

TEXAS ALCOHOLIC BEVERAGE  
COMMISSION

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BEFORE THE TEXAS

VS.

PEDRO YANEZ  
D/B/A EXCLUSIVO  
PERMIT/LICENSE NO(s). MB604177, LB  
DALLAS COUNTY, TEXAS  
(SOAH DOCKET NO. 458-09-2195)

ALCOHOLIC

BEVERAGE COMMISSION

**ORDER**

CAME ON FOR CONSIDERATION this 1st day of April, 2010, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Richard R. Wilfong. The hearing on place or manner and common nuisance allegations convened on the 27<sup>th</sup>, 28<sup>th</sup> and 29<sup>th</sup> day of April, 2009 and on the 17<sup>th</sup>, 18<sup>th</sup>, and 19<sup>th</sup> day of August, 2009. Additional alleged violations specific to the Respondent were heard on October 29, 2009. The record closed on March 1, 2010. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on the 4<sup>th</sup> day of March, 2010. The Proposal For Decision was properly served on all parties who were given an opportunity to file Exceptions and Replies as part of the record herein. As of this date no exceptions have been filed.

The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision and Exhibits, adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge, which are contained in the Proposal For Decision and incorporates those Findings of Fact and Conclusions of Law into this Order, as if such were fully set out and separately stated herein. All Proposed Findings of Fact and Conclusions of Law, submitted by any party, which are not specifically adopted herein, are denied.

**IT IS THEREFORE ORDERED**, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that your permit(s) and/or license(s) is/are hereby **CANCELLED**.

This Order will become **final and enforceable** on the 26<sup>th</sup> day of April, 2010, unless a Motion for Rehearing is filed **before** that date.

By copy of this Order, service shall be made upon all parties by in the manner indicated below.

**SIGNED** this the 1st day of April, 2010, at Austin, Texas.

  
Sherry K-Cook, Assistant Administrator  
Texas Alcoholic Beverage Commission

JLK/cb

Honorable Richard R. Wilfong  
**Administrative Law Judge**  
State Office of Administrative Hearings  
Austin, Texas  
*VIA FACSIMILE: (512) 475-4994*

Paul Rich  
**Attorney for Respondent**  
3500 Oak Lawn Avenue  
Suite 373  
Dallas, TX 75219  
*VIA FACSIMILE: (214) 943-7536*

Pedro Yanez  
**RESPONDENT**  
d/b/a Exclusivo  
3352 Jubilee Trail  
Dallas, TX 75229  
*VIA REGULAR MAIL*

Judith L. Kennison  
**Attorney for Petitioner**  
TABC Legal Section

Licensing Division

Dallas District Office



Respondent (items 1 through 3 and 6 below) were heard on October 29, 2009 at the State Office of Administrative Hearings, 6333 Forest Park Road, Dallas, Texas 75235. All of the hearings were before Administrative Law Judge (ALJ) Richard R. Wilfong. TABC Staff was represented by attorneys Emily Helm and Judith Kennison. Respondent appeared by attorney Paul Rich. Following the hearings the parties submitted written closing arguments and reply briefs. The record closed on March 1, 2010.

## II. ALLEGATIONS AND LEGAL STANDARDS

In its Notice of Hearing, Staff made the following allegations:

1. On or about August 8, 2008, Respondent or Respondent's agent, servant or employee, sold or offered to sell mixed beverages during prohibited hours in violation of §§ 11.61(b)(2) and 105.03 of the Code.
2. On or about August 29, 2008, Respondent or Respondent's agent, servant, or employee, solicited or permitted solicitation of a person to buy drinks for consumption by Respondent or any of his employee(s) in violation of §§ 11.61(b)(2) and 104.01(4) of the Code.
3. On or about November 8, 2008, Respondent, or Respondent's agent, servant, or employee, with criminal negligence, permitted a minor to possess or consume an alcoholic beverage in violation of § 106.13 of the Code.
4. On or about January 1, 2006, through December 15, 2008, the place or manner in which Respondent, or Respondent's agent, servant, or employee conducted its business warrants the cancellation or suspension of the permit based on the general welfare, health, peace, morals and safety of the people and on the public sense of decency, in violation of § 11.61(b)(7) of the Code.
5. On or about January 1, 2006, through December 15, 2008, Respondent or Respondent's agent, servant, or employee used or allowed others to use the permitted premises in a manner that constitutes a common nuisance as defined in § 81.001 of the Code and in violation of § 81.005 of the Code.
6. On or about December 13, 2008, Respondent, or Respondent's agent, servant, or employee, sold, served, or delivered an alcoholic beverage to an intoxicated person in violation of § 11.61(b)(14) of the Code.

A person acts with criminal negligence under the Code if:

with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.<sup>1</sup>

### III. SUMMARY OF EVIDENCE PRESENTED AND ANALYSIS

At the joint hearings on place or manner and common nuisance allegations (items 4 and 5) Staff presented the testimony of 13 witnesses: nine members of the Dallas Police Department and four TABC employees. Staff offered 12 exhibits, 9 of which were admitted. Respondents collectively presented eight witnesses and offered seven exhibits that were admitted.

At the hearing on alleged violations specific to Exclusivo (items 1 through 3 and 6), Staff presented the testimony of four witnesses and offered one exhibit that was admitted. Respondent presented no testimony or exhibits.

The following is a summary of the evidence presented concerning the alleged violations and the ALJ's analysis:

**A. August 8, 2008 - Allegation that Respondent or its Agent, Servant or Employee, Sold Mixed Beverages During Prohibited Hours.**

**1. Evidence:**

On August 8, 2008, Dallas Police Sergeant Richard Santiesteban responded to a citizen's call that narcotics were being sold at Exclusivo.<sup>2</sup> Sergeant Santiesteban and backup officers, Vogel,

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<sup>1</sup> This definition is the Penal Code definition of criminal negligence and adopted by Code § 1.08.

<sup>2</sup> Tr. 1679.

Loeb and Wester, arrived at Exclusivo at approximately 4:50 a.m. When they entered the establishment the door was still open, the music was playing, the bartender was behind the bar, 10-15 patrons were around the bar area, alcoholic beverage containers were in plain sight at the bar, a Budweiser beer keg was operational, a full pitcher of beer was next to the Budweiser beer tap, and alcoholic beverages (beer and mixed drinks) were in close proximity to the patrons. No non-alcoholic beer was observed.<sup>3</sup> One of the patrons sitting at the bar had a Bud Light in front of him. The patron told Sergeant Santiesteban that the bartender, Mr. Reyes, had sold and served the beer to him.<sup>4</sup> A security guard was also present who identified Mr. Reyes as the bartender. Mr. Reyes had approximately \$2,000 and keys to the establishment in his possession.<sup>5</sup> Sergeant Santiesteban attempted to talk with Mr. Reyes, both in English and Spanish, but Mr. Reyes refused to communicate. Mr. Reyes was arrested for selling alcoholic beverages during prohibited hours. Consistent with the citizen's call that initiated the investigation, crack cocaine was found in the trash can in the men's restroom.<sup>6</sup>

## 2. Analysis

The ALJ found the testimony of Sergeant Santiesteban credible and persuasive and substantially unchallenged on cross-examination. Based on the clear preponderance of the evidence, the ALJ finds that TABC proved that Mr. Reyes, in his capacity as Respondent's employee, servant or agent, sold or offered to sell alcoholic beverages during prohibited hours in violation of §§ 11.61(b)(2) and 105.03 of the Code.

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<sup>3</sup> Tr. 1680-1683.

<sup>4</sup> Tr. 1683.

<sup>5</sup> Tr. 1684.

<sup>6</sup> Tr. 1698.

**B. August 29, 2008 – Allegation that Respondent or its Agent, Servant, or Employee, Solicited a Person to Buy Drinks for Consumption by Respondent or Respondent's Employees.**

Petitioner dismissed this allegation on the record of this proceeding.<sup>78</sup>

**C. November 8, 2008 – Allegation that Respondent, or Respondent's Agent, Servant or Employee, with Criminal Negligence, Permitted a Minor to Possess or Consume an Alcoholic Beverage.**

**1. Evidence**

On November 8, 2008, TABC enforcement agents Daniel Garcia and Ruben Suarez arrived at Exclusivo at approximately 1:10 a.m. to conduct an undercover operation. They observed a youthful-appearing female sitting at the bar in possession of a Bud Light beer.<sup>9</sup> She appeared to be alone, and intermittently conversed with a slightly older male patron also seated at the bar. There was no one that appeared to possibly be her husband or parent.<sup>10</sup> When Mr. Garcia moved closer it was even more apparent to him that she was very likely underage. He also observed her drinking the beer.<sup>11</sup> Two bartenders working behind the bar were within a few feet of the girl and she was plainly visible to them because that area was well-lit.<sup>12</sup> The bartenders did not ask the girl her age or question why she had a beer in her possession and was consuming it.<sup>13</sup> She did not have a stamp on her hand or a wristband indicating she was under age 21.<sup>14</sup> The TABC agents observed the bar and the youthful-appearing female patron for approximately 45 minutes before they called-in TABC agent Victor

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<sup>7</sup> Tr. 1703-1704.

<sup>8</sup> Tr. 1445.

<sup>9</sup> Tr. 1625-1626.

<sup>10</sup> Tr. 1645.

<sup>11</sup> Tr. 1627-1628.

<sup>12</sup> Tr. 1629.

<sup>13</sup> Tr. 1629-1630.

<sup>14</sup> Tr. 1660.

Bulos who was the open member of the team.<sup>15</sup> Mr. Bulos identified the girl as Katia Saenz age 20. She had no identification with her as she was in the country illegally.<sup>16</sup> Her age was confirmed by contacting a relative that she was living with. One of the bartenders, Adrianna Elizabeth Mercau, was arrested for allowing a minor to possess and consume alcohol at the licensed premises.

## 2. Analysis

The Petitioner proved by the clear preponderance of the evidence that Katia Saenz was in possession of and consuming a Bud Light beer in the licensed premises. She was very youthful in appearance and was clearly visible to the Respondent's bartenders, including Adrianna Elizabeth Mercau. Ms. Saenz was alone and not accompanied by a husband or parent. Accordingly, the ALJ concludes based on the preponderance of the evidence that Adrianna Elizabeth Mercau, in her capacity as Respondent's agent, servant or employee, with criminal negligence, permitted a minor to possess and consume an alcoholic beverage in violation § 106.13 of the Code.

### D. December 13, 2008 - Allegation that Respondent, or its Agent, Servant, or Employee, Sold, Served or Delivered an Alcoholic Beverage to an Intoxicated Person.

#### 1. Evidence

On December 13, 2008, TABC enforcement agents Gilbert Alba and David Salazar conducted an undercover operation at Exclusivo. Mr. Alba testified that he and Mr. Salazar entered the bar close to midnight and positioned themselves where they could observe all the activity. They observed a man walk within a couple of feet of them who was unsteady on his feet and very uncoordinated.<sup>17</sup> They continued to monitor him as he sat at a table.<sup>18</sup> As the man sat there he began to fall asleep and the man sitting with him kept trying to get his attention and to wake him up. The

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<sup>15</sup> Tr. 1631.

<sup>16</sup> Tr. 1629 and 1666.

<sup>17</sup> Tr. 1580.

<sup>18</sup> Tr. 1460.

man repeatedly started to nap then wake up. It appeared to Mr. Alba that the man had lost his gross motor skills.<sup>19</sup> A female waitress, later identified as Miroslava Gallegos, approached the table and touched the man on the shoulder and poked him or shook him, and asked him a couple of questions. The man then retrieved his wallet with some difficulty and gave the waitress some money. The waitress obtained three beers from the bartender then served a beer to each man at the table, including the man who appeared intoxicated, and she kept one beer for herself. As the man consumed the beer he became more alert and boisterous. As people moved around in the area where the man was sitting he engaged in a verbal altercation. After that was settled the open agents came in and took the man outside. The open agents, Bulos and Keel, had to escort Mr. Mendez out of the bar by supporting him on both sides.<sup>20</sup> The open agents identified the man as Elezar Mendez and confirmed that he was intoxicated.<sup>21</sup> His eyes were bloodshot; he had a strong odor of alcohol on his breath; slurred speech; and very unstable balance. The level of intoxication prevented safe administration of a standard field sobriety test. After confirming that Mr. Mendez was intoxicated, the waitress, Miroslava Gallegos, who sold and served the beer to Mr. Mendez, was charged with sale of an alcoholic beverage to an intoxicated person. Agent Bulos looked throughout the bar and found no policies posted concerning the prohibition of sales of alcohol to intoxicated persons.<sup>22</sup> Respondent presented no controverting evidence.

## 2. Analysis

The ALJ found the testimony of Mr. Alba and Mr Bulos to be very credible and convincing. Thus, the ALJ finds that the preponderance of the evidence proved that: (1) the man was at Exclusivo the night of December 13, 2008; (2) the man was intoxicated; (3) the man's state of intoxication was openly and unmistakably apparent to Ms. Gallegos, the waitress; (4) Ms. Gallegos subsequently served the man a beer, and (5) Ms. Gallegos was the Respondent's employee, servant,

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<sup>19</sup> Tr. 1599.

<sup>20</sup> Tr. 1604 and 1618.

<sup>21</sup> Tr. 1587-1588.

<sup>22</sup> Tr. 1618.

or agent. Thus, the ALJ concludes that the Petitioner proved by a preponderance of the evidence that on December 13, 2008, Respondent's employee, servant, or agent, sold, served, or delivered, an alcoholic beverage to an intoxicated person in violation of § 11.61(b)(14) of the Code.

**E. January 1, 2006 through December 15, 2008 – Allegations that the Place or Manner Respondent Conducted Business Offended the General Welfare, Health, Peace, Morals and Safety of the People and the Public Sense of Decency, and/or Constitutes a Common Nuisance.**

**1. Evidence**

The evidence was extensive concerning the allegations that Respondent, *et al*, conducted business in a place or manner that offended the general welfare, health, peace, morals and safety of the people and the public sense of decency, and/or constitutes a common nuisance.

Exclusivo is among a cluster of bars and other businesses located in close proximity to each other in a "U" shaped strip center located at 2900 Walnut Hill Lane in Dallas, Texas. The bars are not assigned designated parking for use by their patrons; rather, they share a large common parking area. The common parking area is exclusively controlled and maintained by the owner of the property rather than the individual bar owners, who lease their bar locations from the owner of the property.

The bar owners, including Respondent, did not dispute the criminal activity, but claimed they were not responsible for it since it occurred in the common parking area exclusively controlled and maintained by the property owner. Moreover, they adamantly argue that they can not be held legally responsible for criminal activity in the common parking area outside their bars because that is not part of their "licensed premises."

## 2. Analysis

In view of the ALJ's findings and conclusions regarding the specific allegations against El Jardin as discussed above, and the sanctions recommended below, the ALJ concludes that it is unnecessary to address these place or manner and common nuisance allegations.

## IV. RECOMMENDED SANCTIONS

The Commission has adopted a Standard Penalty Chart which sets forth suggested sanctions for the Commission's agents, compliance officers, or other designated personnel to use when settling cases prior to a hearing.<sup>23</sup> The suggested sanctions bind neither an ALJ nor the Commission and deviations from the chart are permitted if there are aggravating or mitigating circumstances.

Although the Standard Penalty Chart is not binding, it does provide some guidance in considering a penalty. And based on the Schedule of Sanctions and Penalties for Health, Safety and Welfare Violations, the ALJ agrees with Staff's recommendation for permit cancellation. The ALJ finds that the number of violations and repeat violations committed by Respondent over a relatively short period of time is indeed cause for concern.<sup>24</sup> Additionally, the evidence presented does not inspire any confidence that Respondent is capable or of a mind to adequately oversee the operation of the licensed premises as required by law and in a manner that would prevent violations that threaten public health, safety, and welfare from occurring in the future. Accordingly, based on the totality of the circumstances and for the reasons stated, the ALJ recommends cancellation of Respondent's permits.

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<sup>23</sup> 16 TEX. ADMIN. CODE (TAC) § 37.60(a).

<sup>24</sup> TABC Ex. 2-E. This exhibit was admitted without object on April 27, 2009, the first day of the joint hearing. See Tr. 13.

## V. FINDINGS OF FACT

1. Pedro Yanez d/b/a Exclusivo (Respondent) is the holder of Mixed Beverage and Mixed Beverage Late Hours permits issued by the Texas Alcoholic Beverage Commission (TABC) for the premises located at 2900 Walnut Hill Lane, Suite 200, Dallas, Dallas County, Texas (licensed premises).
2. Pedro Yanez is the sole owner of Respondent.
3. On February 5, 2009, TABC Staff (Staff) sent a Notice of Hearing to Respondent.
4. The Notice of Hearing contained a statement of the time, date, location, and the nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; 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 the TABC.
5. On April 17, 28, and 29, August 17, 18, and 19, and October 29, 2009, public hearings were held at the J. Eric Jonson Central Library and the State Office of Administrative Hearings in Dallas, Dallas County, Texas, before Administrative Law Judge Richard R. Wilfong (ALJ). Staff appeared through attorneys Emily Helm and Judith Kennison. Respondent appeared through attorney Paul Rich. The presentation of evidence concluded on October 29, 2009, but the administrative record remained open until February 15, 2010, to allow the parties to submit closing arguments and reply briefs as ordered by the ALJ.
6. On August 8, 2008, Sergeant Santiesteban and two backup officers with the Dallas Police Department responded to a citizen's call that narcotics were being sold at Exclusivo. They arrived at the licensed premises at approximately 4:50 a.m.
7. When the Dallas police officers arrived the door of the licensed premises was still open, music was playing, the bartender was behind the bar, alcoholic beverage containers were on display, 10-15 patrons were present with alcoholic beverages in their possession, and a Budweiser beer keg was operational. No non-alcoholic beer was present.
8. One of the patrons identified the bartender, Mr. Reyes, as the one who sold him the Bud Light that he had in front of him. The security guard also identified Mr. Reyes as the bartender. Mr. Reyes had approximately \$2,000 and keys to the licensed premises in his possession.
9. The allegation that on August 29, 2008, Respondent or Respondent's agent, servant or employee solicited a person to buy drinks for consumption by Respondent or Respondent's employee(s), was dismissed by TABC.

10. On November 8, 2008, Katia Saenz was in possession of and consuming an alcoholic beverage in the licensed premises. She was in close proximity to and in plain sight of the bartender, Adrianna Elizabeth Mercau.
11. On November 8, 2008, Katia Saenz was 20 years old.
12. On November 8, 2008, Adrianna Elizabeth Mercau, was employed by Respondent as a bartender.
13. On December 13, 2008, Elezar Mendez was in the licensed premises and was obviously intoxicated.
14. On December 13, 2008, Miroslava Gallegos was employed by the Respondent as a waitress and served an alcoholic beverage to Elezar Mendez, who was intoxicated.
15. On December 13, 2008, Miroslava Gallegos was the Respondent's employee, agent or servant.
16. Respondent has not taken any significant steps to prevent violations from occurring in the future.

## VI. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. Subchapter B of Chapter 5, and §§ 6.01 and 11.61.
2. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.
3. Proper and timely notice of the hearing was provided as required under the Administrative Procedure Act, TEX. GOV'T CODE ANN. §§ 2001.051 and 2001.052; TEX. ALCO. BEV. CODE ANN. § 11.63; and 1 TEX. ADMIN. CODE (TAC) § 155.401.
4. Respondent indirectly encouraged its employees to violate the law. 16 TAC § 50.10(d).
5. Based on the above Findings of Fact, on August 8, 2008, Respondent or Respondent's employee, agent or servant, sold and served alcoholic beverages during prohibited hours in violation of TEX. ALCO. BEV. CODE ANN. §§ 11.61(b)(2) and 105.03.

6. Based on the above Findings of fact, on November 8, 2008, Respondent or Respondent's employee, agent or servant, with criminal negligence, permitted a minor to possess or consume an alcoholic beverage in violation of TEX. ALCO. BEV. CODE ANN. § 106.13
7. Based on the above Findings of Fact, on December 13, 2008, Respondent or Respondent's employee, agent, or servant, sold, served, or delivered an alcoholic beverage to an intoxicated person in violation of TEX. ALCO. BEV. CODE ANN. § 11.61(b)(14).
8. Based on the above Findings of Fact and Conclusions of Law the Respondent's permits should be cancelled pursuant to TEX. ALCO. BEV. CODE ANN. § 11.61.

**SIGNED March 4, 2010.**

  
RICHARD R. WILFONG  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS