

SOAH DOCKET NO. 458-09-2970

Texas Alcoholic Beverage Commission, §  
Petitioner, §  
VS. §  
GERM INTERNATIONAL, LLC. §  
D/B/A §  
CLUB VENOM, RESPONDENT §  
TABC Case No. 581858 §

**ORDER MODIFYING PROPOSAL FOR DECISION**

On this day the captioned matter came before me for consideration and decision. I have reviewed the State Office of Administrative Hearings file, the documentary evidence admitted at the hearing, and the Proposal for Decision (PFD) entered by the Administrative Law Judge (ALJ).

**I.**

**Adopted Findings of Fact**

Based on my review of the pleadings, evidence and testimony presented, I adopt without modification the following Findings of Fact in Section III of the PFD as follows:

1 Germ International d/b/a Club Venom (Respondent) holds Mixed Beverage Permit and Mixed Beverage Late Hours Permit MB615855 issued by the Texas Alcoholic Beverage Commission (TABC) for the premises (Club Venom) located at 2407 N. Mary Street, San Antonio, Bexar County, Texas. This permit was in effect on November 8, 2008.

2 On November 8, 2008, TABC agents Gonzales and Harris observed Hever Carranza consuming an alcoholic beverage on the premises at 2:45 a.m.

5. On April 27, 2009, TABC sent a notice of hearing to Respondent stating that a hearing would be held on this matter on May 8, 2009, at the State Office of Administrative Hearings (SOAH) in San Antonio, Texas.

5[sic]. The Notice of Hearing informed Respondent of the time, location, and the nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; and contained a reference to the particular sections of the statutes and rules involved, and a short plain statement of the allegations and the relief sought by TABC.

6. On May 8, 2009, the evidentiary hearing convened in San Antonio, Texas, before ALJ John H. Beeler. TABC was represented at the hearing by attorney Matthew Clark. Respondent was represented by one of its owners, Sam Mizyed. The hearing concluded that day and the record closed on May 15, 2009, after Respondent submitted a document.

## II. Administrator's Findings of Fact

Based on my review of the pleadings, evidence and testimony presented at the hearing, I make the following Findings of Fact:

- 2.1. Germ International LLC, is a Limited Liability Corporation, organized under the laws of the state of Texas, was issued a Mixed Beverage Permit (MB615855), on December 13, 2005, and has been continuously renewed.
- 2.2. Sam Mizyed testified that he was one of the owners of the bar.
- 2.3. Sam Mizyed testified that he surrendered control of the licensed premise to Hever Carranza, that Mr. Carranza was acting on behalf of the permit holder, and that he was not at the licensed premise when the violation occurred.
- 2.4. The unsworn statement of Hever Carranza, the Incident Report admitted as Exhibit 3, and the sworn testimony of Agents Gonzales and Harris provide inconsistent statements regarding the details relating to whether Mr. Carranza was consuming an alcoholic beverage on the licensed premise during prohibited hours. I find the testimony of Agents Gonzales and Harris credible and reliable and sufficient to establish that Mr. Carranza was consuming an alcoholic beverage on the licensed premise at a time when its consumption was prohibited
- 2.5. The unsworn statement of Hever Carranza, the Incident Report admitted as Exhibit 3, and the sworn testimony of Agents Gonzales and Harris are consistent and sufficient to establish that control of the licensed premise was surrendered to Mr. Carranza to act on behalf and at the request of Mr. Mizyed to lock up the bar.
- 2.6. At the time the violation occurred Mr. Carranza was acting as an authorized agent of the permittee.

### III. Analysis

3.1 An administrative action under §11.61 and §61.71 of the Texas Alcoholic Beverage Code (Code) are actions taken to cancel or suspend a permit. A permittee is defined in §1.04(11) of the Code as “a person who is the holder of the permit provided for in this code, or an agent, servant, or employee of that person. Person is also defined in §1.04(6) of the Code as “a natural person or association of natural persons, trustee, receiver, partnership, corporation, organization, or the manager, agent, servant, or employee of any of them.” Notwithstanding changes in management or ownership, the permit is held by GERM INTERNATIONAL, LLC, is the same legal entity that was issued the original permit in 2005. This administrative action is taken against the permit, and the privilege to engage in the activities authorized by the permit, not against an individual natural person. It is therefore inappropriate to fragment the violation history of “one of the owners” from that of the permit holder, GERM INTERNATIONAL, LLC.

3.2 An agent is defined by *Black's Law Dictionary* as, “one who is authorized to act for or in place of another”. It is undisputed that Mr. Mizyed, gave Mr. Carranza the keys to the bar and asked him to lock up the bar, for or in the place of Mr. Mizyed. Even though there was testimony that there was an employee at the bar, control of the bar was delivered to Mr. Carranzato. Mr. Carranzato had express authority to act on behalf of, and as the agent of the permit holder. There is also evidence that Mr. Carranzato had been granted authority to act on behalf of the permit holder in the past. The definition of permittee does not exclude an imprudently employed, appointed, designated, or apparent agent.

3.3 Prohibited hours violations have been identified by the Texas Sunset Commission and the Texas Legislature as a major public safety risk. Based on their expression of public policy, changes were made to the Code in 2007 to recognize this risk and enhance the Commission's ability to deter violations; and if this fails, impose severe sanctions when violations are detected. Criminal sanctions for Hours of Sale, Chapter 105, offenses were increased to a Class A misdemeanor. Section 11.64 of the Code was amended to exclude prohibited hours from violations for which payment of a civil penalty in lieu of a suspension must be offered. In revisions to the Standard Penalty Chart rules in 16 Texas Administrative Code, §34.2, the Commission increased the minimum amount of civil penalty for all health, safety and welfare violations from \$150 to \$300.

3.4. The Commission has not adopted a rule that would allow a civil penalty to be imposed in lieu of a suspension or cancellation in a contested case brought under Chapter C and D of the

Administrative Procedure Act, for a prohibited hours violation. These actions are specifically excluded from the Standard Penalty Chart rule at §34.1(j).

3.5. The final decision in a contested case, and the sanction or penalty when a violation is found, is reserved to the Administrator. A sanction or penalty must be appropriate and sufficient to accomplish the purpose behind its imposition. Violations that: pose the greatest risks to public health and safety; can be easily avoided by adherence to clearly stated laws; may be motivated by private avarice; and have been identified by elected and appointed official as a priority for all of these reasons, should carry the highest sanctions and allow for the least flexibility and variability when imposed. Prohibited hours violations fall squarely into this category of violations. When a prohibited hours violation is found, it cannot be explained away or diminished by a permittees': "poor judgment" in San Antonio, "inattention" in Amarillo, or "honest mistake" in El Paso. A permittee who fails to exercise reasonable care cannot use that very failure to escape responsibility for a violation that occurs on the licensed premise, or to ameliorate a sanction or penalty for the violation.

#### IV. Conclusions of Law

4.1 The Commission has jurisdiction over this matter. Texas Alcoholic Beverage Code, Chapters 1, 5, 28, 29 and 105, and §11.61, and §11.64.

4.2 The State Office of Administrative Hearings has jurisdiction to conduct a hearing and prepare a proposal for decision with findings of fact and conclusions of law. Texas Government Code, Chapter 2001 and Texas Alcoholic Beverage Code, §5.43.

4.3 The Commission or Administrator has authority to render a decision based on the record, as if the Administrator had conducted the hearing. The review, analysis and the Administrator's Findings of Fact and these Conclusions of Law are based on an exercise of this authority. Texas Alcoholic Beverage Code, §5.43.

4.4 Proper and timely notice of the hearing was provided, and/or no objection to notice was made at the hearing. Texas Government Code, §§ 2001.051 and 2001.052.

4.5 The Permittee consumed an alcoholic beverage or permitted one to be consumed on the licensed premises at a time when the consumption of alcoholic beverages is prohibited by Chapter 105, and §§11.61(22) and 61.71(a)(18) of the Texas Alcoholic Beverage Code.

4.6 Based on the foregoing finding of fact and conclusions of law, the Mixed Beverage Permit and Mixed Beverage Late Hours Permit (MB615855) issued by the Texas Alcoholic Beverage Commission for the premises located at 2407 N. Mary Street, San Antonio, Bexar County, Texas, is **SUSPENDED** for a period of **Ten Days**.

4.7 In lieu of serving a suspension, the Permittee may pay a civil penalty of \$3000.00 on or before 12<sup>th</sup> day of January, 2010. If the full civil penalty is not paid on or before the date due, the privileges granted by the permit will be suspended for 10 days beginning at 12:00 A.M. on January 20<sup>th</sup> 2010.

This Order is final and effective on the 11<sup>th</sup> day of January 2010, unless a motion for rehearing is filed on or before that date.

Signed this 18<sup>th</sup> day of December 2009.



Alan Steen, Administrator  
Texas Alcoholic Beverage Commission

**ATTORNEY FOR RESPONDENT**  
Administrative Law Judge  
State Office of Administrative Hearings  
**ATTORNEY FOR PETITIONER**  
Texas Alcoholic Beverage Commission  
Legal Division  
District Office  
Licensing Division

**DOCKET NO. 458-09-2970**

**TEXAS ALCOHOLIC BEVERAGE  
COMMISSION,  
Petitioner**

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**BEFORE THE STATE OFFICE**

**V.**

**GERM INTERNATIONAL, LLC,  
D/B/A CLUB VENOM,  
Respondent  
(TABC DOCKET NO. 581858)**

**OF**

**ADMINISTRATIVE HEARINGS**

**PROPOSAL FOR DECISION**

The Staff of the Texas Alcoholic Beverage Commission (TABC) brings this action against Germ International LLC d/b/a Club Venom (Respondent), alleging that Respondent's agent, servant, or employee, consumed or permitted others to consume alcoholic beverages on the licensed premises during prohibited hours in violation of TEX. ALCO. BEV. CODE §§ 105.06(5), 11.61(b)(2), 61.71(a)(18), and/or 32.17(a)(7). TABC seeks either a 12-day suspension of Respondent's permit or payment of a penalty of \$300 per day in lieu of suspension. After considering the evidence and arguments presented, the Administrative Law Judge (ALJ) concludes that TABC has proven its allegation by a preponderance of the evidence. For the reasons set out below, the ALJ recommends that Respondent's permit be suspended for three days or, in the alternative, that Respondent be given the opportunity to pay a penalty of \$150 per day in lieu of suspension.

**I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY**

TABC has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. ch. 5 and § 104.01(5). The State Office of Administrative Hearings (SOAH) has jurisdiction over all matters related to conducting a hearing in this case, including the preparation of a proposal for decision with findings of fact and conclusions of law, under TEX. ALCO. BEV. CODE ANN. §§ 5.43 and 11.015, and TEX. GOV'T CODE ANN. § 2003.021. There were no contested issues of notice or jurisdiction in this proceeding. On May 8, 2009, an evidentiary hearing convened before ALJ

John H. Beeler in San Antonio, Texas. TABC was represented by attorney Matthew Clark. Respondent was represented by one of its owners, Sam Mizyed. The hearing concluded and the record was left open to allow Respondent to provide a written statement from the individual alleged to have been consuming alcohol during prohibited hours. The record closed on May 15, 2009, after the receipt of that document.

## II. DISCUSSION AND ANALYSIS

### A. Applicable Law

State law prohibits the consumption of alcoholic beverage on licensed premises during certain hours. Specifically, TEX. ALCO. BEV. CODE ANN. § 105.06 provides:

HOURS OF CONSUMPTION. (a) In this section:

(1) "Extended hours area" means an area subject to the extended hours of sale provided in Section 105.03 or 105.05 of this code.

(2) "Standard hours area" means an area which is not an extended hours area.

(a-1) For the purposes of this section, a licensed or permitted premises is a public place.

(b) In a standard hours area, a person commits an offense if he consumes or possesses with intent to consume an alcoholic beverage in a public place at any time on Sunday between 1:15 a. m. and 12 noon or on any other day between 12:15 a. m. and 7 a. m.

(c) In an extended hours area, a person commits an offense if he consumes or possesses with intent to consume an alcoholic beverage in a public place at any time on Sunday between 2:15 a. m. and 12 noon and on any other day between 2:15 a. m. and 7 a. m.

Further, TEX. ALCO. BEV. CODE ANN. § 61.71 provides:

GROUND FOR CANCELLATION OR SUSPENSION: RETAIL DEALER.

(a) The commission or administrator may suspend for not more than 60 days or cancel an original or renewal retail dealer's on- or off-premise license if it is found, after notice and hearing, that the licensee:

\* \* \* \* \*

(18) consumed an alcoholic beverage or permitted one to be consumed on the licensed premises at a time when the consumption of alcoholic beverages is prohibited by this code;

## **B. Evidence and Arguments**

Petitioner offered three documents and the testimony of two witnesses, both TABC agents. Mr. Mizyed testified for Respondent and offered the written statement of Hever Carranza.

### **1. Testimony of Tulita Harris**

Ms. Harris testified she is employed as a TABC agent and observed that facts made the basis of the allegation of this hearing. On November 8, 2008, she and TABC agent Nina Gonzales, went to Club Venom because of a complaint of after-hours consumption of alcohol. At approximately 2:45 a.m., she looked through a gap in some blinds, and observed a male sitting at the bar drinking a beer.

Agent Harris further testified that she notified Agent Gonzales, who went to the front door and knocked. Agent Harris stayed where she was to see if the male attempted to hide the beer. The male unlocked and opened the door and Agent Gonzales entered the club. Agent Harris soon followed. On the bar they found a half-empty bottle of Miller Lite. It was cold to the touch. The male, identified as Hever Carranza, denied drinking the beer.

Agent Harris acknowledged that she and Agent Gonzalez have been to Club Venom on other occasions and that she cannot recall any other violations.

### **2. Testimony of Nina Gonzales**

Agent Gonzales testified to the same basic facts set out above.

### **3. TABC Documents**

TABC offered a copy of the Notice of Hearing, the license history of the premises, and the incident report for this case. All were admitted without objection.

### **4. Testimony of Sam Mizyed**

Mr. Mizyed testified that he is one of the owners of the bar but was not present at the time of the alleged violation. He had been at the bar earlier but had become ill and ask a friend to lock up the bar so he could leave. The friend, Hever Carranza, was not an employee of the club. Further, Mr. Carranza's only duty for the night was to lock the door at closing time.

Mr. Mizyed further testified that he has only owned the club for a short time and had worked hard to make it a clean operation. He has had no prior violations, but has seen the two agents on the premises.

### **5. Written Statement of Hever Carranza**

Mr. Carranza, in his statement, asserts that the beer found on the bar was one that he picked up from a table and that he was not drinking after hours.

### **C. The ALJ's Analysis**

The ALJ concludes that TABC has shown, by a preponderance of the evidence, that Respondent's agent, servant, or employee, consumed or permitted others to consume alcoholic beverages on the licensed premises during prohibited hours. The TABC agents' testimony was consistent and logical, and no reason for them to have made up the story was offered. Mr. Mizyrd testified that he told Mr. Carranza that his only task was to lock the door at closing time. However, that is not what Mr. Carranza did. After the club had closed, he remained there for quite some time. It was undisputed that the agents observed him there at 2:45 a.m. Agent Harris testified she observed him drinking a beer at that time, and it is a logical conclusion that that he remained on the premises to drink the beer.

Petitioner recommends a suspension of 12 days or a civil penalty of \$300 per day. The ALJ concludes the recommendation is excessive. This is not a situation where Respondent kept the club open during prohibited hours for financial gain. Rather, it is simply a situation where Mr. Mizyrd used poor judgment in his choice of who to trust with following his instructions. Further, there have been no adjudicated violations since Respondent has owned the club. The ALJ, therefore, recommends a suspension of three days and that Respondent be allowed to pay a civil penalty of \$150 per day in lieu of suspension.

In support of this recommendation, the ALJ makes the following findings of fact and conclusions of law.

### III. FINDINGS OF FACT

1. Germ International d/b/a Club Venom (Respondent) holds Mixed Beverage Permit and Mixed Beverage Late Hours Permit MB615855 issued by the Texas Alcoholic Beverage Commission (TABC) for the premises (Club Venom) located at 2407 N. Marys Street, San Antonio, Bexar County, Texas. This permit was in effect on November 8, 2008.
2. On November 8, 2008, TABC agents Gonzales and Harris observed Hever Carranza consuming an alcoholic beverage on the premises at 2:45 a.m.
3. Sam Mizyed, one of the owners of the club, had instructed Mr. Carranza to lock up the club at closing time.
4. Respondent has had no adjudicated violations since the present owners purchased the club.
5. On April 27, 2009, TABC sent a notice of hearing to Respondent stating that a hearing would be held on this matter on May 8, 2009, at the State Office of Administrative Hearings (SOAH) in San Antonio, Texas.
5. The Notice of Hearing informed Respondent of the time, location, and the nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; and contained a reference to the particular sections of the statutes and rules involved, and a short plain statement of the allegations and the relief sought by TABC.
6. On May 8, 2009, the evidentiary hearing convened in San Antonio, Texas, before ALJ John H. Beeler. TABC was represented at the hearing by attorney Matthew Clark.

Respondent was represented by one of its owners, Sam Mizycd. The hearing concluded that day and the record closed on May 15, 2009, after Respondent submitted a document.

#### IV. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN. ch. 5 and § 61.71(a)(18).
2. SOAH has jurisdiction over all matters related to conducting a hearing in this case, including the preparation of a proposal for decision with findings of fact and conclusions of law, under TEX. ALCO. BEV. CODE ANN. §§ 5.43 and 11.015 and TEX. GOV'T CODE ANN. § 2003.021.
3. Proper and timely notice of the hearing was provided as required under the Administrative Procedure Act, TEX. GOV'T CODE §§ 2001.051 and 2001.052; TEX. ALCO. BEV. CODE ANN. § 11.63; and 1 TEX. ADMIN. CODE §155.55.
4. TABC has shown, by a preponderance of the evidence, that Respondent's agent, servant, or employee, consumed or permitted others to consume alcoholic beverages on the licensed premises during prohibited hours in violation of TEX. ALCO. BEV. CODE § 105.06.
5. Based on the foregoing Findings of Fact and Conclusions of Law, Respondent's Mixed Beverage Permit and Mixed Beverage Late Hours Permit MB615855 should be suspended for 3 days. In the alternative, Respondent should be given the opportunity to pay a penalty of \$150 per day in lieu of suspension.

**SIGNED on July 14, 2009.**

  
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**JOHN H. BEELER**  
**ADMINISTRATIVE LAW JUDGE**  
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**