

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

<b>In the Matter of the Off Premises</b>	)	<b>FINAL FINDINGS OF FACT</b>
<b>Sales License Held by:</b>	)	<b>CONCLUSIONS OF LAW</b>
	)	<b>AND ORDOR</b>
	)	
<b>HENRY FU, JUI-CHIH FU,</b>	)	<b>OLCC-11-V-030-R</b>
<b>dba CAPITAL MARKET</b>	)	
<b>1420 State Street</b>	)	
<b>Salem, Oregon</b>	)	

**HISTORY OF THE CASE**

On May 11, 2011, the Oregon Liquor Control Commission (OLCC or Commission) issued a Notice of Proposed License Suspension / Civil Penalty (Notice) to Henry Fu and Jui-Chih Fu (Licensees), doing business as Capital Market, located at 1420 State Street, Salem, Oregon, 97301. The OLCC proposed to suspend Licensees' license for 42 days, with the option of payment of a civil penalty in the amount of \$1,650.00 in lieu of 10 days suspension with the remaining 32 days suspension mandatory because of allegations that Licensees made a false representation or statement to the Commission in violation of ORS 471.425(1) and that Licensee Henry Fu was convicted of a misdemeanor committed on the licensed premises in violation of ORS 471.315(1)(a)(I).

Licensees made a timely request for hearing. The OLCC referred the request to the Office of Administrative Hearings on September 11, 2011. The Office of Administrative Hearings assigned the case to Administrative Law Judge (ALJ) John R. Lohuis.

On October 13, 2011, ALJ Lohuis convened a prehearing conference by telephone. Becky Voelkel appeared for the OLCC. Licensees Henry Fu and Jui-Chih Fu appeared.

ALJ Lohuis conducted a contested case hearing on October 19, 2011 at the Office of Administrative Hearings in Salem, Oregon. Becky Voelkel represented the OLCC. Henry Fu represented Licensees. OLCC Inspector Jacki Miranda appeared as a witness for the OLCC and testified on its behalf. Henry Fu and Jui-Chih Fu testified on their own behalf. The record closed at the end of the hearing.

The Administrative Law Judge considered the record of the hearing and the applicable law and issued a Proposed Order mailed December 2, 2011.

Licensee filed Exceptions to the Proposed Order on December 15, 2011. Staff filed Comments on the Proposed Order on December 19, 2011. The Administrative Law Judge responded to Licensee's Exceptions and Staff's Comments on January 20, 2012.

On February 10, 2012, 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 Licensees made a false representation or statement to the OLCC in order to induce or prevent action by the Commission in violation of ORS 471.425(1).
2. Whether Licensee Henry Fu was convicted of a Class A Misdemeanor, Attempted Theft in the 1st Degree, committed on the licensed premises in violation of ORS 471.315(1)(a)(I).
3. If one or more violations are established, what is the appropriate penalty?

### **EVIDENTIARY RULINGS**

Exhibits A3 through A9 were admitted without objection. Exhibit A1 was admitted over Licensees' objection that it was unduly repetitious. Exhibit A2 was admitted over Licensees' relevancy objection. Exhibit A10 was admitted over Licensees' relevancy and materiality objections.<sup>1</sup> At hearing, the OLCC offered Exhibits A11 and A12. Exhibits A11 and A12 were admitted over Licensees' relevancy and privilege objections.

Exhibit L1 was admitted over OLCC's objection that it was factually incorrect and irrelevant. Exhibit L2 was admitted over OLCC's relevancy objection. OLCC objected to Exhibits L6, L7, L8, L10, L11, L12, L13, L14, and L15 on relevancy grounds and these Exhibits were excluded on that basis. Exhibits L3, L4, L5 and L9 were admitted without objection.<sup>2</sup>

### **STIPULATION**

During the prehearing conference, Licensees stipulated to certain facts presented as Violation Number Two in the Notice. The stipulated facts are identified as such in the Findings of Fact, below.

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<sup>1</sup> Licensees objected to the admission of pages four and five of Exhibit A1, page four of Exhibit A2, and page one of Exhibit A10. However, the Administrative Law Judge ruled on the admissibility of the entire Exhibits, rather than individual pages of the Exhibits.

<sup>2</sup> Licensees did not number their proposed exhibits according to the numbering convention set forth in the Discovery Order dated September 28, 2011. I numbered Licensees' proposed Exhibits L1 through L15.

## FINDINGS OF FACT

1. Licensee Henry Fu and Licensee Jui-Chih Fu, doing business as Capital Market, located at 1420 State Street, Salem, Oregon, have held an Off-Premises Sales License since February 1985.<sup>3</sup> (Ex. A1; test. of Miranda.)

2. On or about January 22, 2008, Licensees submitted an annual License Renewal Application to the OLCC for 2008. The License Renewal Application contained a series of questions, including Operational Question 2, which provides:

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. (Emphasis in original.)

In response to Operational Question 2, Licensee Jui-Chih Fu wrote, “Ø Citation for Jui-Chih Fu 2007 was dismissed by Judge[.]” Both Licensees signed the application. (Test. of Miranda; Ex. A5.)

3. On April 19, 2008, at the licensed premises, Licensee Henry Fu sold tobacco to a 15 year old minor decoy in a sting operation. Licensee Henry Fu was later cited and charged with Endangering the Welfare of a Minor for the sale of tobacco to a minor. On May 8, 2008, Licensee Henry Fu pled guilty to the charge. (Test. of Miranda; Exs. A2, A3, A6.)

4. On May 8, 2008, based on Licensee Henry Fu’s guilty plea for the April 19, 2008 incident, Licensee Henry Fu was convicted of Endangering the Welfare of a Minor. A \$305 fine was assessed for the conviction, and Licensee Jui-Chih Fu wrote a check to pay Licensee Henry Fu’s \$305 fine. (Test. of Miranda; Ex. A6.)

5. On or about January 31, 2009, Licensees submitted a 2009 License Renewal Application to the OLCC. Operational Question 2 on this renewal application asked:

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. (Emphasis in original.)

Licensee Jui-Chih Fu wrote, “None.” Licensees did not disclose Henry Fu’s May 8, 2008 conviction for Endangering the Welfare of a Minor. Both Licensees signed the application. (Test. of Miranda; Test. of Henry Fu; Ex. A4.)

6. On October 13, 2009, at the licensed premises, an undercover detective working with the Department of State Police Lottery Security Section presented Licensee Henry Fu with a

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<sup>3</sup> Inspector Miranda clarified that the OLCC initially issued Licensees a “Package Store License” in February 1985, which is currently referred to as an “Off-Premises Sales License.”

\$15,000 winning lottery ticket. Licensee Henry Fu told the undercover detective that she was not a lottery winner and kept the \$15,000 winning lottery ticket that she had presented. (Ex. A2; Ex. A8.)

7. On June 9, 2010, Licensee Henry Fu pled guilty to the charge of Attempted Theft in the First Degree based on the October 13, 2009 incident. (*Id.*)

8. On June 17, 2010, Licensee Henry Fu was convicted in Marion County Circuit Court of Attempted Theft in the 1st Degree, a Class A Misdemeanor (ORS 165.007). (Stipulation.)

9. On February 10, 2011, Inspector Miranda met with Licensee Henry Fu and asked him about the failure to list this May 8, 2008 conviction on the 2009 liquor renewal application. Henry Fu told Inspector Miranda that he and his wife Jui-Chih Fu understood they needed to list any and all arrests and convictions. Henry Fu also told Inspector Miranda that he did not have an excuse for failing to list the conviction. (Test. of Miranda, Ex. A2.)

10. If Licensees had listed Henry Fu's May 8, 2008 conviction for Endangering the Welfare of a Minor on Licensee's 2009 liquor renewal application, the OLCC would have investigated Licensees' eligibility to hold a license. (Test. of Miranda.)

11. Licensees Henry Fu and Jui-Chih Fu own and manage 32 rental properties in Marion County. Jui-Chih Fu manages the majority of the paperwork for their rental properties, including preparing and serving eviction notices and filing documents in court. Jui-Chih Fu evicted tenants from their properties on March 3, 2008, August 8, 2008, September 25, 2008, November 24, 2008, and December 23, 2008. (Test. of Jui-Chih Fu; Ex. A11.)

## **CONCLUSIONS OF LAW**

1. Licensees made a false representation or statement to the OLCC in order to induce or prevent action by the Commission in violation of ORS 471.425(1).

2. Licensee Henry Fu was convicted of a Class A Misdemeanor, Attempted Theft in the 1st Degree, committed on the licensed premises in violation of ORS 471.315(1)(a)(I).

3. A license suspension of 42 days, or, in the alternative, a license suspension of 32 days with a civil penalty of \$1,650 is the appropriate penalty.

## **OPINION**

The OLCC alleges that Licensees made a false representation or statement to the OLCC in order to induce or prevent action by the Commission in violation of ORS 471.425(1), and that Licensee Henry Fu was convicted of a Class A Misdemeanor, Attempted Theft in the 1st Degree, committed on the licensed premises in violation of ORS 471.315(1)(a)(I). As a result of these allegations, the OLCC proposes a license suspension of 42 days, or, at Licensees' option, a license suspension of 32 days and a civil penalty of \$1,650.

As the proponent of these allegations, the OLCC has the burden to establish by a preponderance of the evidence that the allegations are true and that the proposed penalty 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). As set forth below, the OLCC has met its burden with respect to these allegations.

### 1. *False Representation or Statement*

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.” Earlier OLCC final orders have applied this statute to require that a misrepresentation or false statement need not be intentional, but must be material. *H2O Martini Bar & Restaurant* (OLCC, Final Order, 05-V-012, December 2005.) A false statement is material if the subject of the false statement is a basis for the OLCC to refuse, cancel, or suspend the license. *Trocadero Inn* (OLCC 90-V-055, February 1991.) Material false statements are those that inhibit the Commission’s ability to investigate the eligibility for a license. *Punjab Tavern* (OLCC, Final Order, 91-L-015, April 1992.)

In *City Center Food Mart* (OLCC, Final Order, 08-V-070, September 2009), the Commission determined that a licensee who wrote “N/A” in response to Operational Question 2, (rather than listing an earlier felony arrest) on the liquor license renewal application had made a material false statement that was a basis to refuse,<sup>4</sup> cancel, or suspend the license.<sup>5</sup> The Commission determined that the licensee’s material false statement inhibited the Commission’s ability to investigate the licensee’s license eligibility and induced the Commission to renew the sales license.

Similar to the licensee in *City Center Food Mart*, Licensees in this matter failed to disclose Licensee Henry Fu’s conviction for Endangering the Welfare of a Minor. Licensees’

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<sup>4</sup> In their Comments on the Proposed Order, staff requested correction of the scrivener's error which resulted in omitting the word “refuse” and, instead, inserting the word “suspend” twice in the list of alternative licensing actions, which when connected to an omission, make the omission a material false statement. In his Response to Exceptions and Staff Comments, the ALJ agreed that the listed alternatives should be corrected in this fashion.

<sup>5</sup> Finding of Fact 7 in *City Center Food Mart* states that Operational Question 2 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.” (Emphasis in original.)

written response to Operational Question 2 (“None”) was both false and misleading. By failing to disclose Henry Fu’s conviction, and by falsely answering that Henry Fu had not been convicted, Licensees induced the Commission to renew the liquor license. The false statement was also material because a violation can result in a refusal, suspension or cancellation of a license. ORS 471.315(1). Additionally, if Licensees had listed Henry Fu’s May 8, 2008 conviction on the renewal application, the OLCC would have investigated the matter. Therefore, Licensees’ false statement in response to Operational Question 2 also prevented the Commission from investigating Licensees’ fitness to hold a liquor license.

Licensees argued that Henry Fu’s act of selling tobacco to a minor did not endanger anyone, because the decoy who purchased the tobacco did not intend to consume the tobacco but rather purchased it as part of a sting operation. Licensees’ argument misses the point. The OLCC did not contend that Mr. Fu endangered anyone, rather, the Commission argues that Licensees’ omission of Licensee Henry Fu’s conviction was a false representation or statement. Furthermore, ORS 163.575(1)(d) provides that “A person commits the crime of endangering the welfare of a minor if the person knowingly \* \* \* [d]istributes, sells, or causes to be sold, tobacco in any form to a person under 18 years of age[.] In other words, consumption of tobacco is not an element of the crime of Endangering the Welfare of a Minor, and whether the minor decoy actually consumed the tobacco or not is irrelevant to Henry Fu’s conviction as well as whether Licensees made a false statement to the Commission.

Licensees’ claim that Henry Fu and Jui-Chih Fu forgot to list the conviction on the renewal application is similarly unpersuasive. First, Licensees responded affirmatively to Operational Question 2 in its 2008 renewal application, indicating that Licensees knew the importance of accurately reporting arrest and conviction history and took this history into account when filling out the application. Also, it is unlikely that Henry Fu merely “forgot” the conviction. At the time Licensee Henry Fu signed the renewal application on January 31, 2009, his May 8, 2008 conviction was his only conviction, and it is doubtful that he would have forgotten his sole conviction from only eight months earlier. It is also improbable that Jui-Chih Fu forgot about Henry Fu’s conviction since she had written the check to pay his fine. Additionally, if Henry Fu forgot about his conviction, he likely would have stated this to Inspector Miranda during their February 10, 2011 meeting, in which she asked him specifically about the failure to list his conviction. Instead, Henry Fu told Inspector Miranda that he had no excuse for not listing the conviction. Had Henry Fu truly forgotten his conviction, he likely would have told Inspector Miranda exactly that, rather than candidly admitting that he had no excuse for the omission, as he told Inspector Miranda on February 10, 2011.

Additionally, Licensees’ suggested that the busy nature of their life caused them to forget to list Henry Fu’s conviction on their application. However, Henry Fu and Jui-Chih Fu manage 32 rental properties, and Jui-Chih Fu evicted tenants throughout 2008. Because Jui-Chih Fu was sufficiently capable of supervising 32 rental properties, and was able to process and file pleadings for evictions during the same time frame as Henry Fu’s conviction and Licensees’ submission of their 2009 renewal application, it is doubtful that their life was so hectic as to cause them to forget Henry Fu’s conviction.

Finally, even if Licensees had established that the omission and false statement was an unintentional omission, unintentional false statements may serve to establish a violation of ORS 471.425(1), as explained above.

Here, both Henry Fu and Jui-Chih Fu are Licensees, and therefore both are jointly and severally liable for the violation. OAR 845-006-0301(1), OAR 845-006-0301(3), *see also Lava Lanes of Medford* (OLCC, Final Order, 04-V-007, February 2005); *Jiffy Mart* (OLCC, Final Order, 04-V-027, February 2005) (noting that individuals who are licensees under a single license have equal responsibility for violations committed by any licensee holding the license.)

Given the foregoing, the Commission has established that Licensee Henry Fu and Licensee Jui-Chih Fu violated ORS 471.425(1).

### *2. Conviction of a Misdemeanor Committed on the Licensed Premises*

471.315(1)(a)(I) provides, in relevant part, that the Commission may cancel or suspend a license or impose a civil penalty in lieu of or in addition to suspension if the licensee has been convicted of a felony or of any misdemeanor committed on the licensed premises.

In this matter, the record establishes that Licensee Henry Fu was convicted of Attempted Theft in the 1st Degree, a Class A Misdemeanor (ORS 165.007), on June 17, 2010. Because the misdemeanor occurred on the licensed premises, Licensee Henry Fu's conviction constitutes a violation of ORS 471.315(a)(I).

### *3. Penalty*

A violation of ORS 471.425(1) is defined by the Commission as a Category II violation. OAR 845-006-0500(7), Exhibit 1. A Category II violation has a presumptive 30 day suspension for the first violation in two years. *Id.* However, OAR 845-006-0500(7)(c) provides that the Commission can increase or decrease the penalty for aggravating or mitigating circumstances:

These sanctions are guidelines. If the Commission finds aggravating or mitigating circumstances, it may assess a greater or lesser sanction. Some of the reasons the Commission may mitigate a sanction are: good faith effort to prevent a violation; and extraordinary cooperation in the violation investigation that shows the licensee or permittee accepts responsibility. Some of the reasons the Commission may aggravate a sanction are: a prior warning about compliance problems; repeated failure to comply with laws; failure to use age verification equipment which was purchased as an offset to a previous penalty; efforts to conceal a violation; intentional violations; the violation involved more than one patron or employee; the violation involved a juvenile; and the violation resulted in injury or death. The Commission may always increase or decrease a sanction to prevent inequity or to take account of particular circumstances in the case.

The Commission has, in the past, increased a suspension for two days for each aggravating factor. *See Parrilla Grill* (OLCC, Final Order, 01-V-082, August 2002.) When a

licensee personally commits the violation, aggravation is warranted. *See P-Mart* (OLCC, Final Order, 92-V-098, April 1993.) In this matter, both Licensees were personally involved in the violation of ORS 471.425(1). Because, as discussed above, both Henry Fu and Jui-Chih Fu are Licensees, it is appropriate to impose the standard two day increase in suspension for the aggravating factor that both Licensees were personally involved in the violation.

A violation of ORS 471.315(1)(a)(I) (conviction of a crime other than a felony) is defined by the Commission as a Category III violation, with a 10 day suspension or civil penalty in the amount of \$1,650. OAR 845-006-0500(7), Exhibit 1. The Commission did not propose an increase in the penalty for any aggravating factor for this violation (being a licensee is an element of the violation). Therefore, the standard 10 day suspension or civil penalty in the amount of \$1,650 is the appropriate penalty for this violation.

Licensees did not allege nor establish grounds to decrease the penalty for any mitigating factors, such as a good faith effort to prevent the violations, or extraordinary cooperation in the investigation. Consequently, no mitigation of the penalty is appropriate.

### **FINAL ORDER**

The Commission Orders that the Off-Premises Sales License held by Licensee Henry Fu and Licensee Jui-Chih Fu, doing business as Capital Market, located at 1420 State Street, Salem, Oregon, 97301, be suspended for 42 days, or, in the alternative, suspended for 32 days with a civil penalty in the amount of \$1,650.

If you choose to pay the fine, it must be paid within ten (10) days of the date of this Order; otherwise, the suspension must be served.

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

Dated this 27th day of February 2012.

/s/ Stephen A Pharo

Stephen A. Pharo

Executive Director

OREGON LIQUOR CONTROL COMMISSION

Mailed this 27th day of February 2012.

**THIS ORDER IS EFFECTIVE ON THE DATE MAILED.** Any monetary fine or civil penalty set out in the order shall be due and payable 10 days after the date of mailing.

**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.