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

**AB-9759**
File: 21-429146 Reg: 18086830

JK FIDELIS, INC.,
dba A4 Liquor
8842 Walker Street
Cypress, CA 90630,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: July 25, 2019
Los Angeles, CA

**ISSUED AUGUST 12, 2019**

*Appearances*: *Appellant:* Rick A. Blake, of Blake & Ayaz, a Law Corporation, as counsel for JK Fidelis, Inc.,

*Respondent*: John P. Newton, as counsel for the Department of Alcoholic Beverage Control.

## OPINION

JK Fidelis, Inc., doing business as A4 Liquor (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] revoking its license, with revocation stayed for 180 days to permit transfer of the license to a person (or persons) acceptable to the Department, because it purchased and received distilled spirits, believing them to have been stolen, in violation of Business and Professions Code section 24200, subdivisions (a) and (b) and Penal Code sections 664/496(a). In addition, the

[1] The decision of the Department, dated October 10, 2018, is set forth in the appendix.

Department suspended appellant's license for 20 days and indefinitely thereafter until the transfer occurs or the license is revoked.

FACTS AND PROCEDURAL HISTORY

Appellant's type 21, off-sale general license was issued on September 2, 2005. There are two instances of prior discipline against the license, both involving sales of alcoholic beverages to minors.

On April 23, 2018 the Department instituted a 4 count accusation against appellant charging that on 4 separate occasions – September 22, 2016, December 13, 2016, May 18, 2017, and July 19, 2017 – appellant's employee purchased and received distilled spirits he believed to be stolen, in violation of Article XX, section 22 of the California Constitution, Business and Professions Code section 24200, subdivisions (a)[2] and (b)[3], and Penal Code sections 664/496(a)[4].

At the administrative hearing held on July 19, 2018, documentary evidence was received, and testimony concerning the violation charged was presented by Department Agent Randal Mioloy; and Jae Kun Limb, respondent's corporate officer and 100

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[2] Both Article XX, section 22 of the California Constitution, and Business and Professions Code 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.

[3] Business and Professions Code section 24200(b) provides that a licensee's 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.

[4] Penal Code section 664 provides that a person who attempts to commit any crime, but fails, or who is prevented or intercepted in its perpetration, shall nevertheless be punished.

Penal Code section 496 makes it unlawful to buy or receive property which has been stolen, knowing it to have been stolen. The two Penal Code provisions, in combination, embrace the conduct involved here.

percent shareholder. Robert Kim, chairman of the Orange County Korean American Grocer's Association, also testified on appellant's behalf.

Testimony established that on September 16, 2016, at approximately 6:45 p.m., Department Agents Mioloy and Raul Garcia, in an undercover capacity, entered the licensed premises and saw Limb behind the sales counter. The premises were open for business and the agents saw alcohol displayed for sale. Agent Mioloy asked Limb if he would be interested in buying any surplus alcohol. Limb told the agents to "come back at a later time to talk." (Findings of Fact, ¶ 4.)

On September 22, 2016, Agents Mioloy and Garcia entered the licensed premises with one 750 milliliter bottle each of Hennessy Cognac, Grey Goose Vodka, and Malibu Rum. (Ex. 6.) Again, agents observed Limb behind the sales counter and that alcohol was displayed for sale. The agents approached Limb and placed the bottles of distilled spirits on the counter. Limb asked the agents the price of each bottle, and Agent Mioloy replied that the rum was $10, the vodka was $15, and the Cognac was $20.

Limb stated that he was not interested in buying the Malibu Rum. Agent Garcia advised Limb that if he was interested in the vodka and the cognac, that there were two additional bottles of each in the car. Limb indicated that he was interested and Agent Garcia retrieved the bottles. While Agent Garcia was outside, Limb asked Agent Mioloy where the bottles came from. Agent Mioloy stated that he had a buddy that steals it from his work.

Limb offered the agents $60 for the three bottles of Hennessy Cognac and three bottles of the Grey Goose Vodka. After negotiations, the agents and Limb settled on $75 for all six bottles. Limb paid Agent Mioloy with money from the cash register.

Agent Mioloy told Limb that he has additional bottles and could come back. Limb declined, stating that it was "too dangerous." Agent Garcia told Limb that they could come back at a later time and see how the bottles were doing. Limb agreed and the agents left the premises.

On December 13, 2016, Agents Mioloy and Garcia returned to the licensed premises in an undercover capacity, carrying one bottle each of Grey Goose Vodka Hennessy Cognac, and two bottles of Chivas Regal Whisky. (Ex. 7.) The agents approached Limb at the sales counter and set down the bottles. As before, the agents advised Limb that they had two additional bottles each of the Hennessy and Grey Goose.

Limb rejected the bottles of Chivas Regal Whisky, but offered $60 for the vodka and cognac. Agent Mioloy told Limb that they needed at least $80 as their friend has to steal the bottles from his work and there is a lot of risk. Limb placed his hand on one of the bottles and asked where it came from. Agent Mioloy repeated that his friend stole the alcohol. Limb stated that he did not want to lose his liquor license, but nevertheless, offered $65 for all six bottles. After negotiations, Limb and the agents agreed to $80. Limb paid using money from the cash register and the agents left the premises.

On May 18, 2017, the agents entered the licensed premises with one bottle each of Grey Goose Vodka and Hennessy Cognac. The agents greeted Limb and placed the bottles on the sales counter. The agents told Limb that they had two additional bottles of both the vodka and the cognac in their car. Limb asked the agents where they got the alcohol and the agents replied that their buddy "steals it from work." Limb asked the agents how much they wanted for each bottle. Agent Garcia told Limb that

the bottles were $14 each. Limb then offered $60 for all six bottles. After negotiations, Limb and the agents settled on $65.

On July 19, 2017, the agents again entered the licensed premises in an undercover capacity carrying three 750 milliliter bottles of Grey Goose Vodka and two 750 milliliter bottles of Hennessy Cognac. The agents presented the bottles to Limb, and Limb asked where the bottles came from. The agents confirmed the bottles were the "same as last time," and that their "buddy steals it from work."

Limb offered $50 for all five bottles of distilled spirits, and after negotiations, settled on the price of $55. Agent Mioloy accepted the money and exited the store with Agent Garcia. Thereafter, a team of agents entered the licensed premises, advised Limb of the violations, and issued a citation.

The administrative law judge (ALJ) submitted her proposed decision on August 15, 2018, recommending that the license be revoked, with said revocation stayed for 180 days to permit person-to-person transfers of the license (and concurrently suspending the license for 20 days). The ALJ further recommended that if the license was not transferred within 180 days, that it be permanently revoked. The Department adopted the proposed decision in its entirety on September 21, 2018, and a Certificate of Decision was issued on October 10, 2018.

Appellant then filed a timely appeal raising the following issues: (1) the wording of the penalty is confusing and ambiguous, and; (2) the penalty is excessive.

DISCUSSION

Appellant contends that the wording of the penalty is "confusing, ambiguous and outside the Department's norm." (AOB, at p. 3.) Specifically, appellant claims that the Department's requirement that the license be transferred within 180 days, as opposed to only initiating the transfer process, is unduly harsh, as "a timely application stalled for reasons beyond the licensee's control could result in a revocation while the application is pending." (*Id.* at pp. 2-3.) Appellant contends that the language of the penalty should be consistent with prior Department decisions which only require initiation of the transfer process during the revocation stay period. (*Id.* at p. 3.)

As a preliminary matter, appellant has not cited, and the Board is not aware of, any authority that would allow it to modify the Department's order. Absent this authority, the Board cannot unilaterally change the wording in the appellant's penalty, even if it agreed that the penalty was excessive.

Further, the Board is unclear on the basis of appellant's contention that the Department's order is ambiguous or confusing. An ambiguity exists when a provision is "susceptible to two or more constructions that are reasonable and not based on strained interpretations." (*Shell Oil Co. v. Winterthur Swiss Ins. Co.* (1993) 12 Cal.App.4th 715, 737 [15 Cal.Rptr.2d 815, 828], reh'g denied and opinion modified (Feb. 22, 1993).) The contested language from the proposed decision is as follows:

> Counts 1 through 4 are sustained. The Respondent's off-sale general license is hereby revoked, with said revocation stayed for 180 days from the date this decision becomes final to permit transfer of the license to a person(s) acceptable to the Department. **If the license has not been transferred on or before the expiration of the stayed period,** as ordered herein**, the license shall be permanently revoked** [...]

(Decision, at p. 11 (emphasis added).)

Here, appellant does not contend that the language of the penalty order is susceptible to two or more interpretations. Rather, appellant only offers one interpretation--that its license will be permanently revoked unless the transfer is completed within 180 days--and argues that this language is contrary to the Department's usual practice of only requiring that a licensee file an application for transfer during the stay period. (AOB, at p. 2-3.)

Simply parting from normal custom or practice does not, itself, create an ambiguity. To be ambiguous, the Department's order would still need to be susceptible to one or more reasonable interpretations. Yet, as appellant has correctly deduced, the Department's use of the term "transferred," in past tense, clearly indicates that the license transfer must be completed before the expiration of 180-day stay. There is no reasonable reading of the term "transferred" that would indicate that a pending application to transfer would suffice. Thus, the Board agrees with appellant that, based on the plain language of the order, its license will be permanently revoked if the license is not transferred to another person or persons within 180 days. (*See Day v. City of Fontana* (2001) 25 Cal.4th 268, 272 [105 Cal.Rptr.2d 457, 459, 19 P.3d 1196, 1199] [stating that if there is no ambiguity, then the plain meaning of the language governs].)

Having found that the Department's order is not ambiguous, the Board turns to appellant's contention that the penalty is excessive.

This Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of Cal. v. Alcoholic Bev. Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]) but will not disturb the Department's penalty order in the absence of an abuse of discretion. (*Martin v. Alcoholic Bev. Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].)

"Abuse of discretion" in the legal sense is defined as discretion exercised to an end or purpose not justified by and clearly against reason, all of the facts and circumstances being considered. [Citations.] (*Brown v. Gordon*, 240 Cal.App.2d 659, 666-667 (1966) [49 Cal.Rptr. 901].)

Rule 144 provides:

> In reaching a decision on a disciplinary action under the Alcoholic Beverage Control Act (Bus. and Prof. Code Sections 23000,et seq.), and the Administrative Procedures Act (Govt. Code Sections 11400, *et seq.*), the Department shall consider the disciplinary guidelines entitled "Penalty Guidelines" (dated 12/17/2003) which are hereby incorporated by reference. Deviation from these guidelines is appropriate where the Department in its sole discretion determines that the facts of the particular case warrant such a deviation - such as where facts in aggravation or mitigation exist.

(Cal. Code Regs., tit. 4, § 144.)

The Penalty Policy Guidelines further address the discretion necessarily involved in an ALJ's recognition of aggravating or mitigating evidence:

**Penalty Policy Guidelines:**

> The California Constitution authorizes the Department, in its discretion[,] to suspend or revoke any license to sell alcoholic beverages if it shall determine for good cause that the continuance of such license would be contrary to the public welfare or morals. The Department may use a range of progressive and proportional penalties. This range will typically extend from Letters of Warning to Revocation. These guidelines contain a schedule of penalties that the Department usually imposes for the first offense of the law listed (except as otherwise indicated). These guidelines are not intended to be an exhaustive, comprehensive or complete list of all bases upon which disciplinary action may be taken against a license or licensee; nor are these guidelines intended to preclude, prevent, or impede the seeking, recommendation, or imposition of discipline greater than or less than those listed herein, in the proper exercise of the Department's discretion.

In the decision, the ALJ devotes a separate section to the issue of penalty and factors which might lessen or increase the penalty recommended by rule 144:

> In the present case, outright revocation is warranted. The behavior of the Respondent-Licensee's corporate officer was not isolated, as Jae Limb purchased purportedly stolen property on four different dates over several months. However, it was also taken into account that Jae Limb accepted responsibility for his actions and exhibited remorse in the presentation of his testimony. The penalty assessed below reflects a reasonable weighing of the argued mitigating and aggravating factors present in this case. The penalty recommended herein complies with rule 144.

(Decision, at p. 11.)

The Board may not disturb a penalty order unless it is so clearly excessive that a reasonable person would find it to be an abuse of discretion in light of all the circumstances. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within its discretion." (*Harris v. Alcoholic Bev. Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

Based on the above, the Department did not abuse its discretion with regards to the penalty based on the record in this case and the guidelines of rule 144. The record shows that the Department considered appellant's mitigating evidence, and based on that evidence, allowed appellant to transfer its license, rather than unconditionally revoke it. Further, although appellant could potentially, and through no fault of its own, have its license revoked at the end of the 180-day stay, that punishment is still less than unconditional revocation and within the bounds of the Department's discretion.

ORDER

The decision of the Department is affirmed.[5]

SUSAN A. BONILLA, CHAIR
MEGAN McGUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOAR

[5] 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

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

| | |
|---|---|
| **IN THE MATTER OF THE ACCUSATION AGAINST:**<br><br>JK FIDELIS, INC.<br>A 4 LIQUOR<br>8842 WALKER STREET<br>CYPRESS, CA 90630<br><br>OFF-SALE GENERAL - LICENSE<br><br>Respondent(s)/Licensee(s)<br>Under the Alcoholic Beverage Control Act | SANTA ANA DISTRICT OFFICE<br><br>File: 21-429146<br><br>Reg: 18086830<br><br>**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 September 21, 2018. 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, 1325 J Street, Suite 1560, Sacramento, CA 95814.

On or after November 20, 2018, a representative of the Department will contact you to arrange to pick-up the license certificate.

RECEIVED
OCT 11 2018
Alcoholic Beverage Control
Office of Legal Services

Sacramento, California

Dated: October 10, 2018

Matthew D. Botting
General Counsel

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

IN THE MATTER OF THE ACCUSATION AGAINST:

| | |
|---|---|
| JK Fidelis, Inc.<br>Dba: A 4 Liquor<br>8842 Walker Street<br>Cypress, California 90630<br><br>Respondent | File: 21-429146<br><br>Reg.: 18086830<br><br>License Type: 21<br><br>Word Count: 15,634<br><br>Court Reporter: Tami Comet<br>Kennedy Court Reporters<br><br>Korean Interpreter: Daniel B. Kim, JD<br>California State Certified Interpreter |
| Off-Sale General License | **PROPOSED DECISION** |

Administrative Law Judge D. Huebel, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Santa Ana, California, on July 19, 2018.

John Newton, Attorney, represented the Department of Alcoholic Beverage Control.

Rick Blake, Attorney, represented Respondent, JK Fidelis, Inc. The corporate president and 100 percent stock holder of JK Fidelis, Inc., Jae Kun Limb, was present at the hearing.

The Department seeks to discipline the Respondent's license on the grounds that, on September 22, 2016, December 13, 2016, May 18, 2017, and July 19, 2017, the Respondent-Licensee's corporate officer, Jae Kun Limb, at the premises, bought, received, withheld or concealed property, to-wit: a total of 25 bottles of various distilled spirits, believing the same to have been stolen, in violation of Penal Code sections 664/496(a). (Exhibit 1.)

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued and submitted for decision July 19, 2018.

## FINDINGS OF FACT

1. The Department filed the accusation on April 23, 2018.

2. The Department issued a type 21, off-sale general license to the Respondent for the above-described location on September 2, 2005 (the Licensed Premises).

3. The Respondent has been the subject of the following discipline:

| Dates of Violation | Reg. No. | Violation | Penalty |
|---|---|---|---|
| January 25, 2008 | 08068519 | BP§§25658(a) | 25-day suspension |
| May 19, 2017 | 17085963 | BP§25658(a) | POIC in lieu of 15-day susp. |

The foregoing disciplinary matters are final. (Exhibits 2 and 3.)

**(September 16, 2016)**

4. On September 16, 2016, at 6:45 p.m. Department Agents Randal Milloy and Raul Garcia (hereinafter Agents Milloy and Garcia) entered the Licensed Premises in an undercover capacity conducting investigations into receiving stolen property. Upon entering the Licensed Premises Agent Milloy saw a male clerk standing behind the sales counter, who was later identified as Jae Kun Limb (hereinafter referred to as Jae Limb). Jae Limb is a corporate officer and 100 percent shareholder of the Respondent-Licensee Corporation, JK Fidelis, Inc.[1] The Licensed Premises was open for business. Agent Milloy saw alcohol displayed for sale, including distilled spirits displayed on the south wall and beers in the refrigerated coolers.

5. Agent Milloy asked Jae Limb if he would be interested in buying any surplus alcohol. Jae Limb told the agents to "come back at a later time to talk." The agents left the Licensed Premises.

**(September 22, 2016 – Count 1)**

6. Agents Milloy and Garcia drove to the Licensed Premises with three 750 milliliter bottles each of Hennessy Cognac, Grey Goose Vodka and Malibu Rum (Exhibit 6.)[2] The agents entered the Licensed Premises in an undercover capacity carrying the distilled spirits, which only included one 750 milliliter bottle each of Hennessy Cognac, Grey Goose Vodka and Malibu Rum. The remaining bottles they left in the car. Agent Milloy observed Jae Limb behind the sales counter, the store was open for business, with alcohol displayed for sale in substantially a similar fashion as their last visit on

[1] Exhibit 4 – Certified Copy of Department License Query System Summary as of 06/06/2018. Exhibit 5 – Certified copy of ABC-243 Corporate Questionnaire.
[2] Exhibit 6 depicts three bottles of Malibu Rum behind three bottles of Hennessy Cognac and one bottle of Grey Goose Vodka in front of a Grey Goose box, which Agent Milloy testified included the two remaining Grey Goose Vodka bottles.

September 16, 2016. Agent Milloy greeted Jae Limb. The agents placed upon the sales counter the distilled spirts, which Jae Limb examined. Jae Limb then asked the cost of the bottles. Agent Milloy replied that the Malibu Rum was $10, the Grey Goose Vodka $15, and the Hennessy Cognac cost $20.

7. Jae Limb pushed the Malibu Rum bottle towards the agents and said, "It moves too slow." Agent Garcia told Jae Limb they had two additional 750 milliliter bottles of Hennessy Cognac and two additional bottles of 750 milliliter Grey Goose Vodka in their car. Agent Garcia then asked Jae Limb if he would like Agent Garcia to get the alcohol from the car. Jae Limb nodded his head in the affirmative. Agent Garcia exited the premises. While Agent Garcia was outside, Jae Limb asked agent Milloy from where the bottles came. Agent Milloy replied, "I have a buddy that takes it from work." Agent Garcia re-entered the Licensed Premises carrying two, 750 milliliter bottles each of Hennessy Cognac and Grey Goose Vodka. Agent Garcia left the remaining two bottles of Malibu Rum in the car.

8. Agent Milloy told Jae Limb they could get 10 additional bottles. Jae Limb offered $60 for the three bottles of Hennessy Cognac and the three bottles of Grey Goose Vodka. Jae Limb engaged in negotiations for the distilled spirits with the agents, who eventually settled on $75 for the three bottles of Hennessy Cognac and the three bottles of Grey Goose Vodka. Jae Limb examined each bottle, picked them up and placed them out of sight behind the sales counter. Jae Limb retrieved from the cash register three $20 bills and three $5 bills, which he gave to Agent Milloy. Agent Milloy accepted the money and told Jae Limb he could come back, he has additional bottles available. Jae Limb replied, "No. It's too dangerous." Agent Garcia then said, "If you'd like we can come back and just see how the bottles are doing at a later time." Jae Limb nodded his head in the affirmative. The agents left the premises.

**(December 13, 2016 – Count 2)**

9. On December 13, 2016, Agents Milloy and Garcia drove in the morning to the Licensed Premises with distilled spirits, which included three 750 milliliter bottles each of Grey Goose Vodka, Hennessy Cognac and Chivas Regal Whisky. (Exhibit 7.)[3] The agents entered the Licensed Premises in an undercover capacity carrying one bottle each of the Hennessy Cognac and Grey Goose Vodka, and two bottles of the Chivas Regal Whisky. The Licensed Premises was open for business and operating, with Jae Limb behind the sales counter, and alcohol displayed for sale.

10. The agents approached Jae Limb at the sales counter, upon which they set the distilled spirits. Agent Milloy greeted Jae Limb. Jae Limb inspected the distilled spirit

[3] Exhibit 7 depicts on a table two boxes of Chivas Regal Whiskey, three bottles of Grey Goose Vodka, and three bottles of Hennessy Cognac.

bottles. Agent Milloy told Jae Limb they had two additional bottles of Grey Goose Vodka and two additional bottles of Hennessy Cognac in the car. Jae Limb pointed at the Chivas Regal and said, "That moves too slow." Jae Limb then offered $60 for the three bottles of Grey Goose Vodka and the three bottles of Hennessy Cognac. Agent Milloy told Jae Limb, "We need at least $80 as our friend has to steal it from his work and it's a lot of risk." Jae Limb placed his hand on top of one bottle and asked again where it came from. Agent Milloy repeated, "My friend has to steal the alcohol from his work which is why it's a lot of risk for us." Jae Limb replied, "I don't want to lose my liquor license." Agent Garcia said, "We don't want to get in trouble either." Thereafter, Jae Limb offered $65 for the three bottles of Grey Goose Vodka and the three bottles of Hennessy Cognac. The agent engaged in negotiations with Jae Limb.

11. During the negotiations, Jae Limb motioned toward the front door and told Agent Milloy to "hurry up." Agent Milloy understood Jae Limb to be indicating that a customer might come in and observe them engaging in an exchange of alcohol. Jae Limb and the agents eventually agreed upon a price of $80 for all of the bottles, which included three bottles of Grey Goose Vodka, three bottles of Hennessy Cognac and two bottles of Chivas Regal Whisky.

12. Agent Garcia exited the Licensed Premises and retrieved the remaining bottles of distilled spirits from the vehicle which included two bottles of Grey Goose Vodka and two bottles of Hennessy Cognac. Agent Garcia re-entered the Licensed Premises with the said bottles, which Agent Milloy then gave to Jae Limb. Jae Limb inspected the bottles, picked them up and placed them out of sight behind the sales counter. Jae Limb then retrieved four $20 bills from the cash register and handed the $80 to Agent Milloy, who accepted the money and left the premises with Agent Garcia.

**(May 18, 2017 – Count 3)**

13. On May 18, 2017, Agents Milloy and Garcia drove to the Licensed Premises with six bottles of distilled spirits, including three 750 milliliter bottles of Hennessy Cognac and three 750 milliliter bottles of Grey Goose Vodka. The agents entered the Licensed Premises in an undercover capacity carrying one bottle of the Hennessy Cognac and one bottle of the Grey Goose Vodka. The Licensed Premises was open for business and operating, with Jae Limb behind the sales counter, and alcohol displayed for sale.

14. Agent Milloy greeted Jae Limb, as the agents placed the distilled spirts upon the sales counter. Agent Milloy explained they had two additional bottles of Grey Goose Vodka and two additional bottles of Hennessy Cognac in the car. Jae Limb asked where they got the alcohol. Agent Garcia said, "Same as last time." Agent Milloy said, "My buddy steals it from work." Jae Limb then asked the cost of the distilled spirits. Agent Garcia replied, "$14 per bottle." Jae Limb paused, as if in thought, to which Agent

Milloy asked, "What are you thinking?" Jae Limb then offered $60 for the six bottles of distilled spirits. Agent Milloy and Jae Limb entered into negotiations and eventually agreed upon the price of $65 for three bottles of Hennessy Cognac and three bottles of Grey Goose Vodka. Agent Garcia retrieved the remaining bottles of distilled spirits from the car and brought them back into the Licensed Premises. Jae Limb inspected the said bottles of distilled spirits, picked them up and placed them behind the sales counter, out of sight. Jae Limb then retrieved from the cash register $65, which he handed to Agent Milloy. Agent Milloy accepted the money and the agents exited the premises.

**(July 19, 2017 – Count 4)**

15. On the morning of July 19, 2017, Agents Milloy and Garcia entered the Licensed Premises in an undercover capacity carrying a small, fabric bag containing three 750 milliliter bottles of Grey Goose Vodka and two 750 milliliter bottles of Hennessy Cognac. (Exhibit 8.)[4] The Licensed Premises was open for business, with Jae Limb behind the sales counter and alcohol displayed for sale.

16. Agent Milloy greeted Jae Limb. The agents removed the said bottles of distilled spirits from the bag and placed them upon the sales counter, in front of Jae Limb. Jae Limb asked where the bottles came from. Agent Garcia replied, "The same as last time." Agent Milloy then said, "My buddy steals it from work." Jae Limb offered $50 for the five bottles of distilled spirits. Agent Milloy negotiated with Jae Limb and they eventually agreed upon the price of $55 for all five said bottles of distilled spirits. Jae Limb placed the bottles behind the sales counter and retrieved from the cash register $55, which he handed to Agent Milloy. Agent Milloy accepted the money and exited the store with Agent Garcia. Thereafter, a team of agents entered the Licensed Premises, advised Jae Limb of the violation, for which they issued him a citation.

17. During all of the transactions, interactions and conversations in English between Jae Limb and the agents on September 22, 2016, December 13, 2016, May 18, 2017, and July 19, 2017, there was no indication that Jae Limb did not understand what was said to him in English. Jae Limb never indicated that he did not understand what Agent Milloy said, Agent Milloy understood Jae Limb's spoken English, Jae Limb never asked Agent Milloy to repeat anything said, and Agent Milloy never asked Jae Limb to repeat anything Jae Limb said to him in English.

18. Robert Kim appeared and testified at the hearing. Mr. Kim has known Jae Limb for approximately 13 years. Mr. Kim has held an Alcoholic Beverage Control license for 21 years, and is the chairman of the Orange County Korean American Grocer's Association

[4] Exhibit 8 depicts these bottles upon a table.

(KAGRO). Jae Limb has been a member of KAGRO for approximately seven years and holds the position of CFO, in charge of the accounting for the organization.

19. Approximately one month prior to the hearing, Jae Limb informed Mr. Kim that he mistakenly bought stolen property from street people who looked like they needed help, for which he was cited. Mr. Kim did not know that Jae Limb purchased the said alcohol on four different dates over the course of several months. Jae Limb also did not tell Mr. Kim that the sellers told him their friend steals the alcohol from his work. Mr. Kim believes if the sellers told Jae Limb the alcohol was stolen then it was not a mistake on Jae Limb's part to purchase it. Mr. Kim testified that if someone walked in the front door of his liquor store, just off the street and said, "Hey, you want to buy three bottles of Grey Goose Vodka," and Mr. Kim did not recognize that person, Mr. Kim would think that was weird, and he would not purchase alcohol from them because licensees are not supposed to do that. Mr. Kim purchases his alcohol for his licensed premises from a wholesaler, who holds a wholesale license.

20. Mr. Kim perceives Jae Limb as a good, honest, hard-working person, who is remorseful for his actions, would not commit the said violations in the future, and believes Jae Limb continues to be fit personally to hold an alcohol license. Mr. Kim also has no concern with Jae Limb's honesty and integrity relating to Jae Limb's position as the CFO of KAGRO.

21. Mr. Kim has no knowledge of Jae Limb's ability to speak English, because Mr. Kim only speaks Korean with Jae Limb and has not observed Jae Limb speak English with others except at the hearing. Korean is both Mr. Kim and Jae Limb's first language. Mr. Kim is more comfortable speaking Korean, however he understands English.

22. Jae Kun Limb appeared and testified at the hearing, with the use of a California State Certified Korean interpreter. Jae Limb spelled his name in English when the undersigned requested that he spell it for the record. Jae Limb, speaking in English to the interpreter, corrected the interpreter when the interpreter spelled Mr. Limb's last name incorrectly.[5] Jae Limb claimed he was not comfortable speaking English, explaining that he was only comfortable speaking English if someone speaks in one or two sentences at a time, and keeps it simple, such as, "How much," or "Nice Day," but "that's it, if the sentence continues more than two questions" he claims he is not comfortable. He admitted that he does speak some English.

23. Jae Limb said he is a corporate officer and 100 percent shareholder of JK Fidelis, Inc. Jae Limb said he was "very much" remorseful for the "bad mistake" he made in

[5] The court reporter then asked for instruction from the undersigned whether the court reporter should take down both the English spoken by Jae Limb and the interpreter, to which the undersigned said yes. After that Jae Limb spoke only Korean while testifying, using the Korean interpreter for translation.

purchasing the purportedly stolen distilled spirits. When Respondent's counsel asked Jae Limb when he purchased the alcohol bottles from the agents whether he had an understanding the alcohol was stolen, Jae Limb claimed, through the interpreter, "absolutely not." Jae Limb claimed he believed the alcohol he purchased from the agents was from the agents' friend, who had left-over alcohol from a party.

24. Jae Limb could not recall telling the agents that he did not want to get in trouble with his alcohol license. Jae Limb claimed the reason he purchased the said alcohol was because it "came out of my own sympathetic feeling toward that man thinking, I think I can help this person by purchasing three or four bottles and I also, even though [it was a] gross mistake on my part, it was cheap to buy them." Jae Limb claimed, "I never heard the word 'stolen'" spoken by the agents. Jae Limb admitted that prior to the date he received the Department citation he knew what the word "stolen" in English meant. He said that when he received the citation he read the word "stolen" thereon, and claimed he thought, "hey, it's ridiculous, it didn't make any sense, I didn't buy it." He said, "I'm not such a bad guy who'd buy such a product." He went on to explain he is the type of person who would give someone their wallet back if he found it in on the sales counter or in the parking lot with $200, $300 or even $400 cash in the wallet. Jae Limb testified that on the dates of the said violation he did not know he was supposed to buy alcohol from a licensed wholesaler, but understands that now. Jae Limb acknowledged that he keeps Grey Goose Vodka on display for sale at the Licensed Premises, and usually purchases Grey Goose Vodka from places such as Young's Market or Southern Wine.

24. Jae Limb said he works 365 days a year at the Licensed Premises, from 8:30 a.m. to 9:00 p.m., except that sometimes he will leave the store at 4:00 p.m. or 6:00 p.m. His wife works at the store as well as a "helper," the latter of whom works approximately 30 hours per week. Jae Limb has two daughters, one in graduate school, and the other in college. Jae Limb submitted two character reference letters, one from a friend and the other from an older brother. (Exhibits A1 and A2.)[6] Jae Limb repeated his feelings of remorsefulness for his actions.

25. 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.

[6] Exhibits A1 and A2 were admitted as administrative hearsay.

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. Penal Code section 496(a) provides that every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment in a county jail for not more than one year, or imprisonment pursuant to subdivision (h) of Section 1170.

4. Penal Code section 664 criminalizes the act of attempting to commit any crime, but fails, or is prevented or intercepted in its perpetration.

5. Cause for suspension or revocation of the Respondent's license exists under Article XX, section 22 of the California State Constitution and sections 24200(a) and (b) on the basis that the Respondent-Licensee's corporate officer, Jae Kun Limb, on September 22, 2016, December 13, 2016, May 18, 2017, and July 19, 2017, at the Licensed Premises, bought, received, withheld or concealed property, to-wit: a total of 25 bottles of various distilled spirits, believing the same to have been stolen, in violation of section 496 of the Penal Code. (Counts 1 through 4.) (Findings of Fact ¶¶ 4 through 17.)

6. Since the property was not, in fact, stolen, the question is whether the provisions of attempt pursuant to Penal Code section 664 apply. Under the facts of this case, the purchases that occurred on September 22, 2016, December 13, 2016, May 18, 2017, and July 19, 2017, were clearly attempts by Jae Kun Limb to receive stolen property. Within Jae Kun Limb's knowledge, he believed he completed the purchases (at discounts) of distilled spirits which the agents' friend stole from his work. Beyond Jae Kun Limb's control and knowledge was the fact that these distilled spirits and the "sellers" were law enforcement props in an undercover investigation.

**(Credibility)**

7. 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 the manner in which the witness testifies, the extent of the witness' capacity to perceive, to recollect, or to communicate any matter about which the witness testifies, a statement by the witness that is inconsistent with any part of the witness' testimony at the hearing, the

opportunity of the witness to perceive any matter about which the witness testifies, and the existence or nonexistence of a bias, interest, or other motive.

8. Respondent's contentions that Jae Limb (1) did not hear Agent Milloy say the word "stolen" and therefore did not understand that the said 25 bottles of distilled spirits he purchased were stolen, (2) believed the alcohol he purchased from the agents was from the agents' friend, who had left-over alcohol from a party, (3) did not understand the English spoken to him by the agents during the dates in question, are disbelieved for the following reasons. In applying the factors of Evidence Code section 780 described above, the undersigned found Jae Limb presented evasive, inconsistent testimony, had an inability to recall material matters about which he testified and exhibited a bias and motive in the presentation of his testimony as the corporate officer and 100 percent shareholder of JK Fidelis, Inc., which is facing revocation of its license.

9. Jae Limb presented evasive testimony in claiming he never heard the agents use the word "stolen." Of course he did not hear the word "stolen," because that word was not used. The words spoken by agent Milloy were "steal" and "steals." It is simply not credible that Jae Limb would not have known or heard the distilled spirts were stolen, after the number of times agent Milloy repeated the same phrase over and over, that the alcohol comes from his friend who steals them at work: On December 13, 2016, Agent Milloy said, "We need at least $80 as our friend has to *steal* it from his work and it's a lot of risk." Soon thereafter Agent Milloy repeated again, "My friend has to *steal* the alcohol from his work which is why it's a lot of risk for us." Jae Limb's response after twice being told it was stolen was, "I don't want to lose my liquor license." As for September 22, 2016, when Jae Limb asked agent Milloy from where the bottles came, Agent Milloy replied, "I have a buddy that *takes* it from work." It is found that Jae Limb understood that to mean the alcohol was stolen, because at the end of the transaction that date when Agent Milloy told Jae Limb he could come back with additional bottles Jae Limb replied, "No. It's too dangerous." Jae Limb's responses show he knew the alcohol was stolen, and he did not want to lose his liquor license for purchasing stolen alcohol. Why else would it be "too dangerous" for Jae Limb or why would he lose his liquor license for simply buying left-over party alcohol, if at the time, as he testified, he did not know he was required to purchase from a wholesaler. Jae Limb would not have been of the mindset to know that he would be subject to discipline or cited for purchasing alcohol from someone other than a licensed wholesaler. His testimony is further inconsistent in that if his purchase "came out of my own sympathetic feeling toward that man thinking, I think I can help this person by purchasing three or four bottles," then why was it that he continued to purchase a total of 25 bottles. Jae Limb admitted to the reason when he said "it was cheap to buy them."

10. Again, on both May 18, 2017, and July 19, 2017, Agent Milloy repeats, "My buddy *steals* it from work." Jae Limb's testimony infers that he did not understand the English

spoken to him by the agents. Yet Jae Limb admitted to knowing at the time, not only the meaning of the key word "stolen," but how to read English as he admitted to reading "stolen" on the citation the day it was issued to him. Jae Limb is a little more fluent in English than he led on during his evasive testimony. Jae Limb might not have felt "comfortable" speaking English, but he fully understood the words spoken to him in English on the dates in question. In fact, in observing Jae Limb at the beginning of his testimony at the hearing, Jae Limb showed how comfortable he was speaking English, when spelling his name and correcting the interpreter in English. This was further exemplified based on the consistent, credible testimony of Agent Milloy as to Jae Limb's interactions, negotiations and discussions in English with the agents. Jae Limb never told the agents nor did he testify that he did not understand what the agents were saying to him. In balancing Jae Limb's evasive, inconsistent and biased testimony against the consistent, credible testimony of Agent Milloy, who exhibited no bias in the presentation of his testimony, it is found Jae Limb was fully aware and knew he was purchasing stolen bottles of distilled spirts on the dates in question.

## PENALTY

The Department requested the Respondent's license be revoked based on (1) the sole owner/corporate-licensee, Jae Kun Limb, engaging in four separate instances of receiving purportedly stolen property, even using funds from the register to pay for the transactions, and (2) Jae Kun Limb admitted he engaged in the transactions for profit and gain, "it was cheap to buy them."

The Respondent requested a stayed revocation with a 15 day suspension based on the Respondent being licensed since September 5, 2005, "almost 13 years at this point" with only two disciplinary matters on its record, during this entire time, for sales to minors in 2008 and 2017. The Respondent argued its recommended penalty would be a more reasonable penalty which "would serve the public welfare and morals and get the point across to [Jae] Limb," as taking his only source of income would be unfair.

Rule 144[7] provides for revocation for one single incident of the Respondent/Licensee's receiving stolen property. This mandate is satisfied, however, by a stayed revocation as well as an outright revocation. The rule 144 penalty guidelines are not intended to be an exhaustive list or to preclude imposition of a discipline different than those listed or recommended.

In the present case, outright revocation is warranted. The behavior of the Respondent-Licensee's corporate officer was not isolated, as Jae Limb purchased purportedly stolen property on four different dates over several months. However, it was also taken into

[7] All rules referred to herein are contained in Title 4 of the California Code of Regulations unless otherwise noted.

account that Jae Limb accepted responsibility for his actions and exhibited remorse in the presentation of his testimony. The penalty assessed below reflects a reasonable weighing of the argued mitigating and aggravating factors present in this case. The penalty recommended herein complies with rule 144.

## ORDER

Counts 1 through 4 are sustained. The Respondent's off-sale general license is hereby revoked, with said revocation stayed for 180 days from the date this decision becomes final to permit transfer of the license to a person(s) acceptable to the Department. If the license has not been transferred on or before the expiration of the stayed period, as ordered herein, the license shall be permanently revoked. In addition, the license shall be suspended for 20 days and indefinitely thereafter until the transfer occurs or the license is revoked.

Dated: August 15, 2018

D. Huebel
Administrative Law Judge

☑ Adopt

☐ Non-Adopt: _____

By: _____

Date: 9/21/18