

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

**AB-9997**

File: 47-641321; Reg: 23093054

HALFTIME SPORTS BAR, LLC,  
dba Halftime Sports Bar  
300 Broadway  
Oakland, CA 94607-3085,  
Appellant/Licensee

v.

JAMES YOUNT, *et. al.*  
Protestants, and;

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL  
Respondent

Administrative Law Judge at the Dept. Hearing: David W. Sakamoto

Appeals Board Hearing: July 19, 2024  
Sacramento, CA/Videoconference

**ISSUED JULY 23, 2024**

Appearances: Appellant: Joe Rogoway, Rogoway Law Group, as Counsel  
For Halftime Sports Bar, LLC,

Respondent: Matthew Gaughan, as Counsel for the  
Department of Alcoholic Beverage Control.

**OPINION**

**I. INTRODUCTION**

Appellant, Halftime Sports Bar, LLC, applied to the Department of Alcoholic Beverage Control (“the Department”) to exchange and transfer Appellant’s liquor license. Five people protested Appellant’s application. The Department sustained the protestor’s claims and denied Appellant’s application.<sup>1</sup> Appellant

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<sup>1</sup> The Department’s decision under Government Code section 11517(c), dated January 18, 2024, is set forth in the appendix.

appealed the Department's decision. Appellant's appeal asks the Alcoholic Beverage Control Appeals Board ("the Board") to address five issues. As written in the Notice of Appeal, they are:

- 1) Has Applicant established that issuance of the on-sale retail license in Applicant's census tract would serve public convenience or necessity?
- 2) Has Applicant demonstrated that, if licensed, the presence of its premises within 100 feet of residences would not interfere with the quiet enjoyment of those residences by their occupants?
- 3) Was it unreasonable to deny Applicant's license on the basis of a single instance of selling alcoholic beverages prior to licensure?
- 4) Did Applicant's unintentional error concerning the change of its entity name justify denial of its license?
- 5) Should Applicant have been granted a rehearing, with assistance of counsel, to present new facts and evidence justifying issuance of the license?

Pursuant to Article XX, section 22 of the California Constitution, and for the reasons stated below, the Department's decision is affirmed.

## **II. FACTS**

### **A. Background**

Mr. James Dailey owns Halftime Sports Bar, LLC. Mr. Dailey, through Halftime Sports Bar, LLC, owns and operates a sports bar called Halftime Sports Bar. From 2012 to 2022, Halftime Sports Bar was located at 316 14th Street, Oakland,

California. Halftime Sports Bar had a type 48 retail on-sale general public premises license. A type 48 license allows the sale of beer, wine, and distilled spirits for consumption on the licensed premises. Feeling that the area around 14th Street was becoming increasingly dangerous, Mr. Dailey moved Halftime Sports Bar to 300 Broadway, Oakland, California. Mr. Dailey spent \$200,000 in renovations to turn the new location into a restaurant. Notably, Mr. Dailey installed 25 televisions so his patrons could watch sporting events. Because Mr. Dailey moved Halftime Sports Bar and turned it into a restaurant, Mr. Dailey applied to the Department for two things. First, Mr. Dailey asked to exchange Halftime Sports Bar's type 48 license to a type 47 retail on-sale general bona fide eating place license. A type 47 license allows the sale of beer, wine, and distilled spirits at a restaurant. And second, Mr. Dailey asked to transfer the license to Halftime Sports Bar's new location.

#### B. Halftime Sports Bar's New Location

Halftime Sports Bar's new location is in Jack London Square. Jack London Square is a mixed-use commercial and residential area. It is also Oakland's premier entertainment and tourist destination. There are no churches, schools, hospitals, playgrounds, or other "consideration points" in this area. This location is in census tract 9832. This census tract is allowed one liquor license, but there are 20 licenses issued in this area. Within 1,000 feet of Halftime Sports Bar, there are 11 businesses with liquor licenses. The previous tenant of Halftime Sports Bar's new location had a type 47 license. Halftime Sports Bar is also located across the

street from a 16-floor condominium building. There are approximately 200 people living in the building. All the people who protested Mr. Dailey's application lived in this building.

C. Halftime Sports Bar's Name

In 2018, Mr. Dailey changed the name of Halftime Sports Bar, LLC to Sports Bar, LLC. This name change was recorded with California's Secretary of State. On the application Mr. Dailey submitted to the Department in 2022, Mr. Dailey wrote the applicant's name as "James Dailey dba Halftime Sports Bar" or "Halftime Sports Bar, LLC." But because of the name change in 2018, the Department alleged Mr. Dailey put the incorrect name on the application. According to Mr. Dailey, however, putting the incorrect name was nothing more than a simple mistake. Mr. Dailey became aware of this mistake during the administrative hearing for this case. To correct it, Mr. Dailey changed the name to its original name: Halftime Sports Bar, LLC.

D. Selling Alcoholic Beverages Before Receiving License

In September 2022, the Department learned that Halftime Sports Bar may have been selling alcoholic beverages without a license at its new location. In October 2022, the Department met with Mr. Dailey in person, and the Department reminded him that Halftime Sports Bar was not allowed to sell alcoholic beverages at that time. Mr. Dailey said he was selling mocktails, and he showed the Department a sign that advertised mocktails. Mocktails are non-alcoholic drinks. Again, in October 2022, the Department emailed Mr. Dailey to

remind him that Halftime Sports Bar was not allowed to sell alcoholic drinks or to store alcoholic beverages. In November 2022, undercover agents from the Department visited Halftime Sports Bar. While there, the agents purchased alcoholic beverages. They also seized nine bottles of distilled spirits, and they saw partially filled bottles of distilled spirits behind the bar. The agents met with Mr. Dailey, and they explained to him that Halftime Sports Bar was still not allowed to sell alcoholic beverages. Afterwards, the Department filed an accusation against Halftime Sports Bar's license at the old location. This accusation was resolved by a Stipulation and Waiver, and Mr. Dailey paid a fine.

### **III. PROCEDURAL HISTORY**

Upon receiving Mr. Dailey's application, the Department assigned a Licensing Representative to investigate and to prepare a report that approved or denied the application. The Licensing Representative conducted the investigation and then recommended the application be denied. Because of the denial, Mr. Dailey asked for a hearing before an Administrative Law Judge. The protestors also asked for a hearing. Administrative Law Judge David W. Sakamoto presided over a two-day hearing in May 2023.

Mr. Matthew Gaughan represented the Department. Mr. Dailey represented himself, and he testified on Halftime Sports Bar LLC's behalf. Three out of the five protestors also testified. After the hearing, Judge Sakamoto recommended that the Department deny Mr. Dailey's application. In August 2023, the Department's Director rejected Judge Sakamoto's recommendation.

Instead, the Director conducted an independent review of the record under Government Code section 11517, subdivision (c)(2)(E). As part of this independent review, the Director invited the Department and Mr. Dailey to submit written informal comments to address several issues. Mr. Dailey, through his newly hired counsel, and the Department submitted their comments to the Director. In January 2024, the Department's Director issued a decision denying Mr. Dailey's application. The Department's written opinion sustained the protestors claims, and it provided four separate and independent grounds for denying the application:

- 1) Applicant's failure to establish under section 23958.4 that issuance of another on-sale retail license in applicant's census tract would serve public convenience or necessity.
- 2) The presence of residences within 100 feet of applicant's premises and applicant's inability to demonstrate how, if licensed, operation of the premises would not interfere with the quiet enjoyment of those residences by their occupants.
- 3) Selling alcoholic beverages prior to licensure (and misrepresenting material facts relative to this during the investigation).
- 4) Applicant not using its true and correct name in processing the application.

## IV. DISCUSSION

### A. Standard of Review

The Board's review of the Department's decisions is established by California's Constitution and statutes. (Cal. Const., art. XX, § 22; Bus. & Prof. Code, § 23080 et seq.) The Board's review of the Department's decision is limited to the questions of:

1) whether the Department has proceeded without, or in excess of, its jurisdiction; 2) whether the Department has proceeded in the manner required by law; 3) whether the decision is supported by the findings; 4) whether the findings are supported by substantial evidence in light of the whole record, and; 5) whether there is relevant evidence, which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the Department.

(Bus. & Prof. Code, § 23084.)

When determining whether the Department's decision is supported by substantial evidence, the Board may not reweigh the evidence. (*Kirby v. Alcoholic Bev. etc. Appeals Bd.* (1970) 7 Cal.App.3d 126, 129.) If there are any conflicts with the evidence, the Board must resolve the conflict in the Department's favor. (*Harris v. Alcoholic Bev. etc. Appeals Bd.* (1963) 212 Cal.App.2d 106.) The Board must also accept all reasonable inferences from the evidence that supports the Department's decision. (*Ibid.*) Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. (*Count of San Diego v. Assessment Appeals Bd.* (1983) 148 Cal.App.3d 548, 555.) It is evidence of "ponderable legal significance . . . reasonable in nature, credible, and of solid value." (*Ibid.*)

The Department has the power, in its sole discretion, to deny, suspend, or revoke any alcoholic beverage license if it determines for good cause that the granting or continuance of a license would be contrary to public welfare or morals (Cal. Const., art. XX, § 22.) This discretion, however, is not absolute. The Department's decision should be based on sufficient evidence, and it should not act arbitrarily in determining what is contrary to public welfare and morals (*Stouman v. Reilly* (1951) 37 Cal.2d 713, 717.) But "[e]ven if it is conceded that reasonable minds might differ as to whether granting a license would or would not be contrary to public welfare, such concession merely shows that the determination of the question falls with the broad area of discretion which the Department was empowered to exercise." (*Martin v. Alcoholic Bev. etc. Appeals Bd. (and Richards)* (1959) 52 Cal.2d 238, 248.)

#### B. Public Convenience or Necessity

The Department denied Mr. Dailey's application because it found, under Business and Professions Code<sup>2</sup> section 23958.4, that issuing another license in census tract 9832 would not serve public convenience or necessity.

Section 23958 says the Department "shall deny any application for a license if issuance . . . would result in or add to an undue concentration of licenses, except as provided in Section 23958.4." The Department may issue a license despite the existence of an undue concentration "if the applicant shows that

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

public convenience or necessity would be served by the issuance.” (Bus. & Prof. Code, §23958.4, subd. (b)(1).) Further, section 23958.4, subdivision (f) creates an exception. If two premises have the same type of license, and they have been operating within 90 days of the application, then the applicant does not need to prove public convenience or necessity.

In this case, there is no doubt census tract 9832 had an overconcentration of licenses. The record shows that there are 20 licenses within this tract even though it is allowed only one. Thus, sections 23958 and 23958.4 applied, and Mr. Dailey had the burden to prove that issuing a license would serve public convenience or necessity. To do so, Mr. Dailey sent a letter to the Department that detailed the variety of food served at Halftime Sports Bar. The Department, however, found that a nearby restaurant already served similar types of food. At the administrative hearing, Mr. Dailey also testified that Halftime Sports Bar had 25 televisions.

The Board finds that the Department's decision is supported by substantial evidence. Mr. Dailey presented very little evidence to show how Halftime Sports Bar would serve public convenience or necessity. There was no evidence to show that Halftime Sports Bar would be more appealing than the other bars in the area. There was no evidence of its attractiveness, the probable way its business would be conducted, or its type of patrons. The Board understands that the phrase “public convenience or necessity” is not easily defined and that it does not create a rigid standard. As one court stated, “It is a matter of common knowledge and

experience, known even to judges, that many if not most people patronize bars for reason which presumably include but also transcend their thirst for intoxicating liquid, and that these reasons have to do with such matters as companionship, aesthetics, and ambience." (*Sepatis Alcoholic Bev. etc. Appeals Bd.* (1980) 110 Cal.App.3d 93, 101.) And other than the 25 televisions, Mr. Dailey did not produce sufficient evidence to show how Halftime Sports Bar would transcend the other bars in the area.

The Board finds that section 23958.4 subdivision (f) does not apply. For it to apply, two things had to be true. First, the previous tenant at Halftime Sports Bar's new location must have had a type-47 license. Second, the previous tenant must have been operating within 90 days of Halftime Sports Bar's application. The first is true. The record shows that the previous tenant had a type-47 license. However, there is no evidence in the record regarding the 90-day requirement. Thus, section 23958.4 applied to this case, and Mr. Dailey had the burden to prove public convenience or necessity.

Because section 23958.4 subdivision (f) does not apply, and because Mr. Dailey did not prove Halftime Sports Bar would serve public convenience or necessity, the Department's decision was supported by substantial evidence, and it is affirmed.

### C. Interference with Quiet Enjoyment of Residence

The Department denied Mr. Dailey's application because it found Halftime Sports Bar would interfere with the quiet enjoyment of a nearby residence.

Under California Code of Regulations, title 4, section 61.4, the Department cannot issue a license to a premises that operates within 100 feet of a residence. However, this rule has two exceptions. First, if an applicant shows the premises would not interfere with the residents' quiet enjoyment of their property, the Department may issue the license. (Cal. Code Regs., tit. 4, § 61.4.) Second, this rule does not apply if two premises were licensed and operating with the same type of license within 90 days of the application.<sup>3</sup> (Cal. Code Regs., tit. 4, § 61.4.)

In this case, the Department showed Halftime Sports Bar is located within 57 feet of a 16-story condominium building with approximately 200 residents. Therefore, the Department correctly applied California Code of Regulations, title 4, section 61.4, and Mr. Dailey had to show Halftime Sports Bar would not interfere with the residents' quiet enjoyment of their property. To do this, Mr. Dailey sent a letter to the Department that detailed his efforts to reduce noise and to increase security. At the administrative hearing, Mr. Dailey testified that he conducted a noise test to ensure Halftime Sports Bar would not disturb nearby residents. On the other hand, three protestors, who all live in the condominium building, testified that Halftime Sports Bar and its patrons create noise. According to all three protestors, the noise increases when Halftime Sports Bar closes and its patrons gather outside. Because of this evidence, the Department concluded that "[Halftime Sports Bar] promotes and facilitates an atmosphere where patrons have extended stays with extended socializing." (Determination of Issues ¶ 6.) The

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<sup>3</sup> For the reasons stated in section IV(B), *supra*, this section does not apply.

Department also concluded, "Noise generated by patrons in that setting who have consumed alcoholic beverages is likely to cause added extended disturbances to those residents residing within 100 feet of applicant's premises." (Determination of Issues ¶ 6.)

The Board finds that the Department's decision was supported by substantial evidence. First, there was plenty of evidence that Halftime Sports Bar is a place where patrons stay for an extended time while they watch sports and drink alcohol. (Findings of Fact ¶¶ 30, 32, 33, 35.) The evidence also showed that these same patrons typically gather outside of Halftime Sports Bar to talk and smoke. (Findings of Fact ¶¶ 30, 32, 33, 43.) According to the three protestors, the noise from Halftime Sports Bar increases when it closes for the night. (Findings of fact ¶¶ 30, 32, 33.) Mr. Dailey presented evidence to the contrary, but this Board cannot reweigh the evidence. Rather, the Department was presented with enough credible evidence that a reasonable mind would use to conclude that Halftime Sports Bar creates enough noise to interfere with nearby residents' quiet enjoyment of their property. The Department's decision must stand.

D. Selling Alcoholic Beverages Before Receiving License

The Department denied Mr. Dailey's application because it found that selling alcoholic beverages prior to receiving a license was contrary to the public welfare and morals.

In September 2022, the Department learned that Halftime Sports Bar may have been selling alcoholic beverages at its new location. (Findings of Fact ¶ 21.) Shortly afterwards, in October 2022, the Department told Mr. Dailey, on three separate dates, that Halftime Sports Bar was not allowed to sell alcoholic beverages. (Findings of Fact ¶¶ 22, 23.) Yet in November 2022, the Department's undercover agents purchased alcoholic beverages at Halftime Sports Bar. (Findings of Fact ¶ 24.) The undercover agents also saw several opened and partially filled bottles of distilled spirits behind the bar. (Findings of Fact ¶ 25.) With these facts alone, there was sufficient evidence to show that alcoholic beverages were being sold at Halftime Sports Bar prior to receiving a license to do so.

The Board finds that the Department did not abuse its discretion. As explained above, there was sufficient evidence for the Department to conclude that Halftime Sports Bar was selling alcoholic beverage before it received its license. As such, the Department had good cause to deny Mr. Dailey's application. Therefore, the Department did not abuse its discretion, and its decision is affirmed.

E. Name of Application

The Department denied Mr. Dailey's application because it found that putting an incorrect name on an application was contrary to public welfare and morals. According to the Department, having an incorrect name on an application could circumvent or undermine the Department's investigation and that the license would be issued to the incorrect person or legal entity.

The evidence showed that Mr. Dailey changed the name of his business entity from Halftime Sports Bar, LLC to Sports Bar, LLC in 2018. (Findings of Fact ¶ 5.) But when Mr. Dailey submitted the application to the Department in 2022, he used the name Halftime Sports Bar, LLC. (Ibid.) Therefore, it is clear, even though it may have been a simple mistake by Mr. Dailey, that the incorrect name was used on the application. Also, testimony from the Department's Licensing Representative showed two things. First, it showed that the mistake was found after the Department's investigation was complete. (Ibid.) Second, it showed that having the incorrect name on the application would have caused the license to be issued to the incorrect person or legal entity. (Ibid.)

The Board finds that the Department did not abuse its discretion. As explained above, there was sufficient evidence to show Mr. Dailey put incorrect information on the application. There was also sufficient evidence to show that the license would have been issued to the incorrect legal entity. Naturally, the Department would abuse its discretion if it denied an application because of a simple mistake or typographical error.

But as the Department pointed out in a footnote of its decision, had this mistake been found during its investigation, the Department may have helped Mr. Dailey resolve the issue. (Decision Under Government Code Section 11517(c), P. 16, Fn. 10.) However, the mistake was found after the Department completed its

investigation. As such, and based solely on the facts of this case, the Department had good cause to deny Mr. Dailey's application.

Finally, as the Department argued at the hearing before the Board, even if the name change was not a proper basis for denying appellant's application, the Department still had three separate grounds for denial. As such, appellant cannot show prejudice—that it would have achieved a more favorable result—based on the erroneous name on its application. For all the above reasons, the Department did not abuse its discretion, and its decision is affirmed.

### **ORDER**

Pursuant to Article XX, section 22 of the California Constitution, and for the reasons stated above, the Department's decision is affirmed.<sup>4</sup>

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

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<sup>4</sup> This final order is filed in accordance with Business and Professions Code section 23088, and it 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 section 23090 et seq. Service on the Board pursuant to California Rules of Court (Rule 8.25) should be directed to: 400 R Street, Ste. 320, Sacramento, CA 95811 and/or electronically to: abcboard@abcappeals.ca.gov.

# APPENDIX

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

**IN THE MATTER OF THE PETITION  
FOR AN ON-SALE GENERAL EATING  
PLACE LICENSE TO:**

Halftime Sports Bar, LLC  
Db: Halftime Sports Bar  
300 Broadway  
Oakland, CA 94607-3805

Applicant,

And the Protest Against Issuance of the Applied  
for License by:

James Yount, et al.

Protestants

File No.: 47-641321

Reg. No.: 23093054

**RECEIVED**

JAN 19 2024

Alcoholic Beverage Control  
Office of Legal Services

**DECISION UNDER GOVERNMENT CODE SECTION 11517(c)**

The above-entitled matter having regularly come before the Department on January 18, 2024, for decision under Government Code Section 11517(c) and the Department having considered its entire record, including the transcript of the hearing held on May 8, 2023, and May 25, 2023, before Administrative Law Judge David W. Sakamoto (hereafter the ALJ), and good cause appearing, the following decision is hereby adopted:

ALJ Sakamoto, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter via a video conference on May 8, 2023, and May 25, 2023, via video conference.

Matthew Gaughan, attorney, Office of Legal Services, Department of Alcoholic Beverage Control, represented the Department of Alcoholic Beverage Control (hereafter the Department).

James Dailey, petitioner-applicant Halftime Sports Bar, LLC's 100% member represented petitioner-applicant as a self-represented litigant (hereafter applicant or Dailey as appropriate). Following rejection of the proposed decision under Government Code section 11517, petitioner-applicant is now represented by Joseph Rogoway and Christopher Clark, Rogoway Law Group, P.C..

Protestants Deborah Cussen, James Yount, and William Oughton appeared as self-represented litigants on May 8, 2023, and May 25, 2023 (collectively hereafter protestants). They were allowed to appear and participate in the hearing as parties pursuant to California Government Code section 11500, subdivision (b).

Protestants Vanessa Kaleb and Michelle Tardy did not appear at the May 8, 2023, hearing or at the May 25, 2023, hearing.

### **INTRODUCTION**

1. Applicant applied to the Department to exchange its type 48-on sale general public premises license issued to its premises at 316 14<sup>th</sup> Street, Oakland, California for a type-47 on-sale general license bona fide eating place license and transfer that license to 300 Broadway, Oakland, California (hereafter applicant's premises).
2. For the reasons specified below, the Department recommended the application be denied. Protests were also filed against issuance of the license on the grounds specified below. Applicant requested a hearing on the Department's denial of its application and protestants requested a hearing on their protests.

### **ISSUES TO BE DETERMINED**

1. As to the Department's denial of the application, the issue to be determined is whether granting the license would be contrary to public welfare or morals by reason of article XX, section 22, of the California Constitution and California Business and Professions Code section 23958.<sup>1</sup> The Department's Statement of Issues contended the application should be denied on several grounds, summarized as follows:
  - 1) Issuance of the license would result or add to an undue concentration of on-sale retail licenses under section 23958 and section 23958.4 because applicant's census tract 9832 in Alameda County is allotted one on-sale retail license and 20 on-sale retail licenses have already been issued in that tract and applicant has not shown issuance of another license to it would serve public convenience or necessity.
  - 2) Within the meaning of rule 61.4, applicant's premises is within 100 feet of 131 residences and applicant has not demonstrated how operation of its premises would not interfere with the quiet enjoyment of those residents.
  - 3) Applicant suffered a prior disciplinary action for illegally storing and retailing alcoholic beverages without a license to do so in violation of section 23300, 23355, and 23106.

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<sup>1</sup> All section references are to the California Business and Professions Code unless noted otherwise. All references to unspecified rules are those sections in California Code of Regulations, title 4, division 1, unless noted otherwise.

4) Applicant misrepresented material facts in its application in that:

a) on October 7, 2022, applicant represented it was not selling alcoholic beverages at applicant's premises while it was, in fact, so doing.

b) applicant failed to notify the Department of a change of the name of its limited liability company and pursued the application under Halftime Sports Bar LLC, when in 2018 its legal name was changed with the California Secretary of State to Sports Bar, LLC.

2. As to the protests filed against issuance of the license, the issue to be determined is whether granting it would be contrary to public welfare or morals by reason of article XX, section 22, of the California Constitution and California Business and Professions Code section 23958 in that, as summarized below from the protests, normal operation of the applied for premises, if licensed, would:

1) create or add to undue noise in the area;

2) create or add to undue traffic and/or illegal parking and/or parking congestion in the area;

3) result in or add to an undue concentration of licenses in the area;

4) unduly interfere with the quiet enjoyment of nearby residents of their homes;

5) create or add to undue loitering;

6) result in the license being issued to an unqualified applicant due to law enforcement problems applicant had at its former licensed premises in the area;

7) result in a license issued to applicant who exercised licensed privileges at applicant's premises while not yet licensed by the Department.

### **FINDINGS OF FACT**

1. Applicant applied to exchange its existing type 48 retail on-sale general public premises license issued at 316 14<sup>th</sup> Street, Oakland, California to a type-47 retail on-sale general bona fide eating place license and to transfer that license to 300 Broadway, Oakland, California doing business there as Halftime Sports Bar (hereafter applicant's premises).
2. A type-48 license permits retailing of beer, wine, and distilled spirits for consumption on the licensed premises. With narrow exceptions not relevant here, persons under 21 are not allowed to enter or remain on the licensed premises.
3. A type-47 license permits retailing of beer, wine, and distilled spirits for consumption on the licensed premises that must operate as a bona fide eating place as described in section 23038.
4. A. Tamber, currently one of the Department's Staff Service Managers, investigated the applicant's application when he served as a Department Licensing Representative II. (Hereafter Tamber.) Tamber prepared a report on his investigation recommending the application be denied (Exhibit D-3: Report on Application). His superiors concurred.
5. Sometime after Tamber submitted his report, he discovered that on July 26, 2018, applicant changed its limited liability name with the California Secretary of State from Halftime Sports Bar, LLC to Sports Bar, LLC. (Exhibit D-9: Secretary of State Amendment.) In applicant's ABC-211 Application Signature Sheet dated September 14, 2022, the applicant's name was stated as "James Dailey dba Halftime Sports Bar". In applicant's limited liability questionnaire, the ABC-256, it listed the applicant as "Halftime Sports Bar, LLC". It indicated James A. Dailey (hereafter Dailey) was the sole member of the limited liability company having 100% ownership. Because the name of the LLC had been changed, the license application was filed and processed under the wrong limited liability company name and Tamber testified the application needs to be re-filed under applicant's correct current name, i.e., Sports Bar, LLC. Otherwise, if issued as applied for, the license would be issued under the wrong name. Upon rejection of the proposed decision, applicant again changed the name of the LLC to conform to the name provided in the application documents. In support of this, applicant provided a copy of the change of name purportedly filed with the California Secretary of State after the hearing in this matter and following notice of the rejection of the proposed decision.<sup>2</sup>

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<sup>2</sup> It is indicated that the amendment was "purportedly" filed because, while a copy of the document was submitted with applicant's written argument, it has not been authenticated, has not been moved into evidence, and no request has been made that official notice of the document be taken. However, based upon the representations of counsel and the apparent genuineness of the document and the filing stamp of the Secretary of State, official notice is taken of the Amendment to Articles of Organization of a Limited Liability Company and it is admitted as applicant's Exhibit A-1. (Hereafter Secretary of State Amendment 2; entered into evidence pursuant to Government Code section 11517(c)(2)(E).)

6. Applicant's premises is in a mixed-use commercial and residential area which is also an entertainment and tourist district in Oakland known as "Jack London Square".
7. Applicant's premises is on ground level at the corner of a free-standing building and adjacent to other buildings. Part of applicant's premises faces Broadway and part faces Third Street. It is approximately 49 feet by 75 feet. It has a first-floor patron area, a mezzanine dining area, and a kitchen. Its patron capacity is approximately 100 people. The third floor of the applicant's building is used/occupied by the building's owner for purposes unrelated to applicant's activity.
8. If licensed, applicant's proposed operating hours are Monday through Thursday 11:00 a.m. to 11:00 p.m., Friday and Saturday 11:00 a.m. to 2:00 a.m., and Sunday 11:00 a.m. to 10:00 p.m.
9. Local zoning permits the type of operation applicant seeks at applicant's premises.
10. Applicant's premises was licensed with a type-41 on-sale beer and wine bona fide eating place license from 1995 to 2000. From 2000 to 2022 it was licensed with a type-47 on-sale general bona fide eating place license; the same type of license applicant seeks for applicant's premises. There was no record of disciplinary action against the prior licenses.
11. There were no churches, schools, hospitals, playgrounds, or other "consideration points" in the area.
12. Applicant's premises is in United States census tract 9832. Pursuant to the license concentration formula set forth in section 23958.4, applicant's census tract is allowed one on-sale retail license and 20 on-sale retail licenses have already been issued in census tract 9832.
13. Applicant submitted a letter to the Department to demonstrate how issuance of the license would serve public convenience or necessity so as to warrant issuance of another retail on-sale license. (Exhibit D-4: PCN letter).<sup>3</sup> The letter indicated applicant would provide a variety of dishes including chicken and waffles, shrimp and grits, breakfast sandwiches, prawns with garlic noodles, Po'Boy sandwiches, peach cobbler, and chocolate cake.
14. Within 1,000 feet of applicant's premises are 11 on-sale retail licensed businesses that included both a variety of restaurants and bars. One restaurant identified as "Seabreeze on the Dock" sold "Po'Boy" style sandwiches and a garlic noodle dish, similar to what applicant offers. Tamber concluded applicant did not sufficiently establish licensing applicant's premises would serve public convenience or necessity.

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<sup>3</sup> Applicant presented no added testimony or evidence regarding public convenience or necessity.

15. Pursuant to section 23958.4, applicant is not in a reporting district with high crime, i.e., the crime count, in applicant's police reporting district neither equals nor exceeds 120% of the average for all police reporting districts for the Oakland Police Department (hereafter OPD).
16. The Department notified the OPD of applicant's application and received neither protest nor objection from it against the application.
17. OPD's Alcoholic Beverage and Tobacco Unit indicated to Tamber it had no calls for service to applicant's premises.
18. The Jack London Square Community Benefit District expressed concern if applicant was selling alcoholic beverages without a license and if its patrons were consuming alcoholic beverages on the public sidewalks.
19. Applicant's premises is within 100 feet of 131 residences. They are all within a single 16 story condominium building approximately 57 feet from and across Third Street from applicant's premises. The condominium building has 16 floors with approximately 200 residents. The lowest five floors are for vehicle parking with residences occupying the remaining floors above. All protestants who appeared at the hearing are residents of the condominium building.
20. Applicant submitted a letter addressing how it would operate so as to not interfere with the quiet enjoyment of those residences within 100 feet of the applicant's premises. (Exhibit 5: letter.) Among other things, it indicated applicant desires a place where friends, family and co-workers can gather in a safe environment. It indicated it would close no later than 11:00 p.m. or until the last sporting event is over. It indicated an intent to hire three security guards and that their sound system cannot be heard by nearby residents.
21. On approximately September 18, 2022, Tamber received reports applicant was selling/serving alcoholic beverages without a license. Some protestants supplied Tamber with photos purporting to show loitering, parking congestion, and retailing of alcoholic beverages at applicant's premises.
22. Tamber met with Dailey at applicant's premises on October 7, 2022, and reminded him that applicant was not authorized to retail alcoholic beverages yet. Dailey showed Tamber a sign advertising "mock-tail" drinks. Dailey indicated applicant was selling only non-alcoholic drinks, i.e., mocktails and not selling/serving actual alcoholic beverages.
23. On October 27, 2022, Tamber emailed Dailey to again remind him/applicant to not retail alcoholic beverages. On October 28, 2022, Dailey came to Tamber's ABC office concerning the application. Tamber again reminded Dailey about not retailing alcoholic beverages and no alcoholic beverages should be stored on applicant's premises.

24. On November 17, 2022, Alcoholic Beverage Control Agents Martinez, Lauer, and Green, while in an undercover capacity, purchased alcoholic beverages at applicant's premises despite it not being licensed to retail alcoholic beverages. Agent Lauer ordered and was served three "Jack and Coke" drinks made with Jack Daniels Whiskey, a distilled spirit. The agent paid applicant's bartender \$40.00 plus a tip for the three drinks.

25. During that investigation they met with Dailey and explained the violation to him, stating that he was still not licensed to retail alcoholic beverages. Dailey told the agents he thought he was licensed based upon a visit by a Department licensing representative.<sup>4</sup> They again advised him applicant was not to sell or serve alcoholic beverages. The agents seized nine bottles of assorted distilled spirits, still in sealed bottles, from applicant's premises. They observed other partially filled distilled spirits bottles. Ultimately, the Department filed an accusation against applicant's existing type-48 license at its 14<sup>th</sup> Street licensed premises for exceeding license privileges by retailing alcoholic beverages at applicant's premises and improper storage of distilled spirits at applicant's premises. That accusation was resolved by a Stipulation and Waiver that formed the basis of a final decision. Applicant paid a fine on the accusation. (Exhibit D-2: Accusation pleadings and decision.)

26. At the hearing, applicant indicated its bartender mistakenly relied on a health department certificate as giving permission to retail alcoholic beverages. Applicant indicated it sent a copy of the certificate to the Department to show what it received from the health department. Tamber received an envelope from applicant, but it was empty and did not contain any health department certificate. No such certificate was presented at the hearing; nor did the bartender who is alleged to have made the mistake testify at hearing.

27. Tamber learned of two shooting incidents at applicant's currently licensed location at 316 14<sup>th</sup> Street, Oakland. Applicant's existing license is currently under surrender, so is not being used at that address.

28. Based on his investigation, Tamber recommended denial of the application due to: 1) the noise created at applicant's premises by persons loitering on the sidewalks adjacent to applicant's premises; 2) its operation creating a public nuisance; 3) the census tract being over concentrated with on-sale retail licensees; 4) applicant not applying for the license under the correct limited liability company name; and 5) applicant retailing alcoholic beverages at applicant's premises while not yet licensed.

29. Protestant Deborah Cussen testified in support of her protest. She indicated her building did not receive a notice about applicant's application, although on or about August 1 she received a notice about the application. She indicated that sometime in September applicant withdrew its pending

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<sup>4</sup> It was not established what licensing representative Dailey was referring to. The evidence established Tamber was the licensing representative working on applicant's application and had consistently reminded Dailey that applicant was not yet licensed at applicant's premises so no retailing of alcoholic beverages was permitted.

application for applicant's premises to operate as a bar and substituted an application to operate a restaurant. ABC then sent a letter about that change of application.

30. Cussen has lived in a 12<sup>th</sup> floor corner unit of the condominium building since 2009 and testified about noise generated by the voices of people who are standing at or near the entrance to applicant's premises on Third Street or at the corner of Third Street and Broadway outside applicant's premises. She also hears related noise from cars, car horns, and revving car engines from that same area. The noise is usually worse at night from about 10:00 p.m. to 11:00 p.m. and even worse when a sporting event has finished. Applicant's patrons also regularly congregate on the sidewalk talking and making noise even after applicant's premises closes for the night. In September she saw a bartender making drinks through the applicant's premises windows, which she later noted were then covered up with window coverings/drapes. She observed parked cars near applicant's premises and sometimes even parked on the pedestrian crosswalks.

31. She described a business known as "Club Anton" next to applicant's premises. She indicated it is opened intermittently. Its operation did not disturb her.

32. Protestant James Yount testified he has lived on the 8<sup>th</sup> floor of the condominium building since 2017. He reaffirmed he has experienced the same noise problems as Protestant Cussen testified to. He added that there is also noise from motorcycles and ATVs in addition to the car noise. He has not seen applicant provide any security guards to control the noise problem. He observed that if the premises has a type 47 license, then minors would be able to enter and remain on the licensed premises and that would aggravate the problem. He also heard of news stories about shootings that occurred at applicant's prior location in Oakland. He fears that the gun violence that occurred at applicant's former premises will occur at applicant's premises. He emphasized the noise was loudest when the customers spilled into the street, especially around closing time.

33. Protestant Sean Oughton testified he has resided at the condominium building on the sixth floor for the past 12 years. He took several photos showing activities at the licensed premises and the exterior area and sent them to Tamber. He has witnessed people consuming beer at the applicant's premises. He observed applicant seemed to be having several private events at applicant's premises. He saw a person bring a tequila bottle outside the applicant's premises and consume it on the sidewalk. He had witnessed a patron who kept honking their car horn until Dailey came out to address that problem. Oughton indicated there are already too many on-sale licensees in the immediate area. The noise he hears from applicant's premises occurs primarily from 8:00 p.m. to 10:00 p.m. and consists of car noise and sometimes music having a loud bass sound. He also hears noise when applicant closes for the night. He did not believe a business owner was responsible for controlling street traffic and parking issues/problems. Oughton preferred applicant's premises be used for a grocery. He was also certain the noise he heard was from applicant's business and not from other neighborhood restaurants or licensed premises.

34. James Dailey (hereafter Dailey) testified for applicant, Halftime Sports Bar, LLC. Dailey is 54 years old and was born and raised in Oakland, California. This would be his third Oakland licensed premises. He owned the Golden Bear Bar in Oakland for about 10 years and sold it in 2009. He also owned the Second Half bar in Oakland for about four years. He also had the Halftime Sports Bar, also in Oakland beginning in 2012. That license is the license applicant seeks to exchange to a type 47 license and transfer to applicant's premises. He has never been cited by the Oakland Police for any violation for his licensed businesses.

35. Applicant's premises is to primarily be a sports bar with alcoholic beverages. It has 25 televisions that will show a variety of sporting events. It has a kitchen, a cook, and food available.<sup>5</sup> It is now open Dailey from 1:00 p.m. to 10:00 p.m. and serves food and non-alcoholic beverages. That is keeping the business afloat. People can dine-in and view sports, or take-out food. Dailey and three of his daughters work there full or part time. For a while, they intermittently opened for sporting events or for family or friends to help cover costs. Dailey also works at "flipping houses".

36. Dailey testified applicant does its best to have its customers get to their cars when leaving. However, he added that people like to talk outside when leaving.

37. The Halftime Sports Bar was formerly at 316 14<sup>th</sup> Street in Oakland. That area began to have more people with mental health problems and became somewhat dangerous to operate a business in, especially after a 2019 shooting incident there. Dailey testified there was only one shooting incident at that premises. There was a second shooting incident in the nearby area but it was not related to that licensed premises.

38. On or about March 3, 2019, Dailey first testified that someone he knew claimed he dropped a firearm that discharged in that licensed premises and injured four people. On rebuttal, surveillance video clips were presented showing that person clearly shooting a firearm inside the 14<sup>th</sup> Street location, not merely dropping it causing an accidental discharge. Police reports indicated 43 officers responded to the scene and were met with some hostility from the crowd as police tried to aid victims and investigate what occurred. Police ultimately obtained the premises security video from one of Dailey's daughters. After viewing the video at the hearing, Dailey testified he was at the premises that night and he identified the shooter to the police. Dailey's initial characterization at the hearing that the only shooting at the 14<sup>th</sup> Street location was a mere accident was misleading.

39. Also, as to the shooting incident, conditions on that type-48 license required one security guard for every 20 guests. However, police estimated there were approximately 140 people at the licensed premises at the time of the shooting and there were, at most, only three security staff there. Dailey testified that there were no more than 80 people there and he and three others were providing security that night. After that incident, Dailey began pat-down searches of patrons as they entered.

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<sup>5</sup> Applicant did not present a copy of its menu.

40. ABC Agent Saunders, who investigated not only the 2019 shooting incident but other law enforcement incidents at applicant's 14<sup>th</sup> Street location, determined that from January 2018 to July 2019, there were 32 calls for OPD service at that 14<sup>th</sup> Street premises. Of those, 32 calls, Agent Saunders felt 12 were relevant to his disorderly house investigation.<sup>6</sup> However, he did not know if his investigation resulted in any formal disciplinary action against the licensee.

41. After the 2019 shooting, applicant began to look for a better/safer place to conduct applicant's business. Applicant believed Jack London Square would be a good location. Applicant's premises used to be a karaoke business with an alcoholic beverage license. Applicant spent approximately \$200,000 to renovate applicant's premises to house a restaurant. That work consisted of renovating the kitchen, re flooring, re doing the walls, purchasing and installing 25 televisions to show sporting events, and installing a bar counter and patron seating. Applicant did not realize the location was in an area over concentrated with on-sale retail licenses. Applicant would have been much more cautious in its remodeling efforts if applicant's premises were not previously licensed for retailing alcoholic beverages. However, since it was previously licensed, applicant did not think it would be difficult to transfer its license there. Applicant can close the Third Street door and use its two Broadway doors for patron access.

42. Without added revenue from alcoholic beverage sales, applicant cannot afford to hire security staff. When they are hired, applicant would rely upon them to use what security measures/techniques they believe are appropriate, e.g., pat down searches or use of electronic metal detecting wands. Oakland has high murder rate, so applicant wants to have a safe business and does not want any more shootings at its business. As applicant does not have a license yet, there is also no need for a security guard(s).

43. Currently, applicant's patrons cannot smoke inside so they go out to the sidewalk to smoke and/or talk on the phone.

44. Dailey testified that both LLCs were his and that any error in the name used on the ABC application was not pointed out to him and was just a mix up. He indicated that ABC said he could use either name.<sup>7</sup>

45. Dailey told ABC about serving mocktails, i.e., drinks made of non-alcoholic tequila, wine, beer and spirits. However, Dailey observed some patrons began to bring their own alcoholic beverages to applicant's premises.

46. Applicant agreed the one violation about its bartender selling alcoholic beverages to undercover ABC agents occurred. However, Dailey testified he had no other violations at any of his places and his

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<sup>6</sup> A licensee who has a "Disorderly House" as described in section 25601 is guilty of a misdemeanor.

<sup>7</sup> Applicant did not identify who at ABC allegedly told him this.

bartender thought a letter from Health Department approved retailing of alcoholic beverages. Dailey agreed she made a mistake and applicant took responsibility for that and paid a fine on that violation.

47. Dailey claimed those who reside in an entertainment district should expect some occasional disturbances.

48. Dailey testified OPD should handle illegal car/vehicle parking problems. He calls the police regarding illegally parked cars but does not know who belongs to what car. Dailey testified he has prevented 5 car break-ins and permitted the OPD to view applicant's surveillance video when so requested.

### **LEGAL BASIS OF DECISION**

1. Article XX, section 22, of the California Constitution delegates the exclusive power to license the sale of alcoholic beverages in California to the Department of Alcoholic Beverage Control.

2. In a protest matter, the applicant bears the burden of establishing it is entitled to the applied for alcoholic beverage license from the start of the application process until the Department makes a final determination.<sup>8</sup> However, a protestant has his/her own burden of establishing the merits of their protest to warrant denial of the application.

3. Section 23958 requires the Department conduct a thorough investigation to determine, among other things, if the applicant and the proposed premises qualify for a license, if the provisions of the Alcoholic Beverage Control Act have been complied with, and if there are any matters connected with the application which may affect public welfare or morals. It provides, in part, the Department shall deny an application for a license if the applicant or the premises do not qualify for a license under the Act. It further provides the Department shall deny an application for a license if issuance of the license (a) would tend to create a law enforcement problem, or (b) would result in or add to an undue concentration of licenses, except as provided in section 23958.4.

4. Under section 23958.4, subdivisions (a) and (b), and applying the criteria for over-concentration of licenses set forth therein, if 1) issuance of a type-47 bona-fide eating place license would create or add to an undue concentration of on-sale licenses, and/or 2) applicant's premises is in a high-crime reporting district, then either one or both situations are cause for deeming the area unduly concentrated with licenses and warrant denying the application. However, under section 23958.4, subdivision (b), the Department may issue an added license if, depending on the type of license applied for, either the Department or a local governing body, as specified therein, determines public convenience or necessity would be served by issuance of the applied for license. In the case of an on-sale retail bona-fide eating place license, such as a type-47 license, the Department, not the local governing body, determines if

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<sup>8</sup> *Coffin v. Alcoholic Beverage Control Appeals Board* (2006) 139 Cal. App. 4th 471, 43 Cal. Rptr. 3d 420.

issuance of the license would serve public convenience or necessity.

5. Under section 24015, subdivision (g): “If the person filing the request for a hearing fails to appear at the hearing, the protest shall be deemed withdrawn.”

6. Under California Code of Regulations, title 4, section 61.4 (hereafter rule 61.4), no original issuance of a retail license or premises-to-premises transfer of a retail license shall issue if there are residences within 100 feet of the applicant’s premises or within 100 feet of the parking lot which is maintained for premises patrons or operated in conjunction with the premises. However, another retail license, such as a type-47 license, can be issued if applicant establishes to the Department that operation of the business with that license would not interfere with the quiet enjoyment of the property by those residents.

### **DETERMINATION OF ISSUES**

1. As to the protests of Michelle Tandy and Vanessa Kaleb, section 24015, subdivision (g) states that when a person who requested a hearing does not appear at the hearing, their protest is deemed withdrawn. As both Ms. Tandy and Ms. Kaleb requested a hearing on their protest but did not appear at either session of the hearing, their protests are deemed withdrawn.

2. As to the Department’s Statement of Issues as to why the application should be denied, it asserted that issuing the license would add to an undue concentration of on-sale retail licenses under section 23954 and section 23958.4 because applicant’s census tract is allotted one on-sale retail license and 20 such licenses have already been issued and applicant has not shown issuance of another license to it would serve public convenience or necessity. The evidence established that, applying section 23958 and section 23958.4, applicant’s census tract calls for one on-sale retail license and 20 have already been issued. Therefore, issuance of another on-sale retail license would add to the concentration of licenses in applicant’s census tract.

3. However, section 23958.4 states another license can be issued if doing so would serve some public convenience or necessity. In this instance, applicant’s premises is located in an area known as Jack London Square, an entertainment and dining destination area. While applicant’s premises would add another sports bar to the area, there are at least two already in the census tract.

4. In the letter submitted to the Department (exhibit D4), applicant relied exclusively on the food offerings in an effort to establish public convenience or necessity. At the hearing, Dailey did not emphasize or otherwise explain the operation of a bona fide eating place and did not present applicant’s menu or proposed menu of food items available (beyond what was described in the letter) but did add that the premises has 25 televisions (although this was simply a passing reference made in response to a question from the ALJ unrelated to public convenience or necessity). In the written argument submitted upon review of the proposed decision, applicant added more detail concerning the operation of the premises as a sports bar and emphasized that the subject premises has 25 televisions, asserting that the Department should have engaged in some sort of qualitative analysis to evaluate the

ability of patrons to watch multiple sporting events compared to some other (unspecified) locations that might only have one or two televisions. However, it is the applicant's burden to provide sufficient detail upon which the Department can make its evaluation. None of this information was provided by applicant during the course of the investigation when it was afforded the opportunity to make its case as to how issuance of a license meets public convenience or necessity. Moreover, applicant was on notice with the Statement of Issues that the Department did not find that public convenience or necessity had been established. Applicant therefore had the opportunity to gather additional evidence for submission at hearing and failed to do so. Simply stating at hearing, in response to a question from the ALJ, that there are 25 televisions and then arguing after the fact that the Department was obligated to undertake further assessment and investigation is insufficient to meet the necessary burden of proof. Applicant has failed to establish sufficient grounds for finding that issuance of the 21<sup>st</sup> on-sale retail general license in applicant's census tract was appropriate, even for Jack London Square. Applicant did not sufficiently establish that issuance of the added license would serve public convenience or necessity.

5. The Department also alleged applicant's premises is within 100 feet of 131 residences and applicant had not demonstrated how operation of its premises would not interfere with the quiet enjoyment of those residences. Under rule 61.4, no premises-to-premises transfer of a retail license shall be approved if the premises or its parking lot/area is located within 100 feet of a residence. In this case, there were no less than 131 residences within 100 feet of applicant's premises, all located at the condominium complex.

6. However, rule 61.4 also permits the Department to approve a premises-to-premises license transfer where an applicant establishes that operation of the applicant's business would not interfere with the quiet enjoyment of the property of those residents within 100 feet of applicant's premises or its parking lot. The applicant herein has commenced operations retailing food and non-alcoholic beverages. Applicant indicated its patrons cannot smoke inside, so they go outside to smoke or talk on their phones. The evidence established that on regular basis applicant's patrons gather, talk on their phones, mingle, and smoke on the sidewalks just outside applicant's premises. During that activity, they generate noise by way of their voices, vehicles they use or wait for, or that otherwise drive by the area. That noise currently and regularly disturbs residents living within 100 feet of applicant's premises. Applicant's premises is not planned to operate like a typical bona fide eating place where patrons would come, eat their meal, and leave. Applicant's premises would be a place where patrons would come and be entertained by the sporting events viewable on applicant's 25 televisions. It promotes and facilitates an atmosphere where patrons have extended stays with extended socializing. Noise generated by patrons in that setting who have consumed alcoholic beverages is likely to cause added extended disturbances to those residents residing within 100 feet of applicant's premises. There is no current barrier, feature, or characteristic present that would help deaden or reduce the noise heard by those residents. Applicant did not present sufficient evidence to warrant issuance of a license within 100 feet of the residences herein.

7. The Department also alleged applicant suffered a prior disciplinary action for illegally storing and selling alcoholic beverages without a license in violation of section 23300, 23355, and 23106. The evidence established that even though Tamber reminded Dailey, who was an experienced Department licensee, not to retail in alcoholic beverages at applicant's premises, respondent's bartender sold whiskey to undercover Department agents on one occasion. Applicant admitted that violation occurred but contended his bartender mistook some correspondence from the health department as permission to retail in alcoholic beverages. That correspondence/notice was not presented at the hearing for examination to see if such could have reasonably been construed as conveying that alcoholic beverage retailing could commence. The involved bartender did not testify at the hearing. Such an error by applicant's bartender is not plausible. Furthermore, this is different from what he told the Department agents at the time, when he asserted that he thought he was licensed after being visited by a licensing representative. Dailey is an experienced Department licensee and was specifically reminded by Tamber that sales of alcoholic beverages were prohibited. It is unlikely that applicant's staff would not have been aware of this also. Moreover, given the number of open bottles of distilled spirits on display and readily accessible to bar staff almost invited any error, if in fact there was a mistake. Applicant's assertion that this was an understandable error or that this was the only occasion upon which the illegal service of alcoholic beverages occurred is simply not credible and is disbelieved. When viewed in the totality of the circumstances and evidence adduced at hearing, the observations of protestants (discussed below) supplement the formal disciplinary action and support the conclusion that this was not a solitary incident but rather part of an ongoing practice.

8. The protestants, in their case, testified and presented photographic images they contended established applicant retailed in alcoholic beverages prior to any Department licensing. Some of the photographs show a number of distilled spirits bottles (of well-known alcoholic beverage brands) displayed behind the bar, many of which are obviously partially full, and some have pouring spouts on them. In addition, protestant Oughton testified that he observed patrons consuming beer on the premises and saw a person bring a tequila bottle outside the applicant's premises and consume it on the sidewalk. Dailey also testified that he was aware of patrons bringing their alcoholic beverages into the premises. Tamber warned Dailey not to retail in alcoholic beverages. Dailey informed Tamber he was not doing so and was only selling food with "mock-tails" as advertised on a signboard at applicant's premises. While none of the protestants purchased any alcoholic beverages themselves, testified that they heard any drink orders being made, or examined labeling on bottles closely enough to conclude the beverage was an alcoholic beverage as opposed to non-alcoholic beverages, Oughton was certain that the bottle of beer he observed being consumed was in fact beer and his observation of a patron leaving with and drinking from a bottle of tequila is consistent with Dailey's testimony about being aware of patrons bringing alcohol to the premises. Applicant was selling beverages that might appear at a distance as though they were distilled spirits or other type of alcoholic beverage drinks. As indicated above, these observations sufficiently supplement other evidence to support the conclusion that alcoholic beverages were being served or consumed in the licensed premises on a regular basis.

9. It is also noted that the determination on this point is not being made in the context of a disciplinary proceeding. Given the admitted transgression by applicant regarding selling alcoholic beverages at

applicant's premises to the trio of ABC agents without a license (despite prior admonitions from Tamber that sales of alcohol was not permitted), together with the additional evidence of multiple open bottles of distilled spirits behind the bar, the observations of protestants, and the admission of Dailey that he was aware patrons would bring alcoholic beverages into the premises, it is more likely than not that applicant was in fact engaged in the sales of alcoholic beverages or permitted patrons to consume alcoholic beverages in the unlicensed premises. This finding is sufficient grounds standing alone, and based upon the totality of circumstances, to warrant denial of the application.

10. The Department contended applicant misrepresented material facts in its application in that on October 7, 2022, applicant represented it was not selling alcoholic beverages at applicant's premises while it was, in fact, so doing. Based upon the finding above, this is an accurate assertion and is sufficient basis for denying the application.

11. Lastly, the Department alleged applicant failed to notify the Department of a 2018 change of the name of its limited liability company and pursued the application under its former name of Halftime Sports Bar LLC when its legal name of record with the California Secretary of State as of 2018 was Sports Bar, LLC. The evidence established that in 2018, applicant changed its name from Halftime Sports Bar, LLC to Sports Bar, LLC. If the Department issued a license in this instance, it would be to the incorrectly named entity. Further, it is likely all required postings, public notices, and forms submitted in this matter identified Halftime Sports Bar, LLC as the applicant, and thus could have misled or would mislead those who relied or would rely on those postings, forms, documents, and notices. It was up to applicant to apply under the correct and accurate name of the limited liability company, not a former name that was changed in 2018. It would be contrary to public welfare and morals to issue a license to a wrongly identified entity. Such error does warrant denial of the application.

12. In its written argument upon review, applicant asserted that it is a routine and easy process to change the name of an LLC with the Secretary of State. While it may be true that it is a fairly simple process to change the name of an LLC by amending its Articles of Organization and to thereafter file such amendment with the Secretary of State, that does not mean that the former and current LLC names may be used interchangeably.<sup>9</sup> The fact is that the LLC ceases to exist under its former name. The filing of an application with the Department under that former name is then tantamount to filing such application as a non-existent LLC (or phrased another way, the applicant identified on the Department application documents does not actually exist).

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<sup>9</sup> In rejecting the proposed decision, a question was posed regarding whether the difference between the applicant LLC and the LLC appearing at hearing raised an issue of standing. Upon review of the record, it is clear that this was a change of name of an existing LLC (under the same Secretary of State registration number) as opposed to being two completely independent LLCs. As such, while it is not clear that this creates a standing issue, given the ultimate result here it is unnecessary to explore this further.

13. Dailey testified that he was told by some unidentified person at the Department that he could use either LLC name. However, this is not supported by any evidence and is an unreasonable contention. Dailey is the principal of the LLC; he is the one who changed its name in 2018 (some two years prior to the filing of the instant application) and had full knowledge of the name under which the LLC operated. As a prudent businessperson it is not logical or conceivable for him to truly believe that he may represent the LLC under a different name, especially on such important official documents as an application to obtain an alcoholic beverage license (several of which are actually signed under penalty of perjury). Indeed, despite his own personal knowledge to the contrary, Dailey executed several application documents mis-identifying the applicant as "Halftime Sports Bar, LLC" rather than its true legal name of "Sports Bar, LLC". Although he may not have intended to mislead the Department or members of the public, not accurately identifying the applicant LLC did, at a minimum, create confusion and is in fact a misrepresentation of a material fact.

14. Tamber testified that he did not become aware of this information until after the licensing investigation was completed, but that it would itself be the basis for denial of the application. If not, he testified, it would result in the license being issued to the incorrect person. Applicant does not dispute this testimony and offers no authority otherwise.

15. However, now, following rejection of the proposed decision, applicant has once again changed the name of the LLC. This amendment has reverted the name of the LLC to its original name of "Halftime Sports Bar, LLC" and thereby corresponds to the name stated on the application documents. If an applicant can mislead (intentionally or not) the Department and the public throughout the application process and thereby potentially obtain a license by misrepresenting the applicant's name, only to subsequently change the name and assert that any concern is thereby removed (essentially "no harm no foul"), then the licensing investigation may be readily subverted.

16. Indeed, applicant basically acknowledges the real potential for circumventing and undermining the Department's ability to conduct an appropriate and thorough investigation when the prior change in name is referred to as "temporary" and the most recent amendment as having "restored" the entity's former name, while also stating that "some confusion has previously arisen"<sup>10</sup>. The only argument presented by applicant on this point is that the after-the-fact name change renders this issue moot. However, rather than merely removing any

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<sup>10</sup> While acknowledging previous confusion caused by this change in LLC name, applicant fails to recognize that it would be contrary to public welfare and morals for the Department to issue a license when the application process has been marred by such confusion which, if not caught, would have resulted in the license being issued in the incorrect name. Moreover, it may well be that had this change been made during the course of the investigation then, depending on the circumstances, the issue could have possibly been resolved. However, that is not the case we are dealing with now. At this juncture the harm has already occurred, and it is too little too late.

potential confusion going forward, as asserted by applicant, this serves to highlight the concern and potential mischief that may result. Since applicant has the burden of establishing entitlement to the license in this matter, whether this issue is characterized as a mistake, an error, or a misrepresentation of fact, applicant has failed to meet its burden and this is a basis for denial of the application.

17. As to the protest issues, the protestants primarily objected to applicant's application based on the noise generated by applicant's patrons and visitors who regularly gathered, smoked, talked on their phones, or otherwise socialized on the sidewalks outside applicant's premises combined with accompanying motor vehicle noise. For the reasons discussed above in paragraphs 5 and 6 addressing rule 61.4, this ground of protestants' protest is sustained.

18. Protestants also contended the area is over concentrated with on-sale licensees and another one is not needed. For the reasons discussed above in paragraphs 2, 3 and 4 discussing section 23958 and 23958.4, issuance of another on-sale retail license to applicant would add to an undue concentration of licenses and issuance of yet another on-sale retail license was not shown to serve public convenience or necessity.

19. Protestants also protested due to law enforcement problems applicant had at other or former licensed premises and that such problem could re-occur at applicant's premises. The evidence presented focused on applicant's operations at its former location at 316 14<sup>th</sup> Street, Oakland. The evidence established there was a significant shooting incident there in 2019. Agent Saunders became aware of approximately 32 other law enforcement incidents at that premises, 12 of which he considered relevant to his disorderly house investigation. There was no evidence the Department pursued any formal or informal disciplinary action for a disorderly house at applicant's former licensed premises on 14<sup>th</sup> Street or as to any other former licensed premises Dailey or applicant had. The evidence did not establish denying applicant's application due to law enforcement problems at applicant's or Dailey's prior licensed premises was proven. However, the fact that Dailey gave misleading testimony regarding the 2019 shooting incident is concerning and raises serious questions about the veracity of his testimony on other issues in this matter, most particularly his accounting of the sale of alcoholic beverages (beyond the single occasion investigated by the Department) and the change of the LLC name.

20. Protestants also opposed the license due to applicant exercising license privileges at applicant's premises while not then licensed to retail in alcoholic beverages. As discussed above in paragraphs 7, 8, and 9, this was established. This ground of protestants' protest is sustained.

### **CONCLUSION**

1. Based upon the evidence presented, there are sufficient grounds to deny the application based upon 1) applicant's failure to establish under section 23958.4 that issuance of another on-sale retail license in applicant's census tract would serve public convenience or necessity; 2) the presence of residences within 100 feet of applicant's premises and applicant's inability to demonstrate how, if licensed, operation of the premises would not interfere with the quiet enjoyment of those residences by their

occupants; 3) selling alcoholic beverages prior to licensure (and misrepresenting material facts relative to this during the course of the investigation); and 4) applicant not using its true and correct name in processing the application. Each of these is a separate and independent ground for denial of the application here.

2. As to the protests, they are sustained as to the claim of over concentration of licenses and noise/residential interference.

3. Applicant failed to carry its burden of establishing entitlement to the license.

**ORDER**


1. Applicant's application for issuance of a type-47 on-sale general bona fide eating place license at applicant's premises is denied.

2. The protests of Deborah Cussen, James Yount, and William Oughten are sustained as to the overconcentration of licenses claim and the noise/residential interference claim.

3. The protests of Michelle Tandy and Vanessa Kaleb are deemed withdrawn.

Sacramento, California

Dated: January 18, 2024

  
for Joseph McCullough  
Director

Pursuant to Government Code section 11521(a), any party may petition for reconsideration of this decision. The Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or on the effective date of the decision, whichever is earlier.

Any appeal of this decision must be made in accordance with Chapter 1.5, Articles 3, 4 and 5, Division 9, of the Business and Professions Code. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005.

