DOCKET NO. 458-02-1453
(CONSOLIDATED)

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
v.	§	
MICHAEL ELMO PULKKINEN	§	
D/B/A SNOOK WATERING HOLE	§	OF
PERMIT NO. BG-466474	§	
BURLESON COUNTY, TEXAS	§	
(TABC CASE NO. 595739) and	§	ADMINISTRATIVE HEARINGS
KRISTEN DISTRIBUTING CO.	§	
D/B/A KRISTEN DISTRIBUTING CO.	§	
PERMIT NOS. BB-429709, X-429380,	§	
O-429381 AND BI-429710	§	
BRAZOS COUNTY, TEXAS	§	
(TABC CASE NO. 595740)	§	

PROPOSAL FOR DECISION

In this consolidated case, the Staff of the Texas Alcoholic Beverage Commission (the Commission) brought this action against Commission permittees Michael Elmo Pulkkinen d/b/a Snook Watering Hole (Mr. Pulkkinen) and Kristen Distributing Company (Kristen), based on allegations arising from the Chilifest, Inc., fund raiser held in Burleson County on April 6-7, 2001. Staff alleges Mr. Pulkkinen allowed or consented to an unauthorized person using or displaying his permit. Staff alleges Kristen gave money to induce customers to influence the purchase of products from the distributor and required a retailer to engage in the sale of products to the exclusion of the products sold by a competitor. Staff recommended that the subject permits be canceled or suspended. This Proposal For Decision finds that none of the allegations were proven and recommends that the permits be neither canceled nor suspended.

I. PROCEDURAL HISTORY

Administrative Law Judge Sharon Cloninger convened the hearing on May 21, 2002, at the State Office of Administrative Hearings, Austin, Texas. Staff attorney Dewey A. Brackin represented the Commission. Attorney Don Walden represented Mr. Pulkkinen. Attorney E. Eugene Palmer represented Kristen. After evidence was taken, the hearing concluded on May 22, 2002. The record remained open until August 9, 2002, for the parties to submit post-hearing briefs.

II. JURISDICTION AND NOTICE

There are no contested issues of notice or jurisdiction in this proceeding. Therefore, these matters are set out in the proposed findings of fact and conclusions of law without further discussion here.

III. BACKGROUND

The undisputed facts in this case are that on April 6-7, 2001, a fund raising event called Chilifest 2001 was held in Burleson County, Texas, and attended by between 30,000 and 40,000 people. The organizer of the event was Chilifest, Inc., a not-for-profit Texas corporation. Chilifest, Inc., is not licensed to sell beer in Texas but wanted beer to be available at the event, so it asked Mr. Pulkkinen if he would obtain a temporary beer license and serve as the Chilifest 2001 beer concessionaire.[1] Mr. Pulkkinen agreed, provided he could cover his costs; anything above his costs would be donated to charity. Mr. Pulkkinen applied for and received a temporary beer license[2] from the Commission. Mr. Pulkkinen purchased beer for Chilifest 2001 only from Kristen[3].

Besides being the distributor from whom Mr. Pulkkinen bought beer for Chilifest 2001, Kristen was also the main sponsor of the event. In an agreement signed January 30, 2001, Kristen and Chilifest, Inc., established terms of the sponsorship, including a $35,000 charitable donation from Miller Brewing Company to the event. Part of the express agreement between Kristen and Chilifest, Inc., was that brewery products would be sold at the event. Further, if alcoholic beverages were not sold at the event, Chilifest, Inc., was to reimburse Kristen for all expenses it incurred.[4] The agreement did not expressly require that *only* Kristen products be sold at the event, but only Kristen products were sold at the event.

In addition to the sponsorship agreement, Chilifest, Inc., and Kristen signed a Miller Brewing Company Statement of Policy that set out in boldface type that ". . . Miller's purchase of services, advertising, or sponsorship or promotional rights from an unlicensed organization may not result in, or be the condition of, a licensed retailer carrying Miller's or its wholesalers products." The statement set out in clear terms that the licensed retailer would have full discretion to select which alcoholic beverages to sell at the event.

The sponsorship agreement was reached in January, 2001, and Chilifest, Inc., approached Mr. Pulkkinen in March, 2001. The Miller Statement of Policy was signed by Chilifest, Inc., and Kristen on an unspecified date, but presumably near the time the sponsorship agreement was reached.

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1 Mr. Pulkkinen is the holder of a Wine and Beer Retailer's Permit, issued by the Commission for the premises known as Snook Watering Hole in Snook, Burleson County, Texas. A temporary license may be issued only to a holder of a retail dealer's on-premise license or a wine and beer retailer's permit, pursuant to TEX. ALCO. BEV. CODE § 72.04. The temporary license authorized Mr. Pulkkinen to conduct his business at the temporary location. Anything that occurs at the temporary location under the temporary license reflects back on the permanent permit.

2 TEX. ALCO. BEV. CODE § 72.05 states temporary licenses shall be issued only for the sale of beer at picnics, celebrations, or similar events.

3 Kristen is the holder of a General Distributor's License, General Class B Wholesaler's Permit, Private Carrier's Permit and Importer's License, issued by the Commission for the premises known as Kristen Distributing Company, located at 1501 Independence Avenue, Bryan, Brazos County, Texas. Kristen is the exclusive Miller Brewing Company distributor for Burleson County.

4 The Commission believes this provision requires Kristen products to be sold at the event. Kristen and Chilifest, Inc., do not interpret the provision to require the sale of Kristen products. This issue is discussed in detail later in this Proposal for Decision.

On the day of the event, Mr. Pulkkinen and his volunteers–whom he had sent to Commission server training for certification in preparation for the event–set up the beer ticket booth and the beer tent, collected money for beer tickets, checked customers' ID's, served beer, and counted the money. Mr. Pulkkinen closed the beer tent at 6:45 p.m., before the main musical entertainment began.

At the end of the evening, the money collected from beer sales, which was counted and stored separately from all other Chilifest 2001 receipts, amounted to $178,000. Because Mr. Pulkkinen was on his motorcycle, and the cash would not fit in the saddle bags, he asked that the beer receipts be placed in the armored car that Chilifest, Inc., was using to carry all non-beer receipts to the bank. Chilifest, Inc., chairman Ryan Gambrell agreed, and told Mr. Pulkkinen that Chilifest, Inc., would settle with him later. All of the money, including the beer receipts, was deposited into the Chilifest, Inc., bank account that Saturday night.

The following Tuesday, $45,018.20–the funds necessary to cover Kristen's invoice for the beer–was disbursed to Mr. Pulkkinen. Mr. Pulkkinen paid Kristen the same day. Mr. Pulkkinen remitted $11,147.96 in taxes to the Texas State Comptroller on May 9, 2001; the next day, Chilifest, Inc., paid Mr. Pulkkinen $11,400[5] to cover the taxes. In addition, Chilifest, Inc., gave Mr. Pulkkinen a check for $28,020, representing 50 cents per can of beer sold, for Mr. Pulkkinen to donate to the charity of his choice. Mr. Pulkkinen donated the remaining approximately $94,000 in beer receipts to Chilifest, Inc., to be donated to charity.

No previous violations have been adjudicated against either Kristen or Mr. Pulkkenin by the Commission.

IV. ALLEGATIONS AND APPLICABLE LAW

A. Allegation against Mr. Pulkkinen

Mr. Pulkkinen allowed or consented to an unauthorized person using or displaying the temporary permit, in violation of TEX. ALCO. BEV. CODE ANN §§ 11.05, 11.61 (b) (2), and 109.53.

TEX. ALCO. BEV. CODE ANN. § 11.05 states "No permittee may consent to or allow the use or display of his permit by a person other than the person to whom the permit was issued."

TEX. ALCO. BEV. CODE ANN. § 11.61 states:

> (b) The commission or administrator may suspend for not more than 60 days or cancel an original or renewal permit if it is found, after notice and hearing, that any of the following is true:
>
> (2) the permittee violated a provision of this code or a rule of the commission;

TEX. ALCO. BEV. CODE ANN. § 109.53, in relevant part, states ". . . . No person shall . . .

[5] There is no explanation in the record as to the discrepancy between the amount Mr. Pulkkinen paid the Texas State Comptroller and the amount Chilifest, Inc., gave to him.

consent to the use of or allow his permit to be displayed by or used by any person other than the one to whom the permit was issued. It is the intent of the legislature to prevent subterfuge ownership of or unlawful use of a permit or the premises covered by such permit; and all provisions of this code shall be liberally construed to carry out this intent, and it shall be the duty of the commission or the administrator to provide strict adherence to the general policy of preventing subterfuge ownership and related practices hereinafter declared to constitute unlawful trade practices. . . . Every permittee shall have and maintain exclusive occupancy and control of the entire licensed premises in every phase of the storage, distribution, possession, and transportation and sale of all alcoholic beverages purchased, stored or sold on the licensed premises. Any device, scheme or plan which surrenders control of the employees, premises, or business of the permittee to persons other than the permittee shall be unlawful. . . ."

B. Allegations against Kristen

Count I

Kristen, its agent, servant, or employee, on or about April 8, 2001, gave money or permitted money to be given to induce agents, employees, or representatives of customers or prospective customers to influence their employees or principals to purchase or contract to purchase brewery products from the distributor, or to refrain from buying those products from other persons, in violation of TEX. ALCO. BEV. CODE ANN §§ 102.12 and 61.71.

Count II

Kristen, its agent, servant, or employee, on or about April 8, 2001, directly or indirectly, required a retailer to engage in the sale of brewery products to the total or partial exclusion of the products sold or offered for sale by a competitor, or required the retailer to take or dispose of a certain quota of the product, in violation of TEX. ALCO. BEV. CODE ANN §§ 102.13 and 61.71.

Count III

Kristen, its agent, servant, or employee, on or about April 8, 2001, directly or indirectly or through an affiliate required by agreement or otherwise, that a retailer engage in the sale of beer to the exclusion in whole or in part of beer sold or offered for sale by other persons, or prevented, deterred, hindered, or restricted other persons from selling or offering for sale any such products to any retailer, in violation of TEX. ALCO. BEV. CODE ANN. §§ 109.08 and 61.71.

Count IV

Kristen, its agent, servant, or employee, on or about April 8, 2001, offered an inducement, either directly or indirectly, to a retail dealer of brewery products, in violation of TEX. ALCO. BEV. CODE ANN. §§ 61.74(a)(4) and 108.06, and 16 TEX. ADMIN. CODE (TAC) § 45.110.

Count V

Kristen, its agent, servant, or employee, on or about April 8, 2001, entered with a permittee of a different level or with a person, into a conspiracy or agreement to control or manage, financially or administratively, directly or indirectly, in any form or degree, the business or interests of a permittee of a different level, in violation of TEX. ALCO. BEV. CODE ANN. §§ 102.01(h) and 61.74.

V. EVIDENCE

Staff offered 11 documents, which were admitted. Pulkkinen offered one exhibit, which was admitted. Kristen offered 10 exhibits, which were admitted. Mr. Pulkkinen testified on his own behalf. Mark Kristen, president of Kristen, testified on behalf of the distributor. In addition, five other witnesses testified.

A. Testimony

1. Robert R. Donahoo, Commission enforcement agent

Robert R. Donahoo is an enforcement agent assigned to the Commission's Bryan, Texas, office. In his opinion, Mr. Pulkkinen and Chilifest, Inc., engaged in an illegal subterfuge[6] arrangement because Mr. Pulkkinen did not maintain control of the beer receipts at all times. First, Chilifest 2001 was set up so that beer tickets were bought at one booth, and the tickets were presented for beer at a separate beer tent. Agent Donahoo said Mr. Pulkkinen was not present at the beer ticket booth when money was collected, but rather was at the beer tent, so did not exercise control over the proceeds.[7] However, to Agent Donahoo's knowledge, no agent of Chilifest, Inc., sold beer at the event.

Agent Donahoo testified that Mr. Pulkkinen also relinquished control of the beer proceeds when the money was deposited in Chilifest, Inc.'s, bank account at the end of the day Saturday. Under the Texas Alcoholic Beverage Code (the Code), all beer proceeds should have gone to Mr. Pulkkinen, and none should have gone to Chilifest, Inc.

Mr. Pulkkinen had no management agreement on file with the Commission to show that Chilifest, Inc.,would manage the beer receipts. On cross, Agent Donahoo admitted that the Code does not require a management agreement to be filed with the Commission. He also admitted that if the understanding between Chilifest, Inc., and Mr. Pulkkinen was as testified to by Mr. Pulkkinen, then it was comparable to written management agreements routinely approved by the Commission.

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[6] "Subterfuge" means the permit to sell beer is owned on paper by one person, but is in reality controlled by another person.

[7] However, it is undisputed that the volunteers who worked the beer ticket booth and collected the money were under Mr. Pulkkinen's supervision, and thus, in the ALJ's opinion, were his agents for purposes of collecting money.

As further proof that Mr. Pulkkinen "rented out" his temporary license to Chilifest, Inc., Agent Donahoo testified regarding the $28,020 Mr. Pulkkinen received from Chilifest, Inc., representing 50 cents per can of beer sold at Chilifest 2001, purportedly for Mr. Pulkkinen to donate to a charity of his choice. Mr. Donahoo said the $28,020 check is evidence that Chilifest, Inc., paid Mr. Pulkkinen for the use of his temporary beer license, a subterfuge situation.[8]

Agent Donahoo believes Chilifest, Inc., influenced Mr. Pulkkinen to violate the Code by selling only Kristen products. In support of his belief, he said the agreement between Kristen and Chilifest Inc. gave Chilifest Inc. a motive to influence Mr. Pulkkinen to use Kristen's products, because of the provision that if Kristen products were not sold, Chilifest, Inc., would have to reimburse Kristen for incurred expenses. He said he met with Mr. Pulkkinen before Chilifest 2001, and Mr. Pulkkinen told him then he intended to sell other products; yet on the day of the event, only Kristen products were sold. In meetings leading up to the issuance of Mr. Pulkkinen's temporary license, Agent Donahoo said that he suggested to Mr. Pulkkinen that he sell all kinds of beer under the temporary license. He said Mr. Pulkkinen told him he was going to contact Jack Hilliard Distributing, the Budweiser distributor in Burleson County, about supplying beer for the event, because at his bar in Snook, Budweiser outsells other brands five-to-one.

In Agent Donahoo's opinion, the sponsorship agreement between Chilifest, Inc., and Kristen ties Kristen's $35,000 donation to the sale of their product at Chilifest 2001, which is illegal. Mr. Donahoo said that prior to the event, he explained to Mr. Pulkkinen that although Kristen was a sponsor of Chilifest 2001, Mr. Pulkkinen was not obligated to sell Kristen products at the event. He warned Mr. Pulkkinen that he would be in violation of the Code if he were influenced or coerced to sell only one brand of beer at the event.

On cross, Agent Donahoo admitted it is not in and of itself unlawful to sell only one brand of beer at an event, as long as the exclusion of other brands was not the result of undue influence or coercion. He said the Commission frequently issues temporary licenses for charitable events; at most events, more than one brand of beer is sold, but at some events, only one brand is sold.

2. Mr. Pulkkinen

Before the event, Mr. Pulkkinen met with Chilifest, Inc., chairman Mr. Gambrell a couple of times. Mr. Gambrell did not tell Mr. Pulkkinen that he must sell Miller beer either in addition to or in exclusion of other products, although Mr. Gambrell told him Miller was a sponsor of Chilifest 2001 and it would be courteous to use Miller products. He said Mr. Gambrell never tried to tell him how to conduct beer sales at the event, except for the requirement that anyone serving beer be Commission certified to do so. Mr. Gambrell did not tell Mr. Pulkkinen how to handle the beer money at the event.

Mr. Pulkkinen said he never met Mark Kristen, president of Kristen, until the day of the event. He also said no representative of Chilifest, Inc. or Kristen ever communicated with Mr. Pulkkinen to discourage him from using other distributors.

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[8] There was no further testimony or evidence to show if the $28,020 given to Mr. Pulkkinen by Chilifest, Inc., was actually donated to charity or kept by him.

Mr. Pulkkinen said he met with Commission agents–mostly Mr. Donahoo–five or six times before getting the temporary license, because he wanted to do everything right. He said the Commission agents told him not to be the beer concessionaire for Chilifest 2001. They told him the sponsorship agreement between Kristen and Chilifest, Inc., was illegal.

He said one of the Commission agents in Bryan asked him to contact Jack Hilliard Distributing (Hilliard)[9], the exclusive Budweiser distributor in Burleson County, about providing beer at the event, so he did. He later received a telephone message from Hilliard that it could provide beer for a dollar per case less than what Kristen would charge.[10] He said he thought about using both Hilliard and Kristen, but after inspecting the Chilifest 2001 grounds, decided there would not be enough room for products from two distributors. So he decided to go with Kristen only. He said the decision to go with Kristen had nothing to do with Kristen's sponsorship of the event. He applied for the temporary license about a week before the event, and received it a few days later.

He said he was at the event Friday night and all day Saturday, mainly in the beer tent, serving and lugging beer. He did not work in the beer ticket booth. He said he had the help of 26 or 27 volunteers who had been trained by the Commission and who were not on the Chilifest, Inc., board of directors.[11] He stopped serving beer at about 6:45 p.m., 15 minutes before the temporary license expired. He closed early as a precaution against people driving while intoxicated upon leaving the event later in the evening. He said Chilifest, Inc., did not impose the hours; he chose the hours. He stayed until 8:30 p.m., and people were upset that beer sales had stopped. He said some people jumped over the tables and some threw tables at him.

Mr. Pulkkinen testified that Sherri Hooper, president of Burleson County Go Texan, was his representative at the money counting location. He also said he authorized Chilifest, Inc., to hold his money until accounts could be settled. His original intention was to cover his expenses and remit taxes, then donate the rest of the beer proceeds to a city park project, but when he saw how much money had been collected, he asked that 50 cents per can be given to him to donate to a second charity. He had not filed his 2001 income tax return at the time of the hearing on the merits, but said he would be claiming the entire $178,000 in beer proceeds as income.[12]

3. Mark Allen Kristen, president of Kristen Distributing

Mr. Kristen said Kristen did not impose the sale of only its products, or of Miller Lite in

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[9] Testimony established that Hilliard is Kristen's primary competitor in Burleson County, and that Hilliard and Kristen are the two main distributors there.

[10] However, according to the deposition of John Vollentine, Hilliard's sales manager, he never quoted a price to Mr. Pulkkinen.

[11] Mr. Gambrell testified that Chilifest, Inc., has no members, and is composed entirely of its Board of Directors.

[12] He said he would file his 2001 taxes on September 15, 2002, which is after the record closed in this case on August 9, 2002.

addition to others, at Chilifest 2001, although he hoped their product would be sold. Mr. Kristen's testimony was that it was the intention of Chilifest, Inc., and Kristen that Miller products would be sold at Chilifest 2001, but because the beer retailer would not be Chilifest, Inc., there was no guarantee that the temporary licensee would choose Miller products.

He explained that the provision in Kristen's sponsorship agreement with Chilifest, Inc., requiring reimbursement of expenses actually incurred, related to reimbursement for ad expenses, for instance. He said it also related to the amount of beer that would be ordered and pre-cooled in anticipation of the event, then not used if a temporary license was not issued to a beer retailer. Given the negative press coverage for Chilifest 2001, and Texas A&M's active pressure on businesses not to participate in Chilifest 2001[13], he felt the company had to be protected against the possibility that a temporary beer license might not be issued. He estimated Kristen would order and pre-cool about 3,000 cases of 16-ounce Miller Lite beers for Chilifest 2001, whereas Kristen usually orders between 1,100 and 1,500 cases per month. The product would need to be pre-cooled for seven days; dumping the product at the last minute could cost Kristen $50,000.

The $35,000 referenced in the sponsorship agreement was a donation, or sponsorship. The purpose of the sponsorship was not to make money, but rather, to create brand recognition for Miller products among Chilifest 2001 attendees. He found it demographically correct that the dominant beer at Snook Watering Hole is Budweiser, because the bar is primarily a biker bar, and Budweiser is dominant among bikers. But most Chilifest attendees are 21 to 28 years old, and in that marketing segment, Miller Lite is the beer of choice.

4. Ryan Gambrell, former chairman of Chilifest, Inc.

Ryan Gambrell, a 2002 graduate of Texas A&M, was chairman of Chilifest, Inc., at the time Chilifest 2001 was planned and held. He described Chilifest, Inc., as a non-profit organization formed in the fall of 1999[14], which puts on the annual event known as Chilifest to raise money for charity. As chairman, he was responsible for planning all aspects of Chilifest 2001.

In early March, Mr. Gambrell approached Mr. Pulkkinen to be the beer concessionaire, upon the recommendation of members of Go Texan, an organization that raises scholarship money for Burleson County students and receives donations from Chilifest, Inc. Go Texan President Sherri Hooper introduced Mr. Gambrell to Mr. Pulkkinen sometime in early March, 2001.

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13 Kristen introduced into evidence copies of letters from Texas A&M administrators to the chief executive officers of Miller Brewing Company and Pepsi Cola Company, asking that they refuse to sponsor Chilifest 2001, and warning that the University would pursue legal action against Chilifest, Inc., and event sponsors should the University, its licensed marks, or any affiliated organization of the University be associated with the event. The University's objection to Chilifest is that it had, according to the letters, "become an event where underage consumption of alcohol and abuse of alcohol is prevalent. Local citizens have voiced their concerns to the University about the drunken behavior of students and others attending the event. . . ."

14 Before 2001, Agent Donahoo investigated Chilifest because the Commission received letters from Texas A&M administrators expressing concern that an A&M fraternity was involved in hosting Chilifest, an event in which alcohol is served and which in the past had been the site of under-age drinking, presumably by A&M students. Once Chilifest became incorporated, and was no longer officially affiliated with any A&M organization, the Commission received no more letters of concern from Texas A&M officials.

Mr. Pulkkinen agreed to be a third party beer vendor; there was no written agreement between Chilifest, Inc., and Mr. Pulkkinen.

Mr. Gambrell told Mr. Pulkkinen the first time they met that the event was sponsored by Kristen. Mr. Gambrell said he informally asked for Mr. Pulkkinen's courtesy in using Kristen products, but he did not demand that Mr. Pulkkinen use Kristen. He said that to him, it was common courtesy to return Kristen's support. Mr. Gambrell said he did not tell Mr. Pulkkinen that only Kristen's products were to be sold at Chilifest 2001.

Chilifest, Inc., had a written agreement with Kristen regarding Kristen's sponsorship of the event. While one term of the agreement was that Kristen would donate $35,000 to Chilifest, Inc., Mr. Gambrell explained that the provision could be fulfilled not only by cash payment but also by in-kind donations of things such as manpower for the event. He took the "reimbursement of all incurred expenses" provision of the agreement as applying to any out-of-pocket expenses incurred by Kristen, such as sign preparation. As to the rest of agreement, Mr. Gambrell said all of the terms and conditions were fulfilled by both parties.

Mr. Gambrell said Chilifest, Inc., requested that Mr. Pulkkinen's recruited volunteers be Commission certified. Nobody from the Chilifest, Inc., board of directors worked in the beer booths. Chilifest, Inc., did not tell Mr. Pulkkinen what to do with the beer proceeds. Mr. Pulkkinen could have chosen to keep the entire $178,000, rather than donate any of the money to charity.

The chili cooks arrived Friday, April 6, 2001, and the gates opened to the general public at 10 a.m. Saturday, April 7, 2001. On Friday night, the cooks were allowed to bring in their own alcoholic beverages. On Saturday, beer was available only through the official Chilifest 2001 beer concessionaire, Mr. Pulkkinen, so that Chilifest, Inc., could monitor the amount of alcoholic beverages consumed by the crowd.

Mr. Pulkkinen and his volunteers operated the beer booths. His volunteers included Go Texan members, but nobody from Chilifest, Inc., worked in the beer booths. Attendees bought tickets at the beer ticket booth to redeem for beer at the beer tent. Money from the beer ticket booth was taken to a central location, where it was counted by representatives of Mr. Pulkkinen and Chilifest, Inc., with the amount verified and signed off on by each party. The beer proceeds were counted separately from all other revenue. The money was then deposited by Chilifest, Inc., into its bank account, after Mr. Pulkkinen requested that the money be transported in Chilifest, Inc.'s armored car rather than by him, on his motorcycle.

As to the beer proceeds, the agreement was that Mr. Pulkkinen would take enough to cover his costs. Everything above that would be donated to Chilifest, Inc., to be given to charity. Mr. Gambrell said Chilifest, Inc., kept the Chilifest 2001 proceeds in its bank account until the money could be divided. He said Chilifest, Inc., was obligated by verbal agreement to turn the beer proceeds over to Mr. Pulkkinen.

Of the approximately $178,000 in gross beer sales, about $28,020 went to Mr. Pulkkinen for the charity of his choice; $45,018.20 was given to Mr. Pulkkinen to cover Kristen's invoice; and $11,400 was pulled from the account to cover the taxes remitted to the Texas State Comptroller by Mr. Pulkkinen, leaving about $94,000, which Chilifest, Inc., donated to charity.

5. Sherri Hooper, volunteer

Sherri Hooper coordinated volunteers to sell event tickets, beer tickets, cook, park cars, and work the gates. She said her main job on the day of the event was to collect money and deliver it to the Chilifest, Inc., headquarters, so the money could be counted. The headquarters were at the event site, inside a fenced area secured by law enforcement officers.

She and three or four other volunteers used 3.5 gallon buckets to transport the money from the various collection points at Chilifest 2001. The lids of the buckets were marked to indicate where the money was from. Money from the sale of event tickets was given to Mr. Gambrell; money from beer sales was taken to a different room to be counted by Marie Schoenman. Ms. Schoenman stacked the counted money on shelves in the room. Ms. Hooper said she does not know what happened to the beer receipts after the money was counted.

6. John Sebesta, volunteer

John Sebasta volunteered to help at Chilifest 2001. He checked identification, put armbands on people, and worked the beer tent. He said Mr. Pulkkinen was in charge of the beer tent, and worked beside him the entire time. When Mr. Sebesta was in the tent, from between 3 p.m. or 4 p.m. to 6:45 p.m., he did not see anyone associated with Chilifest, Inc., working there.

7. Gordon Johnson, attorney for Miller beer

Gordon Johnson is an Austin attorney who has represented Miller Brewing since 1987. The company's legal department informed Mr. Johnson that Chilifest 2001 met the definition of a charitable event, so Mr. Johnson okayed Miller's donation to the event, and provided Mr. Gambrell and Mr. Kristen with a copy of Miller's policy statement regarding charitable donations. Part of the policy is that a charitable donation cannot be tied to the sale of Miller at the event.

He said charitable contributions by Miller are routine. As a matter of course, the company makes donations–which can include money or in-kind donations–to build brand-name awareness and loyalty. The applicable statute in the Code requires that no strings be attached in these agreements, so Miller does not tell a charity such as Chilifest, Inc., how it must use the donation.

Mr. Johnson did not see the agreement between Kristen and Chilifest, Inc., and had no opinion regarding the agreement.

B. Argument

1. The Commission's Argument

a. Regarding Mr. Pulkkinen

Mr. Pulkkinen relinquished exclusive control of the sale of alcoholic beverages at Chilifest, 2001, which is a violation of the Code. He, in effect, acted as a "straw man," renting out his temporary beer license to Chilifest, Inc., for the event. The evidence shows that, out of the approximately $178,000 gross sales of brewery products, approximately $11,400 was paid in taxes to the Texas State Comptroller, and approximately $45,000 was paid to Kristen for the cost of the product. Out of the remaining approximately $122,000 in gross sales, the evidence shows that Mr. Pulkkinen received $28,020 as "kickback" from Chilifest, Inc., an amount equivalent to 50 cents for every can of beer sold. The remaining approximately $94,000 in Mr. Pulkkinen's gross sales was retained by Chilifest, Inc., supposedly to be "donated" to charities by Chilifest, Inc., on behalf of Mr. Pulkkinen. This claim is belied by the fact that Chilifest, Inc., did not issue a receipt to Mr. Pulkkinen reflecting his charitable "donation."

Chilifest, Inc., exercised control over the gross receipts of the beer sold at the event by placing the funds in its own bank account and subsequently disbursing the funds. Mr. Pulkkinen did not maintain exclusive control of his business, in that he did not place the funds in his own bank account; he did not make distributions or payments himself; and he did not personally donate the proceeds to the various non-profit or charitable groups, but rather, Chilifest, Inc., made the donations.

Furthermore, no management agreement was ever filed with the Commission authorizing Chilifest, Inc., to exercise sole custody over Mr. Pulkkinen's money. The evidence reflects that had such an agreement been made known to the Commission, the temporary permit would not have been issued since Chilifest, Inc., had received money from Kristen. The "three tier" provisions[15] of the Code prohibit a retailer or its affiliates from receiving anything of value from a distributor.

The Commission's penalty chart, contained in 16 TAC § 37.60, mandates cancellation of a permit or license if it is found that a permittee engaged in a subterfuge; accordingly, the Commission seeks cancellation in this case.

b. Regarding Kristen

1. Allegation I: Commercial Bribery

Kristen gave Chilifest, Inc., $35,000 on the condition that Kristen's products be sold at Chilifest 2001. Chilifest, Inc., influenced Mr. Pulkkinen to buy Miller products from Kristen.

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[15] The Code requires strict separation of and independence between manufacturers, distributors, and retailers of alcoholic beverages. This prohibition of vertical integration promotes the public's interest of preventing domination of the industry by a few, and has been held to be constitutional. *August A. Busch & Co., Inc. v. TABC* 649 SW2d 652 (Tex. App.–Texarkana 1982, writ ref.n.r.e.).

This allegation does not require that one brand of beer be sold to the exclusion of others, just that money or anything of value was given to Chilifest, Inc., an agent or representative of Pulkkinen, who then influenced Mr. Pulkkinen to buy Miller beer. Therefore, Kristen has violated TEX. ALCO. BEV. CODE §102.12.

2. Allegation II: Exclusive Outlet; and

3. Allegation III: Exclusion

Miller was the only brewery product sold at Chilifest 2001. Mr. Pulkkinen could give no credible explanation for why other products were not sold. Therefore, the circumstantial evidence leads to the conclusion that Chilifest, Inc., who had received $35,000 from Kristen on the condition that Miller beer was sold, pressured Mr. Pulkkinen to sell only Miller products. This is especially likely when considering that Budweiser outsells Miller at Mr. Pulkkinen's Snook Watering Hole, and that Budweiser was offered for sale cheaper than Miller. One can only conclude that the money given to Chilifest, Inc., influenced it to pressure Mr. Pulkkinen to buy only Miller to the exclusion in whole or part of others. Thus, Kristen violated TEX. ALCO. BEV. CODE §§ 102.13 and 109.08.

4. Allegation IV: Inducement; and

5. Allegation V: "Tied House"

The evidence reflects that Kristen, indirectly, through an agreement with Chilifest, Inc., controlled or managed in some form or degree the business of Mr. Pulkkinen. Kristen gave $35,000 inducement to Chilifest, Inc., on the condition that its products be sold. Chilifest, Inc., then influenced Mr. Pulkkinen to buy Miller beer. Therefore, Kristen entered into an agreement with a legal entity to indirectly control the business of Mr. Pulkkinen in violation of TEX. ALCO. BEV. CODE §§ 108.06, and 102.01(b) and (i).

2. Mr. Pulkkinen's Argument

The Commission alleges that Mr. Pulkkinen obtained his permit for the benefit of Chilifest, Inc., and that Chilifest, Inc., exercised control of his business. But the evidence in this proceeding proves that what took place at Chilifest 2001 is precisely the opposite of what the Commission alleges. The evidence proves that Mr. Pulkkinen, and not Chilifest, Inc., supervised the volunteers, ordered beer from the beer distributor, operated the beer ticket and service booths, and decided to close the beer booth at around 7 p.m., when the event was still going strong. And although Mr. Pulkkinen authorized Chilifest, Inc., to maintain custody of his revenues for a few days, he in no way surrendered control of his business.

a. Section 109.53

Section 109.53 prohibits any arrangement under which a permittee surrenders control of its alcoholic beverage business to any other person or entity. The purpose of this section is to prevent a person to whom the Commission issues a permit–whose background the Commission has investigated and whom the Commission has determined meets all the legal requirements to hold a

permit–from allowing another person (who has not applied for a permit, whose background the Commission has not investigated, and about whom the Commission consequently has not made any determination regarding qualifications for a permit) to control his business.

To determine whether Mr. Pulkkinen surrendered control of his business to Chilifest, Inc., it is necessary to examine all phases of his business.

1. Mr. Pulkkinen's charitable donations

The very first time that Chilifest, Inc., approached Mr. Pulkkinen and asked whether he would be interested in being the beer vendor at Chilifest 2001, Mr. Pulkkinen responded that he would, but that he would give his proceeds to charitable causes. While the Commission believes that the fact that a large portion of Mr. Pulkkinen's beer revenue went to Chilifest, Inc.'s charitable beneficiaries is evidence that Mr. Pulkkinen rented out his permit to Chilifest, Inc., Mr. Pulkkinen's charitable contributions, in fact, do not constitute unlawful conduct.

The Commission argues that Chilifest, Inc.'s failure to issue a receipt to Mr. Pulkkinen for his donation proves that Mr. Pulkkinen engaged in subterfuge ownership. This argument should be rejected because (1) Mr. Pulkkinen has not yet filed his income tax return for 2001, and when he does so on September 15, 2002, he will follow the instructions of his tax preparer. (2) Mr. Pulkkinen and Ryan Gambrell testified that from the very beginning, Mr. Pulkkinen stated he wanted to donate his money to charity.

2. Mr. Pulkkinen arranged for his volunteer help

It is undisputed that Mr. Pulkkinen arranged for all of his own volunteers at Chilifest 2001 and assured that all his volunteers were Commission certified.

3. Mr. Pulkkinen controlled the sale of beer at Chilifest 2001

Mr. Pulkkinen, and not Chilifest, Inc., controlled the sale of beer at Chilifest 2001. He was there Friday night, checking people's ages, and all day Saturday, when he worked in the beer tent and supervised his volunteers. When he applied for the temporary license, Mr. Pulkkinen–and Mr. Pulkkinen alone–decided for security reasons that he would stop serving beer at 7 p.m. Following through on this commitment, he closed the beer booth shortly before 7 p.m., despite the fact that the event's headline performer was getting ready to take the stage.

Mr. Gambrell testified that aside from recommending to Mr. Pulkkinen that he require his volunteers to become Commission certified, he had no discussion of any kind with Mr. Pulkkinen about the way he should sell beer at Chilifest 2001. Mr. Gambrell also testified that nobody associated with Chilifest, Inc., worked in the beer ticket booth or beer tent. There is no evidence that anyone other than Mr. Pulkkinen and his volunteers controlled the sale and service of beer at Chilifest 2001.

4. Mr. Pulkkinen controlled the revenue from beer sales

Mr. Pulkkinen, and not Chilifest, Inc., controlled the revenue from his beer sales. The beer proceeds were counted separately from revenue from other sources, and Mr. Pulkkinen's representatives alone counted the money. The beer proceeds were counted in a room separate from where the Chilifest, Inc., proceeds were counted.

The Commission made much of the fact that Chilifest, Inc., kept custody of Mr. Pulkkinen's revenue by depositing it into its bank account, as Mr. Gambrell described it, "until we had a chance to settle up." At no time did Chilifest, Inc., consider Mr. Pulkkinen's money to be its own property. Similarly, Mr. Gambrell testified that if after the event Mr. Pulkkinen had changed his mind and decided to keep all of the beer revenue instead of donating any to charity, then Chilifest, Inc., would have been obligated to give him all of his money.

The Commission's argument that depositing his money into his own bank account is the only way for Mr. Pulkkinen to "maintain exclusive control" of his business is contrary to the plain language of the applicable statute and wholly unsupported by law. Nothing in the Code or Commission rules requires that the permittee deposit the money into his own bank account. The money is the property of the person for whom the property is held. The arrangement between Mr. Pulkkinen and Chilifest, Inc., is no different than that of an ordinary depository relationship, a trust, or a custodianship.

The Commission complains that no management agreement was ever filed with Commission staff prior to the event. None is required by law to be filed. The Commission argues that had it known of Mr. Pulkkinen's agreement with Chilifest, Inc., beforehand, it would have denied his application for a temporary license. But there is no statutory ground for doing so.

Despite these facts, the Commission believes that the manner in which the beer revenue was handled violates the Code's subterfuge provision. Nothing whatsoever in the Code or Commission rules prohibits the arrangement between Mr. Pulkkinen and Chilifest, Inc. In fact, no provision in the Code or Commission rules even addresses the manner in which revenue from the sale of alcoholic beverages must be handled. So long as Mr. Pulkkinen maintained control of his business–which he did–neither the Code nor the rules prohibit any kind of lawful arrangement that he and Chilifest, Inc., wish to enter into.

b. Section 11.05

Section 11.05 prohibits the use or display of the permit by a person other than Mr. Pulkkinen. The undisputed evidence proves that nobody other than Mr. Pulkkinen and his volunteer employees worked in the beer ticket and beer service booths.

3. Kristen's Argument

In its post-hearing brief, Kristen argues it is not guilty of commercial bribery, imposition of

requirement of exclusive right to sell beer at a charitable event, improperly inducing a retailer to sell a particular brand of beer, or violating the three-tier statute.

Kristen contracted with Chilifest, Inc., to sponsor an event featuring sale of beer through a temporary permit held by a beer retailer. Pursuant to the contract, Kristen donated $35,000 to Chilifest, Inc., and provided certain other services connected with the event. The privity was between Kristen and Chilifest, Inc., not between Kristen and Mr. Pulkkinen.

The common thread running through the Commission's approach on all counts is the Commission's view of the contract between Kristen and Chilifest, Inc. Starting with the document and proceeding solely on supposition and speculation, the Commision tries to arrive at the point that the contract provided for a sham donation which was in fact consideration for an exclusive right to have only the Miller brand at the event.

The $35,000 donation is not a sham just because it was part of a contract with conditions. Texas law recognizes that there may be conditions to a gift. See *McClure v McClure*, 870 SW 2d 358, 361 (Tex. App.–Fort Worth 1994). Additionally, the uncontroverted testimony of the parties to the contract was that its conditions did not include a return of the $35,000.

Much evidence was received on the parties' interpretation of the contract, counterbalanced only by the speculation and suspicion of the Commission. The literal language of the agreement makes it clear that any brand of beer may be sold, the qualifier being that Kristen's must be among the brands. The parties to the agreement uniformly testified that there was no requirement or compulsion of exclusivity. This evidence should be given great weight in that the "interpretation of a written contract is a quest for the intention of the parties to it." *Jim Walter Homes, Inc. v. Schuenemann*, 668 SW 2d 324, 330 (Tex. 1984).

Another issue raised by the Commission's approach to the contract is whether sponsorship of an event somehow becomes a violation of the statute. Obviously it does not, as sponsorship of a charitable event is contemplated by the Commission's rules. *See* 16 TAC § 45.111.

In Count I, Kristen is puzzled by the citation of Code § 61.71, which on its face applies only to retailers; Kristen is a wholesaler. Code § 102.12 prohibits a wholesaler from giving money to induce customers (necessarily retailers) to buy its product or to refrain from buying the product of another. The evidence fails completely to show any money flowing from Kristen to its retail customers. Not only did Mr. Pulkkinen receive no money from Kristen, he did not feel pressured to limit his sales to the Miller brand.

In Count II, Kristen is again puzzled by the citation of Code § 61.71, pertaining to retailers. As to Code § 102.13, there was no evidence of a quota, and the Commission's other evidence as to exclusivity is supposition and speculation.

In Count III, Kristen is again puzzled by the reference to Code § 61.71. Code § 109.08, by its own terms, is not applicable to the evidence. The wholesaler (Miller or Kristen?) did not require the retailer (Mr. Pulkkinen) to purchase its products exclusively or try to keep other suppliers from selling their products to the retailer.

In Count IV, there is simply no evidence of any inducement extended by Kristen to Mr. Pulkkinen, the retailer. Aside from the sale of beer from the wholesaler to the retailer, there was no privity between the wholesaler and the retailer.

In light of the evidence in the record, Count V requires a leap of faith and then some. There is simply no direct evidence and no inferential evidence that Kristen in any way controlled the business or affairs of Mr. Pulkkinen.

VI. DISCUSSION

A. Allegation against Mr. Pulkkinen

The Commission failed to prove by a preponderance of the evidence that Mr. Pulkkinen allowed or consented to the use of his temporary license by another person. Instead, the evidence shows that nobody except Mr. Pulkkinen used his temporary license.

Mr. Pulkkinen was present at Chilifest 2001 all day Saturday, supervising the volunteers–none of whom were members of the Chilifest, Inc., board of directors– who manned the booth where beer tickets were sold, and the tent where those tickets were exchanged for beer. The volunteers, who had been trained by the Commission, were acting as Mr. Pulkkinen's employees that day.

Mr. Pulkkinen did not work in the beer tickets booth, but did serve beer in the beer tent. In this event attended by between 30,000 and 40,000 people, it is not surprising that Mr. Pulkkinen could not be both at the beer tickets booth and the tent where beer was served. Instead, as beer revenues were collected, Ms. Hooper and three or four other of Mr. Pulkkinen's trained volunteers took all beer proceeds to a central counting location in labelled buckets, where the money was counted by Marie Schoenman, another of Mr. Pulkkinen's volunteers, in a room separate from where other Chilifest 2001 proceeds were counted. Ms. Schoenman stored the money, amounting to some $178,000, on shelves in the separate room where she counted it.

Mr. Pulkkinen's temporary license was to last from 7 a.m. to 7 p.m. the Saturday of the event. Mr. Pulkkinen closed the beer tent at 6:45 p.m. but stayed to clean up. Only Mr. Pulkkinen and the volunteers–who were authorized as Mr. Pulkkinen's employees–used or displayed the permit that day. There is no evidence that any unauthorized person used or displayed Mr. Pulkkinen's temporary license at any time during the 12-hour period. The Commission presented no evidence to the contrary.

Although the beer proceeds were deposited in Chilifest's bank account, at no time did Mr. Pulkkinen relinquish control of those proceeds. The proceeds were deposited in the Chilifest, Inc., bank account as a practical matter. The $178,000 was in cash, it was Saturday night when banks are generally closed, and it was logical that Mr. Pulkkinen not leave Chilifest 2001 with $178,000 in cash on him. Even if he had decided to take the cash, he would have faced the practical problem that $178,000 did not fit in the saddle bags on his motorcycle. The safest place for the cash to be stored over the weekend was in a bank. The safest way for that much cash to be transported, amid 30,000 to 40,000 people, was by the armored car Chilifest, Inc., had called for that purpose.

At no time did Chilifest, Inc., assume that because the beer proceeds were in its bank account the control of the money had been relinquished to them. Mr. Gambrell's testimony was that if Mr. Pulkkinen had requested all $178,000, Chilifest, Inc. would have given it to him, because it was his money and not the property of Chilifest, Inc. Even the charitable donations made from Mr. Pulkkinen's beer proceeds were made by Chilifest, Inc., with his permission.

Mr. Pulkkinen's unwritten agreement with Chilifest, Inc., was that he would obtain the temporary license, and donate any beer proceeds above and beyond his expenses to Chilifest, Inc. That is what happened. On April 10, 2001, the Tuesday following Chilifest 2001, Mr. Pulkkinen paid Kristen $45,018.20 for the beer he had purchased. On that same date, Chilifest, Inc., distributed $45,018.20 of his money to him. On May 9, 2001, Mr. Pulkkinen remitted $11,147.46 in taxes to the Texas State Comptroller. The following day, Chilifest, Inc. gave Mr. Pulkkinen a check for $11,400.00, again from the $178,000 in beer proceeds.[16]

In a separate transaction on April 12, 2001, Chilifest, Inc., issued Mr. Pulkkinen a check for $28,020 to donate to a charity of his choice. The ALJ finds Mr. Pulkkinen's explanation credible that upon the realization of how much money had been raised through beer sales, he decided to donate some of the money to a charity other than Chilifest, Inc. The Commission's position that the $28,020 constitutes a "kickback" or "rent" from Chilifest, Inc., for the use of his temporary license makes no sense. The uncontroverted evidence is that Mr. Pulkkinen was entitled to keep all $178,000. That being the case, it is illogical to conclude that he would rent out his license for a mere $28,020.

The Commission alleges that the arrangement between Mr. Pulkkinen and Chilifest, Inc., amounts to subterfuge, in that the temporary license was obtained by Mr. Pulkkinen with the intent that it be used by Chilifest, Inc. The evidence does not support that conclusion. First of all, Mr. Pulkkinen worked closely with the Commission's agents in Bryan, meeting with them a half dozen times, to ensure that the law was properly followed. They knew he intended to use the temporary license at Chilifest 2001. There was nothing secretive or deceitful about his application for the temporary license or its use. Agent Donahoo attended Chilifest 2001 and observed Mr. Pulkkinen to be working in the beer tent and supervising the volunteers. Agent Donahoo did not see anyone associated with Chilifest, Inc., working in the beer tent or the beer tickets booth. Clearly it was Mr. Pulkkinen, and not Chilifest, Inc., who used the temporary license.

Mr. Pulkkinen did not consent to the use or display of his temporary license by an unauthorized person, and his permit should not be canceled.

B. Allegations against Kristen

The Commission bases its allegations against Kristen principally on the sponsorship agreement between Kristen and Chilifest, Inc., specifically the provision that Kristen will make a charitable donation of $35,000 to Chilifest, Inc., and the provision that "alcoholic beverages (including those distributed by KDC) will be sold at the 2001 Chilifest.

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[16] The discrepancy in the amounts was not addressed at the hearing, but is irrelevant anyway, because Mr. Pulkkinen was entitled to the entire $178,000.

If for any reason alcoholic beverages are not sold (which would specifically include licensing or approvals from governing bodies of any kind), then KDC will be reimbursed for all expenses actually incurred. . . ." (Commission Ex. 1).

The Commission's interpretation of the sponsorship agreement is that Kristen gave Chilifest, Inc., $35,000 in exchange for being the beer distributor at Chilifest 2001. Further, Chilifest, Inc., through receipt of the $35,000, indirectly influenced Mr. Pulkkinen to buy Miller products from Kristen.

But the uncontroverted testimony of the only parties to the sponsorship agreement–both Mr. Gambrell, as chairman of Chilifest, Inc., and Mr. Kristen, as president of Kristen–is that the $35,000 donation would be Chilifest, Inc.'s to keep regardless of whether Kristen products were chosen by the temporary license holder, or whether alcoholic beverages were allowed to be sold at Chilifest 2001. Therefore, receipt of the $35,000 donation was no motivation for Chilifest, Inc., to influence Mr. Pulkkinen to select Kristen's product.

The Commission took the sponsorship agreement provision that Kristen would be reimbursed for expenses incurred if alcoholic beverages were not sold at all to mean that Chilifest, Inc., would have to return the $35,000 to Kristen. But Mr. Gambrell testified that to him, the provision meant that if the temporary licensee had ordered Kristen products and Kristen had made preparations, only to have a last minute withdrawal of governmental approval for the sale of beer at Chilifest 2001, then Chilifest, Inc., would reimburse Kristen for actual expenses. Mr. Kristen testified that in an atmosphere of Texas A&M pressuring businesses not to participate in Chilifest 2001, it was prudent for Kristen to cover itself in the event arrangements to sell beer were canceled at the last minute by a governmental entity. He listed possible out-of-pocket expenses to include advertising and ordering extra beer for the event. In no event would the $35,000 donation have to be returned.

The Commission also read the sponsorship agreement to require the sale of Kristen products at Chilifest 2001, due to the language which states, "It is expressly agreed and understood that alcoholic beverages (including those distributed by KDC) will be sold at 2001 Chilifest. . . ." The ALJ would agree with the Commission, but for the testimony of Mr. Gambrell. He said he interpreted the provision to mean that alcoholic beverages would be sold at Chilifest 2001, and believes the parenthetical statement identifies Kristen products as an example of alcoholic beverages. He does not read the provision to mean that Kristen products would definitely be sold at Chilifest 2001. To the ALJ, this provision, especially when read together with provision No. 3 in the agreement, which says KDC will provide alcoholic beverages to be sold at Chilifest 2001, clearly indicates it was the intent of Chilifest, Inc., and Kristen that Kristen's products would be sold at the event. However, both Mr. Kristen and Mr. Gambrell signed the Miller Policy Statement and testified that they knew there was no guarantee that Kristen products would be sold at Chilifest 2001, that the temporary licensee would decide which products were sold. Therefore, the ALJ concludes there was no intent on the part of Kristen and/or Chilifest, Inc., to influence Mr. Pulkkenin to select Kristen products, and that the meaning of the provisions in the agreement are as stated by Mr. Kristen and Mr. Gambrell.

Count I

The Commission failed to prove Kristen violated TEX. ALCO. BEV. CODE ANN §§ 102.12. Although Kristen made a $35,000 donation to Chilifest, Inc., it neither gave nor permitted money to be given to Mr. Pulkkinen to induce him to use its products. The Commission argues that the $35,000 donation caused Mr. Gambrell to influence Mr. Pulkkinen to use Kristen's products, so Kristen indirectly influenced Mr. Pulkkinen. But the undisputed evidence is that regardless of which distributor's products were used, the $35,000 donation was Chilifest, Inc.'s to keep; the only statement Mr. Gambrell made to Mr. Pulkkinen regarding the use of Kristen products was that since Kristen was supporting Chilifest, Inc., it would be a courtesy to support Kristen; and Mr. Pulkkinen testified that he alone made the choice to use Kristen's products and was not influenced by Mr. Gambrell to do so.

In addition, the Commission failed to prove Kristen violated TEX. ALCO. BEV. CODE ANN. § 61.71, which applies only to retailers, because it did not prove Kristen is a retailer.

Count II and Count III

There is no evidence that Kristen directly or indirectly influenced Mr. Pulkkinen to use its product to the exclusion of others. Mr. Pulkkinen did not meet Mr. Kristen until the day of the event, and had no communication from Kristen prior to that date, so could not have been directly influenced by Kristen to use its products to the exclusion of others. Mr. Gambrell testified that he did not communicate to Mr. Pulkkinen that he must use Kristen products to the exclusion of others, so Mr. Pulkkinen was not indirectly influenced by Kristen, via Mr. Gambrell, to engage in the sale of its products to the total or partial exclusion of others.

The Commission's evidence on this point is totally circumstantial and not persuasive. Agent Donahoo testified that although Mr. Pulkkinen contacted Budweiser, and Budweiser offered its product to him at one dollar per case less than Kristen's price, Mr. Pulkkinen did not use Budweiser, and Agent Donahoo does not know why. He also testified that he knew of no direct evidence of Chilifest, Inc., attempting to influence Mr. Pulkkinen to sell Kristen products to the exclusion of other brands. Agent Donahoo relies on the statement to him by Mr. Pulkkinen that he intended to sell Budweiser, but then did not, as evidence that Mr. Pulkkinen was influenced to sell Kristen products to the exclusion of Budweiser.

The evidence reflects that Mr. Pulkkinen's decision to use only Kristen's products was his alone. Mr. Pulkkinen testified that he met with Budweiser's sales manager to see about using Budweiser products in addition to Kristen's products, but later determined there was not room at the event site for products from two distributors, and decided to use only Kristen. Even though there is evidence that Budweiser would have been a dollar per case cheaper than Miller, Mr. Pulkkinen opted to go with Kristen. He said he had "no reason" for doing so. The ALJ finds that unless it is proved that the reason for doing so was because of direct or indirect influence from Kristen, this element is not proven.

The ALJ finds the Commission's position on this allegation to be mere speculation, especially in light of the testimony of both Mr. Gambrell and Mr. Pulkkinen that no such influence was exerted. The Commission failed to prove Kristen violated TEX. ALCO. BEV. CODE ANN §§ 102.13 and 109.08.

The Commission failed to prove Kristen violated TEX. ALCO. BEV. CODE ANN. § 61.71, which applies only to retailers, because it did not prove Kristen is a retailer.

Count IV

The Commission failed to prove Kristen violated Tex. ALCO. BEV. CODE ANN. § 108.06 and 16 TAC § 45.110. There was no evidence at all that Kristen or Chilifest, Inc., offered an inducement of any kind to Mr. Pulkkinen to use Kristen's products. Because Kristen did not violate Section 108.06, the Commission may not cancel or suspend Kristen's permit under Section 61.74(a)(4).

Count V

The Commission failed to prove Kristen violated TEX. ALCO. BEV. CODE ANN. §§ 102.01(h). There is absolutely no evidence in the record that Kristen entered into an agreement with a manufacturer or retailer or another person to control the business or interests of Mr. Pulkkinen. The Commission alleges that Kristen's sponsorship agreement with Chilifest, Inc., requires Kristen products to be used at Chilifest 2001, which caused Mr. Gambrell to influence Mr. Pulkkenin to use Kristen products, for fear that Chilifest, Inc., would otherwise have to reimburse Kristen its out-of-pocket expenses. Because Kristen did not violate Section 102.01(h), the Commission may not cancel or suspend Kristen's permit under Section 61.74(a)(4).

VII. PROPOSED FINDINGS OF FACT

1. Michael Elmo Pulkkinen (Mr. Pulkkinen) is the holder of Wine and Beer Retailer's Permit No. BG-466474 issued by the Texas Alcoholic Beverage Commission (the Commission) for the premises known as Snook Watering Hole.

2. Snook Watering Hole is located at FM 2155, Southwest side, .3 miles south of the post office, in Snook, Burleson County, Texas.

3. On January 30, 2002, the Commission sent a notice of hearing to Mr. Pulkkinen.

4. The notice of hearing sent to Mr. Pulkkinen contained a statement of the time, place, 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 matters asserted.

5. Kristen Distributing Company (Kristen) holds a General Distributor's License, General Class B Wholesaler's Permit, Private Carrier's Permit and Importer's License.

6. Kristen is located at 1501 Independence Avenue, Bryan, Texas.

7. On January 30, 2002, the Commission sent a notice of hearing to Kristen.

8. The notice of hearing sent to Kristen contained a statement of the time, place, 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 matters asserted.

9. On March 5, 2002, the parties Joint Agreed Motion for Consolidation and Continuance was granted.

10. The hearing on the consolidated cases convened May 21, 2002, at the offices of the State Office of Administrative Hearings in Austin, Texas, and concluded May 22, 2002. Mr. Pulkkinen appeared and was represented by Don W. Walden, attorney. Kristen was represented by E. Eugene Palmer, attorney. Staff Attorney Dewey A. Brackin represented the Commission. The record was left open until August 9, 2002, to allow the parties to file post-hearing briefs.

11. On April 6-7, 2001, Chilifest Inc. held Chilifest 2001 in Burleson County, Texas.

12. Chilifest Inc. is a Texas non-profit corporation.

13. Upon the request of Chilifest Inc., Mr. Pulkkinen agreed to be the beer concessionaire at Chilifest 2001, with the provision that after his costs were covered, any remaining revenue would be donated to Chilifest, Inc., to give to charity.

14. Mr. Pulkkinen applied for a temporary beer or wine and beer license to serve as the beer retailer at Chilifest 2001. The Burleson County Sheriff and County Judge initialed the application.

15. The Commission issued Temporary License BH 179731 to Mr. Pulkkinen on April 3, 2001, authorizing him to sell beer from 7 a.m. to 7 p.m. April 7, 2001, at Chilifest 2001.

16. Mr. Pulkkinen was present at Chilifest 2001, working in the beer booth, which was manned by volunteers, who also manned the beer ticket booth where attendees' ages were checked and where attendees could buy tickets to exchange for beer at the beer booth.

17. The volunteers referenced in Finding of Fact No. 15 were Commission certified, and acting as Mr. Pulkkinen's employees at Chilifest 2001.

18. Mr. Pulkkinen, of his own volition, closed the beer booth at 6:45 p.m., before the main music event occurred.

19. Cash from the beer ticket booth was placed in buckets and labelled, then taken by Mr. Pulkkinen's volunteers to a fenced area to be counted separately from all other money brought in at Chilifest 2001.

20. The beer proceeds totaled approximately $178,000.

21. Mr. Pulkkinen did not want to carry the $178,000 in cash home with him on a Saturday night in saddle bags on his motorcycle. The cash would not fit in the motorcycle saddlebags.

22. Mr. Pulkkinen and Ryan Gambrell, chairman of Chilifest Inc., agreed that the beer proceeds would be taken in the armored car called for by Chilifest, Inc., to the bank, and deposited until the parties could "settle up."

23. Chilifest, Inc., and Mr. Pulkkinen each considered the $178,000 to be Mr. Pulkkinen's property at all times, and it was his property.

24. On April 10, 2001, the Tuesday morning following the Saturday Chilifest 2001 event, Chilifest, Inc., distributed $45, 018.20 to Mr. Pulkkinen to cover Kristen's invoice. On that same day, Mr. Pulkkinen paid Kristen $45,018.20.

25. On April 12, 2001, Chilifest, Inc., gave Mr. Pulkkinen $28,020 because he wanted to donate it to a charity outside Burleson County.

26. On May 9, 2001, Mr. Pulkkinen remitted $11,147.96 to the Texas State Comptroller to cover taxes on the beer proceeds. On May 10, 2001, Chilifest, Inc., gave Mr. Pulkkinen a check for $11,400.

27. The approximately $94,000 left over after the expenditures listed in Findings of Fact Nos. 23-25 was donated by Mr. Pulkkinen to Chilifest, Inc., to give to charity.

28. Mr. Pulkkinen had not obtained a receipt from Chilifest, Inc., for the $94,000 donation at the time of hearing because he has not yet filed his 2001 income taxes.

29. Mr. Pulkkinen bought beer for Chilifest 2001 from Kristen and from no other distributor.

30. The two major distributors serving Burleson County are Kristen and Jack Hilliard Distributing (Hilliard).

    a. Eight days before Chilifest 2001, Mr. Pulkkinen met with John Vollentine, Hilliard's sales manager, in Bryan, Texas, to inquire about buying Budweiser products for Chilifest 2001.

    b. Mr. Vollentine told Mr. Pulkkinen that Hilliard could provide products for Chilifest 2001, and asked Mr. Pulkkinen to call him if he wanted to place an order.

    c. Mr. Vollentine did not discuss prices with Mr. Pulkkinen, but later left a telephone message that Hilliard could provide beer for a dollar a case less than Kristen's price.

    d. Mr. Pulkkinen did not place an order with Mr. Vollentine.

31. Mr. Pulkkinen did not place orders with both Hilliard and Kristen in part because he surveyed the Chilifest 2001 site and determined there would not be room for products from two distributors.

32. Kristen had a sponsorship agreement with Chilifest, Inc., regarding Chilifest 2001. The agreement was signed January 30, 2001, by Mr. Gambrell, chairman of Chilifest Inc., and Mark Kristen, President of Kristen.

    a. Chilifest Inc. and Kristen agreed that Kristen would be the principal sponsor for Chilifest 2001 and Kristen would provide alcoholic beverages to be sold at Chilifest 2001.

    b. In consideration of Chilifest Inc.'s agreement to select Kristen as the principal sponsor at Chilifest 2001, Kristen would make a $35,000 charitable donation to Chilifest, Inc., among other provisions.

    c. The agreement states "It is expressly agreed and understood that alcoholic beverages (including those distributed by KDC) will be sold at the 2001 Chilifest. If for any reason alcoholic beverages are not sold (which would specifically include licensing or approvals from governing bodies of any kind), then KDC will be reimbursed for all expenses actually incurred, subject to the force majeure provision in paragraph 8."

33. Miller Brewing Company's Statement of Policy was communicated on an unspecified date to Mr. Gambrell and Mr. Kristen, as indicated by their signatures at the bottom of the policy statement. The policy clearly states that Miller's purchase of services, advertising, or sponsorship or promotional rights from an unlicensed organization may not result in, or be the condition of, a licensed retailer carrying Miller's or its wholesalers' products.

34. Kristen did not require Chilifest Inc. to make Kristen either the supplier of beer for the event in conjunction with other distributors' products or to the exclusion of other distributors' products.

35. Kristen did not require or influence Mr. Pulkkinen to choose Kristen as the distributor for Chilifest 2001.

36. Kristen did not require or influence Mr. Pulkkinen to exclude distributors other than Kristen from participation in Chilifest 2001.

37. Chilifest, Inc., did not require or influence Mr. Pulkkinen to choose Kristen as the distributor for Chilifest 2001.

38. Kristen did not require or influence Mr. Pulkkinen to exclude distributors other than Kristen from participation in Chilifest 2001.

VIII. PROPOSED CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. §§ 6.01 and 11.61.

2. The State Office of Administrative Hearings has jurisdiction in 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. § 2001 *et. seq.* and 1 TEX. ADMIN. CODE (TAC) § 155, *et. seq.*

3. Service of proper and timely notice of the hearing was provided to Kristen pursuant to the Administrative Procedure Act, TEX. GOV'T. CODE ANN. § 2001 and 1 TAC § 155.

4. Service of proper and timely notice of the hearing was provided to Mr. Pulkkinen pursuant to the Administrative Procedure Act, TEX. GOV'T. CODE ANN. § 2001 and 1 TAC § 155.

5. Based upon Findings of Fact Nos. 13-28, Mr. Pulkkinen did not allow or consent to an unauthorized person using or displaying the permit, so did not violate TEX. ALCO. BEV. CODE ANN §§ 11.05, 11.61 (b) (2), and 109.53.

6. Based upon Finding of Fact Nos. 29-38, Kristen did not give money or permit money to be given to induce agents, employees or representatives of customers or prospective customers to influence their employees or principals to purchase or contract to purchase brewery products from the distributor, or to refrain from buying those products from other persons, so did not violate TEX. ALCO. BEV. CODE ANN §§ 102.12 and 61.71.

7. Based upon Findings of Fact No. 29-38, Kristen did not directly or indirectly require a retailer to engage in the sale of brewery products to the total or partial exclusion of the products sold or offered for sale by a competitor or require the retailer to take or dispose of certain quota of the product, in violation of TEX. ALCO. BEV. CODE ANN §§ 102.13 and 61.71.

8. Based on Findings of Fact Nos. 29-38, Kristen, its agent, servant, or employee, did not directly or indirectly or through an affiliate require by agreement or otherwise that a retailer engage in the sale of beer to the exclusion in whole or in part of beer sold or offered for sale by other persons or prevent, deter, hinder, or restrict other persons from selling or offering for sale any such products to any retailer, so did not violate TEX. ALCO. BEV. CODE ANN. § 109.08 and 61.71.

9. Based on Findings of Fact Nos. 29-38, Kristen, its agent, servant, or employee, did not offer an inducement, either directly or indirectly, to a retail dealer of brewery products, so did not violate Tex. ALCO. BEV. CODE ANN. §§ 61.74(a)(4) and 108.06, and 16 TAC § 45.110.

10. Based on Findings of Fact Nos. 29-38, Kristen, its agent, servant, or employee, did not enter with a permittee of a different level or with a person, into a conspiracy or agreement to

control or manage, financially or administratively, directly or indirectly, in any form or degree, the business or interests of a permittee of a different level, so did not violate TEX. ALCO. BEV. CODE ANN. §§ 102.01(h) and 61.74.

11. Based on the above Findings of Fact and Conclusions of Law, Mr. Pulkkinen's permit should not be suspended or canceled, and no civil penalty should be imposed.

12. Based on the above Findings of Fact and Conclusions of Law, Kristen's permit should not be suspended or canceled, and no civil penalty should be imposed.

IX. RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law, the Administrative Law Judge recommends that Mr. Pulkkinen's permit is not to be suspended or canceled, nor should any civil penalty be imposed. The ALJ also recommends that Kristen's permit should not be suspended or canceled, and no civil penalty should be imposed.

SIGNED this 8th day of October, 2002.

Sharon Cloninger

SHARON CLONINGER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

DOCKET NO. 595739

IN RE MICHAEL ELMO PULKKINEN	§	BEFORE THE
D/B/A SNOOK WATERING HOLE	§	
PERMIT NO. BG-466474	§	
	§	TEXAS ALCOHOLIC
	§	
BURLESON COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-02-1453)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 1st day of August, 2003, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Sharon Cloninger. The hearing convened on May 21, 2002, and adjourned May 22, 2002. The record remained open until August 9, 2002, for the parties to submit post-hearing briefs. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on October 8, 2002. This 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.

The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision, Transcripts, 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, only as they apply to the above-referenced permit, 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 the allegations are hereby **DISMISSED with prejudice.**

This Order will become final and enforceable on <u>September 5, 2003,</u> unless a Motion for Rehearing is filed **before** that date.

By copy of this Order, service shall be made upon all parties by facsimile and by mail as indicated below.

WITNESS MY HAND AND SEAL OF OFFICE on this the 15th day of August, 2003.

On Behalf of the Administrator,

Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

DAB/yt

Michael Elmo Pulkkinen
RESPONDENT
P. O. Box 45
Somerville, Texas 77879
REGULAR MAIL

Don Walden
ATTORNEY FOR RESPONDENT
4408 Spicewood Springs Rd., Suite 304
Austin, Texas 78759
VIA FACSIMILE: (512) 795-8079

Administrative Law Judge
State Office of Administrative Hearings
Austin, Texas
VIA FACSIMILE: (512) 475-4994

Dewey A. Brackin
ATTORNEY FOR PETITIONER
Texas Alcoholic Beverage Commission
Legal Division

Waco District Office
Licensing Division