

**TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN**

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**NO. 03-16-00039-CV**

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**Texas Alcoholic Beverage Commission, Appellant**

**v.**

**Mark Anthony Brewing, Inc., Appellee**

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**FROM THE DISTRICT COURT OF TRAVIS COUNTY, 345TH JUDICIAL DISTRICT  
NO. D-1-GN-13-003570, HONORABLE LORA J. LIVINGSTON, JUDGE PRESIDING**

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**MEMORANDUM OPINION**

The Texas Alcoholic Beverage Commission (TABC) appeals from the district court’s judgment in favor of appellee Mark Anthony Brewing, Inc., in a suit for declaratory judgment. Mark Anthony brought its declaratory-judgment action after TABC refused to approve the labels for a line of malt beverages manufactured by Mark Anthony to be marketed under the “T.G.I. Friday’s” brand. TABC rejected Mark Anthony’s application based on administrative rules that prohibit a manufacturer from using a retailer’s trade name and trademarks on its products. The issues in this case principally concern whether certain statutory and regulatory provisions regarding alcoholic-beverage licensing violate the First Amendment. Based on our determination that Mark Anthony’s labels are not protected commercial speech under the First Amendment because they relate to activity

that is unlawful under Texas’s tied-house statutes,<sup>1</sup> we reverse the district court’s judgment and render judgment that Mark Anthony take nothing on its claims.

### **Background**

Mark Anthony makes and sells flavored alcoholic beverages and, to that end, holds an out-of-state manufacturer’s permit from TABC. T.G.I. Friday’s restaurants in Texas hold retailer permits from TABC.<sup>2</sup> Mark Anthony licensed the use of the T.G.I. Friday’s brand on the labels of its new flavored malt-based beverages that are designed to be sold in grocery stores.<sup>3</sup>

As required by the Alcoholic Beverage Code, Mark Anthony submitted applications to TABC for approval of the labels on its T.G.I. Friday’s products. *See* Tex. Alco. Bev. Code § 101.67(a)(2) (requiring TABC approval of beer, ale, and malt-liquor labels). The submitted product labels included the T.G.I. Friday’s trademarked logo and the trademarked phrase “In here,

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<sup>1</sup> Texas’s tied-house statutes “are designed to prevent certain overlapping relationships between those engaged in the alcoholic-beverage industry at different levels, or tiers.” *Cadena Commercial USA Corp. v. Texas Alcoholic Beverage Comm’n*, 518 S.W.3d 318, 321 (Tex. 2017); *see* Tex. Alco. Bev. Code § 102.01(a) (defining “tied house”). The Alcoholic Beverage Code “separat[es] the industry into three independent tiers: manufacturing (brewing), distribution, and retail.” *Cadena*, 518 S.W.3d at 323 (citing Tex. Alco. Bev. Code §§ 102.01–.82). “It attempts to achieve this separation by prohibiting cross-tier relationships.” *Id.*

<sup>2</sup> At the time of the trademark licensing agreement, Carlson Restaurants Worldwide, Inc., owned 100% of the stock of T.G.I. Friday’s, Inc., a New York Corporation that owned and franchised T.G.I. Friday’s restaurants. All four of the officers of T.G.I. Friday’s of Minnesota, Inc. (the owner of the brand) were also officers of Carlson Restaurants Worldwide, Inc.

<sup>3</sup> The licensing agreement, which is between T.G.I. Friday’s of Minnesota, Inc. and Mark Anthony International, SRL, allows Mark Anthony International, SRL’s affiliates, including Mark Anthony Brewing, Inc., to use the “T.G.I. Friday’s” name, the trademarked phrase “In here, it’s always Friday,” and other proprietary marks owned by T.G.I. Friday’s of Minnesota, Inc., on labels and promotional materials for alcoholic beverages.

it's always Friday.” TABC rejected Mark Anthony’s applications for label approval, however, citing TABC rules that prohibit, stated generally, use of the name, trade name, and trademark of Texas retailer permittees on the labels of malt-based beverages. *See* 16 Tex. Admin. Code §§ 45.73(e) (Label: General) (“No application for a label shall be approved which indicates by any statement, design, device, or representation that the malt beverage is a special or private brand brewed or bottled for, or that includes the name, trade name, or trademark of any retailer permittee or licensee . . . .”), 45.82(a)(7) (Prohibited Practices) (“Containers of malt beverages or any labels on such containers . . . shall not contain . . . any statement, design, device, or representation that . . . includes the name, tradename or trademark of any retail licensee or permittee . . . .”), 45.110(c)(7) (Inducements) (listing as example of unlawful inducement the “marking, branding or labeling of a malt beverage with . . . the tradename or trademark of any retailer permittee or licensee . . . or . . . a tradename or trademark that is owned or licensed by, or is exclusively used by any retailer permittee or licensee”).<sup>4</sup> Mark Anthony asked TABC to reconsider, but TABC declined to change its decision.

In response to TABC’s rejection, Mark Anthony filed the underlying declaratory-judgment action against TABC to determine the validity and constitutionality of certain statutory provisions and TABC rules. *See* Tex. Gov’t Code § 2001.038(a) (authorizing declaratory-judgment action seeking to determine validity or applicability of administrative rule); Tex. Civ. Prac. & Rem. Code § 37.004(a) (authorizing declaratory-judgment action regarding validity of statute); *City of El*

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<sup>4</sup> Unless otherwise indicated, all references to Title 16 of the Texas Administrative Code are to the current version of rules promulgated by TABC.

*Paso v. Heinrich*, 284 S.W.3d 366, 373 n.6 (recognizing that Civil Practice & Remedies Code section 37.004(a) waives sovereign immunity for statutory-validity claims). More specifically, Mark Anthony sought declarations that (1) TABC rules banning malt-beverage labels containing a retailer name restrain commercial speech in violation of the First Amendment, *see* 16 Tex. Admin. Code §§ 45.73(e), 45.82(a)(7), 45.110(c)(7) (rules banning retailer names); (2) sales of products under such labels do not violate thing-of-value prohibitions, but even if they do, such prohibitions violate the First Amendment, *see* Tex. Alco. Bev. Code § 105.15(a)(1) (prohibitions against manufacturers and distributors giving or lending any “thing of value” to retailer); and (3) any statutory provisions prohibiting such labels are unconstitutional restrictions on commercial speech under the First Amendment.

The third declaration was sought, in part, in response to TABC’s contention at trial that Mark Anthony’s labels were “unlawful speech” not entitled to First Amendment protection because the trademark licensing agreement that allowed Mark Anthony to use T.G.I. Friday’s brand on its labels violates the following subsection of Texas’s tied-house ban:

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.

*Id.* § 102.01(h); *see Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 563 (1980) (“For commercial speech to come within [the First Amendment protection], it at least must concern lawful activity and not be misleading.”); *see also Cadena Commercial USA Corp. v. Texas Alcoholic Beverage Comm’n*, 518 S.W.3d 318, 321–23 (Tex. 2017) (describing Texas’s tied-house

ban). More specifically, TABC argued to the trial court that the trademark licensing agreement violated subsection (h) because the agreement gives T.G.I. Friday's control or management over Mark Anthony in the form of quality and manufacturing control over Mark Anthony's products that bear the T.G.I. Friday's brand; restricts Mark Anthony from, among other things, entering into a licensing agreement with a similar style restaurant chain or promoting any such chain; and requires Mark Anthony to conform to T.G.I. Friday's "code of conduct" regarding, for example, treatment of workers, management of Mark Anthony's workforce, impact on the environment, and moral and ethical conduct. TABC argues that these provisions in the trademark licensing agreement render the agreement unlawful under the tied-house statutes because they allow T.G.I. Friday's "to control or manage, financially or administratively, directly or indirectly, in any form or degree, the business or interests of [Mark Anthony] a permittee of a different level." Tex. Alco. Bev. Code § 102.01(h).

After a bench trial, the district court rendered judgment in Mark Anthony's favor, making the following declarations:

- TABC rules 45.73(e), 45.82(a)(7), and 45.110(c)(7), as applied to Mark Anthony, violate the First Amendment.
- Sales of off-premises products bearing the labels at issue do not violate thing-of-value prohibitions, and in the alternative, those prohibitions are unconstitutional as applied.
- The trademark license agreement allowing Mark Anthony to use the T.G.I. Friday's brand does not violate section 102.01(h), and in the alternative, section 102.01(h) and rule 45.110(c)(3) are unconstitutional as applied.

In support of its judgment, the district court also issued findings of fact and conclusions of law, including that the labels at issue here "relate to a lawful activity, the sale of alcoholic beverages"; the license agreement "does not give Mark Anthony any ability to control or manage the business

or interests” of the Texas retail permittee restaurants; and the license agreement “does not give the restaurants any ability to control or manage the business or interests of Mark Anthony.”

### **Discussion**

On appeal, TABC raises three challenges to the district court’s judgment: (1) the district court erred by concluding that Mark Anthony’s proposed labels related only to lawful activity and, thus, constituted commercial speech entitled to First Amendment protection; (2) even if the labels here are not related to unlawful speech, the district court erred in concluding that the challenged rules and statute violated the First Amendment; and (3) the district court abused its discretion by allowing Mark Anthony to assert an unpleaded claim after the trial was over. Because we agree with TABC that Mark Anthony’s speech here is not entitled to First Amendment commercial-speech protection, we need only address TABC’s first issue.

The threshold question in any free-speech analysis is whether the communication at issue is protected by the First Amendment. *See, e.g., Central Hudson*; 447 U.S. at 566 (“At the outset, we must determine whether the expression is protected by the First Amendment.”). Under well-established Supreme Court jurisprudence, commercial speech is afforded First Amendment protection, although to a lesser extent than other constitutionally guaranteed expression. *See id.* at 561 (“The First Amendment, as applied to the States through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation.”) (citing *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761–62 (1976)). In order for commercial speech to come within First Amendment protection, however, it must “concern lawful

activity and not be misleading.” *Central Hudson*, 447 U.S. at 563, 566.<sup>5</sup> Commercial speech that does not concern lawful activity is not protected. *See id.*; *State Bd. of Med. Exam’rs v. Burzynski*, 917 S.W.2d 365, 370–71 (Tex. App.—Austin 1996, writ denied) (holding that doctor’s commercial speech was not entitled to First Amendment protection because it did not concern lawful activity).

The speech at issue here—i.e., Mark Anthony’s use of the T.G.I. Friday’s brand on Mark Anthony’s product labels—does not concern lawful activity when examined through the prism of Texas’s alcoholic-beverage regulations and tied-house ban. Texas law, as noted above, prohibits an agreement that allows a member of one tier (manufacturer, distributor, or retailer) “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.” Tex. Alco. Bev. Code § 102.01(h). Under the broad test set forth in subsection (h), T.G.I. Friday’s ability to oversee the quality of Mark Anthony’s products gives T.G.I. Friday’s some form or degree of, at the very least, indirect control over Mark Anthony’s business or interest. *See The American Heritage Dictionary of the English Language* 1064 (5th ed. 2011) (defining “manage” as “to have charge of; direct or administer” and “to exert control over; regulate or limit toward a desired end”); *Compact Oxford English Dictionary* 1028 (2d ed. 1989) (defining “manage” as, relevant here, “to control and direct the affairs of”); *see also Cadena*, 518 S.W.3d at 325–34 (explaining meaning of direct and indirect interest in different

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<sup>5</sup> If the commercial speech clears these two hurdles, the government must have a “substantial” interest in regulating the speech and, if so, any government regulation of the speech must “directly advance[] the governmental interest asserted” and must not be “more extensive than necessary to serve that interest.” *Central Hudson Gas & Elec. v. Public Serv. Comm’n*; 447 U.S. 557, 566 (1980).

subsection of tied-house ban and construing plain language of that subsection to hold that stock ownership in manufacturer combined with indirect ownership interest in potential retailer violated tied-house ban). As such, the trademark licensing agreement is unlawful under subsection (h) of the tied-house ban and, therefore, Mark Anthony's marketing or advertising use of T.G.I. Friday's brand under that agreement "relates to" or "concerns" unlawful activity. *See Ford Motor Co. v. Texas Dep't of Transp.*, 264 F.3d 493 (5th Cir. 2001) (holding that Ford's online showroom of used vehicles advertised for sale "concerned unlawful activity," and thus was not protected commercial speech under *Central Hudson*, because Texas law prohibited manufacturers like Ford from selling cars directly to consumers).

Mark Anthony argues that the trademark licensing agreement does not violate section 102.01(h) because the agreement does not give T.G.I. Friday's "coercive" control over Mark Anthony. In support of this argument, Mark Anthony references the trial court's conclusion that subsection (h) is not violated by the sale of products containing the name of a retailer under a trademark licensing agreement with the brand owner and its finding that the agreement "does not give the [T.G.I. Friday's] restaurants any ability to control the business or interests of Mark Anthony." But Mark Anthony's argument and the district court's "finding" ignore the plain language of subsection (h)'s prohibition against agreements "to control *or manage* directly *or indirectly*, in *any form or degree*, the business or interests of a permittee of a different level." Tex. Alco. Bev. Code § 102.01(h) (emphases added). As noted, the ability to oversee the quality control of Mark Anthony's malt-based beverages is, at the very least, some form or degree of indirect control or management of Mark Anthony's business or interest.



Mark Anthony argues further that its labels at issue here cannot concern or relate to unlawful activity because malt beverages and the selling of malt beverages is legal in Texas. While that is true, the fact here is that the specific labels at issue arise from an underlying agreement that violates Texas’s tied-house ban. Similar to Ford’s activities in *Ford Motor Co. v. Texas Department of Transportation*, Mark Anthony’s labels or advertising contain true facts and promote the legal sale of a legal product, but the label/advertising itself is “part of an integrated course of conduct [that] violates Texas law,” and thus is not entitled to First Amendment protection. *See* 264 F.3d at 507 (citing *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)).

Mark Anthony argues that *Ford* does not apply here because Ford was advertising the very activity that Texas law made illegal—i.e., online retail sales that did not go through a dealer. But even if we consider Mark Anthony’s speech to be a step removed from Ford’s conduct, the relevant inquiry here is not whether the speech itself is “inherently unlawful,” *see id.* at 506, or references something unlawful, but whether the speech “concerns lawful activity” or, described another way, “relates to unlawful activity.” *Central Hudson*, 447 U.S. at 563, 566 (“For commercial speech to come within the First Amendment, it at least must concern lawful activity and not be misleading.”). Further, as noted above, because Mark Anthony’s speech stems from an agreement that is unlawful under Texas law, the speech is part of an integrated course of conduct that violates Texas’s tied-house ban—i.e., a trademark licensing agreement that gives a member of one level some form of direct or indirect control over a member of another level. *See Ford*, 264 F.3d at 507.

Mark Anthony argues that subsection (h) should not be read to condemn trademark licensing agreements. We agree. The plain language of subsection (h) does not prevent trademark

licensing agreements; instead, it prohibits only agreements that give a member of one level the ability “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.” Tex. Alco. Bev. Code § 102.01(h). A trademark licensing agreement that does not do this would, presumably, not be prohibited by subsection (h).

In sum, Mark Anthony’s speech here is related to unlawful conduct and, therefore, is not entitled to First Amendment protection. Accordingly, we sustain TABC’s first issue on appeal. And having done so, we need not address its remaining issues.

### **Conclusion**

Because Mark Anthony’s labels are not entitled to First Amendment protection, the district court erred in rendering judgment that section 102.01(h) of the Texas Alcoholic Beverage Code and TABC rules 45.73(e), 45.82(a)(7), 45.110(c)(3), and 45.110(c)(7) violate the First Amendment. Accordingly, we reverse the district court’s judgment and render judgment that Mark Anthony Brewing take nothing on its claims.

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Jeff Rose, Chief Justice

Before Chief Justice Rose, Justices Field and Bourland

Reversed and Rendered

Filed: October 13, 2017