

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

AB-9823

File: 48-44011; Reg: 18087148

PERI'S TAVERN, INC.,
dba Peri's Tavern
29 Broadway Boulevard
Fairfax, CA 94930,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: December 5, 2019

ISSUED JANUARY 21, 2020

Appearances: *Appellant:* Gillian Garrett, as counsel for Peri's Tavern, Inc.,

 Respondent: Sean Klein, as counsel for the Department of
 Alcoholic Beverage Control.

OPINION

Peri's Tavern, Inc., doing business as Peri's Tavern, appeals from a decision of the Department of Alcoholic Beverage Control¹ revoking its license, with revocation conditionally stayed for a period of 36 months, and concurrently suspending its license for 15 days, because its employees permitted patrons to smoke or ingest cannabis at the licensed premises in violation of Health and Safety Code section 11362.3(a)(1).²

¹The decision of the Department, dated June 21, 2019, is set forth in the appendix.

² Section 11362.3(a)(1) does not permit any person to “[s]moke or ingest cannabis or cannabis products in a public place,” even though the use or ingestion of cannabis is generally lawful under section 11362.1.

FACTS AND PROCEDURAL HISTORY

On July 9, 2018, the Department instituted a 13-count accusation against appellant alleging, inter alia,³ that appellant's employees permitted patrons to smoke or ingest cannabis (or cannabis products) at the licensed premises. The administrative hearing was held on January 16, 2019, where documentary evidence was received and testimony concerning the violation charged was presented by Department Agents Michael Greene, Christopher Vale, and Samantha Scott, Novato Police Officer Paul Shaw, and Marin County Sheriff's Detective Corin Priest. Appellant's employees, Tyler Snow, Roy Stockton, and Joshua Burks, along with co-owner Michael Peri, testified on appellant's behalf.

Testimony established that three generations of the Peri family have owned and operated the licensed premises since 1927. The licensed premises moved to its current location in 1948 and holds an on-sale general public-premises license. Although the exact date of appellant's licensure is unknown, the Department did not allege any prior discipline against the license.

On March 2, 2018, Ofc. Shaw and his partner entered the licensed premises in an undercover capacity as part of an on-going narcotics investigation. Ofc. Shaw saw five to six patrons openly smoking marijuana in the patio section of the licensed premises. One of the patrons showed his marijuana smoking pipe to appellant's

³ The accusation alleges other violations by appellant's employees, including permitting the sale, possession, and use of a controlled substance, in violation of Health and Safety Code sections 11350, 11351, and 11360 and Business and Professions Code section 24200.5(a). However, since these counts were ultimately dismissed by the administrative law judge, they are omitted for brevity.

bartender, Johnny Umphrey, when Umphrey came into the patio section. Umphrey did nothing to discourage or suppress the use of marijuana at the licensed premises over the several times he came out to the patio that evening.

A few weeks later, on March 14, 2018, Det. Priest went to the licensed premises and waited in the patio section. Det. Priest noticed Jason Bilger, a regular patron at the bar, roll and smoke a marijuana cigarette at one of the patio tables. Later, Bilger smoked his marijuana cigarette in front of one of appellant's bartenders when the bartender came over to Bilger's table. The bartender did not stop Bilger from smoking cannabis at the licensed premises.

Det. Priest returned to the licensed premises on March 22, 2018. Again, she went to the patio section where she observed a group of patrons smoking cannabis in the presence of one of appellant's bartenders. According to Det. Priest, this was a common occurrence at the licensed premises.

On May 11, 2018, Department Agent Vale and another agent entered the licensed premises in an undercover capacity. They ordered drinks and proceeded to the rear patio section where they sat down. While seated, Agent Vale observed two male patrons enter the patio and sit at a table. One of the men produced a baggie of marijuana, which the other man used to roll a cigarette. Once rolled, the two men began to smoke the marijuana cigarette.

Agent Vale left the patio and went into the main bar area to speak with appellant's on-duty bartender, Roy Stockton. Agent Vale asked Stockton if it was okay to smoke "weed" while gesturing to the patio area. Stockton replied "yes," but told

Agent Vale to “be discrete about it.” (Findings of Fact, ¶ 33.) Agent Vale returned to the patio area as the men continued to smoke their marijuana cigarette.

Agent Vale then alerted two back-up agents who entered the patio area and detained the two men, escorting them off the premises. Agent Vale identified himself to Stockton as a Department agent, told him that he observed two males smoking marijuana in the patio area, and reminded Stockton that he told him it was okay to smoke marijuana at the licensed premises. Stockton told Agent Vale that he “thought marijuana was legal now and people could smoke anywhere.” (Findings of Fact, ¶ 35.)

On April 9, 2019, the administrative law judge (ALJ) issued a proposed decision sustaining counts 6, 9, 11, and 13 of the accusation, and dismissing counts 1, 2, 3, 4, 5, 7, 8, 10, and 12. The ALJ recommended that appellant’s license be revoked, but that revocation be stayed for 36 months, provided that no cause for further disciplinary action arise during that time. Additionally, the ALJ recommended that appellant’s license be suspended for 15 days. The Department adopted the ALJ’s proposed decision in its entirety on June 17, 2019 and issued a certificate of decision four days later.

Appellant filed a timely appeal contending that the law enforcement investigation was fundamentally unfair, and the penalty is excessive.

DISCUSSION

I

ISSUE CONCERNING FAIRNESS

Appellant contends the investigation was fundamentally unfair because appellant and its patrons were “confused about when and where it was legal to use cannabis after

January 1, 2018.” (AOB, at p. 10.) This confusion, appellant argues, lasted until July 25, 2018, when the Department issued guidance to its licensees about cannabis.

(*Ibid.*) The Department’s guidance came approximately two months after its investigation of appellant ended. (*Ibid.*)

Given the nature of the new law, and the fact that the Department felt it necessary to issue guidance in an effort to clarify the effect of cannabis legalization, the Board feels it would have been appropriate for the Department to issue a letter of warning to appellant rather than file an accusation. This is especially true since the Department ended up only sustaining the relatively minor counts of allowing patrons to use cannabis at the licensed premises. The Board feels that a letter of warning would be more in line with the Department’s self-stated goal of compliance and supporting businesses to succeed, rather than simply punishing them.

Nevertheless, the Board’s role is not to second-guess the Department, but rather, to determine if it proceeded in the manner required by law, whether its decision is supported by the findings, and whether the findings are supported by substantial evidence. (Cal. Bus. & Prof. Code § 23084(b)-(d).) Appellant maintains that the investigation was fundamentally unfair because it was unaware that patrons could not smoke marijuana at the licensed premises until Department guidance emerged in July 2018. (AOB, at p. 10.) However, a review of the statutory history reveals that the current version of Health and Safety Code section 11362.3(a)(1), the section appellant violated, was enacted by Senate Bill 94 (2017) and effective on June 27, 2017, six months prior to January 1, 2018. (MEDICINAL AND ADULT-USE CANNABIS REGULATION AND SAFETY ACT, 2017 Cal. Legis. Serv. Ch. 27 (S.B. 94) (WEST).)

Further, the original text of section 11362.3(a)(1), enacted by Proposition 64, is the same as the current version. (CONTROL REGULATE AND TAX ADULT USE OF MARIJUANA ACT, 2016 Cal. Legis. Serv. Prop. 64 (PROPOSITION 64) (WEST).) Proposition 64 was approved on November 8, 2016, and effective the very next day. (*Ibid.*) Nevertheless, appellant maintains it was “confused” by (or ignorant of) the applicability of a law that existed for two years in its current form before Department “guidance” emerged and went unchanged by the legalization of recreational cannabis on January 1, 2018. (AOB, at pp. 10-11.)

One of the oldest precepts of law is *ignorantia legis neminem excusat*, or “ignorance of the law excuses no one.”⁴ (See, e.g., *Shevlin-Carpenter Co. v. Minn.* (1910) 218 U.S. 57, 68 [30 S.Ct. 663] [rejecting loggers’ argument that they were ignorant of law requiring permit for removal of lumber from state land]; *Central of Ga. Ry. Co. v. Wright* (1907) 207 U.S. 127, 136 [28 S.Ct. 47] [rejecting railway shareholders’ argument that they were ignorant of shares’ taxability].)

This Board has, in the past, dealt with appellants pleading ignorance of the state’s alcoholic beverage laws and has firmly rejected that defense. (See e.g. *Gupta* (2019) AB-9749 [rejecting appellant’s argument that he did not know slot machines were illegal].) Further, under controlling legal authority, licensees have an affirmative duty to maintain and operate their premises in accordance with law. (*Laube v. Stroh* (1992) 2 Cal.App.4th 364, 379 [3 Cal.Rptr.2d 779] [“A licensee has a general, affirmative duty to maintain a lawful establishment [which includes] the obligation to be

⁴ An alternative phrasing, also employed by the courts, is *ignorantia juris non excusat*, or “ignorance of the law does not excuse.”

diligent in anticipation of reasonably possible unlawful activity, and to instruct employees accordingly."]; see also *CMPB Friends, Inc. v. Alcoholic Bev. Control Appeals Bd.* (2002) 100 Cal.App.4th 1250, 1256 [122 Cal.Rptr.2d 914] ["[L]icensees bear an affirmative duty to ensure that minors are not permitted to enter and remain in their premises in violation of section 25665."].)

Throughout the course of the Department's investigation of appellant, permitting patrons to use or smoke cannabis at the licensed premises (a public place) was prohibited under Health and Safety Code section 11362.3(a)(1), and had been since at least November 9, 2016. Even though the recreational use of marijuana was legalized effective January 1, 2018, the law regarding using such marijuana in public went unchanged. Thus, appellant's argument that it was "confused" as to whether its patrons were allowed to use cannabis at the licensed premises until it received Department guidance is unavailing. Appellant had an affirmative duty to maintain and operate his premises in accordance with these laws. *Laube, supra*, at p. 379. Appellant's ignorance is, therefore, no defense.

II

ISSUE CONCERNING PENALTY

Appellant contends the penalty is excessive. (AOB, at p. 11.) Appellant argues that a "15-day suspension simply is not justified under the circumstances [and that] [n]umerous, substantial mitigating factors support no penalty or a lesser penalty." (*Ibid.*)

This Board may examine the issue of excessive penalty if it is raised by an appellant. (*Joseph's of Cal. v. Alcoholic Bev. Control Appeals Bd.* (1971) 19

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

In determining disciplinary action, the Department is required to consider the penalty guidelines incorporated in California Code of Regulations, title 4, section 144. Under the guidelines, the standard penalty for Health and Safety code violations involving a controlled substance is revocation. (Cal. Code Regs., tit. 4, § 144.) Nevertheless, rule 144 allows the Department to deviate from the standard penalty when, “*in its sole discretion*[, it] determines that the facts of the particular case warrant such deviation — such as where facts in aggravation or mitigation exist.” (*Ibid.*, emphasis added.)

Factors in aggravation include prior disciplinary history, prior warning letters, licensee involvement, premises located in high crime area, lack of cooperation by licensee in investigation, appearance and actual age of minor, and continuing course or pattern of conduct. (Cal. Code Regs., tit. 4, § 144.) Factors in mitigation include the length of licensure at subject premises without prior discipline or problems, positive action by licensee to correct problem, documented training of licensee and employees,

and cooperation by licensee in investigation. However, neither list of factors is exhaustive; the Department may use its discretion to determine whether other aggravating or mitigating circumstances exist. (*Ibid.*)

Here, even though appellant faced revocation, it takes issue with the stayed revocation and 15-day suspension, calling it “excessive.” (AOB, at p. 13.) Specifically, appellant disagrees with the weight the Department afforded to its mitigation evidence. (*Id.* at pp. 11-13.) Appellant believes a “warning letter would have been the fair and efficient way to address [the violations].” (*Id.* at p. 13.)

The record indicates that the Department did afford appellant some mitigation, stating that “some net mitigation was warranted” by appellant’s length of licensure without disciplinary action, positive action taken to correct the problem, and appellant’s “acknowledgments and awards for public service to the community.” (Penalty, ¶¶ 7-10.) However, the Department did discount some of appellant’s mitigation with evidence of aggravation based on the “chronic nature of the problem [of allowing patrons to smoke marijuana at the licensed premises].” (*Id.* at ¶ 6.) Based on the discretion afforded to the Department, as well as its articulated reasoning for balancing evidence of mitigation and aggravation, the Board cannot say that the Department abused its discretion.

As the Board has said many times over the years, the extent to which the Department considers mitigating or aggravating factors is a matter entirely within its discretion. Rule 144 provides revocation for Health and Safety code violations involving controlled substances. Rule 144 also allows the Department to exercise discretion to consider aggravation and mitigation. The Department’s balancing of the

mitigation and aggravation evidence was reasonable and not an abuse of discretion.

The penalty must stand.

ORDER

The decision of the Department is affirmed.⁵

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

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.

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:**

**PERIS TAVERN INC.
PERI'S TAVERN
29 BROADWAY BOULEVARD
FAIRFAX, CA 94930**

ON-SALE GENERAL - LICENSE

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

SANTA ROSA DISTRICT OFFICE

File: 48-44011

Reg: 18087148

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 17, 2019. 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 August 1, 2019, a representative of the Department will contact you to arrange to pick-up the license certificate.

Sacramento, California

Dated: June 21, 2019



Matthew D. Botting
General Counsel

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Alcoholic Beverage
Office of Legal

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

IN THE MATTER OF THE ACCUSATION AGAINST:

Peris Tavern Inc.
Dba: Peri's Tavern
29 Broadway Boulevard
Fairfax, CA 94930

Respondent

Regarding Its Type-48 On-Sale General License Under
the State Constitution and the Alcoholic Beverage
Control Act.

} File: 48-44011
}
} Reg: 18087148
}
} License Type: 48
}
} Word Count Estimate:
} 1-15-19: 37,500
} 1-16-19: 33,341
}
} Court Reporter:
} 1-15-19: Patricia Babits, CSR 12848
} 1-16-19: Cindy Pacatte, CSR 12839

PROPOSED DECISION

Administrative Law Judge David W. Sakamoto, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter in San Rafael, California on January 15-16, 2019.

After oral evidence, documentary evidence, evidence by oral stipulation, and closing written arguments were received, the matter was deemed submitted for decision on March 11, 2019.¹

Sean Klein, Attorney III, Office of Legal Services, Department of Alcoholic Beverage Control, appeared and represented the Department of Alcoholic Beverage Control. (Hereafter the Department)

Gillian Garrett, Esq. and John Hinman, Esq., of Hinman and Carmichael represented the licensee/respondent Peris Tavern, Inc., doing business as Peri's Tavern. (Hereafter Respondent)²

¹ The Department's Closing Argument was marked Exhibit ALJ-1, Respondent's Closing Statement was marked Exhibit ALJ-2, and the Department's Rebuttal on Closing Argument was marked as Exhibit ALJ-3.

As set forth in the Department's accusation, it seeks to discipline Respondent-licensee on the grounds that:

Count 1: On or about January 18, 2018, respondent-licensee's agent or employee, Tyler Snow, permitted patron Mario Chavez Lopez to possess, within the premises, a controlled substance, to-wit: cocaine, in violation of Health and Safety Code section 11350.

Count 2: On or about January 18, 2018, respondent-licensee's agent or employee, Tyler Snow, permitted patron Mario Chavez Lopez to possess, within said premises, a controlled substance, to-wit: cocaine, for purposes of sale, in violation of Health and Safety Code section 11351.

Count 3: On or about March 2, 2018, respondent-licensee's agent or employee, "Johnny," was within the licensed premises, an aider or abettor, as defined in section 31 of the California Penal Code, in the selling or furnishing or in the offering to sell or furnish a controlled substance, to-wit: marijuana, in violation of Health and Safety Code section 11360.

Count 4: On or about January 18, 2018, respondent-licensee(s) knowingly permitted the illegal sale, or negotiations for sales, of controlled substances or dangerous drugs upon the licensed premises, in violation of Business and Professions Code section 24200.5(a).

Count 5: This count was dismissed by the Department at the hearing because it was a duplicate of Count 3.

Count 6: On or about March 2, 2018, respondent-licensee's agent or employee, "Johnny," permitted patron(s) to smoke or ingest cannabis or cannabis products within the licensed premises, a public place, in violation of Health and Safety Code section 11362.3(a)(1).

Count 7: On or about March 8, 2018, respondent-licensee's agent or employee, "Johnny," was within the licensed premises, sold or furnished or offered to sell or furnish a controlled substance, to-wit: marijuana, in violation of Health and safety Code section 11360.

Count 8: On or about March 8, 2018, respondent-licensee(s) knowingly permitted the illegal sale, or negotiations for sales, of controlled substances or dangerous drugs upon the licensed premises, in violation of Business and Professions Code section 24200.5(a).

Count 9: On or about March 14, 2018, respondent-licensee's agent or employee, John Doe 1, permitted patron(s) to smoke or ingest cannabis or cannabis products within the licensed premises, a public place, in violation of Health and Safety Code section 11362.3(a)(1).

² Although the license was issued to Peris Tavern, Inc., the corporation was held by the Peri family, therefore it was commonly referred to as Peri's Tavern.

Count 10: On or about March 14, 2018, respondent-licensee(s) knowingly permitted the illegal sale, or negotiations for sales, of controlled substances or dangerous drugs upon the licensed premises, in violation of Business and Professions Code section 24200.5(a).

Count 11: On or about March 22, 2018, respondent-licensee's agent or employee, John Doe 2, permitted patron(s) to smoke or ingest cannabis or cannabis products within the licensed premises, a public place, in violation of Health and Safety Code section 11362.3(a)(1).

Count 12: On or about May 3, 2018, respondent-licensee's agent or employee, John Doe 3, permitted patron(s) to smoke or ingest cannabis or cannabis products within the licensed premises, a public place, in violation of Health and Safety Code Section 11362.3(a)(1).

Count 13: On or about May 11, 2018, respondent-licensee's agent or employee, Roy Stockton, permitted a patron(s) to smoke or ingest cannabis or cannabis products within the licensed premises, a public place, in violation of Health and Safety Code section 11362.3(a)(1).

FINDINGS OF FACT

1. The Department filed the original accusation on July 9, 2018. It received Respondent's Notice of Defense on July 23, 2018. A First Amended Accusation was filed on September 14, 2018. The matter was set for a hearing.³
2. Three generations of the Peri family have owned and operated Peri's Tavern, previously called Peri's Silver Dollar Tavern, in Fairfax, California. It opened in approximately 1927 at another location in Fairfax. In 1948, it moved to its current location at 29 Broadway Boulevard. (Hereafter the Licensed Premises) The exact date of its original licensure by the Department was not established by the evidence. Respondent currently holds a type-48 on-sale general public-premises license permitting it to retail in beer, wine, and distilled spirits for consumption on the Licensed Premises. In 2017, the stock of Peris Tavern, Inc. was acquired by Michael Peri and his wife. Michael Perry is the grandson of the original owner, Charles Perry Sr. The Department did not allege Respondent suffered any prior disciplinary action.
3. The Licensed Premises consist of a main building (Hereafter main building) with its primary entrance on Broadway Boulevard, an open-air patio (Hereafter patio), and an open-air backyard. (Hereafter backyard) The main building contained a fixed bar counter, tables, chairs, an elevated stage, and one or more billiard tables. Adjacent to the main building, near Broadway Boulevard, was the covered semi-enclosed open-air patio. It was regularly used by Respondent's patrons and contained tables and chairs. Adjacent to the main building near the patio was a parking lot shared by Respondent's patrons and patrons of a nearby restaurant. To the rear of and adjacent to the main building was the enclosed open-air backyard.

³ The First Amended Accusation was deemed to supersede the original Accusation.

The backyard was used by patrons and contained a fixed canopy structure, benches, tables, and chairs. There was no service bar for alcoholic beverages in the backyard. The backyard was approximately 36 ½ feet wide by 75 feet deep and bounded by fencing on two sides, an adjacent building's wall on the third side, and the rear wall of the main building on the fourth side. The backyard was otherwise open air and not covered by any roof.

4. Across Broadway Boulevard from the Licensed Premise's main building was a public parking lot. There was a bus-stop near the parking lot. To the rear of the Licensed Premises' backyard ran a one-way alley called Mono alley. Across Mono alley were some structures including assorted housing.

5. The Marin County Major Crimes Task Force received a complaint of illegal drug or narcotics activity at the Licensed Premises and commenced an undercover investigation there. The investigation involved various local law enforcement personnel including Alcoholic Beverage Control agents.

6. On January 18, 2018 at approximately 8:15 p.m., Alcoholic Beverage Control Agents Scott, Carlson, and Baird entered the Licensed Premises in an undercover capacity to determine if any violations were occurring, including any illegal narcotics trafficking. They ordered drinks from bartender Tyler Snow. (Hereafter Snow)

7. While at the bar counter, Agent Scott noticed a Hispanic male identified as Mario Chavez Lopez (Hereafter Lopez) who sat near Agent Scott at the bar counter. He ordered a Modelo beer and spoke on and off with Snow.

8. While at the counter, Lopez asked Agent Scott if she liked "coke".⁴ Agent Scott indicated she did like "coke" and Lopez offered to give her some but he wanted her to accompany him to his place. Agent Scott declined to accompany him but negotiated to purchase \$100 worth of cocaine from him. Lopez indicated he would go get the cocaine and left the premises.

9. Agent Scott informed Snow she had just agreed to buy "coke" from Lopez and asked him if Lopez was good for it, meaning Lopez would supply Agent Scott with uncontaminated cocaine. Snow responded by telling Agent Scott that Lopez worked at a local taco shop and occasionally delivered food to the Licensed Premises. Snow also commented to the effect that unless Agent Scott wanted "...to take a hit of methamphetamine tonight, I wouldn't recommend it." Snow added that "And for God sake, if you do it, do it outside." Agent Scott remained at the bar counter and engaged Snow in general conversation unrelated to the drug deal.

⁴ Agent Scott testified that in this context, "coke" was street jargon for cocaine, not the Coca-Cola beverage.

10. About 30 minutes later, Lopez returned accompanied by two men. Lopez approached Agent Scott and motioned her to join him away from the bar counter. The pair ended up seated on a bench against a wall in the billiard table area in the main building. Lopez pulled out a small plastic wrapped bindle containing cocaine. Agent Scott gave Lopez \$100 and he gave her the bindle. Agent Scott asked for and received Lopez's phone number in case she wanted to obtain more cocaine from Lopez.

11. Having purchased the cocaine, Agent Scott joined her partner agents who were still seated at the bar counter. Lopez later asked Agent Scott if she wanted to join him and his companions to smoke in the backyard. Agent Scott declined his offer and soon she and her partners left the premises.

12. Agent Scott later gave the bindle of cocaine to Agent Reichel.

13. Prior to March 2, 2018, Novato Police Officer Shaw (Hereafter Ofc. Shaw) received narcotics training in the police academy and had a 16-week field training course that included narcotics. He also took a drug recognition expert training course given by the California Highway Patrol. He also had located and identified marijuana hundreds of times working as a police officer.

14. On March 2, 2018, at approximately 7:00 p.m., Ofc. Shaw and his partner, Deputy Probation Officer Ganose, entered the Licensed Premises in an undercover capacity as part of the narcotics investigation. Respondent's employee "Johnny" aka Johnny Umphrey (Hereafter Umphrey) was working there.⁵

15. In the patio, Ofc. Shaw saw a group of five to six patrons openly smoking marijuana. One of those patrons showed his marijuana smoking pipe to Umphrey when he came into the patio. The patron used the pipe to smoke marijuana in the presence of Umphrey who did nothing to discourage or suppress its usage there. Umphrey came out several times to the patio cleaning ashtrays and clearing empty glasses and bottles.

16. Later that evening, Officer Shaw and his partner asked Umphrey if they could purchase marijuana. Umphrey told Officer Shaw to go to the backyard where there was always someone smoking marijuana and Ofc. Shaw could approach them about obtaining or purchasing marijuana.

⁵ For purposes of the First Amended Accusation and this decision, "Johnny" and Johnny Umphrey were deemed the same person.

17. Once in the backyard, Ofc. Shaw met a man who directed him to a wooden bench he referred to as the "Soul of Fairfax". The bench had a wooden pipe or tube inserted into a horizontal slat that made up part of the back rest of the bench. The man told Ofc. Shaw that feature was a built-in pipe used to smoke marijuana.
18. Ofc. Shaw asked the unidentified man about purchasing some marijuana. The unidentified man introduced him to another man, identified as "Mike". Ofc. Shaw asked Mike about buying marijuana, but Mike did not want to sell any marijuana to Ofc. Shaw. Mike rolled and lit a marijuana cigarette he and others smoked. He offered it to Ofc. Shaw who declined to smoke it. Ultimately, Mike gave Officer Shaw approximately one gram of marijuana. Ofc. Shaw paid no money to Mike for that. On his way out of the Licensed Premises, Ofc. Shaw paid Umphrey \$2.00 for referring him outside to locate someone who could supply Ofc. Shaw with marijuana.
19. Also on March 2, 2018, Det. Priest saw a group of men smoking cannabis by a ping-pong table in the back yard. They did so in the presence of the main bartender that night and a second employee who was emptying the trash, filling kegs, and moving bar property about the Licensed Premises. The employees took no action to admonish or request those patrons who were smoking cannabis to stop that activity.
20. On March 8, 2018, Ofc. Shaw returned to the Licensed Premises and met Umphrey in the backyard. Ofc. Shaw asked Umphrey about the rules for smoking marijuana at the Licensed Premises. Umphrey said it was best to smoke marijuana in the backyard area furthest from the rear door so that smoke would not enter the main building through the rear doorway. Also, any marijuana smoked in the front patio should be on the "D.L." or down-low, meaning smoked in a discrete manner, so that police would not detect marijuana smoking there.
21. Ofc. Shaw asked Umphrey if there was anyone in the backyard who would sell marijuana to him. Umphrey said the "regulars" were not there and advised Ofc. Shaw to see if there was anyone in the patio who might have marijuana to sell. Ofc. Shaw remained in the backyard and did not go to the patio.
22. A few minutes later, Umphrey returned and joined Ofc. Shaw. Ultimately, Umphrey rolled a marijuana cigarette in the presence of Ofc. Shaw and offered it to him. Ofc. Shaw said he could not smoke it because he was driving. Umphrey gave Ofc. Shaw the unlit marijuana cigarette. Umphrey told Ofc. Shaw the marijuana was given by a customer to the bar, possibly as a "tip". Ofc. Shaw kept the cigarette and ultimately gave it to case agent Jensen who would place it in the evidence locker. Umphrey said he worked for a marijuana legal defense firm and was aware selling marijuana at a bar was illegal compared to lawfully purchasing it at a dispensary.

23. Detective Priest (Hereafter Det. Priest) also worked on the investigation at the Licensed Premises. She had received various narcotics related training, including having completed an 80 hour narcotics enforcement course. She had also made approximately 100 narcotics related arrests before she visited the Licensed Premises on March 14, 2018. Prior to that date, she had purchased cocaine from Mario Lopez.

24. On March 14, 2018, at approximately 11:00 p.m., Det. Priest went to the Licensed Premises to attempt to make another undercover cocaine purchase from Lopez. While in the patio, Det. Priest contacted Lopez via cell phone and arranged to purchase cocaine from him at the Licensed Premises. Lopez indicated he was at home and would come over to the Licensed Premises. Lopez lived within walking distance of the Licensed Premises.

25. Once Lopez arrived at the Licensed Premises, he obtained a drink at the bar, then went to the patio where he joined Det. Priest and Det. Scotto at one of the tables. After Lopez sat down, Det. Priest gave Lopez \$40.00 cash. Lopez gave Det. Priest a small folded dollar bill containing cocaine that she put in her wallet, then into her purse. Later that evening, Det. Priest gave the cocaine to Det. Reishel.

26. Also on March 14, 2018, Det. Priest noticed a male patron, known as "Bilger", who she recognized as a regular patron at the bar. Det. Priest saw him roll and smoke a marijuana cigarette at one of the tables in the patio.⁶ She had seen him on earlier occasions behind the bar making drinks and emptying ash trays. Det. Priest saw Bilger smoke his marijuana cigarette in the presence of one of the Respondent's bartenders who had come over to Bilger's table.

27. On March 22, 2018, Detective Priest returned to the Licensed Premises. She observed a group of patrons seated at a table in the patio. They were smoking cannabis in the presence of one of Respondent's employees, an unidentified bartender.

28. Alcoholic Beverage Control Agent Greene (Hereafter Agent Greene) also visited the Licensed Premises as part of the investigation. Prior to his visit, he received some 200 hundred hours in narcotics training and was well familiar with marijuana, including methods of its ingestion and its odor. He also made prior undercover marijuana arrests.

29. On May 3, 2018, at approximately 8:15 p.m., Agents Greene and Cruz entered the Licensed Premises. Only one bartender was on-duty. There were approximately 20 patrons inside the main building. Agent Greene went to the backyard. From the backyard, there was no view of the bar counter in the main building. There were approximately 10-15 patrons in the backyard. Agent Greene saw one of those patrons smoking marijuana for 2-3 minutes.

⁶ At the hearing, Respondent's witness Roy Stockton identified "Bilger" or "Bildger" as Jason Bilger.

When the patron finished smoking, he left the backyard and went into the main building. None of Respondent's employees were in the backyard during Agent Green's visit there that night.

30. Alcoholic Beverage Control Agent Vale (Hereafter Agent Vale) also participated in the investigation at the Licensed Premises. He had already received narcotics training at his Peace Officer Standards and Training (P.O.S.T.) academy at Napa College, the California Department of Corrections (CDC) Academy, and on-the-job training at CDC and ABC. Working for the CDC, he gained experience regarding the ability to track down the odor of marijuana inside custody facilities. While at ABC, he made at least a dozen arrests related to cannabis. For ABC, he also worked at various large public events where the odor of cannabis was prevalent.

31. On May 11, 2018, at approximately 6:00 p.m., Agent Vale and ABC Agent Cesaretti entered the Licensed Premises in an undercover capacity to determine if anyone was smoking cannabis. They ordered drinks and observed only 1-2 patrons in the main building. The agents proceeded to take seats in the backyard. Agent Vale noticed the bartender, the only on-duty employee there, come out briefly to the backyard. He stuck his head outside the rear doorway then returned inside the main building. There were approximately 12 other people in the backyard.

32. After the bartender returned inside, two male patrons entered the backyard and sat at a table. One of the men produced a baggie of marijuana and the other man rolled cigarette using marijuana from the baggie. The men lit the marijuana cigarette and began to smoke it.

33. Agent Vale left the patio and went into the main building and spoke with Respondent's bartender, Roy Stockton. (Hereafter Stockton) Agent Vale, in an undercover capacity, asked Stockton if it was okay to smoke "weed" while gesturing towards the backyard.⁷ Stockton told Agent Vale "yes" but admonished him to "...just be discrete about it." Agent Vale returned to the backyard and walked within six inches of the two men finishing up smoking their marijuana cigarette.

34. Agent Vale alerted two back-up Agents who later entered the backyard, contacted and detained the two men, and escorted them off the Licensed Premises. Both men told Agent Vale they were smoking "medical marijuana" in the backyard.

35. Agent Vale then identified himself as an ABC agent to bartender Stockton and told him he observed two men smoking marijuana in the backyard and reminded Stockton he told Agent Vale it was okay to smoke marijuana in the backyard but to be discreet. Stockton said he thought marijuana was legal now and people could smoke anywhere.

⁷ Agent Vale testified "weed" is commonly known as marijuana.

36. The mens' marijuana was seized as evidence. Agent Vale put it in a locked box in his car. It was transferred to a locked room at his office. The evidence custodian later put it in a locked evidence room. It remained there in the event further Department of Justice lab analysis was needed.

37. Tyler Lee Snow (Hereafter Snow) testified he was one of Respondent's bartenders from 2014 through 2018. During that time, the Licensed Premises offered live music daily. When he tended bar on the weekdays he served approximately 50 patrons. When he worked on weekends he handled 100 or more patrons.

38. Snow testified that between January and May 2018, John Umphrey was employed as a part time bar-back and janitor at the Licensed Premises. He would empty ash trays, wash dishes, cut fruit, bus glasses, and assist the bartenders. He also performed routine janitorial work.

39. Snow was also acquainted with one of the regular customers known as "Bilger". He was not a Licensed Premises' employee. Bilger routinely smoked tobacco cigarettes at the Licensed Premises. Snow believed Bilger also smoked marijuana, but never saw him do that at the Licensed Premises. If Bilger emptied any ashtrays, it was only as a favor or courtesy to the business.

40. Snow also testified that from the interior bar counter, there was not a good view of the front patio via two exterior windows on that side of the building. Also, from the interior bar counter there was not a good view of the area containing the billiard table(s). Lastly, from the main bar counter, there was also no view of the backyard as the rear door connecting the backyard to the main building was kept closed to prevent noise escaping outdoors.

41. Snow testified the odor of burning marijuana was common in and around the Licensed Premises and neighborhood. Its odor is very distinct from burning tobacco products. Marijuana can also be identified by visual inspection. The odor of burning marijuana came not only from the rear alley way and the homes there but also from across Broadway Boulevard where people smoked marijuana in the parking lot and at the bus stop. Snow added the odor of marijuana was also common in the public spaces of Fairfax, including the parks. He added some patrons even had the odor of marijuana on them when they entered the Licensed Premises.

42. Snow testified the odor of marijuana was so prevalent in the area that sometimes when they noticed the odor of burning marijuana inside the Licensed Premises their investigation determined the source was actually somewhere off the Licensed Premises.

43. Snow added many patrons smoked tobacco products, such as cigarettes, pipe tobacco, and vaporized smoking products, on the Licensed Premises.

44. Snow testified Respondent had a "zero-tolerance" policy against smoking marijuana on the Licensed Premises. If patrons were discovered smoking marijuana they were asked to extinguish it or leave the business. If patrons asked about other illegal drugs, Snow told them they were not available there.

45. Snow knew Lopez worked at a nearby restaurant and occasionally delivered take-out food to the Licensed Premises. Snow developed a low opinion of Lopez as a "creep" because he was aggressive towards women. At no time between January to May 2018 had Snow heard Lopez sold illegal drugs.

46. Snow added that when the law in California changed in January 2018, essentially decriminalizing possessing and using small quantities of marijuana, patrons began smoking marijuana more freely on the Licensed Premises. In response, he stepped up his enforcement of not permitting marijuana smoking there. Patrons seemed confused regarding exactly when and where they could lawfully smoke marijuana.

47. Snow testified that when, on January 18, 2018, Agent Scott told him she had just negotiated with Lopez to purchase cocaine from him, he believed Agent Scott was an undercover police officer. Snow testified Agent Scott's undercover partner acted suspiciously, like an undercover officer might. Snow felt Agent Scott was playing a game with him so he played the game with her. Snow recalled telling Agent Scott that if she actually purchased cocaine from Lopez to do it "outside". Snow testified he told Agent Scott she might end up with horse tranquilizers and "shitty" meth. Snow claimed he was being a "jerk" and displayed a sarcastic tone towards Agent Scott because she was trying to put him in jail. Snow added it was not his job to enforce morality standards since he knew it was all kind of a game because Agent Scott was not really going use any drugs she obtained from Lopez.

48. Although not having attended any specialized training about cannabis/marijuana, Scott testified burning marijuana had a very distinctive odor compared to burning tobacco products.

49. Snow knew a regular customer, known as "Bilger". Sometimes Bilger would drink alcoholic beverages, and sometimes not. He was not Respondent's employee. He liked to roll his own tobacco cigarettes and smoke them at the Licensed Premises. He also liked to recreationally use cannabis.

50. Roy William Stockton (Hereafter Stockton) testified he was one of Respondent's bartenders and worked at the Licensed Premises full or part-time since 2011. He is still one of Respondent's employees. Stockton testified that burning marijuana has a distinct odor and he can tell the difference between it and the odor of burning tobacco. He testified that there are many marijuana smokers in Fairfax. Stockton daily detected the odor of burning marijuana that he sensed originated from the rear alley behind the Licensed Premises, the adjacent shared parking lot, and the parking lot and bus stop across Broadway Boulevard. That odor of

marijuana would waft into the backyard. Some patrons even had the odor of marijuana on them as they entered the Licensed Premises. He experienced occasions where he suspected people might be smoking marijuana on the Licensed Premises but determined that its odor actually originated off the Licensed Premises. It was against Respondent's rules for anyone to smoke marijuana on the Licensed Premises. If he saw patrons smoking marijuana, he would tell them they have stop smoking or leave the business.

51. Stockton testified tobacco smoking was permitted on the patio and backyard. Patrons routinely smoked tobacco cigarettes, hand rolled cigarettes, and vaporized tobacco products. Stockton, without any formal training, was able to distinguish between the smoke/odor of marijuana and the smoke/odor of tobacco products.

52. Stockton knew of a patron known as Jason Bilger aka "Bilger". Stockton recalled Bilger smoked only hand-rolled tobacco cigarettes at the Licensed Premises.

53. Stockton recalled patrons were excited yet confused when cannabis was "legalized" in California beginning in 2018. More patrons wanted to smoke marijuana at the Licensed Premises, so they stepped-up enforcing Respondent's cannabis/marijuana smoking ban there.

54. Regarding May 11, 2018, Stockton recalled Agent Vale entered the Licensed Premises. Stockton did not recall what he spoke to Agent Vale about during their initial conversation because Agent Vale did not order a drink and Stockton was busy taking and filling other patrons' drink orders. Stockton testified he did not focus on what Agent Vale was saying.

55. Later that night, after Agent Vale made himself known to Stockton as an ABC Agent, Agent Vale told him about two people smoking marijuana in the backyard. Stockton told Agent Vale he thought that was permitted but later indicated to Agent Vale he was confused whether patrons could or could not smoke cannabis on the Licensed Premises. Stockton testified Agent Vale told him it was not well publicized exactly where people could and could not legally smoke cannabis.

56. Stockton added the Respondent's business is now very scared over any smoking of marijuana on the Licensed Premises. Stockton testified Respondent's management yelled at him because of what happened on May 11, 2018.

57. Joshua Burks (Hereafter Burks) testified he has worked for Respondent since 2011 and served as Respondent's assistant manager the last five years. He is still Respondent's assistant manager.

58. Burks testified Umphrey was a part time bar-back at the Licensed Premises. He collected and washed dishes, poured water, and emptied ash trays.

59. Burks testified burning marijuana has a pungent unique odor distinct from tobacco. He added marijuana has a distinct visual appearance when compared to tobacco.

60. He noticed the odor of burnt or burning marijuana came from the alleyway to the rear of the Licensed Premises, from the adjacent parking lot, and from across Broadway on a daily basis. The odor regularly wafted into the backyard. He testified many people in Fairfax smoke marijuana and that some patrons even had the odor of burnt marijuana on them when they entered the Licensed Premises. If he saw people smoking marijuana inside the Licensed Premises he would tell them to put it out or leave the business. Burks testified that patrons smoke tobacco products by various methods on the Licensed Premises.

61. Burks testified Lopez was not one of Respondent's employees. Burks never saw Lopez with illegal drugs or heard from anyone he was a drug dealer.

62. Burks testified there were three wood benches in the backyard, and each had a metal pipe inserted in a section of the backrest. Burks testified the benches, in addition to some other items displayed in the backyard, were all gifts to the Licensed Premises business from a local artist. Two of the three benches were already at the Licensed Premises when he began to work there in 2011. The third bench arrived about four years ago.

63. Burks testified that in 2018 when cannabis was legalized in California, Respondent's patrons were excited but confused. Burks never received any guidance from ABC regarding cannabis usage until after the investigation at the Licensed Premises was completed.

64. Michael Peri testified he and his wife currently own all the stock of the Respondent-corporation. They acquired it through a family trust in late 2017. He is the third generation of the Peri family to own and operate Peri's Tavern. The bar was started by his grandfather in 1927. The Licensed Premises has operated at its current location since 1948. In 1975, Michael Peri's father became the owner of the business. The business has operated as a bar and community music "gathering place". It offers live music seven days a week. Over the years it has sponsored or supported various charitable causes. It has received several awards and acknowledgments for those efforts. In 2013, it received a notice from ABC acknowledging its proper refusal to sell alcohol to an under-age decoy.

65. Peri also noticed the odor of burnt marijuana when he has been in the Licensed Premises' parking lot. The odor originated from Mono alley that ran behind the Licensed Premises.

66. Peri testified Respondent had a policy of no drugs on its premises. The bartenders were trained to recognize drug activity. If they detected it, they were instructed to have those patrons stop that activity or leave the Licensed Premises.

67. Since the investigation, Respondent installed eight surveillance cameras throughout the Licensed Premises. The cameras cover the backyard, patio, parking lot, bar counter, main entryway, billiard area, and office. The cameras feed to a video monitor inside the Licensed Premises office and recordings are kept.⁸ Bartenders can access the video feeds using their cell phones. Respondent also posted six signs throughout the Licensed Premises informing patrons smoking marijuana was not allowed there. Respondent also increased its staffing on busy nights to make sure business activities were properly monitored. Peri dismissed Johnny Umphrey effective December 2018 due to his conduct related to this case. Peri decided to dismiss Umphrey after reviewing the police reports and certain audio recordings that related to this narcotics investigation.⁹ Peri presented certain business records that indicated Umphrey did not work on March 8, 2018.

68. Peri did not dismiss Stockton because Peri was not presented with any audio recordings of Stockton related to this case.

69. In June or July 2018, Peri requested information from ABC related to marijuana usage on ABC licensed premises. Sometime thereafter, ABC sent him information by way of an IMPACT informational flyer. (Exhibit L)

70. Peri testified the backyard was referred to as the "Soul of Fairfax." This reflected the fact that five persons have their remains interred at various sites in the backyard. Each site is marked with a small plaque.

71. Peri testified that since the investigation, Respondent has lost income and a 30 day license suspension might trigger failure of the business.

LEGAL BASIS OF DECISION

1. Article XX, section 22 of the California Constitution and Business and Professions 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.¹⁰

2. Business and Professions Code 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.

⁸ Peri was not aware how long the video surveillance recordings were kept.

⁹ No audio recordings were presented as evidence at the hearing.

¹⁰ All section references are to the Business and Professions Code unless specified otherwise.

3. Health and Safety Code section 11350 states:

“(a) Except as otherwise provided in this division, every person who possesses (1) any controlled substance specified in subdivision (b), (c), (e), or paragraph (1) of subdivision (f) of Section 11054, specified in paragraph (14), (15), or (20) of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section 11055, or specified in subdivision (h) of Section 11056, or (2) any controlled substance classified in Schedule III, IV, or V which is a narcotic drug, unless upon the written prescription of a physician, dentist, podiatrist, or veterinarian licensed to practice in this state, shall be punished by imprisonment in a county jail for not more than one year, except that such person shall instead be punished pursuant to subdivision (h) of Section 1170 of the Penal Code if that person has one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 of the Penal Code or for an offense requiring registration pursuant to subdivision (c) of Section 290 of the Penal Code.

“(b) Except as otherwise provided in this division, whenever a person who possesses any of the controlled substances specified in subdivision (a), the judge may, in addition to any punishment provided for pursuant to subdivision (a), assess against that person a fine not to exceed seventy dollars (\$70) with proceeds of this fine to be used in accordance with Section 1463.23 of the Penal Code. The court shall, however, take into consideration the defendant’s ability to pay, and no defendant shall be denied probation because of his or her inability to pay the fine permitted under this subdivision.

“(c) Except in unusual cases in which it would not serve the interest of justice to do so, whenever a court grants probation pursuant to a felony conviction under this section, in addition to any other conditions of probation which may be imposed, the following conditions of probation shall be ordered:

(1) For a first offense under this section, a fine of at least one thousand dollars (\$1,000) or community service.

(2) For a second or subsequent offense under this section, a fine of at least two thousand dollars (\$2,000) or community service.

(3) If a defendant does not have the ability to pay the minimum fines specified in paragraphs (1) and (2), community service shall be ordered in lieu of the fine.

“(d) It is not unlawful for a person other than the prescription holder to possess a controlled substance described in subdivision (a) if both of the following apply:

(1) The possession of the controlled substance is at the direction or with the express authorization of the prescription holder.

(2) The sole intent of the possessor is to deliver the prescription to the prescription holder for its prescribed use or to discard the substance in a lawful manner.

“(e) This section does not permit the use of a controlled substance by a person other than the prescription holder or permit the distribution or sale of a controlled substance that is otherwise inconsistent with the prescription.”

4. Health and Safety Code section 11351 states:

“Except as otherwise provided in this division, every person who possesses for sale or purchases for purposes of sale (1) any controlled substance specified in subdivision (b), (c), or (e) of Section 11054, specified in paragraph (14), (15), or (20) of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section 11055, or specified in subdivision (h) of Section 11056, or (2) any controlled substance classified in Schedule III, IV, or V which is a narcotic drug, shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for two, three, or four years.”

5. Health and Safety Code section 11360 states:

“(a) Except as otherwise provided by this section or as authorized by law, every person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport any cannabis shall be punished as follows:

“(1) Persons under the age of 18 years shall be punished in the same manner as provided in paragraph (1) of subdivision (b) of Section 11357.

“(2) Persons 18 years of age or over shall be punished by imprisonment in a county jail for a period of not more than six months or by a fine of not more than five hundred dollars (\$500), or by both such fine and imprisonment.

“(3) Notwithstanding paragraph (2), a person 18 years of age or over may be punished by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for a period of two, three, or four years if:

“(A) The person has one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 of the Penal Code or for an offense requiring registration pursuant to subdivision (c) of Section 290 of the Penal Code;

“(B) The person has two or more prior convictions under paragraph (2);

“(C) The offense involved the knowing sale, attempted sale, or the knowing offer to sell, furnish, administer, or give away cannabis to a person under the age of 18 years; or

“(D) The offense involved the import, offer to import, or attempted import into this state, or the transport for sale, offer to transport for sale, or attempted transport for sale out of this state, of more than 28.5 grams of cannabis or more than four grams of concentrated cannabis.

“(b) Except as authorized by law, every person who gives away, offers to give away, transports, offers to transport, or attempts to transport not more than 28.5 grams of cannabis, other than concentrated cannabis, is guilty of an infraction and shall be punished by a fine of not more than one hundred dollars (\$100). In any case in which a person is arrested for a violation of this subdivision and does not demand to be taken before a magistrate, that person shall be released by the arresting officer upon presentation of satisfactory evidence of identity and giving his or her written promise to appear in court, as provided in Section 853.6 of the Penal Code, and shall not be subjected to booking.

(c) For purposes of this section, “transport” means to transport for sale.

“(d) This section does not preclude or limit prosecution for any aiding and abetting or conspiracy offenses.”

6. Health and Safety Code section 11362.1 states:

“(a) Subject to Sections 11362.2, 11362.3, 11362.4, and 11362.45, but notwithstanding any other provision of law, it shall be lawful under state and local law, and shall not be a violation of state or local law, for persons 21 years of age or older to:

(1) Possess, process, transport, purchase, obtain, or give away to persons 21 years of age or older without any compensation whatsoever, not more than 28.5 grams of cannabis not in the form of concentrated cannabis;

(2) Possess, process, transport, purchase, obtain, or give away to persons 21 years of age or older without any compensation whatsoever, not more than eight grams of cannabis in the form of concentrated cannabis, including as contained in cannabis products;

(3) Possess, plant, cultivate, harvest, dry, or process not more than six living cannabis plants and possess the cannabis produced by the plants;

(4) Smoke or ingest cannabis or cannabis products; and

(5) Possess, transport, purchase, obtain, use, manufacture, or give away cannabis accessories to persons 21 years of age or older without any compensation whatsoever.

“(b) Paragraph (5) of subdivision (a) is intended to meet the requirements of subsection (f) of Section 863 of Title 21 of the United States Code (21 U.S.C. Sec. 863(f)) by authorizing, under state law, any person in compliance with this section to manufacture, possess, or distribute cannabis accessories.

“(c) Cannabis and cannabis products involved in any way with conduct deemed lawful by this section are not contraband nor subject to seizure, and no conduct deemed lawful by this section shall constitute the basis for detention, search, or arrest.”

7. Health and Safety Code section 11362.3(a)(1) states:

“(a) Section 11362.1 does not permit any person to:

“(1) Smoke or ingest cannabis or cannabis products in a public place, except in accordance with Section 26200 of the Business and Professions Code.”

8. Section 24200.5 states:

“Notwithstanding the provisions of Section 24200, the department shall revoke a license upon any of the following grounds:

“(a) If a retail licensee has knowingly permitted the illegal sale, or negotiations for the sales, of controlled substances or dangerous drugs upon his or her licensed premises. Successive sales, or negotiations for sales, over any continuous period of time shall be deemed evidence of permission. As used in this section, “controlled substances” shall have the same meaning as is given that term in Article 1 (commencing with Section 11000) of Chapter 1 of Division 10 of the Health and Safety Code, and “dangerous drugs” shall have the same meaning as is given that term in Article 2 (commencing with Section 4015) of Chapter 9 of Division 2 of this code.

“(b) If the licensee has employed or permitted any persons to solicit or encourage others, directly or indirectly, to buy them drinks in the licensed premises under any commission, percentage, salary, or other profit-sharing plan, scheme, or conspiracy.”

9. California Penal Code section 31 states:

“All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, and all persons counseling, advising, or encouraging children under the age of fourteen years, or persons who are mentally incapacitated, to commit any crime, or who, by fraud, contrivance, or force, occasion the drunkenness of another for the purpose of causing him to commit any crime, or who, by threats, menaces, command, or coercion, compel another to commit any crime, are principals in any crime so committed.”

DETERMINATION OF ISSUES

1. As specified and explained below, cause for suspension or revocation of Respondent's license exists under Article XX, section 22 of the California State Constitution and Business and Professions Code sections 24200(a) and (b) as to counts 6, 9, 11, and 13.

2. As specified and explained below, cause for suspension or revocation of Respondent's license did not exist: under Article XX, section 22 of the California State Constitution and Business and Professions Code sections 24200(a) and (b) as to Counts 1, 2, 3, 4, 5, 7, 8, 10, and 12.
3. Counts 1, 2, and 4 were based on Agent Scott's January 18, 2018 purchase of cocaine from Lopez inside the Licensed Premises.
4. Count 1 alleged that or about January 18, 2018, respondent-licensee's agent or employee, Tyler Snow, permitted patron Mario Chavez Lopez to possess, within the premises, a controlled substance, to-wit: cocaine, in violation of Health and Safety Code section 11350.
5. Count 2 alleged that or about January 18, 2018, respondent-licensee's agent or employee, Tyler Snow, permitted patron Mario Chavez Lopez to possess, within said premises, a controlled substance, to-wit cocaine, for purposes of sale, in violation of Health and Safety Code section 11351.
6. Count 4 alleged that or about January 18, 2018, respondent-licensee(s) knowingly permitted the illegal sale, or negotiations for sales, of controlled substances or dangerous drugs upon the licensed premises, in violation of Business and Professions Code section 24200.5(a).
7. The evidence established on January 18, 2018, Agent Scott informed Snow she had just negotiated to purchase cocaine from Lopez after the actual negotiation had already taken place. Snow did not know Agent Scott was seeking to purchase cocaine from anyone until after she informed him she negotiated a deal with Lopez. Snow could not have stopped the negotiation or otherwise prevented it as he had no reason to believe it was going to occur in the first place. Therefore, it cannot be reasonably concluded Snow permitted Agent Scott and Lopez to negotiate a sale of controlled substance or dangerous drugs on the Licensed Premises.
8. Lopez returned to the Licensed Premises 30 minutes later and sold the cocaine to Agent Scott in the billiard room. However, the evidence did not establish Snow knew or should have known Lopez returned to or was going to return to the Licensed Premises that night in possession of cocaine for sale. While Agent Scott had earlier informed Snow she had negotiated a cocaine purchase from Lopez, she did not convey to Snow it was going to occur on the Licensed Premises that very night. She merely asked Snow if Lopez was "good for it, meaning safe to buy from". Snow responded that unless Agent Scott wanted "...to take a hit of methamphetamine tonight, I wouldn't recommend it." Snow added that "And for God sake, if you do it, do it outside." It appeared Snow attempted to dissuade the drug deal from occurring and advised Agent Scott if she still wanted to make her purchase from Lopez, she should do it outside. Agent Scott did not tell Snow that Lopez was returning to the Licensed Premises to complete the drug deal that night. When Lopez returned, he motioned Agent Scott to meet him in the billiard room. The sale occurred there which was out of view of the main bar counter

where Snow was. There was insufficient evidence provided to prove Snow knew, or should have known, Lopez had returned to the Licensed Premises. Having given his earlier admonition to Agent Scott to do any drug deal "outside" and there being insufficient evidence presented to establish Snow knew, or should have known, Lopez returned or was going to return to the Licensed Premises that night in possession of cocaine to sell to Agent Scott, it cannot be concluded Snow permitted Lopez to possess cocaine, possess cocaine for sale, or permitted the illegal sale of cocaine on the Licensed Premises. There was insufficient evidence to sustain Count 1, Count 2, and Count 4.

9. As Count 5 was a duplicate of Count 3, Count 5 was deemed dismissed from the accusation.

10. Counts 3 and 6 related to the investigation of March 2, 2018.

11. Count 3 alleged that on or about March 2, 2018, respondent-licensee's agent or employee, "Johnny," was within the licensed premises, an aider or abettor, as defined in section 31 of the California Penal Code, in the selling or furnishing or in the offering to sell or furnish a controlled substance, to-wit: marijuana, in violation of Health and Safety Code section 11360.

12. On March 2, 2018, Ofc. Shaw asked Umphrey about obtaining or buying/obtaining some marijuana. Umphrey told Officer Shaw to go to the backyard where there were always people smoking marijuana and ask them about buying/obtaining marijuana.

13. Ofc. Shaw asked an unidentified man in the backyard about buying some marijuana. The unidentified man introduced him to another man, identified as "Mike". Officer Shaw asked Mike about buying some marijuana, but he did not want to sell any marijuana to Ofc. Shaw. Ultimately, Mike rolled and lit a marijuana cigarette he and some others shared. He offered it to Ofc. Shaw to smoke, but he declined. Mike then gave Officer Shaw approximately one gram of marijuana free of charge. On his way out of the premises, Ofc. Shaw voluntarily paid Umphrey \$2.00 for referring him outside to locate someone who could supply Ofc. Shaw with marijuana.

14. Absent an appropriate state issued license, Health and Safety Code section 11360 generally outlaws transporting, selling, furnishing, or giving away cannabis. However, under Health and Safety Code section 11362.1, it is lawful for a person, who is at least 21 years old, to give away, at no cost, to another person, who is also at least 21 years old, no more than 28.5 grams of cannabis or nor more than 8 grams of concentrated cannabis. In this instance, Ofc. Shaw testified Mike gave him free of charge approximately one gram of marijuana, thus well below the quantity threshold specified in Health and Safety Code section 11362.1. There was only a violation of Health and Safety Code section 11360 if it was proven that either Mike or Ofc. Shaw or both were under 21 years old. The Department did not present sufficient evidence to establish the age of either of them. As that was not established, there was insufficient evidence to prove a violation of Health and Safety Code section 11360 occurred. Consequently, it was

not proved Humphrey aided or abetted in the commission of a violation of Health and Safety Code section 11360 as alleged in Count 3.

15. Count 6 alleged that on or about March 2, 2018, respondent-licensee's agent or employee, "Johnny," permitted patron(s) to smoke or ingest cannabis or cannabis products within the licensed premises, a public place, in violation of Health and Safety Code section 11362.3(a)(1).

16. There was sufficient evidence to sustain Count 6. On March 2, 2018, at approximately 7:00 p.m., Ofc. Shaw witnessed a group of five to six patrons openly smoking marijuana in the patio. One of those patrons showed his marijuana smoking pipe to Umphrey who came into the patio. The patron used that pipe to smoke marijuana in Umphrey's presence and he did nothing to have any of the patrons cease their marijuana smoking activity. Umphrey came out several times to the patio cleaning up ashtrays and clearing empty glasses and bottles. As Respondent's employee, Umphrey, was present and noticed, or should have noticed, patrons smoking marijuana on the patio and took no action to abate or suppress that conduct, there was sufficient evidence to sustain Count 6.

17. Counts 7-8 were based on Ofc. Shaw's interaction with Umphrey on March 8, 2018.

18. Count 7 alleged that or about March 8, 2018, respondent-licensee's agent or employee, "Johnny," was within the licensed premises, sold or furnished or offered to sell or furnish a controlled substance, to-wit: marijuana, in violation of Health and safety Code section 11360.

19. Count 8 alleged that on or about March 8, 2018, respondent-licensee(s) knowingly permitted the illegal sale, or negotiations for sales, of controlled substances or dangerous drugs upon the licensed premises, in violation of Business and Professions Code section 24200.5(a).

20. While on the Licensed Premises, Umphrey told Ofc. Shaw the rules for smoking marijuana there. Umphrey said it was best to smoke marijuana in the backyard furthest from the rear door so that marijuana smoke would not enter the main building through the rear doorway. Also, any marijuana smoked in the patio should be on the "D.L." or down-low, meaning marijuana should be smoked in a careful discrete manner, specifically to avoid police detection.

21. Ofc. Shaw asked Umphrey if there was anyone there who would sell marijuana. Umphrey said the "regulars" were not there and advised Ofc. Shaw to see if there was anyone in the front patio who might have marijuana to sell him. Ofc. Shaw did not go to the patio because a few minutes later Umphrey joined Ofc. Shaw in the backyard. Umphrey rolled a marijuana cigarette in the presence of Ofc. Shaw and offered it to him. Ofc. Shaw said he could not smoke it then because he was driving. Umphrey then gave Ofc. Shaw the unlit marijuana cigarette at no charge. Umphrey said he worked for a marijuana legal defense firm and that he was aware selling marijuana at a bar was illegal compared to lawfully purchasing it at a dispensary.

22. As to Count 7, absent an appropriate state issued license, Health and Safety Code section 11360 generally outlaws the selling, furnishing, or giving away of cannabis. However, under Health and Safety Code section 11362.1 it is lawful for a person, who is at least 21 years old, to give away, at no cost, to another person, who is also at least 21 years old, no more than 28.5 grams of cannabis and no more than 8 grams of concentrated cannabis. The evidence did not establish Umphrey gave Ofc. Shaw more than 28.5 grams of cannabis or more than 8 grams of concentrated cannabis. There was also no evidence establishing that either Umphrey or Ofc. Shaw was under 21 years of age that day. Therefore, there was insufficient evidence to sustain Count 7 that alleged a violation of Health and Safety Code section 11360 occurred.

23. As to Count 8, because there was neither an actual sale of cannabis nor any actual negotiation regarding the sale of cannabis by or between Ofc. Shaw, Umphrey, and/or any third party, there was insufficient evidence to establish the illegal sale or negotiations for sale of a controlled substance or a dangerous drug occurred on the Licensed Premises.

24. Count 9 alleged that or about March 14, 2018, respondent-licensee's agent or employee, John Doe 1, permitted patron(s) to smoke or ingest cannabis or cannabis products within the licensed premises, a public place, in violation of Health and Safety Code section 11362.3(a)(1).

25. On March 14, 2018, Det. Priest witnessed a male known as "Bilger", someone she recognized as a regular patron at the Licensed Premises, roll and smoke a cannabis cigarette at one of the tables in the patio.¹¹ She had seen him on other occasions behind the bar making drinks and emptying ash trays. Det. Priest, while at one of the other patio tables, saw Bilger smoke his marijuana cigarette in the presence of one of Respondent's bartenders who had come over to Bilger's table. Detective Priest was a trained and experienced detective regarding illegal drugs. There was sufficient evidence to sustain Count 9.

26. Count 10 alleged that or about March 14, 2018, respondent-licensee(s) knowingly permitted the illegal sale, or negotiations for sales, of controlled substances or dangerous drugs upon the licensed premises, in violation of Business and Professions Code section 24200.5(a).

27. On March 14, 2018, Det. Priest, while at the Licensed Premises, used her cell phone to contact Lopez and arranged to purchase cocaine from him at the Licensed Premises. Once Lopez arrived at the Licensed Premises he obtained a drink at the bar counter. He then went to the patio where he joined Det. Priest and Det. Scotto at one of the tables. After Lopez sat down, Det. Priest gave Lopez \$40.00 cash. Lopez gave Det. Priest a folded dollar bill containing cocaine that she put in her wallet and then put her wallet in her purse.

¹¹ At the hearing, "Bilger" was more fully identified by bartender Roy Stockton as Jason Bilger, a regular premises patron.

28. The evidence did not sufficiently establish any of Respondent's employees knew or should have known Det. Priest negotiated that narcotics deal with Lopez from the Licensed Premises or knew or should have known that such sale actually occurred or was going to occur on the Licensed Premises. The evidence did not establish any of Respondent's employees were aware or should have been aware Det. Priest called or texted Lopez from the Licensed Premises for the purpose of negotiating an illegal drug deal. There was no evidence that whichever bartender Lopez dealt with at the counter upon his arrival to the Licensed Premises or any other employee knew or should have known Lopez was there to engage in a cocaine sale to Det. Priest. In this instance, it cannot be found Respondent or its employees permitted an illegal sale or negotiation for sale of a controlled substance or dangerous drug on the Licensed Premises. Therefore, the evidence did not support sustaining Count 10.

29. Count 11 alleged that or about March 22, 2018, respondent-licensee's agent or employee, John Doe 2, permitted patron(s) to smoke or ingest cannabis or cannabis products within the licensed premises, a public place, in violation of Health and Safety Code section 11362.3(a)(1).

30. In this instance, Det. Priest, who was well qualified, trained, and experienced in narcotics investigations, observed a group of patrons at a table in the patio smoking cannabis. They did so while in the presence of one of Respondent's bartenders who was also at the patrons' table.¹² Det. Priest could tell it was burning cannabis by its odor and the type of pipe being used to smoke it. There was sufficient evidence to sustain Count 11.

31. Count 12 alleged or about May 3, 2018, respondent-licensee's agent or employee, John Doe 3, permitted patron(s) to smoke or ingest cannabis or cannabis products within the licensed premises, a public place, in violation of Health and Safety Code Section 11362.3(a)(1).

32. The evidence was insufficient to sustain Count 12. Although Agent Greene did witness a patron smoking cannabis in the backyard for 2-3 minutes, there was no evidence Respondent's bartender, John Doe 3, or any other of Respondent's employees were specifically aware of or should have been aware that patron was smoking cannabis in the backyard.¹³ Therefore, it was not proven Respondent's employee John Doe 3 permitted a patron(s) to smoke or ingest cannabis in the backyard of the Licensed Premises on that occasion.

33. Count 13 alleged that on or about May 11, 2018, respondent-licensee's agent or employee, Roy Stockton, permitted patron(s) to smoke or ingest cannabis or cannabis products within the licensed premises, a public place, in violation of Health and Safety Code section 11362.3(a)(1).

¹² Exhibit 5, p. 40, a report of the incident, indicated Det. Priest even took a photo of the bartender and the patrons at the table. Page 42 was a plain copy of that image.

¹³ It was presumed John Doe 3 meant the bartender who was the only employee present that night.

34. In this instance, Agent Vale observed two men smoking cannabis in the backyard. Agent Vale, in an undercover capacity, asked bartender Roy Stockton if it was okay to smoke "weed" while gesturing towards the backyard. Stockton replied "yes", but to be discrete about it. Both patrons later told police they were smoking marijuana in the backyard. Stockton's admonition to Agent Vale to be discrete about smoking "weed" in the backyard undercuts Stockton's later comment to Vale, after Vale made himself known as a peace officer to Stockton, that he thought it was legal to smoke cannabis in the backyard. Under the totality of the circumstances, there was sufficient evidence to sustain Count 13 since Stockton told Agent Vale smoking "weed" in the backyard was allowed and, in fact, there were at least two patrons smoking cannabis in the backyard at that very time.

35. With respect to each sustained count discussed above involving cannabis/marijuana, each of the officers or agents who testified regarding the presence and/or use of cannabis/marijuana in their investigations were thoroughly trained and experienced law enforcement officers with respect to narcotics and drug enforcement. Their ability to determine a substance to be cannabis/marijuana based upon its appearance, texture, odor or combination thereof was sufficiently established and credible. Even Respondent's own lay witnesses testified they could determine what cannabis/marijuana was by its odor, appearance, and texture even though they had not received any formal or technical training. Scientific lab analysis on samples of the material were not essential.

36. While Respondent desired to paint a picture that the ambient air in the Fairfax community was continuously laden with the odor of burnt/smoked cannabis and therefore the involved police officers could not reliably determine who was actually smoking cannabis/marijuana at the Licensed Premises was not convincing. The evidence established the officers were well trained and experienced in narcotics enforcement. During their investigations at the Licensed Premises, they were able and capable to determine by texture, odor, color, or combination thereof the material they focused on was cannabis and not a conventional tobacco product or vaporized tobacco product.

37. Any other arguments advanced by the parties in support of or in defense to the accusation had no merit.

PENALTY

1. In assessing an appropriate measure of discipline in this matter, the Department's penalty guidelines are in California Code of Regulations, title 4, section 144, hereafter referred to as "rule 144".
2. Under rule 144, the presumptive penalty for a violation of Business and Professions Code section 24200.5 and Health and Safety Code violations on the licensed premises is license revocation.

3. Rule 144 also permits adjusting the recommended penalty based on the presence of aggravating or mitigating factors. Rule 144 contains a non-exhaustive list of some of those factors, most relevant here being prior disciplinary history or lack thereof, continuing course of conduct, and positive action to correct the problem.

4. The Department recommended Respondent's license be revoked. However, such revocation should be stayed for a period of 36 months. If there were no further violations during that time, the stay would become permanent. Also, a 25 day license suspension should be imposed.

5. Respondent made no specific penalty recommendation in the event some or all of the accusation was sustained.

6. Rule 144 specifies a continuing course of conduct as an aggravating factor. In this instance, although Respondent asserted all its bartenders enforced a long-standing zero-tolerance policy against controlled substances at the Licensed Premises, the evidence indicated that two employees cumulatively told undercover police officers on separate occasions it was acceptable to smoke cannabis/marijuana on the Licensed Premises there so long as: they were discrete about it; it was better to smoke cannabis/marijuana in the backyard; and to be careful about smoking cannabis/marijuana on the patio so as to avoid police detection. There were other occasions when patrons smoked cannabis/marijuana in front of other unidentified employees who took no action whatsoever to abate that activity. The chronic nature of the problem is a factor in aggravation.

7. Rule 144 indicates the length of licensure without disciplinary action as a factor in mitigation. Respondent's bar/tavern business was owned and operated by the Peri family for approximately 90 years. There was no evidence of any disciplinary action against Respondent. Therefore, that warrants some measure of mitigation.

8. Rule 144 also acknowledges positive action to correct the problem as a factor in mitigation. Since the violations herein, Respondent posted no-marijuana smoking signs in the Licensed Premises. It also installed an eight-camera surveillance system capturing areas of the Licensed Premises, including the backyard. Respondent also increased its staffing on busier nights to help enforce its policies and Respondent terminated Humphrey.

9. Over the years, Respondent received some acknowledgments and awards for public service to the community.

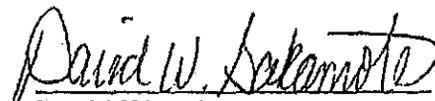
10. Based upon the above, while rule 144 recommends the license be revoked, some net mitigation was warranted. However, the penalty assessed must include a clear incentive for the Respondent to comply with the law in the future. The penalty ordered below is a result of weighing the evidence presented and the factors in mitigation and aggravation. The penalty complies with rule 144's considerations.

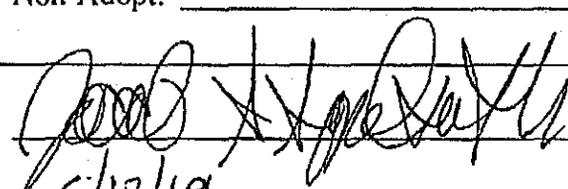
11. With respect to any other arguments made by the parties regarding the appropriate penalty for this matter, they are deemed without merit.

ORDER

1. Counts 6, 9, 11, and 13 of the accusation are sustained.
2. Counts 1, 2, 3, 4, 5, 7, 8, 10, and 12 of the accusation are dismissed.
3. As to each sustained count, Respondent's license is revoked, with such revocation stayed for a period of 36 months commencing the date the decision in this matter becomes final, upon the condition that no subsequent final determination is made, after hearing or upon stipulation and waiver, that cause for disciplinary action occurred during the period of the stay. Should such a determination be made, the Director of the Department of Alcoholic Beverage Control may, in the Director's sole discretion and without further hearing, vacate the stay and revoke the license, and should no such determination be made, the stay shall become permanent.
4. Additionally, the license shall be suspended for 15 days.

Dated: April 9, 2019


David W. Sakamoto
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: 
Date: 6/17/19