

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

**AB-9675**

File: 48-359693 Reg: 16085102

CLUB 215, INC.,  
dba Club 215  
2680 South La Cadena Drive,  
Colton, CA 92324,  
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,  
Respondent

Administrative Law Judge at the Dept. Hearing: D. Huebel

Appeals Board Hearing: October 4, 2018  
Ontario, CA

**ISSUED OCTOBER 19, 2018**

Appearances: *Appellant.* Roger Jon Diamond as counsel for Club 215, Inc., doing business as Club 215.  
*Respondent.* Jennifer M. Casey as counsel for the Department of Alcoholic Beverage Control.

**OPINION**

Club 215, Inc., doing business as Club 215 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> suspending its license for 30 days because appellant allowed several different individuals to violate rules 143.3(1)(a), 143.3(1)(c), and 143.3(2), and because on two occasions appellant's employees refused to comply with a request to examine appellant's books and records, as required by Business and Professions Code section 25753.

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1. The decision of the Department, dated November 15, 2017, is set forth in the appendix.

## FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on February 16, 2000. On September 26, 1997, appellant's license was subject to discipline for violations of rules 143.2(2), 143.2(3), and 143.3(2).

On December 12, 2016, the Department filed a 16-count accusation against appellant. Counts 1 through 7 and 10 through 13 each alleged that appellant allowed an agent or employee whose breasts or buttocks were exposed to perform while not on a stage at least 18 inches high and removed at least six feet from the nearest patron, a violation of rule 143.3(2). (See Code Regs., tit. 4, § 143.3(2).) Counts 8 and 9 alleged that appellant allowed an agent or employee to simulate a sexual act upon the premises, a violation of rule 143.3(1)(a). (See Code Regs., tit. 4, § 143.3(1)(a).) Count 14 alleged appellant's agent or employee permitted an individual to remain on the premises while her pubic hair, anus, vulva, or genitals were exposed to public view, a violation of rule 143.3(1)(c). (See Code Regs., tit. 4, § 143.3(1)(c).) Counts 15 and 16 each alleged that appellant's agent or employee failed to allow or refused to comply with a request to examine appellant's books and records, a violation of section 25753. (See Bus. & Prof. Code, § 25753.)

At the administrative hearing held on August 24, 2017, documentary evidence was received and testimony regarding the alleged violations was presented by Agent Vincent Rock of the Department of Alcoholic Beverage Control; by Job Romo, appellant's manager; by Fernando Navarro, appellant's employee; by Catherine Villareal, a performer at the licensed premises; and by Todd Gibboney, appellant's manager and chief executive officer.

Counts 1 and 2

Testimony established that on December 19, 2015, Agent Rock entered the licensed premises in a plainclothes capacity. Agent Rock sat in one of the chairs placed around the perimeter of a stage. Agent Rock ordered a Coors Light bottled beer for himself, which he was served and drank. The stage was somewhat rectangular in shape, raised approximately 18 inches from the floor, and had a fixed metal vertical pole near the center of the stage. A four inch wide drink/tip rail, raised approximately 12 inches high, ran along the perimeter of the stage. Along the border of the stage was a fixed two-inch thick horizontal metal pole, described as a "trip rail," inset from the edge of the stage approximately seven inches. Measuring from the back side of the trip rail—the side that was furthest away from the edge of the stage—to the edge of the drink/tip rail is three feet, or 36 inches.

At 8:40 p.m. the disc jockey (DJ) announced a dancer by the name of Mya, who took to the stage. Mya, wearing a bra and underwear, began dancing on the stage. During the second song, Mya removed her bra, exposing her breasts and nipples. Agent Rock was seated at the tip rail, approximately three feet away from Mya while she performed and he could see her breasts and nipples. (Count 1.) Mya eventually exited the stage.

The DJ announced another dancer, named Viera, who came out onto the stage wearing a black, one-piece lingerie. Viera danced on the stage to the first song. During the second song and dance Viera pulled the top of her lingerie down, exposing her breasts and nipples, during which she was approximately two feet away from Agent Rock, who could see the entirety of her breasts and nipples. Viera then got down on

both of her knees and pushed her chest out over the edge of the stage, with her breasts and nipples exposed, approximately one foot away from Agent Rock. (Count 2.)

Agent Rock left at approximately 9:50 p.m.

#### Counts 3 and 4

On January 8, 2016, at approximately 11:05 p.m., Agent Rock entered the licensed premises in a plainclothes capacity. He ordered a Coors Light bottled beer, which he was served and drank.

At 11:30 p.m., Viera—the same dancer from December 19, 2015—began dancing on the stage, wearing only a gold-colored bra and black underwear. While dancing to the second song on the stage, Viera removed her bra, exposing her breasts and nipples, which Agent Rock could see while seated at the tip rail, approximately three feet away from Viera. (Count 3.) Viera eventually left the stage.

A second dancer, identified only as Amber, began dancing on the stage, wearing a pink bra and black underwear. During her performance on stage, Amber removed her bra and Agent Rock could see Amber's breasts and nipples from approximately three feet away at the tip rail. (Count 4.)

Agent Rock left at about 1:00 a.m.

#### Counts 5 and 6

On January 21, 2016, at 8:35 p.m., Agents Rock, Gardner, and Gonzalmen entered the licensed premises in an undercover capacity. Agent Rock ordered a bottle of Coors Light beer, which he was served and drank.

At 8:40 p.m., a dancer by the stage name "Roxy," also known as Crystal Marie Rodriguez, took to the stage wearing a dark colored bra and underwear and began to

dance. During the second song, while Roxy was on the stage approximately two feet away from Agent Rock, Roxy removed her bra, exposing her breasts and nipples, which Agent Rock could see from his position at the tip rail. Roxy's breasts were exposed within approximately two feet of Agent Rock for a duration of 30 seconds on two separate occasions while she was on stage. (Count 5.) Roxy eventually left the stage.

A second dancer named Viera—the same dancer from December 19, 2015, and January 8, 2016—took the stage. Viera wore a gold-colored bra and black underwear while she danced on stage. At some point during her performance, she removed her bra, exposing her breasts and nipples, which Agent Rock could see from approximately two feet away. (Count 6.)

#### Count 7 through 14

On May 13, 2016, at 8:25 p.m., Agents Rock and Castillo, in a plainclothes capacity, entered the licensed premises. Agent Rock ordered a Modelo beer, which he was served and drank.

A dancer by the stage name "Jewel," also known as Jonelle Lashon Iles, began dancing on the stage wearing a black bra and white underwear. During the second song on stage, Jewel removed her bra, exposing her breasts and nipples, which Agent Rock could see from his position at the tip rail, with Jewel approximately three to four feet away from Agent Rock. (Count 7.) At some point while Jewel was on the stage and approximately three to four feet away from Agent Rock, she rubbed her clitoris and vaginal area with her index and middle fingers in a vertical motion, simulating masturbation for seven seconds. (Count 8.) Jewel eventually left the stage.

A second dancer by the stage name "Layla," also known as Christy Ann Donnelly, began dancing on the stage wearing an animal print bra and underwear. During the second song, while she was on the stage approximately four feet away from Agent Rock, Layla removed her bra, exposing her breasts and nipples, which Agent Rock saw. Thereafter, while Layla was on the stage, Agent Rock saw Layla rub her clitoris and vaginal area with her middle and index fingers over her underwear, for approximately three seconds, simulating masturbation. (Count 9.) Layla eventually left the stage.

A third dancer by the stage name "Lulu," also known as Thi Nga Thach, danced on the stage wearing a white bra and white underwear. During the second song on stage Lulu removed her bra, exposing her breasts and nipples, which Agent Rock could see from approximately three feet away. (Count 10.) While Lulu was on the stage, Agent Rock saw Lulu, on two separate occasions, rub her clitoris area with her middle finger over her underwear, for approximately five seconds, simulating masturbation. (Count 11.) After the second song, Lulu got off the stage.

A fourth dancer by the stage name "Kashmir," also known as Janel Martinez, danced on the stage wearing a purple bra and underwear. She danced for two songs. During the second song, while Kashmir was on the stage approximately three feet from Agent Rock for 15 seconds, Kashmir removed her bra, exposing her breasts and nipples, which Agent Rock could see. (Count 12.)

Thereafter the Department inspection team entered the licensed premises and the stage dancing stopped. The agents conducted an inspection for 30 to 35 minutes

and then left. During the inspection the agents interviewed and photographed the dancers who were present in the licensed premises.

After the inspection team agents left, the DJ announced a fifth dancer to the stage, by the stage name "Jocelyn," also known as Catherine Rodriguez Villareal. Jocelyn danced on the stage wearing a white bra and underwear. During her performance on the stage Jocelyn removed her bra, exposing her breasts and nipples, while Agent Rock observed from a distance of approximately three feet away from Jocelyn. (Count 13.) Agent Rock thereafter observed Jocelyn sit down on the stage on her buttocks, plant the soles of her feet on the stage, spread her legs apart, and with her hand she pulled her underwear to the side, exposing her genitals, including the labia, for approximately three seconds. (Count 14.) After exposing her genitals for approximately three seconds, she moved her underwear back in place and continued her dance performance on stage. Agent Rock then observed as Jocelyn danced topless on the stage approximately one foot away from an unknown male patron with her breasts and nipples exposed.

#### Count 15

On May 26, 2016, a Department agent hand-delivered to Todd Gibboney, appellant's CEO, a Department Notice to Produce Records. Gibboney initialed the notice at the bottom left to acknowledge receipt thereof. The notice, dated May 26, 2015, requested, pursuant to provisions of section 25753 of the Business and Professions Code, that appellant furnish the requested information within 10 days of the date of the notice. The notice further informed appellant that failure to comply within the time period would result in an accusation filed against appellant's license. The

information requested included (1) copies of any and all work schedules for any and all staff members including employees, security, dancers, independent contractors, etc., at the licensed premises, and (2) copies of any and all employee records for all staff members, including stage names, names, addresses, telephone numbers, and driver's license numbers, at the licensed premises. Agent Rock was listed as the person to contact. The Riverside District Office address, telephone number, and Agent Rock's email address were provided on the notice.

Neither the Department nor Agent Rock received the requested information from appellant within the time frame requested. Gibboney has the authority to release such requested documents. There was no evidence presented that Gibboney or appellant were not capable of complying within the time period.

#### Count 16

On June 15, 2016, a Department agent hand-delivered to Job Romo, appellant's daytime manager and DJ, a Department Notice to Produce Records. Romo initialed the notice at the bottom left to acknowledge receipt thereof. The notice, dated June 17, 2017, requested, pursuant to provision of section 25753 of the Business and Professions Code, that appellant furnish the requested information within 10 days of the date of the notice. The notice further informed appellant that failure to comply within the time period would result in an accusation filed against appellant's license. The information requested included (1) copies of any and all work schedules for any and all staff members including employees, security, dancers, independent contractors, etc., at the licensed premises, and (2) copies of any and all employee records for all staff members, including stage names, names, addresses, telephone numbers, and driver's

license numbers, at the licensed premises. Agent Rock was listed as the person to contact. The Riverside District Office address, telephone number, and Agent Rock's email address were provided on the notice.

Romo informed the agent that he did not have access to the records requested and placed the Department notice in the drop box outside Gibboney's locked office inside the licensed premises. Romo thereafter advised Gibboney of the Department's notice and that he had placed said notice in Gibboney's box outside his office. Gibboney received the notice.

Neither the Department nor Agent Rock received the requested information from appellant within the time frame requested.

On June 29, a Department agent hand-delivered to Romo another Department Notice to produce records. Romo initialed the notice at the bottom left to acknowledge receipt thereof. The notice, dated June 17, 2017, requested, pursuant to provision of section 25753 of the Business and Professions Code, that appellant furnish the requested information within 10 days of the date of the notice. The notice further informed appellant that failure to comply within the time period would result in an accusation filed against appellant's license. The information requested included (1) copies of any and all work schedules for any and all staff members including employees, security, dancers, independent contractors, etc., at the licensed premises, and (2) copies of any and all employee records for all staff members, including stage names, names, addresses, telephone numbers, and driver's license numbers, at the licensed premises. Agent Rock was listed as the person to contact. The Riverside

District Office address, telephone number, and Agent Rock's email address were provided on the notice.

Romo informed the agent that he did not have access to the records requested and placed the Department notice in the drop box outside Gibboney's locked office inside the licensed premises. Romo thereafter advised Gibboney of the Department's notice and that he had placed said notice in Gibboney's box outside his office. Gibboney received the notice.

Thereafter Agent Rock received from Gibboney an incomplete response to the Notice to Produce. The information not produced included the work schedules and employee records, including stage names, names, addresses, telephone numbers, and driver's license numbers, for dancers Mya, Viera, and Amber.

After the hearing, the Department issued a decision determining that counts 1 through 15 were proved and no defense was established. Count 16, which alleged that appellant's employee Job Romo failed to comply with a request to examine appellant's books and records, was dismissed. A penalty of 30 days' suspension was imposed.

Appellant then filed this appeal contending the Department applied the various subdivisions of rule 143.3 in an unnecessarily strict manner and without regard for the purpose of the rules, and that the rule itself is an unconstitutional infringement on free speech and due process.

#### DISCUSSION

Appellant contends that for a law to be valid, there must be "some legitimate non arbitrary purpose for the rule." (App.Br., at p. 12.) Appellant insists "[i]t is arbitrary and

capricious for the Department to regulate the distance between the patron and the performer where there is zero evidence of misconduct by anyone." (*Id.*, at p. 20.)

Appellant claims "[i]t is obvious that the rules in question were designed to prohibit patrons and dancers from touching each other." (*Id.*, at p. 11.) Appellant points out that there is no evidence that any dancers touched any patrons. (*Id.*, at p. 12.) Moreover, according to appellant, Agent Rock "testified that he made no effort to keep track of what percentage of the time during the performance the dancer was more than six feet away" or "within six feet" of him. (*Id.*, at p. 9.) Appellant argues the Department is therefore engaging in "overly aggressive law enforcement" by pursuing appellant for mere technical violations of rule 143.3 and its subdivisions. (*Id.*, at p. 11.) Appellant contends "no purpose is served by strictly interpreting a rule that only has to do with the placement of the dancer on the stage while topless." (*Id.*, at p. 12.) Appellant contends there is no harm to society where, as here, the patrons simply "have better views of the dancers." (*Id.*, at p. 13.)

Appellant initially emphasizes it is not making a "facial" challenge to rule 143.3 of the sort litigated in *La Rue*. (*Id.*, at p. 11; see also *Cal. v. La Rue* (1972) 409 U.S. 109 [93 S.Ct. 390] [finding Department rules 143.3 and 143.4 constitutional despite licensees' First Amendment objections].) Nevertheless, appellant argues,

This is not the People's Republic of North Korea or the Kingdom of Saudi Arabia. This is the United States of America. Patrons at clubs are protected by the First and Fourteenth Amendments to the United [*sic*] States Constitution (freedom of speech). The artists themselves have free speech rights to entertain. Would any one [*sic*] think that at a movie theater a patron would not be able to sit right near the screen if he or she wanted to do so.

The point of this argument is that it is impermissible under our constitutional democracy to prohibit the location of the dancer in relation to the patron.

(App.Br., at p. 13.) Appellant goes on to claim that rule 143.3 is unconstitutional as applied in this case, and violates both the First and Fourteenth Amendment of the U.S. Constitution as well as the due process clause of the California constitution. (*Id.*, at p. 15.) Appellant cites a number of cases prohibiting content-based restrictions on erotic material. (*Ibid.*) Appellant acknowledges the Department may have a valid interest in preventing touching between the patron and the dancer, but reiterates that there is no evidence of touching in this case. (*Id.*, at p. 19.)

Appellant does not appear to challenge counts 8 and 9, alleging simulated sexual acts in violation of rule 143.3(1)(a); count 14, alleging appellant allowed a performer to reveal her genitals in violation of rule 143.3(2); or count 15, alleging the failure to comply with a request to examine appellant's books and records, in violation of Business and Professions Code section 25753. (See generally *ibid.*)

We will address appellant's constitutional arguments first before moving on to its regulatory objections.

In *La Rue*, the United States Supreme Court considered the constitutionality of certain provisions of Department rules 143.3 and 143.4. (See generally *La Rue, supra.*) The court noted that the Department, in adopting these rules in 1970, invited public comment and "heard a number of witnesses on the subject at public hearings." (*Id.*, at p. 110.) The court wrote, "[t]he story that unfolded was a sordid one," and described the content of the transcripts of those hearings:

References to the transcript . . . indicated that in licensed establishments where "topless" and "bottomless" dancers, nude entertainers, and films displaying sexual acts were shown, numerous incidents of legitimate concern to the Department had occurred. Customers were found engaging in oral copulation with women entertainers; customers engaged in public masturbation; and customers placed rolled currency either directly into the

vagina of a female entertainer, or on the bar in order that she might pick it up herself. Numerous other forms of contact between the mouths of male customers and the vaginal areas of female performers were reported to have occurred.

Prostitution occurred in and around such licensed premises, and involved some of the female dancers. Indecent exposure to young girls, attempted rape, rape itself, and assaults on police officers took place on or immediately adjacent to such premises.

(*Id.*, at p. 111.) Accordingly, the Department imposed rules limiting the type of entertainment that could be provided at licensed establishments—including the provisions at issue in appellant's case, which have remained unchanged since their adoption in 1970. (See *ibid.*; see also Code Regs., tit. 4, § 143.3.) The Supreme Court acknowledged the validity of the Department's aims:

A common element in the regulations . . . appears to be the Department's conclusion that the sale of liquor by the drink and lewd or naked dancing and entertainment should not take place in bars and cocktail lounges for which it has licensing responsibility. Based on the evidence from the hearings that it cited to the District Court . . . we do not think it can be said that the Department's conclusion in this respect was an irrational one.

(*Id.*, at p. 115-116.)

The Court then rejected the contention that the regulations at issue were an unconstitutional restraint on the freedom of speech. (*Id.*, at p. 118.) It noted, "the critical fact is that California has not forbidden these performances across the board. It has merely proscribed such performances in establishments that it licenses to sell liquor by the drink." (*Id.*, at p. 118.) As the Court observed, the Twenty-First Amendment to the U.S. Constitution "has been recognized as conferring something more than the normal state authority over public health, welfare, and morals," and therefore bestows a presumption of validity with regard to the states' regulation of alcoholic beverages. (*Id.*, at p. 114.)

Here, appellant merely restates the same arguments made in *La Rue*—that rule 143.3 imposes an unconstitutional limitation on the freedom of speech. The Supreme Court held it does not; rule 143.3 instead represents a valid exercise of the state's authority under the Twenty-First Amendment. (*Id.*, at pp. 114-118.) This Board has neither the jurisdiction nor the authority to overlook a directly relevant holding from the nation's highest court.

We are left, then, to consider appellant's contention that the Department's application of rule 143.3 is "arbitrary and capricious." (App.Br., at p. 20.) Notably, appellant does not appear to dispute the fact of the violations. (See generally App.Br.) Instead, it attempts to escape discipline by arguing that the violations caused no harm.

Rule 143.3 states, in relevant part,

Live entertainment is permitted on any licensed premises, except that:

(1) No licensee shall permit any person to perform acts of or acts which simulate:

(a) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.

[¶ . . . ¶]

(c) The displaying of the pubic hair, anus, vulva or genitals.

(2) Subject to the provisions of subdivision (1) hereof, entertainers whose breasts and/or buttocks are exposed to view shall perform only upon a stage at least 18 inches above the immediate floor level and removed at least six feet from the nearest patron.

(Code Regs., tit. 4, § 143.3.)

Appellant has given this Board no cause to look beyond the plain language of rule 143.3. With regard to statutory law, the Supreme Court has stated, "Where, as here, legislative intent is expressed in unambiguous terms, we must treat the statutory

language as conclusive; 'no resort to extrinsic aids is necessary or proper.'" (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 61 [124 Cal.Rptr.2d 507] [acknowledging, however, that legislative history reinforced the plain-language analysis], citing *People v. Otto* (1992) 2 Cal.4th 1088, 1108 [9 Cal.Rptr.2d 596].) Courts have extended this reasoning to regulations. (See, e.g., *Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (2003) 109 Cal.App.4th 1687, 1695 [1 Cal.Rptr.3d 339], citing *Schmidt v. Foundation Health* (1995) 35 Cal.App.4th 1702, 1710-1711 [42 Cal.Rptr.2d 172] ["Generally, the same rules of construction and interpretation applicable to statutes are used in the interpretation of administrative regulations."].)

We need not consider, as appellant urges, whether there was physical contact between patrons and dancers, or quibble over "what percentage of the time during the performance" each dancer dallied within six feet of patrons. (App.Br. at p. 9.) Those facts are extraneous and irrelevant to the plain language of rule 143.3.<sup>2</sup>

Moreover, rule 143.3 supplies its own justification: "Acts or conduct on licensed premises in violation of this rule are deemed contrary to public welfare and morals, and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted." (Code Regs., tit. 4, § 143.3.) Clearly, rule 143.3. was not simply intended

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2. In its closing brief, appellant shifts to a new argument: that it was deprived of its right to a fair hearing when the ALJ sustained objections to certain lines of questioning, including the relative duration of each violation. (See generally App.Cl.Br.) It argues there are "degrees of crimes in many situations," draws an analogy with the various degrees of murder, and contends the violations here were not particularly serious. (*Id.*, at p. 3.) It was that argument, appellant insists, that it was denied when the ALJ sustained the Department's objections. There are two problems with this argument. First, because there are not "degrees" of a rule 143.3 violation, these lines of questioning were irrelevant and properly excluded. (See Code Regs., tit. 4, § 143.3.) Second, this argument was improperly raised in the closing brief, depriving the Department of the opportunity to respond.

to prevent touching between patrons and performers; it was intended to prevent *the precise conduct it proscribes*. Conduct in violation of rule 143.3 is itself contrary to public welfare and morals. It need not rise to the level of actual touching to merit disciplinary action.

Appellant suggests discipline based on the plain language of rule 143.3 is "arbitrary and capricious" and constitutes "overly aggressive law enforcement." (App.Br., at p. 9.) In *La Rue*, however, the Supreme Court acknowledged the concerns that led the Department to enact rule 143.3, and found that "wide latitude as to choice of means to accomplish a permissible end must be accorded to the state agency that is itself the repository of the State's power under the Twenty-first Amendment." (See *La Rue, supra*, at p. 111.) In other words, the Department has determined that the plain language of rule 143.3 is the best means to protect public welfare and morals, and by operation of the Twenty-First Amendment, that determination is entitled to deference before the courts and this Board.

Appellant does not dispute the fact of the violations alleged, and has failed to show that the Department misapplied the law. We therefore affirm on all counts.

ORDER

The decision of the Department is affirmed.<sup>3</sup>

BAXTER RICE, CHAIRMAN  
PETER J. RODDY, MEMBER  
MEGAN MCGUINNESS, MEMBER  
ALCOHOLIC BEVERAGE CONTROL  
APPEALS BOARD

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

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.

# APPENDIX

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

IN THE MATTER OF THE ACCUSATION AGAINST:

CLUB 215 INC  
CLUB 215 INC  
2680 S LA CADENA DR  
COLTON, CA 92324

ON-SALE GENERAL PUBLIC PREMISES - LICENSE

Respondent(s)/Licensee(s)  
under the Alcoholic Beverage Control Act.

RIVERSIDE DISTRICT OFFICE

File: 48-359693

Reg: 16085102

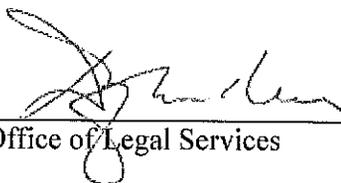
AB: 9675

**CERTIFICATION**

I, Dominique Williams, do hereby certify that I am a Senior Legal Analyst for the Department of Alcoholic Beverage Control of the State of California.

I do hereby further certify that annexed hereto is a true, correct and complete record (not including the Hearing Reporter's transcript) of the proceedings held under Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code concerning the petition, protest, or discipline of the above-listed license heretofore issued or applied for under the provisions of Division 9 of the Business and Professions Code.

IN WITNESS WHEREOF, I hereunto affix my signature on January 24, 2018, in the City of Sacramento, County of Sacramento, State of California.

  
\_\_\_\_\_  
Office of Legal Services

2018 JAN 25 PM 2:36  
RECEIVED  
ABC APPEALS BOARD

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

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

CLUB 215 INC.  
CLUB 215 INC.  
2680 SOUTH LA CADENA DRIVE  
COLTON, CA 92324

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

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

RIVERSIDE DISTRICT OFFICE

File: 48-359693

Reg: 16085102

**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 October 23, 2017. Pursuant to Government Code section 11519, this decision shall become effective 30 days after it is delivered or mailed.

Any party may petition for reconsideration of this decision. Pursuant to Government Code section 11521(a), the Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or if an earlier effective date is stated above, upon such earlier effective date of the decision.

Any appeal of this decision must be made in accordance with Business and Professions Code sections 23080-23089. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005, or mail your written appeal to the Alcoholic Beverage Control Appeals Board, 300 Capitol Mall, Suite 1245, Sacramento, CA 95814.

On or after December 26, 2017, a representative of the Department will contact you to arrange to pick-up the license certificate.

Sacramento, California

Dated: November 15, 2017



Matthew D. Botting  
General Counsel

**RECEIVED**  
NOV 16 2017  
Alcoholic Beverage Control  
Office of Legal Services

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

IN THE MATTER OF THE ACCUSATION AGAINST:

Club 215 Inc.	}	File: 48-359693
Dbas: Club 215 Inc.	}	
2680 South La Cadena Drive	}	Reg.: 16085102
Colton, California 92324	}	
	}	License Type: 48
Respondent	}	
	}	Word Count: 40,238
	}	
	}	Reporter:
	}	Marie Sanchez
	}	Kennedy Court Reporters
	}	
<u>On-Sale General Public Premises License</u>	}	<b><u>PROPOSED DECISION</u></b>

Administrative Law Judge D. Huebel, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at San Bernardino California, on August 24, 2017.

Jennifer Casey, Attorney, represented the Department of Alcoholic Beverage Control.

Roger Diamond, Attorney, represented Respondent, Club 215 Inc.

The Department seeks to discipline the Respondent's license on the grounds that, on various dates, the Respondent permitted several different individuals to violate the prohibitions contained in rule 143.3(1)(a), rule 143.3(1)(c), and rule 143.3(2) while inside the Licensed Premises. (Exhibit 1.)

The Department also seeks to discipline the Respondent's license on the grounds that, on May 26, 2016 and June 17, 2016, Todd Gibboney and Quevedo Romo, respectively, failed to allow or refused to comply with a request to examine the books and records of the Respondent/Licensee, as required by section 25753.

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 24, 2017.

## FINDINGS OF FACT

1. The Department filed the accusation on December 12, 2016.
2. The Department issued a type 48, on-sale general public premises license to the Respondent for the above-described location on February 16, 2000 (the Licensed Premises).
3. Respondent has been the subject of the following discipline:

<u>Date of Violation</u>	<u>Reg. No.</u>	<u>Violation</u>	<u>Penalty</u>
September 26, 1997	98042562	CCR Rules 143.2(2), 143.2(3), 143.3(2)	POIC in lieu of 15-day suspension

The foregoing disciplinary matter is final. (Exhibit 2.)

### December 19, 2015 (Counts 1 and 2)

4. On December 19, 2015, at 8:35 p.m., Department agent Vincent Rock, in a plainclothes capacity, entered the Licensed Premises. Agent Rock sat in one of the chairs placed around the perimeter of a stage. Agent Rock ordered a Coors Light bottled beer for himself, which he was served and drank. The stage is somewhat rectangular in shape, raised approximately 18 inches from the floor (Exhibits A10 & A11<sup>1</sup>), and has a fixed metal vertical pole near the center of the stage. A four inch wide drink/tip rail<sup>2</sup>, raised approximately 12 inches high, ran along the perimeter of the stage. The drink/ tip rail was set back approximately 27 inches from the edge of the stage. (Exhibit A4.) Along the border of the stage was a fixed two-inch thick horizontal metal pole<sup>3</sup>, inset from the edge of the stage approximately seven inches. Measuring from the back side of the trip rail (the side of the trip rail that is furthest away from the edge of the stage) to the edge of the drink/tip rail is 3 feet or 36 inches. (Exhibit A4.)

5. At 8:40 p.m. the disc jockey (DJ) announced a dancer by the name of Mya, who took to the stage. Mya, wearing a bra and underwear, began dancing on the stage. During the second song Mya removed her bra, exposing her breasts and nipples. Agent Rock was seated at the tip rail, approximately three feet away from Mya while she performed and he could see her breasts and nipples. Mya eventually exited the stage.

<sup>1</sup> Exhibit A10 depicts the height measurement of the right side of the stage at 18 5/8 inches. Exhibit A11 depicts the height measurement of the left side of the stage at 18 inches.

<sup>2</sup> The Department referred to this as a "tip rail," whereas Todd Gibboney referred to it in his testimony as both a "tip rail" and a "drink rail." It will be referred to as either, interchangeably, throughout the decision.

<sup>3</sup> Todd Gibboney referred to this horizontal metal pole in his testimony as a "trip rail." For consistency, the undersigned will do the same from here on out.

6. The DJ announced another dancer, named Viera, who came out onto the stage wearing a black, one-piece lingerie. Viera danced on the stage to the first song. During the second song and dance Viera pulled the top of her lingerie down, exposing her breasts and nipples, during which she was approximately two feet away from agent Rock, who could see the entirety of her breasts and nipples. Viera then got down on both of her knees and pushed her chest out over the edge of the stage, with her breasts and nipples exposed, approximately one foot away from agent Rock.

7. Agent Rock left the premises at approximately 9:50 p.m.

**January 8, 2016  
(Counts 3 and 4)**

8. On January 8, 2016, at approximately 11:05 p.m., agent Rock entered the Licensed Premises in a plainclothes capacity. He ordered a Coors Light bottled beer, which he was served and drank.

9. At 11:30 p.m., Viera (the same dancer from December 19, 2015) began dancing on the stage, wearing only a gold-colored bra and black underwear. While dancing to the second song on the stage Viera removed her bra, exposing her breasts and nipples, which agent Rock could see while seated at the tip rail, approximately three feet away from Viera. Viera eventually left the stage.

10. A second dancer, identified only as Amber, began dancing on the stage, wearing a pink bra and black underwear. During her performance on stage Amber removed her bra and agent Rock could see Amber's breasts and nipples from approximately three feet away at the tip rail. Agent Rock left around 1:00 a.m.

**January 21, 2016  
(Counts 5 and 6)**

11. On January 21, 2016, at 8:35 p.m., agents Rock, Gardner and Gonzalmen entered the Licensed Premises in an undercover capacity. Agent Rock ordered a bottle of Coors Light beer, which he was served and drank.

12. At 8:40 p.m., a dancer by the stage name, Roxy (also known as, Crystal Marie Rodriguez) (Exhibit 3), took to the stage wearing a dark colored bra and underwear, and began to dance. During the second song, while Roxy was on the stage approximately two feet away from agent Rock, Roxy removed her bra, exposing her breasts and nipples, which agent Rock could see from his position at the tip rail. Roxy's breasts were exposed within approximately two feet of agent Rock for a duration of 30 seconds on two separate occasions while she was on the stage. Roxy eventually left the stage.

13. A second dancer took to the stage named Viera, who was the same dancer from December 19, 2015 and January 8, 2016. Viera wore a gold-colored bra and black underwear while she danced on stage. At some point during her performance she removed her bra, exposing her breasts and nipples, which agent Rock could see from approximately two feet away.

**May 13, 2016**  
**(Counts 7-14)**

14. On May 13, 2016, at 8:25 p.m., agents Rock and Castillo, in a plainclothes capacity, entered the Licensed Premises. Agent Rock ordered a bottle of Modelo beer, which he was served and drank.

15. A dancer, by the stage name, Jewel (also known as Jonelle Lashon Iles) (Exhibit 4) began dancing on the stage wearing a black bra and white underwear. During the second song on stage Jewel removed her bra, exposing her breasts and nipples, which agent Rock could see from his position at the tip rail, with Jewel approximately three to four feet away from agent Rock. At some point while Jewel was on the stage and approximately three to four feet away from agent Rock, she rubbed her clitoris and vaginal area with her index and middle fingers in a vertical motion, simulating masturbation for seven seconds. Jewel eventually left the stage.

16. A second dancer, by the stage name, Layla (also known as Christy Ann Donnelly) (Exhibit 6), began dancing on the stage wearing an animal print bra and underwear. During the second song, while she was on the stage approximately four feet away from agent Rock, Layla removed her bra, exposing her breasts and nipples, which agent Rock saw. Thereafter, while Layla was on the stage, agent Rock saw Layla rub her clitoris and vaginal area with her middle and index fingers over her underwear, for approximately three seconds, simulating masturbation. Layla eventually left the stage.

17. A third dancer, by the stage name, Lulu (also known as Thi Nga Thach) (Exhibit 7) danced on the stage wearing a white bra and white underwear. During the second song on stage Lulu removed her bra, exposing her breasts and nipples, which agent Rock could see from approximately three feet away. While Lulu was on the stage, agent Rock saw Lulu, on two separate occasions, rub her clitoris area with her middle finger over her underwear, for approximately five seconds, for a total of 10 seconds, simulating masturbation. After the second song ended Lulu got off the stage.

18. A fourth dancer, by the stage name, Kashmir (also known as Janel Martinez) (Exhibit 8) danced on the stage wearing a purple bra and underwear. She danced for two songs. During the second song, while Kashmir was on the stage approximately three feet

away from agent Rock for 15 seconds, Kashmir removed her bra, exposing her breasts and nipples, which agent Rock could see.

19. Thereafter the Department inspection team entered the Licensed Premises and the stage dancing stopped. The agents conducted an inspection for 30 to 35 minutes and then left. During the inspection the agents interviewed and photographed the dancers who were present in the Licensed Premises.

20. After the inspection team agents left, the DJ announced a fifth dancer to the stage, by the stage name, Jocelyn (also known as Catherine Rodriguez Villarreal) (Exhibit 9). Jocelyn danced on the stage wearing a white bra and underwear. During her performance on the stage Jocelyn removed her bra, exposing her breasts and nipples, while agent Rock observed from a distance of approximately three feet away from Jocelyn. Agent Rock thereafter observed Jocelyn sit down on the stage on her buttocks, plant the soles of her feet on the stage, spread her legs apart, and with her hand she pulled her underwear to the side, exposing her genitals, including the labia, for approximately three seconds. After exposing her genitals for approximately three seconds she moved her underwear back in place and continued her dance performance on stage. Agent Rock then observed as Jocelyn danced topless on the stage approximately one foot away from an unknown male patron with her breasts and nipples exposed.

**May 26, 2016  
(Count 15)**

21. On May 26, 2016, a Department agent, hand-delivered to Todd Gibboney, Respondent's CEO, a Department Notice to Produce Records. Todd Gibboney initialed the notice at the bottom left to acknowledge receipt thereof. The notice, dated May 26, 2016, requested, pursuant to provisions of section 25753 of the Business and Professions Code, the Respondent furnish the requested information within 10 days of the date of the notice. The notice further informed Respondent that failure to comply within the time period would result in an accusation filed against Respondent's license. The information requested included (1) Copies of any/all work schedules for any/all staff members including, employees, security, dancers, independent contractor, etc., at the Licensed Premises; and (2) Copies of any/all employee records for all staff members (including stage names, names, addresses, telephone numbers, and driver's license numbers), at the Licensed Premises. Agent Rock was listed as the person to contact. The Riverside District Office address, telephone number, and agent Rock's e-mail address were provided on the notice. (Exhibit 5, first page.)

22. Neither the Department nor agent Rock received the requested information from the Respondent within the time frame requested. Todd Gibboney has the authority to release

such requested documents. There was no evidence presented that Todd Gibboney or Respondent was not capable of complying within the time period.

**June 17, 2016  
(Count 16)**

23. On June 17, 2016, a Department agent, hand-delivered to Job Romo, Respondent's day-time manager and disc jockey, a Department Notice to Produce Records. Job Romo initialed the notice at the bottom left to acknowledge receipt thereof. The notice, dated June 17, 2016, requested, pursuant to provisions of section 25753 of the Business and Professions Code, the Respondent furnish the requested information within 10 days of the date of the notice. The notice further informed Respondent that failure to comply within the time period would result in an accusation filed against Respondent's license. The information requested included (1) Copies of any/all work schedules for any/all staff members including, employees, security, dancers, independent contractor, etc., at the Licensed Premises; and (2) Copies of any/all employee records for all staff members (including stage names, names, addresses, telephone numbers, and driver's license numbers), at the Licensed Premises. Agent Rock was listed as the person to contact. The Riverside District Office address, telephone number, and agent Rock's e-mail address were provided on the notice. (Exhibit 5, second page.)

24. Job Romo informed the agent that he did not have access to the records requested and placed the Department notice in the drop box outside Todd Gibboney's locked office inside the Licensed Premises. Job Romo thereafter advised Todd Gibboney of the Department's notice and that he placed said notice in Todd Gibboney's box outside his office. Todd Gibboney received the said notice.

25. Neither the Department nor agent Rock received the requested information from Respondent within the time frame requested.

26. On June 29, 2016, a Department agent, hand-delivered to Job Romo, Respondent's day-time manager and disc jockey, a Department Notice to Produce Records. Job Romo initialed the notice at the bottom left to acknowledge receipt thereof. The notice, dated June 29, 2016, requested, pursuant to provisions of section 25753 of the Business and Professions Code, the Respondent furnish the requested information within 10 days of the date of the notice. The notice further informed Respondent that failure to comply within the time period would result in an accusation filed against Respondent's license. The information requested included (1) Copies of any/all work schedules for any/all staff members including, employees, security, dancers, independent contractor, etc., at the Licensed Premises; and (2) Copies of any/all employee records for all staff members (including stage names, names, addresses, telephone numbers, and driver's license numbers), at the Licensed Premises. Agent Rock was listed as the person to contact. The

Riverside District Office address, telephone number, and agent Rock's e-mail address were provided on the notice. (Exhibit 5, third page.)

27. Job Romo informed the agent that he did not have access to the records requested and placed the Department notice in the drop box outside Todd Gibboney's locked office inside the Licensed Premises. Job Romo thereafter advised Todd Gibboney of the Department's notice and that he placed said notice in Todd Gibboney's box outside his office. Todd Gibboney received the said notice.

28. Thereafter agent Rock received from Todd Gibboney an incomplete response to the Notice to Produce. The information not produced included the work schedules and employee records (including stage names, names, addresses, telephone numbers, and driver's license numbers) for dancers Mya, Viera, and Amber.

#### **Respondent's Witnesses**

29. Job Romo appeared and testified at the hearing. He has worked for the Respondent for two to three years. He is the Respondent's day-time DJ and manager, in charge of supervising the dancers during the day shift. Mr. Romo's job duties also include providing security and bartending. At the Licensed Premises, on June 17, 2016, and June 26, 2016, he received the Department's hand-delivery of a Notice to Produce (Exhibit 5, pages 2 and 3), both of which he initialed at the bottom left corner to acknowledge receipt thereof. He informed the agents he could not do anything about the notices, but that he would "give them to the right person." Mr. Romo testified that it is not within the scope of his authority or part of his job duty to provide or release company records to third parties, and that he does not have access to such records. Mr. Romo does not have the key or access to Todd Gibboney's locked office inside the Licensed Premises. The same date he received the Notices to Produce he placed them in the drop box outside Todd Gibboney's locked office and thereafter advised Todd Gibboney of the same.

30. Mr. Romo said that a dancer by the name of Viera sounded familiar to him, and that he thought she works the night shift for Respondent. He remembered the dancer by the name Amber, and said she does not work with him at the Licensed Premises during the day shift, but she works for Respondent on the evening shift. He believed a dancer by the name Mya either works during the day with him or the evening shift at the Licensed Premises. Mr. Romo said that he shares managerial duties with Fernando Navarro, who is the night manager - with Mr. Romo and Mr. Navarro each responsible for the dancers who work during Mr. Romo and Mr. Navarro's respective shifts.

31. Fernando Navarro appeared and testified at the hearing. Mr. Navarro has worked for the Respondent for 21 years and has known the owner's son, Todd Gibboney, during that

time. He described the nature of the Licensed Premises' business as a Gentlemen's club where girls dance on the stage topless to music played by a DJ and patrons throw the dancers money. Mr. Navarro claimed he does not "really have a title," but that he provides security and bartends for the Respondent, works with and supervises the Respondent's dancers in the evenings, and works with Todd Gibboney to make sure everything is in order. He said that some people refer to him as a manager and others refer to him as security. He acknowledged he and Mr. Romo have somewhat similar jobs; they both provide security, DJ and bartend for Respondent, with Mr. Romo working with the girls during the day and Mr. Navarro working with the girls in the evenings. Mr. Navarro did not hire Mr. Romo, when Mr. Romo was hired a "few years back," but Mr. Navarro taught Mr. Romo how to DJ and bartend.

32. Mr. Navarro has hired some of the Respondent's dancers, either when the ladies walk into the club looking for work, or through Craig's List postings he places. He said the dancers are considered independent contractors. The Respondent does not pay the dancers directly, "they make money off the dances and on stage from tips from customers." The dancers let him know when they want to work and he keeps track of their schedules by writing down which days they want to work. He said there are a few of the dancers who have worked for the Respondent for a while, but Respondent has quite a bit of a turnover of dancers. Mr. Navarro provides instruction to the dancers when they are hired as to what they can and cannot do. When asked whether he has any problem enforcing the rules with the dancers, Mr. Navarro replied, "uhm, no, not really." He said he lets the dancers know when they do not comply with the rules. Mr. Navarro said the dancers are allowed to dance topless, but only on the stage. He maintained that the dancers usually take their top off during the second song, but are free to dance with their top off during the first song as long as they are on the stage, and they do not come off the stage with their top off. He acknowledged that when the dancers remove their tops their breast and nipples are exposed. Mr. Navarro said the Respondent has on each of the two stage mirrors red tape markers, which are located six feet from the tip rail and three feet from the edge of the stage. (Exhibits A1, A9 & A12.) The dancers are told, "Once their top is off to stay behind the six foot marker," and they cannot come down off the stage unless they are fully dressed. Mr. Navarro said that while the dancers are on the stage dancing topless they "usually" stay right around the pole at the center of the stage, which "keeps them from the tip rail." The pole is approximately nine feet from the tip rail. He claimed there is a marker on the floor of the stage that is three feet from the edge of the stage and six feet from the tip rail. The evidence revealed there were no such markers on the floor of the stage during the dates in question.

33. Mr. Navarro works during the day only on Saturdays and in the evenings on other days from 6:30 p.m. to 2:30 a.m. Because of that he knew he did not work during the day on Friday January 8, 2016, and Thursday January 21, 2016. He did not know if he worked during the day on Saturday, December 19, 2015. He remembers the

Respondent's dancers' names and remembered Mya and Viera. He said, however, that Viera no longer works for the Respondent. Because he could not remember dates he did not know whether Viera was working in December of 2015. He said he did remember that he worked Friday night on May 13, 2016, and recalled when the Department agents came into the Licensed Premises.

34. Catherine R. Villarreal appeared and testified at the hearing. She has been working as a topless dancer for the Respondent, on and off for three years. She was referred to the Licensed Premises by her best friend, who was a dancer for Club 215, Inc. Ms. Villarreal uses the stage name, Jocelyn. She signed an independent contract agreement given to her by Fernando Navarro when she first was hired and he explained the rules to her. She could not remember all the rules but said they included that she must be on time to work, charge \$20 for lap dances, is prohibited from wearing see-through clothing, drinking obnoxiously, meeting-up with patrons after work, getting picked up or dropped off by patrons, and she is to let the bouncers walk her out and tip the DJ and manager. She is paid cash by customers, either when she performs lap dances at \$20 each or through customer tips when she dances on the stage. She said the dancers are not allowed to be topless at the tip rail during the second song of their performance. When asked by Respondent's counsel, "On May 13, 2016, the night of the raid, did you pull your underwear to the side to expose your private area for three seconds?" She replied, "No, I never do that." She also denied having "planted both feet on the stage" on May 13, 2016, "or at any other time." She claimed she honors the Respondent's rule to remain six feet from the nearest patron while dancing topless on stage, and claims she did not violate that rule on May 13, 2016, or at any time.

35. On May 13, 2016, when the Department inspection team entered the Licensed Premises, Ms. Villarreal was working as a topless dancer therein. She went with Department agents and other dancers to a back room, away from the customers, where her photograph was taken (Exhibit 9), she answered questions and signed a document. She acknowledged that she knows Todd Gibboney, who was seated in the hearing during her testimony, and that he was present in the Licensed Premises on the evening of May 13, 2016.

36. Ms. Villarreal said her shift at the Licensed Premises is from 7:00 p.m. to 2:00 a.m. She makes her own schedule by letting the night manager, Fernando Navarro, know each Sunday what nights during the week she wants to work. She typically dances the same nights of the week each week. The independent contract agreement she signed includes the rules which she recited earlier in her testimony (listed above). She added that when she provides lap dances to customers she must keep one foot on the ground. She said she also shares her tips with the bouncer. If she earns \$800 or more in a night, she will share her tips with the bartender, but only if she likes the bartender working that night. She

claimed that the sharing of her tips was not a rule, but "basically it's etiquette," something she knows "from prior clubs."

37. Ms. Villarreal knows the dancer, who uses the stage name, Amber. She said Amber still works for the Respondent as a dancer, and "every now and then [she] see[s] her when [she] works Friday night." Ms. Villarreal claimed that although she shares the changing room with the other dancers she "never ask[s] them their names, stage names, and makes no conversation with these people." Department counsel then showed photographs of Respondent's dancers to Ms. Villarreal. Ms. Villarreal admitted to knowing: (1) Crystal Marie Rodriguez (Exhibit 3) as a dancer at the Licensed Premises, but only knowing her by her stage name, Roxy, (2) Jonelle Lashon Iles (Exhibit 4, stage name "Jewel") as a dancer at the Licensed Premises, but not recalling her name, having not seen her in over a year, (3) Thi Nga Thach (Exhibit 7) as a dancer at the Licensed Premises, and knowing her by her stage name, Lulu, and that Lulu was working at the Licensed Premises on May 13, 2016, that she is still a dancer and changed her stage name, and (4) Janel Martinez (Exhibit 8, stage name "Kashmir") as a dancer at the Licensed Premises, and that she lived where Ms. Villarreal lived, but not recalling her name, and that she is not a dancer at the Licensed Premises any longer, but knowing she was working as a dancer at the Licensed Premises on May 13, 2016.

38. Todd Gibboney appeared and testified at the hearing. He acknowledged that the original license which was issued in approximately 1994 was held solely by his father, Albert L. Gibboney. On February 16, 2000, when the current license was issued under Club 215 Inc. it was and is currently held solely by Albert L. Gibboney, as an officer thereof. Todd Gibboney has been working for his father since issuance of the first license. He is a manager and CEO of the Licensed Premises. He has never been a licensee of the Licensed Premises. He admitted to being present in the Licensed Premises on the evening of the alleged violations on May 13, 2016, "stationed at the bar and talking to customers."

39. Todd Gibboney took photographs of the interior of the Licensed Premises the day before the hearing. The said photographs were marked and entered as Exhibits A1 through A12. At the hearing Todd Gibboney looked through Exhibits A1 through A12 and described them. Regarding Exhibits A1, A6 and A8, he described those as depicting a red tape on the trip rail to let the dancers know where to remain behind to keep six feet from the patrons while dancing topless on the stage. Regarding Exhibit A9 he said the dancers' pole at the center of the stage is approximately four feet from the red tape marker on the mirror. The red tape markers on the trip rails and mirrors have always been there, including during the dates of the investigation at hand, and have never been removed. During the dates of the investigation (December 19, 2015, January 8, 2016, January 21, 2016, and May 13, 2016), there was no red tape or markers on the stage floor to indicate to the dancers where the six foot line demarcation started. Todd Gibboney

testified that Exhibit A4 shows a measuring tape which depicts the distance, between the back side of the trip rail (where the dancer would be) to the far edge of the drink rail (where the patron would sit), to be 40 inches (3 feet 4 inches). He testified that Exhibit A5 depicts his employee, Mr. Romo, seated where a patron might normally sit behind the drink rail, with a measuring tape hooked to the back side of the trip rail, running the distance to where Mr. Romo was seated (slightly backed away from and not touching the drink rail), and that measurement is 60 inches (five feet). Todd Gibboney admitted that the measurement he described in Exhibit A5 is less than six feet.

40. When the Department attorney asked Todd Gibboney whether he had any photographs of the stage on the dates of the investigation, he admitted to having a video that was not produced because he felt it was not relevant. He testified that he has the best video surveillance system for the interior of the Licensed Premises, the video recordings of which he maintains for 10 to 15 days, or which can be saved for future reference. He further acknowledged having "lots of photos of the stage between December 2015, and May 13 2016,...on archives, computers and disposable cameras" that he did not produce, but chose instead to bring photographs to the hearing which he took the day prior to the hearing.

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

### CONCLUSIONS OF LAW

1. Article XX, section 22 of the California Constitution and section 24200(a) provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.
2. 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 143.3(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 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.

4. 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.

5. Rule 143.3 also provides, in an unnumbered paragraph, that "[n]o licensee shall permit any person to remain in or upon the licensed premises who exposes to public view any portion of his or her genitals or anus."

6. An alcoholic beverage licensee has an active duty to prevent violations and a failure to prevent unlawful conduct is legally termed "permitting" within the meaning of 24200(b). *Mercurio v. Department of Alcoholic Beverage Control* (1956) 144 Cal.App. 2d 626. Further, a licensee is affirmatively bound to maintain a law abiding premises and passive or acquiescent conduct constitutes "permitting" under the law. (*Id.*; *Givens v. Department of Alcoholic Beverage Control* (1959) 176 Cal.App.2d 529; *Mundell v. Department of Alcoholic Beverage Control* (1962) 211 Cal.App.2d 231.

7. A licensee is vicariously responsible for the on-premises acts of his employees. Such vicarious responsibility is well settled by case law. See *Harris v. Alcoholic Beverage Control Appeals Board* (1962) 197 Cal.App.2d 172 [17 Cal.Rptr. 315, 320]; *Morel v. Department of Alcoholic Beverage Control* (1962) 204 Cal.App.2d 504 [22 Cal.Rptr. 405, 411]; *Mack v. Department of Alcoholic Beverage Control* (1960) 178 Cal.App.2d 149 [2 Cal.Rptr. 629, 633].

8. "...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. etc. Appeals Bd., supra*, 252 Cal. App. 2d at p. 522.)

9. 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 143.3(1)(a), 143.3(1)(c), and 143.3(2), as alleged in counts 1 through 14 of the accusation by reason of the matters set forth in Findings of Fact, paragraphs 4 through 18, 20, 29, 31 through 33, 38, and 39.

10. On May 13, 2016, various dancers/entertainers, including Jewel, Layla, and Lulu, were permitted by the Respondent/Licensee's agent or employee, to perform acts of or acts which simulate masturbation upon the Licensed Premises in violation of section

143.3(1)(a) as alleged in counts 8, 9, and 11. (Findings of Fact ¶¶ 14 through 17, 29, 31 through 33, and 38.)

11. On May 13, 2016, dancer/entertainer Jocelyn, was permitted by the Respondent/Licensee's agent or employee to remain in or upon the Licensed Premises while her genitals were displayed and exposed to public view, in violation of section 143.3(1)(c) as alleged in count 14. (Findings of Fact ¶¶ 14, 20, 29, 31 through 33, and 38.)

12. On December 19, 2015, January 8, 2016, January 21, 2016, and May 13, 2016, Respondent/Licensee's agent or employee permitted various dancers/entertainers, including Mya, Viera, Amber, Roxy, Jewel, Lulu, Kashmir, and Jocelyn, whose breasts were exposed to view, to perform upon a stage in the Licensed Premises, not at least six feet from the nearest patron, in violation of section 143.3(2) as alleged in counts 1 through 7, 10, 12 and 13. (Findings of Fact ¶¶ 4 through 15, 17, 18, and 20, 29 through 33, 37 and 38.) Sworn, direct testimony of agent Rock credibly indicated that all said dancers, while the said dancers' breasts were exposed, were within less than six feet from agent Rock or a patron during said violations. Credible distance descriptions by agent Rock ranged from dancers being within one foot, two, three and four feet from agent Rock and within one foot of the said patron. In fact, Respondent's own witness testimony and photographs established that Respondent has red tape markers on the trip rail to let the dancers know to stay behind that mark for the "six foot rule." However, Todd Gibboney's own measurements and admission reveal that a dancer at the trip rail would be five feet or less than six feet away from any patron seated behind the drink rail. (Findings of Fact ¶ 39.) With Todd Gibboney's measurement Mr. Romo was seated slightly away from and not touching the drink rail. It is possible for a patron to be seated closer to the drink rail than Mr. Romo is depicted in Exhibit A5; with a patron's elbows either leaning on or over the drink rail the measurement would be far less than five feet. Furthermore, there was no evidence agent Rock was impaired or did not have a clear view during any of the violations. Respondent's arguments otherwise are without merit.

13. Respondent argued the "exposure" for three seconds, the "touching" lasting for seven seconds, and the number of times a dancer came within six feet of a patron is minuscule, de minimis evidence, all insufficient to be violations of Rule 143.3. This argument is without merit. Firstly, Rule 143.3 does not require that the acts which constitute the violations occur for a certain duration or percentage of the performance. Secondly, there is no evidence in the record that the "touching," "exposure" or number of times a dancer came within six feet of a patron while her breasts were exposed while on stage, was inadvertent or incidental. The purposeful placement by Respondent of the red tape markers on the trip rail, as an attempt to let the dancers know to stay behind that mark while topless, failed because Todd Gibboney admitted that his own measurement showed that a dancer at the trip rail would be five feet or less than six feet away from any patron

seated behind the drink rail. During the dates of the investigation (December 19, 2015, January 8, 2016, January 21, 2016, and May 13, 2016), there were no red tape or markers on the stage floor to indicate to the dancers where the six foot line demarcation started. (Findings of Fact ¶ 39.) Fernando Navarro said the dancers are told, "Once their top is off to stay behind the six foot marker." (Findings of Fact ¶ 32.) With the red tape markers on the trip rail, it is no wonder the dancers repeatedly came within less than six feet of agent Rock, who was seated at the tip/drink rail, and the one said patron. Finally, the evidence in the record established there was a sufficient amount of "exposure" and "touching" for said violations.

14. During the hearing, and partially referenced in Respondent counsel's closing argument, Respondent's counsel argued that the 143.3 rules constitutionally infringe on first amendment rights of the dancers to perform. At one point the Department objected to the argument based on relevance. The undersigned sustained the objection. During the hearing the undersigned advised Respondent the argument was not relevant to the hearing at hand because the 143 set of rules have already been held to be constitutional by the U.S. Supreme Court<sup>4</sup> and if Respondent wished to challenge that decision Respondent may do so, but there was no reason for the undersigned to get into the constitutionality of the 143 set of rules in the hearing at hand, given there is already binding precedent on the issue.

15. Respondent argued the dancers were not employees but independent contractors and that the licensee did not permit the violations at hand. This argument is rejected. The said violations were permitted by the Respondent in that they occurred repeatedly over four different dates, within plain view and in the presence of Respondent's management, security guards, and bartenders, all of whom are Respondent's employees. Todd Gibboney, testified that he is a manager and the CEO of the Licensed Premises, and admitted to being present in the Licensed Premises on the evening of said violations on May 13, 2016. The evidence established that Mr. Romo and Mr. Navarro both serve in managerial, bartending and security positions for the Respondent; both of whom supervise the dancers - Mr. Romo during the day shifts and Mr. Navarro during the night shifts. (Findings of Fact ¶¶ 29 through 33, and 38.) Whether or not the dancers were agents (in the form of independent contractors) or employees, Todd Gibboney, Mr. Romo and Mr. Navarro, who were clearly employees/agents of Respondent, permitted the said dancers to, in plain view, engage in the said violations in the Licensed Premises. Respondent is vicariously liable for the acts of its employees. As employees their actions and knowledge are imputed to the Respondent.

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<sup>4</sup> California v. LaRue (1972) 409 U.S. 109 [93 S.Ct. 390].

16. Section 25753 provides that, "The Department may make any examination of the books and records of any licensee or other person and may visit and inspect the premises of any licensee it may deem necessary to perform its duties under this division."

17. Cause for suspension of the Respondent's license exists under Article XX, section 22 of the California State Constitution, and sections 24200(a) and (b) on the basis that, on May 26, 2016, the Respondent's CEO and manager, Todd Gibboney received hand-delivery of the Notice to Produce Records and failed to allow and refused to comply with the said request to examine the books and records of Respondent/Licensee in violation of section 25753, as alleged in count 15 of the accusation. The notice required the information be produced within 10 days of receipt thereof. Todd Gibboney has the authority to release such documents. There was no evidence presented that he or Respondent was not capable of complying within the time period. The documents were not produced within the time frame requested. The Department had to hand-deliver three separate such Notices to Produce Records upon Respondent/Licensee before Todd Gibboney contacted the Department and provided a partial response thereto. Todd Gibboney failed to produce the work schedules and employee records (including stage names, names, addresses, telephone numbers, and driver's license numbers) for Respondent's dancers, Mya, Viera, and Amber. The evidence established, including through Respondent's witnesses, that all three dancers worked for Respondent, and that at least Amber and Mya still do. (Findings of Fact ¶¶ 21 through 30, 33, and 37.)

18. Cause for suspension of the Respondent's license does *not* exist under Article XX, section 22 of the California State Constitution and sections 24200(a) and (b) for the violation of section 25753, as alleged in count 16 of the accusation. Mr. Romo credibly testified that on June 17, 2016, he advised the Department agent he did not have access to the records sought and that he would deliver the notice to the "right person." Mr. Romo credibly maintained that he did not have the authority to release any company records to third parties. Mr. Romo further credibly testified that he did get the notice to the person with that authority, Todd Gibboney, in a timely fashion. (Findings of Fact ¶¶ 23 through 25, and 29.)

19. In determining the credibility of a witness, as provided in section 780 of the Evidence Code, the administrative law judge may consider any matter that has any tendency in reason to prove or disprove the truthfulness of the testimony at the hearing, including a statement by the witness that is inconsistent with any part of the witness's testimony at the hearing, the extent of the opportunity of the witness to perceive any matter about which the witness testifies, the existence or nonexistence of any fact testified to by the witness, the demeanor and manner of the witness while testifying, and the existence or nonexistence of a bias, interest, or other motive.

20. If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust. (Evidence Code, section 412.)

21. Catherine R. Villarreal's contentions that (1) on May 13, 2016, she did not engage in the conduct constituting the violations as alleged, (2) tipping the DJ, manager and bouncers are not part of the Respondent's rules or independent contract agreement she signed, but "basically etiquette," something she "just know[s] from prior clubs," and (3) she does not make conversation with or know the names of the dancers with whom she works and shares a dressing room, are disbelieved for the following reasons. Ms. Villarreal's inconsistent testimony, bias and motive disprove the truthfulness of her testimony in which she denied engaging in the violations as alleged. When Ms. Villarreal was first asked to explain the rules she was given when she was first hired by Respondent, she gave a litany of rules, with the last listed as "then tip the DJ and manager." Later upon cross-examination she changed her testimony and claimed that sharing her tip with the DJ, manager and bouncer was not a rule, in an attempt to correct her prior testimony. After Ms. Villarreal claimed she did not engage in conversation with or know the names of the dancers, with whom she works, she immediately admitted to knowing certain dancers and their names. Ms. Villarreal has an obvious bias and motive to deny engaging in the conduct making up the violations of May 13, 2016 – that includes her bias and motive as an employee, to protect her employment, and with her boss, Todd Gibboney, observing her entire testimony.

22. Fernando Navarro's contentions that on the dates of December 19, 2015, January 8, 2016, January 21, 2016, and May 13, 2016, there was a marker on the floor of the Licensed Premises' stage, and his claim not to be a manager are disbelieved due to his inconsistent testimony and the contradictory testimony presented by Respondent's own witnesses. In Mr. Navarro's testimony he described his managerial duties of hiring dancers, giving dancers instruction on Respondent's rules, disciplining dancers when they violate Respondent's rules, working with the dancers during the night shift, similar to Mr. Romo who works with the dancers during the day, and that he is referred to as a manager by others. Mr. Navarro testified that his duties are "pretty much the same" as Mr. Romo's duties, just "a little bit different." Mr. Romo testified that he is a day manager and has supervision of the dancers during the day, sharing the manager duties with Mr. Navarro, who supervises the dancers in the evening. Todd Gibboney's testimony contradicted Mr. Navarro's testimony. Todd Gibboney testified that during the dates of the investigation (December 19, 2015, January 8, 2016, January 21, 2016, and May 13, 2016), there was no red tape or marker on the stage floor to indicate to the dancers where the six foot line demarcation started. Todd Gibboney presented photographs which depicted the Licensed Premises' stage. In describing Exhibits A1, A6 and A8, Todd Gibboney said they depicted the red tape on the trip rail, which has always been there, to let the dancers know

where to remain behind to keep six feet from the patrons while dancing topless on the stage.

23. Todd Gibboney's contentions that (1) he does not have a video of the alleged incidents or of the Licensed Premises' stage from the dates of the investigation, (2) the allegations and testimony of agent Rock as to the alleged violations were absolutely false, and that agent Rock's descriptions of the dancers engaged in simulated masturbation "does not happen at my club," are disbelieved for the following reasons. Todd Gibboney presented inconsistent, evasive testimony, in addition to his bias as the CEO and manager of the Licensed Premises and son of the Licensee-Respondent, disproved the truthfulness of his testimony. When first asked upon cross-examination whether he had any photos of the stage taken the day of the investigation he replied, "I have a video." When asked where it was he replied, "Not here." When asked if he has a video of the incidents he replied yes that he did, but that he did not bring the video because he felt it was not relevant. He then changed his testimony and claimed he did not have any such video(s) because he was not aware there was a problem; despite the fact on May 13, 2016, the Department's inspection team entered the Licensed Premises and began interviewing and photographing Respondent's dancers; and despite the fact he received a Notice to Produce Records dated May 26, 2016. He then claimed that the video he has does not depict the entire night of May 13, 2016, and only shows certain scenes such as when the agents entered and spoke to him and the dancers. He then presented inconsistent testimony about whether he had other photographs of the stage during the dates in question. He initially denied having any other photographs and then immediately changed his testimony and said, "Actually, I have lots of photos of the stage between December 2015 and May 13 2016. I probably have several. I have to go on archives, computers and disposable cameras. I did not bring them today."

24. By contrast Department agent Rock presented consistent testimony throughout the hearing. In balancing the inconsistent, evasive and biased testimony of Respondent's witnesses against the consistent, unbiased testimony of agent Rock, agent Rock's testimony is deemed more credible.

### **PENALTY**

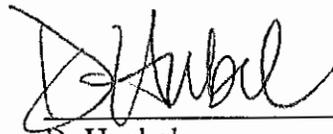
The Department requested that the Respondent's license be suspended for 30 days, on the basis that, despite the length of licensure, Respondent has prior disciplinary history for the same conduct, and was not as cooperative in producing the information for dancers Mya, Viera and Amber, and had the opportunity to produce stronger proof of the violations in the form of the video Todd Gibboney claimed to have. The Respondent argued the penalty should be minimal, such as payment of a "small fine or probation or something." The penalty recommended herein complies with rule 144.

**ORDER**

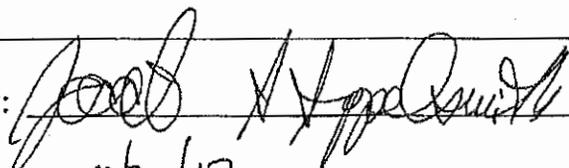
Counts 1 through 15 are sustained. In light of these violations, the Respondent's on-sale general public premises license is hereby suspended for 30 days.

Count 16 is dismissed.

Dated: September 18, 2017



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D. Huebel  
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: 
Date: 10/23/17