

**BEFORE THE LIQUOR CONTROL COMMISSION
OF THE STATE OF OREGON**

IN THE MATTER OF:	)	FINAL FINDINGS OF FACT
	)	CONCLUSIONS OF LAW
	)	AND ORDER
	)	
Palace Dining, LLC	)	OAH Case No. 2017-ABC-00209
Antonio Cisneros, Managing Member, and	)	Agency Case No. 16-V-023
Elizabeth Cisneros, Member	)	
dba EL PALACIO		
601 Main Street		
Klamath Falls, OR 97601		

HISTORY OF THE CASE

On August 9, 2016, the Oregon Liquor Control Commission (OLCC or Commission) issued a Notice of Proposed License Cancellation to Palace Dining LLC, Antonio Cisneros, Managing Member, and Elizabeth Cisneros, Member, dba El Palacio (collectively Licensee), located at 601 Main Street, Klamath Falls, Oregon. The Notice proposed cancellation of the license for an alleged history of serious and persistent problems in the premises or involving patrons of the establishment in the immediate vicinity of the premises in violation of ORS 471.315(1)(c). On August 24, 2016, Licensee requested a hearing.

On September 28, 2016, OLCC referred the hearing request to the Office of Administrative Hearings (OAH). The OAH assigned Senior Administrative Law Judge (ALJ) Alison Greene Webster to preside at hearing. ALJ Webster convened a prehearing conference on November 3, 2016. Attorney Mark Runnels represented Licensee. Case presenter Tom Mott participated for OLCC. During the conference, the hearing was scheduled for April 10 through 14, 2017 in Klamath Falls, Oregon.

On February 9, 2017, OLCC filed an Amended Notice of Proposed License Cancellation alleging three additional violations: Licensee permitted minor in a prohibited area in violation of OAR 845-006-0335(3)(b); Licensee failed to verify the age of a minor in violation of OAR 845-006-0335(1); and Licensee permitted an employee to sell or serve alcoholic beverages without a valid service permit in violation of ORS 471.360 or, alternatively, failed to verify the employee had a valid service permit in violation of OAR 845-009-0015.¹ On March 7, 2017, OLCC filed a Second Amended Notice of Proposed License Cancellation and Proposed Refusal to Renew, alleging an additional serious incident in connection with the alleged violation of ORS 471.315(1)(c) and proposing to refuse to renew the license. On March 22, 2017, OLCC filed a

¹ At hearing, OLCC withdrew alleged Violation Four (alleging that Licensee permitted employee Ruelas Cisneros to mix, sell or serve without a valid permit, or alternatively, failed to verify Cisneros had a valid service permit).

Third Amended Notice of Proposed License Cancellation and Proposed Refusal to Renew, alleging another serious incident related to the licensed premises.

ALJ Webster presided over the hearing in Klamath Falls, Oregon April 10 through 13, 2017. Attorney Mark Runnels represented Licensee. Tom Mott presented the case for OLCC. OLCC called the following witnesses: from the Klamath Falls Police Department, Officer Labeads Yahwhee; Officer Kiley Bergstrom; Officer Joe Foreman; Officer Jeffrey Hutcheson; Officer Jack Daniel; Officer Benjamin Krueger; Sergeant Aaron Thomas; Officer Sean Ferns; Officer Terry Amos; Officer Jesse Snyder; Officer Joel Loudermilk; Officer Taylor Herbst; Officer Thomas Reif; former Reserve Officer (retired) Brett Lemieux; Detective Sergeant Dennis Davenport; Officer Ruben Jenkins; Detective Brandon Dougherty; Officer Christopher Rick; and Captain Rob Dentinger. From the OLCC, Inspector Kent Oldham; License Investigator Amy Navine; and Compliance Technician Siobhan Triska. Additional witnesses, Armando Martinez-Parker (minor decoy); William Carter; Craig Plumondore; Jody Voss; William Degarmo; Charles Hopkins; and Richard Juttner.

The following witnesses testified on behalf of Licensee: Licensee Antonio Cisneros; Licensee Elizabeth Cisneros; Carlos Faiers; Manuel Alejandro "Alex" Campos; and Edgar Shugars.

The evidentiary hearing concluded in Klamath Falls on April 13, 2017. Closing argument was conducted via telephone conference on April 17, 2017, with Tom Mott presenting the closing for OLCC and Attorney Runnels for Licensee. The hearing record closed on April 17, 2017, at the conclusion of closing argument.

The Administrative Law Judge considered the record of the hearing and the applicable law and issued a Proposed Order mailed May 31, 2017.

Licensee filed Exceptions to the Proposed Order on June 30, 2017. Staff filed Comments on the Proposed Order on June 12, 2017. The Administrative Law Judge responded to Licensee's Exceptions and Staff's Comments on July 7, 2017.

On July 28, 2017, the Commission considered the record of the hearing, the applicable law, the Proposed Order of the Administrative Law Judge, Licensee's Exceptions to the Proposed Order, Staff's Comments on the Proposed Order and the Administrative Law Judge's Response to Licensee's Exceptions and Staff's Comments. Based on this review and the preponderance of the evidence, the Commission enters the following:

ISSUES

1. Whether there is a history of serious and persistent problems at the licensed premises, based upon incidents dating back to February 21, 2015. ORS 471.315(1)(c).
2. If so, whether Licensee has demonstrated a willingness and ability to control the premises.

3. Whether, on October 28, 2016, Licensee permitted a minor to be in an area prohibited to minors. OAR 845-006-0335(3)(b).

4. Whether, on November 19, 2016, Licensee's employee failed to verify the age of a minor before serving the minor an alcoholic beverage when the minor reasonably appeared to be under 26 years of age. OAR 845-006-0335(1)(a), (b) and (c).

5. If the violation of ORS 471.315(1)(c) and violations of OAR 845-006-0335(1) and (3)(b) are established, what is the proper penalty?

6. Whether the Commission has grounds to refuse to renew Licensee's license under ORS 471.313(5) (history of serious and persistent problems) or ORS 471.313(4)(g) (poor record of compliance) and, if so, whether Licensee has shown good cause to overcome the refusal to renew.

EVIDENTIARY RULING

OLCC Exhibits A1 through A49 were admitted into the record without objection.² Licensee Exhibits L1 through L5 were also admitted without objection.

CREDIBILITY DETERMINATION

For some of the alleged serious incidents at issue herein, there is conflicting testimony as to what occurred, when it occurred and where it occurred in relation to the licensed premises. One incident with such disputed testimony happened on August 9, 2015, when a patron was stabbed in the vicinity of the premises. Although certain matters are undisputed, *i.e.*, that the patron was at the premises prior to the stabbing, that he was beaten and stabbed in the vicinity of the premises, and that he ran back into the premises seeking refuge immediately after the stabbing, there is conflicting evidence regarding the timing of events, what was said about the incident and by whom, and why police and/or paramedics were not called when the patron ran back into the premises stabbed, bleeding and beaten.

On the one hand, it does not matter whether the patron was standing in front of the licensed premises, across the street from the premises near another licensed premises (The Pikey) or a block away near the Dutch Bros. stand when the violent assault began, because under Commission case precedent (as will be discussed), the incident is nevertheless related to Licensee's sale and service of alcohol. The same is true of several other incidents addressed herein, where there is a dispute as to whether a person was inside the premises, if so for how long, and/or at what point(s) the person was patronizing the licensed premises versus another drinking establishment in the immediate vicinity of the premises. In other words, many of these conflicts are not material, and need not be resolved in determining whether the Commission proved the violations alleged.

² During the hearing, OLCC withdrew pages 1 through 9 and 12 through 14 of Exhibit A37. Licensee later requested that Exhibit A37, Page 9 be made part of the record. The page was remarked and admitted as Exhibit L5.

However, in those instances in which it is necessary to resolve the inconsistencies and conflicts in the evidence, more weight is given to witness statements made closer in time to the incident, as documented in police interviews and reports, than to the witnesses' recollections of the incidents and events offered at hearing, a year or more after the fact. This is especially the case where the testifying witness has a specific interest in the outcome of the case (as a Licensee, or a family member and/or employee of Licensee) and the witness's recollection of the event in issue was unaided by contemporaneously written reports, recorded statements, or incident logs, or any photographs or videos. *See, e.g., Wolf Den* (OLCC Final Order, 89-V-021, July 1989) (holding a licensee's admissions to inspectors made immediately after an incident were more credible than the licensee's testimony at hearing several months later because the licensee had not had time to fabricate a story, the inspectors had no reason to lie about the licensee's admission, and the inspectors' report documenting the licensee's statements was completed shortly after the incident). The findings of fact set out below reflect this determination.

FINDINGS OF FACT

1. On May 1, 2004, OLCC issued a Full On-Premises Sales license to Palace Dining LLC, Antonio Cisneros, Managing Member, dba El Palacio, for a premises located at 601 Main Street, Klamath Falls, Oregon. Effective December 5, 2005, ownership of Palace Dining LLC changed to Antonio Cisneros, Managing Member (50 percent) and Elizabeth G. Cisneros, Member (50 percent). (Ex. A2.)

2. The licensed premises, a Mexican restaurant and bar, is located on the first floor of a former bank building at the corner of Main Street and Sixth Street in downtown Klamath Falls. The premises is open seven days a week. Sunday through Wednesday, business hours are 11:00 a.m. to 9:00 p.m. Thursday, business hours are 11:00 a.m. to midnight, and Friday and Saturday, business hours are 11:00 a.m. to 2:00 a.m. On Thursday, Friday and Saturday nights, Licensee offers Karaoke in the cocktail lounge area. On Friday and Saturday nights, from 10:00 p.m. until at 2:00 a.m., Licensee turns the back of the restaurant into a night club adding a DJ booth, dance floor and a second bar serving drinks. (Test. of A. Cisneros; test of E. Cisneros.)

3. In February 2011, Licensee permitted minors to consume alcoholic beverages on the licensed premises. The Commission charged Licensee with a violation of OAR 845-006-0335(3)(a) (failing to verify age). Licensee purchased age verification equipment and requested that the purchase be used as mitigation toward the sanction for the violation. The Commission agreed and, on October 17, 2011, entered a Final Order by Default ordering that Licensee serve a two day suspension or pay a civil penalty of \$330 for the violation. (Ex. A3.) In February 2012, Licensee permitted a minor in a prohibited area. The Commission charged Licensee with a violation of OAR 845-006-0335(3)(b). In August 2012, the matter was resolved by way of Licensee paying a civil penalty of \$1,485 in lieu of suspension. (Ex. A2.)

4. From approximately 2011 until mid-August 2015, Licensee had a contract with Blade Security, a licensed private security company managed by William Carter, to provide security services at the licensed premises. (Test. of Carter, E. Cisneros and A. Cisneros.)

5. On Saturday, February 21, 2015, just after 2:00 a.m., two patrons leaving the

premises, Rachel Barter and Tiffany Southern, fought with another patron. The fight reportedly started when patron Barter "sucker punched" the unidentified female patron. After security broke up that fight, Barter and Southern began arguing with another patron, Julio Figueroa, in front of the premises. One of Licensee's security staff stepped between the three before this fight became physical, but then Figueroa, who was very intoxicated, took a swing at the security guard. Licensee's security physically restrained patron Figueroa until the police arrived a few minutes later. Meanwhile, as security held Figueroa near the front entrance to the premises, Barter and Southern, who were also both intoxicated, walked around to the parking lot behind the premises, where they continued to argue with patrons leaving the premises. Three Klamath Falls Police Department (KFPD) officers responded to the location. Figueroa was verbally and physically combative with the officers and resisted arrest. He was taken into custody and lodged on charges of Disorderly Conduct. Officers also contacted Barter and Southern in the rear parking lot and arrested them for Disorderly Conduct. (Test. of Bergstrom; test. of Yahwee; test. of Lemieux; test. of Carter; test. of Plumondore; Ex. A5.)

6. On Saturday, February 28, 2015 at 1:42 a.m., KFPD officers were dispatched to a reported disturbance at the licensed premises. Lieutenant Jack Daniels responded to the location and contacted a Robert Carpenter in front of the entrance to the premises. Carpenter was highly intoxicated, and nearly unable to stand on his own. Lt. Daniels took Carpenter into custody on a detox hold and transported him to the Klamath County Jail. (Test. of Daniel; Ex. A6.)

7. On Saturday, March 7, 2015 at 12:34 a.m., KFPD officers were dispatched to the licensed premises on a report of a fight in progress. Dispatch reported five to seven persons were physically fighting in front of the location. Officers responded and contacted Licensee's then-security manager, William Carter. Carter directed the officers to a male subject, later identified as patron Matthew Longan, who at the time was handcuffed behind his back and sitting on the curb. Carter advised the officers that Longan was highly intoxicated, that he had been causing disturbances inside the premises throughout the night, that he had been ejected, and then instigated a fight with another person just outside the front doors of the premises. Carter added that the other person was trying to retreat and disengage. When an officer asked patron Longan what had occurred, Longan responded, "Shit happened and we got rowdy, he was talking shit and I'm drunk.". Officers arrested Longan and lodged him in jail on charges of Disorderly Conduct. (Test. of Krueger; Ex. A7.)

8. On Saturday, March 14, 2015 at 1:38 a.m., Licensee's then-security manager Carter flagged down KFPD officers for assistance with a person, Leon Gallagher, who had been refused entry to the premises. Carter advised the officers that Gallagher had previously been trespassed from the premises for fighting and told not to come back. Carter explained that when he saw Gallagher at the door that night, he told him to leave, but Gallagher ignored him and entered the premises. Officers contacted Gallagher who, at the time, was standing about five feet from the front door of the premises. Officers arrested Gallagher for Trespass II. (Test. of Krueger; Ex. A8.)

9. On Sunday, March 15, 2015 shortly before 1:00 a.m., Licensee's security staff decided to eject patron Stephen Marez from the premises for creating a disturbance and trying to start fights. As security was escorting Marez out the door, he became combative. He threw

punches and threatened to shoot security staff and two patrons, Julius Jackson and Bruce Miller. He then reached behind his back and retrieved a taser gun from his waistband. He shot the taser at Carter and patron Jackson. Marez and his girlfriend then fled to a vehicle parked nearby. Marez got into driver seat. As they left the back parking lot, Marez struck Carter in the leg with the car. While Carter and other security guards were dealing with this incident in the back parking lot, another fight erupted among patrons in front of the premises. (Test. of Carter; Ex. A9.) KFPD officers responded to the premises. Carter and others provided a description of Marez and the vehicle he was driving. A short time later, officers located the suspect vehicle northbound on Highway 97. They stopped the vehicle and took Marez into custody on multiple charges, including Assault III, Disorderly Conduct, Unlawful Use of Stun-Gun and Reckless Driving. (Test. of Yahwee; Ex. A9.)

10. On Saturday, April 18, 2015, at around 12:30 a.m., La Ara Jackson approached Licensee's employee Samantha Clark in the cocktail lounge at the premises, verbally assaulted her, and punched her in the face multiple times before others intervened. Jackson was angry with Clark because Clark was allegedly sleeping with Jackson's boyfriend. Licensee's security called the police and detained Jackson pending the officers' arrival. Licensee Elizabeth Cisneros asked security manager Carter to remove Jackson's handcuffs because Jackson was pregnant and complaining that the handcuffs were uncomfortable, but Carter declined to do so.³ When KFPD officers arrived they spoke to Carter, interviewed Jackson, Clark and Cisneros, and reviewed video footage of the incident. Officers arrested Jackson for Assault IV and transported her to jail without incident. (Test. of Carter; test. of Yahwee; test. of E. Cisneros; Ex. A10.)

11. At closing time on Sunday, April 19, 2015, patrons exiting the premises began arguing amongst each other. An unidentified female hit patron Jessica Kincheloe in the head with a beer bottle. Kincheloe sustained a laceration to the upper left side of her head. Outside the premises, patron Sabrina Roberts was punched in the face and knocked to the ground by a highly intoxicated Donald Cox, who had been ejected from the premises about 45 minutes earlier. Licensee's security staff had ejected Cox for yelling, pushing others, and instigating fights inside the premises. When KFPD officers arrived on scene shortly after 2:00 a.m., they found Roberts lying face down in the street and Kincheloe bleeding from the head. Emergency medical personnel arrived and transported both women to the hospital for treatment. Officers arrested Cox for Assault IV and Disorderly Conduct, and transported him to jail without incident. Cox provided a breath sample at the jail, which disclosed a blood alcohol content (BAC) of .19 percent. KFPD Officers also responded to Sky Lakes Medical Center to interview Roberts and Kincheloe. Roberts, who was familiar with Cox, reported that he got angry and upset with her that night as he became more intoxicated. She claimed Cox approached her in front of the premises, accused her of calling him a "fat ass," and then punched her in the face.⁴ Kincheloe

³ Prior to this incident, Jackson called Licensee Elizabeth Cisneros to complain that employee Clark was harassing her and sleeping with her boyfriend. Cisneros advised Jackson that she did not want to be involved in a dispute between the two women. Cisneros also told Jackson to keep the problem out of the business. (Test. of E. Cisneros; Ex. A10 at 6.)

⁴ Security personnel Carter and Degarmo, who witnessed the incident, reported that Roberts, who was also intoxicated, was "mouthing off" and "getting into Cox's face about something" right before he punched her. (Test. of Degarmo; test. of Carter.)

refused to answer questions and refused name the person who assaulted her. Kincheloe added, "I don't need cops, because that bitch is going to get hers." (Ex. A11 at 9; test. of Yahwhee; test. of Carter.)

12. A week later, on Saturday April 25, 2015 around 2:25 a.m., patron Sabrina Roberts began arguing and fighting with patron Desiree Barber upon leaving the premises. KFPD Officer Bergstrom and other officers, who were across the street from the licensed premises monitoring bar patrons leaving the area, observed the two women arguing. Officer Bergstrom turned her spotlight on the two and the crowd gathering around them. The officers watched Licensee's security guards intervene and separate the two. While the spotlight was still on the group, Officer Bergstrom saw Roberts and Barber go at each other again. Again, security stepped in to separate them. KFPD officers arrested Barber and Roberts for Disorderly Conduct. Both patrons provided breath samples at the jail and both had a BAC of .13 percent. (Test. of Bergstrom; Ex. A12.)

13. On Sunday, May 3, 2015 around 2:00 a.m., patron Bradley Saltenberger punched patron Timothy Tecmire in the face at the premises in a completely unprovoked attack. (Exs. A13, A14; test. of Yahwhee, Foreman, and Carter.) Police were first notified of the assault at around 4:22 a.m. that day, when Tecmire called from Sky Lakes Medical Center emergency room to report it. (Ex. A13 at 6.) Tecmire sustained a bloody and possibly broken nose in the attack, as well as a laceration that required stitches. (*Id.*)

14. Video footage of the May 3, 2015 incident shows Tecmire and a group of friends seated a table in the premises' lounge. It shows Saltenberger seated at a nearby table, glaring at Tecmire. It shows Saltenberger get up, walk over to Tecmire's table, try to engage him in conversation, and then punch him in the face without warning. It shows Tecmire fall back in his chair, but recover before the chair falls over. It shows several others intervene to break up the fight and pull Saltenberger away from Tecmire. (Ex. A14.) Officers identified Saltenberger as the assailant from the video, with the assistance of Carter and employee Carlos Faiers.⁵ On May 8, 2015, officers contacted Saltenberger at his home, arrested him and lodged him on charges of Assault IV and Disorderly Conduct. (*Id.*; Test. of Yahwhee and Foreman.)

15. On Saturday, May 9, 2015 at 1:31 a.m., KFPD officers were dispatched to the parking lot behind the premises on a reported fight. Officer Yahwhee responded and spoke with one of Licensee's security staff. Security reported that a bouncer had been assaulted by a white male, wearing a grey sweatshirt and a black hat. Officer Yahwhee ran a records check on two individuals, but did not arrest anyone. (Test. of Yahwhee; Ex. A15.)

16. On Sunday, July 5, 2015, at around 2:13 a.m., Officer Yahwhee was approximately a block away from the premises when she heard several people screaming. She called for backup and responded to the front of the location. She saw a large crowd involved in a disturbance. Two individuals, later identified as Cody Law and Josh Ayers, had their hands in the air and were screaming profanities. Officer Yahwhee and Oregon State Trooper Chambers contacted Law and Ayers and directed them to calm down and have a seat on the sidewalk, yet both men remained combative and belligerent. Officer Yahwhee spoke with Carter to determine

⁵ Employee Carlos Faiers is the son of Licensees Antonio and Elizabeth Cisneros.

what was going on. Carter advised that Law and Ayers had been inside the premises earlier, and had been trying to start fights with people all night. Officers arrested Ayers for Disorderly Conduct II and Resisting Arrest, and Law for Disorderly Conduct. At the jail, Law provided a breath sample, which disclosed a BAC of .10 percent. (Test. of Yahwee, Carter; Ex. A16.)

17. On Sunday, July 19, 2015, at around 2:00 a.m., patron Jimmy Jackson punched patron Michael Carpenter in the face at the licensed premises, breaking Carpenter's jaw, in what appeared to be a completely unprovoked attack. (Exs. A17, A18; test. of Hutcheson.) Police were first notified of the assault the following day, when Carpenter went to the Police Department to report it. (Ex. A17 at 5.)

18. Patron Carpenter went to the premises with a group of friends. During the course of the night, another patron (later identified as Jackson) who Carpenter did not know, repeatedly approached Carpenter and called him derogatory names. (Ex. A17.) Video footage of the incident shows Carpenter standing near the restrooms at the front of the premises around closing time. Jackson approached Carpenter, Carpenter pointed a finger at Jackson, and Jackson punched Carpenter in the face. The video also shows one of Carpenter's friends throw a beer bottle at Jackson after the punch. The bottle misses Jackson, but strikes another patron in the head. (Ex. A18.) Carpenter sought emergency treatment after leaving the premises and was diagnosed with a broken jaw. Through the video and an anonymous tip, KFPD officers identified Jackson as the assailant, and recommended charges of Assault II and Disorderly Conduct. (Ex. A17; test. of Hutcheson.)

19. Late on Friday night July 31, 2015 or in the early morning hours of August 1, 2015, KFPD Chief David Henslee came to the premises, and told the security guards at the front door to shut down the bar for the night. Security directed Chief Henslee to Licensee Elizabeth Cisneros, who refused to shut down early and told the DJ to keep the music going. Ms. Cisneros and Henslee went outside the premises for a brief discussion. The police chief expressed concern over Licensee's security style and how frequently the police had to respond to the licensed premises. (Test. of E. Cisneros.)

20. A few days later, Licensee Elizabeth Cisneros had a meeting with Chief Henslee and others to discuss concerns that the licensed premises had become a public nuisance negatively impacting the quality of life in downtown Klamath Falls, due to the number of calls for service to the premises and the number of arrests for assault and disorderly conduct arising out of those calls. Chief Henslee suggested that Licensee not turn the premises into a night club on the weekends and close earlier. (Test. of E. Cisneros.)

21. Shortly after the meeting, Licensee hired Charles "Cowboy" Hopkins and Cowboy Security to provide security at the front entrance of the premises. Ms. Cisneros believed that a change in security personnel might reduce the number of police calls for service to the premises. She advised Carter that Blade Security would only be providing security inside the premises. (Test. of E. Cisneros, Carter.)

22. On Sunday, August 9, 2015, at approximately 1:50 a.m., patron Leonel "Leo" Ayala Gonzalez was stabbed multiple times in the torso in the vicinity of the licensed premises.

A few hours earlier, Gonzalez came to the licensed premises with two female acquaintances, including Ms. Vasquez. While there, he consumed several Corona beers. He became increasingly obnoxious and annoying to others, to the point that at about 1:30 a.m., he was ejected from the premises by security.⁶ Gonzalez left the premises and walked across Main Street towards the Pikey. About 20 minutes later, he walked back across the street to the premises' front entrance. There, he was approached by several males he recognized, and with whom he had exchanged words at the premises earlier in the night. The men began to assault him. Gonzalez broke free and fled down Sixth Street. The men gave chase and eventually caught him a block away, by the Dutch Bros. stand. A bigger group gathered, more fighting ensued, and Gonzalez was beaten and stabbed multiple times, although he did not realize it at the time. (Test. of Dougherty; Exs. A19, A23, A24.)

23. Gonzalez broke free again and made his way back to the licensed premises, seeking refuge from his attackers. He left a splatter of blood on the ground where the stabbing occurred and a trail of blood droplets along Sixth Street to the north. Although the premises was closing for the night, Gonzalez was allowed access and immediately taken to a front office/dressing room. Gonzalez was highly intoxicated. He maintained that he did not want the police involved and did not need medical attention despite his bleeding wounds. Employee Derek Palmer gave Gonzalez a towel to help stop the bleeding. A female employee started tending to his wounds. Someone else flagged down Vasquez, who was still in the vicinity, to advise her that Gonzalez had been stabbed and was now back at the premises. Vasquez reentered the premises to speak to Gonzalez. Licensee Antonio Cisneros was still at the premises and aware of these circumstances. No one called the police and no one called for emergency medical responders. There was a discussion among those present (including Mr. Cisneros) that it was not necessary to call the police because the incident did not happen at El Palacio. After about 15 minutes, employee Martha Lossing and Vasquez escorted Gonzalez out the back door of the premises and drove him to his sister's house. Gonzalez arrived at his sister's house at about 3:00 a.m. His entry into the house woke his brother-in-law, Mario Barajas. Seeing Gonzalez's bloody and wounded condition, Barajas immediately drove Gonzalez to the emergency room. (Test. of Dougherty, Thomas, A. Cisneros; Exs. A19, A23, A24.)

24. Police were first notified of the stabbing when Barajas called to report it around 3:17 a.m. KFPD officers responded to Sky Lakes Medical Center to interview Gonzalez and then to the licensed premises to investigate the incident. Over the next few days, officers interviewed several witnesses, including Licensee Antonio Cisneros and re-interviewed Gonzalez. Officers also obtained and reviewed available surveillance video footage. Eventually, and due in part to Gonzalez's refusal to cooperate with police and identify his assailants, the KFPD discontinued the criminal investigation. (Test. of Dougherty; Exs. A19 through A23.)

25. On August 13, 2015, KFPD Chief Henslee sent a letter to Licensee Elizabeth Cisneros notifying Licensee that the licensed premises "has been the location of a pattern of activity that has the potential to cause the subject property to be declared a 'Public Nuisance' as defined by City Code section 5.470." (Ex. A42 at 1.) The letter explained that a property becomes subject to the Public Nuisance Code when a person in charge of the property permits, or

⁶ This was not an unusual occurrence. At that point, Gonzalez (age 22) had been ejected from the premises on 7 or 8 occasions previously for similar behavior. (Test. of Carter; Ex. A19 at 14.)

causes to exist, three or more separate criminal offenses including assault and disorderly conduct within a six month period. The letter also listed eight incidents occurring at the licensed premises between February 2, 2015 and July 5, 2015 that resulted in arrests for assault and/or disorderly conduct and met the City Code's conditions for a Public Nuisance. The Chief requested that Licensee abate the nuisance, and warned that if the nuisance was not abated within 10 days, the City may take action to close the business for 12 months. (*Id.* at 2.)

26. A few days later, Licensee terminated its contract with Blade Security completely. Hopkins and his company Cowboy Security took over all of the security services for the licensed premises. Hopkins also adopted a different approach to the premises security. He was less confrontational with patrons than Carter and less likely to call the police to the premises when he could take care of a problem himself. (Test. of E. Cisneros; Test. of Hopkins.)

27. Shortly before 1:00 a.m. on Sunday, October 4, 2015, Alisha Crow (aka Alisha Van Rossum)⁷ and Erica Salazar, both of whom were highly intoxicated,⁸ got into a physical fight in the public parking lot on North Sixth Street across from the licensed premises. KFPD Officer Loudermilk observed the fight. Officer Herbst, who was a block away at Fifth and Main, heard the women screaming each other and responded to assist Officer Loudermilk. The officers contacted the women and took them both into custody on charges of Disorderly Conduct II. (Ex. A25; test. of Loudermilk, Herbst.) Officer Loudermilk contacted Salazar, who resisted arrest and continued to scream and curse at Crow. (Ex. A25 at 5.) Officer Herbst contacted Crow, and noted that she was barefoot. Officer Herbst asked Crow the whereabouts of her shoes and what started the fight. Crow stated that her shoes were "across the street by the bar," indicating the licensed premises. Crow also reported that the fight started at the licensed premises. Crow stated that while at the bar, Salazar called her a "white bitch," and tried to start a fight. Crow said they "took it outside" and then Salazar "dragged" her across the street. (*Id.* at 7; test. of Herbst.) Later, after an officer recovered Crow's shoes from across the street, Crow chose not to respond when Officer Herbst asked how the boots came off her feet by El Palacio if Salazar truly "dragged" her to the adjacent parking lot. (*Id.*)

28. On Friday, October 9, 2015 at about 11:42 p.m., KFPD Officer Reif was on patrol on Main near Sixth Street when he saw a man and a woman on the right side of Main across the street from the licensed premises engaged in what appeared to be an argument. Officer Reif then saw the woman, later identified as Marnie Whiting, take a swing at the man, later identified as Mario Barajas. As Officer Reif exited his patrol car to make contact with the two, he overheard

⁷ Licensee Elizabeth Cisneros knows Crow by the name Van Rossum. Saturday night, October 3, 2015 was a "Nerd Night" at El Palacio, and Crow began the night at the licensed premises around 10:15 p.m., dressed as a "nerd," wearing black-rimmed nerd-like glasses, suspenders, and a short skirt. When Crow arrived at the licensed premises, Ms. Cisneros took photographs of Crow in her nerd garb, which Cisneros later posted on El Palacio's Facebook page. (Ex. L3; test. of E. Cisneros.) Over the next several hours, Crow patronized both the licensed premises and the VFW. (Test. of E. Cisneros.)

⁸ Salazar provided a breath sample at the jail subsequent to her arrest, which disclosed a BAC of .21 percent. (Test. of Loudermilk; Ex. A25 at 3, 5.) Officer Herbst personally observed signs of intoxication on Crow, including watery and bloodshot eyes and the odor of alcoholic beverages on Crow's breath. (Test. of Herbst.)

others on the sidewalk nearby comment that the woman (Whiting) was the problem and she needed to leave. There were about 10 other people standing nearby on the sidewalk at the time. A security guard from the licensed premises advised the officer that everyone on the sidewalk had been kicked out of El Palacio for being too intoxicated and were not allowed to return for the night. (Ex. A26 at 6.) Officer Reif contacted Whiting. She was belligerent and highly intoxicated. She denied hitting Barajas, even when the officer told her that he had witnessed her do so. Other officers arrived on scene to assist and interviewed witnesses. They reported that Whiting approached Barajas and his brother on the street, she started yelling at Barajas, and then hit him. Officer Reif arrested Whiting for Disorderly Conduct and lodged her at the jail. (*Id.*; test. of Reif.)

29. On Sunday, December 27, 2015, sometime between 12:30 a.m. and 2:00 a.m., patron Marissa Wells punched patron Lindsey Sullivan in the back of the head, knocking Sullivan unconscious. The incident occurred on the premises' dance floor and led to a fight in which multiple patrons were injured. That Saturday night/Sunday morning, Sullivan, her date Rylie Hogue, and another couple were out bar hopping in downtown Klamath Falls. They ran into Wells, who was Hogue's ex-girlfriend and the mother of Hogue's child. Wells was with her fiancé and a group of friends. While at the licensed premises, Wells became upset because Hogue was out with Sullivan rather than home with their child. As soon as Wells struck Sullivan, Sullivan fell back. She was caught by her friend before she hit the floor. In response, Hogue pushed Wells, then one of Wells' friends punched Hogue, and a fight between Hogue and others ensued.⁹ A friend carried the unconscious Sullivan away from the fray, to a bench near the front of the premises. Wells and her group left the premises. Sullivan was unresponsive for several minutes. Licensee Elizabeth Cisneros, who did not see the assault on Sullivan, saw Sullivan on the bench and assumed she was intoxicated. When Sullivan's friends explained what had happened, Cisneros escorted the group to the front office to get Sullivan away from the crowd. No one called 911 despite Sullivan's unconsciousness. At around 2:00 a.m., after Sullivan regained consciousness (but was still woozy), one of Licensee's employees drove Sullivan and her friends to Sullivan's home, where Hogue put Sullivan to bed. (Ex. A27; test. of Rick, E. Cisneros.)

30. The police were first notified of the assault on Sullivan when her father called to report it later that Sunday morning. When Officer Rick interviewed Sullivan, she did not recall what had happened, other than being at the bar and waking up with an extreme headache. She explained that her friends told her that Wells had attacked her and knocked her out. Later that day, Sullivan sought treatment for a severe headache and was diagnosed with a concussion. (Ex. A27; test. of Rick.)

31. A little more than two weeks later, on Saturday, January 16, 2016 around 2:00 a.m., patron Caramia Cyr threw a glass at patron Sabrina Roberts, striking Roberts in the head and causing injury. The incident occurred near the premises' dance floor, immediately after security and other patrons intervened to physically separate the two women from a physical altercation. Cyr threw the glass at Roberts' head from a distance of approximately 12 to 15 feet

⁹ Patron Victoria Rivera, a member of Wells' group, sustained a black eye in the fight. Hogue was struck in the face and head, and sustained a gash on his forehead. (Ex. A27 at 13, 20, 23, 27.)

away. Immediately after throwing the glass, Cyr left the premises. (Exs. A28 and 29; test. of Loudermilk.)

32. When KFPD officers responded to the premises at 2:09 a.m., Roberts was being treated by emergency medical personnel for a deep and moderately large laceration to her forehead. Roberts, who was highly intoxicated, told Officer Loudermilk that she and Cyr have known each other a long time. She reported that she and Cyr have a bad history, and Cyr should not have been at the premises because Cyr knew it was her (Roberts's) birthday, and her night to have a good time. Officer Loudermilk also interviewed other witnesses to the assault, including Roberts' friend Audriana Arizola and Security Manager Hopkins. Arizola told the officer, among other things, that Cyr fled the scene as a passenger in a friend's car. Hopkins advised the officer that the two women were fighting, "hair pulling and girl shit" and then Cyr threw the glass and hit Roberts in the head. (Ex. A28 at 8.) Hopkins also advised Officer Loudermilk the incident was isolated because "things like this almost never happen here." (*Id.*) Hopkins added that he thought Cyr needed to be in jail. He told the officer that and he tried to apprehend Cyr, but she got away out the front door before he could make his way through the crowded bar. (*Id.*)

33. Officers responded to Cyr's apartment. They heard people inside but no one responded to their knock and announced presence. Officer Loudermilk also left voice and text messages on Cyr's phone. Then, at approximately 4:10 a.m., Cyr contacted Officer Loudermilk and agreed to an interview. Officers responded to her apartment. Cyr reported that she drank too much alcohol, blacked out and somebody took her home. She recalled being attacked in the premises parking lot by Arizola as she was leaving, she recalled being "bullied" and harassed at the premises that night by Arizola and Roberts, and when prompted, recalled physically fighting with Roberts, but did she not recall throwing a glass at Roberts. Cyr also recalled, without any prompting, that the security guard, who she described as an older man in a cowboy hat, grabbed her outside the premises, but then just let her go. Officers took Cyr into custody without incident on charges of Assault II. (Ex. A28 at 9; test. of Loudermilk.)

34. On Sunday, April 10, 2016, at approximately 12:30 a.m., one of Licensee's security guards flagged down KFPD officers in the area to report a patron with a firearm in the men's room at the premises. Officers entered the premises and contacted the patron, Franklin Williams. Williams, who was visibly intoxicated, advised that he had a firearm in his waistband. Officers removed the concealed firearm, a loaded 9 mm Ruger P85, from Williams' waistband, and took him into custody on a concealed weapons charge. Williams advised the officers that the gun fell and hit the ground when he pulled down his pants to use the toilet. Williams also reported that he was carrying the gun for protection because he sells marijuana to dispensaries. At the jail, Williams provided a breath sample, which disclosed a BAC of .12 percent. (Ex. A30; test. of Bergstrom.)

35. On Sunday, May 8, 2016, at approximately 1:34 a.m., KFPD officers responded to a reported disturbance at the licensed premises. Licensee's security directed the officers to Ane Rodriguez who at the time, was leaning against a tree near the front of the premises, smoking a cigarette and taunting and threatening passersby. Security Manager Hopkins advised the officers that Rodriguez had been asked to leave earlier for starting a fight in the entrance of the location. Hopkins added that he wanted Rodriguez trespassed forever. Officer Bergstrom

contacted Rodriguez and told him to leave the area and not return, as he had been trespassed for life. Officer Bergstrom noted that Rodriguez was very intoxicated. He was mumbling and slurring his words. As Rodriguez walked off toward the premises' back parking lot, officers followed at a distance to ensure that he did not try to fight anyone else. At one point, Rodriguez stopped, turned around towards the officers, mumbled something incoherent, and threw his lit cigarette at the officers. The officers then took Rodriguez into custody on charges of Disorderly Conduct and Offensive Littering. (Ex. A31; test. of Bergstrom, Thomas.)

36. The following weekend, on Saturday, May 14, 2016 at about 1:20 a.m., KFPD Officer Herbst and Reserve Officer Banderas were on patrol on Pine Street, approaching Sixth Street when they heard and then saw an unruly crowd of approximately 40 people gathered at the intersection of Main and Sixth, about 10 yards from the licensed premises' front entrance. Officer Herbst also saw a person, who she recognized as Licensee's Security Manager Hopkins, being attacked and punched by two men. Officer Herbst activated her patrol vehicle's siren and overhead emergency lights in an attempt to break up the fighting and disperse the crowd. As the crowd dispersed Officer Herbst was able to identify the individuals who had been fighting with Hopkins as Walter Pinto and Arturo Escobar-Gurrola. Once back up officers arrived, the officers took three patrons, Pinto and Escobar and Joseph Allen, Jr., another individual who had been fighting with Licensee's security, into custody.¹⁰ All three men were intoxicated and uncooperative. Allen was bleeding from a laceration above his eye. Officers charged Escobar with Assault IV and Allen and Pinto with Disorderly Conduct II. (Exs. A32 and A33; test. of Herbst.)

37. The following day, Sunday, May 15, 2016 at 1:46 a.m., several KFPD officers were dispatched to the licensed premises on a report of two men throwing bottles at each other. Upon arrival, Security Manager Hopkins directed the officers to Iosefa Sua, who at the time, was about a block from the premises. Hopkins reported that that he had removed Sua from the premises for fighting and physically assaulting three patrons. Officer Loudermilk contacted Sua, who was bleeding from his face and highly intoxicated. Hopkins also told officers that another patron, later identified as Derek Harrison, was instigating fights with Sua. Officers observed Harrison trying to push past security. He was cussing and screaming and challenging others to fight. Officers arrested Sua and Harrison and lodged both on charges of Disorderly Conduct. (Ex. A34.)

38. On May 16, 2016, KFPD Chief Henslee sent Licensee a second Public Nuisance letter. The letter stated, in pertinent part, as follows:

On August 13, 2015, you were notified in writing of the pattern of illegal activity that was occurring at El Palacio. You took action to mitigate the criminal behavior and we appreciate your effort. Unfortunately, the actions you took have not eliminated the pattern of criminal behavior at El Palacio.

The following incidents have occurred, and required police action, at El Palacio (601 Main Street) between January 1, 2015 and May 15, 2016. * * * To

¹⁰ Pinto, Escobar and Allen had been in and out of the premises throughout the night. Just prior to the fight, Hopkins denied them entry and told them to "get going." (Test. of Hopkins.)

summarize, the City of Klamath Falls Police Department has responded to 70 incidents at El Palacio over the past 16 ½ months. Of those responses, 16 meet the conditions of the Public Nuisance Code and 2 additional cases are pending arrest. Police Officers have arrested 24 people for violations of law that meet the requirements of the Public Nuisance Code. Additionally, a male was arrested at El Palacio for carrying a concealed firearm but that specific violation of law is not contained in the Public Nuisance Code.

(Ex. A42 at 5-6.) The letter concluded with a notice that, per the Nuisance Code, Licensee had 10 days to abate the nuisance, and a warning that if the nuisance was not abated within 10 days, the City may take action to abate the situation and cause the premises to be closed for 12 months. (*Id.* at 7.)

39. Around or before midnight Saturday, June 25, 2016, an extremely intoxicated Kassandra Imbert pushed her way past security at Licensee's front entrance and proceeded to the dance floor. Imbert, who was a regular patron at El Palacio, had been in the premises around 10:00 p.m., but left to go to Ladies' Night at the VFW. Security Manager Hopkins contacted Imbert, removed her from the premises, and told her to stay out. Imbert ignored Hopkins' directive. She forced her way back into the premises, violently striking employee Rachel Richards in the face as she did so. Hopkins again removed Imbert from the premises, physically carrying her outside to the sidewalk. While still outside on the sidewalk, Imbert began to feel sick. Hopkins permitted her to reenter the premises to use the restroom. (Ex. A35; test. of E. Cisneros.)

40. A short time later, at about 12:13 a.m. on June 26, 2016, Officer Bergstrom, who was at the premises attempting to locate a missing person, was notified that an intoxicated female in the ladies room (Imbert) had been vomiting and was now unresponsive. Officer Bergstrom responded to the ladies room and called for backup and medical responders. As soon as Imbert regained consciousness she became extremely uncooperative and combative. She was too intoxicated to care for herself, but was also unwilling to go to the hospital and to provide information to paramedics and/or the officers on scene. She physically resisted the paramedics and officers' attempts to escort her from the premises. Eventually, emergency responders had to place Imbert on a gurney with restraints and transport her by ambulance to Sky Lakes Medical Center. There, she continued to kick and thrash about and tried to bite a staff person. A hospital blood draw determined Imbert's BAC was .29 percent. Imbert was charged with Attempted Assault III, Disorderly Conduct, and Resisting Arrest. (Ex. A35; test. of Bergstrom.)

41. On June 30, 2016, Licensees Antonio and Elizabeth Cisneros met with OLCC Inspector Kent Oldham and Acting Regional Manager Amy Navine to discuss public safety concerns connected with the licensed premises. Navine and Oldham warned Licensees that the licensed premises was subject to a history of serious and persistent problems violation and suggested that Licensees take steps to mitigate the problems. Licensees initially wanted to dispute the various incidents mentioned in the police reports and CAD entries. Navine suggested it might be more productive not to rehash each incident, but to look at the overall situation and consider ways they could reduce the frequency of problems at the premises. Licensees mentioned that they believed Chief Henslee was singling out their business versus the other bars

in downtown Klamath Falls. Licensees praised Cowboy Security, explaining that they have had fewer problems since Cowboy Security took over for Blade Security. Licensees blamed Blade Security and Carter for verbally provoking and using a “hands on” approach to patrons. Licensees also identified measures that they began taking about a month prior (presumably in response to the second Public Nuisance letter) to try and address some of the issues, including: (a) closing earlier on weekend nights, at 1:30 a.m. instead of 2:00 a.m. (so El Palacio would not be the “last stop” of the night); (b) having five security staff on duty those nights; (c) maintaining an incident log; (d) denying entry to visibly intoxicated persons; (e) giving out taxi vouchers; and (f) doing a soft close, to encourage patrons to disperse slowly rather than in mass, and having all patrons exit out the back door into the back parking lot only. (Ex. A44; test. of Navine, Oldham, E. Cisneros.)

42. On Friday evening October 28, 2016, KFPD officers were notified that a minor, Taylor Shannon, age 20 at the time, was in the lounge area of the licensed premises, a portion of the premises with a Number 2 minor posting (No Minors Permitted in this Portion of the Premises). Officers Bergstrom, Herbst and Gordon responded to the premises. They entered the lounge and observed Shannon seated at the bar between two men. They saw a partially consumed drink, later determined to be a blackberry margarita, in front of her on the bar. Officer Bergstrom contacted Shannon and asked to see her identification. Shannon told the officer that she did not have her ID on her. She gave the officer her true name and date of birth and admitted she was 20 years old. Shannon denied drinking the margarita, but admitted drinking elsewhere earlier in the evening. Officer Bergstrom issued Shannon a citation for minor in possession of alcohol. Meanwhile, Officer Herbst interviewed the bartender on duty, Carlos Faiers. Faiers admitted he served a blackberry margarita to Shannon. Faiers also admitted that he did not check Shannon’s identification. He explained to Officer Herbst that he recognized Shannon from prior visits to the premises. He noted that Shannon usually comes to premises with a group of people who were all age 21 or older. When officers notified Licensees Antonio and Elizabeth Cisneros of the situation, Licensees were upset with Faiers’s failure to check Shannon’s identification. (Ex. A36 at 1, 15; test. of Bergstrom.)

43. On Saturday, November 19, 2016, OLCC conducted a minor decoy operation in Klamath Falls. El Palacio was among those randomly selected for the operation. (Test. of Oldham.) Shortly after 11:00 a.m. on that date, minor decoy Armando Martinez, age 19,¹¹ entered the licensed premises and asked employee Ruelas Cisneros, “Donde esta ‘the bar’?” (Test. of Martinez.) Cisneros directed Martinez to the lounge and followed him in to the room. Martinez took a seat at the bar and asked for a Corona with “limon.” (*Id.*) Cisneros asked Martinez his age. Martinez presented his Oregon provisional license to Cisneros and said “it’s

¹¹ At the time of the decoy operation, it can be reasonably inferred from evidence in the record that minor Martinez appeared to be his true age of 19 years old. In Staff’s Comments, OLCC staff requested to remove references to Ex. A37, pages 12 and 13, because these documents were not included in the hearing record. The Administrative Law Judge agreed to the removal of these references in her Response to Staff Comments and reasoned that other evidence in the record supports a finding that minor Martinez appeared to be his true age at the time of the minor decoy operation.

on the license.”¹² (*Id.*) Cisneros looked at the license and then asked Martinez if he was born in 1997. Martinez responded affirmatively. Cisneros served Martinez a Corona with lime. Martinez asked for salt, which Cisneros also provided. (*Id.*; Ex. A37 at 10)

44. OLCC Inspector Devore watched Cisneros serve the Corona with lime to minor decoy Martinez and, shortly thereafter, contacted Cisneros about the violation. Devore then issued Cisneros a citation for furnishing alcohol to a minor in violation of ORS 471.410. (Ex. L5.) Due to errors on the citation, including the time of the violation (11:08 p.m. as opposed to 11:08 a.m.) and the court location, OLCC voided this citation and Inspector Oldham issued a new citation to Cisneros about a week later, with the correct time and court address. (Test. of Oldham.)

45. On Saturday, January 28, 2017 at about 10:48 p.m., Officer Loudermilk was on patrol on Main Street and driving by the licensed premises when he observed Security Manager Hopkins pushing and struggling with a man, later identified as Lane Arnet, in the premises’ front doorway. Officer Loudermilk called for backup and exited his patrol vehicle. As Officer Loudermilk approached, Arnet and a woman, later identified as Cherae Minthorn, started to walk away. Officer Loudermilk ordered them to stop. Arnet stopped, but Minthorn grabbed Arnet and told him to keep going. Officer Loudermilk again ordered them to stop. Minthorn continued to ignore the officer and began shoving Arnet down the sidewalk. Officer Loudermilk caught up to them and told Minthorn she was under arrest. Minthorn, who was extremely intoxicated and not coherent, screamed and protested, but did not physically resist the officer. While Officer Loudermilk was handcuffing Minthorn, Hopkins approached Arnett and ordered him to “get out of here.” (Ex. A38 at 3; test. of Loudermilk.) Officer Loudermilk had to shout loudly at Hopkins and give him verbal commands stop to explain to him that Arnet was not free to leave. (*Id.*)

46. After placing Minthorn in his patrol car, Officer Loudermilk interviewed Arnet about what led to his altercation with Hopkins. Arnet, who was also highly intoxicated, but more compliant with the officers, reported that he had been struck in the face by an unidentified white male while inside the premises.¹³ Officers transported Minthorn and Arnet to jail and lodged both on detox holds due to their inability to care for themselves. (Ex. A38; test of Loudermilk.)

47. About three hours later, as they were leaving the premises at closing around 2:00 a.m. on Sunday, January 29, 2017, about 30 patrons of the licensed premises began fighting in the parking lot behind the premises. Security Manager Hopkins and security staff got involved and attempted to break up the fights. The fighting spilled over into the parking lot across the street. (Ex. A39 at 23.) KFPD received multiple calls about a fight in progress in the area of the licensed premises. Dispatch initially reported there were 8 to 10 people fighting. While officers

¹² Martinez’s provisional license, like all other Oregon provisional driver licenses, has a red box around his photo containing the following written in yellow font: “UNDER 21 UNTIL [XX-XX-2018, the date of his 21st birthday].” (Ex. A37 at 11.)

¹³ Lt. Daniel and Hopkins went into the premises and attempted to locate the patron Arnet claimed had hit him, but were unsuccessful. (Ex. A38 at 3.) Lt. Daniel interviewed employees and security staff about the incident. He was told that both Arnet and Minthorn were drunk when they walked in to the premises and had been denied drinks at the premises. (Test. of Daniel.)

responded, dispatch reported there was someone with a sword and the fight had grown in size to about 50 people. All officers on duty (Lt. Daniel and Officers Jenkins, Loudermilk, and Diabes) responded, arriving from different directions. KFPD also requested assistance from any available officers from the Klamath Falls Sheriff's Department and State Police. Upon arrival, responding officers found a chaotic scene, and what appeared to be in excess of 100 people in the parking lot adjacent to the licensed premises. (*Id.* at 3, 15.)

48. Officer Loudermilk saw a vehicle backing out of a parking space in the parking lot and noted that one of the passengers had a swollen eye, blood running down his face, and was sweating profusely. Officer Loudermilk stopped the vehicle, believing that the passenger, later identified as Jose Jaimealcala, had been actively involved in the fighting. Officer Loudermilk ordered Jaimealcala out of the car. Jaimealcala refused to comply. Officer Loudermilk shouted at Jaimealcala that he was under arrest and ordered him to exit the vehicle immediately. Jaimealcala then did so. As Officer Loudermilk started to place handcuffs on Jaimealcala, another passenger, later identified as Rosaria Hernandez, exited the car and started shouting at the officer and pushing him away from Jaimealcala. Other officers arrived to assist Officer Loudermilk. They pushed Hernandez and others who had gathered around away, enabling Officer Loudermilk to safely place handcuffs on Jaimealcala. (Ex. A39; test. of Daniel, Loudermilk, Jenkins.)

49. As the officers provided backup for Officer Loudermilk, they had to deal with an unruly crowd. Lt. Daniel and a deputy struggled with a woman, later identified as Jaimealcala's girlfriend, Laray Pridemore, who also tried to interfere with Jaimealcala's arrest. Officers Jenkins and Diabes physically scuffled with Hernandez, who was very intoxicated, and her husband, Jimmy Hernandez, who was similarly intoxicated. Officer Diabes was assaulted and injured during the altercation with Hernandez. Officers charged Jaimealcala with Rioting, Interfering with a Police Officer and Resisting Arrest; Pridemore with Rioting, Interfering with a Police Officer and Resisting Arrest; Rosaria Hernandez with Rioting, Interfering with a Police Officer and Resisting Arrest; and Jimmie Hernandez with Assault on a Police Officer, Rioting, Interfering with a Police Officer and Resisting Arrest. In an interview subsequent to her arrest, Rosaria Hernandez confirmed the group had gone to the licensed premises for a belated celebration of her 21st birthday. Officers heard from more than one witness that the fight started with an unidentified male wielding a sword or machete, but they have as yet been unable to identify the person. (Ex. A39; test. of Daniel, Loudermilk, Jenkins.)

50. Meanwhile, inside the premises, at about 2:08 a.m. (per the time on the video camera), there was an altercation among patrons who had yet to exit the premises. And, moments later, at 2:11 a.m., a female employee (Martha) clearing a table was punched, without warning, by an unknown female patron. Others quickly intervened to separate them. (Test. of Daniel; Exs. A39 at 10, 23 and A41.)

51. On Sunday, February 19, 2017 at about 2:00 a.m., patron Tyler Van Kirk was leaving the premises and walking with his girlfriend Noheaililani Wiawiaole to her car in the parking lot across from the licensed premises when a pickup truck driving slowly through the parking lot clipped Van Kirk in the leg. Van Kirk yelled to the driver, later identified as Donnie Summers, something to the effect of, "What the hell man, you just hit me!" (Exs. A47 at 4;

A48.) At that point, the front passenger in the pickup, later identified as Jacob Bedard,¹⁴ hopped out and began assaulting Van Kirk. Bedard punched Van Kirk in the face, knocking Van Kirk to the ground. Bedard continued to beat Van Kirk until Van Kirk lost consciousness. Bedard then got back into the pickup and Summers took off out of parking lot, burning the pickup's tires as he did so. Several people gathered to help Van Kirk up off the ground. When Van Kirk regained consciousness, he was disoriented. He was bleeding from lacerations to his face. After a few minutes, Hopkins and Faiers approached. One of them told Van Kirk and Wiawiaole not to worry about calling the police. Wiawiaole understood from this comment that someone from El Palacio would be making the report to the police. Hopkins or Faiers also suggested that Wiawiaole take Van Kirk home and get him cleaned up. She told them she believed he needed to go to the hospital instead. (*Id.*)

52. The police were first notified of the assault on Van Kirk at about 3:10 a.m., when Wiawiaole called from the Sky Lakes Medical Center Emergency Room to report it. Officer Yahwee responded to the ER and interviewed Van Kirk and Wiawiaole, both of whom reported the attack was unprovoked and the assailant was unknown to them. Wiawiaole provided the officer with photos of the pickup and the driver that a witness had taken and sent to her, and Van Kirk provided the name of possible witnesses. Officer Yahwee also photographed Van Kirk's extensive facial injuries. (Ex. A49; test. of Yahwee.) Over the next few days, Officer Yahwee interviewed witnesses, reviewed video footage from the parking lot,¹⁵ and eventually identified Summers as the driver of the pickup and Bedard as the assailant. On February 24, 2017, Yahwee arrested Bedard and lodged him in jail on charges of Assault III. She also recommended that the District Attorney's Office consider charging Summers with Disorderly Conduct and Reckless Driving. (Ex. A47; test. of Yahwee.)

CONCLUSIONS OF LAW

1. There is a history of serious and persistent problems at the licensed premises based upon incidents dating back to February 21, 2015.
2. Licensee has not demonstrated a willingness and ability to control the premises.
3. On October 28, 2016, Licensee permitted a minor to be in an area prohibited to minors.
4. On November 19, 2016, Licensee's employee failed to verify the age of a minor before serving the minor an alcoholic beverage when the minor reasonably appeared to be under 26 years of age.
5. The appropriate penalty for the established violations is cancellation of the license.

¹⁴ Bedard had also been a patron at the licensed premises that night. (Ex. A47; test. of Yahwee.)

¹⁵ Per the video, the assault on Van Kirk began shortly after 2:02 a.m. Around the same time as Van Kirk's assault, there was another altercation among patrons leaving the premises just outside the premises that Hopkins stepped in to break up. (Ex. A48; test. of Yahwee.)

6. The Commission has grounds to refuse to renew Licensee's license. Licensee has not shown good cause to overcome the refusal to renew the license.

OPINION

The Commission has charged Licensee with three violations: (1) a history of serious and persistent problems in violation of ORS 471.315(1)(c); (2) permitting a minor in an area prohibited to minors in violation of OAR 845-006-0335(3)(b); and (3) failing to verify the age of a minor before serving the minor in violation of OAR 845-006-0335(1). The Commission has also proposed to refuse renewal of Licensee's license due to Licensee's history of serious and persistent problems and poor record of compliance with the liquor laws.

As a Category I violation with the standard penalty of license cancellation, a violation of ORS 471.315(1)(c) is by far the most serious of the three alleged violations. The Commission bears the burden of establishing by a preponderance of the evidence that the alleged violations occurred and the proposed sanction (cancellation) and refusal to renew is appropriate. ORS 183.450(2) ("The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position"); *Harris v. SAIF*, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position); *Metcalf v. AFSD*, 65 Or App 761, 765 (1983) (in the absence of legislation specifying a different standard, the standard of proof in an administrative hearing is preponderance of the evidence). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely than not true. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390, 402 (1987).

The burden falls on Licensee, however, to demonstrate there is a basis to mitigate the penalty from cancellation to a suspension or fine and to show good cause to overcome the refusal to renew the license. See, e.g., *Don's Dugout* (OLCC Final Order, 12-V-065, May 2013).

1. History of Serious and Persistent Problems

In the Third Amended Notice, the Commission charged Licensee with a violation of ORS 471.315(1)(c),¹⁶ alleging "about 26 serious incidents in about 24 months" at or in the immediate

¹⁶ ORS 471.315(1)(c) states in relevant part:

(1) The Oregon Liquor Control Commission may cancel or suspend any license * * * if it finds or has reasonable ground to believe any of the following to be true:

* * * * *

(c) That there is a history of serious and persistent problems involving disturbances, lewd or unlawful activities or noise either in the premises proposed to be licensed or involving patrons of the establishment in the immediate vicinity of the premises if the activities in the immediate vicinity of the premises are related to the sale or service of alcohol under the exercise of the license privilege. Behavior which is grounds for cancellation or suspension of a license under this section, where so related to the sale or service of

vicinity of the licensed premises involving patrons and security of the premises. Third Amended Notice at 6. The Commission further alleged that these incidents involved intoxicated patrons, fights and disturbances, and included a stabbing, a broken jaw, a concussion, possible broken nose, cuts and lacerations, and several incidents involved weapons. Commission Staff contends that the numerous serious incidents and their ongoing nature, along with Licensee's practice of not alerting the police of serious incidents involving patrons occurring at or in the immediate vicinity of the premises demonstrate that Licensee lacks the willingness and ability to control the licensed premises and patrons' behavior in the immediate vicinity of the premises.

In interpreting ORS 471.315(1)(c), the Commission has found that a history of serious and persistent problems is based on the nature and circumstances of the incidents in each case. Criminal incidents that occur inside the licensed premises count (*i.e.*, constitute a serious problem), whether or not they are related to the licensee's sale of alcohol. Incidents that occur outside the premises do not count unless the incident is related to the licensee's sale or service of alcohol. The Commission gives significant weight to severe crimes, such as those involving drugs, violence or the threat of violence to a patron or licensee, unless the incident was isolated and happenstance. Less severe crimes, such as shoplifting, are accorded little weight, unless the crime is shown to be related to alcohol. A licensee may overcome the history by showing that the problems are not serious or persistent or by demonstrating a willingness and ability to adequately control the premises and patrons' behavior. *Don's Dugout*, Final Order at 13; *New Copper Penny Restaurant* (OLCC Final Order, O4-V-040, October 2005).

Criminal incidents involving persons going into and coming from the licensed premises are related to the exercise of the license privilege and are considered serious problems regardless of whether the persons consumed alcoholic liquor on the premises. *Don's Dugout*, Final Order at 12 (citing *La Brisa* (OLCC Final Order, 91-L-037, December 1992)). In *La Brisa*, the Commission found that the language "related to the sale or service of alcohol" does not require a showing that the patron involved purchased, was served or consumed alcohol in the licensed premises. The Commission presumes that the persons are coming to the premises because the licensee has a license and for the purpose of consuming alcoholic liquor. *Id.*

In *Headless Horseman* (OLCC, Final Order, 92-L-016, June 1993), the Commission found a history of serious and persistent problems where there were 7 incidents in 13 months. Although the number of incidents was not large, most of the incidents involved patron assaults or fights. Similarly, in *Balzer's Pub & Grill* (OLCC, Final Order, 99-V-019, March 2001), the Commission found a history of serious and persistent problems where there were five serious incidents within six months: two fights outside the premises, an assault on a security guard, the display of a gun by a patron who was denied entry to the premises, an assault and robbery upon a

alcohol, includes, but is not limited to obtrusive or excessive noise, music or sound vibrations; public drunkenness; fights; altercations; harassment or unlawful drug sales; alcohol or related litter; trespassing on private property; and public urination. Mitigating factors include a showing by licensee that the problems are not serious or persistent or that licensee has demonstrated a willingness and ability to control adequately the licensed premises and patrons' behavior in the immediate vicinity of the premises which is related to licensee's sale or service of alcohol under licensee's exercise of the license privilege.

waitress by patrons inside the premises, and a very intoxicated person on the street outside the premises. *See also New Copper Penny Restaurant* (eight incidents involving violence or threat of violence in less than seven months).

In *Felipe's Finest Mexican & Seafood Restaurant* (OLCC Final Order, 06-V-016, February 2007), the Commission held 23 serious incidents involving violence and threat of violence (including assaults and fighting patrons inside and in the immediate vicinity of the licensed premises) and 5 less serious incidents over a 24 month period warranted license cancellation. In *La Brisa*, the Commission concluded that 24 problem incidents over a 2 year period (12 fights, 3 thefts, 4 verbal altercations, a patron intentionally hitting another patron's car in the parking lot, 3 instances of public urination and shots fired in the parking lot) constituted a history of serious and persistent problems.

The Commission also considers incidents involving minors as serious problems. *Mak's Old City Hall Lounge* (OLCC Final Order, 08-V-114, December 2009), citing *Cisco & Pancho's* (OLCC Final Order, 99-V-80ES, September 2000); *see also Girtle's Restaurant & Lounge* (OLCC Final Order, 08-V-079, December 2009) (an intoxicated minor in a prohibited area constitutes a serious problem because it is an unlawful activity related to the licensee's sale and service of alcohol).

In *The Hydrant* (OLCC, Amended Final Order, 00-L-006, October 2001), the Commission held that incidents resulting from a licensee's appropriate steps to deal with problem persons by refusing service and/or by removing them from the premises would be counted among those comprising a history of serious and persistent problems. The Commission explained that it will weigh each incident according to its seriousness, as determined by the presence or absence of violence or the threat of violence directed toward persons (serious) or property (less serious). The Commission will consider the licensee's security staff's efforts in evaluating the licensee's willingness and ability to control the problems associated with the licensed premises.

In this case, as summarized below, the evidence establishes that during the two year period in issue (February 21, 2015 to February 19, 2017), Licensee had at least 21 documented serious incidents involving violence or threat of violence (disorder, fights, assaults, and/or altercations) inside, or in the immediate vicinity of the licensed premises involving patrons of the licensed premises, and 4 serious incidents involving unlawful activity at or related to the exercise of the license privileges, including a concealed weapons offense.

Proven incidents involving disturbances, i.e., violence or threat of violence inside, or in the immediate vicinity of the licensed premises involving patrons of the premises:

(1) February 21, 2015: Two intoxicated female patrons fought with another patron as they exited the premises. The two females then began arguing with an intoxicated male patron outside the front entrance. When security intervened, the male patron took a swing at security. Police arrested all three patrons for disorderly conduct.

(2) March 7, 2015: A highly intoxicated patron who had been ejected from the premises for causing disturbances inside the premises instigated a fight with another person just outside the front entrance. Police arrested the patron for disorderly conduct.

(3) March 15, 2015: A patron ejected from the premises for creating a disturbance became combative while being escorted out the door, and shot a taser at security and another patron. The patron and his girlfriend then hit the security guard in the leg with their vehicle when exiting the lot. Police later stopped the vehicle and arrested the patron on multiple charges, including assault and disorderly conduct.

(4) April 18, 2015: A female patron verbally assaulted a female employee and repeatedly punched her in the face, angry at the employee about matters unrelated to the licensed premises. Police arrested the patron for assault.

(5) April 19, 2015: At closing time, a female patron hit another female patron in the head with a beer bottle, causing injury that required medical attention. A highly intoxicated male patron, who had been ejected from the premises about 45 minutes earlier for instigating fights, punched a female patron leaving the premises in the face, knocking her to the ground. This patron also needed transport to the hospital for treatment. Police arrested the intoxicated male patron for assault and disorderly conduct.

(6) April 25, 2015: At closing time, two intoxicated patrons (one of whom had been injured in the incident the previous weekend) began fighting upon leaving the licensed premises. Licensee's security intervened and separated the two women, but they immediately went back at each other. Licensee's security stepped in again to break them up. Police arrested both patrons for disorderly conduct.

(7) May 3, 2015: A male patron punched another male patron in the face in a completely unprovoked attack, causing a laceration and possible broken nose. The victim sought emergency treatment and notified police of the assault. Police later arrested the assailant for assault and disorderly conduct.

(8) July 5, 2015: Police came upon a large crowd in front of the premises at closing time. Two intoxicated male patrons who had been trying to fight people inside the premises continued to create a disturbance upon exiting the premises. Police arrested the two men for disorderly conduct.

(9) July 19, 2015: Around closing time inside the premises, a male patron punched another male patron in the face in an unprovoked attack, breaking the victim's jaw. Police later identified the attacker and recommend charges of assault and disorderly conduct.

(10) August 9, 2015: About 20 minutes after being ejected from the premises for instigating fights, a male patron was assaulted by other patrons just outside the premises' front entrance. Then, after being chased down, beaten and stabbed a block away from the premises, this patron ran back to the premises. The patron was readmitted, provided refuge for about 15 minutes, and then taken to a family member's home. No one at the premises called 911.

(11) October 4, 2015: Two highly intoxicated female patrons began arguing at the premises. They "took it outside" to the parking lot across the street, where the dispute escalated into a physical fight. Police arrested both patrons for disorderly conduct.

(12) October 9, 2015: Across the street from the premises, a highly intoxicated female who had been ejected from the premises earlier assaulted a male who had also been asked to leave the premises due to his intoxication. Police arrested the woman for disorderly conduct.

(13) December 27, 2015: Inside the premises, a female patron punched another female patron on the back of the head, knocking the victim unconscious for several minutes and causing a concussion. This attack resulted in another fight among patrons in which at least two other patrons sustained injuries. The assailant and her group then left the premises. No one at the premises called 911 despite the victim patron's unconsciousness.

(14) January 16, 2016: After security stepped in to break up a fight between two female patrons, one of the two threw a glass at the other, striking the other in the head, and causing injury. Licensee's security permitted the suspect to leave the premises, but police later arrested her for assault.

(15) May 8, 2016: A highly intoxicated male, who had been asked to leave the area after starting a fight in the entrance to the premises, created a disturbance at the location. Police responded and arrested the man for disorderly conduct and offensive littering.

(16) May 14, 2016: Police came upon an unruly crowd in the street front of the premises around 1:20 a.m. and saw Licensee's security being attacked and punched. Police arrested one patron for assault and two others for disorderly conduct.

(17) May 15, 2016: An intoxicated male patron fought and physically assaulted other patrons inside the premises. After security removed this patron, another other patron sought to continue fighting with him outside the premises. Police responded and arrested both patrons for disorderly conduct.

(18) June 25, 2016: An extremely intoxicated female, a regular customer of the premises who had been there earlier in the night, violently pushed

past security twice to reenter the premises. After passing out in the premises' restroom, the patron regained consciousness and became belligerent and combative and physically resisted paramedics and officers' attempts to remove her from the premises. She was transported to the hospital in restraints, and charged with attempted assault, disorderly conduct and resisting arrest.

(19) January 28, 2017: Two intoxicated patrons, a male and a female, created a disturbance upon being asked to leave the premises. An officer observed security pushing and struggling with the male patron in the premises' doorway. Police lodged both patrons on detox holds due to their inability to care for themselves.

(20) January 29, 2017: Around closing time at 2:00 a.m., about 30 patrons began fighting in the parking lot behind the premises. The crowd grew and the fighting spilled over into the lot across the street. Police responded to reports of a large fight and someone wielding a sword. Upon arrival, they found a chaotic scene with 100 or more people in the parking lot. An officer was assaulted and injured. Police arrest four patrons for rioting plus other crimes. During this same time period, inside the premises, there were altercations among patrons and an unprovoked assault on a female employee.

(21) February 19, 2017: At about 2:00 a.m., in the parking lot across the street from the premises, a male patron leaving the premises punched and beat another patron leaving the premises to unconsciousness. Although Licensee's security was aware of the incident, no one from the premises contacted the police or called 911.

Other documented serious incidents involving unlawful activity at the licensed premises:

(22) March 14, 2015: A person who had been previously trespassed from the premises for fighting ignored security's directives to leave and instead entered the premises. Police contacted the person five feet from the premises' front door and arrested him for trespass.

(23) April 10, 2016: An intoxicated patron carrying a firearm in his waistband dropped the gun to the ground when he pulled down his pants to use the toilet. Police took the patron into custody on a concealed weapons charge.

(24) October 28, 2016: A minor in an area of the premises prohibited to minors.

(25) November 19, 2016: Licensee's employee failed to verify the age of a minor before serving the minor an alcoholic beverage.

Licensee argues that not all of the above incidents should count as serious problems because bar patrons tend to "bar hop" in downtown Klamath Falls. Licensee asserts that patrons

who were reportedly intoxicated may have also patronized the VFW, the Pikey, or other downtown establishments in the vicinity of the licensed premises, and drinks they consumed at those other locations may have contributed to their condition. Licensee also argues that certain incidents should not weigh heavily against Licensee because they were unforeseeable (e.g., the May 3, 2015 Saltenberger/Tecmire incident), or were motivated by something unrelated to the exercise of the license privilege (e.g., the April 18, 2015 Jackson/Clark incident). These contentions are not persuasive.

As discussed above, per well-established Commission final order precedent, incidents that occur inside the licensed premises count against a licensee, whether or not they are related to the licensee's sale of alcohol. Here, while attacks on patrons inside the premises may have been unexpected or unprovoked and, in the case of the April 18, 2015 incident, Jackson may have come to the premises just to confront employee Clark, these violent incidents are nevertheless entitled to significant weight because they were *not* isolated and happenstance. Contrary to what Security Manager Hopkins told officers on January 16, 2016, *i.e.*, that "things like this never happen here," things like disturbances and altercations resulting in physical injury to persons happen with some frequency at the licensed premises. The incidents highlighted by Licensee were not isolated events, but rather part of a pattern of dangerous and disorderly behavior occurring at the licensed premises over an extended period of time.

Moreover, because this is an on-premises licensed business, incidents involving persons going into, or exiting from, the licensed premises are deemed related to the exercise of the license privilege regardless of whether the person consumed alcoholic liquor at the premises. *La Brisa*, Final Order at 16. For that reason, disturbances caused by intoxicated persons denied entry to the premises count as related to Licensee's sale or service of alcohol under the exercise of the license privilege, as do disputes that started inside the premises and carried over into adjacent sidewalks, streets, or parking lots, and disturbances and fights involving patrons of the premises that broke out in the immediate vicinity of the premises. *Don's Dugout*, Final Order at 15-16.

In sum, a preponderance of the evidence establishes a record of 25 serious incidents over a two year period: 21 disturbances, *i.e.* incidents of violence or threat of violence inside or in the immediate vicinity of the licensed premises involving patrons of the premises, and 4 incidents of unlawful activity at the premises or related to Licensee's exercise of the license privilege. Licensee does not argue (as did the licensee in *Felipe's Finest Mexican & Seafood Restaurant*) that there was a sufficient break in the timing of the serious incidents such that the problems at the licensed premises were not persistent. But, even if Licensee had raised this contention, under the circumstances in this case, the 25 serious problems that occurred between February 21, 2015 and February 19, 2017 nevertheless constitute a history of serious and persistent problems.¹⁷ The violation of ORS 471.315(1)(c) has been proven.

¹⁷ The original Notice of Proposed License Cancellation, issued August 9, 2016, alleged a history of serious and persistent problems over a 16 month period, between February 21, 2015 and June 26, 2016. Even if the analysis was limited to that time frame, the Commission has proven the violation of ORS 471.315(1)(c). During that 16 month period, there were 20 serious incidents: 18 disturbances involving violence or threat of violence and two instances of unlawful activity.

2. Willingness and Ability to Control the Premises

Having found that Licensee has a history of serious and persistent problems, the next issue is whether there is a basis for mitigation. As noted above, under ORS 471.315(1)(c), mitigation may be based on a licensee demonstrating a “willingness and ability to control adequately the licensed premises and patrons’ behavior in the immediate vicinity of the premises which is related to licensee’s sale or service of alcohol under licensee’s exercise of the license privilege.”

Where a licensee has made such a showing, the Commission has mitigated the penalty from cancellation to a suspension or fine. *See, e.g., Don’s Dugout*, Final Order at 18 (subsequent to the period charged in the notice, the licensee implemented a control plan, removed lottery machines, and made operational changes that significantly reduced the number and frequency of problems at the premises); *Girtle’s Restaurant & Lounge* (OLCC Final Order, 08-V-079, December 2009) at 19-20 (although there were a few serious problems at, or related to, the premises after the history was established, these problems were more sporadic than persistent and the licensee went several months without having any serious incidents); *Downtown Deli & Greek Cusina*, (OLCC Amended Final Order, 08-V-028, October 2009) at 23-25 (where there was a several month gap between serious problems and an overall decrease in the need for police service at the licensed premises, the licensee established a willingness and ability to control the premises through operational changes and reduced patron capacity). Similarly, in the licensing context (under ORS 471.313(5)), the Commission has granted renewal of a license with restrictions where the licensee demonstrated the willingness and ability to control the premises and patrons’ behavior in the immediate vicinity of the premises. *Cabana Club Café & Grill* (OLCC Final Order, 03-L-010, April 2005); *see also Silver Lace Club* (OLCC Final Order, 10-L-001, February 2011).

The Commission will consider a licensee’s security efforts, including taking appropriate steps in dealing with problem persons by refusing service and/or by removing them from the premises in evaluating the willingness and ability to control the problems associated with the licensed premises. *Don’s Dugout*, Final Order at 17-18; *Downtown Deli & Greek Cusina*, Amended Final Order at 24, n. 11; *Girtle’s Restaurant & Lounge* Final Order at 19, n. 8; *Cabana Club*, Final Order at 21.

In this case, Licensee received a Public Nuisance letter from the Chief of Police in mid-August 2015 directing Licensee to take immediate steps to abate the assaults and disorderly conduct occurring at the licensed premises. A week later, Licensee changed security providers, opting to go with Hopkins and Cowboy Security. Five or six weeks after that, on October 4 and 9, 2015, respectively, there were two disturbances in the vicinity of the licensed premises related to Licensee’s sale and service of alcohol. In both instances, intoxicated patrons engaged in disorderly conduct outside the premises. Two and a half months after that, on December 27, 2015, a patron was knocked unconscious inside the premises and other patrons were injured in physical fighting. Licensee’s security did not contact the police or medical responders in response to this incident. Three weeks later, on January 16, 2016, a patron was injured inside the premises when she was hit in the head by a glass thrown by a patron with whom she had been physically fighting just moments before. And, less than four months after that, Licensee had a

series of incidents (on April 10, May 8, May 14, and May 15, 2016, respectively) that resulted in the arrest of intoxicated patrons. Licensee's failure to abate patrons' criminal behavior prompted Chief Henslee to issue a second Public Nuisance letter on May 16, 2016.

On June 30, 2016, Licensees Antonio and Elizabeth Cisneros met with OLCC Inspector Oldham and Acting Regional Manager Navine to discuss public safety concerns associated with the licensed premises. Licensees complained their business was being singled out by the Chief and praised Hopkins's approach to security at the premises. Licensees then identified measures they had recently implemented to control the premises and patrons' behavior in the immediate vicinity of the premises, including closing at 1:30 a.m., encouraging patrons to disperse slowly as the night wound down, and denying entry to visibly intoxicated persons. Over the next six months, while there were no reported disturbances (violent incidents) associated with the licensed premises, Licensee had two additional serious problems of a different nature, violations involving minors. In late October 2016, a minor in an area of the premises prohibited to minors and, on November 19, 2016, employee Ruelas Cisneros served a beer to a minor decoy.

Violent incidents that occurred in late January and in February 2017 demonstrate that Licensee was not adhering to the control measures outlined during the June 30, 2016 meeting. Indeed, despite the plan to deny entry to visibly intoxicated persons, patrons Arnet and Minthorn were permitted to enter the premises on the night of January 28, 2017 when, by all reports, they were already very intoxicated. And, despite a commitment to close at 1:30 a.m. on weekend nights (so that El Palacio would not be the "last stop") and employ a soft close to encourage patrons to disperse slowly, the evidence establishes that on January 29, 2017 as well as February 19, 2017, the premises remained open until 2:00 a.m. Furthermore, as detailed in Findings of Fact Nos. 47 through 49, when the crowd left the licensed premises at or near closing time on January 29, 2017, patrons were fighting. Police arrived shortly after 2:00 a.m. to chaos and rioting and a crowd of 100 or more in the adjacent parking lot. These circumstances militate against a determination that Licensee has a willingness and ability to control adequately the licensed premises and patrons' behavior in the immediate vicinity of the premises.

Finally, the evidence indicates that Licensee's security has a history of failing to respond appropriately to serious incidents at the premises or in the immediate vicinity of the premises involving patrons going to or exiting from the premises. As examples, no one at the licensed premises called 911 when, on August 9, 2015, patron Gonzalez was being assaulted by other patrons just steps from the premises' front door or when he was readmitted into the premises a short time later bleeding from multiple stab wounds. No one at the licensed premises called 911 when, on December 27, 2015, patron Sullivan was knocked unconscious and remained unresponsive for several minutes. And, on February 19, 2017, no one from the licensed premises called 911 to report the assault on Van Kirk, even though both Hopkins and Faiers saw him beaten and bloody in the adjacent parking lot, and were apprised that he had just been assaulted by someone (likely another patron) upon leaving the premises.

The facts in this case are in stark contrast to those in which the licensee has presented evidence of security responding appropriately to problem incidents by contacting and cooperating with the police. *See, e.g., Downtown Deli & Greek Cusina*, Amended Final Order at 21; *Girtle's Restaurant & Lounge*, Final Order at 19; *Cabana Club*, Final Order at 21.

Consequently, although there have been fewer reported problems at the licensed premises since the meeting with OLCC on June 30, 2016, Licensee has failed to demonstrate a willingness and ability to control the premises.

3. Permitted Minor in Prohibited Area

As Violation Two, the Commission alleged that on October 28, 2016, Licensee violated OAR 845-006-0335(3)(b) by permitting a minor to be in an area of the premises prohibited to minors.

OAR 845-006-0335(3)(b) provides as follows: “No licensee, permittee, or licensee’s employee will permit a minor: * * * (b) To be on licensed premises or an area of the licensed premises prohibited to minors, except as provided in ORS 471.430, 471.480, 471.482, OAR 845-006-0340 and this rule.” For purposes of this rule, “permit” means that the licensee or permittee had knowledge of or had sufficient time and opportunity to detect and determine the minor’s presence at the premises. It is not necessary to show knowledge of the presence of the minor on the premises. A licensee permits a minor to remain if the licensee or permittee had sufficient time and opportunity to detect the minor. *Lava Lanes of Medford* (OLCC Final Order, 04-V-007, February 2005).

Here, the lounge area of the licensed premises has a Number 2 Minor Posting, meaning that no minors are permitted in that portion of the premises. OAR 845-006-0340(5)(b); OAR 845-006-0335(4)(b). The evidence establishes that on October 28, 2016, Licensee’s employee Faiers knew minor Shannon was in the lounge with two others, as he was the bartender on duty who served drinks to the group.¹⁸ Therefore, he permitted minor Shannon to be and remain in the lounge, an area of the premises prohibited to minors. The violation of OAR 845-006-0335(3)(b) has been proven. Pursuant to OAR 845-006-0362,¹⁹ Licensee is responsible for the violation.

¹⁸ As set out in the findings, officers observed a partially consumed blueberry margarita on the bar in front of Shannon. She claimed it was not hers. When interviewed by Officer Herbst that evening, Faiers admitted serving drinks to Shannon and her companions. When interviewed by Inspector Oldham a few days later, Faiers admitted serving Shannon’s companions (who were over age 21) but he denied serving Shannon. (Ex. A36.) At hearing, Faiers denied serving Shannon and denied seeing her with any drinks. For purposes of this violation, however, it need not be determined whether Faiers served or made alcoholic beverages available to Shannon. It is undisputed that he had knowledge of her presence in the lounge area of the premises.

¹⁹ OAR 845-006-0362 provides:

Each licensee may be held responsible for violation of any liquor control law or administrative rule or regulation of the Commission affecting his license privileges and for any act or omission of his servant, agent, employee, or representative in violation of any law, municipal ordinance, administrative rule, or regulation affecting his license privileges.

4. Fail to Verify Age/Minor Decoy

As Violation Three, the Commission alleged that on November 19, 2016, Licensee's employee Ruelas Cisneros failed to verify the age of minor decoy Armando Martinez before serving him an alcoholic beverage in violation of OAR 845-006-0335(1)(a), (b) and (c).

OAR 845-006-0335(1) provides:

(1) Age Verification:

(a) ORS 471.130 requires a licensee or permittee to verify the age of a person who wants to buy or be served alcoholic beverages when there is "any reasonable doubt" that the person is at least 21 years old. The Commission requires a licensee or permittee to verify the age of anyone who wants to drink alcoholic beverages, or is in an area prohibited to minors, if there is reasonable doubt that the person is at least 21 years old. "Reasonable doubt" exists if the person appears to be under the age of 26;

(b) Whenever a licensee or permittee verifies age, he/she must verify it as ORS 471.130 requires (statement of age card or the specified items of identification) and must reject any obviously altered document or one which obviously does not identify the person offering it;

(c) Licensees must require all their employees who sell, serve, oversee or control the sale or service of alcoholic beverages to verify age as subsection (a) of this section requires.

As set out in the findings above, Martinez, who was 19 years old at the time of the decoy operation, also appeared to be his true age at that time. Therefore, reasonable doubt existed as to whether he was at least 21 years old. Before serving the beer to Martinez, employee Cisneros glanced at Martinez's provisional license and then asked Martinez if he was born in 1997. Despite Martinez's affirmative response, employee Cisneros served him a beer.

In *Texaco Star Mart* (OLCC Final Order, 97-V-051, April 1998), the Commission interpreted the language "verify the age of a person" to require that the seller verify that the person is at least 21 years of age. Thus, the Commission will find a violation "even if the seller requested identification before the sale, where the minor produced his valid identification showing that he is a minor." Final Order at 7. In other words, a mistake in reading an identification card or in calculating a person's age does not excuse the violation where the minor presents valid identification showing that he or she is not yet 21 years of age. Based on the Commission's interpretation of OAR 845-006-0335(1)(a)(b)(c), employee Cisneros violated the rule by serving the beer to the minor decoy. And as above, pursuant to OAR 845-006-0362, Licensee is responsible for the violation.

5. Sanction

A violation of ORS 471.315(1)(c) (history of serious and persistent problems) is a

Category I violation. In the absence of mitigating circumstances, the appropriate penalty for a violation of ORS 471.315(1)(c) is cancellation of the license. OAR 845-006-0500; *Mak's Old City Hall Lounge*, Final Order at 29; *Dr. Feelgood's Pub* (OLCC Final Order, June 2009).

A violation of OAR 845-006-0335(3)(b) (minor in prohibited area) is a Category IV violation. Absent aggravating or mitigating circumstances, the standard penalty for a Category IV violation is a seven day license suspension or a civil penalty of \$1,155 for a first violation within two years. A violation of OAR 845-006-0335(1) (failure to verify age) is a Category III violation. Absent aggravating or mitigating circumstances, the standard penalty is a 10 day license suspension or a civil penalty of \$1,650 for the first violation of this type.

In this case, the Commission has proposed cancellation of the license and, under the circumstances, cancellation is warranted. Licensee has not demonstrated a willingness and ability to control the premises and there is, therefore, no basis for mitigation of the standard penalty. Because the Category I violation has been proven and cancellation is appropriate, separate sanctions for the Category III and IV violations are unnecessary.

6. Refusal to Renew License

The Commission has also proposed to refuse to renew Licensee's license pursuant to ORS 471.313(5) based on Licensee's history of serious and persistent problems and/or ORS 471.313(4)(g) based on Licensee's poor record of compliance while licensed.

Under ORS 471.313, the Commission "may refuse to license any applicant * * * if the Commission has reasonable ground to believe any of the following to be true":

(4) That the applicant:

* * *

(g) Did not have a good record of compliance with the alcoholic liquor laws of the state and the rules of the Commission when previously licensed.

* * * * *

(5) That there is history of serious and persistent problems involving disturbances, lewd or unlawful activities or noise either in the premises proposed to be licensed or involving patrons of the establishment in the immediate vicinity of the premises if the activities in the immediate vicinity of the premises are related to the sale or service of alcohol under the exercise of the license privilege. Behavior which is grounds for refusal of a license under this section, where so related to the sale or service of alcohol, includes, but is not limited to obtrusive or excessive noise, music or sound vibrations; public drunkenness; fights; altercations; harassment; unlawful drug sales; alcohol or related litter; trespassing on private property; and public urination. * * * The applicant may overcome the history by showing that the problems are not serious or persistent or that the applicant demonstrates a willingness and ability to control adequately the premises proposed to be licensed and patrons' behavior in the immediate vicinity

of the premises which is related to the licensee's sale or service of alcohol under the licensee's exercise of the license privilege

For purposes of ORS 471.313, the Commission may count as evidence of a poor record of compliance charges that are proved for the first time during the license refusal contested case, as long as the Commission gives reasonable notice of the charges and provides the applicant an opportunity to contest the charges. *Riverside Restaurant & Lounge* (OLCC Final Order, 94-L-008, December 1996).

A poor record of compliance may be overcome as a ground for refusal where the evidence shows that despite the violation record, the licensee would not be a poor risk for future compliance with the alcoholic beverage laws. *See, e.g., Don's Dugout*, Final Order at 19 (license renewed with restrictions despite licensee's history of serious and persistent problems based upon changed circumstances and the licensee demonstrating a willingness and ability to control the licensed premises). The burden is on the licensee to demonstrate that it is a good candidate for future compliance with the liquor laws. *See Dad's Restaurant & Lounge* (OLCC Final Order, 06-V-029, December 2007).

Here, as discussed above, the Commission has proven that Licensee had a history of serious and persistent problems at the licensed premises dating back to February 2015. This history, including the two violations involving minors, also constitutes a poor record of compliance, and justifies the Commission's refusal to renew the license under both ORS 471.313(5) and (4)(g).

Licensee argued it is committed and willing to make changes, but did not propose any additional operative changes. Furthermore, as discussed above, despite purportedly implementing certain measures designed to control the premises and patrons' behavior, Licensee did not present evidence to establish that employees and security staff were adhering to these measures. In fact, the evidence shows otherwise, as Licensee did not start closing earlier on weekend nights, did not consistently deny entry to visibly intoxicated persons, and did not employ a soft closing to shepherd patrons out the door. Licensee also did not demonstrate a willingness to notify the police of serious incidents involving patrons occurring inside, or in the immediate vicinity of the premises. On this record, Licensee has not overcome the refusal to renew the license by demonstrating it is a good candidate for future compliance with the liquor laws. Accordingly, the Commission is entitled to refuse to renew the license.

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FINAL ORDER

The Commission orders that the Palace Dining LLC, Antonio Cisneros, Managing Member, and Elizabeth Cisneros, Member, dba El Palacio violated ORS 471.315(1)(c), OAR 845-006-0335(3)(b), and OAR 845-006-0335(1)(a), (b) and (c).

The Commission further orders that the Full On-Premises Sales License held by Palace Dining LLC, Antonio Cisneros, Managing Member, and Elizabeth Cisneros, Member, dba El Palacio shall be CANCELLED.

The Commission further orders that the application to renew the Full On-Premises Sales License held by Palace Dining LLC, Antonio Cisneros, Managing Member, and Elizabeth Cisneros, Member, dba El Palacio shall be REFUSED.

It is further ordered that notice of this action, including the reasons for it, be given.

Dated this 1st day of August, 2017

/s/ Steven Marks
Steven Marks
Executive Director
OREGON LIQUOR CONTROL COMMISSION

Mailed this 1st day of August, 2017

THIS ORDER IS EFFECTIVE AT 7:00 AM ON THE 4th DAY OF August, 2017.

NOTICE: You are entitled to judicial review of this Order. Judicial review may be obtained by filing a petition for judicial review within 60 days from the service of this Order. Judicial review is pursuant to the provisions of ORS Chapter 183.