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TEXAS ALCOHOLIC BEVERAGE COMMISSION, Jurisdictional Petitioner	§	**BEFORE THE TEXAS**
MCLANE COMPANY, Protestant	§	
VS.	§	
RENEWAL APPLICATION OF CORE-MARK MIDCONTINENT, INC., Respondent/Applicant	§	**ALCOHOLIC**
PERMIT NO. X808338	§	
TARRANT COUNTY, TEXAS (SOAH DOCKET NO. 458-17-1235)	§	
	§	**BEVERAGE COMMISSION**

ORDER

CAME ON FOR CONSIDERATION this 14th day of March, 2018, the above-styled and numbered cause.

After proper notice was given, this case was heard by the State Office of Administrative Hearings ("SOAH"), with Administrative Law Judge ("ALJ") Robert F. Jones, Jr. presiding. After Respondent and Protestant filed separate motions for summary disposition, a hearing on the motions was held on July 14, 2017, and the SOAH record closed the same date. The ALJ made and filed a Proposal for Decision ("PFD") containing Findings of Fact and Conclusions of Law on September 8, 2017. The PFD was properly served on all parties, who were given an opportunity to file exceptions and replies as part of the record herein. Respondent and Protestant filed separate exceptions on September 25, and separate responses to the other's exceptions on October 16, 2017. The ALJ filed a reply to the exceptions and responses on October 23, 2017, recommending that no changes be made to the PFD.

I.Introduction

In his thoughtful Proposal for Decision, the ALJ recommends that Respondent's renewal application for its Class B Wholesaler's Permit be denied based on his interpretation of *Cadena Comercial USA Corp. d/b/a OXXO v. Texas Alcoholic Beverage Commission*, 518 S.W.3d 318

(Tex. 2017) and Section 102.07(a)(1) of the Alcoholic Beverage Code ("Code").[1] I must reject this recommendation because the Institutional Investors do not have an "interest" in Respondent's business that would violate Section 102.07(a)(1).

II.Context

Before getting into the legal analysis, a few words on context are in order. The Alcoholic Beverage Code is a complex set of laws that the Texas Legislature has charged the Texas Alcoholic Beverage Commission ("Commission") with enforcing for eight decades. Where industry has evolved, the Code often has not. The Commission is nonetheless responsible for ensuring "fair competition within the alcoholic beverage industry [and the] consistent, predictable, and timely enforcement of [the Code]." Code § 5.31(b)(3)-(4). This requires us to carry out an efficient and effective licensing and permitting process, Section 5.31(b)(5), without which there would be no legal alcoholic beverage industry in Texas.

The consequences of the ALJ's proposal would result in exactly that – no legal alcoholic beverage industry in Texas. Publicly-traded corporations would certainly be out of the business. But the effects would not stop there. Any financial *connection* between two permittees would become an impermissible cross-tier "interest in" another business. For example, a start-up brewery finances its business through the local bank? Unfortunately, so does the pub down the street. The local wholesaler participates in a 401k? Too bad, because the local grocery store invests in the same. The Code surely cannot anticipate prohibiting circumstances so attenuated as these.

This is the backdrop in which the Commission must consider the PFD. We take guidance from the Supreme Court's admonition in *Cadena* that statutory text cannot be read to yield absurd results. *Cadena* at 325. The ALJ concedes that his analysis would result in an absurd outcome. In amending the PFD, we interpret the Code's plain meaning to avoid that absurdity while remaining faithful to *Cadena*.

III. Legal Analysis

The Institutional Investors are not "persons having an interest in the business of a permittee" under Section 102.07.

The Commission holds that the Institutional Investors are not "persons having an interest in the business of a permittee." As an initial matter, the ALJ did not give the Commission an appropriate level of deference in its interpretation of the Code. An agency's statutory interpretation is an appropriate consideration for a court.[2] "The TABC, an administrative agency, is afforded a great deal of discretion and deference" particularly with its interpretation and application of the Alcoholic Beverage Code. *State v. Malone Serv. Co.*, 829 S.W.2d 763, 767 (Tex. 1992). "Indeed, that we are only now interpreting this statute for the first time—more than eighty years after it was enacted—suggests that the TABC has to date reasonably and effectively used that discretion and avoided pursuing the attenuated scenarios that trouble the dissent." *Cadena* at 338.

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[1] Section 102.07(a)(1) and its predecessor provision in the 1935 Liquor Control Act are practically verbatim.

[2] Texas Government Code § 311.023(6).

First, the strict regulations of mutual funds mitigate any risk of tied-house issues. The ALJ correctly found that the Institutional Investors are not "engaged" in the industry under Section 102.01(a). The funds' portfolios are typically managed by a separate, heavily-regulated entity. Mutual funds are pooled investment companies that own stock passively. The Institutional Investors have not used their votes to exert influence on the companies they own, a point conceded by Protestant and its expert.[3] Their shareholders have no voting rights in those companies.

Second, Chapter 102's title and captions suggest that the Institutional Investors do not create the same tied-house risks that existed in *Cadena*. Chapter 102's title, "Intra-Industry Relationships,"[4] suggests that tied-house prohibitions are confined to relationships between industry businesses, not external ownership by non-industry entities. Moreover, Section 102.07's title indicates that it is limited to *actions* between businesses: "Prohibited *Dealings* with Retailer or Consumer." The Institutional Investors certainly do not "deal with" a retailer or a consumer in the same way that FEMSA dealt with Heineken and OXXO. *See Cadena* at 328 (noting that the "Legislature was concerned with interests that result from various *business dealings* among and between participants in the alcohol industry") (emphasis added).

Third, in the context of the Institutional Investors, the PFD's definition of "having an interest in" another tier is incomplete. The ALJ stated that:

> a "person having an interest in the business of a permittee" is one who shares "any commercial or economic interest that provides a stake in the financial performance of an entity engaged in the manufacture, distribution, or sale of alcoholic beverages," whether or not that person is a permittee or is engaged in the alcoholic beverage industry.

The ALJ correctly stated *Cadena*'s definition of that term as it related to FEMSA's cross-tier ownership. However, entities such as mutual funds, pension funds, and private endowments[5] present a different context in which to interpret the Code.[6] An interpretation of "interest in the business of" that is appropriate for one entity is not always applicable to the other.

That principle applies here. The *nature* of the ownership is important. In *Cadena*, FEMSA owned 100% of OXXO while owning 20% of Heineken, and certainly was aware of the risk of cross-tier ownership. In this proceeding, the Institutional Investors do not have "interests in the business of" multiple tiers in the same way that FEMSA did.[7] Mutual funds' independent managers "have a duty to diversify the fund's portfolio," *Cadena* at 335, and to pursue an overall

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[3] Protestant's expert report, PX-118, at 18.

[4] A statute's title and caption are appropriate considerations when construing a statute. Texas Government Code § 311.023(7).

[5] The Supreme Court was not persuaded by FEMSA's expert report, which suggested that the State of Texas had its own multi-tier ownership issues because of the stock owned by its public pensions. *Cadena* at 335. While entities such as pension funds and endowments for universities, schools, and religious organizations are not at issue in this case, the same principles extend to those entities as well.

[6] "[W]hen interpreting broad, context-sensitive terms such as 'interest,' we must be sensitive to the context." *Cadena* at 328.

[7] At the very least, Protestant bears the burden of establishing that the Institutional Investors are aware of the consequences of a cross-tier ownership. In fact, Protestant has presented no evidence that the Institutional Investors are even aware that this administrative challenge is ongoing. Cancellation could therefore present due process issues for the Institutional Investors.

investment objective.[8] Even though the Institutional Investors own stock in Respondent and the retailers, the nature of their ownership interests by themselves do not create tied-house risks.[9] In sum, the Institutional Investors simply do not present the type of tied-house risks under Section 102.07 that the Supreme Court in *Cadena* found would be created by FEMSA's ownership interests in OXXO and Heineken.

IV. The Commission's Protest Policy

Protestant has no statutory standing to challenge Respondent's renewal application.

This proceeding has highlighted another important issue: The Code does not give a member of the general public, either an individual or a company, the right to protest all applications for licenses and permits. Instead, the Code provides for discrete circumstances when the public can file a protest. For instance, the public can protest a permit application for a sexually-oriented business. *See* Tex. Alco. Bev. Code § 11.43(b) (authorizing in certain circumstances protests of sexually- oriented businesses if "a petition is presented to the commission…").

The Commission's official policy at the time that Protestant filed its protest in 2016 allowed members of the public to challenge renewal and original applications. The policy defined "protest" as "a written allegation on an application filed during the application process by the agency, *a member of the public*, a governmental entity or a governmental official contesting the granting or issuing of an original, renewal, reinstatement, or change of location of a license or permit." The policy further provided that the Commission could refer a permit renewal protest to SOAH for a hearing on the application.[10]

In light of this pending action, the Commission believes that its protest policy should be reconsidered. The Commission questions whether it has authority to send a case to SOAH in the first place when the Code has not authorized it to do so. Under Section 5.43 of the Code "the commission designates the State Office of Administrative Hearings to conduct and make a record of any hearing authorized by this code." There is no clear statutory authority for members of the public (including companies) to protest applications other than for certain situations involving retail permits.

That principle applies here. The Code cannot be weaponized by competitors to put each other out of business. If Protestant wants a permit to do business in Texas, Protestant may submit an application and provide the required information to the Commission.[11] We take no position on whether Protestant is eligible for a license or permit because we do not have the appropriate information about Protestant's business.

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[8] *See, e.g.*, https://www.sec.gov/answers/about-lawsshtml.html.

[9] The ALJ ends his analysis with the "absurd" hypothetical raised by Justice Willett's *Cadena* dissent of the individual who puts a competitor out of business by purchasing a single share. The *Cadena* majority considered and dismissed the argument, and directly stated that it fell within the Commission's purview to do the same. *Cadena* at 338.

[10] Accordingly, the Commission's Notice of Hearing incorrectly stated that authority for the hearing existed in the Code and in the Texas Administrative Procedures Act.

[11] Contrary to Protestant's claim, the Commission never denied its application for a Wholesaler's permit and a Distributor's license. Instead, when the Commission sought information from Protestant about its application, Protestant withdrew its application. It has not submitted an application since.

V. Conclusion

The Commission enforces the Code as written. The Legislature tasks the Commission with ensuring "fair competition within the alcoholic beverage industry" through a licensing process that is "consistent, predictable, and timely." Code § 5.31(b)(3)-(4). The Commission has enforced that charge for 80 years, and now declines McLane Company's invitation to do otherwise.

VI. Findings of Fact and Conclusions of Law

After review and due consideration of the Proposal for Decision, **and with the exception of Findings of Fact 6, 8, 12, 13, 14, and 15, and Conclusions of Law 11, 13, 14, 15, 17, 20, and 21, each of which is modified as set forth separately below,** I adopt the Findings of Fact and Conclusions of Law of the ALJ that are contained in the Proposal for Decision, and incorporate those Findings of Fact and Conclusions of Law into this Order as if such were fully set out and separately stated herein.

Pursuant to the authority granted by Tex. Gov't Code §2001.058(e)(3), Finding of Fact No. 6 is modified to read as follows:

> 6. T. Rowe Price Associates, Inc. (TRP), Vanguard Group, Inc. (VG), Dimension Fund Advisors (DFA), and Blackrock Fund Advisors (BFA) (collectively, the Institutional Investors) own numerous mutual funds that own shares in CM Holding.

Pursuant to the authority granted by Tex. Gov't Code §2001.058(e)(3), Finding of Fact No. 8 is modified to read as follows:

> 8. Mutual funds owned by TRP own about 13% of CM Holding (3 million shares); mutual funds owned by VG own about 7% (1.6 million shares); mutual funds owned by DFA own about 7% (1.6 million shares); and mutual funds owned by BFA own about 6% (1.4 million shares).

Pursuant to the authority granted by Tex. Gov't Code §2001.058(e)(3), Finding of Fact No. 12 is modified to read as follows:

> 12. Mutual funds owned by TRP own about 0.1% of Brown Forman; mutual funds owned by VG own about 13%; mutual funds owned by DFA own about 0.5%; and mutual funds owned by BFA own about 2%.

Pursuant to the authority granted by Tex. Gov't Code §2001.058(e)(3), Finding of Fact No. 13 is modified to read as follows:

> 13. Mutual funds owned by TRP own about 0.2% of Nordstrom; mutual funds owned by VG own about 11%; mutual funds owned by DFA own about 2%; and mutual funds owned by BFA own about 6%.

Pursuant to the authority granted by Tex. Gov't Code §2001.058(e)(3), Finding of Fact No.14 is modified to read as follows:

> 14. Mutual funds owned by TRP own about 1% of Coors; mutual funds owned by VG own about 9%; mutual funds owned by DFA own about 0.9%; and mutual funds owned by BFA own about 2%.

Pursuant to the authority granted by Tex. Gov't Code §2001.058(e)(3), Finding of Fact No.15 is modified to read as follows:

> 15. Mutual funds owned by TRP own about 0.2% of BBB; mutual funds owned by VG own about 9%; mutual funds owned by DFA own about 0.6%; and mutual funds owned by BFA own about 2%.

Pursuant to the authority granted by Tex. Gov't Code §2001.058(e)(1), and for the reasons expressed in Part III of this Order, Conclusion of Law No. 11 is modified to read as follows:

> 11. Based on the Findings of Fact and Conclusions of Law, Core-Mark's motion for summary disposition should be granted because the pleadings, the motion for summary disposition, and the summary disposition evidence show that there is no genuine issue as to any material fact and that Core-Mark is entitled to a decision in its favor as a matter of law. 1 Tex. Admin. Code § 155.505(a).

Pursuant to the authority granted by Tex. Gov't Code §2001.058(e)(1), and for the reasons expressed in Part III of this Order, Conclusion of Law No. 13 is modified to read as follows:

> 13. TRP, VG, DFA, and BFA are not persons holding an interest in Core-Mark's business under Code § 102.07(a)(1).

Pursuant to the authority granted by Tex. Gov't Code §2001.058(e)(1), and for the reasons expressed in Part III of this Order, Conclusion of Law No. 14 is modified to read as follows:

> 14. TRP, VG, DFA, and BFA are not persons holding an interest in Nordstrom's and BBB's businesses, which are retailers licensed by TABC. Code § 102.07(a)(1).

Pursuant to the authority granted by Tex. Gov't Code §2001.058(e)(1), and for the reasons expressed in Part III of this Order, Conclusion of Law No. 15 is modified to read as follows:

> 15. Renewing Core-Mark's General Class B Wholesaler's Permit No. X808338 would not violate Code § 102.07(a)(1).

Pursuant to the authority granted by Tex. Gov't Code §2001.058(e)(1), and for the reasons expressed in Part III of this Order, and because it is contrary to modified Conclusion of Law No. 11, Conclusion of Law No. 17 is deleted.

Pursuant to the authority granted by Tex. Gov't Code §2001.058(e)(1), and for the reasons expressed in Part III of this Order, Conclusion of Law No. 20 is modified to read as follows:

> 20. Renewal of General Class B Wholesaler's Permit No. X808338 would not adversely affect the general welfare, health, peace, morals, and safety of the people or violate the public sense of decency.

Pursuant to the authority granted by Tex. Gov't Code §2001.058(e)(1), and for the reasons expressed in Part III of this Order, Conclusion of Law No. 21 is modified to read as follows:

21. Core-Mark's General Class B Wholesaler's Permit No. X808338 should be renewed.

All motions, requests for entry of Proposed Findings of Fact and Conclusions of Law, and any other requests for general or specific relief submitted by any party are denied unless specifically adopted herein.

IT IS THEREFORE ORDERED that Respondent's renewal application for Permit No. X808338 is **GRANTED**.

This Order will become **final and enforceable** on the 10th day of April, 2018, **unless a Motion for Rehearing is filed by the 9th day of April, 2018.**

SIGNED this the 14th day of March, 2018 at Austin, Texas.

Matthew Chaplin, Deputy Executive Director
Texas Alcoholic Beverage Commission

CERTIFICATE OF SERVICE

I certify that the persons listed below were served with a copy of this Order in the manner indicated below on this the 14th day of March, 2018.

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