

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

AB-9898

File: 48-555344; Reg: 18087224

MELVIN FRANK,
dba Tryst
188 South Indian Canyon Drive
Palm Springs, CA 92262-6604,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Huebel

Hearing: July 9, 2021
Telephonic

ISSUED JULY 9, 2021

Appearances: *Appellant:* David D. L. Horton, of David D. L. Horton, Esq., & Associates APC, as counsel for Melvin Frank,

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

OPINION

Melvin Frank, doing business as Tryst (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ revoking his license, with revocation stayed for 180 days to permit the transfer of the license, because his employee: 1) possessed, and permitted various patrons to possess controlled substances, in violation of California Health and Safety Code sections 11350 and 11351; 2) sold,

¹ The decision of the Department, dated January 11, 2021, is set forth in the appendix.

furnished, offered to sell or furnish, or acted as an aider or abettor in the selling or furnishing, controlled substances, in violation of Health and Safety Code section 11352, and; 3) knowingly permitted the illegal sale, or negotiations for sales, of controlled substances upon the licensed premises, in violation of Business and Professions Code section 24200.5(a).

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on April 28, 2015. There is no prior record of departmental discipline against the license.

On July 23, 2018, the Department filed a 16-count accusation against appellant charging that, between January 5, 2018 and March 23, 2018, appellant knowingly permitted the illegal sale of controlled substances at the licensed premises, and that his employee, Shane Keith Anderson (Anderson), sold, possessed, and permitted patrons to possess, for the purpose of sale, a controlled substance on four separate dates: January 5, 2018, January 25, 2018, February 16, 2018, and March 23, 2018. The Department filed a First Amended Accusation on February 20, 2020.

At the administrative hearing held on March 10, 2020, documentary evidence was received, and testimony was given by the following individuals: appellant; Department Agents Marco Silva and Jeffrey Holsapple; appellant's employees, David Meagley, Gracie Elisarraras, and Clark Bennett, and; business broker Robert Hughes.

Evidence established that in October of 2017, Agent Holsapple assisted the Palm Desert District Attorney's Office in investigating a licensed premises in Cathedral City called, "The Block." At the Block, Agent Holsapple received information from a bartender who told him that a bartender named Shane Anderson, who worked at Tryst,

was holding and selling cocaine. Subsequently, the Department investigated the licensed premises.

January 5, 2018

Agents Silva and Holsapple entered the licensed premises in an undercover capacity on January 5, 2018, and went to the fixed bar where Anderson was bartending. Agent Silva ordered a beer, which Anderson served. Agent Silva asked Anderson if he knew "David" from the Block. Anderson said David was a good friend of his. Agent Silva told Anderson that he wanted to buy "coke," referring to cocaine. Anderson told Agent Silva that he would make some phone calls. Anderson walked to the rear of the licensed premises and met with a male patron named Arie Hughes (Hughes) and pointed to Agent Silva.

Hughes approached Agent Silva and told him that Anderson wanted Hughes to speak to him. Agent Silva told Hughes he was looking for cocaine, and after negotiations, Agent Silva agreed to purchase two grams of cocaine from Hughes for \$140. Hughes left the licensed premises, and Agent Silva confirmed with Anderson that he sent Hughes over to speak with Agent Silva. Later, Hughes re-entered the bar and told Agent Silva to follow him out to the licensed patio.

Agent Silva and Hughes went to the patio, and Hughes retrieved a small baggie of cocaine from his pocket. Agent Silva paid Hughes \$140 for the cocaine and asked Hughes for his phone number, which he provided. Agent Silva returned to the bar and thanked Anderson for putting him in contact with Hughes. Agent Silva also asked Anderson if Hughes' cocaine was good quality, and Anderson replied that it was. Anderson also gave Agent Silva his phone number and work schedule.

January 25, 2018

Agents Silva and Holsapple returned to the licensed premises on January 25, 2018, and went to the fixed bar where Anderson was again tending bar. Anderson confirmed in prior text messages with Agent Silva that he would be working that night. The agents ordered beers from Anderson and were served. Agent Silva asked Anderson if he could obtain two grams of cocaine, and Anderson confirmed that he could get it for Agent Silva. Anderson invited Agent Silva to a small office at the licensed premises and told him that his dealer was not at the premises but could contact someone else. Afterwards, Agent Silva and Anderson returned to the bar.

A short time later, an individual named "Michael" approached the agents and told them that Anderson said they needed assistance. Michael asked the agents what they wanted, and Agent Silva replied that he wanted two grams of cocaine. After negotiations, Agent Silva agreed to buy two grams of cocaine for \$100. Michael said that he had the cocaine with him if Agent Silva would like to try it. Agent Silva declined, and said he wanted it for later.

Michael walked out of the licensed premises to use his cell phone, and then returned to tell Agent Silva that the cocaine would arrive in 10-15 minutes. Agent Holsapple paid Michael \$100 for the cocaine. Michael then asked Agent Silva to follow him to the front patio, and then into an alley next to the licensed premises. In the alley, Michael handed Agent Silva a small baggie of cocaine. Agent Silva asked Michael for his cell phone number, and Michael responded that he could reach him through Anderson.

February 16, 2018

Agents Silva and Holsapple returned to the licensed premises on February 16, 2018, and walked to the fixed bar where Anderson was working. The agents ordered beers, and Agent Silva asked Anderson if Hughes would be at the premises that night because he wanted to purchase two grams of cocaine. Agent Silva added that he would rather purchase cocaine from Hughes and not Michael. Anderson told the agents he could get cocaine for them and that he would make some phone calls.

Anderson used his cell phone and told Agent Silva he was unable to contact Hughes, but was waiting a response from "Mike." However, Anderson said that Hughes would be at the premises later that evening. Anderson reiterated that he could get cocaine for the agents.

A short time later, Anderson told Agent Silva that a dealer wanted \$120 for two grams of cocaine, and added that this cocaine was better than Hughes' cocaine. Agent Silva placed \$120 on the bar countertop. Anderson took the money and then placed four baggies of cocaine on the countertop, and told Agent Silva that each baggie contained .5 grams. Agent Silva placed the baggies of cocaine in his pants pocket and asked if the dealer was inside the premises. Anderson said that he could not tell the agents whether the dealer was in the bar. The agents then left the licensed premises.

March 23, 2018

On March 23, 2018, both agents returned to the licensed premises and went to the fixed bar where Anderson was working. Agent Holsapple asked if either Hughes or "Michael" were coming to the bar that night. Anderson replied that he had not seen Hughes in a long time but that he would contact Michael. Anderson appeared to send a message on his cell phone, and then told the agents he was waiting for Michael to

respond. Anderson also told Agent Silva to send him a text message, because Anderson lost his cell phone number.

Anderson and Agent Silva engaged in a text message conversation while at the fixed bar and Anderson told Agent Silva that Michael was not responding but that he could get another contact if needed. Anderson then approached the agents and told them that he could obtain cocaine from a patron seated at the fixed bar and glanced in the patron's direction.

Agent Holsapple asked for the patron's name and Anderson told him it was "Ryan" (later identified as Ryan Koehler ("Koehler")). The agents went to speak to Koehler, and Agent Silva told him he would like to buy two grams of cocaine. Koehler told the agents he normally sells two grams for \$120, but that he only had 1.8 grams on him. Agent Silva agreed to the purchase price, and Koehler went outside to his car, retrieved the cocaine, and then returned to furnish the cocaine to Agent Silva. Agent Silva paid Koehler \$120. Afterwards, Koehler provided his phone number and told Agent Silva to call him if he wanted more cocaine.

The agents returned to the fixed bar and thanked Anderson for facilitating the cocaine transaction. The agents also remarked at how Anderson seemed to always have a new dealer each time they came to the bar. Anderson stated that he had a lot of contacts.

Shortly after the agents' conversation with Anderson, law enforcement officers supporting the undercover investigation entered the licensed premises and made arrests.

After the hearing, the administrative law judge (ALJ) issued a proposed decision on April 20, 2020, sustaining all 16 counts in the accusation, and recommending that

the license be revoked, with revocation stayed for 36 months on the condition that no further disciplinary action occur during that time. The ALJ also recommended that the license be suspended for 15 days.

The Department declined to adopt the proposed decision on July 8, 2020, and requested additional written argument from the parties on September 2, 2020. After receiving the parties' written arguments, the Department issued a decision under Government Code section 11517(c) on January 11, 2021, sustaining all 16 counts of the accusation and revoking appellant's license. However, the Department stayed revocation for 180 days to permit appellant to transfer the license. The Department also suspended the license for a period of 30 days, and indefinitely thereafter until the license was transferred.

Appellant filed a timely appeal contending that: 1) the Department proceeded without, or in excess of, its jurisdiction by depriving appellant of his license without a factual basis; 2) the Department failed to proceed in the manner required by law because it failed to show appellant's actual or constructive knowledge of Anderson's criminal conduct, and; 3) the decision is not supported by any findings of actual or constructive knowledge of Anderson's criminal conduct by appellant.

DISCUSSION

In his brief, appellant makes various claims that the decision violates his procedural and substantive due process rights. (AOB, at pp. 9-20). However, as the Department points out in its reply, this Board is prohibited from interpreting or nullifying state statutes and/or disregarding relevant caselaw on constitutional (or other) grounds. In fact, this 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].) Thus, the Board may only determine whether there is legal authority and a factual basis for imputing Anderson’s criminal conduct to appellant. If so, the Department’s decision must stand.

I

LEGAL AUTHORITY

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].)

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].)

In *Laube v. Stroh*, the 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. 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.)

Appellant argues that both *Laube* and *Santa Ana Food Market, Inc. v. Alcoholic Beverage Control Appeals Board* (1999) 76 Cal.App.4th 570 [90 Cal.Rptr.2d 523] (*Santa Ana*) support his argument that the Department failed to proceed in the manner required by law. (AOB, at p. 14.)

However, the Department rejected appellant's argument on this issue:

13. The Respondent argued there is no justification to impose strict liability on the Respondent when bartender Anderson acted alone. The Respondent was arguing he had no knowledge of the illegal activities going on within the Licensed Premises. This argument is rejected. In [*Santa Ana*], that matter involved the court annulling the suspension of a license for a clerk's *single* illegal purchase of *food stamps*, where the court found, among other things, the clerk's acts and knowledge could not be imputed to the licensee because the licensee could not have known of the illicit transaction since it only occurred once, within seconds when the clerk quickly made the purchase while the manager was preoccupied with another customer and hiding behind the undercover officer posing as the supplier, the market had taken strong measures prior to the violation to

prevent the type of act, and the on-duty manager immediately fired the clerk after the undercover officer arrested the clerk. *Santa Ana Food Market* creates a very narrow exception and a four-prong test to apply if an employee's actions would not be imputed to a licensee, this case does not invoke the four-prong test established in that case.

14. In contrast, in the matter at hand, there was a continuing course of openly-conducted *multiple*, illegal *cocaine* transactions within the Licensed Premises over *several* months with at least one employee, engaging in such illegal conduct. While the Respondent had a zero-tolerance drug policy and surveillance cameras in place prior to the violations at hand, the surveillance system was not functioning, and there was little if no evidence the Respondent had taken strong measures prior to the violations to prevent the type of act. The illicit acts at hand were foreseeable, as evidenced by the very policy the Respondent had in place. The Respondent's closing statement acknowledged as much, saying that, "the use of cocaine is prolific in many areas especially [in] Palm Springs."

(Conclusions of Law, ¶¶ 13-14, emphasis in original.) We agree with the Department's conclusions.

Santa Ana is clearly distinguishable from the matter at hand. In *Santa Ana*, a clerk surreptitiously purchased food stamps at one-half their face value from a confidential informant working for the United States Department of Agriculture. (*Santa Ana, supra* at p. 575.) The clerk was arrested moments after the sale and was immediately fired by her on-duty manager. (*Ibid.*) The court found that the Department had abused its discretion when it suspended appellant's license, holding that a single criminal act of an employee unrelated to the sale of alcohol, would not be imputed to an employer who had taken extensive measures to protect against criminal acts of its employees. (*Ibid.*) This is not that case.

The *Santa Ana* case teaches us that there is only one exception to the general rule that employee knowledge is imputed to a licensee. The exception only arises in cases where there is "no per se nexus" between the licensee's sale of alcoholic

beverages and the unlawful employee action. (*Santa Ana, supra* at p. 575.) Even then, the narrow exception applies only when the circumstances meet four required elements: 1) the employee commits a single criminal act unrelated to alcohol sales, 2) the licensee has taken strong steps to prevent and deter such crime before the criminal action took place, 3) the licensee is unaware of the criminal act beforehand, and 4) license discipline has no rational effect on public welfare or morals. (*Id.* at p. 576.)

In the instant case, Anderson's actions fail the *Santa Ana* test, where the drug transactions occurred at the licensed premises (a bar), by the bartender, and after the agents purchased alcoholic beverages. Despite appellant's laudable efforts to institute a zero-tolerance policy for drugs and to install security cameras, we obviously cannot say this incident was unrelated to alcohol sales.

II.

SUBSTANTIAL EVIDENCE

This Board is required to defer to the Department's findings so long as they are supported by substantial evidence. (See *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (Southland)* (2002) 103 Cal.App.4th 1084, 1094 [127 Cal.Rptr.2d 652, 659] [citing *Kirby v. Alcoholic Beverage Control Appeals Bd.* (1968) 261 Cal.App.2d 119, 122 [67 Cal.Rptr. 628] ["In considering the sufficiency of the evidence issue the court is governed by the substantial evidence rule[;] any conflict in the evidence is resolved in favor of the decision; and every reasonably deducible inference in support thereof will be indulged. [Citations.]; see also *Kirby v. Alcoholic Bev. etc. Appeals Bd.* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815] ["When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the department."].) "Substantial evidence" is "evidence of ponderable legal significance, which is 'reasonable in

nature, credible and of solid value.’ ” (*County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, 814 [38 Cal.Rptr.2d 304, 307–308], internal citations omitted.)

California Business and Professions Code section 24200.5(a) provides, in relevant part:

[T]he department shall revoke a license upon any of the following grounds:

(a) If a retail licensee has knowingly permitted the illegal sale, or negotiations for the sales, of controlled substances or dangerous drugs upon his or her licensed premises. *Successive sales, or negotiations for sales, over any continuous period of time shall be deemed evidence of permission.*

(Bus. & Prof. Code § 24200.5(a), emphasis added.)

In *Endo v. State Bd. of Equalization*, the court of appeals interpreted the latter sentence of section 24200.5(a) as a “statutory presumption that [successive] sales over any continuous period of time shall be deemed evidence of such permission” and, therefore, furnished substantial evidence “that the licensee did ‘knowingly permit’ the illegal sale of narcotics upon her licensed premises.” (*Endo v. State Bd. of Equalization* (1956) 143 Cal.App.2d 395, 399 [300 P.2d 366], internal quotations omitted.) In a footnote, the court emphasized that section 25200.5(a) “is in form at least a *legislative* mandate,” one that the Board may not even have authority to review. (*Id.* at p. 399, fn., emphasis in original.) Ultimately, the court held that a statutory presumption — as opposed to an inference — cannot be “dispelled by evidence produced by the opposite party.” (*Id.* at p. 400, citing *Engstrom v. Auburn Auto. Sales Corp.* (1938) 11 Cal.2d 64, 70 [77 P.2d 1059].)

In *Kirchhubel v. Munro* (1957) 149 Cal.App.2d 243, 249 [308 P.2d 432], the court reversed the holding in *Endo*, stating that successive sales are not conclusive, but “... merely evidence of permission which may be overcome by a contrary showing.”

Though the petitioners in that case presented evidence which created a conflict with the

presumption, “[t]he resolving of that conflict was a matter for the Department of Alcoholic Beverage Control, whose action thereon cannot be upset ... if there is substantial evidence to support it.” (*Ibid.*, citing *Covert v. State Bd. of Equalization* (1946) 29 Cal.2d 125 [173 P.2d 545].)

The *Kirchhubel* court also noted the substantial policy justifications for such a presumption:

[T]here is a natural and rational evidentiary relationship between a showing that there have been successive sales of narcotics over a continuous period on licensed premises and the very natural conclusion that the sales could not have continued without the implied or express consent of the licensee. Moreover, a licensee holds his liquor license with the knowledge that he must effectively police his premises against successive sales of narcotics Such a situation cannot occur if the licensee is vigilant in protecting his license and is at least as interested in protecting the public welfare and morals as he is in making money.

(*Kirchhubel, supra*, 149 Cal.App.2d at 249.)

In sum, the Legislature provided, in the second sentence of section 24200.5(a), a statutory presumption that successive sales of controlled substances at a licensed premises establishes permission by the licensee. Although this presumption may be overcome, the Department found that appellant did not successfully rebut the presumption in this matter, primarily because “the surveillance system was not functioning, and there was little if no evidence the Respondent had taken strong measures prior to the violations to prevent the type of act.” (Conclusions of Law, ¶ 14.)

Based on the above, the Department’s findings regarding imputing Anderson’s conduct to appellant must stand. At the administrative hearing, the Department offered evidence establishing multiple and successive narcotics sales facilitated by appellant’s employee (a bartender) at the licensed premises (a bar). Extensive legal authority allows the Department to impute this conduct to appellant and his license. Ultimately,

appellants are asking this Board second-guess the Department and reweigh the evidence to reach a different result. However, the Board is prohibited from doing so.

(Kirby v. Alcoholic Beverage Control Appeals Bd. (1970) 7 Cal.App.3d 126, 129.)

ORDER

The decision of the Department is affirmed.²

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

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.

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:**

Melvin Frank
Db: Tryst
188 South Indian Canyon Drive
Palm Springs, California 92262-6604

Licensee(s).

File No.: 48-555344

Reg. No.: 18087224

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Alcoholic Beverage Control
Office of Legal Services

DECISION UNDER GOVERNMENT CODE SECTION 11517(c)

The above-entitled matter having regularly come before the Department January 11, 2021, for decision under Government Code Section 11517(c), and the Department having considered its entire record, including the transcript of the hearing held on March 20, 2020, before Administrative Law Judge D. Huebel, and the written arguments of the parties, adopts the following decision.

The Department seeks to discipline the Respondent's license on the grounds that, on January 5, 25, February 16, and March 23, 2018, the Respondent, through his agent or employee, Shane Keith Anderson:

- 1) possessed, and permitted various patrons to, possess within the premises, a controlled substance, to-wit: cocaine, in violation of California Health and Safety Code section 11350 (counts 1, 5, 9, and 12); and
- 2) possessed, and permitted various patrons to, possess within the premises, a controlled substance, to-wit: cocaine, for purpose of sale, in violation of Health and Safety Code section 11351 (counts 2, 6, 10, and 13); and
- 3) sold, furnished or offered to sell or furnish, and permitted various patrons to sell, furnish, or offer to sell or furnish, within the premises, a controlled substance, to wit: cocaine, in violation of Health and Safety Code section 11352 (counts 3, 7, 11, and 14); and
- 4) was within the licensed premises, an aider or abettor, as defined in section 31 of the California Penal Code, in the selling or furnishing or in the offering to sell or furnish a controlled substance, to-wit: cocaine, in violation of Health and Safety Code section 11352 (counts 4, 8, and 15).

The Department further seeks to discipline the Respondent's license on the grounds that, between on or about January 5, 2018, and March 23, 2018, the Respondent-Licensee knowingly permitted the illegal sale, or negotiations for sales, of controlled substances or dangerous drugs upon the licensed premises, in violation of Business and Professions Code section 24200.5(a) (count 16). (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 10, 2020. The proposed decision was issued on April 20, 2020. The proposed decision was not adopted on July 8, 2020. The notice for written arguments pursuant to Government Code section 11517(c)(2)(E)(i) was issued on September 2, 2020, and written arguments from the Department and Respondent were both received prior to the deadline established within the notice on October 17, 2020.

FINDINGS OF FACT

1. The Department filed the accusation on July 23, 2018. The Department filed a First Amended Accusation on February 28, 2020.
2. The Department issued a type 48, on-sale general public premises license to the Respondent for the above-described location on April 28, 2015 (the Licensed Premises).
3. There is no record of prior departmental discipline against the Respondent's license.
4. The parties stipulated to: (1) the chain of custody of each of the baggies, containing white, powdery substances, which Agent Silva purchased¹ on January 5, 25, February 16, and March 23, 2018, and which were transported to the Palm Desert District Office, and subsequently transported for testing to the Department of Justice Bureau of Forensic Services, (2) the validity of the Department of Justice Bureau of Forensic Services' Report dated October 30, 2018, signed by Irene Cabrera, Senior Criminalist, and (3) the results of each of the white, powdery substances which Agent Silva purchased on the respective dates as having tested positive for and containing cocaine. (Exhibit 6 - copy of Department of Justice Bureau of Forensic Services Report dated 10/30/18.)

¹ On January 25, 2018, Agent Silva negotiated the sale of cocaine with Michael, but while Agent Silva was in the restroom, Agent Holsapple paid \$100 to Michael, who later handed the bag of cocaine to Agent Silva.

5. In October of 2017, Department Agent Holsapple assisted the Palm Desert District Office's investigation at a licensed premise in Cathedral City called "The Block," which is a bar. At The Block Agent Holsapple received information from an on-duty bartender, Dave, who worked there and who informed Agent Holsapple there was another bartender, named Shane Anderson, who worked at Tryst who was holding and would sell cocaine. Subsequently, the Department investigated at the Licensed Premises in the matter at hand.

January 5, 2018
(Counts 1 to 4, and 16)

6. On January 5, 2018, at approximately 9:50 p.m., Agents Silva and Holsapple, working in a plain clothes capacity, entered the Licensed Premises. The agents walked directly to the fixed bar, behind which stood a bartender, later identified as Shane Keith Anderson (hereinafter referred to as bartender Anderson). Agent Silva observed bartender Anderson conducting bartending duties behind the fixed bar, including, but not limited to, serving patrons alcohol, taking money from customers, giving change to customers, clearing the bar counter of empty glasses and bottles, and generally cleaning around the bar. The agents sat at the fixed bar. Agent Silva ordered a beer from bartender Anderson, who served him the alcoholic beverage ordered.

7. Agent Silva asked bartender Anderson if he knew the bartender named David from The Block (the above-referenced bar located in Cathedral City). Bartender Anderson responded that David was a good friend of his and he has known David for a long time. Agent Silva told bartender Anderson he wanted to buy some coke, using the common street term "coke" to refer to cocaine, and asked if bartender Anderson could get cocaine for him. Bartender Anderson told Agent Silva he was going to make some phone calls and let him know. Agent Silva observed bartender Anderson walk to and stand near the rear exit of the Licensed Premises. Bartender Anderson met with another male, later identified as Arie Raphael Lorenz Hughes (hereinafter referred to as Hughes). Bartender Anderson spoke with Hughes for a moment, during which time bartender Anderson pointed his finger at Agent Silva. Hughes thereafter walked directly to where the agents were seated at the fixed bar, approached Agent Silva and said that bartender Anderson told him to "holla at you." Agent Silva told Hughes he was trying to buy some cocaine. Hughes responded by asking how much money the agent wanted to spend. Agent Silva replied that he wanted to buy two grams of cocaine. Hughes said he was selling two grams of cocaine for \$160. Agent Silva said that \$160 was too expensive for two grams and asked if Hughes could sell two grams for \$140. Hughes agreed to that price. Hughes then exited the Licensed Premises and walked outside, east along the parking lot where cars were parked.

8. While Hughes was outside, bartender Anderson had come back to Agent Silva at the fixed bar. Agent Silva asked bartender Anderson if Hughes was the person bartender Anderson had contacted to sell the agent the cocaine. Bartender Anderson acknowledged in the affirmative and said that Hughes was good. At some point, Hughes re-entered the premises, and approached the agents at the fixed bar. Hughes told Agent Silva to follow him to the front patio so Hughes could deliver the cocaine. Agent Silva followed Hughes out to the patio, which is part of the Licensed Premises. Hughes first told Agent Silva to wait while Hughes cautiously looked around and then retrieved a small baggie containing a white, powdery substance from his pocket. Agent Silva then retrieved \$140 from his pocket and the two simultaneously exchanged the bag of suspected cocaine for the \$140. Hughes counted the \$140 in front of Agent Silva. Agent Silva took the bag and placed it in his front pant pocket. Agent Silva asked if Hughes would give his name and phone number, to which Hughes said he went by the name, "Ace," and gave his phone number to Agent Silva.

9. Agent Silva returned to the fixed bar and sat with Agent Holsapple. Bartender Anderson was still tending bar. Agent Silva thanked bartender Anderson for facilitating the narcotics transaction with Hughes and asked if the cocaine he bought from Hughes was good quality. Bartender Anderson assured the agent the cocaine was good quality, explaining that Hughes was a frequent customer at Tryst and if Agent Silva knew David from The Block he would treat the agent like family. Bartender Anderson gave Agent Silva his personal cell phone and work schedule at Tryst. The agents conducted no further investigation at the Licensed Premises that evening.

10. Agent Silva transported the baggy of suspected cocaine to the Palm Desert District Office, where he weighed it and conducted a presumptive NIK test on the substance. The NIK test resulted in a positive for cocaine. (Exhibit 2 – color photograph of bag containing the cocaine, on a digital scale.)

January 25, 2018
(Counts 5 to 8, and 16)

11. On January 25, 2018, at 8:10 p.m., Agents Silva and Holsapple entered the Licensed Premises in an undercover capacity and walked directly to the fixed bar counter. Agent Silva recognized bartender Anderson from January 5, 2018. Agent Silva knew bartender Anderson would be at the Licensed Premises that evening because prior to going to the premises the agent sent bartender Anderson a text message asking if he would be at Tryst that night. Bartender Anderson said he would be there.

12. Agent Silva ordered a beer from bartender Anderson, who served him the alcoholic beer. Agents Silva and Holsapple left the fixed bar and both stood by the rear exit door. At one point,

bartender Anderson approached the agents at the rear exit door and asked Agent Silva if he was the person who had sent him the text message earlier. Agent Silva said he was and thanked bartender Anderson for facilitating the narcotics transaction the last time he was at Tryst on January 5, 2018. Bartender Anderson told Agent Silva if he wanted to get more cocaine that evening to let him know. Bartender Anderson then walked back behind the fixed bar. The agents followed him and sat down at the fixed bar.

13. At the fixed bar Agent Silva engaged in text messages with bartender Anderson while he worked behind the fixed bar. Agent Silva texted to bartender Anderson, "Hey, so you're cool to hook us up again, we want to get 2 gm." Agent Silva was referring to two grams of cocaine, which bartender Anderson understood. Bartender Anderson replied, "yeah, I can get some for you just let me know what's what." Agent Silva could see bartender Anderson manipulating his cell phone during the text messages between Agent Silva and bartender Anderson.

14. Agent Silva also engaged in a verbal conversation with bartender Anderson regarding t-shirts hanging from the ceiling behind the fixed bar which were on display for sale at Tryst. Agent Silva asked how much the shirts were. Bartender Anderson advised Agent Silva there were more shirts in a small back office with different sizes. Bartender Anderson and Agent Silva walked to the small office inside the Licensed Premises to look at the t-shirts. While in the small office looking at the t-shirts bartender Anderson informed Agent Silva that his dealer was not in the Licensed Premises, however he would contact someone else, but that he could get cocaine for the agents for sure. Agent Silva replied, "let me know" and then walked back to the fixed bar.

15. At some point, while at the fixed bar, a male approached the agents and introduced himself as Michael, explaining that bartender Anderson told him the agents needed some assistance and asked what the agents wanted to get. Agent Silva told Michael he wanted to purchase two grams of cocaine. Michael told the agent he was selling one gram of cocaine for \$60. Agent Silva told Michael he wanted to buy two grams of cocaine and asked if Michael could sell him two grams for \$100. Michael agreed to sell Agent Silva two grams of cocaine for \$100. Michael said he had cocaine on his person if the agents wanted to try it before they bought it. Agent Silva said they did not want cocaine at the moment but wanted the cocaine for later. Michael then exited the Licensed Premises and started using his cell phone. Michael returned to the fixed bar and told the agents it would take between 10 to 15 minutes for the cocaine to arrive. Agent Silva then went to the restroom.

16. Agent Holsapple remained seated at the fixed bar. While Agent Silva was in the restroom, Michael approached Agent Holsapple, tapped him on the shoulder with his pool cue (Michael had been playing pool in the Licensed Premises) and asked Agent Holsapple if he had the \$100 that the agents had negotiated with Michael for the two grams of cocaine. Agent Holsapple

asked Michael if he had the cocaine on him. Michael said he did not, but that he would get the cocaine in a couple of minutes. Agent Holsapple asked Michael how the agent could be assured Michael would not just take his money and leave. Michael said he was a regular customer at Tryst and that the on-duty bartender, Anderson, could vouch for Michael. Agent Holsapple gave Michael \$100. Thereafter, Agent Holsapple got the attention of bartender Anderson, asked him if this Michael was good or if he was going to take off with the agent's money and if the agent could trust Michael. Bartender Anderson told Agent Holsapple that Michael was good for it and he could vouch for Michael. Michael left the Licensed Premises at that point.

17. As Agent Silva was returning to the fixed bar from the restroom, he saw Michael speaking to Agent Holsapple. When Agent Silva approached the fixed bar, he asked Agent Holsapple what happened. Agent Holsapple told Agent Silva he had already given Michael \$100 for the cocaine and explained what had transpired.

18. In the meantime, Michael kept entering and exiting the Licensed Premises waiting for someone. Eventually Michael returned to the agents at the fixed bar and told Agent Silva to follow him to the front patio so he could deliver the cocaine. Agent Silva asked Michael if they could complete the deal inside the premises. Michael ignored Agent Silva's request and simply walked to the front patio. Agent Silva followed Michael onto the front patio of the Licensed Premises. Michael walked to the alley right next to Tryst on the north side. As soon as Agent Silva met with Michael, Michael provided Agent Silva with a small baggy containing a white, powdery substance. Agent Silva asked Michael if Agent Holsapple had already given him the \$100. Michael confirmed that Agent Holsapple already paid for the cocaine. Michael pulled a key out of his pocket and told Agent Silva to do some cocaine in front of him because he "did not want any bullshit for later." Agent Silva told Michael he did not want to do cocaine now, that the agent was afraid to get busted by the police. Michael told Agent Silva there were no police around and again told the agent to do some cocaine in front of him. Agent Silva again told Michael he did not want to do cocaine. Agent Silva explained that bartender Anderson was a good friend of his and he never had any problems or issues before when bartender Anderson hooked him up. Michael said bartender Anderson was good and that he would vouch for him. Agent Silva asked Michael if he could get Michael's phone number. Michael refused to give the agent his phone number and said that if the agent wanted to get cocaine in the future to go through bartender Anderson. The agents conducted no further investigation at the Licensed Premises that evening.

19. Agent Silva transported the baggy containing the suspected cocaine to the Palm Desert District Office where he weighed it and conducted a presumptive NIK test on the substance, the results of which tested positive for cocaine. (Exhibit 3 – color photograph of bag containing said cocaine, on a digital scale.)

**February 16, 2018
(Counts 9 to 11, and 16)**

20. On February 16, 2018, at 8:50 p.m., Department Agents Holsapple and Silva, in an undercover capacity, entered the Licensed Premises, and walked straight to the fixed bar where they took a seat. Bartender Anderson was working behind the fixed bar. The agents ordered a beer from bartender Anderson, who served the agents the alcoholic beer.

21. Agent Silva asked bartender Anderson if Hughes was coming to Tryst that night because Agent Silva wanted to buy two grams of cocaine. Agent Silva explained that he would rather buy cocaine from Hughes than Michael. Bartender Anderson said he would make some phone calls and let him know, but he assured the agent he could get cocaine for the agents for sure. Agent Silva observed bartender Anderson use his cell phone after that conversation.

22. At some point bartender Anderson returned to where the agents were seated at the fixed bar and told them he was waiting for Mike to respond, referring to Michael from whom the agents had purchased cocaine on January 25, 2018. Bartender Anderson explained that he was not able to contact Hughes, but that Hughes was coming to Tryst later that night. Bartender Anderson assured the agents twice that he could get them cocaine for sure. Agent Silva went to the restroom.

23. Agent Holsapple remained seated at the fixed bar. While Agent Silva was in the restroom, bartender Anderson approached Agent Holsapple at the fixed bar and notified the agent he was attempting to get two grams of cocaine, but that he was just waiting on the price because he had contacted somebody for the cocaine. Shortly thereafter Agent Silva returned to his seat next to Agent Holsapple at the fixed bar. Agent Holsapple informed Agent Silva of the conversation which took place between Agent Holsapple and bartender Anderson while Agent Silva was in the restroom.

24. At some point, bartender Anderson approached the agents and told Agent Silva the dealer wanted \$120 for the two grams of cocaine. Bartender Anderson said this cocaine was better quality than the one Hughes sold to him prior. Agent Silva retrieved \$120 from his pocket and placed it on the bar countertop. Bartender Anderson grabbed the \$120, placed it in his pant pocket and left. Bartender Anderson returned, approached the agents at the fixed bar and placed on the bar countertop in front of Agent Silva four baggies containing a white, powdery substance. Bartender Anderson told Agent Silva there were four bags of 0.5 grams each, and then walked away. Agent Silva grabbed the four baggies and placed them in the pocket of his jeans. Bartender Anderson returned to the agents and asked them if they had tried the cocaine. The agents said they did not and bartender Anderson told them the cocaine was good quality. Agent Silva asked bartender Anderson if the dealer was inside Tryst. Bartender Anderson said

he could not tell the agents. Agent Silva thanked bartender Anderson for facilitating the narcotics transaction and the agents exited the Licensed Premises.

25. Agent Silva transported the four bags containing the suspected cocaine to the Palm Desert District Office, where he weighed the substances and conducted a presumptive Nik test on the substances, the results of which tested positive for cocaine. (Exhibit 4 – color photograph of the four baggies containing the cocaine, on a digital scale.)

March 23, 2018
(Counts 12 to 15, and 16)

26. On March 23, 2018, at 9:15 p.m., Department Agents Holsapple and Silva, in an undercover capacity, entered the Licensed Premises, and took a seat at the fixed bar. The agents recognized bartender Anderson who was working behind the fixed bar. Agent Silva ordered a 12-ounce Michelob Ultra beer from bartender Anderson, who served the agent the beer.

27. The agents engaged bartender Anderson in conversation. Agent Holsapple asked bartender Anderson if Hughes and Michael were coming to Tryst that night. Bartender Anderson said he had not seen Hughes in a long time and said he could text or contact Michael and see if he was coming. Agent Silva then observed bartender Anderson on his cell phone, appearing to text someone. Bartender Anderson thereafter approached the agents and advised them he was waiting for Michael to respond to his text. Bartender Anderson asked Agent Silva to send him a text message because he lost Agent Silva's phone number. Agent Silva sent a text message to bartender Anderson's cell phone as requested, and subsequently engaged in another text message conversation with bartender Anderson at the bar. Bartender Anderson told Agent Silva he could get someone else to Tryst soon if the agent needed, referring to a cocaine dealer, because Michael wasn't responding, and followed-up with a text to Agent Silva of, "it's up to you do-bro." Agent Silva asked bartender Anderson if he had a contact at the Copa, which is another bar, or at some other bar where the agents could get cocaine later that date. Bartender Anderson replied, "Yeah, I can have them meet you." After that text message, bartender Anderson approached the agents at the fixed bar and informed the agents they could get cocaine from the male patron seated at the end of the fixed bar. As bartender Anderson said this, he glanced in the direction of the male patron who was seated at the end of the fixed bar, to show the agents about whom he was speaking. Agent Holsapple asked bartender Anderson what the male patron's name was, to which bartender Anderson replied, "Ryan." "Ryan" was later identified as Ryan Mathew Koehler.

28. The agents walked over to Ryan at the end of the fixed bar and asked him if his name was Ryan, to which he acknowledged it was. Agent Silva told Ryan they wanted to buy two grams of cocaine. Ryan told the agents he was selling two grams of cocaine for \$120, but then said he

did not have two grams, he only had 1.8 grams and could sell them 1.8 grams of cocaine for \$120. Agent Silva agreed to buy the 1.8 grams of cocaine for \$120. Ryan told the agents he would go get the cocaine from his car. Ryan exited the Licensed Premises and walked east toward the parking lot where the cars were located. Agent Silva walked back to his original seat at the other end of the fixed bar, while Agent Holsapple walked to and stood by the rear exit door to get a visual on Ryan to see to which car Ryan walked. Agent Holsapple walked to the center of the Licensed Premises, at which point Agent Silva walked over to Agent Holsapple and joined him in the center of the Licensed Premise. Ryan re-entered the Licensed Premises and met the agents in the center of the premises. Ryan instructed the agents to walk outside with him so he could deliver the cocaine to the agents. Agent Silva did not agree to walk outside, but instead handed Ryan \$120 in the center of the Licensed Premises. Ryan then handed Agent Silva a small baggy containing a white, powdery substance, which Agent Silva grabbed and placed in his pant pocket. Ryan counted the \$120 in front of Agent Silva and told the agents to contact him later if they wanted to get more cocaine in the future. Agent Silva asked for Ryan's phone number in case they wanted to buy more cocaine in the future. The agents returned to the fixed bar after that transaction.

29. At the fixed bar Agent Silva thanked bartender Anderson for facilitating the narcotics transaction with Ryan. Agent Silva commented to bartender Anderson that each time the agents bought cocaine at Tryst bartender Anderson hooked them up with a new cocaine dealer. Bartender Anderson said that he had a lot of contacts. Agent Silva asked bartender Anderson if Ryan's cocaine was better quality than the cocaine that Hughes and Michael sold to Agent Silva on the prior respective dates. Bartender Anderson told the agents he believed Ryan's cocaine was better quality, but that everyone's cocaine was different. At some point thereafter a take-down team of officers entered the Licensed Premises and began making arrests.

30. Agent Silva transported the bag containing the suspected cocaine to the Palm Desert District Office, where he weighed and conducted a presumptive NIK test on the substance, which test resulted in a positive for cocaine. (Exhibit 5 – color photograph of white bag containing the cocaine, on a digital scale.)

31. At some point Department Agent Stonebrook transported all baggies of cocaine to the Department of Justice Bureau of Forensic Services for further testing and to confirm the presumptive positive NIK test results of said controlled substances. Senior Criminalist Cabrera performed testing of the substances which she numbered items 1 through 4, all of which her analysis revealed to contain cocaine. (Exhibit 6 - one-page report entitled, "Department of Justice Bureau of Forensic Services," dated 10/30/2018, with a signature by Irene Cabrera, Senior Criminalist.)

32. Department Agent Holsapple appeared and testified at the hearing. Agent Holsapple has worked for the Department for 10 years as an agent. He has had extensive training relating to controlled substances, including attending basic police academy training involving 935 hours of study in various topics, including a 12-hour course in a learning domain course involving controlled substances. He attended an ABC² field training program which included a four-hour block specifically related to various drugs and narcotics. He also has had field training in controlled substances from senior and supervising agents, attending in excess of 100 hours of training specifically relating to drugs and narcotics throughout his career. He is a current member of the California Narcotic Officers Association and has been in good standing for the last nine years. He attended two, California Narcotic Officers Association Conferences, each including 24 hours of training directly relating to controlled substances/narcotics. He attended a 40-hour vice school put on by the Los Angeles Police Department, which included drugs and narcotics training, as well as attended an 80-hour narcotics investigation course put on by the Orange County Sheriff's Department. Agent Holsapple participated as the arresting officer on approximately 250 investigations involving the possession of cocaine and participated in one form or another in an additional 400 investigations involving narcotic cases and participated in narcotics investigation involving an additional 40 arrests.

33. Agent Holsapple testified as to the Department's opinion relating to the appropriate penalty in the matter at hand – revocation of the Respondent's license. He explained why revocation was recommended as opposed to allowing the licensee to sell the license to another. If the Department were to allow a Licensee to sell the license "the Department is under the idea that it may not mitigate the problems occurring at the premises." Agent Holsapple testified that as a result of the investigation at hand, the Department is aware of multiple patrons and one employee who deal in narcotics at the Licensed Premises. Therefore, if a simple sale of the alcohol license allowed that criminal element to remain, those patrons and an employee who works at the Licensed Premises may continue with this activity. Whereas if the Department revoked the license a Department license would not be permitted at the address of 188 South Indian Canyon Drive in Palm Springs for a minimum of at least one year; which may result in the problem of this clientele and this criminal element to no longer visit this premises.

Respondent's Witnesses
Melvin Frank

34. Melvin Frank appeared and testified at the hearing. Mr. Frank testified to be the owner of the Licensed Premises, Tryst. Mr. Frank said Tryst has a patron capacity of about 50, which he considers to be a small bar. Mr. Frank said he has owned Tryst for about three years. The first

² The acronym "ABC" will be used hereinafter, and which refers to the Department of Alcoholic Beverage Control.

time Mr. Frank obtained a license to sell alcoholic beverages was in Hayworth, California approximately 30 years prior to the date of the hearing. He estimated that he has continually held an alcoholic beverage license since approximately 1990. He has owned several bars since then, including Mission Impossible Tavern for four years, Score Bar for 13 years, Atlantis for two years, Blame It On Midnight for three years, Crazy Mel's Burgers and Bar for three years, Lone Tree Bar for about four years, Bongo Johnnies bar for three years, and Dillon Road for one year. Since 1990 Mr. Frank's licensed premises have been discipline-free except the Score Bar. Mr. Frank explained that the Score Bar had received discipline because an adjacent bar had trouble with their customers, which customers had moved over to the Score Bar and the incident was reported to the Department.

35. Mr. Frank testified that his policy regarding the sale or use of drugs on any of his licensed premises is that there is "absolutely no" sale or drug use permitted on any of his premises, including at Tryst. Mr. Frank had communicated this said policy to all employees, including bartender Anderson, prior to the respective dates in question. Mr. Frank said he has never failed to take preventative action to keep drugs from being sold at his licensed premises. After Mr. Frank became aware of the violations involving bartender Anderson he hired more security personnel, repaired the preinstalled non-functioning video surveillance system, posted more signs of his drug policy throughout the Licensed Premises, began requiring two employees to work in the evenings at all times, required all employees to complete ABC LEAD training, and established a written drug-free policy at the Licensed Premises.

36. Mr. Frank does not know who Arie Hughes and Ryan Koehler are, and he would not recognize/know either of them if they were in Tryst.

David Meagley

37. David Meagley appeared and testified at the hearing. Mr. Meagley has worked at Tryst bar since it opened five years ago. There was no evidence as to Mr. Meagley's position or title at the Licensed Premises. Mr. Meagley testified Melvin Frank made him aware of the Respondent's drug policy, in that drugs are not allowed, and that said policy has been in place since Tryst opened. Mr. Meagley testified that after bartender Anderson was arrested Mr. Meagley was instructed to and did take further measures to prevent the sale of drugs in the Licensed Premises, including all of the following: (1) immediately repair the non-functioning video surveillance cameras, (2) post signs in the Licensed Premises stating that anyone attempting to buy, sell or share drugs would be permanently barred from the premises and reported to the Palm Springs Police Department, (3) have all employees complete the ABC LEAD training program, (4) create a written drug-free work-place policy, and (5) hire more security personnel to not only watch the patrons but the bartenders for illicit behaviors.

38. Mr. Meagley recalled in the past when the Licensed Premises' employees enforced the Respondent's drug policy prior to bartender Anderson's arrest. He recalled an occasion that involved a prior female customer, whom all personnel kept an eye out for because she was suspected of selling drugs. Mr. Frank advised employees, including bartender Anderson, not to allow the said female customer into the Licensed Premises because of the said suspicions. On one occasion when the female customer entered and refused to leave the Licensed Premises Respondent's employees called the police, who told the woman to leave and she was never seen again at the Licensed Premises. Mr. Meagley also recalled when cannabis was legalized in California the Respondent posted in the Licensed Premises' patio a sign stating that smoking or ingesting cannabis in the Licensed Premises was prohibited. All employees, including bartender Anderson were aware of this policy and if anyone violated said policy they were asked to leave.

39. Mr. Meagley never suspected bartender Anderson was doing or selling drugs. Mr. Meagley worked almost daily at Tryst. When Mr. Meagley did not work at Tryst he worked at Melvin Frank's other licensed premises called, Crazy Mel's Burgers and Bar. When Mr. Meagley worked with bartender Anderson at Tryst their shifts ended at the same time and Mr. Meagley would often give bartender Anderson a ride home. On the ride home they would go through a Del Taco drive through. Mr. Meagley said he did not "know him, know him" referring to bartender Anderson, and said he was surprised to learn both that bartender Anderson was selling drugs and that he was arrested on March 23, 2018. Mr. Meagley did not know bartender Anderson had cocaine on his person at his arrest and said that if he knew that, bartender Anderson would have been fired immediately. Mr. Meagley said he "never suspected [bartender Anderson would] ever do anything like that," referring to the violations at hand. Mr. Meagley testified that Melvin Frank has never failed to take preventative action to stop drugs from being sold, and that "if the bartenders suspect something is going on, we don't have to go through Mel, we simply can tell that person to leave."

40. Mr. Meagley does not know who Arie Hughes or Ryan Koehler are, and if they showed up in the Licensed Premises he would not know who they were.

Gracie Elisarraras

41. Gracie Elisarraras appeared and testified at the hearing. Ms. Elisarraras has worked at Tryst for three years. There was no evidence as to her position or title at the Licensed Premises. Melvin Frank communicated to her his drug policy, which she described as a zero-tolerance drug policy. Ms. Elisarraras confirmed the above-referenced signs posted in the Licensed Premises, relating to the Respondent's drug policy. She estimated working with bartender Anderson approximately two to three times. Ms. Elisarraras was surprised to learn bartender Anderson was arrested and never suspected he was selling drugs at the Licensed Premises. She

is not familiar with what the sale of cocaine looks like. Ms. Elisarraras knows Arie Hughes as a customer at the Licensed Premises and said he has not been in the premises recently. She does not know who Ryan Koehler is and would not know him if he was in Tryst.

Clark Bennett

42. Clark Bennett appeared and testified at the hearing. Mr. Bennett said he has worked for the Respondent for a total of seven years at two of Mr. Frank's licensed premises, including Tryst for three years. He was transferred to the Score Bar until it was sold and then he was rehired at Tryst, approximately seven months from the date of the hearing, to work as security personnel at the Licensed Premises.

43. Mr. Bennett testified to Mr. Frank having communicated his drug policy to him, which he recited as there being no buying, selling or sharing of drugs, if anyone is found doing so, they will be removed, and the employees are to call the Palm Springs Police Department. Mr. Bennett acknowledged this was the policy prior to the incidents with bartender Anderson and confirmed the preventative measures Melvin Frank took.

44. Mr. Bennett said he knew bartender Anderson from their both having attended together two Las Vegas bar conventions approximately three years prior to the date of the hearing. During those conventions Mr. Bennett did not witness bartender Anderson either taking or selling drugs and bartender Anderson never mentioned the fact that he sold drugs. Mr. Bennett said that other than the two conventions he never worked with bartender Anderson. He was not only surprised but felt betrayed when bartender Anderson was arrested for selling drugs because from Mr. Bennett's understanding bartender Anderson "was selling drugs while I was bartender there [at Tryst,] so he put my job in jeopardy and it's a very lucrative job."

Robert Hughes

45. Robert Hughes appeared and testified at the hearing. Mr. Hughes described himself as a real estate business broker in Palm Springs, in which business he has been engaged for 20 years. He says the businesses he brokers include restaurants, bars, service, retail and manufacturing businesses. Mr. Hughes sold Melvin Frank Bongo Johnnies, about 12 years ago, when Melvin Frank came to Palm Springs. Mr. Bennett confirmed that Melvin Frank purchased and sold more than one business. In Mr. Bennett's opinion Melvin Frank has a good reputation.

46. 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. California Health and Safety Code section 11350 makes it a felony to possess any controlled substance
 - (1) specified in
 - (a) subdivision (b), or (c), 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.
4. 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.
5. 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.

6. Business and Professions Code section 24200.5(a) provides in part, "Notwithstanding the provisions of Section 24200, the department shall revoke a license upon any of the following grounds:

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

7. Business and Professions Code section 24013.5(a) provides, "No license shall be issued for any premises for which a license has been denied or revoked, for reasons pertaining to the premises, unless one year has elapsed from the date the order becomes final."

8. With respect to counts 1, 5, 9, and 12, 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 January 5, 25, February 16, and March 23, 2018, Respondent-Licensee's employee or agent, Shane Keith Anderson, on respective dates, possessed, and permitted various patrons to, possess within the Licensed Premises, a controlled substance, to-wit: cocaine, in violation of California Health and Safety Code section 11350. As an employee or agent, his actions and knowledge are imputed to the Respondent. (Findings of Fact ¶¶ 4-31.)

9. With respect to counts 2, 6, 10, and 13, 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 January 5, 25, February 16, and March 23, 2018, Respondent-Licensee's employee or agent, Shane Keith Anderson, on respective dates, possessed, and permitted various patrons to, possess within the Licensed Premises, a controlled substance, to-wit: cocaine, for purpose of sale, in violation of Health and Safety Code section 11351. As an employee or agent, his actions and knowledge are imputed to the Respondent. (Findings of Fact ¶¶ 4-31.)

10. With respect to counts 3, 7, 11, and 14, cause for suspension or revocation of the 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 January 5, 25, February 16, and March 23, 2018, Respondent-Licensee's employee or agent, Shane Keith Anderson, on respective dates, sold, furnished or offered to sell or furnish, and permitted various patrons to sell, furnish, or offer to sell or furnish, within the Licensed Premises, a controlled substance, to wit: cocaine, in violation of Health and Safety Code section 11352. As an employee or agent, his actions and knowledge are imputed to the Respondent. (Findings of Fact ¶¶ 4-31.)

11. With respect to counts 4, 8, and 15, cause for suspension or revocation of the 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 January 5, 25, February 16, and March 23, 2018, Respondent-Licensee's employee or agent, Shane Keith Anderson, on respective dates, was within the Licensed Premises, an aider or abettor, as defined in section 31 of the California Penal Code, in the selling or furnishing or in the offering to sell or furnish a controlled substance, to-wit: cocaine, in violation of Health and Safety Code section 11352. As an employee or agent, his actions and knowledge are imputed to the Respondent. (Findings of Fact ¶¶ 4-19, and 26-31.)

12. With respect to count 16, cause for suspension or revocation of the 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, between on or about January 5, 2018, and March 23, 2018, the Respondent-Licensee knowingly permitted the illegal sale, or negotiations for sales, of controlled substances or dangerous drugs upon the Licensed Premises, in violation of Business and Professions Code section 24200.5(a) (Findings of Fact ¶¶ 4-31.)

13. The Respondent argued there is no justification to impose strict liability on the Respondent when bartender Anderson acted alone. The Respondent was arguing he had no knowledge of the illegal activities going on within the Licensed Premises. This argument is rejected. In *Santa Ana Food Market v. Alcoholic Beverage Control Appeals Board* (1999) 76 Cal.App.4th 570, that matter involved the court annulling the suspension of a license for a clerk's *single* illegal purchase of *food stamps*, where the court found, among other things, the clerk's acts and knowledge could not be imputed to the licensee because the licensee could not have known of the illicit transaction since it only occurred once, within seconds when the clerk quickly made the purchase while the manager was preoccupied with another customer and hiding behind the undercover officer posing as the supplier, the market had taken strong measures prior to the violation to prevent the type of act, and the on-duty manager immediately fired the clerk after the undercover officer arrested the clerk. *Santa Ana Food Market* creates a very narrow

exception and a four-prong test to apply if an employee's actions would not be imputed to a licensee, this case does not invoke the four-prong test established in that case.

14. In contrast, in the matter at hand, there was a continuing course of openly-conducted *multiple*, illegal *cocaine* transactions within the Licensed Premises over *several* months with at least one employee, engaging in such illegal conduct. While the Respondent had a zero-tolerance drug policy and surveillance cameras in place prior to the violations at hand, the surveillance system was not functioning, and there was little if no evidence the Respondent had taken strong measures prior to the violations to prevent the type of act. The illicit acts at hand were foreseeable, as evidenced by the very policy the Respondent had in place. The Respondent's closing statement acknowledged as much, saying that, "the use of cocaine is prolific in many areas especially [in] Palm Springs."

15. A licensee is vicariously responsible for the unlawful, on-premises acts of employees or agents. This principle is established by well-settled 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].

16. Respondent argues that the conduct of an employee must be either known or foreseeable in order to be imputed to the Licensee because the current rule of law is legally defective. Respondent asks the Department to overturn decades of precedent laid out by the California courts, asserting a lack of due process that violates the Fourteenth Amendment to the U.S. Constitution by a revocation of Respondent's license due to actions of an employee on the licensed premises. The Department must rely upon legal precedent and has no power to overrule the longstanding legal principles established by the courts, as indicated above. There is no legal requirement that the Respondent himself had actual knowledge or that the employee's specific conduct was foreseeable for the Department to act in this case as employee or agency conduct and knowledge is imputed to the Licensee.

PENALTY

The Department recommended the Respondent's license be revoked based on the following: (1) the Respondent was licensed for less than three years and already had a reputation around town as being a place where one could buy drugs, when a bartender from The Block referred undercover agents to bartender Anderson at Tryst, which shows the prevalence of drugs available at Tryst; (2) further, when undercover agents conducted the investigation at the

Licensed Premises, on the first night they, as two strangers, walked right up to and asked bartender Anderson for cocaine and he immediately connected the agents with three different dealers, even himself providing the cocaine during one of the transactions; (3) all of which was done without other employees knowing, which suggests that the same criminal conduct of buying and selling drugs will continue to take place at the Licensed Premises, no matter how many signs are posted prohibiting the sale of drugs.

The Respondent did not recommend a penalty in the event the accusation was sustained. The Respondent argued that the broad powers granted by the Constitution to promote public welfare and morals need to have some sort of rational reason. The Respondent argued revocation is a draconian act when there is *insubstantial* evidence that closing the Licensed Premises will somehow abate a nuisance and insufficient evidence that Tryst is a known place to buy drugs. The Respondent argued that, in fact, The Block bartender was not referring agents to Tryst but to bartender Anderson, who was conducting the operations himself. The Respondent further argued the idea someone might be smarter than someone else and secretly sells drugs is not justification to take a man's license.

In assessing an appropriate measure of discipline, the Department's penalty guidelines are in California Code of Regulations, Title 4, Division 1, Article 22, section 144, commonly referred to as rule 144. Rule 144³ 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, although not necessarily outright revocation. Phrased another way, either outright revocation⁴ or stayed revocation⁵ is appropriate depending upon the circumstances.

The Department further asserts that outright revocation is statutorily required under section 24200.5(a), notwithstanding Rule 144's explanation of revocation, as the Respondent has an affirmative obligation to ensure the Licensed Premises is operated in full compliance with the law. The Respondent failed to do so, leaving the Licensed Premises to bartender Anderson to engage in the illicit violations as he saw fit while seemingly unsupervised. The illegal activity at issue here—the possession and sale of controlled substances on the Licensed Premises, in which one of Respondent's employees, bartender Anderson, was directly and indirectly involved—was conducted openly and successively. Illegal drug dealing is a serious offense that has been

³ All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

⁴ 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).

⁵ 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).

specifically statutorily addressed by the Legislature that limits the Department's discretion on penalty imposed.

The Respondent was licensed at the Licensed Premises for only a little over two years and eight months before the violations occurred in the Licensed Premises, and the Licensed Premises has a reputation for being a place to obtain illegal narcotics. Once the Respondent was made aware of said violations, he took some actions to remedy the situation, and to prevent any future similar violations. The video surveillance system/cameras were repaired, and the Respondent began requiring two employees to work in the evenings. However, the Respondent had allowed the video surveillance system to remain in disrepair for a significant period, allowing the conduct of Anderson to proceed unchecked. In addition, security personnel were hired to specifically watch patrons and employees for illicit drug dealing in the Licensed Premises. This is evidence of the Respondent having implemented supervision of its bartenders during their shifts to avoid future similar violations as which occurred with bartender Anderson. The Respondent further established a written drug-free policy at the Licensed Premises. Yet, a licensee cannot absolve themselves of responsibility by being absent from the licensed premises and neglecting their duty, and then only taking actions after serious offenses occur.

There was credible testimony by Mr. Frank and his witnesses, that established Mr. Frank takes his responsibility as a licensee seriously. Mr. Frank credibly testified that he has always had a zero-tolerance drug policy. All employees, including bartender Anderson, were aware of this policy and if anyone violated it their employment was terminated. There was evidence that Respondent's employees acted upon Respondent's drug-free policy. Mr. Meagley credibly recalled when the Licensed Premises' employees enforced the Respondent's drug policy prior to bartender Anderson's arrest, involving a prior female customer, suspected of selling drugs. Pursuant to Mr. Frank's policy, the said female customer was barred from the Licensed Premises and the Respondent's employees called the police. The Respondent's witnesses presented credible evidence they were unaware of the illicit drug dealing occurring at the Licensed Premises by bartender Anderson, despite working with him.

Considering this sole employee's actions, the credibility of Respondent and his witnesses, and the positive steps taken by the Respondent to remedy the problem, some mitigation is warranted to allow for the Respondent to sell its license. However, given the reputation of the Licensed Premises, it would not be appropriate to allow the license to be retained at the current premises (see, Business and Professions Code section 24013.5).

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

ORDER

Counts 1 through 16 of the first amended accusation are hereby sustained. The Respondent's on-sale general public premises license is hereby revoked, with said revocation stayed for 180 days to permit the transfer of the license to person(s) and premises acceptable to the Department, and subject to the following conditions:

- (a) the premises to which the license may be transferred shall not be at the location of the current licensed premises;
- (b) the person(s) to whom the license may be transferred shall not be related to any of the members of the respondent/licensee by blood or by marriage; and
- (c) the license shall be suspended for a period of 30-days and indefinitely thereafter until transferred, said suspension to commence on the effective date of this order.

If the license has not been transferred as ordered herein, on or before the expiration of the stayed period, the Director may, without further notice, revoke the stay and enter an order revoking the license.

Dated: January 11, 2021



Eric Hirata
Director

Pursuant to Government Code section 11521(a), any party may petition for reconsideration of this decision. The Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or on the effective date of the decision, whichever is earlier.

Any appeal of this decision must be made in accordance with Chapter 1.5, Articles 3, 4 and 5, Division 9, of the Business and Professions Code. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005.