

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

AB-9721

File: 45-567813; Reg: 17086242

File: 54-568813; Reg: 17086243

SAN DIEGO WHALE WATCHING, LLC,
dba San Diego Whale Watch, and
dba Cruise San Diego,
1717 Quivira Road,
San Diego, CA 92109,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: January 10, 2019
Ontario, CA

ISSUED FEBRUARY 7, 2019

Appearances: *Appellant:* Donna J. Hooper, of Solomon, Saltsman & Jamieson, as
counsel for San Diego Whale Watching, LLC,

Respondent: Joseph J. Scoleri, III, as counsel for the Department
of Alcoholic Beverage Control.

OPINION

San Diego Whale Watching, LLC, doing business as San Diego Whale Watch,
and doing business as Cruise San Diego, appeals from two decisions of the Department
of Alcoholic Beverage Control,¹ consolidated below and on appeal, revoking its on-sale

¹The decisions of the Department, both dated June 21, 2018, are set forth in the
appendix.

beer and wine boat license as well as its on-sale general boat license — in accordance with Business and Professions Code sections 24200, subdivision (d), and 23405.1, subdivision (c), and the California Code of Regulations, Title 4, Division 1, section 58 — because the spouse of the licensee pled guilty to a crime involving moral turpitude, specifically, 18 U.S.C. § 2271, Conspiracy to Destroy Vessels, and 18 U.S.C. § 2, Aiding and Abetting.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine boat license and on-sale general boat license were issued on November 30, 2016. There is no record of prior departmental discipline against either license.

On December 18, 2017, the Department instituted a one-count accusation against each of the licences, subsequently amended for clarity on February 13, 2018, charging that appellant no longer possessed the necessary qualifications to be a licensee because her spouse, Christopher Switzer, did not possess the qualifications to be a licensee — having been convicted of a crime involving moral turpitude, to wit: Conspiracy to Destroy Vessels, and Aiding and Abetting, for having conspired with another individual to sink and destroy a vessel for the purposes of collecting the insurance money. Appellant's spouse pled guilty to this charge in a Plea Agreement filed February 1, 2017. (RT at pp. 11-12; Exhs. 3 and 4.)

The Department submitted a motion to consolidate the hearings to consider the two accusations, pursuant to government Code section 11507.3, because the two cases involve common questions of law and fact about the same individuals. Appellant's counsel did not oppose consolidation, and the motion was granted on February 20,

2018. The matters remain consolidated on appeal.

At the administrative hearing held on April 11, 2018, documentary evidence was received and testimony concerning the two cases was presented by Department Agent Robert Manaco. Appellant presented no witnesses.

Testimony established that on February 1, 2017, an Information was filed against appellant's spouse, Christopher Switzer, in the United States District Court, Southern District of California, charging him with violating Title 18, U.S.C. § 2271, Conspiracy to Destroy Vessels, and Title 18, U.S.C. § 2, Aiding and Abetting. Also filed on February 1, 2017, in the same court, was a Plea Agreement between the United States and Mr. Switzer, in which he agreed to plead guilty to these charges. The Plea Agreement details Mr. Switzer's effort to intentionally sink a vessel for the purpose of fraudulently collecting insurance money. (Exh. 4.) He and another individual intentionally damaged plastic PVC piping in the engine room which caused sea water to flood the vessel; they pumped sea water into the vessel with hoses; they punctured a bulkhead; and they shut off or ignored bilge alarms while the vessel was flooding. The individuals then called the United State Coast Guard to be rescued. They subsequently gave false statements to the Coast Guard and other law enforcement officials regarding the incident. (*Ibid.*)

The illegal actions outlined in the Plea Agreement took place on October 11, 2016. On November 14, 2016, appellant submitted a Limited Liability Company Questionnaire to the Department (ABC-256), listing herself as the sole shareholder of the LLC (Exh. 8) as well as an amended form ABC-217, removing Mr. Switzer's name from the original Application. (Exh. 10.) The licenses were subsequently issued on

November 30, 2016.

On May 2, 2018, the ALJ submitted two proposed decisions, recommending that both of the licenses be revoked. The proposed decisions were adopted by the Department and Certificates of Decision were issued on June 21, 2018.

Appellant then filed a timely appeal raising the following issues: (1) appellant is an innocent spouse and is being unfairly penalized for the actions of her husband, and (2) rule 58 applies only to the application process, not enforcement, therefore it does not authorize revocation. These issues will be discussed together.

DISCUSSION

Appellant maintains that if Ms. Pandya had been convicted of a crime of moral turpitude — rather than Mr. Switzer — than revocation would be supported by Business and Professions Code section 24200. It contends, however, that since Ms. Pandya was neither charged nor convicted, revocation is not justified. (AOB at pp. 2-5) Here, only the husband pled guilty and was convicted of conspiracy to sink and destroy a vessel for the purpose of fraudulently collecting insurance money, as well as aiding and abetting. (See Information and Plea Agreement, Exhs. 3 & 4.)

Appellant maintains the ALJ erred in this case, because rule 58 addresses the issuance of licenses, not the suspension or revocation of a license that has already been issued. (*Ibid.*) This is incorrect. While it is true that suspension and revocation are not mentioned in the rule, Department rule 58 actually spells out the various ways in which a license may be issued or held where the business is the community property of husband and wife:

Application by Married Persons

(a) Where a business is the community property of husband and wife, an alcoholic beverage license may be **issued or held** either:

(1) In the name of both husband and wife;

(2) In the name of either spouse, **if it can be demonstrated by evidence satisfactory to the department that the unlicensed spouse is qualified** and cannot participate in the business for reasons including, but not limited to, the following:

(A) Physical disability;

(B) Absence from the State for a prolonged period.

(b) Where a business is the separate property of a spouse, established by satisfactory proof to the department, an alcoholic beverage license may be issued in the spouse's name alone.

(c) The unlicensed spouse must have the qualifications required of a holder of a license unless the husband and wife are not living together and have not lived together for at least six months.

(d) The provisions of this rule shall apply to the ownership, by either spouse, of 10 percent or more of the stock of any corporation owning an alcoholic beverage license.

(4 Cal. Code Regs., § 58, emphasis added.)

The Department's position on the application of rule 58 is well-summarized in their brief:

It is of equal importance during the existence of the license that the spouse of a licensee be qualified to be a holder, and there is nothing in the rule that militates against this. Given the possibility that the unlicensed spouse may have a community property interest in the business, and/or might share in the proceeds of the business, it is not unreasonable to require, as a continuing condition of holding the license, that the unlicensed spouse also remain qualified to hold a license.

Mr. Switzer, as the spouse of Ms. Pandya, committed an offense which would disqualify him from holding a license. Rule 58 supports the revocation of the license issued to Ms. Pandya. While this may seem harsh, the Department is charged with protecting the welfare and morals of the people of California with respect to the sale of alcoholic beverages. Given that charge, the Department's position that the unlicensed spouse

must remain qualified to hold a license, cannot be said to be unreasonable. The terms of the Rule make plain that whether the license is in one name or both, both spouses must be qualified to hold the license.

(RRB at p. 4.) We agree.

Appellant contends that she removed her husband's name from the business and from access to the bank accounts prior to issuance of the license. (RT at p. 19.)

Appellant takes issue with what it terms the Department's assumption "that Ms. Pandya is simply an extension of her husband and not a separate person with her own character." (ACB at p. 3.) Appellant, however, ignores the very clear dictates of rule 58, that whether the license is in one name or both — both spouses must be qualified to hold the license, even if it is issued to one of them alone. Appellant's position ignores the fact that any leniency shown to the innocent spouse would necessarily redound to the benefit of the guilty spouse because California is a community property state. In any event, the clear language of rule 58 controls the result in this case. Although the rule is titled "Applications by Married Persons," its text makes it clear that for an alcoholic beverage license to be "issued or held," both spouses must be qualified unless they are eligible for one of the exceptions set forth in the rule. The rule contains no exception which would assist appellant in this instance.

Coletti, a case which predates the creation of the Department of Alcoholic Beverage Control is illustrative. In *Coletti*, the court of appeals addressed the Board of Equalization's revocation of a license for violations of law committed by a co-licensee without the knowledge or participation of the other. (*Coletti v. State Bd. of Equalization* (1949) 94 Cal.App.2d 61 [209 P.2d 984].) Business partners Coletti and Gerbosi operated, as co-licensees, a premises serving beer, wine, and distilled spirits.

Additionally, Gerbosi individually held an alcoholic beverage license for a second premises, and operated a third unlicensed cafe with his wife. Gerbosi was found to have committed a number of liquor violations involving the unlicensed cafe. It was undisputed that Coletti held no interest in the cafe where the violations took place, and had no knowledge of Gerbosi's conduct. Nevertheless, the Board of Equalization revoked not only Gerbosi's individual alcoholic beverage license, but the license held jointly with Coletti as well. (*Ibid.*)

On appeal, Coletti raised what is perhaps best characterized as the "innocent partner" defense — that is, he was innocent of the illegal conduct and ought to be permitted to keep the license as an individual. (*Ibid.*) The superior court accepted this defense and ordered the license restored to Coletti. (*Id.* at p. 984.)

The court of appeals, however, rejected the argument and reversed. It first observed that the lower court had no authority to simply remove Gerbosi's name from the license:

The provision of the judgment that the [Board of Equalization] must restore physical possession of the license to Coletti might indicate a purpose to make him the sole licensee. If this was the purpose, it is clearly one that cannot be accomplished by the judgment. The act contains elaborate provisions for the transfer of licenses, including the giving of notice, establishment of an escrow, payment of claims against the transferor, payment of a transfer fee, and the application for transfer must have the approval of the [Board of Equalization], following a complete investigation to be made by the State Liquor Administrator. [Citation.] A transfer from a partnership to one of the partners is clearly subject to these provisions. . . . It was not competent for the court to create a new license with Coletti as licensee. If he to be made the sole licensee it must be through action by the [Board of Equalization].

(*Id.* at pp. 985-986.) The court acknowledged that "[r]evocation of a partnership license brings about a harsh result as to an innocent partner," but found that result

unavoidable. (*Id.* at p. 986.) It observed:

Certainly the [Board of Equalization] does not act arbitrarily in revoking a partnership license where one partner has been found guilty of violations of law which call for revocation. There is no force in the argument that one partner in a liquor license cannot be bound by unauthorized acts of a copartner which place the license in jeopardy. When two or more persons apply for a partnership license, each of them necessarily assumes responsibility for the acts of the others with relation to the conditions under which the license is held.

(*Ibid.*)

Coletti, of course, did not involve a spousal partnership. Subsequent case law holds that this distinction does not change the result. In *Rice v. Alcoholic Beverage Control Appeals Board* (1979) 89 Cal.App.3d 30 [152 Cal.Rptr. 285], the appellant argued that the penalty of revocation was excessive, and that the spouse's innocence called for revocation only subject to conditions permitting transfer of the license. (*Id.* at p. 39.) The court of appeals rejected the argument and noted:

The fact that unconditional revocation may appear too harsh a penalty does not entitle a reviewing agency or court to substitute its own judgment therein (*MacFarlane v. Dept. Alcoholic Bev. Control* (1958) 51 Cal.2d 84, 91 [330 P.2d 769]); nor does the circumstance of forfeiture of the interest of an otherwise innocent co-licensee sanction a different and less drastic penalty. (See *Coletti v. State Board of Equalization* (1949) 94 Cal.App.2d 61, 64 [209 P.2d 984]; see also Cal. Admin. Code, tit. 4, § 58).

(*Ibid.*) The discretion to select the penalty rested solely with the Department, and could not be disturbed absent a showing of palpable abuse. (*Ibid.*, citing Cal. Const. art. XX, § 22; Bus. & Prof. Code § 24200; *Harris v. Alcoholic Bev Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].) This Board simply has no authority to reverse a penalty of revocation simply because an ostensibly innocent spouse is harmed by the penalty.

In this case, it is undisputed that appellant's spouse pled guilty to and was convicted of a crime of moral turpitude. It is also undisputed that appellant and her husband were married on the day he entered his guilty plea, were married when she applied for the license, and were still married on the day of the administrative hearing. Even if appellant were an utterly innocent spouse — and we are not sure she is, given her actions in removing the husband's name from the application documents immediately following his illegal actions — the Board is not empowered to offer relief. Where the Department determines that a truly innocent spouse has suffered unduly, it alone has the discretion to mitigate the penalty. Under *Rice*, however, this Board has no authority to reverse or alter the Department's penalty determination simply because a purportedly innocent spouse suffers as a result.

ORDER

The decision of the Department is affirmed.²

MEGAN McGUINNESS, ACTING CHAIR
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

²This 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:**

SAN DIEGO WHALE WATCHING LLC
SAN DIEGO WHALE WATCH
1717 QUIVIRA ROAD
SAN DIEGO, CA 92109

ON-SALE BEER AND WINE BOAT - LICENSE

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

SAN DIEGO DISTRICT OFFICE

File: 45-567813

Reg: 17086242

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. 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 August 1, 2018, a representative of the Department will contact you to arrange to pick-up the license certificate.

Sacramento, California

Dated: June 21, 2018



Matthew D. Botting
General Counsel

RECEIVED

JUN 21 2018

**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:

San Diego Whale Watching LLC
dba San Diego Whale Watch
1717 Quivira Road
San Diego, CA 92109

Respondent

On-Sale Beer and Wine Boat License

} File: 45-567813
}
} Reg.: 17 086 242
}
} License Type: 45
}
} Word Count: 7,000
}
} Reporter:
} Brywn Whatford
} Kennedy Court Reporters
}
} **PROPOSED DECISION**

Administrative Law Judge John W. Lewis, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at San Diego, California, on April 11, 2018.

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

Ralph Saltsman, attorney-at-law, represented respondent San Diego Whale Watching LLC.

The Department filed a Motion to Consolidate the hearing in this accusation with the hearing in accusation File # 45-568813, Reg # 17 086 243. The single count alleged in both accusations is identical, the parties are the same as are the attorneys. Respondent's counsel was unopposed to consolidating the two hearings. An order was issued consolidating both cases. (See Exhibit 2)

Although there is only one set of exhibits and one transcript, the exhibits and the transcript apply to both accusations. The parties requested that two separate Proposed Decisions be issued, therefore there are two separate Proposed Decisions, one for each Registration number.

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

- (1) Respondent-licensee, Ulka Pandya, no longer possesses the necessary qualifications of a licensee in that her spouse, Christopher Switzer, does not possess the qualifications of a licensee because he was convicted of a crime

involving moral turpitude, to-wit: 18 U.S.C. Section 2271 and 18 U.S.C. Section 2 Conspiracy to Destroy Vessels, in accordance of the California Code of Regulations, Title 4, Division 1, Section 58.

Oral evidence and documentary evidence were received at the hearing. The matter was argued and submitted for decision on April 11, 2018.

FINDINGS OF FACT

1. The Department filed the accusation on December 18, 2017. A First Amended Accusation was filed on February 13, 2018.
2. The Department issued a type 45, On-Sale Beer & Wine Boat License to Respondent on November 30, 2016.
3. There is no prior disciplinary history against this license.
4. Ulka Pandya is the 100 per cent shareholder of licensee San Diego Whale Watching LLC. (Exhibit 8).
5. The Individual Personal Affidavit (ABC-208-A) completed and signed by Ulka Pandya lists her spouse as being Christopher Switzer, their marriage date being February 9, 2011. (Exhibit 6, first page). The Individual Personal Affidavit (ABC-208-A) completed and signed by Christopher Switzer lists his spouse as being Ulka Pandya, their marriage date being February 9, 2011. (Exhibit 6, second page).
6. On February 1, 2017, an Information was filed against Christopher Switzer charging him with violating Title 18, U.S.C., Section 2271, conspiracy to destroy vessels and Title 18, U.S.C., Section 2, aiding and abetting. This was filed in the United States District Court, Southern District of California. The Case Number is 17cr0251-MMA. (Exhibit 3).
7. Also filed on February 1, 2017, in the United States District Court, Southern District of California, was a Plea Agreement between the United States and Defendant Christopher Switzer. In that Plea Agreement Christopher Switzer agreed to waive indictment and plead guilty to the above Information charging him with violating Title 18, U.S.C., Section 2271, conspiracy to destroy vessels and Title 18, U.S.C., Section 2, aiding and abetting. The plea agreement details Christopher Switzer's effort to intentionally sink a vessel for the purpose of fraudulently collecting insurance money. That Plea Agreement was signed by Christopher Switzer. (Exhibit 4).

8. The final judgment accepting Defendant Switzer's guilty plea was filed on March 23, 2017. (Exhibits).
9. On November 15, 2016, Ulka Pandya submitted to the Department an ABC-811 requesting the P-12 licensure of a second vessel. File 54-568813. (Exhibit 7).
10. Respondent presented no evidence or witnesses.
11. 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. Section 24200(d) provides that the Department may suspend or revoke a license upon the plea, verdict, or judgment of guilty, or the plea of nolo contendere to any public offense involving moral turpitude charged against the licensee.
4. 18 U.S.C. Section 2271 provides that "Whoever, on the high seas, or within the United States, willfully and corruptly conspires, combines, and confederates with any other person, such other person being either within or without the United States, to cast away or otherwise destroy any vessel, with the intent to injure any person that may have underwritten or may thereafter underwrite any policy of insurance thereon or on goods on board thereof, or with intent to injure any person that has lent or advanced, or may lend or advance, any money on such vessel on bottomry or respondentia; or whoever, within the United States, builds, or fits out any vessel to be cast away or destroyed, with like intent, shall be fined under this title or imprisoned not more than ten years, or both.
5. California Code of Regulations, Title 4, Division 1, Section 58 provides that:
Applications by Married Persons.
(a) Where a business is the community property of husband and wife, an alcoholic beverage license may be issued or held either:
(1) In the name of both husband and wife; or

(2) In the name of either spouse, if it can be demonstrated by evidence satisfactory to the department that the unlicensed spouse is qualified and cannot participate in the operation of the business for reasons including, but not limited to, the following:

(A) Physical disability;

(B) Absence from the State for a prolonged period.

(b) Where a business is the separate property of a spouse, established by satisfactory proof to the department, an alcoholic beverage license may be issued in the spouse's name alone.

(c) The unlicensed spouse must have the qualifications required of a holder of a license unless the husband and wife are not living together and have not lived together for at least six months.

(d) The provisions of this rule shall apply to the ownership, by either spouse, of 10 percent or more of the stock of any corporation holding an alcoholic beverage license.

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), (b) and (d) on the basis that, on or about February 1, 2017, Christopher Switzer, husband of Respondent licensee Ulka Panya, pled guilty to violating Title 18, U.S.C., Section 2271, conspiracy to destroy vessels and Title 18, U.S.C., Section 2, aiding and abetting, a public offense involving moral turpitude, in violation of Business and Professions Code section 24200(d). (Finding of Fact ¶ 7)

6. While the problem of defining moral turpitude is not without difficulty it is settled that whatever else it may mean, it includes fraud as a crime involving moral turpitude. It is also settled that the related group of offenses involving intentional dishonesty for purposes of personal gain are crimes involving moral turpitude. *In re Hallinan* 43 Cal2d 243.

7. The spouse of Respondent licensee Ulka Pandya, Christopher Switzer, plead guilty to conspiring to destroy a vessel for personal gain. Clearly this is a guilty plea for crimes involving moral turpitude.

8. California Code of Regulations, Title 4, Division 1, Section 58, requires that the unlicensed spouse of a Department licensee must have the qualifications required of a holder of a license. Having pled guilty to a crime involving moral turpitude, Christopher Switzer does not possess those qualifications. Because of this, Ulka Pandya, the spouse of Christopher Switzer and 100 per cent shareholder of San Diego Whale Watching LLC, is not qualified to hold an Alcoholic Beverage Control license

PENALTY

The Department requested that the Respondent's license be revoked based on the guilty plea of Christopher Switzer. Respondent's counsel seeks a mitigated penalty, something less than outright revocation. Respondent's counsel points out that Ulka Pandya was not named in any of the criminal charges and she is essentially an "innocent spouse".

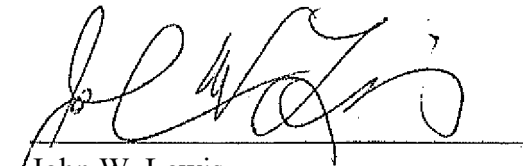
However, the facts point elsewhere. These licenses were issued on November 30, 2016. (Exhibit 1). Christopher Switzer attempted to sink the vessel on October 11, 2016, **prior** to the licenses being issued. (Exhibits 3 and 4). Ulka Pandya knew or should have known of her husband's criminal activity. Instead of informing the Department of this, Ulka Pandya removed Christopher Switzer's name from the ABC-217's (Exhibits 9 and 10, page 2). Ulka Pandya also submitted ABC-256 Limited Liability Company Questionnaire on November 14, 2016, listing herself as the 100 per cent shareholder. (Exhibit 8). All prior documents submitted to the Department listed Christopher Switzer as an owner. Clearly Ulka Pandya was attempting to avoid any problems with the issuing of the ABC licenses by removing Christopher Switzer's name from Department documents.

Continuation of the license would be contrary to public welfare and morals.

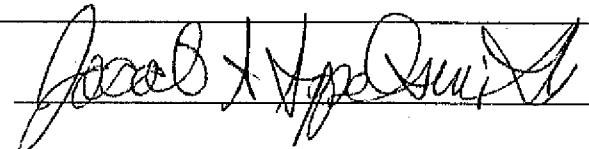
ORDER

The Respondent's on-sale beer and wine boat license is hereby REVOKED.

Dated: May 2, 2018



John W. Lewis
Administrative Law Judge

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

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

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

SAN DIEGO WHALE WATCHING LLC
CRUISE SAN DIEGO
4417 QUIVIRA ROAD
DOCK A, SLIP #2
SAN DIEGO, CA 92109

ON-SALE GENERAL FOR BOAT - LICENSE

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

SAN DIEGO DISTRICT OFFICE

File: 54-568813

Reg: 17086243

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 June 18, 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 August 1, 2018, a representative of the Department will contact you to arrange to pick-up the license certificate.

Sacramento, California

Dated: June 21, 2018

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**Alcoholic Beverage Control
Office of Legal Services**



Matthew D. Botting
General Counsel

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

IN THE MATTER OF THE ACCUSATION AGAINST:

San Diego Whale Watching LLC	}	File: 54-568813
dba Cruise San Diego	}	
4417 Quivira Road	}	Reg.: 17 086 243
Dock A, Slip #2	}	
San Diego, CA 92109	}	License Type: 54
	}	
Respondent	}	Word Count: 7,000
	}	
	}	Reporter:
	}	Brywn Whatford
	}	Kennedy Court Reporters
On-Sale General Boat License	}	<u>PROPOSED DECISION</u>

Administrative Law Judge John W. Lewis, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at San Diego, California, on April 11, 2018.

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

Ralph Saltsman, attorney-at-law, represented respondent San Diego Whale Watching LLC.

The Department filed a Motion to Consolidate the hearing in this accusation with the hearing in accusation File # 45-567813, Reg # 17 086 242. The single count alleged in both accusations is identical, the parties are the same as are the attorneys. Respondent's counsel was unopposed to consolidating the two hearings. An order was issued consolidating both cases. (See Exhibit 2)

Although there is only one set of exhibits and one transcript, the exhibits and the transcript apply to both accusations. The parties requested that two separate Proposed Decisions be issued, therefore there are two separate Proposed Decisions, one for each Registration number.

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

- (1) Respondent-licensee, Ulka Pandya, no longer possesses the necessary qualifications of a licensee in that her spouse, Christopher Switzer, does not possess the qualifications of a licensee because he was convicted of a crime

involving moral turpitude, to-wit: 18 U.S.C. Section 2271 and 18 U.S.C. Section 2 Conspiracy to Destroy Vessels, in accordance of the California Code of Regulations, Title 4, Division 1, Section 58.

Oral evidence and documentary evidence were received at the hearing. The matter was argued and submitted for decision on April 11, 2018.

FINDINGS OF FACT

1. The Department filed the accusation on December 18, 2017. A First Amended Accusation was filed on February 13, 2018.
2. The Department issued a type 54, On-Sale General Boat License to Respondent on November 30, 2016.
3. There is no prior disciplinary history against this license.
4. Ulka Pandya is the 100 per cent shareholder of licensee San Diego Whale Watching LLC. (Exhibit 8).
5. The Individual Personal Affidavit (ABC-208-A) completed and signed by Ulka Pandya lists her spouse as being Christopher Switzer, their marriage date being February 9, 2011. (Exhibit 6, first page). The Individual Personal Affidavit (ABC-208-A) completed and signed by Christopher Switzer lists his spouse as being Ulka Pandya, their marriage date being February 9, 2011. (Exhibit 6, second page).
6. On February 1, 2017, an Information was filed against Christopher Switzer charging him with violating Title 18, U.S.C., Section 2271, conspiracy to destroy vessels and Title 18, U.S.C., Section 2, aiding and abetting. This was filed in the United States District Court, Southern District of California. The Case Number is 17cr0251-MMA. (Exhibit 3).
7. Also filed on February 1, 2017, in the United States District Court, Southern District of California, was a Plea Agreement between the United States and Defendant Christopher Switzer. In that Plea Agreement Christopher Switzer agreed to waive indictment and plead guilty to the above Information charging him with violating Title 18, U.S.C., Section 2271, conspiracy to destroy vessels and Title 18, U.S.C., Section 2, aiding and abetting. The plea agreement details Christopher Switzer's effort to intentionally sink a vessel for the purpose of fraudulently collecting insurance money. That Plea Agreement was signed by Christopher Switzer. (Exhibit 4).

8. The final judgment accepting Defendant Switzer's guilty plea was filed on March 23, 2017. (Exhibit 5).

9. On November 15, 2016, Ulka Pandya submitted to the Department an ABC-811 requesting the P-12 licensure of this second vessel. File 54-568813. (Exhibit 7).

10. Respondent presented no evidence or witnesses.

11. 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. Section 24200(d) provides that the Department may suspend or revoke a license upon the plea, verdict, or judgment of guilty, or the plea of nolo contendere to any public offense involving moral turpitude charged against the licensee.

4. 18 U.S.C. Section 2271 provides that "Whoever, on the high seas, or within the United States, willfully and corruptly conspires, combines, and confederates with any other person, such other person being either within or without the United States, to cast away or otherwise destroy any vessel, with the intent to injure any person that may have underwritten or may thereafter underwrite any policy of insurance thereon or on goods on board thereof, or with intent to injure any person that has lent or advanced, or may lend or advance, any money on such vessel on bottomry or respondentia; or whoever, within the United States, builds, or fits out any vessel to be cast away or destroyed, with like intent, shall be fined under this title or imprisoned not more than ten years, or both.

5. California Code of Regulations, Title 4, Division 1, Section 58 provides that:

Applications by Married Persons.

(a) Where a business is the community property of husband and wife, an alcoholic beverage license may be issued or held either:

(1) In the name of both husband and wife; or

(2) In the name of either spouse, if it can be demonstrated by evidence satisfactory to the department that the unlicensed spouse is qualified and cannot participate in the operation of the business for reasons including, but not limited to, the following:

(A) Physical disability;

(B) Absence from the State for a prolonged period.

(b) Where a business is the separate property of a spouse, established by satisfactory proof to the department, an alcoholic beverage license may be issued in the spouse's name alone.

(c) The unlicensed spouse must have the qualifications required of a holder of a license unless the husband and wife are not living together and have not lived together for at least six months.

(d) The provisions of this rule shall apply to the ownership, by either spouse, of 10 percent or more of the stock of any corporation holding an alcoholic beverage license.

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), (b) and (d) on the basis that, on or about February 1, 2017, Christopher Switzer, husband of Respondent licensee Ulka Panya, pled guilty to violating Title 18, U.S.C., Section 2271, conspiracy to destroy vessels and Title 18, U.S.C., Section 2, aiding and abetting, a public offense involving moral turpitude, in violation of Business and Professions Code section 24200(d). (Finding of Fact ¶ 7)

6. While the problem of defining moral turpitude is not without difficulty it is settled that whatever else it may mean, it includes fraud as a crime involving moral turpitude. It is also settled that the related group of offenses involving intentional dishonesty for purposes of personal gain are crimes involving moral turpitude. *In re Hallinan* 43 Cal2d 243.

7. The spouse of Respondent licensee Ulka Pandya, Christopher Switzer, plead guilty to conspiring to destroy a vessel for personal gain. Clearly this is a guilty plea for crimes involving moral turpitude.

8. California Code of Regulations, Title 4, Division 1, Section 58, requires that the unlicensed spouse of a Department licensee must have the qualifications required of a holder of a license. Having pled guilty to a crime involving moral turpitude, Christopher Switzer does not possess those qualifications. Because of this, Ulka Pandya, the spouse of Christopher Switzer and 100 per cent shareholder of San Diego Whale Watching LLC, is not qualified to hold an Alcoholic Beverage Control license

PENALTY

The Department requested that the Respondent's license be revoked based on the guilty plea of Christopher Switzer. Respondent's counsel seeks a mitigated penalty, something less than outright revocation. Respondent's counsel points out that Ulka Pandya was not named in any of the criminal charges and she is essentially an "innocent spouse".

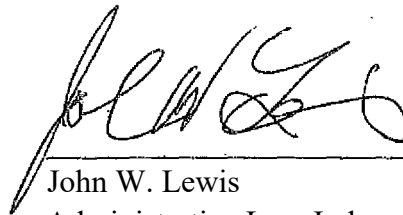
However, the facts point elsewhere. These licenses were issued on November 30, 2016. (Exhibit 1). Christopher Switzer attempted to sink the vessel on October 11, 2016, **prior** to the licenses being issued. (Exhibits 3 and 4). Ulka Pandya knew or should have known of her husband's criminal activity. Instead of informing the Department of this, Ulka Pandya removed Christopher Switzer's name from the ABC-217's (Exhibits 9 and 10, page 2). Ulka Pandya also submitted ABC-256 Limited Liability Company Questionnaire on November 14, 2016, listing herself as the 100 per cent shareholder. (Exhibit 8). All prior documents submitted to the Department listed Christopher Switzer as an owner. Clearly Ulka Pandya was attempting to avoid any problems with the issuing of the ABC licenses by removing Christopher Switzer's name from Department documents.

Continuation of the license would be contrary to public welfare and morals.

ORDER

The Respondent's on-sale general boat license is hereby REVOKED.

Dated: May 2, 2018



John W. Lewis
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: <u>Jacob A. Applequist</u>
Date: <u>6/18/18</u>