COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
TRIAL COURT

COFFEESHOP LLC, d/b/a UPPERWEST Plaintiff,	)	
v.	)	CIVIL ACTION NO. 19-3415
ALCOHOLIC BEVERAGES CONTROL COMMISSION and CAMBRIDGE LICENSING COMMISSION, Defendant and Defendant-Intervenor.	)	

PLAINTIFF'S CONSOLIDATED REPLIES AND OPPOSITIONS TO DEFENDANTS' OPPOSITIONS TO PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS AND CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS[1]

The two separate Oppositions and Cross Motions of the Alcoholic Beverages Control Commission ("ABCC") and Cambridge Licensing Commission ("Cambridge" or "CLC") (collectively, "Defendants") engage in *post hoc* rationalizations that cannot be credited, misrepresent and fail to rebut key facts, and, most importantly, ignore and/or misapply constitutional free speech principles.

For the reasons in UpperWest's Memorandum in Support of its Motion for Partial Summary Judgment ("UpperWest Memo") and set forth below, Defendants arguments should be rejected and the ABCC decision set aside.

[1] Because this submission is in reply to two Oppositions and Cross-Motions from two separate party defendants (per Standing Order 1-96, each opposition is deemed a Cross-Motion), and each Opposition entitles Plaintiff to a 5-page Reply and also an Opposition, Superior Court Rule 9A(a)(2) and (3), this submission of less than 10 pages comports with page limit requirements of Superior Court Rule 9A. Because the two Defendants have expressed a contrary view, to the extent the Court deems such leave necessary, Plaintiff respectfully seeks leave to file the Consolidated Reply.

Argument

I. Defendants' post-hoc rationalizations and factual distortions cannot be accepted.

Faced with the strength of Plaintiff's arguments, both Defendants attempt to assert grounds for affirmance that are inconsistent with, or absent from, the ABCC's decision and which thus contravene the requirement that "an agency's ground of decision must be clear from its own order, not from 'appellate counsel's post hoc rationalizations.'" NSTAR Elec. Co. v. Dep't of Pub. Utils., 462 Mass. 381, 387 n.3 (2012) (quoting Motor Vehicle Mfrs. Ass'n v. State Farm, 463 U.S. 29, 50 (1983)).[2] Examples of Defendants' *post hoc* rationales, and indeed some outright misrepresentations of the record and the law, which much be rejected, include:

1. The ABCC explicitly and repeatedly found only that Plaintiff's discussion with the officials in the parking lot hindered or delayed "the investigation," AR 367–68; yet now, because it has no good response to the fact that the discussion in the parking lot could not have delayed or hindered "the investigation," it contends that the discussion delayed the performance of "other duties." ABCC Opposition (hereinafter "ABCC"), pp. 10–11; see also CLC Opposition (hereinafter "CLC"), p. 15.

2. The ABCC decision emphasized that, as to the use of candles, Cambridge charged Plaintiff only with violating the portable cooking equipment rule, which was without merit, AR 366–67; and Cambridge admits that 1.7.7.2 of the Fire Code (AR 1014) expressly requires that

[2] See also, e.g., Nat. Res. Def. Council, Inc. v. EPA, 824 F.2d 1258, 1286 n.19 (1st Cir. 1987) ("Reviewing courts will not rely on appellate counsel's post hoc rationalizations in lieu of adequate . . . explanations from the agency itself."); Massachusetts Auto. Rating & Acc. Prevention Bureau v. Comm'r of Ins., 401 Mass. 282, 288–89 (1987) (same, as applied to *post hoc* rationalizations by Attorney General). This principle applies with particular force in free speech cases because of the imperative to ensure administrative accountability and due process, and to guard against impermissibly-motivated censorship. Norris on behalf of A.M. v. Cape Elizabeth Sch. Dist., 969 F.3d 12, 26–28 (1st Cir. 2020).

abatement orders be in writing and does not dispute that no written order to blow out the candles was given to Plaintiff, CLC, p. 11. See also Exh. 19 with Sept. 29 video and audio recordings (in which Donovan admits to officer Bates that no written notice was given). Yet now, Defendants contend for the first time that UpperWest failed to cooperate with mere verbal requests to comply with Fire Code Sections 10.10.2,[3] CLC, p. 12, and/or 1.7.8[4], ABCC, p. 13, neither of which are even *mentioned* in the ABCC's reasoning with regard either to Count 1 or Count 2.[5]

3. Relatedly, Defendants assert that Cambridge had a "no candles" rule that it enforced throughout the City, CLC, pp. 5–6, that UpperWest did not contest the existence of, ABCC, p. 5, and that UpperWest was on notice of prior to September 29. ABCC, pp. 2–3, 5. In addition to being false,[6] these assertions are irrelevant because they formed no part of the

[3] This provision says: "The AHJ shall have the authority to prohibit any or all open flames, candles, and open, recreational or cooking fires or other sources of ignition, or establish special regulations on the use of any form of fire or smoking material where circumstances make such conditions hazardous." But, as shown on the video that is Exhibit 19 to the record, when UpperWest asked the officials for a local rule or ordinance implementing this authority, UpperWest was referred once again and only to 20.1.5.2.4(2), which is the Fire Safety Code provision that the ABCC specifically found inapplicable. AR 366–67.

[4] 1.7.8, referenced without any citation by the ABCC at p. 11 of its Memo, provides that "[w]hen conditions exist and are deemed to be an imminent danger, the AHJ shall have the authority to abate or require abatement of such conditions that are in violation of this *Code* or M.G.L. c. 148." Of course, this rule was not even mentioned by the ABCC with regard to Count 2, AR 367-68, the ABCC itself ruled that the candles did not violate the Code section Cambridge accused Plaintiff of violating, AR 366–67, and the small glass surrounded candles were obviously not deemed an imminent danger, given that the officers allowed them to continue to be used from August 3 to September 29, AR 647, ABCC p. 3, allowed them to continue to burn while the conversation occurred in the parking lot, and when they finally went inside left the candles burning while they proceeded to announce the establishment would be closed. Exh. 19.

[5] While arguably irrelevant, the ABCC factual finding that the conversation moved outside "[b]ecause Ms. Courtney was becoming confrontational," AR 364, number 13, is directly contradicted by the video as well as the audio recording also in Exhibit 19 and hence not supported by substantial evidence. See UpperWest Memo, p. 2 n. 2; Compl., Exh. 2.

[6] The record, including but not limited to the video and audio recordings in Exh. 19, shows that: a) UpperWest consistently contested the existence of any such "rule," b) contrary to the grossly

ABCC's reasoning as to Counts 2 through 4. Indeed, the ABCC decision notes that Cambridge had inappropriately relied below on this alleged "rule," a conclusion that Cambridge did not appeal. AR 367.[7]

4. The ABCC ruled that Plaintiff's speech rights were not violated in this case based solely on its citation to cases decided under the "true threats" doctrine, AR 369; yet, as discussed more in Argument II below, it now seeks to invoke (and misapply) the "speech integral to criminal conduct" doctrine, ABCC, pp. 15–16.

5. Although not material because either statement would be constitutionally protected, contrary to substantial evidence, Defendants persist in saying that Ms. Courtney said to the Cambridge officials "you will live to regret this." Yet, both the audio and video recordings of the at-issue incident clearly establish that, as the officers were leaving the premises, Ms. Courtney stated, "You guys are going to regret behaving this way," and, contrary to the ABCC conclusion that parts of the conversation were not recorded, the audio in Exhibit 19 continues after the Cambridge officials departed and the owners returned inside. Neither the video nor the audio, which together capture the entirety of the interaction between the owners and the

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misleading assertion by ABCC, ABCC, p. 2, nothing occurred in December 2017 to put UpperWest on notice of any such non-existent rule, including because the record shows that the UpperWest owners were not even present at the unauthorized inspection and were not given a copy of any report created as a result; AR 2306–07; c) the only law provided to UpperWest after the August 3 visit was the same portable cooking rule the ABCC itself found inapplicable, AR 1058–59, and which UpperWest clearly understood to be inapplicable, AR 606–10, 644–48, d) no Cambridge "no candles" rule was provided or discussed on September 29, AR 366–67 and Exh. 19, and, e) indeed, the record is devoid of any duly promulgated Cambridge prohibition on use of candles, devoid of even a single instance of candle enforcement other than as to UpperWest, AR 700–02, and shows candles in use in other establishments. AR 673–86.

[7] Consistent with Defendants' pattern of exaggeration, misstatements and attempts to paint Ms. Courtney in a false light, contrary to the assertion at CLC, p. 7 ¶ 29, the record does not say that Ms. Courtney behaved "aggressively" on August 3, but rather, was "aggravated" by the official's action in front of customers, which the official himself found understandable. AR 1633–34.

Cambridge officials, contain the statement "you will live to regret this." Defendants further ignore that Donovan testified, consistent with an ABCC Commissioner's statement, that what the owners stated was "not a threat to commit a crime." AR 1747–48; see also AR 2087 (McGinty admitting suing or filing a complaint against someone is not a crime).[8]

II. Plaintiff's speech, attempting to convince officers they were misapplying the law and suggesting they should regret their conduct, is constitutionally protected.

Criticism of public officials in the performance of their public duties is at the core of constitutional protection. See, e.g., New York Times v. Sullivan, 376 U.S. 254 (1964) and City of Houston v. Hill, 482 U.S. 451, 463–64 (1987).[9] This fundamental free speech value is the basis for Commonwealth v. Adams, 482 Mass. 514 (2019), the logic of which the ABCC

[8] Cambridge erroneously asserts that UpperWest had the burden before the ABCC to prove that a 3-day suspension was unlawful, failed to testify at the ABCC hearing, and failed to provide bases for finding the license suspension unlawful. CLC, pp. 13, 199–20. To the contrary, and as the ABCC ruled, Cambridge had the burden of proof, AR 366; the owners of UpperWest were sworn in at the beginning of the informal hearing (AR 1157) and testified under oath throughout, including in an open statement and by answering Commissioners' specific questions (AR 1190-1284); and the cases cited by Cambridge address claims that an otherwise lawful punishment is disproportionate to other sanctions meted out for the same conduct and refer to the licensee's duty to preserve such a claim. Vaspourakan. Ltd. v. ABCC, 401 Mass. 347, 354–55 (1987); Olde Towne Liquor Store, Inc. v. ABCC, 377 Mass. 152, 154–55 (1977). But here Plaintiff claims that *any* sanction is unjustified and unconstitutional, yet nevertheless did put in evidence that Cambridge did not have and did not enforce a "no candle" policy against other establishments. See *supra*, I.3.

[9] As the Sullivan Court explained, "public men are, as it were, public property," and "discussion cannot be denied, and the right, as well as the duty, of criticism must not be stifled." 376 U.S. at 268 (quoting Beauharnais v. Illinois, 343 U.S. 250, 263–64 n.18 (1952)). The Court went on to discuss how laws, including the Sedition Act, are unconstitutional where they fail to recognize "the broad consensus" that laws which restrain "criticism of government and public officials … [are] inconsistent with the First Amendment." Id. at 266. See also McCurdy v. Montgomery Cty., 240 F.3d 512, 520 (6th Cir. 2001) ("Since the day the ink dried on the Bill of Rights, '[t]he right of an American citizen to criticize public officials and policies . . . [has been] central [to the] meaning of the First Amendment,'" including telling an officer that one doesn't have to do the "sh*t" the officer orders one to do (quoting Glasson v. City of Louisville, 518 F.2d 899, 904 (6th Cir. 1975)).

unconvincingly argues is somehow inapplicable because the SJC there was interpreting the common law instead of a statute. But Adams applied *constitutional* principles to determine what must be proven in order *constitutionally* to convict someone of interfering with the duties of a law enforcement officer.[10] These constitutional principles apply equally when statutes are being applied, as is the lesson of Commonwealth v. Bigelow, " (2016), in which the SJC held that the criminal harassment statute could not be applied to criticism directed at a public employee because of the constitutional protection for speech critical of public employee conduct. See also Commonwealth v. Moreno, SJC-12967, slip op. at 25–28 (January 26, 2021) (statute must be construed not to cover speech immunized from government control).

The ABCC's *post hoc* assertion that these constitutional free speech principles do not apply because Plaintiff's speech was unprotected under the doctrine of speech "used as an integral part of conduct in violation of a valid criminal statute" first articulated in Giboney v.

[10] The SJC held that "hinder[ing] or delay[ing]" "requires proof of a *physical* act that obstructs of hinder a police officer in the lawful performance of his or her duty" or a threat of violence that "would have the effect of obstructing or interfering with the officer." Adams, 482 Mass. at 529 (emphasis added). There is nothing in the ABCC's findings nor in the record suggesting any physical act that hindered or delayed the Cambridge officials. To the contrary, the sole basis for the ABCC's conclusion that UpperWest "hinder[ed] or delay[ed]" or failed to cooperate with the Cambridge officials was UpperWest's verbal attempt to convince the officers they were misapplying the law instead of immediately extinguishing the candles when the officers asked them *whether* they would. That one of the owners allegedly took the copy of the law out of the hands of one officer or entered his "personal space" is irrelevant where the investigation that the ABCC found to be hindered was over at that point, there is no evidence that but for this expressive conduct the officers could have finished their (wrongful) enforcement action sooner, and the conduct was not obstructive or violent but part of the overall effort to explain that the officers were misapplying the law. Indeed, on the night in question, Donovan specifically said he did not need or want to "hurry up" when asked to do so by UpperWest. UpperWest Memo, p. 3, with AR cites. Moreover, Donovan himself testified at the hearing that he did not find the alleged physical contact inappropriate, AR 1919–20, so, even if it had occurred, which UpperWest denied, AR 1922, it could not have been "offensive" as required by the case that the ABCC cites. ABCC, p. 13 n. 15. The ABCC's belated and offensive *post hoc* assertion that UpperWest engaged in criminal battery by merely reaching for the paper under discussion, ABCC, p. 13, n. 15, changes exactly nothing about this analysis.

Empire Storage & Ice Co., 336 U.S. 490, 498 (1949), is simply wrong. Speech that is motivated by a legitimate aim does not fall within either the "true threats" or the Giboney exceptions. Id. at 502 (doctrine applied only where the speaker's "sole, unlawful immediate objective," was to force a third party to violate the law); Commonwealth v. Strahan, 30 Mass. App. Ct. 947, 949 (1991) (reversing conviction because no "reasonable basis for concluding" sole purpose of defendant's phone calls was to harass because may have been "motivated at least in part by a desire to reestablish a relationship").[11] And telling public employees that they are wrong and should regret being wrong clearly has a legitimate aim, regardless of the officers' speculation that UpperWest was proposing to report them and thereby could cause them economic harm. AR 364 ¶ 23, 369–70. Indeed, in Seals v. McBee, 898 F.3d 587, 590, 595, 597, 599 (5th Cir. 2018), the Fifth Circuit recently held that threats to *sue* officers for their conduct, thereby potentially causing economic harm, are "wholly lawful" and "constitutionally protected" speech that the government has "no interest" in preventing.[12] For the same reasons, Plaintiff engaged in fully

[11] In Commonwealth v. Carter, 481 Mass. 352, 366–67 (2019), cert. denied 140 S. Ct. 910 (2020), the SJC specifically highlighted that the Giboney exception applies only where "the purpose is to cause injury rather than to add to, or to comment on, the public discourse." See also Commonwealth v. Johnson, 470 Mass. 300, 309 (2014) (holding speech integral to criminal conduct exception applies when "sole purpose of the defendants' speech [is] to further their endeavor to intentionally harass [targets]"). Defendants cite to Sayer v. United States, 748 F.3d 425 (1st Cir. 2014), but neglect to mention that the court applied the sole purpose requirement and found "Sayer points to no lawful purpose of the communications at issue here that would take them outside the Giboney exception." See also United States v. Matusiewicz, 84 F. Supp. 3d 363 (D. Del. 2015), aff'd sub nom. United States v. Gonzalez, 905 F.3d 165 (3d Cir. 2018) (harassing speech did not fall within the Giboney exception because it was possibly motivated by a "legitimate interest in protecting [defendant's] nieces from abuse").

[12] Seals held that such speech is not removed from protection either by the "true threats" analysis or the speech integral to criminal conduct exception and declared an intimidation statute, much like G.L. c. 268, § 13B, that criminalized "'the use of violence, force, or threats' on any public officer or employee with the intent to influence the officer's conduct in relation to his position" unconstitutionally overbroad. 898 F.3d at 597–98 & n.25. Contrast White v. United States, 670 F.3d 498, 514–15 (4th Cir. 2012), abrogated on other grounds by Elonis v. United States, 135 S. Ct. 2001 (2015), cited by ABCC, relied on United States v. Varani, 425 F.2d 758, 762 (6th Cir.

protected speech both by informing the officers they were misapplying the law and that they should regret their actions.[13]

Finally, Defendants argue, without citation to any authority, that UpperWest's speech is not entitled to constitutional protection because, by obtaining a liquor license, it somehow forfeited the free speech rights that private citizens enjoy. ABCC, p. 14; Cambridge, p. 18. This assertion is utterly inconsistent with the well-established principle that government benefits—including liquor licenses—may not be "conditioned on the surrender of a constitutional right." 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 513 (1996). Accord Dep't of Texas, Veterans of Foreign Wars of U.S. v. Texas Lottery Comm'n, 760 F.3d 427, 438 (5th Cir. 2014); R.S.W.W., Inc. v. City of Keego Harbor, 397 F.3d 427, 434 (6th Cir. 2005) (collecting cases); Saints & Sinners v. City of Providence, 172 F. Supp. 2d 348, 355 (D.R.I. 2001) ("While there is no explicit right to a liquor license, there is a right not to have a liquor license be used as a tool to silence First Amendment rights."). See also Perry v. Sindermann, 408 U.S. 593, 597 (1972).

1970) (citing perjury and bribery as crimes that can be based on speech alone because such speech has no lawful purpose and addressing threats to use *physical* force); Commonwealth v. Sholley, 432 Mass. 721, 726–27 (2000) (finding "true threats" made where the statements and conduct were in fact a threat to commit a crime involving *physical* disruption or harm). Compare Nuon v. City of Lowell, 768 F. Supp. 2d 323, 332, 333 (D. Mass. 2011) (expressive conduct that does not rise to the high level of tumultuous behavior is protected and law enforcement not a law unto themselves).

[13] The ABCC baselessly asserts that the constitutional protection for criticism of public employees applies only to criticism of "police" officers and not other public employees, including other types of law enforcement officers, such as the firefighters purporting to enforce the law in this case. Yet, the SJC in Bigelow applied these speech protections to a town official, citing cases guaranteeing protection for criticism of a professor running for public office and a United States attorney, and the Sullivan Court's analysis concerned a Commissioner of Public Affairs. 376 U.S. at 256. Further, nothing in Project Veritas v. Rollins, 982 F.3d 813, 843 (1st Cir. 2020), misleadingly cited by the ABCC, implies that speech protections apply less robustly to interactions with law enforcement officers other than police or implies that *criticism* of all public employees is not fully protected; rather, the court merely held that claims of the right to *secretly record* certain non-law enforcement employees were not ripe for review, while generally emphasizing the First Amendment's strong protection for holding public employees to account.

Conclusion

The ABCC decision imposes a 3-day suspension because Plaintiff tried to convince the fire code officers that they were misapplying the law (which they were) and told them that they should come to regret their actions (which they should). Plaintiff respectfully submits that the ABCC decision must be set aside, including because it unconstitutionally abridges free speech rights protected by the First Amendment and Article 16, and that declaratory relief should be entered pursuant to the third prayer for relief in the Complaint.

Respectfully submitted,

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