

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

**AB-9993**

File: 41-581315; Reg: 23093076

JOSE LUIS RIOS,  
dba Bodega Bar & Restaurant  
1030 North 10th Street  
San Jose, CA 95112-2922,  
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,  
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Huebel

Appeals Board Hearing: April 5, 2024  
Sacramento, CA/Videoconference

**ISSUED APRIL 8, 2024**

*Appearances:*        *Appellants:* John Kevin Crowley, as counsel for Jose Luis Rios,  
  
*Respondent:* Jason T. Liu, as counsel for the Department of  
Alcoholic Beverage Control.

**OPINION**

Jose Luis Rios, doing business as Bodega Bar & Restaurant (appellant), appeals from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> revoking his license on the grounds that he: 1) permitted individuals to solicit or encourage others to buy them drinks in the licensed premises under a commission, percentage, salary, or other profit-sharing plan, scheme or conspiracy, in violation of California Business and

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<sup>1</sup> The decision of the Department, dated November 21, 2023, is set forth in the appendix.

Professions Code<sup>2</sup> section 24200.5(b); 2) employed or permitted individuals to loiter in or about the licensed premises for the purpose of begging or soliciting patrons or customers to purchase alcoholic beverages, in violation of section 25657(b); 3) permitted employees to solicit upon the licensed premises an alcoholic beverage intended for their consumption, in violation of rule 143<sup>3</sup>; 4) encouraged or permitted various individuals on the licensed premises to touch, caress, or fondle the breasts, buttocks, anus, or genitals of another person, in violation of rule 143.2(3); 5) permitted individuals to perform or simulate an act of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, or other sexual act upon the premises, in violation of rule 143.3(1)(a); 6) permitted individuals to perform or simulate an act of touching caressing, or fondling of the breast, buttocks, anus, or genitals upon the licensed premises, in violation of rule 143(1)(b); 7) permitted individuals, entertainers, whose breasts and/or buttocks were exposed to view, to perform while not on a stage 18 inches above immediate floor level and removed at least six feet from the nearest patron, in violation of rule 143.3(2), and; 8) violated conditions number two and three on the license.

#### FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine eating place license was issued for the licensed premises on July 24, 2017. There is no prior record of departmental discipline against the license.

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<sup>2</sup> All statutory references are to the California Business and Professions Code unless otherwise stated.

<sup>3</sup> All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise stated.

The Department filed the accusation on March 23, 2023. The Department filed a First Amended Accusation on April 14, 2023, and a Second Amended Accusation on July 28, 2023. At the administrative hearing on August 17, 2023, the Department moved to amend several counts by interlineating, which was granted without objection.

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. Additional evidence was received on September 1, 2023 vis-à-vis a Motion to Augment the Record, which the Department did not oppose.

The administrative hearing was held from August 15 to August 17, 2023. Department agents Katrina Johnson, Jamie Salvador Martinez, Nathan Lauer, Francisco Gonzalez, and Daniel Sumida testified at the hearing. Appellant and his wife, Guadalupe Rios, testified, as well as security guard Alexander Rodriguez and waitress/bartender Carmen Gonzalez.

Evidence established that appellant signed a Petition for Conditional License (PCL) on June 14, 2017, agreeing to the imposition of three conditions upon his license.

Conditions two and three include:

- 2) The use of any amplifying system or device is prohibited on [the patio] and the use of any such system or device inside the premises shall not be audible outside the premises.
- 3) The licensee(s) or an employee of the licensee(s) will be present in the exterior patio area ... at all times that alcoholic beverages are being served or consumed.

Appellant signed the PCL with the understanding that any violation of the conditions “shall be grounds for the suspension or revocation of the license.” (Exhibit 3.)

MARCH 25, 2022

On March 25, 2022, agents Martinez and Del Moral went to the licensed premises in an undercover capacity to investigate based on complaints the Department received

regarding allegations of prostitution, narcotics, and drink solicitation violations. The licensed premises is in an industrial area, with commercial businesses adjacent to it. There are train tracks behind the licensed premises and residential housing across the train tracks. As the agents parked their car and started walking toward the licensed premises, they could hear amplified music emanating from the licensed premises from approximately two buildings away. The agents entered the licensed premises at approximately 11:20 p.m.

When the agents entered the licensed premises, they immediately saw a disc jockey (DJ) to the right of the entrance on a slightly raised platform. There was no stage in the licensed premises. The bar area was dimly lit but the agents could still see the faces and the actions of patrons and employees inside the premises. While Agent Martinez used the restroom, a female approached Agent Del Moral and asked if he wanted a lap dance, which he declined.

After Agent Martinez returned, the agents took a seat at a table at the back end of the bar area. Agent Martinez saw an entrance to a patio at the back of the premises (Patio A). The patio was brightly lit. The licensed premises also had a second, longer patio to the left of the entrance (Patio B). The licensed premises had a total of four surveillance cameras: three in the bar area and one in Patio A.

A waitress approached the agents and asked for their drink order. The agents ordered and paid for a bucket of six, 12-ounce bottles of Pacifico beers, which the waitress brought to their table. The agents took their beers and walked to Patio A. The agents saw and heard loud music from an amplified boom box/speaker sitting on a pedestal in the middle of Patio A. The music from inside the licensed premises was also audible in Patio A.

The agents took a seat at a table immediately to their right as they walked onto Patio A. The agents consumed their Pacifico beers while they were in Patio A, without appellant or his employees present on the patio. Occasionally, a security guard would walk into Patio A for one or two minutes to check the area before walking back into the bar area.

There were approximately 15 tables with chairs in Patio A. Agent Martinez saw a female dancer, identified in the accusation as Jane Doe #1 wearing a burgundy dress and thong, performing an exotic lap dance upon a male patron who was seated in a chair approximately 20 feet away from the agents' table. Jane Doe #1, while facing the male patron, pulled down the top of her dress and bra exposing her bare breasts, areolas, and nipples to the patron. While exposing herself to the male patron, she allowed the patron to fondle and caress her breasts multiple times, on and off a few seconds each time.

Jane Doe #1's buttocks also contacted the male patron's pant-covered genitals, off and on at different times, for brief seconds at a time, and she jumped up and down on his lap. Jane Doe #1 alternated turning around with her back to the male patron, while doing so she lifted up the bottom half of her dress revealing her thong while exposing her buttocks to the patron. Jane Doe #1 turned around, and while facing the patron, she caressed and fondled herself as she performed. Jane Doe #1 performed the above-described lap dance while not on a stage and not removed at least six feet from the male patron as required.

Agent Martinez ordered another beer from the waitress. The waitress asked Agent Martinez if he liked any of the dancers. The waitress called over a dancer to sit and talk with Agent Martinez. The dancer introduced herself as Aria. Agent Martinez asked Aria how much she charged for a lap dance and Aria replied \$35. Agent Martinez asked Aria

what he would get for \$35, and Aria touched herself and said, "You get me." (Findings of Fact, ¶ 11.) Agent Martinez asked Aria if she would take her clothes off during the dance or if she danced nude, and Aria grabbed her breasts and replied, "I'll show them to you." (*Ibid.*)

Agent Martinez agreed to a lap dance with Aria. Aria grabbed Agent Martinez' hand, walked him over to a corner of Patio A, and sat him on a chair. Agent Martinez tried to pay Aria with a \$100 bill, but she said she did not have change and that he could pay her at the end of the dance by getting change from the bar. Aria was wearing a see-through halter top without a bra or pasties covering her nipples and areolas so the agent could see Aria's nipples and areolas through the top with her breasts exposed to view. Aria also wore a see-through skirt and a black thong under the skirt, which allowed Agent Martinez to see Aria's buttocks.

Aria began dancing in front of Agent Martinez, pulling up her skirt and sitting on his lap. Aria ground her buttocks on his genitals, moving up and down with her buttocks making contact with his genitals multiple times. Aria's actions appeared to Agent Martinez to be simulating sexual intercourse with him. While Aria performed the lap dance upon Agent Martinez, she groped, pinched, and fondled her nipples for 20 to 30 seconds at a time, while she was within five to six inches from him. Aria twice pulled up her top completely exposing her breasts, fondling and caressing her bare breasts, and swiping her breasts across the agent's face and mouth.

Aria also changed her position on the agent's lap, facing away from him, grinding, and moving up and down upon his groin area. Aria reached back, grabbed the agent's hands, placed them upon her breasts, and squeezed his hands causing him to squeeze her breasts. While Aria was engaged in these acts with Agent Martinez, she was not on a

stage and she was within inches of Agent Martinez, while at times touching him, including making skin to skin contact between Aria's breasts and the agent's face and mouth. After Aria finished the lap dance, she and Agent Martinez walked to the fixed bar where he got change and paid Aria for the lap dance. Agent Martinez then returned to his table in Patio A, where Agent Del Moral was seated.

At some point, another female dancer wearing a burgundy dress,<sup>4</sup> identified in the accusation as Jane Doe #2, approached Agent Martinez at his patio table and asked if he wanted a lap dance. Agent Martinez asked Jane Doe #2 the price, and Jane Doe #2 replied that a dance was \$40. Agent Martinez declined, saying that other dancers charged him less. Jane Doe #2 walked away.

Later, near closing time, Jane Doe #2 told Agent Martinez that she would give him a lap dance for \$30, to which he agreed. Jane Doe #2 took Agent Martinez to the opposite corner of the patio and placed a free-standing chair against the wall for Agent Martinez to sit. Jane Doe #2 began dancing in front of him, pulling up her dress, which revealed her thong underwear and exposed her buttocks to his view. Jane Doe #2 then sat upon Agent Martinez' lap and performed a dance similar to the dance Agent Martinez received earlier from Aria. The lap dance lasted for the length of a song, approximately three minutes.

While Jane Doe #2 performed the lap dance on Agent Martinez, he could see other dancers pulling up chairs for male patrons to sit on at the back of Patio A and perform lap dances upon them. The lap dances performed on Agent Martinez and the male patrons in Patio A were not in the view of the camera in Patio A.

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<sup>4</sup> Although not explicitly stated, both Jane Doe #1 and #2 appear to be wearing burgundy dresses.

MAY 13, 2022

Agents Martinez and Del Moral returned to the licensed premises in an undercover capacity on May 13, 2022. At approximately 11:30 p.m., the agents entered the bar and ordered a bucket of Modelo beers. After ordering their beers, the agents walked toward the entrance to Patio A. Before entering Patio A, the agents were stopped by a security guard who advised them they needed to purchase alcohol in order to access the patio. The agents explained that they had purchased alcohol and that the waitress would be bringing a bucket of Modelo beers to them in the patio. The security guard allowed the agents to proceed into the patio area.

Upon entering Patio A, the agents saw a loudspeaker/boom box, which was upon a pedestal stand in the middle of Patio A, playing music and could be heard outside the licensed premises. The agents took a set at a table and were served their bucket of Modelo beers. The agents consumed their beers in Patio A. At times, there were no security or employee present on the patio. A security guard occasionally came onto Patio A for a minute or two to check the area before walking back into the bar.

Agent Martinez observed three female dancers, identified in the accusation as Jane Does #3, #4, and #5. Jane Doe #3 was a Hispanic female wearing a see-through black top and see-through skirt. Jane Doe #4 was a Caucasian female wearing a see-through blue dress with shoulder straps. Jane Doe #5 wore either a see-through top and skirt or see-through dress. None of the dancers wore a bra to cover their breasts, nor did they wear any pasties to cover their areolas and nipples.

Jane Does #3, #4, and #5 were all performing lap dances at the same time in the patio area upon three separate male patrons. All three dancers were dancing to the music that was playing from the loudspeaker/boombox. The lap dances by all three Jane

Does were similar to what Agent Martinez had observed and experienced himself on his prior visit to the licensed premises. The lap dances appeared to be simulating sexual intercourse. None of the dances occurred on a stage and the dancers were within inches of the male patrons or making direct contact with the male patrons' genitalia through their clothing.

Agent Martinez also observed a Hispanic male on the patio wearing black pants, a black jacket with a hoody, and gold shoes. The male was standing in Patio A and observing the female dancers as they performed lap dances, and the dancers would walk up to him and stand by him. Based on Agent Martinez' training and experience with exotic dancer/lewd conduct operations, it is common for dancers to have a handler. The Hispanic male appeared to be an employee/handler in charge of monitoring the dancers, giving them orders, and looking around to see who was in the patio.

AUGUST 26, 2022

Agents Lauer and Sumida arrived in an undercover capacity at the licensed premises at approximately 10:35 p.m. on August 26, 2022. Two security guards patted the agents down. Each agent paid a seven-dollar cover charge and were handed a ticket that could be exchanged for one 12-ounce beer. Upon entering, Agent Lauer could see approximately ten females wearing see-through lingerie attire which exposed certain body parts.

The agents walked towards the fixed bar area and were greeted by a Hispanic waitress who asked them what they wanted to drink. The agents ordered two Modelo beers, which they received in exchange for the ticket they were given at the front door. The agents sat at a table adjacent to the kitchen area at the end of the fixed bar.

While seated, the agents observed several male patrons drinking 12-ounce beers while accompanied by and conversing with females dressed in lingerie, drinking seven-ounce beers. There were two bartenders working behind the fixed bar opening beers and giving them to the waitresses and the females dressed in lingerie. Agent Sumida saw two waitresses cleaning tables. The bartenders and waitresses were dressed in regular street clothing. Agent Lauer observed females wearing lingerie walking with male patrons in the bar.

A Hispanic female wearing see-through red lingerie with thong underwear that exposed her buttocks to view, approached the agents' table and introduced herself as Sophia. Sophia sat at the agents' table, and initially spoke to Agent Lauer in Spanish. After realizing Agent Lauer's first language is English, Sophia spoke in English, and asked Agent Lauer if he wanted a lap dance. Agent Lauer agreed, and Sophia escorted him to a freestanding chair across the room in the corner of the bar area. Agent Lauer sat in the chair with his back to the wall. Sophia told Agent Lauer that one lap dance was \$30, but he could have two for \$50. Agent Lauer agreed to two lap dances and handed her a \$50 bill.

Sophia straddled Agent Lauer, wrapped her legs around his waist and began grinding her buttocks and vagina back and forth, and bouncing up and down over his jean-covered genitals. Sophia continued the dance for Agent Lauer in a similar manner experienced by agents on their two prior undercover visits to the licensed premises.

During the lap dance, appellant's employees, including bartenders, waitresses, and security guards were nearby. The bartenders were within view of the lap dance, as they stood behind the fixed bar approximately 15 feet away. The waitresses and security guards were approximately ten feet away while Sophia performed the lap dance upon

Agent Lauer. No employee or security guard made any attempt to stop Sophia as she performed a lap dance. After Sophia finished the dance, she thanked Agent Lauer and walked away. Agent Lauer returned to the table where Agent Sumida was seated.

At some point later in the evening, a Hispanic female visited the agents' table and identified herself as Marissa. Marissa sat at the agents' table and was drinking a seven-ounce beer. Agent Lauer asked her why her beer was so small, and Marissa explained that a male patron could buy her a seven-ounce bud light beer for \$8 in exchange for hanging out and spending time with Agent Lauer. Marissa also explained that male patrons could purchase her a 12-ounce Modelo beer for \$20 in exchange for her company. Agent Sumida, who was relayed this information by Agent Lauer, asked Marissa if she wanted him to buy her a beer, which she agreed. Agent Sumida asked Marissa what type of beer she wanted, and Marissa asked Agent Sumida for a Modelo beer. Agent Sumida agreed, and ordered a Modelo beer for himself, and gave Marissa \$30 cash to pay for her \$20, 12-ounce Modelo beer and for his \$7, 12-ounce Modelo beer, with a \$3 tip.

Agent Sumida watched Marissa as she got up from the table, walked to the fixed bar, and spoke with the bartender. The bartender retrieved two, 12-ounce Modelo beers and handed them to Marissa, who returned with the beers, and engaged the agents in conversation. Marissa consumed the beer that Agent Sumida bought her.

After speaking with Agent Sumida for two minutes, Marissa asked him if he would like a lap dance. Agent Sumida asked her how much for the lap dance, and Marissa told him it would be \$30. Agent Sumida agreed to the lap dance, and Marissa escorted him through Patio A to Patio B, where he sat on a chair in the corner. Marissa performed a

lap dance for Agent Sumida consistent with the other lap dances witnessed and experienced by the agents on prior occasions.

The dance Marissa performed was not on a stage, and she was either in direct contact with Agent Sumida or within arm's reach at all times. While performing the lap dance on Agent Sumida, a male security guard stood approximately 10 feet away by the Patio A entrance, facing the patio area. Neither the security guard nor any employee attempted to stop Marissa from performing the lap dance upon Agent Sumida. It appeared to Agent Sumida that the security guard's sole job was to monitor the female dancers, because he would only communicate with them. Agent Sumida paid Marissa \$30 cash for the lap dance and the two of them returned to the bar area and the agents' table.

Marissa then approached Agent Lauer and asked him if he would like a lap dance, to which he agreed. Marissa told Agent Lauer to go to the patio with her, and she escorted him to Patio B and had him sit down in a freestanding chair. Agent Lauer did not see any tables in the Patio B area, only chairs, which he observed female dancers use to perform lap dances on male patrons. Agent Lauer agreed to pay Marissa for a lap dance the length of two songs.

Marissa performed a lap dance upon Agent Lauer consistent with all the other lap dances experienced and witnessed by the agents on prior occasions at the licensed premises. Once again, the dance performed by Marissa was not on a stage and she was either touching or was within inches of Agent Lauer at all times. Likewise, no employee or agent attempted to stop Marissa from performing the dance upon Agent Lauer. When the dance finished, Agent Lauer paid Marissa and returned to the bar area. Agent Lauer joined Agent Sumida, who had moved to a different table, and sat down.

While Agent Lauer was receiving a lap dance from Marissa, Agent Sumida observed approximately 15 females wearing lingerie-type attire, similar to Marissa's, either conversing with male patrons or performing sexually explicit lap dances upon the male patrons. Agent Lauer also observed other female dancers attired in lingerie performing sexually explicit lap dances upon male patrons.

The agents also observed Marissa throughout the evening at the licensed premises. Agent Sumida saw Marissa on several occasions taking drink orders from customers, receiving cash from them, walking to the fixed bar, interacting with the bartenders, and retrieving beers from the bartenders and serving the beers to customers. It appeared that Marissa had a working relationship with the bartenders. It appeared to both agents that Marissa was employed at the licensed premises.

Marissa returned to the agents' table and asked Agent Lauer if he would purchase a 12-ounce beer for her. Agent Lauer agreed, and also ordered a 12-ounce beer for himself and Agent Sumida. Agent Lauer was charged \$20 for Marissa's beer, and \$7 each for his and Agent Sumida's beer. Agent Lauer gave Marissa \$40 in cash, which covered the cost of the beer, as well as a \$6 tip. Agent Sumida watched as Marissa took the \$40 to the bar where the bartender was working. Marissa retrieved three, 12-ounce bottles of Modelo beer, which Marissa brought to the agents' table. The agents observed Marissa consume the 12-ounce Modelo beer Agent Lauer had purchased for her.

As the agents then left the licensed premises, Agent Sumida still observed female dancers performing lap dances upon male patrons.

SEPTEMBER 9, 2022

On September 9, 2022, at approximately 11:40 p.m., agents Sumida and Lauer returned to the licensed premises to continue their undercover investigation to determine

whether violations were still occurring. At the entrance, a security guard conducted a pat-down search of the agents. The agents each paid a \$7 cover charge and in return, were given a ticket to be exchanged for one 12-ounce beer inside. The agents entered the licensed premises.

A female waitress greeted the agents near the fixed bar and asked if they wanted a beer. The agents ordered two Modelo beers, which cost \$7 each, and paid with the tickets they were given at the front door. The waitress retrieved the two Modelo beers from the fixed bar and delivered them to the agents.

Upon receiving their beers, the agents walked to Patio A, which was full of people as well as tables and chairs positioned close to one another. Agent Sumida observed the male patrons were drinking 12-ounce bottles of Modelo beer and the females in lingerie attire were also consuming beers. Agent Sumida observed approximately 30 male patrons in Patio B that were receiving sexually explicit lap dances from female dancers wearing lingerie attire.

After finding a table, a Hispanic female wearing a skimpy blue dress approached the agents' table and introduced herself as Rain. Rain sat at the table with the agents and spoke with them. After several minutes, Rain asked Agent Sumida if he wanted a lap dance. Agent Sumida asked the price of the lap dance and Rain replied \$20. Agent Sumida agreed and paid Rain \$20. Rain escorted Agent Sumida to a chair in Patio B and began to perform a lap dance consistent with other sexually explicit dances observed and experienced by the agents at the licensed premises.

Throughout the dance performed by Rain, she was not on a stage and was in direct contact with Agent Sumida for approximately one minute. There was a Hispanic male security guard standing at the Patio A door throughout the night watching the

female dancers and conversing with them. In Agent Sumida's training and experience, he believed the security guard's duty was to monitor the female dancers in the licensed premises. The security guard, who was approximately ten feet away from Agent Sumida while he received a lap dance from Rain, did not attempt to stop Rain from performing a lap dance. After Rain finished the lap dance, Agent Sumida returned to his table and sat down with Agent Lauer.

Shortly after midnight, a team of officers entered the licensed premises to conduct an inspection therein. The team included law enforcement from the Department, the San Jose Police Department, the Santa Clara Sheriff's Office, and the Santa Clara District Attorney's Office. Department Agent Gonzalez was part of the team that entered the licensed premises. He conducted interviews of appellant's employees. One of the employees, Lidia Fernandez Rodriguez, told Agent Gonzalez that she was hired by appellant's wife and has worked at the licensed premises for eight years. She explained that patrons are charged \$7 for a beer; however, any beer a patron purchases for her costs \$8 and is split between her and the licensed premises. Both the licensed premises and Ms. Rodriguez receive \$4 from such a transaction.

Agent Gonzalez also interviewed Yamel Aljanera Meza LaBra, who works at the licensed premises as a bartender. Ms. LaBra has worked at the licensed premises for two years. Ms. LaBra told Agent Gonzalez that she charges patrons \$7 for their drinks, and if a patron offers to buy her a drink, she charges them \$5 for a non-alcoholic juice drink. Mr. LaBra denied participating in any drink solicitation activity at the licensed premises.

Department Agent Johnson also arrived with the team of officers at the licensed premises after midnight. Agent Johnson interviewed Alma Gonzalez, who was visiting

the licensed premises as a patron. Agent Gonzalez translated the conversation. Ms. Gonzalez told Agent Johnson that she went to the licensed premises with a male companion who purchased a Bud Light beer for her for \$8. Ms. Gonzalez was given \$4, and asked one of the employees why she was given \$4. The employee explained that she left the \$4 as commission for Ms. Gonzalez for the Bud Light beer the male companion purchased for her.

The administrative law judge (ALJ) issued a proposed decision on September 28, 2023, recommending that the Department sustain counts 1-2 and 4-43 and revoke appellant's license. The Department requested comments from appellant in a notice dated October 17, 2023. On November 16, 2023, the Department adopted the proposed decision and issued a certificate of decision five days later.

Appellant filed a timely appeal contending that: 1) the Department erred in not allowing appellant to cross-examine Jane Doe # 1 and Jane Doe # 2; 2) the counts for noise violations are not supported by substantial evidence; 3) the Department failed to prove an employment relationship between the licensed premises and individuals participating in a drink solicitation scheme; 4) the Department erred in finding Department agents' testimony credible, despite the fact that they consumed alcohol during the investigation, and; 5) the penalty or revocation is unreasonable.

#### DISCUSSION

The Board's scope of review is limited; it may only review a Department's decision based upon "insufficiency of the evidence, excess of jurisdiction, errors of law, or abuse of discretion." (*Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 95, [84 Cal.Rptr. 113].)

Further, the California Constitution provides:

No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has *resulted in a miscarriage of justice*.

(Cal. Const., art. VI, § 13, emphasis added.) The burden to show an alleged error was prejudicial is on the party seeking reversal. (*Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296, 308 [140 Cal.Rptr.3d 459].)

## I. ERRORS OF LAW

Appellant argues that he was “unfairly denied the opportunity to assess the credibility of [Jane Does #1 and #2] and the veracity of the allegations concerning their lewd acts.” (Appellant’s Opening Brief (AOB), at p. 3.) Appellant claims that the Department’s failure to identify the Jane Does and allow appellant to investigate and conduct discovery violated appellant’s due process rights. (*Id.* at pp. 3-6.)

Appellant made this argument at the administrative hearing. (Conclusions of Law, ¶ 17.) The Department rejected appellant’s argument because it “failed to support its position with meaningful legal argument and citation to authority,” and found “no evidence of any due process or constitutional violations present or prejudice ... .” (*Id.* at ¶ 18.)

Appellant cites a litany of cases in its Opening Brief that stand for the general proposition that procedural due process rights afford an individual “the right to present witnesses and to confront adverse witnesses.” (*Brown v. City of Los Angeles* (2002) 102 Cal.App.4th 155, 175; Cal. Gov. Code § 11513(b); *Chambers v. Mississippi* (1973) 410 U.S. 284; *Kaiser Co. v. Indus. Acc. Comm’n* (1952) 109 Cal.App.2d 54, 60.) However, there are several issues with appellant’s argument.

First, the right to confront adverse witnesses is not at issue here. The Department did not interview the Jane Does or call them to testify. The findings made by the Department in its decision were elicited from testimony of the agents, all of whom appellant had the opportunity to cross-examine at the administrative hearing. Appellant has not cited any legal authority that he was entitled to cross-examine witnesses that did not testify at the hearing. (See *Chambers, supra* at p. 302 [finding it was an error to deny party from cross-examining a witness at trial on the grounds that the witness was not “adverse”].) Appellant is asking this Board to broaden the due process guarantees of the 14th Amendment, which this Board has no authority to do.

Second, there is nothing in the record establishing that the Department prevented appellant from “presenting witnesses.” Appellant claims the Department erred by failing to discover the Jane Does’ identities. (AOB, at pp. 3-6.) Again, appellant’s legal authority falls short of supporting this proposition. (See *Kaiser Co., supra* at pp. 56-57 [finding error in denying party’s application to take depositions of *known witnesses* outside of California].) Further, appellant had the same opportunity to investigate and discover the identities of the Jane Does as the Department. His failure to do so does not constitute reversible error. (See *Johnson v. Alameda Cnty. Med. Ctr.* (2012) 205 Cal. App. 4th 521, 531 [140 Cal. Rptr. 3d 281, 289] [finding that “trial court did not abuse its discretion in denying plaintiff’s motion to reopen discovery [when party] had years to conduct discovery and failed to act diligently.”]) The Board does not find that the Department violated any of appellant’s procedural due process rights.

## **II. INSUFFICIENCY OF THE EVIDENCE**

This Board is required to defer to the Department’s findings so long as they are supported by substantial evidence. (See *Department of Alcoholic Beverage Control v.*

*Alcoholic Beverage Control Appeals Bd. (Southland)* (2002) 103 Cal.App.4th 1084, 1094 [127 Cal.Rptr.2d 652, 659] [citing *Kirby v. Alcoholic Beverage Control Appeals Bd.* (1968) 261 Cal.App.2d 119, 122 [67 Cal.Rptr. 628] [“In considering the sufficiency of the evidence issue the court is governed by the substantial evidence rule[:]; any conflict in the evidence is resolved in favor of the decision; and every reasonably deducible inference in support thereof will be indulged. [Citations.]”; see also *Kirby v. Alcoholic Bev. etc. Appeals Bd.* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815] [“When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the department.”].) “Substantial evidence” is “evidence of ponderable legal significance, which is ‘reasonable in nature, credible and of solid value.’ ” (*County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, 814 [38 Cal.Rptr.2d 304, 307–308], internal citations omitted.)

#### A. Noise Violations

Appellant argues that the counts for noise violation “should be dismissed for lack of probative evidence.” (AOB, at p. 6.) Appellant reasons that the only evidence offered by the Department in support of these counts were the “self-serving statements” of Department agents. (*Ibid.*) Appellant also points out that “no measurement of decibel levels [were] conducted.” (*Ibid.*)

The Department found that, “on March 25, 2022, and May 13, 2022, [appellant] permitted the use of a loudspeaker (boombox) to play music on the patio and permitted the use of that amplifying system or device(s) inside the Licensed Premises that was audible outside the Licensed Premises.” (Conclusions of Law, ¶ 21.) As stated above, the Board will defer to the Department’s findings if supported by substantial evidence.

Here, the noise violations and violations of the conditions of appellant's license are supported by the testimony of Agent Martinez. Agent Martinez testified that he could hear amplified music on March 25, 2022, emanating from the licensed premises from at least two buildings away. (Findings of Fact, ¶ 5.) Agent Martinez also "saw and heard loud music from an amplified boom box-speaker sitting on a pedestal in the middle of Patio A." (*Id.* at ¶ 8.) Agent Martinez also testified that the "music from inside the Licensed Premises was audible outside the Licensed Premises." (*Ibid.*)

On May 13, 2022, Agent Martinez "again saw the loudspeaker/boom box, which was upon a pedestal stand in the middle of Patio A, playing music, and could be heard outside the Licensed Premises." (Findings of Fact, ¶ 15.)

Agent Martinez' testimony constitutes substantial evidence of the substantiated noise violations against appellant's license. Appellant is prohibited by the conditions of his license to use of any amplifying system on the patio or to allow music from inside the licensed premises to be audible outside. Nothing in the license or in any legal authority cited by appellant requires a decibel level to substantiate a violation. The Department's decision regarding appellant's violation of Condition #2 of the license is affirmed.

#### B. Solicitation of Patrons

Appellant challenges the sufficiency of the evidence to support the solicitation counts against him. (AOB, at pp. 6-10.) Specifically, appellant argues that there was no showing "via an accounting or other documentary evidence that the bar participated in overcharging or drink solicitation ... ." (*Id.* at pp. 6-7.) Appellant further contends that no employment relationship was established between the solicitors and appellant. (*Id.* at p. 7.) Finally, appellant cites *Garcia v. Munro* (1958) 161 Cal.App.2d 425, 428-429, to support its argument that a person must be employed *solely* for the purpose of soliciting

drinks; it is not enough to merely show that an employee was soliciting drinks while on duty and performing other tasks. (*Id.* at pp. 8-9.)

Regarding the drink solicitation counts, the Department found:

16. The preponderance of the evidence supports the violations under sections 25657(b) and 24200.5(b). The evidence clearly established a common drink solicitation and commission or scheme at the Licensed Premises permitted by the Respondent's waitresses and bartenders. The evidence further established that on August 26, 2022, Marissa was employed and permitted to solicit male patrons to buy her drinks in the Licensed Premises under a commission, profit-sharing plan or scheme. Marissa was further employed and knowingly permitted to loiter in said premises for the purpose of soliciting any patron, including Agent Lauer, to purchase alcoholic beverages for her. There was no attempt to hide Marissa's loitering, solicitation or the commissioned scheme; it was open and obvious. Marissa had a working relationship with the bartenders, as observed by the agents. Further evidence that the Respondent's employees were aware of the solicitation and commission, profit-sharing plan or scheme was through the statement of Respondent's waitress Lidia Fernandez Rodriguez. Lidia confirmed the commission and profit-sharing plan, explaining that she was cashed out immediately at the fixed bar with \$4 paid to her and \$4 paid to the bar per each beer a male patron purchased for her that she solicited. This evidence was consistent with Marissa's statements to Agent Lauer of the commission, scheme and pricing plan of the beers purchased for her, and for which she provided company to those male patrons who purchased her beers at the inflated rate. The females' compensation was based in some respect on the number of alcoholic beverages purchased. The more beer male patrons purchased for the females as a result of the solicitations, the more a soliciting female made in commission on those sales. Evidence of a scheme and commission paid was further established by the agents' expert testimony, including, but not limited to that they purchased their 12-ounce Modelo beers for \$7, as compared to a female's seven-ounce Bud Light beer at \$8, and 12-ounce Modelo beer at \$20.

(Conclusions of Law, ¶ 16.) In short, the Department found: 1) a drink solicitation scheme at the licensed premises; 2) that Marissa was appellant's employee, and; 3) Marissa was employed to solicit male patrons to buy her drinks. (*Ibid.*)

Here, the Department's findings are supported by the testimony of agents Lauer and Sumida. (Findings of Fact, ¶¶ 1, 2, 5, 24-25, 30, 36, 38, 49, 51, 55, and 65.) The

Department found that the agents testified credibly (see section C, *infra*), and the testimony constitutes substantial evidence supporting the Department's findings.

A licensee has a general, affirmative duty to maintain a lawful establishment. Presumably this duty imposes upon the licensee the obligation to be diligent in anticipation of reasonably possible unlawful activity, and to instruct employees accordingly. (*Laube v. Stroh* (1992) 2 Cal.App.4th 364, 367 [3 Cal.Rptr.2d 779].)

Similarly, in *Reimel*, the court stated:

[A] licensee can draw no protection from his lack of knowledge of violations committed by his employees or from the fact that he has taken reasonable precautions to prevent such violations. There is no requirement . . . that the licensee have knowledge or notice of the facts constituting its violation. [Citations.]

(*Reimel v. Alcoholic Bev. Control Appeals Bd.* (1967) 252 Cal.App.2d 520, 522 [ 60 Cal. Rptr. 641], internal quotations omitted.)

The doctrine of *respondeat superior* provides that an employer or principal is vicariously liable for the wrongful conduct of his or her employees or agents committed within the scope of the employment or agency. (*Perez v. Van Groningen & Sons, Inc.* (1986) 41 Cal.3d 962, 967 [227 Cal.Rptr. 106].) And it is well-settled in alcoholic beverage case law that an agent or employee's on-premises knowledge and misconduct is imputed to the licensee/employer. (See *Yu v. Alcoholic Bev. Control Appeals Bd.* (1992) 3 Cal.App.4th 286, 295 [4 Cal.Rptr.2d 280]; *Kirby v. Alcoholic Bev. Control Appeals Bd.* (1973) 33 Cal.App.3d 732, 737 [109 Cal.Rptr. 291].)

Indeed, earlier in *Laube*, the court observed that the ALJ's factual findings — notably not subject to review on appeal — include:

[T]he element of the licensee's knowledge of illegal and improper activity on his or her premises; this knowledge may be either actual knowledge or

constructive knowledge imputed to the licensee from the knowledge of his or her employees.

(*Laube, supra* at p. 367, citing *Fromberg v. Dept. of Alcoholic Bev. Control* (1959) 169 Cal.App.2d 230, 233-234 [337 P.2d 123].) Importantly, as the court of appeals observed in *McFaddin*:

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

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

Here, the Board sees no error in the Department's findings that appellant's employee, Marissa, engaged in a drink solicitation scheme, and was employed and knowingly permitted to loiter in said premises for the purpose of soliciting any patron. As stated above, these findings are supported by substantial evidence. Marissa's misconduct is imputed to appellant under the above-cited, and extensive, legal authority.

Finally, this matter is distinguishable from *Garcia*, where the court found the alleged solicitor, Jennie:

[W]as employed as a bartender or waitress and performed the duties of that position. Certainly evidence that she talked with patrons, spent some time with them and solicited some patrons to buy her drinks does not support a finding that she was employed to "loiter" on the premises to solicit drinks. If there was evidence that the licensees paid her a commission for drinks solicited, that might be some indication that she was employed "to loiter" to solicit drinks. But the fact that a bartender or waitress solicits a drink from a patron, and talks with him, does not support an inference that such bartender or waitress was employed "to loiter" to solicit drinks. There is no evidence at all that Jennie sat down with the patrons or neglected her duties as a bartender while drinking with patrons. There is no evidence that she lingered idly by or was loafing on the job.

(*Garcia, supra* at p. 429.)

Here, there was substantial evidence that Marissa was paid a commission, that she sat down with patrons, and did not perform any other duties at the licensed premises. (*Ibid.*) In that vein, this case is more like *Wright v. Munro* (1956) 144 Cal.App.2d 843 [301 P.2d 997], where “the woman who was loitering did no other work.” (*Garcia, supra* at p. 429.) The Department’s decision regarding the solicitation counts is, therefore, affirmed.

### C. Credibility of Department Witnesses

Appellant argues that the Department agents’ perception, and thus, testimony, was altered through consumption of alcohol. (AOB, at pp. 11- 13.) Appellant points out that the agents consumed alcoholic beverages while at the licensed premises and failed to keep track of the number of beers they consumed. (*Id.* at p. 11.) Appellant contends that the agents’ testimony, which was affected by alcohol, “falls far short of reliable and credible evidence.” (*Id.* at p. 12.)

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]; *People v. Burton* (1958) 162 Cal.App.2d 790, 792 [328 P.2d 492, 493] [“It was for the trier of the facts to pass upon the credibility of the witnesses and the weight to be accorded the evidence.”].) “The trier of fact . . . is the sole judge of the credibility of the witnesses [and] may disbelieve them even though they are uncontradicted if there is any rational ground for doing so . . . .” (*Pescosolido v. Smith* (1983) 142 Cal.App.3d 964, 970-971 [191 Cal.Rptr. 415].) The Appeals Board may not interfere with an ALJ’s credibility determinations absent a clear showing of abuse of discretion.

The Department found that Agent Martinez “did not feel the effects of the alcoholic beverages he consumed” during his visits to the licensed premises. (Findings of Fact, ¶

23.) The Department further found:

When Agent Lauer works undercover operations if he consumes alcohol, it is his practice to only take incidental sips and not to drink the entirety of the alcoholic beverage. Agent Lauer did not feel the effect of the alcohol he consumed in the Licensed Premises. Agent Sumida slightly<sup>[fn]</sup> felt the effect of the alcohol he consumed in the Licensed Premises, but it did not affect his ability to perform his undercover job duties.

(*Id.* at ¶ 39.) Agent Sumida testified that “on a scale of one to 10, 10 being obviously intoxicated and zero being no influence at all, Agent Sumida said the effects of alcohol he felt were a one or two.” (*Id.* at ¶ 39, footnote 11.) Finally, the Department found that “[t]he alcohol that the undercover agents drank inside the Licensed Premises did not affect or impair their ability to perform their undercover duties, including, but not limited to, listening, talking and making observations.” (*Id.* at ¶ 47.) In other words, the Department found that the agents testified credibly, despite consuming alcoholic beverages, and afforded great weight to their testimony.

Based on the above, appellant’s arguments regarding the credibility of the Department agents must be rejected. The trier of fact considered the effects of alcohol on the agents’ perceptions and observations during their undercover visits to the licensed premises and found them to be credible. The Board is expressly prohibited from reweighing the evidence to reach a different result. (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826, 837].)

### III. ABUSE OF DISCRETION/PENALTY

Appellant contends the Department’s penalty of revocation is excessive. (AOB, at pp. 13-20.) Appellant argues that it offered substantial evidence of mitigation, which was unfairly disregarded by the Department. (*Id.* at p. 16.) Appellant cites the fact that it had

no prior disciplinary history, that it was not aware of the crimes that were occurring at the licensed premises, and that it instituted “significant measures to prevent the underlying violations” as support that he deserved a lesser penalty. (*Id.* at pp. 17-18.)

Finally, in its briefs and at oral argument, appellant argued that revocation is disproportionate to the offenses appellant was charged with, in contravention to *Walsh v. Kirby* (1974) 13 Cal.3d 95, 103 [529 P.2d 33]. (AOB, at pp. 15-16.) Appellant further claims revocation amounts to “cruel or unusual punishment” and is a violation of his due process rights. (Appellant’s Closing Brief, at p. 8.)

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

In determining disciplinary action, the Department is required to consider the penalty guidelines incorporated in California Code of Regulations, title 4, section 144.

The standard penalties for appellant’s violations are:

- Violation of Section 24200.5(b) Revocation
- Violation of Section 25657(b) [...] – *30 day suspension To revocation*
- Employees accepting alcoholic drinks – Rule 143 CCR – *15 day suspension*

- Nude Entertainers, etc. – Rule 143.2 & 3 30 day suspension to revocation
- Violation Of Conditions – B&P 23804 15 day suspension with 5 days stayed for one year

(Cal. Code Regs., tit. 4, § 144 [emphasis in original].) Nevertheless, rule 144 allows the Department to deviate from the standard penalty when, “*in its sole discretion*[, it] determines that the facts of the particular case warrant such deviation — such as where facts in aggravation or mitigation exist.” (*Ibid.*, emphasis added.)

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

Regarding appellant’s penalty, the Department found:

The aggravation substantially outweighs the mitigation, if any. There was no documented training of the licensee and his employees. There was insufficient evidence of positive action by the licensee to correct the rampant, unlawful problems in the Licensed Premises. Mr. Rios continues to rely upon employees to run the day-to-day operations.

Aggravation is warranted given the Respondent was, and continues to be,<sup>[fn]</sup> an absentee licensee who failed/fails to take his responsibilities as a licensee seriously, leaving the premises in the hands of employees, who were condoning and encouraging the violations at hand. No mitigation is warranted for Mr. Rios altering his surveillance system to allow it to record, given he never checked the cameras and there were no cameras encompassing all of Patio A, let alone in Patio B, where violations were occurring. Although Guadalupe Rios checked the cameras for approximately 10 minutes here and there, the policy (whether it was

already in place or newly created after the accusation) of having a security guard warn the females was not working, given the openly rampant, lewd unlawful conduct by multiple entertainers/dancers and multiple violations that continued to occur in the Licensed Premises on multiple dates during a six-month undercover investigation, and under the supervision of Respondent's employees.

(Decision, at p. 31.)

As the Board has said many times over the years, the extent to which the Department considers mitigating or aggravating factors is a matter entirely within its discretion. Rule 144 provides the standard penalty for violation of section 24200.5(b) is revocation, which is what appellant received. Several of appellant's other violations could also merit revocation based on Rule 144.

Importantly, since the penalty for violation of 24200.5(b) is revocation, *Walsh, supra*, 13 Cal.3d 95, does not apply. In *Walsh*, the Department accumulated counts against a licensee, which alone, would not warrant revocation of its license. (*Id.* at p. 102.) However, by accumulating counts and artificially creating a higher monetary penalty and suspension, the Department effectively revoked the license. (*Id.* at p. 103.) This type of "de facto revocation" was found to be excessive. (*Id.* at p. 106.)

Here, revocation is the standard penalty under Rule 144 for appellant's violation of section 24200.5(b). Thus, it is immaterial whether appellant had one violation or several violations of section 24200.5(b). Appellant's true gripe is that he did not receive a stayed revocation. Yet, the record shows that the Department considered both mitigating and aggravating evidence offered at the hearing. The Department's rejection of appellant's mitigation evidence in favor of aggravating factors, and thus, revocation over stayed revocation, does not establish an abuse of discretion. The Board sees no error.

ORDER

The decision of the Department is affirmed.<sup>5</sup>

SUSAN BONILLA, CHAIR  
SHARLYNE PALACIO, MEMBER  
ALCOHOLIC BEVERAGE CONTROL  
APPEALS BOARD

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

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 *et seq.* 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](mailto:abcboard@abcappeals.ca.gov).

# APPENDIX

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

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

JOSE LUIS RIOS  
BODEGA BAR & RESTAURANT  
1030 NORTH 10<sup>TH</sup> STREET  
SAN JOSE, CA 95112-2922

ON-SALE BEER AND WINE EATING PLACE -  
LICENSE

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

SAN JOSE DISTRICT OFFICE

File: 41-581315

Reg: 23093076

**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 November 16, 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 January 2, 2024, a representative of the Department will contact you to arrange to pick up the license certificate.



[https://abcab.ca.gov/abcab\\_resources/](https://abcab.ca.gov/abcab_resources/)

Sacramento, California

Dated: November 21, 2023

**RECEIVED**

**NOV 21 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:

Jose Luis Rios  
Dbas: Bodega Bar and Restaurant  
1030 North 10<sup>th</sup> Street  
San Jose, California 95112-2922

Respondent

On-Sale Beer and Wine Eating Place License

} File: 41-581315  
}  
} Reg.: 23093076  
}  
} License Type: 41  
}  
} Word Counts: 36,072; 26,619; 10,384  
}  
} Kennedy Court Reporters:  
} August 15 and 17, 2023  
} Shelby Maaske, Court Reporter  
} Alex Burke (Video Host)  
} August 16, 2023  
} Donna Cramin, Court Reporter  
} Alex Burke (Video Host)  
}  
} **PROPOSED DECISION**

Administrative Law Judge D. Huebel, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter by video conference on August 15, 16, and 17, 2023.

Jason Liu, Attorney, represented the Department of Alcoholic Beverage Control (the Department).

John Kevin Crowley, Attorney, represented Respondent, Jose Luis Rios, who was present at all three hearing dates.

The Department seeks to discipline the Respondent's license on the grounds that:

- (1) On or about and between August 26, 2022, and September 9, 2022, Respondent permitted individuals to solicit or encourage others, directly or indirectly, to buy them drinks in the licensed premises under a commission, percentage, salary, or

- other profit-sharing plan, scheme or conspiracy, in violation of California Business and Professions Code section 24200.5(b)<sup>1</sup> [count 1]; and
- (2) On or about August 26, 2022, Respondent employed or knowingly permitted Marissa to loiter in or about the licensed premises for the purpose of begging or soliciting patrons or customers in such premises to purchase alcoholic beverages for Marissa, in violation of section 25657(b) [count 39]; and
  - (3) On August 26, 2022, the Respondent's agents or employees, permitted Marissa, an employee, to solicit upon the licensed premises, the purchase or sale of a drink intended for her consumption, in violation of California Code of Regulations, Title 4, Division 1, section 143<sup>2</sup> [count 34]; and
  - (4) On various dates Respondent encouraged or permitted various individuals on the licensed premises, to touch, caress or fondle the breasts, buttocks, anus, or genitals of another person, in violation of rule 143.2(3) [counts 2, 6, 10, 16, 20, 24, 30, 35, and 40]; and
  - (5) On various dates Respondent permitted individuals to perform or simulate an act of sexual intercourse, masturbation, sodomy, bestiality, oral copulation flagellation or other sexual act upon the premises, prohibited by law, in violation of rule 143.3(1)(a) [counts 3, 7, 11, 17, 21, 25, 31, 36, and 41]; and
  - (6) On various dates Respondent permitted individuals to perform or simulate an act of touching, caressing or fondling of the breast, buttocks, anus or genitals, upon the premises, in violation of rule 143.3(1)(b) [counts 4, 8, 12, 18, 22, 26, 32, 37, and 42]; and
  - (7) On various dates Respondent permitted individuals, entertainers, whose breasts and/or buttocks were exposed to view, to perform while not on a stage 18 inches above immediate floor level and removed at least six feet from the nearest patron, upon the premises, in violation of rule 143.3(2) [counts 5, 9, 13, 19, 23, 27, 33, 38 and 43]; and
  - (8) On or about March 25, 2022 and May 13, 2022, Respondent violated conditions #2 and #3 on the license, which state: #2 "The use of any amplifying system or device is prohibited on the patio, as depicted on the ABC-257, dated 5/2/17, and the use of such system or device inside the premises shall not be audible outside the premises," and #3 "The licensee(s) or an employee of the licensee(s) will be present in the exterior patio, as depicted on the ABC-257, dated 5/2/17, at all times that alcoholic beverages are being served or consumed," in that the licensee and/or licensee's employee or agent (i) did use a loudspeaker to play music on the patio, and (ii) did allow consumption of alcoholic beverages on the patio without security staff being present, respectively, such being a violation of the license

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<sup>1</sup> All statutory references are to the Business and Professions Code unless otherwise noted.

<sup>2</sup> All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

conditions and grounds for license suspension or revocation under section 23804 [counts 14, 15, 28 and 29]. (Exhibit 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 August 17, 2023. On September 1, 2023, the undersigned received from the Administrative Hearing Office Respondent's Notice of Motion and Motion to Augment the Record with Memorandum of Points and Authorities, Declaration of Alex Rodriguez, and Proof of Service dated August 31, 2023, to which the Department was not opposed.<sup>3</sup>

### **FINDINGS OF FACT**

1. The Department filed the accusation on March 23, 2023. A First Amended Accusation was filed on April 14, 2023. A Second Amended Accusation was filed on July 28, 2023. At the hearing, the Department moved to amend counts 14, 15, 28 and 29 by interlineation. This motion was granted without objection.
2. The Department issued a type 41, on-sale beer and wine eating place license to the Respondent for the above-described location on July 24, 2017 (the Licensed Premises).
3. There is no record of prior departmental discipline against the Respondent's license.
4. The Respondent/Licensee signed a Petition for Conditional License (PCL) on June 14, 2017, agreeing to the imposition of three conditions upon his license. Conditions two (2) and three (3) include: (2) "The use of any amplifying system or device is prohibited on PATIO, as depicted on the ABC-257, dated 5/2/17, and the use of any such system or device inside the premises shall not be audible outside the premises." (3) "The licensee(s) or an employee of the licensee(s) will be present in the exterior patio area, as depicted on the ABC-257, dated 5/2/17, at all times that alcoholic beverages are being served or consumed." The PCL contains six "Whereas" clauses, two of which state, "Whereas, petitioner(s) intend to exercise privileges of the license in an exterior patio area; and Whereas, the issuance of an unrestricted license would be contrary to public welfare and morals." The Respondent signed the PCL with the understanding that any violation of the conditions "shall be grounds for the suspension or revocation of the license." (Exhibit 3.)

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<sup>3</sup> The undersigned marked and admitted these pleadings and emails as Respondent's Exhibit A.

**March 25, 2022**  
**(Counts 2-15)**

5. On March 25, 2022, Agents Martinez and Del Moral went to the Licensed Premises in an undercover capacity to conduct an investigation based on complaints the Department received regarding allegations of prostitution, narcotics and drink solicitation violations occurring at the Licensed Premises. The agents parked their vehicle at the end of the street on the corner. The Licensed Premises is located in an industrial area, with commercial businesses adjacent to it, train tracks behind the premises and residential housing across the train tracks. As the agents walked past a commercial business, located two buildings away from the Licensed Premises, Agent Martinez could hear amplified music emanating from the Licensed Premises. The agents entered the Licensed Premises at approximately 11:20 p.m.

6. The Licensed Premises measures approximately 47 feet by 74 feet, which includes both a bar area and patio. The bar area measures approximately 30 feet by 49 feet. The patio is in an inverted "L" surrounding the northern and eastern walls, with one part of the patio at the east end of the premises measuring 30 feet by 25 feet (hereinafter referred to as Patio A), and a longer patio area along the northern wall measuring approximately 74 feet by 17 feet (hereinafter referred to as Patio B). The entrance to the Licensed Premises is on the western wall which leads to the bar area. When the agents entered the bar area, Agent Martinez saw a disc jockey (DJ) immediately to the right of the entrance on a slightly raised platform, with restrooms behind the DJ on the south/right wall, elevated<sup>4</sup> booths in the middle of the south wall, tables and chairs in the middle and at the eastern/back portion of the bar area, an L-shaped fixed bar on the north/left wall with a kitchen in the far-left (north/east) corner of the bar area. There was no stage in the Licensed Premises. The bar area was dimly lit but the agents could still see the faces and actions of patrons and employees inside the premises. Agent Martinez used the restroom, and while he was there a female approached Agent Del Moral and asked if he wanted a lap dance, to which he declined. When Agent Martinez exited the restroom, the agents took a seat at a table at the east/back end of the bar area. Agent Martinez saw an entrance to Patio A along the eastern wall at the back of the premises. The patio area was brightly lit. The Licensed Premises has a total of four surveillance cameras,<sup>5</sup> three in the bar area and one in Patio A. In the bar area, two surveillance cameras are located at approximately each end of the northern wall behind the fixed bar (one above the sink and

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<sup>4</sup> Alexander Rodriguez, the Respondent's former security guard testified that these booths were referred to as the VIP section, with the booths elevated approximately two-feet high from the floor.

<sup>5</sup> At the time of the Department's investigations at the Licensed Premises the surveillance cameras were not set up to record.

another at the other end of the fixed bar), and a third surveillance camera in the middle of the southern wall (at the VIP booth section). (Exhibit 2 – ABC-257 Licensed Premises Diagram and Planned Operation (Retail).)

7. A waitress approached the agents at their table and asked for their drink order. The agents ordered and paid for a bucket of six, 12-ounce bottles of Pacifico beers, which the waitress brought back to their table. The agents took their beers and walked to Patio A, through the patio entry located at approximately the middle of the 30-foot eastern wall of the bar area. A security camera was located on the wall just to the left as they entered Patio A. The camera was angled with a view only to the south wall of Patio A. There were no cameras in Patio B.

8. The agents saw and heard loud music from an amplified boom box/speaker sitting on a pedestal in the middle of Patio A. The music from inside the Licensed Premises was audible outside the Licensed Premises.

9. The agents took a seat at a table immediately to their right, as they walked into Patio A, near the south wall, with their backs to the south wall, and the agents facing the north wall. The agents consumed their Pacifico beers while they were in Patio A, without the licensee or licensee's employees or security staff present on the patio at all times while they consumed their beers. Occasionally a security guard would walk into Patio A for one to two minutes to check the area and walk back into the bar area.

10. There were approximately 15 tables with chairs in Patio A. Agent Martinez saw a female dancer, identified in the accusation as Jane Doe #1 wearing a burgundy dress and thong, perform an exotic lap dance upon a male patron who was seated in a chair approximately 20 feet away from the agents' table. Jane Doe#1, while facing the male patron, pulled down the top of her dress and bra exposing her bare breasts, areolas, and nipples to the patron. While exposing herself to the male patron she allowed the patron to fondle and caress her breasts multiple times, on and off a few seconds each time. Jane Doe #1's buttocks made contact with the male patron's pant-covered genitals, off and on at different times, for brief seconds at a time, and she jumped up and down on his lap. Jane Doe #1 alternated turning around with her back to the male patron, while doing so she lifted-up the bottom half of her dress, revealing her thong while exposing her buttocks to the patron. Jane Doe #1 turned around, and while facing the patron she caressed and fondled herself as she performed. As Jane Doe #1 performed the above-described exotic lap dance she was not on a stage and not removed at least six feet from the male patron as required.

11. A waitress approached the agents' table in Patio A and asked if they wanted another beer. Agent Martinez ordered another beer. The waitress left and returned with another

beer for Agent Martinez and immediately asked if he liked any of the dancers. The waitress called over a dancer to sit and talk with Agent Martinez. The dancer introduced herself as Aria. Agent Martinez asked Aria how much she charged for a lap dance, to which Aria replied \$35. Agent Martinez asked her what \$35 would give him as far as the lap dance. Aria touched herself and said, "You get me." Agent Martinez asked Aria if would take her clothes off during the dance or if she danced nude. Aria grabbed her breasts and replied, "I'll show them to you." Agent Martinez agreed to have Aria perform a lap dance upon him. Aria grabbed Agent Martinez' hand, walked him over to a corner of the back patio to a chair, upon which the agent sat. Agent Martinez tried to pay Aria with a \$100 bill, but she said she did not have change and that he could pay her at the end of the dance by getting change from the bar. Aria was wearing a see-through halter top without a bra or pasties covering her nipples and areolas so the agent could see Aria's nipples and areolas through the top with her breasts exposed to view. Aria also wore a see-through skirt and a black thong under the skirt, which allowed Agent Martinez to see Aria's buttocks. Aria began dancing in front of Agent Martinez, pulling up her skirt, and sitting on his lap. Aria ground her buttocks on his genitals, moving up and down on his genitals with her buttocks making contact with his genitals multiple times, on and off a couple seconds at a time, throughout the dance. Aria's actions appeared to Agent Martinez to be simulating sexual intercourse with him. While Aria performed the exotic lap dance upon Agent Martinez she groped, pinched, and fondled her nipples for 20 to 30 seconds at a time, while she was within five to six inches from him. Aria twice pulled up her top completely exposing her breasts, fondling and caressing her bare breasts, and swiping her breasts across the agent's face and mouth making contact with her breasts against his face and mouth, while exposing her bare breasts to view. Aria also changed her position on the agent's lap, facing away from him, grinding, and moving up and down upon his groin area. She then reached back, grabbed the agent's hands, placed them upon her breasts, and squeezed his hands causing him to squeeze her breasts. While Aria was engaged in the above-described acts she was not on a stage and she was within inches of Agent Martinez, while at times touching him, including making skin to skin contact between Aria's breasts and the agent's face and mouth. After Aria finished the lap dance she and Agent Martinez walked to the fixed bar where he got change and paid Aria for the lap dance. Agent Martinez returned to his table in Patio A, near the south wall, where Agent Del Moral was seated.

12. At some point, a female dancer wearing a burgundy dress, identified in the accusation as Jane Doe #2, approached Agent Martinez at his patio table and asked if he wanted a lap dance. Agent Martinez asked how much it would cost, to which she replied that it was \$40. He declined saying that the other dancers charged him less. Jane Doe #2 walked away. Later, near closing time, Jane Doe #2 returned to Agent Martinez' table and said she would give him the lap dance for \$30, to which he agreed. Jane Doe #2 took Agent Martinez to the opposite corner of the patio, and placed against the wall a

freestanding chair, upon which the agent sat. Jane Doe #2 began dancing in front of him, pulling up her dress, which revealed her thong underwear and exposed her buttocks to his view. Jane Doe #2 then sat upon Agent Martinez' lap and began grinding and bouncing up and down upon his genitals, with her buttocks making contact with his pant-covered genitals multiple times, a few seconds at a time as she bounced and ground her buttocks upon his genitals. Jane Doe #2's above actions appeared to Agent Martinez to be simulating sexual intercourse upon him. Jane Doe #2 pulled down the top of her dress and bra exposing her bare breasts, areolas and nipples to view and while doing so she caressed her breasts and nipples for 30 to 40 seconds at a time, within inches from Agent Martinez' face. Jane Doe #2 then grabbed the back of Agent Martinez' head and forced his face into her bare breasts. Jane Doe #2 changed her position on the agent's lap by facing away from him, she then bent over in front of him, spread and caressed her buttocks, exposing her buttocks to view. She turned around, removed one of her shoes, wedged her foot between the chair and the agent's genital area, stood up on the chair with the wedged foot, and began grinding her genital area into the agent's face, with her foot making contact with his genitals and her genitals making contact with the agent's face. While Jane Doe #2 performed the above-described exotic dance she was not on a stage and she was within inches from Agent Martinez, while at times touching and making direct contact with him. The lap dance lasted for the length of a song, approximately three minutes.

13. While Jane Doe #2 performed the exotic lap dance upon Agent Martinez, he could see other dancers pulling up chairs for male patrons to sit on at the back of Patio A (near the dotted line at the 30-foot mark depicted on the Licensed Premises Diagram admitted as Exhibit 2) and perform exotic lap dances upon the male patrons. The lap dances performed on Agent Martinez and the male patrons in Patio A were not in view of the camera in Patio A.

**May 13, 2022**  
**(Counts 16-29)**

14. On May 13, 2022, Agents Martinez and Del Moral returned to the Licensed Premises in an undercover capacity. At approximately 11:30 p.m. the agents entered the bar, which had the same layout and was dimly lit, but the agents could still see the actions of patrons and employees. The back patio was again very well lit, and Agent Martinez could see people in Patio A. A waitress approached the agents and asked what they wanted to drink. The agents ordered and paid for a bucket of Modelo beers. After placing and paying for their beer order with the waitress the agents walked toward the entrance to Patio A. Before entering Patio A, the agents were stopped by a security guard who advised them they needed to purchase alcohol to be allowed entrance into the patio. The agents explained they had, and that the waitress would be bringing a bucket of

Modelo beers to them in the patio. The security guard allowed the agents to proceed into the patio area.

15. Upon entering Patio A, the agents again saw the loudspeaker/boom box, which was upon a pedestal stand in the middle of Patio A, playing music, and could be heard outside the Licensed Premises. The agents sat at a table along the south wall of Patio A. Agent Martinez sat with his back to the south wall, and Agent Del Moral alternated his seat, facing Agent Martinez or facing either the bar area or Patio A. The same waitress who took their drink order delivered their bucket of Modelo beers to their patio table. The agents consumed their beers in Patio A and while doing so no security staff or employee was present at all times on the patio. A security guard occasionally came onto Patio A for a minute or two to check the area and walked back into the bar area.

16. Agent Martinez observed three female dancers, identified in the accusation, as Jane Doe #3, Jane Doe #4, and Jane Doe #5. Jane Doe #3 was a Hispanic female wearing a see-through black top and see-through skirt. Jane Doe #4 was a Caucasian female wearing a see-through blue dress with shoulder straps. Jane Doe #5 wore either a see-through top and skirt or see-through dress.<sup>6</sup> The three dancers did not wear a bra to cover their breasts and did not wear any pasties to cover their areolas and nipples.

17. Jane Doe #3, Jane Doe #4 and Jane Doe #5 were all performing exotic lap dances, at the same time, in the patio area upon three separate male patrons. Jane Doe #3 was performing a lap dance upon a male patron seated in a chair under the camera in Patio A, with the male patron's back up against what would be the kitchen wall. (Exhibit 2 – ABC -257 Licensed Premises Diagram.) Agent Martinez was approximately 15 to 20 feet away and could see the male patron's right side of his body. Jane Doe #4 was performing the lap dance approximately two tables over (toward the dotted line as depicted on Exhibit 2 at the 30-foot mark). Jane Doe #4 had turned the male patron's chair around so that he faced the bar area and Agent Martinez could see the left side of the male patron's body.<sup>7</sup> The said Jane Doe dancers were dancing to the music that was playing from the loudspeaker/boombox.

18. The exotic lap dancing which Jane Doe #s 3, 4 and 5 performed were similar to what Agent Martinez had observed and experienced himself on his prior visit to the Licensed Premises. The lap dances Jane Doe #s 3, 4 and 5 performed appeared to Agent Martinez to be simulating sexual intercourse. When the said Jane Doe dancers were sitting on the male patrons' laps grinding and moving up and down with their buttocks, the dancers'

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<sup>6</sup> During Agent Martinez' testimony he did not physically describe Jane Doe #5 but recalled that she wore either a see-through top and skirt or a see-through dress.

<sup>7</sup> There was no evidence as to where in the patio Jane Doe #5 performed her lap dance.

buttocks made contact with the male patrons' genitalia, off and on, a couple seconds each occurrence, throughout the sexual simulation. The said dancers lifted either their dress or skirt and exposed their buttocks to view. The dancers also pulled down either their top or dress and exposed their breasts and areolas to view. While performing, these Jane Doe dancers were continually caressing their own breasts and nipples for a few seconds, on and off throughout the exotic dance.

19. Jane Doe #3, Jane Doe #4, and Jane Doe #5, while dancing in front of the male patrons put their hands on the male patrons' knees and placed their faces into the male patrons' groin areas, with the dancers moving their faces up and down on the male patrons' pant-covered genitals. These actions appeared to Agent Martinez to be simulating oral copulation.

20. While the three said Jane Doe dancers were performing the exotic lap dances described above, they were not on a stage and were either within inches of the male patrons or making direct contact with the male patrons' genitalia.

21. Each lap dance that Jane Doe #s 3, 4 and 5 performed on the said three male patrons, lasted for the length of a song, approximately three minutes. Agent Martinez then observed as Jane Doe #s 3, 4 and 5 performed similar exotic lap dances upon other male patrons in the patio.

22. Agent Martinez observed on the patio a Hispanic male, approximately five foot seven inches tall and 200 pounds, wearing black pants, a black jacket with a hoody (the hoody was not on his head), and gold shoes. The male was standing in Patio A and observing the female dancers as they performed lap dances, and the dancers would walk up to him and stand by him. Based on Agent Martinez' training and experience with exotic dancer/lewd conduct operations, it is common for exotic dancers to have a handler and the Hispanic male appeared to be an employee/handler in charge of monitoring the dancers, giving them orders, and looking around to see who was in the patio. None of Respondent's employees, nor any security guard, or the handler, attempted to stop the dancers from performing the above-described exotic lap dances upon the male patrons, which exotic dancing was openly visible to all in the patio area.

23. During Agent Martinez' visits to the Licensed Premises he did not feel the effects of the alcoholic beverages he consumed.

**August 26, 2022  
(Counts 1, 30-39)**

24. On August 26, 2022, at approximately 10:35 p.m., Department Agents Lauer and Sumida arrived at the Licensed Premises in an undercover capacity. At the entrance two security guards patted down the agents prior to their entering the Licensed Premises. The agents paid \$7 each as a cover charge and in return were each handed a ticket that could be exchanged for one 12-ounce beer. Upon entering, Agent Lauer observed several male patrons and approximately 10 females, the latter of whom caught his attention because the females were all wearing see-through lingerie attire which exposed certain body parts. The bar area was dimly lit, but Agent Lauer could ascertain images and see everything clearly. There was no stage or designated dancing area in the Licensed Premises.

25. As the agents walked toward the fixed bar a Hispanic waitress greeted them and asked what they wanted to drink. The agents ordered from the waitress two Modelo beers, which cost \$7 each and for which they paid with the tickets the agents were given at the door. The waitress delivered two, 12-ounce Modelo beers to the agents, who thereafter sat at a table adjacent to the kitchen at the end of the fixed bar. While seated the agents observed several male patrons who were drinking 12-ounce beer bottles and accompanied at their tables by females who were dressed in lingerie, drinking 7-ounce Bud Light beers and conversing with the male patrons. There were two bartenders working behind the fixed bar opening beers and giving them to the waitresses and the females dressed in lingerie. Agent Sumida saw two waitresses cleaning tables. The bartenders and waitresses were dressed in regular street clothing. Agent Lauer observed females wearing lingerie walking with male patrons in the bar. Based on Agent Lauer's training and experience he believed the females were exotic dancers and not patrons because only exotic dancers wear lingerie to a bar and female patrons wear street clothing not lingerie.

26. A Hispanic female, wearing see-through red lingerie with thong underwear that exposed her buttocks to view, approached the agents' table and introduced herself as Sophia. Sophia sat at the agents' table. Sophia initially spoke to Agent Lauer in Spanish and shortly after spoke in English, realizing Agent Lauer's first language is English. Sophia asked Agent Lauer if he wanted a lap dance, to which he agreed. Sophia escorted Agent Lauer to a freestanding chair across the room at the south wall in the southeast corner of the bar area. Agent Lauer sat in the chair with his back to the south wall. Sophia told Agent Lauer the cost for one lap dance is \$30 and \$50 for two lap dances. Agent Lauer agreed to two lap dances and handed her a \$50 bill.

27. Sophia straddled Agent Lauer, wrapped her legs around his waist and began grinding her buttocks and vagina back and forth, and bouncing up and down over his jean-covered

genitals. Sophia's vaginal area and buttocks made contact with Agent Lauer's genitals for approximately 15 to 30 seconds. Sophia's actions appeared to Agent Lauer to be simulating sexual intercourse with him. While Sophia performed these acts she was fondling and caressing her breasts and then pressed her breasts up against Agent Lauer's face and mouth several times, for approximately 15 to 30 seconds each occurrence; making direct skin to skin contact between Sophia's breasts and Agent Lauer's face and mouth.

28. Sophia then got up from Agent Lauer's lap and turned around so that her back faced Agent Lauer. She sat upon his lap and began grinding her buttocks back and forth and bouncing her buttocks up and down over his genitals, making contact therewith. Sophia's actions appeared to Agent Lauer to be simulating sexual intercourse with him. Sophia began spanking and slapping her buttocks and asked Agent Lauer to do the same. She bent over in front of Agent Lauer, lifted up her lingerie and exposed her buttocks and the cleft of her buttocks to view. Sophia moved her buttocks toward Agent Lauer's face.

29. Sophia then dropped down to her knees in front of Agent Lauer, placed her head directly in his groin area, put her mouth over his genital area and moved her head up and down, making contact with Agent Lauer's covered genitals for 15 to 30 seconds. Sophia's actions appeared to Agent Lauer to be simulating oral copulation. The above-described exotic lap dance took a duration of two songs or approximately four minutes. Of those four minutes Sophia was in contact with Agent Lauer's genital area for approximately two minutes. For the entirety of the four-minute lap dance Sophia's buttocks was exposed to view because of the thong underwear she wore. Sophia was not on a stage while performing the exotic lap dance for Agent Lauer. During the lap dance Respondent's employees, including bartenders, waitresses and security guards were nearby. The bartenders were within view of the said lap dance, as they stood behind the fixed bar approximately 15 feet away with no one seated at the bar. The waitresses and security guards were approximately 10 feet away while Sophia performed the lap dance upon Agent Lauer. The security guard was near the exit door leading to Patio A. No employee or security guard made any attempt to stop Sophia as she performed the said exotic lap dance. After Sophia finished the dance, she thanked Agent Lauer and walked away. Agent Lauer got up from the chair and walked back to the table at which Agent Sumida was seated in the bar area adjacent to the kitchen at the end of the fixed bar.

30. At some point another Hispanic female, holding a purse and sipping a seven-ounce Bud Light beer, approached the agents' table and introduced herself as Marissa. Marissa sat with the agents and initially spoke to Agent Lauer in Spanish, but once she realized English was his first language, she spoke broken English, which Agent Lauer was able to understand. Agent Lauer asked Marissa why her beer was so small. Marissa explained to Agent Lauer that if he purchased her a 7-ounce Bud Light beer it would cost him \$8,

and if he purchased her a 12-ounce Modelo beer it would cost him \$20, compared to the cost of his 12-ounce Modelo beer he paid for himself at \$7. Agent Lauer asked Marissa why her 7-ounce sized beer cost more than his 12-ounce beer, and why her 12-ounce beer cost more than his 12-ounce beer. Marissa explained that the cost of her beer was to provide company to the male patron who purchases beer for her, so that she can hang out, spend time and talk with that male patron. The music playing in the Licensed Premises was amplified, making it difficult for Agent Sumida to hear people talk or have conversation, so that one had to speak loudly. Agent Lauer relayed to Agent Sumida, who was sitting directly across the table from Agent Lauer, what Marissa had told him about the cost of her beers. Agent Sumida then asked Marissa if she wanted him to buy her a beer, to which she agreed. Agent Sumida asked Marissa what type of beer she wanted. Marissa asked Agent Sumida for a Modelo beer. Agent Sumida agreed to buy her the Modelo beer. He ordered a Modelo beer for himself from Marissa and then gave her \$30 cash to pay for her \$20, 12-ounce Modelo and for his \$7, 12-ounce Modelo, with a \$3 tip. Agent Sumida observed Marissa as she got up from the table, walked to the fixed bar, spoke with the bartender, then the bartender retrieved two, 12-ounce Modelo beers and handed them to Marissa, who returned with the beers, one for herself and one for Agent Sumida. Marissa sat down, drank from her 12-ounce Modelo beer and engaged the agents in conversation. Marissa consumed the beer Agent Sumida bought her.

31. After speaking with Agent Sumida for two minutes, Marissa asked Agent Sumida if he would like a lap dance. Agent Sumida asked her how much the lap dance would cost, to which she replied \$30. Agent Sumida agreed to a lap dance. Marissa escorted Agent Sumida through Patio A to Patio B where he sat on a chair in the northeast corner of Patio B. Marissa began dancing in front of Agent Sumida, rubbing her hands over her body, including her covered breasts, fondling her breasts several times, for five seconds each interval. Marissa then sat upon Agent Sumida's, lap facing him, with her buttocks making contact with his pant-covered genitals for approximately 30 seconds. Marissa then grabbed Agent Sumida's hands, placed them on top of her covered breasts, squeezed his hands with her hands, causing his hands to squeeze her covered breasts. While dancing upon Agent Sumida, Marissa removed her skirt, which revealed her one-piece bathing style suit with thong underwear and exposed her buttocks to view. Marissa rubbed her hands over her covered genitalia and vulva several times, which act appeared to Agent Sumida to be simulating masturbation. At one point, Marissa got down on her knees in front of Agent Sumida, placed her head in his groin area and began moving her head in an up-and-down motion, for 10 to 15 seconds. With each movement of her head in the downward motion she made contact with his pant covered genitals for one second. Marissa's up and down head movements in Agent Sumida's genital area appeared to Agent Sumida to be simulating oral copulation. Marissa got back onto Agent Sumida's lap and continued the exotic lap dance. Marissa pulled down her top and exposed her bare breasts to view. She then grabbed the back of Agent Sumida's head, pulled his head

into her exposed breasts, and moved her body in different directions, resulting in rubbing her bare breasts in his face, causing her bare breasts to make direct skin to skin contact with his face for approximately 15 to 20 seconds. During the lap dance Marissa put her hand on top of Agent Sumida's groin area and began touching his genitals, moving her hand up and down in different directions making contact with his covered penis and genitals for 10 to 15 seconds. These actions appeared to Agent Sumida to be simulating masturbation on him. Throughout the two-minute lap dance Marissa performed on Agent Sumida, Marissa's genital area made contact with Agent Sumida's covered genitals for approximately one minute. During the said exotic lap dance Marissa was not on a stage and was either making direct contact with Agent Sumida while seated upon him or kneeling in front of him and within arm's reach or approximately three feet when standing in front of him. While Marissa performed the exotic lap dance on Agent Sumida a male security guard stood approximately 10 feet away by the Patio A entrance, facing the patio area. Neither the security guard nor any employee attempted to stop Marissa from performing the exotic dance upon Agent Sumida. The security guard at the Patio A entrance was not interacting with any male patron. It appeared to Agent Sumida that the security guard's sole job was to monitor the female dancers because he would only communicate with the female dancers. Agent Sumida paid Marissa \$30 cash for the lap dance. Agent Sumida and Marissa walked through Patio A, back into the bar area to the agents' table.

32. Agent Sumida sat with Agent Lauer at their table. Marissa approached Agent Lauer and asked him if he would like a lap dance, to which he agreed. Marissa told Agent Lauer to go to the patio with her. Marissa escorted Agent Lauer to Patio B and had him sit down in a freestanding chair. (Exhibit 2 – ABC-257 Licensed Premises Diagram: Agent Lauer testified his chair was at the dotted line in Patio B<sup>8</sup> where it states, "...PATIO...." just above the letter "T" in "PATIO.") Agent Lauer saw no tables in Patio B, only chairs, which he observed female dancers use to perform exotic lap dances on male patrons. Agent Lauer agreed to pay Marissa for a lap dance for the length of two songs.

33. Marissa sat directly on Agent Lauer's pant-covered genital area, with her buttocks and genital area making contact with his genitals. Marissa placed her hands over her covered breasts and fondled them for approximately 15 seconds. She then grabbed Agent Lauer's hands, placed them over her covered breasts, squeezed his hands over her breasts causing Agent Lauer to squeeze her covered breasts for about 15 seconds. Marissa slipped off her skirt revealing a tan, one-piece, spaghetti-strapped bodysuit<sup>9</sup> with thong

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<sup>8</sup> See paragraph 6 of Findings of Fact for the description of the location of Patio B on Exhibit 2.

<sup>9</sup> It was not a full, ankle-to-neck bodysuit, but similar to a one-piece swimsuit, from the pelvic region up to the breasts with spaghetti straps over the shoulders.

underwear, which exposed her buttocks to view and which she spanked. Marissa placed her hands over her genitalia and moved her hands in a back-and-forth motion over her genitalia, simulating masturbation. While continuing the exotic lap dance Marissa pulled down the top of her bodysuit, which exposed her bare breasts, areolas and nipples to Agent Lauer; she was not wearing a bra. She then grabbed her bare breasts and pressed them against Agent Lauer's face, making direct skin to skin contact between her bare breasts and his face for approximately 15 to 30 seconds. Marissa placed her hand over the agent's covered genital area and began touching his genitals over his jeans and making contact with his penis. While doing so she began moving her hand in a back-and-forth motion on top of his penis and genital area for approximately 15 to 30 seconds. To Agent Lauer Marissa's actions appeared to be simulating masturbation on him. At one point Marissa dropped down to her knees in front of Agent Lauer and put her head and mouth over his covered genitals and began moving her head in an up and down motion, making contact with Agent Lauer's jean-covered genitals on each downward motion for approximately 15 to 30 seconds. Marissa's actions appeared to Agent Lauer to be simulating oral copulation on him. While Marissa performed this exotic dance upon Agent Lauer, approximately 15 feet away were a security guard as well as waitresses delivering drinks to patrons. The security guard and waitresses made no attempt to stop Marissa from performing the exotic dance upon Agent Lauer. During the four-minute lap dance Marissa was not on a stage and she was within inches of Agent Lauer as well as making contact with his jean-covered penis and genitals for over two minutes. When the dance finished Agent Lauer paid Marissa for the lap dance and walked through Patio A into the bar area. As he walked, Agent Lauer saw Agent Sumida had changed tables and was now seated at a table in the bar area but closer to the entrance to Patio A, about a table north of their original table.<sup>10</sup> Agent Lauer sat in a chair at the table.

34. While Agent Lauer was away getting a lap dance from Marissa, Agent Sumida observed approximately 15 females wearing lingerie-type attire, similar to Marissa's attire, who were either conversing with male patrons or performing sexually explicit, exotic lap dances upon male patrons' laps, similar to the exotic lap dance Marissa gave Agent Sumida.

35. While seated at the agents' table Agent Lauer observed other female dancers, similarly attired in lingerie as Marissa and Sophia, performing similar sexually explicit exotic lap dances upon other male patrons as Marissa and Sophia performed upon him.

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<sup>10</sup> Agent Lauer described, using the Licensed Premises Diagram in Exhibit 2, that the table was in the vicinity of the word "EXIT" in the bar area.

36. Agents Lauer and Sumida observed Marissa's actions in the Licensed Premises throughout that evening. Agent Sumida saw Marissa several times taking drink orders from customers, receiving cash from them, walking to the fixed bar, interacting with the bartenders, retrieving beers from the bartenders and delivering the beers to the customers. Marissa appeared to Agent Sumida to have a working relationship with the bartenders. Agent Lauer observed Marissa go to the fixed bar and engage with the bartenders a few times. Based on the agents' training and experience, the agents' observations of Marissa's actions in the Licensed Premises, along with Marissa's knowledge of the beer pricing and reason why her beer cost more to spend time and accompany the male patrons in the bar, Marissa appeared to the agents to be employed at the Licensed Premises.

37. Other female dancers approached Agents Lauer and Sumida asking if they would like a lap dance, which the agents declined.

38. Marissa returned to the agents' table and asked Agent Lauer if he would purchase her a 12-ounce beer. Agent Lauer agreed to buy her a 12-ounce beer at \$20 and also ordered from Marissa a 12-ounce beer each for himself and Agent Sumida. Agent Lauer gave Marissa \$40 cash, which covered paying \$20 for Marissa's 12-ounce Modelo beer, \$7 for each of the agents' 12-ounce Modelo beers (\$14 for both), and a \$6 tip. Agent Sumida watched as Marissa took the \$40, walked to the bar where there was a bartender working behind the fixed bar. Marissa retrieved from the fixed bar three, 12-ounce bottles of Modelo beer, which Marissa brought to the agents' table. The agents observed Marissa consume the 12-ounce Modelo beer Agent Lauer had purchased for her.

39. When Agent Lauer works undercover operations if he consumes alcohol, it is his practice to only take incidental sips and not to drink the entirety of the alcoholic beverage. Agent Lauer did not feel the effect of the alcohol he consumed in the Licensed Premises. Agent Sumida slightly<sup>11</sup> felt the effect of the alcohol he consumed in the Licensed Premises, but it did not affect his ability to perform his undercover job duties.

40. When the agents were leaving the Licensed Premises Agent Sumida still observed female dancers performing lap dances upon male patrons.

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<sup>11</sup> Agent Sumida testified that on a scale of one to 10, 10 being obviously intoxicated and zero being no influence at all, Agent Sumida said the effects of alcohol he felt were a one or two.

**September 9, 2022  
(Counts 40-43)**

41. On September 9, 2022, at approximately 11:40 p.m., Agents Sumida and Lauer returned to the Licensed Premises to continue their undercover investigation to determine whether violations were still occurring therein. At the entrance a security guard conducted a pat-down search of the agents. The agents each paid a \$7 cover charge and in return were each handed a ticket to be exchanged for one 12-ounce beer inside. The agents entered the Licensed Premises. Upon entry Agent Sumida noticed the Licensed Premises was in the same condition as his prior visit, with no stage or designated dance area, two bartenders working behind the fixed bar, waitresses and approximately seven female dancers dancing with male patrons.

42. A female waitress greeted the agents near the fixed bar and asked if they wanted a beer. The agents ordered from the waitress two Modelo beers, which cost \$7 each and for which they paid with the tickets the agents were given at the door. The waitress retrieved two, 12-ounce Modelo bottles of beer from the fixed bar and delivered them to the agents.

43. Upon receiving the beers the agents walked to Patio A, which was full of people as well as table and chairs positioned close to each other. Agent Sumida observed the male patrons were drinking 12-ounce bottles of Modelo beer and the females in lingerie attire were also consuming beers. Agent Sumida observed in Patio B approximately 30 male patrons who were receiving sexually explicit lap dances from female dancers wearing lingerie attire.

44. One of the females saw the agents looking for a table and cleared some space at a table for the agents in the middle of Patio A. The agents sat down at the table and began consuming their beers. After about five minutes, a Hispanic female wearing a skimpy, blue dress approached the agents' table and introduced herself as Rain. Rain sat at the table with the agents and began speaking in English with them. After several minutes Rain asked Agent Sumida if he wanted a lap dance. Agent Sumida asked how much the lap dance cost, to which Rain replied \$20. Agent Sumida agreed to the lap dance and paid her \$20. Rain escorted Agent Sumida to a chair in Patio B. Agent Sumida sat on the chair and Rain began dancing in front of him.

45. Rain rubbed her hands over her body, and several times grabbed her covered breasts, and fondled her breasts for five to 10 seconds each time she grabbed her breasts. During the dance Rain lifted up her dress, revealing her thong underwear and exposing her buttocks to view. Rain then sat on Agent Sumida's lap, facing him, and began grinding her hips into his hips, and bouncing in an upward and downward motion upon his lap,

with her genital area making contact with Agent Sumida's covered genital area for approximately 15 to 20 seconds. Rain's actions appeared to Agent Sumida to be simulating sexual intercourse upon him. Rain then touched and rubbed her hand over her vulva and genital area several times, in what appeared to be simulating masturbation upon herself while seated on the agent's lap. At one point Rain dropped down to her knees in front of Agent Sumida and put her head in his lap and began moving her head in an up and downward motion, with her face making contact with Agent Sumida's covered genitals on each downward motion for one second. Rain moved her head up and down several times making contact with his genitals, in what appeared to Agent Sumida to be simulating oral copulation. Rain then sat upon the agent's lap, facing away from him, touched her breasts, then reached behind her, grabbed Agent Sumida's hands, put them on top of her covered breasts and squeezed his hands, causing his hands to touch and squeeze her breasts. Rain then pulled down the top of her dress and exposed her bare breasts to Agent Sumida for five to 10 seconds. Rain was not on a stage during the length of the two-minute exotic lap dance, during which she was in contact with Agent Sumida's genitals for approximately one minute. A Hispanic security guard was standing at the Patio A door that night, not drinking or conversing with any males, only watching the female dancers and conversing with them. Based on Agent Sumida's training and experience he believed it was the security guard's duty to monitor the exotic female dancers in the Licensed Premises. Neither that security guard who was approximately 10 feet away, nor any other security guard or employee attempted to stop Rain from performing the exotic lap dance upon Agent Sumida. The Hispanic security guard standing at the Patio A door did not tell any of the exotic female dancers who were performing to put their clothes back on or to stop the sexually explicit lap dances on the male patrons. After Rain finished the exotic lap dance upon Agent Sumida, he got up from the chair, walked back to his table, and sat down with Agent Lauer. Once in a while, females wearing lingerie approached the agents' table and conversed with them.

46. Agent Sumida observed Rain hanging around the premises the entire time he was in the Licensed Premises, with Rain coming and going, conversing only with male patrons and the other female dancers.

47. The alcohol that the undercover agents drank inside the Licensed Premises did not affect or impair their ability to perform their undercover duties, including, but not limited to, listening, talking and making observations.

48. A little after midnight on September 10, 2022, the outside team of officers entered the Licensed Premises to conduct an inspection therein. The team included law enforcement from the Department, the San Jose Police Department and the Santa Clara Sheriff's Department, as well as personnel from the Santa Clara District Attorney's

office, all of whom wore high-profile, tactical vests clearly labeled "Police" on the front and back of their vests.

49. Department Agent Gonzalez was part of the team of officers who entered in a high-profile capacity. He is a state certified Spanish speaker. He found in the Licensed Premises and interviewed one of Respondent's waitresses, Lidia Fernandez Rodriguez. Agent Gonzalez spoke in Spanish with Ms. Rodriguez and assisted her in filling out the Department's drink solicitation affidavit, ABC-307 form. Ms. Rodriguez said she was hired by the Respondent's wife, Guadalupe Rios, as a waitress and that she has been working in that capacity for eight years in the Licensed Premises. Ms. Rodriguez explained that when patrons purchase their own beer they pay \$7, and any beer a patron purchases for her is \$8, for which she is cashed out immediately at the fixed bar where she is paid \$4 and the bar is paid \$4 per beer. The Respondent also pays Ms. Rodriguez biweekly \$400 for her waitressing duties at the Licensed Premises.

50. Agent Gonzalez also interviewed Yamel Aljanera Meza LaBra, who was hired by the Respondent as a bartender. Ms. LaBra said she had been working at the Licensed Premises as a bartender for two years. She charges patrons \$7 for their drinks and if a patron offers to buy her a drink she charges them \$5 for a non-alcoholic juice drink. She claimed she does not participate in the drink solicitation activity in the Licensed Premises.

51. Department Agent Johnson also entered the Licensed Premises in a high visibility capacity to conduct interviews as part of the investigation therein. Agent Johnson interviewed Alma Gonzalez, who was inside the Licensed Premises, visiting as a patron. Agent Gonzalez, a state certified Spanish translator, translated the conversation between Agent Johnson, who speaks English, and Ms. Gonzalez, who speaks Spanish. Agent Johnson asked Ms. Gonzalez questions from the Department's drink solicitation affidavit form, ABC-307, which form the agent assisted her in filling out. Ms. Gonzalez said she had gone to the Licensed Premises with a male companion who purchased a Bud Light beer for her for \$8. At some point Ms. Gonzalez went to the restroom and when she returned to the fixed bar there was \$4 on the counter. Ms. Gonzalez asked one of the employees, who was wearing a black and white striped dress, what the \$4 was for. The employee explained that she left the \$4 as a commission for Ms. Gonzalez for the Bud Light beer the male companion purchased for Ms. Gonzalez.

**(Respondent's Witnesses)**

52. Jose Luis Rios appeared and testified at the hearing. Mr. Rios is the licensee of the Licensed Premises. He has never worked at or managed the Licensed Premises in any capacity. Mr. Rios' full-time, primary occupation is as a maintenance supervisor in the

manufacture of PC boards, in which industry he has been working for 20 years. In early 2000, Mr. Rios and his wife, Guadalupe Rios, became co-licensees of a type-41 license for a premises called the Savoy, which they owned for approximately 13 years, and which had a discipline-free history. Mr. Rios worked as a bartender in that premises.

53. In 2017, Mr. Rios purchased the Bodega Bar and Restaurant and kept the name of the business. The hours of operation are from 3:00 p.m. to 2:00 a.m. Mr. Rios never received training on how to run a bar nor did he take any Department of Alcoholic Beverage Control courses. Since acquiring the Licensed Premises Mr. Rios has left the day-to-day operations and management of the Licensed Premises to the on-duty bartenders, who manage their own work schedules. Mr. Rios said he let the bartenders run the Licensed Premises because he was getting older and tired due to working at his regular job. Mr. Rios said that when the COVID-19 Pandemic hit in 2020, the Licensed Premises closed until the California Department of Public Health said it was okay to reopen. The Licensed Premises reopened in approximately June of 2021. He said it was “super slow,” “we were basically dead,” but “at least we had some people coming in, here and there.” In 2022, Mr. Rios said, “business started picking up.”

54. Between March 2022 and September 2022, the Licensed Premises had three bartenders, Laura Torres, Alea (whose name Mr. Rios could not recall) and Carmen Gonzalez, the latter of whom switched off between working as a bartender and a waitress. Generally, one bartender works behind the fixed bar, unless demand requires additional bartenders. Friday and Saturday evenings are the busiest nights of the week. Mr. Rios places the orders for the alcoholic beverages based on what his bartenders tell him is needed. To track the sales of alcoholic beverages at the Licensed Premises, the on-duty bartenders are required to use a “counting method.” Each night the bartenders are to place the empty beer bottles in the empty 24-capacity cases they came in, stack the cases upon each other on the floor next to the kitchen, and at the end of each night the bartender counts the cases filled with empty bottles.

55. Between March 2022 and September 2022, there were two security guards working in the Licensed Premises, Alex Rodriguez and another male, the name of whom Mr. Rios did not recall. He said there is one other waitress, Lidia Fernandez, besides Carmen Gonzalez. Part of the waitressing duties is to find patrons tables at which to sit, to ask patrons what they want to drink, take the money from the patron, walk to the fixed bar, place the beer order with the bartender, where the bartender and waitress exchange the money for the beer order, the bartender provides the beer and any change to the waitress, who then walks back to the patron and delivers the beer and change, if any. Mr. Rios is not aware if there is any tip protocol between the bartenders and waitresses but knows they do not pool their tips. He believes the bartenders have a tip jar behind the fixed bar next to the cash registers.

56. Mr. Rios said when he acquired the Licensed Premises in 2017, he informed his employees that drugs and “illicit things” are prohibited and they are to turn away a patron who is too drunk at the Licensed Premises. He told employees to alert the security guards if they saw anyone “doing drugs” or getting into a fight. The security guards are to check patron identifications at the door to prevent minors from entering the Licensed Premises. At some unknown time, Mr. Rios claimed he told his employees that lap dancing was not allowed in the Licensed Premises. Mr. Rios initially said he did not have a protocol on drink solicitation, but that drinks are \$7 each. Later Mr. Rios testified that he did let employees know of the drink solicitation protocol, by making sure they knew all drinks were \$7, no matter the size and whether it is domestic or imported beer. He claimed that a drink solicitation and commission scheme is not tolerated. Mr. Rios said patrons are not allowed to grope, fondle, or touch any other patron. There was no evidence as to when Mr. Rios gave these instructions to employees or when these policies or protocols were put in place.<sup>12</sup> The Licensed Premises does not serve food and has no bar menu which lists beer pricing. Mr. Rios’ employees do not wear uniforms or name tags.

57. Mr. Rios said he goes “in and out [of the Licensed Premises] once in a while,” to perform any required maintenance therein. Mr. Rios said he does “not often” go to the Licensed Premises, “maybe twice a week,” on random days, and that it “could be anywhere from 15 minutes to an hour” that he would stay there when he went. He continued the twice a week, random day, 15-minute to an hour schedule throughout 2022. Mr. Rios acknowledged it was “fair to say he was largely absent from the [Licensed] Premises during its operation.” Based on his absence from the Licensed Premises Mr. Rios had cameras installed in the Licensed Premises to be able to watch the activity therein. The cameras were not set up to record, but for live view only. There was no evidence that Mr. Rios ever watched the surveillance cameras during operating hours. At some point, after the said accusation, Mr. Rios changed the video surveillance system to allow for recording. Mr. Rios claimed he relied on the cameras and “the counting method”<sup>13</sup> to assure drink solicitation activity was not taking place in the Licensed Premises. Mr. Rios did not confer with the Department to determine whether “the counting method” was a “reliable and good method.” Mr. Rios was not at the Licensed Premises on the dates of the said undercover operations. He said he otherwise did not observe any of the alleged violations at the Licensed Premises when he was there, and employees did not advise him that the said activities were occurring in the premises. Mr.

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<sup>12</sup> Other than telling employees in 2017 that drugs and “illicit things” are prohibited and to turn away an obviously intoxicated patron.

<sup>13</sup> The undersigned understood Mr. Rios to mean the bottle counting method by the bartenders described above in paragraph number 54. Mr. Rios’ testimony regarding the “the counting method” was not otherwise clarified.

Rios said he relied on his employees to make sure illegal activity was not occurring at the Licensed Premises. Mr. Rios said his wife helped out at times, going to the Licensed Premises, “I think something like myself periodic, a day here, a day there,” to pick up the money from the sale of alcohol, and information for the accounts to bring it home and help Mr. Rios prepare the taxes. Mr. Rios said his wife “might go [to the Licensed Premises other times] but not usually.”

58. Mr. Rios acknowledged there to be an amplifying device in the patio. He does not know how loud that device is when music is played from it. He never took a decibel reading outside the premises to test the sound volume of the music while played inside the Licensed Premises. Mr. Rios said, as to the noise level of any amplifying device in the Licensed Premises, including the loudspeaker in the bar area across from the DJ and the speaker in the patio, the rule relating to the volume of music is that “you can use music as long as we can actually talk or you’re not yelling to try to speak to other people.”

59. Mr. Rios said the Licensed Premises is located in a light industrial area. He believes there are residences on another street around the corner. He said neither the Department, the San Jose Police Department nor any citizen ever complained to the Licensed Premises’ staff that the music was too loud or to turn it down.

60. Mr. Rios said that he complied with condition 3 upon his license by having a security guard stand at the Patio A door and also relied on the waitresses when they were in the patio area taking patrons’ orders. Of the two security guards employed at the Licensed Premises, one would be stationed at the front entrance and the second stationed at the Patio A entrance. Mr. Rios said there was one point in time he had three security guards, but he could not recall when that was. When he had three security guards, he realized the third guard was not necessary and he has had two security guards since then. To assure condition 3 was complied with Mr. Rios would ask the employees if they needed additional help and the employees would say no that they were able to cover it without the added help.

61. Mr. Rios said he never entered into any arrangement with any third party to bring exotic dancers into the Licensed Premises. Mr. Rios claimed to have never employed any type of dancer, lap dancer or exotic dancer, on the Licensed Premises on March 25, 2022. He claimed to have never employed anyone by the name of Aria or Rain. Mr. Rios guessed that the exotic dancers in the Licensed Premises were customers who “knew each other, started calling each other and started showing up [at the Licensed Premises] to do what they do.”

62. After the said accusation Mr. Rios instructed the security guards, bartenders and waitresses “to make sure that if anybody walked in looking like they weren’t dressed properly or if they’re trying to look for giving people dances or anything like that, or they seemed out of place, to make sure they wouldn’t do anything they were not supposed to; [employees are to] explain [to the patrons] they needed to dress per the dress code.” The dress code is no shorts, no flip-flops, tight or see-through attire for women.

63. Guadalupe Rios appeared and testified at the hearing. Mrs. Rios said she goes to the Licensed Premises to pick up the money, from the sales of alcoholic beverages, Monday through Thursday at 11:00 a.m. when it is not open for business. She also goes Friday through Sunday around 8:00 p.m. to 9:00 p.m. In that hour she (1) makes sure the security guards, waitresses and bartenders arrive on time, (2) makes sure there is enough cold beer for the evening sales, and (3) gives the bartenders the money for the evening and counts the money with them. Mrs. Rios said she will also walk the premises and if she sees any scantily clad women dressed in lingerie-type or transparent attire, which she has seen, she has the security guard tell the women to cover up or leave the premises. Mrs. Rios said that on her visits to the Licensed Premises, before she leaves on Friday and Saturday, she will, on occasion, check the women’s restroom for improper activity. Between March 2022 to September 2022, Mrs. Rios found female patrons with little liquor bottles in the restroom. Mrs. Rios told the females they cannot have small liquor bottles in the Licensed Premises because only beer is permitted. She also asked the women if she could search them to make sure they did not have any more. Mrs. Rios asks the waitresses and bartenders to check for small liquor bottles too. Mrs. Rios has never seen any women performing lap dances in the Licensed Premises when she was there. On Friday and Saturday evenings between 9:00 p.m. and 11:00 p.m., for about 10 minutes, Mrs. Rios, while at home, will check the Licensed Premises’ video surveillance cameras from her cell phone. If she sees improperly, scantily dressed women in see-through lingerie and attire, she will text message the security guard to tell the women to cover up or leave the premises. Between March 2022 and September 2022, when Mrs. Rios checked the cameras on her cell phone, she noticed twice that inappropriate activity was occurring at the Licensed Premises and she texted the security guard to take care of it. She described one of the two occurrences as a female improperly dressed in transparent, see-through attire. Mrs. Rios has not seen on the cameras any females lap dancing or exposing their breasts.

64. Alexander Rodriguez appeared and testified at the hearing. Mr. Rodriguez has worked as a security guard for approximately 22 years. He has been licensed as a security guard through the state of California for 14 years.<sup>14</sup> Mr. Rodriguez used to work at the Licensed Premises one day a week as a security guard, sometime prior to the

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<sup>14</sup> There was no evidence when Mr. Rodriguez’ guard registration card was valid.

COVID-19 Pandemic. There was no evidence as to what year prior to the pandemic he began working at the Licensed Premises. Mr. Rodriguez stopped working for the Respondent when the Licensed Premises closed due to the COVID-19 Pandemic restrictions. He returned to work at the Licensed Premises as a security guard sometime in August of 2021, working Friday and Saturdays, from 9:00 p.m. to 2:00 a.m. Mr. Rodriguez stopped working at the Licensed Premises in approximately July of 2023 when he contracted COVID-19.

65. Mr. Rodriguez' duties as a security guard at the Licensed Premises required that he stand at the front entrance, check patron identifications to ensure no minors were allowed entrance and conduct pat-down searches of patrons for weapons. Mr. Rodriguez confirmed that patrons were given at the front entrance a drink ticket, which they could exchange for a \$7 beer inside the premises. He claimed to also walk the Licensed Premises every hour or hour and a half to make sure patrons were not fighting or smoking.

66. Mr. Rodriguez said females were not allowed to enter the Licensed Premises wearing lingerie-type or see-through clothing. He said the Respondent did not permit females to remove their clothes and perform lap dances upon male patrons. There was no evidence as to when these policies were put in place. Mr. Rodriguez said there were occasions when females would enter the Licensed Premises in proper attire and thereafter remove their clothing, wearing only lingerie, see-through clothing. When Mr. Rodriguez saw a female removing her clothing, wearing lingerie or see-through clothing, in the patio he said he would tell them to "change [their] outfit," and if the female refused, he "wouldn't let them in on the next weekend." Mr. Rodriguez saw females wearing lingerie in the Licensed Premises performing lap dances upon male patrons and some removing their clothing. When he saw that he said he "would give them a warning that they shouldn't do that and they wouldn't be allowed to enter [the Licensed Premises] the following weekend." On one occasion he saw a female wearing lingerie who removed "a lot of [her] garments" and exposed herself to a male patron while performing a lap dance upon him. On that occasion Mr. Rodriguez gave that female a warning and when she tried to hit Mr. Rodriguez, he took her out of the Licensed Premises. Mr. Rodriguez said he would comply with Guadalupe Rios' text messages and warn the females to put their clothes back on.

67. When Guadalupe Rios would text message Mr. Rodriguez, after viewing the video cameras from home, he would comply with her request and warn the patrons whether they were smoking, fighting or the females were wearing lingerie, see-through clothing. Mr. Rodriguez knew where the video cameras were located in the Licensed Premises and knew the angle view the patio camera had thereof. He said that as far as he knew all the

Respondent's employees knew the location of the video cameras in the Licensed Premises.

68. Mr. Rodriguez said that when the Respondent had three security guards working at the Licensed Premises, one guard was stationed at the front door, a second guard was stationed in the bar area and the third guard was stationed at the door to Patio A. Mr. Rodriguez said the three security guards would not rotate and he would always be positioned at the front entrance. Mr. Rodriguez could not recall when there were three security guards but said that at some point there were only two security guards all the time.

69. Carmen Gonzalez appeared and testified at the hearing. Ms. Gonzalez has been working for the Respondent at the Licensed Premises as a waitress and bartender since February 2022, working Wednesday through Sunday, from 8:00 p.m. to 1:30 a.m. Her waitressing duties include seating customers, cleaning tables, taking drink orders from customers, and serving alcoholic beverages. Her waitressing duties require that she (1) take customers' orders, (2) immediately get payment from customers when they order because the customer could leave without paying, (3) take the money to the fixed bar, hand it to the bartender, (4) get the change and the alcoholic beverages from the bartender, and then (5) deliver the alcoholic beverages and change, if any, to the patrons. As a waitress Ms. Gonzalez attends to and serves customers only in the bar area and Patio A; she does not go to Patio B. Her bartending duties include serving as cashier; she makes change for and gives alcoholic beverages to the employees. Ms. Gonzalez said amplified music from a speaker plays inside the Licensed Premises, but she can hear customers when they give their orders. Ms. Gonzalez said there are two beer sizes in the Licensed Premises, a seven-ounce and a large, "big one," of which she could not recall the size. Ms. Gonzalez claimed both sized beers cost \$7.

70. Ms. Gonzalez claimed she was not aware of and did not participate in any drink solicitation scheme or commission and that it was not allowed in the Licensed Premises. She initially claimed she never saw any females dressed in lingerie-type clothing. Ms. Gonzalez then testified that when she sees a female dressed inappropriately, she gets a security guard to warn the females. She said Guadalupe Rios instituted the policy to call security to warn customers when an employee sees something improper occurring in the Licensed Premises. There was no evidence as to when that policy was instituted. Ms. Gonzalez said she has never had to call security for anything else other than improper clothing attire.<sup>15</sup> She claimed to have never seen any female expose her breasts/ private parts or perform a lap dance, moving her pelvic area, on a male patron's lap at the

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<sup>15</sup> Mr. Rios, Mrs. Rios and security guard Alexander Rodriguez all testified that inappropriate attire for females included see-through lingerie and attire.

**Licensed Premises.** Ms. Gonzalez also said there is a policy that waitresses and bartenders are not allowed to drink alcoholic beverages during their shift. There was no evidence as to when that policy was put in place.

71. Ms. Gonzalez is aware of the video cameras located in the Licensed Premises. Ms. Gonzalez has received text messages or calls from Guadalupe Rios after Mrs. Rios saw improperly dressed females on the Licensed Premises' video cameras, at which times Mrs. Rios asked Ms. Gonzalez to have security give the females a warning. Ms. Gonzalez said Mrs. Rios comes to the Licensed Premises Monday through Thursday and on the weekend to bring money and make sure everything is okay. Ms. Gonzalez said that customers receive drink tickets at the entrance to exchange for a beer and that customers give her the ticket when she is a waitress or a bartender. Ms. Gonzalez receives tips from customers and each employee keeps their own tips, they do not pool their tips.

### **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. 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. Rule 143 prohibits a licensee's employees from soliciting, in the licensed premises, the purchase or sale of any drink, any part of which is for, or intended for, the consumption or use of such employee. Rule 143 further prohibits a licensee's employees from accepting, in the licensed premises, any drink purchased or sold there, any part of which drink is for, or intended for, the consumption or use of any employee.

4. Cause for suspension or revocation of the Respondent's license exists under Article XX, section 22 of the California State Constitution, and sections 24200(a) and (b) for the violation of rule 143 as alleged in count 34. (Findings of Fact ¶¶ 1-2, 5-7, 14, 24-25, 30, 36, 38, 41-42, 55 and 69.)

5. The preponderance of the evidence clearly established that Marissa was employed by Respondent. The agents credibly testified that they observed Marissa conducting waitressing duties in the Licensed Premises. Marissa's actions mirrored the required waitressing duties that not only Respondent confirmed, but Respondent's other waitresses performed and Carmen Gonzalez acknowledged: namely, taking customers' orders,

immediately getting payment from the customer, taking the money to the fixed bar, handing it to the bartender, getting alcoholic beverages and change at the fixed bar and delivering it to the patrons. The Respondent left the day-to-day operations of the Licensed Premises to his employees. The Respondent's employees permitted Marissa to openly engage in waitressing duties at the Licensed Premises. The Respondent has three video surveillance cameras that captured the bar area where Marissa was openly performing her waitressing duties. On August 26, 2022, Marissa, an employee, was permitted to solicit upon the Licensed Premises from Agent Lauer the purchase of a 12-ounce Modelo beer at \$20 intended for her consumption. Marissa, an employee, also accepted a 12-ounce Modelo beer from Agent Sumida, who purchased it at \$20, intended for Marissa's consumption. The foregoing are in violation of rule 143. Respondent's employees' knowledge and acts are imputed to the Respondent.<sup>16</sup>

6. Section 24200.5(b) provides that the Department shall revoke a license “[i]f the licensee has employed or permitted any persons to solicit or encourage others, directly or indirectly, to buy them drinks in the licensed premises under any commission, percentage, salary, or other profit-sharing plan, scheme, or conspiracy.”

7. Section 25657(b) provides that it is unlawful “[i]n any place of business where alcoholic beverages are sold to be consumed upon the premises, to employ or knowingly permit anyone to loiter in or about said premises for the purpose of begging or soliciting any patron or customer of, or visitor in, such premises to purchase any alcoholic beverages for the one begging or soliciting.”

8. Rule 143.2(3) prohibits a licensee from encouraging or permitting any person on the licensed premises to touch, caress, or fondle the breasts, buttocks, anus, or genitals of any other person. All such acts or conduct are contrary to public welfare or morals and, therefore, no on-sale license shall be held at any premises where a licensee permits such conduct or acts.

9. Rule 143.3(1) prohibits a licensee from permitting any person to perform acts of, or acts which simulate, sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, or any sexual acts which are prohibited by law. Rule 143.3(1) also prohibits a licensee from permitting any person to perform acts of, or acts which simulate, the touching, caressing, or fondling of the breast, buttocks, anus, or genitals as well as the displaying of the pubic hair, anus, vulva, or genitals. All such acts or conduct are

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<sup>16</sup> An employee's on-premises acts and knowledge are imputed to the Respondent. (See *Yu v. Alcoholic Bev. etc. Appeals Bd.* (1992) 3 Cal.App.4th 286, 295 [4 Cal.Rptr.2d 280]; *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 377 [3 Cal.Rptr.2d 779]; *Kirby v. Alcoholic Bev. Etc. Appeals Bd.* (1973) 33 Cal.App.3d 732, 737 [109 Cal.Rptr. 291].)

contrary to public welfare or morals and, therefore, no on-sale license shall be held at any premises where a licensee permits such conduct or acts.

10. Rule 143.3(2) permits live entertainment on a licensed premises by entertainers whose breasts, buttocks, or both are exposed to view, provided that such entertainers perform upon a stage at least 18 inches above the immediate floor level and removed at least six feet from the nearest patron. Performances which violate these restrictions are contrary to public welfare or morals and, therefore, no on-sale license shall be held at any premises where a licensee permits such performances.

11. Cause for suspension or revocation of the Respondent's license was not established for the violation of rule 143.3(1)(a) alleged in count 3. (Findings of Fact ¶ 10.)

12. With respect to count 3, the testimony established that Jane Doe #1 "jumped" up and down on a patron's lap, and made contact with the male patron's pant-covered genitals off and on at different times, for brief seconds at a time, which is insufficient to establish that her actions constituted simulated sexual intercourse.

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) for the violations of rules 143.2(3), 143.3(1)(a), 143.3(1)(b) and 143.3(2) alleged in counts 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 30, 31, 32, 33, 35, 36, 37, 38, 40, 41, 42, and 43, respectively. (Findings of Fact ¶¶ 5-7, 9-29, 31-37, 41-47.)

14. The evidence clearly established by a preponderance of the evidence that the said females wearing lingerie and see-through clothing were entertainers permitted and encouraged in the Licensed Premises by Respondent's employees to openly engage in the prohibited acts as alleged in the accusation under rules 143.2(3), 143.3(1)(a), 143.3(1)(b) and 143.3(2). All the sexually explicit lap dances and illicit acts by the said females were in violation of said rules and were performed in the presence of Respondent's employees, who never attempted to stop said performances. In fact, on March 25, 2022, a waitress called over for Agent Martinez, an exotic dancer, Aria, to sit and talk with Agent Martinez and who subsequently performed a sexually explicit dance upon Agent Martinez. The multitude of rampant unlawful acts were openly and obviously conducted, many of which were in the presence and in view of Respondent's employees, with security and waitresses nearby while the illicit acts were ongoing. The unlawful exotic lap dances lasted from two to four minutes,<sup>17</sup> with multiple lap dances occurring

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<sup>17</sup> The majority of the lap dances lasted three to four minutes; only two lap dances lasted two minutes, namely, both Marissa and Rain's lap dances upon Agent Sumida.

throughout the Licensed Premises. Based on the preponderance of the evidence and given the extent to which the unlawful acts were occurring in the Licensed Premises, it is more probable than not that Respondent's employees observed said unlawful acts. Respondent's employees'<sup>18</sup> knowledge and acts are imputed to the Respondent.<sup>19</sup>

15. 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) for the violations of sections 24200.5(b), and 25657(b), as respectively alleged in counts 1 and 39. (Findings of Fact ¶¶ 1, 2, 5, 24-25, 30, 36 38, 49, 51, 55, and 65.)

16. The preponderance of the evidence supports the violations under sections 25657(b) and 24200.5(b). The evidence clearly established a common drink solicitation and commission or scheme at the Licensed Premises permitted by the Respondent's waitresses and bartenders. The evidence further established that on August 26, 2022, Marissa was employed and permitted to solicit male patrons to buy her drinks in the Licensed Premises under a commission, profit-sharing plan or scheme. Marissa was further employed and knowingly permitted to loiter in said premises for the purpose of soliciting any patron, including Agent Lauer, to purchase alcoholic beverages for her. There was no attempt to hide Marissa's loitering, solicitation or the commissioned scheme; it was open and obvious. Marissa had a working relationship with the bartenders, as observed by the agents. Further evidence that the Respondent's employees were aware of the solicitation and commission, profit-sharing plan or scheme was through the statement of Respondent's waitress Lidia Fernandez Rodriguez. Lidia confirmed the commission and profit-sharing plan, explaining that she was cashed out immediately at the fixed bar with \$4 paid to her and \$4 paid to the bar per each beer a male patron purchased for her that she solicited. This evidence was consistent with Marissa's statements to Agent Lauer of the commission, scheme and pricing plan of the beers purchased for her, and for which she provided company to those male patrons who purchased her beers at the inflated rate. The females' compensation was based in some respect on the number of alcoholic beverages purchased. The more beer male patrons purchased for the females as a result of the solicitations, the more a soliciting female made in commission on those sales. Evidence of a scheme and commission paid was further established by the agents' expert testimony, including, but not limited to that they purchased their 12-ounce Modelo beers for \$7, as compared to a female's seven-ounce Bud Light beer at \$8, and 12-ounce Modelo beer at \$20.

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<sup>18</sup> Respondent's employees, including the waitresses, bartenders, security guards, and Marissa.

<sup>19</sup> An employee's on-premises acts and knowledge are imputed to the Respondent. (See *Yu v. Alcoholic Bev. etc. Appeals Bd.* (1992) 3 Cal.App.4th 286, 295 [4 Cal.Rptr.2d 280]; *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 377 [3 Cal.Rptr.2d 779]; *Kirby v. Alcoholic Bev. Etc. Appeals Bd.* (1973) 33 Cal.App.3d 732, 737 [109 Cal.Rptr. 291].)

17. Respondent suggests dismissing the counts relating to the Jane Does, arguing an unconstitutional denial of due process and the right to cross examine the Jane Does because there was no information obtained by the agents as to the identity and contact information of the various Jane Does; in that the Respondent was unable to find out who the Jane Does were.

18. This argument is rejected. The Respondent takes issue with the use of doe pleadings. Doe pleadings are permitted and appropriate in cases where the true identity of an individual is unknown, as in the case at hand. The Respondent failed to support its position with meaningful legal argument and citation to authority. There is no evidence of any due process or constitutional violations present or prejudice to the Respondent.

19. Well-settled California case law has held that the holder of an alcohol license may be disciplined for the unlawful acts of its employees while engaged in the conduct and operation of the business, even though the licensee did not authorize them, and did not have actual knowledge of the activities. That a licensee lacks personal knowledge is irrelevant. “The holder of a liquor license has the affirmative duty to make sure that the licensed premises are not used in violation of the law and the knowledge and acts of his employees are imputable to the licensee.”<sup>20</sup> The prohibited and lewd conduct of the said Jane Does and other named females was openly conducted in violation of the law in view of and with the knowledge of Respondent’s bartenders, waitresses and security guards. Respondent’s employees condoned and permitted the violations. The licensee who has actual or constructive knowledge can be found to have permitted unacceptable conduct. *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 377. A licensee “may not insulate himself from regulation by electing to function through employees.”<sup>21</sup>

20. 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.

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<sup>20</sup> *Morell v. Department of Alcoholic Beverage Control* (1962) 204 Cal. App. 2d 504, 514, [22 Cal. Rptr. 405, 411]; *Munro v. Alcoholic Beverage Control Appeals Board* (1960) 181 Cal.App.2d 162, 164 [5 Cal.Rptr. 527]; *Givens v. Department of Alcoholic Beverage Control*, *supra*, 176 Cal.App.2d 529, 534; *Fromberg v. Department of Alcoholic Beverage Control* (1959) 169 Cal.App.2d 230, 234 [337 P.2d 123]; *Mantzoros v. State Board of Equalization* (1948) 87 Cal.App.2d 140, 144 [196 P.2d 657]; *Swegle v. State Board of Equalization*, *supra*, 125 Cal.App.2d 432, 438; *Mercurio v. Department of Alcoholic Beverage Control*, *supra*, 144 Cal.App.2d 626, 630; *Cooper v. State Board of Equalization* (1955) 137 Cal.App.2d 672, 678 [290 P.2d 914]; *Endo v. State Board of Equalization* (1956) 143 Cal.App.2d 395, 401-402 [300 P.2d 366].

<sup>21</sup> *Camacho v. Youde* (1979) 95 Cal.App.3d 161, 165, 157 Cal.Rptr. 26, emphasis added.

21. 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) for the violations of section 23804 alleged in counts 14, 15, 28 and 29. Specifically, on March 25, 2022, and May 13, 2022, the Respondent-Licensee through his employees permitted the use of a loudspeaker (boombox) to play music on the patio and permitted the use of that amplifying system or device(s) inside the Licensed Premises that was audible outside the Licensed Premises. Furthermore, on March 25, 2022, and May 13, 2022, the Respondent-Licensee through his employees allowed the consumption of alcoholic beverages on the patio without the licensee or an employee of the licensee being present in the exterior patio area at all times that alcoholic beverages were being served or consumed. The foregoing were violations of condition numbers 2 and 3, respectively, endorsed upon the Respondent's license. (Findings of Fact ¶¶ 1, 2, 4-9, 14-15.)

22. Carmen Gonzalez' claim that she never saw any females dressed in lingerie-type clothing is disbelieved because she provided inconsistent testimony later testifying that when she sees inappropriately dressed females, she has security warn them, and further claimed she has never had to call security for anything else other than improper clothing attire. (Evidence Code section 780.) Mr. Rios testified that pursuant to the dress code inappropriate attire included tight or see-through attire for women. Security guard Rodriguez and Guadalupe Rios also testified that inappropriate attire for females included see-through lingerie and attire.

23. 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 the Respondent's license be revoked pursuant to the Penalty Guidelines of rule 144.<sup>22</sup> The Respondent did not recommend a penalty should the accusation be sustained.

In assessing an appropriate measure of discipline, the Department's penalty guidelines are in California Code of Regulations, Title 4, Division 1, Article 22, section 144, commonly referred to as rule 144. Rule 144 provides for a penalty ranging from a 30-day suspension up to revocation for a violation of section 25657(b). The penalty for a violation of rule 143 is a 15-day suspension. A penalty for a violation of rules 143.2 and 143.3 range from a 30-day suspension up to revocation. Section 24200.5(b), on the

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<sup>22</sup> All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

other hand, mandates a penalty of revocation for any violation of its provisions. This mandate is satisfied, however, by a stayed revocation<sup>23</sup> as well as an outright revocation.<sup>24</sup> Under rule 144, the presumptive penalty for a first-time condition violation under section 23804 is a 15-day license suspension with five days stayed for one year. Rule 144 also permits imposition of a revised penalty based on the presence of aggravating or mitigating factors.

The aggravation substantially outweighs the mitigation, if any. There was no documented training of the licensee and his employees. There was insufficient evidence of positive action by the licensee to correct the rampant, unlawful problems in the Licensed Premises. Mr. Rios continues to rely upon employees to run the day-to-day operations.

Aggravation is warranted given the Respondent was, and continues to be,<sup>25</sup> an absentee licensee who failed/fails to take his responsibilities as a licensee seriously, leaving the premises in the hands of employees, who were condoning and encouraging the violations at hand. No mitigation is warranted for Mr. Rios altering his surveillance system to allow it to record, given he never checked the cameras and there were no cameras encompassing all of Patio A, let alone in Patio B, where violations were occurring. Although Guadalupe Rios checked the cameras for approximately 10 minutes here and there, the policy (whether it was already in place or newly created after the accusation) of having a security guard warn the females was not working, given the openly rampant, lewd unlawful conduct by multiple entertainers/dancers and multiple violations that continued to occur in the Licensed Premises on multiple dates during a six-month undercover investigation, and under the supervision of Respondent's employees.

The penalty recommended herein complies with rule 144.

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<sup>23</sup> See, e.g., *Harris v. Alcoholic Beverage Control Appeals Board*, 244 Cal. App. 2d 468, 36 Cal. Rptr. 697 (1964) (revocation stayed coupled with suspension imposed for violations of section 24200.5).

<sup>24</sup> See, e.g., *Greenblatt v. Martin*, 177 Cal. App. 2d 738, 2 Cal. Rptr. 508 (1960) (outright revocation imposed for violations of section 24200.5).

<sup>25</sup> There is no evidence Mr. Rios does not continue to be an absentee licensee.

**ORDER**

Counts 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, and 43 of the accusation are sustained. With respect to those counts Respondent's on-sale beer and wine eating place license is hereby revoked.

Count 3 of the accusation is dismissed.

Dated: September 28, 2023



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D. Huebel  
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: _____ <i>J. McCullough</i>
Date: _____ <i>11/16/23</i>

