

1 Anthony G. Arger, Esq. (SBN 304483)
ROBERTSON, JOHNSON,
2 MILLER & WILLIAMSON
50 W Liberty Street, Ste. 600
3 Reno, NV 89501
Telephone: (775) 329-5600
4 Facsimile: (775) 348-8300
Email: anthony@nvlawyers.com
5

Yeoryios C. Apallas, Esq. (SBN 53076)
6 APALLAS LAW GROUP
4054 Silverado Trail
7 Napa, CA 94558-1119
Telephone: (707) 320-3806
8 Email: yca@apallaslawgroup.com

9 *Attorneys for Protestants/Appellants, Lawrence Carr, et al.*

10
11 **BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD
OF THE STATE OF CALIFORNIA**

12
13 **IN THE MATTER OF THE PROTEST OF:**

14 LAWRENCE CARR, ET AL,
15 Protestants/Appellants

16 vs.

17 RELIC WINE CELLARS, LLC,
18 dba Relic Wine Cellars and
DEPARTMENT OF ALCOHOLIC
19 BEVERAGE CONTROL,

20 Applicant(s) and/or Respondent(s)
21

CASE NO: AB-9587

File: 02-548261
Reg: 15082334

APPELLANTS' REPLY BRIEF

Hearing Date: December 7, 2017

22 Protestants/Appellants LAWRENCE CARR, *et al.* (hereinafter "Appellants"), by and
23 through its counsel of record, Robertson, Johnson, Miller & Williamson, and Apallas Law
24 Group, hereby file their Reply Brief on Appeal ("Reply"), pursuant to Business and Professions
25 Code section 23080-23089, in response to the opposition brief ("Dept. Brief") submitted by the
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27
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1 Department of Alcoholic Beverage Control (“Department”), as well as the opposition brief
2 (“Relic Brief”) submitted by Relic Wine Cellars (“Relic,” and collectively, “Respondents”).¹

3 This Reply is based on Appellants’ Memorandum of Points and Authorities below,
4 Appellants’ Opening Brief on Appeal (“Opening Brief”), the declarations of Anthony G. Arger
5 (“Arger Dec.”), David J. Hallett, and Lauren Griffiths in support of the Opening Brief, including
6 supporting exhibits; all pleadings and papers on file in the above-titled action; and any additional
7 evidence, arguments, or authorities that the Alcoholic Beverage Control Appeals Board of the
8 State of California (“Appeals Board”) may choose to hear.

9 **MEMORANDUM OF POINTS AND AUTHORITIES**

10 **I. INTRODUCTION**

11 Appellants’ Opening Brief goes into great detail as to how and why evidentiary decisions
12 reached during the hearing by Administrative Law Judge Sakamoto (“ALJ Sakamoto”), and the
13 ultimate decision reached by the Department (“Decision”) were plainly erroneous in light of the
14 legal authority governing decisions by the Department. In response, the Department and Relic
15 dismissively address the valid arguments raised by Appellants with a tone of arrogance that is
16 shocking. Both Respondents advocate as if the Department did not make a mistake, could never
17 make a mistake, and thus any and all decisions issued by the Department can and never should
18 be questioned or overturned. It may come as news to the Department, but there is an Appeals
19 Board *for a reason*. Section 22 of article XX of the California Constitution contains an explicit
20 provision for the Appeals Board *for a reason*. California courts have explicitly stated that the
21 Department’s discretion “under section 22 of article XX of [the California] Constitution is *not*
22 *absolute but must be exercised in accordance with the law*” *for a reason*. *Nick v. Dept. of*
23 *Alcoholic Beverage Control* (2014) 233 Cal. App. 4th 194, 204 (emphasis added) (internal
24 citations omitted). And that reason is that the Department *can and does make mistakes and*
25 *reaches the wrong decision from time to time*. This case is one of those instances when *the*
26 *Department simply got it wrong*, and the Appeals Board *must* exercise the discretion granted to

27
28 ¹ The original date on which Appellants were to file their Reply was September 28, 2017. However, after Appellants’ counsel was not initially served with Relic’s Brief, the parties stipulated to, and the Appeals Board affirmed, a short extension of time to October 2, 2017 for Appellants to file their Reply Brief.

1 it under the California Constitution to reverse and remand the clearly erroneous Decision reached
2 by the Department granting Relic's applied-for license without any restrictions or conditions.

3 This conclusion rings especially true when the Appeals Board considers the wholly
4 inadequate investigation conducted by the Department wherein consideration of the public
5 welfare is narrowly construed and limited to Relic's specific location to exclusion of the rest of
6 the members of the public on Soda Canyon Road, along with the fact that according to the
7 Department's 2012-2013 annual report, out of 10,988 applications for alcohol licenses received,
8 only *six were denied – less than one tenth of one percent*. Put another way, the Department
9 *approved 99.99 percent of the applications it received* during that fiscal year, and took in
10 \$52,586,735 in revenue from those applications, making it obvious that the Department is highly
11 dependent on the revenues generated therefrom. In light of these facts, it is little wonder that the
12 Department effectively ignored all of the public safety incidents and concerns not taking place at
13 Relic's exact location and rubber-stamped the applied-for license; the fox appears to be fully in
14 charge of the chicken coop.

15 As to the specific arguments addressed in this Reply, contrary to the positions of
16 Respondents, (1) the Department's Decision is *not* supported by *substantial evidence* in light of
17 the whole record; (2) the Department's complete reliance upon the *subjective opinions* of local
18 authorities, as opposed to the *objective data* provided by Appellants, demonstrates the
19 Department ignored its obligation to assure the public welfare and morals are protected and
20 preserved; and (3) the Department improperly excluded evidence, as well as the evidence that
21 could not have been produced, is highly relevant and not cumulative, warranting a remand.

22 In accordance with the arguments contained below, as well as for all of the reasons
23 outlined in the Opening Brief, the Department has proceeded without, or in excess of its
24 jurisdiction, and Appellants respectfully request the Decision be reversed and remanded with
25 clear instructions to carefully consider all of the substantial evidence in the record, along with
26 Appellants' newly discovered evidence ("Newly Discovered Evidence") and thereafter either
27 deny the Type 02 license outright, or impose strict conditions that there be (1) *no* sales of
28 alcoholic beverages on-site, and (2) *no* on-site tasting privileges for members of the public.

1 **II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

2 To avoid unnecessary duplication and recitation of the facts, Appellants refer the Appeals
3 Board to their factual background and procedural history sections outlined in the Opening Brief.

4 **III. LEGAL ARGUMENT**

5 **A. Standard of Review**

6 Pursuant to section 22 of article XX of the California Constitution, and Business and
7 Professions Code section 23084, the Appeals Board “shall review the decision” being appealed
8 by considering whether (a) “the [D]epartment has proceeded without, or in excess of, its
9 jurisdiction;” (b) the Department has “proceeded in the manner required by law;” (c) the decision
10 is “supported by the findings;” (d) the findings are “supported by substantial evidence in light of
11 the whole record;” and (e) “there is relevant evidence, which, in the exercise of reasonable
12 diligence, could not have been produced or which was improperly excluded at the hearing before
13 the [D]epartment.” If the Appeals Board finds relevant evidence that could not have been
14 produced, or was improperly excluded at the hearing before the Department, it may remand the
15 Decision for further consideration in light of such evidence. Cal. Bus. & Prof. Code § 23085. In
16 all other cases, the Appeals Board “shall enter an order either affirming or reversing the decision
17 of the department,” and “may direct the reconsideration of the matter in light of its order” as
18 appropriate under the law. *Id.* Critically,

19 the discretion exercised by the Department under section 22 of article XX of [the
20 California] Constitution is ***not absolute but must be exercised in accordance with***
21 ***the law***, and the provision that it may revoke or deny a license for good cause
22 necessarily implies that its decisions ***should be based on sufficient evidence and***
that it should not act arbitrarily in determining what is contrary to public
welfare or morals.

23 *Nick*, 233 Cal. App. 4th at 204 (emphasis added) (internal citations omitted). In California,
24 ***“traffic, parking, safety, noise and nuisance problems . . . clearly represent concerns that are***
25 ***well within the domain of the public interest and public welfare.”*** *Breakzone Billiards v. City*
26 *of Torrance* (2000) 81 Cal. App. 4th 1205, 1246 (emphasis added). In addition, public welfare is
27 defined as “[t]he ***prosperity, well-being, or convenience of the public at large, or of a whole***
28 ***community, as distinguished from the advantage of an individual or limited class.*** It embraces

1 the primary social interests of *safety, order, morals, economic interest. . .*” *Black’s Law*
2 *Dictionary* 271, (7th ed. 2000) (emphasis added).

3 Here, there is simply no question that the Department acted arbitrarily because its
4 Decision entirely ignores its unequivocal obligation to preserve the public welfare and morals.
5 The Decision was not based on substantial, let alone sufficient, evidence, and in fact was
6 rendered in the face of overwhelming evidence to the contrary, and thus the discretion granted to
7 it under the California Constitution was not exercised in accordance with the law. Thus, the
8 Appeals Board must enter an order reversing the Department’s decision, with remand
9 instructions to consider *all of the substantial, relevant evidence* submitted both during the
10 hearing, and that which was newly discovered and properly presented thereafter.

11 **B. The Department’s Decision is Not Supported by the Findings or Substantial**
12 **Evidence In Light of the Whole Record**

13 The thrust of the arguments set forth by both the Department and Relic on this topic is
14 that Appellants improperly seek to have the underlying case re-litigated by re-analyzing the
15 evidence. Dept. Brief at 3:25-4:13; Relic Brief at 5:17-26. However, this is not the case at all.
16 Instead, Appellants request that the Appeals Board exercise its constitutional authority to ensure
17 that the Department’s decision is “*supported by the findings*,” and further, that the findings are
18 “*supported by substantial evidence in light of the whole record*,” which Appellants
19 unequivocally contend they are *not*. Cal. Const., Art. XX § 22 (Emphasis added). In California,
20 “where a ‘statewide agency is delegated quasi-judicial power by the Constitution, the reviewing
21 court is limited to determining whether there was substantial evidence supporting the agency’s
22 decision.’” *Apte v. Regents of Univ. of Cal.* (1988) 198 Cal. App. 3d 1084, 1091 (quoting
23 *Ishimatsu v. Regents of University of California* (1968) 266 Cal.App.2d 854, 862, fn. omitted).
24 In turn, “[s]ubstantial evidence has been defined as relevant evidence that a reasonable mind
25 might accept as adequate to support a conclusion. . . .” *Apte*, 198 Cal. App. 3d at 1091 (quoting
26 *Hosford v. State Personnel Bd.* (1977) 74 Cal.App.3d 302, 307).

27 As thoroughly explained in Appellants’ Opening Brief, the Decision is *not* supported by
28 the findings primarily because the findings misinterpret and/or completely omit reference or

1 discussion to virtually *all of the substantial evidence put forth by Appellants* during the course
2 of the underlying proceedings as to why granting the applied-for license would be contrary to the
3 public welfare and morals. *See* Opening Brief at 39:12-71:9. As a result, and in combination
4 with the Department's wholly inadequate investigation and unquestioning reliance upon local
5 authority *without* actually delving into the scores of public safety incidents on Soda Canyon
6 Road, discussed in the next section of this Reply, there is simply no question that *the Decision is*
7 *not supported by substantial evidence in light of the whole record*. *See* section II.C., below; *see*
8 *also* Opening Brief at 71:12-73:6. Instead, the Department and its Decision ignore the vast
9 majority of the record (the bulk of which is composed of Appellants' substantial evidence) by
10 placing the consideration of Relic's license and location in a vacuum to the exclusion of the rest
11 of Soda Canyon Road. Given that Relic is located approximately 4.1 miles up a *dead-end road*
12 that experiences *hundreds of emergency incidents annually*, including *41 drunk driving*
13 *incidents* between 2014-2016, such a limited and blindfolded review of the license is wholly
14 inappropriate.² *See* Opening Brief at 5:13-24, 9:16-14:28. In short, had all of Appellants'
15 substantial evidence actually been reviewed and considered, there is no question that a
16 reasonable mind could not come to the Decision reached by the Department.

17 **C. The Department's Complete Reliance Upon Mere Statements from Local**
18 **Authorities Ignores its Obligation to Assure the Public Welfare is Protected**

19 Both the Department and Relic argue that the Department properly deferred to and relied
20 upon local authorities in reaching a conclusion that the applied-for license would not be contrary
21 to the public welfare and morals. Dept. Brief at 7:12-8:28; Relic Brief at 7:15-20. While the
22 Department is entitled to look to local authorities, it certainly cannot place undue reliance on
23 subjective opinions when there is substantial evidence to the contrary, which is exactly what the
24 Department did in the instant case.

25
26 ² Relic contends that the issues of quiet enjoyment, traffic congestion, public safety, and zoning were "properly
27 decided." Relic Brief at 6:1-8:27. This is untrue. As thoroughly outlined in the Opening Brief, the Decision on
28 these points is not supported by the findings, and the findings are *not* supported by substantial evidence in light of
the whole record. *See* Opening Brief at 40:24-41:27, 52:11-54:13, 70:26-71:7 (discussing Relic's adverse impacts
on the quiet enjoyment of nearby neighbors, including Mrs. Hallett), 39:12-71:9 (vast majority of the brief
addressing traffic congestion, road conditions, and public safety concerns that makes clear that these issues were *not*
properly decided by the Department). As a result, Relic's arguments on these points must be summarily dismissed.

1 In *Kirby v. Alcoholic Beverage Appeals Board (Schaeffer)*, the court explained that “the
2 Department’s role in evaluating an application for license to sell alcoholic beverages is *to assure*
3 *that the public welfare and morals are preserved ‘from probable impairment in the future.’*”
4 (1972) 7 Cal.3d 433, 441 (quoting *Harris v. Alcoholic Beverage Control Appeals Board* (1963)
5 212 Cal.App.2d 106, 119) (emphasis added). In “appraising the likelihood of future harm to the
6 public welfare, the Department *must be guided to large extent by past experience and the*
7 *opinion of experts.*” *Id.* (emphasis added). As part of this appraisal, the Department *shall*
8 *make a thorough investigation* to determine whether the applicant and the premises for
9 which a license is applied for qualify for a license and whether the provisions of [the Act]
10 have been complied with, and [also to] . . . *investigate all matters connected therewith*
11 *which may affect the public welfare and morals.*

12 *Nick*, 233 Cal. App. 4th at 203 (citing Cal. Bus. & Prof. Code § 23958) (emphasis added).

13 Here, the Department has done everything *but* assure that the public welfare and morals
14 are preserved for two interrelated reasons. First, the Department completely ignored *all* of the
15 *past experience* of a) Soda Canyon residents and property owners, who with some 237 years of
16 combined experience on Soda Canyon Road, *see Feb. 11 Transcript* at 145-46, are
17 unquestionably experts when it comes to the dangers of the road; and b) the local public safety
18 agencies as a result of their irrefutable records demonstrating that Soda Canyon Road, under
19 present conditions, is incredibly dangerous,³ meaning that the likelihood of future harm to the
20 public welfare is high if Relic is permitted to add 4,458 potentially inebriated drivers to the road

21 ³ See Arger Dec., **Exhibits 1-7** (showing a total of **639 reported incidents and accidents** on Soda Canyon Road
22 during the three-year period from 2014 to 2016, which is **an average of 213 reported incidents and accidents per**
23 **year, 18 reported incidents per month, and 4 reported incidents per week** on Soda Canyon Road over the three-
24 year period, with the **vast majority of the incidents (454 of 639) taking place during the daytime hours**, precisely
25 when the Applicant seeks to add thousands of annual drivers to the road in the form of wine-imbibing tourists.
26 Moreover, there were **41 drunk driving incidents** during this time period and **75 traffic collisions, traffic stops, and**
27 **reckless drivers**); **P-Exhibit VI G1-G4** (CHP and CalFire Summary and Detailed Reports for Soda Canyon Road
28 from January 2013 to April 2015); **P-Exhibit VI H1-5** (CalFire Incident Report Summaries and Detailed Reports);
P-Exhibit VI H6 (2007-2008 Grand Jury Report describing the Soda Canyon area as having “the second highest
rate of incidents in Napa County,” with 594); **P-Exhibit H8** (Soda Canyon/Monticello Pre-Attack Fire Plan); **P-**
Exhibit VI F (video of an 18-wheel semi-truck carrying oversized rock-crushing equipment the length of Soda
Canyon Road); **P-Exhibit II** (letter from the Chief of the volunteer Soda Canyon Fire Department and 29 resident of
Soda Canyon Road, Doug Christian, wherein he detailed his specific public safety concerns of granting the applied-
for license, including that by “[p]ermitting wine tours/tastings at the Relic site would add additional drivers to an
already hazardous roadway”); *see also* Opening Brief at 41:27-43:6, 46:18-48:24, 57:7-62:6, 63:5-22, 64:18-69:16.

1 on an annual basis.⁴ Again, this project, which is located on a dilapidated, dead-end road, cannot
2 be evaluated in a vacuum as has been done by the Department.⁵ Instead, the incidents and
3 accidents, including fire-related incidents, which regularly occur along the length of the road
4 *must* be considered because in the event of an emergency there is only *one way out*. *Feb. 9*
5 *Transcript* at 79:15-24. As much as the Department and Relic would like to make it seem
6 otherwise, visitors and patrons of the project cannot teleport to the location 4.1 miles up Soda
7 Canyon road; they must drive there, and as such, the dangerous conditions and incidents along
8 the *entire length of the road must* be taken into account.

9 Second, and intertwined with the first reason, the Decision and the Department's
10 licensing representative for Relic, Judy Barrett ("Licensing Representative"), relied *entirely* on
11 the *opinion* of local authorities to the exclusion of *past experiences*, which under the
12 circumstances of this case, amounted to an entirely *inadequate* investigation. As thoroughly
13 explained in the Opening Brief, while the Licensing Representative did contact local public
14 safety authorities, her investigation report ("Report") and testimony reveal that such contact was
15 nothing more than phone calls limited to brief discussions of just the Applicant's location,
16 without any substantive discussions regarding the hundreds of accidents and incidents that occur
17 annually along Soda Canyon Road, despite her knowledge thereof as learned throughout the
18 course of the hearings. *See* Opening Brief at 54:14-62:6, 68:4-69:16; *see also Feb. 11 Transcript*
19 *at* 161-167. Perhaps most telling as to the *inadequacy of her investigation* is the fact that even

21 ⁴ Relic contends that the "negative impact that vineyard workers have on traffic congestion . . . is irrelevant to the
22 issuance of Relic's winery license." Relic Brief at 6:20-25. Such a contention clearly highlights the blinders worn
23 by both the Department and Relic when it comes to considerations of public safety. As has thoroughly been
24 explained in the Opening Brief, Soda Canyon Road, under existing conditions, is dangerous, be it from drunk
driving incidents, other accidents caused by reckless drivers, fires, or other emergency incidents, and the addition of
some 4,458 potentially inebriated winery tourists only exacerbates such dangers *along the entire length of the road*
because of its narrow, serpentine, steep, and dead-end nature.

25 ⁵ *See July 15 Transcript* at pp. 20, 22-23, 28; *Feb. 9 Transcript* at pp. 18, 21-22, 33-34, 53, 65-66, 74, 108, 113, 115,
26 128-29, 133, 138, 140-41, 143-44, 151, 160, 162-63, 166-68, 171, 180, 182, 189-90, 192-93; *Feb. 10 Transcript* at
27 pp. 33-34, 37, 41-42, 45, 49, 60, 66, 109, 116, 125-26, 129-30, 134, 141, 143, 200-01, 203, 268; *Feb. 11 Transcript*
28 *at* pp. 19, 22, 32-33, 73 (numerous examples of the Applicant arguing for the exclusion of evidence relating to
alcohol consumption, fires, traffic, and accidents occurring on Soda Canyon Road on relevance grounds because it
was outside of the Department's jurisdiction and/or did not take place directly at the Applicant's premises, after
which the Department concurred with the Applicant's objections); *see also Decision* at 8, ¶ 6; *Feb. 10 Transcript* at
pp. 229-31, 244, 246-47 (demonstrating that fire related concerns were only considered *at Relic's premises* to the
exclusion of the rest of the Soda Canyon Road community); *see also* Opening Brief at 47:17-48:24.

1 after hearing all of the substantial evidence produced by Appellants during the hearing, she
2 adamantly pronounced on the final day of the hearing that “[y]ou don’t amend a report after a
3 protest is made,” Feb.10, Transcript at p. 263, and further that there is *nothing* that “*would have*
4 *caused [her] to reexamine [her] position as outlined in [her] investigation report,*” *id.* at 270,
5 even though her final report was issued on March 11, 2015, nearly a year before the hearings
6 were completed. *See* State’s Exhibit 2; Opening Brief at 56:15-57:5. With such a fixed mindset,
7 it is no wonder how the Department arrived at its Decision to grant the applied-for license. But,
8 such Decision was most certainly *not* in accordance with the requirement that the issuance of a
9 license *not* be contrary to the public welfare or morals. *See* Cal. Const., Art. XX § 22.

10 In short, despite its unquestionable obligation to evaluate future impacts on the public
11 welfare and morals by both conducting and considering a thorough investigation, the Department
12 placed undue reliance on the *opinion* of the local government and authorities to the complete
13 exclusion of the *past experiences* of both the residents and property owners on Soda Canyon
14 Road, *and* the incident reports from those same local authorities that contain irrefutable and
15 overwhelming evidence of literally hundreds of incidents and accidents reported on Soda Canyon
16 Road. As a result, the contentions put forth by the Department and Relic that the Department
17 properly deferred to and relied entirely upon the opinions of local authorities must be readily
18 dismissed. *See* Dept. Brief at 7:12-8:28; Relic Brief at 7:15-20.

19 **D. The Improperly Excluded Evidence, and Evidence that Could Not Have Been**
20 **Produced, is Highly Relevant and Warrants Remand**

21 **1. The ALJ Improperly Excluded Highly Relevant Evidence**

22 The Department and Relic both contend that the decision by ALJ Sakamoto to exclude
23 the 1999 Department decision granting a limited Type 02 license to Soda Canyon Real Estate
24 Investments, Inc., Astrale e Terra, (the matter is referred to as “Astrale e Terra,” and the decision
25 therein as “Astrale e Terra Decision”) was proper for two reasons. Dept. Brief at 4:15-5:2; Relic
26 Brief at 9:14-25. First, the Astrale e Terra Decision may not be relied upon as legal precedent.
27 Dept. Brief at 4:18-23. Second, the Astrale e Terra Decision is not relevant because it is “stale,”
28 and the applicant in that case was not seeking to have on-premises sales or tastings. Dept. Brief
at 4:24-5:2; Relic Brief at 9:14-25. Both contentions are entirely unpersuasive.

1 First, a thorough review of the Astrale e Terra Decision makes no reference or mention
2 that the Department either would or would not designate the decision as precedential. There is
3 simply no indication either way. *See P-Exhibit VI I.* As such, the Appeals Board cannot and
4 should not assume that it has **not** been designated as precedent. Moreover, even it has not been
5 designated as precedent, the Astrale e Terra Decision, ***in the very least***, is ***highly persuasive as***
6 ***to issues relating to the public welfare and morals on Soda Canyon Road*** because both that
7 decision and the instant Decision involve wineries ***on the exact same dead-end road***, which has
8 ***not undergone any improvements*** since the 1980s, and has seen a 103% increase in the number
9 of vineyard workers and wine tasters using Soda Canyon Road since 1999 when the Department
10 determined it was a “problematic roadway.” *Id.*; Decision at 4, ¶ 7; *Feb. 9 Transcript* at 15-16;
11 *see also* Opening Brief at 20:4-25:23. For the Department to turn a blind eye to the Astrale e
12 Terra Decision can be interpreted as nothing more than a blatant attempt to ignore crucial,
13 substantial evidence that unequivocally demonstrates that the granting of the instant license
14 would be contrary to the public welfare and morals.⁶ Unfortunately for the legitimately
15 concerned Appellants, this fits directly in line with the of approve-all-applications-no-matter-
16 what position taken by the Licensing Representative, the position of the Department’s counsel to
17 act as more of an “extension of [Relic’s] advocate” as opposed to a “neutral and unbiased party,”
18 *Feb. 11 Transcript* at 166, and certainly indicates that the entire Department is ignoring its
19 constitutional obligation to protect the public welfare and morals. *See* Cal. Const., Art. XX § 22;
20 Cal. Bus. & Prof. Code § 23958. In fact, as pointed out by Appellants, the Department’s annual
21 report for 2012-13 reveals that of the 10,988 applications received during that fiscal year, ***only***
22 ***six were denied***, meaning that “less than one-tenth of one percent of all alcohol applications in
23 the[e] entire state” of California were denied. *Id.* at 167. Put another way, during the 2012-13

24
25 ⁶ The same can be said in response to the Department’s argument that Appellants’ “other evidence” was properly
26 excluded. Dept. Brief at 5:3-19. As outlined in the Opening Brief at 25:25-27:13, this evidence included
27 photographs showing the dilapidated condition of Soda Canyon Road, photographs of an accident that occurred on
28 Soda Canyon Road, a video of a caravan of cars speeding past Relic’s entrance (*see Feb. 11 Transcript* at 31-35),
photographs of large, semi-trucks driving and taking over entire portions of Soda Canyon Road, among others. All
of this evidence tends to show and support that there are serious traffic and public safety problems that exist on Soda
Canyon Road, which should have been considered as part of the Department’s Decision in analyzing Relic’s impacts
on the public safety and welfare, but was not. As such, the failure to consider this evidence warrants a remand
pursuant to Cal. Bus. & Prof. Code sections 23084 and 23085 for proper consideration thereof.

1 reported period, *the Department approved 99.99 percent of the applications for alcoholic*
2 *beverage licenses it received*. Importantly, the Department’s “total revenue derived from those
3 applications” was \$52,586,735. *Id.* These facts raise obvious questions of bias for the
4 Department because they tend to demonstrate that the Department is approving so many
5 applications precisely because of the money it receives from those applications. *Id.*

6 In light of the entire Department’s conduct – from its Licensing Representative’s far-from
7 thorough investigation and complete refusal to amend her report after it was made; to its trial
8 attorney siding with Relic on virtually every single objection and issue; to Administrative Law
9 Judge Sakamoto (who, by the way, used to be an attorney for the Department) denying relevant
10 evidence into the record and ignoring virtually all of the evidence in his Decision; and now to the
11 Department’s attorney on appeal advocating that all of these actions were proper – it seems quite
12 obvious that the Department has become so blinded by, and dependent upon, the money it raises
13 from applications, that it is loath to deny any application, including the application at issue, no
14 matter how contrary approval of said application would be to the public welfare and morals. It is
15 sincerely hoped that the Appeals Board can see through this inherent bias, particularly in the
16 instant matter when approval is so obviously against the public welfare and morals, and rectify
17 this inappropriate behavior that undermines the legal obligations of the Department, whose stated
18 mission is to “administer the provisions of the Alcoholic Beverage Control Act in the manner
19 that fosters and protects the health, safety, welfare, and economic well-being of the state.” *Feb.*
20 *11 Transcript* at 165.

21 Second, and as thoroughly explained in the Opening Brief, the *Astrale e Terra* Decision is
22 more relevant and applicable today than it was in 1999 because road conditions have become
23 *significantly worse* and the road has seen a *103% increase* in the number of vineyard workers
24 and winery visitors alone (i.e. excluding all of the other types of traffic, such as residents, that
25 has also increased). *See* Opening Brief at 18:6- 25:23. It simply defies logic and any degree of
26 common sense for Relic and particularly the Department to argue that the *Astrale e Terra*
27 Decision is stale. Moreover, Relic’s argument that the *Astrale e Terra* applicant “never even
28 sought on-premises sales or tastings” completely misses the mark. Relic Brief at 9:23. As the

1 Astrale e Terra Decision clearly explains, the protestants were concerned with increases of traffic
2 regardless of the applicant’s “primary purpose” and whether there was to be on-site tours and
3 tastings. **P-Exhibit VI I** at 2-6. In fact, the administrative judge determined that “[e]vidence
4 established that *increased traffic on Soda Canyon Road would interfere with the quiet*
5 *enjoyment of nearby residences*,” and that “[e]vidence established that increased *traffic on Soda*
6 *Canyon Road would aggravate a traffic problem on a problematic roadway* which serves
7 [a]pplicant, nearby residents and two other vineyards.” *Id.* at 6. And, as a result of these specific
8 determinations, “issuance of the applied-for license *would be contrary to public welfare or*
9 *morals*.” *Id.* In other words, the applicant’s primary purpose did not matter in the determination
10 of whether increased traffic would aggravate a traffic problem on a problematic roadway. What
11 did matter, however, was that by placing conditions that there be *no on-site winetasting or retail*
12 *sales*, the concerns of the protestants would be resolved. *Id.* *The situation is no different here*,
13 as Relic’s primary purpose is to produce and sell wine, which it can certainly still do if the same
14 conditions are implemented that allow for production and off-site sales, but *no* on-site tasting or
15 retail sales. Thus, for Relic to claim this case is *not* on point is simply absurd.

16 Accordingly, there can be no question that the Astrale e Terra Decision, as well as the
17 other excluded evidence, is *highly relevant and was improperly excluded* at the hearing before
18 the Department, warranting a remand for consideration in light of this evidence. *See* Cal. Bus. &
19 Prof. Code § 23085

20 **2. The Newly Discovered Evidence is Highly Relevant, Not Cumulative, and** 21 **Properly Presented, Requiring a Remand to the Department**

22 The Department makes three arguments as to why Appellants’ Newly Discovered
23 Evidence should not be permitted into the proceedings. First, it argues the evidence is not
24 “newly discovered,” which requires Appellants to make a strong showing why the evidence
25 should serve to remand the case, which Appellants have not done. Dept. Brief at 6:1-14, 6:21-
26 7:5. Second, it argues the evidence is cumulative.⁷ *Id.* at 6:15-20. Third, it argues Appellants

27
28 ⁷ Relic makes only the single argument that the evidence is cumulative and should thus be excluded. Relic Brief at 9:2-13. Because the Department makes a similar argument, the arguments are jointly addressed as one.

1 did not comply with the procedural requirements outlined in 4 Cal. Code Reg. 198 (“Rule 198”).
2 *Id.* at 7:6-10. All of these arguments, which are addressed in turn below, are entirely without
3 merit and must be summarily disregarded by the Appeals Board. Moreover, as described in the
4 Opening Brief and mentioned again below, Appellants’ newly discovered evidence underlines
5 the fact that the Department’s Decision is **not** supported by substantial evidence.

6 To begin, Rule 198 does not require that newly discovered evidence be in existence at the
7 time of trial as the Department seems to suggest. *See* 4 Cal. Code Reg. 198. As such, the fact
8 that many incidents and accidents that comprise the updated CHP and CalFire summary reports
9 had not yet occurred, does not mean they cannot be considered “newly discovered.” *See Id.*
10 Moreover, there is **no question** that Appellants make a **very strong case** that this evidence, in
11 combination with the 498 reported incidents by Sheriff’s Department, require a remand for
12 consideration by the Department. *See Nebelung v. Norman* (1939) 14 Cal.2d 647, 655.
13 Appellants spend eleven pages in the Opening Brief explaining how and why the newly
14 discovered evidence is highly relevant, including discussions that the evidence directly
15 contradicts (1) the testimony of the Licensing Representative that there had *not* been any reports
16 of drunk drivers “in or around” the applicant’s location, *July 15 Transcript* at pp.54-55, (2) her
17 inadequate report, and perhaps most importantly, (3) the oral statements provided by public
18 safety personnel to the Department that they did not have any concerns with the issuance of the
19 applied-for license **at Relic’s location**. *See* Opening Brief at 10:17-14:21, 29:11-36:16. Again,
20 the Department and the public safety personnel (as a result of the narrow questions posed by the
21 Department) focused solely on the Applicant’s location to the exclusion of the other six plus
22 miles of the dead-end Soda Canyon Road. *See Id*; *see also* Opening Brief at 47:17-48:24. The
23 updated records from the CHP and CalFire and the new records from the Sheriff’s Department
24 provide objective evidence that the entirety of Soda Canyon Road is extremely dangerous under
25 existing conditions, suffers from numerous alcohol-related incidents annually, and is thus not an
26 appropriate area to allow another 4,458 potentially inebriated drivers. Moreover, it must be
27 reiterated that the Department, under the California Constitution, is charged with protecting the
28 public welfare and morals. *See* Cal. Const., Art. XX § 22. This Newly Discovered Evidence –

1 showing 639 incidents and accidents on Soda Canyon Road in just three years – *goes to the very*
2 *essence of the public welfare and morals* and clearly demonstrates that the issuance of the
3 applied-for license would be contrary to the public welfare and morals because it unequivocally
4 shows that Soda Canyon Road experiences an incredible number of public safety incidents and
5 accidents on an annual basis, and is no place to introduce another 4,458 wine-imbibing tourists,
6 which amount to approximately 9,000 car trips because the tourists must travel the 4.1 miles up,
7 and then 4.1 miles back down the road. *See Feb. 10 Transcript* at 100. One would think that *the*
8 *Department would welcome such objective evidence to ensure that the Department reaches the*
9 *correct decision as to whether the applied-for license would be contrary to the public welfare*
10 *or morals*. Apparently, however, protecting the public welfare and morals is not at the top of the
11 Department’s priority list.

12 Second, this evidence is *not* cumulative. While it does directly relate to public safety
13 concerns raised and testified to by Appellants, the evidence is composed entirely of objective
14 data, most of which is *not yet in the record*, and thus could not possibly be considered
15 cumulative. Moreover, the hundreds of pages of incident reports from the various agencies have
16 been summarized into a matter of pages for quick and easy consumption and consideration by
17 the Department. *See Arger Dec., Exhibits 2, 4, 6, & 7*. Again, it is truly concerning that the
18 Department is so determined to keep this evidence composed entirely of objective data from
19 local public safety agencies out of the record when the Department’s primary function is to
20 protect the public welfare and morals.

21 Third, the Department’s argument regarding Appellants’ failure to follow the procedure
22 of Rule 198 is nothing more than a blind assertion without any support or reasoning. *See Dept.*
23 *Brief* at 7:6-10. In fact, Appellants have followed the procedural requirements of Rule 198
24 precisely. *See Opening Brief* at 27:14-39:10; *see also Arger Dec.*

25 As explained above and in the Opening Brief, the Department’s arguments (and Relic’s
26 lone argument) as to Appellants’ Newly Discovered Evidence must be disregarded because
27 Appellants (1) made a very strong showing as to why this evidence is highly relevant and should
28 be admitted, (2) explained why the evidence is not cumulative, and (3) followed the procedural

1 requirements of Rule 198 precisely. Accordingly, the Appeals Board should grant Appellants'
2 request and Motion to Supplement the Record with this Newly Discovered Evidence ("Motion")
3 for consideration by the Department on remand. *See* Motion, attached to Opening Brief

4 **IV. CONCLUSION**

5 In sum, contrary to Respondents' contentions, (1) the Department's Decision is *not*
6 supported by the findings or substantial evidence in light of the whole record; (2) the
7 Department's complete reliance upon the *subjective opinions* of local authorities, as opposed to
8 the past experiences and *objective data* provided by Appellants, demonstrates the Department
9 ignored its obligation to assure the public welfare and morals are protected; and (3) the
10 Department improperly excluded evidence, as well as the evidence that could not have been
11 produced, is highly relevant and not cumulative, warranting a remand.

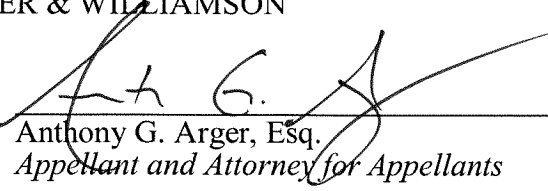
12 When these arguments are combined with the extensive arguments in the Opening Brief,
13 it is clear that the Department's Decision must be reversed and remanded as a matter of law
14 because (1) there is highly relevant evidence that was improperly excluded at the hearing before
15 the Department, (2) there is highly relevant evidence that could not have been produced before
16 the hearing even despite reasonable diligence, (3) the Decision is *not* supported by the findings,
17 and in the alternative, even with the erroneous exclusions of highly relevant evidence and gaping
18 omissions and misinterpretations of critical evidence, the lackluster findings still do *not* support
19 the Decision's determination to grant the applied-for license; and (4) the Department's findings
20 are *not* supported by substantial evidence in light of the whole record.

21 Accordingly, Appellants respectfully request that the Decision be reversed and remanded
22 with clear instructions to the Department that is must carefully consider all of the substantial
23 evidence in the record, along with Appellants Newly Discovered Evidence, and thereafter either
24 deny the Type 02 license outright, or impose strict conditions that there be (1) *no* sales of
25 alcoholic beverages on-site, and (2) *no* on-site tasting privileges for members of the public.

1 Dated this 2nd day of October, 2017.

2
3 ROBERTSON, JOHNSON,
MILLER & WILLIAMSON

4
5 By:


Anthony G. Arger, Esq.

Appellant and Attorney for Appellants

PROOF OF SERVICE

I declare that I am over the age of eighteen years and not a party to this action. I am employed in the City of Reno, Washoe County, and my business address is 50 W. Liberty Street, Suite 600, Reno, NV 89501. On October 2, 2017, I caused to be served the attached document: **APPELLANTS' REPLY BRIEF** on the following parties and/or their attorney(s) of record:

Alcoholic Beverage Control Appeals Board	David R. Heitzman
300 Capitol Mall	23 Rockrose Court
Suite 1245	Napa, CA 94558
Sacramento, CA 95814	<i>Via Electronic Mail</i>
<i>Via Certified U.S. Mail</i>	
Jacob Rambo, Chief Counsel	Lisa Hirayama
Heather Hoganson, Esq.	16 Dogwood Court
Dept. Of Alcoholic Beverage Control	Napa, CA 94558
3927 Lennane Drive, Suite 100	<i>Via Electronic Mail</i>
Sacramento, CA 95834-2917	
<i>Via U.S. Mail</i>	William Hocker
	2460 Soda Canyon Road
	Napa, CA 94558
	<i>Via Electronic Mail</i>
Relic Wine Cellars, LLC	
P.O. Box 327	
St. Helena, CA 94574-0327	Meah Muzquiz
<i>Via U.S. Mail</i>	3354 Soda Canyon road
	Napa, CA 94558
	<i>Via Electronic Mail</i>
Strike & Techel	
Alcoholic Beverage Law	
556 Commercial Street	Anne Palotas
San Francisco, CA 94111	3354 Soda Canyon Road
<i>Via U.S. Mail</i>	Napa, CA 94558
	<i>Via Electronic Mail</i>
Yeoryios C. Apallas, Esq.	
4054 Silverado Trail	Alan Shepp
Napa, CA 94558	3580 Soda Canyon Road
<i>Via Electronic Mail</i>	Napa, CA 94558
	<i>Via Electronic Mail</i>
Lawrence Carr	
16 Dogwood Court	Diane Shepp
Napa, CA 94558	3580 Soda Canyon Road
<i>Via Electronic Mail</i>	Napa, CA 94558
	<i>Via Electronic Mail</i>
Lynne M. Hallett	
2444 Soda Canyon Road	Jim Wilson
Napa, CA 94558	5000 Monticello Road
<i>Via Electronic Mail</i>	Napa, CA 94558
	<i>Via Electronic Mail</i>

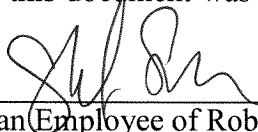
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Nevada, 89501, a copy of the attached document in a sealed envelope, with postage fully
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served, service is presumed invalid if the postal cancellation date or postage meter date is
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transmitting computer.

18 I declare under penalty of perjury under the laws of the State of California that the
19 foregoing is true and correct and that this document was executed on October 2, 2017, at Reno,
Nevada.

20 
an Employee of Robertson, Johnson, Miller & Williamson