

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

In the Matter of the Full)	FINAL FINDINGS OF FACT
On-Premises Sales License Held By:)	CONCLUSIONS OF LAW
)	AND ORDER
Scherer Enterprises, Inc.)	
Mary Scherer, Pres./Dir./Stockholder)	
Robert Welch, Vice Pres.)	
dba SILVER LACE CLUB)	OLCC-10-L-001
(fka STABLES BAR & GRILL))	
414 Main Street)	
Springfield OR 97477)	

HISTORY OF THE CASE

On February 17, 2010, the Oregon Liquor Control Commission (OLCC or Commission) issued a Notice of Proposed Refusal to Renew License to Scherer Enterprises, Inc., Mary Scherer, President, Director and Stockholder and Robert Welch, Vice President, dba Stables Bar and Grill.¹ The Notice proposed to refuse to renew Licensee’s license based upon an alleged history of serious and persistent problems involving disturbances or unlawful activities either in the premises or involving patrons of the establishment in the immediate vicinity of the premises, a violation of ORS 471.313(5) and 471.292(1)(c). Licensee timely requested a hearing.

The hearing request was referred to the Office of Administrative Hearings on March 11, 2010, and assigned to Senior Administrative Law Judge Alison Greene Webster.

On August 13, 2010, the Commission issued an Order Granting Party Status to the City of Springfield, Oregon. On August 19, 2010, the Commission issued an Amended Notice of Proposed Refusal to Renew License and Notice of Proposed License Cancellation. The Amended Notice listed additional alleged problem incidents and charged Licensee with two violations, making a false representation or statement in violation of ORS 471.425(1) and permitting disorderly activities in violation of OAR 845-006-0347(2)(a). On October 11, 2010, the Commission issued a second Amended Notice of Proposed Refusal to Renew License and Notice of Proposed License Cancellation.

The hearing was held in Eugene, Oregon on October 12 and 13, 2010 before Administrative Law Judge Webster. OLCC was represented by Case Presenter Kelly Routt. Licensee was represented by Attorney Duke Tufty. The City of Springfield was represented by Attorney Mary Bridget Smith.

OLCC called the following witnesses: OLCC Manager Pete O’Rourke; OLCC Inspector David Green; OLCC Inspector Christian Hoffman; Oregon State Trooper Kyle Elmenhurst; Springfield Police Officers Brian Antone, Todd Bezates, Marco Espinoza, David Grice, Chris

¹ In May 2010, while this action was pending, Licensee changed its trade name to Silver Lace Club.

Krieger, Mike Massey, Kyle Potter and Richard Smith; Former Springfield Police Officer Matthew Jacobsen; and Retired Springfield Officer Tom Maloney.

Licensee called corporate principals Mary Scherer and Robert Welch to testify on its behalf, along with Richard Welch.

The City of Springfield called Springfield Police Chief Jerry Smith and Michael Harman, City of Springfield Services Bureau Manager, as witnesses on the City's behalf.

The record remained open for written closing arguments, and closed on December 6 2010, upon receipt of OLCC's Rebuttal Closing Argument.

The Administrative Law Judge considered the record of the hearing and the applicable law and issued a Proposed Order mailed December 27, 2010.

Staff filed Comments on the Proposed Order on January 11, 2011. City of Springfield filed Exceptions to the Proposed Order on January 11, 2011. The Administrative Law Judge responded to Staff's Comments and City of Springfield's Exceptions on January 20, 2011.

On February 18, 2011, the Commission considered the record of the hearing, the applicable law, the Proposed Order of the Administrative Law Judge, Staff's Comments on the Proposed Order, City of Springfield's Exceptions to the Proposed Order and the Administrative Law Judge's Response to Staff's Comments and City of Springfield's Exceptions. Based on this review and the preponderance of the evidence, the Commission enters the following:

EVIDENTIARY RULINGS

OLCC's Notice of Proposed Refusal to Renew License, the Amended Notice and the second Amended Notice were received as Pleadings A through C.

OLCC Exhibits A1 through A35, City of Springfield Exhibits C1 through C8 and Licensee's Exhibits P1 through P9, P11 and P12 and P24 and P25 were admitted into the record. Licensee's Exhibits P10 and P13 through P23 were withdrawn.

ISSUES

1. Whether there is a history of serious and persistent problems at Licensee's premises, based upon incidents occurring between December 11, 2008 and February 18, 2010. ORS 471.313(5).
2. If so, whether Licensee has demonstrated a willingness and ability to control the premises. ORS 471.313(5).
3. Whether Corporate Principal Scherer made a false representation or statement to the Commission to induce or prevent action by the Commission in violation of ORS 471.425(1).

4. Whether, on or about August 28, 2009, Licensee permitted disorderly activity on the licensed premises or in areas the licensee controls that are adjacent to or outside the premises in violation of OAR 845-006-0347(2)(a).

5. Whether the Commission has grounds to refuse to renew Licensee's license under ORS 471.313(5) (history of serious and persistent problems), ORS 471.313(4)(b) (false statement) or ORS 471.313(4)(g) (poor record of compliance with the liquor laws of this state while licensed) and, if so, whether Licensee has shown good cause to overcome the Commission's refusal to renew the license.

FINDINGS OF FACT

1. Scherer Enterprises, Inc., with Mary Scherer as President, Director and Stockholder, was granted a Full On-Premises Sales license at the premises now known as the Silver Lace Club (formerly known as Stables Bar & Grill), located at 414 Main Street, Springfield, Oregon on April 3, 2008. As of January 25, 2010, Scherer's son, Robert Welch, was added to the license as Vice President of Scherer Enterprises. On May 11, 2010, Licensee changed the premises name from Stables Bar & Grill to Silver Lace Club. (Ex. A1.)

2. The licensed premises is located in what historically has been a high crime area in downtown Springfield. From December 1, 2008 to February 2010, the 400 block of Main Street had the highest number of calls for police service and the most warrant arrests and drug arrests in the downtown area. (Exs. C1, C2 and C4; test. of Harman.) Just to the east of the licensed premises is another licensed liquor establishment, the 420 Club, located at 420 Main Street. There are (or were in 2008 and 2009), other licensed premises in the near vicinity, including Jim's Landing, a block and a half to the west on Main Street and the Brick House, a gentlemen's club owned by Scherer and her other son, Richard Welch, around the corner on 4th. (Ex. C1.) Historically, and at all times pertinent to this matter, there have been more calls for service and more reported crimes at the 420 Club than at the licensed premises at 414 Main Street. (Test. of Harman; test. of J. Smith.)

3. On the night of December 11, 2008, a Springfield police officer was dispatched to the licensed premises on a reported assault. A patron at the premises reported that, as he was playing video poker, an unknown black man punched him in the head. The patron said that the punch knocked his head into the video poker machine and left him with a bloody lip. The patron added that an unknown female offered to call the police on his cell phone, and then took the phone but did not call the police. The patron also complained that the unknown man and woman cashed out the patron's video poker money and left the premises before the officer arrived. Despite the patron's description of the suspects and their car, the police were unable to locate them. (Ex. A6; test. of R. Smith.)

4. On the night of December 16, 2008, a Springfield police officer was dispatched to the licensed premises on a reported assault. Upon arrival, the officer contacted a female patron who reported that she was attacked by a woman because the patron owed money to a third person. The patron identified her assailant. She added that the female assailant hit her in the face a few

times and bloodied her nose before she was able to get the assailant in a head lock and drag her to the ground. An officer contacted the suspected assailant in the Brick House, another licensed establishment around the corner. The suspect denied involvement in the fight and claimed that she had been at the Brick House all night, but Brick House staff advised the officer that she had only been there for about 10 or 15 minutes. (Ex. A7; test. of R. Smith.)

5. On December 19, 2008, OLCC received an anonymous complaint about minors being allowed to drink at the licensed premises, and minors entering and drinking after hours. The complainant also reported that members of an outlaw motorcycle club known as the Mongols had meetings at the premises and at least one of the members carried a handgun. An OLCC inspector documented the complaint, but OLCC did not investigate further. (Test. of Hoffman; Ex. A8.)

6. In early January 2009, Robert Welch assumed the day-to-day management duties at the licensed premises at the request of his mother, corporate principal Scherer. Prior to that date, Welch's sister (Scherer's daughter) had been managing the premises. Welch took over as manager with the intention of turning the business around, getting rid of problem patrons and changing the business' clientele. Welch instituted new policies to better control the premises and the area around the premises. Welch adopted a "no loitering" policy and began to police the outside area around the premises. He also adopted a no drug policy and let it be known that patrons who brought drugs into the premises would be detained and arrested. He began an "86" list and excluded problem persons from the premises. He also advised the transients and street drinkers who frequented the area not to loiter in front of the premises. He welcomed police visits and bar checks. (Test. of Welch.)

7. On the evening of February 8, 2009, an intoxicated female who was a known transient in the area, Shawn Kubik, entered the premises carrying a bag of items and an opened alcoholic beverage. Welch approached her and told her to leave because she was not welcome in the premises. Kubik became belligerent and disorderly and refused to leave. With the assistance of other patrons, Welch escorted Kubik from the premises. On the way through the front door, Kubik kicked the door frame, causing damage. Once outside the premises, Kubik kicked and bit Welch. The police were called and Welch and a patron held Kubik down on the sidewalk until an officer arrived. The officer arrested Kubik for Trespass, Criminal Mischief and Disorderly Conduct. (Ex. A9; test. of Massey; test. of Welch.)

8. On the evening of March 16, 2009, Licensee's on duty bartender saw a female patron smoking methamphetamine from a pipe in the premises' restroom. The bartender confronted the patron, who immediately washed off the pipe in the sink and dumped it in the garbage can. In accordance with Licensee's no drug policy, the bartender called the police and detained the patron in the bathroom until an officer arrived. The officer contacted the patron, who appeared jittery and exhibited other signs of recent methamphetamine use. The officer found the pipe in the garbage can and a small baggie of methamphetamine on the bathroom floor, near the toilet. The officer arrested the patron for unlawful possession of methamphetamine. (Ex. A10; test. of Antone; test. of Welch.)

9. On the night of April 6, 2009, Springfield officers were dispatched to a fight outside the licensed premises. As an officer approached, he saw a group of about 20 people out front. Some were yelling. One person, a black male later identified as Christopher Green, was walking away. The officer noted that two women (later identified as Nicole Leishman and Misty Schneider) and a black male (later identified as Jonathan Kelly) quickly walked into the 420 Club. The officer contacted Jason Davis, who was beaten and bloody. Davis reported that Leishman, Schneider, Green and Kelly were creating a disturbance outside the premises and that, when they attempted to enter the premises, he and other patrons stepped in to tell them to keep their disorderly conduct outside. Davis reported that as he was telling the group to leave, Green punched him and Leishman scratched him. Officers located Kelly and Green in the area of 6th and B Street and Leishman and Schneider in the alley behind the 420 Club. Green was arrested on charges of Assault, Disorderly Conduct and Criminal Trespass, Kelly (who had previously been "86'd" from the licensed premises) on charges of Disorderly Conduct and Criminal Trespass, and Leishman on charges of Assault. (Ex. A11; test. of Grice.)

10. On the night of April 8, 2009, Jack Dugger, the owner of 420 Club, entered the licensed premises to speak with Welch. Welch and Dugger had a heated discussion at the bar, during which Dugger yelled at Welch, "Don't tell me how to run my business." Welch told Dugger to leave and Dugger walked out. Another patron, Raymond Destin, followed Dugger outside and told Dugger that he was concerned about the drug activity going on at Dugger's 420 Club. Dugger told Destin to "mind his own business." The verbal dispute between Dugger and Destin escalated and culminated with Dugger smacking Destin in the ears with both hands. Destin walked back into the licensed premises and asked Welch to call the police, because he wanted to report the assault. Welch did so. An officer responded and investigated the assault. The officer talked with Destin, Dugger and a female bystander who witnessed the incident. The officer then arrested Dugger for Assault. (Ex. A12; test. of Espinoza; test. of Welch.)

11. On April 24, 2009, OLCC Inspector Lokietz met with Scherer and Welch to discuss illegal activities going on out in front of the licensed premises and the 420 Club next door. The inspector warned that, because of these problems outside the premises, the City of Springfield was considering recommending the denial of renewal of Licensee's liquor license along with the 420 Club. Scherer and Welch indicated that they understood the seriousness of the problems and pledged to change their operations to reduce the criminal activity and better control the area. (Ex. A13.)

12. On the night of May 12, 2009, a Springfield officer saw Brian Cassidy standing in front of the licensed premises. The officer had information that Cassidy was involved in dealing drugs. Dispatch advised that Cassidy had outstanding warrants for his arrest. Cassidy ran into the licensed premises as the officer drove by. A short time later, the officer contacted Cassidy as he was playing video poker inside the licensed premises. Cassidy initially provided the officer with a false name, but later admitted his true identity. As the officer took Cassidy into custody, Cassidy admitted to having drugs on his person. The officer searched Cassidy's pockets and located about \$20 worth of methamphetamine in the coin pocket of his jeans. Cassidy was arrested for providing false information to the police and possession of methamphetamine. (Ex. A14; test. of Potter.)

13. On the night of May 22, 2009, an officer on routine patrol on Main Street saw a woman (Vanessa Hayles, a known transient in the area) run out from the licensed premises being chased by a man (Michael Giseselman, another known transient). Giseselman caught Hayles in front of 420 Main Street. He grabbed her hair and shoved her into the metal bars covering the window. Hayles got away from Giseselman and ran into the 420 Club. Giseselman ran into the bar after her. The officer went into the 420 Club and located Hayles. She advised that Giseselman had punched her in the face and then ran out the back door. Hayles advised the officer that she and Giseselman had been arguing inside Stables, that she ran to get away from him but he followed her into the 420 Club. Hayles said she did not want medical attention and did not want to press charges. The following day, the officer located Giseselman with Hayles on 9th Street and arrested him for Assault. (Ex. A15; test. of Potter.)

14. At about 3:13 a.m. on May 28, 2009, Carrie Hill, a patron of the licensed premises called the police to report that someone had slashed the tires on her car while the car was parked on Main Street in front of the premises. An officer responded to the premises and contacted Hill. Hill said she suspected that Jamie O’Conner, a patron at the 420 Club, was the one who slashed the tires. The officer contacted O’Conner at the 420 Club. O’Conner said she did not have a problem with Hill and denied any wrongdoing. (Ex. A16; test. of Potter.)

15. In June 2009, Licensee submitted a License Renewal Application to the Commission. On June 15, 2009, the Commission granted Licensee the conditional authority to continue to operate while it investigated and considered the renewal application. (Exs. A2 and A3.) On July 20, 2009, the City of Springfield voted to withhold a recommendation on Licensee’s renewal application. (Ex. A4.)

16. On the night of August 12, 2009, a patron’s backpack was stolen from the premises. Another patron known as “Cage Fighter John” was the suspected culprit. (Ex. A5; test. of Welch.)

17. On the night of August 28, 2009, Welch excluded Timothy Fitzgerald and others from the premises because he had previously seen the group smoking marijuana outside in the vicinity of the premises.² Later in the night, Fitzgerald returned to the premises in an intoxicated condition. He approached Welch at the bar, tapped him on the shoulder, and asked to talk to him outside. Fitzgerald wanted to change Welch’s mind about excluding Fitzgerald and his friends from the licensed premises. Welch and Fitzgerald went outside to the front sidewalk. Fitzgerald asked Welch to reconsider his decision, but Welch refused to do so. The conversation became heated. At one point, Fitzgerald cocked his arm back as if he was going to punch Welch. Welch responded by putting his arm up to block the punch. Welch made contact with Fitzgerald’s arm and pushed him away. The push caused the intoxicated Fitzgerald to lose his footing and

² Previously, Welch had agreed to let Fitzgerald hold pool tournaments at the licensed premises. But, after seeing Fitzgerald and his friends smoking marijuana in the vicinity of the premises, Welch also advised Fitzgerald that he did not want him holding pool tournaments at Stables. Welch explained to Fitzgerald that he and his friends were no longer welcome there. (Test. of Welch.)

stumble back off the curb. Fitzgerald fell off the curb to the ground. A Springfield officer responded, interviewed Fitzgerald, Welch and witnesses to the incident. Based on Welch's complaint, the officer arrested Fitzgerald for Trespass. (Ex. A17; test. of Krieger; test. of Welch.)

18. On the night of October 26, 2009, patron Randal Baker began grabbing at glasses behind the bar. Welch was on duty and asked Baker several times to refrain from touching the glasses. Welch also told Baker to leave. Baker continued to grab for the glasses and did not leave. Welch came out from behind the bar to escort Baker from the premises. Baker went to grab a chair, prompting Welch to put Baker into a head lock. Baker struggled to get out of the head lock. He put his hands on Welch's face and his fingers in Welch's mouth. Welch bit down on Baker's fingers. Welch had his bartender call the police. Officers responded and arrested Baker for Assault. (Ex. A18; test. of Maloney; test. of Welch.)

19. On November 6, 2009, Cage Fighter John came into the licensed premises and took a hammer to a bicycle belonging to another patron, Clay. Clay did not have Licensee's permission to park his bicycle in the premises. As a result of this incident, however, the on-duty bartender permanently "86'd" both John and Clay from the premises. (Ex. A5; test. of Welch.)

20. In mid-December 2009, OLCC Inspector David Green contacted Scherer and Welch regarding Welch's relationship to the licensed business. Inspector Green advised that because Welch was managing the day-to-day operations of the business and was not being paid compensation for his services, he was deemed, under the Commission's administrative rules, to have an interest in the business. Inspector Green recommended that Welch be added to the license to avoid Licensee being charged with having an unauthorized interest in the business. (Ex. 30; test. of Green.)

21. On the evening of December 21, 2009, Welch called the police for assistance in removing an unwanted person from the premises. A person who had previously been "86'd" from the premises was refusing to leave. An officer responded and arrested Joseph "Pineapple Joe" Smith for Criminal Trespass. (Ex. A19; test. of Jacobsen.)

22. On the evening of December 23, 2009, Welch went to the Springfield Police Department to report a criminal trespass that had occurred at the licensed premises earlier in the day. Welch advised the officer that Randy Baker, who Welch had previously trespassed from the property, was entering the premises to speak to the bartender (who was Baker's ex-girlfriend). In investigating the claimed trespass, the officer contacted the bartender, who confirmed that although she knew Baker was not supposed to be on the property, she would allow Baker in the premises briefly when Welch was not around. (Ex. A20; test. of Espinoza.)

23. On the afternoon of January 8, 2010, Welch contacted the police for assistance in removing an unwanted person from the premises. An officer responded and contacted Welch. He directed the officer to the unwanted person, Tonya Walton, who was loitering in front of the premises. Welch reported that he had repeatedly asked Walton to leave the area, but she refused to do so. The officer then contacted Walton, who acknowledged she had been told to leave. The

officer cited Walton for Criminal Trespass and Possession of Less Than an Ounce of Marijuana. (Ex. A21; test. of Welch.)

24. In January 2010, Licensee named Welch as a Vice President of Scherer Enterprises, Inc. Welch was added to the liquor license as a corporate principal and the server education designee. (Ex. A31.) Welch continued to perform the day-to-day management duties of the licensed premises. Eventually, Welch also took over the bartending duties. Welch is not, and has never been, compensated for his services to the licensed business. (Test. of Welch.)

25. Also in January 2010 Welch submitted an application to the Oregon Lottery to become a Video Lottery Key Person for the licensed premises. On that application, Welch indicated that he had not previously been convicted, arrested, detained, charged, indicted or cited for any criminal offense. (Ex. A28 at 5.)

26. On February 12, 2010, Welch was cited for False Swearing in violation of ORS 162.075 because the Personal Disclosure form he submitted to the Oregon Lottery in connection with his Video Lottery Key Person application was incomplete and inaccurate. Welch did not disclose several arrests, including some dating back to 1975 when he was a juvenile. (Ex. A28.) Welch subsequently pled no contest to the False Swearing charge, which was reduced to a violation from a Class A misdemeanor. (Test. of Welch.)

27. On the night of February 18, 2010, two patrons, a husband and wife, Derrick and Martina Dubell, began arguing inside the licensed premises. The on-duty bartender told Derrick to leave the bar but he refused. Derrick got angry and hit Martina in the face. Several patrons got involved, and Derrick hit another female patron before he and Martina were escorted outside. The couple continued to argue outside the premises. The police were called and arrived just as the couple drove off. An officer stopped their vehicle on A Street. Martina, the driver, was arrested for DUII. Martina initially denied that Derrick hit her and he was released from the stop location. After arrest, Martina admitted that Derrick hit her. Other witnesses confirmed that Derrick had struck Martina and another female before leaving the bar. An officer arrested Derrick the following day on charges of Trespass and Disorderly conduct. (Ex. A22; test. of Potter.)

28. In May 2010, the City of Springfield notified the Commission that the City Council had voted to deny recommendation of liquor license renewals to three downtown businesses, Licensee, Club 420 and Jim's Landing "as a result of the persistent and continuing illegal activities, environment and the high level of police assistance associated with these three businesses." (Ex. A24.)

29. Also in May 2010, Licensee changed its trade name and its entertainment format. The premises became a gentlemen's club offering nude female dancers. In connection with the new name and entertainment format, Welch added a stage and blue lights. Licensee increased drink prices and eliminated happy hour. The price of beer increased from \$1.50 to \$3.50 and the price of well drinks increased from \$3.50 to \$4.00 or from \$4.00 to \$4.75. Licensee also began charging \$3.50 for non-alcoholic drinks including water and soda. Welch's intent, in changing

the entertainment format and increasing the drink prices, was to “price the bad element out” of the licensed premises. (Test. of Welch.)

30. Licensee also updated its house policies subsequent to its trade name and entertainment format change. The current policies include the following:

- Drink sizes: Cocktails may contain no more than 2 ounces of alcohol, beer no more than 16 ounces and wine no more than 5 ounces.
- Drink limits: Patrons may only have one drink at a time except for beer backs served in small glasses (under 4 ounces).
- Loitering is prohibited: Persons loitering outside the premises will be asked to leave.
- Area immediately adjacent to the premises: Employees will monitor the area immediately adjacent to the premises regularly to ensure no suspicious or unusual activity is occurring.
- Bathrooms: Employees will patrol the restrooms regularly for any suspicious or unusual activity.
- Zero tolerance for criminal behavior occurring in or near the premises, including the use or sale of drugs.
- No service to minors or visibly intoxicated persons.
- Full cooperation with law enforcement and the OLCC.

(Ex. P2.)

31. In June 2010, Scherer submitted Licensee’s Renewal Application to the Commission. On the application, Scherer answered “None” to Operational Question (3), which asks:

Please list all arrests or convictions for any crime, violation, or infraction of any law during the last 18 months even if they are not liquor related for anyone who holds a financial interest in the licensed business. Attach additional sheet of paper to back of form if needed.

(Ex. A25, emphasis in original.)

32. Before submitting the renewal application, Scherer discussed the application’s Operational Questions with her other son. Scherer responded “None” to Question (3) because Welch did not own any shares in the licensed corporation, and Scherer believed that meant Welch did not have any “financial interest” in the licensed business. (Test. of Scherer; test. of Richard Welch.)

33. On June 23, 2010, the Commission granted Licensee the conditional authority to continue to operate while it investigated and considered the renewal application. (Ex. A26.)

34. On July 27, 2010, Inspector Green called Scherer on the telephone and asked her why she did not include Welch’s arrest for False Swearing on Licensee’s 2010 Renewal Application to the Commission. Scherer responded that she “spaced it off” and called it a

“stupid mistake.” She explained that her son Richard filled out the form, and added that as a result of Welch’s conviction, the Lottery had pulled the video lottery machines from the premises. (Ex. A27; test. of Green.)

35. The Commission charged Licensee with making a false statement to the Commission in violation of ORS 471.425(1) based on Scherer’s failure to list Welch’s False Swearing arrest and plea on the 2010 Renewal Application. On August 20, 2010, Scherer called Inspector Green to discuss the charged violation. Scherer asserted that because Welch did not own shares in the licensed corporation, she did not believe she was under any obligation to report his information on the Renewal Application. (Ex. A32; test. of Green.)

36. Meanwhile, on the afternoon of July 19, 2010, OLCC Regional Manager Peter O’Rourke was driving along Main Street when he saw a large crowd on the sidewalk in front in the licensed premises and Club 420.³ The crowd had gathered around two women who were yelling at each other. When the two women began physically fighting, others stepped in and separated them. One of the two went into Club 420 while the other, accompanied by two men, went into the licensed premises. O’Rourke asked Inspector Hoffman to follow up with Licensee about this incident. (Ex. A33; test. of O’Rourke.)

37. In August 2010, Inspector Hoffman asked Welch about the two women Regional Manager O’Rourke saw fighting out front of the licensed premises on July 19th. Hoffman warned Welch about visibly intoxicated persons and disorderly patrons. Welch was unaware of the incident and asserted that the women were not patrons but the “tweaks outside.” (Ex. A33; test of Hoffman.)

38. On the night of September 28, 2010, Springfield officers were dispatched to the licensed premises on a reported fight in progress. An officer arrived on scene almost immediately. He saw a man, Donald Crawford, leaving the licensed premises with a woman following quickly behind. He saw the two get into a large truck parked on Main St. just a block to the west. Crawford got into the driver’s seat. The officer attempted to stop the truck to contact Crawford once he saw that Crawford was bleeding from the nose. The officer suspected that Crawford had been involved in the reported fight. Crawford veered in the officer’s direction, as if to run over the officer, and then abruptly stopped. After an investigation, Crawford was arrested for DUII and Trespass. (Ex. A34; test. of Bezates; test. of Grice.)

39. Crawford is a very large, stocky man, weighing approximately 400 pounds. Earlier in the night, Welch had denied service to Crawford and a group of friends because members of Crawford’s group appeared intoxicated. The group left, but Crawford returned to the bar later in the night, acting hostile and confrontational towards Welch. Crawford grabbed a chair as if to

³ The Proposed Order stated that Inspector Hoffman observed the fight. The evidence in the record shows that it was Regional Manager O’Rourke who observed the fight and subsequently asked Inspector Hoffman to follow up with the Licensee. The ALJ agreed in her Response to Exceptions and Comments that this finding of fact and Finding of Fact 37 should be modified accordingly.

strike Welch, but Welch knocked Crawford to the ground and put him into a choke hold. Welch released his hold on Crawford and asked him to leave the bar after a patron, Billy Abshire, called the police on Welch's request. Crawford exited the premises as the officers responded. (Ex. A34; test. of Bezates; test. of Grice; test. of Welch.)

40. In the past year, the crime rate in the City of Springfield has dropped. The crime rate in downtown, a historically high crime area, has also dropped. In approximately February 2010, the City of Springfield opened a municipal jail facility on 4th Street in downtown Springfield, a few blocks from the licensed premises. The presence of this jail facility is likely one reason for the reduction in criminal activity in downtown Springfield. (Test. of J. Smith.)

41. Since Licensee changed its trade name and its entertainment format in May 2010, Licensee's business dropped significantly. Officers have stopped in to do bar checks on the licensed premises and found only a handful of patrons inside. Welch has adhered to the premises' house policies and continued to cooperate with law enforcement officers whenever officers visit the premises. (Test. of Welch; test. of Grice; test. of Bezates.)

CONCLUSIONS

1. There is a history of serious and persistent problems at Licensee's premises, based upon incidents occurring between December 11, 2008 and February 18, 2010. ORS 471.313(5).

2. Licensee has demonstrated a willingness and ability to control the premises. ORS 471.313(5).

3. Corporate Principal Scherer did not make a false representation or statement to the Commission to induce or prevent action by the Commission in violation of ORS 471.425(1).

4. Licensee did not permit disorderly activity on the licensed premises or in areas the licensee controls that are adjacent to or outside the premises on August 28, 2009.

5. The Commission has established that Licensee had a history of serious and persistent problems, but the license should be renewed under ORS 471.313(5) based on Licensee's demonstrated willingness and ability to control the premises and patrons' behavior in the immediate vicinity. The Commission does not have a basis to refuse to renew the license under ORS 471.313(b) or (g).

OPINION

1. History of Serious and Persistent Problems

The Commission has proposed to refuse to renew Licensee's license pursuant to ORS 471.313(5) based upon an alleged history of serious and persistent problems at the licensed

premises.⁴ In the October 11, 2010 Amended Notice, the Commission asserted that approximately 17 serious problem incidents occurred inside or in the immediate vicinity of the licensed premises during a 14 month period, from December 2008 to February 18, 2010. The Commission alleged that these problem incidents included fights, altercations and drug activity inside the premises and involved patrons of the premises in the immediate vicinity of the premises. As the proponent of these allegations, the Commission bears the burden to prove the violation. ORS 183.450(2); *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).

ORS 471.313(5) authorizes the Commission to refuse to renew a license application based on a history of serious and persistent problems involving the premises proposed to be licensed. ORS 471.313(5) is substantially similar to ORS 471.315(1)(c), which authorizes the Commission to cancel or suspend any license based on a history of serious and persistent problems at, or in the immediate vicinity of, a licensed premises. Both provisions require that the serious and persistent problems be related to the sale or service of alcohol. The problems may include fights, altercations, harassment, and public drunkenness, among other things. Under ORS 471.313(5), 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.

In interpreting ORS 471.313(5) and ORS 471.315(1)(c), OLCC has found that a history of serious and persistent problems is based on the nature and circumstances of the incidents in each case. Incidents inside the licensed premises count, whether related to sale of alcohol or not. Incidents outside do not count unless the incident is related to the licensee's sale or service of

⁴ ORS 471.313(5) states in relevant part:

The Oregon Liquor Control Commission may refuse to license any applicant under the provisions of this chapter if the commission has reasonable ground to believe any of the following to be true::

* * *

(5) 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 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. Histories from premises currently or previously operated by the applicant may be considered when reasonable inference may be made that similar activities will occur as to the premises proposed to be licensed. 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.

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, will be given little weight, unless the crime is shown to be related to alcohol. *Handy Food Mart* (OLCC, Amended Final Order, 91-L-020, March 1994).

For example, in *DiMarco's Restaurant* (OLCC, Final Order, 04-V-043/04-V-062, October 2005), the Commission found that 11 instances of excessive noise over the course of 10 months, nine disturbances involving violence or threat of violence over the course of 13 months and three other instances of unlawful activity (*i.e.*, public drunkenness linked to the licensee's establishment) constituted a history of serious and persistent problems.

In *La Brisa* (OLCC, Final Order, 91-L-037, December 1992), OLCC found that incidents involving persons intending to go into the licensed premises are related to the exercise of the license privilege and count regardless of whether the persons consumed alcoholic liquor on the premises. In that case, OLCC 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 OLCC presumed that the persons are coming to the premises because the licensee has a license and for the purpose of consuming alcoholic liquor. *Id.*

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 shall be counted among those comprising a history of serious and persistent problems. In so holding, the Commission noted that each incident will be weighed according to its seriousness. The Commission also noted that while such incidents count against the licensee, the licensee's security efforts will also be considered in evaluating the willingness and ability to control the problems associated with the licensed premises. *Id.*, Amended Final Order at 41.

In this case, during the time period in issue (December 2008 to February 2010) there were nine documented disturbances involving violence or threat of violence (fights, altercations, assaults and/or harassment) involving patrons of the licensed premises inside, or in the immediate vicinity of the premises:

- (1) December 11, 2008: A patron was assaulted and robbed while playing video poker. This counts against Licensee as a serious incident because it involved violence and occurred in the premises.
- (2) December 16, 2008: A female patron was assaulted by another female patron inside the premises. This also counts as a serious incident because it involved violence and occurred in the premises.
- (3) February 8, 2009: An unwanted transient became belligerent and disorderly when asked to leave. As a result, she was arrested for trespass, disorderly conduct and criminal mischief. This counts against Licensee as a serious incident because it involved violence and occurred in the premises.

(4) April 6, 2009: Unruly persons who were denied entry into the bar fought with patrons outside the premises. At least one patron was beaten and bloody. Other combatants arrested for assault, disorderly conduct and criminal trespass. This incident counts against Licensee as a serious incident because it involved violence, patrons and persons intending to go into the licensed premises.

(5) April 8, 2009: After a heated discussion with Welch at the bar, Club 420 owner Jack Dugger assaulted a patron outside the licensed premises. This incident counts against the Licensee as a relevant incident because it was related to Licensee's business, it involved violence and a patron of the premises in the immediate vicinity of the premises.

(6) May 22, 2009: A female patron was assaulted by a male patron inside the bar. The male was later arrested for assault. This incident counts against Licensee as a relevant incident because it involved violence and occurred in the premises.

(7) August 28, 2009: A patron created a disturbance while arguing with Welch over being excluded from the bar. As a result, the patron was arrested for trespass based on Welch's complaint. This incident counts against Licensee because it involved Welch, a patron and the threat of violence.

(8) October 26, 2009: A patron created a disturbance inside the bar and then assaulted Welch as Welch physically removed the patron from the premises. The patron was arrested for assault on Welch. This incident counts against Licensee because it occurred in the premises and involved violence.

(9) February 18, 2010: Two patrons, husband and wife, argued inside the premises. The husband got angry and struck his wife. Other patrons intervened and the husband hit another female. The husband was arrested the following day for trespass and disorderly conduct. The wife was arrested for DUII driving away from the premises. This incident counts against Licensee because the disturbance occurred in the premises and involved violence.

In addition to the above disturbances, there have been other serious problems involving unlawful activities in the premises, as follows:

- March 16, 2009: Illegal drug use – A patron was smoking methamphetamine in the restroom. This unlawful activity counts against Licensee because it involved a patron and occurred in the premises. The patron was arrested for unlawful possession of methamphetamine.
- May 12, 2009: Illegal drug possession – A patron came into the premises possessing methamphetamine. This unlawful activity counts against Licensee because it involved a patron inside the premises.

- November 6, 2009: Criminal mischief – A patron took a hammer to a bicycle that was parked inside the premises that belonged to another patron. This incident counts against Licensee because it involved patrons and occurred in the premises.
- August 12, 2009: Theft – A patron stole another patron’s backpack from the premises. This incident, although entitled to little weight because it is a less severe crime, is nevertheless relevant because it occurred inside the premises.
- December 21, 2009: Trespass – Welch called police for assistance in removing an unwanted person from the premises. The patron was arrested for criminal trespass. Although the Commission considers this a less serious incident, it is nevertheless relevant.
- December 23, 2009: Trespass – Welch contacted the police to report that a patron who had been permanently excluded from the premises returned to the premises to contact his ex-girlfriend, the bartender. Again, although a less serious incident, it counts against Licensee.
- January 8, 2010: Trespass – Welch contacted the police for assistance in removing an unwanted person from loitering outside the premises. The unwanted person was arrested for criminal trespass and possession of marijuana.

This record over 14 months, specifically nine disturbances and seven instances of unlawful activity (some less serious than others), constitutes a history of serious and persistent problems under ORS 471.313(5).⁵ See, e.g., *Balzer's Pub & Grill* (five serious incidents within six months constitutes a history of serious and persistent problems); *Rastafarian Private Club* (OLCC, Final Order, 90-V-059, April 1991) (eight serious incidents during a one year period); *Headless Horseman* (seven serious incidents within 13 months); *New Copper Penny Restaurant* (OLCC, Final Order, 04-V-040, October 2005) (eight incidents involving violence or threat of violence in less than seven months); see also *Dr. Feelgood's Pub* (OLCC, Final Order, 08-V-052, -074, June 2009) (11 disturbances involving violence or threat of violence plus six other instances of public drunkenness and/or public urination related to the licensee’s sale or service of alcohol over 13 months).

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 Licensee has demonstrated a willingness and ability to control the premises. As noted above, a licensee can overcome the problem history by demonstrating the willingness and ability to control adequately the premises proposed to be licensed. ORS 471.313(5). The

⁵ The incident on May 28, 2009, in which patron Hill’s car tires were slashed while she was patronizing the licensed premises, does not count against Licensee as a relevant incident because of an insufficient link between the criminal mischief and Licensee’s sale or service of alcohol under the exercise of the license privilege. Hill’s car was parked on a public roadway and not in a parking lot associated with the licensed business and within the Licensee’s control. There is no evidence that the culprit was a patron of the licensed premises.

licensee has the burden of establishing both the willingness and the ability to adequately control the premises. ORS 183.450(2); *Cisco & Pancho's* (OLCC, Final Order, 99-080ES, September 2000).

In the violation context, the Commission has mitigated the penalty from cancellation to a suspension or fine where the licensee demonstrates a willingness and ability to adequately control the premises. *See, e.g., 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). In the licensing context, the Commission has granted renewal of a license with existing 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* (OLCC Final Order, 03-L-010, April 2005).

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. *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, several of the relevant incidents discussed above resulted from Welch's attempts to deal with problem persons by refusing them service or removing them from the premises. Indeed, for the disturbance on February 8, 2009, Kubik, a transient, became belligerent and disorderly because Welch told her she was not welcome in the premises and asked her to leave. Welch and other patrons were escorting Kubik from the premises when she kicked and damaged the door frame and assaulted Welch. Similarly, for the disturbance on October 26, 2009 involving patron Baker, Welch told Baker to leave the premises because Baker was grabbing at glasses behind the bar. Baker became aggressive and threatened violence when Welch tried to remove Baker from the premises. And the disturbance on August 28, 2009 involving patron Fitzgerald also stemmed from Welch's prior exclusion of Fitzgerald and his friends earlier in the night. Fitzgerald returned to the premises wanting to persuade Welch to change his mind. Welch was unwilling to do so. The disturbance ensued when Fitzgerald cocked his arm back at Welch as if to throw a punch.

Furthermore, as to the trespass incidents on December 21, 2009 and January 8, 2010, Welch responded appropriately to the problem by contacting the police for assistance in removing unwanted persons from the premises or from loitering outside the premises. Welch also appropriately contacted the police when, in December 2009, he learned that patron Baker (who he had excluded from the premises since late October 2009) was returning to the premises when Welch was not there. Finally, in the March 16, 2009 incident in which a patron was caught smoking methamphetamine in the premises' restroom, Licensee's employee responded

appropriately (and in accordance with Licensee's no drug policy) by contacting the police and detaining the patron until an officer arrived.

This record shows that Licensee, through Welch and others, has both the willingness and ability to control the premises. Welch has consistently adhered to Licensee's no loitering policy and, as noted above, has called the police for assistance in removing unwanted persons from the immediate vicinity. Welch has reported unlawful activity on the premises and cooperated with law enforcement. And, since May 2010, when Licensee changed its trade name and entertainment format, remodeled the premises and increased drink prices, Licensee has had more success in keeping problem persons out of the licensed premises.

Since the period charged in the Amended Notice (ending on February 18, 2010), Licensee has experienced only a few problem incidents associated with the premises. In July 2010, Inspector Hoffman saw two women fighting on the sidewalk between the licensed premises and Club 420. After the women were separated, one went into Club 420 and the other into the licensed premises. Welch was unaware of this incident until the inspector advised him of it, and it is unclear what Welch or Licensee could have done to avoid the fight or better control the behavior of these unknown persons outside the premises.

On September 28, 2010, officers arrested an intoxicated person (Crawford) for DUII and trespass after Welch denied him service and excluded him from the bar. Welch had denied service to Crawford and his party earlier in the night because the group appeared intoxicated, and when Crawford returned to the bar later in an intoxicated condition, Welch attempted to exclude him again. Although this incident was serious in that it started in the premises, involved Welch and patrons and the threat of violence, there are mitigating factors. Because Welch took appropriate steps to deal with Crawford, a problem patron, this incident demonstrates Licensee's willingness and ability to control the premises.

Since Welch took over the day-to-day management duties at the premises in 2009, Licensee has had the willingness to control the premises. In the past year, Licensee has, overall, also been better able to control the premises and patrons' behavior in the immediate vicinity of the premises. Consequently, as discussed *infra*, Licensee has overcome the history of problem incidents at the premises and the serious problems involving patrons in the immediate vicinity of the licensed premises by demonstrating a willingness and ability to adequately control the premises and patrons' behavior in the immediate vicinity of the premises.

3. Alleged False Statement

The Commission next alleges that Licensee made a false representation or statement to the Commission to induce or prevent action by the Commission in violation of ORS 471.425(1) when, in June 2010, Scherer submitted a license renewal application that did not disclose Welch's arrest for false swearing.

ORS 471.425(1) provides: "No person shall make false representations or statements to the Oregon Liquor Control Commission in order to induce or prevent action by the commission." The Commission alleges that Licensee made an intentional false statement on the June 2010

renewal application because Scherer knew about Welch's February 2010 arrest for False Swearing and did not disclose it in response to Operational Question 3. Licensee, in response, asserts that Scherer did not make a false statement and, even if her statement was technically false, it was not material. Specifically, Licensee argues that Scherer did not disclose Welch's arrest because, by her understanding of the term, Welch did not hold a financial interest in the licensed business.

The first issue to be resolved is whether Licensee did, in fact, make a false statement. As noted above, the renewal application asked Licensee to list all arrests or convictions for any crime, violation or infraction during the last 18 months "for anyone who holds a *financial interest in the licensed business.*" (Emphasis added.) If Welch does not hold a financial interest in the business, then Licensee was not required to list his arrest for False Swearing, and the answer "None" to Question 3 was accurate. Scherer reasoned that because Welch did not own any stock in the corporation, he did not hold a financial interest.

Commission Staff asserts that Welch has a financial interest in the business under OAR 845-005-0311(3), either because he receives no compensation, which constitutes "compensation out of the ordinary" under subparagraph (3)(b) or because he manages the licensed premises other than as an employee under subparagraph (3)(c).⁶

As noted above, OAR 845-005-0311(3) defines the phrase "interest in the business." Based on the provisions of subparagraphs (3)(b) and (3)(c), Welch clearly has an "interest in the business," and therefore he was required to be designated as an individual licensee.⁷ The record

⁶ OAR 845-005-0311 provides as follows:

(1) True name on application: Applications for licenses must specify the real and true names of all persons who own or have an interest in the business proposed to be licensed by the Commission, and these persons or in the case of corporations, a duly authorized officer, must sign the application.

(2) License privileges: The license privileges are available only to the persons specified in the application and only for the premises designated on the license.

(3) Interest in the business: For purposes of section (1) of this rule, the following persons have an "interest in the business":

* * * * *

(b) A person who does not receive any of the profits but receives compensation that is out of the ordinary for the services rendered. "Out of the ordinary" includes both over and under compensations;

(c) Any person or firm who contracts to provide food service or to manage or operate any part of the licensed premises, other than as an employee; * * *

⁷ Pursuant to OAR 845-006-0301, a license issued by the Commission shall include as licensees under a

establishes that he receives no compensation for operating the business and performing the duties of the premises manager. But the renewal application does not ask for arrest and conviction evidence about all persons who have an interest in the business. Rather, it asked for such information about “anyone who holds a *financial* interest in the licensed business.”

The phrase “financial interest in the business” is addressed in OAR 845-005-0311(4) as follows:

ORS 471.757⁸ allows the Commission to deny, cancel or suspend a license if an unlicensable person has any financial interest in the licensed business or place of business. For purposes of ORS 471.757, *financial interest exists if a person may financially benefit or suffer based on the performance of the licensed business.* Examples of persons having a financial interest in the business include:

- (a) Any person who rents or leases property to or for the licensed business;
- (b) Any person who invests or loans money or other property for the licensed business;
- (c) Any person who gives money or property for the licensed business and who
 - (A) Exercises control over or participates in the management of the licensed business; or
 - (B) Is employed by the licensed business; or

single license the individuals or legal entities who own or have an interest in the business as defined in OAR 845-005-0311(3).

⁸ ORS 471.757 provides as follows:

(1) At such times as the Oregon Liquor Control Commission may prescribe and upon forms furnished by the commission, any license applicant or licensee of the commission may be required to submit a sworn statement to the commission showing the name, address and the nature and extent of the financial interest of each person, individual and corporate, having a financial interest in the business operated under the license.

(2) The commission shall review the statement and may refuse to issue a license to any license applicant, or may suspend, cancel or refuse to renew the license of any licensee, when conditions exist in relation to any person having a financial interest in the business or in the place of business which would constitute grounds for refusing to issue a license or for cancellation or suspension of a license if such person were the license applicant or licensee. However, in cases where the financial interest is held by a corporation, only the officers and directors of the corporation, any individual or combination of individuals who own a controlling financial interest in the business and any manager of the business shall be considered persons having a financial interest within the meaning of this subsection.

(d) The spouse or domestic partner of the licensee or license applicant. For purposes of this rule, domestic partners (lower case) are individuals who share the same regular and permanent address and who share joint financial assets, resources, accounts or obligations, such as home ownership, checking or banking accounts, brokerage accounts or health care coverage. Domestic partner (lower case) also includes a “Domestic Partner” (upper case), which means an individual who, along with another individual of the same sex, has received a Certificate of Registered Domestic Partnership pursuant to the Oregon Family Fairness Act.

(Emphasis added.)

According to ORS 471.757 and OAR 845-005-0311(4), Welch did not have a financial interest in the business.⁹ Furthermore, in OAR 845-005-0311(3) and (4), there is a distinction between having an “interest in the business” and having a “financial interest in the business.” Although Welch has an interest in the business through exercising control over, and participating in, the business’ management, he has not, according to the evidence presented, given any money or property for the licensed business. He has invested his time and energy serving as the premises’ manager since January 2009, but has not rented or leased property to the business, invested or loaned money to the business or given money or property to the licensed business. Therefore, Welch does not meet the listed examples of persons having a “financial interest in the business” under OAR 845-005-0311(4). And, given the absence of any evidence that Welch has otherwise financially benefited or suffered based on the performance of the licensed business, it is reasonable to conclude that Welch does not hold a financial interest in the licensed business, as that phrase is used in ORS 471.757 and defined by OAR 845-004-0001(1)(b) and OAR 845-005-0311(4).

In short, because Welch is not one who “holds a financial interest in the business” as described in OAR 845-005-0311(4), Licensee was not required to list Welch’s February 2010 arrest in response to Operational Question (3) on the renewal application. The answer “None” to that question was accurate, because no one holding a financial interest in the licensed business had been arrested or convicted for any crime, violation or infraction during the prior 18 months. Scherer is the only person who holds a financial interest in the business and she does not have an arrest or conviction to report. Consequently, Licensee did not make an intentional false representation or statement to the Commission to induce or prevent action by the Commission.

Regulatory Staff argues that if a licensee must report any arrests or convictions by persons who have a financial interest in the business, then the licensee must also report any arrests or convictions by all individual licensees. Operational Question (3) asks for information on any person with a financial interest in the business, which includes all individual licensees who hold such an interest.¹⁰ However, while Welch is an individual licensee and has an interest

⁹ The term “financial interest” is also defined in OAR 845-004-0001(1)(b) for purposes of ORS 471.710. There, “financial interest” means: “knowingly having an ownership interest, as a sole proprietor, partner, limited partner or stockholder in a business licensed by the Commission or any manufacturer of alcoholic beverages sold in Oregon.” According to this definition as well, Welch does not have a financial interest in the licensed business.

¹⁰ Typically an individual licensee as described in OAR 845-006-0301(1), including a person who has an

in the business under OAR 845-005-0311(3), he does not also have a financial interest. As noted above, although Welch is Vice President of the corporate licensee and is responsible for managing the licensed business, he has not made a monetary investment in the business and does not receive any monetary payments from the business. Therefore, although Welch has an interest in the licensed business he does not have a financial interest. For reasons discussed above, Licensee's response to Operational Question (3) was accurate and truthful. The renewal application did not ask Licensee to list arrests or convictions for all corporate officers, or for anyone who exercises control over the business' management. Therefore, under the circumstances, Licensee had no duty to list Welch's arrest on the renewal application. In the absence of a false representation or statement to the Commission, the alleged violation of ORS 471.425(1) must be dismissed.

4. Alleged Permitting Disorderly Activity

The Commission also alleges that on August 28, 2009, Licensee permitted disorderly activity in violation of OAR 845-006-0347(2)(a) when Welch was involved in altercation with Timothy Fitzgerald outside the licensed premises.

Pursuant to OAR 845-006-0347(2), "No licensee or permittee will permit noisy or disorderly activities on licensed premises or in areas the licensee controls that are adjacent to or outside the premises." By rule, the Commission has defined the term "disorderly activities" to mean "those that harass, threaten or physically harm another person." OAR 845-006-0347(1). To establish a violation of this provision, "it must be proved that disorderly activities occurred, Licensee had knowledge of the conditions that resulted in the disorderly activities, and that Licensee did not take reasonable steps to prevent the disorderly activities." *Corral Pastime* (OLCC Final Order, 89-V-165, May 1991), citing *Tacoma Cafe* (OLCC Final Order, 86-V-036, August 1987).

As to the first element, the Commission has concluded that disorderly activities occur when there is a threat of physical harm or where actual physical harm occurs. *Corral Pastime* (OLCC Final Order, 89-V-165, May 1991); *The Sportsman Club* (OLCC Final Order, 87-V-002, June 1987). But, when a licensee, or the licensee's employee, does nothing more than defend him or herself in connection with removing an aggressive and combative patron from the premises, the licensee has not permitted disorderly activities. *Dublin Pub* (OLCC, Final Order, 88-V-068, December 1988); see also *Cactus Bar & Grill* (OLCC Final Order, 03-V-014, June 2004 (holding that the licensee did not permit disorderly activities where the evidence failed to show that the licensee did much more than defend himself and eject a patron who had started a fight).

interest in the business under OAR 845-005-0311(3), is a person who will benefit or suffer financially based on the performance of the licensed business and therefore also has a financial interest. Examples include a person who owns 10% or more of the stock or membership interests in the licensed business (OAR 845-006-0301(1)(c)), a person who receives or is entitled to receive profits of the licensed business (OAR 845-005-0311(3)(a)), and a person who invests money or property in the licensed business (OAR 845-005-0311(3)(d)).

In this case, the evidence establishes that after Fitzgerald had been excluded from the premises earlier in the evening, he returned to the bar in an intoxicated condition. He tapped Welch on the shoulder and asked to speak to him outside. The two men went out to the front sidewalk, where Fitzgerald tried to convince Welch to reconsider his decision to exclude Fitzgerald and his friends from the premises. The conversation became heated. Fitzgerald then cocked his arm back as if to punch Welch. In response, Welch put up his arm to block the punch, making contact with Fitzgerald's arm and pushing him back. The push caused Fitzgerald to lose his footing and stumble back off the curb.¹¹

Given these circumstances, Regulatory Staff has not shown that Welch was the aggressor, or that Welch did anything more than defend himself against Fitzgerald's attempted punch. The persuasive evidence, specifically Welch's testimony about this incident, establishes that Welch's conduct in pushing Fitzgerald's arm was defensive and Welch did not engage in a physical altercation with Fitzgerald. Consequently, the record fails to demonstrate that Welch engaged in disorderly activity. Under the Commission's determinations in *Dublin Pub* and *Cactus Bar & Grill*, the alleged violation of OAR 845-006-0347(2)(a) must be dismissed.

5. License Renewal

In its August 19, 2010 Amended Notice, the Commission proposed to refuse renewal of Licensee's license based upon ORS 471.313(5) (history of serious and persistent problems), ORS 471.313(4)(b) (false statement) and 471.313(4)(g) (poor record of compliance).¹²

¹¹ As noted in the findings, as a result of the police investigation of the incident, Fitzgerald was arrested for Trespass. Welch was not warned or cited for disorderly conduct, harassment or any other offense. According to Officer Krieger's report, one witness to the incident, a transient, reported that Welch threw a punch at Fitzgerald. Two other witnesses reported seeing Fitzgerald try to punch Welch, Welch grab Fitzgerald's arm and push Fitzgerald down. Welch told Officer Krieger that he inadvertently caught Fitzgerald's arm and shoved him down. Fitzgerald also told the officer that Welch did not strike him, but may have pushed him, causing him to fall. (Ex. A17; test. of Krieger.) Welch was the only eyewitness to the incident who testified at the hearing. Unlike the hearsay declarants in the police report, Welch gave sworn testimony and was subject to cross-examination. Welch testified that he put up his arm to block the punch, made contact with Fitzgerald's arm and pushed Fitzgerald back. After considering the various hearsay witness reports along with Welch's sworn testimony, Welch's explanation of this incident (which was corroborated by Fitzgerald's statements to Officer Krieger) was given the most weight.

¹² Pursuant to ORS 471.313(4)(b) and (g), 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:

* * *

(b) Has made false statements to the commission.

* * *

(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.

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).

In this case, the alleged violations of 471.425(1) (false statement) and OAR 845-006-0347(2)(a) (permitting disorderly activity) were not proven, so the Commission does not have grounds to refuse to renew under ORS 471.313(4)(b) or (g). The evidence does, however, show that Licensee had a history of serious and persistent problems under ORS 471.313(5). But, as discussed above, subsequent to that history, Licensee has had both the willingness and ability to adequately control the premises and patrons' behavior in the immediate vicinity. Therefore, Licensee's license should be renewed.

In *Downtown Deli & Greek Cusina*, Final Order at 28-31, the Commission decided to renew the licensee's license despite the violation of ORS 471.315(1)(c) where the licensee adopted and adhered to new policies and procedures that significantly reduced the number of serious problems related to the licensed premises. Similarly, in *Girtle's Restaurant and Lounge*, Final Order at 23, the Commission opted to renew the license despite the licensee's history of serious and persistent problems because the licensee implemented new measures that resulted in a reduction in the number and frequency of serious problems. In both cases, however, the Commission imposed restrictions on the licensees' sale and service of alcohol and added requirements for control of the premises to ensure the licensees' future compliance and reduce the likelihood of future disturbances.

Here, Regulatory Staff has requested that if Licensee's license is to be renewed then restrictions such as reduced hours of alcohol service, limits on alcohol consumption and the presence of certified security staff should be imposed on the license. Notwithstanding Staff's request, such restrictions are not necessary or warranted in this case. Reducing the hours of alcohol service (*i.e.*, prohibiting the sale or service of alcoholic beverages after midnight or 12:30 a.m.), limiting the volume of the alcoholic beverages or limiting patrons to possessing only one drink at a time is appropriate when the licensee has a record of problems occurring after midnight and/or a history of over service. But in this case, Licensee's serious problems did not stem from over service, and most did not occur between midnight and 2:30 a.m. Rather, as detailed above, most of the serious problems at issue resulted from unwanted persons -- persons who were denied entry into the premises or patrons who were angry about being excluded from the premises. Consequently, there is no need to place additional restrictions on Licensee's hours of alcohol service or patrons' alcohol consumption.¹³

Furthermore, although any licensed establishment that mixes, sells and serves alcoholic beverages would benefit by having security staff that is certified by the Department of Public Safety Services and Training (DPSST), it is not necessary to impose this as a requirement on Licensee's license. Indeed, this type of restriction is usually imposed on licensed premises that draw big or rowdy crowds, and is usually limited to certain nights or hours (such as Friday and

¹³ As found above, Licensee's current house policies already limit drink sizes and limit patrons to no more than one drink at a time, with the exception of a less than 4 ounce beer back served in a small glass. (Ex. P2.)

Saturday, 9:00 p.m. to close). The record establishes that since Licensee changed its name and became a gentlemen's club, it has not drawn the crowds or kind of clientele that would necessitate a license restriction requiring one or more DPSST certified security guards on duty during business hours. Consequently, Licensee's license should be renewed without restrictions, but with the requirement that Licensee submit a compliance plan affirming its house policies and setting out specific actions Licensee will take to address problems at the premises and in the immediate vicinity of the premises.

FINAL ORDER

The Commission orders that the application for renewal of the Full On-Premises Sales license filed by Scherer Enterprises, Inc., Mary Scherer, President, Director and Stockholder and Robert Welch, Vice President, dba Silver Lace Club (fka Stables Bar and Grill) be GRANTED.

The Commission further orders that the charges that Licensee Scherer Enterprises, Inc., Mary Scherer, President, Director and Stockholder and Robert Welch, Vice President, dba Silver Lace Club (fka Stables Bar and Grill) violated ORS 471.425(1) (false statement) and OAR 845-006-0347(2) (permitting disorderly activity) be DISMISSED.

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

Dated this 28th day of February, 2011.

/s/ Stephen A. Pharo
Stephen A. Pharo
Executive Director
OREGON LIQUOR CONTROL COMMISSION

Mailed this 28th day of February, 2011.

THIS ORDER IS EFFECTIVE ON THE DATE MAILED.

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.