

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

**AB-9782**

File: 48-582810; Reg: 18086874

COSTANZOS GENCO OLIVE OIL COMPANY, INC.,  
dba Toby & Jacks  
764 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: August 16, 2019  
Sacramento, CA

**ISSUED AUGUST 26, 2019**

*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**

Costanzos Genco Olive Oil Company, Inc., doing business as Toby & Jacks (appellant), appeals from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> revoking its license because appellant's employees permitted patrons to possess controlled substances in the licensed premises, and permitted the sale, or negotiation

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<sup>1</sup>The decision of the Department, dated November 27, 2018, is set forth in the appendix.

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 Health and Safety Code sections 11350, 11351, and 11352.

#### FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on August 8, 2017. There is no record of departmental discipline against the current license.

On May 2, 2018, the Department instituted a 17-count accusation against appellant, charging that on three separate occasions – October 19, 2017, November 9, 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.

At the administrative hearing held from September 25, 2018 to September 28, 2018, documentary evidence was received, and testimony concerning the violation charged was presented by Department Agents Samantha Scott and Chandler Baird; Humboldt County Drug Task Force Investigator Alan Aubuchon; California Highway Patrol Officer Darren Drefke; Eureka Police Department Officer Brian Wilson; Arcata Police Department Officer Luke Scown; Arcata City Manager Karin Diemer; former Arcata Police officer Vincent O'Conner; Humboldt County Supervisor Rex Bohn; Eureka city employee and former Arcata Police officer John Drake Goodale; bartenders Jesus Trejo and Ashlee Marie Parker; appellant's CEO/President Salvatore Costanzo; former Arcata Police Chief Tom Chapman; and appellant's Vice-President and bar manager Michael Costanzo.

Testimony established that Agent Scott went to the licensed premises in an undercover capacity on September 14, 2017. Agent Scott sat at the fixed bar on a barstool and ordered an alcoholic beverage. Agent Scott began speaking with one of the bartenders, Michael Cahill.

After speaking with Cahill, Agent Scott went to the pool table area of the licensed premises and interacted with multiple patrons before heading out to the back patio. In the back patio, Agent Scott observed patrons smoking what appeared to be marijuana and saw others pouring what appeared to be distilled spirits into water bottles. Agent Scott also observed what appeared to be multiple hand-to-hand narcotics transactions.

On October 6, 2017, Agent Scott returned to the licensed premises, again in an undercover capacity. Appellant's bartender, Cahill, took Agent Scott's drink order from the fixed bar. While Cahill continued to work at the fixed bar, Agent Scott struck up a conversation with a patron identified as "Sandy." Sandy told Agent Scott that he cut and sold marijuana. Agent Scott asked Sandy if he sold "white," which is a slang term for cocaine. Sandy appeared to understand Agent Scott's comment and handed his phone to her so they could exchange phone numbers. Agent Scott then went to an area over by the pool tables to talk with other patrons.

At the pool tables, one individual told Agent Scott about his 900-acre marijuana grow. Agent Scott asked him if he sold "white," and the individual excitedly replied, "That's my game!" The individual showed Agent Scott a picture on his phone of a white, powdery substance.

Agent Scott began to speak with another individual named Aster Castropaez. She asked Castropaez if he would be able to obtain cocaine for her. Castropaez apologized, stating he did not have any cocaine on him.

Agent Scott then went outside the licensed premises and stood near the front door, where she saw Cahill smoking a cigarette. Nearby, another individual, Jeff Shields, smoked a marijuana pipe. Shields offered the pipe to Agent Scott, but she declined. Instead, she asked Shields if he was able to get cocaine. Shields tried to convince Agent Scott to walk around the corner with him; however, Agent Scott declined and went back inside the licensed premises.

Back inside, Agent Scott spoke to Castropaez again, who told Agent Scott that he could likely get someone to sell her a "\$40," which Agent Scott understood to be an amount of cocaine for \$40. Castropaez then exited the licensed premises while Agent Scott walked over to "Sideways," appellant's other business which was two doors over. On the way, Agent Scott ran into Shields and asked him if he was able to obtain cocaine. Shields replied, "not yet."

Counts 1-7:

Agent Scott returned to the licensed premises on October 19, 2017 and sat in the fixed bar area. She ordered a drink from Cahill. There were three men seated next to her. One of the men introduced himself as "Corona" and invited Agent Scott to do a shot with him. Agent Scott declined, stating she needed a "line" of cocaine instead. Corona initially seemed offended by Agent Scott's comment but later invited Agent Scott to his home to do a line of cocaine for free.

Agent Scott remained at the fixed bar and observed Joshua Michael Cuppett come into the fixed bar area and begin bartending duties. Cuppett checked with Scott to see if she needed a drink. Scott responded that she was tired and needed "white." Cuppett remarked that Corona was someone she could go to for cocaine and if he came back he could provide it. Cuppett said he would vouch for Agent Scott. Cuppett also told Agent Scott that he would look for someone who might be willing to sell to her. Subsequently, Agent Scott saw Cuppett talk with a person later identified as Scott Clinton Gamar who went by the nickname, "Scoot."

Agent Scott began to talk with Scoot at the fixed bar. She told Scoot that she was interested in buying cocaine. Scoot responded that he "had some" and gave Agent Scott a bindle. Agent Scott asked Scoot how much he would charge her for the bindle. Scoot told her it was free, but that she had to use it in the bathroom. Agent Scott took the bindle to the bathroom where she photographed it. (Ex. D-8.) She then turned the bindle over to one of the task force officers for booking. The bindle was later weighed and tested, which revealed the substance to be .4 grams of cocaine hydrochloride. Agent Scott returned to where Scoot was seated and Scoot invited her to go with him to another bar. When Agent Scott declined, Scoot left the licensed premises.

Agent Scott then told Cuppett about the transaction and asked Cuppett if he knew Scoot. Cuppett said he did not know Scoot. Cuppett also told Agent Scott that Corona was not answering his texts and that he was not coming back.

Scoot returned to the fixed bar a short time later, and Agent Scott told him that his cocaine was good. Agent Scott asked Scoot where he got it from and Scoot described

the person to Agent Scott. Agent Scott saw someone at the licensed premises who matched Scoot's description and approached him. The individual identified himself as "Haven," and told Agent Scott that he sold cocaine and "Molly," which is slang for MDA amphetamine, a controlled substance. Haven told Agent Scott that he was waiting for cocaine but that he had Molly. Haven offered to have someone bring cocaine for Agent Scott and directed her to walk out of the licensed premises to a taco truck near the back patio area. Once outside, Scoot joined them and confirmed that Haven was the person he got the "blue and white" from. Scoot then gave Agent Scott a blue pill.

Agent Scott then asked Haven if she could buy Molly. Haven took out a bag with a powdery substance and offered her a taste. Agent Scott declined, stating she was not going to use it there. Instead, Agent Scott paid Haven \$40 and secured the baggie. The transaction took place approximately five feet from one of the security guards for the licensed premises.

After the sale, Agent Scott re-entered the licensed premises and spoke with Cuppett. She told him about the transaction with Haven and asked him if Haven could be trusted. Cuppett pointed to some people in the licensed premises and told Agent Scott to ask them. Cuppett also remarked that the same people might be able to get Agent Scott some "white." Agent Scott approached the people identified by Cuppett but was told they could not obtain cocaine for her. Agent Scott then exited the licensed premises turned the blue pill and baggie over to a task force agent for booking and testing. Testing confirmed that both the pill and the substance in the baggie from Haven were MDA amphetamine.

Counts 8-10:

Agent Scott returned to the licensed premises on November 9, 2017, again in an undercover capacity. As she walked in, Cahill walked in behind her, and the two greeted each other. Another Department agent, Agent Bernstein, was already at the fixed bar when Agent Scott entered. Agents Scott and Bernstein introduced themselves as if they had just met. They struck up a conversation about cocaine and hallucinogenic mushrooms.

As the two chatted, Cuppett arrived to tend the bar and greeted Agent Scott with a hug. Agents Scott and Bernstein continued their conversation while Cuppett worked nearby. A person named Crawford came up to the fixed bar next to Agents Scott and Bernstein. Agent Scott spoke with Crawford and brought up the subject of buying cocaine. Crawford told Agent Scott that he could get a gram and began to text on his phone. Agent Scott saw the name "Corona" on Crawford's cell phone. When Agent Scott mentioned Corona's name, Crawford stated that he was his other "go to."

Agent Scott later asked Cuppett if he knew Crawford. Cuppett admitted he knew Crawford and referred to him as "Anthony." Agent Scott asked Cuppett if Crawford could be trusted. Cuppett said he trusted Crawford but it depends on his "source." Agent Bernstein then left with Crawford to meet Crawford's "source," while Agent Scott remained at the bar.

At this time, Agent Scott observed Nicole Costanzo arrive. Agent Scott met Nicole<sup>2</sup> at Sidelines the previous day. Nicole is an officer and the Secretary for

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<sup>2</sup> Since appellant's shareholders have the same last name, first names will be used to avoid confusion.

appellant and holds a 15% ownership share of the corporation. Nicole hugged Agent Scott and asked her about her job hunt (the subject of a previous conversation). Agent Scott told Nicole that she wanted to “party” and asked Nicole if her guy was around. Nicole nodded, indicating that he was, and walked with Agent Scott to the fixed bar. At the bar, Nicole introduced Agent Scott to Elijah Calvin Browning and told Browning that Agent Scott was looking for cocaine. Browning responded that he could get Agent Scott an “8-Ball” which is slang for approximately 3.5 grams.

Agent Scott asked Nicole if Browning’s product was good, and Nicole confirmed that it was. Agent Scott exchanged numbers with Browning, who left and returned a short time later. Browning met Agent Scott inside the entrance of the licensed premises and gave Agent Scott a clear plastic baggie containing a powdery white substance that appeared to be cocaine. Agent Scott gave Browning \$100 for the substance, and then departed to photograph the baggie and book it into evidence. The substance inside the baggie was later tested and determined to be cocaine hydrochloride.

Counts 11-17:

On January 25, 2018, Agent Scott returned to the licensed premises and sat at the fixed bar. She saw both Cuppett and Cahill working as bartenders. Cuppett came over and spoke with her. Agent Scott asked if a male sitting nearby was Corona. Cuppett told her that the man was not Corona, but asked Agent Scott if she was looking for the “usual.” Cuppett told Agent Scott that he would find cocaine for her, and then left to speak with someone at the end of the bar. Cuppett returned a short time later and stated that the person did not have any. Later, Cuppett told Agent Scott that

someone was on their way, and an unidentified woman stated someone would be there in 10 minutes. Cuppett nodded after this remark.

Agent Scott was then approached Shields, who she met on October 6, 2017. Shields told Agent Scott that he heard she was looking for some product and invited her outside to his van. Agent Scott declined this offer and remained at the fixed bar. Cuppett later came over and asked if the transaction with Shields worked out. Agent Scott told Cuppett that Shields gave her the creeps. Cuppett asked for Scott's number and offered to do the transaction together after he got off work. However, Shields returned and apologized, agreeing to do the deal with Agent Scott behind the licensed premises near the back-patio area. A woman, Jeanette DeWitt, joined the conversation and agreed to accompany Agent Scott.

DeWitt and Agent Scott met Shields out back and Shields gave Agent Scott a white piece of paper that was folded up. Agent Scott paid Shields \$100 for the bundle and went to the restroom inside the licensed premises to secure it. After, DeWitt and Agent Scott expressed concerns over the quality of Shield's product and Agent Scott told DeWitt that she wanted to buy more coke.

A short time later, a woman, later identified as Jasmine Cerise Oakeshott, joined Agent Scott and offered to buy her a drink. Cuppett came over to Oakeshott, hugged her, and asked Oakeshott if Agent Scott was "good to go." Oakeshott then put her arm around Agent Scott's shoulder and asked her what she wanted. Agent Scott replied, "just some coke." Oakeshott said she had a guy coming with some in ten minutes.

Oakeshott received a text message and left momentarily. She returned with two females and walked towards the bathroom. Agent Scott followed Oakeshott and went

into the bathroom. She could hear Oakeshott giving the two women instructions. Then, Oakeshott put crystals of what appeared to be MDMA methamphetamine in Agent Scott's hands. Agent Scott said that she wanted to use it with her roommate later. One of the women took cellophane from a cigarette package and gave it to Agent Scott to use as a baggie for the crystals. Agent Scott put them in the cellophane and left the licensed premises. The crystals, along with the substance obtained from Shields, were later photographed and tested. The substance from Shields was determined to be .7 grams of cocaine hydrochloride. The crystals from Oakeshott were determined to be .1 grams of MDMA methamphetamine.

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 raising the following issues: (1) the decision is not supported by substantial evidence, and the Department failed to meet its burden of proof, (2) the Department erred when it denied the motion to continue the administrative hearing, (3) the Department failed to provide notice and discovery required by law when the ALJ allowed the amendment of the accusation, and (4) the penalty is excessive.

## DISCUSSION

## I

## ISSUE CONCERNING SUBSTANTIAL EVIDENCE AND BURDEN OF PROOF

Appellant contends the decision is not supported by substantial evidence, and that the Department failed to offer sufficient evidence to meet its burden of proof. (AOB at pp. 10-11, 16.)

This Board is bound by the factual findings in the Department's decision so long as those findings are supported by substantial evidence. The standard of review is as follows:

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citations.] The function of an appellate board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

*(Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)*

When findings are attacked as being unsupported by the evidence, the power of this Board begins and ends with an inquiry as to whether there is substantial evidence, contradicted or uncontradicted, which will support the findings. When two or more competing inferences of equal persuasion can be reasonably deduced from the facts, the Board is without power to substitute its deductions for those of the Department—all conflicts in the evidence must be resolved in favor of the Department's decision. (*Kirby*

*v. Alcoholic Bev. Control Appeals Bd.* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815]; *Harris v. Alcoholic Beverage Control Appeals Board* (1963) 212 Cal.App.2d 106, 112 [28 Cal.Rptr.74].)

Therefore, the issue of substantial evidence, when raised by an appellant, leads to an examination by the Appeals Board to determine, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. The Appeals Board cannot disregard or overturn a finding of fact by the Department merely because a contrary finding would be equally or more reasonable. (Cal. Const. art. XX, § 22; Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113]; *Harris, supra*, at 114.)

Appellant argues that the Department did not prove the violations — i.e., that the decision is not supported by substantial evidence and that the Department failed to meet its burden of proof. (AOB at pp. 10-11, 16.) However, these allegations are simply broad assertions — unsupported by specific citations to the record.

To demonstrate error, appellant must present meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error. Where a point is merely asserted without any argument or authority for the proposition, it is deemed to be without foundation and requires no discussion by a reviewing court. (*Atchley v. City of Fresno* (1984) 151 Cal.App.3d 635, 647 [199 Cal.Rptr. 72].) Appellant has provided no support for its argument that the accusation is not supported by substantial evidence. However, as discussed below, a review of

the record shows there is sufficient evidence to support the ALJ's findings regarding counts 1-17.

Section 24200.5(a) provides that the Department "shall" revoke a license:

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.*

(Emphasis added.)

In *Endo v. State Bd. of Equalization*, the court of appeals interpreted the latter sentence of section 24200.5(a) as a "statutory presumption that [successive] sales over any continuous period of time shall be deemed evidence of such permission" and, therefore, furnished substantial evidence "that the licensee did 'knowingly permit' the illegal sale of narcotics upon her licensed premises." (*Endo v. State Bd. of Equalization* (1956) 143 Cal.App.2d 395, 399 [300 P.2d 366], internal quotations omitted.) In a footnote, it emphasized that section 25200.5(a) "is in form at least a *legislative* mandate," one that the Board may not even have authority to review under the California constitution. (*Id.* at p. 399, fn., emphasis in original.) Ultimately, the court held that a statutory presumption — as opposed to an inference — cannot be "dispelled by evidence produced by the opposite party." (*Id.* at p. 400, citing *Engstrom v. Auburn Auto. Sales Corp.* (1938) 11 Cal.2d 64, 70 [77 P.2d 1059].)

In *Kirchhubel v. Munro*, on the other hand, the court did allow that "[t]he presumption is not made conclusive but merely evidence of permission which may be overcome by a contrary showing." (*Kirchhubel v. Munro* (1957) 149 Cal.App.2d 243, 249 [308 P.2d 432].) Though the petitioners in that case presented evidence which created a conflict with the presumption, "[t]he resolving of that conflict was a matter for

the Department of Alcoholic Beverage Control, whose action thereon cannot be upset . . . if there is substantial evidence to support it.” (*Ibid.*, citing *Covert v. State Bd. of Equalization* (1946) 29 Cal.2d 125 [173 P.2d 545].)

The *Kirchhubel* court also noted the substantial policy justifications for such a presumption:

Having in mind that the power to regulate the liquor business is a very broad one, there is a natural and rational evidentiary relationship between a showing that there have been successive sales of narcotics over a continuous period on licensed premises and the very natural conclusion that the sales could not have continued without the implied or express consent of the licensee. Moreover, a licensee holds his liquor license with the knowledge that he must effectively police his premises against successive sales of narcotics thereon . . . . Such a situation cannot occur if the licensee is vigilant in protecting his license and is at least as interested in protecting the public welfare and morals as he is in making money.

(*Ibid.*)

In sum, the legislature has provided, in the second sentence of section 24200.5(a), a statutory presumption that successive sales of controlled substances at a licensed premise establishes permission by the licensee. Appellant presented little evidence to counter this presumption. This case is precisely the sort of circumstance the presumption of permission in section 24200.5(a) was intended to remedy — a licensee who takes minimal preventative measures and then defends against repeated narcotics sales on its premises by pleading it was not aware. The Board must therefore conclude that ALJ correctly found permission by the licensee, based on the substantial evidence of successive sales of controlled substances at the licensed premises.

As the court of appeals stated in *McFaddin San Diego 1130, Inc. v. Stroh*,

It is not necessary for a licensee to knowingly allow its premises to be used in a prohibited manner in order to be found to have permitted its use. [Citation.] Further, the word "permit" implies no affirmative act. It involves no intent. It is mere passivity, *abstaining from preventative action*. [Citations.]

(*McFaddin San Diego 1130, Inc. v. Stroh* (1989) 208 Cal.App.3d 1384, 1389-1390 [257 Cal.Rptr. 8], internal quotations omitted, emphasis in original.)

The policy reasons for this general rule are evident: otherwise, a licensee could escape discipline simply by absenting himself from the premises and maintaining a practiced state of ignorance. In a case involving after-hours sales, the court of appeals observed:

The licensee, if he elects to operate his business through employees must be responsible to the licensing authority for their conduct in the exercise of his license, else we would have the absurd result that liquor could be sold by employees at forbidden hours in licensed premises and the licensee would be immune to disciplinary action by the board. Such a result cannot have been contemplated by the Legislature.

(*Mantzoros v. State Bd. Of Equalization* (1948) 87 Cal.App.2d 140, 144 [196 P.2d 657].)

It would defy reason and the mandate of the state constitution to interpret the law in a manner that rewards licensees for distancing themselves from the operation of their premises.

In *Laube v. Stroh*, the court noted: "A licensee has a general, affirmative duty to maintain a lawful establishment. Presumably this duty imposes upon the licensee the obligation to be diligent in anticipation of reasonably possible unlawful activity, and to instruct employees accordingly." (*Laube v. Stroh* (1992) 2 Cal.App.4th 364 [3 Cal.Rptr.2d 779].) The court expressly held that "a licensee must have knowledge, either actual or constructive, before he or she can be found to have 'permitted'

unacceptable conduct." (*Ibid.*) Notably, this holding does not demand *actual* knowledge on the part of appellant's corporate officers — it explicitly allows for *constructive* knowledge.

It is well-settled in alcoholic beverage case law that an employee's on-premises knowledge and misconduct is imputed to the licensee/employer. (See *Yu v. Alcoholic Bev. Control Appeals Bd.* (1992) 3 Cal.App.4th 286, 295 [4 Cal.Rptr.2d 280]; *Kirby v. Alcoholic Bev. Control Appeals Bd.* (1973) 33 Cal.App.3d 732, 737 [109 Cal.Rptr. 291].) Indeed, earlier in *Laube*, the court observed that the factual discussion not subject to review on appeal included "the element of the licensee's knowledge of illegal and improper activity on his or her premises; this knowledge may be either actual knowledge or *constructive knowledge imputed to the licensee from the knowledge of his or her employees.*" (*Id.* at p. 367, citing *Fromberg v. Dept. of Alcoholic Bev. Control* (1959) 169 Cal.App.2d 230, 233-234 [337 P.2d 123] and *Endo, supra*, 143 Cal.App.2d at pp. 401-402].)

In the instant case, the Board believes the accusation is supported by substantial evidence. Agent Scott testified extensively regarding successive sales of controlled substances at the licensed premises over an approximate four-month span. According to Agent Scott, this was done in front of, and with the explicit knowledge and assistance of, appellant's employees and/or corporate shareholders. The knowledge and on-premises misconduct of appellant's employees is, therefore, imputed to the appellant and constitutes substantial evidence to support all 17 counts of the accusation.

## II

## ISSUE CONCERNING MOTION TO CONTINUE

Appellant contends the Department erred when it denied appellant's motion to continue the administrative hearing until after potential criminal charges against appellant's intended witnesses could be resolved. It maintains it was denied due process and an opportunity to present a defense as a result of being deprived of the testimony of these witnesses. (AOB at pp. 6-10; 12-16.)

Pursuant to Government Code section 11524, the ALJ may grant a request for continuance for good cause. The party requesting a continuance must show that good cause exists for granting the request. There is no absolute right to a continuance; one is granted or denied at the discretion of the ALJ, and a refusal to grant a continuance will not be disturbed on appeal unless it is shown to be an abuse of discretion. (*Cooper v. Board of Medical Examiners* (1975) 49 Cal.App.3d 931, 944 [123 Cal.Rptr. 563]; *Savoy Club v. Board of Supervisors* (1970) 12 Cal.App.3d 1034, 1038 [91 Cal.Rptr. 198]; *Givens v. Department of Alcoholic Beverage Control* (1959) 176 Cal.App.2d 529, 532 [1 Cal.Rptr. 446].)

The "power to determine when a continuance should be granted is within the discretion of the court, and there is no right to a continuance as a matter of law. [Citation.]" (*Mahoney v. Southland Mental Health Associates Medical Group* (1990) 223 Cal.App.3d 167, 170 [272 Cal.Rptr. 602].) One court offered the following guidance:

In exercising the power to grant continuances in an administrative proceeding, an administrative law judge must be guided by the same principles applicable to continuances generally in adjudicative settings: continuances should be granted sparingly, nay grudgingly, and then only on a proper and adequate showing of good cause. In general, a continuance for a short and certain time is less objectionable than a

continuance for a long and uncertain time, and there must be a substantial showing of necessity to support a continuance into the indefinite future. But the factors that influence the granting or denying of a continuance in any particular case are so varied that the judge must necessarily exercise a broad discretion. Since it is impossible to foresee or predict all of the vicissitudes that may occur in the course of a contested proceeding, the determination of a request for a continuance must be based upon the facts and circumstances of the case as they exist at the time of the determination.

(*Arnett v. Office of Admin. Hearings* (1996) 49 Cal.App4th 332 [56 Cal.Rptr.2d 774].)

In the instant case, appellant maintains that, “[b]y refusing to stay the Hearing until the criminal matters were resolved, the Department deprived [appellant] a full and fair opportunity to defend itself.” (AOB, at p. 15.)

While the Board sympathizes with appellant’s dilemma — namely, that its employees did not wish to incriminate themselves prior to their criminal trials, and therefore asserted their fifth amendment rights — this does not constitute good cause for a continuance. An administrative hearing is not automatically continued or abated when a criminal action involving the same transaction is pending against the same party. (*Savoy Club v. Board of Supervisors* (1970) 12 Cal.App.3d 1034, 1037, [91 Cal.Rptr. 198].) Specifically, when an administrative case is heard prior to a trial or completion of criminal charges arising from the same occurrence, this has been found not to infringe on the constitutional rights of the accused. (*Id.* at p. 1038.) The Board sees no error.

## III

## ISSUE CONCERNING DISCOVERY

Appellant contends the ALJ erred in admitting evidence that was not timely produced by the Department. (AOB, at pp. 17-18.)

Discovery in administrative proceedings is governed by Government Code sections 11507.5 through 11507.7, which are part of the Administrative Procedure Act (APA). These sections "provide the exclusive right to and method of discovery" for such proceedings. (Gov. Code, § 11507.5.) Time constraints are placed on requests for discovery, and discoverable items are limited to those enumerated in the statute. (*Id.*, § 11507.6.)

Here, appellant argues that the Department's late production "precluded [appellant] the opportunity to defend itself at trial." (AOB, at p. 17.) However, the burden is on the party seeking reversal of an administrative agency's decision to affirmatively show that the alleged error was prejudicial, i.e., that it is reasonably probable he or she would have received a more favorable result at trial had the error not occurred. (*Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296, 308 [140 Cal.Rptr.3d 459].)

In regard to the manner discovery was propounded, the Board agrees with the Department that appellant has not demonstrated how it was prejudiced by the Department's purported gamesmanship. Appellant has not articulated how it was precluded from defending itself at trial, and more importantly, how the result would have been more favorable. Without this showing, appellant cannot prevail.

## IV

## ISSUE CONCERNING PENALTY

Appellant contends the penalty is excessive. (AOB, at p. 19.)

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].) If the penalty imposed is reasonable, the Board must uphold it even if another penalty would be equally, or even more, reasonable. "If 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].)

Rule 144 provides that "[d]eviation from [the Penalty Guidelines] is appropriate where the Department *in its sole discretion* determines that the facts of the particular case warrant such deviation — such as where facts in aggravation or mitigation exist." (Cal. Code Regs., tit. 4, § 144, emphasis added.)

Moreover, the Penalty Policy Guidelines further address the discretion necessarily involved in an ALJ's recognition of aggravating or mitigating evidence:

**Penalty Policy Guidelines:**

The California Constitution authorizes the Department, in its discretion[,] to suspend or revoke any license to sell alcoholic beverages if it shall determine for good cause that the continuance of such license would be contrary to the public welfare or morals. The Department may use a range of progressive and proportional penalties. This range will typically extend from Letters of Warning to Revocation. These guidelines contain

a schedule of penalties that the Department usually imposes for the first offense of the law listed (except as otherwise indicated). These guidelines are not intended to be an exhaustive, comprehensive or complete list of all bases upon which disciplinary action may be taken against a license or licensee; nor are these guidelines intended to preclude, prevent, or impede the seeking, recommendation, or imposition of discipline greater than or less than those listed herein, in the proper exercise of the Department's discretion.

The ALJ devotes several paragraphs to a discussion of the penalty:

#### 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.<sup>[fn.]</sup> Outright revocation<sup>[fn.]</sup> or stayed revocation<sup>[fn.]</sup> 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.<sup>[fn.]</sup>

(Decision, at p. 17.)

The Board may not disturb a penalty order unless it is so clearly excessive that any reasonable person would find it to be an abuse of discretion in light of all the

circumstances. In *Martin* this Board stated that the term “judicial discretion” was defined as:

[A]n impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised *ex gratia*, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice.

(*Harris, supra* at pp. 594-595, citations omitted.)

While 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 appellant’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 appellant (see AOB at p. 20) such as: terminating the offending employees, removing Ms. Costanzos as an officer of the corporation, increasing training for employees, increasing security measures, and installing surveillance cameras.

Fundamental fairness and the ends of substantial justice require that the Department reconsider the penalty imposed in this matter in order to consider why the above-mentioned factors should not have afforded appellant some measure of mitigation, such as the ability to sell the business and transfer the license.

ORDER

The decision of the Department is hereby remanded for reconsideration of the penalty in light of the above discussion.<sup>3</sup>

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

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<sup>3</sup> This order of remand is filed in accordance with Business and Professions Code section 23085, and does not constitute a final order within the meaning of Business and Professions Code section 23089.

# APPENDIX

**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.  
TOBY AND JACKS  
764 9<sup>TH</sup> STREET  
ARCATA, CA 95521-6206**

**ON-SALE GENERAL PUBLIC PREMISES -  
LICENSE**

**EUREKA DISTRICT OFFICE**

**File: 48-582810**

**Reg: 18086874**

**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**

**NOV 27 2018**

**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 Toby and Jacks  
764 9<sup>th</sup> Street  
Arcata, California 95521-6206

Respondent

} File: 48-582810  
}  
} Reg.: 18086874  
}  
} License Type: 48  
}  
} Page Count: 455  
}  
} Reporter:  
} Carli McKenny-CSR #14086  
} Atkinson Baker  
}  
}  
} **PROPOSED DECISION**

On-Sale General Public Premises License

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 seventeen allegations in the accusation on the grounds that:

- (1) On or about October 19, 2017 Respondent-Licensee's agent or employee Joshua Cuppett 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 19, 2017 Respondent-Licensee's agent or employee Joshua Cuppett permitted patron Scott Gamar aka "Scoot", 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;

- (3) On or about October 19, 2017 Respondent-Licensee's agent or employee Joshua Cuppett permitted patron(s) to possess, within the premises, a controlled substance, to-wit: MDA amphetamine, in violation of California Health and Safety Code section 11377;
- (4) On or about October 19, 2017 Respondent-Licensee's agent or employee Joshua Cuppett permitted patron "Haven" to possess, within said premises, a controlled substance, to-wit: MDA amphetamine, for purposes of sale, in violation of California Health and Safety Code section 11378;
- (5) On or about October 19, 2017 Respondent-Licensee's agent or employee Joshua Cuppett permitted patron "Haven" to sell, furnish, or offer to sell or furnish, within the premises, a controlled substance, to-wit: MDA amphetamine, in violation of California Health and Safety Code section 11379;
- (6) On or about October 19, 2017 Respondent-Licensee's agent or employee Joshua Cuppett permitted patron Scott Gamar aka "Scoot" to sell, furnish, or offer to sell or furnish, within the premises, a controlled substance, to-wit: MDA amphetamine, in violation of California Health and Safety Code section 11379;
- (7) On or about October 19, 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 9, 2017 Respondent-Licensee's manager, officer or person holding 10% or more of the corporate stock, namely Nicole Costanzo, was within the licensed premises, an aider and abettor, as defined in Section 31 of the California Penal Code, in the selling, furnishing, or the offering to sell or furnish, a controlled substance, to-wit: cocaine, in violation of California Health and Safety Code section 11352;
- (9) On or about November 9, 2017 Respondent-Licensee's manager, officer or person holding 10% or more of the corporate stock, namely Nicole Costanzo, permitted patron Elijah Patrick Browning to possess, within the premises, a controlled substance, to-wit: cocaine, in violation of California Health and Safety Code section 11350;
- (10) On or about November 9, 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);
- (11) On or about January 25, 2018 Respondent-Licensee's agent or employee Joshua Cuppett permitted patron Jeff Shields, Jr. to possess, within the premises, a controlled substance, to-wit: cocaine, in violation of California Health and Safety Code section 11350;

- (12) On or about January 25, 2018 Respondent-Licensee's agent or employee Joshua Cuppett permitted patron Jeff Shields, Jr. to possess, within the premises, a controlled substance, to-wit: cocaine, for purposes of sale, in violation of California Health and Safety Code section 11351;
- (13) On or about January 25, 2018 Respondent-Licensee's agent or employee Joshua Cuppett permitted patron Jeff Shields, Jr. 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.
- (14) On or about January 25, 2018 Respondent-Licensee's agent or employee Joshua Cuppett permitted patron(s) to possess, within the premises, a controlled substance, to-wit: MDMA methamphetamine, in violation of California Health and Safety Code section 11377;
- (15) On or about January 25, 2018 Respondent-Licensee's agent or employee Joshua Cuppett permitted patron Jasmine Oakeshott to possess, within said premises, a controlled substance, to-wit: MDMA methamphetamine, for purposes of sale, in violation of California Health and Safety Code section 11378;
- (16) On or about January 25, 2018 Respondent-Licensee's agent or employee Joshua Cuppett was within the licensed premises, an aider and abettor, as defined in Section 31 of the California Penal Code, in the selling, furnishing, or the offering to sell or furnish, a controlled substance, to-wit: MDMA methamphetamine, in violation of California Health and Safety Code section 11379; and
- (17) 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);

In each of the above seventeen 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 Sidelines Sports Bar, a type 48 establishment located two businesses to the right of the Licensed Premises at 732 9<sup>th</sup> Street in Arcata, California. (Exhibit D-2) There is no record of prior departmental discipline against the Licensed Premises that was introduced in this matter.
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, she 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 September 14, 2017 at approximately 5:45 p.m., Scott entered the Licensed Premises in an undercover capacity. Additional officers from the task force accompanied her. Scott sat at the fixed bar on a barstool and ordered an alcoholic beverage. There were two bartenders working. A bartender who was later identified as Michael Cahill (Cahill) began to speak with Scott. (Exhibit D-4) Scott observed a person by the name of Jeremy Smith (Smith) stash a backpack behind the bar area even though he did not appear to be an employee. Scott went to the pool table area and interacted with multiple people. She then went out onto the back patio. Scott was told by a Licensed Premises security guard that she had to leave her beer inside. Scott saw people smoking what appeared to be marijuana and she saw people pouring what appeared to be distilled spirits into water bottles in the back patio area. Scott observed what appeared to be multiple hand to hand

narcotics transactions from the back patio adjacent to a nearby taco truck. Scott left after having further interactions with patrons.

6. Scott returned to the Licensed Premises on October 6, 2017. She was accompanied in an undercover capacity by other officers of the task force. Cahill took Scott's drink order from the fixed bar. Cahill continued to work in the area while Scott sat there and struck up a conversation with a patron who identified himself as Sandy (Sandy). After Scott asked what Sandy did, he volunteered that he cut and sold marijuana. Scott asked Sandy if he sold "white" which is a slang term for cocaine. Sandy appeared to understand what Scott was referring to. Sandy handed his phone to Scott and had her call his number. After this interaction with Sandy, Scott went over to the pool table area in the Licensed Premises and talked with the patrons that were there. One of the pool players talked about his 900 acre marijuana grow and that he was a businessman. Scott asked him if he sold "white". He excitedly replied "That's my game!" and then showed Scott pictures of a white, powdery substance on his phone.

7. Scott spoke with an individual named Aster Castropaez (Castropaez) while in the Licensed Premises. She asked if he would be able to obtain cocaine for her. He apologized and said he did not have any on him. He also asked Scott if she did "acid" during their discussion. Castropaez left the Licensed Premises with another person after this conversation. Scott walked out in front of the Licensed Premises and stood near the front door. She saw Cahill smoking a cigarette. A person by the name of Jeff Shields (Shields) was standing nearby smoking a marijuana pipe. Shields offered Scott the pipe but she declined and asked him if he was able to get cocaine. Shields tried to convince Scott to walk around the corner with her. Scott declined and then went back into the Licensed Premises. Cahill had gone in a few moments before after extinguishing his cigarette.

6. Scott spoke with Castropaez again inside the Licensed Premises and he said he could likely get someone to sell her a "\$40" which Scott understood to be an amount of cocaine for \$40. Castropaez then exited the Licensed Premises and went onto the plaza. Scott walked over to Sideways which was two doors over. She ran into Shields and asked him if he was able to obtain cocaine for her. Shield stated "not yet." Scott departed the area shortly afterwards.

7. Scott returned on October 19, 2017 at approximately 8:30 in the evening. Scott sat at the fixed bar and ordered a drink from Cahill. There were three men seated next to her. One of the men introduced himself as Corona (Corona) and invited Scott to do a shot with him. Scott declined by saying she was tired and needed a "line" instead. Corona initially appeared offended by Scott's response but he later apologized and said that he did sell

cocaine. Corona later invited Scott to his home to do a line of cocaine for free. Corona appeared very intoxicated during their discussion. Corona later stumbled out of the Licensed Premises.

8. Scott remained at the fixed bar and observed Joshua Michael Cuppett (Cuppett) come into the fixed bar area and begin bartending duties. (Exhibit D-6) Cuppett checked with Scott to see if she needed a drink. Scott responded that she was tired and needed "white." Cuppett remarked that Corona was someone she could go to for cocaine and if he came back he could provide it. Cuppett said he would tell Corona that Scott was "good" in reference to a cocaine sale. Cuppett said he would look for someone who might be willing to sell to Scott. Scott subsequently saw Cuppett talk with a person who was later identified as Scott Clinton Gamar (Gamar) and went by the nickname "Scott."

9. Scott began to talk with Gamar at the fixed bar. Gamar said he cut marijuana and transported it to Sacramento. Scott told Gamar she was interested in obtaining cocaine. Gamar responded "I have some" and he gave Scott a bindle while they were at the bar. Scott asked him for the cost. Gamar said it was free but that she had to use it in the bathroom. Scott went to the bathroom and photographed the bindle. (Exhibit D-8) She then turned it over to one of the task force officers for booking. The bindle of suspected cocaine was later weighed and found to be .4 grams. (Exhibit D-26) Miller tested the substance using the TruNarc device. It was found to contain cocaine hydrochloride. (Exhibit D-27) Scott returned to where Gamar was seated. Gamar invited Scott to go to another bar. Scott declined the invitation and Gamar then left.

10. Scott told Cuppett about the transaction with Gamar. Scott asked Cuppett if he knew Gamar. Cuppett said he did not know him. Cuppett said that Corona was not answering his texts. Cuppett then said Corona is not coming back. Gamar wound up returning to the fixed bar of the Licensed Premises. Scott told Gamar that the cocaine was good and she asked him where he got it from. Gamar described the person and Scott saw someone who matched Gamar's description.

11. Scott approached this person and struck up a conversation. The individual identified himself as "Haven" (Haven). Haven said he sold cocaine and "Molly" which is a slang term for MDA amphetamine, a controlled substance. Haven said he was waiting for cocaine but that he had Molly. Haven offered to have someone bring cocaine for Scott for \$100 or \$60 for lesser quality cocaine. Haven directed Scott to walk out of the Licensed Premises to near the taco truck in the back area. They walked to that area together. Gamar joined them and remarked that Haven was the person Gamar got the "blue and white" from. Gamar then gave Scott a blue pill. Gamar remarked that he was giving it to Scott because he liked her. Scott told Gamar that he was creeping her out. Gamar then departed.

Scott retained the blue pill and turned it over to Miller for booking and testing. Because of its coating, Miller had to crush it before testing. (Exhibit D-28) Miller tested the blue pill using the TruNarc device and found that it was MDA amphetamine. (Exhibit D-34)

12. Haven remained there with Scott. Scott asked to buy Molly from Haven. Haven then took out a bag with a powdery substance in it and offered Scott a taste. Scott declined and said she was not going to use it there. Scott paid Haven \$40 and she secured the baggie and the blue pill on her person. The transaction took place while they were standing approximately 5 feet away from one of the Licensed Premises security guards. Scott reentered the Licensed Premises and spoke with Cuppett again. She told him about the transaction and asked if she could trust Haven. Cuppett pointed to some people in the Licensed Premises and said to ask them. He also remarked that they might be able to get Scott some "white." Scott did approach the people Cuppett pointed to but she was told by them that they could not obtain cocaine for her. Scott then exited and gave Department agent David Miller the baggie and the blue pill received from Gamar to test and book into evidence. (Exhibit D-8) The baggie from Haven was photographed (Exhibit D-29) and then tested with the TruNarc device by Miller. It tested as MDA amphetamine, a controlled substance. (Exhibit D-30)

13. Scott returned to the Licensed Premises on November 9, 2017. As she was walking in, Cahill walked in behind her. Scott greeted him. Department agent Bernstein (Bernstein) was already at the fixed bar. Scott and Bernstein introduced themselves as if they had just met. They both struck up a conversation about cocaine and hallucinogenic mushrooms. Cuppett arrived to tend bar at about 9:00 p.m. He hugged Scott in greeting when he arrived. Scott and Bernstein continued the subject of their conversation while Cuppett worked nearby. A person named Crawford (Crawford) came up to the fixed bar next to Scott and Bernstein. Scott spoke with Crawford and the subject of obtaining cocaine was brought up by Scott. Crawford responded that he could secure some. Scott asked how much and Crawford said he could get a gram. Crawford then began to text. Scott could see the name "Corona" on the telephone that Crawford was using. Scott then brought up the name "Corona" and Crawford said that he was his other "go to" in response. Scott then introduced Crawford to Bernstein.

14. Scott asked Cuppett about whether he knew Crawford. Cuppett said yes and called him "Anthony." Scott asked if he could be trusted and Cuppett said he trusted him but it depends on his source. Crawford and Bernstein departed to meet someone who Crawford described as a source. Scott remained in the Licensed Premises. At this time, Scott observed Nicole Taylor Costanzo (N. Costanzo) arrive. (Exhibit D-10) Scott had met her at Sidelines on November 8, 2017. 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. Costanzo held a 15% share of the corporation in her capacity as the corporation's secretary.

15. N. Costanzo hugged Scott and asked her about her job hunt which had been a subject of their previous conversation. Scott brought up wanting to "party" and asked N. Costanzo if her guy was still around. N. Costanzo nodded yes. Scott walked over to the fixed bar with N. Costanzo who then introduced Scott to a person Scott later identified as Elijah Calvin Browning (Browning). (Exhibit D-11) N. Costanzo told Browning that Scott was looking for cocaine. Browning responded that he could get Scott an "8-Ball" which is a slang term for about 3.5 grams. Scott asked N. Costanzo whether Browning's product was "good" or if it was "cut". N. Costanzo replied "Nah, its good." Browning stated he had to take N. Costanzo somewhere. Browning took Scott's phone number and he texted his number to Scott. Browning left and returned a short time later. They met inside of the entrance of the Licensed Premises. Browning gave Scott a clear plastic baggie containing a powdery white substance that appeared to be cocaine to Scott. Scott paid Browning \$100. Scott then departed and met with Miller to photograph the baggie (Exhibit D-12) and have him book the baggie into evidence. Miller tested the contents of Exhibit D-12 with the TruNarc device and they were determined to be cocaine hydrochloride. (Exhibit D-33 and Exhibit L-3)

16. Scott returned to the Licensed Premises on January 25, 2018 at approximately 10 p.m. Scott went to the fixed bar and sat on a barstool. She saw Cuppett and Cahill working at the bar of the Licensed Premises. Cuppett came over and spoke with Scott. Scott asked Cuppett if a male sitting nearby was Corona. Cuppett said "are you looking for the usual?" and then responded that the person was not Corona. Cuppett said he would find cocaine for Scott. Cuppett spoke with someone at the end of the bar. He returned and said the person did not have any. Cuppett later said that someone was on the way. An unidentified woman remarked to Cuppett that someone would be there in 10 minutes. Cuppett nodded after this remark.

17. Jeffrey Franklin Shields, Jr. (Shields) approached Scott and said that he heard she was looking for "some product." (Exhibit D-5) Shields then invited Scott outside to his van to obtain the cocaine. Scott declined this offer and she remained at the fixed bar. Cuppett later came over and asked if the transaction with Shields worked out. Scott said that Shields gave her the creeps. Cuppett asked for Scott's number and offered to do the transaction together after he got off of work. Scott and Cuppett exchanged numbers. Shields returned and apologized for his earlier exchange with Scott. Shields agreed to a narcotics deal to occur behind the Licensed Premises near the taco truck. A woman by the name of Jeanette DeWitt (DeWitt) had joined the conversation with Scott and Shields. She offered to go with Scott to the back for the transaction.

18. Scott went out back and DeWitt joined her shortly after. Scott met with Shields and Shields provided Scott a white piece of paper that was folded up. Scott paid \$100 for the bindle that was provided by Shields. Scott went into the Licensed Premises restroom to secure the bindle. DeWitt and Scott discussed a concern that the product Shields sold might be “methy” which was a reference to it being a stimulant other than cocaine. Scott told DeWitt that she wanted to buy more coke.

19. Shortly after this remark, a woman who identified herself as “Carly” joined Scott and offered to buy Scott a drink. During their conversation, Scott took a selfie with Carly (Exhibit D-13) and later used it to identify her as Jasmine Cerise Oakeshott (Oakeshott). (Exhibit D-14) Oakeshott at one point walked over to the rope to the fixed bar of the Licensed Premises and ducked under it. Scott asked Oakeshott if she was an employee. She responded that they would never trust Oakeshott there. Cuppett came over and hugged Oakeshott. Cuppett remarked “is she good to go?” to Oakeshott. Oakeshott then put her arm on Scott’s shoulder and asked her what she wanted. Scott said that she wanted “just some coke” in response. Oakeshott said she did not have any right then but that she had a guy coming with some in 10 minutes. Oakeshott asked Scott if she used Molly. Scott responded “sometimes.”

20. Oakeshott got a text and left momentarily. She returned with two females. Oakeshott retrieved her purse from behind the bar and then walked towards the bathroom. Scott followed Oakeshott. Scott went into the bathroom and she could hear Oakeshott giving instructions to the two women. Oakeshott put crystals of what appeared to be MDMA methamphetamine, in Scott’s hand. Scott said that she wanted to use it with her roommate later. One of the women took cellophane from a cigarette package and gave it to Scott to use as a baggie for the crystals. Scott put them in the cellophane to secure it. Scott left the Licensed Premises after this exchange.

21. Scott met with Miller to process the evidence she received that day. The bindle that was received from Shields was photographed as it was opened and the contents weighed. The weight was determined to be .7 grams. (D-15, D-16, and D-17) Miller then used the TruNarc device to test the powdery substance that was inside of the paper bindle. Scott photographed the scan result. (Exhibit D-18) The TruNarc scan report showed the substance to be cocaine hydrochloride. (Exhibit D-19)

22. The crystals that were received from Oakeshott were also photographed as they were opened and the contents weighed. The weight was determined to be .1 grams. (D-20 and D-21) Miller then used the TruNarc device to test the crystals that were inside of the cellophane wrapper that Scott used. Scott photographed the scan result. (Exhibit D-22)

The TruNarc scan report showed the substance to be MDMA methamphetamine. (Exhibit D-23)

23. Department Agent Alan Aubuchon (Aubuchon) testified regarding the chain of custody in this matter and related case 18086872 (The Sidelines case) 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 Sidelines case 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 in the Sidelines case) These receipts documented the evidence seized by Scott and Bernstein during the transactions in this matter and the Sidelines case that were 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.

24. The narcotics that were booked in this case by Miller from the sales that occurred were weighed and photographically documented during the course of the investigation to enable the correlation of booked evidence with the transactions that occurred. 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 in this matter and in the Sidelines case.

25. California Highway Patrol Officer Darron Drefke (Drefke) testified regarding the general operation and efficacy of the TruNarc device in this matter and in the related Sidelines case 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 spectroscope<sup>1</sup> that is capable of identifying molecules contained in a

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<sup>1</sup> 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

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 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 in the related Sidelines case as an example of a TruNarc Scan Report that would result from a test being conducted.

26. S. Costanzo testified in this matter and in the related Sidelines case. 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 in the related Sidelines case) S. Costanzo was having his son, M. Costanzo handle more of the day to day operations. The Licensed Premises and Sidelines 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.

27. 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 Sidelines were not particular problems that stood out to him.

28. M. Costanzo testified that he managed the day to day of the Licensed Premises and Sidelines. Drug use or sales have never been tolerated by the Respondent. He has participated in Department LEAD training and shares those materials with employees. (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 in the related Sidelines case) M. Costanzo testified to being completely blindsided by the allegations. Subsequent to the allegations in this matter and the related Sidelines case, the Respondent had cameras installed at the Licensed Premises.

29. 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 Sidelines 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 Sidelines 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.

30. 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 Sidelines are located. Scown testified to extensive narcotics activity occurring on the plaza and that the Licensed Premises and Sidelines 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.

31. 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 Sidelines were significant contributors to the problem activity that occurred there. Diemer testified that the Licensed Premises and Sidelines 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 Sidelines. 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.

32. 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 11377(a) states that:

(a) Except as authorized by law and as otherwise provided in subdivision (b) or Section 11375, or in Article 7 (commencing with Section 4211) of Chapter 9 of Division 2 of the Business and Professions Code, every person who possesses any controlled substance which is (1) classified in Schedule III, IV, or V, and which is not a narcotic drug, (2) specified in subdivision (d) of Section 11054, except paragraphs (13), (14), (15), and (20) of subdivision (d), (3) specified in paragraph (11) of subdivision (c) of Section 11056, (4) specified in paragraph (2) or (3) of subdivision (f) of Section 11054, or (5) specified in subdivision (d), (e), or (f) of Section 11055, unless upon the prescription of a physician, dentist, podiatrist, or veterinarian, licensed to practice in this state, shall be punished by imprisonment in a county jail for a period of not more than one year, except that such person may

instead be punished pursuant to subdivision (h) of Section 1170 of the Penal Code if that person has one or 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 11378 states that:

Except as otherwise provided in Article 7 (commencing with Section 4110) of Chapter 9 of Division 2 of the Business and Professions Code, a person who possesses for sale a controlled substance that meets any of the following criteria shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code:

- (1) The substance is classified in Schedule III, IV, or V and is not a narcotic drug, except the substance specified in subdivision (g) of Section 11056.
- (2) The substance is specified in subdivision (d) of Section 11054, except paragraphs (13), (14), (15), (20), (21), (22), and (23) of subdivision (d).
- (3) The substance is specified in paragraph (11) of subdivision (c) of Section 11056.
- (4) The substance is specified in paragraph (2) or (3) of subdivision (f) of Section 11054.
- (5) The substance is specified in subdivision (d), (e), or (f), except paragraph (3) of subdivision (e) and subparagraphs (A) and (B) of paragraph (2) of subdivision (f), of Section 11055.4. 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 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.

6. Health & Safety Code section 11379 states that:

(a) Except as otherwise provided in subdivision (b) and in Article 7 (commencing with Section 4211) of Chapter 9 of Division 2 of the Business and Professions Code, 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 any controlled substance which is (1) classified in Schedule III, IV, or V and which is not a narcotic drug, except subdivision (g) of Section 11056, (2) specified in subdivision (d) of Section 11054, except paragraphs (13), (14), (15), (20), (21), (22), and (23) of subdivision (d), (3) specified in paragraph (11) of subdivision (c) of Section 11056, (4) specified in paragraph (2) or (3) of subdivision (f) of Section 11054, or (5) specified in subdivision (d) or (e), except paragraph (3) of subdivision (e), or specified in subparagraph (A) of paragraph (1) of subdivision (f), of Section 11055, unless upon the 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 a period of two, three, or four years.

(b) Notwithstanding the penalty provisions of subdivision (a), any person who transports any controlled substances specified in subdivision (a) within this state from one county to another noncontiguous county shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for three, six, or nine years.

(c) For purposes of this section, "transports" means to transport for sale.

(d) Nothing in this section is intended to preclude or limit prosecution under an aiding and abetting theory, accessory theory, or a conspiracy theory.

7. 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.

8. 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.

9. With respect to counts 1-7, 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 19, 2017 encounters with Gamar and Haven at the Licensed Premises in the presence of Cuppett, the Respondent's agent or employee. The evidence established that Cuppett, a bartender in the Licensed Premises, took an active role in trying to help Scott secure narcotics. Cuppett spoke with Gamar before he approached Scott on October 19, 2017 in the Licensed Premises. Even prior to October 19, 2017 Scott had spoken with Cuppett about obtaining narcotics at the Licensed Premises. Scott spoke with Gamar, Haven and other patrons, in the immediate presence of Cuppett, about purchasing narcotics from them. The conversations were extended and they occurred at the fixed bar and in the front of the Licensed Premises. Scott spoke with Cuppett about securing narcotics and Cuppett took an active role in facilitating Scott's efforts to purchase cocaine and other drugs. Cuppett vouched for a number of the potential dealers in the Licensed Premises and called them by familiar names. Cuppett had a duty to not allow the possession or sale of controlled substances in the Licensed Premises. Under the circumstances of this case, when Gamar gave a baggie of cocaine and a blue pill that contained MDA amphetamine to Scott, Cuppett was permitting him to possess cocaine and MDA amphetamine within the Licensed Premises in violation of Health and Safety Code sections 11377 and 11350. The circumstances also conveyed to Cuppett that Gamar possessed these narcotics for the specific purpose of providing them to Scott in violation of Health and Safety Code sections 11352 and 11379. The sales transaction to Scott from Haven that was also permitted by Cuppett was in violation of Health and Safety Code section 11377, 11378 and 11379 because, while at the Licensed Premises Haven possessed MDA amphetamine, he intended to sell them to Scott, and he then completed the transaction. As an agent or

employee, Cuppett's 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), as well. Even though this was the first day that sales to Scott were documented during the undercover investigation, the overall evidence established that a pervasive drug culture had already established itself at the Licensed Premises prior to October 19, 2017. (Findings of Fact ¶¶ 2-31)

8. With respect to counts 8-10, 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 9, 2017 encounter with Browning at the Licensed Premises that was actively facilitated by N. Costanzo, a 15% shareholder in the respondent's corporation. Scott negotiated the purchase of cocaine from Browning after N. Costanzo referred Browning to Scott to complete the transaction for Scott's expressed desire to purchase cocaine. Scott actually received a baggie of cocaine from Browning in exchange for money. The evidence established that S. Costanzo was familiar with Browning and his role as a dealer of cocaine. S. Costanzo actively assisted Scott in purchasing narcotics from Browning at the Licensed Premises. N. Costanzo 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 to sell cocaine to Scott, N. Costanzo was permitting Browning to possess cocaine within the Licensed Premises in violation of Health and Safety Code section 11350. The circumstances also conveyed to N. Costanzo that Browning possessed cocaine for the specific purpose of selling it in the Licensed Premises to Scott in violation of Health and Safety Code section 11351. The sale transaction that then occurred in the Licensed Premises was also permitted by N. Costanzo in violation of Health and Safety Code section 11352. As a shareholder and principal in the Respondent corporation, her actions and knowledge, under the circumstances of this case, are imputed to the Respondent as a whole and establish a violation of Business and Professions Code section 24200.5(a). This was a sales incident facilitated by a principal in the corporation and it was 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 19, 2017. (Findings of Fact ¶¶ 2-31)

9. With respect to counts 11-17, 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 encounters with Shields and Oakeshott at the Licensed Premises that occurred in large part, in the presence of, and with the active participation of, Cuppett. Scott negotiated the purchase of cocaine from Shields in the presence of Cuppett after Cuppett referred Shields to Scott to complete the transaction. While the transaction was completed in the back of the Licensed

Premises, much of the negotiation for the narcotics transaction occurred within the confines of the Licensed Premises, after Cuppett set it in motion. Cuppett had a duty to not allow the possession or sale of controlled substances in the Licensed Premises. Under the circumstances of this case, when Shields possessed the cocaine to sell to Scott, Cuppett was knowingly permitting him to possess cocaine within the Licensed Premises in violation of Health and Safety Code section 11350. The circumstances also conveyed to Cuppett that Shields possessed the cocaine 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 just outside of the Licensed Premises was also permitted by Cuppett in violation of Health and Safety Code section 11352. Scott also received MDMA methamphetamine from Oakeshott in the bathroom of the Licensed Premises after their discussion in the presence of Cuppett. Oakeshott clearly had a close relationship with the Licensed Premises and Cuppett given her ability to go behind the bar and store her purse on January 25, 2017. Cuppett was clearly directly familiar with Oakeshott and the circumstances conveyed an awareness to Cuppett that Scott was contacting Oakeshott in furtherance of a narcotics transaction. While the transaction was completed in the bathroom of the Licensed Premises, much of the negotiation for the narcotics transaction occurred within the confines of the Licensed Premises in the presence of Cuppett. Cuppett had a duty to not allow the possession or sale of controlled substances in the Licensed Premises. Under the circumstances of this case, when Oakeshott possessed the MDMA methamphetamine that was provided to Scott, Cuppett was knowingly permitting her to possess MDMA methamphetamine within the Licensed Premises in violation of Health and Safety Code section 11377. The circumstances also conveyed to Cuppett that Oakeshott possessed the MDMA methamphetamine for the specific purpose of providing it to Scott in violation of Health and Safety Code section 11378. The actual transaction that then occurred in the bathroom of the Licensed Premises was also permitted by Cuppett in violation of Health and Safety Code section 11379. As an agent or employee, his 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) based on the conduct of Shields and Oakeshott. This was now the third day of narcotics sales incidents documented by Scott during her undercover investigation at the Licensed Premises. 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 19, 2017. (Findings of Fact ¶¶ 2-31)

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 during the investigations. Further, the TruNarc device used by Miller to test the suspected narcotics

seized by Scott 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 seized narcotics where the substances shown in the results 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 suspected narcotics received where consistent with what they were represented to be. Miller tested the suspected narcotics and in each instance, the TruNarc device concluded that the tested compounds contained the substances they were represented to be. 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 the controlled substances that were alleged in each count. It has. (Findings of Fact ¶¶ 2-31)

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, MDMA methamphetamine, and MDA amphetamine was established to have occurred. Imputed knowledge of this pattern of drug sales was established by the multiple 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 ¶¶ 2-31)

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, Sidelines. 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 engaged in her last narcotics transaction at the Licensed Premises. 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 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 ¶¶ 2-31 and 2-24 in the related Sidelines case)

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 ¶¶ 2-31 and 2-24 in the related Sidelines case)

15. 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.<sup>2</sup> Outright revocation<sup>3</sup> or stayed revocation<sup>4</sup> 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, MDMA methamphetamine, and MDA amphetamine to an undercover officer with the knowledge and permission of employees and a principal in the corporation 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.<sup>5</sup>

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<sup>2</sup> Cal. Code of Regs., tit. 4, §144.

<sup>3</sup> 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).

<sup>4</sup> 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).

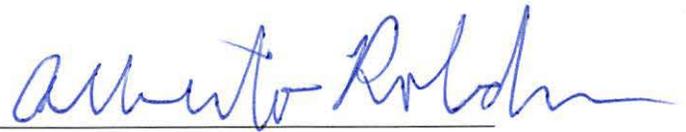
<sup>5</sup> All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

Costanzos Genco Olive Oil Company, Inc.  
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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: <u>Jacob J. Type Smith</u>
Date: <u>11/20/18</u>