

DISTRICT OF COLUMBIA
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ALCOHOLIC BEVERAGE CONTROL BOARD
+ + + + +
MEETING

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IN THE MATTER OF: :
: :
Prospect Dining, LLC :
t/a George : Show Cause
3251 Prospect Street, NW : Hearing
Retailer CR - ANC-2E :
License No. 78058 :
Case #11-AUD-00004 :
: :
(Failed to Meet Food Sales :
Requirements, Failed to :
Maintain Books & Records) :
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January 11, 2012

The Alcoholic Beverage Control Board met in the Alcoholic Beverage Control Hearing Room, 2000 14th Street, N.W., Suite 400S Washington, D.C. 20009, Chairperson

Ruthanne Miller, presiding.

PRESENT:
RUTHANNE MILLER, Chairperson
NICK ALBERTI, Member

DONALD BROOKS, Member
HERMAN JONES, Member
CALVIN NOPHLIN, Member
MIKE SILVERSTEIN, Member
JEANNETTE MOBLEY, Member

ALSO PRESENT:

LOUISE PHILLIPS, OAG

1 P-R-O-C-E-E-D-I-N-G-S

2 (10:54 a.m.)

3 CHAIRPERSON MILLER: And we have
4 one more case for the morning dealing with a
5 Show Cause Hearing and that is Case No. 11-
6 AUD-00004, Prospect Dining, LLC t/a George at
7 3251 Prospect Street and the License No. is
8 78058. And I see the parties are at the
9 table.

10 Would you introduce yourselves for
11 the record, please?

12 MS. PHILLIPS: Good morning and
13 Happy New Year, Board Members. Louise
14 Phillips, Assistant Attorney General for the
15 District of Columbia.

16 MR. KLINE: Good morning and
17 welcome, Chairperson Miller, and new Board
18 Member Mobley, and Happy New Year to everyone
19 else. Andrew Kline on behalf of the licensee.
20 Seated to my left is Logan West. I gave a
21 letter to Ms. Walker earlier from David Chung,
22 he was one of the principals of the licensee,

1 authorizing Mr. West to appear today. And we
2 have electronically transmitted mine and his
3 appearance to legal staff.

4 CHAIRPERSON MILLER: I'm sorry,
5 did you introduce --

6 MR. KLINE: Logan West --

7 CHAIRPERSON MILLER: Okay.

8 MR. KLINE: -- is seated to my
9 left.

10 CHAIRPERSON MILLER: Okay. Logan
11 West. And you are?

12 MR. WEST: I'm the general manager
13 of George.

14 CHAIRPERSON MILLER: Okay.

15 MR. KLINE: And you do have a
16 Letter of Authorization or you should have it.
17 I gave it to Ms. Walker.

18 CHAIRPERSON MILLER: Okay. Okay.
19 Good. So that's in the record.

20 Are there any preliminary matters?

21 MR. KLINE: Well, first of all, we
22 would waive any -- we received the notice. We

1 understood it. We waive any required formal
2 reading.

3 CHAIRPERSON MILLER: Okay. Good.

4 MS. PHILLIPS: I believe Mr. Kline
5 has a preliminary matter.

6 CHAIRPERSON MILLER: Okay.

7 MR. KLINE: I think we're ready
8 for action. We are requesting jointly that
9 the Board continue this hearing and
10 specifically waive the requirements of the six
11 day Notice of Continuance pursuant to 23 DCMR
12 1600.2, which says that the Board can waive
13 the rules for good cause shown.

14 This case involves records and a
15 field audit and is very similar to a decision
16 that the Board recently issued in the Matter
17 of C. Fields Group, LLC t/a District Lounge
18 and Grill, Case No. 11-AUD-0001.

19 In that case, it seems, at least
20 from our standpoint, that what the Board is
21 most concerned about in these cases is having
22 the auditor look at the records and make a

1 determination as to whether minimum food sales
2 have been met.

3 We have the records contrary to
4 the charge. The records are available. They
5 are out here in a box. And rather than go
6 through a long hearing concerning whether
7 minimum food sales have been met, which we
8 would already have been charged anyway, we
9 would suggest that the better course of action
10 given the Board's direction in the District
11 Lounge case, would be to continue this matter
12 and give the auditor an opportunity to come in
13 and look at these records and make a
14 determination and then proceed further from
15 there.

16 CHAIRPERSON MILLER: Now, let me
17 just ask, can I ask you a quick follow-up
18 though? How long would that take and why
19 wasn't that done before now?

20 MR. KLINE: Sure. The records of
21 this establishment are primarily kept
22 electronically. The -- and we have someone

1 who would testify that the records were
2 overwritten. They were believed to be not
3 available.

4 In preparing for this hearing and
5 in talking to representatives of the licensee
6 and asking very specific questions about the
7 recordkeeping, it came to light that there are
8 paper copies of the exact same records that
9 were printed out before the electronic
10 versions were destroyed.

11 So although they didn't have them
12 in the manner that they believed that they had
13 them on a regular basis, there was a backup
14 that they didn't even realize that existed.
15 And we learned it in preparing for this
16 hearing and spoke with Ms. Phillips and
17 determined that this is probably the best way
18 to go, given the Board's decision in the
19 District Lounge case.

20 CHAIRPERSON MILLER: Ms. Phillips?

21 MS. PHILLIPS: While I don't agree
22 with everything that Mr. Kline said, I do

1 agree that the sort of holding in the District
2 Lounge case, which he cited, states a
3 preference, a Board preference to having the
4 records reviewed before we come to any
5 conclusions on a charge.

6 This District Lounge case, I
7 think, Mr. Kline and I both tried this, some
8 Members of the Board were present at the time
9 we tried this, it was a very, very long
10 hearing and the result came out that the
11 Board's preference is that it wants to look at
12 the records, have the auditor look at the
13 records before we go forward.

14 And it kept this charge in this
15 particular case, District Lounge and Grill, it
16 kept the matter open for review by the auditor
17 for 30 days. And since if you are going to be
18 considering time, what I like in these matters
19 given, is that we not set it right away,
20 because I don't know what the auditor's
21 schedule is. I don't know what is going to
22 come up, so a minimum of 30 days, if the

1 continuance is granted, for the auditor to
2 look at it, because I don't see why the Agency
3 or the District should be rushed.

4 MR. KLINE: And we don't object to
5 that. And I would defer to the Agency as to
6 how long the auditor needs to get out and do
7 his review.

8 CHAIRPERSON MILLER: Did you have
9 a question?

10 MEMBER SILVERSTEIN: Yes.

11 CHAIRPERSON MILLER: Okay. Mr.
12 Silverstein?

13 MEMBER SILVERSTEIN: Ms. Phillips,
14 are you saying that we would save time and
15 have a clear understanding of the facts if we
16 had an auditor look at this first? And that
17 that would probably be better for the Board as
18 well as both sides?

19 MS. PHILLIPS: This is why the
20 District consented and asked for more time to
21 hear this opinion again, because the District
22 is always interested in judicial economy and

1 resource economy. And so given those two
2 queries that you made and this opinion, which
3 is very, very recent just at the every end of
4 last year, as I recall, I can't see a date on
5 it quickly, I believe that the answer to your
6 question is yes.

7 In the interest of judicial
8 economy and Agency economy, we should continue
9 this matter.

10 MEMBER SILVERSTEIN: Even though
11 this matter is brought to us with less than
12 seven days, which is something that is much
13 more than a preference for us, it's a matter
14 of almost fury.

15 MS. PHILLIPS: Right. And I
16 understand that. And I also recognize that,
17 as Mr. Kline indicated, he has retained in
18 this matter yesterday and was preparing for
19 it. I recognize that while I don't agree that
20 we should always continue because client's
21 engage lawyers, this is the first time they
22 have made a request for a lawyer.

1 I believe that lawyers are always
2 preferable in administrative matters as well
3 as court matters. And I understand that there
4 are these certain emergencies that at a first
5 time request should be granted, despite the
6 fact that they didn't do it six days in
7 advance because it was an impossibility in
8 this case.

9 MR. KLINE: And frankly, that's
10 not the basis of the request. I mean, if one
11 looks at 1600.2, it says that the Board for
12 good cause shown and in the interest of
13 justice, it says to prevent hardship -- the
14 hardship would really be to all parties. In
15 the interest of justice, we believe, requires
16 that the Board have all the facts, that the
17 Government have all the facts coming into the
18 case and that the licensee have an opportunity
19 to present all of the facts, before the case
20 moves forward, because the central issues that
21 the Board, in my experience, has been
22 concerned about is minimum food service.

1 And recordkeeping is merely a way
2 to demonstrate compliance with minimum food
3 service. So if we look at the objectives of
4 the statute, I think that the interest of
5 justice would certainly be served by all
6 parties of a clear understanding of what the
7 records actually reflect.

8 CHAIRPERSON MILLER: Mr. Jones?

9 MEMBER JONES: Thank you, Madam
10 Chair. Licensee, when did you retain Andrew
11 Kline as your representative?

12 MR. WEST: I believe it was
13 yesterday.

14 MR. KLINE: Yesterday.

15 MEMBER JONES: Yesterday?

16 MR. KLINE: I got --

17 MEMBER JONES: Well, who was your
18 legal counsel prior to Andrew Kline?

19 MR. WEST: On this matter?

20 MEMBER JONES: Who was your legal
21 counsel related to ABC matters or ABRA matters
22 prior to Andrew Kline?

1 MR. WEST: We don't have one
2 specific attorney to work with. We retain
3 different counsel for --

4 MEMBER JONES: Name the counsels
5 you have used prior to Andrew Kline for ABC or
6 ABRA-related matters.

7 MR. WEST: Um, I would not have
8 that information. It's typically the owners
9 who do that.

10 MEMBER JONES: See, I'm at a loss
11 as to how it is that you just retained an
12 attorney for this matter that has been around
13 for longer than yesterday or longer than last
14 week for this matter. It's not like you are
15 unfamiliar with the ABRA process or ABC
16 matters. Is that a fair statement? Are you
17 unfamiliar with ABC matters?

18 MR. WEST: No.

19 MEMBER JONES: Have you used an
20 attorney other than Andrew Kline for ABC
21 matters in the past?

22 MR. WEST: I believe that we have.

1 Again, that's something that the owners have
2 dealt with, not myself.

3 MEMBER JONES: Are you
4 representing the owners at this point?

5 MR. WEST: In today's hearing,
6 yes.

7 MEMBER JONES: Yes. So you are
8 speaking on behalf of them, correct?

9 MR. WEST: Yes.

10 MEMBER JONES: Okay. I'm a little
11 troubled that you are using that as part of
12 the rationale for wanting to have a
13 continuance on this matter. I'm very
14 disappointed to be perfectly frank that that's
15 one of the reasons that you are using for this
16 matter. Yes, Mr. Kline?

17 MR. KLINE: Mr. Jones, I did not
18 argue that. I haven't argued that that's why
19 we have asked for the continuance. The reason
20 that we have asked -- I did say that --

21 MEMBER JONES: That's one of the
22 reasons.

1 MR. KLINE: -- we learned of --
2 no, it's not.

3 MEMBER JONES: Okay. What is your
4 only reason?

5 MR. KLINE: The only reason is the
6 records are available. We will be able to
7 show that the records are available. The
8 Board and all parties would benefit from the
9 auditor looking at those records and making a
10 determination as to whether minimum food sales
11 are met.

12 MEMBER JONES: Okay.

13 MR. KLINE: And the fact that the
14 licensee did not contact me to get me involved
15 in this matter until yesterday, I agree with
16 you. I would not come before you and say
17 well, gee, they just contacted me yesterday,
18 we want more time. I have been before you too
19 many times to do that.

20 And if that were the fact that we
21 were relying upon, I wouldn't waste my breath.
22 But given the District's opinion and given the

1 facts of this case, which are very similar in
2 terms of records and food service compliance,
3 and looking at the case and determining that
4 the records were available, I contacted Ms.
5 Phillips and it was thought that in the
6 interest of judicial economy, all parties
7 would better be served.

8 Otherwise, we are prepared to go
9 forward to the extent that that would be
10 helpful. I don't think it would be, but
11 that's my opinion.

12 MEMBER JONES: Now, what are the
13 charges, Ms. Phillips?

14 MS. PHILLIPS: It's a failure to
15 meet food sales or document food sales and
16 failure to maintain -- keep and maintain on
17 the premises adequate books and records.

18 MEMBER JONES: And just for
19 clarification, does an owner have to -- does
20 an audit have to be performed in order for one
21 to be found in violation of those charges?

22 MS. PHILLIPS: An audit has to be

1 utilized in order to do Charge 1.

2 MEMBER JONES: To do Charge 1?

3 MS. PHILLIPS: To do Charge 1.

4 MEMBER JONES: Okay.

5 MS. PHILLIPS: And it makes little
6 sense to me to do it piecemeal. If you
7 recall, this hearing was a very, very long
8 hearing where in defense, in the District
9 Lounge case, of that, they brought in all the
10 records and we discussed what their system was
11 and it was an over four hour hearing.

12 And in the end, the conclusion of
13 the Board was, in a written order, that give
14 the auditor 30 days to look at the records, so
15 we can make an informed decision. And that's
16 why I agreed to join the continuance motion.

17 MEMBER JONES: And would it be
18 getting into the merits of the case or inquire
19 as to why the audit hasn't been performed?

20 MS. PHILLIPS: I believe that Mr.
21 Kline has spoken to that. And I believe that
22 it would be better -- the Board would be

1 better served in waiting to do that when we
2 have all the information that we need to
3 pursue all of the charges that are available.

4 MEMBER JONES: Okay.

5 MS. PHILLIPS: And so --

6 MEMBER JONES: Mr. Kline, are you
7 stating that the audit hasn't been performed
8 because the records weren't available until
9 yesterday?

10 MR. KLINE: Let me say it more
11 concisely. The records were available, but
12 the licensee apparently didn't realize they
13 were available because the electronic version
14 of some of the periods had been overwritten
15 and they did not realize that some of the
16 reports that they had -- or the reports that
17 they had created on paper contained the very
18 same information that is required.

19 MEMBER JONES: So --

20 MR. KLINE: So it wasn't until I
21 got into it yesterday and started asking hard
22 questions well, what records do you have, that

1 the lightbulb went on and they said well, yes,
2 I guess we do have them.

3 MEMBER JONES: So your statement
4 is that the -- if I'm understanding your
5 statement correctly, the records were
6 available to the licensee, but they weren't
7 made available to the auditor so that an audit
8 could be conducted?

9 MR. KLINE: I think that's a fair
10 statement as far as it goes, yes.

11 MEMBER JONES: Okay. Thank you.

12 MR. KLINE: Thank you.

13 MEMBER JONES: Thank you Mr. -- I
14 mean, Madam Chairperson. I'm sorry.

15 CHAIRPERSON MILLER: Mr. Alberti?

16 MEMBER ALBERTI: Ms. Phillips, so
17 there are two charges. One is failure to
18 maintain records, books and records on the
19 premises. The other one is -- I'm trying to
20 understand the charge of -- how you came about
21 the charge, the failure to substantiate gross
22 food sales. How did you come about the charge

1 that if -- was it because of the books and
2 records were not available or was it because
3 of other information?

4 MS. PHILLIPS: My understanding
5 from reading the report of the auditor is the
6 auditor went out to look at books and records
7 and there were a certain portion of the
8 records that were unavailable because the
9 computer program that they use overwrote one
10 quarter. So this is the charge for, I
11 believe, only one quarter.

12 MEMBER ALBERTI: Right, right.

13 MS. PHILLIPS: But the records
14 were unavailable, at that time, because they
15 were overwritten. Subsequently, Mr. Kline
16 tells me, and I have no independent knowledge
17 of that, paper records were found. So that's
18 how I came about the charge.

19 When the auditor went out, there
20 were no records there.

21 MEMBER ALBERTI: I think this
22 whole discussion about whether records were

1 available, overwritten and everything, are
2 getting into the facts of the case. And
3 that's bothering me a little bit here in this
4 discussion.

5 And so I'm sort of not taking that
6 on face value, because it's not proven.

7 Ms. Phillips, are you prepared to
8 go forward at least on the second charge?

9 MS. PHILLIPS: Um --

10 MEMBER ALBERTI: Of failure to
11 maintain books and records?

12 MS. PHILLIPS: I am prepared to go
13 forward. It just doesn't make -- it isn't --
14 it's not an economy here, because we are going
15 to have to come back. I mean, this opinion
16 that I tried --

17 MEMBER ALBERTI: You have answered
18 my question. You have answered my question.

19 MS. PHILLIPS: Right.

20 MEMBER ALBERTI: That's all my
21 question was, are you prepared to go forward
22 on that charge.

1 MS. PHILLIPS: Absolutely.

2 MEMBER ALBERTI: All right.

3 MS. PHILLIPS: I'm prepared to go
4 forward on both charges.

5 MEMBER ALBERTI: Thank you.

6 MS. PHILLIPS: It's just not in
7 the interest of justice or judicial economy,
8 Agency economy.

9 MEMBER ALBERTI: Okay.

10 MS. PHILLIPS: Etcetera.

11 MEMBER ALBERTI: Thank you.

12 MS. PHILLIPS: You're welcome, Mr.
13 Alberti.

14 CHAIRPERSON MILLER: Do I
15 understand, Mr. Kline, that, basically, you
16 are saying that the licensee actually had the
17 records, but they didn't realize they had
18 them?

19 MR. KLINE: Correct.

20 CHAIRPERSON MILLER: Okay. And
21 but that they are not, unless we have the
22 auditor assess them, really in a form that is

1 economical for us to assess in this hearing.
2 Then if you have an audit, then it's much more
3 understandable, meaningful, okay.

4 MR. KLINE: Correct. I mean, in
5 the District case, we did exactly that. And
6 I think the Board, in its opinion, expressed
7 displeasure about having had to do that, in
8 terms of how the witnesses testified, as to
9 what the record showed, whether minimum food
10 sales were met and we ended up, essentially,
11 presenting audit material during the hearing.

12 And I think all parties, including
13 the representatives of the Government and
14 representatives of the licensee and the Board
15 were extremely, you know, uncomfortable with
16 that procedure. And all agree that all would
17 be better served if this had all been done
18 beforehand.

19 In other words, if the auditor had
20 had an opportunity to look at the records
21 beforehand. In that case, for different
22 reasons as in this one, the records have not

1 been reviewed by the auditor beforehand.

2 CHAIRPERSON MILLER: Okay. So I
3 understand definitely your arguments about why
4 you should have 30 days, so that you have an
5 auditor take a look at it. Okay.

6 Just for the record, the seven day
7 issue, if it's not that you were just hired
8 yesterday, what is the reason for, you know,
9 not having been able to make this motion, you
10 know, seven days ago?

11 MR. KLINE: Because yesterday was
12 when it was discovered that the records
13 actually exist and are available.

14 CHAIRPERSON MILLER: Okay.

15 MR. KLINE: I mean, it's
16 coincidence of my being hired, because I'm the
17 one that asked questions which brought to
18 light the fact that the records existed and
19 are available.

20 CHAIRPERSON MILLER: Okay.

21 MR. KLINE: And if we go forward
22 today, then we will put on evidence of that

1 and I'm not sure where we will end up, but
2 that's, you know, what we will proffer.

3 CHAIRPERSON MILLER: Did you bring
4 the records with you?

5 MR. KLINE: Yes.

6 CHAIRPERSON MILLER: Oh, okay.

7 MR. KLINE: They are sitting over
8 here in a large box, yes.

9 CHAIRPERSON MILLER: Okay. So,
10 conceivably, you could go forward, but you are
11 not recommending that route for judicial and
12 resource economy?

13 MS. PHILLIPS: And the other
14 reason that the Board mentioned here is that
15 none of us are auditors. And even after
16 presenting all of those papers in the District
17 case, we still couldn't come to a conclusion,
18 because I don't think any of us are auditors
19 here.

20 CHAIRPERSON MILLER: Any other
21 questions, comments by the Board? Okay.

22 Okay. I think we are going to take a short

1 recess to deliberate on this and get advice of
2 counsel.

3 I just want to ask one question.
4 I know that just on another case, if we could,
5 there were parties here that -- it was in the
6 Status Hearing Show Cause case. I don't think
7 it's still here. I think that they needed to
8 get some forms and they could come back and
9 fulfill this. Is that correct?

10 Oh, okay, never mind, it doesn't
11 require it at this hearing. Okay.

12 So what we are going to do then is
13 go back to your case and I'm going to read the
14 Open Meeting words.

15 As Chairperson of the Alcoholic
16 Beverage Control Board for the District of
17 Columbia and in accordance with ^U 405 of the
18 Open Meetings Amendment Act of 2010, I move
19 that the ABC Board hold a closed meeting for
20 the purpose of seeking legal advice from our
21 counsel on Case No. 11-AUD-00004 and
22 deliberating on this same case, if necessary,

1 but we will come back out here, obviously, and
2 discuss it out here.

3 So I move to do this. Is there a
4 second?

5 MEMBER ALBERTI: Second.

6 MEMBER SILVERSTEIN: Second.

7 CHAIRPERSON MILLER: Okay. I'll
8 poll the Board.

9 Mr. Nophlin?

10 MEMBER NOPHLIN: I agree.

11 CHAIRPERSON MILLER: Mr. Brooks?

12 MEMBER BROOKS: I agree.

13 CHAIRPERSON MILLER: Mr. Alberti?

14 MEMBER ALBERTI: I agree.

15 CHAIRPERSON MILLER: Mr.

16 Silverstein?

17 MEMBER SILVERSTEIN: I agree.

18 CHAIRPERSON MILLER: Ms. Mobley?

19 MEMBER MOBLEY: I agree.

20 CHAIRPERSON MILLER: Mr. Jones?

21 MEMBER JONES: I agree.

22 CHAIRPERSON MILLER: And Ms.

1 Miller agrees also.

2 Okay. So we will take a short
3 recess and come back on this.

4 (Whereupon, at 11:15 a.m. a recess
5 until 12:16 p.m.)

6 CHAIRPERSON MILLER: Okay. We're
7 back on the record.

8 So what we have here is a motion
9 for a continuance based on the fact that the
10 parties believe an audit should be done of the
11 records, that that would be the most judicial
12 and resourceful economies for dealing with
13 this case.

14 And if I understood you correctly,
15 Mr. Kline, you said that you did bring all of
16 your records with you. Is that --

17 MR. KLINE: Yes.

18 CHAIRPERSON MILLER: -- from the
19 establishment.

20 MR. KLINE: They are in this box
21 behind me.

22 CHAIRPERSON MILLER: Okay. So

1 what the Board would like you to do is to
2 leave the records here for the auditor and if
3 you do that, then we will vote on the motion
4 for continuance and then have OGC get back to
5 you all about the next Status Hearing,
6 depending on the auditor's schedule and once
7 he sees what is involved and everything.

8 MS. PHILLIPS: If I may be heard,
9 Madam Chair? I have spoken to the auditor and
10 to the chief. I have not spoken to the
11 director. But one of the disadvantages of
12 doing what the Board has requested is that we
13 will have legal custody of what may be the
14 only copies of documents, therefore, we are
15 responsible for them.

16 So the auditor has asked and the
17 chief has asked, although I have not consulted
18 the director, and I believe it is the better
19 legal course to give them time for the auditor
20 to go to the establishment, so we do not have
21 legal custody of the documents and, therefore,
22 are responsible and can be accused of losing

1 a document that they believe is key.

2 And I believe just to give you
3 legal advice from the District --

4 CHAIRPERSON MILLER: Yes.

5 MS. PHILLIPS: -- I believe that
6 may be a very, very bad idea, because of those
7 two issues. One, we will be responsible for
8 them. And they can always argue that one
9 document that they think proves the entire
10 case was there, because we haven't been able
11 to inventory it, and was lost.

12 And, therefore, I recommend
13 against that --

14 CHAIRPERSON MILLER: Okay.

15 MS. PHILLIPS: -- course of
16 action.

17 CHAIRPERSON MILLER: Okay. Thank
18 you, Ms. Phillips.

19 MEMBER ALBERTI: Ms. Phillips, I
20 have a suggestion. With you here and the
21 licensee, we put this in a box, we seal them
22 and we have the licensee initial that seal.

1 And that seal is not broken until an
2 appointment is made with the licensee to come
3 in and meet with the auditor.

4 So there would be no question of
5 lost documents, because the seal would not be
6 broken until that meeting took place.

7 Would that be sufficient?

8 MS. PHILLIPS: I believe that that
9 is a good suggestion, but I would go the next
10 step and have the box sealed and Mr. Kline and
11 me be present and the agent for the
12 establishment and perhaps the director even or
13 the auditor seal it up, let them take it, so
14 we don't have legal possession of it and then
15 when the auditor gets there, those seals will
16 be broken, so we know that what they brought
17 is what he is reviewing.

18 That's just my recommendation and
19 the Board can do with it what it will. You
20 know, I personally, as an attorney for the
21 District, never ever take custody of the only
22 copies of documents. And I never ever

1 recommend that if it's interagency from
2 interagency, and this happens with the U.S.
3 and the District sometimes, I always recommend
4 that they -- for example, MPD never give the
5 United States the original copies of the
6 paperwork, because they can't get them back
7 and we don't have the best evidence.

8 This is something that I feel very
9 strongly after my 20 years of working for the
10 District that we never ever as attorneys take
11 custody of the only copies of documents.

12 And so I agree with the Agency in
13 this particular case, because it's an
14 establishment, you know, and so there are
15 separate endpoints.

16 CHAIRPERSON MILLER: Okay.

17 MEMBER ALBERTI: Mr. Kline?

18 MR. KLINE: Either the --

19 MEMBER ALBERTI: Mr. Kline, no. I
20 want to add a question for you.

21 MR. KLINE: Oh, sure.

22 MEMBER ALBERTI: I'm not directing

1 this hearing, so I'm just asking you a
2 question.

3 MR. KLINE: I'm sure.

4 MEMBER ALBERTI: I know, it's
5 tough to make -- to switch voices. Okay. Mr.
6 Kline, all the records that are necessary to
7 substantiate that they meet the food
8 requirements are here today in your
9 possession?

10 MR. KLINE: Um --

11 MEMBER ALBERTI: The entire set of
12 them?

13 MR. KLINE: My understanding is
14 that all of the records related to 2010, which
15 is what is at issue, are present. Just so we
16 are clear and concise.

17 MEMBER ALBERTI: Well, that are
18 relevant to this case at hand?

19 MR. KLINE: Yes.

20 MEMBER ALBERTI: Okay.

21 MR. KLINE: Yes, that's my
22 understanding.

1 MEMBER ALBERTI: All right.

2 Because you said you were able to -- you were
3 prepared to prove your --

4 MR. KLINE: Yes, yes.

5 MEMBER ALBERTI: -- provide
6 evidence today.

7 MR. KLINE: I just want to make
8 sure we're not talking about 2011 or when they
9 were open in 2009.

10 MEMBER ALBERTI: Oh, no, no, no,
11 no. That's outside of this -- these charges.

12 CHAIRPERSON MILLER: That's fine.
13 You don't have another copy of the records in
14 this box that you have brought today?

15 MR. KLINE: We do not.

16 CHAIRPERSON MILLER: You do not.
17 And do you have a list of the documents?

18 MR. KLINE: I am seeing them for
19 the first time today.

20 CHAIRPERSON MILLER: Okay.

21 MR. KLINE: Honestly.

22 MEMBER ALBERTI: Oh, God, I

1 shouldn't ask this. Mr. Kline, how are you
2 going to present your case if you don't really
3 have a list of the documents that are there?
4 You don't really have a good command of what's
5 in that box. And maybe that's a rhetorical
6 question and you don't need to answer it. I'm
7 sorry. I withdraw the question.

8 CHAIRPERSON MILLER: Okay. I
9 think Ms. Phillips raised a very significant
10 point. And I want to know if the Board has
11 any more comments on it, needs to go back and
12 recess again?

13 MR. KLINE: Madam Chairperson, may
14 I respond --

15 CHAIRPERSON MILLER: Yes.

16 MR. KLINE: -- to --

17 CHAIRPERSON MILLER: Oh, I'm
18 sorry. Okay.

19 MR. KLINE: -- Board Member
20 Alberti's --

21 CHAIRPERSON MILLER: Okay.

22 MEMBER ALBERTI: I have withdrawn

1 my question, Mr. Kline.

2 MR. KLINE: Okay. Because I would
3 like to answer it.

4 MEMBER ALBERTI: No, I have
5 withdrawn my question.

6 MR. KLINE: Okay.

7 CHAIRPERSON MILLER: Is there one
8 more point you would like to make before we
9 discuss this?

10 MR. KLINE: The only point I would
11 like to make is, obviously, going forward is
12 it's the Government's burden, which certainly
13 makes representing the licensee a different
14 situation than representing the party that has
15 the burden going forward, to respond to the
16 inquiry that has been made.

17 CHAIRPERSON MILLER: Okay.

18 MEMBER ALBERTI: Madam Chair?

19 CHAIRPERSON MILLER: Yes?

20 MEMBER ALBERTI: I'm actually
21 willing to take Ms. Phillips' suggestion that
22 we seal the box and confirm that it is sealed

1 and then allow the licensee to take it.

2 However, I would only do that if
3 the Board approves the seal. The Board
4 actually sees the seal, the Board initials it,
5 the Board actually confirms the seal. I want
6 -- to me, I cannot accept the fact that we
7 have complete evidence here, unless it is
8 proven and I need to be assured for myself.
9 That's just me.

10 MR. KLINE: Madam Chairperson, if
11 it will help, I'll offer this. It may or may
12 not be of any interest to the Board.

13 I do have Louie Davis here who is
14 the president of the company that provides the
15 POS system, Point of Sales system. And he can
16 certainly get on the stand and testify that
17 the daily records that we have are the ones
18 and how they are compiled and so on, so that
19 the Board would -- what I'm hearing is a fear
20 that somehow something else will be created.

21 And I think if we put that
22 testimony on, we might be able to satisfy the

1 Board that that's not really likely or
2 possible.

3 CHAIRPERSON MILLER: Yes, I know
4 it's --

5 MEMBER ALBERTI: I have --

6 CHAIRPERSON MILLER: Yes, go
7 ahead.

8 MEMBER ALBERTI: I have no fear
9 that something else will be created and that
10 we would use it. You have made the claim to
11 us today that that's a complete set of records
12 that is necessary to prove your case.

13 All right? And then the auditor
14 arrives, the auditor will unseal the box and
15 he will deal with that set of records. I have
16 no fear that there is going to be other
17 evidence produced or something, because we
18 will not take it.

19 CHAIRPERSON MILLER: Well, I think
20 if there were other evidence produced, you
21 would have to file a motion for us to consider
22 it or something to that effect. Is that what

1 you mean?

2 MEMBER ALBERTI: Yes.

3 CHAIRPERSON MILLER: Okay.

4 MEMBER ALBERTI: Yes. We would
5 not take it without further consideration.

6 CHAIRPERSON MILLER: Okay.

7 MEMBER ALBERTI: And the auditor
8 would not be instructed to use it in his
9 report. I'm sorry. Because we are here today
10 and you are asking for a continuance on the
11 basis of the fact that you are prepared to go
12 to trial, but it would be more efficient for
13 the auditor to have a chance to look at the
14 records that you have brought today to
15 substantiate your position.

16 MR. KLINE: Well --

17 MEMBER ALBERTI: And I just want--
18 Mr. Kline, I want to be assured that your
19 statement is valid. That's all I want.

20 MR. KLINE: The only thing that I
21 can tell you is that it has been represented
22 to me that the records that we have in these

1 boxes behind me represents the records for
2 2010.

3 MEMBER ALBERTI: Well, I'm
4 concerned about --

5 MR. KLINE: That --

6 MEMBER ALBERTI: -- what is
7 represented to us.

8 CHAIRPERSON MILLER: Okay. So are
9 we at that this box is going to be sealed,
10 basically, until the auditor --

11 MEMBER ALBERTI: Yes. And we will
12 look at that seal and maybe confirm that it is
13 done correctly to our satisfaction. That's
14 what I would like to see.

15 CHAIRPERSON MILLER: Okay. Okay.
16 Do you want to see them seal it here and
17 then --

18 MEMBER ALBERTI: No, it can be
19 sealed. It can be sealed and then the box
20 that is presented to us will confirm and be
21 satisfied that it is sealed correctly and then
22 it will be returned to and given to the

1 licensee to take back to their establishment.

2 MR. KLINE: I have a logistical
3 problem. As one observes the pile of records
4 that are behind me, there is a box in there,
5 it's what is called a Redwell folder, which is
6 not sealable, so we will need to find another
7 box.

8 MEMBER ALBERTI: We have boxes.

9 MR. KLINE: For the records that
10 are in the Redwell, because, obviously, those
11 are not --

12 MEMBER ALBERTI: Mr. Kline, as
13 confirmed, with our general counsel, we have
14 extra boxes for you.

15 MR. KLINE: Great.

16 CHAIRPERSON MILLER: Okay. So in
17 any event, you are going to take the box with
18 you, it's not going to go outside of your
19 custody and it's going to be sealed before it
20 goes.

21 MR. KLINE: I'm going to take it?

22 CHAIRPERSON MILLER: Isn't that

1 the --

2 MS. PHILLIPS: The establishment
3 is going to take it.

4 CHAIRPERSON MILLER: I'm sorry.

5 MEMBER ALBERTI: The establishment
6 is going to take it after.

7 CHAIRPERSON MILLER: Okay. And
8 wait for the auditor. All right. Good.

9 MR. KLINE: And that way, I mean,
10 this is a minor issue, the records will also
11 be on the premises where they are supposed to
12 be in accordance with the law.

13 CHAIRPERSON MILLER: Okay. All
14 right. Any other questions? Yes, Mr. Jones?

15 MEMBER JONES: Just probably not--
16 I'm almost reluctant to bring it up, but what
17 happens in the event that we find the seal has
18 been broken?

19 MS. PHILLIPS: Can we cross that
20 bridge at -- may I be heard, please?

21 CHAIRPERSON MILLER: Yes.

22 MS. PHILLIPS: This would be a --

1 we are asking for an opinion of what you would
2 do if something happened and that's not
3 usually what we ask courts to do.

4 Now, I've lost the word that I'm
5 looking for, but I would like to, in essence,
6 cross that bridge when we come to it, because
7 I don't want to ask the Board to make a
8 decision in advance of any evidence about what
9 they would do.

10 CHAIRPERSON MILLER: I mean, I
11 would like to say that, you know, I think we
12 can have a little bit of trust in here and
13 that the expectation that the records that
14 were brought were the ones that were intended
15 to prove their case, I don't see a good reason
16 why there would be any fooling around with
17 those records.

18 You know, they have to present
19 their case to the auditor and then to us.
20 Okay. Any other comments, questions?

21 So I believe what is before us is
22 a motion for a continuance. And this would be

1 continued to a date to be determined in
2 consultation with the parties and OGC and then
3 we will set it for another status.

4 Okay. So, Mr. Nophlin?

5 MEMBER NOPHLIN: I agree.

6 CHAIRPERSON MILLER: Mr. Brooks?

7 MEMBER BROOKS: I agree.

8 CHAIRPERSON MILLER: Mr. Alberti?

9 MEMBER ALBERTI: I agree on the
10 conditions that the box is sealed here in the
11 presence of the OAG's Office, the licensee,
12 the Board approves of the seal before the --
13 it is returned to the licensee. Under those
14 conditions, I agree.

15 CHAIRPERSON MILLER: Maybe we
16 should finish the motion, then you can do a
17 friendly amendment or something. How's that?
18 Because we have already started this process,
19 you know. Mr. Nophlin didn't, Mr. Brooks
20 didn't --

21 MEMBER ALBERTI: Can I make a
22 friendly amendment now? I would like to offer

1 a friendly amendment.

2 CHAIRPERSON MILLER: Okay.

3 MEMBER ALBERTI: That the motion
4 be granted with the condition that the box be
5 sealed in the presence of the licensee, their
6 representative, the OAG's Office and a
7 designated ABRA staff person and that the
8 Board has an opportunity to confirm that the
9 seal is sufficient to not allow tampering with
10 the evidence. And then that the box be
11 returned to the licensee. That's my friendly
12 amendment.

13 CHAIRPERSON MILLER: Oh.

14 MEMBER MOBLEY: Is it appropriate
15 for me to second the motion?

16 CHAIRPERSON MILLER: Yes, you can
17 second it.

18 MEMBER MOBLEY: Okay.

19 CHAIRPERSON MILLER: I just
20 logistically don't know when the Board is
21 going to be confirming this. Does the Board
22 have to or can we just rely on the staff?

1 MEMBER ALBERTI: No, I would like
2 to see it. I would like to see what --

3 CHAIRPERSON MILLER: Okay.

4 MEMBER ALBERTI: I want to know --

5 MEMBER JONES: That's your motion.

6 MEMBER ALBERTI: That's my motion.

7 MEMBER MOBLEY: And I'll second
8 it.

9 CHAIRPERSON MILLER: Okay. So
10 we'll start again.

11 Mr. Nophlin?

12 MEMBER NOPHLIN: I agree.

13 CHAIRPERSON MILLER: Mr. Brooks?

14 MEMBER BROOKS: I agree.

15 MEMBER ALBERTI: I agree.

16 MEMBER SILVERSTEIN: I agree.

17 MEMBER MOBLEY: I agree.

18 MEMBER JONES: I will reluctantly
19 agree on the principle of becoming very
20 fatigued with receiving requests for
21 continuances that aren't in compliance with
22 the six day rule.

1 I think we are skirting on being
2 arbitrary and somewhat capricious to use a
3 distinguished colleague of mine's words in how
4 we proceed with accepting these. And I think
5 we are growing very -- too loose in our
6 acceptance of continuances that aren't
7 received -- that requests aren't received in
8 a timely fashion.

9 But with that, based on the --
10 what was presented to us today, I do agree.

11 CHAIRPERSON MILLER: I agree,
12 because I agree to granting the motion for
13 continuance. I don't believe that the whole
14 sealing of the box and that condition is
15 really necessary, but I don't think it does
16 any harm.

17 So that being said --

18 MEMBER ALBERTI: And I think --

19 CHAIRPERSON MILLER: Yes?

20 MEMBER ALBERTI: -- the original
21 motion has to be --

22 MR. KLINE: Madam Chairperson,

1 inasmuch as the Board is going to be involved
2 in the sealing of the box, you know, we have
3 this wonderful new TV system, why don't we do
4 it right here, so there won't be any issues as
5 to how the box has been sealed?

6 We can do it on the record. I
7 mean, if we're going to have a Board Member
8 involved --

9 CHAIRPERSON MILLER: Yes.

10 MR. KLINE: -- it seems to me it
11 should be done on the record.

12 CHAIRPERSON MILLER: So you can do
13 this pretty soon? We could just come back
14 here and you will seal it?

15 MR. KLINE: We'll do it right now.
16 I mean, if the -- if staff has a box available
17 and has tape, we will do it right now.

18 MEMBER ALBERTI: Why don't we just
19 designate a staff. They want efficiency.

20 CHAIRPERSON MILLER: Yes.

21 MEMBER ALBERTI: I think we ought
22 to be efficient with our time, that we can

1 designate it.

2 CHAIRPERSON MILLER: Oh, you do
3 want to designate?

4 MEMBER ALBERTI: We can designate
5 a staff member to watch them do it.

6 CHAIRPERSON MILLER: Okay. We
7 will designate a staff person.

8 MEMBER ALBERTI: Sure.

9 CHAIRPERSON MILLER: Okay. Is
10 there anything else on the agenda for this
11 morning? Okay. Not that I'm aware of.

12 Okay. So I think the parties have
13 been heard. We will look forward to seeing
14 your box. And this hearing is adjourned.

15 (Whereupon, the Show Cause Hearing
16 in the above-entitled matter was concluded at
17 12:33 p.m.)

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