Office of the Attorney General
Washington, D. C. 20530

September 17, 1993

Honorable Michael Davidson
Senate Legal Counsel
United States Senate
Washington, D.C. 20510-7250

Dear Mr. Davidson:

Pursuant to 2 U.S.C. § 288k(b), I write to advise you that the Department of Justice has determined not to pursue an appeal of the district court's decision in Hornell Brewing Co., Inc., et al. v. Lloyd Bentsen, et al., 92-CV-5720 (CBA) (E.D.N.Y. April 27, 1993), appeal docketed, No. 93-6151 (2d Cir.). The Department has concluded that the statute held unconstitutional in this case is no longer defensible in light of recent pronouncements of the Supreme Court.

1. The facts of this case are set forth in the magistrate's Report and Recommendation ("Mag. Rep."; attached), at 2-7. Briefly, in February 1992, the Bureau of Alcohol, Tobacco and Firearms ("ATF") issued a certificate of label approval authorizing the bottling and distribution of "the Original Crazy Horse Malt Liquor" ("Crazy Horse"). Thereafter, plaintiff Hornell Brewing Company ("Hornell") began to distribute the product.

The product swiftly generated controversy, and was criticized by the Surgeon General of the United States and several members of Congress. The principal reason for the criticism was that Hornell was said to be guilty of "'insensitive and malicious marketing,'" because "'defamation of this hero is an insult to Indian culture.'" Mag. Rep. at 4 (citations omitted).

Congressional hearings were held (see Confronting the Impact of Alcohol and Marketing on Native American Health and Culture: Hearings Before the House Select Committee on Children, Youth, and Families, 102d Cong., 2d Sess. (May 19, 1992)), and legislation was introduced. Ultimately, Congress enacted a statute that stated in pertinent part that ATF "shall deny any application for a certificate of label approval, including a certificate of label approval already issued, which authorizes

the use of the name Crazy Horse on any distilled spirit, wine, or malt beverage product * * *." Pub. L. 102-393, § 633. The statute does not apply to bottles already in circulation. Ibid.

Thereafter, ATF informed the bottler of Crazy Horse that the new statute mandates the denial of all labels for the product, including labels already issued. Plaintiffs Hornell Brewing Company and Don Vultaggio (co-owner and chairman of Hornell) then brought this action seeking injunctive relief to prevent enforcement of the statute. Plaintiffs raised a number of theories, but relied chiefly upon the First Amendment.

Plaintiffs initially sought a preliminary injunction, but the parties stipulated that the motion would be recast as a summary judgment motion. The government responded to the latter motion, and cross-moved for summary judgment. The district court referred the case to a magistrate, who recommended that summary judgment be granted in favor of plaintiffs on the First Amendment claim, and in favor of defendants on all of plaintiffs' other claims.[1] The magistrate applied the four-part commercial speech test of Central Hudson Gas & Electric v. Public Service Comm'n, 447 U.S. 557 (1980), and concluded that, although the government has a substantial interest in protecting Native Americans against alcohol abuse and its attendant evils, the statute at issue here neither directly advances that goal nor is narrowly tailored to serve the congressional interest. Mag. Rep. at 20-28. In the alternative, the magistrate held that this content-based restriction upon speech cannot survive strict scrutiny. Id. at 29-31.

The parties filed objections to the magistrate's Report and Recommendation, and the district court conducted a de novo review of the matter. The district court then adopted the magistrate's Report and Recommendation "insofar as it concludes that the government has failed to satisfy the test to regulate commercial speech set forth in Central Hudson Gas & Electric v. Public Service Comm'n, 447 U.S. 557, 100 S. Ct. 2343 (1980)." Order dated April 7, 1993, at 2 (footnote omitted).

2. The Supreme Court has recently held that the burden of establishing that a restriction on commercial speech directly advances the government's interest "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in

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[1] Plaintiffs' other claims alleged violations of the due process clause of the Fifth Amendment, the equal protection component of that clause, the bill of attainder clause, the Fifth Amendment's takings clause, and the principle of separation of powers.

fact alleviate them to a material degree." Edenfield v. Fane, 113 S. Ct. 1792, 1800 (1993) (citations omitted); see also id. at 1802 (restriction on speech must have a "close and substantial relation to the governmental interests asserted"). Commercial speech restrictions must "serve the[] [substantial governmental] purposes in a direct and material manner." Id. at 1801-02.

In light of the Supreme Court's ruling in Edenfield, we have concluded that the challenged statute is no longer defensible. Accordingly, the Department of Justice will not pursue an appeal of the district court's decision in the instant case.

If your office wishes to defend the statute on appeal in the case at bar, we must hear from you promptly. We anticipate that the Second Circuit will set a briefing schedule in the very near future, and that it will impose a relatively short filing deadline.

Thank you very much for your cooperation.

Sincerely,

Janet Reno

cc: Honorable Charles Tiefer
Acting General Counsel to the Clerk
United States House of Representatives
Washington, D.C. 20515