

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

<b>In the Matter of the Off-Premises Sales</b>	)	<b>FINAL FINDINGS OF FACT</b>
<b>License held by</b>	)	<b>CONCLUSIONS OF LAW</b>
	)	<b>AND ORDER</b>
<b>US Market #145, LLC</b>	)	<b>OLCC-11-V-009</b>
<b>Lal Sidhu, Managing Member</b>	)	<b>OLCC-11-V-009A</b>
<b>Satwinder Singh, Member</b>	)	<b>OLCC-11-V-009B</b>
	)	
<b>dba US MARKET #145</b>	)	
<b>1450 NW 9<sup>th</sup> Street</b>	)	
<b>Corvallis, OR 97330</b>	)	

**HISTORY OF THE CASE**

On January 19, 2011, the Oregon Liquor Control Commission (OLCC or Commission) issued a Notice of Proposed License Cancellation and Removal From the Responsible Vendor Program to US Market #145, LLC, Lal Sidhu, Managing Member and Satwinder Singh, Member (collectively Licensee) dba US Market #145, located at 1450 NW 9<sup>th</sup> St., Corvallis, OR 97330. The Commission alleged that Licensee failed to comply with a restriction on the license when its employee failed to use age verification equipment to verify a minor's age before allowing the minor to buy an alcoholic beverage when the minor reasonably appeared to be under 26 years of age, in violation of OAR 845-005-0355(5). The Notice further alleged that Licensee's employee violated OAR 845-006-0335(1)(a),(b) and (c) by failing to verify a minor's age before allowing the minor to purchase an alcoholic beverage. Licensee timely requested a hearing on the Notice.

On March 3, 2011, the Commission referred this matter to the Office of Administrative Hearings. The case was assigned to Senior Administrative Law Judge Alison Greene Webster.

On May 23, 2011, the Commission issued an Amended Notice of Proposed License Cancellation, Removal from the Responsible Vendor Program and Proposed Refusal to Renew License. In addition to the violations alleged in the original notice, the Commission proposed to refuse renewal pursuant to ORS 471.313(4)(g) based on Licensee's alleged poor record of compliance while licensed.

A contested case hearing was held in Salem, Oregon, on July 28, 2011, before ALJ Webster of the Office of Administrative Hearings. Anna Davis presented the case for the Commission. Licensee was represented by Attorney Michael Mills.

OLCC Inspector David Spani and minor decoy Bryan Williams testified on behalf of the Commission. Principal Members Satwinder Singh and Lal Sidhu testified on Licensee's behalf. The record remained open for written closing argument, and closed on August 26, 2011, upon receipt of OLCC's reply brief.

The Administrative Law Judge considered the record of the hearing and the applicable law and issued a Proposed Order mailed September 21, 2011.

Licensee filed Exceptions to the Proposed Order on October 11, 2011. Staff filed Comments on the Proposed Order on October 11, 2011. The Administrative Law Judge responded to Licensee's Exceptions and Staff's Comments on October 18, 2011.

On December 1, 2011 and 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<sup>1</sup>:

### **EVIDENTIARY RULINGS**

OLCC's Exhibits A1 through A25 and A28 were admitted into the record without objection. OLCC's Exhibits A26 and A27 were admitted over Licensee's relevancy objection.

Licensee's Exhibits P1-P6 were designated pleading documents and included in the record. Licensee's Exhibit P10 was admitted over the Commission's relevancy objection. Licensee's Exhibits P15 through P20 were admitted without objection. Licensee's Exhibit P21 was admitted over OLCC's relevancy objection. Exhibits P22 to P28, P31 to P33, P35, P35A and P35B, P36 through P52, P56 through P60 and P65, and P67 were also admitted at hearing.

Licensee's Exhibits P61 and P68 were excluded as irrelevant, but received as offers of proof.<sup>2</sup>

Licensee withdrew Exhibits P7 to P9, P11 to P14, P29 to P30, P34, P53 to P55, P62 and 63 and P66.

### **ISSUES**

1. Whether Licensee's employee Cody Shuck failed to verify minor Bryan Williams' age in violation of OAR 845-006-0335(1)(a), (b) and (c).

2. Whether Licensee, through employee Cody Shuck, failed to comply with the license restriction requiring all employees to "use age verification equipment to verify the age of any patron who reasonably appears to be under the age of 26 who attempts to purchase alcoholic beverages" in violation of OAR 845-005-0355(5).

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<sup>1</sup> The Commission has modified the penalty in this case from that proposed by the Administrative Law Judge (ALJ).

<sup>2</sup> In its Exceptions, Licensee argues that Exhibits P-61 and P68 should have been admitted because they are relevant to an analysis of future compliance. The Commission agrees with the ALJ's decision that these exhibits are not relevant as they pertain to events that occurred several months after the violations at issue in this case.

3. If one or both violations are proven, what is the appropriate penalty and is the Commission required to remove Licensee from the Responsible Vendor Program?

4. Whether the Commission has grounds to refuse to renew Licensee's license under ORS 471.313(4)(g) (poor record of compliance with the liquor laws while previously licensed).

### **FINDINGS OF FACT**

1. In September 2005, OLCC issued an Off-Premises sales license to Satwinder Singh and Lal Sidhu, doing business as US Market #145, located at 1450 NW 9<sup>th</sup> St., Corvallis, Oregon. (Test. of Singh.) In 2007, Mr. Singh and Mr. Sidhu formed a limited liability corporation, US Market #145 LLC. The LLC and Mr. Singh and Mr. Sidhu as principal members have held an Off-Premises Sales license at the premises since March 16, 2007. (Ex. A1.) Mr. Singh oversees the business operations at US Market #145 and works at the premises about 20 hours per week. Mr. Sidhu does not participate in the store's day-to-day operations. (Test. of Singh; test. of Sidhu). At all times pertinent to this action, Licensee was a participant in the OLCC's Responsible Vendor Program. (Ex. P22 to P28.)

2. In July 2007, the Commission notified Licensee that it intended to place restrictions on US Market #145's license requiring Licensee to install age verification equipment and requiring all employees to use the equipment to verify the age of every person who attempts to purchase alcohol who reasonably appears to be under the age of 26. The Commission sought to impose the restrictions based upon a record of violations for selling alcohol to a minor at other premises owned by Mr. Sidhu. (Ex. A4.)

3. Licensee challenged the imposition of these proposed restrictions on the license. Pursuant to a Final Order Incorporating Settlement Agreement, dated March 19, 2008, involving several locations in which Mr. Sidhu was a principal/licensee,<sup>3</sup> the following restrictions were imposed on US Market #145's license:

(1) Licensee will comply with the program standards for the responsible vendor program as set forth in OAR 845-009-0135(4); and

(2) Licensee has age verification equipment, as defined in OAR 845-009-0140(1)(b) installed at all of its locations and will install age verification equipment at any new locations at the time of licensure. Licensee will require that all individual employees or licensees use age verification equipment to verify the age of any patron who reasonably appears under the age of 26 who attempts to purchase alcoholic beverages.

(Ex. A7.)

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<sup>3</sup> The Final Order Incorporating Settlement also included the following locations: US Market #175 in Gresham, US Market #101 in Waldport, US Market 104 in Newport, US Market #109 in Woodburn, US Market #150 in Bend, US Market #155 in Lincoln City, US Market #170 in Albany, K Market in Bend, Mt. Angel Market & Deli in Mt. Angel, Knothole Market in Lebanon, and US Market #180 in Albany. (Ex. A7.)

4. On the evening of December 10, 2010, OLCC Inspectors Spani and Fetterly conducted a minor decoy operation in the Corvallis area. Bryan Williams (date of birth 6-12-1990), was one of the minors used as a decoy that night. Williams was 20 years old at the time and a volunteer police cadet with the Corvallis Police Department (Ex. A24; test. of Williams.)

5. Bryan Williams appears his true age. He has unlined facial features. He stands approximately 6'1" tall and weighs about 150 pounds. On the evening of December 10, 2010, while participating in the decoy operation, he was wearing a hoodie sweatshirt and blue jeans. Williams had his identification, an Oregon provisional driver license, with him in his pocket that evening. The provisional license had a red border around Williams' photo with yellow wording stating, "Under 21 until 06-12-2011" and "Under 18 until 06-12-2008." (Test. of Williams; test. of Spani; Ex. A23 and A24.)

6. At approximately 6:45 p.m. on December 10, 2010, minor Williams and Inspector Spani entered US Market #145. Williams went to the cooler and retrieved a can of Bud Light beer. Williams waited for another customer ahead of him to check out, and then placed the can of beer on the counter to purchase it. Licensee's clerk, Cody Shuck, rang up the sale and told Williams the price. Williams handed money to Shuck. Shuck completed the transaction and gave Williams the change. At no point did Shuck ask to see Williams' identification or otherwise attempt to verify Williams' age. Inspector Spani observed Shuck sell the can of beer to Williams without verifying Williams' age. (Test. of Williams; test. of Spani.)

7. Moments after the sale to minor Williams, Inspector Spani contacted Shuck inside the store. When questioned about the transaction, Shuck admitted to making the sale. When Inspector Spani asked Shuck how old Williams appeared, Shuck said that Williams appeared to be 21 years old. In response to further questioning by Inspector Spani, Shuck acknowledged that he was aware of the restriction on the license requiring the use of age verification equipment for any person attempting to purchase alcoholic beverages who appears under the age of 26. Shuck also acknowledged that he had attended training classes on checking identification and was trained in the use of Licensee's age verification equipment. Shuck explained that he had been using the age verification equipment all day, and "was in the zone" and just forgot to verify Williams' age on this sale. Shuck also explained that he "overrode" the age verification system on the cash register to complete the sale to Williams.<sup>4</sup> (Ex. A22; test. of Spani.)

8. Inspector Spani issued Shuck a citation for violating ORS 471.410, furnishing alcoholic liquor to a minor. (Ex. A26.) Shuck was later convicted of the offense in the Benton County Circuit Court and assessed a fine of \$502. (Ex. A27; test. of Spani.)

9. Licensee Singh terminated Shuck's employment based on Shuck's sale of an alcoholic beverage to minor Williams. When Mr. Singh talked with Shuck about the sale, Shuck admitted that he was aware of Licensee's alcohol sales policies and aware of the license restrictions.

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<sup>4</sup> Licensee's point of sale system scans all merchandise and requires a date of birth to be entered for any purchase of alcoholic beverages or tobacco. Therefore, to "override" the age verification process and complete the sale to minor Williams, Shuck had to key in a date of birth of more than 21 years prior to the sale date, *i.e.*, a birth date of December 9, 1989 or earlier. (Test. of Salwinder; test. of Sidhu.)

Shuck acknowledged that he failed to comply with Licensee's policy of checking the identification of anyone who appears under the age of 30 and did not use the age verification system when selling to minor Williams. (Test. of Singh.)

10. At all times pertinent to this matter, Licensee required its sales clerks to verify the age of any person attempting to purchase alcohol who reasonably appeared to be under the age of 30. Although the OLCC's rules use age 26, Licensee tells clerks to use the standard of age 30 or less to further ensure that the clerks do not sell alcohol to minors. Licensee offers incentives to employees as a reminder to check identification, including paying a cash reward to employees who verify the customer's age and refuse to sell to a minor in any minor decoy sting operation. Licensee also posts notices near the cash register ("No ID No Sale No Way") as a reminder to the sales clerks to verify age. (Test. of Singh; Ex. 67.)

11. Licensee Singh is the person responsible for training the sales clerks at US Market #145. He trains all new employees on the laws, rules and store policies regarding the sale of alcohol and provides quarterly refresher training for all clerks. As part of the initial employee training program, Licensee requires that the sales clerks watch an OLCC-produced video on alcohol sales and checking identification, and to read and sign an OLCC booklet on the sale of alcohol. Licensee also requires that each sales clerk sign an Employee Agreement acknowledging his or her understanding that Oregon law prohibits the sale of alcohol to persons under 21 years of age and agree to Licensee's rules and policies about the sale of alcohol. (Test. of Singh; Ex. 67.)

12. Cody Shuck began working as a sales clerk for Licensee in July 2010, after working for five or six months pumping gas at Licensee's location. On July 25, 2010, Shuck read and signed the OLCC booklet, *What Every Store Clerk Needs to Know About Selling Alcohol*. He was personally trained by Licensee Singh and also participated in US Market's quarterly OLCC refresher training on September 29, 2010. On November 17, 2010, Shuck, Licensee Singh and 33 others (employees of US Market #145 and other US Markets in Linn, Marion, Yamhill and Polk Counties) attended an OLCC Clerk Training Program by OLCC Regional Manager James Lynch. (Exs. P15, P16, P17, P18 and P19; test. of Singh.)

13. The November 16, 2010 Clerk Training Program focused on the laws relating to the sale of alcohol, the requirement to verify the age of any person appearing under the age of 26, and what to look for when checking a patron's identification. Because all of the attendees were employees or principals of US Markets, the training also touched on the license restrictions requiring use of the age verification equipment and reminded the clerks to use the age verification equipment installed at all US Market locations for any person attempting to purchase alcohol who appear under 26 years of age. (Test. of Lynch; Ex. P19.)

14. Licensee Sidhu obtained his first OLCC off-premises sales license in 1998. Since that time, he has had off-premises sales licenses at 20 convenience store locations in Oregon. As of February 2011, he was licensed at 11 locations. As a licensee responsible for the acts and omissions of his employees, Mr. Sidhu has the following compliance record with the Commission:<sup>5</sup>

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<sup>5</sup> The Commission modified this finding of fact as requested in Staff's comments to add the restriction

Trade Name and Location	License Dates	Compliance History
Center Market (Salem)	3-10-98 to 10-11-99	No violations
K Market (Bend)	8-23-00 to present	Sale to minor decoy: 10-24-01 Sale to minor decoy: 6-4-05
Knothole Market (Lebanon)	11-15-00 to 11-3-09	Sale to minor decoy: 5-9-02 Sale to minor decoy: 11-8-05 Sale to minor decoy: 7-18-09 Restriction violation (failure to use AVE): 7-18-09 Restriction violation (failure to use AVE): 8-29-09 License cancelled per Final Order on Default 11-3-09 for failure to comply with restriction and failure to verify age
Mt. Angel Market (Mt. Angel)	3-21-00 to 6-12-03 9-18-07 to present	No violations
Oak Market (Silverton)	2-10-98 to 5-1-02	No violations
US Market #101 (Waldport)	5-14-04 to 2-1-10	No violations
US Market #104 (Newport)	10-30-00 to present	Sale to minor decoy: 11-13-02
US Market #108 (Salem)	1-1-02 to 11-4-03	Sale to minor decoy: 8-28-03
US Market #109 (Woodburn)	7-12-02 to 1-4-10	Sale to minor decoy: 9-12-08 Restriction violation (failure to use AVE): 9-12-08 License cancelled per Final Order on 1-4-10
US Market #115 (Salem)	12-18-02 to 4-1-04	No violations
US Market #120 (Salem)	6-4-04 to 12-27-04	No violations
US Market #125 (Keizer) * co-owned with Satwinder Singh	10-25-05 to present	No violations
US Market #140 (Eugene)	2-14-05 to 1-22-07	No violations
US Market #145 (Corvallis) * co-owned with Satwinder Singh	9-1-05 to present	Pending violations
US Market #150 (Bend)	12-26-05 to present	Sale to minor decoy: 4-20-06 Sale to minor decoy: 7-23-07
US Market #155 (Lincoln City)	4-15-06 to present	No violations

violation at Knothole Market dated 8-29-09 and to correct the date of the violation at US Market #108 to 8-28-03. The ALJ agreed in her response to the comments and exceptions that these corrections were appropriate.

US Market #170 (Albany)	6-6-07 to present	No violations
US Market #175 (Gresham)	7-6-07 to present	No violations
US Market #180 (Albany)	9-18-07 to present	Sale to minor decoy: 4-11-08 Restriction violation (failure to use AVE): 4-11-08 Civil penalty and removal from RVP per Final Order on 10-27-09
US Market #190 (Redmond)	1-1-08 to present	Sale to minor decoy: 4-24-09

(Exs. P60, A8 to A18.)

15. Licensee Satwinder Singh obtained his first OLCC off-premises sales license in 2005. Currently, he has at least four off-premises sales licenses: US Market #145, US Market 125 (Keiser) with Mr. Sidhu, US Market 165 (Portland) and US Market #245 (Salem) with Mehar Din. As a licensee responsible for the acts and omissions of his employees, Mr. Singh has the following compliance record with the Commission:

Trade Name and Location	License Dates	Compliance History
US Market #125 (Keizer) * co-owned with Lal Sidhu	10-25-05 to present	No violations
US Market #145 (Corvallis) * co-owned with Lal Sidhu	9-1-05 to present	Pending violations
US Market #165	unknown	No violations
US Market #245 (Salem)	unknown to present	Sale to minor under age 18: 9-17-2010 Civil penalty and removal from RVP per Stipulated Settlement entered 2-18-11

(Test. of Singh; Ex. A21.)

### CONCLUSIONS OF LAW

1. Licensee's employee Cody Shuck failed to verify minor Bryan Williams' age in violation of OAR 845-006-0335(1)(a), (b) and (c).

2. Licensee, through employee Cody Shuck, failed to comply with the license restriction requiring all employees to "use age verification equipment to verify the age of any patron who reasonably appears to be under the age of 26 who attempts to purchase alcoholic beverages" in violation of OAR 845-005-0355(5).

3. For the violation of OAR 845-005-0355(5) the appropriate penalty is a 30 day suspension. For the violation of 845-006-0335(1)(a), (b) and (c) the appropriate penalty is a 10 day suspension or a civil penalty of \$1,650 in lieu of suspension. Licensee is also removed from the Responsible Vendor Program.

4. Licensee has a poor record of compliance when previously licensed but has established good cause to overcome the poor record and the refusal to renew the license under ORS 471.313(4)(g).

## OPINION

### 1. Violations

**1. Failing to verify age of a minor.** As set out above, the Commission asserts that Licensee's employee Cody Shuck violated OAR 845-006-0335(1)(a), (b) and (c)<sup>6</sup> when he failed to verify minor Williams' age before allowing Williams to buy an alcoholic beverage when Williams reasonably appeared to be under 26 years of age. As the proponent of this contention, the Commission bears the burden of proof. ORS 83.450(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).

The record establishes that minor Williams reasonably appeared less than 26 years of age and therefore, under the Commission's rule, reasonable doubt existed as to whether he was at least 21 years old. Because employee Shuck did not ask to see Williams' identification and did not verify his age, the violation of OAR 845-006-0335(1)(a), (b) and (c) has been established.

Based on OAR 845-006-0362,<sup>7</sup> Licensee is responsible for this violation.

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<sup>6</sup> OAR 845-006-0335 provides, in pertinent part:

(1) Age Verification:

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

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

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

<sup>7</sup> OAR 845-006-0362 provides:

Each licensee may be held responsible for violation of any liquor control law or administrative rule or regulation of the Commission affecting his license privileges and

**2. Failing to comply with a license restriction.** The Commission has also charged Licensee with a violation of OAR 845-005-0355(5), asserting that employee Shuck's failure to use age verification equipment to verify minor Williams' age constituted a failure to comply with the restriction on the license.

OAR 845-005-0355(5) provides as follows:

A licensee or permittee who has a restricted license or permit must exercise license or permit privileges only in compliance with the restriction(s). Failure to comply with the restriction(s) is a Category I violation.

As set out above, pursuant to a March 19, 2008 Final Order Incorporating Settlement Agreement, Licensee's license was subject to restrictions. One restriction requires that "all individual employees or licensees use age verification equipment to verify the age of any patron who reasonably appears under the age of 26 who attempts to purchase alcoholic beverages." Although he was aware of the license restriction requirements, employee Shuck did not use the store's age verification equipment to verify the age of minor Williams, a patron attempting to purchase an alcoholic beverage who reasonably appeared under the age of 26. Therefore, the violation of OAR 845-005-0355(5) has also been established. And, as above, Licensee is responsible for employee Shuck's violation of the restriction under OAR 845-006-0362.

## **2. Sanction**

Commission staff proposes license cancellation pursuant to ORS 471.315 and removal from the Responsible Vendor Program pursuant to OAR 845-009-0135(8)(d) based on allegations that Licensee violated both OAR 845-005-0355(5) (restriction violation) and OAR 845-006-0335(1) (failure to verify age).

The Commission has categorized the failure to comply with a restriction on a license as a Category I violation. OAR 845-005-0355(5). Category I violations, by rule, are ones that make a licensee ineligible for a license. OAR 845-006-0500(7)(a)(A). In prior cases, the Commission has held that, in the context of a license restriction violation, cancellation of the license may only result when the violation is substantial. In *Oceanside Restaurant & Lounge* (OLCC, Final Order, 88-V-123, August 1989), the Commission identified the following factors to consider in determining whether a violation of restriction on the license is substantial:

- (a) the timing of the violation, with breaches early in the contract considered more likely to be substantial;
- (b) whether the violation was willful;
- (c) the number of violations;

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for any act or omission of his servant, agent, employee, or representative in violation of any law, municipal ordinance, administrative rule, or regulation affecting his license privileges.

(d) whether the hardship on the licensee outweighs the importance of the conditions in ensuring compliance with the license condition.

The *Oceanside* factors are not required elements, but are to be examined as factors that weigh for or against the determination that a restriction violation is substantial enough to warrant the presumed penalty of cancellation. *Bettie Ford's* (OLCC Amended Final Order, 06-V-021/06-L-006, August 2007). In this case, as set out below, two of the four factors weigh against Licensee (i.e., in support of the violation being substantial), and two factors weigh in the other direction, (against the violation being substantial enough to warrant cancellation).<sup>8</sup>

(a) *Timing of the Violation*: Licensees Sidhu and Singh have held a license at this location since 2005. The company has been licensed since 2007. The restriction at issue has been in effect since the March 2008 Final Order Incorporating Settlement. The restriction violation occurred in December 2010, two years and eight months after the restriction was imposed. This is a significant period of time without a violation, which weighs against a finding that the violation was substantial. *See, e.g., New Star* (OLCC Final Order, 01-L-007/01-V-075, June 2002) (holding that one year is a sufficient amount of time without a violation for a licensee to show good cause to have a restriction removed).

(b) *Willfulness*: The evidence establishes that employee Shuck was well aware of the restriction requiring the use of age verification equipment. The evidence also establishes that, to complete the sale to minor Williams, Shuck had to override the system by inputting a date of birth of someone age 21 or older.

In prior cases, the Commission has held that where a licensee's employee is aware of restrictions on the license and voluntarily sells an alcoholic beverage in a manner contrary to the license restriction, the violation was committed willfully. *See, e.g., US Market #109* (OLCC Final Order, 08-V-112, January 2010) (violation was willful where employee voluntarily sold alcohol to a minor without using the age verification equipment); *see also Bettie Ford's*, Amended Final Order (employees acted willfully because, even knowing of the restrictions, they voluntarily allowed individual patrons to have more than one drink for personal consumption at a time and free poured drinks without adhering to the 1.25 ounce limit for distilled spirits); *Dad's Restaurant & Lounge* (OLCC Final Findings of Fact, Conclusions of Law and Order, 06-V-029, December 2007) (the bartender, who was aware of license restrictions prohibiting the stacking of drinks and limiting mixed drinks to one ounce of alcohol, acted willfully by voluntarily serving a second drink to a patron already in possession of one and by free pouring drinks without adhering to the one ounce limit); *Cf. US Market #180* (OLCC Final Order, 08-V-043, October 2009) (restriction violation not willful where the employee used the age verification equipment but the print out contained contradictory information and the employee did not verify the patron's age).

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<sup>8</sup> The ALJ stated in the Proposed Order that "two of the four factors weigh against Licensee, one weighs in Licensee's favor and one is neutral." However, there are only two ways that the *Oceanside* factors can weigh, either in favor of or against a determination that the restriction violation was substantial. Therefore, the Commission has revised the language in the order to reflect this. The outcome of the *Oceanside* analysis is the same as that reached by the ALJ; two of the four factors weigh against Licensee and two do not.

Licensee argues that the restriction violation resulted from employee Shuck's negligence rather than a deliberate intention to disregard the known standard and therefore this factor should not weigh as heavily against it. The Commission implicitly rejected this argument in *U.S. Market #109*,<sup>9</sup> as well as *Bettie Ford's* and *Dad's Restaurant & Lounge*.<sup>10</sup> In each case, the Commission found that the restriction violations were willful if the restriction was known to the licensee and the employee voluntarily sold alcohol in a manner contrary to the restriction requirements.

Licensee further asserts that although it may be held responsible for the conduct of employees under OAR 845-006-0362, it is not always appropriate to impute the employee's conduct to the licensee where, as in this case, the licensee takes additional steps to train employees about the sale of alcohol, checking identification and the required use of age verification equipment. While the language of OAR 845-006-0362 is permissive (using the term "may" rather than "shall"), the Commission has consistently held that a licensee is responsible for the acts or omissions of employees working on the licensee's behalf. Consequently, here, as in prior cases, it is appropriate to find that the violation was willful, as the Commission has interpreted that term through case precedent.<sup>11</sup> This factor therefore weighs against Licensee.

(c) *Number of Violations*: The record establishes only the one restriction violation by Licensee's employee at US Market #145. This factor weighs against a finding that the violation is substantial. *US Market #109*, Final Order at 9; *US Market #180*, Final Order at 9.

(d) *Hardship on the Licensee vs. the Importance of the Conditions*: The fourth *Oceanside* factor counts against a licensee where "the breach strikes at the very heart of the

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<sup>9</sup> In *US Market #109*, for example, the evidence established that the employee did not use the required age verification equipment because the ID scanner was not working and the employee was not sufficiently trained on the equipment to know that he could use the key pad function to enter the patron's birth date. The Commission found the restriction violation was willful because the restriction was known to the licensee and the clerk voluntarily sold alcohol to a minor in violation of the restriction. Final Order at 3-9.

<sup>10</sup> Unlike *US Market #109*, which involved a single transaction, both *Bettie Ford's* and *Dad's Restaurant & Lounge* involved repeated restriction violations by multiple employees. In *Bettie Ford's*, for example, three employees committed violations. One employee allowed at least two patrons to have more than one drink for personal consumption at one time, and two others free poured shots of distilled spirits in excess of 1.25 ounces. Amended Final Order at 9-11. And in *Dad's*, one employee violated a restriction at least 10 times by serving alcoholic drinks containing more than one ounce of alcohol, and another employee violated the restriction twice by serving more than one drink to a patron at a time and serving more than an ounce of distilled spirits in a drink. Final Order at 13-16.

<sup>11</sup> Licensee argues that the Commission should look to the law of contracts in analyzing this and the other *Oceanside* factors, and should regard a licensee's or employee's willful breach as more substantial than one due to negligence. However, as the Commission recognized in *Full Moon Bar & Grill* (OLCC Final Order, 10-V-047, April 2011) and *The Vault Bistro & Lounge* (OLCC Final Order, 10-V-006, December 2010), where it has defined a term or established a rule through case precedent (such as what constitutes a willful restriction violation), the case precedent dictates the result and common law definitions and standards do not govern.

restriction or condition placed on the licensee, as the licensee would not be a good risk for compliance with alcoholic beverage laws without the restriction.” *Dad’s*, Final Order at 15, citing to *La Macarena* (OLCC Final Order, 00-V-116, August 2002).

The Commission has previously held that a restriction requiring the use of age verification equipment for persons appearing under the age of 26 who attempt to purchase alcoholic beverages is not onerous and is easily followed. *US Market #109*, Final Order at 9; *US Market #180*, Final Order at 9; *South Salem Food & Gas* (OLCC Final Order, 10-V-030, March 2011.) Here, the restriction was placed on the license because Licensee Sidhu’s record of violations, specifically the sale of alcohol to minors at several of his other licensed convenience store locations. As in *US Market #109*, the breach in this case (failing to use the required age verification equipment to verify a patron’s age) strikes at the very heart of the restriction placed on the license. Accordingly, this factor also weighs against Licensee.

Having found that two of the four factors weigh against the Licensee, the next question is whether these two factors are enough to warrant cancellation of the license. In *US Market #180*, where only two of the four factors weighed against the licensee, the Commission found that a penalty short of cancellation was appropriate. There, the Commission focused on lack of willfulness of the violation under the unique circumstances of the case, noting that the employee received conflicting information from the age verification equipment screen. Conversely, in *US Market #109*, the Commission concluded that a restriction violation was substantial and warranted cancellation where three of the four *Oceanside* factors weighed against the licensee. In that case, the restriction violation occurred within six months of the restriction being placed on the license. The Commission also considered that the licensee knew of the problems with the ID scanner but did not direct employees to use the keypad when the scanner was not working. Similarly, in *South Salem Food & Gas*, the Commission concluded that the restriction violations were substantial enough to warrant cancellation where three of the four factors weighed against the licensee. In *South Salem*, unlike the present case, there were two license restriction violations at issue. The licensees violated a second restriction by allowing two employees to sell alcohol when these employees were not authorized sellers under the license.

Where, as here, only two of the four *Oceanside* factors are present, the presence of other aggravating or mitigating circumstances can be considered in determining whether or not a penalty of cancellation is warranted. In canceling the license in *US Market #109*, the Commission specifically found that no mitigation was warranted; the licensee did not make a good faith effort to comply with the restriction because he did not promptly resolve the problem with the age verification equipment’s scanning feature and did not adequately train the sales clerks on how to use the equipment. Here, on the other hand, Licensee has taken affirmative measures to prevent sales to minors and violations of the restriction requiring the use of age verification equipment at the premises. Licensee has not had any violations at the premises previously and, since the restrictions were imposed in March 2008, has gone for more than two and a half years without any violations. As found above, in addition to having all sales clerks watch an OLCC-produced video on alcohol sales and checking identification and read and sign the OLCC booklet, Licensee requires the clerks to read and sign an additional form acknowledging their understanding of the liquor laws and the company’s rules and policies about the sale of alcohol. Licensee clearly communicates its expectations and the license restrictions to

their employees, including the requirement to use the age verification equipment for persons who appear under the age of 26. Licensee also requires the sales clerks to attend quarterly refresher meetings, and posts notices and reminders to clerks to check identification and use the age verification equipment.

Indeed, less than a month before employee Shuck's sale of alcohol to minor Williams, Licensee's sales clerks, including Shuck, attended an OLCC-sponsored training program focusing on alcohol sales and checking ID. During that training, employees were again reminded about the requirement to use the age verification equipment installed at all US Market locations. Licensee's good faith efforts to train employees and to prevent violations tips the scale in Licensee's favor, and militates against cancellation of the license.<sup>12</sup>

After considering the circumstances in this case in light of the Commission Final Orders discussed above, it is reasonable to conclude that, as in *US Market #180*, a penalty short of cancellation is appropriate. Only two of the four factors weigh in favor of finding the restriction violation substantial. And, while this case is factually different from *US Market #180*, it is also distinguishable from *US Market #109* (where the licensee did not clearly communicate to employees the requirement to use the keypad function when the scanner did not work). Consequently, for the Category I violation of OAR 845-005-0355(5), the appropriate penalty is a 30 day suspension, which is a reduction by one level from the proposed penalty of cancellation.<sup>13</sup> For the Category III violation of OAR 845-006-0355(1), the appropriate penalty is a 10 day suspension or a civil penalty of \$1,650 in lieu of the 10 day suspension.<sup>14</sup>

Pursuant to OAR 845-009-0135(8)(d), a licensee will be removed from the Responsible Vendor Program (RVP) for a Category I violation by an employee, but may reapply for the program in one year. Citing to OAR 845-009-0135(7)<sup>15</sup> and (8)(a),<sup>16</sup> Licensee argues that as a

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<sup>12</sup> Staff argued that these efforts are no more than what is required under Restriction #2 on the license. However, Licensee has gone beyond what the RVP program requires by training its employees on the AVE equipment and clearly communicating the requirement that the equipment be used. While these training activities might not be enough to qualify as mitigation under other circumstances, they are sufficient to tip the balance against cancellation where, as in this case, the *Oceanside* factors themselves are evenly balanced.

<sup>13</sup> The ALJ proposed a sanction of a 30 day suspension or a civil penalty of \$4,950, which is a reduction of two levels on the Commission's penalty schedule from the standard sanction of license cancellation. Given the seriousness of the violation, the Commission finds that a reduction of only one level is warranted.

<sup>14</sup> Because Licensees are also being removed from the Responsible Vendor Program due to the Category I violation of OAR 845-005-0355(5), they are not entitled to a reduced penalty for the sale to a minor violation under Schedule IIIa. OAR 845-009-0135(8)(d).

<sup>15</sup> OAR 845-009-0135(7) provides:

Sanctions. If the licensee's employee sells to a minor and the licensee is a certified Responsible Vendor who has all program standards in place, the Commission will not cancel the license of the licensee, or deny issuance of a license to the person who holds

participant in the RVP with all of the Responsible Vendor standards in place at the time of the violation, it is entitled to the RVP's protections and should not be removed from the program. But, under the circumstances in this case, the fact that Licensee had all program standards in place does not prevent or preclude its removal from the program under OAR 845-009-0135(8)(a). Because of the Category I violation by Licensee's employee, OAR 845-009-0135(8)(d) is the applicable standard, and Licensee is subject to removal from the program. *See US Market #180*, Final Order at 10 (removal from the RVP is an appropriate penalty for a Category I violation by an employee).<sup>17</sup>

### 3. License Renewal

In its Amended Notice, the Commission also proposed to refuse to renew Licensee's license under ORS 471.313(4)(g). This provision authorizes the Commission to refuse to license any applicant if the Commission has reason to believe that the applicant "did not have a good record of compliance" with the liquor laws when 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).

Commission Staff asserts that, when combined, Licensees Sidhu and Singh have 13 prior Category III and III(a) violations for failure to verify the age of a minor and four Category I restriction violations at premises at which they are, or have been, licensed. Commission Staff contends this poor record of compliance, particularly Licensee Sidhu's record, justifies refusing to renew the license. Commission Staff further argues that the two violations at US Market #145, by themselves, constitute a poor record of compliance.

As set out in Finding 14 above, since Licensee Sidhu obtained his first off-premises sales license in 1998, he has had licenses at 20 convenience store locations in Oregon. As of February 2011, he was licensed at 11 locations. In the last 13 years, in addition to the two violations proved above, he has a record of 12 violations for sale to a minor and 4 restriction violations

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the retail license. The licensee will be eligible for reduced sanctions based on OAR 845-006-0500, Suspensions and Civil Penalties.

<sup>16</sup> OAR 845-00900135(8)(a), addressing removal from the program and reinstatement, provides:

(a) For a sale to a minor or failure to properly verify identification by an employee, if the licensee did not have all of the Responsible Vendor standards in place at the time of the violation, the licensee is removed from the program. The licensee may reapply for the program one year after the violation is ratified.

<sup>17</sup> In its Exceptions, Licensee asserts that if the Commission imposes a greater penalty than in the Proposed Order, additional findings and analysis should be made with regard to its affirmative defenses. However, as the ALJ noted in her response to the comments and exceptions, Licensee did not take exception to any of the findings or conclusions made by the ALJ. The Commission has considered Licensee's arguments and finds no basis to remand the case for additional findings.

based on an employee's failure to use age verification equipment. He also has several store locations with no violations. He has not personally committed any violations.

As set out in Finding 15, since Licensee Singh obtained his first off-premises sales license in 2005, he has had at least four licenses at convenience store locations in Oregon. In addition to the two violations proved above, he has a record of one violation based on an employee's sale to a minor at US Market #245 in Salem. He has not personally committed any violations.

Licensee argues that it is not appropriate to aggregate all of the violations attributable to Licensee Sidhu over the last 13 years to find that Licensee has a poor record of compliance at US Market #145. Licensee notes that, in considering the license renewal in *US Market #180* and *US Market #109*, the Commission looked only to the violations at the particular premises in issue in determining whether the licensee had a poor record of compliance for purposes of ORS 471.313(4)(g). Similarly, in *Center Market #1, #2, #9 and #12* (OLCC Final Order, 08-V-104, 08-V-105 and 08-V-106, October 2009), the Commission considered each corporate licensee's compliance record separately from the others in determining whether to renew the licenses at various locations.

Even though Licensee Sidhu and Licensee Singh are considered licensees under OAR 845-006-0301(1) and, as such, are responsible for the conduct at their licensed premises regardless of whether they personally commit the violation, the prior cases cited above indicate that, *in the license renewal context*, the Commission generally considers the individual licensee's compliance record at the particular premises or license in issue, as opposed to the aggregate compliance records from other premises which the individual licensee is, or has been, licensed. By contrast, in *Center Market #18* (OLCC Final Order, 10-L-011, April 2011), a case involving the application for a new license, the Commission explained that in the context of a *new* license application, it will consider the compliance record of the corporate entity and the individuals who own or have an interest in the business in its entirety. With the exception of *A Taste of Thai Restaurant* (OLCC Final Order, 98-L-003, August 1998), the Commission's recent case precedent in the license renewal context considers the licensee's compliance record only at the premises being renewed when determining whether the licensee has a poor record of compliance.<sup>18</sup> Therefore, the Commission declines to consider the compliance record of these Licensees at locations other than US Market #145. Thus, the pertinent inquiry is whether the two violations at US Market #145 themselves constitute a poor record of compliance for purposes of ORS 471.313(4)(g).

Even when considered in isolation, the violations at issue in this case constitute a poor record of compliance under recent Commission case precedent. In both *US Market #109* and *US Market #180*, the Commission concluded that a Category I violation, together with a Category III violation is a poor record of compliance. Thus, in this case, Licensee has a poor record of compliance at US Market #145. The next determination, therefore, is whether Licensee has shown good cause to overcome this poor record of compliance and to warrant renewal of the license with restrictions.

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<sup>18</sup> In *A Taste of Thai Restaurant* the Commission found that the applicant's poor record at another premises was outweighed by her good compliance record at the premises being renewed and other factors.

The Commission considers a number of factors in determining whether there is good cause to overcome a poor record of compliance. In both *US Market #109* and *US Market #180*, the Commission considered the following factors:

- (a) Lengthy period(s) of time without violations as a licensee;
- (b) The nature/seriousness of the violation;
- (c) Personal involvement by the licensee;
- (d) Whether the licensee took immediate corrective steps following the violation;
- (e) Time passage since latest violation;
- (f) Whether the incident was isolated;
- (g) Whether the violation is aggravated or mitigated;
- (h) Willingness to have a permanent restriction;
- (i) Acceptance of responsibility versus evasion of responsibility for the violation.

*US Market #109*, Final Order at 10-12; *US Market #180*, Final Order at 112. Again, in these cases (both of which involved Licensee Sidhu), the Commission looked only to the past operations and compliance history at the licensed location in determining whether the licensee would be a good risk for compliance at that location in the future.<sup>19</sup>

In this case, as set out below, the factors weigh in favor of finding good cause to overcome the poor record of compliance:

(a) *Period of time without violations:* As set out above, Licensees Sidhu and Singh were first licensed at this location in 2005, and formed the LLC in 2007. The restriction was imposed in March 2008. The December 2010 violations were the first violations at this location. This factor weighs in Licensee's favor.

(b) *Nature/seriousness of the violation:* Licensee's employee violated a restriction on the license, rendering this a serious violation. This factor weighs against Licensee.

(c) *Personal involvement by the licensee:* The individual licensees were not personally involved in the violation, so this factor weighs in Licensee's favor.

(d) *Whether the licensee took immediate corrective steps following the violation:* Licensee terminated employee Shuck's employment based on the sale to minor Williams. Licensee has taken, and continues to take, affirmative steps to train employees on the alcohol sales laws, the requirement to check ID and the restriction requirement to use age verification equipment. On the other hand, there is no evidence that Licensee made changes to its operation promptly after these violations to prevent future occurrences. Therefore, on balance this factor provides little or no good cause.

(e) *Time passage since latest violation:* The violations occurred on December 12, 2010, seven months before the hearing. This factor is neutral.

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<sup>19</sup> For this reason, little weight is given to Commission Staff's contention that Licensee Sidhu's compliance record at other convenience store locations where he is currently, or has been, a principal owner shows he is not a good risk for future compliance at US Market #145.

(f) *Whether the incident was isolated:* The violations occurred on a single day and involved a single event. This factor weighs in Licensee's favor.

(g) *Whether the violation is aggravated or mitigated:* Commission staff did not allege, and the record does not establish, any basis to aggravate the sanction. Licensee's continuing efforts to train employees including providing training on the AVE restriction requirement, can be considered as mitigating. This provides some good cause.

(h) *Willingness to have a permanent restriction:* Licensee agreed to the restriction at US Market #145 as part of the March 2008 settlement, and is willing to continue with the restriction requiring that all individual employees and licensees use age verification equipment to verify the age of any person appearing under the age of 26 who attempts to purchase alcohol. However, Licensee has also violated the restriction. Therefore, this factor is neutral with regard to good cause.

(i) *Acceptance of responsibility versus evasion of responsibility for the violation.* Both Licensee and employee Shuck accepted responsibility for the violations. As noted above, Shuck was aware of the requirement to verify age and the requirement to use age verification equipment and admitted that he failed to do so. This factor also weighs in favor of good cause.

Of the nine factors discussed above, five weigh in favor of a finding of good cause, while the remaining factors are either neutral or weigh against Licensee. Considering Licensee's compliance record at the licensed premises in light of the relevant good cause factors discussed above, Licensee will be a good risk for compliance at US Market #145 in the future, if the license is renewed with restrictions.

### **FINAL ORDER**

The Commission orders that, for the violation of OAR 845-005-0355(5), the Off-Premises Sales license held by US Market #145, LLC and members Lal Sidhu and Satwinder Singh, doing business as US Market #145, located at 1450 NW 9<sup>th</sup> Street, Corvallis, Oregon be **SUSPENDED** for 30 days.

For the Category I violation by an employee, Licensee is also removed from the Responsible Vendor Program.

Additionally, for the violation of OAR 845-006-0335(1)(a)(b) and (c), the Off-Premises Sales license held by US Market #145, LLC and members Lal Sidhu and Satwinder Singh, doing business as US Market #145, located at 1450 NW 9<sup>th</sup> Street, Corvallis, Oregon be **SUSPENDED** for 10 days or **FINED** \$1,650 in lieu of suspension.

The Commission also orders that the application for renewal of the Off-Premises Sales license filed by US Market #145, LLC and members Lal Sidhu and Satwinder Singh, doing business as US Market #145, located at 1450 NW 9<sup>th</sup> Street, Corvallis, Oregon be **GRANTED** with the continuing restrictions as follows:

(1) Licensee will comply with the program standards for the responsible vendor program as set forth in OAR 845-009-0135(4);<sup>20</sup> and

(2) Licensee has age verification equipment, as defined in OAR 845-009-0140(1)(b) installed at all of its locations and will install age verification equipment at any new locations at the time of licensure. Licensee will require that all individual employees or licensees use age verification equipment to verify the age of any patron who reasonably appears under the age of 26 who attempts to purchase alcoholic beverages.

The combined penalty for the two violations is a 40 day suspension, or a fine of \$1,650 in lieu of 10 days suspension with the remaining 30 days of the suspension mandatory. If you choose to pay the \$1,650 fine in lieu of 10 days suspension, it must be paid within ten (10) days of the date of this Order; otherwise, the full 40 day suspension must be served.

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

Dated this 21st day of February 2012.

/s/ Stephen A. Pharo

Stephen A. Pharo

Executive Director

OREGON LIQUOR CONTROL COMMISSION

Mailed this 21st 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.

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<sup>20</sup> Although Licensee is removed from the Responsible Vendor Program based on the Category I violation by an employee, Licensee must continue to comply with the program's standards as set forth in OAR 845-009-0135(4) to remain in compliance with the license restriction.