

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

<b>In the Matter of the Off-Premises</b>	)	<b>FINAL FINDING OF FACT</b>
<b>Sales License Held by:</b>	)	<b>CONCLUSIONS OF LAW</b>
	)	<b>AND ORDER</b>
	)	
<b>Plaid Pantries, Inc.</b>	)	<b>OLCC-13-V-108</b>
<b>William C. Girard Jr., Pres/Dir/Stkhldr</b>	)	
<b>Patricia Girard, Stockholder</b>	)	
<b>Mark Conan, VP</b>	)	
<b>Timothy Cote, VP/Stockholder</b>	)	
<b>Joy Cote, Stockholder</b>	)	
<b>Bahman Rostamirad, VP</b>	)	
<b>Jonathan Polonsky, VP</b>	)	
<b>Robert Byrnes, Director</b>	)	
<b>Carl Cadonau Jr., Director</b>	)	
<b>George Mack, Director</b>	)	
<b>Larry Miller, Director</b>	)	
	)	
<b>dba PLAID PANTRY #206</b>	)	
<b>20375 Baseline</b>	)	
<b>Aloha, OR</b>	)	

**HISTORY OF THE CASE**

On August 27, 2013, the Oregon Liquor Control Commission (OLCC or Commission) issued a Notice of Proposed License Suspension/Civil Penalty (Notice) to Plaid Pantries, Inc.; William C. Girard Jr., President/Director/Stockholder; Patricia Girard, Stockholder; Mark Conan, Vice President; Timothy Cote, Vice President/Stockholder; Joy Cote, Stockholder; Bahman Rostamirad, Vice President; Jonathan Polonsky, Vice President; Robert Byrnes, Director; Carl Cadonau Jr., Director; George Mack, Director; Larry Miller, Director (collectively "Licensee"), dba Plaid Pantry #206, located at 20375 Baseline, Aloha, Oregon, 97006. The Notice alleged that Licensee's employee sold alcoholic liquor to a visibly intoxicated person in violation of ORS 471.410(1). Licensee timely requested a hearing.

The Commission referred Licensee's hearing request to the Office of Administrative Hearings (OAH) on October 2, 2013. The OAH assigned the case to Senior Administrative Law Judge (ALJ) Alison Greene Webster.

ALJ Webster presided over a contested case hearing in Tualatin, Oregon, on March 14, 2014. Duke Tufty, Attorney at Law, represented the Licensee. Becky Voelkel presented the case for the OLCC.

The following witness testified on behalf of the Commission: Gregory Hess; Jeremy Rametes; Katherine Kalmbach; Deputy Augusto Orozco of Washington County Sheriff's Office;

Corporal Adam Rorick of the Washington County Sheriff's Office; OLCC Inspector Jeff Bell; and Tony Bui. Licensee called the following witnesses: Employees William McLean and Karen Anderson.

The record remained open for written closing arguments, and closed on March 28, 2014, upon receipt of Commission Staff's Rebuttal Closing Argument.

The Administrative Law Judge considered the record of the hearing and the applicable law and issued a Proposed Order mailed April 14, 2014.

No Exceptions to the Proposed Order were filed within the 15-day period specified in OAR 845-003-0590.

The Commission adopts the Proposed Order of the Administrative Law Judge as the Final Order of the Commission and enters the following based on the preponderance of the evidence:

### **EVIDENTIARY RULINGS**

OLCC Exhibits A1 and A6 were admitted without objection.

Licensee's Exhibits P1 through P3 and P8 through P16 were admitted. Exhibits P4 through P7 were withdrawn.

### **ISSUES**

1. Whether, on the night of July 26, 2013, Licensee's employee William McLean knowingly sold alcoholic liquor to a visibly intoxicated person in violation of ORS 471.410(1).
2. If the alleged violation occurred, what is the proper sanction?

### **FINDINGS OF FACT**

1. On the night of July 26, 2013, G Bar patrons Gregory Hess and Jeremy Rametes were standing outside in front of the bar when they saw a Ford Explorer pull into G Bar's parking lot. Hess and Rametes watched as the vehicle drove over a curb and into a planter. They saw both the driver (later identified as Ruben Perez) and the passenger (later identified as Fernando Sebastian) attempt to maneuver the Explorer out of the planter. Hess and Rametes then saw Perez and Sebastian exit the Explorer and stumble towards the G Bar. Believing that Perez and Sebastian were intoxicated, Hess and Rametes walked inside the bar to warn the bartender. They also called 9-1-1 to report the suspected drunk drivers. (Test. of Hess; test. of Rametes.)

2. G Bar bartender Katherine Kalmbach saw Perez and Sebastian enter the bar. She noted, by the manner in which the two men walked and moved, that they appeared intoxicated. When Sebastian walked up to the bar and ordered a beer, she refused to serve him. She also

refused to serve Perez when he asked her for a beer. She instead offered them water or a soda and something to eat. She also offered to call them a cab. (Test. of Kalmbach.)

3. Perez and Sebastian remained at the G Bar for only a few minutes before they exited and returned to the Explorer. Perez got behind the wheel, and drove the SUV through the parking lot around to the front of the Plaid Pantry.<sup>1</sup> Perez parked the Explorer directly in front of the Plaid Pantry's entry doors, taking up two parking spaces. (Test. of Hess; test. of Rametes; Ex. A6.)

4. At approximately 9:53 p.m. on July 26, 2013, Perez and Sebastian entered the Plaid Pantry. At that time, there were three or four customers in line to purchase items. Employees Kristina Ferguson and William McLean were cashiering behind the counter. Ferguson was on the main register and McLean, who had just started his shift, was on the second register. Perez went into the restroom while Sebastian waited and wandered the aisles. About two minutes later, Perez exited the restroom. Sebastian then entered the restroom and Perez walked to the coolers at the back of the store. A minute or so later, Perez removed a 12 pack of Corona beer from the cooler. He carried it down an aisle, and set it on the floor at the base of the aisle while he appeared to shop for other items. A minute or so after that, Sebastian exited the restroom and walked out of the store. Perez then picked up the 12 pack of Corona and got in line to pay for the beer at the cashier counter. (Exs. A6 and P16; test. of McLean.)

5. Employee Ferguson rang up the sale of the customer in line ahead of Perez. Immediately after that sale, at approximately 9:58 p.m., Ferguson signed off the main register and employee McLean signed on. Perez placed the 12 pack on the counter and waited while Ferguson cashed out and signed off and McLean signed on to the register. It took a minute or two for Ferguson and McLean to go through the steps and complete the shift change on the register. During this time, Perez stood at the counter and waited patiently for Ferguson and McLean to complete the shift change tasks. Perez removed his identification from his wallet without difficulty as he waited. He did not visibly sway, wobble or stagger while he waited. (Exs. A6 [Register Camera 09] and P16; test. of McLean.)

6. At approximately 10:00 p.m., McLean took over cashiering duties on the main register. McLean lifted the 12 pack of Corona off the counter and scanned the sku on the bottom of the package. He then looked at Perez and asked him for identification. Perez handed his driver license to McLean. McLean examined the license, verified Perez's age, rang in the sale on the register and returned the driver license. Perez then handed McLean \$20 for the purchase. McLean placed the cash in the drawer and counted change while Perez, without apparent difficulty, put his driver license in his wallet and his wallet into his pants pocket. McLean handed the change and register receipt to Perez. Perez took the change, the register receipt and the 12 pack of beer in hand and walked towards the door to exit the store. (Ex. A6 [Register Camera 09] and P16; test. of McLean.)

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<sup>1</sup> The Plaid Pantry is located directly to the east of the G Bar/GoGo Burger and the two businesses share a common parking lot. The Plaid Pantry's main entry faces east, on the opposite side of the building from the G Bar. (Ex. A5.)

7. For the approximately two minutes that Perez was standing at the counter waiting to purchase and purchasing the 12 pack of Corona, McLean did not note any signs of intoxication on him. McLean did not see Perez stagger, sway or lean against the counter to balance himself. Perez did not appear clumsy or have any noticeable difficulty presenting his identification or handling the money. Perez was quiet, and he and McLean did not speak to each other during the transaction. (Test. of McLean.)

8. After the sale, as Perez approached the front door with the 12 pack of Corona in hand, he must have seen the Washington County Sheriff's deputies outside speaking with Sebastian because he turned around and walked to the back of the store, near the coolers. There, he set the 12 pack of Corona down on the ground at the end of an aisle. (Ex. A6 [Cooler Camera 04]; Ex. P16.) Perez remained inside the store, away from the front doors, for about 10 minutes. He walked among the aisles while talking on his cell phone. At about 10:11 p.m., Perez approached employee Ferguson (who was still at the store, but off duty). Perez handed Ferguson his cell phone and asked, in broken English, that Ferguson tell the person on the line the location of the store. At this point, Ferguson realized that Perez was intoxicated. She took the phone and spoke to the person on the line. Ferguson advised this person that the police were at the store, probably there to arrest Perez. She added that they were at the Plaid Pantry on Baseline. (Exs. A6 [Mid Store Camera 02], P13 at 3 and P16; test. of Anderson.)

9. The deputies outside the store were aware that Perez was inside and attempting to avoid them. Moments later, a deputy entered the store, contacted Perez and escorted him outside. (Test. of Rorick; Ex. A6.)

10. Following an investigation, deputies arrested both Perez and Sebastian for DUII, based on the witnesses' reports that both men operated the Explorer in the G Bar parking lot. Perez's arrest occurred at 10:57 p.m., about an hour after Perez purchased the beer. Perez submitted to a breath test following his arrest, which disclosed a blood alcohol content of .14 percent. Sebastian also submitted to, and failed, a breath test following his arrest. (Ex. A3; test. of Orozco; test. of Rorick.)

11. On July 31, 2013, OLCC Inspector Bell questioned Ferguson about the sale to Perez. Ferguson told Inspector Bell that remembered the incident. She recalled having contact with both Perez and Sebastian before she left the premises that night. She told the inspector that she recognized the two men because they had been to the premises earlier in the day and had purchased two 12 packs of Corona beer. She advised the inspector that, on their later visit to the store, both men smelled strongly of alcohol and staggered as they walked. She also advised the inspector that one of the two tried to talk to her as she was leaving, but he could not even speak. According to Inspector Bell's report of their conversation, "Ferguson said that she thought that she should tell McLean not to sell any alcohol to Perez and Sebastian; however, she did not say anything to McLean because he is an experienced cashier." (Ex. A4; test. of Bell.)

12. On August 1, 2013, Inspector Bell questioned McLean about the sale to Perez. McLean confirmed that he sold the 12 pack of Corona to Perez. McLean told the inspector that he did not know at the time of the sale that Perez was intoxicated. McLean also advised the inspector that he did not see Perez turn around at the front door and try to hide the 12 pack in the

store after the sale. Bell concluded the interview by advising McLean that he was going to be cited for selling alcohol to a visibly intoxicated person in violation of ORS 471.410(1). (Ex. A4; test. of Bell.)

13. On September 5, 2013, after Licensee received the Notice of Proposed License Suspension/Civil Penalty, members of Licensee's personnel and training department, including employee Karen Anderson, met with Ferguson about McLean's sale to Perez and Ferguson's comments to Inspector Bell about the incident. During the meeting, Ferguson reviewed the video footage of the sale and of Perez and Sebastian's conduct inside the store that night. Ferguson acknowledged that Perez did not appear drunk while he was at the counter making the purchase, and that he did not fumble, stumble or appear loud and boisterous during that time. Ferguson also acknowledged that she "remembered it wrong" when she told Inspector Bell she knew that Perez was intoxicated at the time of the sale, but did not say anything to McLean. (Ex. P13 at 4-5; test. of Anderson.)

## CONCLUSIONS

1. The evidence fails to demonstrate that Licensee's employee William McLean knowingly sold alcoholic liquor to a visibly intoxicated person in violation of ORS 471.410(1).
2. Because no violation was established, no sanction is warranted.

## OPINION

### 1. Violation

Commission Staff asserts that Licensee's employee, McLean, knowingly sold alcoholic beverages to a visibly intoxicated person, Perez in violation of OAR 471.410(1).

ORS 471.410(1) provides:

No person shall sell, give or otherwise make available any alcoholic liquor to any person who is visibly intoxicated.

The *prima facie* elements of a violation of ORS 471.410(1) are as follows: (1) the sale, service or making available alcoholic liquor; (2) by an on-duty licensee, permittee or agent of licensee; (3) to a person who was showing visible signs of intoxication before the service;<sup>2</sup> (4) the licensee, permittee or agent *knew the person was visibly intoxicated*; and (5) the person was

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<sup>2</sup> Signs of visible intoxication include, but are not limited to, the following: slurring; a heavy odor of alcohol; difficulty in handling money or lighting cigarettes; staggering, swaying, stumbling, or falling; bloodshot, watery, or glassy eyes; disruptive, loud, or argumentative behavior; clumsiness, such as spilling drinks or bumping into things; and extreme mood swings. *Jody's Restaurant & Lounge* (OLCC Final Order, 97-V-015, August 1977). A visibly intoxicated person is one whose physical and mental control is diminished by alcohol or drugs to a point where such diminished control can be seen or observed. *Portland Civic Stadium* (OLCC Final Order, 85-V-032, January 1986).

actually intoxicated. *Duffy's Irish Pub* (OLCC Final Order, 05-V-32, February 2006) (emphasis added). "A 'knowing' sale to a visibly intoxicated person is met where, prior to the sale or service of alcohol the patron demonstrated signs of visible intoxication, the server had the opportunity to observe the signs, and the server either actually observed the signs (*i.e.*, interaction with patron while displaying signs) or knew of the presence of a circumstance from which knowledge could be inferred." *Id.* at 7, citing *Cheers to You* (OLCC Final Order, 00-V-070, October 2001). The OLCC calls these latter circumstances knowing "flag factors."<sup>3</sup> In the case of an alleged "knowing" sale, the server's state of mind is a question for the trier of fact to be determined in view of the circumstances as shown by the evidence. *Cheers to You*, Final Order at 8-9.

Here, the evidence demonstrates a sale of alcoholic beverages (Corona beers) by Licensee's clerk (McLean) to a person (Perez) who, prior to the sale, was showing signs of intoxication and who was actually intoxicated. Indeed, approximately 15 minutes before Perez purchased the beer at the Plaid Pantry, G Bar patrons Hess and Rametes and bartender Kalmbach all noted that Perez and Sebastian appeared drunk upon their arrival at the G Bar. About an hour after the sale, Perez was arrested for DUII and his post-arrest breath test disclosed a blood alcohol content .14 percent. Thus, four of the five *prima facie* elements have been established.

What the Commission Staff has not persuasively shown, however, is the "knowing" element, *i.e.*, that McLean *knew* that Perez was intoxicated. As noted above, to find a that "knowing," sale occurred, the evidence must demonstrate that: (1) McLean had the opportunity to observe signs of intoxication on Perez prior to the sale; and (2) McLean actually observed the signs *or* that circumstances existed such that knowledge can be inferred, *i.e.*, that McLean should have observed indicia of intoxication on Perez and refused the sale. *Cheers to You*, Final Order.

McLean credibly testified at hearing that he did not observe signs of intoxication on Perez prior to or during the sale. Though Perez was in the store for about five minutes before he got in line to pay for the beer, McLean was busy behind the counter and did not notice him. Perez was in the bathroom, and then at the back cooler and walking the aisles during that time.

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<sup>3</sup>The knowing flag factors include, but are not limited to, the following:

- 1) Actual interaction with the patron while the patron was showing signs of visible intoxication;
- 2) Knowledge of the patron, including drinking patterns and alcohol tolerance from prior occasions;
- 3) The number of drinks served during an identifiable time frame;
- 4) Notifying the patron at the time of service that he or she is cut-off or has reached his or her maximum;
- 5) Contemporaneous statements by the server about the patron's condition;
- 6) Admissions or stipulations by the server or patron that the patron was visibly intoxicated or should not have been served; or
- 7) One or more signs of intoxication so open and notorious that it or they could not be reasonably missed.

*Duffy's Irish Pub*, Final Order at 7; *Cheers to You*, OLCC, Final Order at 15-16.

McLean's attention was focused on the tasks of ringing up sales at the other register and then signing on to the main register. McLean's testimony that Perez did not appear intoxicated during their contact at the main register is corroborated by the video of the sale from the camera behind the register.<sup>4</sup>

The video from the camera behind the register shows that, for the approximately two minutes Perez was standing at the counter waiting to purchase and then purchasing the 12 pack of Corona, he did not stumble, stagger or visibly sway. Perez waited patiently as Ferguson signed off of and McLean signed on to the cash register. Perez presented his identification and handed McLean the money without difficulty. Perez was not disruptive or noticeably clumsy during the sale. The video also shows that there was little, if any, conversation exchanged between McLean and Perez prior to and during the sale. And, while it is true that the video does not clearly show Perez's facial features and cannot indicate whether he smelled of alcohol, the Commission has never held that bloodshot eyes and the odor of alcoholic beverages are sufficient to establish visible intoxication.<sup>5</sup>

Unlike Hess and Rametes, McLean did not see Perez's poor driving in the parking lot. Unlike Kalmbach, McLean did not see Perez stumble or sway while walking. McLean did not know that Perez had purchased two 12 packs of beer earlier in the day. McLean's contact with Perez was limited to the approximately two minutes it took to complete the shift change at the main register and the sale transaction. The conditions under which the sheriff's deputies later evaluated Perez and arrested him for DUII were also materially different from McLean's brief contact with Perez. Unlike McLean, the deputies saw how Perez parked the Explorer. The deputies knew, based on witness statements, that he had hit a curb and driven into a planter in the parking lot. They also had the opportunity to speak with him for a longer period of time and to test his sobriety. Under these circumstances, the fact that others noted signs of visible intoxication on Perez that night does not undermine the credibility of McLean's testimony that, at the time of the sale, he did not know Perez was intoxicated.

Having found that McLean did not actually observe signs of intoxication on Perez prior to the sale, the question becomes whether the circumstances existing at the time of the sale were such that it is appropriate to infer that McLean had knowledge of Perez's intoxication. In *T.J.'s Fireside Dining* (OLCC Final Order, 00-V-074, October 2001) the Commission addressed the circumstances under which it would infer knowledge in place of a server or clerk actually observing signs of visible intoxication. There, the Commission reasoned that a licensee "cannot escape the duty to comply with the liquor laws by turning a blind eye and not monitoring compliance, or by maintaining conditions which make effective monitoring of compliance

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<sup>4</sup> The video also establishes that, contrary to her statements to Inspector Bell, Ferguson did not have direct contact with Perez and/or Sebastian in the few minutes they were in the store prior to the sale in issue. The video confirms that Ferguson's interaction with Perez occurred about 10 minutes *after* the sale, when Perez handed her his cell phone and asked that she speak to the person he had on the line.

<sup>5</sup> As the Commission recognized in *Portland Civic Stadium*, visible intoxication requires the diminishment of one's physical and mental control by alcohol or drugs "to the point where such *diminished control can be seen or observed.*" Final Order at 6 (emphasis added). While bloodshot eyes and the odor of alcoholic beverages are observable signs of intoxication, neither condition is indicative of diminished physical or mental control.

difficult or impossible.” Final Order at 17, n4. The Commission added that, when these conditions exist, “licensee assumes the risk that violations will occur and may not claim those same conditions excuse liability for the foreseeable violations that do occur.” *Id.* The Commission also noted that to the extent a licensee or permittee turns a blind eye or maintains conditions that make effective monitoring of patrons difficult or impossible, these conditions will not automatically negate that there was the opportunity to observe signs, that signs were observed, or otherwise negate the “knowing” requirement. *Id.* at footnotes 5 through 9.

There is nothing in this record to establish that Licensee in general, or McLean specifically on the night in question, “turned a blind eye” and failed to monitor compliance. As found above, at the time of the sale, Perez held himself together, and did not exhibit signs of intoxication so pronounced that they could not be reasonably missed during a two minute transaction. Therefore, the circumstances of this case are distinguishable from *Smart Buy Market* (OLCC Final Order, 00-V-111, October 2001), in which the Commission found a knowing sale to a visibly intoxicated person where the patron exhibited “big, dynamic motions of swaying back and forth” as he made the purchase. This case is also distinguishable from *Kelsey’s Korner Market* (OLCC Final Order, 97-V-009, October 1997), where the intoxicated patron had to support himself by leaning on the check stand as he made the purchase.

The evidence also fails to demonstrate that Licensee maintains conditions at the store that make compliance with the law difficult or impossible. Despite Commission Staff’s contention, the fact that McLean was busy with cashiering and other tasks when Perez entered the store, and had to briefly turn his attention to the main register to sign on and complete the shift change prior to the sale did not create a condition that made compliance difficult or impossible. Indeed, before McLean made the sale to Perez, he looked at Perez, asked for identification and examined the identification to verify that Perez was of age. Consequently, unlike the cases cited above, this is not the type of fact scenario discussed in *T.J.’s Fireside Dining* that merits an inference of knowledge of visible intoxication.

Moreover, a brief review of the knowing flag factors noted above confirms that these factors are not applicable or determinative in this case. McLean’s actual interaction with Perez was very brief, less than two minutes. The brief interaction involved McLean scanning the sku on the package of beer, checking Perez’s identification, taking cash from Perez and returning the change. There is no evidence that McLean had prior contact with, or knowledge of, Perez’s drinking patterns or alcohol tolerance. Although Ferguson apparently knew that Perez had been in earlier and had purchased two packs of beer, it is not appropriate to impute Ferguson’s knowledge to McLean in this situation. It is also not appropriate to look to events that occurred *after* the sale (*i.e.*, Perez returning to the back of the store, setting down the 12 pack, staying clear of the front entry, and asking Ferguson to talk to someone on his cell phone) in determining whether McLean had an opportunity to observe signs of intoxication on Perez. Finally, during McLean’s contact with Perez, Perez was not exhibiting signs of intoxication so open or notorious they could not be reasonably missed.

In short, Commission Staff has not demonstrated by a preponderance of the evidence that McLean knowingly sold alcoholic beverages to visibly intoxicated person on the night of July 26, 2013. The charged violation of ORS 471.410(1) should therefore be dismissed.



**FINAL ORDER**

*The Commission orders the following:*

The charge that Licensee's employee William McLean knowingly sold alcoholic liquor to a visibly intoxicated person on July 26, 2013 in violation of ORS 471.410(1) is **DISMISSED**.

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

Dated this 8th day of May 2014

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/s/ Steven Marks

Steven Marks  
Executive Director  
OREGON LIQUOR CONTROL COMMISSION

Mailed this 12th day of May 2014

**THIS ORDER IS EFFECTIVE ON THE DATE MAILED.**

**NOTICE:** You are entitled to judicial review of this Order. Judicial review may be obtained by filing a petition for judicial review within 60 days from the service of this Order. Judicial review is pursuant to the provisions of ORS Chapter 183.