

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

AB-9981

File: 21-570309; Reg: 23092923

SURANJITH MALMALA BA FERNANDO,
dba Vikum Liquor Market
8035 Imperial Highway
Downey, CA 90242-3713,
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:* Eliel Chemerinski, as counsel for Suranjith Malmala Ba Fernando,

Respondent: Trisha Pal, as counsel for the Department of Alcoholic Beverage Control.

OPINION

Suranjith Malmala Ba Fernando, doing business as Vikum Liquor Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control (Department)¹ revoking his license because on multiple occasions he or his agent/ employee bought property believing it to be stolen, in violation of Penal Code section 664/496(a); permitted the operation of an illegal software gambling application

¹ The decision of the Department, dated July 18, 2023, is set forth in the appendix.

on the premises, in violation of Penal Code section 330a; allowed access in the licensed premises to a device for the purpose of recording bets, pools, or wagers, to-wit: the "iConnect" application, in violation of California Penal Code section 337a; and permitted the consumption of an alcoholic beverage on the premises, in violation of Business and Professions Code section 25612.5(c)(3).

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on July 28, 2016. There is one instance of prior discipline against the license for the violation of Business and Professions Code section 25658(a) in 2019. (Finding of Fact (FF) ¶ 2; Exh. D-16.)

On January 24, 2023, the Department instituted a thirteen-count accusation against appellant charging that:

- Count 1: On or about March 3, 2022, the licensee, at the licensed premises, bought property, to-wit: Hennessy VS Cognac, believing the same to have been stolen, in violation of California Penal Code sections 664/496(a);
- Count 2: On or about March 3, 2022, the licensee, at the licensed premises bought property, to-wit: Johnny Walker Blue Label, believing the same to have been stolen, in violation of California Penal Code sections 664/496(a);
- Count 3: On or about March 3, 2022, the licensee had under his control and permitted operation of an illegal gambling software application, to-wit: the "iConnect" application at the licensed premises, in violation of California Penal Code section 330a;
- Count 4: On or about March 3, 2022, the licensee did willfully allow access, in the licensed premises, to a device or paraphernalia for the purpose of recording bets, pools, or wagers, to-wit: the "iConnect" application, in violation of California Penal Code section 337a;
- Count 5: On or about March 10, 2022, the licensee's agent or employee, at the licensed premises bought property, to-wit: Hennessy VS Cognac, believing the same to have been stolen, in violation of California Penal Code sections 664/496(a);
- Count 6: On or about March 10, 2022, the licensee's agent or employee, at the licensed premises, bought property, to-wit: Patron Tequila, believing the

same to have been stolen, in violation of California Penal Code sections 664/496a;

- Count 7: On or about March 10, 2022, the licensee had under his control and permitted operation of an illegal gambling software application, to-wit: the "iConnect" application, at the licensed premises, in violation of California Penal Code section 330a;
- Count 8: On or about March 10, 2022, the licensee did willfully allow access, in the licensed premises, to a device or paraphernalia for the purpose of recording bets, pools, or wagers, to-wit: the "iConnect" application, in violation of California Penal Code section 337a;
- Count 9: On or about March 24, 2022, the licensee, at the licensed premises, bought property, to-wit: Hennessy VS Cognac, believing the same to have been stolen, in violation of California Penal Code sections 664/496a;
- Count 10: On or about March 24, 2022, the licensee, at the licensed premises, bought property, to-wit: Patron Tequila, believing the same to have been stolen, in violation of California Penal Code sections 664/496a;
- Count 11: On or about March 24, 2022, the licensee had under his control and permitted operation of an illegal gambling software application at the licensed premises, in violation of California Penal Code section 330a;
- Count 12: On or about March 24, 2022, the licensee did willfully allow access in the licensed premises to a device or paraphernalia for the purpose of recording bets, pools, or wagers, to-wit: the "iConnect" application, in violation of California Penal Code section 337a; and
- Count 13: On or about March 24, 2022, the licensee permitted the consumption of an alcoholic beverage on the licensed premises, in violation of California Business and Professions Code section 25612.5(c)(3).

(Exh. D-1.)

At the administrative hearing held on May 10, 2023, documentary evidence was received and testimony concerning the violation charged was presented by Supervising Department Agent Mehul Patel. Licensee Suranjith Malmala Ba Fernando (Fernando) and his son, Vikum Fernando (Vikum), testified on appellant's behalf.

Testimony established that during an online search in September of 2021, Agent Patel became aware of a Google Maps image containing a photograph of the interior of

the licensed premises depicting a possible gambling machine. As a result, an investigation was initiated. (Exh. 2; FF ¶ 3.)

Agent Patel visited the premises six different times between September 2021 and March 2022 in an undercover capacity. He did not find the suspected gambling machine, but on his visits he observed interactions between clerks and patrons asking to put money on an account. This led him to believe gambling activity was taking place in the premises. During conversations he was told about three games: "River Sweeps," "Vegas X", and "iConnect." Agent Patel asked if he could play, and was asked by the clerks if he had an account. When he responded that he did not, each time he was told he could not set up an account that day because no space was available. (FF ¶ 4.)

On March 3, 2022, Agent Patel returned to the licensed premises in an undercover capacity with Agent Flores, and spoke to Fernando about setting up an account to play one of the games he had heard about on his earlier visits. He was told this would not be possible until after 7:30 p.m. When he returned, Patel took with him a backpack containing four bottles of distilled spirits, which he photographed before going to the licensed premises: a bottle of Johnny Walker Blue Label whisky, a bottle of Hennessy cognac, a bottle of Maker's Mark whisky, and a bottle of Patron tequila. He showed the bottles to Fernando and asked if he was interested in buying them. Patel expressly told Fernando that the bottles were stolen and asked Fernando not to report him. Fernando said he would not. (Exhs. D-3 and D-4; FF ¶¶ 6, 7.)

Fernando expressed interest in the bottles and offered Patel \$22 for the bottle of Hennessy and \$100 for the Johnnie Walker Blue Label. Fernando paid in cash, and Patel surreptitiously photographed him making the cash payment as well as examining the two bottles he purchased. (Exhs. D-5, D-6, D-7; FF ¶ 8.)

Agent Patel returned to the premises at approximately 7:15 p.m. on March 3, 2022, and spoke to Fernando about opening an account. Fernando had Patel write down his name and how much money he wanted on the account. Patel filled out a form, gave Fernando \$20, then watched him interact on a smart phone with the information Patel had provided. Fernando gave Patel a written note with the number needed to connect the iConnect mobile application to the account Fernando had established for him. Patel also purchased a beer. (FF ¶ 9.)

Agent Patel opened the iConnect app on his phone, completed a verification procedure, then saw that he had 2500 credits to use in a variety of available games. Patel selected one called Red Hot Chili 7s and played that game in the premises for approximately 35 minutes, recording the gameplay on his phone (exh. 9). His available credit balance increased or decreased depending on the results of random spins. No skill was required beyond pressing a start button. At one point he asked Fernando if it was okay to play the game inside the premises. Fernando responded that it was okay this time, but in the future he needed to play outside because of “motherfucking undercovers.” (FF ¶¶ 10-11.)

Before leaving, Patel asked to cash out his winnings. The iConnect app showed that he had the equivalent of \$15.26 in credits remaining. Fernando looked at the phone he used initially to set up Patel’s account, and told a female clerk to pay Patel \$15 of the \$15.26. Patel took the cash and exited the premises. (FF ¶ 12.)

Agents Patel and Flores returned to the licensed premises in an undercover capacity on March 10, 2022. Patel asked a female clerk to load \$20 on his account, and she did so with the same cell phone used by Fernando on the previous visit to load credits. Patel also purchased a can of Bud Light beer. The agents showed the clerk

two bottles of Patron tequila and a bottle of Hennessy they had in their backpack, telling her during the conversation that the bottles were stolen. After discussion, the clerk paid the agents \$22 for the bottle of Hennessy and \$20 for the two bottles of Patron. She then placed the bottles in a display behind the checkout counter. (Exh. D-10; FF ¶¶ 13-14.)

Agent Patel remained inside the premises and accessed the iConnect app on his smart phone. He saw that he had credits consistent with the \$20 he had given the clerk, plus the remaining 26 cents from the last visit. Patel selected a different game than on the first visit, and, like before, his credits increased or decreased depending on the random outcome of the spins, with no way to influence the outcome once the start button was pushed. After playing for awhile, and recording his play, Patel asked to cash out the \$13 remaining in his account. Using the smart phone she used to load the account, the female clerk verified the amount and paid him \$13 in cash. Patel then exited the premises. (Exh. D-12; FF ¶ 15.)

During an examination of the iConnect app, Patel determined that it was possible to load credits directly through the app, but that the online purchase of credits yielded fewer credits per dollar than if the credits were purchased through the licensed premises. He discovered that for the same amount of money, 100 credits could be purchased online, versus 125 credits if purchased at the licensed premises. (Exh. D-11; FF ¶ 16.)

On March 24, 2022, Agents Patel and Flores returned to the licensed premises in an undercover capacity, bringing a backpack with a bottle of Patron and two bottles of Hennessy (exh. D-13). They approached Fernando after selecting two cans of Bud Light beer. Patel asked to load \$50 of credits on his account and gave Fernando \$50 in

cash for the credits. Fernando asked “what do you have?” and Patel showed him the bottles in the backpack, telling him they could steal more. Fernando told Patel that if they brought in 50 he would buy them. Fernando also asked for Buchanan’s Scotch Whisky, more Hennessy, Patron, and Don Julio 70 tequila. Fernando also said he would pay more if they brought in more. Flores asked if he would buy Patron if it was not in display boxes, and Fernando said yes. Fernando paid Patel \$56 for the bottles in the backpack. (FF ¶ 17.)

After buying the two cans of Bud Light beer, Patel asked for brown bags for the beer. Patel opened his beer, placed it in a brown paper bag, and began consuming it in the presence of Fernando while he opened the iConnect app and selected a game to play. Patel continued to play the game and drink his beer in the presence of Fernando, who took no steps to stop Patel from drinking inside the licensed premises. Patel recorded his play on the iConnect app (exh. D-14), then logged out and exited the premises. (FF ¶ 18.)

After leaving, Patel logged back in to the iConnect app and played multiple rounds using the credits he had purchased. The credits increased or decreased depending on the number of credits used and the random outcome of the spins, over which he had no control. Patel decided to cash out \$115 from the credits he showed remained in his account, which were greater than the number he started with, after recording his play (exh. D-15). (FF ¶ 19.)

Agent Patel returned to the licensed premises the same day, and asked Fernando to pay out his winnings. Fernando directed a female clerk to process his payout. She asked Patel to write down his name, the amount he wanted to cash out, and the app he had used. Patel wrote this down and the clerk paid him \$115. Patel

then asked Fernando if he still wanted him to obtain more bottles of liquor. Fernando told Patel to speak to his son Vikum, and told Vikum to prepare a list. Vikum asked a female clerk about what was wanted, and Patel exited the premises after the discussion with Vikum and the clerk. (FF ¶ 20.)

During his testimony, Fernando denied any transactions involving the purchase of purportedly stolen bottles of liquor. He also testified that he did not remember any interactions with Agent Patel, and said “I would not buy stolen, I know the rules.” Fernando generally denied the existence of any gambling enterprise at the licensed premises, and said that people were purchasing internet access and video games. Vikum similarly testified that people were purchasing internet access and video games, and that they would not be allowed to interact with the games inside the premises because of its small size. He denied giving Agent Patel a list of items to steal. (FF ¶ 21.)

Following the hearing, the administrative law judge (ALJ) issued a proposed decision on June 12, 2023, sustaining all thirteen counts of the accusation and recommending that the license be revoked. The Department adopted the proposed decision in its entirety on July 17, 2023, and a certificate of decision was issued the following day.

Appellant then filed a timely appeal raising the following issues: (1) the licensee did not violate Penal Code section 330a, (2) the licensee did not violate Penal Code section 337a, and (3) the licensee did not violate Penal Code sections 664/496(a). In sum, appellant maintains the decision is not supported by substantial evidence in regards to these charges. Appellant further maintains (4) the ALJ erred in accepting the testimony of Agent Patel. Issues one and two will be discussed together and issues three and four will be discussed together.

DISCUSSION

I

GAMBLING SOFTWARE

Appellant contends the licensee did not violate Penal Code sections 330a or 337a, as charged in counts 3, 4, 7, 8, 11 and 12. (Appellant's Opening Brief (AOB) at pp. 2-8.) He maintains that "[h]aving a gambling software program is not made illegal by Section 330a" and that a licensee is not responsible for software downloaded on a patron's cell phone. (*Id.* at p. 3.) As the Department notes in its reply brief,

Appellant does not address his own conduct in enabling game play, gambling, and payouts. Agent Patel provided video evidence of the games he played - using an account appellant set up for him - which showed the games operate like illegal slot machines with the outcome based on chance and not skill.

(RRB at p. 9, citations to the record omitted.)

Section 330a (a) provides:

Every person, who has in his or her possession or under his or her control, either as owner, lessee, agent, employee, mortgagee, or otherwise, or who permits to be placed, maintained, or kept in any room, space, inclosure, or building owned, leased, or occupied by him or her, or under his or her management or control, any slot or card machine, contrivance, appliance or mechanical device, upon the result of action of which money or other valuable thing is staked or hazarded, and which is operated, or played, by placing or depositing therein any coins, checks, slugs, balls, or other articles or device, or in any other manner and by means whereof, or as a result of the operation of which any merchandise, money, representative or articles of value, checks, or tokens, redeemable in or exchangeable for money or any other thing of value, is won or lost, or taken from or obtained from the machine, when the result of action or operation of the machine, contrivance, appliance, or mechanical device is dependent upon hazard or chance, and every person, who has in his or her possession or under his or her control, either as owner, lessee, agent, employee, mortgagee, or otherwise, or who permits to be placed, maintained, or kept in any room, space, inclosure, or building owned, leased, or occupied by him or her, or under his or her management or control, any card dice, or any dice having more than six faces or bases each, upon the result of action of which any money or other valuable thing

is staked or hazarded, or as a result of the operation of which any merchandise, money, representative or article of value, check or token, redeemable in or exchangeable for money or any other thing of value, is won or lost or taken, when the result of action or operation of the dice is dependent upon hazard or chance, is guilty of a misdemeanor.

(Pen. Code § 330a.) Section 337a provides:

(a) Except as provided in Section 336.9, every person who engages in one of the following offenses, shall be punished for a first offense by imprisonment in a county jail for a period of not more than one year or in the state prison, or by a fine not to exceed five thousand dollars (\$5,000), or by both imprisonment and fine:

(1) Pool selling or bookmaking, with or without writing, at any time or place.

(2) Whether for gain, hire, reward, or gratuitously, or otherwise, keeps or occupies, for any period of time whatsoever, any room, shed, tenement, tent, booth, building, float, vessel, place, stand or enclosure, of any kind, or any part thereof, with a book or books, paper or papers, apparatus, device or paraphernalia, for the purpose of recording or registering any bet or bets, any purported bet or bets, wager or wagers, any purported wager or wagers, selling pools, or purported pools, upon the result, or purported result, of any trial, purported trial, contest, or purported contest, of skill, speed or power of endurance of person or animal, or between persons, animals, or mechanical apparatus, or upon the result, or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever.

(3) Whether for gain, hire, reward, or gratuitously, or otherwise, receives, holds, or forwards, or purports or pretends to receive, hold, or forward, in any manner whatsoever, any money, thing or consideration of value, or the equivalent or memorandum thereof, staked, pledged, bet or wagered, or to be staked, pledged, bet or wagered, or offered for the purpose of being staked, pledged, bet or wagered, upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of person or animal, or between persons, animals, or mechanical apparatus, or upon the result, or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever.

(4) Whether for gain, hire, reward, or gratuitously, or otherwise, at any time or place, records, or registers any bet or bets, wager or wagers, upon the result, or purported result, of any trial, or

purported trial, or contest, or purported contest, of skill, speed or power of endurance of person or animal, or between persons, animals, or mechanical apparatus, or upon the result, or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever.

(5) Being the owner, lessee or occupant of any room, shed, tenement, tent, booth, building, float, vessel, place, stand, enclosure or grounds, or any part thereof, whether for gain, hire, reward, or gratuitously, or otherwise, permits that space to be used or occupied for any purpose, or in any manner prohibited by paragraph (1), (2), (3), or (4).

(6) Lays, makes, offers or accepts any bet or bets, or wager or wagers, upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of person or animal, or between persons, animals, or mechanical apparatus.

(Pen. Code § 337a.)

As explained in *People ex rel. Green v. Grewal*:

For purposes of this section, slot machine or device means a machine, apparatus, or device that is adapted, or may readily be converted, for use in a way that, as a result of the insertion of any piece of money or coin or other object, or by any other means, the machine or device is caused to operate or may be operated, and by reason of any element of hazard or chance or of other outcome of operation unpredictable by him or her, the user may receive or become entitled to receive any piece of money, credit, allowance, or thing of value, or additional chance or right to use the slot machine or device, or any check, slug, token, or memorandum, whether of value or otherwise, which may be exchanged for any money, credit, allowance, or thing of value, or which may be given in trade, irrespective of whether it may, apart from any element of hazard or chance or unpredictable outcome of operation, also sell, deliver, or present some merchandise, indication of weight, entertainment, or other thing of value.

¶ . . . ¶

The fact that users need not swipe a card or enter a number into the computer terminal and then play a casino-style game in order to obtain a result, does not make the system any less of a slot machine when they do swipe the card or enter the number and do play the casino-style game.

When the user, by some means . . . causes the machine to operate,

and then plays a game to learn the outcome, which is governed by chance, the user is playing a slot machine.

(*People ex rel. Green v. Grewal* (2015) 61 Cal.4th 544, 556-557; 564 [189 Cal.Rptr.3d 686] (*Green*), emphasis added, internal quotation marks and citations omitted.)

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 [28 Cal.Rptr.74].)

Therefore, when the Board examines a decision of the Department, to determine whether it is supported by substantial evidence, it leads us to consider, 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 Penal Code sections 330a and 337a do not apply because the phones used to play the various games (*i.e.*, the gambling devices) were not owned by the licensee:

If Appellant would have supplied the phones or computer monitors to customers and these customers would have used them to gamble in Appellant's store, that could have been different, but that's not what happened and that's not the evidence that was presented. Even if the device was "integrated" with the iConnect app to create a slot machine, this device, this apparatus, this machine, is not Appellant's device apparatus or machine, its Patel. And Patel is that "person" who owned, kept or maintained that device and used it as a slot machine to gamble.

(ACB at p. 3.)

What appellant overlooks is the language of section 330a which says:

Every person, who has in his or her possession or under his or her control, either as owner, lessee, agent, employee, mortgagee, or otherwise, **or who permits** to be placed, maintained, or kept in any room, space, inclosure, or building owned, leased, or occupied by him or her, or under his or her management or control . . .

This language prohibits gambling in the licensed premises, whether the devices are owned by the licensee or not. The key fact here, just as in *Green*, is that appellant

permitted gambling in the premises on **any** device — and facilitated that enterprise by taking money to load credits into participants' accounts and paying out money to cash them out.

The existence of gambling software on an individual's phone is not in and of itself illegal. However, it became so when the licensee participated in the gambling enterprise: by taking money to enable the gambling, permitting individuals to gamble in the licensed premises, and giving out money to those individuals based on a game of chance. Accordingly, the decision is supported by substantial evidence in regards to counts 3, 4, 7, 8, 11 and 12.

II

STOLEN PROPERTY & AGENT PATEL'S TESTIMONY

Appellant contends he did not violate Penal Code sections 664/496(a) and that the ALJ erred in accepting the testimony of Agent Patel regarding counts 1, 2, 5, 6, 9 and 10, charging the attempted receipt of stolen property. (AOB at pp. 9-14.) He admits that he purchased liquor from Agent Patel, but claims he was not told that it was stolen. (*Id.* at p. 9.)

Section 496(a) provides:

Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, shall be punished . . .

(Pen. Code § 496a.) Section 664 defines an attempted crime as: “[e]very person who attempts to commit any crime, but fails, or is prevented or intercepted in its perpetration

. . .” (Pen. Code § 664.) In short, the accusation refers to the attempted receipt of stolen property because the bottles were not in fact stolen — thereby preventing a completed crime. (FF ¶ 18.)

Appellant maintains Agent Patel failed to record the interactions with the licensee and his employees, and then lied about the interactions during his testimony at the administrative hearing. As a result, he maintains the charges should be dismissed and contends:

This is about the intentional and deliberate decision of an agent to not record evidence that would have exculpated and exonerated Vikum Liquor. This is about the non-existence of evidence, the non-existence of the recordings of the critical communications that should have existed but for the corruption of the one and only witness for the Department that designed, planned and orchestrated this operation with the intent to get Vikum Liquor at all costs and regardless.

(AOB at pp. 14-15.) Appellant presented no evidence at the administrative hearing or in his briefs to substantiate his claims of duplicity, targeting, or lack of truthfulness on the part of Agent Patel.

It is the province of the ALJ, as trier of fact, to make determinations as to witness credibility. (*Lorimore v. State Personnel Bd.* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]); *Brice v. Dept. of Alcoholic Bev. Control* (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].)

The ALJ, who saw and heard the witnesses, deemed the agent’s testimony credible, and the testimony of appellant and his son not credible:

The testimony of Fernando and Vikum is rejected as unreliable for a number of reasons. First and foremost, physical evidence received in this matter is at odds with their assertions. . . . Regarding the Respondent's assertion that there was no interaction between Fernando and Patel, Patel surreptitiously photographed Fernando examining, then paying for, one of the purported stolen bottles of liquor. This corroborated the testimony of Patel that he had interacted directly with Fernando. The testimony of both

Fernando and Vikum was vague, and at odds with the physical evidence in this matter. Their testimony is rejected as unreliable. In contrast, the testimony of Patel is found to be reliable and consistent with the physical evidence that was received. The Respondent developed no evidence upon which the sworn testimony of Patel could be disregarded as untrue or unreliable. No reliable support was offered for the Respondent's assertion that the investigation by the Department was a fabrication. (Findings of Fact ¶¶ 3-20)

(Conclusions of Law, ¶ 21.)

It is not the Board's role to substitute its judgment of credibility for that of the trier of fact. We have reviewed the entire record and find it supports the decision with substantial evidence as to counts 1, 2, 5, 6, 9 and 10. Furthermore, we agree with the ALJ's conclusion that evidence is lacking to support any claims that Agent Patel's testimony was untruthful or fabricated.

ORDER

The decision of the Department is affirmed.²

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

² 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:**

SURANJITH MALMALA BA FERNANDO
VIKUM LIQUOR MARKET
8035 IMPERIAL HIGHWAY
DOWNEY, CA 90242-3713

OFF-SALE GENERAL - LICENSE

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

MONROVIA DISTRICT OFFICE

File: 21-570309

Reg: 23092923

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 July 17, 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 28, 2023, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: July 18, 2023

RECEIVED

JUL 19 2023

**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:

Suranjith Malmala Ba Fernando
DBA: Vikum Liquor Market
8035 Imperial Highway
Downey, California 90242-3713

Respondent

} File: 21-570309
}
} Reg.: 23092923
}
} License Type: 21
}
} Word Count: 32,533
}
} Reporter:
} Shelby Maaske
} Kennedy Reporters
}

Off-Sale General License

PROPOSED DECISION

Administrative Law Judge Alberto Roldan, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter, via videoconference, on May 10, 2023.

Trisha Pal, Attorney, represented the Department of Alcoholic Beverage Control (Department).

Eliel Chemerinski, Attorney represented Respondent-Licensee Suranjith Malmala Ba Fernando (Respondent).

The Department seeks to discipline Respondent's license pursuant to 13 counts alleged in the Accusation on the grounds that:

- (1) On or about March 3, 2022, Respondent-Licensee, at the Licensed Premises, bought property, to wit: Hennessy VS Cognac, believing the same to have been stolen, in violation of California Penal Code sections 664/496(a);
- (2) On or about March 3, 2022, Respondent-Licensee, at the Licensed Premises bought, received, withheld or concealed property, to wit: Johnny Walker Blue Label, believing the same to have been stolen, in violation of California Penal Code sections 664/496(a);
- (3) On or about March 3, 2022, the Respondent-Licensee had under his control and permitted operation of an illegal gambling software application, to-wit: the "iConnect" application, at the Licensed Premises, in violation of Penal Code Section 330a;
- (4) On or about March 3, 2022, the Respondent-Licensee did willfully allow access, in the above designated Licensed Premises, to a device or paraphernalia for the purpose of recording bets, pools, or wagers, to-wit: the "iConnect" application, in violation of California Penal Code section 337a;
- (5) On or about March 10, 2022, Respondent-Licensee's agent or employee, at the Licensed Premises bought, received, withheld or concealed property, to wit: Hennessy

- VS Cognac, believing the same to have been stolen, in violation of California Penal Code sections 664/496(a);
- (6) On or about March 10, 2022, Respondent-Licensee's agent or employee, at the Licensed Premises bought, received, withheld or concealed property, to wit: Patron Tequila, believing the same to have been stolen, in violation of California Penal Code sections 664/496(a);
 - (7) On or about March 10, 2022, the Respondent-Licensee had under his control and permitted operation of an illegal gambling software application, to-wit: the "iConnect" application, at the Licensed Premises, in violation of Penal Code Section 330a;
 - (8) On or about March 10, 2022, the Respondent-Licensee did willfully allow access, in the above designated Licensed Premises, to a device or paraphernalia for the purpose of recording bets, pools, or wagers, to-wit: the "iConnect" application, in violation of California Penal Code section 337a;
 - (9) On or about March 24, 2022, Respondent-Licensee, at the Licensed Premises, bought, received, withheld or concealed property, to wit: Hennessy VS Cognac, believing the same to have been stolen, in violation of California Penal Code sections 664/496(a);
 - (10) On or about March 24, 2022, Respondent-Licensee, at the Licensed Premises bought, received, withheld or concealed property, to wit: Patron Tequila, believing the same to have been stolen, in violation of California Penal Code sections 664/496(a);
 - (11) On or about March 24, 2022, the Respondent-Licensee had under his control and permitted operation of an illegal gambling software application, at the Licensed Premises, in violation of Penal Code Section 330a;
 - (12) On or about March 24, 2022, the Respondent-Licensee did willfully allow access, in the above designated Licensed Premises, to a device or paraphernalia for the purpose of recording bets, pools, or wagers, to-wit: the "iConnect" application, in violation of California Penal Code section 337a; and
 - (13) On or about March 24, 2022, the Respondent-Licensee permitted the consumption of an alcoholic beverage on the Licensed Premises, in violation of Business and Professions Code section 25612.5(c)(3). (Exhibit D-1)

In each of the thirteen counts of 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. 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) 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 May 10, 2023.

FINDINGS OF FACT

1. The Department filed the Accusation on January 24, 2023. (Exhibit D-1)
2. The following is the record of prior Department discipline against the Respondent's license as established by official records introduced by the Department (Exhibit D-16):

Violation Date	Violation	Registration Date	Registration Number	Penalty
2/6/2019	B&P section 25658(a)	7/19/2019	19089105	15-day suspension

3. In September 2021, Department Agent M. Patel (Patel), through an online search, became aware of a Google Maps image that had a photograph of what was purported to be the interior of the Licensed Premises. The photograph depicted a possible gambling machine inside of the Licensed Premises. (Exhibit D-2) As a result of the image, Department agents decided to respond to the location on a later date for further investigation. The purpose of the visit was to determine whether there was a possible illegal gambling operation at the Licensed Premises. Patel was an agent with over 8 years with the Department and 8 additional years of experience as a correctional officer. During his law enforcement career, Patel had received training and investigated cases regarding illegal gambling devices and gambling enterprises during the course of his employment.

4. The Licensed Premises was operating as a convenience/liquor store and was open for business when Patel arrived on September 10, 2021. Patel did not find the machine from the Google maps photo, but he did observe interactions between two clerks on duty and patrons at the location that led him to suspect that a gambling operation may be in place. Patel saw patrons interact with the clerks and ask to put money on an account. From conversations with the patrons and the clerks, Patel was told about three games named "River Sweeps", "Vegas X", and "iConnect" from these interactions. When Patel asked the clerks to play, he was asked if he had an account. Patel responded that he did not. Patel was told that an account could not be set up that day.

5. Patel returned on five additional dates through March 2, 2022, and was repeatedly told that they were not able to open account yet because there was no space available. During one of these visits, Patel was advised to visit earlier in the day. During these visits, Patel observed interactions between patrons and the clerks on duty that were consistent with the interactions that drew his attention initially.

6. Patel returned on March 3, 2022. Prior to returning, Patel prepared a backpack with four bottles of distilled spirits that he was going to offer to sell in a sting operation. Patel and one other Department agent entered the Licensed Premises in plain clothes. Patel saw that the Licensee-Respondent, Suranjith Malmala Ba Fernando (Fernando) was one of the persons working behind the counter that day. Patel later confirmed the identity of Fernando through the California Department of Motor Vehicles Cal-ID system. (Exhibit D-8) Patel approached Fernando and asked to open an account in one of the games he had learned about. Fernando told

Patel that he did have space to add him and set up an account, but that Patel would have to return at 7:30 p.m. for this.

7. Patel was carrying the backpack with the liquor bottles. Patel had a bottle of Johnny Walker Blue Label Whisky (Johnny Walker), a bottle of Hennessy cognac (Hennessy), a bottle of Maker's Mark Whisky (Maker's Mark) and a bottle of Patron Tequila (Patron) in the backpack. Prior to going to the Licensed Premises on March 3, 2022, Patel photographed all four bottles. (Exhibits D-3 and D-4) Patel showed the four bottles to Fernando and asked Fernando if he was interested in buying any of them. During his conversation with Fernando, Patel explicitly said he had stolen the bottles. Patel described the Johnny Walker as hard to steal. Patel asked Fernando not to report him and Fernando said he would not.

8. Fernando expressed interest in the bottles and specifically asked Patel about "Hennessy" and told Patel if he brought more bottles, he would buy them. Fernando removed the Johnny Walker from its decorative box and examined it more closely. During the interaction with Fernando, Patel asked Fernando if he wanted him to obtain more Johnny Walker. Fernando said "no" to this offer. After using the register to check the retail price he was charging for Hennessy and Johnny Walker, Fernando offered Patel \$22 for the Hennessy and \$100 for the Johnny Walker. Patel asked for more money for the Johnny Walker. Fernando said he would not pay more than what he initially offered. Patel then accepted Fernando's offer. Patel gave Fernando the Hennessy and the Johnny Walker. Fernando took those two bottles. Fernando placed \$122 in cash in front of Patel on the counter between them as payment. Patel surreptitiously photographed Fernando examining the Johnny Walker bottle (Exhibits D-5 and D-6) and making the cash payment to Patel. (Exhibit D-7) Patel took the cash payment after Fernando placed it on the counter. Patel retained the Maker's Mark and Patron bottles in his backpack. Patel left the Licensed Premises with the understanding that he was to return around 7:30 p.m. to set up an account.

9. Patel went back to the Licensed Premises at 7:15 p.m. on March 3, 2022, to attempt to open an account. Patel contacted Fernando who was behind the counter. Fernando gave Patel a piece of paper to write his account information for the program he wanted to play, and how much he wanted to be placed on the account. Patel filled out the form and gave Fernando \$20 to place on the account. Patel elected to set up an account with the iConnect program. Patel watched Fernando interact with his smartphone using the written information Patel had provided. After doing this, Fernando gave Patel a written note with the number needed to connect the iConnect mobile application to the account Fernando established for him. In addition to the \$20, Patel also bought a beer.

10. Patel remained in the Licensed Premises while he interacted with the iConnect application on his smartphone. Patel opened the application and input the numbers provided by Fernando. The program then prompted Patel to input identifying information. The application sent Patel a verification code to the mobile phone number of the smartphone Patel was using for the investigation. After completing the verification, the application showed that he had 2500 credits to use in game play. The application showed Patel a variety of gameplay options to choose from. Patel selected a game called "Red Hot Chili 7s" to play. The game allowed Patel to select the number of credits he wished to play. After selecting credits to be used for play from his balance,

Patel did not have any ability to change or affect the outcome of a round of play after pressing start. Patel played multiple rounds with the credits he had paid for. His available credit balance increased or decreased depending on the outcome of the random spins. None of the rounds involved any skill or interaction with the process beyond the start button being pressed. Patel had no way of influencing the outcome of play before, during, or after the start button was pressed. The columns would randomly spin and stop on a random result.

11. After interacting with the application for approximately 35 minutes, Patel decided to end his play. The console showed he had the equivalent of \$15.26 in credits remaining. Patel video captured his interaction with the iConnect application on March 3, 2022. (Exhibit D-9) Patel's interaction with the iConnect application took place while he was standing inside of the Licensed Premises. At one point during his interaction with the application on March 3, 2022, Patel asked Fernando if it was okay for him to remain in the Licensed Premises. Fernando responded that it was okay to stay this time, but in the future, he had to play outside. Fernando said the reason was because of "motherfucking undercovers."

12. After ending his play on March 3, 2022, Patel contacted Fernando and told him that he wanted to cash out his winnings. Patel watched Fernando look at the same phone he had initially used to set up Patel's account to verify his balance. Fernando then had one of the female employees of the Licensed Premises pay Patel \$15 in cash of the \$15.26 cash balance. Patel took the \$15 he was given by her and left the Licensed Premises.

13. Patel returned to the Licensed Premises in plain clothes on March 10, 2022, to follow up on the investigation. Patel brought a backpack containing two bottles of Patron and a bottle of Hennessy. The bottles were photographed prior to being used that day. (Exhibit D-10) Patel entered and noted that there was a female clerk working inside the Licensed Premises. Patel watched a number of patrons interacting with her in the same manner that he did when he set up the iConnect application and loaded his account on March 3, 2022. After the female clerk was done with the other patrons, Patel approached her and presented a Bud Light can for purchase. He also presented a piece of paper with the name he had used to set up his account on March 3, 2022.

14. Patel told the female clerk that he wanted to load \$20 onto his account. She reviewed Patel's information with him and then interacted with what appeared to be the same smartphone device Fernando used to set up and settle his iConnect account on March 3, 2022. After she was done loading Patel's iConnect account with the \$20 Patel gave her, Patel asked the female clerk if she was interested in buying any of the bottles he had with him. She initially said that she would give him \$20 for the Hennessy. She took one of the Patron bottles and scanned the bar code to see what the Licensed Premises was charging for that brand. After determining that the Licensed Premises sold that brand for \$18.99, the female clerk offered \$10 for each Patron bottle. During their discussion, Patel mentioned that the bottles were stolen. In addition, one of the bottles of Patron tequila had a price tag applied on top of its decorative box. Patel stated that he was paid \$22 for the Hennessy on a prior occasion. The female clerk agreed to that price. Patel was given \$22 for the Hennessy cognac and \$20 for the two Patron tequilas. After the exchange, Patel

watched the female clerk peel the price label from the Patron tequila before placing it on the shelf with the existing inventory of Patron at the Licensed Premises.

15. Patel remained inside of the Licensed Premises when he accessed the iConnect application on his smartphone on March 10, 2022. Patel saw that the game had been loaded with credits consistent with the \$20 Patel had paid to the female clerk when he asked to load his account. The account also had the remaining 26 cents of credit that was not paid out to him when he collected \$15 on March 3, 2022. Patel selected a different game from the available choices and then engaged in game play. Patel played multiple rounds with the credits available in his account. Like on March 3, 2022, his available credits increased or decreased depending on the number of credits used and the random outcome of the spins. None of the rounds involved any skill or interaction with the process upon the start being activated. Patel had no way of influencing the outcome of play before, during, or after the start button was pressed. After interacting with the iConnect application game, Patel decided to cash out \$13 from the credits he showed remained in his account. The female clerk interacted with the same smartphone she used to load the account earlier. After determining that he had credits that equated to \$13, Patel was given that amount in cash by the female clerk. Patel left the Licensed Premises after receiving the \$13 payout. Patel video captured his interaction with the iConnect application on March 10, 2022. (Exhibit D-12)

16. After leaving, Patel reexamined the iConnect application and determined that the balance of credits available had been adjusted downward in proportion to the \$13 payout he had received. Patel determined during the investigation that there was a mechanism for loading credits by buying them in the application, but that an online purchase of credits was at an unfavorable rate compared to an in-person purchase at the Licensed Premises. For the same amount of money to purchase 100 credits online, you would receive 125 credits for the same amount of money during an in-person transaction. During the investigation, Patel determined that the female clerk he interacted with on March 10, 2022, was Panditharathna Thushara Kumari. (Exhibit D-11)

17. Patel returned to the Licensed Premises on March 24, 2022. He and Department Agent Flores (Flores) were in plain clothes. Patel brought a backpack containing one Patron bottle and two Hennessy bottles. (Exhibit D-13) Patel saw Fernando working in the Licensed Premises after they entered. Patel and Flores approached Fernando after selecting two Bud Light beer cans to purchase. Patel presented a piece of paper with the name he had used to set up the iConnect account. Patel then asked to put \$50 of credits in the account and paid Fernando \$50 in cash. Fernando asked Patel, "What do you have?" in reference to whether Patel had any bottles. Patel showed the three bottles in the backpack to Fernando. After showing him the bottles, Patel told Fernando they could steal more. Fernando then told them if they brought in 50, he would buy them all. Fernando also asked Patel if he could get Buchanan's Scotch whisky. Fernando then asked for more Hennessy, Patron, and for Don Julio 70 tequila. Fernando told the agents that he would pay more if they brought in more. Fernando asked Flores if he could break the lock after Flores said they would have to break open displays to get the liquor. Flores responded "Yes." to this question. Flores asked Fernando if he would buy Patron if it was not in display boxes. Fernando responded that he would. Fernando paid Patel \$56 for the bottles in the backpack.

18. After buying the two cans of Bud Light, Patel asked for brown bags for the beers. Patel placed his can in one of the bags provided by Fernando, opened it, and began sipping it in the presence of Fernando. Patel opened the iConnect application and selected a game to play with the credits that were in the account. The credits corresponded to the balance expected from the \$50 that Patel had just paid. Patel stood in the store and interacted with the game he had selected using the credits available. Patel continued to drink from the Bud Light beer can while he interacted with the iConnect application game he had selected. Patel and Fernando could see each other from where Patel was standing. Despite this, Fernando did not take any steps to stop Patel from drinking the beer inside of the Licensed Premises. Patel video captured his interaction with the application inside of the Licensed Premises. (Exhibit D-14) After playing multiple rounds in the iConnect application, Patel logged out and left the Licensed Premises.

19. After leaving, Patel again logged in to the iConnect application, selected a game, and played multiple rounds using the credits that were available from the credits that Patel bought inside of the Licensed Premises that day. Like on March 3, 2022, and March 10, 2022, Patel's available credits during both sessions of gameplay on March 24, 2022, increased or decreased depending on the number of credits used and the random outcome of the spins. None of the rounds involved any skill or interaction with the process upon the start being activated. Patel had no way of influencing the outcome of play before, during, or after the start button was pressed. After interacting with the iConnect application game selected, Patel decided to cash out \$115 from the credits he showed remained in his account. The cash out amount exceeded the credits he had on the books at the beginning of gameplay. Patel also video captured his gameplay during the second session on March 24, 2022. (Exhibit D-15)

20. Patel returned to the Licensed Premises on March 24, 2022, and approached Fernando to request his payout of winnings. Fernando directed Patel to a female clerk in the Licensed Premises to process his payout. The female clerk handed Patel a piece of paper and directed him to write how much he wanted to cash out, and to write his name and the application he had used. Patel did as he was instructed and gave the information to her. The female clerk then went to a corner of the counter and retrieved the \$115 requested and gave it Patel. After cashing out his winnings, Patel again approached Fernando about whether Fernando still wanted Patel to obtain more bottles of liquor. Fernando then directed Patel to speak with his son, Vikum Fernando (Vikum) in the Licensed Premises. Fernando told Vikum to prepare a list. Vikum then checked in with a female clerk about what was wanted. Patel left after the discussion with Vikum and the female clerk.

21. Respondent Fernando testified in this matter. He was present, via videoconference, during the testimony of Patel. Fernando testified to not remembering any interactions with Patel and he denied any transactions involving the purchase of purported stolen liquor bottles. Fernando testified that he had never seen Patel before. Fernando testified, "I would not buy stolen. I know the rules." Fernando offered no explanation as to how he was photographed by Patel examining the Johnny Walker bottle and placing cash on the counter after the examination of the bottle. Fernando generally denied the existence of any gambling enterprise at the Licensed Premises. Fernando testified that the purchases that Patel testified about were people purchasing internet access and video games. Fernando denied interacting with any of the video games. Vikum also

testified in this matter and stated that the accounts set up were only for internet access and video games. Vikum also testified that people would not be allowed to remain in the Licensed Premises and interact with the games because the Licensed Premises is small and it would be unsafe to do so. Vikum also denied giving Patel a list of items to steal during his testimony.

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. Penal Code section 496(a) provides that "(a) [a]ny person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment in a county jail for not more than one year, or imprisonment pursuant to subdivision (h) of Section 1170. However, if the value of the property does not exceed nine hundred fifty dollars (\$950), the offense shall be a misdemeanor, punishable only by imprisonment in a county jail not exceeding one year, if such person has no prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290".
4. Penal Code section 664 criminalizes the act of attempting to commit any crime, but failing, when the act is prevented or intercepted in its perpetration by an outside force beyond the control of the perpetrator.
5. Penal Code section 330a provides, "(a) Every person, who has in his or her possession or under his or her control, either as owner, lessee, agent, employee, mortgagee, or otherwise, or who permits to be placed, maintained, or kept in any room, space, enclosure, or building owned, leased, or occupied by him or her, or under his or her management or control, any slot or card machine, contrivance, appliance or mechanical device, upon the result of action of which money or other valuable thing is staked or hazarded, and which is operated, or played, by placing or depositing therein any coins, checks, slugs, balls, or other articles or device, or in any other manner and by means whereof, or as a result of the operation of which any merchandise, money, representative or articles of value, checks, or tokens, redeemable in or exchangeable for money or any other thing of value, is won or lost, or taken from or obtained from the machine, when the result of action or operation of the machine, contrivance, appliance, or mechanical device is dependent upon hazard or chance, and every person, who has in his or her possession or under his or her control, either as owner, lessee, agent, employee, mortgagee, or otherwise, or who

permits to be placed, maintained, or kept in any room, space, enclosure, or building owned, leased, or occupied by him or her, or under his or her management or control, any card dice, or any dice having more than six faces or bases each, upon the result of action of which any money or other valuable thing is staked or hazarded, or as a result of the operation of which any merchandise, money, representative or article of value, check or token, redeemable in or exchangeable for money or any other thing of value, is won or lost or taken, when the result of action or operation of the dice is dependent upon hazard or chance, is guilty of a misdemeanor.”

6. Penal Code section 330b provides, “(a) It is unlawful for any person to manufacture, repair, own, store, possess, sell, rent, lease, let on shares, lend or give away, transport, or expose for sale or lease, or to offer to repair, sell, rent, lease, let on shares, lend or give away, or permit the operation, placement, maintenance, or keeping of, in any place, room, space, or building owned, leased, or occupied, managed, or controlled by that person, any slot machine or device, as defined in this section. It is unlawful for any person to make or to permit the making of an agreement with another person regarding any slot machine or device, by which the user of the slot machine or device, as a result of the element of hazard or chance or other unpredictable outcome, may become entitled to receive money, credit, allowance, or other thing of value or additional chance or right to use the slot machine or device, or to receive any check, slug, token, or memorandum entitling the holder to receive money, credit, allowance, or other thing of value.”

7. Penal Code section 330b further provides “(d) For purposes of this section, “slot machine or device” means a machine, apparatus, or device that is adapted, or may readily be converted, for use in a way that, as a result of the insertion of any piece of money or coin or other object, or by any other means, the machine or device is caused to operate or may be operated, and by reason of any element of hazard or chance or of other outcome of operation unpredictable by him or her, the user may receive or become entitled to receive any piece of money, credit, allowance, or thing of value, or additional chance or right to use the slot machine or device, or any check, slug, token, or memorandum, whether of value or otherwise, which may be exchanged for any money, credit, allowance, or thing of value, or which may be given in trade, irrespective of whether it may, apart from any element of hazard or chance or unpredictable outcome of operation, also sell, deliver, or present some merchandise, indication of weight, entertainment, or other thing of value.”

8. Penal Code section 330.1(a) provides that it is a misdemeanor for anyone to manufacture, own, store, keep, possess, sell, rent, lease, let on shares, lend or give away, transport, or expose for sale or lease, or offer to sell, rent, lease, let on shares, lend or give away or to permit the operation of or to permit to be placed, maintained, used, or kept in any room, space, or building owned, leased, or occupied by him or her or under his or her management or control, any slot machine or device as defined.

9. Penal Code section 330.1(a) further provides that it is a misdemeanor to make or permit to be made any agreement with reference to any slot machine or device as defined, pursuant to which agreement the user thereof, as a result of any element of hazard or chance, may become entitled to receive anything of value or additional chance or right to use that slot machine or device, or to

receive any check, slug, token, or memorandum, whether of value or otherwise, entitling the holder to receive anything of value.

10. Penal Code section 330.1(f) provides that a “slot machine or device within the meaning of [s]ections 330.1 to 330.5, inclusive, of this code is one that is, or may be, used or operated in such a way that, as a result of the insertion of any piece of money or coin or other object the machine or device is caused to operate or may be operated or played, mechanically, electrically, automatically, or manually, and by reason of any element of hazard or chance, the user may receive or become entitled to receive anything of value or any check, slug, token, or memorandum, whether of value or otherwise, which may be given in trade, or the user may secure additional chances or rights to use such machine or device, irrespective of whether it may, apart from any element of hazard or chance, also sell, deliver, or present some merchandise, indication of weight, entertainment, or other thing of value.”

11. Penal Code section 337a in relevant part provides that, “(a) Except as provided in Section 336.9, every person who engages in one of the following offenses, shall be punished for a first offense by imprisonment in a county jail for a period of not more than one year or in the state prison, or by a fine not to exceed five thousand dollars (\$5,000), or by both imprisonment and fine:

(1) Pool selling or bookmaking, with or without writing, at any time or place.

(2) Whether for gain, hire, reward, or gratuitously, or otherwise, keeps or occupies, for any period of time whatsoever, any room, shed, tenement, tent, booth, building, float, vessel, place, stand or enclosure, of any kind, or any part thereof, with a book or books, paper or papers, apparatus, device or paraphernalia, for the purpose of recording or registering any bet or bets, any purported bet or bets, wager or wagers, any purported wager or wagers, selling pools, or purported pools, upon the result, or purported result, of any trial, purported trial, contest, or purported contest, of skill, speed or power of endurance of person or animal, or between persons, animals, or mechanical apparatus, or upon the result, or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever.

(3) Whether for gain, hire, reward, or gratuitously, or otherwise, receives, holds, or forwards, or purports or pretends to receive, hold, or forward, in any manner whatsoever, any money, thing or consideration of value, or the equivalent or memorandum thereof, staked, pledged, bet or wagered, or to be staked, pledged, bet or wagered, or offered for the purpose of being staked, pledged, bet or wagered, upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of person or animal, or between persons, animals, or mechanical apparatus, or upon the result, or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever.

(4) Whether for gain, hire, reward, or gratuitously, or otherwise, at any time or place, records, or registers any bet or bets, wager or wagers, upon the result, or purported result,

of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of person or animal, or between persons, animals, or mechanical apparatus, or upon the result, or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever.

(5) Being the owner, lessee or occupant of any room, shed, tenement, tent, booth, building, float, vessel, place, stand, enclosure or grounds, or any part thereof, whether for gain, hire, reward, or gratuitously, or otherwise, permits that space to be used or occupied for any purpose, or in any manner prohibited by paragraph (1), (2), (3), or (4).”

12. Section 25612.5(c)(3) states “ No alcoholic beverages shall be consumed on the premises of an off-sale retail establishment, and no alcoholic beverages shall be consumed outside the edifice of an on-sale retail establishment.”

13. Cause for suspension or revocation of the Respondent’s license exists under Article XX, section 22 of the California State Constitution and sections 24200(a) and (b) on the basis that in the thirteen counts of the Accusation:

1. On March 3, 2022, the Respondent, at the Licensed Premises, bought property, to wit: Hennessy VS Cognac, believing the same to have been stolen, in violation of California Penal Code sections 664/496(a);
2. On March 3, 2022, the Respondent, at the Licensed Premises bought, received, withheld or concealed property, to wit: Johnny Walker Blue Label, believing the same to have been stolen, in violation of California Penal Code sections 664/496(a);
3. On March 3, 2022, the Respondent had under his control and permitted operation of, an illegal gambling software application, to-wit: the “iConnect” application, at the Licensed Premises, in violation of Penal Code Section 330a;
4. On or about March 3, 2022, the Respondent did willfully allow access, in the above designated Licensed Premises, to a device or paraphernalia for the purpose of recording bets, pools, or wagers, to-wit: the “iConnect” application, in violation of California Penal Code section 337a;
5. On March 10, 2022, Respondent’s agent or employee, at the Licensed Premises bought, received, withheld or concealed property, to wit: Hennessy VS Cognac, believing the same to have been stolen, in violation of California Penal Code sections 664/496(a);
6. On March 10, 2022, Respondent’s agent or employee, at the Licensed Premises bought, received, withheld or concealed property, to wit: Patron Tequila, believing the same to have been stolen, in violation of California Penal Code sections 664/496(a);
7. On March 10, 2022, the Respondent had under his control and permitted operation of an illegal gambling software application, to-wit: the “iConnect” application, at the Licensed Premises, in violation of Penal Code Section 330a;

8. On March 10, 2022, the Respondent did willfully allow access, in the above designated Licensed Premises, to a device or paraphernalia for the purpose of recording bets, pools, or wagers, to-wit: the “iConnect” application, in violation of California Penal Code section 337a;
9. On March 24, 2022, Respondent, at the Licensed Premises, bought, received, withheld or concealed property, to wit: Hennessy VS Cognac, believing the same to have been stolen, in violation of California Penal Code sections 664/496(a);
10. On March 24, 2022, Respondent, at the Licensed Premises bought, received, withheld or concealed property, to wit: Patron Tequila, believing the same to have been stolen, in violation of California Penal Code sections 664/496(a);
11. On March 24, 2022, the Respondent had under his control and permitted operation of an illegal gambling software application, at the Licensed Premises, in violation of Penal Code Section 330a;
12. On March 24, 2022, the Respondent did willfully allow access, in the above designated Licensed Premises, to a device or paraphernalia for the purpose of recording bets, pools, or wagers, to-wit: the “iConnect” application, in violation of California Penal Code section 337a; and
13. On March 24, 2022, the Respondent permitted the consumption of an alcoholic beverage on the Licensed Premises, in violation of Business and Professions Code section 25612.5(c)(3).

14. The evidence established that the applications Patel was given access to on March 3, 2022, March 10, 2022, and March 24, 2022, in the Licensed Premises, met the definition of illegal gambling software programs as proscribed by Penal Code section 330a. The gameplay facilitated by the programs in the iConnect application met the definitions of slot machines or devices as defined in Penal Code sections 330b and 330.1(f). The iConnect application operated only after the payment of money and the loading of credits into the user’s account that corresponded to the money paid. The application generated random outcomes. After Patel activated the game play, the reels would appear to spin, and additional credits were possibly awarded based on the result of matching images potentially lining up. The loss or award of credits that Patel received involved no skill or player interaction other than starting play. The game play, in all instances, involved the player using credits placed on their account after paying money. The use of corresponding credits from the initial payment or those “won” during gameplay where the credits that were used during game play. This was established in evidence by Patel’s game play interactions that were video captured and the corresponding payouts he received on the three days he interacted with the iConnect application. (Findings of Fact ¶¶ 3-20)

15. The evidence established that the iConnect application, by hazard or chance, entitled users to receive credit for continued play or to receive money after cashing out, if there were remaining credits. Patel encountered the random accumulation or loss of credits during game play on each date of his investigation he interacted with the iConnect application. On March 3, 2022, March 10, 2022, and March 24, 2022, in the Licensed Premises, Patel received a cash out from game play credits that remained. The remaining credits were paid out as having the cash value

corresponding to the credit that was remaining after Patel's interactions on each date. This cash value directly corresponded to the remaining credits after game play on each date. On March 3, 2022, March 10, 2022, and March 24, 2022, Patel began with a set number of credits after he paid for them. Either Fernando himself, or one of his employees, loaded the credits to Patel's account. Patel then won or lost credits during random game play. Patel was left with an account balance that was less than the credits he started with on March 3, 2022, and March 10, 2022, and more than he started with on March 24, 2022. The game play provided by these consoles was in violation of Penal Code section 330a as alleged in Counts Three, Seven, and Eleven. (Findings of Fact ¶¶ 3-20)

16. Further, the iConnect application allowed persons engaging in gameplay to have their purchases of credits, with cash, recorded and the outcomes of the iConnect application gameplay recorded and saved. The winnings and losses were documented so that individuals gambling, via the iConnect application, could track their winnings and losses and then collect payouts. Patel's testimony, and the video captures preserved by Patel, established that his "bets, pools or wagers" were preserved and recorded for Patel's use and the use of the Respondent. Persons interacting with the iConnect application could be paid their gameplay credits, like Patel was on March 3, 2022, March 10, 2022, and March 24, 2022, in the Licensed Premises. (Findings of Fact ¶¶ 3-20) This evidence established the violations alleged in Counts Four, Eight and Twelve pursuant to Penal Code section 337a. (Findings of Fact ¶¶ 3-20)

17. With respect to Counts One, Two, Five, Six, Nine, and Ten, cause for suspension or revocation of the Respondent's license exists on the basis that the Respondent, in the person of Fernando himself, or his agent or employee, on three separate dates, attempted, pursuant to Penal Code section 664 to buy stolen property, to wit, distilled spirits, in violation of section 496 of the Penal Code. (Findings of Fact ¶¶ 3-20)

18. Since the property was not, in fact stolen, the question is whether the provisions of attempt pursuant to Penal Code section 664 apply. Under the facts of this case, the purchases that occurred on March 3, 2022, March 10, 2022, and March 24, 2022, were clearly attempts by Fernando or his employee to receive stolen property. On March 3, 2022, and March 24, 2022, the purported sale of stolen property occurred directly between Fernando and Patel. Within Fernando's knowledge, he believed that he had completed the purchase (at steep discounts) of distilled spirits that were allegedly stolen by Patel. Beyond Kumala's control and knowledge was the fact that these distilled spirits and the "seller" were law enforcement props in a sting operation. On March 10, 2022, the sale occurred between Patel and Fernando's female clerk who was working that date. The evidence established the clerk was an agent or employee of the Respondent, so her actions on March 10, 2022, are attributable to the Respondent, given the circumstances. On March 3, 2022, March 10, 2022, and March 24, 2022, Patel explicitly stated that the bottles he was offering for sale were stolen. Beyond the explicit statements made by Patel, some of the bottles had price labels that suggested they had already been business inventory. The overall circumstances of their presentation by Patel, on each date, clearly put the Respondent, or his agent or employee, on notice that they were understood to be stolen property. The Respondent, or his agent or employee, completed the offered transactions, and in every instance, paid for the liquor bottles, and took possession of them with the understanding that they

were stolen. The only thing that prevented the possessions from being completed crimes was that they were not *actually* stolen. The Department has established these violations as alleged in the Accusation. (Findings of Fact ¶¶ 3-20)

19. With respect to Count Thirteen, cause for suspension or revocation of the Respondent's license exists on the basis that, on March 24, 2022, the Respondent permitted Patel to open and consume a Bud Light beer can in the Licensed Premises, a type 21, off-sale establishment, in violation of Business and Professions Code section 25612.5(c)(3). On March 24, 2022, Fernando himself, sold the beer to Patel and provided a paper bag to Patel. Patel then opened the beer can, inside of the Licensed Premises, and drank from it. He did this in the immediate presence of Fernando while he stood inside of the Licensed Premises and engaged in gameplay on the iConnect application. The Department has established this violation as alleged in the Accusation. (Findings of Fact ¶¶ 3-20)

20. In this matter, the Respondent has challenged the veracity of Patel's testimony, which was used to establish the case in chief of the Department. Through the testimony of Fernando and his son, Vikum, the Respondent has asserted that Patel never interacted with Fernando or Vikum, at all. Both Fernando and Vikum, denied any involvement in buying purportedly stolen liquor bottles and they asserted that they did not interact with Patel in any fashion. Fernando testified that the program described by Patel was for facilitating internet access and video game play, not gambling. Vikum also asserted in his testimony that the program facilitated video game play and that he had used it to play a shooting game. To accept the testimony of Fernando and Vikum as truthful would require that the testimony of Patel would have to be disbelieved. The two cannot be reconciled. (Findings of Fact ¶¶ 3-20)

21. The testimony of Fernando and Vikum is rejected as unreliable for a number of reasons. First and foremost, physical evidence received in this matter is at odds with their assertions. The video capture of Patel's gameplay received in evidence is at odds with their assertion that the gambling program was a video game. The Respondent offered no examples of the alleged innocent nature of this program, even though it would be something under the Respondent's control. Regarding the Respondent's assertion that there was no interaction between Fernando and Patel, Patel surreptitiously photographed Fernando examining, then paying for, one of the purported stolen bottles of liquor. This corroborated the testimony of Patel that he *had* interacted directly with Fernando. The testimony of both Fernando and Vikum was vague, and at odds with the physical evidence in this matter. Their testimony is rejected as unreliable. In contrast, the testimony of Patel is found to be reliable and consistent with the physical evidence that was received. The Respondent developed no evidence upon which the sworn testimony of Patel could be disregarded as untrue or unreliable. No reliable support was offered for the Respondent's assertion that the investigation by the Department was a fabrication. (Findings of Fact ¶¶ 3-20)

22. The Respondent also argued, without any supporting authority, that the Department's conduct towards the Respondent was tantamount to entrapment and a violation of due process. This argument is rejected. *People v. Smith* (2003) 31 Cal.4th 1207 offers helpful guidance in this area. *Smith*, in affirming the criminal convictions and finding the conduct of the law enforcement officers to be "unremarkable," declined to apply federal sentence manipulation or the federal

standard outrageous conduct doctrine to California. *Smith* did cite with approval California's settled law on the concept of entrapment established in *People v. Barraza* (1979) 23 Cal.3d 675:

"We hold that the proper test of entrapment in California is the following: was the conduct of the law enforcement agent likely to induce a normally law-abiding person to commit the offense? For the purposes of this test, we presume that such a person would normally resist the temptation to commit a crime presented by the simple opportunity to act unlawfully. Official conduct that does no more than offer that opportunity to the suspect - for example, a decoy program - is therefore permissible; but it is impermissible for the police or their agents to pressure the suspect by overbearing conduct such as badgering, cajoling, importuning, or other affirmative acts likely to induce a normally law-abiding person to commit the crime." (23 Cal.3d at 689-690 fn. omitted)

23. In applying the appropriate standard of *Barraza* to this matter, there is no evidence that entrapment took place. In this matter, none of the actions of the law enforcement personnel involved anything more than offering the opportunity to buy stolen property to the Fernando or his agents and employees. It was well within their ability to decline the offers. Regarding Patel's enrollment into an online gambling account, Patel did nothing more than what others were already doing. Fernando and his agents and employees had already put that criminal enterprise in place before Patel's enrollment. Patel's participation was merely as a passive enrollee. As in *Smith*, this was a completely unremarkable investigation. None of the actions of Patel or the other Department agents induced Fernando to buy the purported stolen liquor bottles or set up the gambling operation. Entrapment has not been shown. The Respondent's argument is rejected. (Findings of Fact ¶¶ 3-20)

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

PENALTY

The Department requested that the Respondent's license be revoked outright, given the severity of the violations and the presumption of Rule 146. The Respondent sought an outright dismissal of the allegations by challenging the reliability and truthfulness of the Department officer's testimony through an alternative narrative presented primarily through the Respondent's testimony. As noted in the findings in this matter, that alternative narrative has been rejected. The Respondent has been found to have attempted to receive stolen property on three separate dates, to have maintained an ongoing gambling enterprise run in large part at the Licensed Premises location throughout the period of the investigation. The Respondent has also been shown to have allowed the open consumption of an alcoholic beverage inside of type 21 establishment. While the underlying conduct in the more serious count calls for a presumption of revocation, outright revocation¹ or stayed revocation² can be appropriate depending upon the circumstances.

¹ 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).

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In the present case, outright revocation is warranted. The behavior of the Respondent was not isolated. Fernando personally, actively, and repeatedly sought to have Patel bring him additional stolen property. Fernando presided over and actively ran a sophisticated and extensive criminal gambling enterprise. Fernando chose to testify in a patently untruthful manner in an effort to avoid responsibility for his actions. Further, Fernando's interactions with Patel regarding the purported stolen liquor bottles showed a willingness to continue the criminal enterprise into the future. These factors are appropriate matters to consider in aggravation and they weigh against mitigation.

Fernando, as the actual Licensee-Respondent, has an affirmative obligation to ensure that the Licensed Premises operates in full compliance with the law. The Respondent did not and cannot be entrusted to do so into the future. The behavior at issue here clearly warrants revocation given its seriousness and the personal involvement of the Licensee.

The penalty recommended herein complies with rule 144.

² 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).

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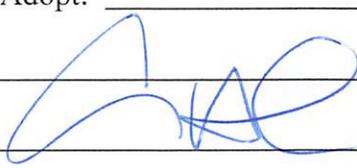
ORDER

The Respondent's Off-Sale General License is hereby revoked.

Dated: June 12, 2023



Alberto Roldan
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By:  _____
Date: <u>07/17/23</u>

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

SURANJITH MALMALA BA
FERNANDO,
dba Vikum Liquor Market
8035 Imperial Highway
Downey, CA 90242-3713,
Appellant/Licensee,

v.

DEPARTMENT OF ALCOHOLIC
BEVERAGE CONTROL,
Respondent.

) AB-9981

) File: 21-570309
) Reg: 23092923

) **DECLARATION OF SERVICE**
) **BY E-MAIL**

I, MARIA SEVILLA, declare that I am over the age of eighteen (18) years, and not a party to the within action; that my place of employment and business is 400 R Street, Suite 320, Sacramento, CA; that on the 11th day of December, 2023, I served a true copy of the attached **Decision** of the Alcoholic Beverage Control Appeals Board in the above-entitled proceeding on each of the persons named below:

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the document(s) to be sent to the person(s) at the e-mail address(es) listed below:

Eliel Chemerinski,
Attorney at Law
16133 Ventura Boulevard, Suite 700
Encino, CA 91436
eliel@chemerinski.com
echemerinski@gmail.com

Department of ABC
Office of Legal Services
3927 Lennane Drive, Suite 100
Sacramento, CA 95834
yuri.jafarinejad@abc.ca.gov

I declare under penalty of perjury that the foregoing is true and correct. Executed at Sacramento, California, on the 11th day of December 2023.

MARIA SEVILLA