

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

AB-9974

File: 41-625877; Reg: 22092056

BAUMAN ENTERPRISES, LLC,
dba Norcina
3251 Pierce Street
San Francisco, CA 94123-2705,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Alberto Roldan

Appeals Board Hearing: December 8, 2023
Videoconference

ISSUED DECEMBER 11, 2023

Appearances: *Appellant:* Dean R. Lueders, of ACTlegally, as counsel for Bauman Enterprises, LLC,

Respondent: Sean Klein, as counsel for the Department of Alcoholic Beverage Control.

OPINION

Bauman Enterprises, LLC, doing business as Norcina (appellant), appeals from a decision of the Department of Alcoholic Beverage Control (Department)¹ suspending its license for 15 days because it violated a condition on its license, in violation of Business and Professions Code section 23804.²

¹ The decision of the Department, dated June 27, 2023, is set forth in the appendix.

² All statutory references are to the California Business and Professions Code unless otherwise indicated.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine license was issued on August 6, 2021. There is no record of prior departmental discipline against the license.

On April 12, 2022, the Department instituted a four-count accusation against appellant charging that on four separate occasions — November 20, 2021, January 21, 2022, February 4, 2022, and March 25, 2022 — it permitted the sale, service and consumption of alcoholic beverages in the sidewalk seating area of the premises after 9:00 p.m., in violation of condition #2 on its license.

At the administrative hearing held on April 11, 2023, documentary evidence was received and testimony concerning the violation charged was presented by Department Agents Ryan Swain, Daniel Louie, and Jimisa Brown. Kaitlynn Bauman, managing member of Bauman Enterprises, LLC, testified on appellant's behalf.

Testimony established that in response to a noise complaint about the premises, Supervising Agent Jesus Gutierrez met with Kaitlynn Bauman on October 14, 2021, to inform her that a complaint had been received. He explained that the license conditions prohibited service and consumption of alcoholic beverages after 9:00 p.m. in the sidewalk seating area. Bauman stated that it was her belief that the condition did not apply to this area. Agent Gutierrez warned Bauman that if the violations continued, the Department would make future visits to the premises and file an administrative case against them. (Finding of Fact (FF) ¶4; RT 27-29.)

Count 1:

On November 20, 2021, Department Agents Louie and Brown went to the licensed premises in an undercover capacity. Although they testified to observing dark red liquid in stemmed wine glasses being consumed by female patrons seated in the

outdoor area, the ALJ determined that substantial evidence was lacking to support this count, and it was dismissed. (FF ¶5.)

Count 2:

On January 21, 2021, at approximately 9:47 p.m., Department Agents Louie and Sam went to the licensed premises in an undercover capacity. They observed multiple individuals seated at the outdoor tables, people standing next to these tables, and liquid which appeared to be wine being consumed by multiple patrons. They also observed wine bottles on the tables. (FF ¶6; RT 43-47.)

Count 3:

On February 4, 2022, at approximately 9:00 p.m., Department Agent Brown went to the licensed premises in an undercover capacity and observed multiple patrons seated at the sidewalk tables consuming clear and red liquids from stemmed wine glasses. There were also what appeared to be wine bottles on the tables, consistent with red and white wine. At 9:06 p.m., Agent Brown began filming the area (Exh. D-10). Brown observed waiters who appeared to be employees serving liquids from the bottles to patrons seated at the tables. At no point did any of these employees stop the patrons from consuming their drinks, clear the tables, or direct the patrons into the interior of the licensed premises. (FF ¶7; RT 55-61.)

Count 4:

On March 25, 2022, at approximately 9:15 p.m., Department Agent Swain went to the licensed premises in an undercover capacity. There were no available tables in the outside area so he took a seat inside with a clear view of the sidewalk seating area. He observed a woman consuming a frothy amber liquid from a 16-ounce can consistent with that used by Laughing Monk brewery. He also observed patrons consuming red

liquid from stemmed wine glasses with wine bottles on the tables consistent with the liquids being red wine. (FF ¶8; RT 11-14.)

The administrative law judge (ALJ) issued a proposed decision on May 16, 2023, dismissing count one and sustaining counts two through four of the accusation. He recommended a 15-day suspension for each of the sustained counts, with the suspensions to run concurrently as a single 15-day suspension. The Department adopted the proposed decision in its entirety on June 26, 2023, and a certificate of decision was issued the following day.

Appellant then filed a timely appeal contending the decision is not supported by substantial evidence because the Department failed to prove that the beverages being served in the sidewalk seating area were alcoholic beverages. (Appellant's Opening Brief (AOB) at pp. 3-6.)

DISCUSSION

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 signed a Petition for Conditional License on August 6, 2021, agreeing to six conditions on its license. Condition two of that agreement provides:

Sales, service and consumption of alcoholic beverages shall be permitted in the sidewalk seating area only between the hours of 10:00 a.m. to 9:00 p.m., each day of the week.

(Exh. D-2.)

Subsequently, on September 1, 2021, appellant signed a COVID-19 Temporary Catering Authorization (CTCA) Application to expand its serving area in the sidewalk area adjacent to the licensed premises by adding three tables in a covered area

extending into the street in front of the premises. The outdoor seating area adjacent to the premises is also referred to throughout the record as a “parklet.”

In the application, a box is checked next to the statement:

Except as to any conditions the Department has determined will not be enforced under other Notices of Regulatory Relief, any operating conditions in place for the existing licensed premises will apply to the temporarily expanded area.

In addition, on the actual CTCA, which was approved the following day, it states:

NOW THEREFORE, said Covid-19 Temporary Catering Authorization is issued subject to the following conditions:

¶ . . . ¶

2. All operating conditions imposed on the applicant’s permanently licensed premises shall remain in effect and be subject to enforcement, except as to any conditions the Department had determined will not be enforced under other Notices of Regulatory Relief.

(Exh. D-3.) There is no notation of any conditions not to be enforced.

The Department has broad authority under section 23800 to place reasonable conditions on licenses. Section 23804 further provides:

A violation of a condition placed upon a license pursuant to this article shall constitute the exercising of a privilege or the performing of an act for which a license is required without the authority thereof and shall be grounds for the suspension or revocation of such license.

(Bus. and Prof. Code §23804.)

Appellant maintains the Department did not prove the section 23804 violations occurred because they failed to establish that the beverages being consumed in the sidewalk seating area were alcoholic beverages. In his closing argument at the administrative hearing, counsel argued:

There is zero proof in this case that any of the beverages that the ABC agents testified to seeing was alcohol. Zero proof. They did not smell it. They did not taste it. They did not even look at the labels. They did not

ask the patrons what they were consuming. They did not ask anyone on the premises as to what the beverage was. It is 100 percent speculation. And on that basis alone, the ABC's case must fail.

(RT 80-81.)

The ALJ found as follows on the issue of whether alcoholic beverages were being served:

9. Given that Bauman had expressed an opinion that the conditional license restrictions did not apply to the parklet, she was already on record indicating that she was not going to comply with the applicable license restrictions. The subsequent observations made by the Department agents was consistent with this observation. On November 20, 2021, which is the conduct documented in count one of the Accusation, only one bottle of what appeared to be wine was observed by the agent. While there is a strong possibility that it may have been wine, there remains the possibility that it may have been a non-alcoholic product. As such, this count has not been proven by a preponderance of the evidence. (Findings of Fact ¶¶ 1-8)

10. On the remaining dates, there were much larger numbers of what appeared to be alcoholic beverage services taking place. **Under the circumstances received in evidence, non-alcoholic service was the exception, not the rule. It is unreasonable to assume that every customer ordered glasses or bottles of non-alcoholic wine on those dates where there were large numbers of bottles and glasses observed by the agents.** The bottles and glasses of what appeared to be wine were served at different tables to different groups. On the February 4, 2022, date in count 3, the Department agent filmed multiple tables and the spaces in the parklet receiving service from various different bottles of what appeared to be different kinds of red and white wines. The outdoor area was packed with multiple groups of patrons. The patrons receiving bottle service were in a variety of different groups. **This, coupled with Bauman's prior assertion that the restriction did not apply to the parklet, makes it more likely than not that at least a few of the patrons were receiving alcohol service and/or consuming those drinks after 9:00 p.m. in the outside area in violation of the conditional license and the CTLA.** (Findings of Fact ¶¶ 1-8)

11. Further, on the March 25, 2022, date in count 4, Swain explicitly saw a patron after 9:00 p.m. seated in the outside area drinking what appeared to be a beer. He saw on the menu that the Licensed Premises offered alcoholic beer from Laughing Monk Brewery, and he saw what

appeared to be a can associated with that beer brand alongside the glass the drink was served in. (Findings of Fact ¶¶ 1-8)

(Conclusions of Law ¶¶ 9-11, emphasis added.)

Appellant asserts these findings are based on conjecture, rather than actual evidence. While it is true there was no direct evidence presented that the bottles and glasses observed on the tables in the sidewalk seating area contained alcohol, circumstantial and testimonial evidence given by Department agents exists to support the ALJ's determination that it was more likely than not that at least some of the patrons were served alcohol, since it was not reasonable to assume that all of the bottles and/or glasses observed by the agents contained non-alcoholic beverages.

The standard is as follows: “[r]elevant circumstantial evidence is admissible in California and can be substantial evidence for an inference based on it.” (*Norris v. State Pers. Bd.* (1985) 174 Cal.App.3d 393, 398 [219 Cal.Rptr. 895], internal citations omitted.)

A finding of fact must be an inference drawn from evidence rather than on a mere speculation as to probabilities without evidence..... What constitutes substantial evidence, as distinguished from mere possibility or speculation, is clarified in the following passage from *Estate of Teed*, 112 Cal.App.2d 638, 644 [247 P.2d 54]: “The sum total of the above definitions is that, if the word 'substantial' means anything at all, it clearly implies that such evidence must be of ponderable legal significance. Obviously the word cannot be deemed synonymous with ‘any’ evidence. It must be reasonable in nature, credible, and of solid value; it must actually be ‘substantial’ proof of the essentials which the law requires in a particular case.”

(*Krause v. Apodaca* (1960) 186 Cal.App.2d 413, 418 [9 Cal.Rptr.10].)

Appellant maintains, “[t]here is no evidence whatsoever that the containers contained an alcoholic beverage, let alone substantial evidence as required by *Estate of Teed*.” (Appellant’s Closing Brief (ACB) at p. 2.) However, “it is axiomatic that a finding

may be supported by inference, as long as the inference is a reasonable conclusion from the evidence.” (*Krause, supra*, at 418.) An inference made by the trier of fact will be overturned by an appellate tribunal only “when that inference is rebutted by clear, positive and uncontradicted evidence of such a nature that it is not subject to doubt in the minds of reasonable men.” (*Hicks v. Reis* (1943) 21 Cal.2d 654, 660 [134 P.2d 788]; see also *Gaffney v. Downey Savings & Loan Assn.* (1988) 200 Cal.App.3d 1154, 1168 [246 Cal.Rptr. 421].) Here, appellant has not rebutted the inference that it was more likely than not that at least some of the beverages being served and consumed in appellant’s outside seating area were alcoholic beverages.

As noted above, “[w]hen 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, supra*, at 335.) We are simply not empowered to reweigh the evidence and reach a contrary conclusion.

Having said that, however, we would note that this accusation could have been easily bolstered by stronger evidence. How difficult would it have been for the agents to have taken actual, physical evidence that the beverages being served were alcoholic? We agree with appellant that much stronger evidence would have been very easy to attain by merely sniffing the beverages, tasting them, taking a close-up photograph of the wine bottles, or asking the patrons what they were drinking. At a time when the popularity of non-alcoholic beverages is increasing, we believe it would be prudent to gather stronger evidence to avoid the possibility of a false accusation. Nevertheless, given the Board’s limited authority to reweigh the evidence, we must affirm the Department’s decision in this case.

ORDER

The decision of the Department is affirmed.³

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

³ This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 *et seq.* Service on the Board pursuant to California Rules of Court (Rule 8.25) should be directed to: 400 R Street, Ste. 320, Sacramento, CA 95811 and/or electronically to: abcboard@abcappeals.ca.gov.

APPENDIX

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

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

BAUMAN ENTERPRISES, LLC
NORCINA
3251 PIERCE STREET
SAN FRANCISCO, CA 94123-2705

ON-SALE BEER AND WINE - LICENSE

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

CONCORD DISTRICT OFFICE

File: 41-625877

Reg: 22092056

CERTIFICATE OF DECISION

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 June 26, 2023. 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. The appeal must be filed within 40 calendar days from the date of the decision, unless the decision states it is to be "effective immediately" in which case an appeal must be filed within 10 calendar days after the date of the decision. Mail your written appeal to the Alcoholic Beverage Control Appeals Board, 400 R St, Suite 320, Sacramento, CA 95811. For further information, and detailed instructions on filing an appeal with the Alcoholic Beverage Control Appeals Board, see: <https://abcab.ca.gov> or call the Alcoholic Beverage Control Appeals Board at (916) 445-4005.

On or after August 7, 2023, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: June 27, 2023



Matthew D. Botting
General Counsel

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

IN THE MATTER OF THE ACCUSATION AGAINST:

Bauman Enterprises, LLC	}	File: 41-625877
DBA: Norcina	}	
3251 Pierce Street	}	Reg: 22092056
San Francisco, CA 94123-2705	}	
	}	License Type: 41
	}	
Respondent	}	Word Count: 14,482
	}	
	}	Reporter:
	}	Savauna Ramirez
<u>On-Sale Beer and Wine License</u>	}	Kennedy Reporters
	}	
	}	<u>PROPOSED DECISION</u>

Administrative Law Judge Alberto Roldan, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter, via videoconference, on April 11, 2023.

Sean Klein, Attorney, represented the Department of Alcoholic Beverage Control (Department).

Dean Leuders, Attorney, represented Respondent, Bauman Enterprises, LLC (Respondent).

In a four count Accusation, the Department seeks to discipline the Respondent’s license on the grounds that,

1. On or about November 20, 2021, respondent-licensee violated license condition #2 which states, “Sales, service and consumption of alcoholic beverages shall be permitted in the sidewalk seating area only between the hours of 10:00 a.m. and 9:00 p.m. each day of the week,” in that the licensee allowed consumption of alcoholic beverages in the sidewalk seating area past 9:00 p.m., such being a violation of the license condition and grounds for a license suspension or revocation pursuant to section 23804¹;
2. On or about January 21, 2022, respondent-licensee violated license condition #2 which states, “Sales, service and consumption of alcoholic beverages shall be permitted in the sidewalk seating area only between the hours of 10:00 a.m. and 9:00 p.m. each day of the week,” in that the licensee allowed consumption of alcoholic beverages in the sidewalk seating area past 9:00 p.m., such being a violation of the license condition and grounds for a license suspension or revocation pursuant to section 23804;

¹ All further statutory references are to the Business and Professions Code unless otherwise noted.

3. On or about February 4, 2022, respondent-licensee violated license condition #2 which states, "Sales, service and consumption of alcoholic beverages shall be permitted in the sidewalk seating area only between the hours of 10:00 a.m. and 9:00 p.m. each day of the week," in that the licensee allowed consumption of alcoholic beverages in the sidewalk seating area past 9:00 p.m., such being a violation of the license condition and grounds for a license suspension or revocation pursuant to section 23804; and
4. On or about March 25, 2022, respondent-licensee violated license condition #2 which states, "Sales, service and consumption of alcoholic beverages shall be permitted in the sidewalk seating area only between the hours of 10:00 a.m. and 9:00 p.m. each day of the week," in that the licensee allowed consumption of alcoholic beverages in the sidewalk seating area past 9:00 p.m., such being a violation of the license condition and grounds for a license suspension or revocation pursuant to section 23804. (Exhibit D-1)

As to all four counts, 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). The Department further alleged 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). (Exhibit D-1)

FINDINGS OF FACT

1. The Department filed the Accusation on April 12, 2022. Since being licensed at this Licensed Premises, the Respondent has not suffered any prior departmental discipline. (Exhibit D-1)
2. On August 6, 2021, the Department issued Respondent a type-41 on-sale beer and wine eating place license for the premises at 3251 Pierce Street, San Francisco, CA 94123-2705 (Licensed Premises). On July 2, 2021, Kait Bauman (Bauman), of Bauman Enterprises, LLC executed the Petition for Conditional License that became the license in this matter. The type-41 conditional license had six specific conditions. In accepting these conditions, the Respondent acknowledged the close proximity of residential units, including residences within 100 feet of the Licensed Premises. The license established conditions for both interior and exterior locations where privileges would be exercised. Condition #2 explicitly limited the hours that privileges could be exercised in the sidewalk seating area by stating "[s]ales, service and consumption of alcoholic beverages shall be permitted in the sidewalk seating area only between the hours of 10:00 a.m. to 9:00 p.m. each day of the week". (Exhibit D-2)
3. In response to limitations that had been imposed on indoor dining as a result of the COVID-19 pandemic, the Respondent sought a temporary expansion of its outdoor seating area to include an outdoor parklet adjacent to the existing outdoor seating where the Respondent was exercising privileges. On September 1, 2021, the Respondent submitted a COVID-19 Temporary Catering Authorization Application that defined the parameters of the parklet. In its application, the Respondent acknowledged that "[e]xcept as to any conditions that the Department has determined will not be enforced under other Notices of Regulatory Relief, any operating conditions in place for the existing licensed premises will apply to the temporarily expanded area." The Department issued

the sought expansion through a COVID-19 Temporary Catering Authorization (CTCA) on September 2, 2021. In the CTCA, the Department established conditions, including Condition 2 that stated “[a]ll operating conditions imposed on the applicant’s permanently licensed premises shall remain in effect and be subject to enforcement, except as to any conditions that the Department has determined will not be enforced under other Notices of Regulatory Relief.” (Exhibit D-3) No evidence was submitted by either party that the hour limitations on the conditional license were not being enforced as the result of a Notice of Regulatory Relief. On September 3, 2021, Department Agent D. Louie (Louie) went to the Licensed Premises to confirm that the Licensed Premises had its conditional license and licensed premises diagram. On that date, Louie reviewed the conditional license and the CTCA with Bauman.

4. On October 14, 2021, at approximately 5:35 p.m., Department Agent J. Gutierrez (Gutierrez) entered the Licensed Premises to follow up on complaints that there had been violations of license conditions at the Licensed Premises related to noise and alcohol service beyond the allowed hours in the expanded outdoor seating area. The Licensed Premises was open for business and a waiter directed Gutierrez to speak with Bauman, who was at the Licensed Premises. Gutierrez raised the concerns with Bauman that led to his visit. While standing outside of the Licensed Premises with Bauman, Gutierrez spoke with Bauman about the service and consumption of alcoholic beverages after 9 p.m. in the outdoor areas and associated noise concerns. Gutierrez asserted that alcohol service after 9 p.m. was in violation of the conditions imposed on the Licensed Premises. Bauman responded that the conditions did not apply to the parklet. Bauman did not raise the argument that only non-alcoholic drink service was occurring in the outdoor seating area after 9 p.m. After Bauman argued that the conditions did not apply to the parklet, Gutierrez asserted that the conditions did indeed apply to the parklet and that the Department would be enforcing those conditions. The conversation between Gutierrez and Bauman became more tense after Gutierrez said the Department would be continuing to enforce the conditional license conditions on the parklet. Bauman ultimately took the paperwork with the conditions they were reviewing and walked into the interior of the Licensed Premises. Gutierrez did not engage with her any further.

5. Louie went to the Licensed Premises on November 20, 2021, along with Department Agent D. Brown. They arrived at approximately 10 p.m. Louie noted several patrons seated at a table in the parklet area of the Licensed Premises defined in the CTCA. At least three of the female patrons had stemmed wine glasses filled with a dark red liquid consistent with the appearance of red wine. Louie observed the patrons in the parklet area for approximately 10 minutes. During that time, employees circulated through the area while the patrons continued to consume from their wine glasses. At no point did the employees clear the glasses, direct the patrons into the interior of the Licensed Premises, or direct them to stop drinking.

6. On January 21, 2022, Louie returned to the Licensed Premises along with Department Agent A. Sam. They arrived at approximately 10:47 p.m. Louie observed multiple groups of patrons of the Licensed Premises using the outside tables, the outside parklet, or standing adjacent to the parklet on the side closest to the window of the Licensed Premises. Multiple patrons standing adjacent to the parklet were holding what appeared to be stemmed wine glasses with liquid in them consistent with the appearance of wine. The persons standing with the wine glasses appeared to be consuming

from them. At least two patrons seated at the outside tables adjacent to the front of the Licensed Premises were drinking from stemmed wine glasses. Louie observed at least one bottle at the tables that was consistent with the appearance of a wine bottle. Louie observed persons who appeared to be employees of the Licensed Premises circulating through the area where Louie made these observations. At no point did any of these employees stop the patrons from consuming their drinks, clear the tables, or direct the patrons into the interior of the Licensed Premises.

7. On February 4, 2022, Department Agent J. Brown (Brown) went to the Licensed Premises to follow up on previous investigations. Brown arrived at approximately 9:00 p.m. Brown observed that the tables adjacent to the front of the Licensed Premises and the tables in the parklet were being utilized by patrons. The outside seating areas were full and bustling with activity. Brown remained and observed the area for approximately 20 minutes. At 9:06 p.m., Brown began filming the outside area. (Exhibit D-10) During this time, Brown observed multiple patrons seated at the outside tables and the parklet with stemmed wine glasses with either clear or red liquids consistent with red and white wines. In addition, at multiple tables, there were what appeared to be wine bottles containing liquids that matched the liquids that the patrons were consuming from the stemmed wine glasses. Brown observed patrons serving liquids from the wine bottles into the stemmed wine glasses. On multiple occasions, Brown observed waiters who appeared to be employees of the Licensed Premises serving liquids from the bottles to patrons seated at the tables. At no point did any of these employees stop the patrons from consuming their drinks, clear the tables, or direct the patrons into the interior of the Licensed Premises.

8. On March 25, 2022, Department Agent R. Swain (Swain) visited the Licensed Premises to follow up on prior observations. Swain arrived at 9:15 p.m. in plain clothes. Swain saw a table open in the parklet and asked one of the waiters if he could be seated there. He was told they could not sell alcohol there after 9:00 p.m. Swain was then seated at an inside table adjacent to the front window. From this seat, Swain could observe the outside tables and the parklet. Swain saw a patron sitting at an outside table with a can and a glass consistent with the appearance of an amber colored beer. Swain saw that the menu offered a Laughing Monk Brewery beer as an alcoholic beverage option. Swain determined that the can this patron had with the amber colored liquid looked like one of the cans that Laughing Monk beer was sold in. At one of the other outside tables, Swain saw patrons with stemmed wine glasses that had servings of a dark red liquid consistent with the appearance of red wine. There was also a wine bottle at the table with these patrons. The patrons continued to consume their drinks during Swain's observations. Swain watched employees working in the outside area of the Licensed Premises. He did not see any employees stop the patrons from consuming their drinks, clear the tables, or direct the patrons into the interior of the Licensed Premises.

CONCLUSIONS OF LAW

1. Article XX, section 22 of the California Constitution and section 24200, subdivision (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. Section 24200, subdivision (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. Section 23804 provides that the violation of a condition placed upon a license constitutes the exercise of a privilege or the performing of an act for which a license is required without the authority thereof and constitutes grounds for the suspension or revocation of the license.

4. As to three of the four counts in the Accusation, cause for suspension or revocation of Respondent's license exists under Article XX, section 22 of the California State Constitution and section 24200, subdivision (a), because, on January 21, 2022, February 4, 2022, and March 25, 2022, respondent-licensee violated license condition #2 which states, "Sales, service and consumption of alcoholic beverages shall be permitted in the sidewalk seating area only between the hours of 10:00 a.m. and 9:00 p.m. each day of the week," in that the licensee allowed the consumption of alcoholic beverages in the sidewalk seating area and/or the parklet past 9:00 p.m., such being a violation of the license pursuant to section 23804. (Findings of Fact ¶¶ 1-8)

5. In the CTCA sought by and granted to the Respondent on September 2, 2021, the Department included Condition 2 that stated "[a]ll operating conditions imposed on the applicant's permanently licensed premises shall remain in effect and be subject to enforcement." The acknowledged reasons for the original conditional license included the fact that there were residences adjacent to the Licensed Premises, including residences within 100 feet of the Respondent's business. These circumstances that required the original conditions remained in effect during the period at issue. The CTCA granted to the Respondent was an expansion of the outdoor privileges to the parklet. The written application and the CTCA itself were explicit that the conditions extended to the parklet and continued for the existing outdoor area. The need for the continuation of the conditions was apparent given that the Licensed Premises would be operating in a larger outdoor footprint with a larger number of patrons potentially making more noise. Louie reviewed the conditions in the original conditional license and the CTCA with Bauman on September 3, 2021. (Findings of Fact ¶¶ 1-8)

6. After receiving complaints, Department agents went to the Licensed Premises on October 14, 2021, and spoke with Bauman. Bauman was specifically by told Gutierrez that the conditions applied to the CTCA and that sales, service or consumption of alcoholic beverages in any of the outside areas after 9:00 p.m. was a violation of the conditional license and the CTCA. Bauman asserted the conditions did not apply to the parklet. Bauman did not argue that only non-alcoholic drink service was occurring in the outdoor seating area after 9 p.m. After Bauman argued that the conditions did not apply to the parklet, Gutierrez asserted that the conditions did indeed apply to the parklet and that the Department would be enforcing those conditions. (Findings of Fact ¶¶ 1-8)

7. Despite the explicit conditions in the conditional license and the CTCA, during investigations after 9 p.m. on January 21, 2022, February 4, 2022, and March 25, 2022, Department agents observed and documented the sales, service or consumption of alcoholic beverages in the outside areas by patrons of the Licensed Premises. These activities were explicitly prohibited by condition

2 of the conditional license. The restriction was extended to the parklet by the explicit language of the CTCA. (Findings of Fact ¶ ¶ 1-8)

8. The Respondent has argued that the Department agents did not determine the explicit contents of each drink observed in the hands of patrons during the four dates at issue. The Respondent presented evidence that it made available non-alcoholic drinks as an alternative to patrons who did not want alcoholic beverages with their food service. Bauman testified that it offered non-alcoholic kombucha drinks and that it also had a non-alcoholic wine on the menu that came in a full-sized wine bottle. (Findings of Fact ¶ ¶ 1-8)

9. Given that Bauman had expressed an opinion that the conditional license restrictions did not apply to the parklet, she was already on record indicating that she was not going to comply with the applicable license restrictions. The subsequent observations made by the Department agents was consistent with this observation. On November 20, 2021, which is the conduct documented in count one of the Accusation, only one bottle of what appeared to be wine was observed by the agent. While there is a strong possibility that it may have been wine, there remains the possibility that it may have been a non-alcoholic product. As such, this count has not been proven by a preponderance of the evidence. (Findings of Fact ¶ ¶ 1-8)

10. On the remaining dates, there were much larger numbers of what appeared to be alcoholic beverage services taking place. Under the circumstances received in evidence, non-alcoholic service was the exception, not the rule. It is unreasonable to assume that every customer ordered glasses or bottles of non-alcoholic wine on those dates where there were large numbers of bottles and glasses observed by the agents. The bottles and glasses of what appeared to be wine were served at different tables to different groups. On the February 4, 2022, date in count 3, the Department agent filmed multiple tables and the spaces in the parklet receiving service from various different bottles of what appeared to be different kinds of red and white wines. The outdoor area was packed with multiple groups of patrons. The patrons receiving bottle service were in a variety of different groups. This, coupled with Bauman's prior assertion that the restriction did not apply to the parklet, makes it more likely than not that at least a few of the patrons were receiving alcohol service and/or consuming those drinks after 9:00 p.m. in the outside area in violation of the conditional license and the CTLA. (Findings of Fact ¶ ¶ 1-8)

11. Further, on the March 25, 2022, date in count 4, Swain explicitly saw a patron after 9:00 p.m. seated in the outside area drinking what appeared to be a beer. He saw on the menu that the Licensed Premises offered alcoholic beer from Laughing Monk Brewery, and he saw what appeared to be a can associated with that beer brand alongside the glass the drink was served in. (Findings of Fact ¶ ¶ 1-8)

12. Based upon the above, there is sufficient evidence to sustain counts 2-4 in the Accusation. There is insufficient evidence to sustain count 1 in the Accusation. (Findings of Fact ¶ ¶ 1-8)

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

PENALTY

1. The Department's penalty guidelines are in California Code of Regulations, title 4, section 144. (Rule 144) Rule 144 declares: "It is the policy of this Department to impose administrative, non-punitive penalties in a consistent and uniform manner with the goal of encouraging and reinforcing voluntary compliance with the law."
2. The presumptive penalty for a violation of section 23804 is a 15-day suspension with 5 days stayed for one year. There are three sustained counts that have been proved in this Accusation. The Department, in asking for a total penalty of 20 days, sought that penalty under the assumption that all 4 counts would be established.
3. Rule 144 adds that: "Higher or lower penalties from this schedule may be recommended based on the facts of individual cases where generally supported by aggravating or mitigating circumstances."
4. Even though there is no prior discipline against the license, the Department argued against mitigation because of the short period of licensure and the ongoing pattern of non-compliance in this matter. The period of licensure was only a period of months before the first incident of sustained discipline. The evidence in this matter shows that the Respondent consistently ignored its conditional license obligations that were in place to protect the quiet enjoyment of residential neighbors of the Licensed Premises. The repeated violations, after being reminded of the duty to comply with these conditions by Department agents, weigh against a mitigated sentence or a suspended penalty.

In line with the penalty guidelines of rule 144 and balancing the aggravating and mitigating factors, the penalty recommended herein complies with rule 144.

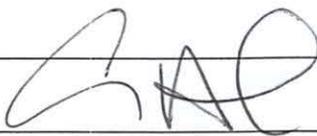
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ORDER

Count one is dismissed. Counts two through four of the Accusation are sustained, and the Respondent's On-Sale Beer and Wine Eating Place License is suspended for 15 days for each of the sustained counts. These penalties are to run concurrently so that the aggregate penalty is a 15-day suspension.

Dated: May 16, 2023


Alberto Roldan
Administrative Law Judge

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<input type="checkbox"/> Non-Adopt: _____
By:  _____
Date: <u>06/26/23</u> _____