

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

AB-9783a

File: 48-582812; Reg: 18086872

COSTANZOS GENCO OLIVE OIL COMPANY, INC.,
dba Sidelines Sports Bar
732 9th Street
Arcata, CA 95221-6206,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Alberto Roldan

Appeals Board Hearing: April 3, 2020
Sacramento, CA

ISSUED APRIL 8, 2020

Appearances: *Appellant:* Gillian Garrett, of Hinman & Carmichael LLP, as counsel
for Costanzos Genco Olive Oil Company, Inc.,

Respondent: Colleen Villarreal, as counsel for the Department of
Alcoholic Beverage Control.

OPINION

This is appellant's second appeal of a decision of the Department of Alcoholic Beverage Control¹ revoking its license because its employees permitted patrons to possess controlled substances in the licensed premises, and permitted the sale, or negotiation for sale, of controlled substances in the licensed premises, in violation of Business and Professions Code sections 24200(a)-(b) and 24200.5(a), as well as

¹Both the decision, dated November 27, 2018, and the decision of the Department following Appeals Board Opinion and Order, dated October 17, 2019, are set forth in the appendix.

Health and Safety Code sections 11350, 11351, and 11352. After the first appeal, the Board remanded the Department's decision for reconsideration of the penalty.

(*Costanzos Genco Olive Oil Company, Inc.* (2019) AB-9783 at p. 17 (“*Costanzos*”).)

Specifically, the Board asked the Department to determine whether appellant should have been afforded “some measure of mitigation — at a minimum, the ability to sell the business and transfer the license.” (*Ibid.*)

After reconsideration of the penalty, the Department issued a Decision Following Appeals Board Opinion and Order again revoking appellant's license without affording it the opportunity to sell the business and transfer the license. Appellant contends that the Department's decision is excessive, and does not afford appellant “any measure of mitigation.” (AOB at p. 6.)

FACTS AND PROCEDURAL HISTORY²

On May 2, 2018, the Department instituted a 13-count accusation against appellant, charging that on three separate occasions – October 6, 2017, November 30, 2017, and January 25, 2018 – appellant's employees permitted patrons to possess controlled substances in the licensed premises, and permitted the sale and/or negotiation for sale of controlled substances.

During the administrative hearing from September 25-28, 2018, documentary evidence and testimony established that an undercover Department agent visited the licensed premises four times over the course of four months. During that time, the undercover agent had numerous narcotics discussions with multiple individuals,

² A complete statement of the facts and previous procedural history can be found in *Costanzos*, AB-9783 at pp. 2-5. For brevity, most of the factual background and procedural history have been omitted.

including appellant's employees and one of appellant's corporate officers. On the three occasions stated in the accusation, the agent was able to purchase controlled substances. These transactions were facilitated by appellant's corporate officer and several employees.

However, the evidence also established that appellant's primary shareholder operated as a sole proprietor at the licensed premises for 25 years without any departmental discipline. The record also established that appellant took substantial efforts to mitigate the violation, including terminating the offending employees, removing the corporate officer from her position, increasing training for employees, installing security cameras, and implementing additional security measures.

After the hearing, the administrative law judge (ALJ) submitted his proposed decision on November 2, 2018, sustaining all counts of the accusation and recommending that the license be revoked. The Department adopted the proposed decision in its entirety on November 26, 2018, and a Certificate of Decision was issued on November 27, 2018. Appellant then filed a timely appeal contending, *inter alia*,³ that the penalty was excessive.

The Appeals Board issued its decision on August 26, 2019, remanding the decision back to the Department on the sole issue of penalty. The Board noted:

While revocation may ultimately be required by statute, we believe it constitutes an abuse of discretion for a licensee with such a long history of licensure — 25 years as a sole proprietor, prior to incorporating under the current license in 2017 — to be entirely deprived of the opportunity to sell the business and transfer the license. We believe it constitutes an abuse of discretion to disregard this substantial mitigating factor and other efforts undertaken by appellant (see AOB at p. 20) such as: terminating the offending employees, removing Ms. Costanzos as an officer of the

³ Appellant's other contentions are not at issue in the present appeal.

corporation, increasing training for employees, increasing security measures, and installing surveillance cameras.

We believe that fundamental fairness and the ends of substantial justice require that the Department reconsider the penalty imposed in this matter in order to consider why these factors should not have afforded appellant some measure of mitigation — at a minimum, the ability to sell the business and transfer the license..

(*Costanzos*, AB-9783 at pp. 16-17.)

On August 29, 2019, the Director of the Department requested written briefs from the parties identifying aggravating and mitigating factors relevant for reconsideration of the penalty. After briefs were received, the Director issued a Decision Following Appeals Board Opinion and Order on October 17, 2019, upholding the penalty of revocation. Appellant requested reconsideration on November 18, 2018—32 days after the Department’s decision was issued—which the Department denied as untimely. On appeal, appellant contends that the Department erred by denying its request for reconsideration and renews its argument that a lesser penalty is warranted.

DISCUSSION

I

REQUEST FOR RECONSIDERATION

Appellant contends that its petition for reconsideration was timely filed. (AOB at pp. 5-6.) Specifically, appellant contends that Code of Civil Procedure section 1013(a) extends the time to file a petition for reconsideration by five days. (*Id.* at p. 5; Code Civ. Proc., § 1013(a) [“Service is complete at the time of the deposit, but any period of notice and any right or duty to do any act or make any response within any period or on a date certain after service of the document, which time period or date is prescribed by statute or rule of court, shall be extended five calendar days, upon service by mail, if the

place of address and the place of mailing is within the State of California”]) The Department responds that section 1013(a) is inapplicable to Government Code section 11521, which does not contemplate the “filing” of a petition for reconsideration into the 30-day time limit, but rather, severs the Department’s power to “order” reconsideration. (RRB at pp. 6-8.)

Government Code section 11521(a) states, in pertinent part:

The power to order a reconsideration shall expire 30 days after the delivery or mailing of a decision to a respondent, or on the date set by the agency itself as the effective date of the decision if that date occurs prior to the expiration of the 30-day period or at the termination of a stay of not to exceed 30 days which the agency may grant for the purpose of filing an application for reconsideration.

(Gov. Code, § 11521(a).) Thus, the issue before the Board is whether Code of Civil Procedure section 1013 applies to Government Code section 11521.

The Board’s scope of review is limited; it may only review a Department’s decision based upon “insufficiency of the evidence, excess of jurisdiction, errors of law, or abuse of discretion.” (*Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 95, [84 Cal.Rptr. 113].) If there was some legal authority that required the Department to accept and act upon a petition for reconsideration within 35 days of mailing the decision, then the Department’s denial of that petition as untimely would constitute legal error. However, appellant has not cited,⁴ and the Board is not

⁴ Appellant cites *Pesce v. Department of Alcoholic Beverage Control* (1958) 51 Cal.2d 310, 313 [333 P.2d 15] in support of its argument. However, the Board agrees with the Department that this is an “apples to oranges” comparison. *Pesce* only considered whether section 1013 applies to the filing of a Notice of Appeal under Business and Professions Code section 23081, not a petition for reconsideration. (*Ibid.*)

aware of, any authority *requiring* the Department to act on appellant's reconsideration request more than 30 days after the decision was issued.

As this Board has said many times, it cannot act absent express authority. Here, the Board does not have the authority to hold, as a matter of first impression, that section 1013 applies to Government Code section 11521. As written, Government Code section 11521 clearly severs the Department's ability to order reconsideration 30 days after the decision was issued, or in this case, on November 16, 2019. Therefore, the Department's decision to deny appellant's request for reconsideration as untimely, when it was sent 32 days after the decision was issued, must stand.

II

EXCESSIVE PENALTY

This Board may examine the issue of excessive penalty if it is raised by an appellant. (*Joseph's of Cal. v. Alcoholic Bev. Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183].) However, the Board will not disturb the Department's penalty order in the absence of an abuse of discretion. (*Martin v. Alcoholic Bev. Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) An administrative agency abuses its discretion when it "exceeds the bounds of reason." (*County of Santa Cruz v. Civil Service Commission of Santa Cruz* (2009) 171 Cal.App.4th 1577, 1582 [90 Cal.Rptr.3d 394, 397].) However, "[i]f reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within its discretion." (*Harris v. Alcoholic Bev. Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

In determining disciplinary action, the Department is required to consider the penalty guidelines incorporated in California Code of Regulations, title 4, section 144. Revocation is the standard penalty for violations of Business and Professions Code section 24200.5, as well as Health and Safety Code sections 11350, 11351, and 11352, where, as here, transactions were conducted on the licensed premises. (Cal. Code Regs., tit. 4, § 144.) Unqualified revocation is the exact penalty appellant received in the Director's decision. Nevertheless, rule 144 allows the Department to deviate from the standard penalty when, "*in its sole discretion*[, it] determines that the facts of the particular case warrant such deviation — such as where facts in aggravation or mitigation exist." (*Ibid.*, emphasis added.)

Factors in aggravation include prior disciplinary history, prior warning letters, licensee involvement, premises located in high crime area, lack of cooperation by licensee in investigation, appearance and actual age of minor, and continuing course or pattern of conduct. (Cal. Code Regs., tit. 4, § 144.) Factors in mitigation include the length of licensure at subject premises without prior discipline or problems, positive action by licensee to correct problem, documented training of licensee and employees, and cooperation by licensee in investigation. However, neither list of factors is exhaustive; the Department may use its discretion to determine whether other aggravating or mitigating circumstances exist. (*Ibid.*)

Here, appellant takes issue with the fact that the Department did not deviate from the standard penalty of revocation. (AOB at pp. 6-9.) Specifically, appellant cites its mitigation evidence, and lists examples of Departmental discipline against other licenses, arguing that those "relatively more reasonable penalties ... show it would be

equitable and reasonable to consider revocation stayed, with a significant period of suspension” (*Id.* at p. 8.) Appellant notes the disparity between the penalties it cites and the penalty it received. (*Id.* at pp. 8-9.)

Ultimately, the Department rejected appellant’s arguments, finding that, after “[c]onsidering all factors, including Salvatore Costanzo’s length of licensure without discipline as a sole proprietor ..., outright revocation is warranted.” (Director’s Decision, ¶ 5.) The Department found that the “repeated drug-sale negotiations resulting in repeated sales of cocaine and methamphetamine with knowledge and permission of one of Respondent’s owners and its employees clearly warrants revocation given the lax approach to management of the licensed premises” (*Ibid.*)

As stated above, the extent to which the Department considers mitigating or aggravating factors is a matter entirely within its discretion. In its prior decision, the Board took issue with the fact that the Department failed to consider appellant’s evidence of mitigation. However, now that the Department has considered this evidence, the Board cannot say that the Department abused its discretion in rejecting it. In fact, the Department is well within its discretion to determine that appellant’s mitigation evidence is outweighed by evidence of aggravation—namely appellant’s lax approach to management of the licensed premises that resulted in repeated drug sales and negotiations by its employees and corporate officer. The Department’s decision is, therefore, neither arbitrary nor capricious.

In short, rule 144 provides a standard penalty of revocation for the subject violations, which is the exact penalty appellant received. Although rule 144 allows the Department to exercise discretion to consider mitigation evidence and shorten the

standard penalty, the Board cannot say that the Department's failure to do so constitutes an abuse of discretion. Therefore, the penalty must stand.

ORDER

The decision of the Department is affirmed.⁵

SUSAN A. BONILLA, CHAIR
MEGAN McGUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁵ This final order is filed in accordance with Business and Professions Code section 23088 and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 *et seq.*

APPENDIX

BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA

RECEIVED

OCT 17 2019

Alcoholic Beverage Control
Office of Legal Services

**IN THE MATTER OF THE ACCUSATION
AGAINST:**

Costanzos Genco Olive Oil Company, Inc.
DBA Sidelines Sports Bar
732 9th Street
Arcata, California 95521-6206

Respondent.

On-Sale General Public Premises License

File No.: 48-582812

Reg. No.: 18086872

AB-9783

DECISION FOLLOWING APPEALS BOARD OPINION AND ORDER

The above-entitled matter is before the Department of Alcoholic Beverage Control (Department) for decision following an Opinion and Order of the Alcoholic Beverage Control Appeals Board (Board) dated August 26, 2019.

In its order, the Board sustained the Department's decision that violations of law occurred, but the Board remanded the Department's penalty determination for reconsideration by the Department, finding that "[w]hile the penalty here is technically within the bounds of the Department's discretion, we note that the ALJ, and by extension, the Department, did not consider [Respondent]'s long history of licensure – 25 years as a sole proprietor, prior to incorporating under the current license in 2017 – when determining the penalty. Accordingly, we believe it constitutes an abuse of discretion to disregard this substantial mitigating factor and other efforts undertaken by [Respondent]."

The Board's remand directed the Department "to consider why the above-mentioned factors should not have afforded [Respondent] some measure of mitigation, such as the ability to sell the business and transfer the license."

The Department sought input from the parties regarding the appropriate penalty in this case and requested briefing on the aggravating and mitigating factors found in the record.

CONTENTIONS OF THE PARTIES ON REMAND

1. At the time of the violations involved in this action and the filing of the accusation, the licensee was a corporation consisting of Salvatore Costanzo (holding 70% of the stock, CEO/President), his son Michael Costanzo (holding 15% of the stock, Vice President), and his daughter Nicole Costanzo (also holding 15% of the stock, Secretary). Prior to incorporation, Salvatore Costanzo held a separate license in his name alone.
2. According to Respondent's arguments following remand, Salvatore Costanzo was experiencing "increasing debilitating health conditions" and Michael Costanzo was taking over more of the management responsibilities. The company was reorganized as described above "upon the advice of [Salvatore Costanzo's] estate planning lawyer." As a result of the instant disciplinary action, Nicole Costanzo's employment was terminated, and she was removed as an officer and owner of the corporation.
3. Respondent asserts that, prior to incorporation, Salvatore Costanzo had in excess of 20 years of discipline-free history as the licensee in the operation of the subject licensed premises.¹
4. In contrast, the Department argues that no consideration should be given to Salvatore Costanzo's length of licensure as an individual without discipline. The Department notes that while Salvatore Costanzo testified to the removal of Nicole Costanzo as an officer and owner of the corporation, no evidence was provided as to when this occurred or when paperwork was filed with the Department to change the license information.
5. The Department further notes that while both Salvatore Costanzo and Michael Costanzo testified at hearing and denied knowledge of narcotics dealing at the licensed premises, the ALJ specifically found this testimony not credible. (See Decision, p. 16, ¶ 15.)
6. In addition, the Department argues, the Arcata City Manager and Arcata law enforcement communicated their concerns over problems at the licensed premises directly to Respondent's principals.

¹ It is unclear from the record if Salvatore Costanzo had 25 years of discipline-free history at the licensed premises or in some other capacity as an ABC Licensee, or if that period was shorter. The Department will base its conclusions upon the assertion that there was a 25-year discipline-free history as stated in the Board's Opinion.

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7. The Department further asserts that it would not be appropriate to consider one licensee's disciplinary history (i.e., Salvatore Costanzo, holding license number 338134) in evaluating the proper discipline with respect to a different licensee (i.e., Costanzos Genco Olive Oil Company, Inc., holding license number 582812). Since the current license had been active only approximately two years, that is all that should be considered for purposes of this disciplinary action.
8. Moreover, the Department contends, one of the principals of the corporate licensee, Nicole Costanzo, was actively involved in the illegal activity. Her employment at the licensed premises continued until August 2018, several months after the filing of the accusation and Salvatore Costanzo becoming aware of the allegations in the accusation. This demonstrates a lack of concern and real commitment to addressing the problems.

Having considered the record and the arguments of the parties following remand, the Department makes the following determinations regarding discipline:

PENALTY

1. In the proposed decision, the ALJ found the following aggravating factors. Salvatore Costanzo, Michael Costanzo, and Nicole Costanzo, all three owners and stockholders of Respondent, had knowledge of the repeated illegal activity on the licensed premises concerning illegal drug use. (See Decision, p. 16, ¶ 15.) Nicole Costanzo not only knew about the illegal drug activity, but she facilitated the illegal activity, for example, repeated sales of cocaine and methamphetamine, within the licensed premises and the nearby, commonly owned, licensed premises, Toby and Jacks. (See Decision, p. 15, ¶ 12.) The ALJ found these aggravating factors severe and ruled the presented facts warranted a revocation of the Respondent's license.
2. Respondent argued at hearing it had taken the following mitigating actions. Respondent had a "no drug policy," it had installed cameras to prevent illegal activity, fired the people responsible for the illegal activities, and reorganized the Respondent to remove Nicole Costanzo as an owner and stockholder. (See Decision, p 9, ¶ 19.)
3. The ALJ found that the Respondent's lax oversight, lack of a written policy on illegal drugs, and lack of a desire to compel employees to enforce the rules that the Respondent suggested were in place established that the Respondent had ignored a "mountain of evidence that the Licensed Premises had grown into a problem location for narcotics activity." The mitigating actions put forward by Respondent

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at hearing were all taken a lengthy time after the accusation was filed by the Department and shortly prior to the hearing date. The timing of the mitigating actions lessens their weight in a penalty determination because it shows a continued lack of dedication by Respondent to solve the problems occurring within the licensed premises. (See Decision, p 16, ¶ 14.)

4. In accordance with the Board's opinion and order, the Department has fully considered whether Salvatore Costanzo's length of licensure as a sole proprietor without discipline warrants mitigation of the discipline in this action. Whether or not it would be appropriate to consider this discipline-free history, it has in fact been considered. Notwithstanding this history, the evidence shows that all the corporate owners had some knowledge of the narcotics activities occurring at the licensed premises. While their respective degrees of knowledge may be varied, there was awareness of the problems and little was done to correct the rampant narcotics dealing. Moreover, one of the corporate officers (Secretary) and stockholders (holding more than 10 percent of the stock) was directly involved in the violations.² While Salvatore Costanzo's prior lack of discipline is commendable, it was his choice to incorporate and include his children in the ownership of the corporation. Nor does this diminish his responsibilities as an owner himself of ensuring that the licensed business is operated in a lawful manner. This is especially true given his awareness of the problems at the licensed premises.

5. The Respondent had an affirmative obligation to ensure that the Licensed Premises was operated in full compliance with the law. The Respondent did not. The illegal activity at issue here—repeated drug-sale negotiations resulting in repeated sales of cocaine and methamphetamine with the knowledge and permission of one of Respondent's owners and its employees clearly warrants revocation given the lax approach to management of the licensed premises evidenced in this case by Respondent's three principles. Considering all factors, including Salvatore Costanzo's length of licensure without discipline as a sole proprietor under a different license number, outright revocation is warranted.

² Business and Professions Code section 23405(d) provides that the Department may "suspend or revoke any license of a corporation subject to the provisions of this section where conditions exist in relation to any officer, director, or person holding 10 percent or more of the corporate stock of that corporation which would constitute grounds for disciplinary action against that person if the person was a licensee."

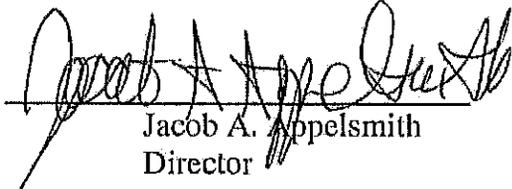
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ORDER

The Respondent's on-sale general public premises license is hereby revoked.

Sacramento, California

Dated: October 17, 2019


Jacob A. Appelsmith
Director

Pursuant to Government Code section 11521(a), any party may petition for reconsideration of this decision. The Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or on the effective date of the decision, whichever is earlier.

Any appeal of this decision must be made in accordance with Chapter 1.5, Articles 3, 4 and 5, Division 9, of the Business and Professions Code. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005.

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

**IN THE MATTER OF THE ACCUSATION
AGAINST:**

Costanzos Genco Olive Oil Company, Inc.
DBA Sidelines Sports Bar
732 9th Street
Arcata, California 95521-6206

Respondent.

On-Sale General Public Premises License

File No.: 48-582812

Reg. No.: 18086872

AB-9783

ORDER FOLLOWING APPEALS BOARD DECISION

The above-entitled matter is before the Department of Alcoholic Beverage Control (Department) for decision following a decision of the Alcoholic Beverage Control Appeals Board (Board) dated August 26, 2019.

In its decision, the Board reversed the decision of the Department based on the penalty imposed in this matter, finding that “[w]hile revocation may ultimately be required by statute, we believe it constitutes an abuse of discretion for a licensee with such a long history of licensure – 25 years as a sole proprietor, prior to incorporating under the current license in 2017 – to be entirely deprived of the opportunity to sell the business and transfer the license. We believe it constitutes an abuse of discretion to disregard this substantial mitigating factor and other efforts undertaken by [Respondent].”

The Board remanded the matter to the Department for reconsideration of “the penalty imposed in this matter in order to consider why these factors should not have afforded [Respondent] some measure of mitigation – at a minimum, the ability to sell the business and transfer the license.”

In light of the Board’s comments, the Department hereby orders that the parties submit written briefs identifying aggravating and mitigating factors that the Department should weigh in its reconsideration of the penalty in this case.

Such briefs shall be concurrently submitted by the parties (and served on all parties) by close of business September 9, 2019. The brief shall be restricted to no more than ten pages in length. Briefs may be in letter form or on pleading paper.

Constanzos Genco Olive Oil Company, Inc.,
DBA Sidelines Sports Bar
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The parties may make such arguments as they deem appropriate. However, the briefs should specifically address the following issues. When identifying evidence, the parties are directed to confine themselves to the record of the proceedings in this matter and to provide specific citation to the record either from exhibits or the transcript of the hearing that occurred on September 25, 2018, through September 28, 2018:

1. Who were the owners and officers of Respondent at the time of the hearing?
2. If different, who were the owners and officers of Respondent at the time of the violations found to have occurred?
3. What involvement or knowledge did each owner or officer of Respondent have of the violations found in this case prior to the accusation being served?
4. What knowledge of potential or actual problems of narcotics use or sales did each owner or officer of Respondent have prior to October 6, 2017.
5. As to any record of knowledge identified in response to the prior question, what action or other response did the owner or officer of Respondent take to correct the problem?
6. What mitigating factors for penalty assessment exist in this case? Address issues with Respondent and all its owners or officers.
7. What aggravating factors for penalty assessment exist in this case? Address issues with Respondent and all its owners or officers.
8. What weight should be given to the length of licensure as a sole proprietor prior to incorporation of Respondent?
9. Considering in all aggravating and mitigating factors, what is the appropriate penalty in this case?

The Department will consider only evidence for which there is a specific citation to the record in this matter. Evidence without citation to the record will not be considered.

Dated: August 29, 2019


FOR
Matthew D. Botting
General Counsel

For: Jacob A. Appelsmith
Director

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

**IN THE MATTER OF THE ACCUSATION
AGAINST:**

**COSTANZOS GENCO OLIVE OIL COMPANY,
INC.
SIDELINES SPORTS BAR
732 9TH STREET
ARCATA, CA 95521-6206**

**ON-SALE GENERAL PUBLIC PREMISES
LICENSE**

EUREKA DISTRICT OFFICE

File: 48-582812

Reg: 18086872

CERTIFICATE OF DECISION

**Respondent(s)/Licensee(s)
Under the Alcoholic Beverage Control Act**

It is hereby certified that, having reviewed the findings of fact, determination of issues, and recommendation in the attached proposed decision, the Department of Alcoholic Beverage Control adopted said proposed decision as its decision in the case on November 26, 2018. Pursuant to Government Code section 11519, this decision shall become effective 30 days after it is delivered or mailed.

Any party may petition for reconsideration of this decision. Pursuant to Government Code section 11521(a), the Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or if an earlier effective date is stated above, upon such earlier effective date of the decision.

Any appeal of this decision must be made in accordance with Business and Professions Code sections 23080-23089. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005, or mail your written appeal to the Alcoholic Beverage Control Appeals Board, 1325 J Street, Suite 1560, Sacramento, CA 95814.

On or after January 7, 2019, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: November 27, 2018

RECEIVED

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**Alcoholic Beverage Control
Office of Legal Services**



**Matthew D. Botting
General Counsel**

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

IN THE MATTER OF THE ACCUSATION AGAINST:

Costanzos Genco Olive Oil Company, Inc.
DBA Sidelines Sports Bar
732 9th Street
Arcata, California 95521-6206

Respondent

} File: 48-582812

} Reg.: 18086872

} License Type: 48

} Page Count: 455

} Reporter:

} Carli McKenny-CSR #14086
} Atkinson Baker

On-Sale General Public Premises License

PROPOSED DECISION

Administrative Law Judge Alberto Roldan, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Eureka, California from September 25, 2018 through September 28, 2018.

Colleen Villarreal, Attorney, represented the Department of Alcoholic Beverage Control (Department).

Patrick Griego, Attorney, represented Respondent Costanzos Genco Olive Oil Company, Inc., a corporation (Respondent).

The Department seeks to discipline Respondent's license pursuant to thirteen allegations in the accusation on the grounds that:

- (1) On or about October 6, 2017 Respondent-Licensee's agent or employee Mykie Bastidas permitted patron(s) to possess, within the premises, a controlled substance, to-wit: cocaine, in violation of California Health and Safety Code section 11350;
- (2) On or about October 6, 2017 Respondent-Licensee's agent or employee Mykie Bastidas permitted Ryan Johnston aka "RJ", to possess, within said premises, a controlled substance, to-wit: cocaine, for purposes of sale, in violation of California Health and Safety Code section 11351;

- (3) On or about October 6, 2017 Respondent-Licensee(s) knowingly permitted the illegal sale, or negotiations for the sale, of controlled substances or dangerous drugs upon the licensed premises in violation of California Business and Professions Code section 24200.5(a);
- (4) On or about October 6, 2017 Respondent-Licensee's agent or employee Mykie Bastidas permitted Ryan Johnston, aka "RJ", to sell, furnish, or offer to sell or furnish, within the premises, a controlled substance, to-wit: cocaine, in violation of California Health and Safety Code section 11352;
- (5) On or about November 30, 2017 Respondent-Licensee's agent or employee Mykie Bastidas permitted patron(s) to possess, within the premises, a controlled substance, to-wit: cocaine, in violation of California Health and Safety Code section 11350;
- (6) On or about November 30, 2017 Respondent-Licensee's agent or employee Mykie Bastidas permitted Elijah Calvin Browning to possess, within said premises, a controlled substance, to-wit: cocaine, for purposes of sale, in violation of California Health and Safety Code section 11351;
- (7) On or about November 30, 2017 Respondent-Licensee(s) knowingly permitted the illegal sale, or negotiations for the sale, of controlled substances or dangerous drugs upon the licensed premises in violation of California Business and Professions Code section 24200.5(a);
- (8) On or about November 30, 2017 Respondent-Licensee's agent or employee Mykie Bastidas permitted Elijah Calvin Browning to sell, furnish, or offer to sell or furnish, to Agent Scott, within the premises, a controlled substance, to-wit: cocaine, in violation of California Health and Safety Code section 11352;
- (9) On or about November 30, 2017 Respondent-Licensee's agent or employee Mykie Bastidas permitted Elijah Calvin Browning to sell, furnish, or offer to sell or furnish, to Agent Bernstein, within the premises, a controlled substance, to-wit: cocaine, in violation of California Health and Safety Code section 11352;
- (10) On or about January 25, 2018 Respondent-Licensee's agent or employee Mykie Bastidas permitted patron(s) to possess, within the premises, a controlled substance, to-wit: cocaine, in violation of California Health and Safety Code section 11350;
- (11) On or about January 25, 2018 Respondent-Licensee's agent or employee Mykie Bastidas permitted Elijah Calvin Browning to possess within said premises, a controlled substance, to-wit: cocaine, for purposes of sale, in violation of California Health and Safety Code section 11351;
- (12) On or about January 25, 2018 Respondent-Licensee(s) knowingly permitted the illegal sale, or negotiations for the sale, of controlled substances or dangerous drugs upon the licensed premises in violation of California Business and Professions Code section 24200.5(a); and

- (13) On or about January 25, 2018 Respondent-Licensee's agent or employee Mykie Bastidas permitted Elijah Calvin Browning to sell, furnish, or offer to sell or furnish, to Agent Scott, within the premises, a controlled substance, to-wit: cocaine, in violation of California Health and Safety Code section 11352.

In each of the above thirteen allegations in the accusation, the Department further alleged that there is cause for suspension or revocation of the license of the Respondent in accordance with section 24200 and sections 24200(a) and (b) of the Business and Professions Code and that the continuance of the license of the Respondent would be contrary to public welfare and/or morals as set forth in Article XX, Section 22 of the California State Constitution and sections 24200(a) and (b) of the Business and Professions Code. (Exhibit D-1)

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued and submitted for decision on September 28, 2018.

FINDINGS OF FACT

1. The Department filed the accusation on May 2, 2018. (Exhibit D-1)
2. The current configuration of the license for the Licensed Premises as a corporation has been in place since August 8, 2017 but the Licensed Premises was previously owned by Salvatore Costanzo (S. Costanzo) for many years prior to the change to a corporation. S. Costanzo is one of the principals of the corporation. The Respondent also holds a type 48 license for Toby and Jacks, a type 48 establishment located two businesses to the left of the Licensed Premises at 764 9th Street in Arcata, California. (Exhibit D-2) There is no record of prior departmental discipline against the Licensed Premises.
3. In September 2017, Department Agent Samantha Scott (Scott) began an assignment as part of a team investigating complaints of narcotics activity made against the Licensed Premises. As part of this investigation, a decision was made to utilize Scott and other undercover officers working as part of the Humboldt County Narcotics Task Force to investigate these allegations. Scott had been a Department agent for 1½ years and had prior experience as a Placer County Sheriff's deputy and correctional officer before joining the Department as an agent.
4. During her academy training, Scott received narcotics training. In addition, she received approximately 100 hours of field and course work related to narcotics investigations. From this training, Scott learned to recognize how illicit drug transactions

occurred and became familiar with the appearance and packaging of various controlled substances sold in face to face transactions and the common jargon used to describe controlled substances in street transactions.

5. On October 6, 2017 at approximately 7:30 p.m., Scott entered the Licensed Premises in an undercover capacity. Another undercover officer from the task force accompanied her and a separate officer had previously entered to act in an internal rescue capacity if there was a need. Scott sat at the fixed bar on a barstool. The Licensed Premises was not crowded and Scott was able to select a seat. A bartender who was later identified as Mykie Rae Bastidas (Bastidas) took a drink order from Scott. (Exhibit D-3) Bastidas interacted with various patrons in a bartender capacity while Scott sat at the bar. A youthful looking white male entered the Licensed Premises and sat next to Scott at the bar. Bastidas and the youthful looking male interacted at the bar. Scott and the male, who was later identified as Ryan Johnston (Johnston) began a conversation while Scott was seated at the bar and in the immediate presence of Bastidas.

6. Scott was making small talk with Johnston and they began to discuss marijuana. Scott then mentioned that she had trouble finding "white" which was a slang term for cocaine. Johnston agreed with what Scott said and then said they should find some. Johnston asked Bastidas for help in obtaining "white girl" which was another slang term used for cocaine. Bastidas responded to Johnston that the person she knew was out of town. During this time, Officer Branson (Branson) from the Humboldt County task force sat on the other side of Johnston and ordered a beer from Bastidas. Scott and Johnston began to interact with Branson. A Hispanic looking person with the last name of King (King) entered the Licensed Premises and came over to the area where Scott, Johnston and Branson were at the bar. Branson and King spoke and Branson asked King for help in obtaining cocaine. King said he could find a "hookup" and that he could also provide "acid" and marijuana that he had at his residence. The conversations among Scott, Branson, Johnston and King all occurred in normal conversational tones. Bastidas continued to tend bar in the area while they were speaking. After the request for cocaine by Branson, Scott saw King using his phone to send a text message. Scott remarked to the group that she wanted to take a selfie before "we get high." Scott, Johnston, King and Branson posed for the photo. Scott later cropped the photo to remove herself and Branson from it. (Exhibit D-4)

7. King and Johnston left the Licensed Premises. Scott and Branson remained seated at the fixed bar with the understanding that King and Johnston would return with cocaine. Scott saw another bartender enter the fixed bar area and began to tend bar. The bartender was later identified as Jesus Jay Trejo (Trejo). Trejo asked Scott if she wanted a drink. During this conversation, Scott remarked to Trejo that she was waiting for someone to connect her and Branson with cocaine. Trejo responded "be careful" to this remark.

While waiting for King and Johnston to return, Scott spoke with Bastidas about King and asked her if she knew him. Bastidas called him "Jorge" and then said "He's a regular. He's fine."

8. King and Johnston returned to the Licensed Premises at approximately 9:40 p.m. and approached Scott and Branson at the fixed bar. Bastidas was tending bar on the other side when they approached. Scott asked King and Johnston if they "got it." Johnston handed Scott a small, square baggie with a white, powdery substance in it. Scott took the baggie from Johnston and asked him for the cost. Johnston remarked that it cost \$80. Johnston initially tried to offer the baggie to Scott for free. Scott negotiated a price of \$40 which she paid to Johnston. Johnston told Scott to go use some of the baggie in the bathroom of the Licensed Premises. Scott took the baggie into the bathroom and took a picture of it. (Exhibit D-7) Scott notified the safety team that she had completed a transaction. Scott then left the Licensed Premises by the rear door. She met with Department Agent David Miller (Miller) and handed him the baggie to book into evidence. Scott then departed. Miller had been the team member tasked with receiving and booking evidence during the investigation. Miller booked the baggie and its contents into evidence.

9. Scott returned to the Licensed Premises on November 8, 2017. When Scott approached the fixed bar area, she recognized the bartender on duty as Nicole Taylor Costanzo (N. Costanzo) from a review of the Respondent's Department file and from Department of Motor Vehicle records. (Exhibit D-8) The Department records of the Licensed Premises identified N. Costanzo as an officer and the Secretary of the corporation that held the license of the Licensed Premises. Scott ordered a drink from N. Costanzo. A male at the bar identified himself as "Dylan" (Dylan) to Scott. Dylan spoke with Scott about marijuana. During this conversation Scott remarked that she had trouble finding cocaine. Dylan responded that he could get "pure white" for Scott. Scott noticed that N. Costanzo seemed to be aware of their conversation. Scott said to N. Costanzo that Dylan said he could get "pure white." N. Costanzo asked "white what?" to which Scott stated "cocaine." N. Costanzo nodded in response and then told Scott that her guy just left. N. Costanzo made this remark in reference to a person that supplied her with cocaine. Scott and Costanzo then planned on meeting again at the Licensed Premises. N. Costanzo provided Scott with information about her work schedule. During this discussion, N. Costanzo joked about knowing the boss. N. Costanzo is the daughter of Salvatore Costanzo (S. Costanzo) and sister of Michael Costanzo (M. Costanzo), two of the other principals in the corporation that owns the Licensed Premises and Toby and Jacks. Scott departed the Licensed Premises shortly after this conversation.

10. Scott returned to the Licensed Premises on November 30, 2017 at approximately 8:45 in the evening. She was accompanied by Department Agent Bernstein (Bernstein) and

both were in an undercover capacity. Bastidas was again bartending. Scott ordered an alcoholic beverage from Bastidas. Scott saw a person she had previously identified as Elijah Calvin Browning (Browning) in the Licensed Premises. (Exhibit D-9) N. Costanzo had previously introduced Scott to Browning at Toby and Jacks. That previous introduction had led to Scott purchasing narcotics from Browning. Scott and Browning began to talk. During this conversation, Scott saw N. Costanzo talking with Bastidas. Bastidas appeared flustered and went outside with N. Costanzo.

11. Bernstein entered the conversation with Browning and Scott while they were at the fixed bar. Trejo then began to bartend at the fixed bar after Bastidas went outside with N. Costanzo. Scott asked Browning if he had cocaine. During Scott's interaction with Browning, the discussion about purchasing cocaine dropped off when they moved outside of the Licensed Premises for a short period. They wound up finding Bastidas outside of the Licensed Premises on her knees appearing to be in distress and under the influence. Bastidas remarked "I am so fucked up" during this event. After seeing Bastidas, Browning called her "Mykie" in a conversation with Scott. The conversation about the purchase later began again. Inside of the Licensed Premises, Bernstein and Scott negotiated the purchase of one gram of cocaine each for \$100 a gram after Scott asked if it was still \$100. Browning responded to this, "Of course."

12. Scott saw Browning interact with another patron in the Licensed Premises. Scott saw this individual hand something to Browning. Browning and this patron then approached Scott and Bernstein at the fixed bar. Trejo was working at the bar and Bastidas returned from outside and began working again when this occurred. Browning pulled out two baggies and held out the baggies with one in each outstretched hand. Scott then remarked in a joking way, "Does it matter which one I take?" Browning then laughed. Scott took one of the baggies and held it up. Bernstein took the other baggie from Browning. Scott remarked to Browning, "You're the best. Thanks a million." Scott and Bernstein paid Browning \$100 each for the two baggies that were provided by Browning. During the transaction for the baggies, Bastidas had returned to working just on the other side of the fixed bar. Scott and Bernstein departed the Licensed Premises at approximately 10 p.m. on November 30, 2017. The baggie that Scott received was turned over to and booked into evidence by Miller. (Exhibit D-11) The baggie that Bernstein received was also given to Miller and booked into evidence by Miller. (Exhibit D-13)

13. Scott reentered the Licensed Premises on January 25, 2017 in the late evening. She was with two other officers who were acting in an undercover capacity. She had earlier negotiated a purchase of cocaine from Browning and had planned to meet him at the Licensed Premises. Scott observed that Bastidas was one of the bartenders working in the Licensed Premises that evening. Scott and Browning met to complete their transaction in

the middle of the Licensed Premises. Scott paid Browning \$100 in cash. Browning handed Scott a baggie in exchange for the \$100. Scott and Browning made small talk during the transaction. During this conversation, Browning invited Scott and her companions to Bastidas' home later that evening to "party". At one point during the drug transaction, a security guard for the Licensed Premises bumped into and past Scott. The guard had no further interaction with Scott or Browning. Scott, during her multiple visits to the Licensed Premises, regularly saw guards carding patrons upon entry and providing security for the Licensed Premises. Scott was never approached by security for the Licensed Premises during any of the transactions that occurred from the start of the investigation through the January 25, 2018 transaction. Scott departed the Licensed Premises with the baggie just after midnight. Scott turned the baggie over to Miller for booking. Based on her training and experience, Scott believed that this baggie and the ones purchased on October 6, 2017 and November 30, 2017 all appeared consistent with cocaine hydrochloride which is what she had negotiated for in each of the transactions.

14. Department Agent Alan Aubuchon (Aubuchon) testified regarding the chain of custody in this matter because Miller was medically unavailable as a witness. Aubuchon is an experienced peace officer from his time as a Department agent and Eureka Police Department officer dating back to 2007. Miller was the designated receiving agent for the evidence seized during this investigation and the related investigation that occurred at Toby and Jacks during the same time period. Aubuchon was the designated second witness. Miller prepared the property receipts for the seized evidence when it was booked into the secure facility of the Eureka Police Department (EPD) that was provided for the Humboldt County Drug Task Force. (Exhibits D-19, D-20, D-21, and D-22) These receipts documented the evidence seized by Scott and Bernstein during the transactions in this matter that was subsequently booked by Miller. Aubuchon reviewed them at the time they were prepared and checked their accuracy before cosigning the property receipts. Jeremy Hunter, the EPD Property Evidence Technician, acknowledged receiving the evidence from Miller for safekeeping.

15. The narcotics that were booked in this case by Miller from the sales that occurred on October 6, 2017, November 30, 2017 and January 25, 2018 were weighed and photographically documented during the course of the investigation to enable the correlation of booked evidence with the transactions that occurred. (Exhibits D-14, D-15, D-16, D-25, D-26, D-28, and D-29) The seized narcotics were also tested by Miller using a TruNarc testing device. Because of the unavailability of Miller, Department Agent Chandler Baird (Baird) reviewed the TruNarc Scan reports that were generated by Miller and correlated them with the evidence booked. Scott also documented on January 27, 2018, via photograph, the screen from the TruNarc device Scan 291 showing the test result from the test conducted by Miller that day. (Exhibit D-17)

16. The evidence established that there were four scan reports from tests conducted by Miller that corresponded with the evidence seized by Scott and Bernstein during the investigation.

- TruNarc Scan Report 241 (Exhibit D-23) corresponded with the suspected narcotics received by Scott on October 6, 2017 from Johnston. (Exhibits D-26 and D-19)
- TruNarc Scan Reports 246 and 247 (Exhibits D-30 and D-24) corresponded with the suspected narcotics received by Scott and Bernstein on November 30, 2017 from Browning. (Exhibits D-19, D-22, D-25 and D-28)
- TruNarc Scan Report 291 (Exhibit D-18 and D-17) corresponded with the suspected narcotics received by Scott on January 25, 2018 from Browning. (Exhibits D-20 and D-29)

17. California Highway Patrol Officer Darron Drefke (Drefke) testified regarding the general operation and efficacy of the TruNarc device in this matter because Miller was medically unavailable as a witness. Drefke was one of the law enforcement officers on the Humboldt County Narcotics Task Force trained and qualified to use the TruNarc device. Drefke was aware that Miller was one of the other officers on the task force trained and qualified to use the TruNarc device. Drefke explained that in his training, he learned that the TruNarc device was designed to be able to deliver lab quality test results in field applications. Drefke explained that the TruNarc device is a Raman spectroscope¹ that is capable of identifying molecules contained in a library of known samples after a laser is applied to an unknown sample. The TruNarc device is hand held and has a cone where a laser is emitted after the device is activated. The cone is placed over the sample prior to the laser being activated. The refraction from the laser applied to the sample is then automatically checked against a library of known substances. The device will report if the wavelengths refracted back from the sample match substances that have previously been documented in the device's known substances library. Common street drugs are contained in the known substances database. The device is regularly connected to a network for software updates that also update the known substances library but the device does not otherwise allow for much interaction or discretion on the part of the user. The sample that is tested is unaffected by the use of the TruNarc device. The TruNarc device

¹ Raman spectroscopy (/ˈrɑːmən/; named after Indian physicist Sir C. V. Raman) is a spectroscopic technique used to observe vibrational, rotational, and other low-frequency modes in a system. Raman spectroscopy is commonly used in chemistry to provide a structural fingerprint by which molecules can be identified. Raman spectroscopy was discovered by Sir C.V. Raman in 1928, for which he received the Nobel Prize in Physics in 1930. (http://en.wikipedia.org/wiki/Raman_spectroscopy)

has a screen that shows scan results and also stores the results so that more comprehensive reports can be printed to document any field testing performed. Drefke identified Exhibit D-23 as an example of a TruNarc Scan Report that would result from a test being conducted.

18. The four TruNarc Scan Reports received in this matter had the following results:

- TruNarc Scan Report 241 (Exhibit D-23) which corresponded with the suspected narcotics received by Scott on October 6, 2017 from Johnston showed that it contained cocaine hydrochloride.
- TruNarc Scan Reports 246 and 247 (Exhibits D-30 and D-24) which corresponded with the suspected narcotics received by Scott and Bernstein on November 30, 2017 from Browning showed that they both contained cocaine hydrochloride.
- TruNarc Scan Report 291 (Exhibit D-18 and D-17) which corresponded with the suspected narcotics received by Scott on January 25, 2018 from Browning showed that it contained cocaine hydrochloride.

During the investigation, the above substances were weighed prior to their testing. Each individual sample returned a weight of at least one gram.

19. S. Costanzo testified in this matter. He testified that he was unaware of narcotics activity taking place at the Licensed Premises and that he did not condone this behavior. Because of his age and extensive health issues, (Exhibit L-3) S. Costanzo was having his son, M. Costanzo handle more of the day to day operations. The Licensed Premises and Toby and Jacks were incorporated in January 2017 and at that time N. Costanzo and M. Costanzo were added as principals in the corporation. Employees were not allowed to drink or use drugs when they were on duty. All employees who were involved in the incidents that were investigated at the Licensed Premises were terminated if they did not previously resign. S. Costanzo has removed N. Costanzo from the corporation and is in the process of trying to have her removed from the license issued by the Department.

20. Former Arcata Police Chief Tom Chapman (Chapman) was called by the Respondents as a witness. He testified to his contacts with M. and S. Costanzo as being positive and that they were responsive to concerns. Chapman testified to his impression that the Licensed Premises and Toby and Jacks were not particular problems that stood out to him.

21. M. Costanzo testified that he managed the day to day of the Licensed Premises and Toby and Jacks. Drug use or sales have never been tolerated by the Respondent. He has participated in Department LEAD training and shares those materials with employees.

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(Exhibit L-5) M. Costanzo also encourages employees to participate in LEAD training when it is offered. The Licensed Premises maintains signage to remind patrons of applicable alcohol and drug laws, in particular, in relation to marijuana use. (Exhibit L-6) M. Costanzo testified to being completely blindsided by the allegations. Subsequent to the allegations in this matter and the related Toby and Jacks case, the Respondent had cameras installed at the Licensed Premises.

22. Brian Wilson (Wilson) was called by the Respondent. He is currently a police officer with the Eureka Police Department but previously served as a security officer and the head of security at the Licensed Premises and for Toby and Jacks between 2008 and 2016. He testified that the Licensed Premises had a policy of no tolerance of drug use or sales during his tenure. Persons were regularly kicked out of the Licensed Premises and Toby and Jack and not allowed back in if they were observed engaging in narcotics activity in either bar. He described seeing drug incidents "more than I could count" when asked about occurrences involving drug activity at either bar. Bartenders had the ability to ask the bouncers to remove people for drug activity. During his tenure, Wilson described having to apply Vaseline to the toilet seat covers in the bathroom to prevent people from using them to snort cocaine. Wilson regularly talked with M. Costanzo and S. Costanzo about security concerns during his tenure.

23. Arcata Police Department Officer Luke Scown (Scown) was called in rebuttal by the Department. Scown testified to having patrolled the Arcata Plaza from 2015-2017. The plaza is where both the Licensed Premises and Toby and Jacks are located. Scown testified to extensive narcotics activity occurring on the plaza and that the Licensed Premises and Toby and Jacks were a disproportionately large source of the calls for service as compared to other bars in the immediate area. In 2016 and 2017, approximately 25% of the calls to these locations referenced drug or narcotics activity. Scown himself has warned the Costanzos to keep certain people out of their locations. Scown did notice a slight downturn in calls for service when the Licensed Premises started hiring private security. Scown elevated his concerns regarding narcotics activity on the plaza to the chief of police level during his tenure in that assignment.

24. Karen Diemer, Arcata's City Manager (Diemer) also testified to her concerns about narcotics activity on the Arcata Plaza and her impression that the Licensed Premises and Toby and Jacks were significant contributors to the problem activity that occurred there. Diemer testified that the Licensed Premises and Toby and Jacks generated approximately 40% of calls for service on the plaza and that in a four year period ending in 2018 there were approximately 1300 calls for service to the Licensed Premises and Toby and Jacks. She testified there was a meeting with business owners on the north side of the plaza, including M. and S. Costanzo, in January 2018, where these concerns were generally

raised with the hope that solutions could be developed with the business owners like the Costanzos.

25. Except as set forth in this decision, all other allegations in the accusation and all other contentions of the parties lack merit.

CONCLUSIONS OF LAW

1. Article XX, section 22 of the California Constitution and section 24200(a) provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.

2. Business and Professions Code section 24200(b) provides that a licensee's violation, or causing or permitting of a violation, of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.

3. Business and Professions Code section 24200.5(a) provides that notwithstanding the provisions of Section 24200, the department shall revoke a license upon any of the following grounds:

(a) If a retail licensee has knowingly permitted the illegal sale, or negotiations for the sales, of controlled substances or dangerous drugs upon his or her licensed premises. Successive sales, or negotiations for sales, over any continuous period of time shall be deemed evidence of permission. As used in this section, "controlled substances" shall have the same meaning as is given that term in Article 1 (commencing with Section 11000) of Chapter 1 of Division 10 of the Health and Safety Code, and "dangerous drugs" shall have the same meaning as is given that term in Article 2 (commencing with Section 4015) of Chapter 9 of Division 2 of this code.

4. Health & Safety Code section 11350 (a) states that, except as otherwise provided in this division, every person who possesses (1) any controlled substance specified in subdivision (b), (c), (e), or paragraph (1) of subdivision (f) of Section 11054, specified in paragraph (14), (15), or (20) of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section 11055, or specified in subdivision (h) of Section 11056, or (2) any controlled substance classified in Schedule III, IV, or V which is a narcotic drug, unless upon the written prescription of a physician, dentist, podiatrist, or veterinarian licensed to practice in this state, shall be punished by imprisonment in a county jail for not more than one year, except that such person shall instead be punished pursuant to subdivision (h) of Section 1170 of the Penal Code if that person has one or

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more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 of the Penal Code or for an offense requiring registration pursuant to subdivision (c) of Section 290 of the Penal Code.

5. Health & Safety Code section 11351 states that except as otherwise provided in this division, every person who possesses for sale or purchases for purposes of sale (1) any controlled substance specified in subdivision (b), (c), or (e) of Section 11054, specified in paragraph (14), (15), or (20) of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section 11055, or specified in subdivision (h) of Section 11056, or (2) any controlled substance classified in Schedule III, IV, or V which is a narcotic drug, shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for two, three, or four years.

6. Health & Safety Code section 11352(a) states that, except as otherwise provided in this division, every person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport (1) any controlled substance specified in subdivision (b), (c), or (e), or paragraph (1) of subdivision (f) of Section 11054, specified in paragraph (14), (15), or (20) of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section 11055, or specified in subdivision (h) of Section 11056, or (2) any controlled substance classified in Schedule III, IV, or V which is a narcotic drug, unless upon the written prescription of a physician, dentist, podiatrist, or veterinarian licensed to practice in this state, shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for three, four, or five years.

7. With respect to counts 1-4, cause for suspension or revocation of the Respondent's license exists under Article XX, section 22 of the California State Constitution and sections 24200(a) and (b). These counts relate to Scott's October 6, 2017 encounter with Johnston and King at the Licensed Premises in the presence of Bastidas, the Respondent's agent or employee. The evidence established that Bastidas was already familiar with Johnston and King. Scott spoke with Johnston and King, in the immediate presence of Bastidas, about purchasing cocaine from them. The conversation was extended and it occurred out in the open while they were being served by Bastidas at the fixed bar. While Scott waited for Johnston and King to return with the cocaine, Scott spoke with Bastidas and she vouched for King and called him by a familiar name. Bastidas had a duty to not allow the possession or sale of controlled substances in the Licensed Premises. Under the circumstances of this case, when Johnston returned with the baggie for Scott, Bastidas was permitting him to possess cocaine within the Licensed Premises in violation of Health and Safety Code section 11350. The circumstances also conveyed to Bastidas that

he possessed it for the specific purpose of selling it to Scott in violation of Health and Safety Code section 11351. The sales transaction that then occurred was also permitted by Bastidas in violation of Health and Safety Code section 11352. As an agent or employee, her actions and knowledge, under the circumstances of this case, are imputed to the Respondent and establish a violation of Business and Professions Code section 24200.5(a). Even though this was the first sales incident documented by Scott during her undercover investigation, the overall evidence established that a pervasive drug culture had already established itself at the Licensed Premises prior to October 6, 2017. (Findings of Fact ¶¶ 2-24)

8. With respect to counts 5-9, cause for suspension or revocation of the Respondent's license exists under Article XX, section 22 of the California State Constitution and sections 24200(a) and (b). These counts relate to the November 30, 2017 encounter with Browning at the Licensed Premises where Scott and Bernstein negotiated the purchase of cocaine from Browning in the presence of Bastidas and actually received baggies of the controlled substance in her presence in exchange for money. The evidence established that both Bastidas and S. Costanzo were already familiar with Browning. S. Costanzo had previously assisted Scott in purchasing narcotics from Browning at Toby and Jacks. Browning was on a first name basis with Bastidas. Scott and Bernstein spoke with Browning, in the immediate presence of Bastidas, about buying cocaine from him. The conversation was extended and it occurred out in the open while they were being served by Bastidas and another employee, Trejo, at the fixed bar. Bastidas had a duty to not allow the possession or sale of controlled substances in the Licensed Premises. Under the circumstances of this case, when Browning offered the baggies to Scott and Bernstein, Bastidas was permitting him to possess cocaine within the Licensed Premises in violation of Health and Safety Code section 11350. The circumstances also conveyed to Bastidas that Browning possessed the baggies for the specific purpose of selling them to Scott and Bernstein in violation of Health and Safety Code section 11351. The two sales transactions that then occurred at the fixed bar in the Licensed Premises were also permitted by Bastidas in violation of Health and Safety Code section 11352. As an agent or employee, her actions and knowledge, under the circumstances of this case, are imputed to the Respondent and establish a violation of Business and Professions Code section 24200.5(a). These were the second and third sales incidents documented by Scott during her undercover investigation in addition to the overall evidence establishing a pervasive drug culture that had already established itself at the Licensed Premises even prior to the first documented sale on October 6, 2017. (Findings of Fact ¶¶ 2-24)

9. With respect to counts 10-13, cause for suspension or revocation of the Respondent's license exists under Article XX, section 22 of the California State Constitution and sections 24200(a) and (b). These counts relate to the January 25, 2018 encounter with

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Browning at the Licensed Premises where Scott negotiated the purchase of cocaine from Browning in the presence of Bastidas and actually received a baggie of the controlled substance in the Licensed Premises in exchange for money. The evidence established that Bastidas was already familiar with Browning and that he was actively engaged in the sale of controlled substances at the Licensed Premises on prior occasions. Scott spoke with Browning about buying cocaine from him under circumstances where Bastidas would be aware of his presence and what he was doing. Browning invited Scott over to Bastidas' residence to "party" later in the evening which further established that Bastidas was more than passingly familiar with Browning and his actions. This also established that Bastidas knew Browning was in the Licensed Premises that evening even though it was a busy night. Bastidas had a duty to not allow the possession or sale of controlled substances in the Licensed Premises. Under the circumstances of this case, when Browning possessed the baggie to sell to Scott, Bastidas was permitting him to possess cocaine within the Licensed Premises in violation of Health and Safety Code section 11350. The circumstances also conveyed to Bastidas that Browning possessed the baggie for the specific purpose of selling it to Scott in violation of Health and Safety Code section 11351. The actual sales transaction that then occurred in the middle of the Licensed Premises was also permitted by Bastidas in violation of Health and Safety Code section 11352. As an agent or employee, her actions and knowledge, under the circumstances of this case, are imputed to the Respondent and establish a violation of Business and Professions Code section 24200.5(a). This was now the fourth sales incident documented by Scott during her undercover investigation. This was in addition to the overall evidence establishing a pervasive drug culture that had already established itself at the Licensed Premises even prior to October 6, 2017. (Findings of Fact ¶¶ 2-24)

10. The Respondent has challenged the chain of custody and sufficiency of the evidence regarding the suspected narcotics seized in this investigation. Though Miller did not testify in this matter, other testimony and documents were received that established that the substances that were tested were the baggies received by Scott and Bernstein during their investigations. Further, the TruNarc device used by Miller to test the four baggies of suspected cocaine was established through the testimony of Drefke as being a sufficiently reliable source of testing, in combination with the overall evidence, to establish that the baggies contained cocaine hydrochloride by a preponderance of evidence. Drefke was trained and qualified in the use of the TruNarc device and he also testified that Miller was trained and qualified to use the TruNarc device. The device used Raman spectroscopy to test substances in the field against an existing library of controlled substance profiles. While the application to controlled substance testing in the field appeared novel, Raman spectroscopy itself is not new and novel and has been an applied testing procedure for many decades. Drefke's testimony credibly established that the TruNarc device was designed to be easy to use and that the device did not allow for much discretion or

interaction. Scott testified, based on her training and experience, that the contents of the baggies were consistent with cocaine. The sellers, in each instance, represented that the contents of the baggies were cocaine. Miller tested the baggies and in each instance, the TruNarc device concluded that the baggies contained cocaine hydrochloride. Miller knew how to use the device, and Drefke credibly testified to the device's reliability and efficacy. While it would have been a far better practice for the Department to have the substances conclusively tested, the question before this court is whether the Department has established, by a preponderance of the evidence, that the baggies contained cocaine. It has. (Findings of Fact ¶¶ 2-24)

11. In this matter, Respondent has argued that the Department's reliance upon Business and Professions Code section 24200.5(a) is misplaced because there was insufficient evidence that the Respondent knew, or should have known of the drug transactions at issue. *McFaddin San Diego 1130 Inc. v. Stroh* (1989) 208 Cal.App.3d 1384 is instructive regarding the issue of whether constructive knowledge can be imputed to a license holder. In *McFaddin*, the Court of Appeal granted the petition of the license holder and reversed the order of the Board and the decision of the Department, based on facts found by the Department that the licensee did not know of the drug transactions at issue, and further had taken extensive preventive measures against them. It held that such evidence did not support a determination that the licensee "permitted" the illicit activity.

12. The Respondent's circumstances are very different than the license holder in *McFaddin* and Business and Professions Code section 24200.5(a) is directly applicable to the circumstances in this case. A pattern of illegal sales of controlled substances, to wit, cocaine, was established. Imputed knowledge of this pattern of drug sales was established by the four instances of sales that occurred at the Licensed Premises over three separate days stretching from October 2017 through January 2018. Multiple employees of the Licensed Premises, including one of the principals, N. Costanzo, had relationships with and were aware of the drug activities being perpetrated by the sellers inside of the Licensed Premises over the course of several months. (Findings of Fact ¶¶ 2-24)

13. Beyond the sales in this case, the Respondent was on more broad notice of an epidemic of drug activity taking place at the Licensed Premises and in the immediate area surrounding the Licensed Premises and at its adjacent business, Toby and Jacks. There were extensive and disproportionate calls for service to both of the Respondent's establishments during the four years leading up to the January 25, 2018 date where Scott made her last purchase. Many of these calls involved complaints of drug activity and the Respondent was aware of this. Local law enforcement and the city manager had directly communicated with the Respondent regarding its concerns in this area. The Respondent's own security manager between 2008 and 2016 testified to the epidemic of drug activity in

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the Licensed Premises and taking drastic measures like smearing Vaseline on toilet seat covers to prevent people from snorting cocaine off of them. (Findings of Fact ¶¶ 2-24)

14. Despite this mountain of evidence that the Licensed Premises had grown into a problem location for narcotics activity, there was lax oversight by the Respondent regarding the actions of employees and agents of the Licensed Premises. The Respondent did not install cameras until after this case came to their attention through the filing of an accusation. The Respondent did not have written policies compelling employees to enforce the rules that the Respondent suggested were in place at the Licensed Premises. The Respondent's own employees and at least one principal in the corporation actively interacted with persons who were actively selling narcotics in the Licensed Premises. All four sales occurred, either in whole or in part, within the Licensed Premises. Scott had little difficulty in openly arranging the transactions that occurred between October 2017 and January 2018. (Findings of Fact ¶¶ 2-24)

M. Costanzo and S. Costanzo have both asserted that they were unaware of the circumstances that had taken hold at the Licensed Premises. This testimony is found not to be credible given the above. While there is no evidence that the Respondent was actively engaged in the sale of narcotics at the Licensed Premises, it is clear that the Respondent knowingly permitted the conduct that was alleged in this accusation and conduct beyond the allegations involving illicit narcotic activity.

PENALTY

The Department requested that the Respondent's license be revoked given the severity of the violations and the statutory requirement set forth in section 24200.5. The Respondent primarily argued that the evidence was insufficient to sustain the accusations. If the narcotics related counts were sustained, the Respondent argued for the court to consider the mitigating circumstances of the Respondent's efforts to avoid the conduct alleged.

Section 24200.5 provides that "the [D]epartment shall revoke a license" for any violation thereof. The Department has consistently construed this section as requiring some form of revocation although not necessarily outright revocation.² Outright revocation³ or stayed revocation⁴ can be appropriate depending upon the circumstances.

In the present case, outright revocation is warranted. The Respondent had an affirmative obligation to ensure that the Licensed Premises was operated in full compliance with the law. The Respondent did not. The illegal activity at issue here—repeated drug sale negotiations resulting in repeated sales of cocaine to undercover officers with the knowledge and permission of employees clearly warrants revocation given the lax approach to management of the Licensed Premises evinced in this case. There is no indication that the Respondent took the appropriate steps to prevent such activity even after being put on repeated notice that there were severe problems with drug activity in the Licensed Premises.

The penalty recommended herein complies with rule 144.⁵

² Cal. Code of Regs., tit. 4, §144.

³ See, e.g., *Greenblatt v. Martin*, 177 Cal. App. 2d 738, 2 Cal. Rptr. 508 (1960) (outright revocation imposed for violations of section 24200.5).

⁴ See, e.g., *Harris v. Alcoholic Beverage Control Appeals Board*, 244 Cal. App. 2d 468, 36 Cal. Rptr. 697 (1964) (revocation stayed coupled with suspension imposed for violations of section 24200.5).

⁵ All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

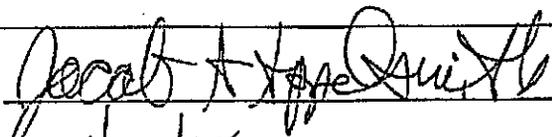
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ORDER

The Respondent's on-sale general public premises license is hereby revoked.

Dated: November 2, 2018


Alberto Roldan
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: 
Date: <u>11/26/18</u>