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IN THE COMMON PLEAS COURT FOR FRANKLIN COUNTY, OHIO
CIVIL DIVISION

WCI, INC.,	)	**CASE NO. 15-CV-007970**
	)	**JUDGE WILLIAM WOODS**
Appellant,	)	
	)	
v.	)	
	)	**BRIEF OF APPELLANT**
OHIO STATE LIQUOR COMMISSION	)	
	)	
Appellee.	)	
______________________________	)	

ASSIGNMENTS OF ERROR

The Ohio State Liquor Control Commission's decision that Appellant violated Ohio Admin. Code 4301:1-1-52 (B)(2), and fining the Appellant an amount of twenty five thousand dollars ($25,000.00), or face revocation of its Liquor Permit, is subject to the following assignments of error: (1) that the Order of the Liquor Control Commission appealed is not supported by reliable, probative, and substantial evidence; (2) that the Order appealed is not in accordance with law; (3) substantial documents were presented to the Commission to consider in mitigation, which were ignored; (4) the Order imposing a $25,000 fine, or, in the alternative, calling for the revocation of the Permit Holder/Appellant's liquor permit, reflects a discriminatory animus which is content based, violates the Appellant's constitutional rights to due process and equal protection of the law, and manifests a violation of the Appellant's First Amendment and companion Ohio State Constitutional rights; (5) the Order manifests the exercise of unbridled administrative discretion; and (6) the penalties imposed by the Order

manifest a violation of the Appellant's Eighth Amendment rights (a ground asserted to exhaust this remedy and establish standing for further challenge). Appellant would again assert reliance on *England v. Louisiana Board of Medical Examiners*, 375 U.S. 411, 421-22, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964), reserving all rights applicable thereto.

ISSUES PRESENTED FOR REVIEW

Whether the Order of the Liquor Control Commission appealed was supported by reliable, probative and substantial evidence.

Whether the Order of the Liquor Control Commission appealed was in accordance with law.

Whether the failure to consider substantial documentation presented to the Liquor Control Commission to consider in mitigation amounts to error under the applicable law.

Whether the Order of the Liquor Control Commission imposing a $25,000.00 fine, or, in the alternative, calling for the revocation of the Appellant's liquor permit, reflects a discriminatory animus which is content based, violates the Appellant's constitutional rights to due process and equal protection under law, and manifests a violation of the Appellant's First Amendment and companion Ohio State Constitutional rights.

Whether the Order of the Liquor Control Commission, and the procedures related thereto, manifest the exercise of unbridled administrative discretion or manifest a violation of the Eighth Amendment to the United States Constitution.

STATEMENT OF FACTS

This action involves a Permit Holder charged with violations of 4301: 1-1-52 ("Regulation 52") the regulations of the Liquor Control Commission dealing with "entertainment," and imposing prohibitions against improper conduct. References to the Record

on Appeal are denominated as "R at p. ___," and references to the transcript of the proceedings before the Liquor Control Commission (the "Commission") are denominated as "R-T at p. __." This action was predicated on a "routine field investigation" by the Investigative Unit of the Ohio Dept. of Public Safety, which took place on March 8, 2014, in the Appellant's business, "Cheeks," a Gentlemen's Club. The Investigative Report is found at R at pp. 49-53.On August 5, 2015, the Appellant entered a plea of "denial w/stipulation" as to violation no. 2 ("improper conduct-nudity"). The Commission, upon the Motion of Counsel for the Attorney General's Office, dismissed violations 1 ("improper conduct-solicitation for anything of value") and 3 (improper conduct-sexual activity). During the hearing, the Appellant asserted a reservation of rights under *England v. Louisiana Board of Medical Examiners*, 375 U.S. 411, 421-22, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964), reserving all rights applicable thereto, and thereafter participated in the hearing, which did not include any evidentiary presentation, with the sole evidence supporting the charge being the reports contained in the Ohio Department of Public Safety Investigative Unit Incident /Arrest Report. This Report speaks for itself, and describes the activities of the performer, Jessica Clark. The Report recites the conduct which occurred between Agent Bowers and Ms. Clark. Critically, there is no statement in the report that anyone in management for the Appellant was informed of any of the conduct occurring between the Agent and Ms. Clark, and no record of any complaint or knowledge that Ms. Clark had any "predisposition" to engage in any offending activity, or that management had any knowledge or consent to the alleged activity.

During the hearing, a substantial amount of information was placed on the record showing the extensive policies and procedures utilized by the Appellant to implement the greatest level of surveillance and supervision to avoid any such problematic conduct (R at pp.

66-154). Included in these materials was a copy of the Entertainer Lease Application, which included extensive documentation showing that any performer had 1) not been convicted for felony possession or sale of drugs, 2) not been convicted of prostitution or solicitation, 3) not been terminated from any other establishment for drugs or promoting prostitution, and 4) acknowledging that any false information under lease application would result in immediate cancellation of her lease, as well as other important informational components (R at pp. 66-74).

In addition to this important legal document, it was also shown that the Appellant even went to the extent of providing written notices on the mirrors of the dressing room to ensure that appropriate coverage was implemented by all performers to avoid any violations of Regulation 52 (R at p. 75). Also provided was documentation reflecting training programs and standards provided to "All Managers and Monitors," to ensure compliance with all regulatory aspects of the operation of the permitted establishment, and specifically identified "zero tolerance" for prostitution, drugs, solicitation, improper touching, and a number of other related conduct issues. Also included were documents reflecting the "Due Diligence Audit," in which various individuals, without being identified and entering the club anonymously, would monitor the premises to verify compliance with all regulatory aspects of the permitted establishment (R at pp. 76-80, pp. 83-97).

Finally, copies of posters and placards were provided which described, specifically, "Rule 52 Dress Standards," the "Due Diligence Program," and notices regarding Human Trafficking and its detection and avoidance (R at pp. 98-109). In addition to these internal operational documents, the Docket Entry for Jessica Clark was provided, showing that her charges had been amended to that of "disorderly conduct," which is apparently not a specific regulatory violation of Regulation 52 (R at pp. 81-82).

The hearing went forward on August 5, 2015 (R-T at pp. 1-21), at which point in time the Asst. Attorney General went through the charges and status of the case (R-T pp. 5-6), with Counsel for the Appellant then presenting the above described facts in mitigation (R-T at p. 7-17), thereafter answering questions posed by the Commissioners (R-T at p. 19). The Commission took the matter under advisement, and, on August 20, 2015, the Commission issued its order, finding the Permit Holder/Appellant to be in violation of no. 2, as specified above (R at. P. 37). Thereafter, the Permit Holder/Appellant filed a Motion for Rehearing or Reconsideration (R at p. 32-36), and the Attorney General filed DPS Memorandum in Opposition to WCI's Inc.'s Motion for Reconsideration, also on September 9, 2015(R at pp. 38-39), with an order denying same issued September 10, 2015, requiring the payment of the $25,000 fine, or suffer revocation, that same day (R at p. 40). On that same day, the Permit Holder/Appellant filed his Notice of Appeal (R at pp. 3-5). This action ensues.

LAW AND ARGUMENT

A. THE THIRD PARTY CONDUCT DESCRIBED IN THE STIPULATED REPORT DID NOT OUTWEIGH THE EVIDENCE SHOWING THE APPELLANT'S CONDUCT AND POLICIES IMPLEMENTED TO ENSURE COMPLIANCE AND THE PENALTY IMPOSED FOR THE CONDUCT OF A THIRD PARTY VIOLATES APPELLANT'S DUE PROCESS RIGHTS

Ohio Rev. Code §119.12 describes the standard by which an administrative decision is reviewed, and under the statute, the Court must, "determine whether the agency's order is 'supported by reliable, probative, and substantial evidence and is in accordance with the law.'" *Colon v. Ohio Liquor Control Comm.*, 2009-Ohio- 5550, ¶ 7, 2009 WL 3367847 (Franklin App. 2009). As more fully explained below, the Appellant's "punishment" was not supported by reliable, probative, and substantial evidence and, based on the important constitutional issues involved, cannot be said to be in accordance with the law

At the outset, while it is true Regulation 52 does not require the permit holder know of the wrongdoing occurring on the premises (See *Goldfinger Enterprises, Inc. v. Ohio Liquor Control Comm.*, Franklin App. No. 01AP-1172, 2002-Ohio-2770), the bottom line in this appeal is that the evidence presented in mitigation for the Commission's consideration showed policies and procedures perhaps more extensive and more "surgical" in addressing the potentialities of any problematic conduct than any similar type of permit holder in the entire State of Ohio. One can only presume that the average convenience store or "Kroger's" would not be likely to go to this extent of training and documentation to prevent any violations and to show, in good faith, a desire to achieve compliance with all applicable regulations. Critically, to punish someone for someone else's wrongdoing is simply a violation is several constitutional principles, as explained below.

By way of analogy, on appeal to an appellate court, the standard of review utilized has been described as follows: "in reviewing the Court of Common Pleas determination that the Commission's order was supported by reliable, probative, and substantial evidence, this court's role is limited to determining whether the Court of Common Pleas abused its discretion." (citing *Duncan v. Ohio Liquor Control Comm.*, 10th Dist. No. 08AP-242-, 2008-Ohio-4358). "Abuse of discretion" connotes more than an error of law or judgment; rather it implies that the trial court's decision was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). As discussed in greater depth below, the instant appeal satisfies such a showing.

In the instant action, the totality of the evidence shows that one performer engaged in improper conduct which ultimately resulted in her conviction for "disorderly conduct." The remaining evidence on this record, and the only other evidence other than the Arrest Report, shows substantial efforts to educate, train, utilize legal contracts, and conduct surveillance in a

sincere effort to control any problematic conduct on the premises of the permitted establishment. It is respectfully submitted that the "reliable, probative, and substantial evidence," as described in the case of *Our Place, Inc v. Ohio Liquor Control Comm.*, 63 Ohio St.3d 570, 571 (1992) and *Colon* v. *Ohio Liquor Control Comm.*, 10th Dist. No. 09AP-325, 2009-Ohio-5550, should support the reversal of the Commission's Order.

> To be reliable, the evidence must be dependable, i.e., that there is a reasonable probability that the evidence is true. *Our Place, Inc.* at 571. To be probative, the evidence must tend to prove the issue in question. *Id.* To be substantial, the evidence must have some weight, i.e., it must have importance and value. *Id.*

Looking at the "weight" of the evidence, it can only be concluded that the extensive operational measures implemented by the Appellant "outweigh" the "improper conduct" of one performer, acting unilaterally, and with no proof of knowledge or acquiescence on the part of Appellant. In the instant action, the penalty for the "nudity" violation calls for the payment of a $25,000.00 financial penalty, and/or revocation of the subject license. Again, by way of comparison, Ohio Code Section, 2907.22, which criminalizes an individual ***knowingly*** "promoting prostitution," imposes the punishment of a 4th Degree Felony, which, pursuant to Ohio Revised Code Sec. 2929.18 (A)(3)(d), can only impose a ***maximum*** financial penalty of $5,000.00 (five thousand dollars). If the presumption is that the problematic conduct occurring at the subject Gentlemen's Club in some way appeals to the "prurient interest," or poses some type of threat to the "public health, safety, and welfare," it is respectfully submitted that the financial penalty imposed on one under the context of "strict liability" as theoretically imposed by Regulation 52, should not reflect a multiplier of ***five times*** the maximum penalty imposed on someone who would knowingly engage in significantly more serious and detrimental criminal

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conduct, particularly when the record before the Commission reflects a Permit Holder engaged in diligent efforts to prevent any misconduct.

In *Lady J. Lingerie, Inc. v. City of Jacksonville,* 176 F.3d 1358 (11th Cir.1999), *cert. denied,* 529 U.S. 1053, 120 S.Ct. 1554, 146 L.Ed.2d 459 (2000), the Eleventh Circuit recognized the application of respondeat superior liability in the context of "public welfare" crimes. Such "crimes" are "not crimes in the traditional sense; instead, they are a means of regulating activities that pose a special risk to the public health or safety." *Id.* at 1367. The court further recognized that the imputation of such liability is limited to circumstances where the defendant has a "responsible relation" to such unlawful conduct or omission, that is, where defendant "has the power to prevent violations from occurring." *Id.* at 1367 (citing *United States v. Park,* 421 U.S. 658, 670–73, 95 S.Ct. 1903, 44 L.Ed.2d 489 (1975)). However, criminal liability based on respondeat superior is inappropriate for offenses for which the penalty involves imprisonment. *See id.* at 1367. Regulation 52 facially violates this basic principle of due process by imputing criminal liability for the acts of other persons. "Due process prohibits the state from imprisoning a person without proof of some form of personal blameworthiness more than a 'responsible relation.' " *Lady J. Lingerie,* 176 F.3d at 1367. Corporate criminal liability and the vicarious liability it imposes "is a substantial departure from the ordinary rule that a principal is not answerable criminally for the acts of his agent without the principal's authorization, consent or knowledge, and thus corporate criminal liability continues to be a matter of vigorous debate." *Maple Heights v. Ephraim,* 178 Ohio App. 3d 439 (2006)898 N.E. 2d 974, 2008-Ohio-4576, citing LaFave & Scott, Substantive Criminal Law (1986) 364, Section 3.10(b); and *Comer v. Risko,* 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶ 17 (rejecting the imposition of vicarious liability upon a principal for the acts of independent contractors as "radically"

departing from basic agency principles). As the *Maple Heights v. Ephraim* decision observed: "Our demand that responsibility be personal is the result of the 'inarticulate, subconscious sense of justice of the [person] on the street.' Personal responsibility is the 'only sure foundation of law.' Causation, then, is the instrument we employ to ensure that responsibility is personal. It links the actor to the harm. It helps us to understand who should be punished by answering how the harm occurred. Causation is * * * 'an ultimate notion, deeply characteristic of human thought and expressed even among the most primitive people, in their effort to understand the "way of things." ' " (Footnotes omitted.) Dressler, Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem (1985), 37 Hastings L.J. 91, 103.

See also *WCI, Inc. v. Ohio Liquor Control Comm.,* Franklin App. No. 05A-896, 2006-Ohio-2751, for further discussion of "respondeat superior" observations.

As discussed *supra,* Regulation 52 lacks any requirement of personal blameworthiness, and, regardless of the "civil" nature of the Commission's action, facially and as applied, the Commission's Order is unconstitutional to the extent that it provides for a penalty based on the conduct of third parties, for either civil or threatened criminal punishment for such public welfare crimes.

B. THE INABILITY OF THE COURT TO MODIFY A PENALTY THAT HAS NO LIMITATION VIOLATES FUNDAMENTAL DUE PROCESS REQUIREMENTS AS WELL AS THE EIGHTH AMENDMENT, PARTICULALRY WHEN FIRST AMENDMENT RIGHTS ARE AT STAKE

In spite of the fundamental concept of "separation of powers," there is authority that mandates that reviewing courts not disturb a penalty that the commission was otherwise authorized to impose. See *Aida Ent., Inc. v. Ohio Liquor Control Comm.,* Franklin App. No. 01 AP-1178, 2002-Ohio-2764, at ¶ 13 (holding that a reviewing court may only modify an order

after finding that the order cannot stand); see, also, *Henry's Café, Inc. v. Bd. of Liquor Control* (1959), 170 Ohio St. 233, paragraph three of the syllabus (holding that a reviewing court "has no authority to modify a penalty that [an administrative] agency was authorized to and did impose"); see, also, *McCartney Food Mkt., Inc. v. Ohio Liquor Control Comm.* (June 22, 1995), Franklin App. No. 94APE10-1576 (stating that "once there is a proper determination of a violation of law by the commission, it has within its discretion the authority to impose various penalties"). See also *Twenty Two Fifty, Inc. v. Ohio Liquor Control Comm.,* Not Reported in N.E.2d (2007)- 2007-Ohio-946.

Obviously, the basis of these assertions is predicated on the requirement that, from a procedural standpoint, Appellant cannot argue constitutional claims or other claims of error for the first time on appeal after failing to even brief its position or raise such issues in the trial court. *State v. Awan* (1986), 22 Ohio St.3d 120, syllabus cited with approval in *Abraham v. National City Bank Corp.* (1990), 50 Ohio St.3d 175, 176. It was, indeed, the basis of Appellant's preservation of its federal rights under the assertion of reservation under *England v. Louisiana Board of Medical Examiners*, 375 U.S. 411, 421-22, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964), reserving all rights applicable thereto, both during the August 5, 2015 hearing in front of the Commission and in the Notice of Appeal.

In the instant action, the bottom line is that the Commission has threatened revocation of a valuable property right, the Appellant's liquor permit, or requires the payment of a $25,000 (twenty five thousand dollars) fine to avoid such revocation, all for the showing of a female's areola during an exotic dance performance. For the record, and again based on preservation of the argument, this "punishment' has no relationship to the "crime," particularly when you look at the context of the "exposure."

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The Commission's decision cannot stand because the portion of Regulation 52 on which the violation is based, is unconstitutional under the First and Fourteenth Amendments to the United States Constitution when applied to a live performance presented in a nightclub. With all due respect to recent decisions upholding Regulation 52, Appellant submits that any law that criminalizes such presentations of non-obscene expression is overbroad and cannot be reconciled with the Supreme Court's decisions in *Miller v. California*, 413 U.S. 15 (1973), *Jenkins v. Georgia*, 418 U.S. 153 (1974), *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), *Pope v. Illinois*, 481 U.S. 497 (1987); *Brockett v. Spokane Arcades,* 472 U.S. 491 (1985); *State v. Burgun*, 56 Ohio St.2d 354, 384 N.E.2d 255 (1978). The Supreme Court has held that live performances, including those with nudity, enjoy First Amendment protection. In *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981), the Court wrote:

> Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and televison, and live entertainment, such as musical and dramatic works fall within the First Amendment guarantee. *Joseph Burstvn. Inc. v. Wilson*, 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098 (1952); *Schacht v. United States*, 398 U.S. 58, 90 S.Ct. 1555, 26 L.Ed.2d 44 (1970); *Jenkins v. Georgia*, 418 U.S. 153, 94 S.Ct. 2750, 41 L.Ed.2d 642 (1974); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975); *Erznoznik v. Citv of Jacksonville*, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975). *See also California v. LaRue*, 409 U.S. 109, 118, 93 S.Ct. 390, 397, 34 L.Ed.2d 342 (1972); *Young v. American Mini Theatres, Inc.*, *supra*, at 61, 62, 96 S.Ct., at 2447-2448. Nor may an entertainment program be prohibited solely because it displays the nude human figure.

Id. at 65-66

Accordingly, in *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), the Court struck down a city ordinance that made it a crime to exhibit a movie that showed a bare buttocks, a female breast or pubic area if the film were visible from a public street. *Id.* at 206-07. The City urged that its law was designed to protect citizens from exposure to materials that may be offensive. *Id.* at 208. Rejecting this argument, the Court stated:

> Much that we encounter offends our esthetic, if not our political and moral sensibilities. Nevertheless, the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection from the unwilling listener or viewer. Rather, absent the narrow circumstances described above, the burden normally falls upon the viewer to "avoid further bombardment of [his] sensibilities simply by averting [his] eyes." *Cohen v. California, supra*, 403 U.S., at 21, 91 S.Ct., at 1786. *See also Spence v. Washington*, 418 U.S. 405, 412, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974).

Id. at 211 (emphasis added).

Thus, under established Supreme Court precedent, any statute that purports to prohibit live performances or expression, even expression involving nudity, runs afoul of the First Amendment. Accepting the constitutional parameters of "exposing" one's areola in the context of a First Amendment protected dance performance, the next consideration is the "proportionality" of a $25,000 fine for such exposure. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., Amdt. 8. At the time the Constitution was adopted, "the word "fine' was understood to mean a payment to a sovereign as punishment for some offense." *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.,* 492 U.S. 257, 265, 109 S.Ct. 2909 2915, 106 L.Ed.2d 219 (1989). The Excessive Fines Clause thus "limits the government's power to extract payments, whether in cash or in kind, "as punishment for some offense."' *Austin v. United States,* 509 U.S. 602, 609-610, 113 S.Ct. 2801 2805, 125 L.Ed.2d 488 (1993) (emphasis deleted).

Assuming the goal is "deterrence," the $25,000 penalty is still unconstitutional. Deterrence, has traditionally been viewed as a goal of punishment, and forfeiture of the currency here does not serve the remedial purpose of compensating the Government for a loss. See Black's Law Dictionary 1293 (6th ed. 1990) (" [R]emedial action" is one "brought to obtain compensation or indemnity"); *One Lot Emerald Cut Stones v. United States,* 409 U.S. 232, 93

S.Ct. 489, 34 L.Ed.2d 438 (1972) *(per curiam)* (monetary penalty provides "a reasonable form of liquidated damages," *id.,* at 237, 93 S.Ct., at 493, to the Government and is thus a "remedial" sanction because it compensates government for lost revenues). This also applies to the "revocation," or forfeiture of a liquor permit.

The theory behind such forfeitures was the fiction that the action was directed against "guilty property," rather than against the offender himself. See, *e.g., Various Items of Personal Property v. United States,* 282 U.S. 577, 581, 51 S.Ct. 282, 284, 75 L.Ed. 558 (1931) (" [I]t is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient"); see also R. Waples, Proceedings In Rem 13, 205-209 (1882). Historically, the conduct of the property owner was irrelevant; indeed, the owner of forfeited property could be entirely innocent of any crime. See, *e.g., Origet v. United States,* 125 U.S. 240, 246, 8 S.Ct. 846, 850, 31 L.Ed. 743 (1888) (" [T]he merchandise is to be forfeited irrespective of any criminal prosecution . . . The person punished for the offence may be an entirely different person from the owner of the merchandise, or any person interested in it. The forfeiture of the goods of the principal can form no part of the personal punishment of his agent"). As Justice Story explained:

> "The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing; and this, whether the offence be *malum prohibitum,* or *malum in se* . . . .[T]he practice has been, and so this Court understand the law to be, that the proceeding *in rem* stands independent of, and wholly unaffected by any criminal proceeding *in personam." The Palmyra,* 12 Wheat., at 14-15, 6 L.Ed. 531.

Traditional *in rem* forfeitures were thus not considered punishment against the individual for an offense. See *id.,* at 14; *Dobbins's Distillery v. United States, supra,* 96 U.S., at 401; *Van Oster v. Kansas,* 272 U.S. 465, 467-468, 47 S.Ct. 133, 134, 71 L.Ed. 354 (1926); *Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663, 683-684, 94 S.Ct. 2080, 2091-2092, 40 L.Ed.2d

452 (1974); *Taylor v. United States,* 3 How. 197, 210, 11 L.Ed. 559 (1845) (opinion of Story, J.) (laws providing for *in rem* forfeiture of goods imported in violation of customs laws, although in one sense "imposing a penalty or forfeiture[,] . . . truly deserve to be called, remedial"); see also *United States v. Ursery,* 518 U.S. 267, 293, 116 S.Ct. 2135 2150, 135 L.Ed.2d 549 (1996) (KENNEDY, J., concurring) (" [C]ivil *in rem* forfeiture is not punishment of the wrongdoer for his criminal offense"). Because they were viewed as nonpunitive, such forfeitures traditionally were considered to occupy a place outside the domain of the Excessive Fines Clause.

The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish. See *Austin v. United States,* 509 U.S., at 622-623, 113 S.Ct., at 2812 (noting Court of Appeals' statement that " "the government is exacting too high a penalty in relation to the offense committed' "); *Alexander v. United States,* 509 U.S. 544, 559, 113 S.Ct. 2766 2776, 125 L.Ed.2d 441 (1993) ("It is in the light of the extensive criminal activities which petitioner apparently conducted . . . that the question whether the forfeiture was "excessive' must be considered"). Based on the foregoing, a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense, under any analysis, the fine and revocation of the Commission’s Order violates these principles.

The text and history of the Excessive Fines Clause demonstrate the centrality of proportionality to the excessiveness inquiry; nonetheless, they provide little guidance as to how disproportional a punitive forfeiture must be to the gravity of an offense in order to be "excessive." Excessive means surpassing the usual, the proper, or a normal measure of proportion. See 1 N. Webster, American Dictionary of the English Language (1828) (defining

excessive as "beyond the common measure or proportion"); S. Johnson, A Dictionary of the English Language 680 (4th ed. 1773) (" [b]eyond the common proportion").

Based on the foregoing, assessing a $25,000 fine, or threatening the revocation of a liquor permit for the "presumptively" protected activity of exposing an areola in the context of an expressive dance performance, shocks the conscience, and must be viewed as, under no theory, even remotely being "in accordance with the law."

For these reasons, the decision of the Ohio Liquor Control Commission must be reversed.

CONCLUSION

There was no evidence, let alone evidence that establishes unequivocally and decisively, that the Appellant authorized or condoned the alleged offending behavior, and, in light of the extensive measures instituted by the Appellant to prevent such actions, the Commission's decision should be reversed. Additionally, there are numerous constitutional argument supporting reversal, as specified above. For all of the foregoing reasons, the decision of the Ohio Liquor Control Commission should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the Appellant's foregoing Brief of Appellant was served on Charles E. Febus, Esquire, Assistant Attorney General, 30 East Broad Street, 26th Floor, Columbus, Ohio, 43215-3428, by the court's electronic filing system, this 10th day of December, 2015.

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