

12:01 a.m. on December 16, 2015 and shall remain suspended for EIGHT (8) CONSECUTIVE DAYS, UNLESS a civil penalty in the amount of \$2,400.00 is paid ON OR BEFORE December 8, 2015.

This Order will become final and enforceable on the 1st day of December 2015, unless a Motion for Rehearing is filed by the 30th day of November, 2015.

SIGNED this the 5th day of November, 2015, at Austin, Texas.



Sherry K-Cook, Executive Director
Texas Alcoholic Beverage Commission

CERTIFICATE OF SERVICE

I certify that the persons listed below were served with a copy of this Order in the manner indicated below on this the 5th day of November, 2015.



Martin Wilson, Assistant General Counsel
Texas Alcoholic Beverage Commission

Steven M. Rivas
ADMINISTRATIVE LAW JUDGE
State Office of Administrative Hearings
300 W. 15th Street, Suite 502
Austin, TX 78701
VIA FACSIMILE: (512) 322-2061

Tracy McCormick
Chase Offshore Corporation
d/b/a Wild West
RESPONDENT
12260 Nacogdoches Road, Suite 102
San Antonio, TX 78217
VIA FIRST CLASS MAIL, CMRRR # 70090960000121491261

Judith Kennison
ATTORNEY FOR PETITIONER
TABC Legal Division
VIA E-MAIL: Judith.kennison@tabc.texas.gov

TEXAS ALCOHOLIC BEVERAGE COMMISSION
CIVIL PENALTY REMITTANCE

DOCKET NUMBERS: 619875, 627273, 623808 REGISTER NUMBER:

NAME: Chase Offshore Corporation, Ltd.

TRADENAME: Wild West

ADDRESS: 12260 Nacogdoches Road, Suite 102, San Antonio Texas

DUE DATE: December 8, 2015

PERMITS OR LICENSES: MB797214, LB

AMOUNT OF PENALTY: \$2,400.00

Amount remitted \$ _____ Date remitted _____

You may pay a civil penalty rather than have your permits and licenses suspended if an amount for civil penalty is included on the attached order.

YOU HAVE THE OPTION TO PAY THE CIVIL PENALTY ONLY IF YOU PAY THE ENTIRE AMOUNT ON OR BEFORE THE DUE DATE. AFTER THAT DATE YOUR LICENSE OR PERMIT WILL BE SUSPENDED FOR THE TIME PERIOD STATED ON THE ORDER.

Mail this form with your payment to:

TEXAS ALCOHOLIC BEVERAGE COMMISSION
P.O. Box 13127
Austin, Texas 78711
Overnight Delivery Address: 5806 Mesa Dr., Austin, Texas 78731

You must pay by postal money order, certified check, or cashier's check. No personal or company check nor partial payment accepted. Your payment will be returned if anything is incorrect. You must pay the entire amount of the penalty assessed.

Attach this form and please make certain to include _____ payment.

Signature of Responsible Party

Street Address P.O. Box No.

City State Zip Code

Area Code/Telephone No.

Catherine Chamblee. Respondent appeared and was represented by attorney Tracy McCormick. The parties filed written closing arguments following the hearing, and the record closed on March 25, 2015.

II. LEGAL STANDARDS AND APPLICABLE LAW

Pursuant to Code § 11.61(b)(4), the Commission may suspend for not more than 60 days a permit if it is found that the permittee sold or delivered an alcoholic beverage to an intoxicated person. Intoxicated is defined as not having the normal use of mental or physical faculties by reason of the introduction of alcohol; or having an alcohol concentration of 0.08 or more pursuant to the Texas Penal Code § 49.01(2).

Pursuant to Code § 28.11, the Commission may suspend or cancel a mixed beverage permit if it finds that a breach of the peace has occurred on the licensed premises and that the breach of the peace was not beyond the control of the permittee and resulted from his improper supervision of persons permitted to be on the licensed premises.

Pursuant to Code § 11.61(b)(7), the Commission may suspend for not more than 60 days a permit if it is found the place or manner in which the permittee conducts his business warrants the cancellation or suspension of the permit based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency. Suspension is also warranted under Code § 11.61(b)(2) if the permittee violated a Commission rule, specifically 16 Texas Administrative Code § 45.103(c)(8), which states a permittee may not sell or serve more than two drinks to a single consumer at one time.

III. EVIDENCE

A. Sale to an Intoxicated Person

Staff alleged that on or about April 26, 2013, Miranda Hazard, a bartender employed by Respondent, served alcoholic beverages to a customer who was intoxicated. Some of the facts are undisputed. On the night in question, a customer named Jose Osornio visited Respondent's premises and consumed alcoholic beverages. Mr. Osornio was at that time employed by the Texas Department of Public Safety as a state trooper. In the early morning hours of April 27, 2013, Mr. Osornio left the premises and was stopped at approximately 2:10 a.m. by an officer with the Cedar Park Police Department (CPPD). Mr. Osornio was subsequently arrested for Driving While Intoxicated (DWI) and refused to provide a breath specimen upon request of the officer.

Staff offered into evidence Mr. Osornio's bar tab, which reflected 11 drinks purchased between 8:57 p.m. and 2:01 a.m.¹ The drinks on Mr. Osornio's bar tab consisted of 10 drinks made with Tito's Vodka and Red Bull, and one "Vegas" drink containing whiskey and Red Bull.²

Staff also offered testimony of CPPD officers Mike Pellegrino and Kristy Whitley. Officer Pellegrino testified he received a report that a vehicle was traveling the wrong way on FM 1437 Lago Vista and Jonestown. After receiving the report, Officer Pellegrino stopped Mr. Osornio's vehicle.³ Officer Pellegrino testified Mr. Osornio admitted he had just left Respondent's premises and had consumed alcoholic beverages while he was there. Officer Pellegrino observed signs of intoxication and called Officer Whitley for assistance.

¹ Staff Ex. 6. The time-stamp on the receipt indicated the tab was opened at 19:57 (7:57 p.m.) and closed at 01:01 (1:01 a.m.). However, the parties stipulated that the time-stamp was off by one hour and the tab was actually opened at 8:57 p.m. and closed at 2:01 a.m.

² *Id.* The bar tab totaled \$75.25.

³ It is unclear whether Mr. Osornio was operating the vehicle that was reportedly traveling the wrong way

Officer Whitley testified Mr. Osornio exhibited slurred speech, unsteady balance, and had an odor of alcohol coming from his breath. She arrested Mr. Orsonio following the administration of field sobriety tests.

Respondent's bartender Ms. Hazard testified she served Mr. Osornio on the night in question. Ms. Hazard stated she has worked in the service industry for 7 years and has been TABC-certified for 6 years. She claimed to have taken a TABC seller-certification class on three occasions and asserted she is trained to detect signs of intoxication. In addition, she explained that Respondent's management requires its servers to be seller-certified and requires all servers to identify patrons who may be intoxicated. Being belligerent, stumbling, and slurring words are signs of intoxication that Ms. Hazard is trained to observe. Ms. Hazard further testified she and all servers are required to attend weekly meetings where the topic of identifying intoxicated customers is always discussed. Respondent's management has a very strict attitude toward not serving intoxicated guests, and its staff strives to limit the number of patrons who become intoxicated while on the premises, according to Ms. Hazard. She further contended Respondent's management has a serious interest in curbing the intoxication levels of its patrons.

Ms. Hazard recalled serving Mr. Osornio on the night in question because he was a regular customer whom she had served on previous occasions. She remembered that Mr. Osornio opened the tab for himself and two other friends. As for his demeanor, Ms. Hazard recalled, he was aware of his surroundings and acted in a responsible manner. She claimed she had a very good vantage point where she could observe him if he became intoxicated, but nothing seemed out of the ordinary. She asserted she would have notified management if Mr. Osornio or any customer was intoxicated and needed to be cut off. But, she recollected, Mr. Osornio seemed perfectly fine the entire night.

B. Breach of the Peace**1. The Parking Lot Fight**

On or about August 17, 2013, a fight broke out in the parking lot of Respondent's premises that involved three customers and some of Respondent's employees. John King, a TABC police officer, testified he arrived on the premises on the night in question dressed in plain clothes in order to conduct an undercover operation. However, Officer King testified that when he arrived, he observed a physical altercation in the parking lot of the premises and requested uniformed TABC agents to intervene. Officer King remained undercover and observed the altercation, but did not make contact with any witnesses or participants and eventually called off the undercover assignment.

Officer King testified he first observed three customers dressed in western attire arguing with Respondent's door staff at the front door of the premises. He believed door staff had recently asked the patrons to leave the premises. Officer King stated he observed bar staff members follow the customers out about "halfway" through the parking lot at which time punches were thrown and it became an "absolute free-for-all." Once the fight erupted, Officer King testified, he contacted Williamson County Sheriff's Department and officers from the CPPD to respond.

Officer King recalled seeing "four or five" bar staff members involved in the altercation against three customers, whom he characterized as being "small and youngish." There were fewer bar staff members involved at the beginning of the altercation, but more joined in when it became physical, according to Officer King. He stated he was able to distinguish the bar staff members from the customers because bar staff were wearing blazer-type sport coats. One member of Respondent's bar staff was a large man, Officer King remembered, who removed his sport coat and started fighting with the customers.

By following the patrons out into the parking lot, Officer King asserted, Respondent's employees escalated the situation, which could have been resolved at the door. There was no reason to follow the customers into the parking lot, according to Officer King, because they were not destroying property or disturbing other guests on their way out.

Respondent's assistant manager, Samuel "Keith" Fernandez, testified that, on the night in question, he was employed as one of Respondent's door staff and recalled the incident. Mr. Fernandez stated that when the three customers arrived on the premises, they exhibited signs of intoxication by having slurred speech and unsteady balance. In addition, one of the three was a minor and could not enter the bar for that reason alone, according to Mr. Fernandez. When the three patrons were refused entry, Mr. Fernandez testified, they became argumentative and combative.

When the customers initially refused to leave, another door man, Sean Cunningham, assisted Mr. Fernandez in escorting them off the premises. As the customers were being led away in the parking lot, Mr. Fernandez recalled hearing Mr. Cunningham say "don't touch me" to one of the three customers. At that moment, Mr. Fernandez saw the customer hit Mr. Cunningham in the face, after which Mr. Cunningham "instinctively" returned the punch. Mr. Fernandez said he then placed the customer in a bear hug and asked Mr. Cunningham to contact security inside the bar.

Mr. Fernandez contended he released the customer from the bear hug and then removed his sport coat and prepared to defend himself from the other two customers who were coming at him. The customer who was released from the bear hug ran away, according to Mr. Fernandez, as the other two customers started punching him. Mr. Fernandez claimed he merely defended himself from the punches thrown by the two other customers, but did not throw a punch himself. He further asserted that no other staff member threw a punch other than Mr. Cunningham—whose punch was instinctive rather than intentional.

2. The Fight Inside the Bar

Also on August 17, 2013, another physical altercation occurred inside the bar as officers from several agencies responded to the premises for the fight taking place in the parking lot. One of Respondent's regular customers, Shayne Campbell, testified that he witnessed the events inside the bar on the night in question. Mr. Campbell testified that another customer at the bar, Timothy Ochoa, asked Mr. Campbell's girlfriend to dance while Mr. Campbell was in another part of the bar. Mr. Campbell's girlfriend told him about Mr. Ochoa's request and pointed out Mr. Ochoa, who at that time, was talking to some of Mr. Campbell's friends. When Mr. Campbell walked over to where his friends and Mr. Ochoa were talking, another person, Max McCoy (a relative of one of Mr. Campbell's friends), struck Mr. Ochoa in the head and knocked him unconscious. Mr. Ochoa's wife then struck Mr. McCoy with a beer bottle, and Mr. McCoy attempted to flee the premises, according to Mr. Campbell.

TABC Agent Michael Deans testified he responded to Officer King's request for assistance for the fight in the parking lot and when he arrived, he began looking for the customer who ran from the fight with Respondent's employees. At that time, Agent Deans recalled, he observed a man wearing a ripped shirt running toward him. Agent Deans stated that the man was later identified as Mr. McCoy, who had just fled the premises after the fight inside the bar. Agent Deans testified that he detained Mr. McCoy and eventually arrested him on unrelated warrants.

Likewise, CPPD officers Mathew Decker and Bryce Martin testified they initially arrived on scene to investigate the fight in the parking lot but were immediately notified about the altercation that had occurred inside the bar. Officer Decker stated that he called EMS to treat Mr. Ochoa's injuries. Officer Martin testified he obtained several witness statements but was unable to get a statement from Mr. Ochoa.

C. Sale of More Than Two Drinks to a Single Customer

Staff alleged that on July 16, 2014, Respondent's bartender, Briette Moser, sold and served more than two drinks at one time to an undercover TABC agent posing as a customer. TABC Agent Deans testified that he and TABC Agent Matt Zavaglia entered the premises on the night in question for the purpose of performing an undercover sting operation. Agent Deans testified that he sat at a table upstairs where he was out of view of Ms. Moser, who was bartending downstairs. After Agent Deans situated himself upstairs, he testified, Agent Zavaglia went downstairs to order drinks from Ms. Moser.

Agent Deans testified Ms. Moser accepted cash payment and provided change to Agent Zavaglia and served him five drinks. She advised Agent Zavaglia that she could only allow him to take two drinks at one time, according to Agent Deans. Agent Zavaglia took the first two drinks to Agent Deans and immediately returned to the bar to retrieve the other three drinks, according to Agent Deans. He further stated that he photographed the five drinks and then reported the violation to TABC open agents.

D. Respondent's Position

Respondent's manager, Joseph Collins, testified he has been in the service industry for 24 years and is familiar with Respondent's policies and procedures. He asserted that Respondent is a no-nonsense company when it comes to serving intoxicated persons, and that it is never allowed. Mr. Collins stated that at weekly staff meetings he discusses with Respondent's employees how to detect intoxicated customers. The manner in which Respondent's staff treats intoxicated persons is to first talk to them outside and away from the bar to determine if they need a ride home. Mr. Collins stated if a customer is intoxicated, it is Respondent's policy to arrange a ride home for the customer at Respondent's expense. Mr. Collins testified that he only involves law enforcement if the intoxicated person refuses assistance.

As for preventing physical altercations at the bar, Mr. Collins stated it is difficult to prevent such an occurrence if a person intends to hit someone without warning, such as the incident that occurred on August 17, 2013. Although physical altercations are rare, Mr. Collins testified, Respondent's policy is to separate the combatants and issue a criminal trespass warning to each person, if necessary. The only time an employee is allowed to make physical contact with a patron at the bar is when patrons have to be separated during a physical altercation, said Mr. Collins. Moreover, he has stated he has never had an issue with Mr. Cunningham or Mr. Fernandez, the employees who were involved in the parking lot fight.

Mr. Collins further testified that when he asked Ms. Moser if she had served Agent Zavaglia five drinks on July 16, 2014, Ms. Moser stated she did not remember the incident. Regardless, Mr. Collins asserted that he impresses upon his staff in weekly meetings that the law allows a customer to be served only two drinks at a time, regardless of whether or not a customer requests more than two.

IV. ANALYSIS

Staff failed to present sufficient evidence that on or about April 26, 2013, Respondent's employee sold or delivered an alcoholic beverage to an intoxicated person. Under Texas Penal Code § 49.01(2), being intoxicated is defined as not having the normal use of mental or physical faculties by reason of the introduction of alcohol or having an alcohol concentration of 0.08 or more. Because Mr. Osornio did not provide a breath or blood specimen, his blood alcohol concentration level is unknown. Therefore, the ALJ must determine whether or not his actions while on Respondent's premises demonstrated he did not have the normal use of his mental or physical faculties. The evidence indicates that when Ms. Hazard served Mr. Osornio an alcoholic beverage, he was not intoxicated.

Mr. Osornio's tab receipt reflects that he and two other patrons ordered 11 drinks 5 hour time span between approximately 9:00 p.m. and 2:00 a.m. while on Respondent. Dividing 11 drinks by three patrons over 5 hours results in less than one drink per hour, per person. There is no evidence that Mr. Osornio purchased or consumed more drinks than what was reflected on his tab. Nor was there any evidence that Mr. Osornio exhibited any signs of intoxication such as slurred speech or unsteady balance to anyone while on Respondent's premises. On the contrary, Ms. Hazard testified that Mr. Osornio seemed aware of his surroundings and acted perfectly fine while on the premises.

Ms. Hazard also presented credible testimony that she has received proper training in detecting intoxicated customers, and that had she believed Mr. Osornio was intoxicated on the night in question, she would discontinued serving him alcoholic beverages. Moreover, although Mr. Osornio was eventually arrested for DWI, this fact alone does not sufficiently preponderance of the evidence that he was intoxicated, or appeared intoxicated, when Ms. served him alcoholic beverages on Respondent's premises. As such, the ALJ finds that did not prove a violation occurred, no action should be taken against Respondent's ; pertains to the allegation that Ms. Hazard served an alcoholic beverage to an intoxicated

However, the ALJ finds Staff presented sufficient evidence to prove the other two violations alleged against Respondent. Pursuant to Code § 28.11, the Commission may suspend a mixed beverage permit if it finds that a breach of the peace occurred on the licensed premises and that the breach of the peace was not beyond the control of the permittee. Remarkably, on August 17, 2013, there were two separate physical altercations that occurred at the same time TABC agents were preparing to perform a sting operation at Respondent's premises. The ALJ finds that the occurred inside the bar was, for the most part, unforeseen and beyond the control of F staff. However, the fight that occurred in Respondent's parking lot was a breach of it was not beyond Respondent's control. It started when three customers engaged altercation with Respondent's door staff after being turned away at the door. Soon, i

physical altercation after several of Respondent's employees followed the customers into the parking lot.

Mr. Fernandez testified that he and Mr. Cunningham merely attempted to escort the customers off the premises. But TABC Officer King testified that he witnessed several of Respondent's employees follow the customers out into the parking where the altercation turned into a "free-for-all." The breach of peace was not beyond the control of Respondent's employees; to the contrary, it was caused by Respondent's employees. The ALJ finds Officer King's testimony credible, in that Respondent's staff escalated the altercation (from verbal to physical) by unnecessarily following the customers into the parking lot. As Officer King noted, the customers were not damaging property or harassing other customers on their way out, and the situation could have ended at the door but for the actions of Respondent's staff.

The ALJ further finds the actions of Mr. Fernandez contributed to the breach of peace. Officer King specifically recalled seeing a large staff member (Mr. Fernandez) remove his sport coat and start fighting with the customers. Mr. Fernandez admitted he removed his sport coat, but claimed he did so only to defend himself. He further stated he did not throw any punches but rather sustained several hits from the customers without retaliating. Mr. Fernandez's explanation of the events is not credible. If he only intended to defend himself, it is unlikely he would have removed his sport coat, because removing an item of clothing such as a shirt or sport coat is typically done by an individual who is preparing to engage in a physical altercation rather than retreat or attempt to diffuse a hostile situation. His version of events also does not coincide with Officer King's testimony that a "free-for-all" was occurring in the parking lot. Based on Officer King's observations, it is more likely that Mr. Fernandez was participating in the altercation and not merely on the receiving end of punches being thrown.

The ALJ also finds Staff proved a violation of the Commission's rule at 15 O.A.C. 45.103(c)(8), which states a permittee may not sell or serve more than two drinks to a single consumer at one time. Agent Deans offered credible and uncontroverted testimony

that on July 16, 2014, he and Agent Zavaglia conducted a sting operation where Agent Zavaglia purchased five drinks at once from Ms. Moser, a bartender working for Respondent. Mr. Collins candidly admitted that Ms. Moser did not recall the incident. Mr. Collins further asserted that he impressed to his staff members that the law allows only two drinks be served to a customer at one time. Regardless, the ALJ found the testimony of Agent Deans persuasive and finds it more likely than not the alleged violation occurred.

V. RECOMMENDATION

The ALJ finds that on August 17, 2013, a breach of the peace occurred on Respondent's premises that was not beyond the control of Respondent. For this violation, Staff sought a 3-5 day suspension of Respondent's permit or, alternatively, a \$300 per day civil penalty pursuant to the Commission's Standard Penalty Chart.⁴

The ALJ also finds that on July 16, 2014, Respondent's employee served more than two drinks to a single consumer at one time. Staff considered this to be a place and manner violation pursuant to Code § 11.61(b)(7), and sought a 5-7 day suspension of Respondent's permit or, alternatively, a \$300 per day civil penalty as outlined in the Standard Penalty Chart.⁵

For the aforementioned reasons, the ALJ recommends Respondent's permit be suspended 3 days for the breach of peace violation, and 5 days for the violation of serving more than two drinks to a single consumer at one time. Because each suspension shall run for consecutive days,⁶ the ALJ recommends Respondent's permit be suspended for a total of 8 days, or in lieu of suspension, Respondent may pay a civil penalty of \$300 per day totaling \$2,400.⁷

⁴ 16 Tex. Admin. Code § 34.2

⁵ See *Id.*

⁶ 16 Tex. Admin. Code § 34.1(f).

⁷ See *Id.* The Commission may, in its discretion, allow Respondent to divide an imposed sanction between civil penalty and suspension.

VI. FINDINGS OF FACT

1. Chase Offshore Corporation, LTD d/b/a Wild West (Respondent) holds Permit No. MB797214, LB issued by the Texas Alcoholic Beverage Commission (TABC or Commission) for the premises located at 401 East Whitestone Blvd, Cedar Park, Texas 78613.
2. On October 27, 2014, TABC issued proper and timely notice of the hearing to Respondent.
3. The notice of hearing informed the parties of the date, time, and location of the hearing; the matters to be considered; the legal authority under which the hearing would be held; and the statutory provisions applicable to the matters to be considered.
4. On March 2, 2015, a hearing convened at the State Office of Administrative Hearings in Austin, Texas, before Administrative Law Judge Steven M. Rivas. The Commission was represented by staff attorney Catherine Chamblee. Respondent appeared and was represented by attorney Tracy McCormick. The parties filed written closing arguments following the hearing, and the record closed on March 25, 2015.
5. On or about April 26, 2013, Respondent's bartender Miranda Hazard served alcoholic beverages to a customer, Jose Osornio.
6. Mr. Osornio opened a bar tab at 8:57 p.m. and closed it at 2:01 a.m.
7. Mr. Osornio and two other guests ordered 11 alcoholic beverages on the tab.
8. While on Respondent's premises, Mr. Osornio was aware of his surroundings and acted in a responsible manner.
9. Ms. Hazard is trained to observe signs of intoxication such as slurred speech and unsteady balance.
10. Mr. Osornio did not exhibit any signs of intoxication to Ms. Hazard or to any other staff member while on Respondent's premises.
11. After Mr. Osornio left Respondent's premises, his vehicle was stopped by officers from the Cedar Park Police Department (CPPD), and he was later arrested for Driving While Intoxicated.
12. On August 17, 2013 TABC Police Officer John King arrived at Respondent's premises in plain clothes and planned to conduct an undercover sting operation.

22. At the same time that the parking lot fight was happening, another physical altercation occurred inside Respondent's premises among other patrons that was unforeseen and beyond the control of Respondent's employees.
23. On July 16, 2014, Respondent's bartender Bricette Moser sold and served more than two drinks at once to an undercover TABC agent posing as a customer.
24. TABC Agent Michael Deans and TABC Agent Matt Zavaglia entered the premises on the night in question for the purpose of performing an undercover sting operation.
25. Agent Deans sat at a table upstairs where he was out of view of Ms. Moser, who was bartending downstairs.
26. After Agent Deans situated himself upstairs, Agent Zavaglia went downstairs to order drinks from Ms. Moser.