

DOCKET NO. 458-03-0812

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE STATE OFFICE
	§	
	§	
VS.	§	
	§	OF
FIESTA INDUSTRIES OF EL PASO, INC.	§	
D/B/A PRINCE MACHIAVELLI LOUNGE	§	
PERMIT NOS. MB-190625 & LB-190626	§	
EL PASO COUNTY, TEXAS	§	
(TABC CASE NO. 599710)	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The staff of the Texas Alcoholic Beverage Commission (hereinafter TABC) seeks to cancel the permits of Fiesta Industries of El Paso, Inc. d/b/a Prince Machiavelli Lounge (Respondent) based on three allegations of possession of a narcotic and three allegations of sale of a narcotic on the licensed premises in violation of the Texas Alcoholic Beverage Code §11.61(b)(7) and §104.01(9). The Administrative Law Judge recommends the permits be canceled.

I. PROCEDURAL HISTORY, NOTICE & JURISDICTION

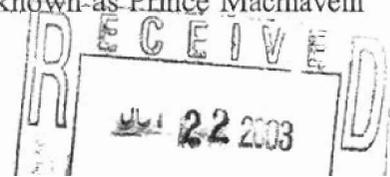
The hearing was convened on August 21, 2003 at 9:30 a.m. at the Office of Administrative Hearings, 401 East Franklin Avenue, Suite 580, El Paso, Texas. Staff attorney Dewey A. Brackin appeared on behalf of TABC. Respondent was represented by Mr. Sergio Gonzalez, Attorney at Law. The hearing concluded that same day. The record closed upon receipt of Respondent's Response to Petitioner's Brief on September 26, 2003. Present at the hearing was Mr. Ralph Hernandez, owner of Prince Machiavelli Lounge.

There are no contested issues of notice or jurisdiction in this proceeding. Therefore, those matters are addressed in the Findings of Fact and Conclusions of Law sections without further discussion.

II. DISCUSSION

A. Background.

Respondent currently operates under authority of a Mixed Beverage Permit and a Mixed Beverage late Hours Permit issued to Respondent for the premises known as Prince Machiavelli



Lounge, located at 533 Executive Boulevard, El Paso, El Paso County, Texas 79902. Prince Machiavelli Lounge operates a sexually oriented business as a topless bar. Liquor sales amount to on or about \$70,000.00 per month. It is the only topless bar on the West side of El Paso city.

Respondent's administrative history begins in February 1993 with citations for public lewdness, sexual contact and obscene acts on premises for which Respondent paid \$4,500 or 30 day suspension; Respondent paid \$5,700.00/38 day suspension for permitting public lewdness on licensed premises in December 1993; Respondent's third violation was cited in May 1995 for public lewdness, sexual contact and obscene acts for which it paid \$4,500.00/30 day suspension; In August 1995 respondent was cited for public lewdness again and paid \$2,250.00/15 days suspension; An Order was entered against Respondent in December 1996 for which he paid a civil penalty of \$75,000.00/60 days suspension for public lewdness, sexual contact and obscene acts violations; and finally, the last Order against Respondent was entered June 1999 for permitting lewd or vulgar entertainment or acts for which it paid \$80,000.00/90 days suspension in civil penalties. In April of the current year, the Respondent made an application for renewal of its permits which is currently pending.

#### **B. Evidence.**

TABC offered four exhibits: a certified copy of the permits at issue and administrative history (Exhibit #1); a certified copy of the renewal application of said permits (Exhibit #2); TDPS toxicology report L4E-38743 (Exhibit #3); TDPS toxicology report L4E-3874 (Exhibit #4); TDPS lab report L4E-38748 (Exhibit #5) and a sketch drawing of premises at issue (Exhibit #6). All six exhibits were entered into the record. Respondent did not offer any evidentiary documentation.

TABC also made available for testimony the following witnesses: Sgt. Glenn E. Shioji and Samaris "Samantha" Brooks. Mr. Gus de la Torre, evening manager of Prince Machiavelli Lounge, testified for the Respondent.

### **III. ARGUMENT**

#### **1.) TABC's case**

On Sept, 28, 2001 TABC participated in a joint undercover investigation with the El Paso Police Department. Undercover agents, posing as cocaine buyers, met with topless dancer "Samantha" at the bar, resulting in the sale and actual delivery of a narcotic at Prince Machiavelli Lounge, on three different dates, which are the subject of this cause.

Sgt. Glenn E. Shioji testified that he participated in a joint investigation with the El Paso Police Department resulting in the sale of cocaine on three different dates. He entered the club with partner Sgt. Sanchez at approximately 5:30 to 6:00 p.m. in plain clothes and engaged the dancers in conversation. The attention of the topless dancer, "Samantha," was obtained by tipping her while she was dancing on the main stage. Subsequent to the dance phase, the dancer approached the table and asked whether she could join the table. The Officer noticed that the dancer was approached by many of the other dancers while she was working the lounge. The Officer initiated and negotiated the sale of the cocaine. The dancer stated that she was the main connection for the cocaine in the club. Following the discussion, the Officers waited approximately two hours for the drug. The dancer left the lounge area and upon her return asked the officers for the money. She was given \$75.00 and she handed Officer Shioji a white tissue. Inside the tissue were three zip-lock bags with an eight ball symbol (1/8 of an ounce of cocaine approximately 3.5 grams) on each. The cocaine was transferred and delivered underneath the table. She was paid \$75.00, \$60 for the drug and \$15.00 as a tip. The date of the offense was Friday, September 28, 2001. The dancer, however, was not arrested until October 13<sup>th</sup>, after the date of the last sale transaction.

Officer Shioji further testified that he placed the drug in a plastic bag and secured it in the evidence locker that evening. No one else had access to the locker.

Sgt. Glenn E. Shioji's testimony reveals the modus operandi of the undercover buy on September 30, 2001 was basically the same as that of September 28, 2001. On this night, the same officers entered the club on or about 9:00 p.m. "Samantha" was observed working the club. The Officers made contact with her at approximately 10:00 p.m. and she agreed to sell them cocaine again. This time, they only waited forty minutes for the transaction and delivery of the narcotic. She was given \$45.00 and she handed Officer Shioji a white tissue. Inside the tissue were two zip-lock bags. This transaction involved the purchase of two "twenties." The cocaine was transferred and delivered underneath the table. She was paid \$45.00, \$40 for the drug and \$5.00 as a tip. The date of the second transaction was Sunday, September 30, 2001. Once again, the narcotic was placed in a bag and labeled accordingly and secured in the evidence locker that evening by Officer Shioji. The Officer further testified that the narcotic secured on the 28<sup>th</sup> and 30<sup>th</sup> of September was also photographed, time dated, weighed and field tested. The substance purchased tested positive for cocaine. The narcotic was thereafter submitted to the lab on Monday morning, October 1, 2001.

The same Officers returned to the club at approximately 6:00 p.m. on October 1, 2001 and proceeded to make contact with "Samantha" again. They asked for an eight ball. Officer Shioji's testified that "Samantha" indicated that she wasn't able to sell them cocaine because her source was upset with her because she had dealt with undercover officers. Two hours later she asked them if they were still interested in purchasing. This time, she asked for the money in advance. She handed Officer Shioji the narcotic about twenty minutes later. She was paid \$90.00 and the drug was delivered in the same manner under the table. Upon delivery Officer Shioji placed the drug in his right pocket, as he had done on the two prior transactions. The narcotic was secured in the evidence

locker and turned in to the lab the next morning. The same chain of custody procedures were followed. The 2.68 grams purchased field tested positive for cocaine.

TABC's rebuttal witness was Samanta Samaris Brooks known as "Samantha." She testified that she sold and delivered cocaine on the dates at issue. *Subsequent* to these transactions, she cooperated and entered into a formal agreement with the El Paso District Attorney in exchange for information. She testified she was not working with any other agency when the sale transactions occurred. She said that drugs were sold to patrons at the club on a daily basis. She said that at least six other dancers were dealing drugs. She sold drugs at the club for nine months. She testified with regard to an incident in which a patron was observed doing drugs in the lounge and was directed by the day manager "to go over there" pointing to the bathroom. She testified that she completed an employment application with pertinent legal information before beginning her employment with Respondent. She testified that permission to dance was given to her by Respondent and that no directives were given to dancers about doing and dealing drugs. She also said Respondent was not enforcing the lewd dancing rules.

## **2.) Respondent's case**

Respondent argues the following: (a) that the incidents alleged should be treated as one single incident because it involved the same person on all three sales of narcotics; (b) that the Respondent has taken due diligence to avoid these incidents from occurring but due to the small quantity of the drug involved it was impossible to prevent; (c) that the person involved in the sales of narcotics was an agent of the State; (d) and, that the dancer "Samantha" was not an employee of Respondent nor that a master-servant relationship existed between her and Respondent. In support of its position, Respondent called Gus de la Torre to testify.

Mr. De la Torre, night-shift general manager, testified that he has been employed by Respondent for 14 years. His testimony indicates that the club requires an employment application; that the dancers dance at the will of Respondent; that the dancers pay a fee to Respondent for dancing; that the exchange of money is a usual activity at the club because the dancers get paid for performing table dances. He further testified that the club has cameras, more bouncers and that he walks the floors and conducts random checks of the lockers. Testified that the dancers were 'allowed' to walk to the front to smoke a cigarette but have changed this practice since these incidents. Testified that the dancers are required to work eight hour shifts alternating topless dances. The club has about 25 dancers working the evening shift. He testified that he had no knowledge of any drug sales. He said the sale of liquor generates about \$70,000.00 per month. Testified as to how

it is not a problem to 'let go' of a dancer because there are many that apply to work there and further said that any illegal activity will result in firing of the dancer.

#### IV. STATUTORY AUTHORITY

The applicable legal statute in this cause is Section 11.61 (b) of the Alcoholic Beverage Code which allows for the suspension or cancellation of a renewal permit if the place or manner in which the permittee conducts his business warrants the cancellation of the permit based on the general welfare, health, morals and safety of the people and on the public sense of decency. Furthermore, the sale of narcotics has been defined as an offense against the general welfare.<sup>1</sup> And under TABC administrative rules, "narcotic" is defined as "any substance defined in the Texas Controlled Substance Act"<sup>2</sup> Cocaine is one of the controlled substances defined in the Texas Controlled Substance Act.<sup>3</sup>

With regard to the possession of a controlled substance, Section 104.01(9) of the Alcoholic Beverage Code applies and states that no person authorized to sell beer at retail, nor his agent, servant or *employee*, may engage in or permit conduct on the premises of the retailer which is lewd, immoral, or offensive to public decency, including *possession of a narcotic*.

Furthermore, "premises" is defined as the grounds and all buildings, vehicles and appurtenances pertaining to the grounds, including any adjacent premises if they are directly or indirectly under the control of the same person.<sup>4</sup>

#### V. ANALYSIS

While Respondent offered no evidence at the hearing to rebut the occurrence of the alleged violations, Respondent challenges the allegations with the following arguments. Respondent first argues that the incidents alleged should be treated as one single incident because it involved the same person on all three sales of narcotics. This argument is not persuasive and has no merit. The sale of narcotics occurred on three separate dates, September 28, September 30 and October 1, 2003; at different times; involving varied amounts of narcotics; involving different conversations; and at different locations within the club.

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<sup>1</sup> Rule 35.31(15) Offenses Against the General Welfare.

<sup>2</sup> 16 TEX.ADMIN.CODE § 35.41(b).

<sup>3</sup> HEALTH & SAFECODE ANN. §481.002 (Vernon 1992).

<sup>4</sup> TEX. ALCO. BEV. CODE §11.49(V.T.C.A. 2001).

Respondent's second argument is that it has taken due diligence to avoid these incidents from occurring but due to the small quantity of the drug involved it was impossible to prevent. This argument is also not persuasive. It is illogical to expect greater and/or bulkier amounts of the narcotic to be sold. The amount of the narcotic sold complies with the "user amount" that is typically dealt under these circumstances. Furthermore, the proper test of whether a permittee "permits" certain conduct is not his actual observation or knowledge of the violations but rather whether he knew *or should have known* of them.<sup>5</sup> There is no affirmative requirement of knowledge in the applicable statute. Furthermore, mere conclusory statements about spot checks and cameras are not sufficient to satisfy due diligence. There was no specific evidence presented with regard to actions that Respondent took to prevent the sale of narcotics in the establishment at issue. The employer must take some affirmative actions, that is, do more than simply state that the possession and/or sale of drugs is prohibited.

Respondent further alleges that the person involved in the sales of narcotics was an agent of the State. Samanta Samaris Brooks a/k/a "Samantha" testified that she reached a formal agreement with the District Attorney's Office in exchange for information executed *after* the incidents at issue and that she was not working for any other state agency at the time of the drug sales. No evidence to the contrary was presented.

And finally, Respondent argues that the dancer "Samantha" was not an employee of Respondent nor that a master-servant relationship existed between her and Respondent. The testimony presented at the hearing was to the effect that women who dance at the club must initially fill out application forms and receive permission from Respondent before they may perform. The dancers are then called to the stage by a disc jockey employed by the club. The dancers must perform one dance with the top on followed with one dance with the top off, as required by Respondent. Once they have completed their performance, Respondent requires the dancers to "work" the floor *i.e.*, table dances. Additionally, the testimony makes clear that the dancers are controlled and directed within their scope of employment by Respondent, and 'fired' by Respondent, as well.

The fact that Respondent requires the dancers to complete an application; decides when the dancers perform; controls the length and makeup of the shifts; controls their movement *i.e.*, does not allow them to go outside to smoke, are evidence of Respondent's control over the operations and employees of the club at issue. In this case, "Samantha" is a person who was in the service of Respondent under a contract of hire, whether express or implied, oral or written, where the employer

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<sup>5</sup>*Conway v. State*, 738 S.W.2d 692,693 (Tex.Cr.App. 1987).

had the power or right to control and direct the employee in the material details of how the work is to be performed.<sup>6</sup> "Samantha" was an employee of Prince Machiavelli's Lounge under Texas law.<sup>7</sup>

There was a brief argument made about the fact that "Samantha" left the lounge upon obtaining the narcotics to be sold, but there was no testimony to the effect that "she left the establishment" as alleged in Respondent's Response to Petitioner's Brief. The fact that she was out of sight of the Officers in the lounge, went outside to the parking lot, still falls within the definition of premises as defined as the grounds and all buildings, vehicles and appurtenances pertaining to the grounds, including any adjacent premises if they are directly or indirectly under the control of the same person.

## VI. CONCLUSION

On September 28 and 30, 2001 and October 1, 2001, Respondent's employee, Samanta Samaris Brooks a/k/a "Samantha," possessed and sold a narcotic on the licensed premises to undercover officers. In view of Respondent's enforcement history with regard to past violations of the Texas Alcoholic Beverage Code, the flagrant and repeated nature of the violations and the aggravating testimony defining the sale of narcotics in Respondent's establishment as commonplace, the permits at issue should be canceled without the opportunity to pay a civil penalty.

**THEREFORE**, having considered the evidence and arguments presented the undersigned ALJ recommends that Respondent's permits be canceled.

## VII. FINDINGS OF FACT

1. Fiesta Industries of El Paso, Inc. d/b/a Prince Machiavelli Lounge (Respondent), located in El Paso, Texas, holds permits no. MB-190625 and LB-190626 issued by the Texas Alcoholic Beverage Commission.

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<sup>6</sup>*Riverbend Country Club v. Patterson*, 399 S.W.2d 382.

<sup>7</sup>See *Casey v. Sanborn's Inc. of Texas*, 478 S.W.2d 234 (Tex.Civ.App. -Hou.[1st Dist.]1972, no writ), *Riverbend Country Club v. Patterson*, 399 S.W.2d 382, *Bruce v. State*, 743 S.W.2d 313 (Tex.App. -Hous[14th Dist.]1987, writ refused), and *Reich v. Circle Investments*, 998 F.2d 324 (5<sup>th</sup> Cir. 1993).

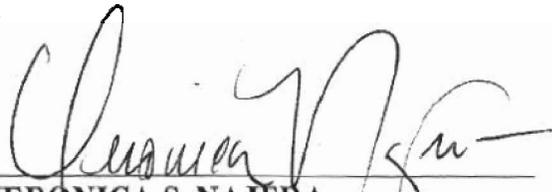
2. On November 12, 2002, TABC issued a notice of hearing asserting three allegations of possession of a narcotic and three allegations of sale of a narcotic on the licensed premises. The notice also stated the time and location of the hearing; the legal authority and jurisdiction under which the hearing was to be held; and the particular sections of the statutes and rules involved.
3. Respondent timely received the notice of hearing.
4. On September 28, 2001, an undercover operation was conducted by the Texas Alcoholic Beverage Commission and the El Paso Police Department at Prince Machiavelli Lounge, located at 533 Executive Boulevard, El Paso, El Paso County, Texas 79902.
5. On September 28, 2001, Respondent's employee Samanta Samaris Brooks a/k/a "Samantha" possessed a narcotic on the licensed premises.
6. On September 28, 2001, on the licensed premises, the undercover agent Sgt. Glenn E. Shioji purchased cocaine from Respondent's employee, dancer Samanta Samaris Brooks a/k/a "Samantha."
7. On September 30, 2001 an undercover operation was conducted by the Texas Alcoholic Beverage Commission and the El Paso Police Department at Prince Machiavelli Lounge, located at 533 Executive Boulevard, El Paso, El Paso County, Texas 79902.
8. On September 30, 2001, Respondent's employee Samanta Samaris Brooks a/k/a "Samantha" possessed a narcotic on the licensed premises.
9. On September 30, 2001, on the licensed premises, the undercover agent Sgt. Glenn E. Shioji purchased cocaine from Respondent's employee, dancer Samanta Samaris Brooks a/k/a "Samantha."
10. On October 1, 2001, an undercover operation was conducted by the Texas Alcoholic Beverage Commission and the El Paso Police Department at Prince Machiavelli Lounge, located at 533 Executive Boulevard, El Paso, El Paso County, Texas 79902.
11. On October 1, 2001, Respondent's employee Samanta Samaris Brooks a/k/a "Samantha" possessed a narcotic on the licensed premises.

12. On October 1, 2001, on the licensed premises, the undercover agent Sgt. Glenn E. Shioji purchased cocaine from Respondent's employee, dancer Samanta Samaris Brooks a/k/a "Samantha."
13. Respondent took no significant action to prevent its employee(s) from possessing and selling narcotics on the premises.
14. Based on the wide-spread and recurring nature of the sales, Respondent should have known narcotics were being sold on the premises.

### **VIII. CONCLUSIONS OF LAW**

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. (the Code) §§6.01 and 11.61.
2. The State Office of Administrative Hearings has jurisdiction over matters related to the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and conclusions of law, pursuant to TEX. GOV'T. CODE ANN. §§ 2003.021(b) and 2003.042(5).
3. Respondent received proper and timely notice of the hearing pursuant to TEX. GOV'T. CODE ANN. §§ 2001.051 and 2001.052.
4. Based on the above Findings of Fact and pursuant to § 11.61(b)(7) and §104.01(9) of the Code, Respondent's permits are subject cancellation.
5. Based on the above findings of fact and conclusions of law, Respondent's permits should be canceled.

**SIGNED** this 20<sup>th</sup> day of October, 2003.

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

**DOCKET NO. 599710**

IN RE FIESTA INDUSTRIES OF	§	BEFORE THE
EL PASO, INC.	§	
D/B/A PRINCE MACHIAVELLI	§	
LOUNGE	§	
PERMIT NOS. MB-190625 & LB-190626	§	<b>TEXAS ALCOHOLIC</b>
	§	
	§	
EL PASO COUNTY, TEXAS	§	
<i>(SOAH DOCKET NO. 458-03-0812)</i>	§	<b>BEVERAGE COMMISSION</b>

**ORDER**

**CAME ON FOR CONSIDERATION** this 12th day of January, 2004 , the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Veronica S. Najera. The hearing convened on August 21, 2003, and adjourned the same date. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on October 20, 2003. 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. As of this date exceptions to the Proposal have been filed by the Respondent.

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, 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.

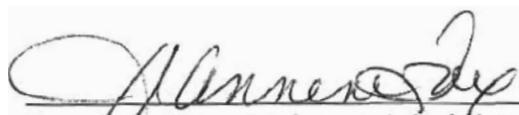
**IT IS THEREFORE ORDERED**, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that Mixed Beverage Permit No. MB-190625 and Mixed Beverage Late Hours Permit No. LB-190626 are hereby **CANCELLED FOR CAUSE**.

This Order will become final and enforceable on **February 2, 2004**, 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.

**SIGNED** on this the 12<sup>th</sup> day of January, 2004.

On Behalf of the Administrator,



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Jeannene Fox, Assistant Administrator  
Texas Alcoholic Beverage Commission

DAB/yt

The Honorable Veronica S. Najera  
Administrative Law Judge  
State Office of Administrative Hearings  
*VIA FACSIMILE (915) 834-5657*

Sergio Gonzalez  
**ATTORNEY FOR RESPONDENT**  
8517 Lockheed  
El Paso, Texas 79925  
*VIA FACSIMILE: (915) 779-3630*

Fiesta Industries of El Paso, Inc.  
d/b/a Prince Machiavelli Lounge  
**RESPONDENT**  
533 Executive Center Boulevard  
El Paso, Texas 79902  
*CERTIFIED MAIL NO. 7001 2510 0007 0098 8022*  
*RETURN RECEIPT REQUESTED*

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

El Paso District Office  
Licensing Division