

**DOCKET NO. 612274**

TEXAS ALCOHOLIC BEVERAGE COMMISSION	§	BEFORE THE TEXAS
	§	
	§	
VS.	§	
	§	ALCOHOLIC
BEN E. KEITH COMPANY	§	
D/B/A BEN E. KEITH BEERS	§	
PERMIT/LICENSE NO(s). BC132658	§	
TAYLOR COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-06-1808)	§	BEVERAGE COMMISSION

**ORDER**

**CAME ON FOR CONSIDERATION** this day, in the above-styled and numbered cause.

After proper notice was given, this case was heard by the Administrative Law Judge . The hearing convened on August 31, 2006 and adjourned on the same date. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on September 22, 2006. The Proposal For Decision was properly served on all parties who were given an opportunity to file Exceptions and Replies as part of the record herein. As of this date no exceptions have been filed.

The Assistant Administrator of the Texas Alcoholic Beverage Commission, after review and due consideration of the Proposal for Decision and Exhibits, adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge, which are contained in the Proposal For Decision and incorporates those Findings of Fact and Conclusions of Law into this Order, as if such were fully set out and separately stated herein. All Proposed Findings of Fact and Conclusions of Law, submitted by any party, which are not specifically adopted herein are denied.

**IT IS THEREFORE ORDERED**, by the Assistant Administrator of the Texas Alcoholic Beverage Commission, pursuant to Subchapter B of Chapter 5 of the Texas Alcoholic Beverage Code and 16 TAC §31.1, of the Commission Rules, that the Commission will take no action against Respondent, and this matter should be dismissed.

This Order will become final and enforceable on **December 18, 2006**, unless a Motion for Rehearing is filed **before** that date.

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

SIGNED November 2, 2006.

On Behalf of the Administrator,



Jeannene Fox, Assistant Administrator  
Texas Alcoholic Beverage Commission

WMC\bc

Honorable Monica Garza  
Administrative Law Judge  
State Office of Administrative Hearings  
Fort Worth, Texas  
**VIA FAX (817) 731-1964**

Stewart David Greenlee  
General Counsel  
BEN E. KEITH COMPANY  
d/b/a BEN E. KEITH BEERS  
**RESPONDENT**  
PO BOX 2628  
Fort Worth, TX 76113  
**VIA FAX (817) 882-9181**  
**AND CERTIFIED MAIL NO. 7001 2510 0000 7275 9374**

W. Michael Cady  
**ATTORNEY FOR PETITIONER**  
TABC Legal Section

Licensing Division  
Abilene District Office

# State Office of Administrative Hearings



**Shelia Bailey Taylor**  
Chief Administrative Law Judge

September 22, 2006

Alan Steen, Administrator  
Texas Alcoholic Beverage Commission

VIA FACSIMILE 512/206-3498

**RE: Docket No. 458-06-1808; Texas Alcoholic Beverage Commission vs Ben E. Keith  
d/b/a Ben E Keith Beers, (TABC Case No. 612274)**

Dear Mr. Steen:

Enclosed please find a Proposal for Decision in the above-referenced cause for the consideration of the Texas Alcoholic Beverage Commission. Copies of the proposal are being sent to Michael Cady, attorney for Texas Alcoholic Beverage Commission, and to Stewart Greenlee, attorney for the Respondent. The Texas Alcoholic Beverage Commission (TABC) staff (Petitioner) brought this enforcement action against Ben E. Keith Company d/b/a Ben E. Keith Beers (Respondent), alleging that Respondent's employee delivered an alcoholic beverage to an unlicensed business, in violation of the Texas Alcoholic Beverage Code (Code). The parties have stipulated to the material facts in this case, and each party has requested summary disposition in its favor. For reasons discussed in this proposal, the Administrative Law Judge (ALJ) finds Respondent did not violate the Texas Alcoholic Beverage Code. Respondent is entitled to a decision in its favor as a matter of law. Accordingly, the ALJ recommends dismissal of this case.

Pursuant to the Administrative Procedure Act, each party has the right to file exceptions to the proposal, accompanied by supporting briefs. Exceptions, replies to the exceptions, and supporting briefs must be filed with the Commission according to the agency's rules, with a copy to the State Office of Administrative Hearings, located at 6777 Camp Bowie Blvd., Suite 400, Fort Worth, Texas 76116. A party filing exceptions, replies, and briefs must serve a copy on the other party hereto.

Sincerely,

A handwritten signature in cursive script that reads "Monica Garza".

Monica Garza  
Administrative Law Judge

M...dd  
Michael Cady, TABC Staff Attorney, VIA FACSIMILE 512/206-3498  
Stewart Greenlee, Attorney for Respondent, VIA FACSIMILE, 817/882-9181



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held; a reference to the particular sections of the statutes and rules involved; and a short, plain statement of the matters asserted, as required by TEX. GOV'T CODE ANN. § 2001.052.

On June 9, 2006, Respondent filed an Objection to Petitioner's Notice of Hearing and Application for More Definite Statement, citing the failure of the original notice of hearing to provide adequate notice of the claim against Respondent. On June 29, 2006, Petitioner filed an Amended Notice of Hearing in response to the objection.

On August 3, 2006, Petitioner filed a Motion for Partial Summary Disposition, indicating there were no material facts in dispute and that Petitioner was entitled to a decision in its favor as a matter of law. On August 8, 2006, Respondent filed an Agreed Stipulation of Facts and Scheduling Agreement. On August 11, 2006, Respondent filed a Motion for Summary Disposition, indicating there were no material facts in dispute and that Respondent was entitled to a decision in its favor as a matter of law. Both parties have waived oral argument, having availed themselves of the opportunity to file briefs and supporting memoranda. Pursuant to the Scheduling Order, upon the filing of Respondent's Counter-Reply Brief, the record closed on August 22, 2006. Based on the pleadings filed by the parties, the ALJ will consider this proceeding under the provisions of 1 TEX. ADMIN. CODE § 155.57(a)<sup>1</sup>.

## II. APPLICABLE LAW

In its Amended Notice of Hearing, Petitioner alleged that Respondent violated the following Code provisions:

TEX. ALCO. BEV. CODE ANN. § 6.01:

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<sup>1</sup>Summary Disposition. In response to a party's motion...the judge may issue a proposal for decision...resolving a contested case without evidentiary hearing, if the pleadings, affidavits, materials obtained by discovery, admissions, matters officially noticed, stipulations, or evidence of record show there is no genuine issue as to any material fact and that a party is entitled to a decision in its favor as a matter of law. 1 TEX. ADMIN. CODE § 155.57(a).

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**RIGHTS AND PRIVILEGES; REVOCATION.** (a) A person may manufacture, distill, brew, sell, import, export, transport, distribute, warehouse, store, possess, possess for the purpose of sale, bottle, rectify, blend, treat, fortify, mix, or process alcoholic beverages or possess equipment or material designed for or capable of use for manufacturing alcoholic beverages, if the right or privilege of doing so is granted by this Code and the person has first obtained a license or permit of the proper type as required by this Code. (b) A license or permit issued under this Code is a purely personal privilege and is subject to revocation or suspension if the holder is found to have violated a provision of this Code or a rule of the commission.

TEX. ALCO. BEV. CODE ANN. § 61.74(a)(1):

**GROUNDS FOR CANCELLATION OR SUSPENSION: DISTRIBUTOR.** (a) The commission or administrator may suspend for not more than 60 days or cancel an original or renewal general, local, or branch distributor's license if it is found, after notice and hearing, that the licensee: (1) violated a provision of this Code or a rule of the commission during the existence of the license sought to be cancelled or suspended or during the immediately preceding license period...

TEX. ALCO. BEV. CODE ANN. § 64.01(a)(2):

**AUTHORIZED ACTIVITIES.** (a) The holder of a general distributor's license may: ... (2) distribute or sell beer in the unbroken original packages in which it is received to general, branch, or local distributors, to local distributor permittees, to permittees or licensees authorized to sell to ultimate consumers, to private club registration permittees, to authorized outlets on any installation of the national military establishment, or to qualified persons for shipment and consumption outside the state...

Based on briefs filed by the parties, the following Code and rule provisions are also relevant to the legal issue in this case:

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TEX. ALCO. BEV. CODE ANN. § 108.04:

ACTS OF PROMOTION OR COURTESY NATURE: ADMINISTRATIVE DISCRETION. The commission may promulgate rules which shall set definite limitations consistent with the general provisions of this Code, relaxing the restrictions of Sections 102.07, 102.14, 102.15, and 108.06, with respect to: ... (2) the making of gifts to civic, religious, or charitable organizations... and (5) acts of a purely courtesy nature.

16 TEX. ADMIN. CODE § 45.113(f):

Gifts to unlicensed organizations. Manufacturers and distributors may donate money, beer, or other things of value to unlicensed civic, religious or charitable organizations. (1) Beer may only be given for consumption in a wet area. (2) Advertising of events sponsored by organizations receiving donations shall include promotion of the organization sponsor or cause in a manner at least equal to or greater than the advertising of the industry donor. (3) Distributors and manufacturers authorized to sell to retailers may furnish draft beer dispensing equipment for use at temporary events, provided that such equipment may not be given in exchange for an exclusive sales privilege. (4) Manufacturers, distributors and their employees may not serve or dispense malt beverages at temporary events. (5) "Unlicensed" means not having a permit or license authorizing the sale or service of alcoholic beverages.

### III. STIPULATED FACTS

The parties stipulated to the following facts occurring in Abilene, Taylor County, Texas, on August 21, 2004. On that date, Respondent held a Branch Distributor's License, BC132658, and other permits and licenses for its beer distribution facility (warehouse) located at 2141 Cottonwood Street in Abilene, Taylor County, Texas. Hendrick Home for Children (charity) was a bona fide IRS § 501(c)(3) charity in Abilene, Taylor County, Texas. The charity was an unlicensed civic, religious, or charitable organization as referenced in 16 TEX. ADMIN. CODE § 45.113(f).

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The charity was holding a charitable event, a dinner banquet (event), at the Taylor County Expo Center Round Building (event premises) in Abilene, Taylor County, Texas. No part of the event premises were within the premises of Respondent or any third party holding a license or permit issued by TABC. The event premises were located in an area which was a wet area for the sale of beer, as defined by TEX. ALCO. BEV. CODE ANN. §§ 1.04(15) and 251.71.

Respondent had donated beer to the charity for the event. The charity had picked up the donated beer from the warehouse earlier that day. Mike Weber was Respondent's full-time employee, and he served as the general manager of the warehouse. Mr. Weber held an Agent's Beer License issued by TABC. Mr. Weber and his wife attended the event as guests. Mr. Weber did not attend the event in his official capacity as Respondent's officer, director, manager, or agent.

During the event, the beer which had been donated by Respondent was being consumed more quickly than the charity had expected. The charity's director approached Mr. Weber during the event and requested an additional donation of beer from Respondent. Mr. Weber agreed, on behalf of Respondent, to make such a donation.

Turner Cariker, an event volunteer who was not Respondent's employee, officer, or agent, and who did not hold any permit or license issued by TABC, drove to the warehouse with Mr. Weber in a sport utility vehicle (Weber SUV) owned by Mr. and Mrs. Weber. Mr. Weber drove the Weber SUV during this trip. Respondent had no ownership or other interest in the Weber SUV.

At the warehouse, Mr. Weber drew some cases of beer from stock, and he and Mr. Cariker loaded the beer into the Weber SUV. Such beer was an alcoholic beverage coming within the definition of beer set out in TEX. ALCO. BEV. CODE ANN. § 1.04(15). Mr. Weber and Mr. Cariker returned with the beer to the event premises in the Weber SUV. Mr. Weber drove the Weber SUV during the return trip.

Mr. Weber and Mr. Cariker unloaded the beer from the Weber SUV upon the event premises

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and gave it to individuals who were serving food and beverages at the event upon the event premises (the servers). None of the servers was Respondent's employee, officer, or agent, and none of the servers held any permit or license issued by TABC. Neither Mr. Weber nor Mrs. Weber served food or beverages at the event.

No stipulation was made as to which, if any, of the above-described acts of Mr. Weber constituted acts of Respondent, but it was stipulated that if any of the above-described acts of Mr. Weber are found to constitute acts of Respondent, that such acts were within the scope of authority of Mr. Weber as Respondent's employee.

#### IV. ANALYSIS

Petitioner agrees that 16 TEX. ADMIN. CODE § 45.113(f) entitled Respondent to donate beer to the charity. However, Petitioner claims the means engaged by Respondent in perfecting the donation, i.e. transporting the beer to the charitable event, were in violation of TEX. ALCO. BEV. CODE ANN. § 64.01(a)(2). Petitioner's position is that an unlicensed charity must retrieve donated beer from the premises of a licensed distributor. As discussed below, the ALJ disagrees with Petitioner.

Respondent holds a Branch Distributor's License. TEX. ALCO. BEV. CODE ANN. § 66.01 provides that, "the holder of a branch distributor's license may engage in the same activities as a holder of a general distributor's license." The authorized activities of a licensed general distributor are outlined in TEX. ALCO. BEV. CODE ANN. § 64.01, the Code provision which Respondent allegedly violated. This provision authorizes licensed general distributors to distribute or sell beer in unbroken original packages to specified types of entities. An unlicensed charitable organization is not listed among those entities.

In its Amended Notice of Hearing, Petitioner also cites a violation of TEX. ALCO. BEV. CODE

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ANN. § 6.01. Besides providing a blanket penalty for any violation of the Code or TABC rules, this provision states that a person may do any number of things in reference to an alcoholic beverage, including transport, "if the right or privilege of doing so is granted by this Code and the person has first obtained a license or permit of the proper type as required by this Code." Having reviewed all Code provisions, the ALJ finds the Code does not provide for any type of license or permit specifically authorizing the transport of donated beer to an unlicensed charitable organization. In other words, had Respondent applied for a license or permit to take its offering of beer from its warehouse to the premises of an unlicensed charitable event, TABC would have had no such license or permit to issue.

Because the transportation in question is not one for which Respondent could have obtained a permit authorizing the privilege, the ALJ concludes Respondent did not violate the Code. <sup>2</sup> In making this conclusion, the ALJ emphasizes that Respondent's act of placing the beer into the hands of the charity on the event premises by transporting the beer to the location was the only alleged illegal act. Petitioner agrees that Respondent may lawfully donate the beer to the charity and that the charity may lawfully receive such a donation. Since TABC does not issue permits for the transportation or delivery of charitable donations, Respondent's means of completing its transaction were lawful.

The ALJ also notes that TEX. ALCO. BEV. CODE ANN. § 61.01 provides specific restrictions regarding the handling of beer, providing that, "[n]o person may manufacture or brew beer for the purpose of sale, import it into this state, distribute or sell it, or possess it for the purpose of sale without having first obtained an appropriate license or permit as provided in this Code." This

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<sup>2</sup>In *Blanks v. State*, 336 S.W.2d 430 (Tex. Crim. App. 1960), the Court reversed Defendant's conviction for transporting whiskey in a wet area without first procuring a permit. The evidence demonstrated that Defendant simply placed the whiskey into his automobile from the garage floor. The Court held that, "[i]f appellant transported the whiskey by picking it up and putting it in the automobile it was not such a transportation for which he could have secured a permit authorizing the privilege and therefore such act did not violate [the Texas Liquor Control Act]."

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provision does not make any specific prohibition regarding the transport of beer. However, TEX. ALCO. BEV. CODE ANN. § 11.01, which provides specific restrictions regarding the handling of liquor, lists both “transport” and “distribute” as restricted acts. The absence of the word “transport” from the beer-prohibition provision suggests the legislature’s intent to allow the transportation of beer unless otherwise prohibited. In reviewing the Code, the ALJ notes the only specific prohibition involves transportation in a dry area. As both parties agree that Respondent’s acts occurred entirely in a wet area, the ALJ concludes that Respondent’s transport of beer to the charitable event was not prohibited by the Code.

Finally, the ALJ will address whether 16 TEX. ADMIN. CODE § 45.113(f) requires licensed distributors to complete charitable beer donations on their licensed premises. A donation or gift necessarily requires delivery to a beneficiary to complete the transaction. In promulgating 16 TEX. ADMIN. CODE § 45.113(f), under the authority of TEX. ALCO. BEV. CODE ANN. § 108.04, TABC was required to set definite limitations consistent with the general provisions of the Code. TABC failed to set limitations regarding the delivery, or completion, of a beer donation. If TABC intended for charitable organizations to retrieve all donated beer on the distributor’s licensed premises, it could have so stated. TABC did set other limitations regarding gifts to unlicensed organizations, such as prohibiting distributors from serving or dispensing malt beverages at temporary events. The failure of TABC to limit the manner or location of delivery for beer donations, other than to state the donation must be for consumption in a wet area, leads the ALJ to conclude that a licensed distributor’s delivery of donated beer to a charitable event in a wet area is authorized under 16 TEX. ADMIN. CODE § 45.113(f).

Based on the above analysis, the ALJ finds Respondent did not violate the Code by delivering its donated beer to the unlicensed premises of a charitable event. The ALJ further finds that Respondent’s Motion for Summary Disposition should be granted. Accordingly, the ALJ recommends that TABC take no enforcement action against Respondent in relation to this incident and that this matter be dismissed.

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**V. PROPOSED FINDINGS OF FACT**

1. All factual events relevant to this case occurred in Abilene, Taylor County, Texas, on August 21, 2004.
2. Ben E. Keith Company d/b/a Ben E. Keith Beers (Respondent) held a Branch Distributor's License, BC132658, and other permits and licenses for its beer distribution facility (warehouse) located at 2141 Cottonwood Street.
3. Hendrick Home for Children (charity) was a bona fide IRS § 501(c)(3) charity, operating as an unlicensed civic, religious, or charitable organization.
4. The charity was holding a charitable event, a dinner banquet (event), at the Taylor County Expo Center Round Building (event premises).
5. No part of the event premises were within the premises of Respondent or any third party holding a license or permit issued by the Texas Alcoholic Beverage Commission (TABC).
6. The event premises were located in an area which was a wet area for the sale of beer.
7. Respondent had donated beer to the charity for the event. The charity had picked up the donated beer from the warehouse earlier that day.
8. Mike Weber was Respondent's full-time employee, serving as the general manager of the warehouse. Mr. Weber held an Agent's Beer License issued by TABC.
9. Mr. Weber and his wife attended the event as guests. Mr. Weber did not attend the event in his official capacity as Respondent's officer, director, manager, or agent.
10. During the event, the beer donated by Respondent was being consumed more quickly than the charity expected.
11. The charity's director approached Mr. Weber during the event and requested an additional donation of beer from Respondent.
12. Mr. Weber agreed, on behalf of Respondent, to make such a donation.
13. Turner Cariker, an event volunteer who was not Respondent's employee, officer, or agent, and who did not hold any permit or license issued by TABC, drove to the warehouse with

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- Mr. Weber in a sport utility vehicle (Weber SUV) owned by Mr. And Mrs. Weber. Mr. Weber drove the Weber SUV during this trip.
14. Respondent had no ownership or other interest in the Weber SUV.
  15. At the warehouse, Mr. Weber drew some cases of beer from stock, and he and Mr. Cariker loaded the beer into the Weber SUV.
  16. Mr. Weber and Mr. Cariker returned with the beer to the event premises. Mr. Weber drove the Weber SUV during the return trip.
  17. Mr. Weber and Mr. Cariker unloaded the beer from the Weber SUV upon the event premises and gave it to individuals who were serving food and beverages at the event upon the event premises.
  18. None of the servers was Respondent's employee, officer, or agent, and none of the servers held any permit or license issued by TABC.
  19. Neither Mr. Weber nor Mrs. Weber served food or beverages at the event.
  20. On April 13, 2006, TABC staff (Petitioner) issued its notice of hearing, directed to Respondent and its attorney, Stewart David Greenlee.
  21. The notice contained a statement of the time, place, and 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 matters asserted.
  22. On June 9, 2006, Respondent filed an Objection to Petitioner's Notice of Hearing and Application for More Definite Statement, citing the failure of the original notice of hearing to provide adequate notice of the claim against Respondent.
  23. On June 29, 2006, Petitioner filed an Amended Notice of Hearing in response to the objection.
  24. On August 3, 2006, Petitioner filed a Motion for Partial Summary Disposition, indicating there were no material facts in dispute and that Petitioner was entitled to a decision in its favor as a matter of law.

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25. On August 8, 2006, Respondent filed an Agreed Stipulation of Facts and Scheduling Agreement.
26. On August 11, 2006, Respondent filed a Motion for Summary Disposition, indicating there were no material facts in dispute and that Respondent was entitled to a decision in its favor as a matter of law.
27. Both parties filed briefs and supporting memoranda.
28. Pursuant to the Scheduling Order, upon the filing of Respondent's Counter-Reply Brief, the record closed on August 22, 2006.

#### VI. PROPOSED CONCLUSIONS OF LAW

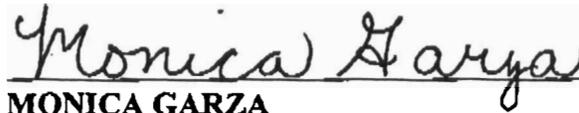
1. TABC has jurisdiction over this matter. TEX. ALCO. BEV. CODE ANN. ch. 5 and §§ 6.01 and 61.74(a)(1).
2. SOAH has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a proposal for decision with proposed findings of fact and conclusions of law. TEX. GOV'T CODE ANN. ch. 2003.
3. Respondent received proper notice of the hearing. TEX. GOV'T CODE ANN. § 2001.052.
4. Summary disposition of this contested case is proper because there is no genuine issue as to any material fact and Respondent is entitled to a decision in its favor as a matter of law. 1 TEX. ADMIN. CODE § 155.57(a).
5. Respondent's conduct was not in violation of the TABC statutes or rules. TEX. ALCO. BEV. CODE ANN. §§ 6.01, 61.74(a)(1), 64.01(a)(2), and 108.04 and 16 TEX. ADMIN. CODE § 45.113(f).
6. TABC should not take enforcement action against Respondent, and this matter should be dismissed. 1 TEX. ADMIN. CODE § 155.57(a).

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SIGNED September 22, 2006.

A handwritten signature in cursive script that reads "Monica Garza". The signature is written in black ink on a white background.

MONICA GARZA

ADMINISTRATIVE LAW JUDGE

STATE OFFICE OF ADMINISTRATIVE HEARINGS

## STATE OFFICE OF ADMINISTRATIVE HEARINGS

**6777 Camp Bowie Blvd.  
Ft. Worth, Texas 76116  
Phone (817) 731-1733  
Fax (817) 377-3706**

### SERVICE LIST

**AGENCY:** TEXAS ALCOHOLIC BEVERAGE COMMISSION

**CASE:** Ben E. Keith, Co d/b/a Ben E. Keith Beers

**DOCKET NUMBER:** 458-06-1808

**AGENCY CASE NO:** 612274

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W. Michael Cady  
Staff Attorney  
Texas Alcoholic Beverage Commission  
Ph: 512/206-3490  
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**AGENCY COUNSEL**  
BY FAX

Stewart David Greenlee  
Attorney at Law  
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Ph: 817/877-5700  
Fax: 817/882-9181

**RESPONDENT**  
BY FAX

as of September 22, 2006