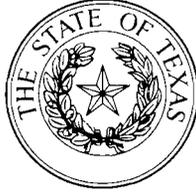


# State Office of Administrative Hearings



**RECEIVED**

**APR 11 2011**

**TABC HOUSTON  
LEGAL**

April 7, 2011

Cathleen Parsley  
Chief Administrative Law Judge

**VIA REGULAR MAIL**

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

**RE: Docket No. 458-11-1623  
Serad Corporation d/b/a Galaxy Night Club**

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,

A handwritten signature in black ink, appearing to read "Veronica S. Najera", written over a horizontal line.

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

Enclosure

xc Sandra Patton, 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**  
Enrique Ramirez, attorney for Respondent, 1006 Magoffin Ave., El Paso, TX 79901 - **VIA REGULAR MAIL**

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**SOAH DOCKET NO. 458-11-1623**

<b>TEXAS ALCOHOLIC BEVERAGE COMMISSION,</b>	§	<b>BEFORE THE STATE OFFICE</b>
<b>Petitioner</b>	§	
<b>V.</b>	§	<b>OF</b>
<b>SERAD CORPORATION d/b/a GALAXY NIGHT CLUB</b>	§	<b>ADMINISTRATIVE HEARINGS</b>
<b>Respondent</b>	§	
<b>EL PASO COUNTY, TEXAS (TABC CASE NO. 592133)</b>	§	

**PROPOSAL FOR DECISION**

The Staff of the Texas Alcoholic Beverage Commission (Petitioner) seeks the cancellation of the alcoholic beverage permit issued to Serad Corporation d/b/a Galaxy Night Club (Respondent) based on the allegation that Respondent, its agent, servant, or employee knowingly possessed, or permitted the possession, of alcoholic beverages not covered by invoice.

After a review of the evidence of record and applicable law, the Administrative Law Judge (ALJ) recommends cancellation.

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

There are no contested issues of notice and jurisdiction. The hearing was convened by ALJ Veronica S. Najera, at the State Office of Administrative Hearings, El Paso Regional Office. Staff was represented by Sandra K. Patton, staff attorney. Respondent appeared through its president, Adriana Fuentes, and was represented by Enrique Ramirez, attorney. The record closed on March 8, 2011 at the adjournment of the hearing.

## II. BACKGROUND AND EVIDENCE

The establishment is located in the city of El Paso, County of El Paso, Texas. The TABC issued Respondent a mixed beverage permit, which includes a beverage cartage permit and a mixed beverage late hours permit, in July 2008.<sup>1</sup> Agent Oscar Menchaca testified that 33 cocaine bindles were seized on March 3, 2009 on the premises. As a consequence, Respondent paid a civil penalty in the amount of \$10,500.00 for a place or manner violation. Thereafter, on January 29, 2010, TABC agents conducted a routine follow-up inspection. The distilled spirits bottles seized during this inspection are the subject matter of the current case.

### A. Petitioner's direct case

#### 1. Bottles in the bar

In the January 29, 2010, follow-up inspection, TABC agents Menchaca and Wesley Rappe entered the bar and observed three boxes containing assorted distilled spirits bottles on the bar's counter.<sup>2</sup> The boxes were opened and the bottles did not correspond to the labels on the boxes. There were 32 bottles in the boxes. The agents spoke with an employee named Paola Violeta Loya. She testified at hearing. She identified herself as the bar's accountant and said to be conducting inventory behind the bar when the agents arrived. Upon being asked by the agents as to the origin of the bottles in the boxes, she gave various convoluted answers.<sup>3</sup> Both agents testified the bottles were all new, factory sealed, and affixed with old and new local distributor's stamps. The agents testified the stamps appeared to have been "reaffixed" to the bottles. Further, the stamp number series ranged from 27 million through 55 million. Agent Rappe testified the range in numbering represents an inconsistent number sequence for a distilled spirits order.

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<sup>1</sup> Petitioner's Exhibit No. 1, custodian of records affidavit for permit MB-697259.

<sup>2</sup> Petitioner's Exhibit No. 5, photograph.

Agent Rappe testified he obtained the lot source codes from the manufacturers to decipher the individual lot code on each bottle. He determined the manufacture dates on seven bottles postdated the dates that the bottles were reportedly purchased by Galaxy Night Club from Juanito's Liquor Store:<sup>4</sup>

	Type of bottle	Manufacture date	purchase date on invoice	Discrepancy	Local distributor stamp (LDS)	Lot number
1.	One liter Sauza Hornitos tequila, new/unopened	05-24-09	03-13-09	Bought 73 days before it existed	CC43161990	L9144213ST 30953
2.	One liter Skol vodka, new/unopened	07-27-09	04-03-09	Bought 96 days before it existed	CC43172765	009210 10 07A
3.	One liter Jack Daniels old #7 whiskey, new/unopened	12-11-09	07-08-09	Bought 157 days before it existed	CC49112832	125234509A 4295466
4.	One liter Rio Grande tequila, new/unopened	09-28-09	08-07-09	Bought 53 days before it existed	CC49124251	128091420 BR#1075 NOM1102
5.	One liter El Jimador tequila, new/unopened	09-02-09	08-25-09	Bought 10 days before it existed	CC49131048	03 SEP 09 mO1 9:12 LOTE 190727079
6.	One liter Johnnie Walker scotch whiskey, new/unopened	09-18-09	08-25-09	Bought 25 days before it existed	CC49131054	L9261T5000 11849089
7.	One liter Buchanan's scotch whiskey, empty	10-17-09	10-16-09 for a 1.75 liter bottle	Bought one day before it existed and bottle weight incorrect	CC49151524.	L9290DE000 1913933

Furthermore, a Bacardi Anejo rum bottle with affixed LDS CC27296893 was found. The bottle was invoiced to permittee's prior bar, Karmina's Night Club, under a different permit number. There is no record that a lawful transfer of alcoholic beverages took place between Karmina's Night Club and Galaxy Night Club.

<sup>3</sup> The following responses were given: "They came from the storage room," "My father brought them," "The owner's husband brought them," and "I don't know. They were already here when I opened the bar."

<sup>4</sup> See Petitioner's Exhibit No. 11, documentation explaining manufacturing source codes; Petitioner's Exhibit No. 2, all invoices; and Petitioner's Exhibit Nos. 12 and 13, TABC reports.

## 2. Bottles found in vehicle

The agents also found 13 distilled spirits bottles in Ms. Loya's vehicle. A vehicle registration check named permittee Adriana Fuentes as the owner. The vehicle was parked on the bar's front parking lot about 10 feet from the main entrance.<sup>5</sup> The following bottles were located inside a tote bag and behind the backseat:<sup>6</sup>

	Type of bottle	Local distributor stamp (LDS)	Appearance
1.	One liter Jagermeister	CC 49163301	Empty bottle
2.	One liter Jagermeister	CC 55753824	Empty bottle
3.	750 ml Glenlivet Single Malt	CC 49144777	Empty bottle
4.	One liter Glenlivet Single Malt	No LDS stamp affixed	Unsealed
5.	One liter Chivas Regal	No LDS stamp affixed	Unsealed
6.	One liter Buchanan's	CC 55764422.	Unsealed
7.	One liter Buchanan's	CC 45420576	Unsealed
8.	One liter Buchanan's	CC49151524	Empty bottle
9.	One liter Kahlua Café	CC43172748	Unsealed
10.	One liter Kahlua Café	CC49159913	Unsealed
11.	Bols Peach Schnapps	CC49153480	Unsealed
12.	750 ml Remy Martin VS	CC36902199	Empty
13.	One liter Malibu Coconut	CC55753825	Empty

The tote bag also contained a single stamp, LDS CC36852231, which was affixed to a partially torn label of "Don Julio Anejo" tequila.<sup>7</sup> The torn label was not on a bottle. Agent Menchaca testified the LDS was invoiced to the permittee's former bar "Karmina's Night Club."<sup>8</sup> A large heat gun was also located next to the tote bag and bottles.<sup>9</sup> The agents said it was apparent to them the stamp was possessed with the intent to reattach it to another bottle of distilled spirits. Agent Menchaca said Ms. Loya told him she was instructed to take the empty bottles to "Adriana's house." A total of 45 bottles were seized.<sup>10</sup>

<sup>5</sup> Petitioner's Exhibit no. 7, photographs.

<sup>6</sup> Petitioner's Exhibit No. 2, all invoices containing the information reflected on the chart.

<sup>7</sup> Petitioner's Exhibit No. 10, actual LDS.

<sup>8</sup> *Id.*, invoice to Karmina's Night Club number 102850.

<sup>9</sup> Petitioner's Exhibit No. 9, photograph.

<sup>10</sup> Respondent's Exhibit No. 3, seized property report.

**B. Respondent's direct case**

Ms. Loya testified she is no longer employed at Galaxy Night Club. She confirmed she transported empty bottles to Ms. Fuentes' home at her directive. Ms. Loya said she reported to Ms. Fuentes. Ms. Fuentes testified she can produce a paper invoice for each bottle seized. Respondent thereby argued the bottles are not uninvoiced. Ms. Fuentes testimony revealed she manages and controls the operations at the bar. She claimed ignorance of any wrong doing.

**III. DISCUSSION AND ANALYSIS****A. Possession of alcoholic beverages not covered by invoice violation**

Section 28.06(c) of the Texas Alcoholic Beverage Code requires the element of knowledge in possession by Respondent, its agent, servant or employee, on the licensed premises, of any alcoholic beverage which is not covered by invoice.<sup>11</sup> When the word "knowingly" is used, it means that the person realized what he/she was doing and was aware of the nature of the conduct and did not act through ignorance, mistake, or accident. Knowledge may be proved by the person's conduct and by all the facts and circumstances surrounding the case. The evidence of record reveals the person in control of the operations of Galaxy Night Club, and the person who directed an employee to transport the bottles to her, is Ms. Fuentes. Ms. Fuentes has experience as a permit holder and has owned a prior bar establishment. The undersigned ALJ does not find Ms. Fuentes' claim of ignorance plausible or credible. By preponderance of the evidence, the knowledge requirement is met.

Furthermore, the evidence of record clearly proves that seven bottles found in the bar inside boxes are not covered by invoice. Objectively, the manufacturer lot numbers tell the exact date each bottle was created. The seven bottles were allegedly purchased prior to their manufacture date; an impossibility. Thus, the invoices presented correspond to other bottles.

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<sup>11</sup> TEX.ALCO. BEV. CODE (Code) 28.06(c) and (d).

The fraud perpetrated is obvious. The ALJ concludes the bottles are not covered by a valid invoice. Possession of uninvoiced bottles is a major regulatory violation as defined by TABC Rule.<sup>12</sup>

#### **B. Invalidation of stamp violation**

The ALJ further finds that Respondent failed to immediately invalidate the identification stamp on each bottle in a manner prescribed by rule.<sup>13</sup> The Code requires immediate invalidation of the identification stamp upon emptying a bottle. The requirement is specific. Obviously, the seven uninvoiced bottles discussed above have stamps that belong to other bottles affixed to them. Those stamps were not mutilated. In addition, the single stamp affixed to a partially torn label of "Don Julio Anejo" tequila was not mutilated.

#### **C. Modus operandi**

Respondent's method of activity is proven by the totality of the circumstances. It is of record that the bottles found in the vehicle were destined to permittee's home. It is also of record that permittee directed them to be transported to her. It is a violation to remove them from the premises.<sup>14</sup> The 13 bottles found in the vehicle had labels with knife cuts around the LDS and glue residue. A large heat gun was found with the bottles. The ALJ agrees with Staff that this is indicative of stamp removal and adhesion. Furthermore, seven bottles had another bottle's stamp on them. The ALJ agrees with staff that local distributor stamps were being removed, and affixed to new bottles. Based on the evidence of record and enumerated in this proposal for decision, the ALJ recommends cancellation of Respondent's permit.

### **IV. FINDINGS OF FACT**

1. Notice of Hearing was issued on January 10, 2011.

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<sup>12</sup> TABC Rule § 34.3.

<sup>13</sup> Code at §28.09 [Invalidation of Stamp].

<sup>14</sup> *Id.* at § 28.10 [Consumption Restricted to Premises].

2. On March 8, 2011, the hearing was convened by ALJ Veronica S. Najera, at the State Office of Administrative Hearings, El Paso Regional Office.
3. Staff was represented by Sandra K. Patton, staff attorney. The president of the Serad Corporation d/b/a Galaxy Night Club (Respondent), Adriana Fuentes, appeared and was represented by Enrique Ramirez, attorney.
4. The record closed on March 8, 2011 at the adjournment of the hearing.
5. Galaxy Night Club operates under the authority of a mixed beverage permit, which includes a beverage cartage permit and a mixed beverage late hours permit, number MB-697259, issued on July 2008.
6. The bar is situated in El Paso City, County of El Paso, Texas.
7. As president of Serad Corporation, permittee Adriana Fuentes, manages and controls the operations of the bar.
8. Ms. Fuentes directed an employee to transport alcoholic bottles to her off premises.
9. On January 29, 2010, seven bottles seized by TABC at the bar had manufacture dates which postdated the purchase dates on from Juanito's Liquor Store:

	Type of bottle	Manufacture date	purchase date on invoice	Discrepancy	Local distributor stamp (LDS)	Lot number
1.	One liter Sauza Hornitos tequila, new/unopened	05-24-09	03-13-09	Bought 73 days before it existed	CC43161990	L9144213ST 30953
2.	One liter Skol vodka, new/unopened	07-27-09	04-03-09	Bought 96 days before it existed	CC43172765	009210 10 07A
3.	One liter Jack Daniels old #7 whiskey, new/unopened	12-11-09	07-08-09	Bought 157 days before it existed	CC49112832	125234509A 4295466
4.	One liter Rio Grande tequila, new/unopened	09-28-09	08-07-09	Bought 53 days before it existed	CC49124251	I28091420 BR#1075 NOM1102
5.	One liter El Jimador tequila, new/unopened	09-02-09	08-25-09	Bought 10 days before it existed	CC49131048	03 SEP 09 mO1 9:12 LOTE 190727079
6.	One liter Johnnie Walker scotch whiskey, new/unopened	09-18-09	08-25-09	Bought 25 days before it existed	CC49131054	L9261T5000 11849089

7.	One liter Buchanan's scotch whiskey, empty	10-17-09	10-16-09 for a 1.75 liter bottle	Bought one day before it exited and bottle weight incorrect	CC49151524.	L9290DE000 1913933
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10. The seven bottles discussed in number 8 above have LDS affixed to them which belong to other bottles.
11. The seven bottles discussed in number 8 above are not invoiced with valid purchase receipts.
12. Respondent knowingly possessed seven uninvoiced bottles detailed in number 8 above.
13. On January 29, 2010, TABC agents found a bottle of Bacardi Anejo rum that was invoiced to another bar previously owned by permittee.
14. Respondent knowingly possessed an uninvoiced bottle of Bacardi Anejo rum which was bought under an expired permit.
15. On January 29, 2010, TABC agents found 13 distilled spirits bottles in an employee's vehicle. A vehicle registration check named permittee as the owner. The vehicle was parked on the bar's front parking lot about 10 feet from the main entrance.
16. The following bottles were located inside a tote bag and behind the backseat of an employee's vehicle:

	Type of bottle	Local distributor stamp (LDS)	Appearance
1.	One liter Jagermeister	CC 49163301	Empty bottle
2.	One liter Jagermeister	CC 55753824	Empty bottle
3.	750 ml Glenlivet Single Malt	CC 49144777	Empty bottle
4.	One liter Glenlivet Single Malt	No LDS stamp affixed	Unsealed
5.	One liter Chivas Regal	No LDS stamp affixed	Unsealed
6.	One liter Buchanan's	CC 55764422	Unsealed
7.	One liter Buchanan's	CC 45420576	Unsealed
8.	One liter Buchanan's	CC49151524	Empty bottle
9.	One liter Kahlua Café	CC43172748	Unsealed
10.	One liter Kahlua Café	CC49159913	Unsealed
11.	Bols Peach Schnapps	CC49153480	Unsealed
12.	750 ml Remy Martin VS	CC36902199	Empty
13.	One liter Malibu Coconut	CC55753825	Empty

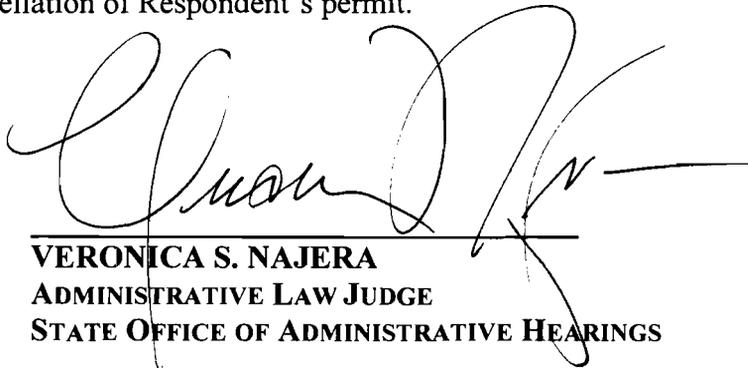
17. On January 29, 2010, a large heat gun was also found next to the tote bag and bottles in an employee's vehicle.

18. On January 29, 2010, TABC agents found a single stamp, LDS CC36852231, which was affixed to a partially torn label of "Don Julio Anejo" tequila. The torn label was not on a bottle. The LDS was invoiced to the permittee's former bar "Karmina's Night Club."
19. Respondent did not invalidate the identification stamp of the bottles described in number 9, 16 and 18 above.

#### V. CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this proceeding pursuant to TEX. ALCO. BEV. CODE ANN. (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.
4. Based upon the Findings of Fact, Respondent, any officer, agent or employee, knowingly possessed or permitted to be possessed on the licensed premises eight alcoholic beverage bottles which were not covered by invoice, in violation of Code § 28.06(c) and (d).
5. Based upon the Findings of Fact, Respondent, any officer, agent or employee failed to invalidate identification stamps on bottles seized on January 29, 2010, in violation of Code § 28.09
6. The ALJ recommends cancellation of Respondent's permit.

**SIGNED April 7, 2011.**



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

**DOCKET NO. 592133**

<b>TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner</b>	§	<b>BEFORE THE TEXAS</b>
	§	
<b>VS.</b>	§	
	§	
<b>SERAD CORPORATION D/B/A GALAXY NIGHT CLUB, Respondent</b>	§	<b>ALCOHOLIC</b>
	§	
<b>PERMITS NO. MB697259, LB &amp; PE</b>	§	
	§	
<b>EL PASO COUNTY, TEXAS (SOAH DOCKET NO. 458-11-1623)</b>	§	<b>BEVERAGE COMMISSION</b>

**ORDER NUNC PRO TUNC**

**CAME ON FOR CONSIDERATION** this 26th day of October, 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 March 8, 2011 and the SOAH record closed on that date. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on April 7, 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. Exceptions were filed by Respondent on April 20, 2011, and Petitioner responded on May 4, 2011. The Administrative Law Judge submitted a letter on May 12, 2011 indicating that after reviewing Respondent’s Exceptions and Petitioner’s Response, she did not wish to revise the Proposal for Decision.

The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision, Respondent’s Exceptions, Petitioner’s Response, and the Administrative Law Judge’s May 12, 2011 letter, adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge that are contained in the Proposal for Decision, **with the following corrections:**

**Finding of Fact No. 9:** Delete the second use of the word “on”, so that the sentence reads: “On January 29, 2010, seven bottles seized by TABC at the bar had manufacture dates which postdated the purchase dates from Juanito’s Liquor Store:”. There are no changes to the chart in Finding of Fact No. 9.

**Findings of Fact Nos. 10 -12:** In each Finding, change the reference from “number 8 above” to “number 9 above”.

With these corrections, the Findings of Fact and Conclusions of Law are incorporated 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.

**THEREFORE**, it is **ORDERED** that Mixed Beverage Permit No. MB697259, and the Mixed Beverage Late Hours and Beverage Cartage Permits that are subordinate thereto, held by Serad Corporation d/b/a Galaxy Night Club are hereby **CANCELLED**.

This Order will become final and enforceable on the 21st day of November, 2011, unless a Motion for Rehearing is filed **BEFORE** that date.

**SIGNED** this the 26th day of October, 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 26th day of October, 2011.



---

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**

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