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

(10:01 a.m.)

CHAIRPERSON MILLER: All right.

I'm going to call the next few cases together,
because they involve the same establishment.

Case No. 12-251-00223, they are
all for Ibiza, located at 1222 1st Street,
N.E., License No. 74456 in ANC-6C. So that is
also Case No. 12-251-00168, Case No. 12-251-
00196 and Case No. 12-251-00108.

MR. RIVERO: Good morning, Board
Members, Fernando Rivero for the District of
Columbia in all cases.

CHAIRPERSON MILLER: Good morning.

MR. TRUONG: Aldo Truong for
Superclub Ibiza, LLC.

MR. CLAY: Eric Clay with
Superclub Ibiza, LLC.

CHAIRPERSON MILLER: I'm sorry,
what's your name, sir?

MR. CLAY: Eric Clay.

CHAIRPERSON MILLER: Okay. These

1 are Show Cause (Status) Hearings, so I need to
2 ask you whether you got a copy of the notice
3 of these hearings?

4 MR. TRUONG: Yes.

5 CHAIRPERSON MILLER: And did you
6 read them?

7 MR. TRUONG: Yes.

8 CHAIRPERSON MILLER: Understand
9 them?

10 MR. TRUONG: Yes.

11 CHAIRPERSON MILLER: And do you
12 waive the Board's reading of them into the
13 record?

14 MR. TRUONG: (No audible answer.)

15 CHAIRPERSON MILLER: Okay. Are
16 there any preliminary matters with respect to
17 any of these cases?

18 MR. RIVERO: Yes, actually, but we
19 will, first, start with Case No. 12-251-00196.
20 This is a case where the parties do not have
21 an offer in compromise to present to the Board
22 and will move forward to the next scheduled

1 date.

2 CHAIRPERSON MILLER: Okay. So you
3 are separating this one out? There is no
4 preliminary matter in this one and we will
5 schedule this for hearing, correct? Okay.
6 And that is for March 20, 2013 at 10:00 a.m.
7 on 00196. Okay.

8 MR. RIVERO: Correct.

9 CHAIRPERSON MILLER: Okay. Done.

10 MR. RIVERO: The Government would
11 next turn to the other three cases: Case 12-
12 251-00168, Case 12-251-00108 and Case 12-251-
13 00223. The Government will be dismissing all
14 three cases at this time.

15 CHAIRPERSON MILLER: Okay. Then I
16 would move to dismiss those three cases. Do
17 I have a second?

18 MR. RIVERO: These cases are again
19 related to a case that I, some time ago,
20 dismissed on the basis of a DC Court of
21 Appeals opinion that I mentioned at that time.
22 It is the same opinion released in November

1 concerning 1900 M Street Restaurant
2 Association versus the DC Alcoholic Beverage
3 Control Board that governs the interpretation
4 of the charge of failure to follow Board --
5 excuse me a security plan.

6 And at the time that these cases
7 were charged, it was prior to that decision.
8 On the basis of that decision, the Government
9 cannot move forward.

10 CHAIRPERSON MILLER: Okay. That's
11 what I figured. So I didn't know you were
12 going to do that explanation, so I have
13 already moved, but do I have a second on the
14 motion to dismiss?

15 MEMBER SILVERSTEIN: Second.

16 CHAIRPERSON MILLER: Are there any
17 questions or comments? Yes, Mr. Alberti?

18 MEMBER ALBERTI: Mr. Rivero?

19 MR. RIVERO: Yes.

20 MEMBER ALBERTI: I would like
21 maybe a little out of the norm unusual here,
22 but I would like to get your opinions on a

1 matter.

2 It is my impression that there
3 needs -- with charges such as this, if we are
4 going to move forward on this in the future,
5 there would have to be a history that could be
6 pointed here. And you prosecute a case
7 somewhere in future court establishment and
8 would have to show that there is a history.

9 Now, the fact that you are
10 dismissing it, rather than having the Board
11 give a warning for this case, how does that
12 affect future cases with this establishment?

13 And I'm feeling very -- I will
14 tell you quite honestly, this is my personal
15 view, I look at the history of this
16 establishment and I see red flags that says
17 oh, there is potential here for similar
18 behavior/actions. And so I'm very concerned.

19 So I would like to get your
20 opinion.

21 MR. RIVERO: Thank you. Well,
22 Board Members have asked for my personal

1 opinion and not the opinion of the office,
2 so --

3 MEMBER ALBERTI: Yes, that would
4 be great. I understand.

5 MR. RIVERO: So that would be
6 something that I could speak to, so long as
7 the Board understands that I'm not conveying
8 the opinion of the office.

9 Not to be surprising anybody, but
10 this is not a Court decision that I like,
11 right? It is, in fact, an opinion of the DC
12 Court of Appeals that makes very little
13 logical sense if you understand the
14 legislative history of this particular
15 provision, which requires licensees to follow
16 their security plans.

17 Essentially, the Court of Appeals
18 bootstrapped the logic behind the provision
19 concerning not allowing an establishment to be
20 used for an unlawful or disorderly purpose
21 unto the totally separate provision of
22 concerning security plans.

1 Apparently, they are located in
2 the same absolute section, so maybe the Court
3 didn't see a problem with that, but the
4 histories are quite different.

5 Your question points to one of the
6 logical problems with this rationale and I
7 think it is a consequence that the Court did
8 not intend, but it's a clear consequence.

9 The Court indicated, first of all,
10 that in order to find a violation, you need to
11 find a sustained history of incidents that
12 would allow you to say this establishment
13 isn't following its security plan.

14 Leave aside the fact that there is
15 a way to interpret statutes where you just
16 look at the facial language of the statute
17 that says, you know, you failed to follow your
18 security plan. If your security plan says you
19 can't do A, B and C and you didn't do A, B and
20 C, it doesn't matter whether you didn't do it
21 one time, five times or 20 times, once should
22 suffice in a facial reading of the statute.

1 But that's not the method that the
2 Court employed. And so you have got a
3 situation here where a violation must be found
4 in order for something to happen.

5 Now, I'm not aware that the Board
6 can issue a warning unless it makes a factual
7 finding. If it makes a factual finding, then,
8 at that point, you know, I'm employed here as
9 the prosecutor and I want to see more than a
10 warning, if you will.

11 So this is the -- between the
12 devil and the deep blue sea scenario, which is
13 the unintended consequence of the way this
14 opinion reads.

15 If there were another way to go
16 about this, you can probably be assured that
17 I would have found it by now. This decision,
18 in my personal opinion, presents a situation
19 that requires a legislative fix.

20 In the meanwhile, I'll keep
21 thinking about it, but right now, please,
22 understand that each of these cases are

1 presented individually. You are looking at
2 three violations of a security plan only
3 because you have conveniently decided to call
4 of the cases together.

5 In an appellate record before the
6 DC Court of Appeals, the Court of Appeals is
7 not going to see what you are seeing in this
8 room. They will see one case with one
9 violation and if you find a violation of the
10 security plan on the basis of those facts in
11 front of you in that one case, the Court of
12 Appeals will reverse that decision.

13 Am I being clear with that?

14 MEMBER ALBERTI: Very clear. And
15 I thank you very much for that and I
16 appreciate that. And --

17 MR. RIVERO: And likewise with the
18 other two cases that we have before you --

19 MEMBER ALBERTI: Yes.

20 MR. RIVERO: -- today that I'm
21 dismissing.

22 MEMBER ALBERTI: And I have every

1 confidence that if you had an alternative, you
2 would have exercised it. I thank you very
3 much for that.

4 I just want to say to the licensee
5 that the fact that this is being dismissed, do
6 not think that the Board takes this lightly.
7 And you probably understand that from my
8 remarks. This is repeat behavior that I find
9 very troubling. It goes to publication. You
10 have a very large club. You've got a lot of
11 people whose welfare is being put in danger by
12 the way you appear to be operating.

13 And that is of grave concern to
14 me.

15 CHAIRPERSON MILLER: I just want
16 to say that, you know, there is a Court of
17 Appeals opinion and I'm sure there is not just
18 one way to interpret it. And I'm just
19 wondering if you are -- even though you are,
20 Mr. Rivero, moving to dismiss in this case,
21 whether you are keeping a record of these
22 occurrences that you might use it some time to

1 show a pattern or a history?

2 MR. RIVERO: Well, in that
3 instance, let's say we look at a case with
4 facts and it gets dismissed, but at this point
5 all it is is an allegation, right? An
6 allegation moves into a finding only as a
7 result of a Show Cause proceeding in Title
8 25's enforcement provisions.

9 So I've got these reports, if you
10 will.

11 CHAIRPERSON MILLER: Yes.

12 MR. RIVERO: And, yes, they are in
13 my office, but to indicate that I could "use
14 them in the future" would entail bringing
15 allegations anew that have been dismissed.
16 And we would be moving into new territory, at
17 that point, from a procedural standpoint.

18 And there would be a legal
19 question presented as to whether allegations
20 that have been dismissed can be brought again
21 under another rationale.

22 My answer today is neither yes nor

1 no, but to simply outline the question for the
2 Board.

3 CHAIRPERSON MILLER: Okay.

4 MR. RIVERO: That is raised by
5 that approach.

6 CHAIRPERSON MILLER: Okay. All
7 right. Thank you.

8 MR. RIVERO: You're welcome.

9 CHAIRPERSON MILLER: Any other
10 questions or comments?

11 Okay. Then there has been a
12 motion to dismiss three of the four cases by
13 Mr. Rivero and those were, just to repeat
14 again and Mr. Rivero can correct me if I'm
15 wrong, Case No. 12-251-00223, 12-251-00168 and
16 12-251-00108 all involving failure to follow
17 the security plan.

18 Okay. So there has been a motion
19 to dismiss that has been seconded.

20 All those in favor say aye.

21 MEMBER BROOKS: Aye.

22 CHAIRPERSON MILLER: Aye.

1 MEMBER ALBERTI: Aye.

2 CHAIRPERSON MILLER: All those
3 opposed?

4 MEMBER SILVERSTEIN: Abstaining.

5 CHAIRPERSON MILLER: All those
6 abstaining?

7 MEMBER SILVERSTEIN: I abstain.

8 CHAIRPERSON MILLER: Then the vote
9 is --

10 MEMBER SILVERSTEIN: I abstain.

11 CHAIRPERSON MILLER: Okay. The
12 vote is 3-0-1 to grant the motion. Okay.

13 And then the other case has been
14 set for hearing. Okay. That's all then. I
15 think that completes consideration of these
16 four cases.

17 MR. RIVERO: Thank you.

18 CHAIRPERSON MILLER: Oh, did you
19 want that, so you know what concerns the
20 motion, because it's something that we have
21 not yet completed. Okay?

22 MEMBER SILVERSTEIN: I would

1 explain my abstention. This is simply an
2 intolerable situation that you are in, Mr.
3 Rivero. That this is in desperate need of a
4 legislative fix, that it needs to happen
5 yesterday.

6 And that I felt that I simply,
7 being that this passed, wanted to do this as
8 a protest and I think that my fellow Board
9 Members share frustration that we find
10 ourselves in right now because of the
11 situation.

12 MR. RIVERO: Believe me, duly
13 noted.

14 CHAIRPERSON MILLER: Well good.

15 MEMBER ALBERTI: Can I just say
16 one last word --

17 CHAIRPERSON MILLER: Yes.

18 MEMBER ALBERTI: -- to the
19 licensee? Look, Mr. Truong and Mr. Clay, you
20 have lots of experience in this field. And I
21 suspect and I'm pretty sure you can do better.
22 So I ask, plead with you to take a look at

1 your security training and your operation and
2 see if you can make -- there are improvements
3 to be made. Okay? Thank you.

4 MR. CLAY: Thank you.

5 MR. TRUONG: Thank you.

6 MR. RIVERO: Thank you.

7 CHAIRPERSON MILLER: Thank you
8 very much.

9 (Whereupon, the Show Cause
10 (Status) Hearing in the above-entitled matter
11 was concluded at 10:16 a.m.)
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<p style="text-align: center;">A</p> <p>above-entitled 16:10</p> <p>absolute 8:2</p> <p>abstain 14:7,10</p> <p>abstaining 14:4,6</p> <p>abstention 15:1</p> <p>affect 6:12</p> <p>ago 4:19</p> <p>Alberti 1:21 5:17 5:18,20 7:3 10:14 10:19,22 14:1 15:15,18</p> <p>Alcoholic 1:2,15,15 5:2</p> <p>Aldo 2:15</p> <p>allegation 12:5,6</p> <p>allegations 12:15 12:19</p> <p>allow 8:12</p> <p>allowing 7:19</p> <p>alternative 11:1</p> <p>ANC-6C 1:8 2:8</p> <p>anew 12:15</p> <p>answer 3:14 12:22</p> <p>anybody 7:9</p> <p>Apparently 8:1</p> <p>Appeals 4:21 7:12 7:17 10:6,6,12 11:17</p> <p>appear 11:12</p> <p>appellate 10:5</p> <p>appreciate 10:16</p> <p>approach 13:5</p> <p>aside 8:14</p> <p>asked 6:22</p> <p>Association 5:2</p> <p>assured 9:16</p> <p>audible 3:14</p> <p>aware 9:5</p> <p>aye 13:20,21,22 14:1</p> <p>a.m 2:2 4:6 16:11</p> <hr/> <p style="text-align: center;">B</p> <p>B 8:19,19</p> <p>basis 4:20 5:8</p>	<p>10:10</p> <p>behavior 11:8</p> <p>behavior/actions 6:18</p> <p>Believe 15:12</p> <p>better 15:21</p> <p>Beverage 1:2,15,15 5:2</p> <p>blue 9:12</p> <p>Board 1:2,15 2:11 3:21 5:3,4 6:10,22 7:7 9:5 11:6 13:2 15:8</p> <p>Board's 3:12</p> <p>bootstrapped 7:18</p> <p>bringing 12:14</p> <p>BROOKS 1:21 13:21</p> <p>brought 12:20</p> <hr/> <p style="text-align: center;">C</p> <p>C 8:19,20</p> <p>call 2:4 10:3</p> <p>case 1:9,9,10,10 2:6 2:9,9,10 3:19,20 4:11,12,12,19 6:6 6:11 10:8,11 11:20 12:3 13:15 14:13</p> <p>cases 2:4,13 3:17 4:11,14,16,18 5:6 6:12 9:22 10:4,18 13:12 14:16</p> <p>Cause 1:6 3:1 12:7 16:9</p> <p>Chairperson 1:17 1:20 2:3,14,19,22 3:5,8,11,15 4:2,9 4:15 5:10,16 11:15 12:11 13:3 13:6,9,22 14:2,5,8 14:11,18 15:14,17 16:7</p> <p>charge 5:4</p> <p>charged 5:7</p> <p>charges 6:3</p> <p>Clay 2:17,17,21,21</p>	<p>15:19 16:4</p> <p>clear 8:8 10:13,14</p> <p>club 11:10</p> <p>CN 1:8</p> <p>Columbia 1:1 2:13</p> <p>comments 5:17 13:10</p> <p>completed 14:21</p> <p>completes 14:15</p> <p>compromise 3:21</p> <p>concern 11:13</p> <p>concerned 6:18</p> <p>concerning 5:1 7:19,22</p> <p>concerns 14:19</p> <p>concluded 16:11</p> <p>confidence 11:1</p> <p>consequence 8:7,8 9:13</p> <p>consideration 14:15</p> <p>Control 1:2,15,15 5:3</p> <p>conveniently 10:3</p> <p>conveying 7:7</p> <p>copy 3:2</p> <p>correct 4:5,8 13:14</p> <p>court 4:20 6:7 7:10 7:12,17 8:2,7,9 9:2 10:6,6,11 11:16</p> <hr/> <p style="text-align: center;">D</p> <p>danger 11:11</p> <p>date 4:1</p> <p>DC 4:20 5:2 7:11 10:6</p> <p>decided 10:3</p> <p>decision 5:7,8 7:10 9:17 10:12</p> <p>deep 9:12</p> <p>desperate 15:3</p> <p>devil 9:12</p> <p>different 8:4</p> <p>dismiss 4:16 5:14 11:20 13:12,19</p> <p>dismissed 4:20</p>	<p>11:5 12:4,15,20</p> <p>dismissing 4:13 6:10 10:21</p> <p>disorderly 7:20</p> <p>District 1:1 2:12</p> <p>DONALD 1:21</p> <p>duly 15:12</p> <p>D.C 1:17</p> <hr/> <p style="text-align: center;">E</p> <p>employed 9:2,8</p> <p>enforcement 12:8</p> <p>entail 12:14</p> <p>Eric 2:17,21</p> <p>Essentially 7:17</p> <p>establishment 2:5 6:7,12,16 7:19 8:12</p> <p>excuse 5:5</p> <p>exercised 11:2</p> <p>experience 15:20</p> <p>explain 15:1</p> <p>explanation 5:12</p> <hr/> <p style="text-align: center;">F</p> <p>facial 8:16,22</p> <p>fact 6:9 7:11 8:14 11:5</p> <p>facts 10:10 12:4</p> <p>factual 9:6,7</p> <p>failed 1:12 8:17</p> <p>failure 5:4 13:16</p> <p>favor 13:20</p> <p>feeling 6:13</p> <p>fellow 15:8</p> <p>felt 15:6</p> <p>Fernando 1:24 2:12</p> <p>field 15:20</p> <p>figured 5:11</p> <p>find 8:10,11 10:9 11:8 15:9</p> <p>finding 9:7,7 12:6</p> <p>first 3:19 8:9</p> <p>five 8:21</p> <p>fix 9:19 15:4</p> <p>flags 6:16</p> <p>follow 1:12 5:4</p>	<p>7:15 8:17 13:16</p> <p>following 8:13</p> <p>forward 3:22 5:9 6:4</p> <p>found 9:3,17</p> <p>four 13:12 14:16</p> <p>front 10:11</p> <p>frustration 15:9</p> <p>future 6:4,7,12 12:14</p> <hr/> <p style="text-align: center;">G</p> <p>give 6:11</p> <p>go 9:15</p> <p>goes 11:9</p> <p>going 2:4 5:12 6:4 10:7</p> <p>good 2:11,14 15:14</p> <p>Government 4:10 4:13 5:8</p> <p>governs 5:3</p> <p>grant 14:12</p> <p>grave 11:13</p> <p>great 7:4</p> <hr/> <p style="text-align: center;">H</p> <p>happen 9:4 15:4</p> <p>hearing 1:7,16 4:5 14:14 16:10</p> <p>hearings 3:1,3</p> <p>histories 8:4</p> <p>history 6:5,8,15 7:14 8:11 12:1</p> <p>honestly 6:14</p> <hr/> <p style="text-align: center;">I</p> <p>Ibiza 1:6,6 2:7,16 2:18</p> <p>impression 6:2</p> <p>improvements 16:2</p> <p>incidents 8:11</p> <p>indicate 12:13</p> <p>indicated 8:9</p> <p>individually 10:1</p> <p>instance 12:3</p> <p>intend 8:8</p> <p>interpret 8:15 11:18</p>
--	---	---	--	--

interpretation 5:3	1:22 5:15,18,20	Okay 2:22 3:15 4:2	procedural 12:17	13:4,8,13,14
intolerable 15:2	7:3 10:14,19,22	4:5,7,9,15 5:10	proceeding 12:7	14:17 15:3,12
involve 2:5	13:21 14:1,4,7,10	13:3,6,11,18	prosecute 6:6	16:6
involving 13:16	14:22 15:15,18	14:11,12,14,21	prosecutor 9:9	room 1:16 10:8
issue 9:6	Members 2:12 6:22	16:3	protest 15:8	Ruthanne 1:17,20
	15:9	once 8:21	provision 7:15,18	
J	mentioned 4:21	operating 11:12	7:21	S
January 1:14	met 1:15	operation 16:1	provisions 12:8	says 6:16 8:17,18
	method 9:1	opinion 4:21,22	publication 11:9	scenario 9:12
K	MIKE 1:22	6:20 7:1,1,8,11	purpose 7:20	schedule 4:5
keep 9:20	Miller 1:17,20 2:3	9:14,18 11:17	put 11:11	scheduled 3:22
keeping 11:21	2:14,19,22 3:5,8	opinions 5:22	P-R-O-C-E-E-D-...	sea 9:12
know 5:11 8:17 9:8	3:11,15 4:2,9,15	opposed 14:3	2:1	second 4:17 5:13
11:16 14:19	5:10,16 11:15	order 8:10 9:4		5:15
	12:11 13:3,6,9,22	outline 13:1	Q	seconded 13:19
L	14:2,5,8,11,18		question 8:5 12:19	section 8:2
language 8:16	15:14,17 16:7	P	13:1	security 1:12 5:5
large 11:10	morning 2:11,14	particular 7:14	questions 5:17	7:16,22 8:13,18
Leave 8:14	motion 5:14 13:12	parties 3:20	13:10	8:18 10:2,10
legal 12:18	13:18 14:12,20	passed 15:7	quite 6:14 8:4	13:17 16:1
legislative 7:14	move 3:22 4:16 5:9	pattern 12:1		see 6:16 8:3 9:9
9:19 15:4	6:4	people 11:11	R	10:7,8 16:2
let's 12:3	moved 5:13	personal 6:14,22	raised 13:4	seeing 10:7
License 1:8 2:8	moves 12:6	9:18	rationale 8:6 12:21	sense 7:13
licensee 11:4 15:19	moving 11:20	plan 1:12 5:5 8:13	read 3:6	separate 7:21
licensees 7:15	12:16	8:18,18 10:2,10	reading 3:12 8:22	separating 4:3
lightly 11:6	N	13:17	reads 9:14	set 14:14
likewise 10:17	name 2:20	plans 7:16,22	record 3:13 10:5	share 15:9
little 5:21 7:12	NE 1:7	plead 15:22	11:21	show 1:6 3:1 6:8
LLC 1:6 2:16,18	need 3:1 8:10 15:3	please 9:21	red 6:16	12:1,7 16:9
located 2:7 8:1	needs 6:3 15:4	point 9:8 12:4,17	related 4:19	SILVERSTEIN
logic 7:18	neither 12:22	pointed 6:6	released 4:22	1:22 5:15 14:4,7
logical 7:13 8:6	new 12:16	points 8:5	remarks 11:8	14:10,22
long 7:6	NICK 1:21	potential 6:17	repeat 11:8 13:13	similar 6:17
look 6:15 8:16 12:3	norm 5:21	preliminary 3:16	reports 12:9	simply 13:1 15:1,6
15:19,22	noted 15:13	4:4	requires 7:15 9:19	sir 2:20
looking 10:1	notice 3:2	present 1:19,23	respect 3:16	situation 9:3,18
lot 11:10	November 4:22	3:21	Restaurant 5:1	15:2,11
lots 15:20	N.E 2:8	presented 10:1	result 12:7	sorry 2:19
	N.W 1:16	12:19	Retailer 1:8	speak 7:6
M		presents 9:18	reverse 10:12	standpoint 12:17
M 5:1	O	presiding 1:17	right 2:3 7:11 9:21	start 3:19
March 4:6	OAG 1:24	pretty 15:21	12:5 13:7 15:10	Status 1:8 3:1
matter 1:5 4:4 6:1	occurrences 11:22	prior 5:7	Rivero 1:24 2:11	16:10
8:20 16:10	offer 3:21	probably 9:16 11:7	2:12 3:18 4:8,10	statute 8:16,22
matters 3:16	office 7:1,8 12:13	problem 8:3	4:18 5:18,19 6:21	statutes 8:15
MEETING 1:3	oh 6:17 14:18	problems 8:6	7:5 10:17,20	Street 1:7,16 2:7
Member 1:21,21			11:20 12:2,12	

<p>5:1 suffice 8:22 Suite 1:16 Superclub 1:6 2:16 2:18 sure 11:17 15:21 surprising 7:9 suspect 15:21 sustained 8:11</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>take 15:22 takes 11:6 tell 6:14 territory 12:16 thank 6:21 10:15 11:2 13:7 14:17 16:3,4,5,6,7 think 8:7 11:6 14:15 15:8 thinking 9:21 three 4:11,14,16 10:2 13:12 time 4:14,19,21 5:6 8:21 11:22 times 8:21,21 Title 12:7 today 10:20 12:22 totally 7:21 training 16:1 troubling 11:9 Truong 2:15,15 3:4 3:7,10,14 15:19 16:5 turn 4:11 two 10:18 t/a 1:6</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>understand 3:8 7:4 7:13 9:22 11:7 understands 7:7 unintended 9:13 unlawful 7:20 unusual 5:21 use 11:22 12:13</p> <hr/> <p style="text-align: center;">V</p> <hr/>	<p>versus 5:2 view 6:15 violation 8:10 9:3 10:9,9 violations 10:2 vote 14:8,12</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>waive 3:12 want 9:9 11:4,15 14:19 wanted 15:7 warning 6:11 9:6 9:10 Washington 1:17 way 8:15 9:13,15 11:12,18 welcome 13:8 welfare 11:11 wondering 11:19 word 15:16 wrong 13:15</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>yesterday 15:5</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>p 1:4,13</p> <hr/> <p style="text-align: center;">#</p> <hr/> <p>#12-251-00108 1:10 #12-251-00168 1:9 #12-251-00196 1:10 #12-251-00223 1:9</p> <hr/> <p style="text-align: center;">0</p> <hr/> <p>00196 2:10 4:7 00223 4:13</p> <hr/> <p style="text-align: center;">1</p> <hr/> <p>1st 1:7 2:7 10:00 4:6 10:01 2:2 10:16 16:11 12 4:11 12-251 2:9 4:12</p>	<p>12-251-00108 2:10 4:12 13:16 12-251-00168 2:9 13:15 12-251-00196 3:19 12-251-00223 2:6 13:15 1222 1:7 2:7 14th 1:16 1900 5:1</p> <hr/> <p style="text-align: center;">2</p> <hr/> <p>20 4:6 8:21 2000 1:16 20009 1:17 2013 1:14 4:6 23 1:14 25's 12:8 251-00168 4:12</p> <hr/> <p style="text-align: center;">3</p> <hr/> <p>3-0-1 14:12</p> <hr/> <p style="text-align: center;">4</p> <hr/> <p>400S 1:17</p> <hr/> <p style="text-align: center;">7</p> <hr/> <p>74456 1:8 2:8</p>		
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