

TEXAS ALCOHOLIC BEVERAGE  
COMMISSION

VS.

CADENA COMERCIAL USA CORP  
D/B/A OXXO, APPLICANT

TABC NO. 607230

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BEFORE THE HONORABLE

TRAVIS COUNTY JUDGE  
SAMUEL T. BISCOE

TRAVIS COUNTY, TEXAS

### ORDER DENYING ORIGINAL APPLICATION FOR PERMIT

Came to be heard this 1<sup>st</sup> day of November, 2012, the forgoing Original Application for a Wine and Beer Retailer's Permit and Retail Dealer's On-Premise Permit submitted by Cadena Comercial USA Corp d/b/a/ OXXO, before the Honorable Samuel T. Biscoe, Travis County Judge, presiding, who finds that due and legal notice was given as required by law and testimonial and documentary evidence was presented. The Applicant, Cadena Comercial USA Corp d/b/a/ OXXO was present with counsel, James Cousar. Judith Kennison appeared as attorney for the Texas Alcoholic Beverage Commission ("TABC"). After reviewing the testimony and documents on file in this matter, the Court makes the following findings of fact and conclusions of law:

#### I. FINDINGS OF FACT

1. Cadena Comercial USA Corp., a Texas business corporation, is the Applicant in this matter.
2. On April 12, 2011, Applicant applied to the TABC for a Wine and Beer Retailer's Off-Premise Permit (the "Permit").
3. Applicant has applied for the Permit for a premises located at 8868 Research Boulevard, Suite 604, Austin, Travis County, Texas.
4. Neither the TABC nor any other governmental unit has objected to the requested physical location of the Permit named by Applicant in its application (the "Application").

5. With the exception of the statutory and regulatory provisions cited by TABC in the March 22, 2012, Notice of Protest (Texas Alcoholic Beverage Code §§ 102.01 (a)(b)(c)(h) and 25.04, and/or 102.07(a)(1), and/or 102.11(a), 61.42(a)(3), 61.43(a)(9), 61.44(a)(1), and 61.44(b)(1)), there is no impediment under TABC regulations for the operation of a Wine and Beer Retailer's Off Premise Permit at 8868 Research Boulevard, Suite 604, Austin, Travis County, Texas.
6. Applicant complied with TABC's filing requirements in filing the Application, and fees or charges are currently owed by Applicant to the TABC in connection with the Application.
7. At the request of TABC representatives, Applicant supplemented the Application with additional information regarding ownership and citizenship of Applicant, its parent entities, and their officers and directors as requested. The Supplemental Information is set out in attachments that are part of the Application.
8. The Travis County Judge has jurisdiction to hear the Application and to enter orders on all contested matters pursuant to §§26.03, 61.31 and 61.32 of the Texas Alcoholic Beverage Code.
9. The statutory and regulatory provisions cited in the Notice of Protest (Texas Alcoholic Beverage Code §§ 102.01(a)(b)(c)(h) and 25.04, and/or 102.07(a)(1), and/or 102.11(a), 61.42(a)(3), 61.43(a)(9), 61.44(a)(1), and 61.44(b)(1) constitute the entire basis of the TABC's objections to the Application.
10. But for the operation of the Texas Alcoholic Beverage Code provisions cited in the Notice of Protest (Texas Alcoholic Beverage Code §§ 102.01(a)(b)(c)(h) and 25.04, and/or 102.07(a)(1), and/or 102.11(a), 61.42(a)(3), 61.43(a)(9), 61.44(a)(1), and 61.44(b)(1)), the effects of which are in dispute between TABC and Applicant, Applicant is entitled to be granted a Wine and Beer Retailer's Off-Premise Permit at the location named in the Application.
11. Petitioner's Exhibit No. 5 is a chart that accurately describes the current ownership structure of the parent companies of Applicant and the parent companies of Heineken Italia, Heineken Brouwerijen, and CCM (the "Heineken Manufacturing Tier Licensees").



12. As described by the Applicant in the Application, the ownership interests of the FEMSA entities as of August 10, 2011, were as follows:
  - a. Applicant Cadena Comercial USA Corp. is a wholly-owned subsidiary of FEMSA Comercio, S.A. de C.V, which is owned 0.001% by Emprex Servicios, S.A. de C.V. and 99.999% by Grupo Industrial Emprex, S.A. de C.V.
  - b. Emprex Servicios, S.A. de C.V. is owned 0.001% by Perfil Corporativo, S.A. de C.V. and 99.999% by FEMSA.
  - c. Grupo Industrial Emprex, S.A. de C.V is owned 0.001% by Emprex Servicios, S.A. de C.V. and 99.999% by FEMSA.
  - d. Perfil Corporativo, SA de C.V. is owned 0.001% by FEMSA and 99.999% by Emprex Franquicias, S.A. de C.V.
  - e. Emprex Franquicias, S.A. de C.V. is owned 0.001% by Emprex Servicios, SA de C.V. and 99.999% FEMSA.
  - f. Compania Internacional de Bebidas, S.A. de C.V. is owned 0.001 % by Emprex Servicios, S.A. de C.V and 99.999% by FEMSA.
  - g. FEMSA is a publicly-traded company in the stock markets of Mexico City and New York. 38.69% of the outstanding shares of FEMSA are held by the INVEX Irrevocable Management Trust number 463, with the remaining 61.31% free float shares held by public investors.
  - h. Excepting Applicant, all named entities listed above are Mexican entities.
13. As described by the Applicant in the Application, the ownership interests of the European entities as of August 10, 2011 were as follows:
  - a. TH Equity Beer Limited, Ltd. is a wholly-owned subsidiary of FEMSA.
  - b. CB Equity, LLP is owned 30% by Compania Intemacional de Bebidas, S.A. de C.V., 25% by Grupo Industrial Emprex, SA de C.V., 44.999% FEMSA and 0.001% by TH Equity Beer, Ltd.

- c. Premium Enterprise Management B.V. is a wholly-owned subsidiary of CB Equity, LLP.
  - d. The partnership interests in CV1 Netherlands Beer Partnership One CV are divided as follows: 0.0001% by TH Equity Beer, Ltd., 0.0001% by Premium Enterprise Management B.V. and 99.9998% by CB Equity, LLP.
  - e. The partnership interests in CV2 Netherlands Beer Partnership Two CV are divided as follows: 0.0001% by CB Equity, LLP, 0.0001% by Premium Enterprise Management B.V. and 99.9998% by CV1 Netherlands Beer Partnership One CV.
  - f. TH Beer Equity, Ltd. And CB Equity, LLP are United Kingdom entities. Premium Enterprise Management B.V., CV1 Netherlands Beer Partnership One CV and CV2 Netherlands Beer Partnership Two CV are Netherlands entities.
14. FEMSA, Heineken NV, Heineken Holding NV are among the parties to an April 30, 2010 "Corporate Governance Agreement" arising from Heineken NV's acquisition of certain assets of FEMSA as of April 12, 2011.
- a. The Corporate Governance Agreement (clause 2) authorizes FEMSA to nominate two out of ten members, or 20% of the Supervisory Board of Heineken NV:

*2.2 The number of members of the H-Supervisory Board shall be determined by the H-Supervisory Board. At the date hereof the H-Supervisory Board consists of ten (10) members and the Femsa H-Representatives shall be two (2) of such ten (10) members.*

*2.3 For the duration of and subject to the terms of this Agreement, Femsa shall be entitled to nominate at least two (2) members for appointment to the H-Supervisory Board, the initial two members being appointed in accordance with Clause 2.1. The Parties acknowledge and agree that the number of H-Supervisory Board members to be nominated by Femsa is based on the assumption that the H-Supervisory Board consists of ten (10) members. Regardless of any increase or decrease in*



*the total number of members of the H-Supervisory Board, and subject to Clause 8 and the remaining provisions of this Agreement, Femsa shall at all times be entitled to nominate the whole number of members which is closest to two-tenths (20%) of the total number of members of the H-Supervisory Board from time to time provided that Femsa shall at all times be entitled to nominate at least two (2) members.*

- b. The Corporate Governance Agreement (clause 3) authorizes FEMSA to nominate one member of the Board of Directors of Heineken Holding NV, which currently consists of five Directors.

*3.2 For the duration of and subject to the terms of this Agreement, Femsa shall be entitled to nominate one (1) member for appointment to the HH-Board of Directors, the initial member being appointed in accordance with Clause 3.1. So long as Femsa maintains its right to nominate the Femsa HH Representative in accordance with this Agreement, L 'Arche Green shall vote all of its Holding Shares in favour of the proposition that (i) a Femsa HH-Representative duly qualified and nominated as member of the HH-Board of Directors pursuant to this Agreement shall be appointed by the general meeting of shareholders of Holding in accordance with such nomination, (ii) the general meeting of shareholders of Holding shall promptly suspend or dismiss a Femsa HH-Representative as member of the HH-Board of Directors if a proposal to that effect is made by Femsa and (Hi) subject to Clause 3.4, no Femsa HH-Representative shall be suspended or dismissed by the general meeting of shareholders of Holding as a member of the HH-Board of Directors without the approval of Femsa, Stichting Beheer and Stichting Prioeres have agreed to give their affirmative support to sub clause (i), (ii) and (Hi) of this Clause 3.2 for as long as Femsa maintains its right to nominate the Femsa-HH Representative in accordance with this Agreement.*

- c. The Corporate Governance Agreement (clause 9) limits FEMSA and entities controlled by FEMSA to a maximum ownership interest of 20% in Heineken NV, referred to in the Corporate Governance Agreement as a "Voting Ownership Cap," including any indirect ownership through Heineken Holding NV;

## **Clause 9 Standstill**

*9.1 Except as provided in Clause 9.2 and Clause 9.3, the Femsa Parties agree and undertake towards HNV Holding and L 'Arche Green that they shall not, and shall procure that no member of the Femsa Group shall, directly or indirectly, acquire, offer or propose to acquire or agree to acquire, whether by purchase, tender or exchange offer, through the acquisition of control of another person (whether by way of merger, consolidation or otherwise), by joining a partnership, syndicate or other group or otherwise, an Economic Interest of more than 20% in HNV or more than 20% of all outstanding Holding Shares (in each case, such capped percentages to be referred to as a " Voting Ownership Cap") and, in relation to HNV such Voting Ownership Cap shall be deemed to take account of all HNV Shares held as treasury shares, it being understood that for purposes of this Agreement, such ownership includes ownership by any member of the Femsa Group who, directly or indirectly, through any contract, arrangement, understanding, relationship or otherwise, has or shares (i) voting power which includes the power to vote, or to direct the voting of such security; and/or (ii) investment power which includes the power to dispose, or to direct the disposition, of such security (in either case, "Beneficial Ownership"); provided that for purposes of determining Beneficial Ownership, a person shall be deemed to be the Beneficial Owner of any securities which may be acquired by such person pursuant to any agreement, arrangement or understanding or upon the exercise of conversion rights, exchange rights, warrants or options, or otherwise.*

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*9.3 Notwithstanding any other provision of this Agreement, in no event may either Femsa Party or any members of the Femsa Group, directly or indirectly, including through any agreement or arrangement, exercise any voting rights, during the term of this Agreement, in respect of any Shares Beneficially Owned by either of them and any members of the Femsa Group, if and to the extent such shares are in excess of the applicable Voting Ownership Cap.*



15. In 2004, TABC published and made available to applicants "Application Instructions for Alcoholic Beverage License or Permit" (the "2004 Application Instructions") that directed new applicants which were publicly held companies (or which had an ownership change) to "submit a list of all officers, directors and stockholders holding 5% or more."
16. TABC's 2004 "Application Instructions" are no longer published or made available to applicants.
17. TABC's current "Application Guide for Retailers" makes no reference to a requirement for applicants to list stockholders holding 5% or more of the stock of a publicly held company.
18. Texas statutes and TABC regulations do not define the terms "interest," "interest in a permit" or "interest in the business of" used in the Texas Alcoholic Beverage Code. TABC and Applicant stipulate to the expertise of their respective experts, Evan Lawson for Petitioner TABC, and William Charlton and Stephen Magee for Applicant, in their respective fields of expertise for which they are tendered.
19. Petitioner withdrew its allegation of violation of Sec. 61.44(a)(1) of the Code.
20. The applicant has a real interest in the business or premises of the holder of a manufacturer's or distributor's license.
21. For licensing purposes, as a subsidiary of FEMSA, the applicant is a manufacturer.
22. For licensing purposes, as a subsidiary of FEMSA, the applicant has an interest in the business of a brewer.
23. Issuance of the requested permit would violate Sections 102.01(c), (h), 102.07(a)(1), and 102.11(1) of the Code.

## **II. CONCLUSIONS OF LAW**

1. The Court has jurisdiction over this matter pursuant to Texas Alcoholic Beverage Code ("Code") §§61.31 and 61.32.

2. Notice of the hearing was provided as required by Tex. Gov't. Code §§2001.051-052.
3. The Texas Alcoholic Beverage Code Section 61.39 provides that any person may contest the applicant's right to secure a license.
4. The Texas Alcoholic Beverage Code Section 61.32 provides that the county judge shall conduct the hearing on whether a legal basis exists to refuse a license.
5. The Texas Alcoholic Beverage Code Section 61.42(a)(3) provides the county judge with the authority to deny an application for a license if he has reasonable grounds to believe and finds that the place or manner in which the applicant for a retail dealer's license may conduct his business warrants a refusal of a license based on the general welfare, health, peace, morals, safety, and sense of decency of the people.
6. Based on the Findings of Fact, issuance of the license would result in the applicant in violation of Chapter 102 of the Code and thereby warrants refusal of the license based on the general welfare of the people.
7. The Texas Alcoholic Beverage Code Section 61.43(a)(9) provides that the county judge may refuse to approve an application for a license as a distributor or retailer if the county judge has reasonable grounds to believe and finds that the applicant for a retail dealer's license will conduct business in a manner contrary to law or in a place or manner conducive to a violation of the law.
8. The Texas Alcoholic Beverage Code Section 61.44 (b)(1) provides that the county judge may refuse to approve an application for a retail dealer's license if he has reasonable grounds to believe and finds that the applicant has a real interest in the business or premises of the holder of a manufacturer's or distributor's license.
9. The Texas Alcoholic Beverage Code Section 102.07(a) provides that except as provided in Subsections (b), (d), and (g), 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



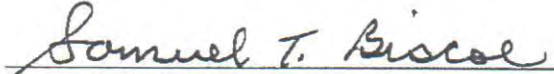
employee of such a person, may own or have a direct or indirect interest in the business, premises, equipment, or fixtures of a retailer.

10. The Texas Alcoholic Beverage Code Section 102.11 provides that no manufacturer or distributor directly or indirectly, or through a subsidiary, affiliate, agent, employee, officer, director, or firm member, may own any interest in the business or premises of a retail dealer of beer.
11. Based on the Findings of Fact, the application must be refused in accordance with Sections 61.42(a)(3), 61.43(a)(9), 61.44(a)(1), and Sec. 61.44(b)(1) of the Code.

### ORDER

For these reasons, it is the decision of this Court that said original application for a Wine and Beer Retailer's Permit On-Premise submitted by Cadena Comercial USA Corp d/b/a/ OXXO, is hereby **DENIED**.

SIGNED THIS 20<sup>th</sup> DAY OF DECEMBER, 2012.

  
Samuel T. Biscoe, County Judge

Certificate of Service

Judith L. Kennison  
Attorney – TABC  
512-206-3498

James E. Cousar  
Attorney for Applicant  
512-469-6180