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

AB-9835
File: 47-451778; Reg: 19088479

6506 HOLLYWOOD
ASSOCIATES L-PSHIP,
dba Playhouse Hollywood
6506 Hollywood Boulevard
Los Angeles, CA 90028-6210,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Huebel

Appeals Board Hearing: February 6, 2020
Los Angeles, CA

ISSUED FEBRUARY 18, 2020

Appearances: *Appellant:* Roger Jon Diamond, as counsel for 6506 Hollywood Associates L-Pship,

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

OPINION

6506 Hollywood Associates L-Pship, doing business as Playhouse Hollywood, appeals from a decision of the Department of Alcoholic Beverage Control[1] suspending its license for 30 days because its employees permitted alcohol to be consumed on the

[1] The Department's decision, dated September 9, 2019, is included in the appendix.

premises after hours, violated license conditions, and served alcohol to obviously intoxicated patrons, in violation of Business and Professions Code[2] sections 25632, 23804, and 25602(a).

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general eating place license was issued on September 16, 2010. There is one prior record of departmental discipline against the license.

On January 22, 2019, the Department filed a six-count accusation against appellant alleging that appellant's employees permitted consumption of alcohol on the premises after hours (count 1), violated license conditions (counts 2 and 3), and served alcohol to obviously intoxicated persons (counts 4-6).

At the administrative hearing held on June 21, 2019, documentary evidence was received, and testimony concerning the sale was presented by Los Angeles Police Department (LAPD) Officers Luis Flores, Daniel Lopez, Shirmika Gonzalez, and Julio Paredes. Robert Vinokur, appellant's owner and general partner, testified on appellant's behalf.

On July 15, 2019, the administrative law judge (ALJ) issued a proposed decision, sustaining counts 1, 2, 4, 5, and 6, and dismissing count 3 (violation of section 23804). The ALJ proposed a 30-day suspension of the license for each sustained count, to run concurrently. The Department adopted the proposed decision on August 27, 2019 and issued a certificate of decision on September 9, 2019.

Appellant filed a timely appeal contending that the Department erred by allowing Officer Paredes to testify while possessing a firearm and that the Board lacks jurisdiction

[2] All statutory references are to the California Business and Professions Code unless otherwise stated.

to hear this appeal since a third Board member has not yet been appointed.[3] We will discuss appellant's contentions in reverse order.

DISCUSSION

I

ISSUE REGARDING BOARD'S JURISDICTION

Appellant contends that the Board does not have jurisdiction to hear the instant appeal because it currently does not have a third member. (AOB, at pp. 2-3.)

The Board notes that there is nothing in the language of the California Constitution or in pertinent legislation that addresses the question of whether the Board may hear and decide an appeal when it does not have a full complement of members. Further, there are no general statutory provisions applicable to California administrative boards or agencies addressing the subject. While there are specific statutes pertaining to *other* state administrative agencies as to what constitutes a quorum for conducting business,[4] the ABC Appeals Board is not one of them.

Nevertheless, authority from other jurisdictions, relying on common law, supports the Board's long-standing practice[5] of deciding cases when a simple majority of the three-member Board is present for oral argument. (See, e.g., *Fed. Trade Comm. v. Flotill Prods., Inc.* (1967) 389 U.S. 179, 183-184 [88 S.Ct. 401] ["[I]n the absence of a contrary statutory provision, a majority of a quorum constituted of a simple majority of a

[3] The underlying facts of the sustained counts in the accusation are not in dispute, nor are they relevant to the instant appeal. As such, they have been omitted for brevity.

[4] See, e.g., Bus. & Prof. Code §§ 5524 [California Architects Board] and 8524 [Structural Pest Control Board].

[5] *Chevron Stations, Inc.* (2015) AB-9445 at pp. 16-17.

collective body is empowered to act for the body. Where the enabling statute is silent on the question, the body is justified in adhering to that common-law rule."]; see also *Ho Chong Tsao v. Immigration & Naturalization Service* (5th Cir. 1976) 538 F.2d 667, 669.)

Finally, it would be an absurd result to fully suspend the activity of the Board until a third member is appointed, especially since the appointment procedure is controlled by the Governor's office and is entirely out of the Board's hands. Until a reviewing court or the California Legislature mandates otherwise, this Board has the authority to hear and decide appeals so long as two Board members are present.

II

ISSUE CONCERNING ARMED WITNESS

Appellant states that "the Appeals Board should direct the Department not to allow Police Officer Witnesses to testify while armed." (AOB, at p. 2.) However, appellant does not cite any authority or provide argument for his contention. Rather, appellant's counsel states that he "raised the issue at p. 112 of the Transcript of Proceedings." (*Ibid*.)

As a preliminary matter, the Appeals Board is not required to make an independent search of the record for error. It was appellant's duty to show the Board that some error existed, not to simply reference the transcript for the Board to search itself. Without such assistance, the Board may treat unsupported and unasserted contentions as waived or forfeited. (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852 [57 Cal.Rptr.3d 363, 377] ["When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived."]; *Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 52 [183 Cal.Rptr.3d 654] ["It is the responsibility of the appellant … to support claims of error with meaningful argument and citation to authority. [Citations.] When legal argument with citation to

authority is not furnished on a particular point, we may treat the point as forfeited and pass it without consideration. [Citations.] In addition, citing cases [or statutes] without any discussion of their application to the present case results in forfeiture"].)

Further, the Board's scope of review is limited; it may only review a Department's decision based upon "insufficiency of the evidence, excess of jurisdiction, errors of law, or abuse of discretion." (*Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 95, [84 Cal.Rptr. 113].) Here, appellant makes not such contentions. Rather, it asks this Board to step outside its permissible scope of review and "direct" the Department to prohibit its witnesses from testifying while armed. There is absolutely no authority that allows this Board to do so. Absent this express authority, the Board cannot and will not act.

ORDER

The decision of the Department is affirmed.[6]

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

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[6] 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:

6506 HOLLYWOOD ASSOCIATES L-PSHIP
PLAYHOUSE HOLLYWOOD
6506 HOLLYWOOD BLVD
LOS ANGELES, CA 90028-6210

ON-SALE GENERAL EATING PLACE - LICENSE

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

CERRITOS DISTRICT OFFICE

File: 47-451778

Reg: 19088479

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 August 27, 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 October 21, 2019, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: September 9, 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:

6506 Hollywood Associates L-PSHIP Dba: Playhouse Hollywood 6506 Hollywood Boulevard Los Angeles, California 90028-6210 Respondent	File: 47-451778 Reg.: 19088479 License Type: 47 Word Count: 28,506 Reporter: Dorothy Simpson California Reporters
On-Sale General Eating Place License	**PROPOSED DECISION**

Administrative Law Judge D. Huebel, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Cerritos, California, on June 21, 2019.

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

Roger Diamond, Attorney, represented the Respondent, 6506 Hollywood Associates L-PSHIP. Robert Vinokur, general partner of the Respondent, 6506 Hollywood Associates L-PSHIP, was present.

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

1) on January 1, 2018, the Respondent-Licensee's agents or employees permitted an alcoholic beverage, to-wit: various including Buchannan's Whiskey, to be consumed upon the premises during hours in which it is unlawful to sell, give, or deliver an alcoholic beverage for consumption on the premises, in violation of Business and Professions Code section 25632[1];
2) on January 1, 2018, the Respondent-Licensee's agents or employees violated condition number 1 on the license which states, "Sales, service, and consumption of alcoholic beverages shall be permitted only between the hours of 11:00 a.m. and 2:00 a.m. each day of the week," in that the Licensee's employees or agents did allow consumption of alcoholic beverages after 2:00 a.m. such being a violation of the license condition and ground for license suspension or revocation under Business and Professions Code section 23804;

[1] All statutory references are to the Business and Professions Code unless otherwise noted.

3) on January 21, 2018, the Respondent-Licensee's agents or employees violated condition number 11 on the license which states, "Petitioner(s) shall not require an admission charge or a cover charge to enter the restaurant area of the premises as defined in red [*sic*] attached ABC-257 dated 3-11-09," in that the Licensee's employees or agents did require an admission charge to enter the restaurant area of the premises such being a violation of the license condition and ground for license suspension or revocation under Business and Professions Code section 23804;
4) on January 21, 2018, the Respondent-Licensee's agent or employee, Taylor Sipple, at the licensed premises, sold, furnished, gave or caused to be sold, furnished or given, an alcoholic beverage, to-wit: vodka, to Harrison Dai Ngo, an obviously intoxicated person, in violation of Business and Professions Code section 25602(a);
5) on April 14, 2018, the Respondent-Licensee's agent or employee, Taylor Sipple, at the licensed premises, sold, furnished, gave or caused to be sold, furnished or given, an alcoholic beverage, to-wit: vodka, to Samuel Troilo, an obviously intoxicated person, in violation of Business and Professions Code section 25602(a);
6) on September 22, 2018, the Respondent-Licensee's agent or employee, Stanley Greene, at the licensed premises, sold, furnished, gave or caused to be sold, furnished or given, an alcoholic beverage, to-wit: vodka, to Jeff Ding, an obviously intoxicated person, in violation of Business and Professions Code section 25602(a). (Exhibit 1.)

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued and submitted for decision on June 21, 2019.

FINDINGS OF FACT

1. The Department filed the Accusation on January 22, 2019. The Department filed a First Amended Accusation on April 16, 2019. (Exhibit 1.)

2. The Department issued a type 47, on-sale general eating place license to the Respondent at the above-described location on September 16, 2010 (the Licensed Premises).

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

Violation Date	Reg. No.	Violation	Penalty
August 27, 2011	11075941	BP §§ 23804, 24200(a,b), 25632	15-day susp. (POIC)

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

4. On March 8, 2010, Robert Vinokur, on behalf of the Respondent Licensed Premises, signed a Petition for Conditional License, Form ABC-172. (Exhibit 3.) Condition numbers 1 and 11, contained therein, provide that:

> "1. Sales, service and consumption of alcoholic beverages shall be permitted only between the hours of 11:00 a.m. and 2:00 a.m. each day of the week.
>
> ...
>
> 11. Petitioner(s) shall not require an admission charge or a cover charge to enter the restaurant area of the premises as defined in red [*sic*] attached ABC-257 dated 3-11-2009."

January 1, 2018
(Counts 1 & 2)

5. On January 1, 2018, Los Angeles Police Department (LAPD) Officer Flores received a radio call of a shooting which occurred in a public parking lot south of the Licensed Premises. At 2:45 a.m., Officer Flores entered the Licensed Premises to seek video surveillance which would aid his investigation into the said shooting. Officer Flores was familiar with the Licensed Premises because he had been there several times prior to January 1, 2018. Officer Flores saw Respondent's security guards wearing black suits, as they usually do, telling patrons, who were wearing cocktail party attire, to go to the second floor and take the party upstairs. Officer Flores also observed the Respondent's bartenders and waitresses wearing lingerie-style attire, and the Respondent's bus-boys wearing black polo shirts and black pants. This was the same attire Officer Flores had seen Respondent's bartenders, waitresses, bus-boys and security guards wear during his prior visits to the Licensed Premises. None of the staff were wearing cocktail attire. Based on his experience with the premises he estimated there were 15 to 20 of Respondent's employees on-duty at any given time during his visits to the Licensed Premises.

6. Officer Flores asked to speak to a manager who might be able to direct him to the Licensed Premises' video camera surveillance system to determine if the surveillance system captured the outer perimeter of the location where the shooting occurred. A female manager walked Officer Flores to a loft on the second floor, where Officer Flores observed approximately 50 patrons, dressed in cocktail party attire, holding and drinking alcoholic beverages, including a bottle of Buchannan's Whiskey. Officer Flores did not seize any of the Buchannan's Whiskey or conduct any further investigation into the after-hours alcohol consumption and sales at the Licensed Premises that evening because he was focused on investigating the shooting, which was the LAPD's priority.

7. While at the Licensed Premises Officer Flores viewed the video surveillance footage for January 1, 2018, between the recording time frame of 2:15 a.m. to 2:45 a.m. During that video footage he did not see any of the patrons from the Licensed Premises being evacuated from the premises.

January 21, 2018
(Counts 3 & 4)

8. On January 21, 2018, at approximately 12:40 a.m., LAPD Officers Lopez, Flores and Monzon went to the Licensed Premises in a plain clothes capacity to investigate the premises because it had been a problem premises for the LAPD. Officer Lopez testified that prior to January 21, 2018, the LAPD has had to go the premises due to "really intoxicated" patrons exiting the premises or laying down on the sidewalks adjacent to the premises, with the police having to call for ambulance assistance for "extremely intoxicated" persons. Officer Lopez had, in the past, called for an ambulance because there were "people passed out drunk in the parking lot," which lot Officer Lopez said is the responsibility of the Respondent's security staff to monitor. On January 21, 2018, Officers Lopez, Flores and Monzon were also following-up on their ABC investigation of the Licensed Premises to ensure it was in-compliance with its conditions. The Licensed Premises has been found to be in violation of its ABC and CUP conditions in the past. Officer Lopez had spoken with the Respondent's manager before about issues concerning sales of alcohol. Officer Lopez has expertise as a vice investigator in conducting compliance checks. Officer Lopez received specialized training from ABC Agents, as well as Building and Safety Agents, who instructed and taught Officer Lopez how to look for businesses operating in or out of compliance with their ABC and CUP conditions, rules and regulations.

9. On January 21, 2018, while standing outside the Licensed Premises, Officer Lopez observed from the outside of the premises that the Licensed Premises appeared to be two separate business establishments. Facing the premises, to his right was a restaurant called, "Calle Tacos," and to his left was a glass door with the name, "Playhouse" thereon. At that glass door Officers Lopez, Flores and Monzon each paid a $50 cover charge to a security person to enter the Playhouse. (Exhibit 4 – ABC-257 Licensed Premises Diagram (Retail)[2].) When Officer Lopez entered through the glass door he did not enter the restaurant portion of the business but entered the Playhouse night club portion.[3] The restaurant has a separate entrance from the exterior where patrons enter the restaurant through a large gate, which measures 14 foot by 14 foot.

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[2] In the ABC-257, the red-lined portion of the diagram is the Calle Tacos Restaurant and the black section of the diagram is the Playhouse Hollywood night club.

[3] Officer Lopez testified that at some point prior to January 21, 2018, the Licensed Premises used to have a door to enter the restaurant from within the Playhouse portion of the business, but the Respondent has since walled-off the said interior door to the restaurant, so that the entrance to the restaurant was now from the exterior of the business.

10. When Officer Lopez entered the Playhouse portion of the premises he observed it to appear to be a typical night club with a large crowd of patrons. He then saw people smoking and dancing, and at the far end of the establishment a disc jockey (DJ) who had a large bottle of Hennessey on his DJ equipment. The DJ was playing music and interacting with the crowd of patrons asking them to take a shot of alcohol if it was their birthday. Officer Lopez saw booths along the wall, with a waiter bringing bottle service to the patrons sitting at the booths. Officer Lopez observed people dancing in the general area of the booths, with waiters supplying hookah pipes[4] to the patrons in the booths. One of Officer Lopez' partners inquired about the hookah pipes and was told they had to purchase a table to be served hookah.

11. Officer Lopez monitored the bar area. Two persons, who walked into the bar, caught his attention because they appeared intoxicated to the officer. Officer Lopez observed the two persons, as they walked towards him, to walk with an unsteady gate and have flushed faces. As the two persons walked past Officer Lopez he heard one of the persons suggest purchasing a drink, to which the other individual, later identified as Harrison Dai Ngo (hereinafter referred to as patron Ngo), replied, "I don't think I should I'm a little fucked up." Patron Ngo and his friend approached the bar, behind which stood two bartenders, later identified as Taylor Sipple and Sally Nguyen (hereinafter referred to as bartender Sipple and bartender Nguyen).

12. As patron Ngo stood at the bar, bartender Sipple observed patron Ngo, who was in her line of sight. Bartender Sipple approached patron Ngo, who was at the end of the bar counter, and was now standing directly across from bartender Sipple. Officer Lopez was standing right behind patron Ngo. Bartender Sipple asked for patron Ngo's order. Patron Ngo slurred his speech as he told bartender Sipple his drink order. Bartender Sipple could not understand what patron Ngo was saying because he was slurring his speech. Bartender Sipple turned to patron Ngo's friend to clarify the drink order. During this communication, which lasted approximately 10 minutes, patron Ngo continued to be in bartender Sipple's line of sight and had an unsteady gate, slurred speech, blood-shot eyes, and bumped into his friend. Patron Ngo's friend ordered two Ciroc Vodka shots for patron Ngo and himself, which bartender Sipple prepared and thereafter placed one shot each in front of patron Ngo and his friend. Officer Lopez asked patron Ngo and his friend what they ordered because it looked good, to which patron Ngo's friend replied, "Ciroc Vodka."

13. Officer Lopez communicated with LAPD uniformed officers, who were waiting outside the Licensed Premises, informing them of his observations and formulated a plan for them to enter and detain patron Ngo and the two bartenders, both of whom had served

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[4] Officer Lopez testified that he referred to the said pipes as "hookah pipes," therefore the undersigned used his terminology.

alcohol to patron Ngo and his friend while Officer Lopez was inside the Licensed Premises.

14. At some point, the uniformed officers entered the Licensed Premises, whereupon Officer Lopez observed one of the Respondent's security guards walk in front of him, get on a radio and say, "We have PD coming in the front door." Respondent's employees were aware that police were on the scene inside the Licensed Premises. After the Respondent's security guard made the said radio announcement the lights in the premises were turned off and all the security staff quickly started gathering all alcohol from the tables and taking away alcoholic beverages from the patrons.

15. Uniformed officers issued citations to bartenders Sipple and Nguyen, and removed patron Ngo from the premises. Patron Ngo was detained outside the Licensed Premises. Officer Corea conducted a preliminary breathalyzer/PAS kit test upon patron Ngo. Patron Ngo blew twice on the breathalyzer which resulted in a 0.185 and 0.189 percent blood alcohol content (BAC). Officer Lopez determined the results to be "over double," the legal tolerance limit for driving a vehicle in California. The officers seized samples of the Ciroc Vodka served to patron Ngo and his friend, which evidence was later booked and placed in the property locker at the LAPD Hollywood station.

16. Officer Lopez credibly testified that he had absolutely no racial motivation in performing his investigation at the Licensed Premises and that in fact he is a minority, who grew up in the same neighborhood surrounding the Licensed Premises and listens to the same music played at the Licensed Premises. Officer Lopez said that his job involves public safety and involves inspecting over 150 premises in Hollywood at least once every two years, unless there is a problem location and the vice unit conducts more than one follow-up every two years. Officer Lopez' hope on January 21, 2018, was that he would find the Licensed Premises in compliance, as it would be less work for him since he would not have to prepare any investigative reports. It is his desire that the business thrive, and the community is safe.

April 14, 2018
(Count 5)

17. On April 14, 2018, at approximately 1:05 a.m., LAPD Officer Gonzalez, and three other LAPD officers entered the Licensed Premises in a plain clothes capacity. The four officers stood across from a fixed bar. Officer Gonzalez' attention was drawn to a male, later identified as Samuel Troilo (hereinafter referred to as patron Troilo), whom she observed to exhibit signs of intoxication, including having blood-shot watery eyes, slurred speech, difficulty maintaining his balance, leaning on the fixed bar with his arms on the bar, and at one point when attempting to stand on his own he waivered and embraced his friends around the neck. Officer Gonzalez was close enough to patron Troilo to hear him attempt to speak. Officer Gonzalez had difficulty understanding

patron Troilo because he was slurring his speech while trying to place an order with bartender Sipple. Officer Gonzalez monitored patron Troilo for approximately five minutes. During that time bartender Sipple had a clear, unobstructed line of sight of patron Troilo and the afore-described signs of intoxication; there was nothing to prevent bartender Sipple from viewing patron Troilo. Patron Troilo eventually placed an order with bartender Sipple for three 7-Up and vodka mixed drinks, which bartender Sipple prepared and served in three separate glasses to patron Troilo. Patron Troilo handed two of the said mixed drinks to his friends and kept the third mixed drink for himself. Patron Troilo, still having difficulty with his balance, left the fixed bar with the assistance of his two friends, who helped patron Troilo walk to the dance floor area.

18. Officer Gonzalez reported her observations to uniformed LAPD officers waiting outside the Licensed Premises. Those uniformed officers entered the Licensed Premises and detained both bartender Sipple and patron Troilo. Officers issued a citation to bartender Sipple. Officers explained to patron Troilo that he was being detained for being drunk in public. Patron Troilo was uncooperative and incoherent due to his intoxication, which caused a spectacle in the Licensed Premises. Patron Troilo was transported to the LAPD Hollywood Station where Officer Deckel, using a PAS kit, performed a breathalyzer test upon patron Troilo. The said breathalyzer test resulted in a blood alcohol content of 0.204. Patron Troilo was booked for being drunk in public.

19. Officer Gonzalez, who appeared to be of African American ethnicity, had no racial motivation in the performance of her duties and investigation at the Licensed Premises. The patrons inside the premises were of mixed race and diverse ethnicity, making up no predominant racial or ethnic group.

September 22, 2018
(Count 6)

20. On September 22, 2018, at approximately 11:00 p.m. LAPD Officer Paredes along with two other LAPD officers entered the Licensed Premises in a plain clothes capacity. Officer Paredes walked straight to the restroom, whereupon a male patron, later identified as Jeff Ding (hereinafter referred to as patron Ding), staggered out of the restroom and bumped into Officer Paredes. Patron Ding appeared intoxicated to Officer Paredes because patron Ding was staggering, had difficulty walking and slurred his speech when he attempted to apologize to Officer Paredes for bumping into him. Patron Ding then walked to the fixed bar area. Officer Paredes took a position of advantage with the other LAPD officers to observe patron Ding from the west side of the premises.

21. Officer Paredes was able to see patron Ding as he stood at the bar. Patron Ding attempted to get the bartender's attention (the bartender was later identified as Stanley Greene, who will hereinafter be referred to as bartender Greene). Bartender Greene saw

patron Ding knock over the container of lemon and lime wedges upon the fixed bar, in an attempt to get bartender Greene's attention. Bartender Greene rolled his eyes in response thereto and walked away to attend to another patron. Bartender Greene returned to patron Ding, who spoke in slurred speech, while attempting to place an order with the bartender. Officer Paredes was in a position to hear their conversation but could not understand what patron Ding said because his speech was so slurred it was incoherent. Officer Paredes watched as bartender Greene took a vodka bottle from behind the bar, poured four shots of vodka and gave them to patron Ding. During this entire time patron Ding was not able to stand on his own and leaned against the bar counter, using the bar counter to hold himself up to stand. Patron Ding then attempted to carry the four vodka shots while walking to a table. Patron Ding spilled two of the vodka shots while making his way to the table at which his friends sat. Patron Ding drank one of the vodka shots.

22. Officer Paredes reported his observations to uniformed LAPD officers who were waiting outside of the Licensed Premises. Uniformed officers entered the Licensed Premises and detained bartender Greene and patron Ding, which attracted attention in the premises. Bartender Greene was issued a released-from custody citation. Patron Ding was administered a breathalyzer test, which resulted in a blood alcohol content of 0.10. Officer Paredes determined the result to be over the legal BAC limit for driving a vehicle. A uniformed officer placed patron Ding in an Uber to drive patron Ding home for safety reasons.

23. Officer Paredes had no racial motivation in the performance of his duties and investigation at the Licensed Premises.

(Respondent's Witness – Robert Vinokur)

24. Robert Vinokur appeared and testified at the hearing. He described himself as the owner and general partner of 6506 Hollywood Associates Limited Partnership. Mr. Vinokur said that the Respondent owns and operates two venues, Calle Tacos, which is the restaurant section at the front of the premises and is open seven days a week from 11:00 a.m. to 3:00 a.m., and the Playhouse night club, which is the entertainment component in the rear of the premises and open Thursday through Sunday from 10:30 p.m. to 3:00 a.m. The premises opened for business in July of 2009.

25. Mr. Vinokur said he spent a lot of time with the Department of ABC prior to obtaining its type-47 license, in an attempt, to "figure out what is the best way to be able to run the entertainment component in the rear, the night club, to be able to charge a cover charge." He said he worked out a plan with the Department where a section of the premises was carved out of the front of the premises as the restaurant which does not require a cover charge. He said the restaurant has a separate entrance with a large gate, 14 foot by 14 foot, and then to the east of the restaurant there are four doors that enter

into the rear component of the premises, which is the Playhouse night club. Mr. Vinokur was adamant that the Licensed Premises does not charge a cover charge to enter the restaurant and has never done so in the 10 years it has been open.

26. On January 1, 2018, Mr. Vinokur was present at the Licensed Premises at around 2:00 a.m. or 2:05 a.m. when he was informed of a shooting that had occurred in the city public parking lot south of the Licensed Premises. Pursuant to Respondent's active shooter procedures the Licensed Premises was immediately closed and they all waited for the police to enter. Mr. Vinokur claimed that at that time, all of Respondent's bartenders, bar-backs and porters began removing all alcohol bottles from the tables to place them in a secured storage area on the second floor. Mr. Vinokur said two LAPD officers entered the premises and spoke with him requesting to see the video surveillance of the exterior parking lot. Mr. Vinokur said the officers also requested the lights be turned on and everyone be evacuated through the front entrance. There were 600 patrons in the Licensed Premises attending the New Year's Eve Gala. While Mr. Vinokur took the officers upstairs through the second-floor lounge to a small office, which housed the video surveillance equipment to show the officers the requested video surveillance, the staff began the process of exiting people out the front entrance. Because of the number of patrons, it took a while to evacuate all the patrons from the premises. Mr. Vinokur claimed that after everyone was evacuated the premises was closed and only staff remained therein. Mr. Vinokur claimed there were 35 to 40 staff, not including security guards, and when the security guards were added the total number of employees in the Licensed Premises was 75 to 80. The security guards were dressed in black suits with the word, "Security" on their clothing. Mr. Vinokur said that at some point, the employees went up to the second-floor lounge to cash-out and change into their regular clothes. Food was brought upstairs for the employees, who were eating and drinking.

27. Mr. Vinokur claimed the Licensed Premises did not have Buchannan's Whiskey at any time, including on January 1, 2018. The Respondent produced incomplete invoices, with missing pages and dates. (Exhibit B.) The Respondent claimed those invoices represented the "invoices over the last three months showing all purchase of alcohol we made from our liquor vendor," and proof the Respondent did not purchase Buchannan's Whiskey from its sole distributor, Southern Glazer's Wine & Spirits. Mr. Vinokur admitted that Southern Glazer's Wine & Spirits does sell Buchannan's Whiskey, but claimed the Respondent does not purchase it.

28. The Respondent provides STARR training to its employees annually, which includes a review of company policy. With regards to intoxicated patrons Mr. Vinokur said the staff are trained to be aware of approximately five signs of intoxication and are "not supposed to serve patrons that look intoxicated," with such signs including, "if someone cannot speak or someone has blurry eyes or is falling over."

29. Mr. Vinokur said that when he is present at the Licensed Premises during the Playhouse business hours of 10:30 p.m. to 3:00 a.m., he patrols the premises, makes sure everyone follows company policy as well as the CUP and ABC conditions, assures bartenders are providing the best customer service, attends to patrons, and makes sure everyone enters and exits the premises properly. The Respondent provides security guards in the Playhouse Hollywood night club and pays to have "motor cops" sit and keep watch in the Respondent's parking lot.

30. Except as set forth in this Decision, all other allegations in the Accusation and all other contentions of the parties lack merit.

CONCLUSIONS OF LAW

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

2. Section 24200(b) provides that a licensee's violation, or causing or permitting of a violation, of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.

3. Section 25632 provides that "Any retail licensee, or agent or employee of such licensee, who permits any alcoholic beverage to be consumed by any person on the licensee's licensed premises during any hours in which it is unlawful to sell, give, or deliver any alcoholic beverage for consumption on the premises is guilty of a misdemeanor."

4. Cause for suspension or revocation of the Respondent's license exists under Article XX, section 22 of the California State Constitution, and sections 24200(a) and (b) for the violations of section 25632 alleged in count 1. Specifically, on January 1, 2018, the Respondent-Licensee's agents or employees permitted an alcoholic beverage, to-wit: various including Buchannan's Whiskey, to be consumed upon the premises during hours in which it is unlawful to sell, give, or deliver an alcoholic beverage for consumption on the premises, in violation of Business and Professions Code section 25632. (Findings of Fact ¶¶ 4-7.)

5. Section 23804 provides that the violation of a condition placed upon a license constitutes the exercise of a privilege or the performing of an act for which a license is required without the authority thereof and constitutes grounds for the suspension or revocation of the license.

6. Cause for suspension or revocation of the Respondent's license exists under Article XX, section 22 of the California State Constitution, and sections 24200(a) and (b) for the violation of section 23804 alleged in count 2. Specifically, on January 1, 2018, the Respondent-Licensee's agents or employees violated condition number 1 on the license which states, "Sales, service, and consumption of alcoholic beverages shall be permitted only between the hours of 11:00 a.m. and 2:00 a.m. each day of the week," in that the Licensee's employees or agents did allow consumption of alcoholic beverages after 2:00 a.m. such being a violation of the license condition and cause for license suspension or revocation under Business and Professions Code section 23804. (Findings of Fact ¶¶ 4-7.)

7. Cause for suspension or revocation of the Respondent's license does **not** exist under Article XX, section 22 of the California State Constitution, and sections 24200(a) and (b) for the violation of section 23804 alleged in count 3. Specifically, on January 21, 2018, LAPD Officers Lopez, Flores and Monzon did not pay a $50 admission charge/cover charge to enter the restaurant, but to enter the Playhouse night club. There was no evidence the officers entered the restaurant portion of the premises. In fact, Officer Lopez repeated in his testimony several times, both upon direct and cross-examination, that once he paid the $50 he entered the glass door marked with lettering "Playhouse," and entered directly into the night club and not the restaurant. Officer Lopez testified that the Playhouse is separate from the restaurant. As such, there was insufficient evidence and the Department failed to prove that the Respondent was in violation of condition number 11 endorsed upon the Respondent's license on January 21, 2018 as alleged. (Findings of Fact ¶¶ 4, 8 and 9.)

8. Section 25602(a) provides that any person who sells, furnishes, or gives any alcoholic beverage to any obviously intoxicated person is guilty of a misdemeanor.

9. In cases such as this, the term "obviously" denotes circumstances "easily discovered, plain, and evident" which place upon the seller of an alcoholic beverage the duty to see what is easily visible under the circumstances. *People v. Johnson* 81 Cal.App.2d Supp. 973, 185 P.2d 105. Such signs of intoxication may include bloodshot or glassy eyes, flushed face, alcoholic breath, loud or boisterous conduct, slurred speech, unsteady walking, or an unkempt appearance. *Jones v. Toyota Motor Co.* 198 Cal.App.3d 364 at 370, 243 Cal.Rptr. 611. It is not necessary for all of the signs described to be present in order to find a person is obviously intoxicated, but there must be sufficient indications "to cause a reasonable person to believe that the one with whom he or she is dealing is intoxicated." *Schaffield v. Abboud* 15 Cal.App.4th 1133, 19 Cal.Rptr.2d 205.

10. Cause for suspension or revocation of the Respondent's license exists under Article XX, section 22 of the California State Constitution and sections 24200(a) and (b) for the violation of section 25602(a) alleged in counts 4, 5, and 6. Specifically, on the basis that,

on January 21, 2018, April 14, 2018, and September 22, 2018, Respondent-Licensee's employees, bartenders Taylor Sipple and Stanley Greene, inside the Licensed Premises, sold, furnished, gave or caused to be sold, furnished or given, an alcoholic beverage, to-wit: vodka, to Harrison Dai Ngo, Samuel Troilo, (by Taylor Sipple), and Jeff Ding (by Stanley Greene), obviously intoxicated persons, in violation of section 25602(a). The preponderance of evidence established that both bartenders Sipple and Greene had the opportunity to observe each of the said patrons displaying multiple signs of being obviously intoxicated prior to serving them. (Findings of Fact ¶¶ 8-23.)

11. The Respondent argued that count 6 relating to Jeff Ding is "weak" for a number of reasons. Those reasons, the Respondent argued, include that Jeff Ding (1) did not function in a state of intoxication because he apologized to the officer for bumping into him, which shows he was mentally alert and sharp, (2) he was only in the Licensed Premises 15 minutes, and (3) he only blew a 0.10 in the breathalyzer test, and since Ding may not have been driving and could have used Uber to get home, there is "less of a need to strictly apply some of the rules." These arguments are rejected and without merit. The preponderance of the evidence including Officer Paredes' sworn, credible testimony established that Jeff Ding displayed several signs of intoxication[5] in front of bartender Greene, and that Jeff Ding was anything but mentally alert or sharp prior to being served vodka, despite any amount of time he was in the Licensed Premises. The purpose behind section 25602(a) is to avoid persons leaving licensed establishments in such a state of intoxication that they cause injury to others and to protect members of the general public against injuries resulting from such intoxication. There was no evidence that Jeff Ding did not intend to drive himself from the Licensed Premises. Nevertheless, whether or not Jeff Ding would have been driving, California's legal driving limit of less than 0.08 percent blood alcohol content is a good baseline from which to determine Jeff Ding's impairment level, in addition to the multiple signs of obvious intoxication observed by bartender Greene and Officer Paredes.

12. 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 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.

13. 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.)

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[5] Officer Paredes credibly testified that patron Ding was slurring his speech in such a manner that he was incoherent, as well as not able to stand on his own, leaning against the bar counter, using the bar counter to hold himself up to stand.

14. Robert Vinokur's testimony and Respondent's contentions that (1) the Respondent did not have Buchannan's Whiskey in the Licensed Premises on January 1, 2018, and in fact, the invoices in Exhibit B prove the Respondent did not purchase or have Buchannan's Whiskey on the Licensed Premises on January 1, 2018, (2) alcohol was not being consumed in the Licensed Premises after 2:00 a.m. on January 1, 2018, but instead non-alcoholic beverages were being consumed, (3) the LAPD officers created a fictitious party with patrons drinking alcohol on the second floor, as there was no partying going on but employees cashing-out, (4) all the patrons on January 1, 2018, were evacuated by 2:30 a.m., or in other words by the time Officer Flores entered the Licensed Premises, (5) Officer Flores did not see patrons holding alcoholic beverages but staff carrying bottles of alcohol which they were placing in storage on the second floor, (6) on January 1, 2018, all of the Respondent's staff, except security, were not wearing their typical clothing attire, including Respondent's inference its staff were wearing cocktail attire because it was a New Year's Eve Gala, (7) patrons Ngo, Troilo and Ding did not display the signs of intoxication to which the LAPD officers testified they observed on the relevant dates, (8) patron Ding spoke intelligently on September 22, 2018, and (9) the LAPD officers on said dates of investigation were racially motivated against and engaging in discriminatory/selective enforcement of the Licensed Premises, are disbelieved for the following reasons[6].

15. Mr. Vinokur exhibited a bias in the presentation of his conflicting testimony, as the general partner of the Respondent, 6506 Hollywood Associates Limited Partnership, facing potential discipline, along with his lengthy involvement with the Licensed Premises since July of 2009, all of which tend to disprove the truthfulness of his testimony and contentions. Each of the officers were found to have no reason or motive to falsify their testimony, testimony which was consistent and wholly credible. The officers' testimony as to their observations is found more credible than Mr. Vinokur's testimony regarding the contentions and conflicts in testimony.

16. When asked by Respondent's counsel, whether any of the patrons, as far as Mr. Vinokur could see, were falling down and exhibiting traits or characteristics of intoxication, Mr. Vinokur claimed that on the dates in question, "At no point did I see anyone that was overly intoxicated as I do my rounds through the facility." However, despite Mr. Vinokur claiming to be present on each of the dates in question, there is no evidence Mr. Vinokur was present to specifically observe patrons Ngo, Troilo, and Ding at the time when the LAPD officers and bartenders Sipple and Greene were observing the patrons' obvious signs of intoxication.

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[6] As to these contentions, while Respondent's counsel referred to them during his case in chief the Respondent did not present any argument in closing relating to these claims and therefore it was understood and treated by the undersigned that the Respondent abandoned these arguments. Nonetheless, the undersigned has addressed them briefly below and as without merit.

17. Mr. Vinokur presented inconsistent and conflicting testimony. Mr. Vinokur first testified that on January 1, 2018, when the officers entered at 2:15 a.m. they requested the patrons be evacuated. Mr. Vinokur claimed it only took 15 to 20 minutes to evacuate the patrons from the Licensed Premises, with all the patrons evacuated by 2:30 a.m. (prior to Officer Flores entering the Licensed Premises.) Yet later in Mr. Vinokur's testimony he went on about how long it took to evacuate the patrons because there were 600 people to evacuate and they were restricted to exiting out of the front entrance and not the rear exit. Mr. Vinokur further claimed that after all patrons were evacuated the premises was closed and only the Respondent's staff remained therein. Mr. Vinokur said there were 35 to 40 staff, not including security guards, which when he added security the total number of employees was 75 to 80 inside the Licensed Premises. Mr. Vinokur then inferred that the staff, excluding the security guards, were wearing cocktail attire and not dressed in their normal work attire because it was the New Year's Eve Gala. Mr. Vinokur presented later conflicting testimony that he instructed the staff to remain seated while he walked the officers upstairs to show them the video surveillance. This latter testimony indicates the staff remained downstairs, when his earlier testimony was that the staff were all upstairs cashing-out. Then Mr. Vinokur testified that the staff went to the second-floor lounge to change into their regular clothes and cash-out. This latter testimony contradicts Mr. Vinokur's claim that the staff were wearing cocktail attire when Officer Flores walked into the second-floor room. In contrast, Officer Flores credibly testified that when he entered the Licensed Premises at 2:45 a.m. he heard Respondent's security telling patrons to take the party upstairs and saw, on the second floor, patrons dressed in cocktail attire holding and drinking alcoholic beverages, including a bottle of Buchannan's Whiskey. Officer Flores further credibly maintained that all of the Respondent's bartenders, servers and bus-boys were wearing their normal work attire and not cocktail attire. (Findings of Fact ¶¶ 5-7.)

18. The invoices which the Respondent produced were incomplete. Only the first page of multiple-paged invoices was produced for a majority of the invoices. In other words, multiple pages of many of the invoices were missing. The Respondent claimed Exhibit B represented three months of invoicing for "all" of its purchases from its sole vendor. From the invoices produced, it appeared that the Respondent would purchase alcohol every week, and there are many weeks for which invoices were not provided. As such, the said invoices are not credible proof that the Respondent did not have Buchannan's Whiskey at the Licensed Premises on January 1, 2018, and did not buy Buchannan's Whiskey. The Respondent, having failed to produce all the invoices without explanation as to why it did not produce the complete invoices, took the risk the trier-of-fact would infer that if the evidence had been produced it would have been adverse. Therefore, when it was within the power of the Respondent to produce stronger, more satisfactory evidence, the evidence offered is viewed with distrust. (Evidence Code, section 412.) [7]

[7] 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

19. The Respondent argued that the LAPD officers' testimony was not credible. During the presentation of testimony, the Respondent's counsel claimed the officers were racially motivated against the Respondent and counsel referred to selective enforcement due to the alleged racial make-up of the patrons that attend the Licensed Premises nightclub and the music played therein. As to these later contentions, while the Respondent's counsel referred to racial motivation and selective enforcement during his case in chief the Respondent did not present any argument in closing relating to these claims and therefore they were understood and treated by the undersigned as abandoned by the Respondent. Nonetheless, the undersigned will address them briefly below.

20. The Respondent's contentions are rejected and without merit. First and foremost, the Respondent failed to meet its burden of proving any of the necessary elements of discriminatory or selective enforcement/ prosecution[8]. Additionally, the Respondent presented no credible evidence whatsoever that the investigations by the LAPD officers into the violations in the matter at hand had any racial motivation or selective enforcement attached to it. Each of the LAPD officers who testified provided sworn, direct, credible and consistent testimony. None of the officers exhibited any bias or motive in the presentation of their testimony. In fact, when directly asked by Department's counsel the officers were adamant and credibly maintained they had no improper motive in their investigations. Officer Lopez credibly testified that he had "absolutely" no racial motivation in performing his investigation at the Licensed Premises and that, in fact, he is a minority, who grew up in the same neighborhood surrounding the Licensed Premises and listens to the same music played at the Licensed Premises. Officer Lopez' hope on January 21, 2018, was that he would find the Licensed Premises in compliance as it would be less work for him since he would not have to prepare any investigative reports. He credibly testified it is his desire that the business would thrive, and the community is safe. Officer Gonzalez, who appeared to be of African American ethnicity, credibly testified she had "absolutely" no racial motivation in the performance of her duties and investigation at the Licensed Premises. She further credibly testified that the patrons inside the Licensed Premises were of mixed race and diverse ethnicity; thereby the patrons did not make-up any predominant racial or ethnic group. Officer Paredes also presented credible testimony that he had "absolutely" no racial motivation in the performance of his duties and investigation at the Licensed Premises.

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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.

[8] *People v. Battin* (1978) 77 Cal.App.3d 635, 666 [143 Cal.Rptr. 731]; *Baluyut v. Superior Court* (1996) 12 Cal.4th 826, 831-833 [50 Cal.Rptr.2d. 101]; *U.S. v. Armstrong*, 517 U.S. 456, [116 S.Ct. 1480]; *Murgia v. Municipal Court* (1975) 15 Cal.3d 286. The undersigned did not delve into any of the elements, since none were addressed by the Respondent, and instead simply refer to the latter footnoted citations.

PENALTY

The Department requested the Respondent's license be suspended for a period of 30 days, based on: (1) the Licensee's prior discipline, which included similar violations in 2011 consisting of four counts of two separate incidents, (2) a continuing course and pattern of conduct of sections 23804, 25632 and 24200(a) and (b), and (3) Mr. Vinokur's testimony that he was at the Licensed Premises each time the police detained and cited persons, as such Respondent was on notice with the officers' issuing warnings and returning to see the same violations. The Department did not provide a breakdown of the penalty among the counts.

The Respondent argued that the accusation should be dismissed. The Respondent did not recommend a penalty in the event the accusation was sustained.

The standard penalty under rule 144[9] for a first-time violation of section 25602(a) is a 15-day suspension; and a 25-day suspension for a second violation within three years. For violations of section 25632, referring to by the public, a 15-day suspension is recommended. For violations of conditions under section 23804 the recommended penalty is a 15-day suspension with 5-days stayed for one year. Rule 144 offers guidance on adjusting the standard up or down depending on aggravating and mitigating factors.

While the prior 25602(a) violations fall outside of the three-year period referred to above, they are aggravating factors to be considered in weighing the penalty. The Respondent's license has somewhat of a recent disciplinary history for violations of the same sections as alleged in the present matter. The prior disciplinary action shows the Respondent had prior notice and warning, and in conjunction with the current violations over several months show a continuing course or pattern of conduct. The foregoing is weighed against the Licensee's cooperation in the investigation. The penalty recommended herein complies with rule 144.

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

ORDER

Counts 1, 2, 4, 5 and 6 of the First Amended Accusation are sustained. In light of these violations, the Respondent's on-sale general eating place license is hereby suspended for a period of 30 days as to each count, with the penalties as to those counts to be served concurrently with one another.

Count 3 of the First Amended Accusation is dismissed.

Dated: July 15, 2019

D. Huebel
Administrative Law Judge

☒ Adopt

☐ Non-Adopt: _____

By: _____

Date: 8/27/19