

**DOCKET NO. 593998**

<b>TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner</b>	§	<b>BEFORE THE TEXAS</b>
	§	
<b>VS.</b>	§	
	§	
<b>SOHO COCKTAIL LOUNGE INC. D/B/A SOHO COCKTAIL LOUNGE, Respondent</b>	§	<b>ALCOHOLIC</b>
	§	
<b>PERMIT NOS. MB678432, LB &amp; PE</b>	§	
	§	
<b>EL PASO COUNTY, TEXAS (SOAH DOCKET NO. 458-11-1408)</b>	§	<b>BEVERAGE COMMISSION</b>

**ORDER**

**CAME ON FOR CONSIDERATION** this 1st day of July 2011, the above-styled and numbered cause.

After proper notice was given, this case was heard by the State Office of Administrative Hearings (SOAH), with Administrative Law Judge Veronica S. Najera presiding. The hearing convened on December 14, 2010 and the SOAH record closed the same date. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on February 3, 2011. 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, adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge that 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 motions, requests for entry of Proposed Findings of Facts and Conclusions of Law, and any other requests for general or specific relief submitted by any party are denied, unless specifically adopted herein.

**IT IS THEREFORE ORDERED** that Respondent pay a civil penalty in the amount of **\$8,400.00** on or before **July 26th**, 2011. If the civil penalty is not paid when due, the privileges granted by the Commission and activities authorized under the above permits by the Code will

be **SUSPENDED** beginning at 12:01 A.M. on **August 3rd**, 2011, and shall remain suspended for **28** consecutive days.

If this Order is appealed and judgment is issued affirming the Order, Respondent shall pay the civil penalty in the amount of **\$8,400.00** on or before the **TENTH (10<sup>th</sup>)** day following the date the judgment is signed. If not paid by that date, the privileges granted by the Commission and activities authorized under the above permits by the Code will be **SUSPENDED** beginning at 12:01 A.M. on the **EIGHTEENTH (18<sup>th</sup>)** day following the date the judgment is signed and shall remain suspended for **28** consecutive days

This Order will become final and enforceable on the 25th day of July, 2011, unless a Motion for Rehearing is filed **before** that date.

**SIGNED** this the 1st day of July, 2011, at Austin, Texas.

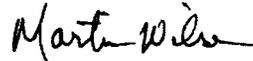


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Sherry K-Cook, Assistant Administrator  
Texas Alcoholic Beverage Commission

#### **CERTIFICATE OF SERVICE**

I certify that the persons listed below were served with a copy of this Order in the manner indicated below on this the 1st day of July, 2011.



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Martin Wilson, Assistant General Counsel  
Texas Alcoholic Beverage Commission

Veronica S. Najera  
**ADMINISTRATIVE LAW JUDGE**  
State Office of Administrative Hearings  
401 East Franklin Avenue, Suite 580  
El Paso, Texas 79901

***VIA FACSIMILE: 512.322.0472***

Soho Cocktail Lounge Inc.  
d/b/a Soho Cocktail Lounge  
**RESPONDENT**  
500 North Oregon Street Suite A  
El Paso, TX 79901  
***VIA REGULAR MAIL***

Gil Gonzalez  
**ATTORNEY FOR RESPONDENT**  
6936 Lorn Green #103  
Henderson, Nevada 89011  
***VIA REGULAR MAIL***  
***AND VIA FACSIMILE: (702) 450-6799***

Ramona M. Perry  
**ATTORNEY FOR PETITIONER**  
TABC Legal Division

TEXAS ALCOHOLIC BEVERAGE COMMISSION  
CIVIL PENALTY REMITTANCE

DOCKET NUMBER: 593998 REGISTER NUMBER:

NAME: SOHO COCKTAIL LONGE INC.

TRADENAME: SOHO COCKTAIL LOUNGE

ADDRESS: 500 NORTH OREGON STREET SUITE A, EL PASO, TEXAS 79901

DUE DATE: 7/26/2011

PERMITS OR LICENSES: MB678432, LB & PE

AMOUNT OF PENALTY: \$8,400

Amount remitted \$ \_\_\_\_\_ Date remitted \_\_\_\_\_  
You may pay a civil penalty rather than have your permits and licenses suspended if an amount for civil penalty is included on the attached order.

**YOU HAVE THE OPTION TO PAY THE CIVIL PENALTY ONLY IF YOU PAY THE ENTIRE AMOUNT ON OR BEFORE THE DUE DATE. AFTER THAT DATE YOUR LICENSE OR PERMIT WILL BE SUSPENDED FOR THE TIME PERIOD STATED ON THE ORDER.**

Mail this form with your payment to:

TEXAS ALCOHOLIC BEVERAGE COMMISSION  
P.O. Box 13127  
Austin, Texas 78711  
Overnight Delivery Address: 5806 Mesa Dr., Austin, Texas 78731

**You must pay by postal money order, certified check, or cashier's check. No personal or company check nor partial payment accepted.** Your payment will be returned if anything is incorrect. You **must** pay the entire amount of the penalty assessed.

**Attach this form and please make certain to include the Docket # on your payment.**

\_\_\_\_\_  
Signature of Responsible Party

\_\_\_\_\_  
Street Address

\_\_\_\_\_  
P.O. Box No.

City      State      Zip Code

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Area Code/Telephone No.

# State Office of Administrative Hearings



Cathleen Parsley  
Chief Administrative Law Judge

February 3, 2011

Alan Steen  
Administrator  
Texas Alcoholic Beverage Commission  
5806 Mesa Drive  
Austin, Texas 78731

**VIA REGULAR MAIL**

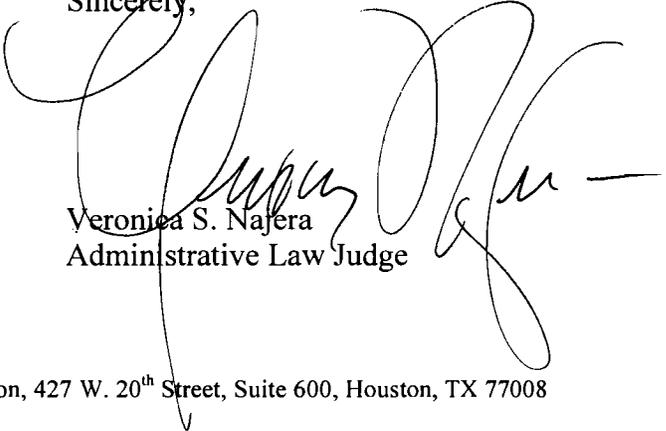
**RE: Docket No. 458-11-1408  
Soho Cocktail Lounge Inc., d/b/a Soho Cocktail Lounge**

Dear Mr. Steen:

Please find enclosed a Proposal for Decision in this case. It contains my recommendation and underlying rationale.

Exceptions and replies may be filed by any party in accordance with 1 TEX. ADMIN. CODE § 155.507(c), a SOAH rule which may be found at [www.soah.state.tx.us](http://www.soah.state.tx.us).

Sincerely,

  
Veronica S. Najera  
Administrative Law Judge

Enclosure

xc Ramona Perry, Texas Alcoholic Beverage Commission, 427 W. 20<sup>th</sup> Street, Suite 600, Houston, TX 77008  
- **VIA REGULAR MAIL**  
Emily Helm, General Counsel, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX  
78731- **VIA REGULAR MAIL**  
Gil Gonzalez, attorney for Respondent, 6396 Lorn Green #103, Henderson, Nevada 89011 -**VIA  
REGULAR MAIL**

El Paso State Office Building  
401 East Franklin Avenue Suite 580 El Paso, Texas 79901  
915.834.5650 (Telephone) 915.834.5657 (Fax)  
[www.soah.state.tx.us](http://www.soah.state.tx.us)

**RECEIVED**

**FEB 07 2011**

**TASO HOUSTON  
LEGAL**

**SOAH DOCKET NO. 458-11-1408**

**TEXAS ALCOHOLIC BEVERAGE  
COMMISSION,**

**Petitioner**

**V.**

**SOHO COCKTAIL LOUNGE, INC.  
d/b/a SOHO COCKTAIL LOUNGE,**

**Respondent**

**EL PASO COUNTY, TEXAS  
(TABC CASE NO. 593998)**

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**BEFORE THE STATE OFFICE**

**OF**

**ADMINISTRATIVE HEARINGS**

**PROPOSAL FOR DECISION**

The Staff of the Texas Alcoholic Beverage Commission (Petitioner or Staff) alleges that Soho Cocktail Lounge, Inc. d/b/a Soho Cocktail Lounge (Respondent) with criminal negligence sold, served, dispensed, or delivered an alcoholic beverage to minors, in violation of the TEX. ALCO. BEV. CODE ANN. (Code) § 106.13.

After a review of the evidence of record, the Administrative Law Judge (ALJ) finds sufficient evidence to establish all of the elements of the alleged violation. Therefore, the ALJ recommends a 14-day suspension for each sale and delivery of an alcoholic drink to a minor patron, for a total of 28 days suspension. In lieu of the suspension, ALJ recommends a civil penalty of \$8,400.00.

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

There are no contested issues of notice and jurisdiction. The hearing convened on December 14, 2010. The hearing was held before ALJ Veronica S. Najera, at the State Office of Administrative Hearings, El Paso Regional Office. Staff was represented by attorney Ramona M. Perry. Respondent was represented by Gil Gonzalez, attorney. The record closed the same day at the adjournment of the hearing.

## II. DISCUSSION AND ANALYSIS

The Respondent is a domestic business corporation which operates under one permit within the City and County of El Paso, Texas. The owners of the corporation are Joe Rodriguez, Anthony DiNapoli and Tudor Thomas. The TABC issued Respondent a mixed beverage permit, which includes a beverage cartage permit and a mixed beverage late hours permit, in December 2007.<sup>1</sup>

### A. Sale to minor violation

Staff alleges that on May 12, 2010, Respondent's bartender Jacob Rodriguez sold and served alcoholic beverages to two female patrons who were 19 years old without requiring identification. The facts in evidence, which are not contested, do in fact establish the patrons were younger than 21 years of age on the date at issue and that the bartender did not verify their ages. The bartender, Jacob Rodriguez, testified he relied on Joe Rodriguez to "card" the patrons.

In addition, the patrons were asked to provide identification upon entering the bar by owner Joe Rodriguez. The patrons falsely represented themselves to be 21 years old or older. One female patron presented a New Mexico driver's license with a birth date of August 6, 1986. The other minor presented a California identification card with a birth date of August 22, 1986, which states "age 21 in 2007." Mr. Rodriguez allowed the minors to enter the bar to consume alcohol. Joe Rodriguez testified he has *considerable* experience in the bar industry.

May 12, 2010 was a slow night at the bar. TABC agent Robert E. Chavez testified he immediately detected the two minors at the bar because they "looked like teenagers." He observed the bartender walk towards them, serve them alcoholic beverages, and take their money for the drinks.

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<sup>1</sup> Petitioner's Exhibit No. 1, custodian of records affidavit for permit MB-678432.

**B. Legal burden**

Under Code § 106.13(a) it is insufficient to show merely that an employee served an alcoholic beverage to a minor. Rather, the section requires proof that the employee was criminally negligent in serving a minor. The Code incorporates the definition of “criminal negligence” contained in TEX. PENAL CODE (Penal Code) § 6.03(d) which reads as follows:

- (d) A person acts with criminal negligence, or is criminally negligent with respect to circumstances surrounding his conduct or the results of his conduct when he ought to be aware of a substantial and justifiable risk that the circumstances exist or the result will occur. The risk must be of such 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. *See also Edmonson v. State*, 955 S.W.2d 472 (Tex.App.-Austin 1997, no writ).

**C. Analysis**

Various factors in evidence lead the ALJ to conclude this may have been a case of intentional avoidance upon the initial identification at the door. The ALJ concludes that Mr. Rodriguez intentionally ignored the facts that the patrons appeared to be teenagers and presented false identification. This conclusion is supported by the following facts:

- The youthful appearance of the patrons was immediately apparent to the TABC agent, but not to Mr. Rodriguez. The photograph taken of the female patrons on May 12, 2010 by the TABC supports Staff’s contention that Mr. Rodriguez should have realized the patrons were minors.<sup>2</sup>

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<sup>2</sup> Petitioner’s Exhibit No. 6, photograph of Vivian and Adriana, both age 19. The photograph was taken by agent Chavez on May 12, 2010.

- The person depicted on the New Mexico driver's license<sup>3</sup> was 23 years and nine months of age on the date of occurrence. The female patron who presented the identification resembled a teen-ager. She was 19 years of age.

New Mexico Driver License		Identity of female minor <sup>4</sup>	
	Marlene Franco		Vivian R. Monzano
d/b	08-06-1986		10-13-1990
Weight	<b>170 lbs</b>		<b>135 lbs</b>
Height	5'5"		5'6"
Hair/eyes	brown		brown

- The person depicted in the California identification card<sup>5</sup> was also 23 years and nine months of age. The female patron who presented the identification also looked like a teen-ager and her appearance was not consistent with the photograph. Agent Chavez testified that when he first saw the California identification, he said to himself "that's not her."

California identification card		Identity of female minor	
	Teresa Monge		Adriana Guadian
d/b	08-22-1986		07-15-1990
Weight	120 lbs		110 lbs
Height	<b>5'6"</b>		<b>5'1"</b>
Hair/eyes	brown		Brown

- Mr. Rodriguez testified he thoroughly checked to see if the identifications presented were fake. He determined they were not. His conclusion does not overcome the determination of criminal negligence because the photographs did not resemble the persons who presented them, and there were physical description discrepancies.
- Upon being asked by agent Chavez, the female patron was unable to state the date of birth on the California identification card, and an ordinary person would have inquired about further when presented with the card.

The ALJ does not find Mr. Rodriguez's testimony credible regarding the resemblance of the photographs to the persons. Therefore, Mr. Rodriguez's failure to perceive the obvious youthful

<sup>3</sup> Petitioner's Exhibit no. 5, New Mexico driver's license.

<sup>4</sup> Petitioner's Exhibit No.8, incident report identifying both minors.

<sup>5</sup> Petitioner's Exhibit No. 5.

appearance of the female patrons or his intentional avoidance of such a fact, is a gross deviation from the standard of care that an ordinary person would exercise under the same circumstances.

Furthermore, it was established via testimony that the bartender does not to make any independent judgments regarding age upon serving alcohol. The bartender relies on the door person to identify drinking-age appropriate patrons. The bartender does not verify or question the decision made at the door. This is an issue. The server ultimately has the responsibility to confirm identification. It is the bartender who will be legally responsible, not the door person. The evidence shows the bartender was issued a criminal notice to appear in district court for the offense of sale to a minor. Jacob Rodriguez's failure to perceive the obvious youthful appearance of the female patrons and/or his intentional avoidance of such a fact, constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances identified hereto. Therefore, the ALJ agrees with staff that the bartender's failure to check the patrons' identification constituted criminal negligence.

The Code provides a defense under § 106.03 if the minor falsely represents herself to be 21 years or older by displaying an apparently valid proof of identification that contains a physical description and photograph consistent with the minor's appearance. The undersigned ALJ is cognizant of the subjectivity regarding whether a photograph is consistent. But, in this case, it is obvious that the photographs did not resemble the two female patrons. Upon being asked at hearing regarding the variation in skin color between the photograph on the California identification and Ms. Guadian, Mr. Rodriguez attributed it to the "California sun." Such a statement is not credible. Therefore, the ALJ concludes the physical descriptions and photographs are not consistent with the female patrons.

Based on the evidence of record, the ALJ sustains the sale to minor allegation under Code. § 106.13. The ALJ recommends a 14-day suspension for each sale and delivery of an alcoholic drink to a minor patron, for a total of 28-days suspension. In lieu of the suspension, ALJ recommends a civil penalty of \$8,400.00. The recommended penalty is derived from the fact the violation involves minors; there are no mitigating facts in evidence for the Respondent, it

is within the recommended range for first violations; and a Code § 106.13 violation is characterized as health, safety and welfare violation.

### III. FINDINGS OF FACT

1. Notice of hearing was issued on November 24, 2010.
2. A hearing convened on December 14, 2010, in the matter of the Texas Alcoholic Beverage Commission (Petitioner) versus Soho Cocktail Lounge, Inc. d/b/a Soho Cocktail Lounge (Respondent).
3. The hearing was held before Administrative Law Judge (ALJ) Veronica S. Najera at the State Office of Administrative Hearings, El Paso Regional Office, State Office Building, 401 East Franklin Avenue, Suite 580, El Paso, Texas.
4. Staff was represented by Ramona Perry, staff attorney. Respondent was represented by Gil Gonzalez, attorney.
5. The record closed on December 14, 2010.
6. The Respondent is a domestic business corporation which operates under one permit within the City and County of El Paso, Texas. The owners of the corporation are Joe Rodriguez, Anthony DiNapoli and Tudor Thomas.
7. The TABC issued Respondent a mixed beverage permit, which includes a beverage cartage permit and a mixed beverage late hours permit, in December 2007.
8. On May 12, 2010, Respondent's bartender Jacob Rodriguez sold and served alcoholic beverages to Vivian R. Monzano and Adriana Guadian, both 19 years old, without requiring identification.
9. Vivian R. Monzano date of birth is 10-13-1990.
10. Adriana Guadian date of birth is 07-15-1990.
11. The two female patrons were asked to provide identification upon entering the bar by owner Joe Rodriguez.
12. The patrons falsely represented themselves to be 21 years old or older. Vivian R. Monzano presented a New Mexico driver's license with a birth date of August 6, 1986. Adriana Guadian presented a California identification card with a birth date of August 22, 1986 which states "age 21 in 2007."

13. Mr. Rodriguez allowed the minors to enter the bar to consume alcohol.
14. May 12, 2010 was a slow night at the bar.
15. The photograph and physical description were not consistent with Vivian R. Monzano:

New Mexico Driver License		Identity of female minor <sup>6</sup>
	Marlene Franco	Vivian R. Monzano
d/b	08-06-1986	10-13-1990
Weight	<b>170 lbs</b>	<b>135 lbs</b>
Height	5'5"	5'6"
Hair/eyes	brown	brown

16. The photograph and physical description were not consistent with Adriana Guadian:

California identification card		Identity of female minor
	Teresa Monge	Adriana Guadian
d/b	08-22-1986	07-15-1990
Weight	120 lbs	110 lbs
Height	<b>5'6"</b>	<b>5'1"</b>
Hair/eyes	brown	Brown

17. From their photographs taken on May 12, 2010, Ms. Franco and Ms. Monzano both appear to be teenagers and an ordinary person would have realized that they may be minors.

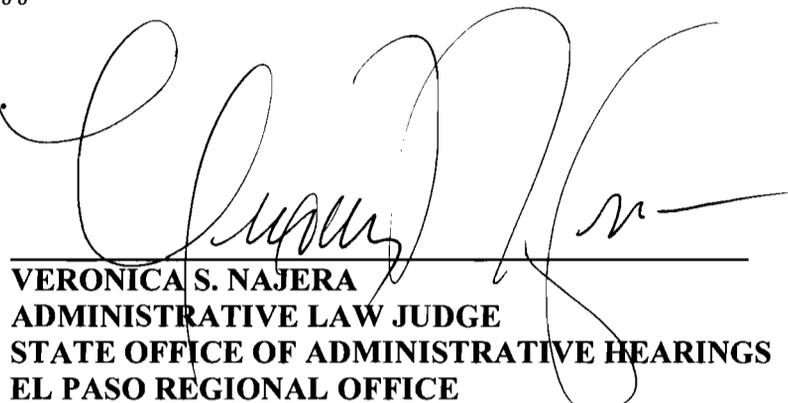
#### IV. CONCLUSIONS OF LAW

1. The TABC has jurisdiction over this proceeding pursuant to Code §§ 5.31 and 5.35.
2. The State Office of Administrative Hearings has jurisdiction over all matters relating to conducting a hearing in this proceeding, including the preparation of a proposal for decision with proposed findings of fact and conclusions of law, pursuant to Code § 5.43 and TEX. GOV'T CODE ANN. §§ 2003.021(b) and 2003.042.
3. Notice of hearing was provided pursuant to 1 TEX. ADMIN. CODE (TAC) § 155.401 and Code § 11.63.

<sup>6</sup> Petitioner's Exhibit No.8, incident report identifying both minors.

4. Based upon the Findings of Fact Nos. 8-17, the permittee or its agent, servant, or employee, with criminal negligence sold, served, dispensed, or delivered an alcoholic beverage to two minors, in violation of Code § 106.13.
5. A 14-day suspension for each sale and delivery of an alcoholic drink to a minor patron, for a total of 28-days suspension should be imposed against Respondent
6. In lieu of the suspension, Respondent should be allowed to pay a civil penalty of \$8,400.00, pursuant to Code §§ 11.64 and 11.641.

**SIGNED February 3, 2011.**



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**VERONICA S. NAJERA  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS  
EL PASO REGIONAL OFFICE**