BEFORE THE LIQUOR CONTROL COMMISSION
of the STATE OF OREGON

In the Matter of the Off-Premises Sales License Held by:	))))	**FINAL FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER**
US Market #130, LLC Feroz Mohammed, Managing Member Nasreen Akhtar, Member dba **US MARKET #130** 1030 Broadway NE Salem, Oregon 97302	))))))	OLCC-12-V-017 OLCC-12-V-017A OLCC-12-V-017B

HISTORY OF THE CASE

On March 30, 2012, the Oregon Liquor Control Commission (OLCC or Commission) issued a Notice of Proposed License Cancellation and Removal From Responsible Vendor Program to US Market #130, LLC, Feroz Mohammed, Managing Member, and Nasreen Akhtar, Member, dba US Market #130 (Licensee). The Notice alleged that Licensee failed to comply with a license restriction that required Licensee to provide certain documentation to the OLCC by February 1, 2012.

Licensee timely requested an administrative hearing. On May 3, 2012, the OLCC referred the hearing request to the Office of Administrative Hearings (OAH). The OAH assigned the matter to Senior Administrative Law Judge (ALJ) Jennifer H. Rackstraw.

On August 2, 2012, the OLCC issued an Amended Notice of Proposed License Cancellation, Removal from Responsible Vendor Program, and Proposed Refusal to Renew License to Licensee.

A hearing was scheduled for September 25, 2012, but was subsequently postponed because a Punjabi interpreter was not available for Feroz Mohammed. A status conference occurred instead on September 25, 2012. Attorney Michael Mills represented Licensee. OLCC Case Presenter Becky Voelkel represented the OLCC. The hearing was rescheduled to November 28, 2012, but it was subsequently postponed at the OLCC's request.

On December 19, 2012, the OLCC issued a Second Amended Notice of Proposed License Cancellation, Removal from Responsible Vendor Program, and Proposed Refusal to Renew License to Licensee. This notice alleged an additional restriction violation (*i.e.* that Licensee allowed Lal Sidhu, either individually or through an entity associated with Mr. Sidhu, to take part in the operation or management of Licensee's business).

On January 29, 2013, ALJ Rackstraw convened a hearing in Salem, Oregon. Mr. Mills represented Licensee. Ms. Voelkel represented the OLCC. The following persons testified: OLCC Administrative Specialist Karen Maia; OLCC Administrative Specialist Lanette Clayton; OLCC Case Presenter Anna Davis; former OLCC District Inspector Steve Berrios; and Feroz

Mohammed. Rajdeep Kaur, a qualified Punjabi interpreter, interpreted for Mr. Mohammed. The record closed on March 12, 2013, after the receipt of written closing arguments.

The Administrative Law Judge considered the record of the hearing and the applicable law and issued a Proposed Order mailed May 10, 2013**.**

Licensee filed Exceptions to the Proposed Order on June 7, 2013. The Administrative Law Judge responded to Licensee's Exceptions on June 17, 2013.

On June 27, 2013, 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 and the Administrative Law Judge’s Response to Licensee’s Exceptions. Based on this review and the preponderance of the evidence, the Commission enters the following:

EVIDENTIARY RULINGS

OLCC staff offered Exhibits A1 through A31. Licensee objected to Exhibits A17 through A27 on the basis of relevancy. Those objections were overruled, and Exhibits A1 through A31 were admitted into the record.

Licensee offered Exhibits P1 through P8. Those exhibits were admitted into the record without objection.

ISSUES

1. Whether Licensee violated a license restriction by failing to provide required documentation to the OLCC by February 1, 2012. OAR 845-005-0355(5).

2. Whether Licensee violated a license restriction by allowing Lal Sidhu to take part in the operation or management of the licensed business. OAR 845-005-0355(5).

3. If one or more violations are proven, what is the appropriate penalty?

4. Whether the Commission has grounds to refuse to renew Licensee’s license under ORS 471.313(4)(g); and, if so, whether Licensee has shown good cause to overcome the refusal.

FINDINGS OF FACT

Chronological Findings

1. On March 7, 2007, US Market #130, LLC filed Articles of Organization with the Oregon Secretary of State, Corporation Division (Corporation Division). The document lists the organizers as Feroz Mohammed and Nasreen Akhtar. It lists 1038 Broadway NE, in Salem Oregon,[1] as the registered agent’s publicly available address and mailing address. It lists Nadya Boulware as the contact name and (503) 391-8889 as the contact phone number. (Ex. A29.)

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[1] 1038 NE Broadway is the physical address for US Market Enterprises, LLC. US Market #130 is adjacent to the parking lot for US Market Enterprises, LLC, and has a physical address of 1030 NE Broadway. (Test. of Berrios, Davis; Exs. A1.)

2. During all times relevant to this matter, US Market #130, LLC, Feroz Mohammed, Managing Member, and Nasreen Akhtar, Member, dba US Market #130 (Licensee)[2] have held an Off-Premises Sales license for the premises, a convenience store, located at 1030 Broadway NE in Salem, Oregon. The OLCC issued the sales license to Licensee in April 2007. (Ex. A1; test. of Berrios.) In July 2007, the OLCC approved Licensee's application for Responsible Vendor status. (Ex. A2.)

3. On September 29, 2011, the OLCC issued a Second Amended Notice of Proposed License Cancellation, Removal from Responsible Vendor Program, and proposed Refusal to Renew License to Licensee.[3] (Ex. A5.) The notice alleged the following violation:

> From about October 27, 2009 to the present, Licensee allowed an unlicensable person to maintain a financial interest in the business. Lal Sidhu is an unlicensable person due to his poor record of compliance with alcoholic liquor laws * * * and [he] has a financial interest in the business because he rents or leases property to or for the licensed business * * *[.] Lal Sidhu also has a financial interest in the business because he invested or loaned money for the licensed business to Managing Member Feroz Mohammed[.]

(*Id.* at 1.) In approximately mid to late 2011, because of the actions taken by the OLCC, Mr. Mohammed told Lal Sidhu to stop signing contracts on behalf of US Market #130. (Test. of Mohammed.)

4. Licensee requested a contested case hearing. But in lieu of a hearing, the OLCC and Licensee entered into a Settlement Agreement. As part of that agreement, the OLCC withdrew the alleged violation and penalty, and agreed to renew Licensee's license with certain restrictions. (Exs. A3, A4, A5.) The Settlement Agreement stated, in part:

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[2] OAR 845-006-0301 defines "licensee" as follows:

> (1) A license issued by the Commission shall include as licensees under a single license the individuals or legal entities who own or have an interest in the business as defined in OAR 845-005-0311(3). If any such licensee is a corporation or other legal entity, the following persons shall also be included as licensees under the license:
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> (a) Each principal officer as defined in OAR 845-006-0475(1)(d);
>
> (b) Each director;
>
> (c) Each person or entity who owns or controls 10% or more of the entity's stock or who holds 10% or more of the total membership interest in the entity or whose investment interest is 10% or more of the total investment interests in the entity;
>
> (d) Each manager of a limited liability company and each general partner of a limited partnership.

[3] Licensee had filed a License Renewal Application in February 2011. (Ex. A15; test. of Clayton.)

> The Commission will renew the license with the following restrictions on the license, effective on the date this agreement is ratified:
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> * * * * *
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> 2. Licensee will not allow Lal Sidhu to take part in the operation or management of the licensed business, either individually or through any entity associated with Lal Sidhu. Licensee may receive services from entities that also offer services to Lal Sidhu provided that Lal Sidhu does not take part in the operation or management of the licensed business via the associated entity. Management or operation of the business includes but is not limited to any of the following specific prohibitions.
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> a. Beginning on the date the settlement is ratified, Licensee will not allow Lal Sidhu, either individually or through any entity associated with Lal Sidhu, to take part in the operation or management of the licensed business through any of the following activities: responding to regulatory agencies on behalf of the licensed business, negotiating or executing contracts on behalf of the licensed business, and/or receiving, allocating or disbursing funds owed to the licensed business[.]
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> b. Beginning on February 1, 2012, in addition to the requirements of Restriction 2.a, Licensee will also not allow Lal Sidhu, either individually or through any entity associated with Lal Sidhu, to take part in the operation or management of the licensed business through any of the following activities: being a signatory on any bank account for the licensed business, holding Power of Attorney for Licensee or any of its corporate principals, being named on any contract involving the licensed business, or holding or carrying an interest in any such contract.
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> * * * * *
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> 4. On February 1, 2012 and on the first business day of every February thereafter, Licensee will provide to the Administrative Policy and Process Division of the OLCC copies of all vendor contracts, all service contracts, all bank signature cards associated with the licensed premises, and documentation of any loans made for the benefit of the business.

(Ex. A5 at 2.) The restrictions were drafted by OLCC and the purpose of the restrictions was to ensure that Mr. Sidhu was divested of any interest in Licensee's business. (Test. of Davis.)[4]

5. When the OLCC placed the above restrictions on Licensee's license, Mr. Sidhu was the managing member of US Market Enterprises, LLC (USME), located at 1038 Broadway NE,

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[4] Licensee sought to include this additional finding of fact in its Exceptions to the Proposed Order and the ALJ agreed in her Response to Exceptions to Proposed Order that the finding was supported by the record.

in Salem, Oregon.[5] (Ex. P6 at 2; test. of Berrios.) USME provides a variety of services to US Market stores and receives profits from them. Mr. Sidhu owns several US Market stores. (Test. of Davis, Berrios.)

6. On October 14, 2011, Licensee's attorney, Michael Mills, signed a Stipulated Settlement Agreement for Entry into Final Order on Licensee's behalf. (Ex. A5 at 1-3.)

7. On October 21, 2011, Mr. Sidhu sold his membership interest in USME to his wife, Parveen Sidhu. (Ex. P5 at 1-4.) Mrs. Sidhu is the sister of Feroz Mohammed's wife, Rajdeep Kaur. (Test. of Mohammed.)

8. On October 27, 2011, the OLCC mailed a Final Order Incorporating Settlement Agreement, along with a cover letter, to Licensee at 1030 Broadway NE and to Mr. Mills. (Exs. A3, A4, A6; test. of Maia.) There is no record that the U.S. Postal Service returned those documents as undeliverable. (Test. of Maia.) The Final Order Incorporating Settlement Agreement became effective on October 27, 2011. (Ex. A4 at 3.)

9. Sometime after October 27, 2011, OLCC Administrative Specialist Karen Maia received a phone call from an unidentified man who asked whether US Market #130 owed the OLCC any money with regard to the settlement. Ms. Maia recognized the man's voice and realized that he had called her with the same question after the OLCC had issued previous notices to US Market #130. (Test. of Maia.)

10. On or about November 1, 2011, the OLCC mailed an Off-Premises Sales License Certificate to Licensee at 1030 Broadway NE. (Ex. A7 at 1-2; test. of Clayton; *see* Ex. A14.) The Certificate stated on its face that it was a "Restricted" license certificate. (Ex. A7 at 1.) The OLCC's customary business practice is to mail a restricted license certificate to a licensee in an envelope that states "Restricted License Certificate Enclosed" on the front. (Test. of Clayton; *see* Ex. A8.)

11. On or about December 21, 2011, USME filed a 2011 Annual Report with the Secretary of State's Corporation Division. The report listed Parveen Sidhu as the managing (and sole) member of the LLC. (Ex. P6 at 1; test. of Davis.)

12. In a January 18, 2012 letter to Judith Bracanovich of OLCC's Administrative Policy and Process Division, Mr. Mills stated, in part:

> Per the terms of the settlement agreements between the OLCC and various US Markets, certain items are to be submitted to * * * OLCC by February 1, 2012. I am assuming those items should be directed to you, but let me know if otherwise.
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> [I] am not sure if I still represent US Market 130 * * *. I will clarify my representation of US Market 130.

(Ex. P7.)

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[5] From January 2007 to January 2011, Mr. Sidhu and Parveen Parveen (aka Parveen Sidhu) were partners in US Market Enterprises LLP, a limited liability partnership. (Ex. P4 at 1-2.)

13. On January 26, 2012, Feroz Mohammed signed a bank signature card (card) from West Coast Bank. (Ex. P1 at 1-2.) The account holder name listed on the card is "US Market 130 LLC," and the two authorized individuals on the account are Mr. Mohammed and Ruzak Ahmad. (*Id.* at 1.) The mailing address and street location listed on the card are both 1038 Broadway Street NE.[6] The telephone number listed on the card is (503) 391-8889. (*Id.*) On a business card for "US Market & Cigs," (503) 391-8889 is listed as an office number for "Nadya." (Ex. A28.) That same business card lists Lal Sidhu's name and cell number. (*Id.*; test. of Davis.)

14. In an email to OLCC Hearing Coordinator Susan Rudberg dated January 31, 2012, Mr. Mills stated, in part:

> I have not yet confirmed my representation of [US Market #] 130, but have reminded them of date of February 1 as date in settlement agreement.
>
> If you don't hear from them let me know. As far as I know they are complying. There is a bit of communication difficulty but no bad intent.

(Ex. A10 at 2.)

15. By February 1, 2012, the OLCC had not received from Licensee any of the documents specified in Restriction No. 4 of the Settlement Agreement. (Test. of Davis.)

16. From February 1, 2012 to March 14, 2012, Feroz Mohammed and Nasreen Akhtar were in India. Before Mr. Mohammed left for India on February 1, 2012, he applied for renewal of his license with the OLCC, and he submitted a Change of Registered Agent/Address to the Corporation Division. (Test. of Mohammed; Ex. A30.) On the document he submitted to the Corporation Division, the "new address of registered agent" is listed as 7551 Duckhorn Lane NE, in Keizer, Oregon. (Ex. A30.) Mr. Sidhu had requested that Mr. Mohammed sign that document. (Test. of Mohammed.)[7] The document was officially filed with the Corporation Division on February 2, 2012. (*See* Ex. A30.)

17. In a February 7, 2012 letter to Susan Rudberg of the OLCC, Mr. Mills stated, in part:

> Lal Sidhu is no longer associated in any manner with US Market Enterprises, LLC. Parveen Sidhu wholly owns USME, LLC and is sole Managing Member. This change has been filed with the Corporation [Division].

(Ex. P8.)

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[6] A West Coast bank signature card for US Market #130 dated October 8, 2004 lists Nadya Boulware as an authorized individual on the account. (Ex. A16.) In contrast to the January 26, 2012 card, the mailing address and street location listed on the October 8, 2004 card is 1030 Broadway NE. (*Compare* Ex. A16 *with* P1 at 1.)

[7] When questioned about Exhibit A30 at hearing, Mr. Mohammed initially appeared to have no knowledge of the document. However, he subsequently testified that Mr. Sidhu had asked him to sign it.

18. On February 22, 2012, OLCC Inspector Steve Berrios visited the licensed premises and spoke with Feroz Mohammed's son, Ruzak Ahmed. When Mr. Berrios asked Mr. Ahmed whether he was aware of the restrictions on the license, Mr. Ahmed answered "no." (Ex. A13 at 3; test. of Berrios.) When Mr. Berrios informed Mr. Ahmed that Licensee should have provided documents to the OLCC by February 1, 2012, Mr. Ahmed stated that Mr. Mohammad and Nasreen Akhtar were in India and would not return until March 6, 2012. When Mr. Berrios asked Mr. Ahmed whether Lal Sidhu or Nadya Boulware could provide the required documents, Mr. Ahmed stated that he would need to check with his father about that. (Ex. A13 at 3; test. of Berrios.)

19. On March 6, 2012, Mr. Berrios called the licensed premises and spoke with Mr. Ahmed. Mr. Ahmed informed Mr. Berrios that his father and Ms. Akhtar would not return from India until March 14, 2012. When Mr. Berrios asked Mr. Ahmed if he was able to get the contracts, he replied, "Well there is no contract for Columbia. Did you need everything or just for alcohol?" (Ex. A13 at 3; test. of Berrios.) When Mr. Berrios informed Mr. Ahmed that the OLCC needed all contracts for US Market #130, Mr. Ahmed stated, "Well I will have to get with my dad." (Ex. A13 at 3; test. of Berrios.)

20. On March 7, 2012, the OLCC mailed Licensee a Notice of Violation, charging a restriction violation under OAR 845-006-0355(5). (Ex. A11; *see* Ex. A12.)

21. In mid to late March 2012, Mr. Mohammed and Mr. Ahmed came to the OLCC's Salem office and spoke with Mr. Berrios. Mr. Berrios explained that, pursuant to the Settlement Agreement, US Market #130 was required to provide certain documents to the OLCC. (Test. of Berrios, Mohammed.) During the conversation, Mr. Mohammed stated "it's hard for me to go against Lal." (Test. of Berrios.)

22. On March 30, 2012, the OLCC issued a Notice of Proposed License Cancellation and Removal from Responsible Vendor Program to Licensee. (March 30, 2012 Notice.)

23. On April 2, 2012, the OLCC mailed a Conditional Letter of Authority to Operate to Licensee. The letter stated, in part:

> This letter is your authority to continue to operate * * *[.] Any conditions or restrictions on your license continue to apply to this authority. We have given you this authority so you can continue to operate your business until we make a final decision about your renewal application.

(Ex. A9 at 1.)

24. On August 2, 2012, the OLCC issued an Amended Notice of Proposed License Cancellation, Removal from Responsible Vendor Program, and Proposed Refusal to Renew License to Licensee. (August 2, 2012 Notice.)

25. On September 11, 2012, Licensee, through Mr. Mills, submitted to the OLCC a new bank signature card and various vendor and service contracts. (Licensee's Prehearing Statement; Exs. P1, P2.)

26. On October 12, 2012, the OLCC served subpoenas on R.J. Reynolds Tobacco Company, McLane Company, Inc., and PepsiCo Americas Beverages, requesting copies of all vendor and service contracts and agreements associated with Licensee for any period in 2012. (Ex. A31.) In response, the OLCC received various vendor and service contracts directly from those companies. (*See, e.g.,* Exs. A17 through A24; test. of Davis.)

27. On December 19, 2012, the OLCC issued a Second Amended Notice of Proposed License Cancellation, Removal from Responsible Vendor Program, and Proposed Refusal to Renew License to Licensee. (December 19, 2012 Notice.)

28. Mr. Berrios drives by the USME office at 1038 Broadway NE on his way to and from work each day. He observes Mr. Sidhu's car parked outside of the USME office approximately three days per week. (Test. of Berrios.)

Contract/Agreement Findings

29. On February 9, 2006, January 22, 2007, and June 3, 2008, Mr. Sidhu signed contracts with R.J. Reynolds Tobacco Company (RJR) on behalf of US Market #130. (Ex. A17 at 2-7, 9, 11.) On those contracts, the address for US Market #130 is listed as 1038 Broadway NE. (*Id.* at 8, 10, 12.) On January 28, 2009, Nadya Boulware signed a contract with RJR on behalf of US Market #130. That contract also lists the address for US Market #130 as 1038 NE Broadway. (*Id.* at 13-14.) On November 7, 2011, Ms. Boulware signed a contract (2011 American Snuff Company Plan) with RJR on behalf of US Market #130. (*Id.* at 15, 20-26.) On December 12, 2011, RJR mailed a letter to Licensee stating that for contracted retail customers who sign a 2012 marketing plan contract on or before April 1, 2012, their current contract would terminate effective April 1, 2012. (Ex. P2 at 12.) On January 19, 2012, Ms. Boulware signed a contract (2012 Pack Outlet Plan) with RJR on behalf of US Market #130. (Ex. A17 at 18, 27-35.)

30. On or about January 26, 2007, Mr. Sidhu signed a 2007 Customer Marketing Agreement (CMA) with Coca-Cola on behalf of "US Markets,"[8] which included US Market #130. (Ex. A18 at 1.) On or about January 28, 2009, Mr. Sidhu signed a 2009 CMA with Coca-Cola on behalf of "US Markets," which included US Market #130. (*Id.* at 5-7.) On January 26, 2012, Ms. Boulware signed a 2012 CMA with Coca-Cola on behalf of "US Markets." (Ex. P2 at 13-14.) The agreement was effective February 1, 2012 through January 31, 2013. (*Id.* at 14.)

31. On February 12, 2007, Mr. Sidhu signed a Distribution Service Agreement between USME, LLP and McLane Company, Inc. (McLane). (Ex. A19 at 1-2.) On January 22, 2010, Mr. Sidhu signed a Distribution Service Agreement between USME, LLP and McLane. (*Id.* at 3-11.) The Agreement covered stores "owned, operated or managed by any US Market Enterprises LLP Entity." (*Id.* at 3.) The agreement was effective February 1, 2010 through February 1, 2013. (*Id.* at 7.) On or about January 31, 2012, Mr. Mohammed signed a Tobacco Inspection Report for the Oregon Department of Revenue. On the report, he listed McLane as a tobacco distributor for US Market #130. (Ex. P2 at 15.) On November 9, 2011, Mr. Mohammed signed a Premier Partner Contract with Hershey's and listed McLane as the distributor for US Market #130. (Ex. A20.) On November 29, 2011, Mr. Mohammed signed a Lorillard Buydown Promotion Worksheet/Agreement, listing McLane as a supplier for US Market #130. The agreement was effective January 2, 2012 through April 1, 2012. (Ex. A24.)

[8]The term "US Markets" has been used in contracts to mean USME. (Test. of Davis.)

32. On February 17, 2011, Mr. Sidhu signed a Fountain and Bottle/Can Sales Agreement between Pepsi Beverages Company and USME, on behalf of several US Markets, including US Market #130. (Ex. A21 at 5, 8.) The agreement is effective December 15, 2010 through December 14, 2015. (*Id.* at 1.)

33. On June 22, 2007, Mr. Sidhu signed a Retail Leaders 2007 Agreement between US Market #130 and Philip Morris USA, Inc. (Philip Morris or PM). (Ex. A23 at 1-4.) On January 4, 2008, Ms. Boulware signed a Retail Leaders 2008 Agreement between USME and Philip Morris, with regard to US Market #130. (*Id.* at 5-9.) On April 1, 2010, Ms. Boulware signed a Retail Leaders Program 2010 Agreement between USME and Philip Morris, with regard to US Market #130. Mr. Sidhu is listed on the agreement as the "CEO." (*Id.* at 10-14.) On March 16, 2011, Mr. Mohammed signed a Marlboro Leadership Price ("MLP") Option Election Form, which amends the Retail Leaders Program 2010 Agreement. (*Id.* at 15.) On April 16, 2012, Ms. Boulware signed a PM USA Retail Leaders Program 2012 Form of Plan-O-Gram Addendum. (*Id.* at 16-18.) The Addendum is incorporated into the Retail Leaders 2012 Agreement between US Market #130 and Philip Morris. The effective date of the Retail Leaders 2012 Agreement is January 1, 2012. (*Id.* at 16; *see id.* at 19-53.)

34. On April 26, 2012, Ms. Boulware signed a U.S. Smokeless Tobacco Brands Inc. 2012 Retail Program Agreement for US Market #130. The agreement became effective on April 1, 2012. (Ex. A25 at 1-6.) The "Retailer eMail" listed on the agreement is "USMKT@ COMCAST.NET," the email address for US Market Enterprises. (Ex. P2 at 17; test. of Davis.) The telephone number listed on the agreement is (503) 391-8889, the office number for US Market Enterprises. (Ex. P2 at 18; test. of Davis; *see* Ex. A28.)

35. On February 13, 2012, Ruzak Ahmad signed a 2012 Retail Merchandising Program agreement between US Market #130 and Liggett Vector Brands, LLC. The agreement was effective on January 29, 2012. (Ex. A22 at 9-12.)

36. On May 1, 2012, Mr. Ahmad signed a 2012 Lorillard Tobacco Company Excel Merchandising Agreement for US Market #130. The agreement was effective on January 1, 2012. (Ex. P2 at 8-11.)

37. On February 3, 2012, Mr. Ahmad signed a John Middleton Co. 2012 Retail Program Agreement, which became effective on January 1, 2012. (Ex. A26 at 1-5.) The telephone number listed on the agreement is (503) 391-8889, the office number for USME. (*Id.* at 1; test. of Davis; *see* Ex. A28.)

38. On April 10, 2012, Ruzak Ahmad signed a Frito-Lay 2012 UDS "Accelerate the Growth" Program agreement, which was effective January 1, 2012 through December 29, 2012. (Ex. A27.)

39. None of the contracts at issue are for the sale of alcoholic beverages. (Ex. P2 and A17 through A27.)[9]

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[9] Licensee sought to include this additional finding of fact in its Exceptions to the Proposed Order and the ALJ agreed in her Response to Exceptions to Proposed Order that the finding was supported by the record.

CONCLUSIONS OF LAW

1. Licensee violated a license restriction by failing to provide required documentation to the OLCC by February 1, 2012.

2. Licensee did not violate a license restriction by allowing Lal Sidhu to take part in the operation or management of the licensed business.[10]

3. The appropriate penalty is cancellation of Licensee's license and removal from the Responsible Vendor Program.

4. The Commission has grounds to refuse to renew Licensee's license under ORS 471.313(4)(g), and Licensee has not shown good cause to overcome the refusal.

OPINION

Jurisdiction over this matter lies with the OLCC. *See* ORS 471.040(1), 471.730.[11] The OLCC must prove its allegations by a preponderance of the evidence. *See* ORS 183.450(2)

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[10] In its Exceptions to the Proposed Order, Licensee objected to the conclusion of law that Licensee violated Restriction No. 2 (b) by allowing Mr. Sidhu to take part in the operation or management of the business by being named on the contracts after the February 1, 2012. In the ALJ's Response to Licensee's Exceptions to Proposed Order, she agreed with Licensee's objection and revised the conclusion of law for reasons discussed on page 15 of this order. The Commission adopts this reversal of analysis by the ALJ.

[11] ORS 471.040(1) provides, in part:

> The * * * Commission has the powers and duties specified in this chapter and ORS 474.105 and 474.115, and also the powers necessary or proper to enable it to carry out fully and effectually all the purposes of this chapter and ORS 474.105 and 474.115. * * *. The jurisdiction, supervision, powers and duties of the commission extend to any person who buys, sells, manufactures, imports or transports any alcoholic liquor within this state[.]

ORS 471.730 provides, in part:

> The function, duties and powers of the * * * Commission include the following:
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> * * * * *
>
> (2) To grant, refuse, suspend or cancel licenses and permits for the sale or manufacture of alcoholic liquor, or other licenses and permits in regard thereto, and to permit, in its discretion, the transfer of a license of any person.
>
> * * * * *
>
> (5) To adopt such regulations as are necessary and feasible for carrying out the provisions of this chapter and ORS 474.105 and 474.115[.] When such regulations are adopted they shall have the full force and effect of law.
>
> (6) To exercise all powers incidental, convenient or necessary to enable it to administer or carry out any of the provisions of this chapter and ORS 474.105 and 474.115.

("The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position"); *Harris v. SAIF*, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position); *Metcalf v. AFSD*, 65 Or App 761, 765 (1983) (in the absence of legislation specifying a different standard, the standard of proof in an administrative hearing is preponderance of the evidence). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely than not true. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390, 402 (1987).

The OLCC alleges that Licensee failed to comply with Restriction Nos. 4 and 2(b) of the Settlement Agreement. OAR 845-005-0355(5) pertains to license restrictions, and provides:

> 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.

1. Failure to provide required documentation

Restriction No. 4 of the Settlement Agreement provides:

> On February 1, 2012 and on the first business day of every February thereafter, Licensee will provide to the Administrative Policy and Process Division of the OLCC copies of all vendor contracts, all service contracts, all bank signature cards associated with the licensed premises, and documentation of any loans made for the benefit of the business

Exhibit A5 at 2.

At hearing, Licensee admitted that it failed to provide the OLCC with the required documentation by February 1, 2012. However, Licensee argues that failing to provide the documents does not relate to the sale of alcoholic beverages or to the exercise of license privileges and that the OLCC cannot therefore establish a violation under either OAR 845-005-0355(5) or ORS 471.405(1). Licensee's Closing Statement at 2-4.

ORS 471.405(1) provides, in part, that "No licensee shall sell or offer for sale any alcoholic beverage in a manner, or to a person, other than the license permits the licensee to sell." In *9 Ball Sports Bar* (OLCC Final Order, 05-V-020, June 2006), the Commission concluded that a licensee's failure to immediately report a fight, in violation of a license restriction, did not result in a violation of ORS 471.405(1) because the conduct (*i.e.* failure to report) did not involve selling alcoholic beverages in a manner other than the licensee is permitted to sell. OLCC staff contends that the precedent in *9 Ball* does not apply in the present case because the OLCC has charged Licensee with a violation of OAR 845-005-0355(5), not ORS 471.405(1). OLCC Staff's Rebuttal Closing Statement at 1.

Licensee further asserts that to establish a violation of OAR 845-005-0355(5), the violation of a license restriction must relate to the exercise of license privileges. Licensee's Closing Statement at 3-4. To reiterate, OAR 845-005-0355(5) requires a licensee with a restricted license to "exercise license * * * privileges only in compliance with the restriction(s)."

Licensee holds an Off-Premises Sales license, which allows Licensee to perform the activities set forth in ORS 471.186. Licensee argues that the same analysis adopted in the *9 Ball* case must apply to this matter. Licensee's Closing Statement at 4.

OLCC staff cites to several cases since *9 Ball* where the OLCC found violations of OAR 845-005-0355(5) for restrictions that do not directly involve the sale of alcoholic beverages. OLCC Staff's Rebuttal Closing Statement at 1. Examples include the following: *Illusion Sports Bar* (OLCC Final Order, 11-V-037, May 2012) (involving violation of a restriction requiring DPSST-certified security); *Foster Waterhole* (OLCC Final Order, 11-V-014, April 2012) (involving violation of a restriction that prohibited licensee's spouse from being on the premises); and *Exotica International Club for Men* (OLCC Final Order, 08-V-077, April 2010) (involving violation of a restriction for employees to use a wand on patrons entering premises after 9:00 p.m.).

The Commission concludes that both OLCC precedent and the language of OAR 845-005-0355(5) support OLCC staff's position that a violation of OAR 845-005-0355(5) does not require that the restriction involved be directly related to the sale of alcoholic beverages. For example, with regard to *Foster Waterhole*, the restriction at issue prohibited licensee's spouse from entering the licensed premises <u>at all times</u>, not just during business hours. Thus, the restriction is not directly related to the exercise of license privileges. Similarly, in *CS Convenient Services*, the Commission found that a violation of OAR 845-005-0355(5) occurred when Licensee violated a license restriction prohibiting a specific individual from being on the licensed premises <u>at all times</u>. *CS Convenient Services* (OLCC Final Order, 09-V-059, June 2010). In fact, the Commission found that multiple violations of the restriction had occurred, because the individual had been on the licensed premises several times, both before and during business hours. *Id.*

The language of the rule also supports the position that a violation of OAR 845-005-0355(5) does not require that the restriction involved be directly related to the sale of alcoholic beverages or the exercise of license privileges. The rule states, in part, that "[a] licensee * * * who has a restricted license * * * must exercise license * * * privileges only in compliance with the restriction(s)." OAR 845-005-0301(2)(c) provides that with regard to alcoholic beverage licenses and related privileges, the Commission is to liberally apply the rules contained in OAR Chapter 845, division 005 to ensure that only qualified persons hold licenses and operate in compliance with alcoholic beverage laws.[12] A plausible interpretation of the language in OAR 845-005-0355(5) is that a licensee with a restricted license must comply with the restrictions in order to exercise license privileges. In other words, compliance with any restrictions on the license is a condition precedent to exercising license privileges. There is no requirement in OAR

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[12] OAR 845-005-0301, states, in part:

> (1) [T]he rules in this Division describe how the Commission applies these and other licensing-related statutes in granting, denying, modifying or renewing alcoholic beverage licenses and related privileges.
>
> (2) The Commission liberally applies these rules to:
>
> * * * * *
>
> (c) Ensure that qualified persons obtain available licenses and operate in compliance with alcoholic beverage laws[.]

845-005-0355(5), either explicit or implicit, that the restrictions be directly related to the exercise of the license privileges. As such, the OLCC may establish a violation of OAR 845-005-0355(5) against a licensee for *any violation* of a license restriction.

Here, Licensee failed to provide the OLCC with multiple vendor contracts and one bank signature card by the February 1, 2012 deadline. This conduct violates Restriction No. 4 of the Settlement Agreement. Consequently, OLCC staff has proven that Licensee violated OAR 845-005-0355(5).

2. Lal Sidhu taking part in the operation or management of the licensed business

Restriction No. 2(b) of the Settlement Agreement provides, in relevant part:

> Beginning on February 1, 2012, * * * Licensee will also not allow Lal Sidhu, either individually or through any entity associated with Lal Sidhu, to take part in the operation or management of the licensed business through any of the following activities: * * * being named on any contract involving the licensed business[.]

Exhibit A5 at 2.

First, OLCC staff asserts that Licensee violated the above restriction because Mr. Sidhu is named on contracts involving Licensee that remained effective after February 1, 2012. Second, OLCC staff asserts that Licensee violated the restriction because USME, an entity allegedly associated with Mr. Sidhu, and Nadya Boulware, a USME employee, are named on contracts involving Licensee that remained effective after February 1, 2012.

A. Lal Sidhu named on contracts

On February 17, 2011, Mr. Sidhu signed an Agreement between PBC and USME, on behalf of several US Markets, including US Market #130. The agreement is effective December 15, 2010 through December 14, 2015.

On January 22, 2010, Mr. Sidhu signed a Distribution Service Agreement between USME, LLP and McLane, which remained effective through February 1, 2013. The Agreement covered stores "owned, operated or managed by any US Market Enterprises LLP Entity." Exhibit A19 at 3. Licensee contends that US Market #130 is not a party to the Agreement because #130 is not specifically named, and there is no evidence that USME, LLP owned, operated, or managed #130. Licensee's Closing Statement at 10. The Commission finds, however, that the record contains sufficient evidence to establish, more likely than not, that the January 22, 2010 Agreement covered #130. First, several documents establish that McLane was a contracted supplier for #130. On November 9, 2011, Mr. Mohammed signed a contract with Hershey's, listing McLane as the distributor for #130; on November 29, 2011, he signed a Lorillard contract, listing McLane as a supplier for #130; and on or about January 31, 2012, he signed a report for the Oregon Department of Revenue, listing McLane as a tobacco distributor for #130. Second, there is no other evidence, aside from the January 22, 2010 Agreement that remained in effect through February 1, 2013, of a contract between McLane and #130.

As set out above, Restriction No. 2(b) of the Settlement Agreement provides that "Beginning on February 1, 2012, Licensee will * * * not allow Lal Sidhu to take part in the operation or management of the licensed business [by] * * * being named on any contract involving the licensed business[.]"

Licensee argues that the term "named" should be interpreted as an "active verb" and that, to violate the restriction, Licensee must have allowed Mr. Sidhu's name to appear on a contract *executed after* the February 1, 2012 deadline, and not merely left on a contract that was previously executed (yet still effective). Licensee's Closing Statement at 12-13. Licensee asserts that because Mr. Sidhu's name appeared on the above contracts *before* the OLCC imposed the license restrictions on Licensee, Licensee did not therefore "allow" Mr. Sidhu to be "named" on any contracts beginning on February 1, 2012.

OLCC staff, on the other hand, contends that because Mr. Sidhu's name appears on the above contracts involving US Market #130, and those contracts remained in effect and continued to bind US Market #130 on and after February 1, 2012, Licensee allowed Mr. Sidhu to be named on a contract after the February 1, 2012 deadline and therefore violated Restriction No. 2(b). Staff's Rebuttal Closing Argument at 2. The Commission finds OLCC staff's interpretation of the restriction more persuasive than Licensee's interpretation.

However, the evidence does not establish that Mr. Sidhu remained associated with, or had a financial interest in, US Market Enterprises, LLP after February 1, 2012. Per the restriction language, Mr. Sidhu's being "named on any contract" involving the licensed premises is one way to establish that Licensee allowed Mr. Sidhu to take part in the operation or management of the business. The fact that Mr. Sidhu was a signatory for USME on contracts that remained in effect after February 1, 2012 did not result in Mr. Sidhu retaining any interest in the licensed business, or in his being able to take part in the operation or management of the business after February 1, 2012, because Mr. Sidhu had no association with USME after February 1, 2012. Therefore, it is not reasonable to interpret Restriction No. 2(b) as including these circumstances. While Mr. Sidhu's name appears on the contracts at issue, the record establishes that his name was used solely in his capacity as an agent for USME. Once he was divested of his interest in USME, he had no legally enforceable rights under the contracts, nor in the operation or management of USME. Thus the record does not establish that Licensee allowed Mr. Sidhu to take part in the operation or management of the business by being named on the contracts after the February 1, 2012 deadline, in violation of Restriction No. 2(b). As such, the OLCC has not proven that Licensee violated OAR 845-005-0355(5) with respect to Restriction No. 2(b) by allowing Mr. Sidhu to be named on contracts after February 1, 2012.[13]

B. USME and USME employee named on contracts

On November 7, 2011 and January 19, 2012, Nadya Boulware signed contracts with RJR on behalf of US Market #130. Per a December 12, 2011 letter from RJR, for contracted retail customers who signed a 2012 marketing plan contract on or before April 1, 2012, their current contract would terminate effective April 1, 2012. Thus, the 2011 contract Mr. Boulware signed remained effective after February 1, 2012.

[13] See fn 10, *supra* at 10.

On or about January 26, 2007 and January 28, 2009, Mr. Sidhu signed marketing agreements with Coca-Cola on behalf of "US Markets," which included US Market #130. On January 26, 2012, Ms. Boulware signed a marketing agreement with Coca-Cola on behalf of "US Markets," with an effective date of February 1, 2012 through January 31, 2013.

OLCC staff asserts that Licensee violated Restriction 2(b) because USME, or its employee, Ms. Boulware,[14] is named on contracts involving Licensee that remained effective after February 1, 2012, and USME is an entity associated with Mr. Sidhu.

Licensee contends, however, that the evidence is insufficient to establish that Mr. Sidhu had an association with USME after October 21, 2011, when he sold his membership interest to his wife, Parveen Sidhu. Licensee points out that, under ORS 63.265(1), a member ceases to be a member of an LLC upon assignment of the member's entire membership interest.[15] Licensee argues that the OLCC has no proof that Mr. Sidhu exerted any influence over USME after October 21, 2011, including negotiating or executing contracts or operating or managing businesses on behalf of USME. Licensee's Closing Statement at 6-7.

OLCC staff asserts that Mr. Sidhu has remained associated with USME, and that the assignment of his membership interest to Mrs. Sidhu was simply to avoid the appearance of violating US Market #130's license restrictions. Staff's Closing Statement at 3. Staff points out that the transfer of membership was not an "arm's length transaction" involving a disinterested third party, but rather a transfer to his spouse. Staff's Rebuttal Closing Statement at 2. OLCC staff contends that OAR 845-005-0311(4)(d) supports its position that Mr. Sidhu remains associated with USME by virtue of being the spouse of USME's managing member. *Id.* OAR 845-005-0311(4)(d) provides, in part:

> ORS 471.757 allows the Commission to deny, cancel or suspend a license if circumstances exist with regard to any person who has any financial interest in the licensed business * * * such that the Commission would have a basis to cancel or refuse to issue a license to the person with a financial interest if that person were the licensee or applicant. * * *. Examples of persons having a financial interest in the business include:
>
> * * * * *
>
> (d) The spouse * * * of the licensee[.]

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[14] The record establishes that Ms. Boulware is an employee of USME. *See, e.g.,* Exhibits A17 at 13, 18 (listing her as an administrative assistant for USME); A17 at 15 (listing her as an executive assistant manager for USME); A22 at 7 (listing her as a contact for USME on a vendor contract); A23 at 6 (listing her as USME's user administrator/general manager on a vendor contract); A28 (listing her on a USME business card). Moreover, when asked at hearing, "Who is Nadya Boulware?" Mr. Mohammed testified in response, "She works for Lal."

[15] ORS 63.265(1) provides, in part:

> Except as otherwise provided in the articles of organization or any operating agreement:
>
> (1) A member shall cease to be a member in a limited liability company upon the member's * * * assignment of the member's entire membership interest.

OLCC staff asserts that, pursuant to the above rule, if USME held a liquor license, the OLCC would consider Mr. Sidhu to have a financial interest in the business, even after transferring membership to his wife. Staff argues that the same rationale should be used to conclude that Mr. Sidhu continues to have a financial interest in (or association with) USME as the spouse of USME's managing member. Staff's Rebuttal Closing Statement at 2. However, USME is not a licensee, and the Commission declines to apply (by analogy) OLCC's licensing standards to the laws governing limited liability corporations. The Commission therefore concludes that Mr. Sidhu does not have a *per se* interest in or association with USME by virtue of his status as the spouse of USME's managing member.

At hearing, OLCC staff offered testimony from Mr. Berrios that he has observed Mr. Sidhu's car parked outside of the USME office approximately three times per week. OLCC staff suggests that this is an indicator that Mr. Sidhu is inside the USME premises conducting business on USME's behalf. However, it is equally as plausible that Mr. Sidhu's car is parked at the USME office for reasons unrelated to operating or managing businesses on behalf of USME.

OLCC staff also asserts that Mr. Mohammed's testimony that Ms. Boulware "works for Lal" is proof that Mr. Sidhu remains associated with USME. *Id.* at 2-3. However, the Commission finds it equally as plausible that Mr. Mohammed's testimony simply reflects the way he personally views Mr. Sidhu's connection with USME and Ms. Boulware, given Mr. Sidhu's longstanding role with USME prior to October 21, 2011.

The record does not support a conclusion that, more likely than not, Mr. Sidhu continued to hold an interest in USME after February 1, 2012. Thus, on this record, OLCC staff has not proven that Licensee violated OAR 845-005-0355(5) by allowing USME (or its employee) to be named on contracts involving US Market #130 after February 1, 2012.

3. Penalty

A. Cancellation of License

Under OAR 845-005-0355(5), license restriction violations are Category I violations. A Category I violation is one that makes the licensee ineligible for a license. OAR 845-006-0500(7)(a)(A). Under the Commission's guidelines, the standard penalty for a first Category I violation is cancellation of the license. OAR 845-006-0500(7)(b).

In restriction violation cases, the OLCC considers the factors described in *Oceanside Restaurant & Lounge* (OLCC Final Order, 88-V-123, August 1989) to determine whether the restriction violation was substantial and therefore warrants cancellation. As the Commission noted in *Betty Ford's* (OLCC Final Order, 06-V-021/06-L-006, August 2007), the *Oceanside* factors are "not required elements but are examined as factors weighing in favor of or against a determination that a restriction violation is substantial enough to warrant the presumed penalty of cancellation." Final Order at 13, n. 5. The *Oceanside* factors are as follows:

> 1. The timing of the violation, with breaches early in the contract considered more likely to be substantial;
>
> 2. Whether the violation was willful;

3. Whether the violation consisted of repeated incidents; and

4. Whether the hardship the restriction causes to the licensee outweighs the importance the restriction has in ensuring that the licensee complies with liquor laws.

In *Oceanside,* the Commission found that the restriction violation was substantial and merited cancellation where all four factors weighed against the licensee. There, the licensee's principal violated the restriction (requiring that she abstain from psychoactive substances during the duration of the license) three times during the first six weeks of licensure, and her consumption of alcoholic beverages in contravention of the restriction was willful, repeated, and struck at the very heart of the condition placed on the license. Final Order at 12-13. In *Lotsa Luck* (OLCC Final Order, 08-V-054, April 2009), where the licensee's principal violated a restriction prohibiting him from consuming alcoholic beverages on the premises, the Commission found that the violation was substantial and merited cancellation because it was willful, it occurred six months after the restriction was imposed, and the hardship on the licensee did not outweigh the importance of the restriction.

Applying the *Oceanside* factors in this case similarly demonstrates that the restriction violation at issue was substantial:

1. Timing of the violations

Violation of the restriction at issue began on February 1, 2012, when Licensee failed to provide required documents to the OLCC. Because the violation began only three months after the OLCC imposed the license restrictions, this *Oceanside* factor weighs against Licensee. *See Lotsa Luck*, Final Order at 6 (timing factor weighed against the licensee where violation occurred approximately six months after the restriction was placed on the license).

2. *Willfulness of the violations*

The Commission has held that where a licensee is aware of restrictions on the license and voluntarily acts in a manner contrary to the restriction, the violation was committed willfully. *See, e.g., C.S. Convenient Services* (OLCC Final Order 09-V-059, June 2010); *Lotsa Luck* (OLCC Final Order, 08-V-054, April 2009); *Betty Ford's* (OLCC Final Order, 06-V-021, August 2007); *see also Dad's Restaurant & Lounge* (OLCC Final Order, 06-V-029, December 2007) (noting that "willful" means voluntary and intentional, but not necessarily malicious). Here, the record establishes that Mr. Mohammed was aware of the license restrictions.

Licensee was represented by attorney Mills when Licensee and the OLCC entered into the Settlement Agreement. Mr. Mills signed the Settlement Agreement on behalf of Licensee on October 14, 2011. It is reasonable to infer that Mr. Mills would have informed Mr. Mohammed of the restrictions and would have explained Licensee's requirements pursuant to those restrictions.

On October 27, 2011, the OLCC mailed a Final Order Incorporating Settlement Agreement to Licensee's address of record, and there is no evidence that the U.S. Postal Service returned the document as undeliverable.[16] Sometime after October 27, 2011, an OLCC employee received a phone call from an unidentified man inquiring as to whether US Market #130 owed the OLCC any money with regard to the settlement. On or about November 1, 2011, the OLCC mailed an Off-Premises Sales License Certificate to Licensee's address of record. The certificate stated on its face that the license was "Restricted."

Mr. Mohammed started signing vendor agreements on Licensee's behalf shortly after the Settlement Agreement went into effect. For example, on November 9, 2011, he signed a contract with Hershey's, and on November 29, 2011, he signed a contract with Lorillard. Previously, Mr. Sidhu had signed contracts with those vendors on behalf of US Market #130.

In a January 31, 2012 email to OLCC's Susan Rudberg, Mr. Mills stated that he had reminded Licensee of the February 1, 2012 restriction deadline. At hearing, Mr. Mohammed testified that because of the OLCC, he had told Mr. Sidhu and USME for approximately the past one and one-half years not to sign any more contracts on behalf of US Market #130.

Given the above, the record establishes, more likely than not, that Mr. Mohammed was aware of the license restrictions.

To the extent Licensee argues that Mr. Mohammed was unable to provide required documentation to the OLCC by February 1, 2012 because he left for India on that date, that argument is not persuasive. Mr. Mohammed was performing business activities on behalf of US Market #130 just prior to his trip to India, as evidenced by the bank signature card he signed on January 26, 2012 and the Change of Registered Agent/Address he submitted to the Corporation Division sometime before February 1, 2012 (which the Division filed on February 2, 2012). There is simply no evidence that anything precluded Mr. Mohammed, or someone else on Licensee's behalf, from submitting the required documentation to the OLCC before he left for India on February 1, 2012.

Because Licensee, through its principal Mr. Mohammed, knew of the restrictions and failed to comply with them, the Commission concludes that these actions were voluntary and intentional, and therefore willful. This *Oceanside* factor weighs against Licensee.

3. Whether violations were repeated

OLCC staff has proven a violation of OAR 845-005-0355(5) that was based on Licensee's ongoing, repeated failure to provide required documentation to the OLCC. Licensee was required to provide certain documents to the OLCC by February 1, 2012, and there were no such documents forthcoming until September 11, 2012. Even then, the submissions were not complete. Thus, this *Oceanside* factor weighs against Licensee.

4. *Hardship the restriction causes Licensee vs. the importance of the restriction in ensuring Licensee's compliance with liquor laws*

The fourth *Oceanside* factor counts against a licensee where "the breach strikes at the very heart of the restriction or condition placed on the licensee, as the licensee would not be a

[16] Under OAR 137-003-0520(10), "[d]ocuments sent through the U.S. Postal Service by regular mail are presumed to have been received by the addressee, subject to evidence to the contrary."

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).

Here, the OLCC had grounds to cancel Licensee's license and refuse to renew the license based on Licensee allowing Mr. Sidhu—an unapproved, unlicensable person—to maintain a financial interest in Licensee's business. Instead, Licensee agreed to certain license restrictions, including the two at issue. The Commission placed the restriction prohibiting Mr. Sidhu from participating in the operation or management of Licensee's business because of Mr. Sidhu's status as an unlicensable person. The Commission placed the restriction requiring Licensee to submit copies of all vendor and service contracts, bank signature cards, and loan documentation related to Licensee's business as a check on whether Licensee was complying with the other restrictions. OLCC staff contends that these restrictions were not onerous and that any hardship the restrictions caused Licensee did not outweigh the importance of the restrictions in ensuring that Licensee complied with liquor laws. Staff's Closing Statement at 9. There is no reliable evidence to the contrary. This *Oceanside* factor therefore weighs against Licensee.

With all four *Oceanside* factors weighing against Licensee, the violation proven herein is substantial and warrants the presumed penalty of cancellation.

B. Removal from Responsible Vendor Program

OLCC staff has also proposed to remove Licensee from the Responsible Vendor Program.[17] OAR 845-009-0135(7)(d) states, in relevant part:

> [T]he licensee is removed from the program in the following circumstances:
>
> * * * * *
>
> (d) For a Category I or II violation by the licensee personally. The licensee may not reapply for the program[.]

Because Licensee committed a Category I violation, OAR 845-009-0135(7)(d) requires that Licensee be removed from the Responsible Vendor Program.

4. Refusal to renew license

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[17] ORS 471.344 provides, in part:

> (1) The Oregon Liquor Control Commission shall by rule establish a responsible vendor program. The program shall include a list of positive measures that a licensee must take to avoid sales of alcoholic beverages to minors. Any person holding a liquor license that authorizes the person to sell alcoholic beverages at retail may participate in the program.
>
> (2) If a licensee participates in the responsible vendor program and takes all measures specified by the program as necessary to prevent sales of alcoholic beverages to minors, the commission may not cancel the license of the licensee, or deny issuance of a license to the licensee, based on sales of alcoholic beverages to minors by employees of the licensee.

ORS 471.313(4)(g) provides, in 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:
>
> * * * * *
>
> (4) That the applicant:
>
> * * * * *
>
> (g) Did not have a good record of compliance with the alcoholic liquor laws of this state and the rules of the commission when previously licensed.

Based on the violation proven in this contested case proceeding,[18] the Commission has reasonable grounds to find that Licensee does not have a good record of compliance with the liquor laws. Therefore, the Commission has grounds to refuse to renew Licensee's license under ORS 471.313(4)(g).

A licensee may overcome the grounds for refusing a license upon a showing that, despite the licensee's violation record, the licensee would not be a poor risk for future compliance with liquor laws. *Hale's Tavern* (OLCC Final Order, 85-L-010, June 1985). 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* (OLCC Final Order, 08-V-112, January 2010) and *US Market #180* (OLCC Final Order, 08-V-043, October 2009), 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.[19]

US Market #109, Final Order at 10-12; *US Market #180,* Final Order at 11.

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[18] The Commission may count as evidence of a poor record of compliance charges that are proven for the first time during the license refusal contested case, as long as the Commission provided the applicant with reasonable notice of the charges and an opportunity to contest the charges. *Riverside Restaurant & Lounge* (OLCC, Final Order, 94-L-008, December 1996). The OLCC satisfied both of those conditions here.

[19] The Proposed Order analyzed good cause on the basis of prior case precedent in *Quincy Store* (OLCC Final Order, 02-V008/L-001, December 2002) and *Dad's Restaurant & Lounge* (OLCC Final Order, 06-V-029, December 2007). This Final Order alters the basis, but not the outcome of the analysis to reflect more recent case precedent in *US Market #109* and *US Market #180*.

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

(a) *Period of time without violations:* Licensee US Market #130, LLC was first licensed at this location in 2007. The February 2012 restriction violation was the first violation at this location. This factor weighs in Licensee's favor.

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

(c) *Personal involvement by the licensee:* The restriction at issue created obligation for the Licensee to provide certain contracts to the OLCC. Because the individual licensees had responsibility to provide these contracts and failed to do so, the licensees were personally involved in the violation. This factor weighs against Licensee.

(d) *Whether the licensee took immediate corrective steps following the violation:* Licensee began violating the restriction on February 1, 2012 by failing to provide required documents and did not send any of the required documents until September 11, 2012. A delay of over seven months cannot be considered an immediate corrective step. Therefore, this factor weighs against Licensee.

(e) *Time passage since latest violation:* The violation began on February 1, 2012 and continued until at least September 11, 2012, approximately seven months before the hearing. This factor is neutral.

(f) *Whether the incident was isolated:* The violation began on February 1, 2012 and continued until at least September 11, 2012. This factor weighs against Licensee.

(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, nor does the record establish any basis to mitigate the sanction. Therefore, this factor is neutral.

(h) *Willingness to have a permanent restriction*: Licensee agreed to the restriction at US Market #130 as part of the October 2011 settlement agreement. However, Licensee has also violated the restriction which shows that the Licensee is not willing to comply with a permanent restriction. Therefore, this factor weighs against Licensee.

(i) *Acceptance of responsibility versus evasion of responsibility for the violation*. There is no evidence that Licensee has accepted responsibility for the violation. This factor weighs against Licensee.

Of the nine factors discussed above, six weigh against the Licensee, one weighs in favor of a finding of good cause, and two factors are neutral. Considering Licensee's compliance record at the licensed premises in light of the relevant good cause factors discussed above, Licensee will not be a good risk for compliance at US Market #130 in the future, if the license is renewed with restrictions. On this record, the Commission may refuse to renew Licensee's license.

FINAL ORDER

The Commission orders that the Off-Premises Sales License held by US Market #130, LLC, Feroz Mohammed, Managing Member, and Nasreen Akhtar, Member, dba US Market #130, located at 1030 Broadway NE, Salem, Oregon be CANCELLED.

It is further ordered that US Market #130, LLC, Feroz Mohammed, Managing Member, and Nasreen Akhtar, Member, dba US Market #130, located at 1030 Broadway NE, Salem, Oregon be REMOVED from the Responsible Vendor Program.

It is further ordered that the Renewal of the Off-Premises Sales License for US Market #130, LLC, Feroz Mohammed, Managing Member, and Nasreen Akhtar, Member, dba US Market #130, located at 1030 Broadway NE, Salem, Oregon be REFUSED.

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

Dated this 2nd day of July, 2013

/s/ Merle Lindsey
Merle Lindsey
Interim Executive Director
OREGON LIQUOR CONTROL COMMISSION

Mailed this 2nd day of July, 2013

THIS ORDER IS EFFECTIVE AT 7:00 AM ON THE 7TH DAY OF JULY, 2013.

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.