

DOCKET NO. 458-03-2619

TEXAS ALCOHOLIC BEVERAGE COMMISSION,	§	BEFORE THE STATE OFFICE
Petitioner	§	
	§	
v.	§	
	§	OF
ALKEEZ ON SIXTH LLC, et al.	§	
d/b/a ALKEEZ ON SIXTH	§	
Permits MB-522653, LB-522654, PE-522655	§	
Respondent	§	
(TABC Case No. 603696)	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (Staff) brings this action to cancel three permits held by Alkeez on Sixth LLC d/b/a Alkeez on Sixth (Alkeez), on the basis of alleged violations of the Texas Alcoholic Beverage Code (the Code). Alkeez denies the Staff's allegations. In this Proposal for Decision, the Administrative Law Judge (ALJ) concludes that the Staff has failed to establish by a preponderance of the evidence that Alkeez violated the Code or otherwise engaged in conduct for which its permits may be canceled. Accordingly, the ALJ recommends that no adverse action be taken against Alkeez.

I. Procedural History

This action was instituted on March 13, 2003, when the Staff provided notice of its intent to cancel the permits held by Alkeez. When Alkeez requested a hearing on the matter, the case was referred to the State Office of Administrative Hearings (SOAH). The hearing on the merits was conducted on May 21-22, 2003, with ALJ Craig R. Bennett presiding. The Staff appeared and was represented by staff attorney Dewey Brackin. Alkeez appeared and was represented by attorneys Willie Schmerler and David Sander. The record closed on June 16, 2003, after the parties filed their final written arguments. There are no contested issues of notice or jurisdiction, and these matters are set out in the Findings of Fact and Conclusions of Law without further discussion here.

II. Background Facts

The Staff alleges that Alkeez (1) violated Section 11.61(b)(13) of the Code because its owner was intoxicated on the licensed premises; (2) violated Sections 11.61(b)(2) and 105.06 of the Code because it permitted its employees or others to consume alcoholic beverages on the licensed premises during prohibited hours; and (3) violated Section 11.61(b)(7) of the Code because one or more of its employees assaulted and/or unlawfully restrained a peace officer. The Staff's allegations are based on two separate and discrete incidents, one occurring on December 29, 2002, and the other occurring on January 26, 2003. The undisputed facts surrounding these incidents are set out below, while disputed allegations are addressed in the discussion section.

A. Incident of December 29, 2002

Alkeez received its permits from the Commission in 2002 and began operating as a bar in October 2002. On December 29, 2002, peace officer Robert McGowen observed a group of people holding cups and standing in a window on the second floor of the Alkeez premises.¹ Because it was approximately 3:00 a.m. at the time, and Sgt. McGowen knew that alcohol could not be served after 2:15 a.m., he decided to investigate. He got two other officers—Officer Kacey Gabriel and Detective Kevin Leverenz—to join him, and all three officers approached Alkeez and knocked on the front door. An employee unlocked the door to let the officers into the bar. The officers then went upstairs to investigate what was occurring in the second floor room in issue.

Upon arriving on the second floor, the officers found seven to ten people standing or sitting in the room in question. At the time, the main lights were turned off and the officers used their flashlights to illuminate the room.² When the officers arrived, some of the people were holding plastic cups. Sgt. McGowen asked who was in charge, and Chris Keating, one of the owners of the bar, walked up and spoke with him. Initially, Mr. Keating was holding both a plastic cup and a dark bottle. He set those down to speak with Sgt. McGowen. After speaking with Mr. Keating for a few moments, Sgt. McGowen asked him to go downstairs for a more detailed discussion.

While Mr. Keating and Sgt. McGowen were speaking, Detective Leverenz and Officer Gabriel detained and questioned the other persons in the room, obtaining identification from each person. After speaking with Mr. Keating downstairs for a few minutes, Sgt. McGowen arrested him for public intoxication on a licensed premises. Concluding that none of the other persons present were intoxicated, all of the officers left the bar.

B. Incident of January 26, 2003

The next incident occurred on January 26, 2003. On that date, peace officer Jennifer Stephenson was on duty on Sixth Street in Austin, Texas, when a large fight involving 15-20 people broke out in the street near the Alkeez premises.³ Corporal Stephenson approached two people who appeared to be fighting and attempted to intervene. One of the people—who was later identified as James Etter, an employee of Alkeez—turned and struck Corporal Stephenson. After being struck, Corporal Stephenson maintained her balance and attempted to arrest Mr. Etter. During Corporal Stephenson's efforts to arrest Mr. Etter, both of them ended up moving toward and into the Alkeez

¹ Robert McGowen is a sergeant with the Austin Police Department (APD). He has been employed with APD for 21 years and is the supervisor of the Downtown Street Response Unit, a unit of nine officers tasked with monitoring street level narcotic sales and alcohol violations for downtown Austin. Tr. Vol. 1, p. 27, line 5 through p. 28, line 7. (All future references to the transcript will be in the format of page:line).

² Although the main lights were turned off, the testimony indicates that light from a computer monitor in the room and from outside lights illuminated the room sufficiently to allow movement.

³ Jennifer Stephenson is a corporal with APD. She has been employed with APD for more than eight years and is assigned to the downtown area command. Tr. Vol. 1, 140:6-25.

premises. After overcoming his initial efforts to avoid arrest, and with the assistance of other officers, Corporal Stephenson arrested Mr. Etter for unlawful restraint and assault on a peace officer.

Corporal Stephenson also directed other officers to arrest Luke Talbot, another employee of Alkeez, for unlawful restraint in interfering with the arrest of Mr. Etter. No other persons were arrested at that time, although Corporal Stephenson later mistakenly identified another employee, Christopher Muller, as being involved in the incident and interfering with her arrest of Mr. Etter.⁴ Based on Corporal Stephenson's identification, Mr. Muller was later arrested. Ultimately, the charges against Mr. Muller and Mr. Talbot were dropped when a grand jury declined to indict them.

After both of these incidents, the Staff initiated efforts to cancel the permits for Alkeez, specifically its Mixed Beverage Permit, Mixed Beverage Late Hours Permit, and Beverage Cartage Permit. Notice was sent to Alkeez and it requested a hearing, resulting in this proceeding.

III. Applicable Law

As noted, the Staff relies on Section 11.61 of the Code. In the relevant parts relied on by the Staff, that statute provides that the Commission may cancel a permit if it is found, after notice and hearing, that any of the following is true:

- the permittee violated a provision of the Code or a rule of the commission;⁵
- 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;⁶ or
- the permittee was intoxicated on the licensed premises.⁷

In asserting that Alkeez violated a provision of the Code, the Staff cites to Section 105.06 of the Code, which provides, in relevant part, that:

(c) In an extended hours area, a person commits an offense if he consumes or possesses with intent to consume an alcoholic beverage in a public place at any time on Sunday between 2:15 a.m. and 12 noon and on any other day between 2:15 a.m. and 7 a.m.

⁴ At the hearing, Corporal Stephenson admitted that she was mistaken in identifying Mr. Muller as being involved in the incident. Tr. Vol. 1, 166:20 - 168:4.

⁵ TEX. ALCO. BEV. CODE §11.61(b)(2).

⁶ TEX. ALCO. BEV. CODE §11.61(b)(7).

⁷ TEX. ALCO. BEV. CODE §11.61(b)(13).

(d) Proof that an alcoholic beverage was possessed with intent to consume in violation of this section requires evidence that the person consumed an alcoholic beverage on that day in violation of this section.⁸

Also, the Staff relies on Section 35.31 of its rules to support its contention that the place or manner in which Alkeez conducts its 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. Specifically, Section 35.31 states in relevant part that a permittee commits an offense against the general welfare if the permittee “in the course of conducting his/her alcoholic beverage business” commits any assaultive offense described in Chapter 22 of the Texas Penal Code.⁹

Finally, in regard to the allegation that the owner of Alkeez was intoxicated on the premises, the Staff correctly notes that the Code does not specifically define “intoxicated.” Rather, the Texas Penal Code, the case law, and the Commission’s rules all clearly define intoxication as “not having the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a dangerous drug, a combination of two or more of those substances, or any other substance into the body.”¹⁰

IV. Discussion

The Staff presented evidence related to three separate alleged violations in support of its request to cancel the permits of Alkeez. The ALJ addresses each alleged violation separately.

A. Was an Agent, Servant or Employee of Alkeez Intoxicated on the Premises in Violation of Section 11.61(b)(13) of the Code?

1. The Parties’ Arguments and Evidence

The Staff alleges that Mr. Keating, a co-owner of Alkeez, was intoxicated on the premises on December 26, 2002. To support this allegation, the Staff offered the testimony of Sgt. McGowen and Officer Gabriel. At the hearing, Sgt. McGowen testified that Mr. Keating was “extremely intoxicated” and “plastered.”¹¹ More specifically, Sgt. McGowen testified that Mr. Keating had red eyes, smelled of alcohol, and had difficulty maintaining his balance while walking.¹² He also testified that Mr. Keating was holding a beer at the time that contact was initiated with him and was

⁸ TEX. ALCO. BEV. CODE §105.06(c)-(d).

⁹ 16 TEX. ADMIN. CODE § 35.31.

¹⁰ TEX. PENAL CODE § 49.01(2)(A); 16 TEX. ADMIN. CODE § 50.2(a)(2)(A); *also El Chico Corp. v. Poole*, 732 S.W.2d 306 (Tex. 1987).

¹¹ Tr. Vol. 1, 34:21–22; 52:20 – 53:9.

¹² Tr. Vol. 1, 34:23 – 34:2; 36:6–10; 52:20 – 53:6.

evasive in initially answering questions.¹³ Further, Officer Gabriel testified that Mr. Keating was “swaying” some while speaking with the officers.¹⁴ Based on the testimony of Sgt. McGowen and Officer Gabriel, the Staff alleges that it has proven that Mr. Keating was intoxicated on the premises in violation of Section 11.61(b)(13) of the Code.

In response, Alkeez presented numerous witnesses who testified that Mr. Keating was not intoxicated at the time of his arrest. In particular, Jason Bellah—a commissioned peace officer himself—is a friend of Mr. Keating and was with him for much of the night in question. Mr. Bellah testified that Mr. Keating had a couple of drinks at another bar earlier that evening, but had not been drinking since then and was definitely not intoxicated when he was arrested by Sgt. McGowen.¹⁵ Ann Ponce, Chris Muller, and Mark Smith were present with Mr. Keating at or near the time he was arrested and offered testimony similar to that presented by Mr. Bellah, *i.e.*, that Mr. Keating was not intoxicated on the night in issue.¹⁶ Mr. Keating himself admitted to drinking a few beers that night, but denied that he was intoxicated.¹⁷

Alkeez also points out that Sgt. McGowen did not offer Mr. Keating any field sobriety or blood alcohol content tests. Instead, Sgt. McGowen made the unilateral decision, based on his limited observations, to arrest Mr. Keating without attempting to obtain corroborating evidence. Most persuasive, argues Alkeez, is the videotape of the premises on the night in question.¹⁸ The videotape shows Mr. Keating in the 15 minutes prior to and during his arrest. According to Alkeez, nothing on the videotape indicates that Mr. Keating was intoxicated; instead, it supposedly controverts Sgt. McGowen’s testimony, showing Mr. Keating to be conducting business operations with good balance and movement and no unusual actions that might be indicative of intoxication.

2. The ALJ’s Analysis

After considering the arguments and evidence, the ALJ finds that the Staff has failed to establish by a preponderance of the evidence that any agent, servant, or employee of Alkeez was intoxicated on the premises on December 29, 2002, in violation of Section 11.61(b)(13) of the Code. The Staff’s position is based primarily on the subjective conclusions of Sgt. McGowen, who believed Mr. Keating to be intoxicated. While Sgt. McGowen appeared credible, so did the witnesses presented by Alkeez who disputed Sgt. McGowen’s conclusions. Although the Staff correctly points out that the witnesses called by Alkeez are friends of Mr. Keating, the ALJ does not reach the extreme conclusion implied by the Staff’s argument, *i.e.*, that all of the witnesses lied to

¹³ Tr. Vol. 1, 34:19 – 35:13; 49:11 – 50:6.

¹⁴ Tr. Vol. 1, 116:4–5.

¹⁵ Tr. Vol. 1, 207:10 – 209:12.

¹⁶ Tr. Vol. 2, 75:5–15; 136:8–23; 201:4–24.

¹⁷ Tr. Vol. 2, 236:3–25; 253:11–25.

¹⁸ Alkeez maintains security cameras throughout the bar and the videotape from the night of December 26, 2002, was offered into evidence as TABC Ex. 2. The videotape shows the room and other areas in issue.

benefit Mr. Keating. The ALJ finds it difficult to believe that four witnesses with nothing apparent to gain would perjure themselves in this case, and nothing in the witnesses' testimony gives the ALJ reason to believe that they lied as to Mr. Keating's level of intoxication. While one might be able to discount the reliability of their testimony if they themselves were intoxicated and unable to properly assess Mr. Keating's condition, the evidence establishes the contrary—*i.e.*, the officers investigating determined that none of the other people present appeared to be intoxicated.

Nearly as important, the ALJ has closely reviewed the videotape of the night in question and finds that it supports the arguments presented by Alkeez. On the videotape, Mr. Keating appears to be conducting business and socializing with friends at the bar. He is seen throughout the tape speaking with and directing the activities of bar employees and also cleaning and picking up items around the bar. While the ALJ cannot see his eyes or smell his breath on the video, the ALJ is able to see much of Mr. Keating's movement and actions. His movements, walking, balance, and other actions do not indicate that he was "plastered" or "extremely intoxicated" as alleged. On the contrary, Mr. Keating appears in control of his mental and physical faculties. The ALJ also notes that there is no additional evidence to corroborate Sgt. McGowen's conclusions, as no breath or field sobriety tests were administered.

Ultimately, the ALJ simply finds more persuasive the evidence presented by Alkeez in support of its contention that Mr. Keating was not intoxicated. In reaching this conclusion, the ALJ does not determine that Sgt. McGowen was untruthful in his statements at hearing; rather, the ALJ assumes that he was simply mistaken in his subjective judgment. He spent a very limited time with Mr. Keating and was probably not in as good a position to evaluate Mr. Keating as some other witnesses who had spent the bulk of the evening with him. Regardless, from reviewing the entire record, the ALJ finds that the preponderance of the evidence does not establish that Mr. Keating was intoxicated on the premises of Alkeez on December 29, 2002. For this reason, the ALJ concludes that the Staff has not proven that Alkeez violated Section 11.61(b)(13) of the Code and permit cancellation is not justified on the basis of this provision.

B. Did an Agent, Servant or Employee of Alkeez Consume, or Permit Others to Consume, an Alcoholic Beverage on the Licensed Premises During Prohibited Hours in Violation of Sections 11.61(b)(2) and 105.06 of the Code?

1. The Parties' Arguments and Evidence

Next, the Staff contends that Alkeez violated Sections 11.61(b)(2) and 105.06 of the Code by allowing its co-owner and others to consume alcoholic beverages on the licensed premises during prohibited hours (after 2:15 a.m.). In support of this, the Staff relies on the testimony of Sgt. McGowen and Officer Gabriel, who testified that Mr. Keating was holding a beer bottle at the time the officers arrived and that others in the room were holding plastic cups containing a liquid that smelled like an alcoholic beverage.¹⁹ Further, other witnesses also identified Mr. Keating as carrying

¹⁹ Tr. Vol. 1, 49:1 – 50:6; 111:10 – 115:2.

a beer bottle at the time the officers arrived.²⁰ Detective Leverenz testified that, while questioning those present, an Alkeez employee told him that Mr. Keating was walking around the bar with a bottle of vodka and plastic cups, asking people “if they wanted a cup.”²¹

In response, Alkeez asserts that the entirety of the Staff’s case rests on the assumption that (1) the bottle Mr. Keating held contained beer and that he was drinking out of it after hours; and/or (2) the plastic cups that people held actually contained alcohol and that people were drinking out of them after hours. Alkeez notes that there is no direct evidence in the record that anyone actually consumed alcohol after hours, rather there are just assumptions being made based on indirect evidence. Alkeez contends that this is not sufficient to support a finding of a violation under Sections 11.61(b)(2) and 105.06 of the Code, particularly in light of the controverting evidence offered by Alkeez refuting such assumptions and showing that there was no alcohol being consumed. In particular, Mr. Bellah and Ms. Ponce testified that the cups that they held that night contained only water, not alcohol, and that they did not see Mr. Keating consuming alcohol after hours.²² Similarly, Christopher Muller and Marc Smith testified that they did not see anyone consuming alcohol or Mr. Keating distributing vodka in plastic cups.²³

In addition to offering controverting evidence, Alkeez presents other challenges to the reliability of the Staff’s evidence. In particular, Alkeez points out that Sgt. McGowen never actually smelled or tested what was in the bottle that Mr. Keating held, but simply made his determination “by sight;” similarly, Sgt. McGowen made no inspection nor determination as to what was in the plastic cups held by the patrons.²⁴ Alkeez also asserts that the videotape clearly refutes the testimony of Officer Gabriel, who claimed to have checked at least three plastic cups, finding them to contain alcohol, and to have looked into the bottle held by Mr. Keating and found it to contain beer. Alkeez points out that the videotape shows that throughout the incident Officer Gabriel never checked any plastic cups and that his only observation of the beer bottle was from a couple of feet away while Detective Leverenz held it up; Officer Gabriel did not look inside it as he contended. Finally, Alkeez points out that the videotape refutes the other allegations made because it never shows Mr. Keating consuming alcohol or passing out cups or vodka.

2. The ALJ’s Analysis

After considering the parties’ arguments and evidence, the ALJ concludes that the Staff has failed to establish by a preponderance of the evidence that an agent, servant or employee of Alkeez consumed, or permitted others to consume, an alcoholic beverage on the licensed premises during prohibited hours in violation of Sections 11.61(b)(2) and 105.06 of the Code. First, the ALJ notes

²⁰ Tr. Vol. 2, 142:22 – 143:15.

²¹ Tr. Vol. 1, 87:2–12; 101:11–14; 102:2–5.

²² Tr. Vol. 2, 73:11 – 75:7; 206:14.

²³ Tr. Vol. 2, 136:2 – 137:22; 142:22 – 144:21; 200:25 – 201:24.

²⁴ Tr. Vol. 1, 50:1–6; 60:9–19.

that all of the evidence relied on by the Staff is circumstantial. None of the officers testified to seeing any of the persons present at Alkeez drinking an alcoholic beverage. None of the officers verified the contents of the drink containers held by those present. Sgt. McGowen did not even attempt to smell what was in the bottle held by Mr. Keating, simply making a determination "by sight." The ALJ finds such a determination to be entirely unreliable.

While Officer Gabriel testified to smelling what was contained in some plastic cups and to observing what was inside the bottle held by Mr. Keating, the ALJ finds his testimony to be unreliable as well. Troubling to the ALJ, the videotape from the incident does not corroborate Officer Gabriel's testimony. The ALJ closely reviewed the videotape for purposes of watching Officer Gabriel's actions throughout. At no time was the ALJ able to discern Officer Gabriel ever checking the contents of any plastic cup (let alone three cups as reflected in his testimony). Moreover, even if the ALJ found Officer Gabriel's testimony about the plastic cups to be reliable, he also testified that he did not know who the cups belonged to and never made a determination as to who, if anyone, had been drinking from the cups.²⁵

The ALJ also finds that the videotape does not fully corroborate Officer Gabriel's testimony regarding the beer bottle held by Mr. Keating. In his testimony, Officer Gabriel claimed "I looked inside of [the beer bottle] -- it was sat down -- once Mr. Keating placed it down, and I looked inside of it and observed what appeared to be beer."²⁶ Elsewhere in his testimony, Officer Gabriel reiterates the fact that he got close to the bottle and specifically looked inside of it, determining that it contained beer and did not contain smokeless tobacco grains that might indicate it was being used for other purposes. On the video, however, Officer Gabriel looked at the beer bottle for only a second or two, while walking out the door, when it was held up by Detective Leverenz on their way out. Officer Gabriel did not appear particularly interested in the bottle and clearly did not look inside the bottle, rather merely glancing at the bottle from a couple of feet away. This is simply not consistent with his testimony, and the clear implications of his testimony, at the hearing.

The videotape is also inconclusive as to whether Mr. Keating was offering vodka in plastic cups to those present. At different times in the video, it appears that Mr. Keating may be carrying one or more bottles in his hand, but the ALJ cannot discern the labeled content of such bottles. Given that Mr. Keating, at different times in the video, appears to be doing clean-up and other tasks associated with the closing of the bar, it is not necessarily unusual that he might have one or more bottles in his hand. The ALJ certainly could not discern any situations where Mr. Keating appeared to be passing out cups of vodka. However, even if the ALJ accepted the testimony as credible, such testimony does not establish a violation. Under Section 105.06 of the Code, possession with intent to consume is a violation, but to establish such violation there must also be "evidence that the person consumed an alcoholic beverage on that day in violation of this section."²⁷ Testimony that an

²⁵ Tr. Vol. 1, 113:2-6.

²⁶ Tr. Vol. 1, 113:15-17.

²⁷ TEX. ALCO. BEV. CODE §105.06(d).

employee stated that Mr. Keating was offering vodka to those present is insufficient to meet this requirement. Given the reliability problems of the other evidence, the record is devoid of evidence showing that Mr. Keating *consumed an alcoholic beverage on that day in violation of Section 105.06.*²⁸

Aside from the reliability questions raised above, the ALJ finds the controverting evidence presented by Alkeez to be credible. Numerous witnesses testified that no alcohol was being consumed after hours that night, by Mr. Keating or others present. While the Staff points out that the evidence presented by Alkeez is tainted because many of the witnesses are friends of the co-owner of Alkeez, the ALJ does not find that such alleged “taint” renders the testimony unreliable. As noted previously, the ALJ does not perceive those witnesses to be lying about the events of that night.²⁹ However, even if the ALJ found the testimony to be unpersuasive, such does not cure the deficiency in the Staff’s evidence. The Staff has the burden of proof. While it is very possible that persons were consuming alcohol after hours on the premises of Alkeez on December 29, 2002, the *preponderance of the evidence* in this case simply does not establish that. For this reason, the ALJ concludes that the Staff has not proven that Alkeez violated Sections 11.61(b)(2) and 105.06 of the Code and permit cancellation is not justified on the basis of these provisions.

C. Did an Agent, Servant or Employee of Alkeez Engage in Conduct Warranting the Cancellation or Suspension of the Permits Based on the General Welfare, Health, Peace, Morals, and Safety of the People and on the Public Sense of Decency, as Understood in Section 11.61(b)(7) of the Code?

1. The Parties’ Arguments and Evidence

The Staff relies on an incident from January 26, 2003, as the final basis for its request to cancel the permits held by Alkeez. As noted in the background facts above, an employee of Alkeez, James Etter, struck a peace officer on that date. The Staff alleges that the evidence shows that, after Mr. Etter struck Corporal Stephenson, he and Luke Talbot dragged Corporal Stephenson into the Alkeez premises and restricted her movements in an effort to allow Mr. Etter to avoid arrest. The Staff also contends that the evidence establishes that when assisting officers arrived, Mr. Talbot was deceptive to the officers in an effort to conceal the attempted arrest of Mr. Etter. The evidence relied on by the Staff is discussed below.

The Staff presents testimony from three witnesses, all APD officers, regarding the incident of January 26, 2003. Corporal Stephenson testified that, on January 26, 2003, she responded to a

²⁸ While the evidence shows that Mr. Keating consumed alcohol earlier that night, Section 105.06 requires more—namely proof that Mr. Keating consumed alcohol *after hours*.

²⁹ The ALJ does not lightly discount the reliability of the peace officers in question, while giving credence to the testimony of the witnesses presented by Alkeez. It is worth noting that one of the key witnesses who testified for Alkeez, Mr. Bellah, is himself a certified peace officer and an investigator for the Texas Department of Transportation. Ultimately, the videotape was significant in either corroborating or controverting the testimony of numerous witnesses.

large brawl involving 15-20 people in the middle of Sixth Street in the area near Alkeez.³⁰ She observed a man, later identified as Mr. Etter, kicking a person on the ground. As Corporal Stephenson approached him, Mr. Etter backed into her. She then grabbed him in an effort to pull him away from the person on the ground, and he turned and struck her in the face. Corporal Stephenson testified that she then informed him to get on the ground because he was under arrest. Mr. Etter attempted to pull away from Corporal Stephenson and repeatedly apologized to her, pleading not to be arrested.

Corporal Stephenson then testified that another person, also wearing an Alkeez shirt and later identified as Luke Talbot, approached and pleaded with her not to arrest Mr. Etter. He then allegedly attempted to pull Corporal Stephenson away from Mr. Etter and, when that did not work, attempted to pull Mr. Etter away. After Corporal Stephenson repeatedly told Mr. Talbot to back away, he did so and left the immediate vicinity. However, while Corporal Stephenson continued to struggle with Mr. Etter, Mr. Talbot returned and continued in his efforts to prevent Mr. Etter from being arrested. Shortly thereafter, another man approached and joined in asking that Mr. Etter not be arrested. When she continued in her effort to arrest Mr. Etter, Corporal Stephenson testified that Mr. Talbot and this other individual grabbed her and Mr. Etter and dragged them inside the Alkeez premises, trying to separate her from Mr. Etter so as to assist him in avoiding arrest.

Once inside Alkeez, Corporal Stephenson called for help on her radio. Mr. Talbot left and went to the front of the bar. While Corporal Stephenson was placing handcuffs on Mr. Etter, the second person who had grabbed her also left the area. Shortly after that, other officers arrived to provide backup to Corporal Stephenson. With their assistance, Mr. Etter was arrested and led away. Before leaving the bar, Corporal Stephenson directed officers to arrest Mr. Talbot for unlawfully restraining her.

In addition to Corporal Stephenson's testimony, the Staff presented testimony from Officers Kevin Covington and Jason Goodman, who assisted in arresting Mr. Etter.³¹ Officer Covington testified that he was on duty on January 26, 2003, when he heard a call for help placed by Corporal Stephenson. He also heard Corporal Stephenson mention Alkeez. Officer Covington testified that, when he arrived at Alkeez, he questioned the doorman (Mr. Talbot) as to whether a fight was going on inside Alkeez. Mr. Talbot responded "No." Officer Covington looked inside and saw Corporal Stephenson attempting to arrest Mr. Etter and went in to assist her. He and Corporal Stephenson were then able to complete the arrest of Mr. Etter and Officer Covington took him to a police vehicle, thus concluding Officer Covington's involvement.

Officer Goodman testified that he was partnered with Officer Covington on the night in question. In his efforts to locate Corporal Stephenson in response to her call for help, Officer Goodman questioned Mr. Talbot at the doorway to Alkeez. Specifically, Officer Goodman testified

³⁰ See Tr. Vol. 1, 142:4 – 163:10 for Corporal Stephenson's testimony about the entire incident.

³¹ See Tr. Vol. 2, 7:2 – 12:24 for Officer Covington's testimony about the incident; and Tr. Vol. 2, 46:16 – 56:4 for Officer Goodman's testimony about the incident.

that he asked Mr. Talbot if an officer was inside, and Mr. Talbot simply shrugged and gave an inaudible response that Officer Goodman understood to be a “no.” Later, when Officer Covington located Corporal Stephenson inside, Officer Goodman assisted with Mr. Etter’s arrest.

Alkeez presented evidence disputing much of Corporal Stephenson’s recollection of the incident. Numerous witnesses testified that Corporal Stephenson was behind Mr. Etter pushing him into the bar or simply following him into the bar, rather than being forced into the bar by him and others.³² However, beyond this point, the different witness accounts vary somewhat as to what occurred. At least one witness claimed to see a man named Nathan Pepler pulling on Mr. Etter’s shirt when he came into the bar.³³ Other witnesses indicate that they did not see anyone with Corporal Stephenson or Mr. Etter when they entered the bar. All of the witnesses presented by Alkeez, who observed the incident, agreed that no one was touching Corporal Stephenson when she entered the bar. But, the witnesses differ on the details about the arrest (*i.e.*, some witnesses claim that Mr. Etter was taken to the ground while other witnesses say that he was not). Unfortunately, other than Corporal Stephenson, none of the individuals allegedly involved in the matter, including Mr. Talbot or Mr. Etter, testified.

Alkeez also contends that Corporal Stephenson’s recollection of the incident is unreliable, pointing to incidents that occurred after Mr. Etter’s arrest. Specifically, the evidence shows that Corporal Stephenson later identified Christopher Muller as the other person involved in restraining her during Mr. Etter’s arrest. This led to Mr. Muller’s arrest. It was later determined that Mr. Muller was not present at the scene that night and could not have been involved. Corporal Stephenson acknowledges that she was wrong in her identification of him. Further, Alkeez points to the discrepancies between Corporal Stephenson’s testimony and that presented by every other eyewitness called to testify. Alkeez asserts that it is quite possible, given Corporal Stephenson’s alleged blow to the head, that her recollection of events is foggy. Finally, Alkeez also notes that the grand jury reviewing the criminal charge against Mr. Talbot declined to indict him, which Alkeez argues supports its position that he did not unlawfully restrain Corporal Stephenson.

Alkeez further asserts that, even if Mr. Etter struck Corporal Stephenson, that alone would not support a violation under Section 11.61(b)(7) of the Code because Mr. Etter’s actions were not in the course and scope of his employment with Alkeez and cannot be attributed to Alkeez. Alkeez cites to numerous cases establishing when an employer may be liable for the conduct of its employees, and argues that the facts of this case would not fall within any of the established bases for imputing liability to an employer. Alkeez relies on the testimony of one of the owners of Alkeez that employees who leave the bar are considered off-duty and may not return to work that day.

³² See, e.g., Tr. Vol. 1, 200:21 – 202:2; Tr. Vol. 2, 81:17 – 83:12; 117:19 – 118:17; 129:18–20; 175:1–25; and 193:24 – 195:20.

³³ Tr. Vol. 2, 117:21 – 120:5.

2. The ALJ's Analysis

After considering the parties' arguments and evidence, the ALJ concludes that the Staff has failed to establish by a preponderance of the evidence that an agent, servant or employee of Alkeez engaged in conduct against the general welfare, health, peace, morals, and safety of the people and on the public sense of decency, as understood in Section 11.61(b)(7) of the Code. In reaching this conclusion, the ALJ considered two separate matters: (1) whether the assaultive conduct of Mr. Etter is attributable to Alkeez; and (2) whether the evidence establishes that other employees of Alkeez engaged in conduct violating Section 11.61(b)(7) of the Code.

As to the first matter, the ALJ concludes that the uncontroverted evidence establishes that Mr. Etter struck Corporal Stephenson. In addition to Corporal Stephenson's testimony on this, at least one of the witnesses called by Alkeez also testified that Mr. Etter struck the officer, and none of the witnesses offered clearly controverting testimony. So, the next question is whether Mr. Etter's conduct is attributable to Alkeez for purposes of showing a violation under Section 11.61(b)(7) of the Code. The ALJ concludes that it is not. The Commission's rules provide clarification on the type of conduct that is considered to be "against the general welfare" for purposes of that Code provision.³⁴ Specifically, Section 35.31 of the Commission's rules states in relevant part that a permittee commits an offense against the general welfare if the permittee "in the course of conducting his/her alcoholic beverage business" commits any assaultive offense described in Chapter 22 of the Texas Penal Code.³⁵ Mr. Etter's actions in assaulting Corporal Stephenson clearly fall within the definition of an "assaultive offense" under Chapter 22 of the Penal Code. But, the ALJ concludes that such assaultive offense was not committed by the permittee in the "in the course of conducting his/her alcoholic beverage business" as required under Section 35.31.

Because the Commission's rules do not provide further clarification, the ALJ finds it appropriate to turn to case law for guidance on when actions by an agent are considered to be "in the course" of the employer's business. As Alkeez notes, the courts recognize that if the act of an employee is not in the furtherance of the employer's business or for the accomplishment of the object for which he was employed, but instead is performed in furtherance of personal animosities of the employee, the employer is not liable.³⁶ Except with certain specific exceptions, an employee's assault on a third party is not within the scope of his authority.³⁷ As the Texas Supreme Court made clear just last year, "if an employee deviates from the performance of his duties for his own purposes, the employer is not responsible for what occurs during that deviation."³⁸

³⁴ 16 TEX. ADMIN. CODE § 35.31.

³⁵ *Id.*

³⁶ See *Smith v. M System Food Stores*, 156 Tex. 484, 486, 297 S.W.2d 112, 114 (1957); *Peek v. Equipment Servs., Inc.*, 906 S.W.2d 529, 531-32 (Tex.App-San Antonio 1995, no writ).

³⁷ *Peek*, 906 S.W.2d at 532.

³⁸ *Minyard Food Stores, Inc. v. Goodman*, 80 S.W.3d 573, 577 (Tex. 2002).

Some courts have diverged on the exceptions to this general rule.³⁹ The most liberal line of reasoning (*i.e.*, the one more likely to find the employer liable for the employee's actions) holds that an employer may be liable if the employee's act arose directly out of and in the prosecution of the employer's business.⁴⁰

Even under the most liberal test applied, the ALJ cannot conclude that Mr. Etter's actions in leaving the bar, engaging in a fight, and then assaulting a peace officer arose directly out of and in the prosecution of the business of Alkeez; nor would such actions otherwise be within "the course of conducting [Alkeez'] alcoholic beverage business" as would be required for a finding under Section 35.31 of the Commission's rules. First, it is worth noting that Mr. Etter was not hired to be a doorman or bouncer for Alkeez, just a bartender. While Mr. Etter was on duty as a bartender at Alkeez earlier that evening, he voluntarily abandoned his duties as a bartender, left the premises completely and engaged in a street brawl. The street fight did not occur directly in front of Alkeez, was not on any property owned by Alkeez, and the record is devoid of any evidence indicating that any Alkeez' patrons were involved in it. There is no evidence that Mr. Etter was protecting the property or patrons of Alkeez or otherwise engaging the fight in any way in relation to his position as a bartender at Alkeez. Under the policies of Alkeez, Mr. Etter was considered off-duty once he left the bar.⁴¹ The Staff contends that the Code is a strict liability statute and that a permittee is responsible for the acts of its employees and agents. Ultimately, as seen in the wording of Section 35.31, the extent of liability is limited, though, to actions that are within the course of the permittee's business. In fact, such is a required logical conclusion. It seems unlikely that the Staff would argue that Alkeez would be liable if one of its employees voluntarily left the premises during his/her shift, drove across town to a personal enemy's home, and assaulted that person.

So, ultimately, the ALJ cannot conclude that the actions of Mr. Etter in assaulting Corporal Stephenson indicates that the place or manner in which Alkeez conducts its 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.

Next, the ALJ turns to the alleged actions of Luke Talbot, another employee of Alkeez. The Staff contends that he unlawfully restrained Corporal Stephenson, interfered with the arrest of Mr. Etter, and was deceptive with peace officers when they attempted to aid Corporal Stephenson. The evidence was very conflicting, with all of the eyewitnesses (except Corporal Stephenson) testifying that Corporal Stephenson was not dragged into the bar by anyone, but rather voluntarily entered the

³⁹ See *Green v. Jackson*, 674 S.W.2d 395, 398 (Tex.App.--Amarillo 1984, writ ref'd n.r.e.); *Rosales v. American Buslines, Inc.*, 598 S.W.2d 706, 708 (Tex.Civ.App.--El Paso 1980, writ ref'd n.r.e.). See generally Charles E. Cantu, *Vicarious Liability of an Employer for an Assault by His Servant: A Survey of Texas Cases Reexamining the "Rule of Force,"* 4 ST. MARY'S L.J. 169 (1972).

⁴⁰ See *Smith*, 297 S.W.2d at 114; *Houston Transit Co. v. Felder*, 146, Tex. 428, 430, 208 S.W.2d 880, 881-81 (1948); *Durand v. Moore*, 879 S.W.2d 196, 199 (Tex.App.--Houston [14th Dist.] 1994, no writ); *Frito-Lay Inc. v. Ramos*, 770 S.W.2d 887, 888- 89 (Tex.App.--El Paso 1989), *rev'd on other grounds*, 784 S.W.2d 667 (Tex.1990); *Humbert v. Adams*, 361 S.W.2d 458, 461 (Tex.Civ.App.--Dallas 1962, no writ).

⁴¹ Tr. Vol. 2, 186:16 – 187:9.

bar in her efforts to arrest Mr. Etter. Excluding Corporal Stephenson, none of the eyewitnesses saw Mr. Talbot involved *at all* with Corporal Stephenson at the time she entered the bar. In trying to determine which version of events is more likely, the ALJ notes that other extrinsic factors do not support the Staff's allegations. While it is understandable, Corporal Stephenson *was incorrect* in her identification of one of the persons allegedly involved. Similarly, it is difficult to believe that Corporal Stephenson and the many bystanders would have allowed a law enforcement officer to be dragged into a bar against her will without taking very serious measures to intervene and prevent the restraint of the officer. Apparently the grand jury also did not find the evidence compelling enough to charge Mr. Talbot with any criminal offense regarding the incident. Ultimately, the ALJ again falls back on the burden of proof, concluding that the preponderance of the evidence does not support the conclusion that Mr. Talbot unlawfully restrained Corporal Stephenson.

While it is possible that Mr. Talbot interfered in some manner with Corporal Stephenson's arrest of Mr. Etter, the Staff relies on the allegation that he unlawfully restrained her and then deceived other law enforcement personnel about her whereabouts. As noted, the ALJ does not find that the credible evidence supports the conclusion that Mr. Talbot unlawfully restrained Corporal Stephenson. Because the exact level of Mr. Talbot's conduct cannot be readily ascertained and, in any event, does not appear to have risen to the level of criminality, the ALJ cannot conclude that his conduct warrants cancellation of the permits held by Alkeez on the ground that it is against the general welfare health, peace, morals, and safety of the people and on the public sense of decency.

Moreover, as to Mr. Talbot's other actions, the evidence does not establish that he was deceptive when questioned by peace officers about the events inside Alkeez on the night in question. When questioned by Officer Covington, Mr. Talbot answered that "no," a fight was not going on inside Alkeez. From all of the evidence presented, this appears to be a true statement. Next, Mr. Talbot was asked by Officer Goodman whether "an officer was inside." According to Officer Goodman, Mr. Talbot simply shrugged and gave an inaudible response. Given the conflicting evidence regarding the involvement of Mr. Talbot in Mr. Etter's arrest, the ALJ cannot conclude that such a statement was knowingly false. Even if Mr. Talbot was aware that Corporal Stephenson was inside, the ALJ does not find that the response by Mr. Talbot was criminal in nature nor would it constitute "conduct against the general welfare, health, peace, morals, and safety of the people and on the public sense of decency," as understood in Section 11.61(b)(7) of the Code. For this reason, such is not a sufficient basis to impose disciplinary action against Alkeez.

V. Conclusion

This is a very difficult case, with conflicting testimony from many witnesses and a videotape that appears to controvert the testimony of some of the witnesses. In such cases, the assignment of the burden of proof can be a determinative factor. Such is true in this case. For all of the reasons set forth above, the ALJ concludes that the Staff has not established by a preponderance of the evidence any violations of the Code or other basis upon which the permits held by Alkeez should be canceled. Accordingly, the ALJ recommends that no adverse action be taken against Alkeez. The ALJ presents the following findings of fact and conclusions of law in support of the ALJ's recommendation.

VI. Findings of Fact

1. Alkeez on Sixth, LLC d/b/a Alkeez on Sixth (Alkeez) holds Mixed Beverage Permit MB-522653, Mixed Beverage Late Hours Permit LB-522654, and Beverage Cartage Permit PE-522655, all of which were issued on September 20, 2002.

Alleged Violation of Section 11.61(b)(13) of the Code

2. At approximately 3:00 a.m. on December 29, 2002, peace officers Robert McGowen, Kacey Gabriel, and Kevin Leverenz entered Alkeez to investigate what was occurring in a second-floor room.
3. Christopher Keating is a co-owner of Alkeez and was present at the time and Sgt. McGowen spoke with him.
4. After speaking with Mr. Keating, Sgt. McGowen arrested him for public intoxication on a licensed premises. Concluding that none of the other persons present were intoxicated, all of the officers left the bar.
5. Sgt. McGowen did not attempt to have any field sobriety tests or blood alcohol content tests performed on Mr. Keating.
6. Mr. Keating had just a few beers over the course of the evening and was not intoxicated on the licensed premises of Alkeez on December 29, 2002.

Alleged Violation of Sections 11.61(b)(2) and 105.06 of the Code

7. At the time the officers investigated on December 29, 2002, numerous people were gathered in a second floor room at the premises of Alkeez, and some of them held cups in their hands.
8. None of the officers verified what was contained in the cups held by those present, nor did any officers verify that the bottle held by Christopher Keating at the time the officers arrived contained alcohol.
9. The Staff has failed to present credible evidence sufficient to establish that Mr. Keating or others present on the premises of Alkeez consumed alcoholic beverages during prohibited hours (*i.e.*, after 2:15 a.m.) on December 29, 2002.

Alleged Violation of Section 11.61(b)(7) of the Code

10. On January 26, 2003, peace officer Jennifer Stephenson was on duty on Sixth Street in Austin, Texas, when a large fight involving 15-20 people broke out in the street near the Alkeez premises.

11. Corporal Stephenson approached two people who appeared to be fighting and attempted to intervene.
12. One of the people—who was later identified as James Etter, an employee of Alkeez—turned and struck Corporal Stephenson.
13. After being struck by Mr. Etter, Corporal Stephenson maintained her balance and attempted to arrest Mr. Etter.
14. During Corporal Stephenson's efforts to arrest Mr. Etter, both of them ended up moving toward and into the Alkeez premises.
15. After overcoming his initial efforts to avoid arrest, Corporal Stephenson arrested Mr. Etter, with the assistance of other officers, for unlawful restraint and assault on a peace officer.
16. Mr. Etter was employed by Alkeez as a bartender, and not as a bouncer or doorman.
17. The policy of Alkeez is that if an employee leaves the bar while on duty, they are no longer on duty and working for the bar.
18. While Mr. Etter was on duty as a bartender at Alkeez earlier that evening, he voluntarily abandoned his duties as a bartender, left the premises completely and engaged in a street brawl.
19. The street fight did not occur directly in front of Alkeez, was not on any property owned by Alkeez, and the record is devoid of any evidence indicating that any Alkeez' patrons were involved in it.
20. There is no evidence that Mr. Etter was protecting the property or patrons of Alkeez or otherwise engaging the fight in any way in relation to his position as a bartender at Alkeez.
21. Mr. Etter's actions on January 26, 2003, in engaging in a fight outside Alkeez and striking Corporal Stephenson were not taken in the course of conducting the alcoholic beverage business of Alkeez.
22. At the direction of Corporal Stephenson, other officers arrested Luke Talbot, another employee of Alkeez, for unlawful restraint in interfering with the arrest of Mr. Etter.
23. After January 26, 2003, Corporal Stephenson identified another employee, Christopher Muller, as being involved in the incident and interfering with her arrest of Mr. Etter.
24. Based on Corporal Stephenson's identification, Mr. Muller was later arrested.

25. Mr. Muller was not involved in the altercation on January 26, 2003, and did not restrain Corporal Stephenson nor interfere in her arrest of James Etter.
26. Corporal Stephenson later admitted that she was mistaken in identifying Mr. Muller as being involved in the incident.
27. The charges against Mr. Muller and Mr. Talbot were dropped when a grand jury declined to indict them.
28. Mr. Talbot did not drag Corporal Stephenson into the premises of Alkeez nor did he unlawfully restrain her.

Procedural Findings

29. On March 13, 2003, the Staff notified Alkeez of the Commission's intent to cancel its Mixed Beverage Permit, Mixed Beverage Late Hours Permit, and Beverage Cartage Permit.
30. Alkeez requested a hearing regarding the Commission's intended actions.
31. On April 1, 2003, the Staff sent its Notice of Hearing to Alkeez. This Notice of Hearing informed Alkeez of the time, location, and the 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 allegations and the relief sought by the Staff.
32. The hearing on the merits was convened on May 21, 2003, at a SOAH hearing room in the William P. Clements Building, 300 West 15th Street, Austin Texas. ALJ Craig R. Bennett presided. The Staff appeared and was represented by staff attorney Dewey Brackin. Alkeez appeared and was represented by attorneys Willie Schmerler and David Sander. The record closed on June 16, 2003, after the parties filed their final written arguments.

VII. Conclusions of Law

1. The Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE (Code) Subchapter B of Chapter 5.
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 ch. 2003.
3. Proper and timely notice of the hearing was provided as required under the Administrative Procedure Act, TEX. GOV'T CODE §§2001.051 and 2001.052; Code §11.63; and 1 TEX. ADMIN. CODE §155.55.

4. The Staff has failed to establish by a preponderance of the evidence that any agent, servant, or employee of Alkeez was intoxicated on the premises on December 29, 2002 in violation of Section 11.61(b)(13) of the Code.
5. The Staff has failed to establish by a preponderance of the evidence that an agent, servant or employee of Alkeez consumed, or permitted others to consume, an alcoholic beverage on the licensed premises during prohibited hours in violation of Sections 11.61(b)(2) and 105.06 of the Code.
6. The actions of Mr. Etter in assaulting Corporal Stephenson were not conducted in the course of the alcoholic beverage business of Alkeez and are not attributable to Alkeez because they were not conducted in the course and scope of Mr. Etter's employment with Alkeez.
7. Mr. Etter's actions do not indicate that the place or manner in which Alkeez conducts its 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.
8. The Staff has failed to establish by a preponderance of the evidence that an agent, servant or employee of Alkeez engaged in conduct against the general welfare, health, peace, morals, and safety of the people and on the public sense of decency, as understood in Section 11.61(b)(7) of the Code.

SIGNED this 1st day of August 2003.


CRAIG R. BENNETT
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

DOCKET NO. 603696

IN RE ALKEEZ ON SIXTH LLC ET AL	§	BEFORE THE
D/B/A ALKEEZ ON SIXTH	§	
PERMIT NO. MB-522653, LB-522654	§	
& PE-522655	§	TEXAS ALCOHOLIC
	§	
TRAVIS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-03-2619)	§	BEVERAGE COMMISSION

O R D E R

CAME ON FOR CONSIDERATION this 29th day of September, 2003 , the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Craig R. Bennett. The hearing convened on May 21, 2003, and adjourned May 22, 2003. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on August 1, 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 no exceptions have been filed.

The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision, 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.

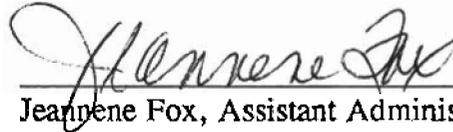
IT IS THEREFORE ORDERED, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that Mixed Beverage Permit No. MB-522653, Mixed Beverage Late Hours Permit No. LB-522654 and Beverage Cartage Permit No. PE-522655 are hereby **DISMISSED**.

This Order will become final and enforceable on October 20, 2030, 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 29th September, 2003.

On Behalf of the Administrator,



Jeanene Fox, Assistant Administrator
Texas Alcoholic Beverage Commission

DAB/yt

The Honorable Craig R. Bennett
Administrative Law Judge
State Office of Administrative Hearings
VIA FACSIMILE (512) 475-4994

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