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 Toby & Jacks 764 9th Street Arcata, CA 95521-6206 Respondent. On-Sale General Public Premises License	**File No.: 48-582810** **Reg. No.: 18086874** **AB-9782**

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 further asserts that, prior to incorporation, Salvatore Costanzo had in excess of 12 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. 20, ¶ 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.

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[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.

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 457677) in evaluating the proper discipline with respect to a different licensee (i.e., Costanzos Genco Olive Oil Company, Inc., holding license number 582810). Since the current license had been active only for 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. 20, ¶ 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, Sidelines Sports Bar. (See Decision, p. 19, ¶ 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, p11, ¶ 26.)

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

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 20, ¶ 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 the 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.

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[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."

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.