

SOAH DOCKET NO. 458-16-3124
(TABC Docket 636429)

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION,	§	
Petitioner	§	
v.	§	OF
	§	
SPEC'S FAMILY PARTNERS, LTD.	§	
PERMIT NOS. P046166, BF270903,	§	
E, LP, PS	§	
Respondent	§	ADMINISTRATIVE HEARINGS

SOAH DOCKET NO. 458-17-1741
(TABC Docket 640774)

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION,	§	
Petitioner	§	
v.	§	OF
	§	
SPEC'S FAMILY PARTNERS, LTD.,	§	
Applicant	§	ADMINISTRATIVE HEARINGS

SOAH DOCKET NO. 458-17-1742
(TABC Docket 640748)

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION,	§	
Petitioner	§	
v.	§	OF
	§	
SPEC'S FAMILY PARTNERS, LTD.	§	
Applicant	§	ADMINISTRATIVE HEARINGS

SOAH DOCKET NO. 458-17-1743
(TABC Docket 640749)

TEXAS ALCOHOLIC BEVERAGE	§	BEFORE THE STATE OFFICE
COMMISSION,	§	
Petitioner	§	
v.	§	OF
	§	
SPEC'S FAMILY PARTNERS, LTD.	§	
Applicant	§	ADMINISTRATIVE HEARINGS

TABLE OF CONTENTS

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY	1
II. BACKGROUND AND ALLEGATIONS	2
A. Permits and Applications	2
B. Code and Rules Provisions.....	3
C. Witnesses	5
III. STIPULATED FACTS	6
IV. WAIVER ORDER IS NOT AND DOES NOT CONTAIN AN ADMISSION	8
V. FAILURE TO PROVIDE DOCUMENTS	12
A. Allegation 1	12
B. Applicable Law	12
C. TABC Evidence.....	12
1. Deposition of Ms. Anderson	12
2. Testimony of Ms. Anderson at Hearing on the Merits (HOM)	13
a. Background	13
b. Regarding Allegation 1	13
3. Testimony of Mr. Jones at HOM.....	16
a. Background	16
b. Regarding Allegation 1	17
D. Spec's Evidence	19
1. Testimony of Mr. Heisler at HOM	19
a. Background	19
b. Regarding Allegation 1	19
2. Testimony of Mr. Rydman at HOM.....	20
a. Background	20
b. Regarding Allegation 1	21
3. Testimony of Mr. Coleman at HOM	22

a.	Background	22
b.	Regarding Allegation 1	22
E.	Discussion and Recommendation	22
VI.	CREDIT LAW VIOLATIONS	25
A.	Allegations 6, 7, and 11	25
B.	Applicable Law	26
C.	TABC Evidence	27
1.	Deposition of Ms. Anderson	27
a.	Regarding Allegation 6	27
b.	Regarding Allegation 7	28
c.	Regarding Allegation 11	28
2.	Testimony of Ms. Anderson at HOM	28
a.	Regarding Code § 102.32(c)	28
b.	Regarding Marketing Practices Advisories or Bulletins (MPB or Bulletins)	29
c.	Regarding Rule § 45.121	30
d.	Regarding Allegation 6	30
e.	Regarding Allegation 7	31
f.	Regarding Allegation 11	32
D.	Spec's Evidence	32
1.	Testimony of Mr. Heisler at HOM	32
a.	Regarding Allegation 6	33
b.	Regarding Allegation 7	34
c.	Regarding Allegation 11	35
2.	Testimony of Mr. Rydman at HOM	36
3.	Testimony of Mr. Coleman at HOM	36
E.	Discussion and Recommendation	37
1.	Calculation of the payment due date	37
2.	Grace Period	38
a.	Established by Code and Rules	38
b.	Ratified by Staff's Actions	39
3.	Summary of Evidence	41

4.	Allegation 11	41
5.	Allegation 7	42
6.	Allegation 6	42
VII. CONSPIRACY TO ALLOW AN EXCESSIVE DISCOUNT: \$1 CULITO'S WINE		43
A.	Allegation 22	43
B.	Applicable Law	44
C.	TABC Evidence	44
1.	Deposition of Ms. Anderson	44
2.	Testimony of Ms. Anderson at HOM	45
3.	Testimony of John Saladino at HOM	47
4.	Testimony of Jay Broddon at HOM	50
5.	Testimony of Billy Davis at HOM	50
D.	Spec's Evidence	50
1.	Testimony of Mr. Rydman at HOM	50
2.	Testimony of Mr. Coleman at HOM	51
3.	Testimony of Richard Wills at HOM	52
E.	Discussion and Recommendation	52
VIII. CONSPIRACY TO RECEIVE A THING OF VALUE: \$1 CULITO'S WINE		55
A.	Allegation 23	55
B.	Applicable Law	55
C.	TABC Evidence	55
1.	Deposition of Ms. Anderson	55
2.	Testimony of Ms. Anderson at HOM	56
D.	Spec's Evidence	56
1.	Testimony of Mr. Rydman at HOM	56
2.	Testimony of Mr. Coleman at HOM	56
E.	Discussion and Recommendation	57
IX. CONSPIRACY: NONRESIDENT SELLER/WHOLESALE OFFERED AN INDUCEMENT - \$2 INCENTIVE		58
A.	Allegation 24	58
B.	Applicable Law	58

C.	TABC Evidence.....	58
1.	Deposition of Ms. Anderson.....	58
2.	Testimony of Ms. Anderson at HOM.....	59
3.	Testimony of Mr. Saladino at HOM.....	60
4.	Testimony of Mr. Broddon at HOM.....	61
5.	Testimony of Mr. Davis at HOM.....	61
D.	Spec's Evidence.....	61
1.	Testimony of Mr. Rydman at HOM.....	61
2.	Testimony of Mr. Coleman at HOM.....	62
E.	Discussion and Recommendation.....	62
X.	CONSPIRACY: NONRESIDENT SELLER/WHOLESALE OFFERED AN INDUCEMENT- 40% PROFIT.....	64
A.	Allegation 25.....	64
B.	Applicable Law.....	64
C.	TABC Evidence.....	65
1.	Deposition of Ms. Anderson.....	65
2.	Testimony of Ms. Anderson at HOM.....	66
3.	Testimony of Mr. Jones at HOM.....	67
4.	Testimony of Mr. Davis at HOM.....	67
D.	Spec's Evidence.....	67
1.	Testimony of Mr. Rydman at HOM.....	67
2.	Testimony of Mr. Coleman at HOM.....	68
3.	Testimony of Mr. Wills at HOM.....	68
E.	Discussion and Recommendation.....	69
XI.	CONSPIRACY: ACCEPTED AND RECEIVED A THING OF VALUE- FREE WINE AND PAYMENT FOR EMPLOYEE INCENTIVE PROGRAM.....	70
A.	Allegations 26 and 28.....	70
B.	Applicable Law.....	71
C.	TABC Evidence.....	71
1.	Deposition of Ms. Anderson.....	71
2.	Testimony of Ms. Anderson at HOM.....	73
3.	Testimony of Mr. Davis at HOM.....	74

4.	Testimony of Mr. Saladino at HOM	75
5.	Testimony of Mr. Broddon at HOM	76
D.	Spec's Evidence.....	76
1.	Testimony of Mr. Kemble at HOM.....	76
2.	Testimony of Mr. Coleman at HOM.....	78
3.	Testimony of Mr. Wills at HOM	78
E.	Discussion and Recommendation	79
XII. AGREEMENT TO CONTROL OR MANAGE WHOLESALER AND JOSEPH KEMBLE ACTING AS EMPLOYEE OF WHOLESALER		81
A.	Allegations 29 and 29B.....	81
B.	Applicable Law	81
C.	TABC Evidence.....	82
1.	Deposition of Ms. Anderson	82
2.	Testimony of Ms. Anderson at HOM.....	82
3.	Testimony of Mr. Saladino at HOM	83
4.	Testimony of Mr. Broddon at HOM	84
D.	Spec's Evidence.....	84
1.	Testimony of Mr. Rydman at HOM.....	84
2.	Testimony of Mr. Kemble at HOM	85
3.	Testimony of Mr. Coleman at HOM	85
4.	Testimony of Mr. Slobin at HOM	86
5.	Testimony of Mr. Wills at HOM	86
E.	Discussion and Recommendation	87
XIII. EMPLOYEE OF NONRESIDENT SELLERS AND AGREEMENT TO CONTROL OR MANAGE NONRESIDENT SELLERS		89
A.	Allegations 31, 31B, 32, 32B, 33, 33B, 34, 34B, 35, 35B, 36, 36B, 37, 37B, 38, 38B, 39, 39B, 40, 40B, 41, 41B, 42, 42B, 44, 44B, 45, 45B, 46, and 46B	89
	Staff's allegations include:	89
B.	Applicable Law	93
C.	TABC Evidence.....	94
1.	Deposition of Ms. Anderson	94
2.	Testimony of Ms. Anderson at HOM.....	96

3.	Testimony of Mr. Jones at HOM.....	97
D.	Spec's Evidence.....	98
1.	Testimony of Mr. Rydman at HOM.....	98
2.	Testimony of Mr. Wills.....	98
3.	Testimony of Mr. Slobin at HOM	99
4.	Testimony of Mr. Coleman at HOM.....	100
E.	Discussion and Recommendation.....	101
1.	Original Applications.....	101
2.	Renewal Applications and Label Certification Fees.....	101
XIV.	UNAUTHORIZED TASTINGS.....	105
A.	Allegation 47.....	105
B.	Applicable Law	105
C.	TABC Evidence.....	105
1.	Deposition of Ms. Anderson.....	105
2.	Testimony of Ms. Anderson at HOM.....	106
D.	TABC Evidence.....	107
1.	Testimony of Mr. Rydman at HOM.....	107
2.	Testimony of Mr. Coleman at HOM.....	109
XV.	ACTING AS A DISTILLER.....	110
A.	Allegation 48.....	110
B.	Applicable Law	111
C.	TABC Evidence.....	111
1.	Deposition of Ms. Anderson	111
2.	Testimony of Ms. Anderson at HOM.....	112
3.	Testimony of Mr. Saladino at HOM	113
4.	Testimony of Mr. Broddon at HOM	114
D.	Spec's Evidence.....	114
1.	Testimony of Mr. Heisler at HOM	114
2.	Testimony of Mr. Coleman at HOM.....	115
E.	Discussion and Recommendation.....	115

XVI.	PURCHASE FROM AN UNAUTHORIZED SOURCE.....	117
A.	Allegation 50.....	117
B.	Applicable Law	117
C.	TABC Evidence.....	117
1.	Deposition of Ms. Anderson	117
2.	Testimony of Ms. Anderson at HOM.....	118
D.	Spec's Evidence.....	119
1.	Testimony of Mr. Rydman at HOM.....	119
2.	Testimony of Mr. Coleman at HOM.....	119
E.	Discussion and Recommendation.....	120
XVII.	EXCLUSIVE AGREEMENT.....	121
A.	Allegation 52.....	121
B.	Applicable Law	121
C.	TABC Evidence.....	122
1.	Deposition of Ms. Anderson	122
2.	Testimony of Ms. Anderson at HOM.....	123
3.	Testimony of Mr. Saladino at HOM	124
D.	Spec's Evidence.....	124
1.	Testimony of Mr. Rydman at HOM.....	124
2.	Testimony of Mr. Coleman at HOM.....	125
E.	Discussion and Recommendation.....	125
XVIII.	MANNER OF OPERATION.....	127
A.	Allegation 53.....	127
B.	Applicable Law	127
C.	TABC Evidence.....	128
1.	Testimony of Ms. Anderson at HOM.....	128
2.	Testimony of Mr. Jones at HOM.....	128
D.	Spec's Evidence.....	129

1.	Testimony of Mr. Rydman at HOM.....	129
2.	Testimony of Mr. Coleman at HOM.....	130
E.	Discussion and Recommendation.....	130
XIX.	FINDINGS OF FACT	131
XX.	CONCLUSIONS OF LAW.....	146

PROPOSAL FOR DECISION

Staff of the Texas Alcoholic Beverage Commission (TABC, Commission, or Petitioner) brought this action against Spec's Family Partners, Ltd. (Spec's or Respondent). It alleges that Spec's engaged in 47 violations of the Texas Alcoholic Beverage Code (Code) and TABC rules (Rules). Staff seeks cancellation of all 164 Spec's package stores or, in the alternative, a suspension of 13 days per violation or, in lieu of suspension, a civil penalty in the amount of \$25,000 per day, for a total of \$15,275,000 (13 days x \$25,000 x 47 violations) to \$713,050,000.¹ Additionally, Staff seeks denial of Spec's pending original and supplemental applications. After a review of the evidence of record and applicable law, the Administrative Law Judges (ALJs) conclude Staff has not met its burden of proof with regard to all the allegations, with the exception of one credit law violation. The ALJs recommend a warning for the credit law violation. The ALJs also recommend the pending original and supplemental applications be granted.

I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY

This Proposal for Decision addresses four enforcement actions brought by Staff against Spec's. The four matters were filed separately under different docket numbers, but all involved the same allegations and Respondent. During a prehearing conference, Spec's agreed to have all four cases heard together.

¹ The total amount of civil penalty is calculated based on the total number of alleged violations multiplied by 13 days per permit involved. Staff is seeking a 13-day suspension per violation, with the option (in lieu of suspension) to pay \$25,000 per day, for a subtotal of \$325,000 per violation, per permit. Thirteen violations were alleged by Staff to have been committed by 164 permits as listed in Attachment A of its Second Amended Notice of Hearing. Thirty-three violations were alleged to have been committed by a single permit. One violation was alleged to have been committed by 30 permits as listed in Attachment B. Although Staff originally sought the suspension to be assessed against each permit involved in the allegation, in closing Staff is seeking 13 days per violation, not per permit. However, pursuant to Code § 11.66, the penalty of suspension or cancellation must be assessed against the permit for the premises where the offense occurred. Therefore, if a violation is found to have occurred, the ALJs must determine where the offense occurred. Based on Staff's attached lists of affected permits, the allegations could have occurred at a single location, 30 locations, or all 164 locations. Therefore, if all violations are found to have occurred at all locations alleged in the Second Amended Notice of Hearing, there could be a total of 28,535 days of suspension [(33 allegations x 1 permit x 13 days) + (1 allegation x 30 permits x 13 days) + (13 allegations x 164 permits x 13 days)]. In lieu of suspension, the civil penalty would be \$713,050,000 (28,535 days x \$25,000).

On September 8, 2016, Spec's filed a motion for partial summary disposition as to Allegations 49 and 51 under Docket 458-16-3124. The violations were alleged to have occurred on October 2, 2006, and September 20, 2007. The motion argued that Staff failed to timely enforce and prosecute the allegations, in violation of Code § 5.31(b)(4) and 1 Texas Administrative Code § 155.503(a)(1)(B). The ALJs found the delay caused Spec's to be harmed and materially disadvantaged in its ability to investigate and prepare a defense. Therefore, the motion was granted and the allegations dismissed.²

The hearing on the remaining allegations convened on February 22, 2017, before State Office of Administrative Hearings (SOAH) ALJs Lindy Hendricks and Bennie Brown. Staff was represented by attorneys Judith Kennison and Michael Cherry. Respondent was represented by attorneys Al Van Huff, John Fason, and Jennifer McCammon. The hearing concluded on March 3, 2017, and the record was held open until April 25, 2017, for written closing arguments and post-hearing briefs.

There are no contested issues of notice or jurisdiction in this matter. Therefore, notice and jurisdiction are addressed in the findings of fact and conclusions of law without further discussion.³

II. BACKGROUND AND ALLEGATIONS

A. Permits and Applications

In February 2013, Staff began an audit of Spec's operations. The audit changed into a 3-year investigation. At the conclusion of its investigation, Staff determined Spec's had multiple violations of the Code and Rules and issued a Notice of Violation in February 2016. Staff seeks to cancel or suspend all Spec's package store permits under Docket 458-16-3124.

² SOAH prehearing Order No. 4 in Docket 458-16-3124.

³ Respondent previously contested issues of jurisdiction in this matter in prehearing motions for summary disposition. The issues were addressed by ALJ Hendricks in prehearing Order Nos. 3, 5, and 7 of Docket 458-16-3124.

In 2016, after the conclusion of the investigation, Spec's filed two original applications for new package stores and a supplemental application for a change of address with the Commission. In response, Staff opened three additional administrative cases against Spec's, arguing the violations found during the investigation are grounds to protest the following applications:

- Supplemental application for a Package Store Permit for the premises to be located at 9618 FM 1097 in Willis, Montgomery County, Texas, that is the subject of the protest under Docket 458-17-1741.
- Original application for a Package Store Permit for the premises to be located at 13201 N RR 620, Suite B, in Austin, Williamson County, Texas, that is the subject of the protest under Docket 458-17-1742.
- Original application for a Package Store Permit for the premises to be located at 4319 Kemp Boulevard in Wichita Falls, Wichita County, Texas, that is the subject of the protest under Docket 458-17-1743.

Staff is seeking the denial of those applications. Spec's requested a hearing on all four cases and agreed they should be heard together to avoid any further delay in the issuance of the applications.

B. Code and Rules Provisions

Staff has the burden of proof in this case.⁴ Its Second Amended Notice of Hearing (NOH)⁵ asserts that at various times between January 9, 2011, and March 9, 2015, Spec's violated 47 provisions of the Code and Rules in 16 Texas Administrative Code (TAC) chapter 45. Staff alleges the following Code and Rules sections were violated:

⁴ 1 Tex. Admin. Code (TAC) § 155.427.

⁵ The same violations are asserted in the Notices of Hearing for Dockets 458-17-1741, -1742, and -1743 as grounds to protest the original and supplemental applications.

Violations Alleged in the Second Amended NOH and protest NOHs	Statute or Rules
Failed to provide information, records, or other documents.	Code § 5.32.
Failed to timely pay for the purchase of liquor.	Code § 102.32 and Rule § 45.121(d).
Conspired with another person to violate or accept the benefits of a violation of this Code or Rules.	Code § 104.03.
No person who owns or has an interest in the business of a distiller, brewer, rectifier, wholesaler, class B wholesaler, winery, or wine bottler, nor the agent, servant, or employee of such a person, may furnish, give, or lend any money, service, or thing of value to a retailer.	Code § 102.07(a)(2).
No person who owns or has an interest in the business of a distiller, brewer, rectifier, wholesaler, class B wholesaler, winery, or wine bottler, nor the agent, servant, or employee of such a person, may allow an excessive discount to a retailer.	Code § 102.07(a)(7).
No person who owns or has an interest in the business of a distiller, brewer, rectifier, wholesaler, class B wholesaler, winery, or wine bottler, nor the agent, servant, or employee of such a person, may offer a prize, premium, gift, or similar inducement to a retailer or to the agent, servant, or employee of a retailer.	Code § 102.07(a)(8).
Acted or served as officer, director, or employee of the businesses of permittees at different levels.	Code § 102.01(d).
Entered with a permittee of a different level or with another person or legal entity into a conspiracy or agreement to control or manage, financially or administratively, directly or indirectly, in any form or degree, the business or interests of a permittee of a different level.	Code § 102.01(h).
The holder of a distiller's or rectifier's permit, distiller's agent's permit, nonresident seller's permit, or manufacturer's agent's permit or that permit holder's agent or employee may participate in and conduct product tastings of alcoholic beverages at a retailer's premises and may open, touch, or pour alcoholic beverages, make a presentation, or answer questions at the tasting. Any alcoholic beverage tasted under this subsection must be purchased from the package store permit holder on whose premises the tasting is held. The permit holder may not require the purchase of more alcoholic beverages than are necessary for the tasting. This section does not authorize the holder of a distiller's or rectifier's permit, distiller's agent's permit, nonresident seller's permit, or manufacturer's agent's permit to withdraw or purchase an alcoholic beverage from the holder of a wholesaler's permit or provide an alcoholic beverage for tasting on a retailer's premises that is not purchased from the retailer.	Code § 52.01(m).

Violation Alleged in the Second Amended NOH and protest NOHs	Statute or Rules
Failed to obtain a permit to: 1. manufacture, distill, brew, sell, possess for the purpose of sale, import into this state, export from this state, transport, distribute, warehouse, or store liquor; 2. solicit or take orders for liquor; or 3. for the purpose of sale, bottle, rectify, blend, treat, fortify, mix, or process liquor.	Code § 11.01.
Notwithstanding any other provision of this Code, no person engaged in business as a distiller, brewer, manufacturer, winery, or any other manufacturer level producer of liquor or beer, or their wholesalers, may directly or indirectly or through an affiliate require, by agreement or otherwise, that any retailer engaged in the sale of liquor or beer purchase any such products from such person to the exclusion in whole or in part of liquor or beer sold or offered for sale by other persons, or prevent, deter, hinder, or restrict other persons from selling or offering for sale any other such products to any retailer.	Code § 109.08.
Purchased liquor in this state from an entity that did not hold a winery, wholesaler's, class B wholesaler's, or wine bottler's permit.	Code § 22.01(1).
Violated a provision of this Code or Rules.	Code § 11.61(b)(2).
Conducted its business in a place or manner that 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.	Code §§ 11.46(a)(8) and 11.61(b)(7).

C. Witnesses

Staff offered the testimony of the following witnesses at the hearing:⁶

1. Kathy Anderson is an auditor at TABC.
2. Dexter Jones is the Chief of Audit and Investigations at TABC.
3. John Saladino is the managing director of sales at United Wine.
4. Jay Broddon is the managing director of operations at United Wine.
5. Billy Davis is Vice President of Chain Accounts at United Wine.

⁶ Not all witnesses called by Staff provided testimony helpful to Staff's case. In fact, when called to testify for the Commission, the testimony of the witnesses from United Wine directly contravened Staff's case.

Spec's offered the testimony of the following witnesses at the hearing:

1. John Rydman is the owner of Spec's.
2. John Kemble is the head of the Italian wine department at Spec's.
3. Keith Coleman was a former TABC supervisor and currently works at Gerald Franklin Agency.
4. Richard Wills was a former TABC supervisor and currently owns Gerald Franklin Agency.
5. Todd Slobin is a board-certified labor and employment lawyer.

III. STIPULATED FACTS

Both parties stipulated to the following written statements:

1. Spec's Family Partners, Ltd. is a Texas limited partnership that also goes by the name "Spec's."
2. Spec's headquarters is located at 2410 Smith Street, Houston, Texas 77006.
3. The President of Spec's is John Rydman.
4. Other employees of Spec's include, but are not limited to, Robert Heisler, Christi Collins, Scarlet McGeorge, and Joseph Kemble.
5. This case is governed by the Code, SOAH Administrative Procedural Rules, and, where applicable, the Texas Rules of Civil Procedure.
6. This case originated after an audit by Petitioner.
7. Petitioner issued three Notices of Hearing: Notice of Hearing dated July 28, 2016; First Amended Notice of Hearing dated October 31, 2016; and Second Amended Notice of Hearing dated January 4, 2017.⁷
8. The Second Amended Notice of Hearing contains 47 live allegations numbered 1 through 53.

⁷ The Agreed Stipulations refer to the notices of hearing that were filed in Docket 458-16-3124.

9. The following Allegations have been dismissed without prejudice or otherwise deleted from the Second Amended Notice of Hearing: Allegation 2, Allegation 3, Allegation 4, Allegation 5, Allegation 8, Allegation 9, Allegation 10, Allegation 12, Allegation 13, Allegation 14, Allegation 15, Allegation 16, Allegation 17, Allegation 18, Allegation 19, Allegation 20, Allegation 21, Allegation 27, Allegation 30, Allegation 49, and Allegation 51.
10. United Wine and Spirits (“United Wine”) was previously investigated by Petitioner.
11. United Wine settled with TABC, resulting in the documents “Settlement Agreement and Waiver of Hearing” and “Waiver Order.”
12. Jay Broddon, John Saladino, and Billy Davis are employed by or are otherwise representatives of United Wine.
13. Petitioner and United Wine settled for \$100,000.00.
14. Petitioner failed to timely designate any expert witnesses, and the ALJs later denied Petitioner’s Opposed Motion to Grant Leave to Designate an Expert Witness.
15. The grace period for delinquent payments has been continuously shortened since 2010.
16. The grace period changes were made in Marketing Practices Bulletins until it was added into Section 102.32(c) of the Code and 16 Texas Administrative Code § 45.121.
17. Effective November 18, 2010, the grace period changed from 10 calendar days to 8 calendar days.
18. Effective on or about November 10, 2011, the grace period changed from 8 calendar days to 6 calendar days.
19. Effective March 1, 2013, the grace period changed from 6 calendar days to 4 business days. It was added into the Code at that time.
20. Saturdays, Sundays, and legal holidays are not included in the grace period calculation.
21. Petitioner publishes a document entitled “Delinquent List Publication Date” each year.
22. United Wine is a member of the 2nd tier of alcohol distribution because it is a wholesaler.
23. Spec’s is a member of the 3rd tier of alcohol distribution because it is a retailer.
24. Joseph Kemble’s email address is grappajoe@hotmail.com.
25. Scarlet McGeorge signed the checks in SPEC’S000081-95 and marked as Respondent’s Exhibit 11.

26. Robert Heisler signed checks #3603 and #3602 that are made out to Napa Valley Vintners.

IV. WAIVER ORDER IS NOT AND DOES NOT CONTAIN AN ADMISSION

The owners of United Wine, called by Staff as witnesses, testified the violations alleged in the Waiver Order did not occur. Mr. Broddon and Mr. Saladino testified that they made a business decision that, in lieu of spending money to defend themselves, it would cost less to settle with TABC. The agreement to settle was reached with one major caveat: there would be no admission of guilt. TABC agreed, and a Settlement Agreement was drafted, memorializing the caveat.⁸

Spec's argues Staff intentionally misled the ALJs through the testimony of its auditor Kathy Anderson. Specifically, Spec's argues Staff failed to disclose to Ms. Anderson the Settlement Agreement between TABC and United Wine. Rather, Staff only disclosed the Waiver Order to Ms. Anderson. The Waiver Order contained certain findings by TABC that United Wine engaged in prohibited conduct.⁹ The Settlement Agreement, however, contained language indicating that the settlement between TABC and United Wine "is a compromise of the contested allegations...and is not intended, nor is it to be construed as an admission of liability" by United Wine.¹⁰ Staff only offered the Waiver Order into evidence even though the Settlement Agreement is specifically referenced in the Waiver Order.

Staff failed to reveal the contents of the Settlement Agreement to its own witness, Ms. Anderson, and to the ALJs. Six times during her deposition and for the same allegations during the hearing, Staff purposefully phrased questions to Ms. Anderson asking if any of the parties involved in the Spec's investigation "admitted" or "agreed" to engaging in wrongful

⁸ Spec's Ex. 26.

⁹ TABC Ex. 46.

¹⁰ Spec's Ex. 26 at 1.

conduct with Spec's.¹¹ Each time, Ms. Anderson answered affirmatively and referenced the Waiver Order between TABC and United Wine.

1. In Ms. Anderson's Deposition, concerning Allegations 22 and 23:

Q: And how does that document [United Wine's Waiver Order] relate to the allegations and conclusions that you've come to?

A: In this, United Wine and Spirits admitted that they provided prohibited benefits to Spec's retailer by billing 448 cases of Culito's Chardonnay and Merlot to the retailer, Spec's at a rate of \$1 per case, which is an excessive discount.¹²

2. In Ms. Anderson's Deposition, concerning Allegation 24:

Q: And did any of the parties involved admit to the allegations?

A: Yes.

Q: And could you please just explain to me how that occurred?

A: On the [Anderson Deposition] Exhibit 2 [Waiver Order], United Wine and Spirits admitted that they provided prohibited benefits by giving the retailer a per-bottle incentive for the retailer's employees.¹³

3. In Ms. Anderson's Deposition, concerning Allegation 25:

Q: And at any time, did any of the parties involved agree that the conduct occurred?

A: Yes. United Wine and Spirits agreed that they violated the Code by giving Spec's a reduced price from the manufacturer that had previously been negotiated between the retailer and the manufacturer.¹⁴

¹¹ TABC Ex. 55 at 12-13, 14-15, 18, 59-60, 72, 75-76.

¹² TABC Ex. 55 at 12-13.

¹³ TABC Ex. 55 at 14-15.

¹⁴ TABC Ex. 55 at 18.

4. In Ms. Anderson's Deposition, concerning Allegation 47:

Q: Okay. Thank you. If – we will look at what's been referred to as TABC Exhibit 32B, and then for today's purpose has been known as Anderson [Deposition] Exhibit 2.

Did you receive any information from any of the parties in this agreement that certified your allegations that the retailer was attempting to pay for and manufacture an alcoholic beverage product?

A: Yes.

Q: And what was that?

A: The Waiver Order between United Wine and Spirits. In it, they said on October 9, 2010, a wholesaler -- let's see -- a wholesaler or respondent's or wholesaler's agent, servant, or employee pay -- materials were paid by the retailer, materials and labels for distillery, for Lone Star Vodka, materials were paid for by the retailer, in this case, Spec's.¹⁵

5. In Ms. Anderson's Deposition, concerning Allegation 6:

Q: Okay. I'm gonna ask you to take a look at what is referred to as Anderson [Deposition] Exhibit 2, which is the Waiver Order from Docket – TABC Docket 635377.

In looking at that, did the wholesaler at any time admit to TABC or agree that they did receive a delinquent payment for these alcoholic beverage products?

A: Yes.

Q: And what did they say, exactly?

A: On certain dates from March 31, 2011, to October 30, 2014, respondent – or wholesaler or respondent's agent, servant, or employee violated Sections 11.61(b)(2), 102.32(c), (d), and (e) of the Code, and 16 TABC Rule § 45.121(e) by failing to place a delinquent retailer on the delinquent list and allowed the retailer to purchase alcoholic beverages on credit.¹⁶

¹⁵ TABC Ex. 55 at 59-60.

¹⁶ TABC Ex. 55 at 72.

6. In Ms. Anderson's Deposition, concerning Allegation 11:

Q: Okay. I'm gonna ask you to take a look at what is referred to as Anderson [Deposition] Exhibit 2, which is the Waiver Order from Docket – TABC Docket 635377. In looking at that, did the wholesaler at any time admit to TABC or agree that they did receive a delinquent payment for these alcoholic beverage products?

A: Yes.

Q: And what did they say, exactly?

A: On certain dates from March 31, 2011, to October 30, 2014, respondent – or wholesaler or respondent's agent, servant, or employee violated Sections 11.61(b)(2), 102.32(c), (d), and (e) of the Code, and 16 TABC Rule § 45.121(e) by failing to place a delinquent retailer on the delinquent list and allowed the retailer to purchase alcoholic beverages on credit.¹⁷

Ms. Anderson concluded that since one party (United Wine) admitted engaging in prohibited conduct with Spec's, the prohibited conduct actually occurred. Consequently, Ms. Anderson relied on this misinformation while formulating her opinion that Spec's engaged in wrongful conduct with United Wine.

Therefore, any testimony by Ms. Anderson regarding the "admission" or "agreement" by United Wine that it engaged in prohibited conduct will be given no evidentiary weight because the Settlement Agreement explicitly indicates to the contrary.

¹⁷ TABC Ex. 55 at 72.

V. FAILURE TO PROVIDE DOCUMENTS

A. Allegation 1

Staff alleges that, on or about March 9, 2015, Spec's failed to provide or timely provide information, records, or other documents as requested by the Commission.¹⁸

B. Applicable Law

The Commission may require persons engaged in the alcoholic beverage business to provide information, records, or other documents the Commission finds necessary to accomplish the purpose of this Code.¹⁹

C. TABC Evidence

1. Deposition of Ms. Anderson

Ms. Anderson is an auditor with TABC. She holds a Certificate of Accounting, an Associate of Applied Science in Accounting, and a Bachelor's of Science in Accounting. She began employment with TABC on September 3, 2013. As part of her training, she spent 30 days studying the Code and Rules and attended a 4-week auditor training academy. She also shadowed a senior auditor. In July 2014, she attended a 1-week, in-service training.

¹⁸ In its Notice of Violation dated February 17, 2016, Staff alleged that Spec's failed to timely provide documents or information on or about the following dates: June 13, 2013; October 30, 2013; January 21, 2014; November 12, 2014; November 20, 2014; and March 9, 2015. Electronic Case File (ECF) No. 3. However, in its original Notice of Hearing, Amended Notice of Hearing, and Second Amended Notice of Hearing, Staff only cited March 9, 2015, as the date of the alleged violation. ECF Nos. 7, 27, and 62. On Day 6 of the hearing on the merits, after Staff rested its case, Staff moved to amend its pleadings regarding Allegation 1 to read, "On or about October 30, 2013, to March 9, 2015." Staff's motion to amend its pleadings was denied. Tr. Day 6 at 830-832. Therefore, the ALJs will only consider evidence related to March 9, 2015, in relation to Allegation 1, as it is the only alleged violation date pleaded in Staff's Second Amended Notice of Hearing.

¹⁹ Code § 5.32.

Ms. Anderson was initially assigned to the United Wine investigation in November 2013. During that investigation, documents were found that suggested an improper relationship between Spec's and the other two tiers. She was assigned to the Spec's investigation in March 2014.²⁰

2. Testimony of Ms. Anderson at Hearing on the Merits (HOM)²¹

a. Background

Ms. Anderson is currently an Auditor IV with TABC and is a certified fraud examiner. She was promoted to Auditor IV in September 2016. Ms. Anderson does not have any previous experience in the alcohol industry. Prior to the Spec's investigation, Ms. Anderson had conducted a couple of food and beverage audits and one excise tax audit.

In March 2014, Ms. Anderson was assigned to the Spec's investigation by her supervisor Nicole Philips. Prior to her assignment, two other TABC auditors, Ann Spencer and Latida Moore, were assigned to the Spec's investigation.

Ms. Anderson testified that the 3-tier system consists of the manufacturer, the wholesaler, and the retailer. The 3-tier system was originally created to protect retailers from manufacturers. The industry has grown, however, and none of the tiers are allowed to create a disadvantage in the marketplace.

b. Regarding Allegation 1

Ms. Anderson testified that Spec's failed to timely provide documents to the Commission in violation of Code § 5.32. She explained that Spec's failed to provide detailed bank statements pursuant to her request dated March 9, 2015. Ms. Anderson testified that she could not speak to

²⁰ Ms. Anderson did not address Allegation 1 in her deposition.

²¹ Tr. Day 1 at 24-41; Tr. Day 2 at 275-276; Tr. Day 3 at 288-297.

any previous records requests by the Commission as they occurred before she became involved with the Spec's investigation. She did not have any knowledge regarding the documents reviewed by the previous auditors.²²

Ms. Anderson testified that she had questions regarding some of Spec's banking transactions and sent an email to Spec's on March 9, 2015. At approximately 4:28 p.m., Ms. Anderson emailed Mr. Rydman, President of Spec's, and Mr. Heisler, Chief Financial Officer of Spec's.²³ In the email, Ms. Anderson advised that she had questions regarding wire transfers into Spec's Amegy bank account ending in 4026. She also had questions regarding checks written from Spec's Bank of America account ending in 7710. Ms. Anderson requested documentation and reasoning for the wire transfers and checks. Ms. Anderson's email included an attachment referencing the specific transactions.²⁴ However, it is unknown what was referenced in the attachment, as the attachment was not offered into evidence. Ms. Anderson requested the documents be provided to her by 5:00 p.m. on March 12, 2015.²⁵

On March 9, 2015, at approximately 6:02 p.m., Mr. Heisler responded via email advising that he was currently on vacation and would be back in the office on March 17, 2015. Mr. Heisler advised that most of the wire payments appeared to involve the Centennial asset purchase agreement.²⁶ He requested a 1-week extension to respond to Ms. Anderson's request.²⁷

On March 10, 2015, Ms. Anderson replied to Mr. Heisler and advised that she had not yet received a response from Mr. Rydman. Ms. Anderson did not address Mr. Heisler's request for an extension.²⁸ That same day, Mr. Heisler replied and stated he would be able to answer most

²² Tr. Day 1 at 28.

²³ TABC Ex. 43 at 2.

²⁴ TABC Ex. 43 at 2.

²⁵ TABC Ex. 43 at 2.

²⁶ During the summer of 2012, Spec's acquired a series of stores owned by Centennial. As each Centennial store closed, Spec's sent a wire transfer to Centennial as payment for each store. This resulted in several wire transfers between Spec's and Centennial. Tr. Day 5 at 806.

²⁷ TABC Ex. 43 at 2.

²⁸ TABC Ex. 43 at 1.

of her questions when he returned to work. Mr. Heisler advised that he would review the information and respond as quickly as possible.²⁹

On March 17, 2015, Mr. Heisler emailed Ms. Anderson and stated that most of the wire transfers she referenced were received from Centennial. He asked Ms. Anderson to confirm whether the payments were sent to Spec's from Centennial, as they referenced a time period when Spec's was purchasing the assets of selected Centennial stores. Spec's had made individual payments to Centennial as each store was closed.³⁰

Ms. Anderson testified that Spec's failed to provide the requested bank records and the Commission had to subpoena the records directly from the bank. However, Ms. Anderson later testified that, after reviewing the *subpoenaed* bank records, she had questions regarding some of the transactions and sent the email dated March 9, 2015.³¹ When asked how Spec's failed to provide records *on March 9, 2015*, Ms. Anderson replied that she had seen wire transfers *in the subpoenaed bank records* and had questions regarding documentation of those transactions. Ms. Anderson testified that Spec's did not respond with documentation for all of the transactions she requested.³² However, Ms. Anderson later agreed that Mr. Heisler communicated with her and responded to her request for information via email.³³ She does not remember speaking with Mr. Heisler on the telephone regarding her records request.

Ms. Anderson conceded that most of the wire transfers dealt with the Centennial purchase agreement, which is not part of any allegation against Spec's. However, Ms. Anderson stated that some of the wire transfers and checks were written to companies that dealt with alcoholic beverages. Ms. Anderson also confirmed that the Commission eventually obtained the Amegy bank statements.

²⁹ TABC Ex. 43 at 1.

³⁰ TABC Ex. 43 at 1.

³¹ Tr. Day 3 at 290.

³² Tr. Day 3 at 290.

³³ Tr. Day 3 at 295.

Regarding the timeliness of Spec's response to her request, Ms. Anderson acknowledged that the Code does not have a timeliness requirement.³⁴ Nevertheless, she testified that pursuant to her March 9, 2015, request, Spec's failed to timely provide the Centennial records.

3. Testimony of Mr. Jones at HOM³⁵

a. Background

Mr. Jones is the Chief of Audit and Investigations with the TABC. He began employment with TABC in March 1999 as an auditor. He progressed to an Auditor IV through promotions, and in 2003, he became the Regional Supervisor of Audit and Compliance. From 2004-2008, Mr. Jones served as the Marketing Practices Director. From 2008-2011, he served as the Assistant Chief of Field Operations for the Audit Department. In 2012, the division was reorganized, and he became Chief over the North Texas Audit Enforcement Division. He is a certified fraud examiner and a certified peace officer commissioned by the Commission.

Currently, Mr. Jones's duties include overseeing the following four units within TABC: Audit and Investigations Division, Marketing Investigations Unit, Special Investigations Unit, and Financial Crimes Unit. The local offices investigate complaints regarding compliance with the Code and determine whether a violation has occurred. However, Staff usually briefs Mr. Jones on particular investigations and violations, and he may provide input regarding compliance.

Mr. Jones recalls that the Spec's investigation began in 2013 after a complaint was received involving a possible subterfuge between Spec's and United Wine. The complaint

³⁴ Day 2 of the hearing concluded with a question about whether there is anything in the Code or Rules regarding timeliness of the production of documents. Staff researched the issue and represented to the ALJs at the beginning of Day 3 that there is no such requirement. Staff stated there is no Code provision or Rule that addresses when a permittee must comply with a request for documents. Staff then represented that it was using a 10-day reasonable notice requirement under the Administrative Procedures Act that applies to notices of hearing. Tr. Day 3 at 285-288.

³⁵ Tr. Day 3 at 392-438; Tr. Day 4 at 456-501, 519-527, 530-532.

alleged that Spec's was the financier for United Wine and that United Wine was the clearinghouse that brought in products for Spec's.

Mr. Jones became involved with the Spec's investigation after Staff advised him documents were discovered during the United Wine investigation that related to Spec's. According to Mr. Jones, the documents showed a pattern of products coming from United Wine, and it appeared that Spec's may have had some involvement or direct negotiations with the supplier. Staff reviewed the documents and made a request for records from Spec's.

b. Regarding Allegation 1

Mr. Jones testified that it is standard practice for Staff to request documents from permittees. If an audit is being conducted, Staff will send notice for an entrance conference to discuss the objective of the audit. Staff then makes a records request, either orally or in writing. If an investigation is being conducted, Staff will contact the permittee and send a request for records in writing. Staff usually allows 10 days for the permittee to respond to the first request for records. Staff is flexible if the permittee requests an extension. If no extension is requested and no response is received, Staff will send a second request for records and contact the permittee by telephone. Mr. Jones explained that the second request would contain a shorter deadline to produce the records. If no response is received, a third records request may be issued. The Commission also has subpoena power and can obtain a search warrant if probable cause exists.

The Code does not require a specific response time for a records request. When determining a "reasonable response time," Staff usually allows 10 days because that is the same amount of time given by TABC's legal department when issuing a notice of hearing. Staff may allow more than 10 days to respond, especially if there is a large volume of records. The records can be made available to Staff and, after examination, Staff may obtain copies of the records, or Staff can request the records be sent to them.

Mr. Jones explained that Code § 5.32 authorizes the Commission to make records requests. Rule § 41.23(a) requires certain types of records to be maintained for 2 years at the actual place of business. However, Code § 206.01 requires certain records to be maintained for at least 4 years and made available for inspection by the Commission.

Mr. Jones acknowledged that Code § 5.32, which grants the Commission the authority to request records, is different from the legal obligation of a permittee to maintain records for 2 or 4 years. However, he believes the two sections go hand-in-hand and allow the Commission to request any record at any time. Mr. Jones reasoned that since the Commission can request any record pursuant to Code § 5.32, a permittee should maintain all records relating to the sale of alcohol even though there is no specific statute requiring the maintenance of all records.

Mr. Jones testified at length regarding previous document requests made by Staff to Spec's dating from June 2013 through March 9, 2015. The majority of the requests were made by Ms. Phillips, supervisor for the TABC Houston office. Ms. Phillips supervised the Spec's investigation.³⁶ Mr. Jones had no specific or personal knowledge of the requests or responses and was only able to testify that Spec's provided some but not all of the documents requested.³⁷ He added that Staff eventually subpoenaed Spec's bank records in November 2014.³⁸ Although not specifically required by Code § 5.32, Mr. Jones believes Spec's should have retained and produced the bank records pursuant to Code § 5.32.

Regarding the March 9, 2015, email sent by Ms. Anderson to Spec's, Mr. Jones had no personal knowledge regarding the transactions reviewed by Ms. Anderson that prompted her to send the email. It is possible she sent the email after reviewing the bank records that were subpoenaed by Staff and/or other documents. Mr. Jones agreed that Mr. Heisler responded to Ms. Anderson's March 9 email.³⁹

³⁶ Ms. Phillips was present for all 8 days of the hearing, but was not called to testify.

³⁷ For reasons stated earlier, evidence regarding the records requests prior to March 9, 2015, will not be considered as those dates were not pleaded in Staff's Second Amended Notice of Hearing.

³⁸ TABC Ex. 40-42.

³⁹ Tr. Day 4 at 495.

D. Spec's Evidence

1. Testimony of Mr. Heisler at HOM⁴⁰

a. Background

Mr. Heisler has been Spec's Chief Financial Officer since 1996. He has a Bachelor of Arts degree in History from the University of Notre Dame. His duties include assisting Mr. Rydman with the financial aspect of the company. He is responsible for the production of financial statements and compliance work, which includes: tax reports, tax returns, and various other reports that must be filed. He also maintains the relationships with the company's bankers and generally organizes, oversees, and manages the financial reportings of the company. Mr. Heisler has five staff accountants that are directly involved in the general accounting process and 52 staff accountants that are involved in the extended accounting functions of the company. He oversees 57-60 people.

b. Regarding Allegation 1

Mr. Heisler is familiar with the TABC investigation and records request. He was out of town when Ms. Anderson sent the email on March 9, 2015. However, he replied to her email 1½ hours after it was sent. In his reply, Mr. Heisler stated that most of the transactions referenced by Ms. Anderson involved the Centennial asset purchase, and he requested more time to comply with her request.⁴¹

Mr. Heisler explained that during the summer of 2012, Spec's was acquiring a series of stores owned by Centennial. As each Centennial store closed, Spec's sent a wire transfer to Centennial as payment for each store. This resulted in several wire transfers over a period of 6 to 8 weeks.

⁴⁰ Tr. Day 5 at 772-816; Tr. Day 6 at 895-907.

⁴¹ TABC Ex. 43 at 2.

Mr. Heisler stated that Spec's received some wire transfers from Centennial as well. During the transition, Spec's used Centennial's cash registers, and Spec's credit card transactions were processed under Centennial's master merchant agreement. Therefore, Centennial reimbursed Spec's for the credit card receipts via wire transfers. Mr. Heisler added that Spec's and TABC had several discussions regarding the Centennial asset purchase and the wire transfers. Based upon his understanding, TABC accepted the legitimacy of those transactions.

On March 17, 2015, Mr. Heisler emailed Ms. Anderson to confirm whether the wire payments were sent to Spec's from Centennial. He testified that he called Ms. Anderson on March 18, 2015, after returning from vacation. He left a message on her voicemail. Ms. Anderson returned his phone call later that day and stated she was out of the office. Ms. Anderson advised that she needed to return to her office in order to review information so she could answer Mr. Heisler's question from his March 17 email. Ms. Anderson never contacted Mr. Heisler again and never responded to his request for an extension. Mr. Heisler believes he responded to Ms. Anderson's records request by contacting her and providing information regarding her questions. He testified that his questions were for purposes of clarification and were not a diversionary tactic.

2. Testimony of Mr. Rydman at HOM⁴²

a. Background

Mr. Rydman is the President and owner of Spec's, which is a limited partnership. The company was founded in 1962⁴³ by Mr. Rydman's father-in-law, Spec Jackson. As the company grew, 27 stores were opened. Mr. Rydman joined the company after he and his wife graduated college in 1972. Mr. Jackson died in 1995, and Mr. and Mrs. Rydman began running the company in 1996. Mr. and Mrs. Rydman's daughter joined the company after she graduated from college. Today, Spec's has 165 retail stores throughout Texas and employs about 3,500

⁴² Tr. Day 7 at 964-1010, 1019-1020.

⁴³ Spec's package store permit in this case was issued on September 1, 1965.

employees. Spec's is the largest package store in the United States and the second largest family-owned alcohol retailer.

As President of Spec's, Mr. Rydman's current duties include fielding hundreds of emails per day, as his email is on Spec's website and every customer is invited to inform him of any problems. He deals with landlords and real estate issues. He and Mr. Heisler work on budgets for every department and deal with all purchasing issues. Mr. Rydman deals with human resources issues and Equal Employment Opportunity Commission complaints. He is also very involved with the look and feel of each store because no two stores are alike. He provides consulting on new legislation affecting the alcohol industry and participated in the evolution of the Code and Rules. Mr. Rydman has met with the drafters of the Code and learned their intent behind the Code regulations. He was also present in meetings with TABC in 2013 when they were writing changes to credit law.

Excluding the past 3 years, Mr. Rydman described his previous relationship with TABC as stellar. TABC would typically bring new employees to his stores to train them on how a good retailer operates. Mr. Rydman has dealt with TABC General Counsel on numerous occasions and has discussed new legislation affecting the alcohol industry.

b. Regarding Allegation 1

Ms. Anderson's March 9, 2015, email was addressed to Mr. Heisler and Mr. Rydman. Mr. Rydman believes he was traveling at the time it was sent and did not see the email until after he returned home. By that time, Mr. Heisler had already responded to Ms. Anderson. Since Mr. Heisler had already taken care of the situation, Mr. Rydman did not address the email. He testified he would not know where to get the information and would have referred the issue to Mr. Heisler.

3. Testimony of Mr. Coleman at HOM⁴⁴

a. Background

Mr. Coleman has 28 years of experience in the alcoholic beverage industry. He worked over 16 years in the Enforcement Division of TABC, supervised the Licensing Division, and was responsible for enforcement of the Code. He has worked at Gerald Franklin Agency for the last 12 years. He was asked to look at the facts and prepare a report as an expert witness. He reviewed the information using the same methods as a TABC enforcement officer, looking at the elements of the allegations in light of the Code and Rules.

b. Regarding Allegation 1

Mr. Coleman reviewed Ms. Anderson's March 9 email request for records as well as Mr. Heisler's responses.⁴⁵ Mr. Coleman testified that the 3-day response time expected by Ms. Anderson was unreasonable and the request itself lacked specificity. He testified that Mr. Heisler responded quickly, and the request for an extension of time was appropriate.

Mr. Coleman disagrees with Mr. Jones's testimony regarding a 4-year retention period in Code Chapter 206 for records. Mr. Coleman stated that Chapter 206 of the Code deals with Title V taxation and excise taxes. Since package stores are not subject to excise taxes, that Code section does not apply to Spec's. The only records Spec's is required to maintain for 4 years are invoices, which are the records of each day's receipt of liquor.⁴⁶

E. Discussion and Recommendation

Staff's Second Amended Notice of Hearing alleges that, on or about March 9, 2015, Spec's violated Code § 5.32 by failing to provide or failing to timely provide information,

⁴⁴ Tr. Day 7 at 1176-1184.

⁴⁵ TABC Ex. 43.

⁴⁶ Code § 206.01.

records, or other documents requested by the Commission. Specifically, Staff argues that Spec's failed to provide all of its bank account statements after repeated requests dating back to October 30, 2013. Even though Staff did not include the additional violation dates in its original Notice of Hearing, First Amended Notice of Hearing, or Second Amended Notice of Hearing and despite having its motion to amend its pleadings denied,⁴⁷ Staff continues to argue Spec's violated Code § 5.32 between the dates of October 30, 2013, to March 9, 2015.⁴⁸

Staff argues that even though the additional violation dates were not pleaded in any of its Notices of Hearing, the additional violation dates were tried by consent because Staff offered evidence regarding those dates and Spec's did not object. Staff, however, fails to acknowledge that Spec's objected to the evidence and questioning and provided argument regarding the relevancy of the additional alleged violation dates based upon the pleadings.⁴⁹ As a result, the additional violation dates were not tried by consent and will not be considered in relation to Allegation 1.

Staff also argues that the violation dates listed in its Notice of Violation are relevant to the March 9, 2015, allegation because those dates represent a series of record requests by the Commission to which Spec's failed to respond, in violation of the Code.⁵⁰ Staff, however, failed to prove that Ms. Anderson's email was related in any way to the prior records requests. Staff only offered one witness with personal knowledge of any records request, Ms. Anderson. Ms. Anderson testified that she could not speak to any previous records requests by the Commission, as they occurred prior to her assignment to the investigation in March 2014.⁵¹ She explained that two other auditors handled the Spec's investigation prior to her involvement. She had no personal knowledge of what documents the other auditors reviewed.⁵² Therefore, the

⁴⁷ Tr. Day 6 at 830-832.

⁴⁸ ECF Nos. 193 and 204.

⁴⁹ Tr. Day 5 at 765-766; Tr. Day 6 at 831-832, 899.

⁵⁰ In its Notice of Violation, Staff alleged that Spec's violated Code § 5.32 on the following dates: June 13, 2013; October 30, 2013; January 21, 2014; November 12, 2014; November 20, 2014; and March 9, 2015. ECF No. 3.

⁵¹ Tr. Day 1 at 28.

⁵² Tr. Day 1 at 28.

evidence is insufficient to show that the March 9, 2015, records request was related to any prior records request.

Staff further argues that on March 9, 2015, Ms. Anderson made the Commission's final attempt to obtain bank account statements and records. However, Staff is unable to explain which bank statements and records were requested and not provided. Ms. Anderson testified that her email was sent *after* she reviewed the *subpoenaed* bank records and had questions regarding specific transactions.⁵³ Mr. Jones testified that the Commission subpoenaed Spec's bank records in November 2014. These subpoenaed bank records are the same bank accounts referenced in Ms. Anderson's March 9 email.⁵⁴ It appears then that Staff had the previously requested bank records in its possession at the time of the March 9 email. Consequently, Ms. Anderson's email could not have been the last in a series of emails requesting bank records when Staff already had the bank records in its possession.

At the hearing, Ms. Anderson testified that Spec's failed to comply with her records request because Spec's did not send her all of the Centennial records. However, no evidence was offered to show which records were actually requested. Ms. Anderson's email referenced an attachment that was never offered into evidence. Thus, Staff failed to provide evidence of a specific records request that was unanswered by Spec's.

Additionally, the evidence reveals that Mr. Heisler contacted Ms. Anderson on at least four occasions over a 9-day period in an attempt to respond to her March 9 request. By both email and telephone, Mr. Heisler provided an explanation regarding the referenced transactions, requested clarification from Ms. Anderson, and requested an extension to respond. Although Mr. Jones testified that Staff is flexible if the permittee requests an extension, Ms. Anderson did not even acknowledge Mr. Heisler's request for an extension. She never followed up, clarified,

⁵³ Tr. Day 3 at 290.

⁵⁴ On November 12, 2014, a subpoena was issued for bank statements from Spec's Bank of America account ending in 7710. TABC Ex. 40. Another subpoena was issued the same day for bank statements from Spec's Amegy bank account ending in 4026. TABC Ex. 41. Ms. Anderson's March 9, 2015, email references Spec's Bank of America account ending in 7710 and Spec's Amegy bank account ending in 4026. TABC Ex. 43 at 2.

or responded to Mr. Heisler's questions or request for an extension. TABC's eventual response was a notice of violation.

Staff also alleged Spec's failed to *timely* respond to its March 9, 2015, records request. The Code, however, does not contain a timeliness requirement regarding the production of documents. Although Ms. Anderson and Mr. Jones testified that Staff allows a 10-day response time, Spec's was not given the benefit of this newly adopted standard.⁵⁵ Rather, Spec's was only given 3 days to respond to Ms. Anderson's request. Despite the short response time, however, both Ms. Anderson and Mr. Jones conceded that Mr. Heisler responded to Ms. Anderson's request.⁵⁶

Regardless of the circumstances in the instant case, Code § 5.32 allows the Commission to require the production of information, records, or other documents. This section falls under the Powers and Duties of the Commission. No penalty is provided under Code § 5.32 for the failure to comply with the request. Instead, Code § 5.44(a)(6) provides a tool for the Commission to gain compliance with a records request; however, the relief must be sought in district court.

For the reasons discussed above, the ALJs find that the preponderance of the evidence is insufficient to show that Spec's failed to provide or timely provide information, records, or documents as requested by the Commission on March 9, 2015. Therefore, the ALJs recommend no sanction should be imposed for Allegation 1.

VI. CREDIT LAW VIOLATIONS

A. Allegations 6, 7, and 11

Staff makes the following allegations:

⁵⁵ As noted earlier, Staff announced on Day 3 of the hearing that it was adopting a 10-day response time for records requests. Tr. Day 3 at 285-288.

⁵⁶ Tr. Day 3 at 295; Tr. Day 4 at 495.

Allegation 6: On December 27, 2011, Spec's purchased liquor and was delinquent in payment to the seller.

Allegation 7: On October 10, 2012, Spec's purchased liquor and was delinquent in payment to the seller.

Allegation 11: On March 1, 2013, Spec's purchased liquor and was delinquent in payment to the seller.

B. Applicable Law

No retailer may purchase liquor except for cash or on terms requiring payment by the retailer in accordance with subsection (c) of section 102.32 of the Code.⁵⁷ Subsection (c) states that, on purchases made from the 1st through 15th day of a month, payment must be made on or before the 25th day of that month.⁵⁸ On purchases made the 16th through the last day of the month, payment must be made on or before the 10th day of the following month.⁵⁹ An account is not delinquent if payment is received by the wholesale dealer not later than the fourth business day after the date payment is due under this subsection.⁶⁰ Each delivery of liquor shall be accompanied by an invoice giving the date of purchase.⁶¹

An account becomes delinquent if it is not paid when it is required to be paid under subsection (c) of this section.⁶² Failure to pay for liquor under the terms of the Code is known as a credit law violation. A retailer who makes a delinquent payment to a seller for the delivery of alcoholic beverages violates this section unless an exception applies.⁶³ Delinquent retailers must

⁵⁷ Code § 102.32(b).

⁵⁸ Code § 102.32(c).

⁵⁹ Code § 102.32(c).

⁶⁰ Code § 102.32(c) was amended in 2013 but provides guidance as to how and when an account is deemed delinquent. Prior to the 2013 Code change, the grace periods were set out in TABC's Marketing Practices Bulletins and Advisories. As stipulated by the parties, the grace period has been modified from 10 calendar days, 8 calendar days, and 6 calendar days, to the current 4 business days. The ALJs will address and apply the grace period in effect at the time of the alleged violation.

⁶¹ Code § 102.32(d).

⁶² Code § 102.32(d); 16 TAC § 45.121(d).

⁶³ 16 TAC § 45.121(d).

be reported to the Commission for inclusion on the Commission's delinquent list.⁶⁴ A report of a violation or payment must be submitted electronically to the Commission on or before the date the delinquent list is published.⁶⁵ The publication dates are set out in the Rules and Marketing Practices Bulletins. A retailer may not purchase or accept alcohol until all delinquent payments are paid in full.⁶⁶

C. TABC Evidence

1. Deposition of Ms. Anderson

Ms. Anderson testified that, if a retailer purchases alcoholic beverages between the 1st and 15th of the month, payment is due to the wholesaler by the 25th day of that month.⁶⁷ If a retailer purchases alcoholic beverages between the 16th and the last day of the month, payment is due by the 10th day of the following month.⁶⁸ According to Ms. Anderson, Spec's violated the Code by paying after the due date.

a. Regarding Allegation 6

Spec's purchased alcoholic beverages from United Wine on December 27, 2011.⁶⁹ Payment was due January 10, 2012.⁷⁰ United Wine received payment on January 18, 2012.⁷¹ According to Ms. Anderson, Spec's violated the Code by paying after the due date.⁷²

⁶⁴ Code § 102.32(d); 16 TAC § 45.121(e).

⁶⁵ Code § 45.121(e).

⁶⁶ Rule 45.121(g)(1).

⁶⁷ TABC Ex. 55.

⁶⁸ TABC Ex. 55 at 69-70.

⁶⁹ TABC Ex. 5, Vol. 2 at 1; TABC Ex. 55 at 71.

⁷⁰ TABC Ex. 55 at 71.

⁷¹ TABC Ex. 5, Vol. 2 at 2; TABC Ex. 55 at 71.

⁷² TABC Ex. 55 at 71.

b. Regarding Allegation 7

Spec's purchased alcoholic beverages from United Wine on October 10, 2012.⁷³ Payment was due October 25, 2012.⁷⁴ United Wine received payment on November 6, 2012.⁷⁵ According to Ms. Anderson, Spec's violated the Code by paying after the due date.⁷⁶

c. Regarding Allegation 11

Spec's purchased alcoholic beverages from United Wine on March 1, 2013.⁷⁷ Payment was due March 25, 2013.⁷⁸ United Wine received payment on April 10, 2013.⁷⁹ According to Ms. Anderson, Spec's violated the Code by paying after the due date.⁸⁰

2. Testimony of Ms. Anderson at HOM⁸¹

a. Regarding Code § 102.32(c)

Ms. Anderson testified that there is no grace period in the Code or Rules, and that payments are due on the 25th and 10th of the month.⁸² When asked if Code § 102.32(c) allows a grace period when it states that an account is not delinquent if payment is received by the fourth business day after the date payment is due, Ms. Anderson testified the Code does not call it a

⁷³ TABC Ex. 9, Vol. 2 at 1; TABC Ex. 55 at 73.

⁷⁴ TABC Ex. 55 at 73.

⁷⁵ TABC Ex. 9, Vol. 2 at 2; TABC Ex. 55 at 73-74.

⁷⁶ TABC Ex. 55 at 74.

⁷⁷ TABC Ex. 2, Vol. 2 at 1-2; TABC Ex. 55 at 72.

⁷⁸ TABC Ex. 55 at 75.

⁷⁹ TABC Ex. 2, Vol. 2 at 3; TABC Ex. 55 at 75.

⁸⁰ TABC Ex. 55 at 75.

⁸¹ Tr. Day 3 at 297-327, 372-374.

⁸² Tr. Day 3 at 297-298.

grace period. She testified the retailer is still delinquent if it pays after the due date, but the retailer is not placed on the delinquent list until the 5th day after the due date.⁸³

According to Ms. Anderson, wholesalers have some time to report delinquencies. She testified that the reporting time is referred to as the “grace period.”⁸⁴ If a retailer pays after the 25th or 10th day of the month, but before the publication of the delinquent list, the retailer is still delinquent even if he does not get on the delinquent list.⁸⁵ No wholesaler may sell to a retailer who is on the delinquent list until the delinquent payment is paid in full. In Spec’s case, every Spec’s store would be on the delinquent list and none of their stores could purchase alcohol.⁸⁶ She testified that Spec’s took their accounts to the last day before being reported on the delinquent list. One payment was made on the publication date, but Spec’s was not reported. With all three invoices, Spec’s paid after the due date but prior to being placed on the delinquent list.⁸⁷

b. Regarding Marketing Practices Advisories or Bulletins (MPB or Bulletins)⁸⁸

Ms. Anderson is aware of, but did not consider, any Bulletin regarding grace periods because they predated the start of her employment in 2013.⁸⁹ She has seen MPB048 which aligned the delinquent list publication date with the payment due date.⁹⁰ Under MPB048, the publication date was shortened from 8 to 6 calendar days. Therefore, a Payment Calendar was

⁸³ Tr. Day 3 at 299, 325.

⁸⁴ Tr. Day 3 at 324.

⁸⁵ Tr. Day 3 at 325.

⁸⁶ Tr. Day 3 at 326.

⁸⁷ Tr. Day 3 at 325.

⁸⁸ Pursuant to Code § 5.57, the Commission developed a formal process for making policy decisions affecting marketing practices regulations and communicated those decisions to regional staff and industry members through its Internet website, electronic email, or Commission publications. These publications are known as Marketing Practices Advisories or Bulletins. The purpose of the Bulletins was to ensure a more consistent interpretation and application of the statutes across the state.

⁸⁹ Tr. Day 3 at 301. The ALJs note that all the credit law allegations pre-dated Ms. Anderson’s employment.

⁹⁰ Spec’s Ex. 15.

included to assist industry members calculate the payment due date in relation to the shortened publication date. Ms. Anderson testified that MPB048 addresses the publication date of the delinquent list.⁹¹ According to Ms. Anderson, MPB048 did not change the payment due date but rather the publication date of the delinquent list.⁹² The additional 4 days is not a grace period for the retailer to pay but rather time for the wholesaler to report the delinquency for publication.

She agreed that MPB043 states that for a retailer's first six credit law violations, the retailer is mailed a notification of the incident but the civil penalty per individual case is zero.⁹³

c. Regarding Rule § 45.121

Effective November 4, 2011, Rule § 45.121 states that all reports of violations or payment must be made to Commission on or before the date the delinquent list is published.⁹⁴ Ms. Anderson testified that "reports of violations or payment" means reports of violations or reports of payment. It does not mean payment is due or may be made on the publication date of the delinquent list.⁹⁵

d. Regarding Allegation 6

The December 24, 2011, invoice does not show a delivery date.⁹⁶ Ms. Anderson testified that the Code requires wholesalers to put the delivery date on the invoice, but she does not know the reason for the requirement.⁹⁷ She testified that, based on her experience, the delivery date is

⁹¹ Tr. Day 3 at 304.

⁹² Tr. Day 3 at 304, 314.

⁹³ Tr. Day 3 at 305; Spec's Ex. 34.

⁹⁴ Tr. Day 3 at 307.

⁹⁵ Tr. Day 3 at 311-313.

⁹⁶ Tr. Day 3 at 307; Spec's Ex 14.

⁹⁷ Tr. Day 3 at 309.

usually the invoice date.⁹⁸ It is her practice to calculate the payment due date based on the purchase or order date, not the delivery date.⁹⁹

Ms. Anderson was shown TABC's Delinquent List Publication Dates for 2012.¹⁰⁰ For shipments between December 16 and December 31, 2011, the payment due date was January 10, 2012.¹⁰¹ The delinquent list was published on January 18, 2012.¹⁰² Spec's paid \$2,241.91 on the publication date of the delinquent list.¹⁰³ This amount included the \$778.91 invoice at issue.¹⁰⁴ Ms. Anderson testified that Spec's was delinquent because it paid after the payment due date and on the publication date of the delinquent list.¹⁰⁵

e. Regarding Allegation 7

The October 10, 2012, invoice for \$2,510.14 was signed and dated on October 11, 2012.¹⁰⁶ Spec's receiving scan log shows the products were received on October 11, 2012.¹⁰⁷ The payment due date was October 25, 2012.¹⁰⁸ Ms. Anderson was shown MPB048 which updated Rule § 45.121. Effective November 10, 2011, the publication date was reduced from 8 to 6 calendar days after the due date.¹⁰⁹ According to the Delinquent List Publication Dates for 2012, the publication date is November 1, 2012.¹¹⁰ Spec's sent a wire

⁹⁸ Tr. Day 3 at 308.

⁹⁹ Tr. Day 3 at 307, 309.

¹⁰⁰ Tr. Day 3 at 310; Spec's Ex. 15 at 6.

¹⁰¹ Tr. Day 3 at 310; Spec's Ex. 15 at 6.

¹⁰² Tr. Day 3 at 310.

¹⁰³ Tr. Day 3 at 312; Spec's Ex. 14; TABC Ex. 5, Vol 2 at 2.

¹⁰⁴ Tr. Day 3 at 313; Spec's Ex. 14.; TABC Ex. 5, Vol 2 at 1

¹⁰⁵ Tr. Day 3 at 313; Spec's Ex. 14.

¹⁰⁶ Tr. Day 3 at 314; Spec's Ex. 10 at 27; TABC Ex. 9, Vol 2 at 3.

¹⁰⁷ Tr. Day 3 at 315; Spec's Ex. 10 at 28; TABC Ex. 9, Vol 2 at 4.

¹⁰⁸ Tr. Day 3 at 315.

¹⁰⁹ Tr. Day 3 at 317; Spec's Ex. 15 at 1.

¹¹⁰ Spec's Ex. 15 at 6.

transfer of \$1,864,621.03 on October 31, 2012.¹¹¹ This amount included the \$2,510.14 invoice at issue.¹¹² She stated that payment was made before the publication date of the delinquent list.¹¹³

f. Regarding Allegation 11

The March 1, 2013, invoice has a shipment date of February 26, 2013.¹¹⁴ Spec's receiving scan log shows the products were received on March 22, 2013.¹¹⁵ Ms. Anderson testified that, based on Spec's receipt date, the payment due date was April 10, 2013.¹¹⁶ She was shown an updated copy of Rule § 45.121. Effective March 1, 2013, the publication date was reduced from 6 calendar days to 4 business days.¹¹⁷ The delinquent list was published on April 16, 2013.¹¹⁸ Spec's sent a wire transfer of \$1,674,897.12 on April 15, 2013.¹¹⁹ This amount included the \$4,483.68 invoice at issue.¹²⁰ She asserted that payment was made before the publication date of the delinquent list.¹²¹

D. Spec's Evidence

1. Testimony of Mr. Heisler at HOM¹²²

Mr. Heisler stated that, on a monthly basis, Spec's has over 100,000 invoices. Over 1.2 million invoices are processed a year. Spec's has a system in place to ensure invoices are

¹¹¹ Tr. Day 3 at 316; Spec's Ex. 10 at 44-45.

¹¹² Tr. Day 3 at 316.

¹¹³ Tr. Day 3 at 316.

¹¹⁴ Tr. Day 3 at 320; Spec's Ex. 10 at 75; TABC Ex. 3, Vol 2 at 1.

¹¹⁵ Tr. Day 3 at 320; Spec's Ex. 10 at 76.

¹¹⁶ Tr. Day 3 at 321.

¹¹⁷ Tr. Day 3 at 321.

¹¹⁸ Tr. Day 3 at 315.

¹¹⁹ Tr. Day 3 at 321; Spec's Ex. 10 at 77-78; TABC Ex. 2, Vol 2 at 4.

¹²⁰ Tr. Day 3 at 322.

¹²¹ Tr. Day 3 at 321.

¹²² Tr. Day 6 at 833-869, 908-909.

paid timely. Mr. Heisler testified to the procedures involving the delivery of alcohol to Spec's. An invoice accompanies every delivery. Spec's receives the invoice, crosschecks the quantities listed on the invoice against actual delivery, and confirms pricing. Then, Spec's checks off the invoice, signs and dates the invoice, and agrees to the delivery of the products. The products are then entered into Spec's system as received via electronic scan or manual data entry.¹²³

Mr. Heisler explained that the date of delivery represents the date of purchase.¹²⁴ Special orders could take months to fulfill, so an invoice date is inconsequential.¹²⁵ He cannot speak to what "ship date" means on United Wine's invoice.¹²⁶ However, he said Spec's obligation to pay begins with the delivery date.¹²⁷

Spec's offered various Marketing Practices Bulletins to explain the changes to the credit law provisions since 2009.¹²⁸ According to Mr. Heisler, MPB048 was TABC's effort to shorten the time lag between the pay period control date and the date at which the delinquent list was published.¹²⁹ In TABC's Delinquent List Publication Dates for 2012, the second column refers to a "shipping period," again showing the importance of the delivery date.

a. Regarding Allegation 6

United Wine's invoice in the amount of \$778.91 is dated December 27, 2011.¹³⁰ The due date is January 10, 2012. The publication date for this shipping period is January 18, 2012.¹³¹ Mr. Heisler testified that the publication date is the date when TABC publishes a list of

¹²³ Tr. Day 6 at 838, 840.

¹²⁴ Tr. Day 6 at 867.

¹²⁵ Tr. Day 6 at 868.

¹²⁶ Tr. Day 6 at 868.

¹²⁷ Tr. Day 6 at 867-868.

¹²⁸ Spec's Ex. 15 includes MPB048, MPA054, and MPB035.

¹²⁹ Tr. Day 6 at 841; Spec's Ex. 15 at 1.

¹³⁰ Tr. Day 6 at 839; Spec's Ex. 14.

¹³¹ Tr. Day 6 at 841-842; Spec's Ex. 15 at 6.

delinquent retailers.¹³² It is his understanding that payment made on or before January 18, 2012, is timely.¹³³ On January 18, 2012, United Wine received \$2,241.91 from Spec's, which included payment for this invoice.¹³⁴ Mr. Heisler wired payment for this invoice 8 days after the due date.¹³⁵ He testified that Spec's timely paid for the invoice and was not delinquent.¹³⁶

b. Regarding Allegation 7

The United Wine invoice in the amount of \$2,510.14 is dated October 10, 2012.¹³⁷ According to Spec's scan log, the products were actually delivered on October 11, 2012.¹³⁸ The due date is October 25, 2012.¹³⁹ At the time of this invoice, the grace period was 6 calendar days.¹⁴⁰ Factoring in the grace period, the pay period was extended to October 31, 2012.¹⁴¹ The Delinquent List Publication Dates for 2012 lists November 1, 2012, as the publication date for this shipping period.¹⁴²

Mr. Heisler testified that payment received on or before publication on November 1, 2012, is timely.¹⁴³ On October 31, 2012, Spec's wired \$1,864,621.03, which included payment for this invoice.¹⁴⁴ He testified that Spec's timely paid for the invoice and was not delinquent.¹⁴⁵

¹³² Tr. Day 6 at 842.

¹³³ Tr. Day 6 at 842.

¹³⁴ Tr. Day 6 at 842; Spec's Ex. 14 at 2; TABC Ex 5, Vol 2 at 1-2.

¹³⁵ Tr. Day 6 at 859.

¹³⁶ Tr. Day 6 at 848.

¹³⁷ Tr. Day 6 at 843; Spec's Ex. 10 at 27.

¹³⁸ Tr. Day 6 at 845; Spec's Ex. 10 at 28.

¹³⁹ Tr. Day 6 at 846, 860.

¹⁴⁰ Tr. Day 6 at 844; Spec's Ex. 15 at 1, 6.

¹⁴¹ Tr. Day 6 at 846.

¹⁴² Tr. Day 6 at 844; Spec's Ex. 15 at 6.

¹⁴³ Tr. Day 6 at 845.

¹⁴⁴ Tr. Day 6 at 848-849; Spec's Ex. 10 at 29-45.

¹⁴⁵ Tr. Day 6 at 848.

United Wine's "Payment History" document shows United Wine received \$7,908.64 on November 6, 2012, a total that included this invoice.¹⁴⁶ Mr. Heisler testified that United Wine's date stamp is inaccurate because Spec's wired the money on October 31, 2012.¹⁴⁷

c. Regarding Allegation 11

The United Wine invoice in the amount of \$4,483.68 is dated March 1, 2013, with a ship date of February 26, 2013.¹⁴⁸ The invoice was for an order of special scotches.¹⁴⁹ Spec's received \$4,483.68 worth of scotches on March 22, 2013, as confirmed by Spec's signed invoice and scan log.¹⁵⁰ With a delivery date of March 22, 2013, the payment due date was April 10, 2013.¹⁵¹

Mr. Heisler testified the grace period changed from 6 calendar days to 4 business days at the time of this invoice.¹⁵² Factoring in the grace period, Spec's was not delinquent if payment was made by April 16, 2013.¹⁵³ On April 15, 2013, Spec's wired \$1,647,897.12, which included payment for this invoice.¹⁵⁴ When money is wired through the Federal Reserve System it only takes minutes for United Wine to receive the funds.¹⁵⁵ He testified that Spec's timely paid for the invoice and was not delinquent.¹⁵⁶

¹⁴⁶ Tr. Day 6 at 860; TABC Ex. 9, Vol 2 at 1-2.

¹⁴⁷ Tr. Day 6 at 860.

¹⁴⁸ Tr. Day 6 at 843; Spec's Ex. 10 at 75; TABC Ex. 2, Vol 2 at 1.

¹⁴⁹ Tr. Day 6 at 849.

¹⁵⁰ Tr. Day 6 at 850; Spec's Ex. 10 at 74, 76.

¹⁵¹ Tr. Day 6 at 850.

¹⁵² Tr. Day 6 at 850-851; Spec's Ex. 15 at 1.

¹⁵³ Tr. Day 6 at 851.

¹⁵⁴ Tr. Day 6 at 851-852; Spec's Ex. 10 at 76-78.

¹⁵⁵ Tr. Day 6 at 869.

¹⁵⁶ Tr. Day 6 at 851-852.

2. Testimony of Mr. Rydman at HOM¹⁵⁷

Mr. Rydman testified that Spec's signs and dates their invoices when they receive their products. The delivery date is used to calculate payment due dates. This has been the procedure since 1972. He testified that every wholesaler and retailer uses the delivery date to calculate payment. He has never heard of any other concept. He testified that if Spec's business practice was incorrect, these credit law violations would have come up before now.

3. Testimony of Mr. Coleman at HOM¹⁵⁸

Mr. Coleman testified that the Code and Rules require the delivery date on all invoices because the delivery date is how the due date is computed. He is aware of four Marketing Practices Bulletins created by the TABC to educate permit holders about cash and credit law violations. Each Bulletin contains a "Payment Calendar" that begins with the word "delivery date" and uses the delivery date as the day from which the payment due date is computed. Three of those Bulletins were authored and signed by Mr. Jones.¹⁵⁹ It was reasonable for Spec's to rely on the Bulletins.

Mr. Coleman disagreed with the assertion that payment received on or before the publication date is a violation. He testified that it is TABC's practice that if an invoice is paid up to or before publication, it is not a violation. If the retailer paid before publication, it would not be on the delinquent list, and TABC would not even be aware of any violation. According to Mr. Coleman, Spec's properly calculated the grace periods.

¹⁵⁷ Tr. Day 7 at 1020-1021, 1066-1067.

¹⁵⁸ Tr. Day 7 at 1184-1192; Tr. Day 8 at 1277.

¹⁵⁹ Tr. Day 7 at 1185; Spec's Ex. 15.

E. Discussion and Recommendation

1. Calculation of the payment due date

To determine whether Spec's violated the credit law provision, the ALJs must first determine what triggers the calculation of the due date.

The parties do not agree on when a purchase is "made." Staff argues that the purchase date should be utilized when assessing a violation of the Code because credit is extended at the time the order is initiated.¹⁶⁰ Ms. Anderson calculated the due date based on the invoice date and assumed the invoice date is the same as the delivery date. The ALJs find that Staff's use of the purchase or invoice date is inconsistent with the Code, Rules, and TABC's Marketing Practices Bulletin.

Code § 102.32(d) requires each *delivery* to have an invoice with the date of purchase. Rule § 45.121 further requires the place and date of delivery to be recorded on the invoice. More importantly, it requires the retailer to sign the invoice after it has verified the receipt of alcoholic beverages and accuracy of invoice.¹⁶¹ The Rules require both seller and retailer to retain the signed invoice.¹⁶² Therefore, a seller can have a date when the invoice is created, but the signed invoice shows a full description of the alcoholic beverages, the price and terms of sale, and the place and date of delivery.¹⁶³ It appears that the intent of the Code and Rules is for the delivery of the alcoholic beverages to trigger the obligation to pay, thus beginning the calculation of the payment due date.

¹⁶⁰ Staff's Response to Respondent's Trial Brief Allegations 6, 7, and 11.

¹⁶¹ Rule 45.121(c)(1).

¹⁶² Rule 45.121(c)(2).

¹⁶³ Rule 45.121(c).

Finally, the Marketing Practice Bulletins authored by Mr. Jones include Payment Calendars that clearly show the due date is determined by the delivery date. The Delinquent List Publication Date also refers to the “shipping period” in determining the payment due dates.

As shown by the evidence, placing an order does not mean products are immediately available. There may be a gap between the order and delivery of goods. Additionally, a seller may have a date when the invoice was created or its ship date may be incorrect. However, both seller and retailer have an opportunity and obligation to confirm delivery. The Code and Rules set out procedures and requirements to verify when goods are delivered. It is at the point of delivery that the retailer, having confirmed the delivery of goods and signed the invoice, becomes responsible for payment.

For the reasons stated above, the ALJs find that the delivery date is the date from which the payment due date is calculated.

2. Grace Period

It is undisputed that Spec's paid for all three invoices after the 10th and 25th of the month. The next question the ALJs must determine is whether there is a grace period for payment after the due date.

a. Established by Code and Rules

In 2009, the Commission implemented significant credit law changes and announced its plan to align the delinquent list publication date with the credit law payment due date.¹⁶⁴ To that end, the Commission initiated a rulemaking process that annually reduced the publication date by 2 days each year over a period of 5 years. To assist permittees in evaluating their business practices and making necessary changes to adapt to the reduced publication dates, the

¹⁶⁴ Spec's Ex. 15; MBP048.

Commission provided guidance through Marketing Practices Bulletins, Payment Calendars, and Delinquent List Publication Dates.

Staff argues that the alignment of the publication date with the credit law payment due date did not create a grace period for payment. However, this argument is contradicted by the Payment Calendars contained in the Marketing Practices Bulletins. The statutory due dates have not changed. The only change in the Payment Calendars for each amendment is the time period from the due date to the publication date. This time period is marked for *payments made after the due date and before the publication date*.

When the publication date was shortened by 2 days, the time to pay by cash or cash equivalent after the due date was shortened by 2 days. Retailers are allowed to reconcile their accounts by making a payment in cash or cash equivalent before the publication of the delinquent list and avoid being placed on the delinquent list. This effectively creates a grace period for payments. This interpretation is consistent with the current amendment that states an account is not delinquent if payment is made by the fourth day after the due date. It is also consistent with Staff's actions set out below.

b. Ratified by Staff's Actions

Spec's relied on Rule § 45.121(e)(3) to show a grace period for payment and argued there was no violation because payment was made during the grace period. Staff argues that the failure to pay by the appropriate statutory deadlines – either the 25th or the 10th – is a violation of Code § 102.32(c) and results in the retailer being delinquent.¹⁶⁵ Staff further argues that there is no grace period relating to payment, as contended by Spec's. Instead, Rule § 45.121(e)(3) pertains to a *seller's* duty to report a violation or payment, not a retailer's duty to timely pay. There is no "grace period" for retailers. Staff argues the grace period is time extended to

¹⁶⁵ Staff makes argument that the initial act of becoming delinquent is a violation. However, the "initial act of becoming delinquent" language refers to violations that are part of a cascading event rather than a single event. There is no evidence that any of these violations are not part of a cascading event.

wholesalers to report delinquent payers. It is not an extension of time for retailers to make payment.¹⁶⁶

The ALJs do not find Staff's arguments to be persuasive for two reasons. First, Staff did not previously dispute the existence of a grace period and agreed to the dismissal of allegations where payments were clearly made during the grace period. Then, Staff stipulated to the grace periods.

Initially, Staff charged Spec's with 20 credit law violations in its original Notice of Hearing, dated July 28, 2016.¹⁶⁷ Spec's responded and filed motions for summary disposition regarding the credit law violations.¹⁶⁸ In its second motion for summary disposition dated September 8, 2016, Spec's set out the amendments related to the grace periods found in the Code, Rules, and Marketing Practices Bulletins.¹⁶⁹ Spec's argued that there was a grace period for payment, and that Spec's paid after the due date but during the grace period allowed by TABC. On September 22, 2016, in response to the motion, Staff agreed to the granting of the motion for summary disposition and dismissal of allegations 2, 3, 4, 5, 9, 12, 13, 14, 15, 16, and 18.¹⁷⁰ The dismissal of those eleven credit law allegations left the three remaining credit law allegations at issue in this hearing.¹⁷¹ All the allegations that Staff agreed should be dismissed involved payments that were made *after* the due date of the 10th or 25th of the month but *before* the publication date of the delinquent list. It would appear that, five months before the hearing, Staff concurred with Spec's argument that there was a grace period for payment.

The same arguments in Spec's motions for summary disposition reappeared in the Agreed Stipulations.¹⁷² There, Staff agreed and stipulated that the grace period for delinquent

¹⁶⁶ Tr. Day 6 at 856.

¹⁶⁷ ECF No. 7.

¹⁶⁸ ECF Nos. 9 and 15.

¹⁶⁹ ECF No. 15.

¹⁷⁰ ECF No. 19.

¹⁷¹ SOAH Order No. 3 issued on September 19, 2016 on Docket 458-16-3124.

¹⁷² On January 30, 2017, parties filed Agreed Stipulations.

payments had been continuously shortened. Specifically, Staff stipulated that the grace period was 6 calendar days beginning November 10, 2011. This grace period applies to Allegations 6 and 7. Staff stipulated that, effective March 1, 2013, the grace period changed to 4 business days. The current amendment was codified and shows that an account is not delinquent if payment is received by the fourth business day after payment is due. The current grace period applies to Allegation 11.

At no point prior to the hearing did Staff clarify that grace periods did not apply to payment but rather related only to reporting. To the contrary, Staff's actions in dismissing or agreeing to the dismissal of most of its credit law violations support the position that there is a grace period for delinquent payments. For these reasons, the ALJs find that a grace period exists for delinquent payments to be made between the payment due date and before the publication date.

3. Summary of Evidence

All. No.	Invoice No.	Invoice Date	Delivery Date	Payment Due Date	Publication Date	Paid Date
11	27479	3/01/2013	3/22/2013	4/10/2013	4/16/2013	4/15/2013
7	22082	10/10/2012	10/11/2012	10/25/2012	11/1/2012	10/31/2012
6	12602	12/27/2011	12/27/2011	1/10/2012	1/18/2012	1/18/2012

4. Allegation 11

Effective March 1, 2013, the publication date was shortened to 4 business days after the due date as seen in MPA054. Allegation 11 presents the same scenario as illustrated in the Payment Calendar of MPA054 which reads as follow:

Delivery Date	Due Date	Publication Date
March 16 - 31	April 10	April 16 (instead of 18 th)
↓		↓
Payments made between 16 th and 10 th may be made <u>check, cash or other form</u>		Payments made between 11 th and 15 th must be made by <u>cash or cash equivalent</u>

The signed, dated, and verified copy of the invoice was a more credible source for determining delivery date. The preponderance of the evidence shows the delivery date of this invoice is March 22, 2013. Therefore, the payment due date is April 10, 2013. The publication date is April 16, 2013. The grace period is effectively April 11 to April 15, 2013. Payment must be made in cash or cash equivalent between April 11 and April 15, 2013. Spec's made a cash-equivalent wire payment on April 15, 2013. Therefore, the ALJs find the preponderance of the evidence is insufficient to show Spec's violated Code § 102.32 or Rule § 45.121. Therefore, the ALJs recommend no sanction should be imposed for Allegation 11.

5. Allegation 7

The preponderance of the evidence shows the delivery date is October 11, 2012. Therefore, the payment due date is October 25, 2012. As shown in MPB048 and stipulated by the parties, effective November 10, 2011, the grace period was shortened from 8 calendar days to 6 calendar days. The Delinquent List Publication Dates for 2012 has the publication date as November 1, 2012. The grace period is effectively from October 26 to October 31, 2012. Payment must be made in cash or cash equivalent during this grace period. United Wine's document shows a payment was received on November 6, 2012. However, how this date was determined was not clarified. The ALJs find the more credible evidence of payment is the October 31, 2012, date on the bank's wire transfer document. Spec's made a cash-equivalent wire payment on October 31, 2012. Therefore, the ALJs find the preponderance of the evidence is insufficient to show Spec's violated Code § 102.32 or Rule § 45.121. Therefore, the ALJs recommend no sanction should be imposed for Allegation 7.

6. Allegation 6

Effective November 10, 2011, the publication date was shortened to 6 calendar days after the due date as seen in MPB048. Allegation 6 presents the same scenario as illustrated in the Payment Calendar of MPB048 which reads as follow:

Delivery Date	Due Date	Publication Date
December 16 - 31	January 10	January 16 (instead of 18 th)
<div style="text-align: center;">↓</div> Payments made between 16 th and 10 th may be made <u>check, cash or other form</u>		<div style="text-align: center;">↓</div> Payments made between 11 th and 15 th must be made by <u>cash or cash equivalent</u>

The preponderance of the evidence shows the delivery date is December 27, 2011. Therefore, the payment due date is January 10, 2012. The publication date provided by TABC was either January 16 or January 18, 2012. MPB048's Payment Calendar shows the publication date is January 16, 2012. However, the Delinquent List Publication Dates for 2012 has a publication date of January 18, 2012. The evidence shows Spec's made a cash-equivalent wire payment on January 18, 2012. Even with the later publication date, the ALJs find Spec's failed to pay *before* the publication date. Spec's was a day late. However, Spec's was not placed on the delinquent list.

Spec's administrative history shows only one prior credit law violation in 2013 for which it received a warning. Spec's handles more than 1.5 million invoices a year and has been in business since 1965. This violation in December 2011 occurred more than 5 years ago, constitutes one of the first six credit law violations for Spec's, and is outside the scope of the 24-month look-back period for enhancement purposes for any subsequent credit law violations.¹⁷³ For these reasons, the ALJs recommend a warning be imposed for Allegation 6 against Spec's permit P602902, the permit for which the invoice was billed.

VII. CONSPIRACY TO ALLOW AN EXCESSIVE DISCOUNT: S1 CULITO'S WINE

A. Allegation 22

Staff alleges that, on October 8, 2014, Spec's conspired with another person to violate or accept the benefits of a violation of the Code or Rules in violation of Code §§ 104.03 and

¹⁷³ Credit law violation is a major regulatory violation with a 24-month look-back period for enhancement purposes. Rule § 34.1-.2.

102.07(a)(7) to-wit: Spec's conspired with wholesaler United Wine and/or nonresident seller Joseph Victori Wines to allow an excessive discount, namely \$1.00 per case of Culito's Chardonnay and Merlot wine.

B. Applicable Law

A retail dealer or its 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 Rules.¹⁷⁴ No person who owns or has an interest in the business of a distiller, brewer, rectifier, wholesaler, class B wholesaler, winery, or wine bottler, nor the agent, servant, or employee of such a person, may allow an excessive discount to a retailer.¹⁷⁵

C. TABC Evidence

1. Deposition of Ms. Anderson

Ms. Anderson testified that Spec's conspired with United Wine and/or Joseph Victori Wines to allow an excessive discount, namely cases of Culito's Chardonnay and Culito's Merlot wine for \$1 per case. During her investigation, she came across an email, dated October 1, 2014, from John Umbach with Joseph Victori Wines to John Saladino with United Wine.¹⁷⁶ In his email, Mr. Umbach stated that he would write a Spec's Program in which 600 cases [assorted] would be sold to Spec's at \$1.00 per case, including freight to United Wine.¹⁷⁷

According to Ms. Anderson, a wholesaler selling wine for \$1 per case to one retailer and not offering that price to other retailers is creating an excessive discount.¹⁷⁸ The wine was sold to

¹⁷⁴ Code § 104.03.

¹⁷⁵ Code § 102.07(a)(7).

¹⁷⁶ TABC Ex. 55 at 10; TABC Ex. 3; TABC Ex. 3B.

¹⁷⁷ TABC Ex. 3.

¹⁷⁸ TABC Ex. 55 at 11.

other retailers for \$62 to \$72 per case, while Spec's received the case for \$1.¹⁷⁹ Spec's was the only retailer to get a 95% discount. In her experience as a TABC auditor, the \$1 price per case is considered an excessive discount.¹⁸⁰

2. Testimony of Ms. Anderson at HOM¹⁸¹

Allegation 22 is predicated on the premise that \$1 per case is an excessive discount for that wine. The Code does not define excessive. Based on her training, Ms. Anderson opines that excessive means outside the normal practice of the industry. The Commission does not have a price sheet showing a normal range of prices nor does it mandate a minimum mark-up for products. There are no written guidelines or parameters in determining what constitutes a normal discount. Ms. Anderson agreed that excessive is a subjective determination. It was her determination that the cost of \$1 per case was an excessive discount for that product.

Ms. Anderson agrees that Code § 102.07 does not apply to a retailer (Spec's) or nonresident seller (Joseph Victori Wines).¹⁸² Nevertheless, she testified that Spec's conspired with another person to violate or accept a benefit of a violation of Code § 102.07. As pleaded, Allegation 22 omitted "accept the benefits" language under "to-wit," alleging instead that Spec's "conspired . . . to allow an excessive discount."

Ms. Anderson determined that Spec's accepted the benefits of the violation of an excessive discount based on the following documents: an email from Joseph Victori Wines to United Wine, Joseph Victori Wines' invoice to United Wine, United Wine's invoice to Spec's, and United Wine's Sales by Item Detail Report (United Wine Sales Report).

¹⁷⁹ TABC Ex. 55 at 11.

¹⁸⁰ TABC Ex. 55 at 11.

¹⁸¹ Tr. Day 1 at 41-82; Tr. Day 3 at 328-339, 375-376.

¹⁸² Tr. Day 1 at 71-72.

In the email, Joseph Victori Wines tells United Wine that it will offer Spec's a program involving various cases of Culito's wines for \$32 to \$51 a case with 600 assorted cases at \$1 per case.¹⁸³ Ms. Anderson conceded that Spec's was not involved in the email between Joseph Victori Wines and United Wine.¹⁸⁴ She testified that the email does not evidence an agreement with Spec's, and Spec's was not a party to the email.¹⁸⁵ She does not know with whom Spec's conspired. She had no "internal knowledge that Spec's conspired, but [Spec's] did accept the benefit, which is what § 104.03 is, conspires or accepts."¹⁸⁶

On November 14, 2014, Joseph Victori Wines billed United Wine for 224 cases of Culito's Chardonnay for \$1 per case and 224 cases of Culito's Merlot for \$1 per case.¹⁸⁷ On November 24, 2014, United Wine billed Spec's for five cases of Culito's Chardonnay at \$1 per case and five cases of Culito's Merlot at \$1 per case.¹⁸⁸ United Wine's Sales by Item Detail Report showed a total of 224 cases of Culito's Merlot and 224 cases of Culito's Chardonnay sold at \$1 per case to Spec's from November 19, 2014 to December 16, 2014.¹⁸⁹ During that time, United Wine charged other retailers \$53 to \$67 a case.¹⁹⁰ Ms. Anderson did not investigate any other wholesaler. She could not say whether any other wholesaler in Texas gave that same discount to another retailer in Texas. Ms. Anderson was able to track a total of 448 cases of Culito's sold to Spec's for \$1 per case. After the program ended, Spec's paid full price for the wine from May to October 2016.

When asked about volume discounts, Ms. Anderson testified that a brand-specific volume discount is permitted. She testified that it is permissible to get a discount on product X if one

¹⁸³ TABC Ex. 3 at 2. The email also includes a Sweet Bitch Program for Spec's, offering Sweet Bitch wine at a discount at \$24 per case for 3 months.

¹⁸⁴ Tr. Day 1 at 60.

¹⁸⁵ Tr. Day 1 at 63.

¹⁸⁶ Tr. Day 1 at 72.

¹⁸⁷ TABC Ex. 3 at 4.

¹⁸⁸ TABC Ex. 3 at 3.

¹⁸⁹ TABC Ex. 3B at 1-2 and, 4-5.

¹⁹⁰ TABC Ex. 3B.

buys a certain volume of product X. She has not seen a volume discount involving different brands, such as: Buy XYZ and get a discount on X. She testified that the latter scenario could be deemed an inducement. Rule § 45.110(d)(6) defines inducement as discriminatory if it is not offered to all retailers in the local market on the same terms, unless the wholesaler has a business reason to justify the difference in treatment. Ms. Anderson testified that other retailers paid over \$50 per case, which was unfair to them. If there was a volume discount, then it must have been offered to all retailers. She conceded that Code § 102.07 does not contain language regarding volume discount when discussing “excessive discount.”

Ms. Anderson is unaware of the shelf life of Chardonnay wine and did not factor the shelf life of the particular wine in her evaluation of the totality of the transaction. However, it is her experience that when alcohol is about to expire, retailers typically fill out a destruction form with TABC to get rid of the product and get a discount on excise tax. She has not seen \$1 per case offered to any other retailer.

3. Testimony of John Saladino at HOM¹⁹¹

In 2008, Mr. Saladino and Jay Broddon started United Wine. Mr. Saladino is the managing director over sales at United Wine. Prior to United Wine, he worked as a sales representative or sales manager at Quality Beverage, Houston Distributing Co., and American Wine Co., all wholesalers. Mr. Saladino was also a broker with a manufacturer’s agent permit for wine and distilled spirits. As a sales representative, he shows items and makes sales. As a sales manager, he has the same duties but he also sets pricing, puts deals together, and works with suppliers for programs such as sales incentives. He currently manages a team of 11 sales representatives.

Spec’s has been a customer since United Wine opened for business. Between 2011 and 2013, Spec’s made up about 90-95% of United Wine’s business. There are two key account sales representatives for Spec’s.

¹⁹¹ Tr. Day 4 at 538-550, 571-572, 577-585, 610-620.

Mr. Saladino has over 33 years of experience in the Texas alcoholic beverage industry. He testified that his suppliers come from many different states and countries and are not familiar with Texas laws. In his experience, it is common for suppliers to ask for something that is not legal in Texas. It is his job to help restructure their offers and programs to be in compliance with Texas laws.

Mr. Saladino confirmed that, on October 1, 2014, he received an email from Mr. Umbach with Joseph Victori Wines, a supplier that he represents. He testified that the email represented what Joseph Victori Wines wanted to offer Spec's for Culito's. On October 8, 2014, Mr. Saladino responded, telling Joseph Victori Wines that they will "need to rework this program so all is ok with TABC" by offering it to all retailers.¹⁹² After he restructured the program, Mr. Saladino published the new program and had his sales representatives offer the deal to all retailers.¹⁹³ The program, entitled OND 2014, ran from October through December 2014, and reads as follows:

If a retailer purchases 500 cases between now and the end of the year we will reduce your Sweet Bitch price by \$24 per case Also, on the Sweet Bitch Bubbly Sparkling, if a retailer purchases 92 cases we will sell them 20 cases at \$1 per case. In addition, any retailer who purchases the above program will be able to purchase 600 cases of Culito's at a special price of \$1 per case.¹⁹⁴

Mr. Saladino testified that the program offered a volume discount for the purchase of 1,000 cases, the equivalent of a container. The volume deal was offered to all retailers, including Fiesta and Goody Goody. Spec's was the only retailer who qualified by purchasing a sufficiently large volume. Spec's purchased 600 cases of Sweet Bitch wine and received 400 cases of Culito's at \$1 per case.¹⁹⁵

¹⁹² TABC Ex. 3.

¹⁹³ Spec's Ex. 3.

¹⁹⁴ TABC Ex. 3-C.

¹⁹⁵ Spec's Ex. 8.

Mr. Saladino testified that a discount is not considered excessive if there is a business reason. Wine is a perishable item that starts to deteriorate the day after bottling. Suppliers will offer discounts to move products or discontinue or reduce inventory. He does not consider \$1 a case to be an excessive discount because it is a regular business practice to move an older perishable product in anticipation of a new vintage.

Mr. Saladino testified that the Culito's wines were going bad so he wanted to move them out and move on to the next vintage. He did not know how long they are good but he knew there was another vintage coming out. The supplier wanted to move through these products before the new vintage came out. Some cases in the same vintage go bad before other cases. It seemed imminent to his supplier because he sold it to United Wine for \$1. Mr. Saladino testified he purchased the wine for a \$1, so he sold it for \$1.

Under the OND 2014 program, a retailer could qualify for \$1 per case price as part of a volume discount. The discount helped a valuable supplier to move a product out and helped United Wine make more money by moving another vintage into the market. He testified that it would have been in United Wine's interest if Goody Goody and Fiesta had accepted the volume discount.

Mr. Saladino is familiar with Rule § 45.110 regarding inducements. A pattern and practice that places a retailer's independence at risk is not permissible. As a wholesaler, he cannot require a retailer to purchase a specific product in order to buy another product. He explained that his volume deal was not an inducement because retailers were still allowed to purchase other products.¹⁹⁶ They were merely given certain price discounts for a volume purchase. He is not aware of anything in the OND 2014 program that placed the independence of Spec's at risk.

¹⁹⁶ TABC Ex. 3-C.

4. Testimony of Jay Broddon at HOM¹⁹⁷

Mr. Broddon is the managing director of operations at United Wine. He manages the internal operations of the business including warehouse, receiving, and administration. He testified that Mr. Saladino handles all sales and marketing. Mr. Broddon is responsible for handling orders. The two divisions are kept separate. He was not involved in the sales of Culito's wine and is not aware of the emails between Mr. Saladino and Mr. Umbach.

5. Testimony of Billy Davis at HOM¹⁹⁸

Mr. Davis has worked at United Wine as Vice President of Chain Accounts since 2008. His duties include calling on chain or key accounts for spirits and wines sales. Spec's is his account. He has known Mr. Umbach as a representative for Joseph Victori Wine for 15 years. He was copied on the email between from Mr. Umbach to Mr. Saladino. Mr. Davis typically gets copied on emails regarding Spec's. However, Mr. Davis did not work on this project and is unfamiliar with the particulars of the email.

Mr. Davis testified that he has sold \$1 wine to other companies before when they were close-out wines. He explained that wine typically goes bad in 3 years.

D. Spec's Evidence

1. Testimony of Mr. Rydman at HOM¹⁹⁹

Mr. Rydman testified that Spec's was not a participant in the emails between United Wine and Joseph Victori Wines. He recalled Mr. Saladino coming into Spec's with

¹⁹⁷ Tr. Day 5 at 645-654.

¹⁹⁸ Tr. Day 5 at 721-730, 750-753.

¹⁹⁹ Tr. Day 7 at 1022-1030, 1095-1117.

Mr. Umbach and talking about getting rid of some old vintage Culito's to make room for a new vintage. This was a legitimate business reason to offer a low or discount price.

With regard to United Wine's Program OND 2014, Mr. Rydman testified that it appears to be a deal structure offering a volume discount on Sweet Bitch and Culito's wines. These products are sold all over the state, and the program is communicated to all retailers. He testified that discount and volume discounts are lawful under the Code. On the other hand, an *excessive* discount is unlawful unless there is a business reason. A big discount is not per se excessive. He gave examples of business reasons for excessive discounts: wine that is getting old; flavors not selling; new labeling changes; changes in winery; new distributor getting get rid of product; lower inventory; scratched labels; heated wine; bad boxes; and improper packaging. He testified there are numerous reasons for a business to discount a product. The seller makes decisions regarding the business reason to discount. Mr. Rydman testified that Spec's simply placed an order based on what United Wine offered at that time. Spec's did not "allow" an excessive discount.

2. Testimony of Mr. Coleman at HOM²⁰⁰

Mr. Coleman testified that, before and after Prohibition, the distribution of alcohol was controlled by organized crime. One means of exerting control over retailers was by extending credit. By giving products cheaply to retailers, they were able to get retailers on the hook and control them. Therefore, an excessive discount prohibition was intended to prevent retailers from losing independence. Mr. Coleman testified that this was not the case with the Culito's discount. The testimony he heard supports a solid legal basis and business reason for the discount of \$1 per case. This was not an upper tier member trying to control Spec's. Under United Wine's discount program, a volume discount was offered on qualifying purchases that did not violate the Code.

²⁰⁰ Tr. Day 7 at 1192-1199; Tr. Day 8 at 1278-1279, 1304-1305.

3. Testimony of Richard Wills at HOM²⁰¹

Mr. Wills was an auditor with the TABC from 1981 to 1986. He returned in 2005 as an auditor and was promoted to Assistant Regional Compliance Supervisor and then Regional Licensing Supervisor for the Gulf Coast Region. He has a total of 15 years' experience at TABC. He is currently the owner of Gerald Franklin Licensing Agency and provides consultation to liquor businesses. He continues to remain abreast of TABC laws. He was asked to review the allegations and provide his expert opinion. Mr. Wills testified that he does not see the \$1 Culito's wine discount as a violation of the Code. To determine if there is an excessive discount, he would have to consider the totality of the circumstances, including any legitimate business reasons such as improper temperature, shelf life, new products, or improper labels.

Mr. Wills testified that the public policy behind restricting excessive discounts was to protect retailers from an unfair market advantage. If something was available to one retailer, it must be available to other retailers. Mr. Wills testified that the volume discount was available to all retailers, but Spec's was the only retailer who qualified for the discount with its purchase. Therefore, he did not see a violation of the Code.

E. Discussion and Recommendation

Code § 102.07(a)(7) prohibits manufacturers and wholesalers from allowing an excessive discount to a retailer. The prohibited conduct can only be committed by an upper tier member. According to Ms. Anderson, the prohibition does not apply to a retailer or nonresident seller. Nevertheless, Staff argues that Spec's entered into a conspiracy with nonresident seller and wholesaler to violate or accept the benefits of a violation of this section, *to allow an excessive discount*.

"Proof of conspiracy may be made by circumstantial evidence but vital facts may not be prove[n] by unreasonable inferences from other facts and circumstances. A vital fact may not be

²⁰¹ Tr. Day 8 at 1371-1378, 1396-1399.

established by piling on interference upon inference.”²⁰² “In cases with only slight circumstantial evidence, something else must be found in the record to corroborate the probability of the fact’s existence or non-existence.”²⁰³

Staff argues that a reasonable inference could be made of Spec’s knowledge, assent, and/or actions in each conspiracy allegation. Staff argues that United Wine and Joseph Victori Wines negotiated and crafted a program specifically for Spec’s benefit alone. United Wine’s invoices, dated November 14, 2014, show Spec’s received cases of Culito’s Chardonnay and Merlot at \$1 per case. Staff does not accept the business reason given that the wine was going bad because, during the same time period, other retailers were paying full price for those wines. Spec’s discounted price was approximately 95% less than what other retailers paid. Therefore, Staff argues that Spec’s conspired to violate or accept the benefits of a violation by allowing an excessive discount.

The initial offer by Joseph Victori Wines appears to be a retailer-specific discount. However, the email states what Joseph Victori Wines *will* write up for Spec’s. After the offer was presented to United Wine (not Spec’s), United Wine responded that it would have to restructure the offer to comply with state laws. From the initial exchange, it is evident that United Wine did not accept the original offer. Mr. Saladino restructured the offer and presented a new program entitled OND 2014. Similar to the original offer by Joseph Victori Wines, OND 2014 included pricing for Culito’s and Sweet Bitch wines. Unlike the original offer, OND 2014 was not retailer-specific but volume-specific. It offered a volume discount to all retailers who made a qualifying purchase.

In its analysis and argument, Staff relied on certain records from Joseph Victori Wines and United Wine but did not address United Wine’s OND 2014 program or Spec’s Purchase Orders. Those documents were provided to the Commission during the investigation and offered as TABC Exhibit 3-C. Despite the existence of the documents, Staff seems to ignore any other

²⁰² *Schlumberger Well Surveying Corp. v. Nortex Oil & Gas Corp.*, 435 S.W. 2d 854 (Tex. 1968).

²⁰³ *W. Atlas Int’l v. Randolph*, No. 13-02-00244-CV, 2005 WL 673483 (Tex. App. - Corpus Christi Mar. 24, 2005, no pet.) (mem. op.).

plausible explanation for the \$1 per case price. Staff's analysis wholly disregards or dismisses OND 2014 as an acceptable discount program, or assumes that it is still an excessive discount because no other retailer accepted and received the volume discount. Staff compared the price in the invoices to the original offer and concluded that Spec's received an excessive discount. Spec's did receive a \$1 per case price, but it appears to be part of a large purchase of 600 cases of wine. The purchase quantity and price are consistent with the terms of United Wine's OND 2014 program.

Code § 102.07(a)(7) does not address volume discount as an unacceptable excessive discount. According to Ms. Anderson, as long as the volume discount is offered to all retailers, it does not violate the law. The ALJs find the testimony and OND 2014 document to be credible evidence that United Wine restructured the offer to provide a volume discount program to all retailers. Additionally, the ALJs find that Spec's placed a large order that qualified for the terms of the OND 2014 program. Therefore, the ALJs find that there was not an excessive discount offered only to a single retailer, and no violation.

Even if the ALJs were to disregard the OND 2014 program or find that it offered an excessive discount, the ALJs do not find Spec's conspired with United Wine and Joseph Victori Wines to allow an excessive discount. The email exchange was between United Wine and Joseph Victori Wines. The evidence as alleged by Staff does not show that Spec's was aware of the emails or that the original program offer was ever presented to Spec's. Spec's was not a party to any of the emails or discussion. As Ms. Anderson testified, the email exchange did not present an agreement with Spec's. Spec's did not engage in any price negotiations for an excessive discount. It is unreasonable to infer that Spec's knew, consented, or conspired to allow an excessive discount.

For the reasons discussed above, the ALJs find that the preponderance of the evidence is insufficient to show that Spec's conspired to violate or accept the benefits of a violation of the Code by allowing an excessive discount to a retailer. Therefore, the ALJs recommend no sanction should be imposed for Allegation 22.

VIII. CONSPIRACY TO RECEIVE A THING OF VALUE: \$1 CULITO'S WINE

A. Allegation 23

Staff asserts that, on or about October 8, 2014, Spec's conspired with another person to violate or accept the benefits of a violation of the Code or a valid Rule of the Commission in violation of Code §§ 104.03 and 102.07(a)(2), to-wit: Spec's conspired with wholesaler United Wine and/or nonresident seller Joseph Victori Wines to receive a thing of value to Spec's, namely Culito's Chardonnay and Merlot wine for \$1.00 per case.

B. Applicable Law

A retail dealer or its agent, servant, or employee commits an offense if he conspired with another person to violate or accepts the benefits of a violation of this Code or Rule.²⁰⁴ No person who owns or has an interest in the business of a distiller, brewer, rectifier, wholesaler, class B wholesaler, winery, or wine bottler, nor the agent, servant, or employee of such a person, may furnish, give, or lend any money, service, or thing of value to a retailer.²⁰⁵

C. TABC Evidence

1. Deposition of Ms. Anderson

Ms. Anderson testified that Spec's received a thing of value, which was the wine being sold for only \$1 per case.²⁰⁶

²⁰⁴ Code § 104.03.

²⁰⁵ Code § 102.07(a)(2).

²⁰⁶ TABC Ex. 55 at 11-12.

2. Testimony of Ms. Anderson at HOM²⁰⁷

Ms. Anderson testified that Spec's conspired with United Wine and/or Joseph Victori Wines to receive a thing of value, namely cases of Culito's Chardonnay and Merlot wine for \$1 per case. Based on the same transactions and evidence related to Allegation 22, Ms. Anderson testified that Spec's received a thing of value in violation of Code §§ 104.03 and 102.07(a)(2).

D. Spec's Evidence

1. Testimony of Mr. Rydman at HOM²⁰⁸

Mr. Rydman testified that, after reading Mr. Umbach's email, it appears that Joseph Victori Wines needed to get the product off its inventory and offered a lower price to move it. He explained there are many legitimate business reasons why a product needs to be moved. If a new vintage was scheduled to come out soon, one would not want to sit on old vintage. Wine, particularly cheap wine like Culito's, does not hold up long and goes bad. White wines like this Chardonnay go bad first, turning yellow with too much heat or accelerated aging. A discount is not excessive if there is a legitimate business reason for discount.

2. Testimony of Mr. Coleman at HOM²⁰⁹

Mr. Coleman testified that "stacking" is piling multiple similar offenses in criminal or administrative cases against a permittee. It is a discouraged practice at TABC. It is a practice that might be done to overwhelm a permittee and make a case look worse than it is in order to encourage settlement. He testified that the Enforcement Division was directed to not stack charges when they filed charges against people. Mr. Coleman testified that Allegations 22 and

²⁰⁷ Tr. Day 1 at 82-88.

²⁰⁸ Tr. Day 7 at 1030-1034.

²⁰⁹ Tr. Day 7 at 1199-1200; Tr. Day 8 at 1324-1325.

23 are examples of stacking and violate TABC policy of being consistent in enforcement. The Code should be applied fairly across the board.

3. Testimony of Mr. Wills at HOM²¹⁰

Mr. Wills testified that, if the thing of value is the case of Culito's for \$1 versus a non-discount price, the difference in price is not a thing of value that would be a violation of the Code.

E. Discussion and Recommendation

Staff argues that a reasonable inference could be made of Spec's knowledge, assent, and/or actions in each conspiracy allegation. Staff argues that "the active participation by Spec's" with United Wine and Joseph Victori Wines is set out in the "Culito's Spec's Program" described in Allegation 22. According to Staff's closing argument, the discounted price provided Spec's a "market advantage of the ability to have a significantly higher profit margin over any other retailer due to Spec's ability to undercut any of their competitors because every single other retailer was compelled to pay between \$54.50 and \$72.12 per case for the same wine." Therefore, Staff argues that Spec's active participation in the "Culito's Spec's Program" conspiracy allowed Spec's to obtain a thing of value in violation of Code § 102.07(a)(2).

Staff argues that Allegations 22 and 23 are different violations and do not constitute stacking of charges. Contrary to Staff's contention that the charges are not stacked, the same transactions and evidence were used to argue that the \$1 per case price is *both* an excessive discount and a thing of value. And for the same reasons set forth under Discussion and Recommendation of Allegation 22, the ALJs find that the preponderance of the evidence is insufficient to show that Spec's conspired to violate or accept the benefits of a violation of the Code by receiving a thing of value. Therefore, the ALJs recommend no sanction should be imposed for Allegation 23.

²¹⁰ Tr. Day 8 at 1378.

**IX. CONSPIRACY: NONRESIDENT SELLER/WHOLESALE OFFERED AN
INDUCEMENT - \$2 INCENTIVE**

A. Allegation 24

Staff asserts that, on or about January 8, 2014, Spec's conspired with another person to violate or accept the benefits of a violation of the Code or a valid Rule of the Commission in violation of Code §§ 104.03 and 102.07(a)(8), to-wit: nonresident seller MHW and wholesaler United Wine offered a prize, premium, gift, or similar inducement, namely a \$2 incentive, to retailer Spec's.

B. Applicable Law

A retail dealer or its agent, servant, or employee commits an offense if he conspired with another person to violate or accepts the benefits of a violation of this Code or Rule.²¹¹ No person who owns or has an interest in the business of a distiller, brewer, rectifier, wholesaler, class B wholesaler, winery, or wine bottler, nor the agent, servant, or employee of such a person, may offer a prize, premium, gift, or similar inducement to a retailer or to the agent, servant, or employee of a retailer.²¹²

C. TABC Evidence

1. Deposition of Ms. Anderson

Ms. Anderson testified that an email chain between John Saladino at United Wine and John Rivers, a representative for wine manufacturer Tequilera Ocho Mesas,²¹³ evidenced a violation of the Code.²¹⁴ Ms. Anderson explained that retailers and suppliers are not supposed to

²¹¹ Code § 104.03.

²¹² Code § 102.07(a)(8).

²¹³ MHW is the nonresident seller for manufacturer Tequilera Ocho Mesas wine. Tr. Day 1 at 100.

²¹⁴ TABC Ex. 55 at 13-14; TABC Ex. 5.

engage in price negotiations. In the email, the supplier offered to pay for an employee incentive program at Spec's.

2. Testimony of Ms. Anderson at HOM²¹⁵

In an email dated December 5, 2013, Mr. Rivers wrote to Mr. Saladino:

I presented some Holiday and 2014 programming to Mr. Rydman recently. After speaking with Mr. Rydman, he would just like the product at the price support level that I can offer with your company from today through the end of 2014. He will be running his own programming with his on-premise team and retail team.²¹⁶

On January 8, 2014, Mr. Rivers sent an email to Billy Davis at United Wine, stating:

Hoping to offer the following for Spec's or large purchase accounts

- \$2 PM²¹⁷ or more for sales associates
- Key discount of \$4
- \$2 maybe more . . . On-Premise Inventive (sic)²¹⁸

Current Situation

- \$1 PM
- Key discount \$0
- On-Premise Inventive (sic) \$0²¹⁹

Based upon these emails, Ms. Anderson concluded that Spec's negotiated pricing with a nonresident seller in violation of the Code. Under Code § 102.07(a)(8), it is a violation for a wholesaler to offer a prize, premium, gift, or similar inducement to a retailer. According to Ms. Anderson, the retailer commits a violation by accepting the offer. If Spec's conspired with the wholesaler, then it would be a violation under § 104.03.

²¹⁵ Tr. Day 1 at 88-106; Tr. Day 3 at 342-344, 376-377.

²¹⁶ TABC Ex. 5 at 2.

²¹⁷ "PM" stands for promotional money or product movement and is generally used as an incentive for sales.

²¹⁸ TABC Ex. 5 at 1.

²¹⁹ TABC Ex. 5 at 1.

Although Spec's was not a party to the emails, Ms. Anderson believed Spec's negotiated pricing with Mr. Rivers because Mr. Rivers wrote, "[a]fter speaking with Mr. Rydman. . ."²²⁰ Even though the same email indicated that Mr. Rydman advised he would be running his own program, Ms. Anderson did not believe that negates Mr. Rydman's alleged acceptance of the proposed pricing.

Ms. Anderson acknowledged that Mr. Rivers said this was the program he was "[h]oping to offer"²²¹ Spec's, and she agreed that there was no evidence Spec's accepted the terms he was hoping to offer.²²² Ms. Anderson did not know if Spec's paid any of its employees the PM described in the email.²²³ She also admitted that there was no documentary evidence that Spec's actually purchased any of the products discussed in the email chain.²²⁴ This email chain was the only evidence that Staff had to support the alleged conspiracy in Allegation 24.²²⁵

3. Testimony of Mr. Saladino at HOM²²⁶

Mr. Saladino testified that Mr. Davis is the Key Account Sales Manager for United Wine. Mr. Davis is responsible for calling on Spec's. Mr. Saladino knows Mr. Rivers as a supplier. The "price support level" referenced in the email refers to a situation where suppliers typically give wholesalers depletion allowances and wholesalers run a pricing support program for a specific time frame.²²⁷ When Mr. Rivers stated Mr. Rydman would run his own program, Mr. Saladino interpreted that to mean Mr. Rydman could do what he wanted with his own retail team. Mr. Saladino was not familiar with the program referenced in the emails.

²²⁰ TABC Ex. 5 at 2.

²²¹ TABC Ex. 5 at 1.

²²² Tr. Day 1 at 92.

²²³ Tr. Day 1 at 96.

²²⁴ Tr. Day 1 at 97.

²²⁵ Tr. Day 1 at 99.

²²⁶ Tr. Day 4 at 550-561.

²²⁷ TABC Ex. 5 at 2.

4. Testimony of Mr. Broddon at HOM²²⁸

Mr. Broddon stated that he does not know Mr. Rivers. Mr. Davis forwarded Mr. Rivers's emails to Mr. Broddon, and he perused them. However, he did not pay much attention to the emails. Typically, Mr. Davis forwards sales emails to him, and Mr. Broddon forwards them to Mr. Saladino because Mr. Saladino oversees the sales division within the company.

5. Testimony of Mr. Davis at HOM²²⁹

Mr. Davis testified that he did not present this program to Spec's. He does not keep a record of sales visits to Spec's. He keeps appointments on his cell phone.

D. Spec's Evidence

1. Testimony of Mr. Rydman at HOM²³⁰

Mr. Rydman testified that he never saw the email exchange between Mr. Rivers and United Wine. He never agreed to the program offered by Mr. Rivers. He did not agree to do a \$2 PM for his employees. United Wine did not ask Spec's to do a PM. After notice of the alleged violation, Mr. Rydman did some research and determined that Spec's did not even run an incentive program for their employees during the referenced time period.

Mr. Rydman testified that in prior conversations, Mr. Rivers referenced program offerings in other states. Mr. Rydman told Mr. Rivers, "We can't do those things here. You

²²⁸ Tr. Day 5 at 654-658.

²²⁹ Tr. Day 5 at 731-737.

²³⁰ Tr. Day 7 at 1034-1047, 1054.

have to get with your wholesaler and get a program working with your wholesaler.”²³¹
Wholesalers, like United Wine, adapt requests by nonresident sellers to conform with the Code.

2. Testimony of Mr. Coleman at HOM²³²

After reviewing the email exchange between Mr. Rivers and United Wine, Mr. Coleman testified that he did not find any evidence of a conspiracy by Spec’s to violate the Code or to accept the benefits of a violation of the Code. He explained that in order to have a conspiracy, there must be mutual communication between the parties and something done in furtherance of the act. To the contrary, it appears that Mr. Rydman just wanted the best price he could be given and would do his own marketing program.

3. Testimony of Mr. Wills at HOM²³³

Mr. Wills testified that it is permissible and commonplace for a retailer such as Spec’s to run an incentive program for its employees. However, it is a violation of the Code if someone other than the retailer funds the incentive program. Mr. Wills did not see any evidence of that with regard to this allegation.

E. Discussion and Recommendation

Staff alleges that Spec’s violated Code §§ 104.03 and 102.07(a)(8) by conspiring with another person to violate or accept the benefits of a violation of the Code. However, this allegation pleaded specifically that nonresident seller MHW and wholesaler United Wine *offered* Spec’s an inducement or \$2 incentive. There is no specific allegation of wrongdoing by Spec’s. The prohibited conduct can only be committed by an upper tier member. According to Ms. Anderson, the prohibition does not apply to a retailer or nonresident seller. Nevertheless,

²³¹ Tr. Day 7 at 1040.

²³² Tr. Day 7 at 1200-1203.

²³³ Tr. Day 8 at 1378-1380.

Staff argues that Spec's entered into a conspiracy with a nonresident seller and a wholesaler to violate or accept the benefits of a violation of this section, *by having them offer Spec's an inducement or a \$2 incentive.*

Staff argues that the December 5, 2013, email evidences a discussion between Spec's and Mr. Rivers, a nonresident seller. Mr. Rivers's email stated that he presented some programs to Spec's. There is no evidence that Spec's initiated, engaged, or conspired to have Mr. Rivers offer Spec's any inducement or incentive. Mr. Rivers's email shows that Mr. Rydman rejected the offer and would be running his own program. Mr. Rydman also testified that he never accepted the program offered by Mr. Rivers and did not run an employee incentive program during the referenced time period.

Staff then argues that, although Spec's rejected that program, Mr. Rivers was determined and continued to email United Wine. Staff points to the January 8, 2014, email in which Mr. Rivers discussed with United Wine a pricing agreement that would incorporate an incentive for Spec's employees. Staff argues that the email demonstrates "United (Wine) and the nonresident seller's conspiracy to provide a gift or inducement for the benefit of Spec's *with Spec's full knowledge of the program.*"²³⁴

Staff is inferring that Spec's had full knowledge of a program that had yet to be offered to Spec's. The January 8, 2014, email described a program that Mr. Rivers was *hoping to offer* to Spec's.²³⁵ There is no evidence that the program described in the email was actually offered to Spec's or, more importantly, that Spec's knew about or accepted the offer.

The email exchange is the only evidence offered by Staff to support this allegation. However, Spec's was not even a party to any of the emails. The emails are from Mr. Rivers to United Wine. The emails do not show Spec's acceptance, awareness, or involvement in these negotiations.

²³⁴ ECF No. 193 (emphasis added).

²³⁵ TABC Ex. 5 at 1.

Mr. Rydman testified that he never accepted the original program. In fact, Spec's did not run an incentive program during the referenced time frame. Ms. Anderson did not investigate or determine if Spec's had any incentive program at the time that mirrored the alleged violation with a \$2 PM.

For the reasons discussed above, the ALJs find that the preponderance of the evidence is insufficient to show that Spec's conspired to violate or accept the benefits of a violation of the Code by having a nonresident seller and wholesaler offer Spec's an inducement or a \$2 incentive. Therefore, the ALJs recommend no sanction should be imposed for Allegation 24.

X. CONSPIRACY: NONRESIDENT SELLER/WHOLESALE OFFERED AN INDUCEMENT- 40% PROFIT

A. Allegation 25

Staff alleges that, on or about April 18, 2013, Spec's conspired with another person to violate or accept the benefits of a violation of the Code or a valid Rule in violation of Code §§ 104.03 and 102.07(a)(8), to wit: nonresident seller Ambition Beverages and wholesaler United Wine offered an inducement to Spec's by adjusting prices to ensure a minimum of 40% profit per bottle and/or cases.

B. Applicable Law

A retail dealer or its agent, servant, or employee commits an offense if he conspired with another person to violate or accepts the benefits of a violation of this Code or Rules.²³⁶ No person who owns or has an interest in the business of a distiller, brewer, rectifier, wholesaler, class B wholesaler, winery, or wine bottler, nor the agent, servant, or employee of such a person,

²³⁶ Code § 104.03.

may offer a prize, premium, gift, or similar inducement to a retailer or to the agent, servant, or employee of a retailer.²³⁷

C. TABC Evidence

1. Deposition of Ms. Anderson

Ms. Anderson testified that during her investigation, she reviewed emails and invoices between United Wine and nonresident seller Ambition Beverages. On April 18, 2013, Bill Tresten, an agent of nonresident seller Ambition Beverages, sent an email to Billy Davis at United Wine.²³⁸ In the email, Mr. Tresten stated:

Our understanding is that Spec's wants to make a 40% profit over their cost from you. They in turn absorb the costs of any cash discounts, key pricing discounts and internal employee sales incentives. So if we want a retail price of \$28.40 for a 1 liter bottle, United would need to sell this item to Spec's at \$17.04 per bottle or \$204.48 per case to yield a 40% GP. I understand we need to adjust our price to you to compensate for the \$4.50 per case Spec's handling fee, \$7.61 case tax expense and the \$10.00 case freight expense. These costs would then reflect a selling price to United of \$182.37 per case or \$15.20 per bottle. We also understand the terms to be [n]et 60 days. Should we want to offer any further temporary selling incentives, that amount would be negotiated by you with Spec's on our behalf and any associated monies would then be remitted directly to Spec's by us.²³⁹

On October 17, 2013, Ambition Beverages invoiced United Wine for Vision Vodka in the amount of \$182.37 per case, the amount discussed in the email.²⁴⁰ On November 1, 2013, United Wine invoiced Spec's for Vision Vodka in the amount of \$198.48 per case, which presumably gave Spec's a gross profit of a little more than 40%.²⁴¹

²³⁷ Code § 102.07(a)(8).

²³⁸ TABC Ex. 6 at 1.

²³⁹ TABC Ex. 6 at 1.

²⁴⁰ TABC Ex. 6 at 4.

²⁴¹ TABC Ex. 6 at 3; TABC Ex. 55 at 17.

Based on these documents, Ms. Anderson concluded that Spec's entered into an agreement with Ambition Beverages to ensure that Spec's received a specific profit margin. This is prohibited by the Code because Spec's, a retailer, controlled the pricing of an alcoholic beverage product.

2. Testimony of Ms. Anderson at HOM²⁴²

Ms. Anderson testified that it is a violation of the Code if a manufacturer sets prices based on what a retailer wants. That would be an example of a retailer controlling a manufacturer. In this case, Ms. Anderson concluded Spec's controlled the pricing by the manufacturer because the manufacturer knew that Spec's wanted a 40% profit margin. Spec's actually received the product for less than the negotiated price and accepted the benefits of a 40% profit. According to Ms. Anderson, the email and invoices are evidence that the deal was consummated.

Ms. Anderson explained that manufacturers, wholesalers, and retailers negotiating a specific price for a retailer is an inducement. A 40% profit margin is not a prize but an inducement. Ms. Anderson stated this pricing gave Spec's an unfair advantage in the marketplace.

Ms. Anderson testified that if Spec's did not know about the email detailing the Vision Vodka pricing scheme, there would be no violation.²⁴³ She conceded that Spec's was not a party to the email.²⁴⁴ She also acknowledged that Spec's purchase price for the Vision Vodka was different than the price listed in the email.²⁴⁵ Ms. Anderson stated that she did not know the price at which Spec's sold the Vision Vodka or if Spec's made a profit on the sale of the product.²⁴⁶ She also stated that adjusting prices could be considered a discount.

²⁴² Tr. Day 1 at 106-125; Tr. Day 3 at 339-342.

²⁴³ Tr. Day 1 at 116.

²⁴⁴ Tr. Day 1 at 116.

²⁴⁵ Tr. Day 1 at 114.

²⁴⁶ Tr. Day 1 at 117.

3. Testimony of Mr. Jones at HOM²⁴⁷

Mr. Jones testified that a retailer may inquire about price from a manufacturer but cannot make an agreement regarding the price of an alcoholic beverage. He explained that negotiations could mean a discussion or an agreement. An agreement is when both parties agree that something will transpire. Not all negotiations lead to an agreement. If one side makes an offer, and the other side does not respond, the discussion could be a precursor to negotiations. However, if there is no response from one side, an element would be missing for an agreement.

4. Testimony of Mr. Davis at HOM²⁴⁸

Mr. Davis testified that he has known Mr. Tresten for 20 years. Mr. Davis does not know how Mr. Tresten knew Spec's wanted to make a 40% profit. He did not provide that information to Mr. Tresten. Mr. Davis stated that Mr. Tresten previously owned a wholesale liquor company called Grand Crew. He believes Mr. Tresten may have learned about Spec's profit margin from his previous position. Mr. Davis does not know the profit margins desired by retailers and does not get involved in their pricing.

D. Spec's Evidence

1. Testimony of Mr. Rydman at HOM²⁴⁹

Mr. Rydman explained that suppliers typically know the price at which they want to sell a product in a particular state. So they will adjust their price to the wholesaler to get to the price they want the product to sell for on the retail shelf. This is referred to as top-down pricing, and this is what is being described in Mr. Tresten's email.

²⁴⁷ Tr. Day 4 at 505-512, 527-530, 531-534.

²⁴⁸ Tr. Day 5 at 737-750.

²⁴⁹ Tr. Day 7 at 1047-1052, 1055.

Spec's was not a party to the email string between United Wine and Mr. Tresten. Mr. Tresten made the offer to United Wine, not Spec's. According to Mr. Rydman, Spec's never negotiated price with Ambition Beverages. Mr. Rydman recalls that the Spec's liquor buyer did not want to buy Vision Vodka because he thought it would not sell very well. Mr. Davis and the Ambition representative met with Spec's liquor buyer and had a discussion about the quality of the product and whether it would sell. However, there was not any negotiation about price.

Spec's bought the Ambition Vodka, and it did not sell very well. It has been on clearance for the past 2 years. Spec's did not make a 40% profit on this product.

Mr. Rydman stated that he does not understand Staff's assertion that a specific profit margin is an inducement. If true, any profit he made on a sale would be an inducement. There are business reasons to give discounts, and that is permissible as long as they are not excessive.

2. Testimony of Mr. Coleman at HOM²⁵⁰

Mr. Coleman testified that he did not see any evidence of an inducement to Spec's. He explained that an illegal inducement would be an attempt to induce a retailer to do something that the retailer would not ordinarily be predisposed to do. He agreed that a wholesaler communicating about how to get a retailer to buy their product is not an illegal inducement because a retailer ordinarily buys products from wholesalers in the course of business.

3. Testimony of Mr. Wills at HOM²⁵¹

Mr. Wills testified that adjusting prices to allow a retailer to make a certain profit is not an inducement.²⁵² He explained that business owners have the right to set their profit margins and to only purchase a product if they can make a profit. He did not see any evidence of

²⁵⁰ Tr. Day 7 at 1203-1205; Tr. Day 8 at 1306-1308.

²⁵¹ Tr. Day 8 at 1380-1382.

²⁵² Tr. Day 8 at 1380-1381.

Spec's engaging in a conspiracy to violate or accept the benefits of a Code violation like an illegal inducement.

E. Discussion and Recommendation

Staff alleges Spec's conspired with another person to violate or accept the benefits of a violation of the Code or a valid Rule in violation of Code §§ 104.03 and 102.07(a)(8). Staff pleaded specifically that nonresident seller Ambition Beverages and wholesaler United Wine offered an inducement to Spec's by adjusting prices to ensure a minimum profit of 40% per bottle or case. As in Allegation 24, there is no specific allegation of wrongdoing by Spec's. The prohibited conduct can only be committed by an upper tier member. According to Ms. Anderson, the prohibition does not apply to a retailer or nonresident seller. Nevertheless, Staff argues that Spec's entered into a conspiracy with a nonresident seller and wholesaler to violate or accept the benefits of a violation of this section, *by having them offer Spec's an inducement by adjusting prices to ensure a 40% profit.*

Staff deduces that Spec's was involved in a conspiracy because Ambition Beverages told United Wine that Spec's wanted a 40% profit margin. Staff argues that the nonresident seller and wholesaler would not have blindly calculated a specific profit margin for Spec's. Therefore, Staff infers that Spec's demanded a 40% profit and all parties agreed, in violation of the Code.

Staff, however, cannot rely on mere inferences and speculation to prove a Code violation. Staff argues that it is reasonable to infer Spec's communicated this information to Ambition Beverages during price negotiations because there is no other way Ambition Beverages would have known about a specific profit margin. Staff, however, failed to offer any supporting evidence for this inference and failed to exclude other possibilities or explanations. A preponderance of the evidence does not support Staff's assertion. For example, Mr. Davis testified that Mr. Tresten may have obtained knowledge about Spec's profit margin during his previous position as a wholesale liquor owner. Additionally, Mr. Tresten stated "it was his understanding" of what Spec's wanted. His understanding could have been right or

wrong, and it could have come from any source, including rumors or speculations. It is unclear why Staff did not investigate any further into the matter or interview Mr. Tresten.

Staff has failed to show any communication among Spec's, Ambition Beverages, and United Wine regarding pricing and profit margins. In fact, the only evidence of communication is an email between Ambition Beverages and United Wine. As with other allegations, Spec's was not a party to this email exchange. Ms. Anderson conceded that there is no evidence Spec's had any knowledge about the email or the terms it described.²⁵³ She testified that if Spec's did not know about the email detailing the Vision Vodka pricing scheme, then there would not be a violation.²⁵⁴

For the reasons discussed above, the ALJs find that the preponderance of the evidence is insufficient to show Spec's *entered into a conspiracy* to violate or accept the benefits of a violation of the Code by having a nonresident seller and wholesaler offer Spec's an inducement of a 40% profit margin. Therefore, the ALJs recommend no sanction should be imposed for Allegation 25.

XI. CONSPIRACY: ACCEPTED AND RECEIVED A THING OF VALUE- FREE WINE AND PAYMENT FOR EMPLOYEE INCENTIVE PROGRAM

A. Allegations 26 and 28²⁵⁵

Staff makes the following allegations:

Allegation 26: On or about February 1, 2011, Spec's conspired with another person to violate or accept the benefits of a violation of the Code or a valid Rule of the Commission in violation of Code § 104.03 and 102.07(a)(2), to-wit: Joseph Kemble, an agent, servant, or

²⁵³ Tr. Day 1 at 116.

²⁵⁴ Tr. Day 1 at 116.

²⁵⁵ Allegations 26 and 28 arise from the same transaction and evidence.

employee of Spec's, accepted a thing of value, namely sixty (60) free cases of Mi Amore wine from nonresident seller P&C Beverage Consultant and Brokers, L.L.C. (P&C Beverage).

Allegation 28: On or about February 1, 2011, Spec's conspired with another person to violate or accept the benefits of a violation of the Code or a valid Rule of the Commission in violation of Code § 104.03 and 102.07(a)(2), to-wit: Joseph Kemble, an agent, servant, or employee of Spec's, accepted (sic) received a thing of value, to-wit, payment for [Spec's] employee incentive programs from nonresident seller P&C Beverage.

B. Applicable Law

A retail dealer or its agent, servant, or employee commits an offense if he conspired with another person to violate or accepts the benefits of a violation of this Code or Rules.²⁵⁶ No person who owns or has an interest in the business of a distiller, brewer, rectifier, wholesaler, class B wholesaler, winery, or wine bottler, nor the agent, servant, or employee of such a person, may furnish, give, or lend any money, service, or thing of value to a retailer.²⁵⁷

C. TABC Evidence

1. Deposition of Ms. Anderson

Ms. Anderson testified that Spec's violated the Code by receiving a thing of value (free cases of wine) from nonresident seller P&C Beverage. Spec's then used this benefit to pay for a \$2 per bottle incentive program for Spec's employees.

She came to this conclusion after reviewing several records during the investigation. In particular, Ms. Anderson reviewed an email from Charles Lynch²⁵⁸ to Joseph Kemble, the Italian

²⁵⁶ Code § 104.03.

²⁵⁷ Code § 102.07(a)(2).

²⁵⁸ Mr. Lynch is a managing member of P&C Beverage.

wine buyer at Spec's.²⁵⁹ In the email, Mr. Lynch referenced a 60-day program for Mi Amore wine and stated:

[T]he following is the way I understand the program and free goods projection . . .
Program – Do a \$2.00 per bottle 'PM' for the store sales personnel/manager . . .
Free Goods – Buy 3 Pallets (2 Reds and 1 White) at 60 cases per pallet and get
"1" pallet of White No Charge – (Credit Towards Program - \$4395.60).²⁶⁰

Mr. Lynch closed the email by saying, "Lastly, please review the above and let's talk Tuesday afternoon as we discussed."²⁶¹ The email was dated January 9, 2011.²⁶²

On February 1, 2011, Mr. Kemble forwarded the email to Billy Davis at United Wine.²⁶³ Mr. Kemble added, "Billy, here is what Charles and I discussed[:] buy three get one free plus a credit of 9 cases to pay for the pm of what we already have in stock. [L]et's get it rolling."²⁶⁴

Two days later, on February 3, 2011, United Wine submitted a purchase order to CW Imports for Mi Amore wine reflecting the terms referenced in the email.²⁶⁵ Both the purchase order and the corresponding invoice from P&C Beverage (CW Import's supplier) reflected 69 cases of Mi Amore white wine at no charge to United Wine.²⁶⁶

According to Ms. Anderson, United Wine sent these free cases of wine to Spec's. She reviewed United Wine's Sales by Item report for February 2013 to July 2013. Ms. Anderson determined Spec's was the only retailer that received the Mi Amore wine from February 2013 to

²⁵⁹ TABC Ex. 9 at 1.

²⁶⁰ TABC Ex. 9 at 1.

²⁶¹ TABC Ex. 9 at 1.

²⁶² TABC Ex. 9 at 1.

²⁶³ TABC Ex. 9 at 1.

²⁶⁴ TABC Ex. 9 at 1.

²⁶⁵ The purchase order reflected 60 cases of Mi Amore White for \$73.26 per case; 69 cases of Mi Amore White at no charge; and 120 cases of Mi Amore Red for \$73.26 per case. The purchase order total was \$13,186.80. TABC Ex. 9 at 2.

²⁶⁶ TABC Ex. 9 at 4.

July 2013.²⁶⁷ She concluded Spec's, through Joseph Kemble, accepted a thing of value (free cases of wine) from a manufacturer. This is a violation because a manufacturer cannot give a thing of value to a retailer.²⁶⁸ Based on the same transaction, Ms. Anderson found that Mr. Kemble received a thing of value because the free cases of wine were used to fund an incentive program for Spec's employees.

2. Testimony of Ms. Anderson at HOM²⁶⁹

Ms. Anderson testified that the Code does not prohibit a wholesaler from receiving free cases of wine from the manufacturer. However, the wholesaler may not pass the benefits of those free cases to the retailer. When asked how she determined Spec's received free cases of wine, Ms. Anderson referred to invoices from P&C Beverage to United Wine and United Wine's invoice to Spec's.²⁷⁰ However, after reviewing United Wine's invoices to Spec's from March 24, 2011, to May 13, 2015, Ms. Anderson conceded that there were no invoices showing Spec's received free wine from United Wine.²⁷¹ United Wine billed Spec's \$79.88 to \$83.19 per case for Mi Amore white wine.²⁷²

Ms. Anderson argued that an invoice merely shows billing and not payment by Spec's. When asked if her investigation revealed whether Spec's actually paid for the wine, she stated, "I don't know if Spec's paid for the wine or not."²⁷³ After being shown Staff's own exhibit, however, Ms. Anderson conceded that Spec's paid for Mi Amore wine.²⁷⁴ On March 24, 2011, Spec's was invoiced \$147,402.23, which included 167 cases of Mi Amore wine.²⁷⁵ Spec's paid

²⁶⁷ TABC Ex. 55 at 21; TABC Ex. 10 at 7-8.

²⁶⁸ TABC Ex. 55 at 22.

²⁶⁹ Tr. Day 1 at 125-145; Tr. Day 2 at 152-153; Tr. Day 3 at 344-350, 377-386.

²⁷⁰ TABC Exs. 9, 10, and 10-B.

²⁷¹ Tr. Day 1 at 132-134, 141.

²⁷² TABC Ex. 10-B.

²⁷³ Tr. Day 1 at 140.

²⁷⁴ Tr. Day 1 at 140-141; TABC Ex. 10-B at 41-48.

²⁷⁵ TABC Ex. 10-B at 3-4.

the full amount by wire transfer on April 15, 2011.²⁷⁶ There were other invoices included in TABC Ex. 10-B. Staff stipulated that all the invoices from United Wine to Spec's show payment by Spec's for the wine received.²⁷⁷

When it could not be shown on invoices that Spec's received free cases of wine, Ms. Anderson testified that free cases of wine could be cost-averaged into the total invoice. It is lawful for a wholesaler to receive free wine from the manufacturer and then cost-average the wine to the retailer, as long as the wholesaler does so for all his customers. Ms. Anderson initially testified that, according to her calculations, United Wine used cost-averaging to calculate the price of the wine for Spec's. However, after reviewing the exhibits and re-working her calculations, she conceded that P&C Beverage did not cost-average the cases of Mi Amore wine to United Wine, and United Wine did not pass on free cases of wine to Spec's through cost-averaging. In fact, she testified that United Wine received free cases of wine, but no benefit was passed on to Spec's.²⁷⁸

Based on the same transaction and evidence, Ms. Anderson testified that Mr. Kemble's email confirmed that the free cases of wine were for the purpose of paying for Spec's PM or incentive program.

3. Testimony of Mr. Davis at HOM²⁷⁹

Mr. Davis has known Mr. Kemble for 20 years and Mr. Lynch for 10 years. He has exchanged a few emails with Mr. Lynch.

Mr. Davis testified that United Wine has never been involved in a Buy Three, Get One Free program. Suppliers may request that, but United Wine will adjust the prices and lower the

²⁷⁶ TABC Ex. 10-B at 48.

²⁷⁷ Tr. Day 6 at 946.

²⁷⁸ Tr. Day 3 at 377-386.

²⁷⁹ Tr. Day 5 at 728-729, 753-760.

price to the retailer. He also testified that United Wine has never given a retailer a credit for a PM. He has never given a credit of nine cases unless the product is going bad.

Regarding Mi Amore wine, Mr. Davis testified that, when he received the email from Mr. Kemble, he interpreted “let’s get it rolling”²⁸⁰ to mean that Spec’s was ready to carry that product. He does not recall what he did with that information.

4. Testimony of Mr. Saladino at HOM²⁸¹

Mr. Saladino testified that he has known Mr. Kemble for 10 to 12 years. He is also familiar with Mi Amore wine and their supplier, CW Imports.

Regarding Mr. Kemble’s email, Mr. Saladino testified he does not know what Mr. Kemble meant by stating a credit of nine cases to pay for the payment of the PM. Mr. Saladino has never heard of credits for a PM because that would be illegal.

To him, the “let’s get it rolling” language meant that Spec’s wanted to buy the product. He testified that the email did not dictate the transaction or control the price for Mi Amore wines. The only significance of the email was that it showed Spec’s was interested in purchasing Mi Amore wines. As with some deals from suppliers, United Wine would have to restructure the offer in order to comply with the Code. In this case, Mr. Saladino testified that the program referenced in the email was never put into place. United Wine received free cases of wine from P&C Beverage and sold them to Spec’s for the listed price of approximately \$83 per case. This enhanced United Wine’s profit margin. United Wine did not pass on any benefit to Spec’s.

²⁸⁰ TABC Ex. 9 at 1.

²⁸¹ Tr. Day 4 at 561-571, 585-600.

5. Testimony of Mr. Broddon at HOM²⁸²

Mr. Broddon stated that he knows Mr. Kemble as an employee of Spec's. He has known Mr. Lynch for about 10 to 12 years. Mr. Broddon does not discuss sales numbers with Mr. Kemble. Mr. Saladino would handle those discussions. Mr. Broddon may have been copied on the Mi Amore email between the supplier and United Wine; however, he had no input on the program.

Mr. Broddon is not aware of United Wine ever giving a credit to a retailer for a PM. He is not sure what a PM means. He is aware of credits being given to a retailer for various reasons, such as the delivery of a bad product, the improper shipment of a product, or a product shipped without Federal Drug Administration approval. Typically, the retailer would contact United Wine and request a credit. In those circumstances, however, United Wine communicates with TABC and inquires if the credit is acceptable. United Wine usually requests an email confirmation from TABC. He testified that sometimes TABC responds and sends an email, and sometimes it does not.

D. Spec's Evidence

1. Testimony of Mr. Kemble at HOM²⁸³

Mr. Kemble is the head of the Italian wine department for Spec's and has been employed with them for over 20 years. He started his employment as a stocker and has worked his way up to his current position. His current duties include meeting with wholesalers and importers in Texas. Generally, wholesalers offer wine products for sale, and if the product meets his price point, he accepts the offer. The product is shipped to Spec's, and Spec's sells it to their customers. Spec's currently sells approximately 3,500 different types of Italian wine.

²⁸² Tr. Day 5 at 658-668, 709-712, 715-720.

²⁸³ Tr. Day 6 at 919-948, 953-963.

If Mr. Kemble finds a wine that he would like to buy for Spec's, he searches for a Texas wholesaler that carries the wine and discusses pricing with the wholesaler. The wholesaler makes the deal with the manufacturer, and Spec's makes a deal with the wholesaler.

Mr. Kemble testified that his email address is published by the Italian Trade Commission and identifies him as an Italian wine buyer for Spec's. He explained that many nonresident sellers are not familiar with Texas laws and email him offers. He cannot help what offers come to his email in-box. He only does business with wholesalers. Although he has communicated with manufacturers in the course of business, it is generally to discuss matters such as vintage, growing season, temperature, and mildew. Mr. Kemble testified that he never makes deals or enters into price agreements with manufacturers.

Mr. Kemble testified that, on January 9, 2011, he received an email from Mr. Lynch.²⁸⁴ Mr. Kemble has never met Mr. Lynch. Initially, Mr. Kemble did not recall ever having a conversation with Mr. Lynch. However, after reviewing the email, he believes he may have talked with Mr. Lynch once by telephone prior to receiving the email. Mr. Kemble believes Mr. Lynch obtained his contact information from the Italian Trade Commission. Mr. Kemble stated that this was the only communication he ever had with Mr. Lynch.

Mr. Kemble testified that he never communicated any acceptance of the program being offered by Mr. Lynch. He forwarded the email to Mr. Davis with the intent that Spec's would buy the wine from United Wine, if United Wine could get the right price. Mr. Kemble testified that he added, "let's get it rolling"²⁸⁵ because he thought it sounded like a good plan. However, he was not going to make any decision until he received pricing from United Wine.

Mr. Kemble was unable to explain why he added language regarding a credit of nine cases when that information was not contained in Mr. Lynch's email. Mr. Kemble surmised that he added the language because that may have been discussed during the phone conversation with

²⁸⁴ TABC Ex. 9 at 1.

²⁸⁵ TABC Ex. 9 at 1.

Mr. Lynch.²⁸⁶ After he forwarded the email to Mr. Davis, Mr. Kemble was not aware of or involved with any communication between United Wine and Mr. Lynch.

Mr. Kemble testified that Spec's did not receive any free cases of wine from United Wine. Rather, Spec's paid for everything they received. He added that Spec's never accepted free cases of wine and did not benefit from the deal between P&C Beverage and United Wine. Mr. Kemble testified that Spec's was invoiced and paid for all Mi Amore wine. Staff stipulated that all invoices from 2011 through May 12, 2015, show some payment by Spec's for Mi Amore wine.²⁸⁷

2. Testimony of Mr. Coleman at HOM²⁸⁸

Mr. Coleman testified that, based upon his review of the evidence, he did not see anything indicating Spec's received free wine. He would expect to see an invoice or something showing Spec's received the wine and it was invoiced at zero. That is not the case here. All the invoices reflect that Spec's was billed for Mi Amore wine. He does not interpret Mr. Kemble's email as evidence of a conspiracy to accept free wine. He added that Allegation 26 appears to be stacked with Allegation 28.

3. Testimony of Mr. Wills at HOM²⁸⁹

Mr. Wills testified that Spec's did not receive free wine from United Wine. Mr. Kemble's email does not constitute a conspiracy to receive free cases of wine from the wholesaler. In his opinion, Spec's did not commit the unlawful conduct alleged in Allegations 26 and 28.

²⁸⁶ Tr. Day 6 at 959.

²⁸⁷ TABC Ex. 10-B; Tr. Day 6 at 946.

²⁸⁸ Tr. Day 7 at 1204-1210.

²⁸⁹ Tr. Day 8 at 1382-1385.

E. Discussion and Recommendation

Staff argues that Spec's conspired with nonresident seller P&C Beverage and wholesaler United Wine in violation of Code §§ 104.03 and 102.07(a)(2). Specifically, Staff alleges that Mr. Kemble accepted a thing of value (60 free cases of Mi Amore wine) from nonresident seller P&C Beverage. Staff argues this conspiracy is set out in the email that constitutes an agreement between P&C Beverage and Spec's wherein P&C Beverage agreed to give 60 free cases of wine to Spec's to pay for Spec's employee incentive program. That is, Spec's would receive free cases of wine and would sell the wine to its customers. The sales revenue from the free cases would be used to pay Spec's employees' bonuses or PMs, rather than using Spec's own money to fund the PMs.

Staff asserts that Mr. Kemble forwarded the email to Mr. Davis to inform him of the terms of the agreement. Mr. Kemble also added that P&C Beverage would give Spec's a credit of nine additional cases of wine to pay for the PM of what Spec's already had in stock. Staff points to the purchase order and invoice between United Wine and P&C Beverage as evidence that the agreement was executed.

Spec's, however, argues that it did not conspire with P&C Beverage in violation of the Code. Spec's asserts that the email from Mr. Lynch to Mr. Kemble was a program offering by Mr. Lynch that was never accepted by Mr. Kemble. Therefore, no agreement was ever reached between Mr. Kemble and Mr. Lynch. Spec's argues that the forwarded email by Mr. Kemble to Mr. Davis at United Wine was merely a sharing of information, not a dictation of terms. Mr. Kemble's "let's get it rolling" language merely indicated an intent to buy the Mi Amore wine if United Wine could offer it for the right price.

The ALJs, however, disagree with Spec's interpretation of the forwarded email from Mr. Kemble to United Wine. The more reasonable interpretation is that Mr. Kemble expected P&C Beverage to sell the Mi Amore wine to United Wine and Spec's with the terms listed in the email. To a reasonable person, Mr. Kemble's "let's get it rolling" language means let's do this deal with the terms listed in the email.

It appears, then, that Mr. Kemble may have discussed pricing with Mr. Lynch. This could potentially be a Code violation, depending upon the nature of the discussion. However, Staff specifically pleaded that Mr. Kemble accepted a thing of value, namely 60 cases of free wine. For the reasons set out below, the evidence does not support this specific allegation.

Although the evidence reveals United Wine received free cases of Mi Amore wine from P&C Beverage, there is no evidence that this benefit was passed on to Spec's. To the contrary, the evidence shows that Spec's was billed and submitted payment for every case of Mi Amore wine it received.²⁹⁰

Staff argues the invoices from United Wine to Spec's merely show that Spec's was billed for the wine, not that Spec's actually paid for the wine. Staff, however, fails to acknowledge the existence of its own exhibit and the testimony of its own witness, Ms. Anderson. Ms. Anderson conceded that there was evidence of payment by Spec's for every case of Mi Amore wine. On March 24, 2011, Spec's was invoiced \$147,402.23 which included 167 cases of Mi Amore wine. Spec's paid the full amount by wire transfer on April 15, 2011. Staff offered additional invoices regarding Mi Amore wine. Staff stipulated that all the invoices from United Wine to Spec's show payment by Spec's for the wine received.²⁹¹

Staff's argument, then, that Spec's accepted a thing of value from a nonresident seller is unfounded and unproven. And, since Staff failed to show Spec's received free cases of wine, Staff has also failed to show Spec's accepted any benefits from said free wine, such as payment for Spec's employee incentive program.

For the reasons discussed above, the ALJs find that the preponderance of the evidence is insufficient to show that Spec's conspired to violate or accept the benefits of a violation of the Code by accepting or receiving a thing of value. Therefore, the ALJs recommend no sanction should be imposed for Allegations 26 and 28.

²⁹⁰ TABC Ex. 10 at 7-8; TABC Ex. 10-B at 41-48.

²⁹¹ Tr. Day 6 at 946.

**XII. AGREEMENT TO CONTROL OR MANAGE WHOLESALER AND
JOSEPH KEMBLE ACTING AS EMPLOYEE OF WHOLESALER**

A. Allegations 29 and 29B²⁹²

Staff makes the following allegations:

Allegation 29: On or about January 9, 2011, Spec's entered into a conspiracy or agreement to control or manage, financially or administratively, directly or indirectly, in any form or degree, the business or interest of a permittee of a different level, namely wholesaler United Wine, in violation of Code §§ 102.01(h) and 104.01.²⁹³

Allegation (29B): On or about January 9, 2011, Spec's employee, Joseph Kemble, acted as an employee of wholesaler United Wine in violation of Code § 102.01(d).

B. Applicable Law

Code § 102.01(h) provides that no permittee may enter with a permittee of a different level or with another person or legal entity into a conspiracy or agreement to control or manage, financially or administratively, directly or indirectly, in any form or degree, the business or interests of a permittee of a different level.

Section 102.01(d) provides that no person may act or serve as officer, director, or employee of the businesses of permittees at different levels.

On a finding that a person has violated any provision of subsections (c) through (i) of § 102.01, the Commission shall suspend for not less than six months or cancel the permit of any

²⁹² Allegations 26, 28, 29, and 29B arise from the same transaction and evidence.

²⁹³ Code § 104.01 prohibits lewd, immoral, or indecent conduct on a retailer's premises. As discussed below, Code § 104.01 does not appear to be applicable to the facts of this case.

permittee involved.²⁹⁴ A person who held or had an interest in a permit cancelled under this subsection is ineligible to hold or have an interest in a permit for one year after the cancellation.²⁹⁵

C. TABC Evidence

1. Deposition of Ms. Anderson

Based upon the same evidence as discussed in Allegations 26 and 28, Ms. Anderson concluded that Spec's entered into a conspiracy or an agreement to control or manage United Wine. She also concluded that Mr. Kemble acted as an employee of United Wine by negotiating price with a nonresident seller, which is an activity only authorized for wholesalers.

Ms. Anderson surmised that Spec's negotiated a deal with nonresident seller P&C Beverage to receive free cases of wine in order to pay for Spec's PM. Spec's then advised wholesaler United Wine, through Mr. Kemble's email, of the terms of the agreement. According to Ms. Anderson, the deal between Spec's and the nonresident seller took away the wholesaler's ability to negotiate their own terms with the nonresident seller.

2. Testimony of Ms. Anderson at HOM²⁹⁶

Ms. Anderson testified that the Code prohibits negotiations between a retailer and a nonresident seller or manufacturer. Only a wholesaler may negotiate prices with a nonresident seller or manufacturer. A retailer may only negotiate price, freight, shipping, and incentives with a wholesaler or distributor.

²⁹⁴ Code § 102.01(j).

²⁹⁵ Code § 102.01(j).

²⁹⁶ Tr. Day 2 at 153-170; Tr. Day 3 at 350-355.

Ms. Anderson explained that a retailer simply inquiring about price from a manufacturer would be permissible. However, if they discuss freight, excise tax, or PMs, those discussions would be unlawful.

Ms. Anderson also testified that the forwarded email from Mr. Kemble to Mr. Davis at United Wine demonstrated a conspiracy or agreement to control or manage the business interests of United Wine. However, she conceded that it is unknown if United Wine and Mr. Lynch previously discussed the terms of the email and Mr. Lynch just forwarded the terms to Mr. Kemble.

3. Testimony of Mr. Saladino at HOM²⁹⁷

Mr. Saladino testified that United Wine never entered into any agreement with Spec's for the control or management of United Wine. There was never a business agreement to manage any business interest of United Wine.

According to Mr. Saladino, no one at Spec's has ever had control over United Wine's employees. Only he and Mr. Broddon make personnel decisions for United Wine. Mr. Broddon oversees the financial aspect of the company, and he oversees the sales aspect.

Mr. Saladino went on to say that Mr. Kemble is not an employee of United Wine. He did not control an essential function of United Wine and has never negotiated a transaction on behalf of United Wine. Mr. Kemble did not control the price United Wine paid for Mi Amore wine. Mr. Kemble's forwarded email to United Wine did not dictate the transaction between United Wine and P&C Beverage. It merely let United Wine know that Spec's was interested in the product. United Wine still had to communicate with the supplier, discuss pricing, and assemble a program that complied with the Code.

²⁹⁷ Tr. Day 4 at 603-605, 608-609.

Spec's comprises about 90-95% of United Wine's business with retailers, said Mr. Saladino. However, United Wine is not obligated to sell products to Spec's, and Spec's is not obligated to buy products from United Wine.

4. Testimony of Mr. Broddon at HOM²⁹⁸

Mr. Broddon testified that neither Spec's nor any employee of Spec's has ever managed or controlled the financial or administrative business interests of United Wine. Spec's does not have any capital or investment interest in United Wine.

According to Mr. Broddon, no employee of Spec's has ever controlled or directed an employee of United Wine. There is no agreement between Spec's and United Wine that allows Spec's any control of United Wine's business. Mr. Kemble never acted as an employee of United Wine.

D. Spec's Evidence

1. Testimony of Mr. Rydman at HOM²⁹⁹

Mr. Rydman testified that Spec's did not control United Wine. Spec's does not have a business interest in United Wine and has never invested in the company. Spec's does not have any employees working at United Wine. Spec's would never enter into an agreement with a wholesaler or manufacturer that would obligate Spec's to run a particular program. Mr. Rydman explained that once Spec's purchases a product from the wholesaler, Spec's can do whatever it wants with a program offering.

²⁹⁸ Tr. Day 5 at 701-709.

²⁹⁹ Tr. Day 7 at 992-998, 1091.

2. Testimony of Mr. Kemble at HOM³⁰⁰

Mr. Kemble testified that he did not engage in a conspiracy to manage the business or interests of United Wine. He did not attempt to control United Wine by forwarding the email from Mr. Lynch.³⁰¹ He testified that it was up to United Wine to do what they wanted with the forwarded information.

Mr. Kemble has never been employed by United Wine. He has never been paid wages by United Wine, and they have never controlled his day-to-day functions. He did not act as employee or agent of United Wine.

3. Testimony of Mr. Coleman at HOM³⁰²

Mr. Coleman testified that Code § 102.01(h) is known as the “Tied House prohibition” and it prohibits certain relationships between members of different tiers in the alcohol industry. The public policy behind the Tied House prohibition is to keep upper tier members from controlling retailers. While no permittee may enter into a conspiracy to manage or control the business or interest of a different level, negotiations do not necessarily demonstrate control.

Regarding the email forwarded by Mr. Kemble to Mr. Davis, Mr. Coleman testified that the email alone does not show control between Mr. Kemble and United Wine. If a retailer was controlling a wholesaler, he would expect to see the deal executed from the manufacturer to the wholesaler to the retailer. That is not the case here. He explained that in order for a retailer to control a wholesaler, there would have to be negative ramifications if the wholesaler did not participate in the deal. For example, control would be demonstrated if the retailer told the wholesaler to do the deal or lose the retailer’s business, and the wholesaler actually lost the retailer’s business.

³⁰⁰ Tr. Day 6 at 948-952.

³⁰¹ TABC Ex. 9 at 1.

³⁰² Tr. Day 8 at 1300-1301.

In this case, United Wine was free to negotiate with P&C Beverage and to decide whether to accept or decline any offers. The retailer did not control the wholesaler but simply provided information to the wholesaler about the product the manufacturer was willing to sell. This is not uncommon in the industry.

4. Testimony of Mr. Slobin at HOM³⁰³

Mr. Slobin is a board certified labor and employment lawyer. He has been a practicing attorney for 20 years and board certified for 10 years. He was asked to review the allegations and provide his expert opinion.

Mr. Slobin testified that the Code does not define “employee.” Under the Texas Labor Code, an employee/employer relationship is created when an individual receives wages for services. An employee works under the direction and control of their employer.

Mr. Slobin testified that Mr. Kemble is an employee of Spec’s. Mr. Kemble did not provide services to United Wine for wages. United Wine did not control Mr. Kemble’s actions. Mr. Slobin also testified that a person could not act as employee without receiving wages or being subject to the control of the employer.

5. Testimony of Mr. Wills at HOM³⁰⁴

Mr. Wills testified that Mr. Kemble’s forwarded email was just a forwarded email. It is not evidence that Mr. Kemble or Spec’s controlled, directly or indirectly, the business or financial interests of United Wine. Regardless of the email, United Wine still had an independent choice whether to enter into any transaction with P&C Beverage.

³⁰³ Tr. Day 7 at 1147-1149, 1157-1161, 1167-1172.

³⁰⁴ Tr. Day 8 at 1385-1386.

E. Discussion and Recommendation

To support Allegation 29, that Spec's entered into a conspiracy or an agreement to control or manage United Wine, Staff relies upon the same facts and exhibits as those concerning Allegations 26 and 28. Specifically, Staff asserts that Mr. Kemble's forwarded email to Billy Davis is evidence that Mr. Kemble negotiated with a nonresident seller to purchase wine and to receive free cases of wine. Because the Code only allows wholesalers to purchase alcohol from nonresident sellers, Staff asserts that Spec's performed the function of a wholesaler, thereby controlling United Wine's business.

Staff relies on the email from Mr. Kemble as evidence that Spec's controlled United Wine's pricing. As noted earlier, it appears Mr. Kemble and Mr. Lynch may have discussed the products and pricing listed in the email. Whether this discussion rose to the level of price negotiation is unknown. Both Ms. Anderson and Mr. Jones testified that a retailer simply inquiring about price from a manufacturer is lawful. Ms. Anderson stated that it is unknown if United Wine had any discussion with Mr. Lynch about price.

Even assuming, however, that Spec's engaged in price negotiations with P&C Beverage, engaging in negotiations is different from controlling or managing another entity. No matter the agreement between Spec's and P&C Beverage, United Wine was still free to accept, decline, or re-negotiate the terms listed in the email. This is evidenced by the fact that United Wine received free cases of wine and Spec's did not. United Wine exercised independence when it received free cases of wine but did not pass on the free cases to Spec's. It is unclear, then, why Spec's would attempt to control the price United Wine paid when Spec's received no benefit from the "controlled" pricing.

Although Staff presumes United Wine had no choice but to accept the terms of the email, there is no evidence to support that presumption. Likewise, there is no evidence that Spec's demanded or coerced United Wine into accepting the terms of the email. United Wine did not pass on the benefits of the free wine to Spec's and did not suffer any negative consequences, such as losing Spec's business.

Every witness from United Wine and Spec's denied that Spec's had any agreement to control or in fact controlled the interests of United Wine. Mr. Saladino testified specifically that Spec's did not control the price United Wine paid for Mi Amore wine and that the program described in the email was never implemented. Spec's points out that the price per case and the total amounts on the invoice from P&C Beverage are different than the terms described in the email.³⁰⁵ Spec's argues that this is proof there were negotiations between United Wine and P&C Beverage. As a result, Staff has failed to show how Spec's presumed negotiations equate to management or control of United Wine.

Staff also alleges in Allegation 29 that Spec's violated Code section 104.01. However, that section of the Code deals with lewd, immoral, or indecent conduct on a retailer's premises. Staff presented no evidence on this issue, and as a result, the ALJs find Spec's did not violate Code § 104.01.

For the reasons discussed above, the ALJs find that the preponderance of the evidence is insufficient to show that Spec's entered into a conspiracy or an agreement to control or manage United Wine or allowed lewd, immoral, or indecent conduct on its premises. Therefore, the ALJs recommend no sanction should be imposed for Allegation 29.

In Allegation 29B, Staff alleges Mr. Kemble acted as an employee of United Wine in violation of Code § 102.01(d). In support of this allegation, Staff relies on the same evidence as discussed in Allegations 26, 28, and 29. Staff argues Mr. Kemble acted as an employee of United Wine by negotiating the price and amount of wine to be purchased by United Wine from P&C Beverage. However, the evidence is inconclusive as to what, if any, negotiations Mr. Kemble had with P&C Beverage. The one clear and singular action Mr. Kemble took was forwarding the email from Mr. Lynch to United Wine. The purpose of forwarding the email was to get the product from United Wine at the right price for Spec's. Again, Mr. Kemble's actions

³⁰⁵ TABC Ex. 9 at 1, 4. In Mr. Lynch's email, the price per case is listed as \$73.26, excluding freight, taxes, and clearing. On the invoice from P&C Beverage to United Wine, the price per case is listed as \$66.60.

were done on behalf of Spec's. That one action is insufficient to show Mr. Kemble was acting as an employee of United Wine.

On the other hand, Mr. Kemble has been employed by Spec's for over 20 years and heads Spec's Italian wine department. The two owners of United Wine, Mr. Saladino and Mr. Broddon, testified that Mr. Kemble was never an employee of and never acted on behalf of United Wine.

For the reasons discussed above, the ALJs find that the preponderance of the evidence is insufficient to show that Mr. Kemble acted as employee of United Wine. Therefore, the ALJs recommend no sanction should be imposed for Allegation 29B.

XIII. EMPLOYEE OF NONRESIDENT SELLERS AND AGREEMENT TO CONTROL OR MANAGE NONRESIDENT SELLERS

A. Allegations 31, 31B, 32, 32B, 33, 33B, 34, 34B, 35, 35B, 36, 36B, 37, 37B, 38, 38B, 39, 39B, 40, 40B, 41, 41B, 42, 42B, 44, 44B, 45, 45B, 46, and 46B

Staff's allegations include:

Allegation 31: On October 3, 2012, Spec's, a retailer, acted or served as an employee of a permittee of a different level in violation of Code § 102.01(d), to-wit: accepted \$676.00 from nonresident seller Azienda Marramiero SLR (Azienda).

Allegation 31B: On or about October 3, 2012, an employee of Spec's entered into an agreement to manage, financially or administratively, directly or indirectly, in any form or degree, the business or interest of a permittee of licensed nonresident seller Azienda in violation of Code § 102.01(h).

Allegation 32: On September 17, 2014, Spec's, a retailer, acted or served as an employee of a permittee of a different level in violation of Code § 102.01(d), to-wit: accepted \$676.00 from nonresident seller Azienda.

Allegation 32B: On or about September 17, 2014, an employee of Spec's entered into an agreement to manage, financially or administratively, directly or indirectly, in any form or degree, the business or interest of a permittee of licensed nonresident seller in violation of Code § 102.01(h).

Allegation 33: On September 8, 2014, Spec's, a retailer, acted or served as an employee of a permittee of a different level in violation of Code § 102.01(d), to-wit: accepted \$1,484.64 from nonresident seller Sari Le Cellier Des Charmettes (Charmettes).

Allegation 33B: On or about September 8, 2014, an employee of Spec's entered into an agreement to manage, financially or administratively, directly or indirectly, in any form or degree, the business or interest of a permittee of licensed nonresident seller Charmettes in violation of Code § 102.01(h).

Allegation 34: On January 13, 2014, Spec's, a retailer, acted or served as an employee of a permittee of a different level in violation of Code § 102.01(d), to-wit: accepted \$701.00 from nonresident seller Champagne Louis de Sacy (Louis de Sacy).

Allegation 34B: On or about January 13, 2014, an employee of Spec's entered into an agreement to manage, financially or administratively, directly or indirectly, in any form or degree, the business or interest of a permittee of licensed nonresident seller Louis de Sacy in violation of Code § 102.01(h).

Allegation 35: On September 19, 2014, Spec's, a retailer, acted or served as an employee of a permittee of a different level in violation of Code § 102.01(d), to-wit: accepted \$342.52 from nonresident seller SCAE Domaine De Cabasse (Cabasse).

Allegation 35B: On or about September 19, 2014, an employee of Spec's entered into an agreement to manage, financially or administratively, directly or indirectly, in any form or degree, the business or interest of a permittee of licensed nonresident seller Cabasse in violation of Code § 102.01(h).

Allegation 36: On July 9, 2013, Spec's, a retailer, acted or served as an employee of a permittee of a different level in violation of Code § 102.01(d), to-wit: accepted \$856.00 from nonresident seller Waterford Wines Ply (Waterford).

Allegation 36B: On or about July 9, 2013, an employee of Spec's entered into an agreement to manage, financially or administratively, directly or indirectly, in any form or degree, the business or interest of a permittee of licensed nonresident seller Waterford in violation of Code § 102.01(h).

Allegation 37: On May 2, 2012, Spec's, a retailer, acted or served as an employee of a permittee of a different level in violation of Code § 102.01(d), to-wit: accepted \$676.00 from nonresident seller Just I Vignerons (Vignerons).

Allegation 37B: On or about May 2, 2012, an employee of Spec's entered into an agreement to manage, financially or administratively, directly or indirectly, in any form or degree, the business or interest of a permittee of licensed nonresident seller Vignerons, in violation of Code § 102.01(h).

Allegation 38: On January 22, 2014, Spec's, a retailer, acted or served as an employee of a permittee of a different level in violation of Code § 102.01(d), to-wit: accepted \$676.00 from nonresident seller Guilbaud Freres CPY (Guilbaud).

Allegation 38B: On or about January 22, 2014, an employee of Spec's entered into an agreement to manage, financially or administratively, directly or indirectly, in any form or degree, the business or interest of a permittee of licensed nonresident seller Guilbaud in violation of Code § 102.01(h).

Allegation 39: On December 20, 2012, Spec's, a retailer, acted or served as an employee of a permittee of a different level in violation of Code § 102.01(d), to-wit: accepted \$802.49 from nonresident seller H Cuvelier & Fils (Cuvelier).

Allegation 39B: On or about December 20, 2012, an employee of Spec's entered into an agreement to manage, financially or administratively, directly or indirectly, in any form or degree, the business or interest of a permittee of licensed nonresident seller Cuvelier in violation of Code § 102.01(h).

Allegation 40: On January 23, 2013, Spec's, a retailer, acted or served as an employee of a permittee of a different level in violation of Code § 102.01(d), to-wit: accepted \$1,326.00 from nonresident seller Union Cooperative Foncalieu (Foncalieu).

Allegation 40B: On or about January 23, 2013, an employee of Spec's entered into an agreement to manage, financially or administratively, directly or indirectly, in any form or degree, the business or interest of a permittee of licensed nonresident seller Foncalieu in violation of Code § 102.01(h).

Allegation 41: On January 31, 2013, Spec's, a retailer, acted or served as an employee of a permittee of a different level in violation of Code § 102.01(d), to-wit: accepted \$950.98 from nonresident seller I/LA Passion Des Terroirs (Passion).

Allegation 41B: On or about January 31, 2013, an employee of Spec's entered into an agreement to manage, financially or administratively, directly or indirectly, in any form or degree, the business or interest of a permittee of licensed nonresident seller Passion in violation of Code § 102.01(h).

Allegation 42: On November 6, 2013, Spec's, a retailer, acted or served as an employee of a permittee of a different level in violation of Code § 102.01(d), to-wit: accepted \$656.00 from nonresident seller Vignobles Carteyron (Carteyron).

Allegation 42B: On or about November 6, 2013, an employee of Spec's entered into an agreement to manage, financially or administratively, directly or indirectly, in any form or degree, the business or interest of a permittee of licensed nonresident seller Carteyron in violation of Code § 102.01(h).

Allegation 44: On October 4, 2012, Spec's, a retailer, acted or served as an employee of a permittee of a different level in violation of Code § 102.01(d), to-wit: accepted \$906.00 from nonresident seller Maison Riviere Fils (Riviere Fils).

Allegation 44B: On or about October 4, 2012, an employee of Spec's entered into an agreement to manage, financially or administratively, directly or indirectly, in any form or degree, the business or interest of a permittee of licensed nonresident seller Riviere Fils in violation of Code § 102.01(h).

Allegation 45: On May 30, 2012, Spec's, a retailer, acted or served as an employee of a permittee of a different level in violation of Code § 102.01(d), to-wit: accepted \$676.00 from nonresident seller I/Domini De La Cartoixa (Cartoixa).

Allegation 45B: On or about May 30, 2012, an employee of Spec's entered into an agreement to manage, financially or administratively, directly or indirectly, in any form or degree, the business or interest of a permittee of licensed nonresident seller Cartoixa in violation of Code § 102.01(h).

Allegation 46: On June 20, 2012, Spec's, a retailer, acted or served as an employee of a permittee of a different level in violation of Code § 102.01(d), to-wit: accepted \$836.00 from nonresident seller I/Exportadora San Luis Limitada (San Luis).

Allegation 46B: On or about June 20, 2012, an employee of Spec's entered into an agreement to manage, financially or administratively, directly or indirectly, in any form or degree, the business or interest of a permittee of licensed nonresident seller [unnamed] in violation of Code § 102.01(h).

B. Applicable Law

Code § 102.01(d) provides that no person may act or serve as officer, director, or employee of the businesses of permittees at different levels.

Section 102.01(h) states that no permittee may enter with a permittee of a different level or with another person or legal entity into a conspiracy or agreement to control or manage, financially or administratively, directly or indirectly, in any form or degree, the business or interests of a permittee of a different level.

On a finding that a person has violated any provision of subsections (c) through (i) of § 102.01, the Commission shall suspend for not less than six months or cancel the permit of any permittee involved.³⁰⁶ A person who held or had an interest in a permit cancelled under this subsection is ineligible to hold or have an interest in a permit for 1 year after the cancellation.³⁰⁷

C. TABC Evidence

1. Deposition of Ms. Anderson

During her investigation, Ms. Anderson reviewed Spec's bank statements and identified approximately \$7,300 in wire transfers made into Spec's bank accounts from nonresident sellers.³⁰⁸ Spec's offered copies of checks, explaining that the checks were written to pay for nonresident sellers' permit fees and/or label approval fees.³⁰⁹ According to Ms. Anderson, this is a violation of Code § 102.01(d) because a retailer cannot pay fees for a manufacturer. By paying the manufacturer's fees, Spec's acted as an employee of the manufacturer.³¹⁰ Based on the same transactions, Ms. Anderson concluded that Spec's also violated Code § 102.01(h) by managing an upper tier member by paying for their fees.³¹¹ Ms. Anderson identified the following payments to show Spec's acted as an employee and entered an agreement to control nonresident sellers:

³⁰⁶ Code § 102.01(j).

³⁰⁷ Code § 102.01(j).

³⁰⁸ TABC Ex. 55 at 25-48.

³⁰⁹ TABC Ex. 55 at 26.

³¹⁰ TABC Ex. 55 at 27.

³¹¹ TABC Ex. 55 at 27.

All. Nos.	Nonresident Seller	(Out-of) Country	Spec's Received Funds from NRS	Spec's Paid TABC Fees	Original Permit Issued ³¹²	Amount of Fees
31/31B	Azienda	Italy	10/3/2012	10/18/2012	10/18/2010	\$676.00 ³¹³
32/32B	Azienda	Italy	9/17/2014	9/23/2014	10/18/2010	\$676.00 ³¹⁴
33/33B	Charmettes	France	9/8/2014	9/19/2013 2/13/2014	2/12/2008	\$1,484.64 ³¹⁵
34/34B	Louis De Sacy	France	1/13/2014	12/23/2013 5/27/2014	1/4/2012	\$701.00 ³¹⁶
35/35B	Cabasse	France	9/19/2014	8/11/2014	5/14/2013	\$342.52 ³¹⁷
36/36B	Waterford	South Africa	7/9/2013	7/10/2013	8/29/2013	\$676.00 ³¹⁸
37/37B	Vignerons	France	5/2/2012	5/21/2012	5/25/2012	\$676.00 ³¹⁹
38/38B	Guilbaud	France	1/22/2014	1/24/2014	2/8/2008	\$676.00 ³²⁰
39/39B	Cuvelier	France	12/20/2012	1/7/2013	2/8/2008	\$676.00 ³²¹
40/40B	Foncalieu	France	1/23/2013	4/25/2012 7/23/2012 8/13/2012 11/15/2012	11/30/2010	\$1,326.00 ³²²

³¹² The dates the permits were originally issued were provided by Ms. Anderson during her testimony at HOM and through Spec's exhibits. However, the dates are included here for clarification.

³¹³ TABC Ex. 14. One check was written for renewal fees.

³¹⁴ TABC Ex. 14. One check was written for renewal fees.

³¹⁵ TABC Ex. 15. One check was written for renewal fees. The other check was written for label registration fees. Both totaled \$826.00. The remaining \$673.64 was for wine tastings.

³¹⁶ TABC Ex. 16. One check was written for renewal fees. The other check was written for label registration fees.

³¹⁷ TABC Ex. 18. Fees are noted for wine samples, not label or permit fees as alleged.

³¹⁸ TABC Ex. 19. One check was written for original application fees.

³¹⁹ TABC Ex. 20. One check was written for original application fees.

³²⁰ TABC Ex. 21. One check was written for renewal fees.

³²¹ TABC Ex. 23. One check was written for renewal fees. The other check was written for label registration fees.

³²² TABC Ex. 24. One check was written for renewal fees. The other check was written to TABC for label registration fees.

All. Nos.	Nonresident Seller		Spec's Received Funds from NRS	Spec's Paid TABC Fees	Original Permit Issued	Amount of Fees
41/41B	Passion	France	1/31/2013	12/17/2012 1/22/2013 1/22/2013	4/22/2013	\$950.98 ³²³
42/42B	Carteyron		11/6/2013	10/30/2013	11/18/2011	\$676.00 ³²⁴
44/44B	Riviere Fils	France	10/4/2012		10/8/2012	\$906.00 ³²⁵
45/45B	Cartoixi	Spain	5/30/2012		6/7/2012	\$676.00 ³²⁶
46/46B	San Luis	Chile	6/20/2012		7/11/2012	\$836.00 ³²⁷

2. Testimony of Ms. Anderson at HOM³²⁸

Ms. Anderson testified that Spec's acted as employee of *a permittee of a different level* by managing the application and paying fees for nonresident sellers. The Code defines permittee as a permit holder. However, Ms. Anderson acknowledged that, at the time of the alleged violations, some nonresident sellers were not permittees, an essential element of the violation. She conceded that Waterford, Vigneron, Cartoixi, and San Luis were not permittees on the date of the alleged violations.³²⁹

Based on the same set of facts, Ms. Anderson testified that Spec's entered into an agreement to control or manage upper-tier permittees by paying for their fees. She did not locate any written agreement and did not know which Spec's employee actually entered into the agreement for the fee payment. However, she located checks written by Spec's employee Scarlet McGeorge and submitted to the Commission by Christi Collins.³³⁰ Ms. Anderson

³²³ TABC Ex. 25. One check was written for original application fees. The other three checks were written for label registration fees.

³²⁴ TABC Ex. 28. One check was written for renewal fees.

³²⁵ TABC Ex. 22. No check was offered, but it was for original application fees.

³²⁶ TABC Ex. 26. No check was offered, but it was for original application fees.

³²⁷ TABC Ex. 27. No check was offered, but it was for original application fees.

³²⁸ Tr. Day 2 at 170-206.

³²⁹ There were actually six wineries that were not permittees at the time of the alleged violations.

³³⁰ Spec's Ex. 9.

testified the wire transfers were not greater than the fees paid to TABC. She confirmed that Spec's was only reimbursed for the fees. However, she testified Spec's profited because the nonresident seller was able to obtain a license in Texas and sold products to Spec's. When crossed, Ms. Anderson testified she found no evidence that these nonresident sellers sold any products to Spec's directly or via wholesalers. Ms. Anderson testified that Spec's fee payment would affect the safety of people because if a retailer was allowed to violate the system, then violation of the system would cause other retailers to lose their business and jobs and create chaos.

Ms. Anderson testified that Mr. Wills was the supervisor of licensing when she was hired. She is aware of Mr. Will's deposition in which he stated he gave Spec's permission to pay fees for nonresident sellers. She has no personal knowledge of the conversation or what permission was actually granted. Ms. Anderson testified that "in unusual situations, which this would have been . . . the standard practice is to get this in writing and then I would in turn give it to my supervisor who would take it up the chain of command and then a written response would come back down."³³¹

3. Testimony of Mr. Jones at HOM³³²

Mr. Jones has no recollection of authorizing a retailer to pay fees for nonresident sellers. If Mr. Wills had asked him if a retailer could pay fees for nonresident sellers, Mr. Jones would have told him no because it would have been a prohibited relationship under Code § 102.01.

³³¹ Tr. Day 2 at 200.

³³² Tr. Day 3 at 441-445.

D. Spec's Evidence

1. Testimony of Mr. Rydman at HOM³³³

Mr. Rydman testified that, until recently, TABC did not accept credit card payments or monies from non-U.S. bank accounts. He explained that not all nonresident sellers are large businesses with U.S. bank accounts. Although nonresident sellers wanted to do business in Texas, TABC would not accept foreign money. Mr. Rydman testified that Spec's contacted Mr. Wills in the TABC Houston office to see if Spec's could help accept fees and write checks on behalf of nonresident sellers. Mr. Wills stated he would look into the matter. Mr. Rydman testified that Mr. Wills responded and said they could go ahead with the plan. Based on his conversation with Mr. Wills and given TABC's approval, Spec's received wire payments for fees from nonresident sellers. Spec's then wrote a check to TABC for any original permit fees and label registration fees. Spec's also wrote checks for label registrations to the TABC. Spec's checks for original and renewal permits were made out to the Comptroller but were also sent to the TABC.

Mr. Rydman testified that Spec's did not act as an employee of a nonresident seller by accepting money and writing a U.S. check for the same amount. Spec's did not enter into an agreement to manage the business of any nonresident seller. Spec's employees, Christi Collins and Scarlet McGeorge, assisted nonresident sellers by writing checks for fees with TABC's approval. Mr. Rydman testified that while they were assisting nonresident sellers, they were still Spec's employees and under Spec's control.

2. Testimony of Mr. Wills³³⁴

At the time of the incidents, Mr. Wills was the Supervisor of Compliance at the TABC Houston office. He recalled the phone call from Spec's about assisting out-of-country wineries

³³³ Tr. Day 7 at 1055-1064.

³³⁴ Tr. Day 8 at 1386-1395, 1399-1423.

for reimbursement. Mr. Wills testified that there was limited information in the Code, Rules, and manuals regarding how out-of-country wineries could get into business in Texas so he contacted Thomas Graham, the marketing director in Austin. He asked Mr. Graham³³⁵ if Spec's could pay for nonresident seller fees if Spec's did not make money or charge for the service. Mr. Graham said he saw nothing wrong with the arrangement as long as Spec's did not charge a fee or receive something in return, like free shipments of products. Mr. Wills testified that he called Mr. Rydman to tell him it was approved. Mr. Rydman said he would rely on that information.

Mr. Wills testified that it was once the mission of the TABC to promote public safety and foster education and voluntary compliance. TABC's current mission statement no longer mentions education and voluntary compliance. Mr. Wills explained that it was common practice for industry people to call and ask if they could do something. This practice fit with the goal of educating and obtaining voluntary compliance from the industry. Mr. Wills testified that Mr. Rydman inquired and obtained permission to pay fees.

According to Mr. Wills, the purpose of Code § 102.01(h) was to protect the independence of a retailer. He sees nothing in the process of writing a check for a nonresident seller that threatens the independence of Spec's as a retailer.

3. Testimony of Mr. Slobin at HOM³³⁶

Mr. Slobin testified that allegations 31 through 46 refer to Spec's acting or serving as an employee of another permittee. Mr. Slobin testified that Spec's cannot be an employee because Spec's is a company and not a person. Pursuant to the Labor Code, through an implied or express contract, only a person who is providing services for wages or compensation may be an employee. Spec's was not compensated or paid wages for assisting nonresident sellers. Moreover, it is necessary to have some degree of control to establish an employer-employee relationship. Spec's was not under the control or management of any nonresident seller.

³³⁵ Mr. Wills testified he spoke to the Director of Marketing Practices at the time and thought it was Mr. Graham. However, he agreed it could have been Steve Greinert, but he could not recall.

³³⁶ Tr. Day 7 at 1149-1157, 1162-1166, 1172-1175.

Therefore, it is Mr. Slobin's expert opinion that Spec's could not be an employee of another permittee.

4. Testimony of Mr. Coleman at HOM³³⁷

Mr. Coleman testified that he reviewed the allegation that Spec's acted as an employee of another permittee and, based on practices permitted by TABC historically, he did not see a Code violation. He testified that the Tied House prohibition was intended to prevent the risk of control of one tier member by another tier member. Ms. Collins assisted 14 out-of-country wineries by attaching a check signed by Ms. McGeorge and sending the application and check to TABC. Mr. Coleman testified that attaching a check to a winery application is not the type of harm that Tied House prohibition is meant to prevent. He stated that the Code is confusing and has many gray areas. It is important to understand the purpose of the Code. Some provisions are never enforced, some are always enforced, and others are enforced in different ways at different times. Common sense, historical knowledge, and practice are necessary. Mr. Coleman explained that this was how he was trained at TABC.

Mr. Coleman testified that when TABC received Spec's company checks, someone in Licensing should have been aware of it. If TABC thought it was improper to have a Spec's check accompanying an out-of-country winery application, then TABC should not have accepted the application. TABC personnel processing applications are required to look for Code violations, including Tied House prohibitions. He testified that everything is reviewed by someone at TABC. If it was deemed improper, then it should have been stopped with the initial application. Mr. Coleman testified that it would be one thing if one or two applications slipped through the process. However, fourteen winery applications were successfully processed over multiple years. Mr. Coleman testified that this meant TABC was aware of the practice and did not perceive it be a problem. It is his expert opinion that TABC knowingly accepted payment from Spec's. Furthermore, he testified that Spec's did not act as an employee of another permittee.

³³⁷ Tr. Day 8 at 1313-1322, 1326.

As for the allegation that Spec's entered into an agreement to manage the business of nonresident sellers, Mr. Coleman testified that Spec's merely attached a check and forwarded the application to TABC. Ms. Collins was, in essence, acting as an in-state notice agent for the nonresident seller. Mr. Coleman testified that this is not a violation of the Code because historically, TABC allowed wholesalers to be registered agents for nonresident sellers and to facilitate by handling applications. He does not see how it would be a violation for the retailer to do the same thing the wholesaler could do for a different tier. Facilitating a transaction for an out-of-country winery that has difficulty paying or processing fees does not rise to a level of control. Furthermore, Spec's was reimbursed for the fees and received no additional payments. Mr. Coleman testified that Spec's did not manage or control an out-of-country winery by writing a check for which it was later reimbursed.

E. Discussion and Recommendation

1. Original Applications

Staff argues that Spec's violated Code § 102.01(d) and (h) by acting as an employee of another *permittee* and entering an agreement to manage or control the business interest of another *permittee*. However, at the time of the alleged violation, six of those wineries were not permittees, an essential element of the violation. In its written closing argument, Staff actually concedes that Allegations 36, 36B, 37, 37B, 41, 41B, 44, 44B, 45, 45B, 46, and 46B pertain to original applications and moves to dismiss these allegations. Because these wineries were not permittees at the time of the alleged violations, the ALJs find that the preponderance of the evidence fails to show that Spec's violated Code §§ 102.01(d) and (h) for Allegations 36, 36B, 37, 37B, 41, 41B, 44, 44B, 45, 45B, 46, and 46B. Therefore, the ALJs recommend no sanction should be imposed for Allegations 36, 36B, 37, 37B, 41, 41B, 44, 44B, 45, 45B, 46, and 46B.

2. Renewal Applications and Label Certification Fees

In its closing argument, Staff argues that Ms. Collins and Ms. McGeorge, employees of Spec's, acted as employees of 10 nonresident sellers by writing checks for the payments of

renewal application fees and/or label certification fees and ensuring that the payments were sent to the Commission.³³⁸ These functions are the activities that nonresident sellers and their employees should be conducting in order to maintain their alcohol permits. Staff argues that each time Spec's employees performed these functions, Spec's acted as an employee of another permittee.³³⁹ Spec's received approximately \$7,300 wired into its account from nonresident sellers. Staff argues that Spec's used the funds to perform the functions that only an employee of the nonresident seller would perform. Based on the same evidence, Staff argues that Spec's entered into an agreement to manage or control the business or interests of a permittee of a different.

Spec's denies it acted as employee or entered into an agreement to manage another permittee. It is undisputed that Spec's wrote company checks for the payment of nonresident sellers' applications and label approval fees. At a time when the Commission did not accept checks from foreign banks accounts or credit cards, Spec's was told it could pay the fees as long as it did not profit from the arrangement.

Mr. Rydman testified that Spec's obtained approval from the Commission through supervisor Richard Wills to pay for the fees. Without Mr. Wills's authorization, Spec's would not have paid the fees for nonresident sellers.

³³⁸ In its closing argument, Staff includes Allegations 36, 36B, 37, and 37B, seeking a finding of a violation. However, Staff also conceded that Allegations 36, 36B, 37, and 37B involved original applications and moves to dismiss the allegations. The ALJs previously addressed Allegations 36, 36B, 37, and 37B and will not address them here. Allegations 38 and 38B were not included in Staff's closing argument but will be addressed here. Of the original 14 nonresident sellers, there are eight remaining nonresident sellers. Spec's paid for two renewals applications for Azienda.

³³⁹ The Second Amended Notice of Hearing alleged that Spec's acted as employee by *accepting* certain wire transfers. Although Staff's argument has changed, it does not affect the ALJs' ultimate finding.

Staff argues³⁴⁰ that the TABC employee who had the authority to address the issue was former Director of Marketing Practices, Mr. Greinert, and he did not recall having the conversation with Mr. Wills.³⁴¹ Mr. Jones, the former Director of Compliance, did not recall ever communicating with Mr. Wills and would have not approved the arrangement. Although Mr. Greinert and Mr. Jones do not recall having a conversation about this issue, Mr. Wills testified he may have discussed the matter with Mr. Graham in Austin, not Mr. Greinert or Mr. Jones.

Staff also points out that Ms. Anderson testified that, given the unusual situation, she would have put Spec's inquiry in writing and submitted it to her supervisor. While Ms. Anderson may be required to get approval from her supervisor, it is not known what is required of a regional supervisor. There is no evidence that Mr. Wills violated any policy or procedure. After review of the evidence and sworn statements, the ALJs find Mr. Wills's testimony to be credible. The evidence shows that Mr. Wills had a conversation with Spec's in which he approved the fee-payment arrangement.

The ALJs find that Spec's reasonably relied on the approval from a TABC supervisor before writing checks for the application and label fees of nonresident sellers. Regardless of whether Mr. Wills actually had the authority as the Regional Supervisor to approve the arrangement, Spec's was told the fee arrangement was approved. A permittee should be able to rely on the representations of a TABC employee.

³⁴⁰ Staff also argues that Mr. Wills is not credible because of sworn statements from his supervisors pointing out inaccuracies in his deposition. Staff is referring to affidavits by Deputy Director of Licensing Jo Ann Joseph and Director of Licensing Amy Harrison that were attached to its Motion to Strike Expert Richard Wills. *See* ECF No. 94. The ALJ considered the affidavits, and the motion was denied. The affidavits were not offered or admitted into evidence. In the hearing, Staff's request to call Ms. Harrison as a witness was denied for failure to list her as a witness pursuant to SOAH Order No. 2. *See* ECF No. 6. Even considering the affidavits, the ALJs' analysis of Mr. Will's testimony remains unchanged.

³⁴¹ Staff is referring to Mr. Greinert's affidavit that was attached to its Response to Spec's 20th Motion for Partial Summary Disposition. *See* ECF No. 126. The affidavit was not offered or admitted into evidence. Even considering the affidavit, the ALJs' analysis remains unchanged.

The arrangement was approved if Spec's was merely writing checks for the fees and did not profit from the transactions. Although she inferred the wire transfers could have been for wages or services rendered, Ms. Anderson agreed the wire transfers equaled the amount of the fees. Ms. Anderson then argued that Spec's could have earned interest between the time it received the wire transfers and when Spec's actually wrote the checks. Ms. Anderson also suggested that Spec's could have profited when the nonresident sellers sold their products to Spec's. Apart from speculation, there is no evidence that Spec's profited in any manner from the fee arrangement. Spec's was reimbursed for the exact amount of the fees. Spec's did not earn wages or receive compensation for its services. Spec's merely wrote checks for the fees of nonresident sellers after the arrangement was approved by TABC. There is no evidence that Spec's controlled or managed the business or interests of the nonresident sellers.

It is also important to note there was no evidence that Spec's attempted to conceal their actions. From May 2012 to September 2014, Spec's paid fees for 15 applications and label fees for 14 nonresident sellers. The evidence is uncontroverted that the nonresident sellers were from out of the country. For over 2 years, the Commission accepted over 21 checks from Spec's and approved applications from 14 nonresident sellers. Spec's company checks even included in the memo line the names of the nonresident sellers, some with the notation "NRS" and others with the nonresident seller's permit numbers. It is not a stretch to assume employees of the Commission would recognize Spec's company check and know that Spec's is a retailer. A reasonably prudent employee should have recognized that a retailer's checks were attached to nonresident sellers' applications. The failure to stop the transactions supports the contention that this was an approved practice.

For the reasons discussed above, the ALJs find that the preponderance of the evidence fails to show that Spec's violated Code §§ 102.01(d) and (h). Therefore, the ALJs recommend no sanction should be imposed for Allegations 31, 31B, 32, 32B, 33, 33B, 34, 34B, 35, 35B, 38, 38B, 39, 39B, 40, 40B, 42, and 42B.

XIV. UNAUTHORIZED TASTINGS

A. Allegation 47

Staff alleges that, from June 22, 2012, to October 14, 2014, Cognac Ferrand USA (Cognac Ferrand) conducted unauthorized tastings on the premises of a retailer in violation of Code § 52.01(m), to-wit: Spec's permitted Cognac Ferrand, *an unlicensed entity*, to conduct tastings on its premises.

B. Applicable Law

Code § 52.01(m) provides that the holder of a distiller's or rectifier's permit, distiller's agent's permit, nonresident seller's permit, or manufacturer's agent's permit or that permit holder's agent or employee may participate in and conduct product tastings of alcoholic beverages at a retailer's premises and may open, touch, or pour alcoholic beverages, make a presentation, or answer questions at the tasting. Any alcoholic beverage tasted under this subsection must be purchased from the package store permit holder on whose premises the tasting is held. The permit holder may not require the purchase of more alcoholic beverages than are necessary for the tasting. This section does not authorize the holder of a distiller's or rectifier's permit, distiller's agent's permit, nonresident seller's permit, or manufacturer's agent's permit to withdraw or purchase an alcoholic beverage from the holder of a wholesaler's permit or provide an alcoholic beverage for tasting on a retailer's premises that is not purchased from the retailer.

C. TABC Evidence

1. Deposition of Ms. Anderson

Ms. Anderson testified that during the investigation, she found wire transfers from Cognac Ferrand USA to Spec's from June 22, 2012, to October 14, 2014. Cognac Ferrand USA did not hold a permit from TABC at the time of the wire transfers. In Spec's response letter to

TABC, Spec's advised that the wire transfers from Cognac Ferrand USA were payment for wine purchased and used for tastings on Spec's premises.³⁴² However, this response was later retracted by Spec's due to confusion regarding Cognac Ferrand USA, the nonresident seller, and Cognac Ferrand, the brand.³⁴³

Based on these documents, Ms. Anderson concluded Spec's violated Code § 5.01(m) by allowing Cognac Ferrand USA, an unpermitted entity, to conduct tastings on Spec's premises.

2. Testimony of Ms. Anderson at HOM³⁴⁴

Ms. Anderson explained that Code § 52.01(m) allows the holder of a nonresident seller permit to conduct tastings on the premises of a package store. However, if the nonresident seller does not hold a permit, it is a violation of the Code to conduct tastings at the package store unless an employee or agent of the package store conducts the tastings. Ms. Anderson explained that if Cognac Ferrand USA conducted tastings on Spec's premises at a time when they were not permitted, Spec's would be in violation of the Code.

Cognac Ferrand USA held a nonresident seller's permit from February 1995 to February 1998. Cognac Ferrand alcoholic beverages are registered with Deutsch Family Wine and Spirits (Deutsch), which holds a valid nonresident seller's permit.

Ms. Anderson explained that as a permit holder, Spec's is responsible for supervising and controlling what happens on its premises. According to Ms. Anderson, Spec's should have confirmed whether Cognac Ferrand USA was permitted prior to allowing tastings on its premises. Even if the tastings were conducted by a third party, the permit holder is still responsible for what happens on its premises.

³⁴² TABC Ex. 44 at 137.

³⁴³ Tr. Day 2 at 232; Spec's Ex. 28.

³⁴⁴ Tr. Day 2 at 207-234; Tr. Day 3 at 357-358.

Ms. Anderson testified that Staff only relied on the invoices produced by Spec's to prove this allegation. Staff did not rely on any verbal admissions or statements against interest by Spec's. She noted some of the invoices were for two to four bottles of alcoholic beverages, bags of ice, and 2-ounce cups. Based on Ms. Anderson's experience, these invoices were consistent with tastings held by a nonresident seller on the licensed premises. However, Ms. Anderson admitted that the dates of the alleged tastings and the products used for the alleged tastings are unknown. Furthermore, the invoices do not indicate the products were used for tastings at a Spec's location.³⁴⁵ Ms. Anderson also conceded that some of the alcohol purchased by Cognac Ferrand USA was not even a brand produced by Cognac Ferrand USA.

Ms. Anderson testified that if Deutsch conducted a tasting of Cognac Ferrand's brands on Spec's premises, it would be permissible as long as Deutsch paid Spec's for the product. However, she later acknowledged that while Code § 52.01(m) mandates alcoholic beverages be purchased from the package store where the tasting will be held, it does not mandate *who* must pay for the alcoholic beverages.

D. TABC Evidence

1. Testimony of Mr. Rydman at HOM³⁴⁶

Mr. Rydman testified that just because Cognac Ferrand USA purchased goods, it does not mean they conducted tastings or that tastings were held on Spec's premises. He pointed out that simply purchasing goods is different from holding a tasting. In his experience, these invoices are not consistent with tastings on Spec's premises.

According to Mr. Rydman, Cognac Ferrand USA has had an office in Houston for a long time and has done a lot of marketing in Houston and in Texas. Cognac Ferrand USA has always had a house account with Spec's. They buy merchandise to entertain people and promote their

³⁴⁵ Tr. Day 2 at 224; Spec's Ex. 11 at 13.

³⁴⁶ Tr. Day 7 at 1072-1085, 1122-1126, 1138-1140.

products. Cognac Ferrand USA has done a lot of work with the French Embassy and the Beaujolais Nouveau annual program. They are on the board at Awty International School and have had several events at the school. These invoices are more akin to open bar tabs. Instead of invoicing every individual purchase, Spec's groups them together and sends an invoice.

Mr. Rydman explained that Cognac Ferrand USA is a subsidiary of Deutsch and would have been working under the auspices of Deutsch if they did, in fact, conduct a tasting. It is also possible that the products were purchased by Cognac Ferrand USA, and the tastings were conducted by Deutsch. That practice is lawful.

Mr. Rydman testified that there were only three invoices that contained the word "tastings".³⁴⁷ The invoices were dated March 8, 15, and 16, 2013.³⁴⁸ On all these invoices, the word "tastings" appeared below the heading for delivery instructions.³⁴⁹ Mr. Rydman noted, however, that several of the alcoholic beverages purchased on these invoices were not the Cognac Ferrand brand.

Mr. Rydman was unable to determine if the remaining invoices were for tastings. Some invoices referenced bags of ice and 2-ounce cups; however, that alone does not demonstrate a tasting was held or the location at which a tasting was held. It is equally probable that the items were purchased for a party or entertainment, especially since some of the items purchased were a competitor's product or only included one bottle of alcohol, which would be insufficient for a tasting.

³⁴⁷ TABC Ex. 44 at 62, 63, and 65.

³⁴⁸ TABC Ex. 44 at 62, 63, and 65.

³⁴⁹ TABC Ex. 44 at 62, 63, and 65.

2. Testimony of Mr. Coleman at HOM³⁵⁰

Mr. Coleman testified that he is not aware of any requirement that Spec's check the permit status of an entity before allowing tastings on its premises. That would be the responsibility of the person conducting the tasting and the TABC. Mr. Coleman stated it was reasonable for Spec's to believe the Cognac Ferrand products were legal because the products are in commerce and have passed state and federal regulations.

Mr. Coleman testified that tastings do not always occur on the premises of a retailer. For example, tastings could occur at the French Consulate or at a personal home. Under those circumstances, there would be no violation. In the present case, Mr. Coleman stated that additional evidence would be needed to show the tastings actually occurred on Spec's premises. For example, a photograph, an eyewitness, or a report from the promotional company conducting the tasting would reveal the location and the person conducting the tasting. If Deutsch conducted tastings and the payment for the products came from Cognac Ferrand USA, then that would be lawful.

E. Discussion and Recommendation

Staff asserts that Spec's violated Code § 52.01(m) by allowing Cognac Ferrand USA, an unpermitted entity, to conduct tastings on Spec's premises. In its Second Amended Notice of Hearing, Staff alleged Spec's committed this violation from June 22, 2012, to October 14, 2014.³⁵¹ Staff offered 136 invoices into evidence regarding this allegation; however, only three invoices contained the word "tastings."³⁵² In its written closing argument, Staff only referenced those three invoices and the associated violation dates of March 8, 15, and 16, 2013.³⁵³

³⁵⁰ Tr. Day 8 at 1331-1344.

³⁵¹ ECF No. 62.

³⁵² TABC Ex. 44 at 62, 63, and 65.

³⁵³ ECF No. 193 at 23-24.

As a result, the ALJs will only consider those three invoices and dates in relation to Allegation 47.

Staff argues that because three invoices contain the word “tastings”, the products listed on the invoices were purchased by Cognac Ferrand USA for tastings on Spec’s premises. Staff also argues that because the invoices list different Spec’s shipping addresses, it must be presumed that the tastings occurred at the Spec’s addresses listed on the invoices.

Spec’s, however, argues that the invoices alone are not evidence of tastings on Spec’s premises. Spec’s asserts that the word “tastings” could apply to events that do not occur at a retail store. For example, Cognac Ferrand USA could have purchased the products for tastings at their own office, a private residence, or the French Consulate.

The ALJs agree that the invoices alone are insufficient to show the date, location, and identity of the person(s) conducting the tastings. As noted by the testimony, it is equally probable that if there were tastings, they were conducted at a location other than Spec’s. Without any additional evidence to support Staff’s presumption of a violation, the ALJs find that the preponderance of the evidence is insufficient to show that Spec’s permitted Cognac Ferrand USA to conduct an unauthorized tastings on its premises. Therefore, the ALJs recommend no sanction should be imposed for Allegation 47.

XV. ACTING AS A DISTILLER

A. Allegation 48

Staff alleges that, on or about October 12, 2010, Spec’s acted as a distiller without first obtaining a distiller’s permit in violation of Code § 11.01(a), to-wit: Spec’s paid for labels and raw materials to produce Lone Star Vodka.

B. Applicable Law

No person who has not first obtained a permit of the type required for the privilege exercised may, in a wet area, do any of the following:

1. manufacture, distill, brew, sell, possess for the purpose of sale, import into this state, export from this state, transport, distribute, warehouse, or store liquor;
2. solicit or take orders for liquor; or
3. for the purpose of sale, bottle, rectify, blend, treat, fortify, mix, or process liquor.³⁵⁴

C. TABC Evidence

1. Deposition of Ms. Anderson

Ms. Anderson testified that she spoke with Jay Broddon at United Wine, and at her request, he signed an affidavit on September 23, 2014, stating the following:

United was invoiced by North Texas Distillers for labels and materials to start Lone Star Vodka. We had not yet received any orders, nor (sic) purchase orders from any retailers on a product of this name and had no plans to order it. Spec's informed United that they would be ordering this product, and as United had no plans to carry this item for sale unless a retailer wanted the product, United issued an invoice to Spec's for these items, collected the invoice and paid the bill from North Texas.³⁵⁵

Ms. Anderson testified that Mr. Broddon's statement was supported by an invoice to Spec's from United Wine dated October 9, 2010, for Lone Star Vodka materials and labels.³⁵⁶ This was not an invoice for the actual product but for the labels and materials to produce the product. These items are usually purchased by the manufacturer, not the retailer. The evidence shows United Wine received an invoice from North Texas Distillers, a manufacturer of

³⁵⁴ Code § 11.01(a).

³⁵⁵ TABC Ex. 32 at 1.

³⁵⁶ TABC Ex. 32 at 2.

Lone Star Vodka. United Wine then billed Spec's. Once United Wine received payment from Spec's, United Wine passed the payment onto North Texas Distillers.

The invoice from United Wine to Spec's contains two entries. The item code for both entries is listed as "prepaid goods."³⁵⁷ Under item description, the products are listed as "Lone Star Vodka Materials" and "Lone Star Vodka labels."³⁵⁸ The total amount invoiced to Spec's was \$40,164.40.³⁵⁹

Based upon these documents, Ms. Anderson concluded that Spec's paid for the production of Lone Star Vodka and used United Wine as a pass-through. This is a Code violation because the pass-through payment was used to pay for materials to produce Lone Star Vodka. In essence, Spec's was acting as a distiller, and that is the activity of a manufacturer.

2. Testimony of Ms. Anderson at HOM³⁶⁰

Code § 11.01 requires a permit to distill liquor. Ms. Anderson testified that Spec's did not distill liquor and Staff does not allege an employee of Spec's was an employee of a distiller. Rather, Staff alleges that Spec's acted as a manufacturer by paying for materials to produce a final product.

When Ms. Anderson found the invoice from United Wine to Spec's, she spoke with United Wine and received the statement from Mr. Broddon. After reviewing the statement, the invoice from North Texas Distillers to United Wine, and records showing Spec's wired money in the same amount as on the invoice, she concluded Spec's had violated the Code.

³⁵⁷ TABC Ex. 32 at 2.

³⁵⁸ TABC Ex. 32 at 2.

³⁵⁹ TABC Ex. 32 at 2.

³⁶⁰ Tr. Day 2 at 234-244; Tr. Day 3 at 359-360; Tr. Day 8 at 1432-1434, 1437-1441.

Ms. Anderson testified that it is lawful for Spec's to prepay for Lone Star Vodka as long as the payment is for finished goods. She agreed that if Spec's actually prepaid for Lone Star Vodka and United Wine made a mistake when describing the items on the invoice, there would not be a Code violation. Ms. Anderson confirmed there is no evidence Spec's actually received Lone Star Vodka materials and labels. Likewise, there is no evidence Spec's received raw materials or used those materials to distill Lone Star Vodka.

She agreed that either Spec's paid for labels and materials or Spec's prepaid for a finished product; it could not be both. Although the invoice from United Wine to Spec's indicates both prepaid goods and labels and materials, she does not believe those items are inconsistent. According to Ms. Anderson, labels and materials could be described as "goods" for accounting purposes. She later testified, however, that prepaid goods would be payment for a finished product, not raw materials.

3. Testimony of Mr. Saladino at HOM³⁶¹

Mr. Saladino testified that the item description on the invoice from United Wine to Spec's was a mistake. Rather than listing labels and materials, the invoice should have listed bottles and quantities of Lone Star Vodka. Mr. Saladino believes North Texas Distillers incorrectly billed United Wine with this language and United Wine carried the language forward on their invoice to Spec's.

Mr. Saladino testified that United Wine never charged Spec's for material and labels. The payment issued by Spec's was later applied to the Lone Star Vodka delivered to Spec's by United Wine.

³⁶¹ Tr. Day 4 at 572-577.

4. Testimony of Mr. Broddon at HOM³⁶²

Mr. Broddon identified the letter he wrote at Ms. Anderson's request.³⁶³ He explained that North Texas Distillers sent the invoice to United Wine, and United Wine passed it on to Spec's. United Wine invoiced Spec's, and in return, Spec's received the finished product.

Mr. Broddon testified that United Wine received an order from Spec's for Lone Star Vodka. He explained that the invoice to Spec's was for the beginning of a project. He characterized the invoice as a preorder and stated that neither Spec's nor United Wine received labels and materials.³⁶⁴ Rather, they both received Lone Star Vodka as a finished product. According to Mr. Broddon, Spec's payment of \$40,164.40 was treated as a prepayment for final goods.

D. Spec's Evidence

1. Testimony of Mr. Heisler at HOM³⁶⁵

Mr. Heisler testified that the invoice from United Wine to Spec's was for a prepayment of goods.³⁶⁶ Spec's received a credit from United Wine for this prepayment. Spec's only received the finished product and never received labels and materials. Spec's did not distill Lone Star Vodka.

Mr. Heisler testified Spec's accounting records reveal this transaction was booked as prepaid goods. In addition, Spec's pay period summary confirms Spec's payment of \$40,164.40 was used as a credit toward the purchase of Lone Star Vodka.³⁶⁷ United Wine invoiced Spec's at

³⁶² Tr. Day 5 at 668-676, 698-701.

³⁶³ TABC Ex. 32 at 1.

³⁶⁴ Tr. Day 5 at 670-673.

³⁶⁵ Tr. Day 5 at 816-822; Tr. Day 6 at 870-895, 909-911.

³⁶⁶ TABC Ex. 32 at 1.

³⁶⁷ Spec's Ex. 35.

full price. Once the Lone Star Vodka was received at the end of 2010, the prepayment was applied as a credit refund off the full invoice price.

2. Testimony of Mr. Coleman at HOM³⁶⁸

Mr. Coleman testified that, based upon the evidence, it appears that Spec's intended to purchase the vodka once it had been produced. They actually received the vodka as a finished product.

However, even if Spec's paid money to a wholesaler for labels and raw materials, that is not the same as "distilling" alcohol. He explained that simply purchasing materials does not require a distiller's permit. Rather, a permit is required once those materials are used to create an alcoholic beverage. Additionally, it is not unlawful to purchase labels. It is unlawful for someone other than a distiller to label the finished product. He is not saying a retailer could finance a distillery. Instead, one must look at what actually occurred. In this case, Spec's received a finished product in the amount they paid for. In his opinion, Spec's did not engage in the conduct described in Allegation 48.

E. Discussion and Recommendation

Staff alleges Spec's violated Code § 11.01 by paying for labels and raw materials to produce Lone Star Vodka. Staff relies on the invoice from United Wine to Spec's and the written statement by Mr. Broddon as proof of the purchase. Staff argues that purchasing labels and raw materials for alcoholic beverage production is a manufacturing activity and by purchasing these items, Spec's acted as a distiller without a permit.

Spec's, however, argues that it prepaid for Lone Star Vodka as a finished product. It did not actually purchase labels and raw materials and did not engage in the activity of a manufacturer. Although the invoice from United Wine lists the purchased goods as labels and

³⁶⁸ Tr. Day 8 at 1250-1252, 1345-1355.

raw materials, Spec's contends the invoice is erroneous because it also codes the items as prepaid goods.

The greater weight of the evidence supports Spec's argument that it prepaid for the finished product of Lone Star Vodka. All parties agreed Spec's never received labels or raw materials and Spec's did not distill Lone Star Vodka. Rather, Spec's received Lone Star Vodka as a finished product.

Mr. Saladino testified that the invoice to Spec's contained an error. He believes North Texas Distillers incorrectly billed United Wine with the labels and materials language and United Wine carried the language forward on their invoice to Spec's. Ms. Anderson agreed that if Spec's actually prepaid for Lone Star Vodka and United Wine made a mistake when describing the items on the invoice, there would not be a Code violation.

Although Staff relies on Mr. Broddon's affidavit to support its allegation, Mr. Broddon testified at the hearing that United Wine received an order from Spec's for Lone Star Vodka. He characterized the order as a preorder for finished goods. Both Mr. Heisler and Mr. Broddon testified the \$40,164.40 payment issued by Spec's was credited toward the purchase of Lone Star Vodka. Spec's pay period summary also confirms the credited amount.³⁶⁹

For the reasons discussed above, the ALJs find the preponderance of the evidence is insufficient to show that Spec's acted as a distiller. Therefore, the ALJs recommend no sanction should be imposed for Allegation 48.

³⁶⁹ Spec's Ex. 35.

XVI. PURCHASE FROM AN UNAUTHORIZED SOURCE

A. Allegation 50

Staff alleges that, on or about May 10, 2013, Spec's placed orders for the purchase of alcoholic beverages from an out-of-state winery Napa Valley Vintners, an unauthorized source, in violation of Code § 22.01(1).

B. Applicable Law

The holder of a package store permit may purchase liquor in this state from the holder of a winery, wholesaler's, class B wholesaler's, or wine bottler's permit.³⁷⁰

C. TABC Evidence

1. Deposition of Ms. Anderson

Napa Valley Vintners is an auction house in California that has agreements with Napa Valley wineries to sell their wines. Ms. Anderson stated that Spec's violated the Code by purchasing wine from Napa Valley Vintners, an out-of-state business that does not have a TABC permit. She based her conclusion on an invoice from Napa Valley Vintners and two checks written by Spec's to Napa Valley Vintners.³⁷¹

On February 28, 2013, Napa Valley Vintners issued an invoice to Spec's, referencing various cases of wine including five cases of Tetra 2011 Blend.³⁷² On May 10, 2013, Spec's paid Napa Valley Vintners with two checks. The first check was written for \$81,000.³⁷³

³⁷⁰ Code § 22.01(1).

³⁷¹ TABC Ex. 30 at 2-3.

³⁷² TABC Ex. 30 at 4.

³⁷³ TABC Ex. 30 at 3.

The second check was written for \$25,000.³⁷⁴ She noted the memo line on the second check stated: "Reynold lot w/ Cliffewood Syndicate."³⁷⁵ This check appeared to be payment for a lot of wines produced by Reynolds winery. Based on the invoice and checks, Ms. Anderson surmised that Spec's purchased wine from an unpermitted out-of-state business.

2. Testimony of Ms. Anderson at HOM³⁷⁶

Ms. Anderson initially testified that she does not know if Napa Valley Vintners holds a California wine permit or if they are even a winery. After reviewing a print-out from the California Secretary of State website, Ms. Anderson agreed that Napa Valley Vintners is a domestic non-profit organization.³⁷⁷ She also agreed that the checks written by Spec's were the result of a charitable auction conducted by Napa Valley Vintners on February 23, 2013. However, she did not believe the checks were charitable donations. Rather, she stated they were for the purchase of wine based on the invoice she reviewed.³⁷⁸ Spec's was invoiced by Napa Valley Vintners on February 23, 2013. There was, however, no purchase order from Spec's to Napa Valley Vintners.³⁷⁹ On May 10, 2013, Spec's issued two checks to Napa Valley Vintners.

Ms. Anderson did not know what the \$25,000 check was for as she was unable to locate any corresponding invoice. She acknowledged that the check for \$81,000 could have been for the right to purchase wine in the future. Ms. Anderson did not know if the wine in question had already been bottled as of the date of the auction. She conceded that if the product did not exist at the time of the purchase, it would be payment for wine futures. Ms. Anderson is not familiar with wine futures. She does not know what they are and whether they are lawful.

³⁷⁴ TABC Ex. 30 at 2.

³⁷⁵ TABC Ex. 30 at 2.

³⁷⁶ Tr. Day 2 at 244-262; Tr. Day 3 at 360-362.

³⁷⁷ Spec's Ex. 23.

³⁷⁸ TABC Ex. 30 at 4.

³⁷⁹ On April 29, 2014, more than a year after the auction date, Spec's issued a purchase order to United Wine for five cases of the Tetra Red Blend 2011 with an expected arrival date of May 15, 2014.

D. Spec's Evidence

1. Testimony of Mr. Rydman at HOM³⁸⁰

Mr. Rydman disputes this allegation and Staff's characterization of Napa Valley Vintners as an out-of-state winery. He explained that they are a domestic, non-profit charity. Napa Valley Vintners advertise and promote the quality of Napa products around the world. In this case, they held an auction for "lots" which are a futures contract or a rights contract. The highest bidder obtained the right to purchase a specific amount of wine that a particular winery would make in the future. This was a charity function.

Mr. Rydman testified that the checks to Napa Valley Vintners were donations to charity. It may be years before the actual wine is received. Mr. Rydman explained that the check for \$81,000 was a donation to charity for the right to purchase a special lot of wine in the future. He explained that people buy the rights to buy the wine. Later, they purchase the wine from the wholesaler who purchases the wine from the winery.

2. Testimony of Mr. Coleman at HOM³⁸¹

Mr. Coleman testified that Napa Valley Vintners is not an out-of-state winery. It is a trade association. In his opinion, the checks from Spec's to Napa Valley Vintners were donations derived through a charity auction. The thing being sold was wine futures or the right to purchase. Spec's did not order alcohol from Napa Valley Vintners. Ordering alcohol is not the same as purchasing wine futures.

Mr. Coleman testified that it would be important to know what actually happened to the wine in question and how it was delivered to Spec's. In this case, Spec's sent a purchase order to United Wine in compliance with the 3-tier system. Spec's made a good faith effort to get the

³⁸⁰ Tr. Day 7 at 1072-1085, 1122-1126, 1138-1140.

³⁸¹ Tr. Day 8 at 1355-1357.

product moved through normal distribution channels. In his opinion, Spec's did not violate Code § 22.01(1).

Mr. Coleman stated that the legislature did not want to discourage charities and allowed some relaxation in the Code for charitable events. He does not believe Spec's participation in this charitable event endangered the health, safety, or welfare of the people of Texas.

E. Discussion and Recommendation

Staff alleges Spec's violated Code § 22.01(1) by placing orders for the purchase of alcoholic beverages from an out-of-state winery, Napa Valley Vintners, an unauthorized source.

The evidence, however, reveals that Spec's participated in a fundraising auction conducted by Napa Valley Vintners. Napa Valley Vintners is a non-profit trade association. It is not an out-of-state winery as alleged by Staff.

The evidence also reveals that Spec's wrote two checks to Napa Valley Vintners as a result of the fundraising auction. Staff argues that the checks were written for the purchase of wine. However, Ms. Anderson did not know if the wine existed or was bottled at the time of the auction. She stated she did not know what a wine futures was and as a result, she was unable to determine if the checks were written for the purchase of wine futures. She did not know if the purchase of wine futures was lawful or unlawful.

Mr. Rydman, on the other hand, explained that the auction was held for "lots" of wine or for wine futures. That is, people bid to obtain the right to purchase a specific amount of wine that a particular winery would produce in the future. The actual wine may not be received until years later. Mr. Rydman stated the checks to Napa Valley Vintners were written as charitable donations for the right to purchase a special lot of wine in the future.

Staff argues that even if the checks were written for the purchase of wine futures, it would still be a Code violation because that is not an authorized activity under Spec's permits.

Nevertheless, the ALJs find that the checks written to Napa Valley Vintners are more akin to a charitable donation or gift, which is a permissible activity under Code § 109.58(b). It is uncontested that Napa Valley Vintners is a non-profit organization and it conducted a fundraising auction. They are not an out-of-state winery. It is further uncontested that the checks were written as a result of the fundraising auction. Therefore, the ALJs find that the preponderance of the evidence is insufficient to show that Spec's placed orders for the purchase of wine from an out-of-state winery. Therefore, the ALJs recommend no sanction should be imposed for Allegation 50.

XVII. EXCLUSIVE AGREEMENT

A. Allegation 52

Staff alleges that, on or about April 10, 2013, Spec's conspired with another person to violate or accept the benefits of a violation of the Code or a valid Rule in violation of Code §§ 104.03 and 109.08, to-wit: [Spec's] directly or indirectly entered into an agreement to purchase wine from nonresident seller Sovex GrandsChateaux (Sovex) to the exclusion in whole or part of liquor sold or offered for sale by other persons.

B. Applicable Law

A retail dealer or its agent, servant, or employee commits an offense if he conspired with another person to violate or accepts the benefits of a violation of the Code or Rules.³⁸²

No person engaged in business as a distiller, brewer, manufacturer, winery, or any other manufacturer level producer of liquor or beer, or their wholesalers, may directly or indirectly or through an affiliate require, by agreement or otherwise, that any retailer engaged in the sale of liquor or beer purchase any such products from such person to the exclusion in whole or in part

³⁸² Code § 104.03.

of liquor or beer sold or offered for sale by other persons, or prevent, deter, hinder, or restrict other persons from selling or offering for sale any other such products to any retailer.³⁸³

C. TABC Evidence

1. Deposition of Ms. Anderson

Ms. Anderson sent a letter to Sovex, inquiring about its dealings with Spec's.³⁸⁴ Specifically, Ms. Anderson asked if Sovex had any written or verbal agreements with Spec's.

On July 29, 2015, Dorothée Salinas, Export Assistant at Sovex, responded and provided documents. According to Ms. Anderson, the response reflected a Code violation because Ms. Salinas stated that Spec's had "exclusivity in Texas for Chateau Du Glana."³⁸⁵ Ms. Salinas also provided a copy of an email, dated April 10, 2013, from Maria Mercier at Sovex to Bear Dalton, an employee of Spec's.³⁸⁶ In the email, Ms. Mercier stated that "we are glad to confirm you again, that Spec's does have the exclusivity rights for Texas, via Sovex from Meffre family - owners of Ch(ateau) Du Glana."³⁸⁷ Ms. Salinas also provided a Sovex invoice dated July 9, 2015, showing sales of Chateau Du Glana wine (and other wines) to United Wine with the description "Spec's Family USA."³⁸⁸

Based on Ms. Salinas's response, Ms. Anderson determined that Sovex used United Wine as the wholesaler for Spec's. Therefore, Ms. Anderson requested all invoices from United Wine for the sale of Chateau Du Glana wine.³⁸⁹ United Wine responded with invoices showing it sold

³⁸³ Code § 109.08.

³⁸⁴ TABC Ex. 55 at 64; TABC Ex. 45 at 2.

³⁸⁵ TABC Ex. 55 at 65; TABC Ex. 45 at 2.

³⁸⁶ TABC Ex. 55 at 66; TABC Ex. 45 at 4-5.

³⁸⁷ TABC Ex. 55 at 66; TABC Ex. 45 at 4.

³⁸⁸ TABC Ex. 45 at 6.

³⁸⁹ TABC Ex. 55 at 68.

Chateau Du Glana wines to Spec's from March 15, 2013, through May 1, 2013.³⁹⁰ Based on United Wine's invoices, Ms. Anderson testified that the product was not sold to anyone else in Texas except Spec's.³⁹¹

Ms. Anderson stated that it is a violation for a retailer to receive a product exclusively that is not sold to anyone else in the state because it creates an unfair advantage in the market place if only one retailer can carry a specific brand of wine.³⁹²

2. Testimony of Ms. Anderson at HOM³⁹³

Ms. Anderson testified that Code § 109.08 does not apply to a retailer.³⁹⁴ However, she said that § 109.08 applies to Sovex because it is a broker or affiliate of the manufacturer of Chateau Du Glana wines.³⁹⁵ That being said, Ms. Anderson does not know if the manufacturer sells Chateau Du Glana wines to other wholesalers who may sell the wine in Texas.³⁹⁶ She also does not know if other brokers sell Chateau Du Glana wine in Texas.

It is alleged that Spec's entered an agreement with Sovex to be the exclusive retailer of Chateau Du Glana wine in Texas. Ms. Anderson determined that an agreement existed based on the Sovex's email, United Wine's invoices, Sovex's response to her inquiry, and Sovex's invoice to United Wine.

The April 2013 email was sent from Ms. Mercier (Sovex) to Bear Dalton (Spec's). There was no response or confirmation from Mr. Dalton or Spec's to the email. However, Ms. Anderson testified that an agreement was reached because Ms. Mercier confirmed

³⁹⁰ TABC Ex. 45 at 7-11.

³⁹¹ TABC Ex. 55 at 68-69.

³⁹² TABC Ex. 55 at 67-68.

³⁹³ Tr. Day 3 at 362-367, 374-375, 387-389.

³⁹⁴ Tr. Day 2 at 266.

³⁹⁵ Tr. Day 2 at 265.

³⁹⁶ Tr. Day 2 at 266.

Spec's has exclusivity rights in Texas. Ms. Anderson concluded there was agreement based on that email and Ms. Salinas's response in July 2015 that repeated Spec's had exclusivity in Texas for Chateau Du Glana.

Ms. Anderson testified that, although the response from Sovex mentioned another wholesaler, Favorite Brands, she did not investigate Favorite Brands to see if it was selling Chateau Du Glana wines. When Ms. Anderson asked "which representative of Spec's do you routinely contract with to fill purchase orders," Sovex replied United Wine.³⁹⁷ Therefore, Ms. Anderson only looked at United Wine's invoices because [Sovex's] current wholesaler was United Wine. Ms. Anderson agreed that if the product was available to other retailers, then it would not be an exclusive product. However, she did not check if other wholesalers sold this product to other retailers.³⁹⁸

3. Testimony of Mr. Saladino at HOM³⁹⁹

Mr. Saladino does not recognize Sovex and is unfamiliar with Chateau Du Glana. However, he testified that United Wine has never agreed and was never part of any agreement to sell exclusively to a single retailer.

D. Spec's Evidence

1. Testimony of Mr. Rydman at HOM⁴⁰⁰

Mr. Rydman disputes Allegation 52 and testified that Spec's did not enter into an agreement to purchase wine with Sovex to the exclusion of other retailers.⁴⁰¹ He testified that

³⁹⁷ Tr. Day 2 at 270.

³⁹⁸ Tr. Day 2 at 270.

³⁹⁹ Tr. Day 4 at 607-608.

⁴⁰⁰ Tr. Day 7 at 1085-1091, 1126-1129.

⁴⁰¹ Tr. Day 7 at 1086.

Sovex is a broker who represents about 150 to 200 different wines that are sold to wholesalers and importers all over the world.⁴⁰² Mr. Rydman reads Ms. Mercier's email to mean that Sovex has not sold this product to anyone in Texas yet. However, that does not mean that other brokers or wholesalers are not selling the product. Mr. Rydman testified that Ms. Mercier did not understand how the system works in Texas. Wholesalers can buy from anyone. An importer in Washington DC could purchase the product and get it into Texas. The same product may have been sold to another state but it can move around and still end up in Texas. Mr. Rydman explained that it is impossible to have an exclusivity agreement given how the system works. United Wine, Favorite Brands, or any other wholesaler could sell to any retailer.

2. Testimony of Mr. Coleman at HOM⁴⁰³

Based on his experience at TABC, Mr. Coleman would not consider one email from one person as evidence of an agreement between the sender and recipient of that email without a response from the recipient. He would look for a two-way communication where an offer was put forth and the other party accepted.

After reviewing the documentary evidence and based on the wording of the allegation, Mr. Coleman is unable to determine what alcoholic beverages Spec's was excluded from purchasing or from whom. He could not tell if other retailers were excluded because he could not determine Ms. Mercier's intent from her use of the term "exclusivity." If she meant Spec's could sell Chateau Du Glana exclusively in Texas, as opposed to another state like Louisiana or Oklahoma, then that is lawful.

E. Discussion and Recommendation

Staff argues that Code § 109.08 makes it a violation for a manufacturer, wholesaler, or its affiliate to require a retailer to enter an agreement to sell a product exclusively. Spec's as a

⁴⁰² Tr. Day 7 at 1086.

⁴⁰³ Tr. Day 8 at 1357-1364.

retailer cannot violate this Code section. Therefore, Staff alleges Spec's committed the violation by conspiring with another person to violate this Code section.

Staff argues that Spec's made a mutual agreement with a nonresident seller Sovex to be the exclusive retailer of Chateau Du Glana wine in Texas.⁴⁰⁴ This argument fails because Staff did not show how Spec's made a mutual agreement with Sovex and that Spec's was the exclusive retailer for Chateau Du Glana wine in Texas.

As to the issue of a mutual agreement, Spec's is the recipient of an email in which Sovex states that Spec's has "exclusivity rights" in Texas for Chateau Du Glana wine. There is no evidence that Spec's made a mutual agreement or that it conspired to create an exclusivity agreement. The email was sent from Ms. Mercier to Spec's. There is no evidence that Spec's responded, accepted, agreed, or confirmed the agreement.

To show that Spec's was an exclusive retailer, Staff offered five invoices from mid-March and May 1, 2013, and argued that Spec's purchased Chateau Du Glana wine from United Wine as part of this exclusivity agreement. Staff also offered an invoice from Sovex to United Wine to show Spec's was still receiving Chateau Du Glana wine in July 2015. However, there is no corresponding United Wine invoice or Spec's purchase order to show that United Wine actually sold that shipment of Chateau Du Glana wine to Spec's.

As for the 2013 invoices, they are evidence that Spec's purchased Chateau Du Glana wine. However, they are insufficient to show that Spec's was the *only* retailer to sell Chateau Du Glana wine. Sovex is merely a broker for the manufacturer. Ms. Anderson testified the manufacturer could sell Chateau Du Glana wine to another broker or wholesaler. However, she did not investigate whether the manufacturer sold Chateau Du Glana wine to another broker

⁴⁰⁴ Staff pleaded that Spec's entered into an agreement to purchase wine from nonresident seller Sovex to the exclusion in whole or part of liquor sold or offered for sale by other persons. Being the exclusive retailer of Du Glana wine is not the same thing as requiring Spec's to purchase Chateau Du Glana wine from Sovex *to the exclusion of liquor or beer sold by other persons*. However, the ALJs will address the allegation in the manner that Staff presents its evidence and arguments.

or wholesaler who may have sold the product to another retailer in Texas. Sovex stated it used United Wine for Spec's, but that it also used Favorite Brands wholesaler. In Sovex's response to Ms. Anderson, Sovex indicated that Favorite Brands had a pending order. However, Ms. Anderson did not investigate whether Favorite Brands was selling Chateau Du Glana wine to another retailer. Finally, Ms. Anderson did not investigate whether Chateau Du Glana was sold by another retailer. Without checking if the manufacturer or another broker, wholesaler, or retailer sold Chateau Du Glana wine in Texas, it is merely presumptuous to conclude that Spec's is the only retailer to sell Chateau Du Glana wine. The fact that Spec's purchased Chateau Du Glana wine is not conclusive that it was the *exclusive* retailer.

For these reasons, the ALJs find that the preponderance of the evidence is insufficient to show that Spec's directly or indirectly entered into an agreement to purchase wine from nonresident seller Sovex to the exclusion in whole or part of liquor sold or offered for sale by other persons or that Spec's was the exclusive retailer of Ch Du Glana wine as argued by Staff. Therefore, the ALJs recommend no sanction should be imposed for Allegation 52.

XVIII. MANNER OF OPERATION

A. Allegation 53

Staff asserts that, on or about the dates listed in the allegations set forth above, Spec's conducted its business in a place or manner that warrants the cancellation, suspension, or refusal of its permits based on the general welfare, health, peace, morals, and safety of the people, and on the public sense of decency, in violation of Code §§ 11.46(a)(8), 11.61(b)(2) and (7).

B. Applicable Law

The Commission 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 this Code

or Rules.⁴⁰⁵ The Commission may suspend for not more than 60 days or cancel or refuse an original or renewal permit if it is found, after notice and hearing, that the place or manner in which 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.⁴⁰⁶

C. TABC Evidence

1. Testimony of Ms. Anderson at HOM⁴⁰⁷

According to Ms. Anderson, Spec's conduct as evidenced in Allegations 1 through 52 of the Second Amended Notice of Hearing is contrary to the health, peace, morals, and safety of the people. Specifically regarding Allegations 31 through 42B, Ms. Anderson testified that Spec's assisting foreign wine companies is contrary to the general welfare and could affect the safety of the people of the state of Texas because "if one retailer is allowed an unfair violation of the 3-tier system, it could cause other retailers to lose their business, lose their jobs, go out of business."

Ms. Anderson has no specific knowledge of the protests except that there are three pending protests of applications. She did not know that the protests are based on the conduct in Allegations 1 through 52.

2. Testimony of Mr. Jones at HOM⁴⁰⁸

Mr. Jones testified that Spec's conducted its business in a place or manner that warrants cancellation based on general welfare, health, peace, and morals. Spec's conduct impacts the

⁴⁰⁵ Code § 11.61(b)(2).

⁴⁰⁶ Code §§ 11.46(a)(8) and 11.61(b)(7).

⁴⁰⁷ Tr. Day 2 at 272-274.

⁴⁰⁸ Tr. Day 4 at 455-456.

welfare of the people of Texas and the alcohol industry by creating unfair competition. That conduct included private pricing to get products on the shelf and in commerce, discounts with manufacturers and wholesalers, and wholesalers and manufacturers appearing to agree to pay for bonuses for Spec's employees. Such conduct threatens the 3-tier system in Texas and creates an unfair advantage against competition.

Mr. Jones testified that, if the ALJs determine all alleged violations occurred, Staff is requesting cancellation of all permits. If the ALJs find some but not all violations occurred, Staff is requesting that a penalty be assessed. Based on Rule § 34.3, the penalty for a major regulatory violation is a suspension ranging from 2 to 13 days. Under the Code, a civil penalty can range from \$150 to \$25,000 per day. Based on the egregiousness and pattern of behavior, Mr. Jones is requesting a 13-day suspension per violation, with the option to pay \$25,000 per day in lieu of suspension. He is asking for this amount per violation, not per location or permit. Additionally, if the ALJs find all or a majority of the violations occurred, he is requesting all pending original and supplemental applications by Spec's be denied.

D. Spec's Evidence

1. Testimony of Mr. Rydman at HOM⁴⁰⁹

Mr. Rydman disputes the allegation. Spec's is an honorable, honest business that does not operate in any manner that offends the health, peace, or morals of the people of Texas. Spec's strives to keep consumers happy. Spec's runs its operation in a manner that businesses around the world look to as a model. He stated that, if the people of Texas were not happy with Spec's, it would not be the largest retailer in the state of Texas.

Mr. Rydman said it is heart-wrenching that TABC is impugning Spec's reputation. People throughout the industry are laughing at or avoiding Spec's so as to not be tainted or investigated. Spec's landlord is threatening to cancel its lease because Spec's is unable to get its

⁴⁰⁹ Tr. Day 7 at 1092-1094, 1129-1138, 1143-1144.

renewal permit. Staff has investigated Spec's for 3 years for things such as paying someone's license fees. Mr. Rydman testified that the conduct, even if it amounted to a violation, is a technical deficiency and does not affect the public. The process of defending itself has cost Spec's a tremendous amount of time and money. Most people settle with TABC and pay the penalty. However, there is a process to go through to get to that point. The punishment, he said, is in the process.

2. Testimony of Mr. Coleman at HOM⁴¹⁰

Mr. Coleman testified that "place or manner" is a catch-all provision used when a permittee is such a poor operator or character that he must be placed out of business because his place or manner of operation is detrimental to the people in Texas. Mr. Coleman knows Mr. Rydman to be an honorable man. Based on his evaluation of the allegations, Mr. Coleman testified that the allegations are technical and do not affect the welfare, health, peace, morals, safety or sense of decency.

E. Discussion and Recommendation

Staff alleged that the conduct in Allegations 1 to 52 warrants the denial, cancellation, or suspension of the applications and permits. However, the ALJs have found that Staff failed to prove all but one credit law violation. Thus, the ALJs find the preponderance of the evidence is insufficient to show that the place or manner in which Spec's conducts its business warrants the denial, cancellation, or suspension of the applications and permits based on the general welfare, health, peace, morals, and safety of the people and on the public sense of decency.

Therefore, the ALJs recommend no sanction should be imposed for Allegation 53.

The ALJs further recommend that the original and supplemental applications under Dockets 458-17-1741, 458-17-1742, and 458-17-1743 be granted.

⁴¹⁰ Tr. Day 8 at 1273-1277.

XIX. FINDINGS OF FACT

1. Spec's Family Partners, Ltd. d/b/a Spec's (Spec's or Respondent) is located at 2410 Smith Street in Houston, Texas, and holds a Package Store Permit, Local Cartage Permit, Local Distributor's Permit, and Beer Retailer's Off Premise License.
2. Spec's filed a supplemental application for a Package Store Permit for the premises to be located at 9618 FM 1097 in Willis, Montgomery County, Texas, that is the subject of the protest under Docket 458-17-1741.
3. Spec's filed an original application for a Package Store Permit for the premises to be located at 13201 N RR 620, Suite B, in Austin, Williamson County, Texas, that is the subject of the protest under Docket 458-17-1742.
4. Spec's filed an original application for a Package Store Permit for the premises to be located at 4319 Kemp Boulevard in Wichita Falls, Wichita County, Texas, that is the subject of the protest under Docket 458-17-1743.
5. The staff of the Texas Alcoholic Beverage Commission (TABC, Commission, or Petitioner) issued a Second Amended Notice of Hearing, alleging multiple violations of the Texas Alcoholic Beverage Code (Code), and was the most recent notice of hearing in Docket 458-16-3124. The notice was sent to Respondent on January 4, 2017.
6. Staff also issued three Notices of Hearing, alleging the same violations as grounds for the protests under Dockets 458-17-1741, -1742, and -1743. The notices were sent to Respondent on January 6, 2017.
7. The notices stated the time, place, and nature of the hearing; legal authority and jurisdiction under which the hearing was to be held; statutes and rules involved; and factual matters asserted.
8. On September 8, 2016, Spec's filed a motion for partial summary disposition as to Allegations 49 and 51 under Docket 458-16-3124.
9. Allegations 49 and 51 were alleged to have occurred on October 2, 2006, and September 20, 2007, respectively.
10. Staff did not timely enforce and prosecute Allegations 49 and 51.
11. The delay caused Spec's to be harmed and materially disadvantaged in its ability to investigate and prepare a defense.
12. The hearing on the merits in all four docket numbers convened on February 22, 2017, before ALJs Lindy Hendricks and Bennie Brown at the State Office of Administrative Hearings, located at 2020 North Loop West, Suite 111, in Houston, Texas. Staff was

represented by attorneys Judith Kennison and Michael Cherry. Respondent was represented by attorneys Al Van Huff, John Fason, and Jennifer McCammon. The hearing concluded on March 3, 2017, and the record was held open until April 25, 2017, for written closing arguments and post-hearing briefs.

13. The President of Spec's is John Rydman.
14. Other employees of Spec's include, but are not limited to, Robert Heisler, Christi Collins, Scarlet McGeorge, and Joseph Kemble.
15. This case originated after an audit by Petitioner.
16. Petitioner has issued a total of three Notices of Hearing: Notice of Hearing dated July 28, 2016; First Amended Notice of Hearing dated October 31, 2016; and Second Amended Notice of Hearing dated January 4, 2017, in Docket 458-16-3124.
17. The Second Amended Notice of Hearing contains 47 live allegations numbered 1 through 53.
18. The following Allegations have been dismissed without prejudice or otherwise deleted from the Second Amended Notice of Hearing: Allegation 2, Allegation 3, Allegation 4, Allegation 5, Allegation 8, Allegation 9, Allegation 10, Allegation 12, Allegation 13, Allegation 14, Allegation 15, Allegation 16, Allegation 17, Allegation 18, Allegation 19, Allegation 20, Allegation 21, Allegation 27, Allegation 30, Allegation 49, and Allegation 51.
19. United Wine and Spirits ("United Wine") was previously investigated by Petitioner.
20. United Wine settled with Petitioner, resulting in the documents "Settlement Agreement and Waiver of Hearing" and "Waiver Order."
21. The Waiver Order is not and does not contain an admission of liability or guilt.
22. Jay Broddon, John Saladino, and Billy Davis are employed by or are otherwise representatives of United Wine.
23. Petitioner and United Wine settled for \$100,000.00.
24. United Wine is a member of the 2nd tier of alcohol distribution because it is a wholesaler.
25. Spec's is a member of the 3rd tier of alcohol distribution because it is a retailer.

Allegation 1: Failure to provide or timely provide documents

26. Kathy Anderson is an auditor with the TABC.

27. Ms. Anderson was assigned to the Spec's investigation in March 2014.
28. On March 9, 2015, at 4:28 p.m., Ms. Anderson sent an email to Mr. Rydman and Mr. Heisler.
29. In the email, Ms. Anderson advised she had questions regarding wire transfers into Spec's Amegy bank account ending 4026 and checks written from Spec's Bank of America account ending in 7710.
30. Staff had subpoenaed the bank statements from these accounts in November 2014.
31. The email referenced an attachment; however, the attachment was not offered into evidence.
32. Ms. Anderson requested documentation for the reason for the transfers and checks and requested that the information be provided by March 12, 2015, at 5:00 p.m.
33. On March 9, 2015, at 6:02 p.m., Mr. Heisler emailed Ms. Anderson that he was on vacation and would be back in the office on March 17, 2015.
34. In the email, Mr. Heisler stated that most of the wire payments appeared to involve the Centennial asset purchase agreement.
35. In the summer of 2012, Spec's acquired stores owned by Centennial. These purchases resulted in a series of wire transfers between Spec's and Centennial.
36. Mr. Heisler requested a 1-week extension to respond to Ms. Anderson's request.
37. On March 10, 2015, Ms. Anderson emailed Mr. Heisler that she had not received a response from Mr. Rydman.
38. Ms. Anderson did not acknowledge Mr. Heisler's request for an extension.
39. On March 10, 2015, Mr. Heisler emailed Ms. Anderson and stated he would review the information and respond as quickly as possible when he returned from vacation.
40. On March 17, 2015, Mr. Heisler emailed Ms. Anderson and stated that most of the wire transfers she referenced were received from Centennial.
41. Mr. Heisler asked Ms. Anderson to confirm whether the referenced wire payments were sent to Spec's from Centennial.
42. Mr. Heisler advised that the referenced dates corresponded with the asset purchase of selected Centennial stores.
43. Mr. Heisler explained that Spec's sent payments to Centennial as each store closed.

- 44. On March 18, 2015, after returning from vacation, Mr. Heisler called Ms. Anderson and left a message on her voicemail.
- 45. Ms. Anderson returned his phone call later that day and stated she was out of the office.
- 46. Ms. Anderson advised that she would review the information and answer Mr. Heisler's question from his March 17, 2015, email.
- 47. Ms. Anderson did not follow up or respond to Mr. Heisler.
- 48. Spec's was only given 3 days to respond to Ms. Anderson's request for documentation.
- 49. Ms. Anderson agreed that Mr. Heisler communicated with her and responded to her request for information via email.

Allegations 6, 7, and 11: Credit Law Violations

- 50. On January 30, 2017, Staff stipulated to grace periods.
- 51. At no point prior to the hearing did Staff assert that grace periods did not apply to payment but rather for reporting.
- 52. Petitioner publishes a document entitled "Delinquent List Publication Date" each year.
- 53. The Delinquent List Publication Date includes a Payment Calendar showing payments may be made after the due date but before the publication date of the delinquent list.
- 54. The time period after the due date but before the publication date of the delinquent list is effectively the grace period for payment.
- 55. The payment due date for liquor is reasonably calculated from the date of delivery.
- 56. The date of delivery is reasonably determined by the signed invoice showing a full description of the alcoholic beverages, the price and terms of sale, and the place and date of delivery
- 57. The grace period for delinquent payments has been continuously shortened since 2010.
- 58. The grace period changes were made in Marketing Practices Bulletins until the grace period was added into Texas Alcoholic Beverage Code (Code) § 102.32(c) and 16 Texas Administrative Code § 45.121.
- 59. Effective November 18, 2010, the grace period changed from 10 calendar days to 8 calendar days.

- 60. Effective on or about November 10, 2011, the grace period changed from 8 calendar days to 6 calendar days.
- 61. Effective March 1, 2013, the grace period changed from 6 calendar days to 4 business days. It was added into the Code at that time.
- 62. Saturdays, Sundays, and legal holidays are not included in the grace period calculation.

Allegation 11: Credit Law

- 63. On March 22, 2013, Spec's received a delivery of liquor.
- 64. The payment due date was April 10, 2013.
- 65. The publication date was April 16, 2013.
- 66. The grace period was April 11 to April 15, 2013.
- 67. Payments between April 11 and April 15, 2013 must be made by cash or cash equivalent.
- 68. On April 15, 2013, Spec's wired cash-equivalent payment.
- 69. Spec's paid before the publication date of the delinquent list.

Allegation 7: Credit Law

- 70. On October 11, 2012, Spec's received a delivery of liquor.
- 71. The payment due date was October 25, 2012.
- 72. The publication date was November 1, 2012.
- 73. The grace period was October 26 to October 31, 2012.
- 74. Payments between October 26 and October 31, 2012 must be made by cash or cash equivalent.
- 75. On October 31, 2012, Spec's wired cash-equivalent payment.
- 76. Spec's paid before the publication date of the delinquent list.

Allegation 6: Credit Law

- 77. On December 27, 2011, Spec's received a delivery of liquor.
- 78. The payment due date was January 10, 2012.

79. According to MPB048, the publication date was January 16, 2012.
80. According to the Delinquent List Publication Dates for 2012, the publication date was January 18, 2012.
81. The grace period was January 11 to January 17, 2012.
82. Payments between January 11 and January 17, 2012 must be made by cash or cash equivalent.
83. On January 18, 2012, Spec's wired cash-equivalent payment.
84. Spec's paid on, but not before, the publication date of the delinquent list.
85. Spec's was not placed on the delinquent list.
86. Spec's handles more than 1.5 million invoices a year and has been licensed since 1965.
87. Spec's administrative history shows only one prior credit law violation in 2013 for which Spec's received a warning.
88. This violation occurred more than 5 years ago and constitutes one of the first six credit law violations for Spec's.

Allegations 22 and 23: Conspiracy To Allow an Excessive Discount (\$1 Culito's Wine) and To Receive a Thing of Value (\$1 Culito's Wine)

89. On October 1, 2014, Joseph Victori Wines emailed United Wine about a program Joseph Victori Wines intended to offer Spec's.
90. On October 8, 2014, United Wine responded to the email and stated that the program would have to be restructured "so all is ok with TABC."
91. United Wine restructured the program to offer a volume discount for the months of October, November, and December and called it OND 2014.
92. United Wine's OND 2014 program was offered to all retailers as a volume discount.
93. OND 2014 program reads, "If a retailer purchases 500 cases between now and the end of the year we will reduce your Sweet Bitch price by \$24 per case Also, on the Sweet Bitch Bubbly Sparkling, if a retailer purchases 92 cases we will sell them 20 cases at \$1 per case. In addition, any retailer who purchases the above program will be able to purchase 600 cases of Culito's at a special price of \$1 per case."
94. A volume discount is not unlawful if it is offered to all retailers.

95. Although the program was offered to all retailers, Spec's was the only retailer who made a qualifying purchase to get the volume discount.
96. Spec's placed a purchase order for 600 cases of wine and qualified for the volume discount.
97. Ms. Anderson located documents showing Spec's received 448 cases of Culito's Chardonnay and Merlot at \$1 per case.
98. The email exchange about the initial program offer was between United Wine and Joseph Victori Wines.
99. Spec's was not a party to the email exchange.
100. Spec's was not aware of the emails or original program offer.
101. The original program offer was not presented to Spec's.
102. The email exchange did not present an agreement with Spec's.
103. Spec's did not engage in any price negotiations for an excessive discount.
104. Spec's did not conspire with United Wine and/or Joseph Victori Wine to allow an excessive discount.
105. Spec's did not conspire with United Wine and/or Joseph Victori Wines to receive a thing of value.

Allegation 24: Conspiracy when Nonresident Seller and Wholesaler Offered \$2 Incentive

106. In 2013, John Rivers represented wine manufacturer Tequilera Ocho Mesas. MHW is the nonresident seller of the wine.
107. On December 5, 2013, Mr. Rivers sent an email to Mr. Saladino at United Wine.
108. In the email, Mr. Rivers advised that he presented Holiday and 2014 programming to Mr. Rydman.
109. Mr. Rydman rejected the offer and said he would be running his own program.
110. On January 8, 2014, Mr. Rivers sent an email to Billy Davis at United Wine.
111. In the email, Mr. Rivers stated he was hoping to offer a specific pricing program for Spec's, which included a \$2 incentive.

- 112. Neither Spec's nor Mr. Rydman was a party to any of the emails between Mr. Rivers and United Wine.
- 113. There was no evidence that the program described in the Rivers email was offered to Spec's.
- 114. There was no evidence Spec's knew about or accepted the offer described in the email.
- 115. Spec's did not run an incentive program during the referenced time frame.
- 116. Ms. Anderson did not investigate or determine if Spec's had any incentive program at the time that mirrored the alleged violation with a \$2 PM incentive.
- 117. Spec's did not accept or agree to accept a \$2 PM from Mr. Rivers, nonresident seller MHW, or United Wine.
- 118. Spec's did not initiate, accept, agree, engage, or in any manner conspire to have Mr. Rivers, nonresident seller MHW, or United Wine offer an inducement or \$2 incentive to Spec's.

Allegation 25: Conspiracy When Nonresident Seller and Wholesaler Offered Inducement of 40% Profit Margin

- 119. On April 18, 2013, Bill Tresten was employed as an agent of nonresident seller Ambition Beverages.
- 120. Mr. Tresten previously owned a wholesale liquor company named Grand Crew.
- 121. On the above-listed date, Mr. Tresten sent an email to Mr. Davis at United Wine.
- 122. In the email, Mr. Tresten said he understood that Spec's wanted to make a 40% profit on the sale of Vision Vodka, produced by Ambition Beverages.
- 123. Mr. Davis did not advise Mr. Tresten that Spec's wanted to make a 40% profit.
- 124. Neither Mr. Rydman nor Spec's negotiated pricing with Mr. Tresten or Ambition Beverages.
- 125. Mr. Tresten provided specific pricing to United Wine that would yield a 40% profit for Spec's based on the retail price he wanted per bottle.
- 126. According to Mr. Tresten's email, United Wine would purchase Vision Vodka from Ambition Beverages for \$182.37 per case. Spec's would purchase Vision Vodka from United Wine for \$204.48 per case.

127. On October 17, 2013, Ambition Beverages invoiced United Wine for Vision Vodka at \$182.37 per case.
128. On November 1, 2013, United Wine invoiced Spec's for Vision Vodka at a different price, \$198.48 per case.
129. Spec's was not a party to the email exchange between Mr. Tresten and United Wine.
130. There is no evidence Spec's had any knowledge of the email exchange between Mr. Tresten and United Wine.
131. There is no evidence of any communication among Spec's, Ambition Beverages, and United Wine regarding pricing and profit margins.
132. There is no evidence Spec's conspired to violate or agreed to accept the benefits of violation of the Code by controlling the pricing of alcoholic beverages.
133. Spec's did not make a 40% profit on Vision Vodka.

Allegations 26 and 28: Conspiracy by Accepting and Receiving a Thing of Value (Free Wine and Payment for Employee Incentive Programs)

134. In 2011, Charles Lynch was a managing member of P&C Beverage Consultant and Brokers, L.L.C. (P&C Beverage), a nonresident seller.
135. On January 9, 2011, Mr. Lynch sent an email to grappajoe@hotmail.com.
136. Joseph Kemble's email address is grappajoe@hotmail.com.
137. Mr. Kemble is the Italian wine buyer for Spec's.
138. Mr. Lynch's email referenced a 60-day program for Mi Amore wine, which included a \$2 PM (product movement/incentive program) for the store sales personnel and managers.
139. The email also referenced an offering of free goods: buy three pallets of wine (two reds and one white) at 60 cases per pallet and get one pallet of white wine at no charge.
140. Mr. Lynch asked Mr. Kemble to review the listed terms and to talk on Tuesday afternoon, as they had discussed.
141. Mr. Kemble did not respond to the email from Mr. Lynch.
142. On February 1, 2011, Mr. Kemble forwarded the email to Mr. Davis at United Wine.

143. Mr. Kemble prefaced the forwarded email by saying that it was what he and Mr. Lynch had discussed in addition to a credit of nine cases to pay for the PM of what Spec's already had in stock.
144. Mr. Kemble told Mr. Davis, "[L]et's get it rolling."
145. On February 3, 2011, United Wine submitted a purchase order to P&C Beverage that included free Mi Amore wine.
146. On February 4, 2011, P&C Beverage invoiced United Wine with free cases of Mi Amore wine.
147. P&C Beverage did not cost-average the cases of Mi Amore wine to United Wine.
148. On February 4, 2011, United Wine received free cases Mi Amore wine.
149. United Wine billed Spec's \$79.88 to \$83.19 per case of Mi Amore wine.
150. United Wine did not cost-average the cases of Mi Amore wine to Spec's.
151. On March 24, 2011, Spec's was invoiced \$147,402.23 by United Wine, which included 167 cases of Mi Amore wine.
152. On April 15, 2011, Spec's paid United Wine \$147,402.23 by wire transfer.
153. All the invoices from United Wine to Spec's show payment by Spec's for Mi Amore wine.
154. United Wine did not pass along the benefit of free Mi Amore wine to Spec's.
155. Mr. Kemble and Spec's did not accept or receive free cases of Mi Amore wine from United Wine.
156. Mr. Kemble and Spec's did not accept or receive free cases of Mi Amore wine from P&C Beverage.
157. Spec's did not accept or receive free cases of Mi Amore wine as payment for an employee incentive program.

Allegations 29 and 29B: Conspiracy to Control or Manage Business Interest and Joseph Kemble Acting as Employee of United Wine

158. Mr. Kemble and Mr. Lynch may have had some discussion about products and pricing.
159. The nature of the discussion and whether it rose to the level of price negotiations are unknown.

160. A retailer simply inquiring about price from a manufacturer is lawful.
161. Price negotiation does not necessarily indicate control.
162. Forwarding an email is insufficient evidence to show that Spec's managed or controlled United by dictating its pricing, leaving United Wine no input about its own profit through mark-up; or, that Spec's controlled United Wine for Spec's exclusive benefit.
163. United Wine was able to accept, decline, or renegotiate the terms listed in the email from Mr. Kemble.
164. It is unknown if United Wine had any discussion with Mr. Lynch about price.
165. United Wine exercised independence when it received free cases of wine but did not pass on the free cases to Spec's.
166. Mr. Kemble did not control the actions or duties of United Wine.
167. Spec's did not enter into a conspiracy or agreement to control or manage the business or interest of United Wine.
168. There is no evidence of lewd, immoral, or indecent conduct on any of Spec's premises.
169. Mr. Kemble has been employed by Spec's for over 20 years and heads the Italian wine Department.
170. Mr. Kemble has never been employed by United Wine.
171. Mr. Kemble has never been paid wages by United Wine.
172. United Wine did not control the actions or duties of Mr. Kemble.
173. Mr. Kemble was acting on behalf of Spec's when he forwarded the email to United Wine.
174. Mr. Kemble did not act as an employee of United Wine.

Regarding Allegations 36 and 36B

175. On July 9, 2013, Waterford Wines Ply, Ltd. was not a permittee.

Regarding Allegations 37 and 37B

176. On May 2, 2012, Just I Vignerons was not a permittee.

Regarding Allegations 41 and 41B

177. On January 31, 2013, I/LA Passion des Terroirs was not a permittee.

Regarding Allegations 44 and 44B

178. On October 4, 2012, Maison Riviere Fils was not a permittee.

Regarding Allegations 45 and 45B

179. On May 30, 2012, I/Domini de la Cartoixa S.L.O. was not a permittee.

Regarding Allegations 46 and 46B

180. On June 20, 2012, I/Exportadora San Luis Limitada was not a permittee.

Regarding Allegations 31, 31B, 32, 32B, 33, 33B, 34, 34B, 35, 35B, 38, 38B, 39, 39B, 40, 40B, 42, and 42B

181. Richard Wills was the Regional Supervisor of Compliance for Houston in 2012.
182. At the time, the Commission did not accept money or credit card payments from foreign bank accounts.
183. Spec's called Mr. Wills to inquire if Spec's could assist nonresident sellers by writing checks for their application and label approval fees.
184. Mr. Wills represented to Spec's that the fee arrangement was permissible as long as Spec's did not profit in any manner from the arrangement.
185. Spec's reasonably relied on TABC's approval and began to write Spec's company checks for application and label fees due by out-of-county wineries.
186. Scarlet McGeorge signed the checks in SPEC'S000081-95 and marked as Spec's Exhibit 11.
187. Spec's company checks included a memo line with the nonresident seller's name, notation "NRS," and permit numbers where applicable.
188. The nonresident sellers were all out-of-country wineries.
189. Spec's wrote company checks for the following nonresident sellers:
- Azienda Marramiero S.R.L. on October 3, 2012, and September 17, 2014.
 - Sari Le Cellier Des Charmettes on September 8, 2014.
 - Champagne Louis de Sacy on January 13, 2014.
 - SCAE Domaine de Cabasse on September 19, 2014.

- Guilbaud Freres CPY on January 22, 2014.
 - H. Cuvelier & Fils on December 20, 2012.
 - Union Cooperative Foncalieu on January 23, 2013.
 - Vignobles Carteyron on November 6, 2013.
190. From May 2012 to September 2014, Spec's paid for the application and label fees for 14 nonresident sellers.
191. For over 2 years, TABC accepted over 22 checks from Spec's and approved applications for 14 nonresident sellers.
192. Spec's was reimbursed for the exact amount of fees.
193. Spec's did not earn wages or receive compensation for its services.
194. There is no evidence that Spec's controlled or managed the business or interests of the nonresident sellers.

Allegation 47 Unauthorized Tastings

195. From June 22, 2012, to October 14, 2014, Cognac Ferrand USA sent wire transfer payments to Spec's.
196. Cognac Ferrand USA held a nonresident seller's permit with TABC from February 1995 to February 1998.
197. At the time of the alleged violation, Cognac Ferrand USA was not permitted by TABC.
198. Cognac Ferrand USA has an office in Houston, Texas, and maintains a house account with Spec's.
199. Cognac Ferrand alcoholic beverages are registered with Deutsch Family Wine and Spirits (Deutsch), which holds a valid nonresident seller's permit.
200. On March 8, 2013, Spec's issued an invoice to Cognac Ferrand USA. The word "tastings" appeared below the heading for delivery instructions on the invoice.
201. On March 15, 2013, Spec's issued an invoice to Cognac Ferrand USA. The word "tastings" appeared below the heading for delivery instructions on the invoice.
202. On March 16, 2013, Spec's issued an invoice to Cognac Ferrand USA. The word "tastings" appeared below the heading for delivery instructions on the invoice.
203. The invoices do not reflect the date, time, location, or the identity of the person(s) conducting the tastings.

204. The invoices do not show that Cognac Ferrand USA conducted tastings on Spec's premises.

Allegation 48: Acting as Distiller

205. On October 9, 2010, United Wine invoiced Spec's for \$40,164.40.
206. The invoice contained two entries. The item code for both entries was listed as "prepaid goods." The item description was listed as "Lone Star Vodka Materials" and "Lone Star Vodka labels."
207. Spec's paid \$40,164.40 to United Wine per the invoice.
208. Spec's did not receive Lone Star Vodka materials or labels.
209. Spec's did not distill Lone Star Vodka.
210. Spec's received Lone Star Vodka as a finished product.
211. After the Lone Star Vodka was received, Spec's payment of \$40,164.40 was credited toward the purchase of Lone Star Vodka.
212. Spec's payment of \$40,164.40 was a prepayment for goods.
213. Spec's did not act as a distiller by paying for labels and materials to produce Lone Star Vodka.

Allegation 50: Purchase from an Unauthorized Source

214. Napa Valley Vintners is a domestic non-profit organization located in California.
215. Napa Valley Vintners is not an out-of-state winery.
216. Napa Valley Vintners does not hold a TABC permit.
217. On February 23, 2013, Napa Valley Vintners held a fundraising auction for the future rights to purchase special lots of wine.
218. On May 10, 2013, Spec's issued two checks to Napa Valley Vintners as a result of the fundraising auction.
219. One check was written for \$81,000. Another check was written for \$25,000.
220. Robert Heisler signed the checks #3603 and #3602 that are made out to Napa Valley Vintners.

- 221. The checks were payment for the right to purchase a special lot of wine in the future.
- 222. It is unknown if the wine existed or was bottled at the time of the auction.
- 223. Spec's did not place an order or purchase wine from an out-of-state winery.

Allegation 52: Exclusive Agreement

- 224. On April 10, 2013, Maria Mercier at Sovex GrandsChateaux, a nonresident seller, sent an email to Bear Dalton, an employee of Spec's, stating, "We are glad to confirm you again, that Spec's does have the exclusivity rights for Texas, via Sovex from Meffre family - owners of Ch(ateau) Du Glana."
- 225. There was no response, acceptance, or confirmation from Spec's to the email.
- 226. From March 15, 2013 to May 1, 2013, Spec's purchased Chateau Du Glana wines from United Wine.
- 227. On July 9, 2015, Sovex sold Chateau Du Glana wines to United Wine.
- 228. There is no evidence that United Wine sold Chateau Du Glana wines to Spec's in July 2015.
- 229. On July 14, 2015, Ms. Anderson sent a letter asking Sovex about its dealings with Spec's. Specifically, Ms. Anderson asked if Sovex had any written or verbal agreements with Spec's and the name of its wholesalers.
- 230. On July 29, 2015, Dorothee Salinas, Export Assistant at Sovex, responded that Spec's had "exclusivity in Texas for Chateau Du Glana."
- 231. Sovex is a broker for the manufacturer of Chateau Du Glana wine.
- 232. Ms. Anderson did not investigate whether the manufacturer sold Chateau Du Glana to another broker or wholesaler who may have sold the product to another retailer in Texas.
- 233. Ms. Salinas indicated that Sovex used Texas wholesalers United Wine and Favorite Brands who had a pending purchase order.
- 234. Ms. Anderson did not investigate whether Favorite Brands was selling Chateau Du Glana wine to another retailer.
- 235. Ms. Anderson did not investigate whether another retailer was selling Chateau Du Glana wine.

Allegation 53: Manner of Operation

- 236. Spec's does not operate in a manner in that offends the health, peace, or morals of the people of Texas.
- 237. Spec's manner of operation does not show a pattern or practice of egregious conduct.

XX. CONCLUSIONS OF LAW

- 1. The Commission has jurisdiction over this case pursuant to Texas Alcoholic Beverage Code (Code) Chapters 5 and 22 and §§ 11.46 and 11.61.
- 2. The State Office of Administrative Hearings has jurisdiction over all matters relating 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 Texas Government Code Chapter 2003.
- 3. Notice of the hearing was provided pursuant to Texas Government Code Chapter 2001.
- 4. Staff has the burden of proof by a preponderance of the evidence. 1 Tex. Admin. Code § 155.427.
- 5. Staff failed to timely prosecute Allegations 49 and 51, pursuant to Code § 5.31(b)(4) and 1 Texas Administrative Code § 155.503(a)(1)(B).
- 6. A preponderance of the evidence does not show that, on or about March 9, 2015, Spec's failed to provide or timely provide information, records, or other documents as requested by the Commission in violation of Code § 5.32.
- 7. A preponderance of the evidence does not show that Spec's was delinquent in payment to the seller for the deliveries of alcohol on October 11, 2012, and March 22, 2013, in violation of Code § 102.32(c) and 16 Texas Administrative Code § 45.121.
- 8. A preponderance of the evidence shows that Spec's paid on but not before the publication date for the December 27, 2011, delivery of alcohol in violation of Code § 102.32(c) and 16 Texas Administrative Code § 45.121.
- 9. A preponderance of the evidence does not show that, on or about October 8, 2014, Spec's conspired with wholesaler United Wine and nonresident seller Joseph Victori Wines to allow an excessive discount in violation of Code §§ 104.03 and 102.07(a)(7).
- 10. A preponderance of the evidence does not show that, on or about October 8, 2014, Spec's conspired with wholesaler United Wine and nonresident seller

Joseph Victori Wines to receive a thing of value in violation of Code §§ 104.03 and 102.07(a)(2).

11. A preponderance of the evidence does not show that, on January 8, 2014, Spec's conspired with wholesaler United Wine and nonresident seller MHW to offer Spec's a prize, premium, gift, or similar inducement receive a thing of value in violation of Code §§ 104.03 and 102.07(a)(8).
12. A preponderance of the evidence does not show that, on or about April 18, 2013, Spec's conspired with nonresident seller Ambition Beverages to offer Spec's an inducement in violation of Code §§ 104.03 and 102.07(a)(8).
13. A preponderance of the evidence does not show that, on or about February 1, 2011, Spec's conspired with nonresident seller P&C Beverage Consultant and Brokers, L.L.C., for Spec's employee Joseph Kemble to accept a thing of value (60 free cases of wine) in violation of Code §§ 104.03 and 102.07(a)(2).
14. A preponderance of the evidence does not show that, on or about February 1, 2011, Spec's conspired with nonresident seller P&C Beverage Consultant and Brokers, L.L.C., for Spec's employee Joseph Kemble to accept or receive a thing of value (payment for an employee incentive program) in violation of Code §§ 104.03 and 102.07(a)(2).
15. A preponderance of the evidence does not show that, on or about January 9, 2011, Spec's entered into a conspiracy or agreement to control or manage, financially or administratively, directly or indirectly, in any form or degree, the business or interest of a permittee of a different level in violation of Code § 102.01(h).
16. A preponderance of the evidence does not show that, on or about January 9, 2011, Spec's allowed lewd, immoral, or indecent conduct on its premises.
17. A preponderance of the evidence does not show that, on or about January 9, 2011, Spec's employee Joseph Kemble acted as an employee of wholesaler United Wine in violation of Code § 102.01(d).
18. A preponderance of the evidence does not show that, on or about October 3, 2012, and September 17, 2014, Spec's acted or served as an employee of a permittee of a different level, namely Azienda Marramiero S.R.L., in violation of Code § 102.01(d).
19. A preponderance of the evidence does not show that, on or about October 3, 2012, and September 17, 2014, an employee of Spec's entered into an agreement to manage or control the business or interest of a licensed nonresident seller, namely Azienda Marramiero S.R.L., in violation of Code § 102.01(h).
20. A preponderance of the evidence does not show that, on or about September 8, 2014, Spec's acted or served as an employee of a permittee of a different level, namely Sari Le Cellier Des Charmettes, in violation of Code § 102.01(d).

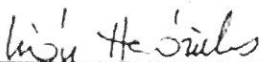
21. A preponderance of the evidence does not show that, on or about September 8, 2014, an employee of Spec's entered into an agreement to manage or control the business or interest of a licensed nonresident seller, namely Sari Le Cellier Des Charmettes, in violation of Code § 102.01(h).
22. A preponderance of the evidence does not show that, on or about January 13, 2014, Spec's acted or served as an employee of a permittee of a different level, namely Champagne Louis de Sacy, in violation of Code § 102.01(d).
23. A preponderance of the evidence does not show that, on or about January 13, 2014, an employee of Spec's did not enter into an agreement to manage or control the business or interest of a licensed nonresident seller, namely Champagne Louis de Sacy, in violation of Code § 102.01(h).
24. A preponderance of the evidence does not show that, on or about September 19, 2014, Spec's acted or served as an employee of a permittee of a different level, namely SCAE Domaine de Cabasse, in violation of Code § 102.01(d).
25. A preponderance of the evidence does not show that, on or about September 19, 2014, an employee of Spec's entered into an agreement to manage or control the business or interest of a licensed nonresident seller, namely SCAE Domaine de Cabasse, in violation of Code § 102.01(h).
26. A preponderance of the evidence does not show that, on or about July 9, 2013, Spec's acted or served as an employee of a permittee of a different level, namely Waterford Wines Ply, Ltd., in violation of Code § 102.01(d).
27. A preponderance of the evidence does not show that, on or about July 9, 2013, an employee of Spec's entered into an agreement to manage or control the business or interest of a licensed nonresident seller, namely Waterford Wines Ply, Ltd., in violation of Code § 102.01(h).
28. A preponderance of the evidence does not show that, on or about May 2, 2012, Spec's acted or served as an employee of a permittee of a different level, namely Just I Vignerons, in violation of Code § 102.01(d).
29. A preponderance of the evidence does not show that, on or about May 2, 2012, an employee of Spec's entered into an agreement to manage or control the business or interest of a licensed nonresident seller, namely Just I Vignerons, in violation of Code § 102.01(h).
30. A preponderance of the evidence does not show that, on or about January 22, 2014, Spec's acted or served as an employee of a permittee of a different level, namely Guilbaud Freres CPY, in violation of Code § 102.01(d).

31. A preponderance of the evidence does not show that, on or about January 22, 2014, an employee of Spec's entered into an agreement to manage or control the business or interest of a licensed nonresident seller, namely Guilbaud Freres CPY, in violation of Code § 102.01(h).
32. A preponderance of the evidence does not show that, on or about December 20, 2012, Spec's acted or served as an employee of a permittee of a different level, namely H Cuvelier & Fils, in violation of Code § 102.01(d).
33. A preponderance of the evidence does not show that, on or about December 20, 2012, an employee of Spec's entered into an agreement to manage or control the business or interest of a licensed nonresident seller, namely H Cuvelier & Fils, in violation of Code § 102.01(h).
34. A preponderance of the evidence does not show that, on or about January 23, 2013, Spec's acted or served as an employee of a permittee of a different level, namely Union Cooperative Foncalieu, in violation of Code § 102.01(d).
35. A preponderance of the evidence does not show that, on or about January 23, 2013, an employee of Spec's entered into an agreement to manage or control the business or interest of a licensed nonresident seller, namely Union Cooperative Foncalieu, in violation of Code § 102.01(h).
36. A preponderance of the evidence does not show that, on or about January 31, 2013, Spec's acted or served as an employee of a permittee of a different level, namely I/LA Passion des Terroirs, in violation of Code § 102.01(d).
37. A preponderance of the evidence does not show that, on or about January 31, 2013, an employee of Spec's entered into an agreement to manage or control the business or interest of a licensed nonresident seller, namely I/LA Passion des Terroirs, in violation of Code § 102.01(h).
38. A preponderance of the evidence does not show that, on or about November 6, 2013, Spec's acted or served as an employee of a permittee of a different level, namely Vignobles Carteyon, in violation of Code § 102.01(d).
39. A preponderance of the evidence does not show that, on or about November 6, 2013, an employee of Spec's entered into an agreement to manage or control the business or interest of a licensed nonresident seller, namely Vignobles Carteyon, in violation of Code § 102.01(h).
40. A preponderance of the evidence does not show that, on or about October 4, 2012, Spec's acted or served as an employee of a permittee of a different level, namely Maison Riviere Fils, in violation of Code § 102.01(d).

41. A preponderance of the evidence does not show that, on or about October 4, 2012, an employee of Spec's entered into an agreement to manage or control the business or interest of a licensed nonresident seller, namely Maison Riviere Fils, in violation of Code § 102.01(h).
42. A preponderance of the evidence does not show that, on or about May 30, 2012, Spec's acted or served as an employee of a permittee of a different level, namely I/Domini de la Cartoixa S.L.O., in violation of Code § 102.01(d).
43. A preponderance of the evidence does not show that, on or about May 30, 2012, an employee of Spec's entered into an agreement to manage or control the business or interest of a licensed nonresident seller, namely I/Domini de la Cartoixa S.L.O., in violation of Code § 102.01(h).
44. A preponderance of the evidence does not show that, on or about June 20, 2012, Spec's acted or served as an employee of a permittee of a different level, namely I/Exportadora San Luis Limitada, in violation of Code § 102.01(d).
45. A preponderance of the evidence does not show that, on or about June 20, 2012, an employee of Spec's entered into an agreement to manage or control the business or interest of a licensed nonresident seller, namely I/Exportadora San Luis Limitada, in violation of Code § 102.01(h).
46. A preponderance of the evidence does not show that, from June 22, 2012 to October 14, 2014, Spec's permitted Cognac Ferrand USA, an unlicensed entity, to conduct tastings on its premises in violation of Code § 52.01(m).
47. A preponderance of the evidence does not show that, on or about October 12, 2010, Spec's acted as a distiller without first obtaining a distiller's permit in violation of Code § 11.01.
48. A preponderance of the evidence does not show that, on or about May 10, 2013, Spec's placed orders for the purchase of alcoholic beverages from an out-of-state winery in violation of Code § 22.01(l).
49. A preponderance of the evidence does not show that, on or about April 10, 2013, Spec's conspired or, directly or indirectly, entered into an agreement to purchase wine from nonresident seller Sovex GrandsChateaux to the exclusion in whole or in part of liquor sold or offered for sale by other persons, or that Spec's was the exclusive retailer of Ch Du Glana wine, in violation of Code §§ 104.03 and 109.08.
50. A preponderance of the evidence does not show that the manner in which Spec's conducts its business warrants the denial, 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 pursuant to Code §§ 11.46(a)(8), 11.61(b)(2), and 11.61(b)(7).

51. Based on the foregoing findings and conclusions, Spec's package store permit P602902 should be assessed a warning for a credit law violation for the December 27, 2011, delivery, pursuant to Code § 102.32, Rules 34.2, and MPB043.
52. Based on the foregoing findings and conclusions, Spec's supplemental application for a Package Store Permit at 9618 FM 1097, Willis, Montgomery County, Texas, should be granted.
53. Based on the foregoing findings and conclusions, Spec's original application for a Package Store Permit at 13201 N RR 620, Suite B, Austin, Williamson County, Texas, should be granted.
54. Based on the foregoing findings and conclusions, Spec's supplemental application for a Package Store Permit at 4319 Kemp Boulevard, Wichita Falls, Wichita County, Texas, should be granted.

SIGNED June 23, 2017.



LINDY HENDRICKS
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS



BENNIE BROWN
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS