

DOCKET NO. 591779

TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner	§	BEFORE THE TEXAS
	§	
	§	
VS.	§	
	§	
GERM INTERNATIONAL, LLC D/B/A CLUB VENOM, Respondent	§	ALCOHOLIC
	§	
PERMIT NOS. MB615855, LB	§	
	§	
BEXAR COUNTY, TEXAS (SOAH DOCKET NO. 458-10-4120)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 14th day of January, 2011, the above-styled and numbered cause.

After proper notice was given, this case was heard by the State Office of Administrative Hearings, with Administrative Law Judge Donald B. Dailey presiding. The hearing convened on August 25 and September 10, 2010. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on September 27, 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.

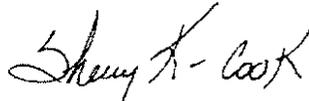
The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision, adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge that are contained in the Proposal for Decision, and incorporates those Findings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

IT IS THEREFORE ORDERED that Respondent pay a civil penalty in the amount of **\$5,400.00** on or before March 15th, 2011. If the civil penalty is not paid when due, the privileges granted by the Commission and activities authorized under the above permits will be **SUSPENDED** beginning at 12:01 A.M. on March 23rd, 2011, and shall remain suspended for **eighteen (18) consecutive days**.

This Order will become final and enforceable on the 9th day of February, 2011, unless a Motion for Rehearing is filed **before** that date.

If this Order is appealed and judgment is rendered by the District Court affirming the Order, Respondent shall pay the civil penalty in the amount of **\$5,400.00** on or before the **tenth (10th) day** following the date the judgment is rendered by the District Court. 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 (18th) day** following the date the judgment is rendered by the District Court, and shall remain suspended for **eighteen (18) consecutive days**.

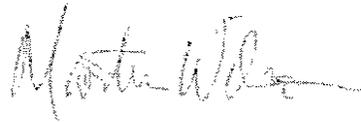
SIGNED this the 14th day of January, 2011, at Austin, Texas.



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 14th day of January, 2011.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

Donald B. Dailey
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
10300 Heritage, Suite 250
San Antonio, Texas 78216
VIA FACSIMILE: (512) 322-0476

Germ International, LLC
d/b/a Club Venom
RESPONDENT
2407 N Saint Mary's Street
San Antonio, Texas 78212
VIA REGULAR MAIL

Sam Mizyed
MANAGING MEMBER FOR RESPONDENT
25506 Velvet Rose
San Antonio, Texas 78260
VIA REGULAR MAIL

Matthew M. Clark
ATTORNEY FOR PETITIONER
TABC Legal Section

TABC Licensing Division

Lt. Craig Smith
TABC San Antonio District Office

TEXAS ALCOHOLIC BEVERAGE COMMISSION
CIVIL PENALTY REMITTANCE

DOCKET NUMBER: 591779 REGISTER NUMBER:

NAME: Germ International, LLC

TRADENAME: Club Venom

ADDRESS: 2407 N Saint Marys Street San Antonio, TX 78212-3737

DUE DATE: March 15, 2011

PERMITS OR LICENSES: MB615855, LB

AMOUNT OF PENALTY: \$5,400.00

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

Area Code/Telephone No.

SOAH DOCKET NUMBER 458-10-4120

TEXAS ALCOHOLIC BEVERAGE	*	BEFORE THE STATE OFFICE
COMMISSION,	*	
Petitioner	*	
	*	
VERSUS	*	
	*	
GERM INTERNATIONAL, LLC,	*	OF
D/B/A CLUB VENOM,	*	
PERMIT NUMBERS MB615855, LB,	*	
Respondent	*	
	*	
BEXAR COUNTY, TEXAS	*	
TABC CASE NUMBER 591779	*	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (the Commission) alleges that Germ International, LLC, doing business as Club Venom (Germ International), on or about January 29, 2010, when its permit was suspended, purchased alcoholic beverages and permitted the consumption of alcoholic beverages on its licensed premises. The Commission proposes to suspend the permits of Germ International for 18 days. The Administrative Law Judge (ALJ) concludes that the Commission has proven its allegations by a preponderance of the credible evidence. The ALJ recommends that Germ International's permits be suspended for 18 days.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

This case presents no contested issues of jurisdiction or notice. This matter was heard on August 25 and September 10, 2010, at the State Office of Administrative Hearings (SOAH) in San Antonio before ALJ Donald B. Dailey. The Commission appeared through its staff attorney, Matthew M. Clark. Germ International appeared through its managing member, Sam Mizyed.

II. APPLICABLE LAW

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: ... (22) purchased, sold, offered for sale, distributed, or delivered an alcoholic beverage, or consumed an alcoholic beverage or permitted one to be consumed on the licensed premises while his license was under suspension[.] TEX. ALCO. BEV. CODE ANN. § 11.71(a)(22).

A party in a contested case shall be notified either personally or by first class mail of any decision or order. TEX. GOV'T. CODE ANN. § 2001.142(a) and 16 TEX. ADMIN. CODE § 37.2.

III. EVIDENCE PRESENTED

Tina Saldavar, an enforcement agent for the Commission, and Mr. Clark testified for the Commission. Mr. Clark offered four exhibits that were admitted. Mr. Mizyed testified for Germ International. Mr. Mizyed offered two exhibits, one of which was admitted.

Commission Exhibit One includes a copy of Germ International's Mixed Beverage Permit and Mixed Beverage Late Hours Permit for premises in San Antonio, Texas, for the period from December 13, 2009, to December 12, 2011. The document shows a mailing address of 2407 North Saint Mary's Street, San Antonio, Texas 78212-3737. Commission Exhibit One, also, includes a copy of an Order Modifying Proposal for Decision signed by the Commission's Administrator and dated December 18, 2009. The order provides that Germ International's permit was suspended for 10 days beginning at midnight on January 20, 2010. Commission Exhibit Four is a copy of a transmittal letter for the Order Modifying Proposal for Decision also dated December 18, 2010. The letter is addressed to Mr. Mizyed at the address for Germ International on Germ International's permit, except for the four digit zip code extension. Commission Exhibit Two is a copy of an invoice showing that Germ International purchased beer on January 21, 2010.

Agent Saldavar testified that she went to Club Venom on January 29, 2010, at about 10:30 p.m., with another agent. She observed the bartender serve a beer to a customer in the presence of Mr. Mizyed. She was told by Mr. Mizyed that the suspension had expired the previous night.

Germ International Exhibit One is a copy of an Order signed by the Commission's Administrator dated November 16, 2009. The order provides that Germ International's permit was suspended for three days beginning at midnight on October 7, 2009. Mr. Mizyed testified as follows. He received the written order for a three-day suspension, but not until after the date the suspension expired. Mr. Clark told him that he would receive new paperwork. Mr. Mizyed said that a long time passed without his receiving any new paperwork. So he went to the Commission's San Antonio office in December. He met with an agent, whose full name he could not recall. Mr. Mizyed told the agent that he was going to California on vacation for two weeks. He "made an arrangement" that Club Venom would be closed to serve its suspension starting on Christmas Eve and ending two weeks later. The amount of time Club Venom would be closed was longer than the period of time Germ International's permits were to be suspended and was during a normally busy period of time. After returning from California and after Club Venom had been closed for two weeks, he restocked and opened Club Venom on Friday, January 29, 2010.

Mr. Mizyed further testified that he did not receive the Order Modifying Proposal for Decision before the agents' visit to Club Venom. Usually, the Commission communicated with him by e-mail. When the agents came into Club Venom, he identified himself. He told them that Club Venom had already served its suspension. He did not recall saying that the suspension expired the previous evening. Mr. Mizyed did not dispute that a customer was served a beer at Club Venom on January 29, 2010, or that Club Venom purchased beer on January 21, 2010.

Agent Saldavar testified that, after the hearing on August 25, 2010, she checked the visitor logs for the Commission's San Antonio office. She found no record of Mr. Mizyed having made a visit in November or December 2009. Mr. Clark testified that he composed Commission's Exhibit Four and directed that it be mailed.

IV. ANALYSIS

The evidence is undisputed that Germ International purchased beer on January 21, 2010, and permitted the consumption of alcoholic beverages at Club Venom at about 10:30 p.m. on January 29, 2010, even though Germ International's license was suspended from 12 a.m. on January 20, 2010 through 11:59 p.m. on January 29, 2010.

Mr. Mizyed's testimony indicates that he made an "arrangement" with a San Antonio agent of the Commission for Germ International to serve its suspension for two weeks beginning on December 24, 2009. However, the ALJ does not find Mr. Mizyed's testimony in that regard credible. In the second place, even if Mr. Mizyed had made such an "arrangement," it would not be of any legal effect. The Alcoholic Beverage Code, the Administrative Procedures Act, the Commission's rules, and SOAH's rules simply do not make any provision for an informal agreement between a permittee and an agent of the Commission to preempt an order of the Commission's Administrator issued in the course of a contested case proceeding.

Mr. Mizyed testified that he did not receive a copy of the Commission's Order Modifying Proposal for Decision before the agents came to Club Venom on January 29, 2010. In that connection, the Government Code and the Commission's rules provide that copies of orders be sent to the permittee by first class mail to the last known mailing address of the permittee. In this case, the Commission produced evidence in the form of a transmittal letter that was dated December 18, 2009, and addressed to Germ International at its address on its permit. Mr. Mizyed did not present any evidence that mail addressed to Germ International at its address on the permit was not being delivered. The preponderance of the evidence in this case establishes that Germ International was given proper and timely notice of the suspension.

In conclusion, the preponderance of the evidence establishes that Germ International violated the Texas Alcoholic Beverage Code by purchasing and permitting the consumption of beer at Club Venom when its permit was suspended, after proper and timely notice of such suspension. Further, pursuant to the schedule of Sanctions and Penalties, the requested sanction of an 18-day suspension is within the range of eight to thirteen days plus the original 10 day

suspension.

V. FINDINGS OF FACT

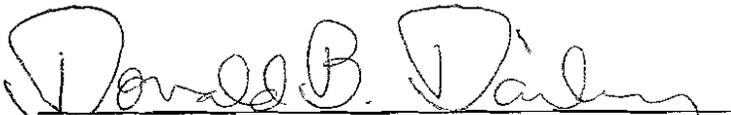
1. Germ International, LLC (Germ International) is the holder of a Mixed Beverage Permit and a Mixed Beverage Late Hours Permit issued by the Texas Alcoholic Beverage Commission (the Commission) for the premises known as Club Venom located in San Antonio, Texas, for the period from December 13, 2009, to December 12, 2011.
2. Pursuant to an Order Modifying Proposal for Decision dated December 18, 2009, Germ International's permit was suspended for ten days beginning on January 20, 2010, at 12 a.m.
3. On January 21, 2010, Germ International purchased beer.
4. On January 29, 2010, at about 10:30 p.m., Germ International permitted the consumption of alcoholic beverage at Club Venom.
5. On May 17, 2010, the Commission sent Germ International a Notice of Hearing.
6. The Notice of Hearing contained a statement of the time, date, location, and 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 relief sought by the Commission.
7. On August 25 and September 10, 2010, hearings were held at the State Office of Administrative Hearings (SOAH) in San Antonio before ALJ Donald B. Dailey. The Commission appeared through its staff attorney, Matthew M. Clark. Germ International appeared through its managing member, Sam Mizyed.

VI. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter. TEX. ALCO. BEV. CODE ANN. § 5.31.
2. SOAH has jurisdiction over all matters related to conducting a hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law. TEX. ALCO. BEV. CODE ANN. § 5.43 and TEX. GOV'T. CODE ANN. ch. 2001.
3. Proper and timely notice of the hearing was provided to Germ International. TEX. GOV'T. CODE ANN. §§ 2001.051 and 2001.052.
4. Germ International purchased alcoholic beverages while its permit was suspended in violation of TEX. ALCO. BEV. CODE ANN. § 11.71(a)(22).

5. Germ International permitted the consumption of an alcoholic beverage on its licensed premises while its permit was suspended in violation of TEX. ALCO. BEV. CODE ANN. § 11.71(a)(22).
6. Pursuant to the Schedule of Sanctions and Penalties, an 18-day suspension of Germ International's permit is recommended. In the alternative, Germ International should be given the opportunity to pay a penalty of \$300 per day in lieu of suspension. 16 TEX. ADMIN. CODE § 34.3.

SIGNED September 27, 2010.



DONALD B. DAILEY
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARING