

DOCKET NO. 588455

IN RE GRAPEVINE MARKET L.P.	§	BEFORE THE
D/B/A GRAPEVINE MARKET	§	
PERMIT NOS. P-451698, PS451701,	§	
E-451700, LP451699	§	TEXAS ALCOHOLIC
	§	
TRAVIS COUNTY, TEXAS	§	
(SOAH DOCKET NO. 458-00-1585)	§	BEVERAGE COMMISSION

ORDER

CAME ON FOR CONSIDERATION this 15th day of February, 2001, the above-styled and numbered cause.

After proper notice was given, this case was heard by Administrative Law Judge Bill Ehret. The hearing convened and adjourned on September 11, 2000. The Administrative Law Judge made and filed a Proposal For Decision containing Findings of Fact and Conclusions of Law on January 23, 2001. 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, 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 Permit Nos. P-451698, PS451701, E-451700, LP451699 are herein **SUSPENDED** for **three (3) days**.

IT IS FURTHER ORDERED that unless the Respondent pays a civil penalty in the amount of **\$450.00** on or before the **15th day of May, 2001**, all rights and privileges under the above described permits will be **SUSPENDED** for a period of **three (3) days, beginning at 12:01 A.M. on the 22nd day of May, 2001**.

This Order will become final and enforceable on **March 8, 2001**, 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 15th day of February, 2001.

On Behalf of the Administrator,



Randy Yarbrough, Assistant Administrator
Texas Alcoholic Beverage Commission

CB/bc

The Honorable Bill Ehret
Administrative Law Judge
State Office of Administrative Hearings
Austin, Texas
VIA FACSIMILE (512) 475-4994

Holly Wise, Docket Clerk
State Office of Administrative Hearings
300 West 15th Street, Suite 504
Austin, Texas 78701
VIA FACSIMILE (512) 475-4994

Greg Steiner
The Grapevine Market L.P.
d/b/a Grapevine Market
RESPONDENT
7938 Great Northern Blvd.
Austin, Texas 78757-8035
CERTIFIED MAIL NO. Z 280 626 982

Christopher Burnett
ATTORNEY FOR PETITIONER
TABC Legal Section

Licensing Division
Austin District Office

TEXAS ALCOHOLIC BEVERAGE COMMISSION

CIVIL PENALTY REMITTANCE

DOCKET NUMBER: 588455

REGISTER NUMBER:

NAME: THE GRAPEVINE MARKET L.P. TRADENAME: GRAPEVINE MARKET

ADDRESS: 7938 Great Northern Boulevard, Austin, Travis County, Texas 78757-8035

DATE DUE: May 15, 2001

PERMITS OR LICENSES: P-451698, PS451701, E-451700, LP451699

AMOUNT OF PENALTY: \$450.00

Amount remitted \$ _____ Date remitted _____

If you wish to pay a civil penalty rather than have your permits and licenses suspended, you may pay the amount assessed in the attached Order to the Texas Alcoholic Beverage Commission in Austin, Texas. **IF YOU DO NOT PAY THE CIVIL PENALTY ON OR BEFORE THE 15TH DAY OF MAY 2001, YOU WILL LOSE THE OPPORTUNITY TO PAY IT, AND THE SUSPENSION SHALL BE IMPOSED ON THE DATE AND TIME STATED IN THE ORDER.**

When paying a civil penalty, please remit the total amount stated and sign your name below. **MAIL THIS FORM ALONG WITH YOUR PAYMENT TO:**

TEXAS ALCOHOLIC BEVERAGE COMMISSION
P.O. Box 13127
Austin, Texas 78711

WE WILL ACCEPT ONLY U.S. POSTAL MONEY ORDERS, CERTIFIED CHECKS, OR CASHIER'S CHECKS. NO PERSONAL CHECKS. NO PARTIAL PAYMENTS.

Your payment will not be accepted unless it is in proper form. Please make certain that the amount paid is the amount of the penalty assessed, that the U.S. Postal Money Order, Certified Check, or Cashier's Check is properly written, and that this form is attached to your payment.

Signature of Responsible Party

Street Address P.O. Box No.

City State Zip Code

Area Code/Telephone No.

DOCKET NO. 458-00-1585

TEXAS ALCOHOLIC BEVERAGE
COMMISSION, Petitioner

VS.

THE GRAPEVINE MARKET L.P.
D/B/A GRAPEVINE MARKET
PERMIT NOS. P-451698, PS-451701,
E-451700, LP-451699
LICENSE NO. BF451702
TRAVIS COUNTY, TEXAS
(TABC CASE NO. 588455), Respondent

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BEFORE THE

STATE OFFICE OF

ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

The Staff of the Texas Alcoholic Beverage Commission (the Commission or TACB) brought this action against a licensee of the Commission alleging that Grapevine Market (the Respondent) conspired to engage in an illegal consignment sale of wine, thereby violating Sections 101.68 and 104.03 of the Texas Alcoholic Beverage Code (the Code). The Staff recommended that the Respondent be required to either pay a civil penalty of \$450.00 or that its permits be suspended for a period of three days. The Administrative Law Judge (ALJ) finds that the Staff's recommendation is warranted and that the Respondent either pay a penalty of \$450.00 or serve a three-day suspension of its permits.

I. Procedural History

On June 9, 2000, the Staff of the Commission notified The Grapevine Market, L.P., d/b/a The Grapevine Market that the Staff would seek disciplinary action against the Respondent's permits for conspiring to engage in an illegal consignment sale. The Staff asserted that such an act constitutes grounds for suspension or cancellation of the Respondent's permits. The hearing commenced on September 11, 2000, in the offices of the State Office of Administrative Hearings in Austin, Travis County, Texas. After the taking of evidence, the hearing was concluded, with the record left open for post hearing argument until

September 25, 2000. Staff was represented by staff attorney Christopher Burnett and the Respondent by one of its owners, Greg Steiner.

II. Jurisdiction and Notice

There are no contested issues of notice or jurisdiction in this proceeding. Therefore, these matters are set out in the proposed findings of fact and conclusions of law without further discussion here.

III. Statutory Criteria

The relevant sections of the Texas Alcoholic Beverage Code (the Code) in this proceeding are Sections 101.68, 1.04, and 104.03.

Section 101.68 of the Code provides:

A person commits an offense if he is a party to, or directly or indirectly interested in or connected with, a consignment sale of an alcoholic beverage.

Section 1.04(2) of the Code defines "consignment sale" as:

(A) the delivery of alcoholic beverages under an agreement, arrangement, condition, or system by which the person receiving the beverages has the right at any time to relinquish possession to them or to return them to the shipper and in which title to the beverages remains in the shipper;

(B) the delivery of alcoholic beverages under an agreement, arrangement, condition, or system by which the person designated as the receiver merely acts as an intermediary for the shipper or seller or the actual receiver; . . .

(D) any method employed by a shipper or seller by which a person designated as the purchaser of alcoholic beverages does not in fact purchase the beverages;

(E) any method employed by a shipper or seller by which a person is placed in actual or constructive possession of an alcoholic beverage without acquiring title to the beverage;

Section 104.03 of the Code provides:

A retail dealer or his agent, servant, or employee commits an offense if he conspires with another person to violate or accepts the benefits of a violation of this code or a valid rule of the commission.

IV. Evidence

The evidence consisted of the testimony of two witnesses for the Commission, four exhibits offered into evidence by the Commission, and the testimony of one of the owners for the Respondent.

1. TACB's Evidence

TACB compliance officer Michael Kane testified regarding the "three tier" regulatory framework of the Commission, *e.g.*, (1) manufacturer or an out of state seller permitted to sell alcoholic beverages in Texas by the Commission to (2) a wholesaler to (3) a retailer. It is required that the title to the alcoholic beverages transfer at each stage to the next entity in order to not be a prohibited consignment sale. He discovered a proposed arrangement whereby GHWine of California would sell wine to Ambiente Wine Importing, Inc. of Texas (wholesaler) which would then sell the wine to the Respondent for sale as the retailer to the public. This arrangement would not violate the statutory provisions regarding consignment sales. However, the TACB introduced a copy of the contract between GHWine and the Respondent that indicates a different organization or system had been established. TACB Exhibit No. 4 is a contract between GHWine and the Respondent, which Respondent admitted was in effect at the time of the TACB

investigation that resulted in this action. It sets out a procedure by which GHWine would ship wine to the ultimate consumer, with the Respondent acting as nothing more than an intermediary in the process, and without the Respondent ever acquiring true title to the wine. The TACB points to two contract paragraphs in particular:

10. GHWine shall notify a common carrier on Retailer's behalf when packages of wine are ready to be delivered to consumers. GHWine shall prepare packing slips, invoices, and other paperwork necessary to legally deliver the wine to the consumer, and shall provide necessary paperwork to Retailer, with copies to any common carrier, any distributor, and to the manufacturer as proof of delivery.

13. GHWine shall remit a check to Retailer to pay the sales tax due on said orders no later than three (3) days before said sales tax is due to be paid by Retailer to Retailer's State. Retailer shall remit the sales tax when due. At the same time, and with the same frequency, GHWine shall remit to Retailer the discount Retailer has earned.

TACB asserts that the implication or result of these provisions is that GHWine would initially collect the sales tax from the ultimate consumer and provide all documentation necessary to ship the wine to the ultimate consumer. Although the Respondent would take actual possession of the wine before sending it on to the consumer, the Respondent would not have true title to the wine, which would remain with GHWine. The Respondent would merely act as an intermediary for GHWine and the ultimate consumer. Therefore, such action would constitute a prohibited consignment sale.

TACB enforcement officer David Ball testified that Mr. Steiner, one of the owners of Grapevine Market, had brought this contract to him and that they had discussed it. Although he did not raise any questions about it, he did not give any opinion as to the legality of the contract to Mr. Steiner.

2. Respondent's Evidence

Mr. Steiner testified for the Respondent. Mr. Steiner testified he took the contract to David Ball, TACB enforcement officer, to review and that they had discussed it. He noted that Mr. Ball had not raised any questions or alerted him to any problems with the contract, and that he had acted in good faith by checking with the TACB about the contract with GHWine.

V. Analysis and Recommendation

The ALJ notes the TACB characterizes the violation alleged as a "technical violation". The ALJ found Mr. Steiner's testimony that he acted in good faith credible and convincing. The Respondent never received a shipment or any payment from GHWine, and never paid any sales tax for GHWine. The TACB agreed that the Respondent was not a bad actor, but that the agreement it entered into with GHWine is, nonetheless, a violation of Section 104.03 of the Code, regardless of intent. The TACB described the recommended penalty or suspension as minor in light of these facts. The ALJ recommends that either a three-day suspension of Respondent's permits or a penalty of \$450.00 be imposed on the Respondent.

VI. PROPOSED FINDINGS OF FACT

1. Respondent, The Grapevine Market L.P. d/b/a/ Grapevine Market, is the holder of Permit Nos. P-451698, PS-451701, E-451700, and LP-451699 issued to the Respondent by the TABC.
2. On June 9, 2000, the Staff of the Texas Alcoholic Beverage Commission (TABC) notified the Respondent of this hearing by certified mail, return receipt requested.
3. The Respondent entered into a contract with GHWine of California. This contract provided the following :

GHWine shall notify a common carrier on Retailer's behalf when packages of wine are ready to be delivered to consumers. GHWine shall prepare packing slips, invoices, and other paperwork necessary to legally deliver the wine to the consumer, and shall provide necessary paperwork to Retailer, with copies to any common carrier, any distributor, and to the manufacturer as proof of delivery.

GHWine shall remit a check to Retailer to pay the sales tax due on said orders no later than three (3) days before said sales tax is due to be paid by Retailer to retailer's State. Retailer shall remit the sales tax when due. At the same time, and with the same frequency, GHWine shall remit to Retailer the discount Retailer has earned.

4. True title of the wine delivered pursuant to the contract described in Finding of Fact No. 3 would remain with GHWine, with the Respondent acting as an intermediary for the shipper or seller and the actual receiver (the customer/purchaser).
5. The Respondent never received any shipment of wine or payment from GHWine, and never paid any sales tax for GHWine under the contract.

VII. PROPOSED CONCLUSIONS OF LAW

1. The Texas Alcoholic Beverage Commission has jurisdiction over this matter pursuant to TEX. ALCO. BEV. CODE ANN. (the Code) §§6.01,11.61, and 61.71.
2. The State Office of Administrative Hearings has jurisdiction over matters relating to the hearing in this proceeding, including the authority to issue a proposal for decision with proposed findings of fact and proposed conclusions of law, pursuant to the TEX. GOV'T CODE ANN. §§2003.021(b)and 2003.042(5).

3. The Respondent received proper and timely notice of the hearing pursuant to TEX. GOV'T CODE ANN. §2001.051.
4. Based on Finding of Fact No. 5, there is insufficient evidence to conclude that the Respondent engaged in an actual consignment sale as prohibited by §101.68 of the Code.
5. Based on Findings of Fact Nos. 3 and 4, the Respondent conspired to engage in a consignment sale as prohibited by §104.3 of the Code.
6. Based on Conclusion of Law No. 5, the Respondent should either pay a penalty of \$450.00 or serve a three-day suspension of its permits.

Signed this 23rd day of January, 2001.



Bill Ehret
Administrative Law Judge
State Office of Administrative Hearings