

DOCKET NO. 604252

IN RE PLUCKERS-DALLAS NO. 1 L.P.	§	BEFORE THE
D/B/A MD PLUCKERS	§	
PERMIT/LICENSE NOS. BG527311,	§	
FB527313, BL527312	§	TEXAS ALCOHOLIC
	§	
DALLAS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-05-2336)	§	BEVERAGE COMMISSION

**ORDER**

**CAME ON FOR CONSIDERATION** this 12th day of May, 2005, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Hiram T. McBeth. The hearing convened on April 29, 2004 and adjourned on that same date. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on July 2, 2004. This Proposal For Decision (**attached hereto as Exhibit "A"**), 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, Transcripts, and Exhibits, adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge, which are contained in the Proposal For Decision and incorporates those Findings of Fact and Conclusions of Law into this Order, as if such were fully set out and separately stated herein. All Proposed Findings of Fact and Conclusions of Law, submitted by any party, which are not specifically adopted herein are denied.

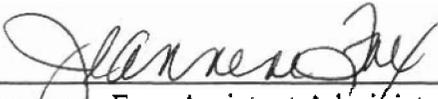
**IT IS THEREFORE ORDERED**, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that the allegations against Respondent are hereby **DISMISSED** with prejudice.

**This Order will become final and enforceable on June 2, 2005** unless a Motion for Rehearing is filed **before** that date.

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

**SIGNED** this 12th day of May, 2005

On Behalf of the Administrator,

  
\_\_\_\_\_  
Jeannene Fox, Assistant Administrator  
Texas **Alcoholic** Beverage Commission

TEG/bc

The Honorable Hiram T. McBeth  
Administrative Law Judge  
State Office of Administrative Hearings  
**VIA FAX (214) 956-8611**

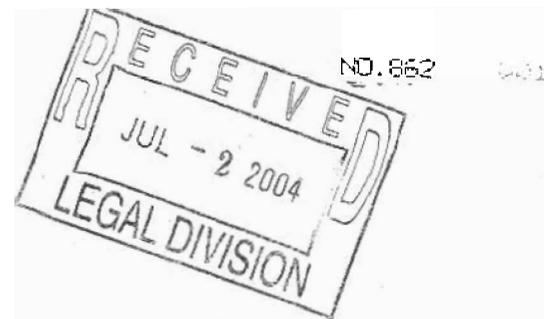
Sean Greenberg  
**ATTORNEY FOR RESPONDENT**  
VIA FAX (214) 691-9464

Pluckers-Dallas No. 1 L.P.  
d/b/a MD Pluckers  
**RESPONDENT**  
2222 Rio Grande St., Ste. D108  
Austin, Texas 78705-5135

Timothy E. Griffith  
**ATTORNEY FOR PETITIONER**  
TABC Legal Section

Licensing Division

Dallas District Office



DOCKET NO. 458-04-2336

TEXAS ALCOHOLIC BEVERAGE  
COMMISSION, Petitioner

§  
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§

BEFORE THE STATE OFFICE

OF

v.

PLUCKERS-DALLAS NO. 1, L.P.  
D/B/A MD PLUCKERS  
Respondent

ADMINISTRATIVE HEARINGS

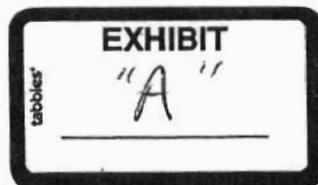
**PROPOSAL FOR DECISION**

The Texas Alcoholic Beverage Commission (Petitioner or Commission), brought this enforcement action against Pluckers-Dallas No. 1, L.P., (Respondent), alleging that the Respondent, his agents, servants, employees or assigns did, on February 20, 2003, with criminal negligence, permit a minor to possess or consume an alcoholic beverage on the licensed premises in violation of Texas Alcoholic Beverage Code (the Code) Sections 106.3 (a) or 61.71(a)(1). Petitioner recommended that the Respondent's permits be suspended for one hundred twenty days for six violations or, in lieu thereof, that the Respondent pay the sum of \$18,000.00 in civil penalties.

**I. JURISDICTION, NOTICE AND PROCEDURAL HISTORY**

No contested issues of notice, jurisdiction or venue were raised in this proceeding. Therefore, these matters are set forth only in the findings of fact and conclusions of law.

On April 29, 2004, a public hearing was held before Hiram T. McBeth, ALJ, at the offices of the State Office of Administrative Hearings, Dallas, Dallas County, Texas. The Petitioner was represented by Timothy E. Griffin, Attorney. The Respondent was represented by Sean Greenberg, Attorney. The record was closed on May 3, 2004 at 5:00 P.M. to allow sufficient time for the submission of post-hearing briefs and reply briefs.



## II. DISCUSSION

### A. Petitioner Testimony

**Anthony Keel, Enforcement Agent.** Anthony Keel, for the Petitioner, testified that on February 20, 2003, he was involved in the conduct of an investigation of the Respondent for allegedly serving alcoholic beverages to Southern Methodist University students, who were also minors, at its facility. Mr. Keel testified that he was specifically investigating the following suspicious individuals: Carl Koupal; Matthew Corn; Matthew Kalthoff; John Paul Goodman; Marshall Harris, and Joseph Brock.

The witness testified that the listed individuals were minors, all between the ages of eighteen and twenty years of age, and that they were drinking beer. Mr. Keel further identified the employee who allegedly served the beer to the minors as John Thornton, a waiter and employee of the Respondent. The minors were allegedly drinking beer in full public view. Mr. Keel testified that the targeted individuals carried authentic-looking fake identification cards from Florida and California. Mr. Keel acknowledged Southern Methodist University enrolls a large percentage of out-of-state students. Mr. Keel testified that he confiscated the fake identification cards from each of the six subjects.

On cross examination, Mr. Keel said the University Park Police had notified TABC of alleged violations regarding the serving of alcoholic beverages to minors in this dry area at Southern Methodist University. Each of the minors admitted that they intentionally presented the faked identification cards to employees of the Respondent in order to mislead them into serving them beer, each of them had been "carded" before entering the Respondent's facility, and the Respondent's employee, John Thornton, carded them.

Mr. Keel admitted that it is most difficult to immediately detect expertly-produced fake identification cards such as those presented by the targets. Mr. Keel also testified that the owner of the establishment, Mark Greenberg, admitted that not all of his employees were TABC certified, but Mr.

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Thornton was certified.

### B. Respondent's Evidence

The Respondent did not call any witnesses in its case-in-chief. Counsel for Respondent advanced the defense that the Respondent exerted all due diligence in attempting to screen its patrons and that, in itself, should absolve the Respondent of criminal culpability.

The Respondent submitted into evidence its MD Pluckers Orientation Checklist for its employees, which included a provision for confirmation of employee TABC certification. Respondent contended that the technology is not yet available for a foolproof system of detection of carefully-crafted, fake identification documents and that any alleged violations in light of the Respondent's self-imposed safeguards mitigate against charges of "criminal intent" and/or criminal negligence.

### C. Analysis

Pursuant to TEX. ALCO. BEV. CODE ANN. Section 106.13 (a), the Commission may suspend or cancel a permit if it is found that the permittee with criminal negligence sold, served, dispensed, or delivered an alcoholic beverage to a minor. Section 104 (11) defines a "permittee" as a person who is the holder of the permit or an agent, servant, or employee of that person. Pursuant to TEX. PENAL CODE ANN. Section 6.03 (a), a person acts with criminal negligence, or is criminally negligent with respect to the circumstances surrounding his conduct, or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk and the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all circumstances as viewed from the actor's viewpoint.

The test for a suspension of a permittee under the facts in the instant case must entail an analysis

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as to whether the required burden of proof has been met under Sections 106.13(a) and/or 61.71(a)(1). The Staff must prove by a preponderance of the evidence that the (1) the Respondent permitted a minor to possess or consume an alcoholic beverage on the licensed premises, and (2) that Respondent acted with criminal negligence by a preponderance of the evidence.

In this case, the burden of proof is preponderance of the evidence and such burden is not met under the facts presented. It is shown by the testimonial evidence that the Respondent did, indeed, request identification and that it was intentionally misled by expertly-produced, out-of-state identification cards presented by the targeted subjects. It is, furthermore, not shown that the Respondent failed to mitigate against potential damage and risk by intentionally or recklessly serving underage individuals. The Respondent established that it took reasonable, prudent and diligent measures to ascertain the ages of customers by "carding" youthful-appearing customers, as it did in this case.

A charge of "criminal" negligence requires the substantial risk to be of such nature as described in Texas Penal Code Section 6.03(d). The ALJ is not persuaded that the standard set by the Texas Penal Code is met here. Therefore, the unwitting acceptance of or fraudulent presentation of expertly-crafted, out-of-state identification by an unknowing examiner does not rise to the level of gross deviation from the standard of ordinary care as contemplated by the Texas Penal Code. The facts established in this case do not rise to the level of criminal negligence.

Accordingly, the evidence was insufficient to prove that Respondent violated the Code and that its permits should be suspended or that a civil fine shall be paid. The ALJ recommends that the Petitioner's call for cancellation or suspension of the Respondent's permit be denied.

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### III. PROPOSED FINDINGS OF FACT

- 1 Pluckers-Dallas No.1, L.P., dba MD Pluckers, Respondent, holds a wine and beer retailer's permit, BG527311, and a food and beverage certificate, FB 527313, issued by the Texas Alcoholic Beverage Commission (TABC), Petitioner.
2. Notice of hearing pursuant to 1 Texas Administrative Code Sections 155.27, et seq was mailed to the Respondent on January 26, 2004, and set for hearing March 5, 2004.
3. An Order Setting Hearing & Establishing Requirements for Participation was forwarded to the Respondent on February 17, 2004, scheduling a hearing for March 5, 2004. The hearing was continued for good cause until April 29, 2004.
4. An Order Reassigning Administrative Law Judge was signed on April 27, 2004, assigning the case to be heard by Judge Hiram McBeth.
5. On April 29, 2004, a public hearing was held before Hiram McBeth, ALJ, at the offices of the State Office of Administrative Hearings, Dallas, Dallas County, Texas. Petitioner was represented by Attorney Timothy Griffin. Respondent was represented by attorney Sean Greenberg. The record was closed May 3, 2004.
- 6 Respondent employed a waiter by the name of John Thornton at the licensed premises on or about February 20, 2003.
7. On February 20, 2003 John Thornton requested identification from each of the six minors to ascertain if any was a minor.
- 8 The identification cards, purportedly from the states of California and Florida, were of such high

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quality that the Respondent, after due diligence, concluded that each of the six individuals were not minors.

9 On that date, the six minors who had presented false identification to Mr. Thornton in order to obtain entrance into the licensed premises purchased beer from the Respondent.

10. The six minors consumed beer on the licensed premises.

#### IV. PROPOSED CONCLUSIONS OF LAW

1. The TABC has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN Sections 6.01, 61.71, 106.13(a), 25.04(b), and/or 25.13.
2. SOAH has jurisdiction to conduct the hearing in this matter and to issue a Proposal For Decision containing findings of fact and conclusions of law pursuant to TEX. GOV'T CODE ANN. Ch 2003.
3. Notice of the hearing was provided as required by TEX. GOV'T CODE ANN Sections 2001.051 and 1 TEX. ADMIN. CODE Section 155.55.
4. Based on the Findings of Fact Nos. 1-10, the Commission failed to prove that the Respondent's agent, servant, or employee, with criminal negligence, permitted a minor to possess and consume and alcoholic beverage on its premises on February 20, 2003.
5. Based on the foregoing, no action should be taken against Respondent as a result of these

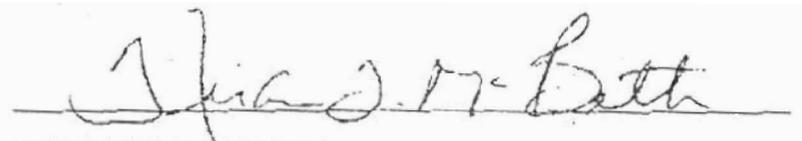
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PROPOSAL FOR DECISION

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proceedings.

SIGNED this 2<sup>nd</sup> day of July, 2004.

  
HIRAM T. MCBETH  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS

## SERVICE LIST

### STATE OFFICE OF ADMINISTRATIVE HEARINGS

6333 Forest Park Road, Suite 150-A

Dallas, Texas 75235

Phone (214) 956-8616

Fax (214) 956-8611

AGENCY: TEXAS ALCOHOLIC BEVERAGE COMMISSION

CASE: TABC vs. Pluckers-Dallas No. 1, L. P.

DOCKET NUMBER: 458-04-2336

AGENCY CASE NO: 604252

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2222 Rio Grande Street, Ste. D108  
Austin, TX 78705-5135

RESPONDENT

as of July 02, 2004

# State Office of Administrative Hearings



Shelia Bailey Taylor  
Chief Administrative Law Judge  
July 02, 2004

Jeannene Fox, Assistant Administrator  
Texas Alcoholic Beverage Commission  
5806 Mesa, Suite 160  
Austin, Texas 78731

RE: TABC Vs. Pluckers-Dallas No. 1, L.P., D/B/A MD Pluckers  
SOAH Docket No. 458-04-2336  
TABC Case No. 604252

Dear Ms. Fox:

Enclosed please find the Proposal For Decision in the above reference cause for the consideration of the Texas Alcoholic Beverage Commission.

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](http://www.soah.state.tx.us)

Sincerely,

Hiram McBeth  
Administrative Law Judge

HM/sr

Enclosure

cc: Timothy Griffith, Staff Attorney for Texas Alcoholic Beverage Commission Via Fax;  
Sean Greenberg, Respondent's Attorney, Via Fax. Jeannene Fox, Assistant Administrator,  
TABC, Via Mail