden R&R and Fedway." The first part of this statement is a concession that her position as a solicitor to her relatives' accounts has a negative impact on market competition between wholesalers. The second part is merely her own self-serving conclusion that the ongoing adverse impact on others is not nearly as significant as the adverse effect on her would be if her waiver application is denied.

With regard to the "consistent with the underlying purposes of Title 33 and the implementing rules prong," Mrs. McAdam, like Ms. Canal, argues that the recent amendments were caused by the actions of Allied and R&R. There were no allegations of wrongdoing on the part of either Mrs. McAdam or the family accounts she services and Mrs. McAdam should not suffer due to the actions of others or she will become "a 'classic case of collateral damage.'" See page 72 for an explanation of why this is not the case.

Finally, Mrs. McAdam suggests that, if a date certain for termination of a waiver is required, fifteen years would be appropriate, to allow her to finish out her career and retire. She states that this is "proportionate to the wind-down period applied in the October 16, 1995 agreement with Saul Leighton." It is unnecessary for me to address this argument, because I have determined to deny Mrs. McAdam's waiver application.

5. **Decision on Donna McAdam's Waiver Application**

Donna McAdam's waiver application is denied, because she has failed to satisfy all three of the criteria in N.J.A.C. 13:2-9.1. According to Allied, Mrs. McAdam's average annual commission for 2007-2009 was $174,071 (versus Mrs. McAdam's submission in which she

stated that she received $174,418 solely on her husband's accounts). She has maintained an average of 16 accounts. In contrast, the average non-waiver applicant Allied solicitor makes approximately $105,288 in commissions and has 52 accounts. In 2009, the median commission paid to non-applicant solicitors by Allied was $84,802. While she stated that she works in excess of 40 hours per week, her husband indicated that she spends about five hours per week at Stirling Liquors. Anthony Pellegrino indicated that she visits Roselle Park Liquors one or two times each week and spends between 20 minutes and a half-hour on each visit. Thus, she spends about six hours each week on the two accounts that generate about 98 percent of her total commissions. Her husband tries not to speak with her when she is there, so he can get his work done. Mr. Pellegrino indicated that she talks a lot when she is there and "ties [him] up time wise." McAdam Exhibit 6 at 28-19. Mr. McAdam does not believe anyone should make $100,000 per year from one account and thinks his wife puts in too much effort on small accounts. While Mr. McAdam indicates that he does not make all of his non-exclusive purchases through his wife, he admitted that he would increase them if his personal finances required it. And Mr. Pellegrino buys most of his non-exclusives from Mrs. McAdam because she is married to his partner. The adverse impact of her familial relationship to the owner of these two retail accounts cannot be more clear.

With regard to the waiver criterion of "undue hardship," Mrs. McAdam argues that that the loss of her husband's accounts will have "a devastating impact on [her] income." While this may be true, Mrs. McAdam may be reassigned to other accounts pursuant to the CBA provision and she may also attempt to develop other accounts on her own. Understandably, that might require Mrs. Adam to service more accounts, like other Allied solicitors, or to find accounts in

areas where they do not compete with her husband's businesses. However, in this way, she would have the opportunity to recoup some or all of the commissions lost as a result of the denial of the waiver. Unfortunately Mrs. McAdam appears to have difficulty developing accounts other than those involving a related retailer. Even Mrs. McAdam's husband acknowledges this, stating she does not want to take away business from other people. However, neither Mrs. McAdam's lack of sales success in a job that requires sales success nor her need for medical insurance can be the sole basis for granting a waiver.

With regard to the waiver criterion of "effect on other parties," Mrs. McAdam, like Ms. Canal, questions who these other people are. That argument has previously been discussed at length. Although Mrs. Adam claims that her husband does not give her all his business, she has received about 70 percent of all non-exclusive product purchases made by her husband's accounts from 2007 through September 30, 2010. Mrs. McAdam concedes that, if her waiver application is granted, R&R and Fedway will not be able "to effectively compete for non-exclusive sales," but somehow concludes that this "does not unduly burden R&R and Fedway." In addition, she has a significantly greater share of non-exclusive products than the other Allied solicitors who sell to her husband's accounts combined (ranging from a low of 83.8 percent to a high of 92.6 percent for the same period). Thus, the grant of a waiver would adversely affect competition both between wholesalers and between other solicitors from the same wholesaler. Mr. McAdam recognizes that the denial of a waiver would have a direct personal financial impact, but concedes that it would not have a detrimental impact on Stirling Liquors and it would be able to obtain the products it needs. Other solicitors could provide the same services as his

wife. Mr. Pellegrino agreed with regard to Roselle Park Liquors and indicated that other solicitors may see an increase in business.

Finally, with regard to the waiver criterion of "consistent with the purposes of Title 33 and the implementing rules," the negative effects of granting a waiver on competition are discussed above. Moreover, the three-tier system may be undermined by the grant of a waiver. N.J.S.A. 33:1-43. Mrs. McAdam and her husband have joint checking and savings accounts, from which they pay their bills. Mrs. McAdam indicated that they need her commissions to pay their mortgage. Moreover, while Mr. McAdam indicates that he does not make all of his non-exclusive purchases through his wife, he admitted that he would increase them if his personal finances required it. These factors suggest that Mrs. McAdam's commissions constitute an indirect "subsidy" of a retailer by a solicitor.

Since Donna McAdam has failed to satisfy all three of the criteria for a waiver, her application for a waiver must be denied.

E. Rory McCormick

1. Accounts for Which Relaxation is Sought

Rory McCormick ("Mrs. McCormick) is employed as a solicitor by Fedway. McCormick Exhibit 1 at 1. She seeks relaxation of N.J.A.C. 13:2-16.11 so that she can continue to service Anthony Prisco, Inc., t/a Spirits Unlimited (owned by her husband, Kevin McCormick) and

Square Liquors, Inc., t/a Spirits Unlimited (owned by her father, Anthony Prisco, and managed by her brother, Vance Prisco). McCormick Exhibit 1 at 2.[41,42]

Mrs. McCormick visits most of her accounts twice per week. McCormick Exhibit 2 at 69-7 to 10. However, she visits the accounts owned by her father and brother once per week, on Thursdays, but calls their orders in on Mondays. McCormick Exhibit 2 at 69-11 to 70-1. She goes to Square Liquors, Inc. every Thursday for about 45 minutes to an hour. McCormick Exhibit 4 at 46-10 to 12.

Mrs. McCormick's average annual commissions for 2007-2009 (on all sales) was $156,580, but the commissions she received on purchases by her husband's and father's/brother's account averaged $60,614 or 38.7 percent of her average annual commissions. Fedway Exhibit 1; Fedway Exhibit 2. In 2009, the average Fedway solicitor was paid $107,521 in commissions. Fedway Exhibit 1. In 2009, the median commission paid to non-applicant solicitors by Fedway was $90,245. Ibid.

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[41]Paragraph 6 of Mrs. McCormick's Verified Petition inadvertently identified Anthony Prisco, Inc. as being owned by her father and managed by her brother, and Square Liquors, Inc., as being owned by her husband. Ibid. However, this mistake was corrected during her sworn statement. McCormick Exhibit 2 at 34-8 to 23.

[42]Vance Prisco testified that another of his sisters, Janet DiRosa, solicits Square Liquors on behalf of Jersey National, a division of Fedway. McCormick Exhibit 4 at 21-8 to 10. This is a violation of N.J.A.C. 13:2-16.11. Ms. DeRosa did not apply for a waiver. A review of Ms. DeRosa's Solicitor Permit Renewal Application for the 2010-2011 term does not disclose Mr. Prisco or Square Liquors in response to Question 3 on her Solicitor Permit Renewal Application for 2010-2011 (asking whether any family member, including brother, participates in the operation of a retail alcoholic beverage license in New Jersey). McCormick Exhibit 5. The Enforcement Bureau is directed to investigate and review whether Janet DiRosa is in violation of N.J.A.C. 13:2-16.11 and take appropriate action.

2. Background

Mrs. McCormick has been a Fedway solicitor for 31 years. McCormick Exhibit 2 at 5-13 to 15. She first interviewed for the position in 1979. McCormick Exhibit 2 at 8-25 to 9-5. At that time, both her father and grandfather held retail liquor licenses. McCormick Exhibit 2 at 11-9 to 24. She met her then future husband in approximately 1978, while attending Trenton State College. McCormick Exhibit 2 at 12-5 to 8. In approximately 1981, he became a solicitor for International Vintners, McCormick Exhibit 2 at 12-11 to 19, which is now part of Allied. About two years later, he became a retail distribution licensee, having acquired However, Inc. McCormick Exhibit 2 at 13-17 to 18. Subsequently, he sold However, Inc. and purchased Anthony Prisco, Inc. from Mrs. McCormick's father. McCormick Exhibit 2 at 14-14 to 15-24.

When she first became a solicitor, she was given approximately 40 accounts, of which 25 were active. McCormick Exhibit 2 at 10-1 to 20. Currently, she still has 30 of the original 40 accounts given to her. McCormick Exhibit 2 at 16-10 to 12. In December 2010 through January 2011, she added four new accounts. McCormick Exhibit 2 at 42-6 to 7.

Fedway provided a printout to ABC that shows the number of accounts serviced by each of its solicitors. See Fedway Exhibit 3. Mrs. McCormick services significantly fewer accounts than the average Fedway non-applicant solicitor, as set forth in the following table:

Account Number Comparison

	2007	2008	2009	2010
Rory McCormick	29	28	27	25
Average Fedway Non-Applicant Solicitor	58	58	58	50

See Fedway Exhibit 3. Thus, according to information provided to ABC, from 2007 through September 2010, Mrs. McCormick has maintained an average portfolio of 28 accounts per year, while non-applicant Fedway solicitors maintained an average of 56 accounts.

Mrs. McCormick attends weekly company and supplier sponsored sales meetings, makes weekly sales calls to each of her accounts and assists consumption licensees with promotions, wine lists and drink menus. She works closely with suppliers and retailers in coordinating on- and off-premises wine tastings for wine clubs and charitable events. McCormick Exhibit 1 Initial Questionnaire and Document Production at 2. She notes that "because of thirty years of hard work and dedication ... [she is] able to say that [Anthony Prisco, Inc. and Square Liquors, Inc.] are not [her] total business." McCormick Exhibit 1 at Supplemental Statement. Her waiver application and other sales data provided by Fedway verify this claim, as depicted in the chart below:

Rory McCormick's Sales to Accounts for Which Waiver is Sought

	2005	2006	2007
Anthony Prisco, Inc.	$656,630	$701,067	$721,298
Square Liquors, Inc.	$579,503	$535,834	$556,039
Sales to Relative Accounts	$1,236,134	$1,236,901	$1,277,337
Total Sales to All Accounts	$3,276,196	$3,149,428	$3,286,352
Relative Accounts as % of Total	**37.7%**	**39.3%**	**38.9%**

	2008	2009	2010
Anthony Prisco, Inc.	$812,274	$889,558	$519,929
Square Liquors, Inc.	$479,041	$451,746	$250,830
Sales to Relative Accounts	$1,291,315	$1,341,304	$770,759
Total Sales to All Accounts	$3,281,786	$3,397,113	$2,148,137
Relative Accounts as % of Total	**39.6%**	**39.5%**	**35.9%**

Total Sales to Relative Accounts for Period	$7,153,750
Total Sales for Period	$18,539,012
Relative Accounts as % of Total Sales for Period	**38.6%**

Source:
Rory McCormick's Response to Initial Questionnaire and Document Production, Schedule A (August 26, 2010)

See McCormick Exhibit 1.

Mrs. McCormick has been named Sales Person of the Month five times and has been a member of the Fedway Presidents Club for 12 years. She has been, and is currently, on the executive board of the Gateway/Perrone Sales Club and is Secretary to the Fedway Advisory Council. Id.

As a solicitor, she is provided with a health insurance policy and a 401(k) account. Her husband is covered on her health insurance policy. He is also the beneficiary on her 401(k) account. McCormick Exhibit 2 at 17-25 to 18-10. Her pay is direct-deposited into a joint account that she shares with her husband. McCormick Exhibit 2 at 18-11 to 18. She once provided this account number in order to acquire a car. McCormick Exhibit 2 at 19-11 to 22. Currently, the McCormicks do not have a mortgage, having used their paychecks, savings and

money inherited from her grandmother to build their home. McCormick Exhibit 2 at 20-8 to 25. Her husband does the banking for both of them. McCormick Exhibit 2 at 22-10 to 11.

The McCormicks file joint tax returns reflecting income from Square Liquors, Inc., Rory McCormick's father's licensed company. McCormick Exhibit 2 at 52-9 to 53-6. This is because Kevin McCormick, Rory McCormick's husband, works as a "fill-in manager" at Square Liquors, Inc. McCormick Exhibit 3 at 52-9 to 24.

3. Waiver Application

a. Undue Hardship

Mrs. McCormick gave the following explanation as to why her waiver application should be granted:

> A. I just don't see any reason why I should - - why I should lose two accounts out of my entire run. I mean, I service the accounts just like I do everybody else. They get the same consideration for products that everyone else does. And I certainly don't play any favoritism, because by me giving them something, doesn't put any money in my pocket for not selling it to somebody else. The whole idea of my job is to make money. ...
>
> Q. That's why the [D]irector should make an exception for you?
>
> A. Yes. Is that not good enough? [McCormick Exhibit 2 at 32-2 to 18].

She further explained that loss of her relatives' accounts would prevent her from "sending [her] daughter to college and paying for a hundred percent of it." McCormick Exhibit 2 at 32-22 to 24. Her husband would "hate to see her penalized, ... at a time in her life when .... [she is] starting to think about retirement." McCormick Exhibit 3 at 52-17 to 19.

b. Effect on Other Parties

Mrs. McCormick acknowledged that denial of her waiver application might result in increase purchases from another solicitor from another company. McCormick Exhibit 2 at 65-14 to 66-4 and 66-25 to 67-10. In fact, denial of her waiver application may increase the selling opportunity for both Allied and R&R. McCormick Exhibit 2 at 67-8 to 19. However, Square Liquors, Inc. and Anthony Prisco, Inc. would not be adversely affected. McCormick Exhibit 2 at 66-5 to 7. Her husband indicated that, if his wife's waiver application is denied, the F&A (Allied) solicitor would probably be the biggest beneficiary, not her Fedway replacement. McCormick Exhibit 3 at 34-7 to 17. This is an admission that he orders a disproportionate amount of non-exclusive products from Fedway instead of Allied because his Fedway solicitor is also his wife.[43]

Should Mrs. McCormick's waiver application be denied, Square Liquors, Inc.'s manager, Vance Prisco, would "continue to do business with Fedway, [but he didn't] know if it would be at the same amount." McCormick Exhibit 4 at 39-20 to 23. The business that Fedway would lose "would probably go to Allied." McCormick Exhibit 4 at 42-19 to 23. However, he noted that Fedway is "the best company to deal with." McCormick Exhibit 4 at 42-2 to 4. If someone just as qualified took Mrs. McCormick's place, Square Liquors, Inc. would not be disadvantaged. McCormick Exhibit 4 at 46-2 to 6.

Mr. McCormick stated that Anthony Prisco, Inc. would suffer, because his wife is "irreplaceable." McCormick Exhibit 3 at 39-3 to 8. However, Anthony Prisco, Inc.'s "business would be the same ..." McCormick Exhibit 3 at 50-4 to 8. Square Liquors, Inc.'s manager, Vance

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[43] R&R "would not be in the pecking order ... [because] they are a horrible company to deal with." McCormick Exhibit 3 at 35-5 to 9.

Prisco, "would certainly like to see her ... continue as [his] salesperson because [he does not] want to retrain somebody as to what [his] expectations are ..." McCormick Exhibit 4 at 64-6 to 8.

c. Purposes of Title 33 and the Implementing Rules

Anthony Prisco, Inc. and Square Liquor, Inc. are Mrs. McCormick's two largest accounts. McCormick Exhibit 2 at 41-14 to 16. Mrs. McCormick asserts that the fact that she solicits licensees owned by her father and husband has not provided them with any unfair advantage. McCormick Exhibit 2 at 39-4 to 10. She makes no mention of whether it places her or her employer, Fedway, at a competitive advantage. McCormick Exhibit 2 at 39-11 to 16.

Mrs. McCormick admits that she "happen[s] to be the favorite salesperson" of Anthony Prisco, Inc. and Square Liquors, Inc. McCormick Exhibit 2 at 39-24 to 25. In fact, as set forth in the charts below, from 2007 to 2009, inclusive, she received 73-80 percent of all of the non-exclusive products purchased by her father's account (Square Liquors, Inc.) and her husband's account (Anthony Prisco, Inc.) from the three major wholesalers for the same period:

Rory McCormick (Fedway Associates)
Sales of Non-Exclusive Products
to Accounts for Which Waiver is Sought
(Anthony Prisco, Inc. and Square Liquors, Inc., Combined)

	2007	2008	2009	Thru 9/30/2010
Rory McCormick (Fedway)	$995,393	$954,466	$962,558	$568,883
Other Fedway Solicitors	$16,037	$18,581	$10,734	$8,264
R&R Marketing, LLC	$99,472	$66,905	$90,389	$77,519
Allied Beverage Group	$133,989	$267,079	$249,289	$182,405
Total Sale of Non-Exclusives	$1,244,891	$1,307,031	$1,312,970	$837,071
Rory McCormick as Percentage	**80.0%**	**73.0%**	**73.3%**	**68.0%**
All Other Solicitors as Percentage	**20.0%**	**27.0%**	**26.7%**	**32.0%**

Information Provided by Allied Beverage Group, Fedway Associates and R&R Marketing for 2007 through September 30, 2010

See Allied Exhibit 7; Fedway Exhibit 2; R&R Exhibit 1.

Mrs. McCormick concedes that she is the "favorite salesperson," because one of these accounts is owned by her father and managed by her brother, and the other account is owned by her husband. McCormick Exhibit 2 at 40-1 to 3; 48-7 to 10; 64-14 to 65-4. Her brother, Vance Prisco, agreed that she is Square Liquors, Inc.'s favorite solicitor because of the familial relationship. McCormick Exhibit 4 at 33-3 to 17. Moreover, she admits that she cannot compete as effectively in accounts to which she is not related. McCormick Exhibit 2 at 50-18 to 22. Her husband admitted that, for purchases for Anthony Prisco, Inc., "if [the] price is the same then I'm going to give it to Fedway." McCormick Exhibit 3 at 21-16 to 17; 29-6 to 11.[44] Based on this statement, there appears to be no reason to believe that Mr. McCormick's purchasing habits would change if his wife's waiver application is granted. The manager at Square Liquors, Inc., Vance Prisco, admitted that Rory McCormick's status as his sister is clearly relevant to his purchasing decisions. McCormick Exhibit 4 at 59-20 to 23.

Mr. McCormick gave one example of the benefit of having a wife working for one of his distributors, as follows: in February 2011, she told him what the price on Johnnie Walker would be in April, so he "didn't buy in the wrong month." McCormick Exhibit 3 at 26-22 to 27-5. "That's something that most other salesman can't or wouldn't put the time in to do ..." McCormick Exhibit 3 at 27-6 to 8. However, Allied will do it "if [Mr. McCormick] pushes." McCormick Exhibit 3 at 41-23 to 43-1. In fact, Mr. McCormick's statement that his wife provides him with pricing information not generally available to retail licensees, see N.J.A.C.

[44]In spite of the overwhelming percentage of non-exclusive products he purchases from his wife, Kevin McCormick claimed that his wife receiving a commission on those purchases was not a factor in placing orders with his wife. McCormick Exhibit 3 at 24-8 to 26-3.

13:2-24.6, appears to be an admission of an improper practice that demonstrates discrimination between retailers, in violation of N.J.S.A. 33:1-3.1b(10).

4. **Additional Submission on Behalf of Rory McCormick**

By letter dated September 8, 2011, the Division provided each of the waiver applicants with a list of documents and a disc containing those documents, to allow the applicants to provide a response, if any, no later than September 26, 2011. Thereafter, the record would be closed and decisions rendered on each of the waiver applications.

By letter dated September 22, 2011, Scott N Silver, Esq., attorney for Rory McCormick, requested an extension of time to respond until October 3, 2011. By letter dated September 26, 2011, this request was granted. By letter dated September 30, 2011, a response was filed on behalf of Rory McCormick.

Rory McCormick begins her submission with the same case citations as does Kerry Lynn Canal, the suggestion that denial of the waiver would be an impermissible taking and that, even if there is no basis in alcoholic beverage control law to allow her to continue servicing these accounts, a waiver should be granted based on "equitable principals" (sic), and a list of the standards for the grant of a waiver.

With regard to "undue hardship," Rory McCormick states that she has been a bona fide solicitor for over 30 years, and there are two accounts she services in which her "'immediate family members'" hold an interest. She has won numerous sales awards and is the third generation of her family to be involved in the alcoholic beverage industry. In 2009, she earned approximately $167,000 and about 40 percent of this income was from commissions on sales to the accounts owned by immediate family members.

She argues that Fedway is under no obligation to replace these accounts and that, even if I order Fedway to do this, the accounts would not be obligated to accept or keep her as their solicitor. She also believes that it is unlikely that she could acquire similarly sized accounts on her own, because competing retailers would be concerned that she would share their operations and marketing strategies with retailers who are family members. Her arguments are not persuasive. First, any unethical solicitor could share this kind of information with competitor retailers, even if there was no family relationship involved. Second, Mrs. McCormick could work to develop accounts in locations where the retailers would not be in competition with her family members. Mrs. McCormick also repeats Kerry Lynn Canal's argument about "favored" solicitors and what happens when a solicitor ceases to service an account.

With regard to the "not unduly burden affected parties prong," Mrs. McCormick repeats Kerry Lynn Canal's question as to whom the affected parties are and her arguments explaining why they are not consumers, not competing retailers and not competing solicitors (and even if they are, they are affected in only a small way). These arguments have already been discussed. Finally, Mrs. McCormick concedes that, if her waiver application is granted, R&R and Allied will not be able "to effectively compete for approximately $965,000 in non-exclusive sales," but [t]hat is a minuscule price to pay for having engaged in practices that brought this matter to its current status." The first part of this statement is a concession that her position as a solicitor to her relatives' accounts has a negative impact on market competition between wholesalers. The second part is merely her own self-serving conclusion that the ongoing adverse impact on others is not nearly as significant as the adverse effect on her would be if her waiver application is denied.

With regard to the "consistent with the underlying purposes of Title 33 and the implementing rules prong," Mrs. McCormick, like Ms. Canal, argues that the recent amendments were caused by the actions of Allied and R&R. There were no allegations of wrongdoing on the part of either Mrs McCormick or the family accounts she services and Mrs. McCormick should not suffer due to the actions of others or she will become "a 'classic case of collateral damage.'" See page 72 for an explanation of why this is not the case.

Finally, Mrs. McCormick, like Mrs. McAdam, suggests that, if a date certain for termination of a waiver is required, fifteen years would be appropriate, to allow her to finish out her career and retire. She states that this is "proportionate to the wind-down period applied in the October 16, 1995 agreement with Saul Leighton." There is no reason for me to address this argument, because I have determined to deny Mrs. McCormick's waiver application.

5. **Decision on Rory McCormick's Waiver Application**

Rory McCormick's waiver application is denied, because she has failed to satisfy all three of the criteria in N.J.A.C. 13:2-9.1. Mrs. McCormick's commissions from 2007-2009 (last full years of reporting) have averaged $156,580. She has maintained an average of 28 accounts. In contrast, the average Fedway solicitor was paid $107,521 in commissions for that period and had 58 accounts. In 2009, the median commission paid to non-applicant solicitors by Fedway was $90,245. Fedway Exhibit 1. Her relatives' accounts generated 38.6 of her commissions from 2005 through September 30, 2010. Ironically, she visits most of her accounts twice each week, but visits her relatives' accounts (which generate nearly 40 percent of her total sales volume) only once each week and calls their orders in on a second day. She spends between 45 minutes and

one hour per week at Square Liquors, Inc. Her husband and her brother both concede that she gets more business due to her family relationship.

With regard to the waiver criterion of "undue hardship," Mrs. McCormick may be assigned to other accounts by Fedway and she could also work to develop other retail accounts on her own, in locations where the retailers do not compete with her relatives. Understandably, that might require Mrs. McCormick to service more accounts, like other Fedway solicitors, and to work more hours per week. However, in this way, she would have the opportunity to recoup all or some of the commissions lost as a result of the denial of the waiver. Given that her sales ability has been specially recognized by Fedway on several occasions, she should be able to do this successfully.

With regard to the waiver criterion of "effect on other parties," Mrs. McCormick, like Ms. Canal, questions who these other people are. That argument has previously been discussed at length. Mrs. McCormick had 75.2 percent (2007), 73 percent (2008), 73.3 percent (2009) and 68 percent (through September 30, 2010) of all non-exclusive sales to her relatives' accounts. Both her husband and her brother conceded that, if the waiver application is denied, Allied would probably get more of the non-exclusive product purchases. Even Mrs. McCormick admits that, if the waiver is granted, R&R and Allied will not be able "to effectively compete for approximately $965,000 in non-exclusive sales." In addition, she has a significantly greater share of non-exclusive products than the other Fedway solicitors who sell to her relatives' accounts combined. Thus, the grant of a waiver would continue to affect competition both between wholesalers and between other solicitors from the same wholesaler. Moreover, Mrs. McCormick, her husband and her brother all admit that the retail businesses would be the same if the waiver is denied.

Finally, with regard to the waiver criterion of "consistent with the underlying purposes of Title 33 and the implementing rules," the negative effects of granting a waiver on competition are discussed above. Moreover, the three-tier system may be undermined by the grant of a waiver. N.J.S.A. 33:1-43. Mrs. McCormick and her husband have a joint checking account from which they pay their bills. He is covered by her health insurance policy and is the beneficiary of her 401(k). These factors suggests that Mrs. McCormick's commissions and benefits constitute an indirect "subsidy" of a retailer by a solicitor. Moreover, according to Mrs. McCormick's husband, she provides him with pricing information not generally available to retail licensees. This has also been discussed above. This information could result in better inventory practices, enabling him to sell at a lower price than competing retailers or make a greater profit on sales than competing retailers. In either case, it may demonstrate discrimination between retailers, in violation of N.J.S.A. 33:1-3.1b(10).

Since Rory McCormick has failed to satisfy all three of the criteria for a waiver, her application for a waiver must be denied. Given that I have denied Mrs. McCormick's waiver application, the Division will take no further action against her solicitor's permit for the seeming violation of N.J.S.A. 33:1-3.1b(10).

F. Thomas Harris

1. Accounts for Which Relaxation is Sought

Thomas Harris ("Mr. Harris") has applied for relaxation of the Solicitor Regulation, because his brother and wife own Benedict A. Schepis, Inc., t/a Brand Bar & Beverages ("Brand Bar"), and Harris Liquors, Inc., t/a Old Tappan Fine Wine and Spirits ("Old Tappan"). ABC

records indicate that Mr. Harris has been a solicitor since at least 1985. He has been selling to Brand Bar for 32 years and to Old Tappan for 27 years. Harris Exhibit 1 at 1.

Mr. Harris' father and brother acquired Brand Bar in 1978. They acquired Old Tappan in 1983. Harris Exhibit 1 at 1. Mr. Harris' father owned a 50 percent interest in these licensed entities. Harris Exhibit 2 at 45-13 to 15. When his father became ill 10 years ago, Mr. Harris' parents wanted to gift the stores to their children. Harris Exhibit 1 at 1. However, due to the fact that he (Thomas) was a solicitor and could not hold an interest in a retail license, Thomas Harris' father left his 50 percent interest to Thomas Harris' wife instead. Harris Exhibit 2 at 45-1 to 12. Thus, Thomas Harris' wife now holds a 50 percent interest in both Brand Bar and Old Tappan. Harris Exhibit 2 at 44-2 to 45-12.[45]

Mr. Harris works approximately 60 hours per week, providing such services as inventory control, providing information regarding new packaging, new RIPs, new ideas for merchandising, putting up signage, picking up checks, and keeping them informed of monthly pricing changes. Harris Exhibit 1 at 1. He lost one of his largest accounts from 2005-2007, when the retailer filed

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[45]On or about January 3, 2011, Frank T. Luciano, Esq., requested an adjournment of the sworn statement of Thomas Harris, because Joseph T. Harris had suffered a heart attack. Joseph Harris is the brother of Solicitor-Applicant Thomas Harris and 50 percent owner of the two retail licenses for which Thomas Harris seeks a waiver. Due to Joseph Harris' heart attack, it was contemplated that these two retail licenses might be sold. Mr. Luciano never contacted the Division to reschedule the sworn statement, nor has he advised that the application for a waiver has been withdrawn. However, by letter dated September 21, 2011, Mr. Luciano advised that negotiations are underway with a third party for the sale of both licenses. He stated that "Mr. Harris' continued presence as a sales representative for these businesses will facilitate a seamless transfer to this third party. In addition, the assistance Mr. Harris can give to the third party in this transition period will greatly assist Mr. Harris' opportunity to function as a sales representative for these two accounts when the businesses are sold." From these two statements, I conclude that Mr. Harris has not withdrawn his application for a waiver, because a waiver is required for him to continue servicing these accounts until such time as the businesses are sold.

for bankruptcy protection in 2008. Harris Exhibit 1 at 2. Recently, he has suffered serious illnesses, including a major heart attack. Harris Exhibit 1 at 2. Mr. Harris' average annual commissions for 2007-2009 (on all sales) was $170,792, but the commissions he earned from sales to his wife's and brother's accounts averaged only $16,542 or 9 percent of his average annual commissions. Allied Exhibit 1; Allied Exhibit 2.

2. Background

The following table sets forth Mr. Harris' sales to his wife's and brother's accounts:

Thomas Harris' Sales to Accounts for Which Waiver is Sought

Brand Bar & Beverage and Old Tappan Fine W&S

	2005	2006	2007
Brand Bar & Beverage	$190,028	$180,877	$190,840
Old Tappan Fine W&S	$189,687	$164,195	$152,874
Sales to Relative Accounts	$379,715	$345,072	$343,714
Total Sales to All Accounts	$3,512,741	$3,545,472	$3,436,721
Relative Accounts as % of Total	**10.8%**	**9.7%**	**10.0%**

	2008	2009	2010
Brand Bar & Beverage	$181,037	$214,232	$127,585
Old Tappan Fine W&S	$152,131	$182,340	$96,479
Sales to Relative Accounts	$333,168	$396,572	$224,064
Total Sales to All Accounts	$3,224,307	$5,143,510	$3,189,078
Relative Accounts as % of Total	**10.3%**	**7.7%**	**7.0%**

Total Sales to Relative Accounts for Period	$2,022,305
Total Sales for Period	$22,051,829
Relative Accounts as % of Total Sales for Period	**9.2%**

Source:
Thomas Harris' Response to Initial Questionnaire and Document Production, Schedule A (October 15, 2010)

Harris Exhibit 1.

The number of accounts serviced by Mr. Harris slightly exceeds the average number of accounts serviced by non-applicant Allied solicitors, as set forth in the following table:

Account Number Comparison

	2007	2008	2009	2010
Thomas Harris	59	59	57	55
Average Allied Non-Applicant Solicitor	53	52	52	49

See Allied Exhibit 3. Thus, according to information provided to ABC, from 2007 through September 2010, Mr. Harris has maintained an average portfolio of 58 accounts per year, whereas non-applicant Allied solicitors maintained an average of 52 accounts.

3. **Waiver Standards**

a. Undue Hardship

Mr. Harris is 62 years old. Harris Exhibit 1 at 2. He has two children, ages 13 and 17. Harris Exhibit 1 at 2. He will shortly be paying for his children's college educations. Harris Exhibit 1 at 2. His pension after 28½ years of service is worth $481 per month. Harris Exhibit 1 at 2.

b. Effect on Other Parties

No statement is provided in Mr. Harris' waiver application regarding the effect that the outcome of his application will have on other parties. As set forth in the chart above, Mr. Harris' total sales to Brand Bar and Old Tappan appear modest compared to the total sales to relatives' accounts attributed to some of the other solicitor-applicants. For example, the Bayway purchases attributed to Shelley Novick-Leighton are nearly 30 times the sales made by Mr. Harris to both of the accounts for which he seeks a waiver. His sales volume to these accounts is not significant enough to entice competitor wholesalers or solicitors to violate rules. Thus, it is unlikely that

anyone other than Mr. Harris will be noticeably affected by the decision regarding his waiver application.

c. **Purposes of Title 33 and the Implementing Rules**

As displayed in the following table, Mr. Harris receives a significant portion of the sales of non-exclusive products purchased by his relatives' accounts:

Thomas Harris (Allied Beverage Group)
Sales of Non-Exclusive Products
to Accounts for Which Waiver is Sought
Brand Bar & Beverage and Old Tappan Fine W&S

	2007	2008	2009	Thru 9/30/2010
Thomas Harris (Allied)	$196,414	$272,679	$314,950	$181,531
Other Allied Solicitors	$2,449	$2,988	$1,611	$1,544
R&R Marketing, LLC	$10,831	$9,017	$9,599	$4,760
Fedway Associates	$26,297	$28,554	$33,369	$28,254
Total Sale of Non-Exclusives	$235,991	$313,238	$359,530	$216,089
Thomas Harris as Percentage	**83.2%**	**87.1%**	**87.6%**	**84.0%**
All Other Solicitors as Percentage	**16.8%**	**12.9%**	**12.4%**	**16.0%**

Sources:
Information Provided by Allied Beverage Group, Fedway Associates and R&R Marketing through September 30, 2010

See Allied Exhibit 7; Fedway Exhibit 2; R&R Exhibit 1.

Based on the foregoing chart, looking simply at percentages, it appears that the accounts for which Mr. Harris seeks a waiver overwhelmingly purchase non-exclusive products from him. However, when examined in terms of actual dollars, it is debatable whether the amount of non-exclusive products purchased from him are significant enough to affect free competition.

4. **Decision on Thomas Harris' Waiver Application**

Mr. Harris will suffer some personal hardship if the waiver application is denied, given his age and the fact that his children are approaching college age. It appears that the grant or denial of the waiver application is unlikely to have a noticeable effect on anyone other than Mr. Harris and

it is also debatable whether the total dollar amount of the non-exclusives purchased from him by Brand Bar and Old Tappan is large enough to affect free competition. Moreover, the two accounts in question are in the process of being sold to a third party, who is presumably unrelated to Mr. Harris. Based on all of these factors, I will grant Mr. Harris' request for a waiver. However, if Mr. Harris does not provide proof of the sale of these two licenses to an unrelated third party by May 31, 2013, this waiver will be subject to reconsideration.

G. Marc Keal

1. Account for Which Relaxation is Sought

Marc Keal ("Mr. Keal") seeks relaxation of the Solicitor Regulation in order to be able to continue to service Rudi and Inge, Inc., t/a Saddle River Liquors, which is owned by his brother-in-law, Bill Liston. Keal Exhibit 1 (cover letter); Keal Exhibit 2 at 42-16 to 17. It is worth noting that, according to information provided to ABC by Allied for the period January 1, 2007-September 30, 2010, Mr. Keal's share of non-exclusive purchases ($254,317) by Saddle River Liquors, Inc. is less than non-relative Thomas Harris' ($362,005). Allied Exhibit 7. Mr. Keal's average annual commissions for 2007-2009 (on all sales) was $109,940, but the commissions he earned from sales to his brother-in-law's account averaged only $7,372, or 6.7 percent of his annual average commissions. Allied Exhibit 1; Allied Exhibit 7.

2. Background

Mr. Keal began his career in the liquor industry by working at this retail account as a stock boy in 1975. Keal Exhibit 2 at 6-18 to 7-21. He worked for Saddle River Liquors for 3 years, before becoming a solicitor for the J&J division of Jaydor, which is now part of Allied. Keal

Exhibit 2 at 7-16 to 9-24. According to his application, Mr. Keal began servicing Saddle River Liquors as a solicitor before his brother-in-law acquired the business in 1998. Keal Exhibit 1 (cover letter). In fact, when his brother-in-law was just out of high school, Mr. Keal "got [Mr. Liston] a job" at Saddle River Liquors. Keal Exhibit 3 at 26-14 to 17. Mr. Keal currently calls on Saddle River Liquors on Mondays and Wednesdays. Keal Exhibit 3 at 16-15 to 17.

The following information regarding Mr. Keal's sales to his brother-in-law's account is obtained from his application:

Marc Keal's Sales to Accounts for Which Waiver is Sought
Rudi's & Inge, Inc., t/a Saddle River Liquors

	2005	2006	2007
Saddle River Liquors	$182,249	$156,456	$178,616
Total Sales to All Accounts	$2,312,614	$2,393,668	$2,484,641
Relative Accounts as % of Total	**7.9%**	**6.5%**	**7.2%**

	2008	2009	2010
Saddle River Liquors	$163,007	$145,462	$101,438
Total Sales to All Accounts	$2,458,602	$2,407,458	$1,586,483
Relative Accounts as % of Total	**6.6%**	**6.0%**	**6.4%**

Total Sales to Relative Accounts for Period	$927,227
Total Sales for Period	$13,643,467
Relative Accounts as % of Total Sales for Period	**6.8%**

Source:
Marc Keal's Response to Initial Questionnaire and Document Production, Schedule A (October 3, 2010)

See Keal Exhibit 1. Thus, Mr. Keal receives less business from his relative's account, as a percentage of sales, than any other solicitor-applicant.

When Mr. Keal first became a solicitor, he was given a "run" with approximately 20 accounts. Keal Exhibit 2 at 11-5 to 7. He increased his portfolio of accounts to an average portfolio of 68 accounts per year (from 2007 through September 2010). The chart below compares the number of accounts Mr. Keal services with the average Allied non-applicant solicitor.

Account Number Comparison

	2007	2008	2009	2010
Marc Keal	65	70	70	65
Average Allied Non-Applicant Solicitor	53	52	52	49

See Allied Exhibit 3. Thus, according to information provided to ABC, Mr. Keal has maintained an average portfolio of 68 accounts per year, whereas non-applicant Allied solicitors maintained an average of 52 accounts.

3. Waiver Standards

a. Undue Hardship

Mr. Keal is currently recovering financially from the cost of college for his recently graduated son and daughter and his daughter hopes to go to graduate school. Denial of his waiver would cause an average annual loss of $7,372. Keal Exhibit 1. He further indicates that his wife's employer recently cut her work hours. Keal Exhibit 1. Mr. Keal also notes that the loss of this account would be "devastating" and "hurtful," because he started in the liquor industry by working as a stock boy in Saddle River Liquors. Keal Exhibit 2 at 50-9 to 51-16.

b. Effect on Other Parties

Mr. Keal believes that, if his waiver application is denied, Allied will lose business and R&R and Fedway stand to increase sales to Saddle River Liquors. Keal Exhibit 2 at 69-13 to 70-8. Mr. Keal also believes that Saddle River Liquors would lose the buy-in projections that he provides. Keal Exhibit 2 at 68-14 to 69-3. Mr. Keal's statement that he provides pricing information not generally available to retail licensees, see N.J.A.C. 13:2-24.6, is an admission of

what appears to be an improper practice that demonstrates discrimination between retailers, in violation of N.J.S.A. 33:1-3.1b(10).

Mr. Liston testified that his two primary considerations when ordering products are to even out his purchases, since he does not want to owe too much money to any one wholesaler, and cash flow. Keal Exhibit 3 at 17-25 to 20-1. However, if a wholesaler "goes lower, [he will] certainly ... order from [that wholesaler]." Keal Exhibit 3 at 20-13 to 14. In other words, if Mr. Keal's waiver application is denied, Saddle River Liquors

> wouldn't be affected. [Mr. Liston] would miss [his] brother-in-law. [He'd] have to give ... the next salesman would get the Smirnoff orders and [Mr. Liston] would just go on with his life. ... [Keal Exhibit 3 at 37-12 to 15].

Mr. Liston, did point out, however, that:

> He let's [sic] me know if there [are] any specials going on that I might miss, because sometimes they run specials ... . And he's a nice man, I mean, talk to anyone, Mark [sic] Keal is a very nice person. [Keal Exhibit 3 at 38-12 to 18].

c. Purposes of Title 33 and the Implementing Rules

To ascertain the impact of Mr. Keal's familial relationship with Saddle River Liquors' owner, the purchasing history of the retailer from 2007 through September 30, 2010 was examined. The following chart compares the amount of non-exclusive products purchased by Saddle River Liquors from Mr. Keal and other Allied solicitors and competing wholesalers:

Marc Keal (Allied Beverage Group)
Sales of Non-Exclusive Products
to Account for Which Waiver is Sought
Rudi's & Inge, Inc., t/a Saddle River Liquors

	2007	2008	2009	Thru 9/30/2010
Marc Keal (Allied Beverage Group)	$60,791	$85,144	$67,787	$40,595
Other Allied Solicitors	$97,747	$150,446	$136,474	$95,745
R&R Marketing, LLC	$58,777	$64,003	$64,786	$43,720
Fedway Associates	$113,070	$121,801	$93,074	$38,410
Total Sale of Non-Exclusives	$330,385	$421,394	$362,121	$218,470
Marc Keal Sales as Percentage	**18.4%**	**20.2%**	**18.7%**	**18.6%**
All Other Solicitors as Percentage	**81.6%**	**79.8%**	**81.3%**	**81.4%**

Sources:
Information Provided by Allied Beverage Group, Fedway Associates and R&R Marketing from 2007 through September 30, 2010

See Allied Exhibit 7; Fedway Exhibit 2; R&R Exhibit 1. Thus, unlike all of the other applicants except Mr. Zachary, Mr. Keal does not receive the majority of non-exclusive product purchases made by his relative-retailer.

The following table compares the amount and nature of products purchased by Saddle River Liquors from Mr. Keal and Thomas Harris, another solicitor from Allied:

Rudi and Inge, Inc., t/a Saddle River Liquors Purchases

		Exclusive Products	Non-Exclusive Products	Total Sales
2010	Marc Keal	$60,853	$40,595	$101,448
	Thomas Harris	$20,400	$69,886	$90,287
2009	Marc Keal	$77,653	$67,787	$145,440
	Thomas Harris	$30,325	$97,642	$127,968
2008	Marc Keal	$77,846	$85,144	$162,991
	Thomas Harris	$29,305	$110,071	$139,376
2007	Marc Keal	$117,809	$60,791	$178,600
	Thomas Harris	$72,322	$84,406	$156,728

See Allied Exhibit 7. Thus, the purchase history of Saddle River Liquors indicates that Mr. Keal received more total purchases than did Mr. Harris, only because Saddle River Liquors purchases more exclusive products, specifically Smirnoff Vodka, from Mr. Keal. Keal Exhibit 3 at 29-21 to 30-5. However, non-relative Mr. Harris received more purchases of non-exclusive products than did relative Mr. Keal. Consequently, the above comparisons suggest that, even within Allied, Mr. Keal's familial relationship with the owner of Saddle River Liquors has little, if any, impact on Saddle River Liquors' purchasing decisions.

Unlike all of the applicant-solicitors previously discussed, Mr. Keal does not receive the majority of Saddle River Liquors' purchases of non-exclusive products. Based on the foregoing, it appears unlikely that this will change, if his waiver application is granted.

4. **Decision on Marc Keal's Waiver Application**

It appears that Mr. Keal will lose approximately $7,352 in annual commissions if the waiver application is denied. The grant or denial of the waiver application is unlikely to have a noticeable effect on anyone other than Mr. Keal. Moreover, it appears that Mr. Keal's familial relationship with the owner of Saddle River Liquors has little, if any, impact on its purchasing decisions, underscored by the fact that Mr. Keal received a relatively small percentage (ranging from 18.4 percent to 20.2 percent) of Saddle River Liquors's total purchases of non-exclusive products. Thus, I will grant Mr. Keal's request for a waiver. However, if Mr. Keal's sales of non-exclusive products increase significantly, I may reconsider the waiver. Finally, Mr. Keal admitted to a seeming violation of N.J.S.A. 33:1-3.1b(10). The Enforcement Bureau is directed to investigate and review this seeming violation and take appropriate action.

H. Martin Zachary

1. Account for Which Relaxation is Sought

Martin Zachary ("Mr. Zachary") has applied for a waiver of N.J.A.C. 13:2-16.11, so that he can continue to sell to Canal's Marlton, which, at the time the waiver application was submitted, was owned by his brother-in-law, Joseph Canal, and managed by his nephew, Paul Canal.[46]

2. Background

Mr. Zachary is 64 years old. Zachary Exhibit 1 at 1. Mr. Zachary initially worked for Trentacoste, Zachary Exhibit 3 at 8-16-17, which no longer operates within the alcoholic beverage industry. In 1983, he began working for Fedway. Zachary Exhibit 3 at 8-23 to 9-16. He started out with 25 accounts and eventually grew his portfolio to approximately 70 accounts. Canal's Marlton came into business in 1992, Id. at 11-17, and, therefore, did not exist when Mr. Zachary became a solicitor. Zachary Exhibit 3 at 9-20-21.

Mr. Zachary performs "all of the duties and services required of a salesperson." Zachary Exhibit 1. He speaks with Manager Paul Canal regularly, puts up shelf talkers for his products and reviews current pricing and deals. Id. at 1. He introduces new products, picks up checks for invoices due and tries to rectify any delivery problems. Zachary Exhibit 1 at 1; Zachary Exhibit 2 at 2.

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[46]Joseph Canal died on March 7, 2011. Zachary Exhibit 4.

The following table sets forth Mr. Zachary's sales to Canal's Marlton.

Marin D. Zachary's Sales to Accounts for Which Waiver is Sought
Joe Canal's (Marlton)

	2005	2006	2007
Joe Canal's (Marlton)	$691,054	$673,264	$667,289
Total Sales to All Accounts	$2,660,992	$2,583,541	$2,523,218
Relative Accounts as % of Total	**26.0%**	**26.0%**	**26.5%**

	2008	2009	2010
Joe Canal's (Marlton)	$634,227	$593,895	$306,265
Total Sales to All Accounts	$2,476,592	$2,342,589	$1,219,47
Relative Accounts as % of Total	**25.6%**	**25.5%**	**25.1%**

Total Sales to Relative Accounts for Period	$3,565,994
Total Sales for Period	$13,806,403
Relative Accounts as % of Total Sales for Period	**25.8%**

Source:
Martin Zachary's Response to Initial Questionnaire and Document Production, Schedule A (Received September 24, 2010)

See Zachary Exhibit 2. Notably, as set forth below, Mr. Zachary is not the "favored" solicitor at Canal's Marlton. Rather, Mr. Zachary sells primarily exclusive products to that account. In fact, as indicated below, he receives less in both purchases of non-exclusive products and total purchases from Canal's Marlton than does solicitor Thomas Fiore, who works for a competing wholesaler.

3. Waiver Application

Fedway provided a printout to ABC that shows the number of accounts serviced by each of its solicitors. See Fedway Exhibit 3. The chart below identifies the number of accounts serviced by Mr. Zachary for the period January 1, 2007 through 2010, and the average number of accounts serviced by the average Fedway non-solicitor applicant, as calculated by ABC based on the information provided by Fedway.

Account Number Comparison

	2007	2008	2009	2010
Martin Zachary	48	46	50	44
Average Fedway Non-Applicant Solicitor	58	58	58	50

See Fedway Exhibit 3. Thus, Mr. Zachary has maintained an average portfolio of 47 accounts per year, whereas non-applicant Fedway solicitors maintained an average of 56 accounts.

a. Undue Hardship

Mr. Zachary suffers from severe medical issues. He has throat cancer and was recently diagnosed with diabetes. Zachary Exhibit 3 at 27-5 to 7. He has had three throat operations for tumors. Id. at 28-11. He admits that he is "on a decline." Id. at 42-21 to 22. Due to his health, he is no longer "able to do what [he] used to do." Id. at 27-9. He has made some bad investments. Id. at 28-11 to 13. "At the end of each month [he's] just about making it." Id. at 28-17. "[L]osing [Canal's Marlton] would really hurt [him] financially and put [him] in a hardship because of the situation [he's] in right now." Id. at 62-7 to 9.

b. Effect on Other Parties

Mr. Zachary acknowledges that, if his waiver application is denied, it "[w]ouldn't bother [his nephew, Paul]." Id. at 29-8 to 9. Nor would denial adversely affect Fedway, because the orders Mr. Zachary receives are mostly for exclusive products. Id. at 29-16 to 17. Denial of Mr. Zachary's application would have "zero" effect on Canal's Marlton. Zachary Exhibit 5 at 62-15 to 24. Whatever purchases of non-exclusive products Canal's Marlton makes now would be made through Mr. Zachary's replacement. Zachary Exhibit 5 at 63-13 to 20.

c. Purposes of Title 33 and the Implementing Rules

Manager Paul Canal describes himself as a "creature of habit." Zachary Exhibit 5 at 37-14 to 15. "Whoever has been selling [a] product, ... is who [he will] continue with." Zachary Exhibit 5 at 29-7 to 10. Price and customer service are his "two factors." Zachary Exhibit 5 at 30-11 to 21.

Even though Fedway solicitor Mr. Zachary is Paul Canal's uncle, Allied is by a large margin the primary source from which he purchases the most non-exclusive products. Zachary Exhibit 5 at 34-23 to 25. Paul Canal attributes this fact to "years of relationships" and that Allied gives him "the least grief." Zachary Exhibit 5 at 35-1 to 5. He does not purchase a product simply because his uncle, Mr. Zachary, asks him to - - the business comes first. After all, Mr. Zachary "[is] not paying my bills." Zachary Exhibit 5 at 48-16 to 23. As Paul Canal stated:

> There's no family preferential treatment. Marty, you know, Marty is my uncle outside of the business. He's not my uncle when he is in the store. He is my salesman. He gets no preferential treatment. [Zachary Exhibit 5 at 50-20 to 24].

In other words, Paul Canal "look[s] at the company instead of the individual." Zachary Exhibit 5 at 52-3 to 4. "[N]o one ever thought Marty [Zachary] was having a competitive edge in [Canal's Marlton] because he was [Paul Canal's] uncle." Zachary Exhibit 5 at 58-17 to 19.

To ascertain the impact of Mr. Zachary's familial relationship with his nephew, Paul Canal, the purchasing history of the licensee from 2007 through September 30, 2010 was examined. The following chart compares the amount of non-exclusive products purchased by Canal's Marlton from Mr. Zachary and other Fedway solicitors and competing wholesalers.

Martin Zachary (Fedway Associates)
Sales of Non-Exclusive Products
to Account for Which Waiver is Sought
Canal's Marlton

	2007	2008	2009	Thru 9/30/2010
Martin D. Zachary (Fedway Associates)	$194,927	$122,580	$90,568	$46,626
Other Fedway Associates Solicitors	$10,781	$77,702	$31,277	$18,852
R&R Marketing, LLC	$400,633	$397,109	$368,202	$201,635
Allied Beverage Group	$901,191	$2,084,614	$1,685,786	$859,918
Total Sale of Non-Exclusives	$1,507,532	$2,682,005	$2,175,833	$1,127,031
Martin Zachary's Sales as Percentage	**12.9%**	**4.6%**	**4.2%**	**4.1%**
All Other Solicitors as Percentage	**87.1%**	**95.4%**	**95.8%**	**95.9%**

Sources:
Information Provided by Allied Beverage Group, Fedway Associates and R&R Marketing
from 2007 through September 30, 2010

See Allied Exhibit 7; Fedway Exhibit 2; R&R Exhibit 1. Thus, Martin Zachary receives only a small percentage of the non-exclusive purchases made by Canal's Marlton. In fact, his percentage of sales of non-exclusive products for 2008 through September 30, 2010 was only about one-third of his 2007 sales of non-exclusive products. The following chart compares the amount and nature of products purchased by Canal's Marlton from Mr. Zachary, Fedway, and Thomas Fiore, Allied.

JVC, Inc., t/a Joe Canal's Discount Liquor Outlet (Canal's Marlton)

		Exclusive Products	Non-Exclusive Products	Total Sales
2010	Martin Zachary (Fedway)	$268,894	$46,626	$315,520
	Thomas Fiore (Allied)	$213,313	$813,970	$1,027,282
2009	Martin Zachary (Fedway)	$503,327	$90,568	$593,895
	Thomas Fiore (Allied)	$425,241	$1,597,404	$2,022,646
2008	Martin Zachary (Fedway)	$511,647	$122,580	$634,227
	Thomas Fiore (Allied)	$432,548	$1,932,945	$2,365,494
2007	Martin Zachary (Fedway)	$472,362	$194,927	$667,289
	Thomas Fiore (Allied)	$1,183,133	$879,215	$2,062,348

Allied Exhibit 7; Fedway Exhibit 2. Based on this analysis, it is clear that, in spite of the fact that Fedway solicitor Martin Zachary is related to the owner of Canal's Marlton, he receives fewer purchases of non-exclusive products from that account than does Allied solicitor Thomas Fiore. From all of the information obtained, it appears that the impact of his familial relationship is insignificant.

d. Other Arguments

Mr. Zachary points out that,

> [u]nlike a lot of these other people that were hired solely to bring in business from a family member, ... I wasn't hired that way. Joe Canal's didn't even exist. [Zachary Exhibit 3 at 42-16 to 19].
>
> I came into this business before [Canal's Marlton] even started. And it's not like I'm writing hundreds and hundreds of thousands of dollars from this account, I'm just about surviving from this account but it is helpful to me. And as I stated, ... losing this account would really hurt me financially and put me in a hardship because of the situation I'm in right now. I wasn't hired like some of these people to get solely business from relatives' accounts and give it to the distributor. That was not the case. That was – in fact, that's further from the truth than anything. I feel I'm not in the same situation as some of these other people. ... It's not like I just sit there and collect a check and not [work] on the accounts. ... And I don't feel like I belong in the same mold as ... those people. If you just can consider all of that. [Zachary Exhibit 3 at 62-2 to 24].

Paul Canal echoed the comments of his uncle, when he stated:

> ... it's such a small number of non-exclusive brands that I give him. I just can't understand why the State would want to penalize him for such a small minuscule number when it's clearly, I mean, if ... Marty could sell Captain Morgan and ... I kicked Buddy Start to the curb, then there's an advantage to Marty ... of being my uncle.
>
> If it was, if the reason was that he was my uncle, but when I have demonstrated a pattern here for years of not favoring Marty over

> anybody else, I just don't understand what the point of the State would be. [Zachary Exhibit 5 at 64-7 to 19].

In his closing comments, Paul Canal stated:

> I ... ask [the Director to] please allow him to continue to solicit me. There's no competitive edge that Marty [Zachary] has over any[one] ... and I think it would be a crime to take the store away from him. He is at the tail end of his career, at the tail end of his life. [T]here's no competitive edge here and I applaud the Director for all that he's done since he's been in charge because all he has done in my mind for the last 10 to 15 years is he wants a level playing field and I think that is all anybody asks for is a level playing field and Marty has been on the level playing field with everybody ... [T]he numbers dictate it. And I think if you look at some other people in this investigation, I think the numbers won't show what my numbers show or Marty's number show. ... [J]ust be fair and look at it very objectively. ... [T]he numbers speak for themselves. [Zachary Exhibit 5 at 75-6 to 76-1].

Unlike most of the other waiver applicants, Mr. Zachary does not receive the majority of Canal's Marlton's purchases of non-exclusive products. Based on the foregoing, it appears unlikely that this will change, if Mr. Zachary's waiver application is granted.

4. **Decision on Martin Zachary's Waiver Application**

It appears that Mr. Zachary will suffer some personal hardship if the waiver application is denied, given his age and medical issues, and that the grant or denial of the waiver application is unlikely to have a noticeable effect on anyone other than Mr. Zachary. Moreover, it appears that Mr. Zachary's familial relationship with the Manager of Canal's Marlton has little, if any, impact on its purchasing decisions, underscored by the fact that Mr. Zachary receive only a small percentage (ranging from 4.1 percent to 12.9 percent, with the high in 2007 and the low in 2010) of Canal's Marlton's purchases of non-exclusive products. Thus, I will grant Mr. Zachary's

request for a waiver. However, if Mr. Zachary's sales of non-exclusive products increase significantly, I may reconsider the waiver.

Accordingly, it is on this 3rd day of February, 2012,

ORDERED that the waiver application of Shelley B. Novick-Leighton is denied and she must cease serving Leiham Corp., t/a Bayway World of Liquors, as a solicitor no later than March 31, 2012; and it is further

ORDERED that the waiver application of Kerry Lynn Canal is denied and she must cease serving Canal's Pennsauken, t/a Canal's Discount Liquor Mart, and Canal's Camden as a solicitor no later than March 31, 2012; and it is further

ORDERED that the waiver application of Donna McAdam is denied and she must cease serving Richard McAdam, Inc., t/a Stirling World of Liquors, and David McAdam, Inc., t/a Roselle Park Liquors, as a solicitor no later than March 31, 2012; and it is further

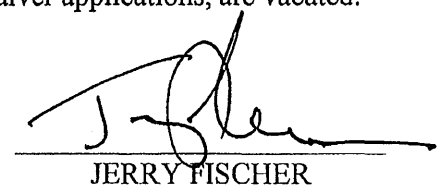
ORDERED that the waiver application of Rory McCormick is denied and she must cease serving Anthony Prisco, Inc., t/a Spirits Unlimited, and Square Liquors, Inc., t/a Spirits Unlimited, as a solicitor no later than March 31, 2012; and it is further

ORDERED that the waiver application of Thomas Harris is granted. However, if Mr. Harris does not provide proof to me of the sale of the subject liquor licenses to an unrelated third party by May 31, 2013, this waiver will be subject to reconsideration; and it is further

ORDERED that the waiver application of Marc Keal is granted; and it is further

ORDERED that the waiver application of Martin D. Zachary is granted; and it is further

ORDERED that the stays of N.J.A.C. 13:2-16.11, which I previously entered to permit thorough consideration of the waiver applications, are vacated.



JERRY FISCHER
DIRECTOR