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

AB-9828
File: 48-322498; Reg: 18087352

TOM L. THEATRES, INC.,
dba Fantasy Theatre
1091 South La Cadena Drive
Colton, CA 92324,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Huebel/Alberto Roldan

Appeals Board Hearing: January 9, 2020
Los Angeles, CA

ISSUED JANUARY 21, 2020

Appearances: *Appellant:* Louis R. Mittelstadt, as counsel for Tom L. Theatres, Inc.,

Respondent: Alanna K. Ormiston, as counsel for the Department of Alcoholic Beverage Control.

OPINION

Tom L. Theatres, Inc., doing business as Fantasy Theatre, appeals from a decision of the Department of Alcoholic Beverage Control[1] revoking its license (with the revocation stayed for two years, conditioned on discipline-free operation during that period), because appellant, through its agent or employee: (1) possessed within the premises a controlled substance, to-wit: cocaine, for the purpose of sale, in violation of Health and Safety Code section 11351; and (2) sold, furnished or offered to sell or

[1]The decision of the Department, dated July 17, 2019, is set forth in the appendix.

furnish, within the premises, a controlled substance, to-wit: cocaine, in violation of Health and Safety Code section 11352.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on June 5, 1997. There is no record of prior departmental discipline against the license.

On August 7, 2018, the Department instituted a two-count accusation against appellant charging that, through its agent or employee, it possessed within the premises a controlled substance, to-wit: cocaine, for the purpose of sale (count 1); and sold, furnished or offered to sell or furnish, within the premises, a controlled substance, to-wit: cocaine (count 2).

Administrative hearings were held on January 10, 2019 before Administrative Law Judge (ALJ) Doris Huebel, and on March 20, 2019 before ALJ Alberto Roldan. Documentary evidence was received and testimony concerning the violation charged was presented by Department Agents Jeff Holsapple and Mike Patel. Stephen Kozub, president and shareholder of appellant Tom L. Theatres, Inc., testified on its behalf.

Testimony established that on June 23, 2017, at approximately 10:00 p.m., Department Agents Holsapple and Patel entered the licensed premises in plain clothes to conduct a general enforcement inspection of the adult entertainment premises. They were greeted by a security guard, paid a $7 cover charge, then went to the bar where they each ordered a 12-ounce bottle of Modelo beer for $6 each. They took a seat near the main performance stage.

Two females, identified by their stage names as “Tony” and “Charlie” were observed by the agents speaking to patrons, dancing on the stage, going behind the fixed bar, and entering the dressing room. Two security guards were observed keeping

watch on the premises. Women were observed entering the premises fully clothed, checking in with the security guards, going to the dressing room, and emerging in bikini lingerie. They are paid in the form of tips for dancing and providing companionship to patrons.

Agent Holsapple was approached by Tony, wearing bikini lingerie. She introduced herself and sat down between the two agents. She said during the conversation that she had been working at the licensed premises for a couple of years. Agent Holsapple told Tony that he and Agent Patel wanted to party and asked her if she knew where they could get some "coke" — street vernacular for cocaine. She said she would ask around and let them know.

Agent Holsapple asked Tony for a companion for Agent Patel. She got Charlie's attention and asked her to accompany Agent Patel. Charlie, who was dressed in a bikini, introduced herself to Agent Patel and they began a conversation. During their conversation, Agent Patel told Charlie that he and Agent Holsapple wanted to party later and asked her if she could get them some cocaine. She said she would look into it, then entered the dressing room.

Agent Holsapple continued to talk to Tony and asked her who she would follow up with about the "coke." Tony said she would ask Charlie, because Charlie usually had cocaine on her and had been a drug user in the past. Tony then entered the dressing room.

Approximately one hour later, the agents walked to the billiards table. Charlie asked Agent Holsapple if he wanted to tip her. He said he did, and placed four $1 bills in the strap of her bikini bottom. She asked him if he wanted a lap dance. He said he would love to but was saving his money to buy some coke. He asked her if she could

hook him up. She said she could, although she could not get him much, but that what she could get was "good shit" — which he understood to mean high quality cocaine. Charlie told the agent it would be $40 and asked for the money up front. Agent Holsapple said he was not comfortable with that so she suggested he give her $20 up front and $20 when she supplied the cocaine. He agreed and gave her $20 which she put in her purse.

Later that evening, Charlie whispered in Agent Holsapple's ear that she had "it" — which he understood to mean that she had the cocaine. She suggested moving to the back corner of the premises because she said she did not want security to see. Agent Holsapple followed Charlie to the back row of seating where she handed him a green plastic baggy containing a white powdery substance which appeared to be cocaine. In return, he gave her $20. Agent Holsapple placed the baggy in the front pocket of his jacket. A short while later he informed Agent Patel that he had purchased cocaine from Charlie for $40 and they exited the premises.

The baggy was transported to the Department's Riverside District Office where it was photographed, weighed, and tested — producing a positive result for the presence of cocaine. (Exhs. 2A & 2B.) The baggy was booked into evidence.

Stephen Kozub, the president of Tom L. Theatres, Inc. testified that the premises offers topless dancing for the entertainment of its patrons and that the dancers are independent contractors, not employees. Appellant does not pay the dancers, does not ask them to abide by a schedule, nor tell them how to dress, what make-up to wear, or what music to play. The dancers are asked to check in with security when they arrive and leave for liability reasons. Mr. Kozub was not personally familiar with the dancer named Charlie. He also testified that part of appellant's policy is that drugs are not

allowed, that anyone found in possession of drugs is to be removed from the premises, and that random bag checks are performed.

Following the hearings, ALJ Huebel issued a proposed decision on May 1, 2019, sustaining both counts of the accusation and recommending that the license be revoked (with the revocation conditionally stayed for a period of two years, provided no further cause for discipline arises during that time). The Department adopted the proposed decision in its entirety on June 25, 2019, and a certificate of decision was issued on July 17, 2019.

Appellant then filed a timely appeal contending the violation should not be imputed to the licensee.

DISCUSSION

Appellant contends the violation took place in a covert fashion by a non-employee, and that appellant had no reason to believe or suspect that this transaction would take place. Accordingly, it maintains the violation should not be imputed to the licensee. (AOB at pp. 3-7.)

This Board is bound by the factual findings in the Department's decision so long as those findings are supported by substantial evidence. The standard of review is as follows:

> We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citations.] The function of an appellate board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

> When findings are attacked as being unsupported by the evidence, the power of this Board begins and ends with an inquiry as to whether there is substantial evidence, contradicted or uncontradicted, which will support the findings. When two or more competing inferences of equal persuasion can be reasonably deduced from the facts, the Board is without power to substitute its deductions for those of the Department—all conflicts in the evidence must be resolved in favor of the Department's decision.

(*Kirby v. Alcoholic Bev. Control Appeals Bd.* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815]; *Harris v. Alcoholic Bev. Control Appeals Bd.* (1963) 212 Cal.App.2d 106, 112 [28 Cal.Rptr.74].)

Therefore, the Appeals Board examines the issue of substantial evidence in light of the whole record to determine whether substantial evidence exists — even if contradicted — to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. The Appeals Board cannot disregard or overturn a finding of fact by the Department merely because a contrary finding would be equally or more reasonable. (Cal. Const. Art. XX, § 22; Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113]; *Harris*, *supra*, 212 Cal.App at p. 114.)

Count 1 of the accusation alleges that appellant's agent or employee possessed within the premises a controlled substance (cocaine) for the purpose of sale, in violation of section 11351 which provides:

> Except as otherwise provided in this division, **every person** who possesses for sale or purchases for purposes of sale . . . any controlled substance . . . shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for two, three, or four years.

(Health and Safety Code § 11351, emphasis added.)

Count 2 of the accusation alleges that appellant's agent or employee sold, furnished, or offered to sell or furnish within the premises a controlled substance (cocaine) in violation of section 11352 which provides in pertinent part:

> Except as otherwise provided in this division, **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 controlled substance . . . shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for three, four, or five years.

(Health and Safety Code § 11352, emphasis added.)

Appellant maintains the individual being charged with these violations — identified as "Charlie" — is not an employee and, as such, her wrongdoing should not be imputed to appellant. It maintains:

> The dancers are not paid by the venue, have no fixed period of time to report to the venue, may come or leave as they wish at any time, may dance in any manner to any music they wish, may wear make up, or not, as they wish, may offer their services to competing venues as they wish and their compensation is based solely on tips the [*sic*] receive from patrons. The venue does not consider them as employees. . . .

(AOB at p. 2.) In short, appellant maintains the dancers are independent contractors — not under appellant's direction and control — and therefore their actions should not be imputed to appellant, nor should appellant be deemed to have permitted their actions. We disagree.

The Board has heard and rejected the "no liability for the actions of an independent contractor argument" many times and has found again and again that the employment status of performers is of no consequence where the thrust of the rule is to protect public welfare and morals. (See *Funtastic, Inc.* (1998) AB-6920; *Clubary* (2011) AB-9098.)

Notwithstanding the Board's views as expressed in the cited cases, the statutes themselves make clear that the employment status of the individual is irrelevant. Both Health and Safety Code section 11351 and 11352 state that they apply to *every person* who possesses or sells cocaine — not just employees who do so.

Furthermore, both this Board and the courts have consistently found that a licensee may be held liable for the actions of his agents or employees.

> The owner of a liquor license has the responsibility to see to it that the license is not used in violation of law and as a matter of general law the knowledge and acts of the employee or agent are imputable to the licensee. [Citation.]

(*Harris v. Alcoholic Beverage Control Appeals Board* (1961) 197 Cal.App.2d 172, 180 [17 Cal.Rptr. 315].)

The *Laube* court noted:

> A licensee has a general, affirmative duty to maintain a lawful establishment. Presumably this duty imposes upon the licensee the obligation to be diligent in anticipation of reasonably possible unlawful activity, and to instruct employees accordingly.

(*Laube v. Stroh* (1992) 2 Cal.App.4th 364, 367 [3 Cal.Rptr.2d 779].) Similarly, in *Reimel* the court stated:

> [A] licensee can draw no protection from his lack of knowledge of violations committed by his employees or from the fact that he has taken reasonable precautions to prevent such violations. There is no requirement . . . that the licensee have knowledge or notice of the facts constituting its violation. [Citations.]

(*Reimel v. Alcoholic Bev. Control Appeals Bd.* (1967) 252 Cal.App.2d 520, 522 [60 Cal. Rptr. 641], internal quotations omitted.)

It is well-settled in alcoholic beverage case law that an agent or employee's on-premises knowledge and misconduct is imputed to the licensee/employer. (See *Yu v. Alcoholic Bev. Control Appeals Bd.* (1992) 3 Cal.App.4th 286, 295 [4 Cal.Rptr.2d

280]; *Kirby v. Alcoholic Bev. Control Appeals Bd.* (1973) 33 Cal.App.3d 732, 737 [109 Cal.Rptr. 291].) Indeed, earlier in *Laube*, the court observed that the ALJ's factual findings — notably not subject to review on appeal — include:

> [T]he element of the licensee's knowledge of illegal and improper activity on his or her premises; this knowledge may be either actual knowledge or constructive knowledge imputed to the licensee from the knowledge of his or her employees.

(*Laube, supra,* 2 Cal.App.4th at p. 367, citing *Fromberg v. Dept. of Alcoholic Bev. Control* (1959) 169 Cal.App.2d 230, 233-234 [337 P.2d 123].) Importantly, as the court of appeals observed in *McFaddin*:

> It is not necessary for a licensee to knowingly allow its premises to be used in a prohibited manner in order to be found to have permitted its use. . . . Further, the word "permit" implies no affirmative act. It involves no intent. It is mere passivity, *abstaining from preventative action*.

(*McFaddin San Diego 1130, Inc. v. Stroh* (1989) 208 Cal.App.3d 1384, 1389-1390 [257 Cal.Rptr. 8], internal quotations omitted, emphasis in original.)

11. As the ALJ notes:

> 9. The types of misconduct historically imputed to a licensee are those that are foreseeable in the operation of a licensed premise. One such traditional ground is for the illegal sale of drugs. Similarly, when a clerk sells alcohol to a minor, even though the licensee is not present, the licensee is liable for that sale as if the licensee had made the sale themselves — the conduct is imputed to the licensee because it is foreseeable, and is therefore the type of conduct the licencee has an obligation to prevent. The same is true of the matter at hand, in that the possession (for purposes of sale) and sale of a controlled substance, to-wit: cocaine, by Charlie, whether she be deemed Respondent's employee, agent, or independent contractor . . . in the Licensed Premises is the type of misconduct that is foreseeable in the operation of the Licensed Premises, and thus imputed to the Respondent-Licensee.

(Conclusions of Law, ¶ 9.)

The policy reasons for this general rule (that licensees are vicariously liable for — and responsible for preventing — foreseeable misconduct by individuals in the licensed premise) are evident. Without it, a licensee could escape discipline simply by maintaining a practiced state of ignorance. It would defy reason and the mandate of the State Constitution (which authorizes the Department to suspend or revoke a license when continuation of the license would be contrary to public welfare or morals) to interpret the law in a manner that rewards licensees for distancing themselves from the operation of their premises or allows licensees to escape responsibility for reasonably foreseeable activity in their premises.

As appellant's witness noted, when asked whether the security staff are instructed to monitor for potential drug activity on the premises, "[w]ell we don't really have drug problems at the club for it to be a constant battle but we do monitor the areas for anything that [*sic*] any conversation that would intimate any activity like that regarding drugs or gang activity." And when asked whether he had reason to believe there was any kind of drug trafficking in the premises he replied, "[w]ell we all know drugs exist. However, I do whatever I can proactively with my staff to deter anything like that happening at my club." (Findings of Fact, ¶ 20.) In short, he was aware that potential drug activity was foreseeable.

The decision is supported by substantial evidence and the violation was properly imputed to the licensee. Accordingly, we must affirm the Department's decision.

ORDER

The decision of the Department is affirmed.[2]

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

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

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

APPENDIX

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

IN THE MATTER OF THE ACCUSATION AGAINST:

TOM L. THEATRES, INC.
FANTASY THEATRE
1091 SOUTH LA CADENA DRIVE
COLTON, CA 92324

ON-SALE GENERAL PUBLIC PREMISES - LICENSE

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

RIVERSIDE DISTRICT OFFICE

File: 48-322498

Reg: 18087352

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 25, 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, 1325 J Street, Suite 1560, Sacramento, CA 95814.

On or after August 27, 2019, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: July 17, 2019

Matthew D. Botting
General Counsel

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

IN THE MATTER OF THE ACCUSATION AGAINST:

Tom L. Theatres, Inc. Dba: Fantasy Theatre 1091 South La Cadena Drive Colton, California 92324 Respondent	File: 48-322498 Reg.: 18087352 License Type: 48 Word Count: 13,945; 5,706 Reporter: Susan Gallagher, Judith Jacobs Kennedy Court Reporters
On-Sale General Public Premises License	**PROPOSED DECISION**

Administrative Law Judge D. Huebel, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at San Bernardino, California, on January 10, 2019. Administrative Law Judge Albert Roldan, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard the continued matter at San Bernardino, California, on March 20, 2019. A transcript of the hearing of March 20, 2019, was provided to Administrative Law Judge D. Huebel, who decided the matter.

Alanna Ormiston, Attorney, represented the Department of Alcoholic Beverage Control.

Louis R. Mittelstadt, Attorney, represented Respondent, Tom L. Theatres, Inc. Stephen Kozub, President of Tom L. Theatres, Inc., was present.

The Department seeks to discipline the Respondent's license on the grounds that, on June 23, 2017 the Respondent, through its agent or employee, "Charlie," (1) possessed within the said premises, a controlled substance, to-wit: cocaine, for purpose of sale, in violation of Health and Safety Code Section 11351 (count 1); and (2) sold, furnished or offered to sell or furnish, within the premises, a controlled substance, to wit: cocaine, in violation of California Health and Safety Code section 11352.[1] (Exhibit 1.)

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued and submitted for decision on March 20, 2019.

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[1] All statutory references are to the California Health and Safety Code unless otherwise noted.

FINDINGS OF FACT

1. The Department filed the accusation on August 7, 2018.

2. The Department issued a type 48, on-sale general public premises license to the Respondent for the above-described location on June 5, 1997 (the Licensed Premises).

3. There is no record of prior departmental discipline against the Respondent's license.

4. The parties stipulated to the positive test results for cocaine of the white, powdery substance in the green, plastic baggy provided to Department Agent Holsapple by Charlie within the Licensed Premises on June 23, 2017, as analyzed by Randall Rees and reflected in the "Report On The Examination of Controlled Substances," signed on May 22, 2018. (Exhibit 3.) The results of the examination revealed, "The white solid, 0.36 gram net weight, contain(s) cocaine. Preliminary testing indicates it is not in the base form."

5. On Friday, June 23, 2017, at approximately 10:00 p.m. Department Agents Holsapple and Patel arrived at the Licensed Premises while conducting general enforcement in the City of Colton. They were in a plain clothes capacity posing as patrons. The Licensed Premises provides adult entertainment, which includes, but is not limited to, female dancers performing on a stage while removing their tops, offering lap dances to patrons and providing companionship to patrons inside the premises. Agents Holsapple and Patel were greeted outside the entrance by an on-duty security guard, to whom they each paid a $7 cover charge and thereafter entered the Licensed Premises.

6. Upon entering the Licensed Premises the agents walked to a fixed bar where they each ordered a 12 ounce bottle of Modelo beer for $6 each. The agents then walked to the front of the main performance stage and took a seat in the third row of a fixed counter. There was music being played by a disc jockey (DJ). Agent Holsapple observed two females, later identified by their stage names as Tony and Charlie[2], speaking to other patrons inside the Licensed Premises. At some point the DJ took roll call of the females working in the Licensed Premises by calling out the names of the females, including the names Tony and Charlie, after which multiple females, including Tony and Charlie, all walked onto the performance stage and presented themselves to the patrons. Agent Holsapple observed Charlie dancing on the performance stage. Music was playing at a level in which conversation could be had. Agent Patel observed two security guards inside the Licensed Premises. Initially he observed a security guard near the vestibule area near the DJ. He also observed a security guard who "roved around" inside the

[2] These two females will be referred to hereinafter as Tony and Charlie, or otherwise included in the reference of "dancers."

Licensed Premises, appearing to keep an eye on the premises, walking around the interior of the premises; walking to the fixed bar, the performance stage and along the west wall of the premises. The security guards wore attire marked "Security."

7. Agent Holsapple was approached by Tony, who was wearing bikini lingerie and introduced herself to the agents as Tony. Tony engaged Agent Holsapple in casual conversation, with Agent Patel seated immediately to the left of Agent Holsapple. Agent Holsapple recalled having observed Tony on several occasions walking to employee-restricted areas in the premises, including behind the fixed bar to get a drink and into the dressing rooms where the other dancers entered. Agent Holsapple asked Tony if she worked at the premises and for how long. Tony replied that she had been working at the Licensed Premises for a couple of years. Tony asked about Agent Patel and if they had plans. Agent Holsapple told Tony that Agent Patel and he wanted to party and asked if she knew where they could get "coke[3]." Tony understood to what Agent Holsapple was referring and replied she would ask around and let him know later in the evening. Agent Holsapple asked Tony if there was someone who could accompany Agent Patel. Tony got Charlie's attention and informed Charlie that Agent Patel was in need of a companion.

8. Charlie, who also wore a bikini, approached Agent Patel, introduced herself as Charlie, engaged in casual conversation and served as a companion for Agent Patel as Tony had requested. Agent Patel recalled seeing Charlie walk into restricted areas of the premises where the public were not allowed, including the dressing room, behind the fixed bar, and dancing on the performance stage. Charlie spoke with Agent Patel for approximately 20 minutes and then walked to the dressing room. During their conversation, Agent Patel asked Charlie if she could get him and Agent Holsapple cocaine because they wanted to party later that evening. Charlie said she would look into it, left Agent Patel and walked into the dressing room.

9. Agent Holsapple continued to speak with Tony briefly. Tony informed him she would find out about the "coke" and let him know. Agent Holsapple asked Tony who she would ask about the "coke." Tony said she would ask Charlie, the dancer at the Licensed Premises, about the cocaine since Tony knew Charlie usually had cocaine on her and in the past was a drug user but had been clean for several years. Agent Holsapple and Tony's conversation ended and Tony walked to the dressing room where Charlie had gone.

10. Agent Patel had also observed Tony enter restricted areas not open to the public, including the dressing room and dancing on the performance stage. Agent Patel noticed the dressing room appeared to have lockers. He observed that when fully-attired females first entered the Licensed Premises, they checked in with the security guard, and

[3] Agent Holsapple used the street vernacular for cocaine.

thereafter entered the dressing room, which they exited wearing bikini lingerie. Agent Patel had observed some of the dancers go behind the fixed bar to get a beverage.

11. Approximately one hour later, Agents Holsapple and Patel walked to the billiards table where they stood next to a free-standing table and at which point Charlie made eye contact with Agent Holsapple, approached him and asked Agent Holsapple if he wanted to tip her. Agent Holsapple replied that he did and placed four, single dollar bills into the strap of Charlie's bikini bottom. Charlie asked Agent Holsapple if he wanted a lap dance, to which he replied he would love to have one but he was saving his money to buy some "coke." Agent Holsapple immediately asked Charlie if she could hook him up with some "coke." Charlie understood Agent Holsapple was referring to cocaine. Charlie said she could hook him up, but that while she could not get him much, what she could get him was "good shit," which Agent Holsapple understood to mean high quality cocaine. Charlie told Agent Holsapple it would cost $40 and requested the money upfront. Agent Holsapple replied that he was not comfortable giving her $40 upfront. Charlie suggested he give her $20 upfront and then once she provided him with the cocaine he could pay her the $20 balance. Agent Holsapple agreed and gave Charlie $20, which Charlie placed in her purse. The foregoing narcotic discussions[4] and money exchange were conducted in the open; there was no evidence they were hidden. Charlie thereafter left Agent Holsapple.

12. Later in the evening, Charlie approached Agent Holsapple and whispered in his ear that she had "it."[5] Agent Holsapple understood, based on his training and experience, that Charlie was referencing the cocaine. Charlie suggested that she and he move to the corner of the premises, and said she did not want security to see. Agent Holsapple followed Charlie to the back row in the corner of the Licensed Premises where there was available patron seating, away from most of the activities of the premises. Charlie sat on a booth chair that aligned the west wall of the premises and Agent Holsapple sat next to her. Charlie then handed to Agent Holsapple a green, plastic baggy containing a white, powdery substance resembling cocaine. Agent Holsapple gave Charlie $20, which Charlie accepted. Agent Holsapple looked at the contents of the plastic baggy and recognized, based on his training and experience, the white, powdery contents to be what he suspected as cocaine. The foregoing transfer of cocaine, money exchange and examination of cocaine was done in the open; there was no evidence they were hidden. Agent Holsapple placed the green, plastic baggy into the top, right, front pocket of his jacket. A short while later Agent Holsapple located Agent Patel and informed him he purchased cocaine from Charlie for $40, and they exited the Licensed Premises.[6]

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[4] Including discussions between Tony and Agent Holsapple, Agent Patel and Charlie, and Agent Holsapple and Charlie.
[5] All other conversations relating to cocaine between the agents, Tony and Charlie were conducted in the open.
[6] Agent Patel estimated he and Agent Holsapple were inside the Licensed Premises for approximately a two-hour duration.

13. Agent Patel believed, based on his observations, training and experience, that Tony and Charlie were employees of the Respondent due to the Department agents observing Tony and Charlie have access to employee-restricted areas (behind the fixed bar, on the stage and in the dressing room), and their actions inside the Licensed Premises, including, but not limited to, dancing on stage, speaking with and providing companionship to the male patrons in and around the premises; with the dancers paid for the entertainment services they perform inside the Licensed Premises in the form of tips paid by the patrons.

14. Agent Holsapple transported the green, plastic baggy with its contents to the ABC Riverside District Office, where he photographed and weighed the baggy with its contents[7], and conducted a presumptive NIK test of the contents. (Exhibits 2A and 2B.) The NIK test produced a positive result for the presence of cocaine. Agent Holsapple then placed the baggy with its contents into an evidence envelope which he sealed and booked into the evidence locker at the Riverside District Office.

15. Agent Patel learned, sometime after June 23, 2017, through other dancers/employees at the Licensed Premises that the Respondent fired Charlie because she had gotten into a fight with the other females in the Licensed Premises.

16. On May 17, 2018, Agent Patel removed the said sealed evidence envelope containing the said green, plastic baggy with its white, powdery contents from the evidence locker of the Riverside District Office and transported the same to the Scientific Investigations Laboratory in San Bernardino.

(Respondent's Witness)

17. Stephen Kozub appeared and testified at the hearing. Stephen Kozub is the president of Tom L. Theatres, Inc. Mr. Kozub said he has been operating the Licensed Premises since 2001.[8] Mr. Kozub testified that the Licensed Premises provides alcohol sales and "adult business entertainment," with alcohol sales providing 90 percent of the gross sales revenue. Mr. Kozub acknowledged one of the services offered at the Licensed Premises is topless dancing to entertain the patrons; with the dancers dancing on the premises' stage for the entertainment of Respondent's patrons, and the dancers engaging in conversation with the patrons when the dancers are not on the stage dancing. Mr. Kozub claimed the Licensed Premises "offer[s] independent contracting dancers that work there," and whom Respondent does not consider employees but "independent contractors." Mr. Kozub said the Respondent does not pay the dancers. The "girls"[9] are

[7] The combined weight of the baggy and white, powdery substance was 0.51 grams.
[8] Mr. Kozub testified, "I've owned the club ever since 2001."
[9] This term is used because the Respondent referred to the female dancers who work in the establishment as the "girls." However, when not quoting the Respondent, the undersigned will otherwise reference them as "dancers."

required to check in and out with security personnel when they arrive and leave the Licensed Premises, with their names marked on a dance list. Mr. Kozub said the dance list is taken for two reasons, first, to document what time the "girls" arrive and leave the Licensed Premises, for liability purposes, and, second, to make "sure that we knew to take care of this individual until she had left the club." Mr. Kozub said the Respondent does not require the "independent contractors" to abide by a schedule; Respondent does not tell them how to dress or what make-up to wear or what music to play while they dance on stage. If the "girls are in a conversation with a patron and we have a roll call, they do not have to participate in the roll call it's entirely up to their discretion." Mr. Kozub acknowledged the dancers are allowed access to the dressing room and behind the fixed bar, which are not accessible to the public.

18. Mr. Kozub said, as a shareholder of Tom L. Theatres, Inc., he is not familiar with the dancer Charlie. Mr. Kozub said he inquired with his manager as to the legal names of the females who worked at the Licensed Premises and were known by the stage names of Tony and Charlie. Respondent's manager informed Mr. Kozub that Tony's "real name is Ashley Prieto" and the manager did not know Charlie's "real name." Mr. Kozub did not know when Charlie began working at the Licensed Premises but he knew when Charlie was "fired" from her employment with Respondent. Mr. Kozub also said, "I do know that I have paperwork that confirms she was there on the 23rd of June 2017, because she's on the dance list."

19. Mr. Kozub testified that Respondent's employees consist of the bartenders serving people at the fixed bar, waitresses who service patrons in the premises, and on Friday and Saturday evenings three security guards, one of whom is the manager, and a disc jockey (DJ) whose duties include, but are not limited to, playing music and "announc[ing] the girls that go on stage." One security guard is posted during the week. On Friday and Saturday evenings three security guards are on duty. The security personnel patrol the interior and exterior of the Licensed Premises, "to make sure there's no drinking in the parking lot, to make sure that customers are not misbehaving or being belligerent inside the club, make sure the girls are acting in an appropriate legal fashion in the dressing room or on the floor of the club." The three security guards rotate during the course of a Friday and Saturday evening, taking "the door for a certain amount of time and they'll rotate within the confines of the club and will patrol the outside of the club." Mr. Kozub said the instructions the security staff are given relating to maintaining the club in an orderly condition is they are "just told to use their common sense and best judgment not to hit a patron, if a patron swings at anyone in the club they are to escort him to the door."

20. Mr. Kozub testified that part of the Respondent's policy is that "drugs are not allowed period." When patrons walk into the premises at the front entrance there is a

sign with listed rules, including that no drug or drug paraphernalia is permitted.[10] There was no evidence whether the sign is conspicuous to patrons and employees in order to be effective. When Mr. Kozub was asked by his counsel, "would it be correct, you never anticipated the possibility of drug transactions occurring on the premises," Mr. Kozub said that drug transactions taking place in the Licensed Premises "is not something that occurs on a basis that is considered a problem but it's something we are very well concerned about." When asked whether the "security staff are instructed to monitor for this potential drug activity on premise," Mr. Kozub replied, "Well we don't really have drug problems at the club for it to be a constant battle but we do monitor the areas for anything that any conversations that would intimate any activity like that regarding drugs or gang activity." If the security staff finds someone in possession of drugs on the Licensed Premises they are instructed to "throw the person out of the club immediately." When asked again on direct-examination, "Did you ever have any reason to believe there was ever any kind of drug traffic that occurred on the premises?" Mr. Kozub replied, "Well, we all know drugs exist. However, I do whatever I can proactively with my staff to deter anything like that happening at my club." Mr. Kozub added, "As far as us being proactive to that, we'll have random bag[11] checks of the dancers that come in to dance there." There was no evidence presented as to when the testified to drug policy, sign listing rules, and the proactive steps of random bag checks, were put in place and/or into practice at the Licensed Premises.

21. Mr. Kozub first learned of the matter at hand when he received the Accusation, which was issued August 7, 2018. Mr. Kozub said the Respondent has "a very good and open relationship with the Colton P.D., as well as the Riverside Sheriff's Department, San Bernardino Sheriff's Department. They're all welcome to come in any time they want."

22. Mr. Kozub testified, as an explanation for why the female dancers on said violation dates walked behind the fixed bar to get drinks, that sometimes when it is busy at the Licensed Premises it is common practice for the bartenders to "tell a girl, 'Just come back and get the water.'" He added that since Agent Holsapple testified that the dancer obtained a plastic cup of liquid from behind the fixed bar, that indicated to Mr. Kozub that it "was water because no alcohol is served in a plastic [cup], only beer, and that's on the beer special days." Mr. Kozub claimed the females would have "no contact with the register at that time," when they went behind the fixed bar to get a drink for themselves. Mr. Kozub added that when he "was bartending" at the Licensed Premises he permitted the female dancers to go behind the fixed bar to get water to drink.

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

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[10] The sign with listed rules was not offered as an exhibit or asked to be admitted into evidence; the record is not clear as to the full content of the sign and thus the extent of notice given to employees and patrons is unknown.
[11] Mr. Kozub explained he meant purses when he referred to "bags."

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. California Health and Safety Code section 11351 makes it a felony to possess for purposes of sale any controlled substance

(1) specified in
(a) subdivision (b), (c), or (e) of section 11054,
(b) paragraph (14), (15), or (20) of subdivision (d) of section 11054,
(c) subdivision (b) or (c) of section 11055, or
(d) subdivision (h) of section 11056, or
(2) classified in Schedule III, IV, or V which is a narcotic drug.

4. California Health and Safety Code section 11352 makes it a felony to transport, import into this state, sell, furnish, administer, or give away, or offer to transport, import into this state, sell, furnish, administer, or give away, or attempt to import into this state or transport any controlled substance

(1) specified in
(a) subdivision (b), (c), or (e), or paragraph (1) of subdivision (f) of Section 11054,
(b) paragraph (14), (15), or (20) of subdivision (d) of Section 11054,
(c) subdivision (b) or (c) of Section 11055, or
(d) subdivision (h) of Section 11056, or
(2) 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.

5. With respect to count 1, 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) on the basis that, on June 23, 2017, Respondent-Licensee's employee or agent, Charlie, possessed cocaine for the purposes of sale, inside the Licensed Premises, in violation of Health and Safety Code section 11351. As an employee or agent, her actions and knowledge are imputed to the Respondent. (Findings of Fact ¶¶ 4-20.)

6. With respect to count 2, cause for suspension or revocation of the Respondent's license exists under Article XX, section 22 of the California State Constitution and sections 24200(a) and (b) on the basis that, on June 23, 2017, Respondent-Licensee's employee or agent, Charlie, sold cocaine to Agent Holsapple, inside the Licensed Premises, in violation of Health and Safety Code section 11352. As an employee or agent, her actions and knowledge are imputed to the Respondent. (Findings of Fact ¶¶ 4-20.)

7. A licensee is vicariously responsible for the unlawful, on-premises acts of employees or agents; that a licensee lacked personal knowledge thereof is irrelevant. Such vicarious responsibility is well-settled by case law. See *Harris v. Alcoholic Beverage Control Appeals Board* (1962) 197 Cal.App.2d 172 [17 Cal.Rptr. 315, 320]; *Morell v. Department of Alcoholic Beverage Control* (1962) 204 Cal.App.2d 504 [22 Cal.Rptr. 405, 411]; *Mack v. Department of Alcoholic Beverage Control* (1960) 178 Cal.App.2d 149 [2 Cal.Rptr. 629, 633]; *Benedetti v. Department of Alcoholic Beverage Control* (1960) 187 Cal.App.2d 213, 216-217 [9 Cal.Rptr. 525]; *Arenstein v. California State Bd. of Pharmacy* (1968) 265 Cal.App.2d 179, 192, [71 Cal.Rptr. 357].

8. A licensee cannot draw any protection from his lack of knowledge of violations committed by his employees/agents or from the fact the licensee has taken reasonable precautions to prevent such violations. "There is no requirement . . . that the licensee have knowledge or notice of the facts constituting its violation.[Citations.]" (*Reimel v. Alcoholic Beverage Control Appeals Bd.* (1967) 252 Cal.App.2d 520, 522 [60 Cal. Rptr. 641].) This principle has given rise to several corollaries. A single act is sufficient to justify a suspension. (*Id.* at 523 [bartender took a bet]; *Harris*, 197 Cal.App.2d at 172 [employee directed customer to a house of prostitution].)

9. The types of misconduct historically imputed to a licensee are those that are foreseeable in the operation of a licensed premise. One such traditional ground is for the illegal sale of drugs. Similarly, when a clerk sells alcohol to a minor, even though the licensee is not present, the licensee is liable for that sale as if the licensee had made the sale themselves – the conduct is imputed to the licensee because it is foreseeable, and is therefore the type of conduct the licensee has an obligation to prevent. The same is true of the matter at hand, in that the possession (for purposes of sale) and sale of a controlled substance, to-wit: cocaine, by Charlie, whether she be deemed Respondent's employee, agent, or independent contractor (as more fully discussed below), in the Licensed Premises is the type of misconduct that is foreseeable in the operation of the Licensed Premises, and thus imputed to the Respondent-Licensee.

10. "The holder of a liquor license has the affirmative duty to make sure that the licensed premises are not used in violation of the law."[12] "If a licensee elects to operate his business through employees he must be responsible to the licensing authority for their conduct in the exercise of his license and he is responsible for the acts of his *agents or employees* done in the course of his business in the operation of the license."[13] Furthermore, a licensee "may not insulate himself from regulation by electing to function through employees *or independent contractors.*"[14] Whether Charlie and Tony were agents, employees, or independent contractors, the Respondent elected to operate the business through the use of the services of the female dancers, which included Tony and Charlie, and is therefore responsible for their conduct in the course of the business operation of the license. The Respondent "may not insulate himself from regulation by electing to function through employees *or independent contractors.*"[15]

11. Respondent argued and claimed Charlie and Tony were independent contractors and not employees. This argument is rejected.

12. Employees include individuals whose services are provided within the usual course of the business of the entity for which the work is performed and, thus, who would ordinarily be viewed by others as working in the hiring entity's business and not as working, instead, in the worker's own independent business.[16] Depending on the nature of the work and overall arrangement between the parties, a business need not control the precise manner or details of the work in order to be found to have maintained the necessary control that an employer ordinarily possesses over its employees, but does not possess over a genuine independent contractor, under the suffer or permit to work standard for determining whether a worker is a covered employee, rather than an excluded independent contractor, under a state wage order.[17]

13. "Under the common law, ' "[t]he principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired." ' What matters is whether the hirer 'retains all *necessary* control' over its operations. ' "[T]he fact that a certain amount of freedom of action is inherent in the nature of the work does not change the character of the employment where the employer has general supervision and control over it." ' Perhaps the strongest evidence of the right to control is whether the hirer can discharge the worker

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[12] *Morell v. Department of Alcoholic Beverage Control* (1962) 204 Cal. App. 2d 504, 514, [22 Cal. Rptr. 405, 411].
[13] *Arenstein v. California State Bd. of Pharmacy* (1968) 265 Cal.App.2d 179, 192, 71 Cal.Rptr. 357, emphasis added.
[14] *Camacho v. Youde* (1979) 95 Cal.App.3d 161, 165, 157 Cal.Rptr. 26, emphasis added.
[15] *Id.*
[16] See *Martinez v. Combs* (2010) 49 Cal.4th 35, 64, 109 Cal.Rptr.3d 514, 231 P.3d 259; *Rutherford Food Corp. v. McComb* (1947) 331 U.S. 722, 729, 67 S.Ct. 1473, 91 L.Ed. 1772; Cal. Code Regs. tit. 8, § 11010 et seq.
[17] See *Borello*, 48 Cal.3d at pp. 353-354, 356-357, 256 Cal.Rptr. 543, 769 P.2d 399; Cal. Code Regs. tit. 8, § 11010 et seq.

without cause, because '[t]he power of the principal to terminate the services of the agent gives him the means of controlling the agent's activities.'"[18] In addition to the hirer's right to control, "Courts may consider '(a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee.'"[19]

14. Whether applying a combination of factors used under common law, case law[20] or the "ABC test" presented under *Dynamex Operations West, Inc., v. Superior Court* (2018) 4 Cal.5th 903, the weight of the evidence establishes Charlie and Tony are Respondent's employees, rather than independent contractors. Both Charlie and Tony danced on stage and provided companionship to Respondent's patrons conversing with them, including Charlie having offered a lap dance to Agent Holsapple. Their services were provided within the usual course of the Respondent's business for which the work was performed. While the Respondent does not tell the "girls" how to dress, what make-up to wear, or what music to play while they dance, the fact the dancers have "a certain amount of freedom of action" in that regard is inherent in the nature of their work as dancers, and the Respondent "need not control the precise manner or details of [their] work in order to be found to have maintained the necessary control that an employer ordinarily possesses over its employees."[21] The Respondent still, "'retains all *necessary*

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[18] *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 531 (italics in original) (internal citations omitted).

[19] *Ayala*, 59 Cal.4th 522, 532.

[20] Factors properly considered in determining whether a worker was an employee or an independent contractor include, a hirer's right to discharge a worker "at will, without cause" constitutes " '[s]trong evidence in support of an employment relationship.' " (*Tieberg*, 2 Cal.3d at p. 949, 88 Cal.Rptr. 175, 471 P.2d 975, quoting *Empire Star Mines*, 28 Cal.2d at p. 43, 168 P.2d 686.) A permanent integration of the workers into the heart of the licensee's business is a strong indicator that the licensee functions as an employer. (*Borello*, 48 Cal.3d at p. 357.) The fact the parties may have mistakenly believed they were entering into the relationship of principal and independent contractor is not conclusive. (*Max Grant v. Director of Benefit Payments*, 71 Cal.App.3d 647). Case law points to additional factors, derived principally from section 220 of the Restatement Second of Agency: "(a) whether or not the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee." (*Empire Star Mines*, 28 Cal.2d at pp. 43-44, 168 P.2d 686; see also *Tieberg*, 2 Cal.3d at p. 949, 88 Cal.Rptr. 175, 471 P.2d 975; *Isenberg*, 30 Cal.2d at p. 39, 180 P.2d 11; *Perguica*, 29 Cal.2d at p. 860, 179 P.2d 812.)

[21] *Borello*, 48 Cal.3d at 353-354, 356-357.

control' over its operations."[22] Furthermore, the Respondent supplies the instrumentalities, tools, and place of work in order for the dancers to perform their services. For example, the Respondent provides lockers for the dancers to change into their lingerie attire, the performance stage to dance upon, the clientele for whom they perform, and the DJ, who announces roll call of the dancers and who plays the music to which the dancers perform on stage. After roll call is announced the dancers walk on the stage and present themselves to Respondent's patrons, to whom they provide companionship and entertainment, as part of the Respondent/employer's usual business operations.

15. The forgoing leads to a portion of Department counsel's closing argument, something to the effect, that the Respondent-Licensee is operating its business under payment for companionship to patrons, the services of which are reliant solely upon the dancers serving as an extension of the licensee, as an agent. The undersigned understood this argument to mean that the Respondent allows the dancers to appear as agents for Respondent by allowing reimbursement to those dancers/agents in the form of tips from the Respondent's patrons. An agency was created as both the dancers and the Respondent were receiving mutual benefits (tips for the dancer; and for the Respondent, entertainment is provided for its patrons). The Respondent uses the dancers to induce patrons into its premises in order to sell alcoholic beverages, which makes up 90% of its business revenue. The Respondent created the appearance that the dancers/entertainers were its agents in promoting the business of selling alcoholic beverages. The Department seems to have, therefore, been arguing that an "ostensible" agency was created when the principal allowed an appearance of agency to be seen by third parties. (Civil Code §§2298 and 2300.) This is a likely scenario. However, the undersigned finds it is more likely the dancers, including Charlie and Tony, are employees under this scenario, as more fully addressed below.

16. As referenced above, and acknowledged by the Respondent, all services performed by the dancers are part of the Respondent's usual course of business. Mr. Kozub testified that the Respondent's business at the Licensed Premises provides both alcoholic beverage sales and "adult business entertainment," with alcohol sales providing 90 percent of the gross sales. As the Department counsel aptly pointed out, "the majority of the licensee's income involves the sale of alcohol, but the sale of alcohol, as the Department asserts, is based on the number of patrons the Respondent can encourage to come to the establishment, and that encouragement is based on the primary purpose of offering the services of these female dancers." Mr. Kozub acknowledged one of the primary services offered at the Licensed Premises is topless dancing to entertain the patrons; with the dancers dancing on the premises' stage for the entertainment of Respondent's patrons, and the dancers engaging in conversation with the patrons when the dancers are not on

[22] *Ayala*, 59 Cal.4th 522, 532.

the stage dancing. Both Tony and Charlie presented themselves on the performance stage after the DJ announced roll call. The agents observed Charlie and Tony dancing on the performance stage, and conversing with other patrons in the Licensed Premises. In fact, Agent Holsapple asked Tony if there was someone who could accompany Agent Patel, whereupon Tony got Charlie's attention and informed Charlie that Agent Patel was in need of a companion, and Charlie provided companionship to Agent Patel, engaging him in casual conversation.

17. Both Charlie and Tony were permitted access to restricted areas of the premises where the public were not allowed, including the dressing room, behind the fixed bar, and on the performance stage; areas which ostensibly were limited to employees only. Tony informed agent Holsapple she has been working at the Licensed Premises for a couple of years; suggesting she has an on-going employment relationship with Respondent until an at-will firing occurs, as occurred with Charlie when she was fired. Mr. Kozub said he did not know when Charlie was hired, but knew when she was "fired," adding, "I do know that I have paperwork that confirms she was there on the 23rd of June 2017 because she's on the dance list."

18. The evidence does not establish that the dancers are free from the control and direction of the Respondent in connection with the performance of their work. The Respondent has the right to direct the work of the dancers in the Licensed Premises and, as a matter of practice, the dancers were never entirely independent from any supervision.[23] While Mr. Kozub said the Respondent does not require the dancers to abide by a schedule, the evidence established the dancers are required to check in with security personnel when they arrive and leave the Licensed Premises, with their names marked on a dance list. While Respondent claims the dance list is used to document, for liability purposes, when each dancer is in the Licensed Premises the dancers are supervised by security personnel who monitor the dancers' activities to ensure "the girls are acting in an appropriate legal fashion" and to "take care of" the dancers until they leave the club. As such, the Respondent is controlling the manner and means of accomplishing the result desired, and the Respondent does not exercise control only as to the result of the work.[24] In order for the Respondent to comply with all laws governing its type-48 operation it must ensure that the manner and means by which the dancers accomplish their services to patrons comply with Respondent's guidelines, policy and procedure. For example, the Respondent must make sure the dancers do not engage in prohibited conduct, i.e., exposing to public view any portion of their genitals/anus[25] or exposing their breasts, in violation of California Code of Regulations §143.3(2) (two of many listed prohibitions under Rule 143). Hence, the need for the supervision by security personnel of the dancers' services while they work in the Licensed Premises.

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[23] *Empire Star Mines*, 28 Cal.2d at 44
[24] *Id.* at 43.
[25] California Code of Regulations §143.3, unnumbered paragraph.

The dancers are, therefore, not permitted, as an independent contractor is, to exercise their own discretion and judgment in performing services, but rather must follow detailed orders from the Respondent- hirer.[26]

19. Despite Respondent's further claims, when the "girls are in a conversation with a patron and we have a roll call, they do not have to participate in the roll call it's entirely up to their discretion," since part of the service the "girls" perform is that of providing entertainment to patrons through conversation, it behooves or benefits the Respondent not to require the "girls" to leave a patron with whom they are in conversation to participate in the roll call. The fact that a certain amount of freedom of action is inherent in the nature of the work does not change the character of the employment where the Respondent has general supervision and control over it.[27]

20. The undersigned recognizes there are certain factors that would suggest the dancers worked as independent contractors. These include the Respondent's claim it does not pay them or require them to abide by a schedule. However, even those factors do not outweigh the substantial other evidence presented above which shows the Respondent essentially controlled the manner and means of the dancers' work[28] and that Tony and Charlie are/were employees. Even the fact the Respondent may have mistakenly believed the parties were entering into the relationship of principal and independent contractor is not conclusive.[29]

21. Even, if the Respondent, Tony and Charlie believed they entered into a verbal or written agreement that the dancers had the status as independent contractors, it would be against policy, public welfare and morals to allow the Respondent to be exempt from responsibility for these constructively known violations. California Civil Code section 1668 provides in part, "All contracts which have for their object, directly or indirectly to exempt anyone from responsibility for his...violation of law, whether willful or negligent, are against the policy of the law." The Respondent cannot through employment status or other business practice avoid liability for misconduct on the premises which the Respondent, through its employees, agents, or independent contractors, either knew or should have known and anticipated.

22. In order to best effectuate the purpose of the law at issue,[30] as touched on above, public welfare and morals is best served whether Charlie and Tony are considered employees, agents or independent contractors, the Respondent-Licensee in this matter,

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[26] *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 670; *Johnson v. Ralphs Grocery Co.* (2012) 204 Cal.App.4th 1097, 1107; *McCarty v. Department of Transportation* (2008) 164 Cal.App.4th 955, 970.
[27] *Ayala*, 59 Cal.4th 522, 532.
[28] This includes Tony and Charlie's work.
[29] *Max Grant v. Director of Benefit Payments*, 71 Cal.App.3d 647.
[30] *Borello*, 48 Cal.3d at pp. 356-359, 256 Cal.Rptr. 543, 769 P.2d 399.

who has an affirmative duty to make sure the Licensed Premises are not used in violation of the law and who has elected to operate the business through the services of the dancers, including Charlie and Tony, must be held responsible to the licensing authority for their conduct in the exercise of Respondent's license. As such, the Respondent is responsible for the acts of Charlie and Tony done in the course of Respondent's business in the operation of the license and "may not insulate himself from regulation by electing to function through employees *or independent contractors.*"[31]

23. It appears that Respondent delegated the control and operation of the Licensed Premises to his manager and security personnel. Respondent's/Mr. Kozub's non-involvement with business operations does not absolve Respondent of responsibility in its/his capacity as a licensee when misdeeds committed by Respondent's employees, agents or independent contractors occur at the premises. Further, had Respondent had closer oversight of the operations of the Licensed Premises, Respondent may have been able to prevent the offenses herein. To not hold licensees responsible in this fashion would only encourage licensees to be absentee operators and subvert proper regulation and accountability of the licensees and their businesses. If this were not the case, a licensee would have no incentive to ensure that a premise was operated in an orderly and legal manner. To that extent, and towards that end, the Respondent in this matter is accountable for Charlie's actions and knowledge at the Licensed Premises.

24. The Respondent argued it had no knowledge of the illicit activities because Charlie went to efforts to ensure her acts were covert by telling the agent she wanted to get away from the security and go in the corner. The Respondent cited several cases in support of its argument including, but not limited to, *McFaddin v. Stroh* (1989) 208 Cal.App.3d 1384, *Laube v. Stroh* (1992) 2 Cal.App.4th 364. However, the facts of those cases are distinguishable from the matter at hand. In those cases it was determined the licensee's knowledge of illegal or improper activity on their premises was neither actual knowledge nor constructive knowledge imputed to the licensee from the knowledge of his or her employees. In other words, there was no evidence that the licensee's employees knew or reasonably should have known about the illicit sales, and therefore it could not be said that the licensee(s) knew of the same.

25. The court of appeal in *McFaddin* concluded that "where a licensee does not *reasonably* know of the specific drug transactions and further has taken all reasonable measures to prevent such transactions, the licensee does not 'permit' the transactions."[32] The court of appeal held the evidence did not support a determination the licensee "permitted" the illicit activity based on facts found by the Department that the licensee did not know of the drug transactions at issue, and further had taken extensive preventive

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[31] *Morell,* 204 Cal. App. 2d 504, 514; *Arenstein,* 265 Cal.App.2d 179, 192, emphasis added; *Camacho,* 95 Cal.App.3d 161, 165, emphasis added.
[32] *Id. at 1390* (Italics added for emphasis).

measures against them. Specifically, the court of appeal pointed out that the licensee was determined to have no knowledge of the drug transactions because the Department had found the licensee's "employees did not permit the sales or did not know, or should not reasonably have known, about the sales."[33]

26. In contrast, in the matter at hand, the licensee had constructive knowledge of the said illicit drug transactions/violations imputed to the licensee not only from the knowledge of Respondent's employees Tony and Charlie (who knew about the possession and sale of cocaine, and participated, directly or indirectly, in the same), but from the knowledge of Respondent's employees (bartenders, waitresses and security personnel), who reasonably should have known of the said illicit drug discussions, negotiations and transactions, all of which were openly conducted. The record is clear that on June 23, 2017, both Tony and Charlie openly engaged with the Department agents about the illicit cocaine discussions, negotiations and transactions. For example, those discussions and transactions occurred between both Tony and the agents and Charlie and the agents at the third row of a fixed counter by the main performance stage in normal speaking voice, then again between Charlie and Agent Holsapple at a billiards table in a normal speaking voice wherein Charlie negotiated the terms of the cocaine sale - with the first $20 handed to Charlie, and thereafter where there was some available patron seating along the west wall where Charlie openly handed the green, plastic baggy containing cocaine to Agent Holsapple, who openly paid her the $20 balance for said cocaine. While that seating was said to be away from *most* of the activities of the premises, this does not mean it had no patron or personnel activities. The illicit discussions, negotiations and transactions were all[34] conducted in the open and in areas where waitresses attend to patrons and the security personnel monitor. On June 23, 2017, the security personnel were observed by the Department agent(s) to monitor these same areas, and pursuant to Mr. Kozub's testimony the three security personnel patrol the *entire* premises, "they'll rotate *within the confines* of the club," for any conversation or activity that "would intimate" drug or gang activity occurring on the Licensed Premises.

27. Furthermore, the preponderance of the evidence indicates that the illicit discussions, negotiations and transactions of Tony and Charlie with the Department agents were not the only ones that occurred in the Licensed Premises, and that such similar illicit activity more likely occurred at the premises before. After Agent Holsapple asked Tony if she could provide the agents with cocaine, Tony readily said she would ask around, said she knew of another dancer at the premises, Charlie, whom Tony knew "usually" had cocaine on her person, walked into an employee restricted dressing room area, where Charlie had gone, and thereafter provided the agents with Charlie, who said she would look into getting cocaine for the agents and thereafter negotiated and sold cocaine to Agent

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[33] *Id.*

[34] Except Charlie whispering in Agent Holsapple's ear that she had "it."

Holsapple. Agent Patel estimated the agents were in the premises for approximately two hours, and within that short time frame, Tony connected the agents with Charlie who completed the cocaine sale to Agent Holsapple. These interactions were completed in such a manner that it was more likely such drug activity had occurred at the Licensed Premises before. Additionally, Mr. Kozub, in his testimony, despite his attorney's efforts at framing the question in a manner so that Mr. Kozub would answer in the negative, Mr. Kozub instead answered in a manner which indicated he was aware drug transactions had occurred within the Licensed Premises, prior to and other than the violations on June 23, 2017. When asked, "would it be correct, you never anticipated the possibility of drug transactions occurring on the premises," Mr. Kozub said that drug transactions taking place in the Licensed Premises "is not something that occurs on a *basis* that is considered a problem but it's something we are very well concerned about." It is not clear how often drug activity would have to occur on the Licensed Premises for Mr. Kozub to consider it occurring on a basis that would be a problem. Any occurrence of drug transactions is an unacceptable basis. Then when asked again on direct-examination, "Did you ever have any reason to believe there was ever any kind of drug traffic that occurred on the premises?" Mr. Kozub replied, "Well, we all know drugs exist. However, I do whatever I can proactively with my staff to deter anything like that happening at my club." When asked on his first day of testimony whether the "security staff are instructed to monitor for this potential drug activity on premise," Mr. Kozub replied, "Well we don't *really* have drug problems at the club for it to be a *constant battle* but we do monitor the areas for anything that any conversations that would intimate any activity like that regarding drugs or gang activity." On his second day of testimony, Mr. Kozub then presented conflicting testimony when asked, "Ever had any problems at the premises of any drug-type nature," and Mr. Kozub replied, "No."

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

29. If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust. (Evidence Code, section 412.) [35]

30. The Respondent's contention the dancers, including Tony and Charlie, were independent contractors and that he never "had any problems at the premises of any drug-type nature," is disbelieved for the following reasons. The Respondent presented inconsistent testimony, which revealed the extent of the control which the Respondent has over the dancers, and the fact that illicit drug activity had occurred in the Premises prior to the date in question, as discussed above. Additionally, the Respondent failed to produce an independent contractor agreement executed by Tony, Charlie or any of the dancers. Respondent further failed to produce the list of rules at the entrance of the premises. Respondent's failure to offer such contract and list of rules when it was within its power to produce stronger, more satisfactory evidence in support of its defense is viewed with distrust. Respondent further takes the risk of inference due to its failure to produce such evidence that would naturally have been produced, that if the evidence had been produced it would have been adverse. In other words, that the alleged independent contract agreement and list of rules would, in fact, demonstrate the extent of control Respondent has over the dancers. Furthermore, Mr. Kozub exhibited a bias in the presentation of his testimony having, "owned the club ever since 2001," and as the President of Tom L. Theatres, Inc., the license of which is subject to potential revocation.

PENALTY

The Department recommended revocation stayed for two years in addition to a 20-day suspension, factoring in Respondent's length of licensure without discipline. The Respondent suggested that if the accusation was sustained an all-stayed penalty would be appropriate, given its discipline-free history.

Rule 144[36] provides for "revocation" for any Health & Safety Code violation involving narcotic transactions on the licensed premises. The Department has consistently construed this section as requiring some form of revocation, not necessarily outright revocation. Phrased another way, either outright revocation[37] or stayed revocation[38] is appropriate depending upon the circumstances.

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[35] Although a defendant is not under duty to produce testimony adverse to himself, if he fails to produce evidence that would naturally have been produced, he must take the risk that the trier of facts will infer that if the evidence had been produced it would have been adverse. Breland v. Traylor Engineering & Manufacturing Co. (App. 1 Dist. 1942) 52 Cal.App.2d 415, 126 P.2d 455. Where defendant, refuses to produce evidence which would overthrow case made against him if not founded on fact, presumption arises that evidence, if produced would operate to defendant's prejudice. Dahl v. Spotts (App. 1932) 128 Cal.App. 133, 16 P.2d 774.

[36] Cal. Code of Regs., tit. 4, §144.

[37] See, e.g., *Greenblatt v. Martin*, 177 Cal. App. 2d 738, 2 Cal. Rptr. 508 (1960) (outright revocation imposed for violations of section 24200.5).

In the present case, outright revocation would be warranted as the Respondent has an affirmative obligation to ensure the Licensed Premises is operated in full compliance with the law. Respondent did not. The illegal activity at issue here—the possession and sale of cocaine on the Licensed Premises, in which two of Respondent's employees, Tony and Charlie, were directly and indirectly involved—was conducted openly. Illegal drug dealing is a serious offense.

The sign with the listed rules was not offered into evidence, as such the record is not clear as to the full content of the sign and thus the extent of notice given to employees and patrons is unknown. Mr. Kozub merely stated that when patrons walk into the premises at the front entrance there is a sign with listed rules, including that no drug or drug paraphernalia is permitted. It was not clear whether the sign was conspicuous to patrons and employees in order to be effective; was it behind an opened door or blocked in any way by an object, was it well lit, etc. In addition, there was no evidence presented as to documented training of employees or whether any type of annual or regular training is conducted with those working for the Respondent to remind them of its policy, procedure and prohibitions, including a drug policy and any prohibition against illicit drug activity on the Licensed Premises.

There was no evidence presented as to when the testified to drug policy, the sign listing rules, and the proactive steps, including random bag checks, were put in place and/or into practice at the Licensed Premises. It was not clear as to whether the foregoing was in place prior to the violation of June 23, 2017, or thereafter. In other words, there was no evidence or indication that Respondent took any additional steps to prevent such future illicit activity. As such, there was no evidence of positive action by the Licensee to correct the problem. Mitigation regarding the foregoing is not warranted. However, the Respondent is correct, its 19 year and seven and a half month discipline-free operation warrants substantial mitigation.

The penalty assessed below reflects a reasonable weighing of the mitigating and aggravating factors present in this case. The penalty recommended herein complies with rule 144.[39]

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[38] See, e.g., *Harris v. Alcoholic Beverage Control Appeals Board*, 244 Cal. App. 2d 468, 36 Cal. Rptr. 697 (1964) (revocation stayed coupled with suspension imposed for violations of section 24200.5).

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

ORDER

Counts 1 and 2 of the accusation are hereby sustained. The Respondent's on-sale general public premises license is hereby revoked, with such revocation stayed upon the condition that no subsequent final determination be made, after hearing or upon stipulation and waiver, that cause for disciplinary action occurred within **twenty-four months** from the effective date of this decision; that should such determination be made, the Director of the Department of Alcoholic Beverage Control may, in the Director's sole discretion and without further hearing, vacate this stay order and re-impose the stayed penalty; and that should no such determination be made, the stay shall become permanent.

Dated: May 1, 2019

D. Huebel
Administrative Law Judge

☒ Adopt

☐ Non-Adopt: _____

By: _____

Date: 6/25/19