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BEFORE THE
CALIFORNIA GAMBLING CONTROL COMMISSION

In the Matter of the First Amended Accusation
Against:

Delta C, LP, doing business as Kings Card
Club;

Delta CM, Inc. – General Partner:
Tigran Marcarian – President/Shareholder
Richard Shindle – Director/Shareholder
Tracey Kennedy – Shareholder
James Mullins – Secretary/Shareholder
Kerry Mullins – Shareholder

Delta Fore, LLC – A California Limited
Liability Company:
Richard Shindle – Managing Member
Tracey Kennedy – Member
James Mullins – Member
Kerry Mullins – Member

Tigran Marcarian – Limited Partner
Chant Manoukian – Limited Partner

Respondents.

BGC Case No. BGC-HQ2020-00004AC
OAH Case No. 2020110130

**ORDER OF ADOPTION OF PROPOSED
DECISION WITH TECHNICAL
CHANGES**

Hearing Dates: December 16-17, 2021

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by
the California Gambling Control Commission (Commission) with technical changes as its
Decision in the above-entitled matter pursuant to California Government Code section
11517(c)(2)(C).

The technical changes are as follows:

(1) On page 8, paragraph 16 of the Proposed Decision, the word “Legislation” is
replaced by the word “Licensing.”

(2) On page 8, footnote 8 of the Proposed Decision, the word “Licensing” is
replaced by the word “Legislation.”

These technical changes relate to the former and current employment position of
Commission staff member Adrianna Alcala-Beshara. These technical changes do not affect the

1 factual or legal basis of the Proposed Decision.

2 This Order is effective on August 23, 2021.

3 IT IS SO ORDERED.


4
5 Dated: 7/22/21

Signature: 
6 Paula LaBrie, Chair

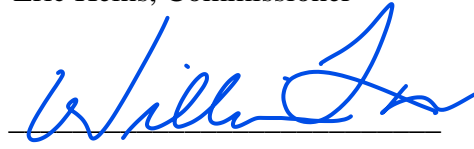
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8 Dated: 7-22-21

Signature: 
9 Cathleen Galgiani, Commissioner

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11 Dated: 07/22/2021

Signature: 
12 Eric Heins, Commissioner

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14 Dated: 7.22.21

Signature: 
15 William Liu, Commissioner

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17 Dated: 7/22/21

Signature: 
18 Edward Yee, Commissioner

**BEFORE THE
CALIFORNIA GAMBLING CONTROL COMMISSION
STATE OF CALIFORNIA**

In the Matter of the First Amended Accusation Against:

**DELTA C, LP, dba KINGS CARD CLUB; DELTA CM, INC.,
General Partner, TIGRAN MARCARIAN,
President/Shareholder, RICHARD SHINDLE,
Director/Shareholder, TRACEY KENNEDY, Shareholder,
JAMES MULLINS, Secretary/Shareholder, KERRY MULLINS,
Shareholder; DELTA FORE, LLC, a California Limited Liability
Company, RICHARD SHINDLE, Managing Member, TRACEY
KENNEDY, Member, JAMES MULLINS, Member, KERRY
MULLINS, Member; TIGRAN MARCARIAN, Limited Partner;
and CHANT MANOUKIAN, Limited Partner, Respondents**

Agency Case No. HQ 2020-00004AC

OAH No. 2020110130

PROPOSED DECISION

Administrative Law Judge (ALJ) Coren D. Wong, Office of Administrative Hearings, State of California, heard this matter by videoconference and telephone on December 16 and 17, 2020, from Sacramento, California.

Paras H. Modha, Deputy Attorney General, represented complainant Stephanie Shimazu, Director of the California Department of Justice, Bureau of Gambling Control (Bureau).

Attorney Tiffany Conklin-Lichtig, California Gaming Advisors LLC, represented respondents Delta C, LP, dba Kings Card Club; Delta CM, Inc., General Partner, Tigran Marcarian, President/Shareholder, Richard Shindle, Director/Shareholder, Tracey Kennedy, Shareholder, James Mullins, Secretary/Shareholder, Kerry Mullins, Shareholder; Delta Fore, LLC, a California Limited Liability Company, Richard Shindle, Managing Member, Tracey Mullins, Member, James Mullins, Member, Kerry Mullins, Member; Tigran Marcarian, Limited Partner; and Chant Manoukian, Limited Partner.

Evidence was received and the record held open to receive copies of emails previously marked as Exhibits A and B, evidence of complainant's costs of investigation and prosecution, respondents' opposition to evidence of costs, complainant's reply to respondents' opposition, and closing briefs. The Declaration of Nathan Davalle Re Costs of Investigation and Prosecution and the Declaration of Paras H. Modha Re Costs of Investigation and Prosecution are marked as Exhibits 15 and 16, respectively, respondents' opposition is marked as Exhibit C, and complainant's reply is marked as Exhibit 17. Complainant's Post-Hearing Brief and Complainant's Reply Brief are marked as Exhibits 18 and 19, respectively, and Respondents' Closing Brief and Respondents' Reply Brief are marked as Exhibits D and E, respectively.

Respondents' objections to Exhibits 15 and 16 are overruled, and Exhibits 15 and 16 are admitted for all purposes. California Code of Regulations, title 1, section 1042, subdivision (b), expressly authorizes costs to be proven through declarations. Therefore, Evidence Code section 1280 and Government Code section 11514, subdivision (a), do not apply. Respondents' remaining objections address the weight of

the evidence, rather than its admissibility. Exhibits 17, 18, C, and D are admitted for argument. Exhibit 19 is not admitted for any purpose and was not considered because it exceeds the page limit the ALJ imposed. Exhibit E is admitted for argument, but: 1) page 3, line 10 through page 4, line 9; 2) page 10, line 1 through page 12, line 11; and 3) page 14, lines 3 (starting with the first full sentence) through 16, are stricken and were not considered because they refer to evidence outside the record.¹

The record was closed and the matter submitted for written decision on April 9, 2021.

SUMMARY

The original wall around the perimeter of respondents' patio exceeded the three-foot height restriction set forth in the Outdoor Guidelines. Complainant alleged that the violation of the height restriction constitutes cause for discipline for violating the Public Health Order, Outdoor Guidelines, and the Commission's emergency regulations (First Cause for Discipline), and for violating the San Joaquin Order (Second Cause for Discipline). Cause exists for violating the San Joaquin Order only. When all relevant evidence is considered, imposing a \$2,500 fine strikes a proper balance between the Bureau's duty to protect public health, safety, and welfare through enforcement of the Gambling Control Act (Bus. & Prof. Code, § 19800 et seq.; the Act) and respondents' legitimate business interests.

¹ Exhibits A and B were not admitted into evidence at hearing, and that ruling stands.

FACTUAL FINDINGS

History of Licensure

1. The California Gambling Control Commission (Commission) issued Owner/Entity License Number GEOW-003148 to respondent Delta C, LP (Delta C). Delta C owns Kings Card Club (Casino), an 11-table cardroom located in Stockton, California, with annual gross gaming revenue in excess of \$200,000.² The Commission issued the Casino State Gambling License Number GEGE-001313.

2. Delta C is a limited partnership, and the Commission issued gambling licenses to each partner as follows:³

a. Delta CM, Inc. (Owner/Entity License Number GEOW-003796) and its officers, directors, or shareholders Tigran Marcarian (Owner/Person License Number GEOW-003896), Richard Shindle (Owner/Person License Number GEOW-003773), Tracey Kennedy (Owner/Person License Number GEOW-003770), James Mullins (Owner/Person License Number GEOW-003772), and Kerry Mullins (Owner/Person License Number GEOW-003771);⁴

² Based on its average daily gross gaming revenue of \$35,950 during the two weeks prior to its October 15, 2020 shutdown.

³ Each partner of a partnership that owns a gambling establishment must obtain a gambling license. (Bus. & Prof. Code, § 19852, subd. (d).)

⁴ "[E]ach officer, director, and shareholder" of a corporation that owns a gambling establishment must obtain a gambling license. (Bus. & Prof. Code, § 19852, subd. (a).)

b. Delta Fore, LLC, a California Limited Liability Company (Owner/Entity License Number GEOW-003778) and its members Richard Shindle (Owner/Person License Number GEOW-003774), Tracey Kennedy (Owner/Entity License Number GEOW-003776), James Mullins (Owner/Entity License Number GEOW-003775), and Kerry Mullins (Owner/Person License Number GEOW-003781);⁵ and

c. Tigran Marcarian (Owner/Person License Number GEOW-003143) and Chant Manoukian (Owner/Person License Number GEOW-003767).

The Pandemic

3. On March 4, 2020, the Governor of the State of California declared a state of emergency due to the COVID-19 Pandemic (Pandemic). Two weeks later, he issued Executive Order N-33-20 requiring all California residents to follow any directives issued by the California Department of Public Health (CDPH). That same day, the CDPH issued a public health order directing all California residents "to stay home or at their place of residence except as needed to maintain continuity of operations of the federal critical infrastructure sectors"

4. On May 7, 2020, the CDPH issued a public health order authorizing local public health departments to begin allowing lower risk workplaces and other spaces to reopen. Two months later, the CDPH issued a public health order directing all cardrooms to "close indoor services to customers" and follow all industry guidance issued by the CDPH.

⁵ "[E]very officer, manager, member, or owner" of a limited liability company that owns a gambling establishment must obtain a gambling license. (Bus. & Prof. Code, § 19852, subd. (f).)

5. On August 28, 2020, the CDPH issued a public health order modifying the framework for reopening by adopting a four-tier system, with each tier "corresponding to specific epidemiological profiles based on indicators of disease burden" (Public Health Order).⁶ Each tier permitted "a broader range of reopening guided by risk-based criteria pertinent to each sector." The Public Health Order continued to require cardrooms to follow the CDPH's industry guidelines.

6. On August 31, 2020, the San Joaquin County Department of Public Health Services (San Joaquin County) issued a public health order adopting and incorporating the Public Health Order and all current and future CDPH industry guidelines (San Joaquin Order). All individuals and businesses in San Joaquin County were ordered to comply with the San Joaquin Order.

7. On September 9, 2020, the CDPH issued the "COVID-19 Industry Guidance: Outdoor Operations of Cardrooms" (Outdoor Guidelines). The purpose of the Outdoor Guidelines was to provide "guidance for the **outdoor operations** of cardrooms . . . to support a safe, clean environment for workers." (Bold original.)

8. The Outdoor Guidelines provided, "cardrooms opening outdoor operations must take appropriate measures to ensure worker security, including installing barriers that prevent vehicles from entering the outdoor gaming area." The height of the barriers was limited to three feet.

9. That same day, the Commission sent the Casino notice that the Outdoor Guidelines were issued and must be complied with. The notice required compliance "as soon as possible, but no later than Monday, September 28, 2020."

⁶ The Public Health Order did not take effect until August 31, 2020.

The Casino's Outdoor Operations

10. The Casino reopened for outdoor operations on its patio on August 21, 2020. The patio was adjacent to the Casino on the far right when facing the front of the Casino. It was enclosed by a solid wall on three sides and the side of the Casino on the fourth. The wall was five feet nine inches in height. There were metal security bars extending upward from the top of the wall.

11. The patio was accessible through glass doors in the side of the Casino or through a gate in the perimeter wall. An A-shaped roof covered the patio from the side of the Casino across most of the patio's length; the entire width of the patio was covered. A retractable awning attached to the edge of the roof line could be opened to cover the remaining length of the patio. The width of the awning did not cover the entire patio. The roof's apex was 28 feet high.

12. There were several feet between the top of the security bars on the perimeter wall and the roof line on either side of the patio. When the awning was open, it covered the security bars on the back wall. There were six ceiling fans hanging from the roof over the patio and several portable fans on the ground.

The Bureau's Investigation

13. Kerry Davis is a Field Representative employed by the Bureau. She spoke with Mr. Mullins on September 21, 2020, and expressed concern that the Casino's patio's perimeter wall exceeded the three-foot height limit specified in the Outdoor Guidelines. Mr. Mullins opined that the height restriction applied only to temporary structures built to accommodate outdoor gaming during the Pandemic. The Casino conducted outdoor gaming operations on its patio prior to the Pandemic, and the

perimeter wall preexisted the Outdoor Guidelines. Therefore, Mr. Mullins told Ms. Davis he did not believe the three-foot height limit applied to the Casino.

14. Ms. Davis conducted an unannounced inspection of the Casino on October 2, 2020. She observed that the Casino was conducting gaming operations on its patio, and the patio's perimeter wall was more than three feet in height. Jamin Teague, the Special Agent in Charge of the Bureau's Compliance and Enforcement Section, drafted an Emergency Letter of Warning (ELOW) to the Casino. He wrote, "Field Representative Davis conducted a site visit at Kings Casino and observed their gaming area to be surrounded by three solid walls and the Casino building comprised of fourth solid wall." He directed the Casino to "immediately" respond by explaining the steps taken to comply with the Outdoor Guidelines.

15. Special Agent Teague sent the ELOW to Mr. Marcarian by email on October 2, 2020. The email requested Mr. Marcarian's "immediate response." At all times relevant, Mr. Marcarian was the Casino's "designated agent."⁷

The Casino's Response to the ELOW

16. Mr. Marcarian responded to the ELOW the following day. He explained that the Bureau's concern about the height of the wall was first brought to his attention during Ms. Davis's visit "last month." He further explained that he contacted Adrianna Alcala-Beshara, then the Commission's Deputy Director of Legislation,⁸

⁷ "'Designated agent' means a person appointed by [a] . . . licensee . . . to serve as their representative." (Cal. Code Rigs., tit. 4, § 12002, subd. (s).)

⁸ She has since become the Commission's Deputy Director of Licensing and Regulatory Affairs.

immediately after that visit and forwarded her pictures of the Casino's outdoor gaming area. Ms. Alcala-Beshara agreed to contact Mr. Marcarian after discussing the Casino's patio with Commission staff.

17. Mr. Marcarian exchanged emails with Ms. Alcala-Beshara inquiring about obtaining an exemption from the Outdoor Guidelines. Ms. Alcala-Beshara advised that the Commission had no authority to grant an exemption and referred Mr. Marcarian to the CDPH and the Governor's Office.

18. Special Agent Teague responded to Mr. Marcarian on October 6, 2020, and acknowledged receipt of pictures and videos of the Casino's patio. He explained there was no dispute over how the patio was set up and requested an "immediate corrective action plan" explaining how the Casino would comply with the Outdoor Guidelines.

19. The following day, Mr. Marcarian spoke with Nathan Davalle, the Bureau's Assistant Director of Compliance and Enforcement, by telephone and sent a follow-up email. Mr. Marcarian admitted that the Casino's perimeter wall was five feet nine inches tall, but explained he was trying to contact the Governor's Office to request an exemption from the Outdoor Guidelines. He requested "a couple of days" to "see if we can get an exemption."

20. Mr. Marcarian also spoke with Special Agent Teague, after which Special Agent Teague sent an email clarifying their conversation as follows:

You mentioned to me repeatedly that you need more time to reach someone at the capitol to seek an exemption. As I said on the phone, the Governor's orders came out on or around September 7. We gave all cardrooms until

September 28 to come in [*sic*] to compliance. An Emergency Letter of Warning was issued to you on October 2.

I know that you feel your airflow is adequate, that is not the issue. The issue is that your cardroom is not in compliance with the current Governor's orders. These were orders that were issued over a month ago.

The ELOW that was issued on 10/02 requested an immediate remedy, that still has not been provided. I want to be clear that our conversation this morning was in no way an extension of time to come in [*sic*] to compliance with the Governor's orders. We are again asking for you to provide, in writing, your plan to come in [*sic*] to compliance.

21. Also on October 7, 2020, Michael Hakeem, the Casino's attorney, wrote Special Agent Teague "requesting 72 hours to resolve this issue." Special Agent Teague responded by explaining the Bureau could not grant an exemption from the Outdoor Guidelines and would not grant an extension of time to comply with them. He requested the Casino's corrective action plan "immediately."

22. Mr. Hakeem responded to Special Agent Teague the following day. He explained that CDPH told him to contact San Joaquin County and request an inspection of the Casino's patio to determine if the perimeter wall complied with the Outdoor Guidelines. Mr. Hakeem further explained that he contacted San Joaquin County and was waiting to schedule an inspection. He concluded: "If SJCo DPH does not approve the wall as is . . . we will then make any necessary physical adjustments to the wall to be in compliance."

23. On the morning of October 14, 2020, Mr. Marcarian sent Special Agent Teague an email advising that Greg Diederich, the Director of Public Health Care Services for San Joaquin County, inspected the Casino's patio the week before and had no concerns with the height of the perimeter wall. Mr. Diederich agreed to document his lack of concerns in a letter that afternoon.

24. Special Agent Teague immediately responded "that the County can [*sic*] not make exemptions on state guidelines." He again requested the Casino's corrective action plan.

25. Mr. Marcarian responded to Special Agent Teague's email by asking, what he should do "if the State Health Department tells us that it's the County's jurisdiction." He also asked Special Agent Teague to call to discuss alternatives to lowering the walls, "such as drilling holes in the wall so it would not be considered a solid wall." Special Agent Teague responded by explaining his expectation was that the Casino comply with the Outdoor Guidelines and "submit a plan to us immediately describing how you have done that."

26. Mr. Marcarian again requested an opportunity to discuss with Special Agent Teague the possibility of drilling holes in the perimeter walls so they were no longer considered solid walls. He persisted:

The guidance from the governor's [*sic*] office was generated from the California Health Department, if they say the County should determine if we are in compliance, or how we can alter the wall to be in compliance why can't we wait for Mr. Diederich's letter. If there is no viable alternative we

are ready to reduce the height of the wall to three feet. We have already contacted a contractor to do so.

(Punctuation original.)

27. Mr. Diedrich's letter did not arrive by the promised deadline, so Mr. Marcarian notified Special Agent Teague that the wall would be lowered to three feet the following week.

28. Mr. Diedrich's letter arrived on October 15, 2020. He wrote that the Casino "is substantially in compliance with both local Public Health orders and the States [*sic*] industry guidance." He opined that "the entirety of the operation provides for the required 'adequate airflow' and that the block walls were not used to 'create' the gaming space as it was an already permitted outdoor gaming operation."

October 15, 2020 Emergency Order

29. On October 15, 2020, the Bureau issued an Emergency Order requiring the Casino to immediately "cease any and all indoor and outdoor gambling and gambling-related activities . . . and close the gambling establishment." The Casino was further required to "remain closed for all indoor and outdoor gambling-related activities in accordance with this Emergency Order's provisions."

30. The Emergency Order alleged the following facts:

5. [Delta C, LP] currently conducts gambling-related activities at the Casino in violation of the Public Health Order and the Outdoor Guidelines. The Casino's so-called outdoor facility is open to the public, but does not comply with, and violates, the Public Health Order and the Outdoor

Guidelines. The Casino remains open and operating while not complying with, and in violation of, the law. The Casino's continued operation thus endangers the public health, safety, and general welfare.

6. In view of the foregoing, the Casino's opening and continued operation without complying with the Public Health Order, the Outdoor Guidelines and other applicable state and local rules, regulations, and orders poses an immediate threat to the public health, safety, and welfare. The Casino's opening and continued operation without complying with the Public Health Order, the Outdoor Guidelines and other applicable state and local rules, regulations, and orders also undermine the public's trust and confidence that the Casino employs and maintains suitable methods of operation to protect the public health, safety, and general welfare.

October 16, 2020 Inspection

31. Ms. Davis inspected the Casino on October 16, 2020, and confirmed the patio's perimeter wall had been cut from its original height to three feet. The construction work was performed earlier that day, at a cost to respondents of \$22,089. On October 20, 2020, complainant sent Mr. Marcarian notice authorizing the Casino to reopen for outdoor operations.

Respondents' Appeal

32. Respondents appealed the Emergency Order. On October 19, 2020, complainant signed the Accusation solely in her official capacity. The Accusation alleged that the patio wall was too high and violated "the Public Health Order, the Outdoor Guidelines, and the Commission's emergency regulations (collectively, Laws)."

33. On December 17, 2020, complainant signed the First Amended Accusation solely in her official capacity. The amended pleading added a second cause alleging that the height of the wall violated the San Joaquin Order. Neither the Accusation nor the First Amended Accusation alleged cause to discipline the Casino's gambling license (GEGE-001313).

Respondents' Evidence

34. Respondents did not dispute that the patio's perimeter wall was higher than three feet prior to October 16, 2020. They admitted that Ms. Davis raised concern about the height of the wall as early as September 21, 2020. They claimed, however, that it was not clear that the Outdoor Guidelines applied to the Casino because the patio was a pre-existing structure rather than a new one. Additionally, respondents tried to obtain an exemption from the Outdoor Guidelines from the CDPH, the Governor's Office, and San Joaquin County. When they could not, they lowered the wall.

35. Respondents focused much of their presentation at hearing on legal challenges to the First Amended Accusation and the Emergency Order.

CAUSE FOR DISCIPLINE PURSUANT TO BUS. & PROF. CODE, § 19920

36. Business and Professions Code section 19920 authorizes discipline for the willful or repeated operation of a gambling establishment in a manner the Commission or a local government deems inconsistent with public health, safety, or welfare. Respondents argued there is no legal basis for disciplining their licenses pursuant to that statute because the Commission did not adopt the Outdoor Guidelines as safety standards licensees must follow. Contrary to complainant's argument, California Code of Regulations, title 4, section 12371, subdivision (g), did not require respondents to comply with the Outdoor Guidelines, and only provided that compliance with the regulation did not exempt them "from any other federal, state, or local laws or other requirements."

37. "Respondents concede[d] that the San Joaquin County Order made the Outdoor Guidance enforceable under Section 19920," but then argued the Bureau has no independent authority to enforce the Outdoor Guidance. They explained Health and Safety Code section 120275, which makes it a misdemeanor for a person to violate a CDPH order it has prior notice of, did not apply because there was no evidence respondents had prior notice of the San Joaquin Order. Neither Health and Safety Code sections 120155 nor 120195 applied because neither was alleged as a legal basis for discipline.

38. Respondents also argued San Joaquin County concluded the Casino was being operated "substantially in compliance with both local Public Health orders and the States [*sic*] industry guidance." Additionally, they posited complainant had no notice of the San Joaquin Order and incorrectly assumed it did not apply to respondents.

39. Lastly, respondents argued they had insufficient notice that discipline was being sought based on their violation of the San Joaquin Order because that violation was not raised until the First Amended Accusation. They were not provided a copy of the amended pleading until shortly before hearing began on the second day. Respondents' counsel was given a brief recess to review the pleading, after which she confirmed she was ready to proceed with hearing on the amended pleading.

THE EMERGENCY ORDER WAS INVALID

40. Respondents argued the Emergency Order violated their constitutional rights to due process because they were not given notice and an opportunity to be heard before or after the Casino was closed. Additionally, the Commission violated respondents' rights to equal protection because it issued emergency warning letters to the Casino and another cardroom on the same day, but only the Casino was subsequently ordered to cease operations.

41. Respondents posited the Commission may issue an emergency decision only after adopting regulations authorizing the use of the Administrative Procedures Act's (Gov. Code, § 11400 et seq.) emergency decision process. The Commission never adopted such regulations. Finally, respondents argued the Emergency Order did not include facts establishing the emergency that necessitated its issuance.

Analysis

CHRONOLOGY OF RELEVANT EVENTS

42. The following chronology of events was undisputed:

- The CDPH issued a public health order requiring cardrooms to cease indoor operations and to follow the CDPH's industry guidance for cardrooms. The

Casino reopened for outdoor operations on a patio adjacent to its building. The patio was enclosed by a solid wall that was five feet nine inches in height. The design of the patio provided adequate airflow.

- The CDPH issued the Public Health Order reiterating the requirement that cardrooms follow industry guidance for cardrooms. San Joaquin County issued the San Joaquin Order directing compliance with all CDPH industry guidance for cardrooms.
- The CDPH issued the Outdoor Guidelines requiring cardrooms to provide barriers around their outdoor gambling area to protect employees from cars. A solid barrier could be no higher than three feet. The Commission told the Casino about the Outdoor Guidelines and that compliance was required "as soon as possible, but no later than Monday, September 28, 2020."
- Ms. Davis told Mr. Mullins about her concern that the height of the wall violated the Outdoor Guidelines. Mr. Mullins explained he did not believe the Outdoor Guidelines applied because the wall was built before the height restriction was imposed.
- The Bureau issued the ELOW informing the Casino the height of the wall violated the Outdoor Guidelines. The Casino was directed to "immediately" submit a corrective action plan explaining the steps it took to comply with the Outdoor Guidelines.
- Bureau representatives and Casino representatives exchanged emails over the following two weeks. The Bureau remained steadfast that the Casino immediately comply with the Outdoor Guidelines, no exemptions would be granted, and no extensions of time would be issued. The Casino requested

additional time; initially to obtain an exemption from the CDPH or the Governor, and then from San Joaquin County.

- The Bureau issued the Emergency Order suspending the Casino's gambling operations. San Joaquin County sent correspondence opining that the original design of the patio provided "'adequate airflow,'" but did not grant an exemption. The perimeter wall was lowered to three feet. The Casino reopened after being closed five days.
- All CDPH public health orders were issued pursuant to Health and Safety Code section 120130, subdivision (c), "for the protection of the public health."

RESPONDENTS' LEGAL ARGUMENTS

Existence of Cause Pursuant to Bus. & Prof. Code, § 19920

43. Respondents' arguments challenging the existence of cause pursuant to Business and Professions Code section 19920 were based on the incorrect premise that only one cause pursuant to that statute was alleged. Two causes were alleged – the first was based on respondents' violation of the Laws, and the second was based on their violation of the San Joaquin Order.

44. Respondents "concede[d] that the San Joaquin County Order made the Outdoor Guidance enforceable under Section 19920," and it was irrelevant that the Commission did not adopt the Outdoor Guidelines as guidelines for maintaining public health, safety, and welfare. It was also irrelevant that the First Amended Accusation did not allege the notice required to establish a violation of Health and

Safety Code section 120275, and did not allege Health and Safety Code sections 120155 or 120195 as a legal basis for discipline.

45. San Joaquin County's opinions that the Casino was operating "substantially in compliance with both local Public Health orders and the States [*sic*] industry guidance" and the original design of the patio provided "'adequate airflow'" were not relevant. The Bureau seeks discipline for violating the height restriction set forth in the Outdoor Guidelines, which was incorporated into the San Joaquin Order. San Joaquin County had no authority to grant an exemption from those state-issued guidelines. The point of respondents' argument about complainant having no notice of the San Joaquin Order and incorrectly assuming it did not apply to respondents was unclear.

46. Respondents' argument that they were not given proper notice that discipline was being sought for violating the San Joaquin Order was disingenuous. Although the First Amended Accusation was not presented until the second day of hearing, a recess was taken to allow respondents' attorney time to review it. After the recess, counsel did not request a continuance, but confirmed she was prepared to proceed on the amended pleading.

Validity of the Emergency Order

47. Respondents' legal challenges to the validity of the Emergency Order were also unpersuasive. The argument that the Commission had no authority to issue the Emergency Order pursuant to the emergency decision process outlined in the Administrative Procedures Act ignored the plain language of Government Code section 11460.20, subdivision (c): "This article does not apply to an emergency decision, including a cease and desist order or an interim or temporary suspension

order, issued pursuant to other express statutory authority." Business and Professions Code section 19931, subdivision (a), expressly authorizes the Bureau to "issue any emergency orders . . . that [it] deems reasonably necessary for the immediate preservation of the public peace, health, safety, or general welfare." The allegations outlined in Factual Finding 30 were the "statement of facts constituting the alleged emergency necessitating the action" required by Business and Professions Code section 19931, subdivision (b). The Public Health Order was issued pursuant to Health and Safety Code section 120130, subdivision (c), "for the protection of the public health."

48. There is no jurisdiction to consider respondents' constitutional challenges to the Emergency Order. (Cal. Const., art. III, § 3.5 [no administrative agency has authority to consider the constitutionality of the statute].)

49. Any other arguments made by the parties not specifically addressed herein are found to be without merit.

Request for Costs of Investigation and Prosecution

50. Complainant requested that respondents be required to pay the Bureau's costs of investigation and prosecution pursuant to Business and Professions Code section 19930, subdivision (d). Complainant introduced the Declaration of Paras H. Modha Regarding Costs of Preparation and Prosecution of Case certifying that the Office of the Attorney General incurred \$32,285 for the time he and Supervising Deputy Attorney General William P. Torngren, Jr., spent prosecuting this matter. Mr. Modha declared that the amount "does not include time spent on hearing preparation after December 15, 2020, or time to be spent during the hearing and on any post-hearing matters."

A document entitled "Matter Time Activity By Professional Type" was attached to Mr. Modha's declaration, and itemized the time he and Mr. Tornngren spent on this matter by date, task, number of hours, hourly rate, and amount billed. Contrary to Mr. Modha's declaration, the attachment included billing entries for work he performed after December 15, 2020, including trial and post-trial work.

51. Complainant also introduced the Declaration of Nathan Davalle Regarding Costs of Investigation and Prosecution of Case certifying that the Bureau incurred \$7,044 for time staff spent investigating this matter through December 15, 2020. A document entitled "Activity Log Entry Report" was attached to Mr. Davalle's declaration, and itemized the Bureau's costs by staff member, date, task, and number of hours. No entries were included for Special Agent Teague. Also attached was a spreadsheet providing "the hourly billable rate and cost totals for the Bureau's staff identified in [the Activity Log Entry Report]," including Special Agent Teague.

52. There is no legal basis for awarding complainant any costs for the reasons explained in Legal Conclusion 27. Therefore, the issue of the reasonableness of the costs the Office of the Attorney General and the Bureau incurred in this matter is moot.

Appropriate Discipline

53. The Commission has adopted aggravating and mitigating factors for determining the appropriate discipline for violating the Act. (Cal. Code Regs., tit. 4, § 12556.) Respondents violated the Act because the patio wall exceeded three feet in height. The height restriction was included in the Outdoor Guidelines, which was issued after the wall was built. In other words, respondents' violation occurred once the Outdoor Guidelines was issued and was not a volitional act.

54. True, respondents did not immediately comply with the Outdoor Guidelines. However, their noncompliance was not for nefarious reasons. When Ms. Davis first expressed concern that the wall violated the Outdoor Guidelines, Mr. Mullins expressed his belief, albeit mistaken, that the Outdoor Guidelines did not apply to the Casino. The Bureau did not confirm the applicability of the Outdoor Guidelines until it issued the ELOW.

55. Respondents did not immediately lower the wall in response to the ELOW, but they did not blatantly ignore the ELOW either. They first sought an exemption from the Outdoor Guidelines from the Commission. When unsuccessful, they sought an exemption from the CDPH or the Governor's Office, and then San Joaquin County. Respondents kept the Bureau apprised of their efforts to obtain an exemption. When they were not issued an exemption, the wall was reconstructed to comply with the Outdoor Guidelines.

56. Based on the above, complainant's proposed 18-day suspension of respondents' licenses would not provide additional public protection and would be unduly punitive.⁹ The same applies to the proposed \$50,000 fine.¹⁰ Respondents reduced the height of the wall, thereby eliminating any possibility of a repeat violation.

⁹ The length of the proposed suspension is based on the number of days that elapsed between the Commission's deadline for complying with the Outdoor Guidelines (September 28, 2020) and the date the wall was lowered (October 16, 2020).

¹⁰ The proposed fine is based on a \$10,000 fine for not complying with the September 28, 2020 deadline and each of Special Agent Teague's follow-up requests for a corrective action plan.

They have no history of prior discipline, and there was no evidence that they derived an economic benefit from their violation or that any patrons suffered actual harm. The purpose of the Outdoor Guidelines was to protect the Casino's employees from cars entering the patio. Although the original wall violated the height restriction, San Joaquin County confirmed that the original design of the patio allowed for "adequate airflow." Additionally, Special Agent Teague told Mr. Marcarian the patio's airflow "is not the issue."

57. But respondents' proposal that no suspension, fine, or civil penalty be imposed would not be reasonable either. Their argument that they complied with the Emergency Order and "immediately lowered the patio walls" – although temporally accurate – was misleading. It was their inability to obtain an exemption that prompted them to lower the wall, not the Bureau's issuance of the Emergency Order.

58. It was reasonable for respondents to seek an exemption from the height restriction before spending \$22,089 to lower the wall because the wall, which preexisted the Outdoor Guidelines, was an integral part of the patio's overall design. The height restriction was included in the Outdoor Guidelines, which the CDPH issued. Therefore, it was appropriate to seek an exemption from the CDPH or the Governor's Office. But once the CDPH referred respondents to San Joaquin County, they knew, or reasonably should have known, that San Joaquin County had no authority to grant an exemption from state-issued guidelines, and compliance should have been forthcoming. Respondents did not comply until they concluded San Joaquin County would not issue an exemption.

59. The Commission has adopted disciplinary guidelines for determining the appropriate discipline when a cardroom business licensee or a cardroom endorsee licensee violates the Act. (Cal. Code Regs., tit. 4, §§ 12566 & 12568.) California Code of

Regulations, title 4, section 12566, subdivision (a), applies to a cardroom business licensee found to have violated the Act "pursuant to Business and Professions Code section 19922." As explained in Legal Conclusions 9 and 18, no cause exists for discipline pursuant to that statute. The First Amended Accusation did not allege any of the violations discussed in Subdivision (b) or (c). Additionally, the First Amended Accusation did not seek to discipline the Casino, the cardroom business licensee.

60. California Code of Regulations, title 4, section 12568 does not either. That regulation applies only to the discipline of "a cardroom endorsee licensee who has committed a separate violation from the cardroom business licensee." (*Ibid.*) The sole violation alleged in the First Amended Accusation was that the wall exceeded three feet in height.

LEGAL CONCLUSIONS

Applicable Burden/Standard of Proof

1. Complainant has the burden of proving the grounds for disciplining respondents' licenses alleged in the First Amended Accusation. (*Daniels v. Department of Motor Vehicles* (1983) 33 Cal.3d 532, 536 ["When an administrative agency initiates an action to suspend or revoke a license, the burden of proving the facts necessary to support the action rests with the agency making the allegation"].) She must meet her burden by a preponderance of the evidence. (Cal. Code Regs., tit. 4, § 12554, subd. (c).) This evidentiary standard requires complainant to produce evidence of such weight that, when balanced against evidence to the contrary, is more persuasive and convinces the trier of fact that such evidence "is more likely true than not true." (*Ibid.*;

People ex rel. Brown v. Tri-Union Seafoods, LLC (2009) 171 Cal.App.4th 1549, 1567;
Lillian F. v. Superior Court (1984) 160 Cal.App.3d 314, 320.)

Applicable Law

PERTINENT DEFINITIONS

2. "'Gambling enterprise' means a natural person or an entity . . . that conducts a gambling operation and that by virtue is required to hold a state gambling license." (Bus. & Prof. Code, § 19805, subd. (m).) "The owner of a gambling enterprise shall . . . obtain a state gambling license. (Bus. & Prof. Code, § 19851, subd. (a).) "'Owner licensee' means an owner of a gambling enterprise who holds a state gambling license." (Bus. & Prof. Code, § 19805, subd. (ad).)

3. A "cardroom business licensee" is an owner licensee that holds a state gambling license issued pursuant to Business and Professions Code section 19851, subdivision (a). (Cal. Code Regs., tit. 4, § 12002, subd. (j).) The Casino owns a gambling enterprise, and it was issued State Gambling License Number GEGE-001313 pursuant to Business and Professions Code section 19851, subdivision (a). Therefore, the Casino is a cardroom business licensee.

4. Delta C is a limited partnership consisting of partners Delta CM, Delta Fore, Mr. Marcarian, and Mr. Manoukian. Delta C and each partner holds a state gambling license pursuant to Business and Professions Code section 19852, subdivision (d). Delta CM, a corporation, and Mr. Marcarian, Mr. Shindle, Ms. Kennedy, Mr. Mullins, and Ms. Mullins hold state gambling licenses pursuant to Business and Professions Code section 19852, subdivision (a). Delta Fore, a limited liability company, and Mr. Shindle, Ms. Kennedy, Mr. Mullins, and Ms. Mullins hold state gambling licenses pursuant to Business and Professions Code section 19852, subdivision (f).

5. When a state gambling license is issued pursuant to Business and Professions Code section 19852, a separate license certificate is not issued, "but the license of every such person shall be endorsed on the license certificate that is issued to the owner of the gambling enterprise." (Bus. & Prof. Code, § 19851, subd. (b).) A cardroom endorsee licensee is one licensed pursuant to Business and Professions Code section 19852 and endorsed on another's license pursuant to Business and Professions Code section 19851, subdivision (b). (Cal. Code Regs., tit. 4, § 12002, subd. (l).) Each respondent is endorsed on the Casino's state gambling license, and each is a cardroom endorsee licensee.

AUTHORITY TO DISCIPLINE

6. The Commission has authority to discipline a license "or impose any fine" when the holder violates the Act. (Bus. & Prof. Code, § 19824, subd. (b).) Authority to discipline includes authority to "impose any condition, limitation, order, or directive," and to "stay . . . the imposition of a revocation or suspension." (Cal. Code Regs., tit. 4, § 12554, subd. (d)(4) & (6).) A fine or penalty may be imposed in addition to, or in lieu of, other discipline. (*Id.*, subd. (d)(5).) "[N]o fine imposed shall exceed twenty thousand dollars (\$20,000) for each separate violation of any provision of this chapter or any regulation adopted thereunder." (Bus. & Prof. Code, § 19930, subdivision. (c).)

A written decision resolving an accusation must include factual findings, "including findings concerning any relevant aggravating or mitigating factors." (Cal. Code Regs., tit. 4, § 12554, subdivision. (c).)

Cause for Discipline

FIRST CAUSE FOR DISCIPLINE – VIOLATING THE LAWS

7. Complainant alleged that cause exists to discipline respondents' licenses pursuant to Business and Professions Code section 19857. That statute does not authorize discipline, but specifies qualifications for licensure. Therefore, no cause exists to discipline respondents' licenses pursuant to Business and Professions Code section 19857.

8. Complainant alleged that cause exists to discipline respondents' licenses pursuant to Business and Professions Code section 19920. That statute authorizes discipline for the willful or repeated operation of a gambling enterprise in a manner the Commission or a local government deems inconsistent with public health, safety, or welfare. The Commission did not adopt the height restriction set forth in the Outdoor Guidelines as a standard for measuring respondents' business operations. Therefore, no cause exists to discipline their licenses pursuant to Business and Professions Code section 19920 based on their violation of the Laws.

9. Complainant alleged that cause exists to discipline respondents' licenses pursuant to Business and Professions Code section 19922. That statute mandates compliance with the Act and all regulations adopted pursuant to it, but does not authorize discipline for the failure to do so. Therefore, no cause exists to discipline respondents' licenses pursuant to Business and Professions Code section 19922.

10. Complainant alleged that cause exists to discipline respondents' licenses pursuant to California Code of Regulations, title 4, section 12568, subdivision (c)(3). That regulation provides guidelines for determining the appropriate discipline when a cardroom endorsee licensee "no longer meets any criterion for eligibility, qualification,

suitability or continued operation," but does not authorize discipline. Therefore, no cause exists to discipline respondents' licenses pursuant to California Code of Regulations, title 4, section 12568, subdivision (c)(3).

11. Complainant alleged that cause exists to discipline respondents' licenses pursuant to California Code of Regulations, title 4, section 12371, subdivision (g). That regulation specifies that a cardroom business licensee's compliance with the regulation does not make it exempt "from any other federal, state, or local laws or other requirements imposed by entities with jurisdiction over the cardroom business licensee," but does not authorize discipline. Therefore, no cause exists to discipline respondents' licenses pursuant to California Code of Regulations, title 4, section 12371, subdivision (g).

12. Complainant alleged that cause exists to discipline respondents' licenses pursuant to Government Code section 8665. That statute criminalizes certain conduct, but does not authorize discipline. Therefore, no cause exists to discipline respondents' licenses pursuant to Government Code section 8665.

13. Complainant alleged that cause exists to discipline respondents' licenses pursuant to Health and Safety Code section 120275. That statute criminalizes certain conduct, but does not authorize discipline. Therefore, no cause exists to discipline respondents' licenses pursuant to Health and Safety Code section 120275.

SECOND CAUSE FOR DISCIPLINE – VIOLATING THE SAN JOAQUIN ORDER

14. Complainant alleged that cause exists to discipline respondents' licenses pursuant to Business and Professions Code section 19801, subdivisions (d), (e), and (l). That statute sets forth various findings and declarations the Legislature made about the gambling industry, but does not authorize discipline. Therefore, no cause exists to

discipline respondents' licenses pursuant to Business and Professions Code section 19801, subdivisions (d), (e), or (l).

15. Complainant alleged that cause exists to discipline respondents' licenses pursuant to Business and Professions Code section 19803, subdivision (b). That statute clarifies the Legislature's intent in enacting the Act, but does not authorize discipline. Therefore, no cause exists to discipline respondents' licenses pursuant to Business and Professions Code section 19803, subdivision (b).

16. Complainant alleged that cause exists to discipline respondents' licenses pursuant to Business and Professions Code section 19857. No cause exists to discipline respondents' licenses pursuant to that statute for the reasons explained in Legal Conclusion 7.

17. Complainant alleged that cause exists to discipline respondents' licenses pursuant to Business and Professions Code section 19920. The height restriction is set forth in the Outdoor Guidelines. The San Joaquin Order incorporated the Outdoor Guidelines and ordered all businesses in San Joaquin County to abide by the guidelines. Therefore, cause exists to discipline respondents' licenses pursuant to Business and Professions Code section 19920 based on their violation of the San Joaquin Order.

18. Complainant alleged that cause exists to discipline respondents' licenses pursuant to Business and Professions Code section 19922. No cause exists to discipline respondents' licenses pursuant to that statute for the reasons explained in Legal Conclusion 9.

19. Complainant alleged that cause exists to discipline respondents' licenses pursuant to Business and Professions Code section 19923. That statute prohibits

operating "a gambling enterprise in violation of any governing local ordinance," but does not authorize discipline. Neither the Outdoor Guidelines nor the San Joaquin Order was enacted as a local ordinance. Therefore, no cause exists to discipline respondents' licenses pursuant to Business and Professions Code section 19923.

20. Complainant alleged that cause exists to discipline respondents' licenses pursuant to California Code of Regulations, title 4, section 12566, subdivision (a)(3). That regulation provides guidelines for determining the appropriate discipline when a cardroom business licensee violates the Act or any regulation adopted pursuant to it, but does not authorize discipline. Therefore, no cause exists to discipline respondents' licenses pursuant to California Code of Regulations, title 4, section 12566, subdivision (a)(3).

21. Complainant alleged that cause exists to discipline respondents' licenses pursuant to California Code of Regulations, title 4, section 12568, subdivisions (a)(6), and (c)(3). That regulation provides guidelines for determining the appropriate discipline when a cardroom endorsee licensee violates the Act or any regulations adopted pursuant to it or "no longer meets any criterion for eligibility, qualification, suitability or continued operation," but does not authorize discipline. Therefore, no cause exists to discipline respondents' licenses pursuant to California Code of Regulations, title 4, section 12568, subdivisions (a)(6), or (c)(3).

22. Complainant alleged that cause exists to discipline respondents' licenses pursuant to California Code of Regulations, title 4, section 12371, subdivision (g). No cause exists to discipline respondents' licenses pursuant to that regulation for the reasons explained in Legal Conclusion 11.

23. Complainant alleged that cause exists to discipline respondents' licenses pursuant to Government Code section 8665. No cause exists to discipline respondents' licenses pursuant to that statute for the reasons explained in Legal Conclusion 12.

24. Complainant alleged that cause exists to discipline respondents' licenses pursuant to Health and Safety Code section 120275. No cause exists to discipline respondents' licenses pursuant to that statute for the reasons explained in Legal Conclusion 13.

Conclusion

25. Cause exists to discipline respondents' licenses pursuant to Business and Professions Code section 19920 for the reasons explained in Legal Conclusion 17 only. Considering the relevant mitigating and aggravating factors discussed in Factual Findings 53 through 60, imposing a \$2,500 fine properly balances the Bureau's obligation to protect public health, safety, and welfare with respondents' legitimate business interests.

Award of Costs

26. Business and Professions Code section 19930, subdivision (d), provides that the Bureau may be awarded its reasonable costs of investigation and prosecution "in any case in which the administrative law judge recommends that the commission revoke, suspend, or deny a license" Costs may be proven through "Declarations that contain specific and sufficient facts to support findings regarding actual costs incurred and the reasonableness of the costs." (Cal. Code Regs., tit. 1, § 1042, subd. (b).)

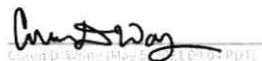
27. No legal basis exists for awarding the Bureau any of its costs because the recommended discipline is imposition of a fine. (Bus. & Prof. Code, § 19930, subd. (d); Cal. Code Regs., tit. 4, § 12554, subd. (i) ["Any order to pay the costs of investigation or prosecution of the case shall be fixed pursuant to Bus. & Prof. Code, § 19930, subd. (d)"].) Therefore, no costs are awarded to the Bureau.

ORDER

1. Respondents Delta C, LP; Delta CM, Inc.; Delta Fore, LLC; Tigran Marcarian; Richard Shindle; Tracy Kennedy; James Mullins; Kerry Mullins; and Chant Manoukian shall pay a fine in the amount of \$2,500. Liability for the fine is joint and several.

2. The Department of Justice, Bureau of Gambling Control, is not awarded its costs of investigation and enforcement of this matter.

DATE: May 5, 2021



COREN D. WONG

Administrative Law Judge

Office of Administrative Hearings