

DISTRICT OF COLUMBIA
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ALCOHOLIC BEVERAGE CONTROL BOARD
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MEETING

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IN THE MATTER OF: :
: :
Restaurant Enterprises, Inc. :
t/a Smith Point : Show
1338 Wisconsin Ave., NW : Cause
Retailer CR - ANC-2E : Hearing
License No. 60131 :
Case #13-AUD-00047 :
: :
(Failed to Maintain :
Documentation Showing All :
Sales & Purchase Invoices, :
Failed to Maintain on Premises :
Three Years of Adequate Books :
and Records Showing All Sales) :
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December 4, 2013

The Alcoholic Beverage Control

Board met in the Alcoholic Beverage Control
Hearing Room, Reeves Building, 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
MIKE SILVERSTEIN, Member
HERMAN JONES, Member

ALSO PRESENT:

LOUISE PHILLIPS, OAG
ADENIYI ADEJUNMOBI, ABRA Investigator

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

(11:19 a.m.)

CHAIRPERSON MILLER: Okay. Good morning.

ALL: Good morning.

CHAIRPERSON MILLER: I'm calling Case No. 13-AUD-00047, Smith Point located at 1338 Wisconsin Avenue, N.W., License No. 60131, in ANC-2E.

And would you all start by identifying yourselves for the record, please?

MS. PHILLIPS: Louise Phillips, Assistant Attorney General for the District of Columbia.

MR. KLINE: Good morning, Andrew Kline on behalf of the licensee.

MR. SIMONE: Good morning, David Simone, one of the licensees.

CHAIRPERSON MILLER: Okay. So this is a Show Cause Hearing. Are there any preliminary matters to begin with?

MS. PHILLIPS: I always consider

1 stipulations to be a preliminary matter, Madam
2 Chair.

3 CHAIRPERSON MILLER: Yes.

4 MS. PHILLIPS: The parties have
5 agreed to stipulate to the facts as they are
6 presented in the investigative report with the
7 attached exhibits. And at that point, that's
8 the stipulation thus far. Have I stated it
9 correctly?

10 MR. KLINE: Yes.

11 MS. PHILLIPS: All right. That's
12 the stipulation. And then the parties, I
13 guess, will argue after that.

14 CHAIRPERSON MILLER: Okay.

15 MR. KLINE: And procedurally where
16 I think we are is there is a stipulated set of
17 facts, which is agreed upon. The Government
18 has presented, the Government rests,
19 presumably. We are not putting on any
20 evidence, but I do have a Motion to Dismiss
21 based upon the failure to make a prima facie
22 case on one of the charges, which I think

1 should be heard before we do closing on what
2 the total evidence is.

3 MS. PHILLIPS: I think that's a
4 preliminary matter, isn't it?

5 MR. KLINE: No, I can't make a
6 Motion to Dismiss based upon failure to make
7 a prima facie case until you put on your case,
8 which you just did by stipulating to the
9 facts.

10 CHAIRPERSON MILLER: Okay. So
11 whatever we call it, at this point, there is
12 a stipulation of the facts, as Ms. Phillips
13 presented it, that are contained in the
14 reports and in the exhibits that are in the
15 record to date, correct?

16 MR. KLINE: Right. And I don't
17 want to be hyper-technical, but I also don't
18 want to waive our right to be able to argue
19 for dismissal of one of the charges, based
20 upon failure to make out a prima facie case
21 and then the Board can rule on that. And then
22 our closing argument based upon what charges

1 survive after that argument.

2 CHAIRPERSON MILLER: Okay. So I
3 mean it sounds like the facts are here and
4 each of you are going to argue the law based
5 on the facts.

6 MR. KLINE: I think I'm fighting
7 over order, at this point --

8 CHAIRPERSON MILLER: Okay. How--

9 MR. KLINE: -- of the case. I
10 think that's what I'm looking at.

11 CHAIRPERSON MILLER: Okay. There
12 are two charges. Now, you haven't admitted to
13 -- you are not stipulating to liability or
14 anything like that. Just the underlying
15 facts?

16 MR. KLINE: Right.

17 CHAIRPERSON MILLER: Okay.

18 MR. KLINE: So --

19 CHAIRPERSON MILLER: So how do you
20 propose to proceed?

21 MR. KLINE: What I propose is that
22 the Government has rested, we rested, we're

1 not putting on any evidence. I would like the
2 opportunity before we do closing arguments to
3 argue a Motion to Dismiss, that the facts as
4 set forth in the stipulated facts, which are
5 the facts that are set forth in the notice, do
6 not support those charges.

7 MS. PHILLIPS: So I think that's
8 where we are. I think it's a preliminary once
9 there is a stipulation. It doesn't matter to
10 me. It's now time to argue his Motion to
11 Dismiss, as I see it.

12 CHAIRPERSON MILLER: Okay.

13 MR. KLINE: Right.

14 CHAIRPERSON MILLER: Well, it
15 sounds like you both agree to that anyway.

16 MR. KLINE: Yep.

17 CHAIRPERSON MILLER: All right. I
18 just want to just make certain for the record
19 that the facts you stipulate to are not just
20 the ones in the notice, but also the ones in
21 the underlying report and exhibits?

22 MR. KLINE: No. We are

1 stipulating to --

2 CHAIRPERSON MILLER: What?

3 MR. KLINE: -- the facts as laid
4 out in the notice.

5 CHAIRPERSON MILLER: Period?

6 MEMBER ALBERTI: Period?

7 MS. PHILLIPS: No. We are
8 stipulating to the facts as laid out in the
9 case report.

10 MR. KLINE: Well --

11 MS. PHILLIPS: I don't make up
12 facts.

13 MR. KLINE: Well, no, but there is
14 a Summary of Facts that presumably supports
15 the charge.

16 MEMBER ALBERTI: Oh.

17 MR. KLINE: That's the way the
18 notice was written. I mean, that's what we
19 are on notice. I mean, we have a report, but
20 the notice says these are the facts. This is
21 what you did. And as a result of what you did
22 or didn't do, we have these two charges.

1 MS. PHILLIPS: I disagree with
2 that. The notice is notice. It's what we
3 call notice pleading in Superior Court and the
4 Federal Court, which is the only thing we can
5 go by. And in ABRA Rules a notice is just a
6 notice of pleading. It's all based on the
7 facts of the case report, the investigative
8 report and the exhibits.

9 This is just like a complaint in
10 any other forum. I don't put every single
11 fact that is in the evidentiary investigative
12 report. I put enough to put people on notice.
13 Here are the charges. They are all based on
14 the investigative report. I do a summary in
15 the notice, as does everyone else on behalf of
16 the District in these matters, and it's all
17 based on the investigative report.

18 Whether the District chooses to
19 put some of the things that are in the
20 investigative report in the notice is of no
21 merit. If somebody comes to testify, they are
22 not testifying on the notice that the District

1 Attorney wrote. They are testifying on the
2 report that they did.

3 CHAIRPERSON MILLER: Okay. We are
4 not deciding what is to be stipulated. So
5 either you have agreed or you haven't agreed.
6 If you haven't agreed, then --

7 MS. PHILLIPS: So you are saying
8 we didn't agree, then I always stipulate on
9 the investigative report and the exhibits.
10 That's what I said. I thought that's what you
11 agreed to. And I said and the notice. So if
12 that's not what we agreed to, my witness is
13 here. We can go forward, you know.

14 CHAIRPERSON MILLER: If you need
15 to -- do you need to take another two minutes
16 to see what you are going to do?

17 MR. KLINE: No. I think the issue
18 is this. As long as the stipulation is as to
19 facts contained in the investigative report
20 and not to the Investigator's conclusions,
21 then we're fine with that.

22 My difficulty is the investigative

1 report contains conclusions and the notice,
2 frankly, is a complete recitation of relevant
3 facts. Reading from the report, I'm a little
4 troubled that Ms. Phillips doesn't deem her
5 notice sufficient to support her case, but so
6 be it.

7 I mean, I really don't understand
8 the Government's position. We sent you a
9 notice. It sets forth facts that support a
10 charge, but we are not comfortable with those
11 facts and we need more to sustain the charge.
12 I don't understand that.

13 I mean, the Board signed this
14 letter. Ms. Miller, you as Chair on behalf of
15 the Board, signed the letter with a Show Cause
16 notice reciting facts that presumably are
17 sufficient to maintain the charge.

18 And one would think just like in a
19 criminal case, which this is not, if one
20 admits to the facts in the charging document,
21 then that should be sufficient.

22 So maybe we won't stipulate.

1 Maybe instead what we will do is admit the
2 facts as set forth in the notice. And if Ms.
3 Phillips doesn't deem that sufficient, that's
4 up to her.

5 MS. PHILLIPS: I think we just
6 don't have an agreement on the stipulation.

7 CHAIRPERSON MILLER: Okay.

8 MS. PHILLIPS: So we just need to
9 go forward.

10 CHAIRPERSON MILLER: Okay.

11 MS. PHILLIPS: That is as simple
12 as it gets.

13 MR. KLINE: We do not have an
14 agreement on the stipulation. However, the
15 licensee is admitting the facts as set forth
16 in the notice.

17 MS. PHILLIPS: And since until
18 right here this minute I didn't believe -- I
19 didn't -- that wasn't a stipulation to which
20 I thought I was agreeing, then I can't take
21 the time to go through and make sure I had put
22 every single fact, because that's not Notice

1 of Pleading. That's just, you know, you put
2 down enough to --

3 CHAIRPERSON MILLER: Okay.

4 MS. PHILLIPS: -- make the charge.
5 But we have testimony that carries the rest of
6 them. And from now on, believe me, on Mr.
7 Kline's cases, I can certainly in every single
8 notice on behalf of the District of Columbia
9 incorporate my reference, the investigative
10 report, as I do in other notices where it is
11 more important that every single word is
12 incorporated.

13 CHAIRPERSON MILLER: Okay. Okay.
14 I think that we need to just stop and proceed.
15 You don't have a stipulation, then you can go
16 forward and put on whatever evidence you need
17 to put on.

18 MR. KLINE: If I may? I mean, is
19 the Government concerned that the charging
20 document that they put out is incomplete? I'm
21 completely puzzled why it is that we would
22 walk in here and say okay, you have alleged

1 these facts. We admit them. Now, let's talk
2 about what they mean, that the Government
3 would say well, we don't know if that's
4 sufficient. They prepared the charging
5 document.

6 CHAIRPERSON MILLER: Okay. I hear
7 you. I hear you, but it's really not our
8 call. Either you have --

9 MR. KLINE: All right.

10 CHAIRPERSON MILLER: -- a
11 stipulation or you don't. If you don't, let's
12 move and maybe you don't have to spend too
13 much time on facts if they are not contested.

14 MR. KLINE: Fine.

15 CHAIRPERSON MILLER: But, you
16 know, to hear you guys just argue back and
17 forth isn't --

18 MR. KLINE: That's fine. So for
19 the record, the licensee admits the facts
20 which are set forth in the notice.

21 CHAIRPERSON MILLER: Okay.

22 MEMBER ALBERTI: I'm not -- may I

1 ask a question?

2 CHAIRPERSON MILLER: Yes.

3 MEMBER ALBERTI: I'm not sure what
4 that means. I don't really want to spend a
5 lot of time, but there is a sentence in the
6 report that says while performing the review,
7 the Compliance Analyst determined such and
8 such. And I won't go into what that was.

9 But the determination by the
10 Compliance Analyst, is that a fact that you
11 are admitting to, Mr. Kline, or not? Just so
12 we know what you are admitting to. I want to
13 be fair to you.

14 MR. KLINE: I appreciate that. We
15 are -- I mean, I can read the whole thing into
16 the record.

17 MEMBER ALBERTI: No.

18 MR. KLINE: But we are --

19 MEMBER ALBERTI: That's all right.
20 Go ahead.

21 MR. KLINE: We are admitting all
22 of the facts -- there are no facts recited

1 under Charge 2. Charge 2 incorporates by
2 reference.

3 MEMBER ALBERTI: No, but I mean
4 in the report. Oh, you only are -- you are
5 only admitting to the facts in the notice. Is
6 that correct?

7 MR. KLINE: Yeah.

8 MEMBER ALBERTI: Okay. Now, I
9 understand. I understand now.

10 MR. KLINE: Yes.

11 MEMBER ALBERTI: All right.

12 MR. KLINE: And presumably, Mr.
13 Alberti --

14 MEMBER ALBERTI: That's fine. I
15 understand.

16 MR. KLINE: -- if this is -- if
17 everyone did their jobs, then this should be
18 sufficient to support the charges.

19 CHAIRPERSON MILLER: All right.

20 MS. PHILLIPS: Move to strike the
21 preparatory --

22 MR. KLINE: I would withdraw that.

1 MS. PHILLIPS: -- comment on --

2 CHAIRPERSON MILLER: All right.

3 Let's move on. Let's just move on with the
4 case. Okay. We are beyond preliminary
5 matters. Are there opening statements?

6 MS. PHILLIPS: Yes.

7 CHAIRPERSON MILLER: Okay.

8 MS. PHILLIPS: Thank you, Madam
9 Chair. The District has put forth a notice
10 based on Investigative Report Case No. 13-AUD-
11 00047. The date of occurrence May 23, 2013,
12 according to the investigative case report.

13 The charging document contains to
14 charges. One is failure to maintain the
15 documentation on file that could be reviewed
16 in an audit capacity or in quarterly
17 statements that were filed. There were
18 quarterly statements filed and then there were
19 amended quarterly statements filed.

20 The second charge is failure to
21 keep and maintain records on the premises for
22 three years. And if you are missing certain

1 records, then you don't have them on file to
2 review.

3 The conclusion, I believe, of the
4 auditor, which is a fact, is that they didn't
5 have at least one quarter, I think it's just
6 one quarter, worth of records.

7 And while I believe the
8 investigative report says it is a computer
9 failure, I have come to learn subsequently if
10 the report doesn't say so, that there was a
11 computer failure, that is the reason why we
12 stipulated about the investigative report of
13 the notice, because they were going to argue
14 about the merits of computer failure, which do
15 happen sometimes.

16 That's where the -- that issue
17 right there is for the Board to make a
18 determination. The District believes that
19 there are enough facts, both in the notice and
20 the case report, to substantiate both charges
21 and asks that the Board, at the conclusion of
22 the evidence, find in favor of the District

1 and charge the establishment with Charge 1 and
2 Charge 2 and enable -- enact a fine.

3 CHAIRPERSON MILLER: Okay. Mr.
4 Kline, do you have an opening statement?

5 MR. KLINE: I'll reserve.

6 CHAIRPERSON MILLER: Okay. Ms.
7 Phillips, do you want to call your first
8 witness?

9 MS. PHILLIPS: I do.

10 CHAIRPERSON MILLER: Okay. You
11 just have one witness. Is that right?

12 MS. PHILLIPS: Just one.

13 CHAIRPERSON MILLER: Okay. Good
14 morning.

15 INVESTIGATOR ADEJUNMOBI: Good
16 morning.

17 Whereupon,

18 INVESTIGATOR ADENIYI ADEJUNMOBI
19 was called as a witness by Counsel for the
20 Government, and having been first duly sworn,
21 assumed the witness stand and was examined and
22 testified as follows:

1 CHAIRPERSON MILLER: Okay. Thank
2 you. Take a seat.

3 DIRECT EXAMINATION

4 MS. PHILLIPS: Good morning.

5 INVESTIGATOR ADEJUNMOBI: Good
6 morning.

7 MS. PHILLIPS: Will you state your
8 name for the record and spell it for the court
9 reporter, please?

10 INVESTIGATOR ADEJUNMOBI: Adeniyi
11 Adejunmobi, A-D-E-N-I-Y-I A-D-E-J-U-N-M-O-B-
12 I.

13 MS. PHILLIPS: And just to make
14 sure, is your mike on?

15 INVESTIGATOR ADEJUNMOBI: Yes,
16 it's on.

17 MS. PHILLIPS: Okay. Because I'm
18 having trouble hearing you, so it must be just
19 me.

20 CHAIRPERSON MILLER: No, it's not
21 just you. It's just, you know, speak up a
22 little bit. Thanks.

1 MS. PHILLIPS: Okay.

2 CHAIRPERSON MILLER: Okay.

3 MS. PHILLIPS: Could you tell me
4 what your capacity is in ABRA, please?

5 INVESTIGATOR ADEJUNMOBI: I'm a
6 Compliance Analyst for Alcoholic Beverage
7 Regulation Administration.

8 MS. PHILLIPS: And as part of your
9 job description, as it relates to this
10 particular case that we are talking about,
11 what did you do in this case as part of your
12 job?

13 INVESTIGATOR ADEJUNMOBI: In this
14 particular case, Smith Point was selected for
15 the audit, which involved looking at the
16 quarterly statement that was filed by Smith
17 Point and verifying the figures on the
18 quarterly statement.

19 In essence, making sure that those
20 figures are supposed by quest checks as
21 evidence that food were being sold and
22 alcoholic beverages were being sold.

1 MS. PHILLIPS: And I understand
2 that some times computer -- they have --
3 establishments have computer programs that
4 record the information that you need to
5 utilize to do your audit and compare the
6 quarterly statements. Is that true?

7 INVESTIGATOR ADEJUNMOBI: Yes, if
8 that's what they use.

9 MS. PHILLIPS: Right.

10 INVESTIGATOR ADEJUNMOBI: But not
11 in all cases.

12 MS. PHILLIPS: Not in all cases.
13 In this case, was there a computer program
14 that you were going to review?

15 INVESTIGATOR ADEJUNMOBI: I
16 wouldn't know that, ma'am, because when we
17 asked the operator of the establishment to
18 provide the records for January through March,
19 calendar year 2012, he said he does not have
20 it.

21 MS. PHILLIPS: Okay. And was it
22 Mr. Simone that you spoke to or it was

1 somebody else? And if you have to look at
2 your report, I believe you have your report in
3 your hand. Is that correct?

4 INVESTIGATOR ADEJUNMOBI: Yes, I
5 believe so. I can recognize Mr. Simone.

6 MS. PHILLIPS: Okay. All right.
7 Now, as part of your job, do you conduct
8 audits on establishments upon request of
9 either the Board or the Administration?

10 INVESTIGATOR ADEJUNMOBI: Yes.

11 MS. PHILLIPS: And that's part of
12 your normal course and scope of your job that
13 you do these things. Is that correct?

14 INVESTIGATOR ADEJUNMOBI: Yes.

15 MS. PHILLIPS: And quarterly
16 reports, how do they come usually in each
17 case?

18 INVESTIGATOR ADEJUNMOBI: They are
19 submitted on a quarterly basis as mandated by
20 the law, based on the kind of license that you
21 have, CR.

22 MS. PHILLIPS: Okay.

1 INVESTIGATOR ADEJUNMOBI: And we
2 have so many different means for them to make
3 that submission.

4 MS. PHILLIPS: Right. And so
5 quarterly statements come in quarterly as they
6 state, but do they have any kind of grace
7 period after the quarter ends within which
8 they are supposed to file the quarterly
9 statements, whichever -- by whichever means
10 they choose?

11 INVESTIGATOR ADEJUNMOBI: No grace
12 period. You have a mandated 30 days after the
13 three months period.

14 MS. PHILLIPS: Okay.

15 INVESTIGATOR ADEJUNMOBI:
16 Stipulated by law, but it's not a grace
17 period.

18 MS. PHILLIPS: Okay. See when I
19 use the wrong word, just correct me, because
20 so in other words the law states that it is
21 yearly chronological year, right?

22 INVESTIGATOR ADEJUNMOBI: Yes.

1 MS. PHILLIPS: January to March,
2 that would be a quarter.

3 INVESTIGATOR ADEJUNMOBI: Um-hum.

4 MS. PHILLIPS: Correct?

5 INVESTIGATOR ADEJUNMOBI: Yes.

6 MS. PHILLIPS: And so they would
7 have to file it by the end of April. Is that
8 fair?

9 INVESTIGATOR ADEJUNMOBI: Yes,
10 yes.

11 MS. PHILLIPS: All right. And all
12 restaurants file quarterly statements?

13 INVESTIGATOR ADEJUNMOBI: Yes.
14 All with CR Licenses and DH.

15 MS. PHILLIPS: Okay. And as part
16 of your normal course and scope of your job as
17 Compliance Officer, do you check the quarterly
18 statements?

19 INVESTIGATOR ADEJUNMOBI: Yes.

20 MS. PHILLIPS: And did you so
21 check the quarterly statements as they were
22 filed in this particular establishment?

1 INVESTIGATOR ADEJUNMOBI: Yes.

2 MS. PHILLIPS: And at some point
3 in time a determination was made that there
4 was going to be an audit. Is that fair?

5 INVESTIGATOR ADEJUNMOBI: Yes.

6 MS. PHILLIPS: And how does that
7 come about, the determination to have an
8 audit?

9 INVESTIGATOR ADEJUNMOBI: We
10 review the quarterly statements and we have so
11 many per different parameters that we use.
12 Some times it's random because we have over
13 900 in our database and some times in case of
14 amended statements, I mean, it's a red flag.
15 When you amend the statements, we feel that we
16 pick them. So in this case, I believe it was
17 part of the reason why we picked Smith Point.

18 MS. PHILLIPS: All right.

19 INVESTIGATOR ADEJUNMOBI: The
20 statements were amended.

21 MS. PHILLIPS: All right. Can you
22 tell me, I know it's in your report somewhere

1 that you had where amendments were filed, when
2 they were filed, as compared to the
3 determination for the audit?

4 INVESTIGATOR ADEJUNMOBI: Yes, on
5 May 15th we received three quarterly
6 statements covering the period second through
7 fourth period of calendar year 2012.

8 MS. PHILLIPS: All right. And is
9 it my understanding, and correct me if I'm
10 wrong, is that when an establishment is chosen
11 by whatever means the Administration chooses
12 establishments be audited, there is a Notice/
13 Letter of Audit that goes out. Is that
14 correct?

15 INVESTIGATOR ADEJUNMOBI: Yes,
16 ma'am.

17 MS. PHILLIPS: All right. Then
18 did such go out in this case?

19 INVESTIGATOR ADEJUNMOBI: Yes,
20 such went out.

21 MS. PHILLIPS: And did you attach
22 that audit letter to your report?

1 INVESTIGATOR ADEJUNMOBI: Yes.

2 MS. PHILLIPS: And is that Exhibit

3 2?

4 INVESTIGATOR ADEJUNMOBI: Yes.

5 MS. PHILLIPS: Is the date on that
6 audit letter February 25, 2013?

7 INVESTIGATOR ADEJUNMOBI: It is.

8 It is, ma'am.

9 MS. PHILLIPS: Okay. So was that
10 when -- February 25th the date of the letter
11 or whatever it gets there, is that the date
12 that the establishment knew that they were
13 going to have an audit?

14 INVESTIGATOR ADEJUNMOBI: Yes.

15 MS. PHILLIPS: How is the date
16 chosen upon which the audit is going to be
17 held?

18 INVESTIGATOR ADEJUNMOBI: We -- by
19 law, we have to give them 30 days. So and we
20 have several of these audits that we schedule
21 at the same time. So the dates is based on
22 that.

1 MS. PHILLIPS: Okay.

2 INVESTIGATOR ADEJUNMOBI: At least
3 it has to be 30 days from the date of the
4 initiation.

5 MS. PHILLIPS: All right. So when
6 you send out a Notice of Intent to take an
7 audit and you send out the notice letter, you
8 give an appointment. Is that fair?

9 INVESTIGATOR ADEJUNMOBI: Yes.

10 MS. PHILLIPS: And that such an
11 appointment is recorded in the notice letter,
12 which is Exhibit 2. Is that fair?

13 INVESTIGATOR ADEJUNMOBI: Yes.

14 MS. PHILLIPS: And now, if the
15 establishment is unavailable on that day, is
16 there some method that can be used to change
17 the date?

18 INVESTIGATOR ADEJUNMOBI: Well, we
19 have in the letter that if they are not going
20 to be available, they can call the Auditor and
21 reschedule.

22 MS. PHILLIPS: And did this

1 establishment avail themselves of this
2 rescheduling?

3 INVESTIGATOR ADEJUNMOBI: I don't
4 think so.

5 MS. PHILLIPS: Okay. So I believe
6 you said the -- on Wednesday, May 15, 2013, is
7 when they amended their quarterly statement?

8 INVESTIGATOR ADEJUNMOBI: Yes.

9 MS. PHILLIPS: Did I hear you
10 correctly?

11 INVESTIGATOR ADEJUNMOBI: Yes.

12 MS. PHILLIPS: So that would have
13 been after they received the Notice/Letter of
14 Audit?

15 INVESTIGATOR ADEJUNMOBI: Yes,
16 definitely.

17 MS. PHILLIPS: All right. Okay.
18 And how many quarterly statements, amended
19 quarterly statements did you receive on May
20 15, 2013?

21 INVESTIGATOR ADEJUNMOBI: Three.

22 MS. PHILLIPS: Three? And they

1 were for which quarters?

2 INVESTIGATOR ADEJUNMOBI: For
3 quarter two, quarter three and quarter four.

4 MS. PHILLIPS: Okay. And the
5 audit is being conducted for the year 2012.
6 Is that fair?

7 INVESTIGATOR ADEJUNMOBI: Yes.

8 MS. PHILLIPS: And it's the
9 chronological year, not a fiscal year, so it's
10 chronological year, January to December?

11 INVESTIGATOR ADEJUNMOBI: Yes.

12 MS. PHILLIPS: So you went out to
13 the establishment. Did you go with others?

14 INVESTIGATOR ADEJUNMOBI: Yes, I
15 did.

16 MS. PHILLIPS: And who were those
17 others?

18 INVESTIGATOR ADEJUNMOBI: I went
19 with Ms. Monica Clark, who is a Compliance
20 Analyst and Investigator Brian Owens, who is
21 no longer here.

22 MS. PHILLIPS: And when you got to

1 the establishment, what did you determine?

2 INVESTIGATOR ADEJUNMOBI: Well, at
3 the end of the -- I spoke with Mr. Simone. We
4 requested for the documents. I explained the
5 audit process to him, as we normally do, and
6 what -- why we were there, the reason why we
7 are there for is to verify the figures on the
8 quarterly statement.

9 And we requested for the books and
10 records and I told him about the amended
11 statements that we received subsequent to the
12 day that we initiated the audit. And he said
13 well, that -- and I asked him, I said the four
14 statements -- the four quarterly statement
15 that you sent on time, can you support them?
16 He said no.

17 He said but he can support only
18 one quarter, which is first quarter of 2012.
19 But he will be able to support the amendment
20 statements for the three quarters, not the
21 original statements.

22 MS. PHILLIPS: So all right, I'm

1 confused and perhaps I just misheard you.

2 This hearing thing is problematic.

3 So what you just told me, I think
4 I heard was that Mr. Simone told you he could
5 not support the first quarter of 2012, because
6 he had no records. Is that what you said?

7 INVESTIGATOR ADEJUNMOBI: No,
8 that's not what I said.

9 MS. PHILLIPS: Okay. So tell me
10 again, which quarters could he support on the
11 timely submitted quarterly statements?

12 INVESTIGATOR ADEJUNMOBI: First
13 quarter.

14 MS. PHILLIPS: Only first quarter?

15 INVESTIGATOR ADEJUNMOBI: Yes.

16 MS. PHILLIPS: And why could he
17 not support the second, third and fourth
18 quarters of the timely submitted quarterly
19 statements?

20 INVESTIGATOR ADEJUNMOBI: That I
21 do not know.

22 MS. PHILLIPS: He did not tell you

1 why he could not support them?

2 INVESTIGATOR ADEJUNMOBI: No.

3 MS. PHILLIPS: And he did not show
4 you that he didn't have documentation of
5 support for the second, third and fourth
6 quarters?

7 INVESTIGATOR ADEJUNMOBI: Well,
8 what he said was he could not support the
9 fourth set of statements, the third or the
10 second, third or fourth quarter of the
11 original statement that was submitted on time.
12 The reason behind it, I did not inquire as to
13 why.

14 MS. PHILLIPS: So he submitted
15 three amended quarterly statements?

16 INVESTIGATOR ADEJUNMOBI: Yes.

17 MS. PHILLIPS: A couple of days,
18 was it eight days prior to the audit. And for
19 what quarters were they?

20 INVESTIGATOR ADEJUNMOBI: They
21 were for third -- for second, third and fourth
22 quarter, calendar year 2012.

1 MS. PHILLIPS: And for the amended
2 quarterly statements, did Mr. Simone tell you
3 he had books and records to support the
4 amended quarterly statement?

5 INVESTIGATOR ADEJUNMOBI: Yes,
6 yes.

7 MS. PHILLIPS: Did he say why he
8 could not support the timely filed second,
9 third and fourth quarters, but he could
10 support the eight day prior to the audit,
11 second, third and fourth quarters? Did he tel
12 you that?

13 MR. KLINE: Objection. Part of it
14 is asked and answered and the other reason for
15 my objection is it's a compound question.

16 CHAIRPERSON MILLER: Yes,
17 sustained. I mean, I have gotten confused by
18 your questions. So if you could rephrase it
19 and separate it?

20 MS. PHILLIPS: I can do that.

21 CHAIRPERSON MILLER: Okay.

22 MS. PHILLIPS: But he also

1 objected to asked and answered and the reason
2 I am --

3 CHAIRPERSON MILLER: Oh.

4 MS. PHILLIPS: -- asking it again
5 is because I didn't catch what he said in that
6 long, what would be, clarifying, and then I
7 don't hear it.

8 CHAIRPERSON MILLER: Okay.

9 MS. PHILLIPS: So there is a two
10 part objection.

11 CHAIRPERSON MILLER: Well, if you
12 are trying to clarify, you can, you know,
13 rephrase your question and get a clarification
14 that you are seeking.

15 MS. PHILLIPS: Thank you.

16 CHAIRPERSON MILLER: Okay.

17 MS. PHILLIPS: All right. Did Mr.
18 Simone tell you why he could not support the
19 timely filed second quarterly report, but he
20 could support the one, the second quarter
21 report, filed eight days prior to the audit?

22 INVESTIGATOR ADEJUNMOBI: No. He

1 did not tell me, because I didn't ask why he
2 didn't -- couldn't support the first set of
3 statements, because he filed an amendment.

4 MS. PHILLIPS: So did you check to
5 see if he could support the amended second
6 quarterly statement?

7 INVESTIGATOR ADEJUNMOBI: Yes.

8 MS. PHILLIPS: And did his books
9 and records support the amended second
10 quarterly statement?

11 INVESTIGATOR ADEJUNMOBI: They
12 supported the second, third and fourth
13 quarter.

14 MS. PHILLIPS: Books and records
15 supported the second, third and fourth
16 quarter --

17 INVESTIGATOR ADEJUNMOBI: Amended.

18 MS. PHILLIPS: -- amended
19 statements?

20 INVESTIGATOR ADEJUNMOBI: Yes.

21 MS. PHILLIPS: And you had no
22 explanation as to why the books and records

1 would not support the timely filed second,
2 third and fourth quarters?

3 MR. KLINE: Objection. Asked and
4 answered.

5 CHAIRPERSON MILLER: It was asked
6 and answered. Okay.

7 MS. PHILLIPS: And I don't
8 remember the answer, but the record will speak
9 for itself. It is a yes or no answer, so it's
10 taking less time.

11 CHAIRPERSON MILLER: All right.
12 Go ahead. You don't know what the answer is
13 truly? Go ahead. I'll allow it.

14 MS. PHILLIPS: I wouldn't have
15 asked it again if I could remember the answer.

16 CHAIRPERSON MILLER: Okay.

17 MR. KLINE: Stipulate he doesn't
18 know. He didn't ask.

19 CHAIRPERSON MILLER: That was the
20 answer I heard, too. But do you want to say
21 it for the record again?

22 INVESTIGATOR ADEJUNMOBI: I need

1 to hear --

2 CHAIRPERSON MILLER: Hear the
3 question again?

4 INVESTIGATOR ADEJUNMOBI: Yes,
5 ma'am.

6 MS. PHILLIPS: If they have
7 stipulated, that's fine with me.

8 CHAIRPERSON MILLER: Okay.

9 MS. PHILLIPS: So at the end of
10 the day, what, with regard to the audit, was
11 the determination that you made as a
12 Compliance Analyst and an Auditor?

13 INVESTIGATOR ADEJUNMOBI: The
14 determination was the operator of Smith Point
15 was unable to provide a complete records to
16 perform the audit. And in the sense what I
17 remember was the same January through March
18 was missing and we are doing a whole year
19 calendar year audit, three months couldn't see
20 -- I mean, couldn't see the documents or the
21 evidence for the sales that was presented on
22 the first quarter quarterly statement.

1 MS. PHILLIPS: Okay.

2 INVESTIGATOR ADEJUNMOBI: Which
3 covered the month of January through March.

4 MS. PHILLIPS: So in other words,
5 the audit could not be completed because the
6 establishment did not have the books and
7 records that you needed for the complete
8 audit.

9 INVESTIGATOR ADEJUNMOBI: Exactly.

10 MS. PHILLIPS: All right. Now,
11 while you were also at the establishment, did
12 you make a determination about whether the
13 establishment complied with the maintenance of
14 records for three years in the establishment?

15 INVESTIGATOR ADEJUNMOBI: Okay.
16 We had an Audit Team out in the field. The
17 Investigator Brian Owens made that
18 determination.

19 MS. PHILLIPS: And what was the
20 determination based on your investigation,
21 since you were in the field?

22 INVESTIGATOR ADEJUNMOBI: That the

1 establishment did not have complete books and
2 records for three years.

3 MS. PHILLIPS: For three years.
4 Now, as part of your analysis for an audit,
5 looking at the difference between the timely
6 filed quarterly statements and the amended
7 quarterly statements just to see if there is
8 any differences or what the differences were,
9 is that part of your analysis?

10 INVESTIGATOR ADEJUNMOBI: Yes.
11 Sometimes I do that to see that, but, at this
12 point in time, what I was really concerned
13 about is that he amended the statements, which
14 I already put in the report. As an Auditor,
15 it's a little -- if you are amending a report,
16 after receiving a Letter of Engagement, okay,
17 I mean, to me as an Auditor the fact that you
18 are admitting to something that is wrong with
19 the previously filed records, that's why you
20 are amending them.

21 MS. PHILLIPS: Now, is there a
22 provision in the law that you, as an Auditor,

1 use where establishment who must file
2 quarterly reports can file an amended
3 quarterly statement? Is there a time period?

4 INVESTIGATOR ADEJUNMOBI: That I'm
5 not sure, but I believe there is.

6 MS. PHILLIPS: Okay. And if the
7 amended quarterly statements two, three and
8 fourth quarters were filed eight days prior to
9 the audit appointment, even if you don't know
10 the time limit by which you can file a
11 corrected audited statement, would they have
12 complied with this?

13 INVESTIGATOR ADEJUNMOBI: No.

14 MS. PHILLIPS: Now, I see that you
15 attached an Exhibit 1 to your report. What is
16 Exhibit 1?

17 INVESTIGATOR ADEJUNMOBI: Exhibit
18 1 is the complete set of quarterly statements
19 that were filed by Smith Point.

20 MS. PHILLIPS: And is there a way
21 to determine by looking at the quarterly
22 statements when they were filed?

1 INVESTIGATOR ADEJUNMOBI: Yes.

2 MS. PHILLIPS: How do you do that?

3 Do you look at the to/sent date?

4 INVESTIGATOR ADEJUNMOBI: Yes, you
5 look at that.

6 MS. PHILLIPS: All right. So --

7 INVESTIGATOR ADEJUNMOBI: That
8 will tell you.

9 MS. PHILLIPS: -- the first
10 exhibit, and we will just use it for an
11 example, appears to be the first quarter,
12 January to March 2012. And up in the sent it
13 has a date. Is that the date by which this
14 quarterly report was submitted?

15 MR. KLINE: Objection. Madam
16 Chair, I'm going to object to this line of
17 questioning on the grounds of relevance. This
18 is -- the charge is not failure to timely file
19 quarterly reports. That's not what this case
20 is about.

21 I mean, it seems to me based upon
22 the charges that have been filed, it's a

1 records case. The issue is were the records
2 kept on the premises? So in terms of the
3 dates and all of that, I'm not sure where we
4 are going in terms of what is relevant.

5 CHAIRPERSON MILLER: Ms. Phillips,
6 could you please address that, because I mean
7 I thought this was going to be a pretty
8 focused hearing.

9 MS. PHILLIPS: And it is.

10 CHAIRPERSON MILLER: Okay.

11 MS. PHILLIPS: And I was just
12 using it as an example of one out of seven, so
13 that when the Board looks at the evidence,
14 which has been submitted, which will be the
15 investigative report, they can make a
16 determination. And if this goes any further,
17 it will be in the record as to how the
18 determination is made as to which one of these
19 quarterly statements is the original quarterly
20 statement and which one is the amended.

21 And if it's not in the record, if
22 this goes further, then the court will have to

1 make a determination on its own.

2 CHAIRPERSON MILLER: Why is that
3 relevant to either maintaining the
4 documentation or what is it relevant to in the
5 charge? Which one is which? Why are we going
6 to be examining that?

7 MS. PHILLIPS: I don't know that
8 you are going to be examining that. It may
9 not be something that you examine. It may be
10 something that if this goes further, as I
11 stated, needs to be in the record of one of
12 the seven, which was all I was going to do.
13 Another yes or no question, which the
14 objection has taken longer than the -- the
15 objection and discussion has taken longer than
16 the answer would have.

17 I just wanted it to be in the
18 record that that's how you make a
19 determination how these are filed, which one
20 comes -- which was the amended.

21 CHAIRPERSON MILLER: Okay.

22 MS. PHILLIPS: And which was not.

1 CHAIRPERSON MILLER: All right.
2 So then if it's going to be one or two and
3 that's it, then I would say ask it and we will
4 move on.

5 MS. PHILLIPS: Right. It was
6 going to be one.

7 CHAIRPERSON MILLER: One, good.

8 MS. PHILLIPS: By way of example.

9 CHAIRPERSON MILLER: Okay.

10 MS. PHILLIPS: And the example was
11 in the top of Exhibit 1, the first one, there
12 is a sent, from, sent, to, subject. And the
13 sent says "Monday, April 30, 2012, at 7:07
14 p.m." Is that the time that this was filed?

15 INVESTIGATOR ADEJUNMOBI: Yes.

16 MS. PHILLIPS: And on each
17 subsequent document the sent would tell you
18 the time that it was filed. Is that fair?

19 INVESTIGATOR ADEJUNMOBI: Yes.

20 MS. PHILLIPS: All right. Thank
21 you. Now, when you went out to conduct the
22 audit, did you explain to Mr. Simone what was

1 going to happen and what you were going to be
2 looking for?

3 INVESTIGATOR ADEJUNMOBI: Yes,
4 it's a standard process.

5 MS. PHILLIPS: Right. And that
6 information was also included in the Notice of
7 Audit which gives the date. Is that fair?

8 INVESTIGATOR ADEJUNMOBI: Yes.

9 MS. PHILLIPS: Okay. I have no
10 further questions. Thank you very much.

11 CHAIRPERSON MILLER: Okay. Thank
12 you. Is there cross-examination?

13 MR. KLINE: Yes, I have cross-
14 examination.

15 CHAIRPERSON MILLER: Okay.

16 CROSS-EXAMINATION

17 MR. KLINE: Good morning.

18 INVESTIGATOR ADEJUNMOBI: Good
19 morning.

20 MR. KLINE: So let me be clear.
21 You went and conducted an audit and you were
22 able to verify that the records on premises

1 supported the amended quarterlies for the
2 second, third and fourth quarter of 2012,
3 correct?

4 INVESTIGATOR ADEJUNMOBI: Yes.

5 MR. KLINE: All right. And all
6 the appropriate documentation was there,
7 including guest checks, and the other things
8 that you need to see to verify the numbers,
9 correct?

10 INVESTIGATOR ADEJUNMOBI: Yes.

11 MR. KLINE: Okay. Now --

12 INVESTIGATOR ADEJUNMOBI: For
13 those three months. I mean, for those three
14 quarters.

15 MR. KLINE: Right, for those three
16 quarters. Now, with respect to the first
17 quarter, your report says that the records
18 were incomplete, correct?

19 INVESTIGATOR ADEJUNMOBI: Yes.

20 MR. KLINE: All right. And that
21 doesn't mean there weren't any records. It
22 means they were incomplete, correct?

1 INVESTIGATOR ADEJUNMOBI: No. Not
2 correct.

3 MR. KLINE: It's not correct?

4 INVESTIGATOR ADEJUNMOBI: Huh-uh.

5 MR. KLINE: Well, isn't it a fact
6 that the licensee had guest checks for the
7 first quarter of 2012?

8 INVESTIGATOR ADEJUNMOBI: We were
9 unable to replicate for feeders on the
10 quarterly statement first quarter, that's how
11 the audit stands now.

12 MR. KLINE: Now, with all due
13 respect, that was not my question to you. My
14 question to you is isn't it a fact that the
15 licensee had on the premises guest checks for
16 the first quarter of 2012?

17 INVESTIGATOR ADEJUNMOBI: No.

18 MR. KLINE: They had no guest
19 checks?

20 INVESTIGATOR ADEJUNMOBI: Not I'm
21 aware of.

22 MR. KLINE: Not that you are aware

1 of.

2 INVESTIGATOR ADEJUNMOBI: No.

3 MR. KLINE: All right. So isn't
4 it a fact that Mr. Simone was able to access
5 some of the records for the first quarter in
6 the computer system, but couldn't access all
7 of the records?

8 INVESTIGATOR ADEJUNMOBI: No.

9 MR. KLINE: That's not a fact?

10 INVESTIGATOR ADEJUNMOBI: No.

11 MR. KLINE: So your position is he
12 couldn't access any of the records for the
13 first quarter?

14 INVESTIGATOR ADEJUNMOBI: No.

15 Because he couldn't produce them to me.

16 MR. KLINE: None of them?

17 INVESTIGATOR ADEJUNMOBI: Nope.

18 MR. KLINE: So what you are
19 saying, your testimony is that the
20 establishment had no records for the first
21 quarter of 2012?

22 INVESTIGATOR ADEJUNMOBI: I mean

1 that it was, I believe, because when I asked
2 him, he couldn't produce them.

3 MR. KLINE: Well, do you remember
4 or are you conjecturing?

5 MR. SIMONE: I --

6 MR. KLINE: Shhh, you're not
7 testifying.

8 INVESTIGATOR ADEJUNMOBI: I
9 remember.

10 MR. KLINE: You remember. But so
11 when your report says -- this report was made
12 relatively contemporaneous with your visit,
13 correct?

14 INVESTIGATOR ADEJUNMOBI: Yeah.

15 MR. KLINE: Pretty soon after,
16 right?

17 INVESTIGATOR ADEJUNMOBI: Yeah,
18 pretty soon after.

19 MR. KLINE: All right.

20 INVESTIGATOR ADEJUNMOBI: Not the
21 same date though.

22 MR. KLINE: So and this was back

1 in May?

2 INVESTIGATOR ADEJUNMOBI: Yes.

3 MR. KLINE: So we would presume
4 that perhaps what you recorded in the report
5 might be more accurate than what you remember
6 today?

7 INVESTIGATOR ADEJUNMOBI: It's the
8 same thing.

9 MR. KLINE: It's the same thing?

10 INVESTIGATOR ADEJUNMOBI: Sure, it
11 would be the same thing.

12 MR. KLINE: Well, when you say
13 that the books and records for the first
14 quarter were incomplete, in your mind is that
15 the same thing as saying that there were no
16 records at all?

17 INVESTIGATOR ADEJUNMOBI: See, the
18 quarterly statement establish the record, but
19 to support the quarterly statement, you need
20 the guest checks. That should be part of the
21 records. They weren't complete, because he
22 couldn't produce the guest checks.

1 MR. KLINE: Okay. But you don't
2 say in your report that there were no records
3 for the first quarter, do you?

4 INVESTIGATOR ADEJUNMOBI: They
5 were incomplete.

6 MR. KLINE: Okay. Because there
7 were some records, correct?

8 INVESTIGATOR ADEJUNMOBI: Yes, the
9 quarterly statement.

10 MR. KLINE: Okay. And there were
11 also guest checks on the premises, weren't
12 there?

13 INVESTIGATOR ADEJUNMOBI: For
14 those quarters to support.

15 MR. KLINE: Now, was the licensee
16 cooperative with you when you visited the
17 premises?

18 INVESTIGATOR ADEJUNMOBI: Yes.

19 MR. KLINE: All right. And the
20 licensee told you that they had had a computer
21 problem with the data with respect to the
22 first quarter. Isn't that true?

1 INVESTIGATOR ADEJUNMOBI: I

2 believe he said that he couldn't retrieve

3 them.

4 MR. KLINE: He couldn't retrieve

5 them. Did he tell you why he couldn't

6 retrieve the information?

7 INVESTIGATOR ADEJUNMOBI: No.

8 MR. KLINE: He didn't tell you

9 why?

10 INVESTIGATOR ADEJUNMOBI: Huh-uh.

11 MR. KLINE: Did you ask him why?

12 INVESTIGATOR ADEJUNMOBI: No.

13 MR. KLINE: And your testimony is

14 that there were three amended statements filed

15 for which there were complete records on the

16 premises that you were able to verify,

17 correct?

18 INVESTIGATOR ADEJUNMOBI: Yes.

19 MR. KLINE: All right. But there

20 was no amendment filed for the first quarter?

21 INVESTIGATOR ADEJUNMOBI: No.

22 MR. KLINE: And did Mr. Simone

1 tell you that that wasn't done, because they
2 didn't have complete records?

3 INVESTIGATOR ADEJUNMOBI: No, he
4 didn't tell me that.

5 MR. KLINE: Did you ask him why it
6 was that they filed amendments for three
7 quarters?

8 INVESTIGATOR ADEJUNMOBI: No, I --

9 MR. KLINE: Let me finish my
10 question, sir, please. Did you ask him why
11 they, the establishment, filed amended reports
12 for the three quarters and not for the first
13 quarter?

14 INVESTIGATOR ADEJUNMOBI: No.

15 MR. KLINE: Didn't it strike you
16 as odd that they filed it for three quarters
17 and not for the first quarter?

18 INVESTIGATOR ADEJUNMOBI: Yes.

19 MS. PHILLIPS: Objection.

20 Relevance.

21 MR. KLINE: Really?

22 MS. PHILLIPS: Um-hum.

1 CHAIRPERSON MILLER: It sounds
2 relevant to me.

3 MR. KLINE: I mean, it sounds -- I
4 mean, based upon the Government's examination
5 on all these issues, it seems quite relevant.

6 MS. PHILLIPS: I was objecting to
7 didn't it seem odd.

8 CHAIRPERSON MILLER: Well, but he
9 is making assessments about what to evaluate
10 and why, so I don't think that's an irrelevant
11 question.

12 MS. PHILLIPS: Okay.

13 MR. KLINE: That was the question.
14 Did it seem odd to you?

15 INVESTIGATOR ADEJUNMOBI: No.
16 Refresh it, please.

17 MR. KLINE: My question was wasn't
18 it odd to you that they filed amended
19 quarterly reports for quarters two, three and
20 four and they didn't file one for the first
21 quarter?

22 INVESTIGATOR ADEJUNMOBI: The

1 whole amendment statement was very odd to me
2 right from the beginning.

3 MR. KLINE: That's not my question
4 though. My question is given that there were
5 amendments filed and the three quarters there
6 were amended statements for and there was no
7 amended statement for the first quarter,
8 didn't that strike you as odd?

9 INVESTIGATOR ADEJUNMOBI: The
10 whole amendment thing was odd to me.

11 MR. KLINE: Okay. But with
12 respect to the three quarters for which there
13 are amended statements, there isn't any issue
14 that there were complete books and records to
15 verify the sales that were shown on those
16 amended reports, correct?

17 INVESTIGATOR ADEJUNMOBI: No.
18 Yes.

19 MR. KLINE: That's correct?

20 INVESTIGATOR ADEJUNMOBI: Yes, for
21 those --

22 MR. KLINE: So the record is

1 clear.

2 INVESTIGATOR ADEJUNMOBI: For the
3 three quarters.

4 MR. KLINE: Okay. All right.
5 That's all I have.

6 CHAIRPERSON MILLER: Board
7 questions? Mr. Alberti?

8 MEMBER ALBERTI: I'm a little
9 confused, Mr. Adejunmobi. Okay. For the
10 first quarter of 2012, January to March, all
11 right, did you ask Mr. Simone for -- to see
12 guest checks for that quarter?

13 INVESTIGATOR ADEJUNMOBI: Yes.

14 MEMBER ALBERTI: You did?

15 INVESTIGATOR ADEJUNMOBI: I did,
16 yes.

17 MEMBER ALBERTI: Did he present
18 any to you?

19 INVESTIGATOR ADEJUNMOBI: No.

20 MEMBER ALBERTI: Okay. Thank you
21 for answering my question. Thank you.

22 CHAIRPERSON MILLER: Others? I

1 want to follow-up on that question. So when
2 you say in your report at page 2 that Smith
3 Point didn't have complete books and records
4 for the calendar year 2012, and that the books
5 and records for the first quarter were
6 incomplete, how were they incomplete?

7 INVESTIGATOR ADEJUNMOBI: Because
8 there were no guest checks to support the
9 quarterly statement.

10 CHAIRPERSON MILLER: So there were
11 no --

12 INVESTIGATOR ADEJUNMOBI: There
13 were no guest checks.

14 CHAIRPERSON MILLER: What were
15 there?

16 INVESTIGATOR ADEJUNMOBI: There
17 were no guest checks.

18 CHAIRPERSON MILLER: I got that.

19 INVESTIGATOR ADEJUNMOBI: The
20 guest checks were not available or was not
21 presented to us.

22 CHAIRPERSON MILLER: Okay. So

1 there were no guest checks for the first
2 quarter.

3 INVESTIGATOR ADEJUNMOBI: That's
4 right.

5 CHAIRPERSON MILLER: Is there
6 anything else that should be there that you
7 would be looking for in --

8 INVESTIGATOR ADEJUNMOBI: Yes.

9 CHAIRPERSON MILLER: -- your
10 audit?

11 INVESTIGATOR ADEJUNMOBI: To match
12 the quarterly statements.

13 CHAIRPERSON MILLER: But other
14 than guest checks, is that the only thing they
15 were required to have that they didn't have?

16 INVESTIGATOR ADEJUNMOBI: Yes,
17 ma'am, because you -- can I ask -- yes, we
18 need the guest checks.

19 CHAIRPERSON MILLER: That's it?

20 INVESTIGATOR ADEJUNMOBI: To
21 verify the figures on the quarterly statement.

22 CHAIRPERSON MILLER: So when you

1 do your audit, that's all you look for are
2 guest checks? You don't look for any other
3 financial information?

4 INVESTIGATOR ADEJUNMOBI: No.

5 CHAIRPERSON MILLER: Purchases,
6 anything like that?

7 INVESTIGATOR ADEJUNMOBI: What
8 kind of financial information are you asking?

9 INVESTIGATOR ADEJUNMOBI: I'm just
10 saying for instance purchasing of alcohol or
11 things like that. You are just looking at
12 guest checks?

13 INVESTIGATOR ADEJUNMOBI: Yeah, we
14 looking at the guest checks, because the
15 purpose of that is --

16 CHAIRPERSON MILLER: The food
17 and --

18 INVESTIGATOR ADEJUNMOBI: -- to
19 trace the food amount.

20 CHAIRPERSON MILLER: Okay.

21 INVESTIGATOR ADEJUNMOBI: To
22 ensure all entered into the quarterly

1 statements.

2 CHAIRPERSON MILLER: Okay.

3 Because I know that Mr. Kline was asking you
4 this type of question is that so he was saying
5 was there nothing there or was there something
6 there that was responsive to your audit? And
7 you are saying it's because there were no
8 guest checks, there is nothing there. Is that
9 correct?

10 INVESTIGATOR ADEJUNMOBI: Well,
11 for the first, for those three months.

12 CHAIRPERSON MILLER: For the first
13 quarter.

14 INVESTIGATOR ADEJUNMOBI: For that
15 January 2012, yes.

16 CHAIRPERSON MILLER: Okay.

17 INVESTIGATOR ADEJUNMOBI: The
18 guest checks were not available, so that makes
19 the records incomplete.

20 CHAIRPERSON MILLER: Okay. So you
21 don't mean partially complete. You just mean
22 totally they didn't have the records they

1 needed to have period. Is that correct?

2 INVESTIGATOR ADEJUNMOBI: The
3 records necessary to do the verification for
4 those three months.

5 CHAIRPERSON MILLER: Okay. And
6 was the excuse that they had computer
7 problems?

8 INVESTIGATOR ADEJUNMOBI: Well,
9 what I know is what I was told was it cannot
10 be retrieved. So I can't make any assumptions
11 for why. Whether it is deliberate or computer
12 malfunction, I can't make a determination to
13 that.

14 CHAIRPERSON MILLER: So when you
15 say can't be retrieved, could it be -- was it
16 on a computer that you could look at it and it
17 just couldn't be retrieved on the computer or
18 just wasn't there at all?

19 INVESTIGATOR ADEJUNMOBI: I don't
20 know. One is to say the ones that were
21 verified had them on the computer. The other
22 ones we couldn't see them.

1 CHAIRPERSON MILLER: Okay. So
2 that first quarter --

3 INVESTIGATOR ADEJUNMOBI: He was
4 unable to access them on the computer.

5 CHAIRPERSON MILLER: Okay. Okay.
6 So is this case -- what this is about is that
7 first -- those first quarter records?

8 INVESTIGATOR ADEJUNMOBI: Well,
9 based on the way, I think, I'm not a lawyer.

10 CHAIRPERSON MILLER: Okay. But
11 what --

12 INVESTIGATOR ADEJUNMOBI: But
13 based on the way we look at it, what would
14 really -- I mean, I need to talk a little bit
15 about what we doing. The audit is all about
16 verifying that they meet that food percentage.

17 CHAIRPERSON MILLER: Right.

18 INVESTIGATOR ADEJUNMOBI: Either
19 the 45 percent or the \$2,000 per seat. In
20 order to make that determination, we need to
21 verify the business for making that, which is
22 a quarterly statement and this is going on

1 calendar year of business. So if you don't
2 have the complete 12 months, you can't make --
3 verify the figures for those complete
4 quarters. You can't make that determination.

5 CHAIRPERSON MILLER: And you
6 couldn't make that because you didn't have the
7 guest checks for the first quarter?

8 INVESTIGATOR ADEJUNMOBI: Yes.

9 CHAIRPERSON MILLER: Is that
10 correct?

11 INVESTIGATOR ADEJUNMOBI: Yes,
12 ma'am.

13 CHAIRPERSON MILLER: Okay. So
14 this isn't about a timely filing of quarterly
15 statements or whether licensees can amend
16 their quarterly statements to correct them and
17 bring them up to date or anything like that.
18 It's just --

19 INVESTIGATOR ADEJUNMOBI: No,
20 ma'am. This is strictly an audit of the
21 figures that were presented to the Agency.

22 CHAIRPERSON MILLER: Okay.

1 INVESTIGATOR ADEJUNMOBI: Either
2 the original statement, if they have the books
3 and records to support it, or the amended
4 statement.

5 CHAIRPERSON MILLER: So the fact
6 that you couldn't find -- they didn't have the
7 guest quarters for that quarter meant that
8 they couldn't meet the three year requirement
9 of maintaining the records as well?

10 INVESTIGATOR ADEJUNMOBI: There is
11 no way to verify the figures presented to us
12 to make that determination.

13 CHAIRPERSON MILLER: Okay. And I
14 have one other question. I'm not sure I heard
15 this so well. When you did your audit you
16 went with somebody who is no longer available
17 there. Is that what you said?

18 INVESTIGATOR ADEJUNMOBI: Yes,
19 ma'am.

20 CHAIRPERSON MILLER: Who was it?

21 INVESTIGATOR ADEJUNMOBI: An
22 Investigator.

1 CHAIRPERSON MILLER: An
2 Investigator?

3 INVESTIGATOR ADEJUNMOBI: An
4 Investigator.

5 CHAIRPERSON MILLER: And who is
6 that?

7 INVESTIGATOR ADEJUNMOBI: Mr.
8 Brian Owens.

9 CHAIRPERSON MILLER: Okay. So did
10 he do anything that is represented in your
11 report that we would be relying on or for the
12 conclusions about the guest receipts of yours
13 based on your own observations?

14 INVESTIGATOR ADEJUNMOBI: What I
15 think is part of the thing is that he would
16 ask for the three years books and records, but
17 the three year books and records is kind of
18 back. So if we are doing 2012, I will fail to
19 see the books and records for three months in
20 2012, I think is -- he can't have complete
21 three year records. If you don't have three
22 months in 2012 and they are looking at your

1 books and records for three years, so --

2 CHAIRPERSON MILLER: Did he have
3 the books and records for everything but that
4 first quarter?

5 INVESTIGATOR ADEJUNMOBI: No,
6 ma'am. The books and records for that first
7 quarter.

8 CHAIRPERSON MILLER: Right.

9 INVESTIGATOR ADEJUNMOBI: Out of
10 it would have been -- because you see when he
11 looks at that, he is looking at other things
12 like invoices for that three year period. But
13 part of the stuff he looks for, part of the
14 books and records as defined, I believe, by
15 the law includes guest checks, which if you
16 don't have three months in 2012 and you are
17 looking from 2011 through, then --

18 CHAIRPERSON MILLER: My question
19 was though if you are looking at a three month
20 period --

21 INVESTIGATOR ADEJUNMOBI: Yes.

22 CHAIRPERSON MILLER: -- you did

1 look at a three month period. Was -- did he
2 have all the books and records, I mean, for a
3 three year period other than that first
4 quarter that we are talking about where there
5 was supposedly a computer issue?

6 INVESTIGATOR ADEJUNMOBI: For the
7 three year period, if I may rephrase what you
8 just said.

9 CHAIRPERSON MILLER: Right.

10 INVESTIGATOR ADEJUNMOBI: For
11 three years period, there were three months
12 within the three year period that were
13 missing.

14 CHAIRPERSON MILLER: Right. For
15 the same first quarter of that 2012?

16 INVESTIGATOR ADEJUNMOBI: Yes,
17 ma'am.

18 CHAIRPERSON MILLER: Okay. I
19 guess my other question is did he have
20 invoices for the period that he had -- didn't
21 have guest checks?

22 INVESTIGATOR ADEJUNMOBI: Yes, I

1 believe he did. Because this was an audit
2 that was conducted of him.

3 CHAIRPERSON MILLER: Okay. And
4 going back to my other question and then this
5 should be it. I asked you about the other
6 Investigator. Was there something that the
7 other Investigator was responsible for that is
8 reflected in this report, as opposed to you,
9 or do you have personal knowledge of
10 everything in the report?

11 INVESTIGATOR ADEJUNMOBI: I
12 believe what -- because we all work as a team.
13 First, he was -- we were all there and I was
14 told that he couldn't retrieve these from the
15 computer. And since I need these to do the
16 audit, they are going to take it there. The
17 books and records were not available. The
18 complete three years records --

19 CHAIRPERSON MILLER: Okay.

20 INVESTIGATOR ADEJUNMOBI: -- were
21 not available. So --

22 CHAIRPERSON MILLER: Okay. Thank

1 you. Anything else from Board Members? Any
2 counsel questions on Board questions?

3 MR. KLINE: Yes, I do.

4 CHAIRPERSON MILLER: Okay.

5 MR. KLINE: So the conclusion that
6 records were not maintained for three years is
7 based solely on the fact that there were not
8 complete records for the first quarter of
9 2012, correct?

10 INVESTIGATOR ADEJUNMOBI: For the
11 three months that were missing.

12 MR. KLINE: Right. So that's the
13 conclusion that there were not records for
14 three years, right?

15 INVESTIGATOR ADEJUNMOBI: Yes.

16 MR. KLINE: Okay. And with
17 respect to the food sales, you verified three
18 quarters with respect to the amended returns,
19 correct?

20 INVESTIGATOR ADEJUNMOBI: Yes.

21 MR. KLINE: And you don't have any
22 basis to say whether or not they met their

1 food sales, other than the reports that were
2 filed, correct?

3 INVESTIGATOR ADEJUNMOBI: Because
4 the basis that I would need is to see the
5 whole -- to be able to verify the whole
6 figures.

7 MR. KLINE: That's not my
8 question. My question is you don't have any
9 basis to say whether or not they did or they
10 didn't meet their annual food sales, other
11 than you were able to verify three quarters,
12 correct?

13 INVESTIGATOR ADEJUNMOBI: All I
14 know is to do the calculations and --

15 MR. KLINE: This is a yes or no
16 question. I mean, you always want to rephrase
17 my question, but I want you to answer my
18 question. So my question is you don't have
19 any information -- granted you weren't able to
20 verify the first quarter, but you don't have
21 anything that would substantiate that the
22 first quarter numbers that were presented are

1 not accurate, do you?

2 INVESTIGATOR ADEJUNMOBI: No.

3 MR. KLINE: Okay. Thank you.

4 That's all I have.

5 CHAIRPERSON MILLER: Okay. Ms.

6 Phillips, do you have any redirect?

7 MS. PHILLIPS: No, ma'am.

8 CHAIRPERSON MILLER: Okay. Thank
9 you very much.

10 INVESTIGATOR ADEJUNMOBI: You're
11 welcome.

12 (Whereupon, witness was excused.)

13 CHAIRPERSON MILLER: Whenever you
14 are ready, Mr. Kline. They have rested.

15 MR. KLINE: Oh, the Government
16 rests?

17 CHAIRPERSON MILLER: She has
18 rested.

19 MR. KLINE: I didn't hear that.

20 CHAIRPERSON MILLER: Yes. Right?
21 She didn't exactly say that, but, right?
22 Yeah. Okay.

1 MR. KLINE: I would move to
2 dismiss Charge 1. There are two charges in
3 this case. They are both based upon the same
4 recital of facts, in that Charge 1
5 incorporates the factual -- I'm sorry. Charge
6 2 incorporates the actual allegations of
7 Charge 1.

8 There is also something else that
9 is very similar about the two charges. They
10 recite one, two, three, four of the same
11 regulations for each of the charges. There is
12 only one difference that I can see between the
13 two charges and that's the first charge
14 charges a violation of 25-113(j)(3). I'm
15 sorry, 25-113(b)(3)(B)(i). Otherwise, both
16 charges charge violations of 25-113(j)(3)(A),
17 23 DCMR 1204, 2100 and 2101.

18 We only have one set of facts
19 here. We don't have two dates or two sets of
20 facts. So otherwise the charges are
21 identical. So focusing in on 113(b)(3)(B)(i)
22 as being the only difference between the two

1 charges, that is the provision of the Code
2 which talks about the issuance of a Class CR
3 License, which says that may be issued to an
4 establishment which qualifies as a restaurant
5 meeting the requirements of \$2,000 per seat
6 per year in food sales or the 45 percent.

7 I would question, number one,
8 whether you can charge someone as violating
9 the terms of the definition. But even if you
10 can, there is no evidence here today that this
11 establishment did not meet its minimum food
12 requirements.

13 The quarterly reports that are in
14 evidence, the amended quarterlies along with
15 the original quarterly total up to enough food
16 sales and there isn't any evidence that that
17 information is inaccurate. In fact, three of
18 the quarters were audited and the Auditor
19 determined that there were books and records
20 to support those food sales.

21 It is not as if the first quarter
22 would need to be such an anomaly from the

1 other three quarters to make the food sales.
2 So I think that there is just no case that
3 they did not make the food sales. We would
4 ask that that charge be dismissed.

5 CHAIRPERSON MILLER: Ms. Phillips,
6 would you like to address that?

7 MR. KLINE: I'm finished.

8 MS. PHILLIPS: This --

9 CHAIRPERSON MILLER: You are
10 finished, correct, making your --

11 MS. PHILLIPS: I wanted to make
12 sure.

13 CHAIRPERSON MILLER: -- motion?

14 MR. KLINE: On the Motion to
15 Dismiss.

16 CHAIRPERSON MILLER: Right.

17 MS. PHILLIPS: Right.

18 CHAIRPERSON MILLER: Okay.

19 MS. PHILLIPS: I wanted to make
20 sure. This case, as states in the charges, is
21 about two things, two charges. Didn't have
22 three years worth of books and records on the

1 premises, that was Charge 2.

2 The first was that you didn't have
3 the records that the Auditor needed to
4 complete the audit which is required when
5 asked for to look at the quarterly statements
6 to determine that the quarterly statements are
7 accurately presented to the Administration.

8 You have to be able to back up
9 your quarterly statements. That's why we do
10 audits, otherwise, we wouldn't do audits. We
11 conduct audits so that we can determine on
12 whatever basis the Administration chooses to
13 determine that establishments are filing
14 accurate quarterly statements.

15 Now, if you don't -- if you are
16 supposed to keep the records so that your
17 quarterly statements can be backed up if the
18 Administration likes to do an audit, then
19 that's what this case is about under Charge 1.

20 They didn't have the first
21 quarter, so we could not make a determination,
22 as required, when an audit is requested for

1 one year. So that's Charge 1.

2 Charge 2 is you are supposed to
3 keep three years worth of records and since
4 you didn't have the first quarter of 2012, you
5 didn't have three years worth of records on --
6 in the establishment. That's pretty simple
7 also.

8 So it's up to the Board to make a
9 determination what the Board wants to do with
10 those facts. Those are the facts, those are
11 the charges, that's what has been presented.
12 If the Board wants to make a determination
13 that only one quarter for an audit year is
14 missing and all the other quarters were
15 perfect, the Board wants to decide that that's
16 okay with them, that's for the Board to
17 determine, not for the District bringing the
18 case under the rules and regulations that the
19 District is forced to use when looking at an
20 investigative report.

21 So as far as the District is
22 concerned, if you are missing a quarter, you

1 have not complied with the request for an
2 audit and the Administration has asked for an
3 audit and, therefore, you have not complied.
4 It doesn't matter that the other three
5 quarters are okay and everything is fine with
6 those, you didn't have one quarter. We
7 require a year's worth.

8 The second is, you know, the Board
9 -- the rules and regulations require that you
10 have three years on the premises. If you are
11 missing a quarter, you don't have three years.
12 The Board can make a determination that that's
13 a de minimis violation or that that's a
14 serious violation, as it can with Charge 1 or
15 Charge 2.

16 That's why I believe that the
17 Board cannot grant Mr. Kline's Motion to
18 Dismiss as he argued it.

19 MR. KLINE: Madam Chair, if I may
20 rebut?

21 CHAIRPERSON MILLER: Okay.

22 MR. KLINE: Perhaps I have a bad

1 head-cold and I don't get it, but it seems to
2 me the recitation of the two charges is
3 exactly the same. They didn't have records
4 for three years, because they were missing the
5 first quarter or a portion of the first
6 quarter. They didn't have three years because
7 they were missing the first quarter or a
8 portion of the first quarter.

9 The Investigator testified, as far
10 as he knew, that was the only deficiency was
11 the first quarter. How that translates into
12 two violations of the same set of regulations
13 is -- I don't get it. And I would
14 respectfully request that the first charge be
15 dismissed. The first charge.

16 CHAIRPERSON MILLER: Okay. I just
17 want to ask, I guess, a question maybe of each
18 of you and then I don't know if other Board
19 Members do, but we haven't had a chance to
20 look at the regulations really with respect to
21 this case, but it sounds like what I'm hearing
22 is they didn't have the books and records or

1 documentation available for the audit, so that
2 means they didn't have it for the three years.

3 It's the same set of facts. So do
4 both regulations always apply or is there a
5 difference or are they redundant with respect
6 to the facts? Ms. Phillips?

7 MS. PHILLIPS: I don't even
8 understand what you are asking.

9 CHAIRPERSON MILLER: Okay. My
10 question is I think what Mr. Kline said. It
11 seems like there isn't much of a dispute that
12 one quarter of records were not -- were
13 missing and were not on the premises. So that
14 meant that they were not available to the
15 audit under one of the charges, the way I hear
16 you all describing them, the first charge.

17 Under the second charge it means
18 well, since they weren't there then, they
19 weren't there for the three year period.

20 MS. PHILLIPS: Well, see that's --
21 I think you are confusing what the law is.

22 CHAIRPERSON MILLER: But the --

1 MS. PHILLIPS: The law says you
2 have to keep three years worth of records on
3 the premises period. It doesn't say -- you
4 know, so if you go out -- what's today,
5 December 4th? You go back three years.

6 CHAIRPERSON MILLER: No, I get
7 that. I'm not --

8 MS. PHILLIPS: You're missing a
9 quarter, so you don't have three years.

10 CHAIRPERSON MILLER: So it's not
11 there. Okay.

12 MS. PHILLIPS: Right. So --

13 CHAIRPERSON MILLER: And it's not
14 there for the audit.

15 MS. PHILLIPS: Right. And so --

16 CHAIRPERSON MILLER: Because it's
17 not there.

18 MS. PHILLIPS: Right. But it's --

19 CHAIRPERSON MILLER: So two
20 charges.

21 MS. PHILLIPS: -- apples and
22 oranges. One is you don't have three years

1 worth of records and that's a certain
2 requirement and the other is we are doing an
3 audit on a year's worth of quarterly
4 statements in 2012 and you don't have that
5 quarter and, therefore, you are out of
6 compliance.

7 CHAIRPERSON MILLER: If you don't?
8 And my question is if you don't have the
9 records there for the audit, then are you
10 automatically in violation of the other
11 regulation, which requires them to be there
12 for three years?

13 MS. PHILLIPS: It seems to me
14 that's the way you have to read the law.
15 That's for you to determine, that's what I'm
16 arguing on behalf of the District, that's what
17 the evidence shows.

18 CHAIRPERSON MILLER: Okay.

19 MS. PHILLIPS: And it is your, the
20 Board's, decision what to do with that
21 evidence. I have given you the evidence to
22 make two charges as far as the District is

1 concerned.

2 CHAIRPERSON MILLER: Okay. Mr.
3 Kline, do you have anything else to --

4 MR. KLINE: Yes. If we take all
5 that as a given, which I don't --

6 CHAIRPERSON MILLER: Okay.

7 MR. KLINE: -- then it would seem
8 to me we wouldn't have two charges that
9 replicated the exact same sections of the
10 statute and the regulations with the exception
11 of one, which doesn't even seem to be
12 relevant. I mean, if Ms. Phillips is correct
13 and we are talking about, and I'm not sure
14 about this, so I'm using this as an example,
15 Charge 1 is a violation of 25-113(j)(3)(A) and
16 Charge 2 is a violation of 23 DCMR 1204, 2100
17 and 2101, then maybe I get that.

18 But when both charges, as they are
19 presented, are identical with the exception of
20 the insertion of another statute that doesn't
21 seem to be at all relevant to this proceeding
22 because there is no evidence of it, I don't

1 get it at all. And that's all I have.

2 CHAIRPERSON MILLER: Okay. And I
3 would like to welcome Mr. Jones to the dias.

4 Okay. Do Board Members have any
5 other questions on that motion? Okay. I
6 would suggest that we hold that in abeyance
7 and, you know, take a look at those
8 regulations with more time.

9 And so --

10 MR. KLINE: Normally, I would
11 argue that that will affect the way I present
12 our defense, but in this case it doesn't, so
13 I won't.

14 CHAIRPERSON MILLER: Okay. Okay.
15 Unless Board Members have objection to that
16 process? All right. Not hearing any, Mr.
17 Kline, do you want to put on a witness or how
18 do you want to proceed here?

19 MR. KLINE: No, we will rest on
20 the record and make arguments.

21 CHAIRPERSON MILLER: Okay. All
22 right. Then closing, Ms. Phillips?

1 MS. PHILLIPS: My closing is
2 really the same as my argument with regard to
3 the Motion to Dismiss, so other than the fact
4 that the Board can determine an applicable
5 fine for this violation, and, at this point,
6 the District recommends \$2,000 for each
7 charge, the District rests.

8 I have said everything that needs
9 to be said on this matter.

10 CHAIRPERSON MILLER: Okay. Thank
11 you.

12 MR. KLINE: And I likewise will
13 incorporate what I stated with respect to the
14 Motion to Dismiss and add the following, which
15 is we concede that the Government's case makes
16 out a records violation, which is what we
17 tried to do at the outset to short circuit
18 this hearing, but we couldn't quite get there.

19 We would submit, however, that the
20 appropriate action in this case is a warning
21 under the Board's rulemaking which was
22 effective September 25, 2013.

1 Now, I concede to you that this
2 occurred before that date and I'm sure the
3 Board's natural inclination would be to say
4 well that doesn't apply, that was before the
5 date that these rules were in effect and,
6 therefore, these rules do not govern. And I
7 agree with that proposition.

8 But my argument is slightly
9 different than that. My argument is the Board
10 has determined through its rulemaking that it
11 is appropriate in a records case for failure
12 to maintain records on the premises that there
13 will be a mandatory warning.

14 So the Board as a matter of policy
15 has determined that warnings are appropriate
16 and, indeed, are mandatory in these types of
17 cases and that rulemaking was done, as the
18 Board knows, over a tortured four year long
19 process, transmitted to the Council and they
20 were approved by the Council.

21 Now, I submit to you for the Board
22 to have enunciated a public policy that

1 warnings are appropriate in a first offense
2 records violation and now to say well, gee,
3 this happened before a certain date,
4 therefore, a warning is not appropriate is the
5 very definition of arbitrary and capricious.

6 If that's the Board's policy, and
7 I want to make clear I'm not arguing that the
8 regulations apply to this because it occurred
9 prior to the effective date of these
10 regulations. What I'm arguing is what is
11 appropriate and we have great guidance as to
12 what is appropriate by the Board deciding in
13 its rulemaking that a first offense, and this
14 is a first offense, failure to keep records on
15 the premises merits a warning.

16 So we would submit, given the
17 facts of this case, that what is appropriate
18 is that the licensee be found liable for the
19 violation and that the licensee be given a
20 warning.

21 MS. PHILLIPS: Madam Chair, I'm
22 going to have to be heard on that latter part,

1 because that wasn't part of any argument that
2 we heard before and maybe it didn't need to
3 be, but I think we do need to discuss it.

4 While I believe that on behalf of
5 the District that these changes in the law
6 don't go backwards, they only go forward, he
7 is using a set of terms that is called
8 arbitrary and capricious.

9 What would be arbitrary and
10 capricious is all those cases that settled
11 that occurred before this new rule, that were
12 settled on the basis that there wasn't a
13 warning available or tried because there
14 wasn't a warning available at the time, and
15 then to give this establishment the benefit of
16 whatever reasoning that the Board used and the
17 Council used, at this point in time.

18 The event occurred before the
19 change in the law, the event should be
20 governed by the law that was in place at the
21 time of the incident and it would be arbitrary
22 and capricious to do else-wise -- to do

1 otherwise because of all the cases that went
2 before.

3 CHAIRPERSON MILLER: Okay.

4 MR. KLINE: If I may just on that
5 last point, because I think it's helpful.
6 There was a warning available before the
7 regulations went into effect, it just wasn't
8 a mandatory warning and that's the difference.

9 CHAIRPERSON MILLER: Right. We
10 know that. Okay.

11 MR. KLINE: Okay. Thank you.

12 CHAIRPERSON MILLER: Thank you.
13 Okay. Now, I'm going to close the record.

14 MS. PHILLIPS: The investigative
15 report and the exhibits are part of the
16 record?

17 CHAIRPERSON MILLER: Yes.

18 MS. PHILLIPS: I thought so.
19 Thank you, Madam Chair, for that
20 clarification.

21 CHAIRPERSON MILLER: Okay. And
22 the charging document that's all I know.

1 Okay. And this record of these proceedings.
2 All right.

3 MS. PHILLIPS: Thank you, Madam
4 Chair, for that.

5 CHAIRPERSON MILLER: Okay. Are we
6 clear?

7 MS. PHILLIPS: -- clarification.
8 Yes.

9 CHAIRPERSON MILLER: Do the
10 parties want to file proposed findings of fact
11 and conclusions of law or waive their right to
12 do so?

13 MS. PHILLIPS: The District
14 waives.

15 MR. KLINE: We will waive.

16 CHAIRPERSON MILLER: Okay. Thank
17 you. Okay. Then we would be issuing a
18 written order within 90 days. And we will
19 just be reading the -- we will take a vote on
20 deliberating this in closed session.

21 As Chairperson of the Alcoholic
22 Beverage Control Board for the District of

1 Columbia and in accordance with Section 405 of
2 the Open Meetings Amendment Act of 2010, I
3 move that the ABC Board hold a closed meeting
4 for the purpose of seeking legal advice from
5 our counsel on Case No. 13-AUD-00047, Smith
6 Point, per Section 405(b)(4) of the Open
7 Meetings Amendment Act of 2010, and
8 deliberating upon this case for the reasons
9 cited in Section 405(b)(13) of the Open
10 Meetings Amendment Act of 2010.

11 Is there a second?

12 MEMBER BROOKS: Second.

13 CHAIRPERSON MILLER: Mr. Brooks
14 has seconded the motion. I'll now take a roll
15 call vote on the motion before us now that it
16 has been seconded.

17 Mr. Brooks?

18 MEMBER BROOKS: I agree.

19 CHAIRPERSON MILLER: Mr. Alberti?

20 MEMBER ALBERTI: I agree.

21 CHAIRPERSON MILLER: Ms. Miller
22 agrees.

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Mr. Silverstein?

MEMBER SILVERSTEIN: I agree.

CHAIRPERSON MILLER: Okay. Then the vote is 4-0-0. And I hereby give notice that the ABC Board will hold a closed meeting in the ABC Board conference room today or next Wednesday pursuant to the Open Meetings Amendment Act of 2010 and issue an order within 90 days.

MR. KLINE: Thank you.

CHAIRPERSON MILLER: Okay. Thank you very much.

MS. PHILLIPS: Thank you.

CHAIRPERSON MILLER: That concludes our morning session and the Board will recess until 1:30.

(Whereupon, the Show Cause Hearing in the above-entitled matter was concluded at 12:29 p.m.)

A		
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