

COPY

DOCKET NOS. 615846, 615866, 615867, 615879-615882

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE TEXAS
	§	
	§	
VS.	§	
	§	
FIESTA LIQUORS INC.	§	
	§	ALCOHOLIC
	§	
TEXAS	§	
(SOAH DOCKET NO. 458-06-2799)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this day, in the matter regarding Fiesta Liquors Inc., whose mailing address is P.O. Box 7481, Houston, Texas 77248-7481, the holder of the following permits, issued by the Texas Alcoholic Beverage Commission ("Commission") for locations doing business as Fiesta Beverage Mart:

P 202824 BF236885	FIESTA LIQUORS INC. D/B/A FIESTA BEVERAGE MART 8667 MAIN HOUSTON TX 77054 (Docket No. 615846)
P 209196 BF246469	FIESTA LIQUORS INC. D/B/A FIESTA BEVERAGE MART 20700 GULF FREEWAY WEBSTER TX 77598 4808 (Docket No. 615877)
P 210469 BF248283	FIESTA LIQUORS INC. D/B/A FIESTA BEVERAGE MART 8320 FM 1960W "A" HOUSTON TX 77070 (Docket No. 615879)
P 222074 BF264435	FIESTA LIQUORS INC. D/B/A FIESTA BEVERAGE MART #22 12311 MAIN HOUSTON TX 77035 (Docket No. 615880)

P 223587 BF266718	FIESTA LIQUORS INC. D/B/A FIESTA BEVERAGE MART #23 9415 MESA DRIVE HOUSTON TX 77028 (Docket No. 615881)
P 512729 BF512730	FIESTA LIQUORS INC. D/B/A FIESTA BEVERAGE MART 8702 BELLAIRE SUITE 300 HOUSTON TX 77036 (Docket No. 615882)
P 165957 BF187156	FIESTA LIQUORS INC. D/B/A FIESTA BEVERAGE MART 10401 JENSEN DR "A" HOUSTON TX 77093 (Docket No. 615866)
P 191596 BF220916	FIESTA LIQUORS INC. D/B/A FIESTA BEVERAGE MART 14487 BELLAIRE BLVD HOUSTON TX 77083 (Docket No. 615876)
P 165955 BF187159	FIESTA LIQUORS INC. D/B/A FIESTA BEVERAGE MART 800 S WAYSIDE DR. "A" HOUSTON TX 77023 (Docket No. 615867)
P 165953 BF187157	FIESTA LIQUORS INC. D/B/A FIESTA BEVERAGE MART 12201 E FREEWAY SPACE A HOUSTON TX 77015 (Docket No. 615868)
P 165705 BF186803	FIESTA LIQUORS INC. D/B/A FIESTA BEVERAGE MART 2323 WIRT RD "B" HOUSTON TX 77055 (Docket No. 615869)
P165706 BF186800	FIESTA LIQUORS INC. D/B/A FIESTA BEVERAGE MART 4711 AIRLINE DRIVE SPACE A HOUSTON TX 77022 (Docket No. 615870)

P 165708
BF186802
FIESTA LIQUORS INC.
D/B/A FIESTA BEVERAGE MART
5600 MYKAWA ROAD "A"
HOUSTON TX 77033
(Docket No. 615871)

P 165709
BF186801
FIESTA LIQUORS INC.
D/B/A FIESTA BEVERAGE MART
6200 BELLAIRE BLVD "B"
HOUSTON TX 77081
(Docket No. 615872)

P 165958
BF187161
FIESTA LIQUORS INC.
D/B/A FIESTA BEVERAGE MART
1611 SPENCER HWY "A"
SOUTH HOUSTON TX 77504
(Docket No. 615873)

P 165956
BF187158
FIESTA LIQUORS INC.
D/B/A FIESTA BEVERAGE MART
2807 N SHEPHERD DR "B"
HOUSTON TX 77008
(Docket No. 615874)

P 165954
BF187165
FIESTA LIQUORS INC.
D/B/A FIESTA BEVERAGE MART
5800 LYNN AVE "A"
HOUSTON TX 77020
(Docket No. 615875)

After proper notice was given, this case was heard by Administrative Law Judge John H. Beeler. The hearing convened on August 22, 2007 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 November 5, 2007. The Proposal For Decision was properly served on all parties who were given an opportunity to file Exceptions and Replies as part of the record herein. As of this date no exceptions have been filed.

The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision 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 any action against your permit(s) or license(s) be **DISMISSED**.

This Order will become final and enforceable on December 26, 2007, unless a Motion for Rehearing is filed **before** that date.

By copy of this Order, service shall be made upon all parties by in the manner indicated below.

SIGNED this November 29, 2007, at Austin, Texas.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

JLK\bc

Administrative Law Judge
State Office of Administrative Hearings
VIA FAX (512) 475-4994

E. Eugene Palmer
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VIA FAX (512) 454-6973

Michael J. Durrschmidt
ATTORNEY FOR RESPONDENT
700 Louisiana, 25th Floor
HOUSTON, TX 77002
VIA FAX (713) 223-9319

FIESTA LIQUORS INC.
RESPONDENT
d/b/a FIESTA BEVERAGE MART
PO BOX 7481
HOUSTON, TX 77248-7481

Judith L. Kennison
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division

Enforcement Division

SOAH DOCKET NO. 458-06-2799
TABC CASE NOS. 615846, 615866, 615867, 615879-615882

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION,	§	
PETITIONER	§	
V.	§	OF
	§	
FIESTA LIQUORS, INC.,	§	
RESPONDENT	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Texas Alcoholic Beverage Commission (TABC) Staff brought this enforcement action against Fiesta Liquors Inc. (Fiesta or Respondent), alleging that Respondent has a direct or indirect interest in a wine and beer retailer's, wine and beer off-premise, or mixed beverage permit while holding a package store permit or holding an interest in a package store permit in violation of TEX. ALCO. BEV. CODE ANN. § 22.06. Both parties filed motions for summary disposition and also filed a joint stipulation of factual matters. Staff requested that Respondent's permits be canceled. The Administrative Law Judge (ALJ) recommends no action be taken against Respondent's permits.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

Notice was not contested and is addressed only in the Findings of Fact and Conclusions of Law. TABC has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. §§ 5.43 and 11.61. The State Office of Administrative Hearings (SOAH) has jurisdiction over all matters relating to conducting a hearing in this proceeding, including the preparation of a Proposal for Decision with Findings of Fact and Conclusions of Law, under TEX. GOV'T CODE ANN. ch. 2001.

After the parties filed stipulations of fact, presented oral closing arguments, and filed briefs in support of their positions, the record closed on September 4, 2007.

II. DISCUSSION

A. **Applicable Law**

TEX. ALCO. BEV. CODE ANN § 22.06 (a) provides:

Except as otherwise provided in Section 102.05 of this code and in Subsection (b) of this section, no person who holds a package store permit or owns an interest in a package store may have a direct or indirect interest in any of the following: (1) a manufacturer's, retail dealer's on-premise, or general, branch, or local distributor's license; (2) a wine and beer retailer's, wine and beer retailer's off-premise, or mixed beverage permit; or (3) the business of any of the permits or licenses listed in Subdivisions (1) and (2) of this subsection.

B. **Relevant Stipulated Facts**

Respondent, as a corporate permittee, holds permits to operate package stores. Respondent is a wholly-owned subsidiary of Fiesta Mart. In October 2004, The Grocers Supply Co., Inc. (Grocers) acquired the stock and became the parent corporation of Fiesta Mart. Grocers exercises some control of the day-to-day operations of Fiesta Mart. Grocers is also a wholesale distributor of groceries and other non-alcoholic products to various grocery retailers which are generally independent grocery stores and convenience stores. Grocers is not a stockholder, manager, officer, agent, servant, or an employee of Respondent.

In its normal course of business, Grocers extends credit to various grocery and convenience stores, generally secured by security interests in accounts receivable, equipment, general intangibles, and inventory, including alcoholic beverages. Some of the borrowers sell beer and wine under "BQ" permits and have various other permits issued by TABC. The permits are not property and not subject to liens by Grocers.

C. Staff's Argument

Staff alleges that Respondent holds package store permits and has an indirect interest in wine and beer retailer's off premise permits (BQs). Because Grocers owns Fiesta Mart, which owns Respondent, Grocer's owns an interest in Respondent's package store permits. Grocers and Respondent are, in fact, one entity. Further, Grocers has an indirect interest in BQ permittee's businesses because it makes loans to the holders of those permits and part of the collateral for the loans is the beer and wine itself.

D. Respondent's Argument

Respondent argues that it has no interest in the BQ permits or the business of the BQ permittees. Although Respondent is owned by Fiesta Mart which is owned by Grocers, Grocers does exercise any control of the day to day operations of Respondent. There are no common managers, employees, or members of the two boards of directors. The three corporations are distinct entities.

Further, Respondent argues that Grocers does not have a direct or indirect interest in the permits of the BQ permittees. The permits are not property subject to liens and the security agreements do not grant Grocers any right to control the operation of any of the permittees' business activities. The loans made by Grocers are similar to ones made by banks, and TABC has never challenged the right of any bank to loan to both BQ and package store permittees.

III. ANALYSIS

After a review of the stipulated facts, arguments of counsel, and applicable law, the ALJ recommends no action be taken against the permits. Staff argues that Respondent has an indirect interest in the business of BQ permittees because Grocers loans money to those permittees. This proposition fails for two reasons.

First, although TEX. ALCO. BEV. CODE ANN § 22.06 (a) provides that no “person who holds a package store permit or owns an interest in a package store may have a direct or indirect interest in any of the following: . . . a wine and beer retailer's, wine and beer retailer's off-premise, or mixed beverage permit; or (3) the business of any of the permits or licenses . . . ,” the notice of violation in this matter did not allege an interest in the business of the permittee. The only allegation is an interest in the permit itself. In the jointly filed stipulations of fact, Petitioner agrees that the BQ permits are not property and that no lien could attach to them. In the event of a default on a loan, Grocers could claim an only an interest in property to which it could attach a lien, therefore, Grocers could not have an interest in the permit itself.

Second, although Staff asserts otherwise, Grocers and Respondent are separate entities. When seeking to disregard separate corporate entities, the burden is on the party making the assertion. *I & JC Corp. V. Helen of Troy L.P.*, 164 S.W. 3d 877 (Tex. App.--El Paso 2005). In support of its position, Staff cites *Texas Liquor Board v. Continental D. S. Co.*, 199 S.W. 2d 1009 (Tex. App.--Dallas 1947). In that case the court held that two corporations were, in fact, one entity. However, the court’s basis for the decision was that both corporations had the same managers. Not only did Staff not offer evidence of a similar arrangement between Grocers and Respondent, Staff stipulated otherwise. Further, the two corporations have no common employees or directors, and neither corporation has any day to day control over the business of the other. It is Grocers that makes the loans to BQ permittees, not Respondent, and nothing in the record indicates that they are one entity.

Based on the above, The ALJ recommends that no action be taken against the permits.

III. FINDINGS OF FACT

1. Fiesta Liquors Inc., (Respondent) as a corporate permittee, holds permits to operate package stores.
2. Grocers Inc., a corporation, owns Fiesta Mart.

3. Fiesta Mart, a corporation, owns Respondent.
4. Grocers is not a stockholder, manager, officer, agent, servant, or an employec of Respondent.
5. Grocers and Respondent have no common employees, managers, or directors.
6. Grocers has no control of the day to day operations of Respondent.
7. Respondent has no control of the day to day operation of Grocers.
8. Grocers extends credit to wine and beer retailer's off-premise permittees.
9. The wine and beer retailer's off-premise permits are not property and not subject to liens by Grocers.
10. On July 13, 2006, TABC Staff issued a Notice of Violation to Respondent. The Notice of contained a statement of legal authority and jurisdiction, a reference to the particular sections of the statutes and rules involved; and a statement of the matters asserted.
11. By agreement of the parties, the case was presented by written stipulations of fact, followed by oral closing arguments and written briefs.
12. The record in this matter closed on September 4, 2007.

IV. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter, pursuant to TEX. ALCO. BEV. CODE ANN. § 5.43 and ch. 61.
 2. SOAH has jurisdiction over all matters relating to conducting a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2001.
 3. Based upon the above Findings of Fact Respondent and grocers are separate entities. *I & JC Corp. V. Helen of Troy L.P.*, 164 S.W. 3d 877 (Tex. App.-El Paso 2005).
 4. Based upon the above Findings of Fact Respondent does not have a direct or indirect interest in wine and beer retailers' off-premise permits.
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5. Based upon the above Findings of Fact and Conclusions of Law, Respondent is not in violation of TEX. ALCO. BEV. CODE ANN § 22.06 (a).
6. Based upon the above Findings of Fact and Conclusions of Law, no action should be taken against Respondent's permits.

SIGNED November 5, 2007.



**JOHN H. BEELER
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

State Office of Administrative Hearings



Shelia Bailey Taylor
Chief Administrative Law Judge

November 5, 2007

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

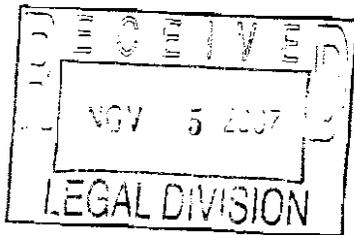
HAND DELIVERY

RE: Docket No. 458-06-2799; Texas Alcoholic Beverage Commission vs. Fiesta Liquors, Inc.

Dear Mr. Steen:

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

Exceptions and replies may be filed by any party in accordance with 1 TEX. ADMIN. CODE § 155.59(c), a SOAH rule which may be found at www.soah.state.tx.us.



Sincerely,

A handwritten signature in black ink that reads "John H. Beeler for".

John H. Beeler
Administrative Law Judge

JHB/sb
Enclosure

xc: Docket Clerk, State Office of Administrative Hearings- **VIA HAND DELIVERY**
Judith Kennison, Staff Attorney, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731-
VIA HAND DELIVERY
Lou Bright, Director of Legal Services, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731-
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