

**DOCKET NO. 591368**

<b>TEXAS ALCOHOLIC BEVERAGE COMMISSION, Petitioner</b>	<b>§</b>	<b>BEFORE THE TEXAS</b>
	<b>§</b>	
<b>VS.</b>	<b>§</b>	
	<b>§</b>	
<b>M.I.S. ENTERPRISES, INC. D/B/A MOULIN ROUGE, Respondent</b>	<b>§</b>	<b>ALCOHOLIC</b>
	<b>§</b>	
<b>PERMIT NOS. MB471800, LB471801</b>	<b>§</b>	
	<b>§</b>	
<b>HARRIS COUNTY, TEXAS (SOAH DOCKET NO. 458-10-4384)</b>	<b>§</b>	<b>BEVERAGE COMMISSION</b>

**ORDER**

**CAME ON FOR CONSIDERATION** this 14th day of January, 2011, the above-styled and numbered cause.

After proper notice was given, this case was heard by the State Office of Administrative Hearings (SOAH), with Administrative Law Judge Lindy Hendricks presiding. The hearing convened on September 10, 2010 and the SOAH record closed that day. The Administrative Law Judge made and filed a Proposal for Decision containing Findings of Fact and Conclusions of Law on September 27, 2010. 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, adopts the Findings of Fact and Conclusions of Law of the Administrative Law Judge that 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 other motions, requests for entry of Proposed Findings of Facts and Conclusions of Law, and any other requests for general or specific relief submitted by any party, which are not specifically adopted herein, are denied.

**IT IS THEREFORE ORDERED** that Respondent pay a civil penalty in the amount of **\$12,000.00** on or before March 15th, 2011. If the civil penalty is not paid when due, the privileges granted by the Commission and activities authorized under the above permits by the

Code will be **SUSPENDED** beginning at 12:01 A.M. on March 23rd, 2011, and shall remain suspended for **forty (40)** consecutive days.

If this Order is appealed and judgment is issued affirming the Order, Respondent shall pay the civil penalty in the amount of **\$12,000.00** on or before the **tenth (10<sup>th</sup>)** day following the date the judgment is signed. If not paid by that date, the privileges granted by the Commission and activities authorized under the above permits by the Code will be **SUSPENDED** beginning at 12:01 A.M. on the **eighteenth (18<sup>th</sup>)** day following the date the judgment is signed and shall remain suspended for **forty (40)** consecutive days.

This Order will become final and enforceable on the 9th day of February, 2011, unless a Motion for Rehearing is filed **before** that date.

**SIGNED** this the 14th day of January, 2011, at Austin, Texas.



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Sherry K-Cook, Assistant Administrator  
Texas Alcoholic Beverage Commission

#### **CERTIFICATE OF SERVICE**

I certify that the persons listed below were served with a copy of this Order in the manner indicated below on this the 14th day of January, 2011.



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Martin Wilson, Assistant General Counsel  
Texas Alcoholic Beverage Commission

Lindy Hendricks  
**ADMINISTRATIVE LAW JUDGE**  
State Office of Administrative Hearings  
2020 North Loop West, Suite 111  
Houston, Texas 77018  
**VIA FACSIMILE: (512) 322-0474**

M.I.S. Enterprises Inc.  
d/b/a Moulin Rouge  
**RESPONDENT**  
8930 Winkler Drive  
Houston, Texas 77017  
***VIA REGULAR MAIL***

Clyde Burleson and Michael Craig  
**ATTORNEYS FOR RESPONDENT**  
1533 W. Alabama, Suite 100  
Houston, Texas 77006  
***VIA REGULAR MAIL***

Shelia Lindsey  
**ATTORNEY FOR PETITIONER**  
TABC Legal Section

TABC Licensing Division

Lt. Harold Schreffler  
TABC Houston District Office

# State Office of Administrative Hearings



Cathleen Parsley  
Chief Administrative Law Judge

September 27, 2010

Alan Steen  
Administrator  
Texas Alcoholic Beverage Commission  
5806 Mesa Drive  
Austin, Texas 78731

**VIA REGULAR MAIL**

**RE: Docket No. 458-10-4384; Texas Alcoholic Beverage Commission vs. M.I.S. Enterprises Inc. d/b/a Moulin Rouge**

Dear Mr. Steen:

Please find enclosed a Proposal for Decision in this case. It contains my recommendation and underlying rationale.

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,

A handwritten signature in cursive script that reads "Lindy Hendricks".

Lindy Hendricks  
Administrative Law Judge

LH/mr  
Enclosure

xc: Docket Clerk, State Office of Administrative Hearings- **VIA REGULAR MAIL**  
Shelia Lindsey, Staff Attorney, Texas Alcoholic Beverage Commission, 427 W 20<sup>th</sup> Street, Suite 600, Houston, TX 77008- **VIA REGULAR MAIL**(with Certified Evidentiary Record and 1 hearing CD)  
Emily Helm, Director of Legal Services, Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Austin, TX 78731- **VIA REGULAR MAIL**  
Clyde Burleson and Michael Craig, Attorney at Law, 1533 W. Alabama, Suite 100, Houston, TX 77006 -**VIA REGULAR MAIL**

2020 North Loop West Suite 111 Houston, Texas 77018  
713.957.0010 (Telephone) 713.812.1001 (Fax)  
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## II. APPLICABLE LAW

Petitioner alleges that Respondent violated section 28.08 of the Texas Alcoholic Beverage Code (Code) which states that a holder of a mixed beverage permit may not refill with any substance a container which contained distilled spirits on which the tax has been paid.<sup>1</sup> Petitioner also alleges that Respondent violated section 28.15 of the Code which states that a mixed beverage permit holder may not possess or permit a person to possess on the premises distilled spirits in any container that does not bear a serially numbered identification stamp issued by the Commission or other identification approved by the Commission.<sup>2</sup>

The applicable law sets forth that TABC may suspend for not more than 60 days or cancel an original or renewal permit if it is found, after notice and hearing, that the permittee violated a provision of the Code.<sup>3</sup> Instead of a suspension, TABC may allow a permittee to pay a civil penalty. The amount of civil penalty imposed may not be less than \$150 per day or more than \$25,000 for each day the permit was to be suspended.<sup>4</sup>

## III. EVIDENCE

Petitioner offered six exhibits: the custodian of record affidavit and copy of permit number MB-471800 and three waiver orders (Exhibit No.1); the notice of hearing (Exhibit No. 2); the green card from the notice of hearing sent certified (Exhibit No. 3); photographs (Exhibit No. 4A-E); the seizure report (Exhibit No. 5); and a voluntary sworn statement (Exhibit No. 6). Respondent offered one exhibit: the dispositions of refilling cases (Exhibit No.7). All documents and items were admitted into evidence.

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<sup>1</sup> Code § 28.08 [Refilling Containers Prohibited].

<sup>2</sup> Code § 28.15 [Stamps].

<sup>3</sup> Code § 11.61(b)(2) [Cancellation or Suspension of Permit].

<sup>4</sup> Code § 11.64(a).

Petitioner offered the testimony of TABC auditor Donny Betts. On December 18, 2009, Mr. Betts observed Mohammad Espari carry a cooler into the business. Mr. Espari is the brother of Nasrolah Espari (Permittee), the owner of Respondent. Upon making contact with Mr. Espari, Mr. Betts noticed the cooler contained a funnel and six bottles of distilled spirits that did not bear serially numbered identification stamps. Mr. Espari admitted using the bottles to refill. Mr. Betts, accompanied by TABC Agent Steven Roskey, continued the investigation and inspected the bar, office, and kitchen. Mr. Betts testified that they found no other evidence of refilling.

Respondent admitted to refilling distilled spirits bottles and having distilled spirits in containers that do not bear a serially numbered identification stamp, and does not contest the alleged violations. Accordingly, since the allegations are not disputed, the ALJ incorporates the facts in evidence into the Findings of Fact below. The only issue is the penalty to be assessed.

Respondent offered the testimony of the Permittee and Mr. Espari in seeking leniency on the penalty. Permittee testified that he did not know or authorize Mr. Espari to refill distilled spirits. When he learned of the violation, he fired Mr. Espari. Three days later, Permittee rehired Mr. Espari when the family interceded. However, Permittee demoted Mr. Espari from general manager to manager and reduced his responsibilities.

Mr. Espari testified that he cooperated with investigators and provided a written statement, admitting to refilling bottles. He testified that he refilled bottles on three occasions between October and December, without Permittee's knowledge. He reasoned that, because his friends were visiting him and receiving free drinks, Permittee should not have to absorb the costs of those free drinks by paying for gross receipts taxes on drinks that had not been sold. Mr. Espari testified that he did not know refilling was illegal and vowed never to do so again. Permittee and Mr. Espari testified that TABC conducted several subsequent inspections and found no violations. Permittee is asking for any sanction or penalty short of cancellation.

#### IV. ANALYSIS

Petitioner is asking for cancellation of the permits, stating that cancellation is the only possible penalty for a refilling case. Presumably, Petitioner is basing this position on the recommended Schedule of Sanctions and Penalties (Schedule) set forth in the TABC Rules.<sup>5</sup> The Schedule recommends cancellation as the penalty for the first refilling violation. However, the Schedule applies to a *settlement offer* made by an agent, compliance officer, or other specifically designated commission personnel, *prior to a contested case under Government Code Chapter 2001*.<sup>6</sup> The Schedule is also not absolute. Rule 34.1(i) allows for deviation from the recommended sanction when aggravating or mitigating circumstances are found to exist. Respondent provided a list of refilling violations in the state of Texas between February 2009 and June 2010, a total of twenty-four cases. Only three cases resulted in cancellation. There was one dismissal and six warnings. The remaining fourteen cases settled for a suspension or civil penalty; all but three cases provided a civil penalty of \$300 per day, with an average suspension period of 26 days.<sup>7</sup>

The ALJ is not bound by the Schedule in a contested hearing and may assess a penalty consistent with Section 11.61 of the Code cited by Petitioner in its Notice of Hearing. The statute allows for a suspension range of up to 60 days *or* cancellation for violation of a code provision.

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<sup>5</sup> TABC Rules can be found at 16 TEX. ADMIN. CODE (TAC), Chapters 32-50. Rule 34.2 sets forth the Schedule of Sanctions and Penalties.

<sup>6</sup> Rule 34.1(b). This section states that agents, compliance officers or other specifically designated commission personnel have authority to settle a complaint issued by the commission against a person for violation of the Texas Alcoholic Beverage Code, prior to filing a contested case under Government Code, Chapter 2001, Subchapter C (Administrative Procedure Act). Subsection (c) states that the settlement, the number of days or civil penalty amount, authorized by this chapter must conform to the provisions of this chapter.

<sup>7</sup> Resp. Exhibit 7.

Respondent has been in operation for over 10 years.<sup>8</sup> Respondent has entered into three waiver orders during this time-span. The last violation was over five years ago.<sup>9</sup> This is Respondent's first violation of sections 28.08 and 28.15 of the Code. Permittee and Mr. Espari cooperated with the TABC in the investigation. Mr. Espari was forthcoming, admitted to refilling, and provided a written statement. Without the statement, it is uncertain that bottles of distilled spirits had actually been refilled. The presence of the funnel indicates an intention, without opportunity when TABC personnel interceded, to commit a violation of refilling. The evidence shows the TABC auditor and agent immediately made contact with Mr. Espari when he entered the business with a cooler. The cooler contained six bottles of unstamped distilled spirits and a funnel. The auditor and agent inspected the bar, kitchen, and office, but did not find any evidence of refilling. The bottles seized were those without serially numbered identification stamps. It is unclear what and how many bottles were refilled or the amount of taxes Respondent may have avoided paying the State to warrant cancellation of the permits. But for Mr. Espari's testimony that he refilled three times, TABC was only aware of and charged Respondent with one refilling case based on the admission. Numerous subsequent inspections of the business resulted in no administrative citations. There is no indication that this incident was so egregious, that Respondent continues to violate the law, or that Respondent is beyond correction or compliance that cancellation is warranted.

Therefore, the ALJ recommends a 40-day suspension, or a \$12,000 civil penalty,<sup>10</sup> based on the fact that refilling is a major regulatory violation and Respondent was found in possession of six bottles of distilled spirits that did not bear serially numbered identification stamps.

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<sup>8</sup> The permit was originally issued on May 8, 2000, and has been continuously renewed.

<sup>9</sup> In 2001, Respondent paid a civil penalty of \$2,100 for a sale to an intoxicated person and permitting minor to possess or consume violations. In 2003, Respondent paid a civil penalty of \$2,250 for a place or manner prostitution offense. In 2005, Respondent paid a civil penalty of \$2,250 for two solicitations of drinks violations. *See* TABC Exhibit No. 1.

<sup>10</sup> The civil penalty is assessed at \$300 per day.

## V. FINDINGS OF FACT

1. M.I.S. Enterprises Inc. d /b/a Moulin Rouge currently operates under authority of a Mixed Beverage Permit, which includes a Mixed Beverage Late Hours Permit, issued for the premises located at 8930 Winkler Drive, Houston, Harris County, Texas 77017.
2. The permit was issued on May 8, 2000, and has been continuously renewed.
3. On July 14, 2010, the TABC issued its notice of hearing to Respondent.
4. 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.
5. On September 10, 2010, a hearing convened before ALJ Lindy Hendricks in Houston, Texas. TABC Staff appeared at the hearing through its Staff Attorney Shelia Lindsey. Respondent appeared and was represented by its attorneys, Clyde Burleson and Michael Craig. The record closed the same day.
6. On December 18, 2009, a TABC auditor observed Respondent's manager bring a cooler into the licensed premises.
7. Upon inspection of the cooler, the auditor found a funnel and six bottles of distilled spirits that did not bear serially numbered identification stamps.
8. The unstamped bottles seized included Juarez Tequila, Captain Morgan Rum, Ron Rio Rum, Taaka Vodka, and two bottles of Windsor Canadian Whiskey.
9. Respondent's manager admitted refilling distilled spirits.

## VI. CONCLUSIONS OF LAW

1. TABC has jurisdiction over this matter under TEX. ALCO. BEV. CODE ANN. chs. 5, 11, and 28. TEX. ALCO. BEV. CODE ANN. § 1.01 *et seq.*
2. The State Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a proposal for decision with findings of fact and conclusions of law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.
3. Proper and timely notice of the hearing was provided to all parties pursuant to the Administrative Procedure Act, TEX. GOV'T CODE ANN. ch. 2001, and 1 TEX. ADMIN. CODE § 155.401.

4. In December 2009, as detailed in the Findings of Fact No. 9, Respondent refilled a container that contained distilled spirits on which taxes had been paid, in violation of TEX. ALCO. BEV. CODE ANN. § 28.08.
5. In December 2009, as detailed in the Findings of Fact Nos. 6-8, Respondent possessed bottles of distilled spirits that did not bear serially numbered identification stamps, in violation of TEX. ALCO. BEV. CODE ANN. § 28.15.
6. Respondent's permits should be suspended for 40 days, and Respondent should be allowed to pay \$12,000 in lieu of suspension.

**SIGNED September 27, 2010.**

  
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**LINDY HENDRICKS**  
**ADMINISTRATIVE LAW JUDGE**  
**STATE OFFICE OF ADMINISTRATIVE HEARINGS**