THE DISTRICT OF COLUMBIA
ALCOHOLIC BEVERAGE CONTROL BOARD

In the Matter of:	)	
	)	
Tas, LLC	)	
t/a Libertine	)	Case Numbers: 13-PRO-00008
	)	13-PRO-00034
	)	License Number: 86298
	)	Order Number: 2013-393
Application to Renew a	)	
Retailer's Class CR License	)	
	)	
at premises	)	
2435 18th Street, NW	)	
Washington, D.C.	)	
	)	

BEFORE: Ruthanne Miller, Chairperson
Nick Alberti, Member
Donald Brooks, Member
Herman Jones, Member
Mike Silverstein, Member

ALSO PRESENT: Scott Auslander, Managing Member, on behalf of the Applicant

Thomas Knott, Managing Member, on behalf of the Applicant

William Simpson, Chairperson, Advisory Neighborhood Commission 1C, Protestant

Denis James, President, Kalorama Citizens Association, Protestant

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

INTRODUCTION

These matters arise from (i) the Application for a Change in Hours for the Premises and the Sidewalk Café that was posted on February 1, 2013; and (ii) the Application to

Renew a Retailer's Class CR License posted on March 15, 2013, both filed by Tas, LLC t/a Libertine (Respondent) at premises 2435 18th Street, NW, Washington, DC 20009.

By letter dated March 13, 2013, Advisory Neighborhood Commission 1C (ANC) filed a protest of the Application for a Change in Hours for the Premises and the Sidewalk Café, alleging that approval of the Application would have a negative impact on the neighborhood's peace, order, and quiet. By letter dated March 14, 2013, the Kalorama Citizens Association (KCA) filed a protest of the Application, also alleging that approval of the Application would have a negative impact on the neighborhood's peace, order, and quiet. The Alcoholic Beverage Regulation Administration (ABRA) assigned Case No. 13-PRO-00008 to this protest.

By letter dated April 9, 2013, the ANC filed a protest of the Application to Renew Respondent's license, alleging that the approval of the Application would have a negative impact on the neighborhood's peace, order, and quiet. By letter dated April 29, 2013, the KCA filed a protest of the Application, also alleging that approval of the Application would have a negative impact on the neighborhood's peace, order, and quiet. ABRA assigned Case No. 13-PRO-00034 to this protest.

Both Protestants request that the Alcoholic Beverage Control Board (Board) deny the applications as presented and subject them to conditions similar to those contained in settlement agreements entered into by other establishments in Adams Morgan. The Board finds in favor of the Applicant, and (i) approves the change of hours for the Premises and the Sidewalk Café and (ii) renews the Applicant's license with conditions. The Board finds that Applicant's operation, in and of itself, does not have a demonstrated negative impact on the neighborhood's peace, order, and quiet. Moreover, the (ABRA) investigation of the Applicant's operations, including repeated observations of the establishment, found that there were no significant impacts on the peace, order and quiet of the neighborhood. Moreover, the failure of Respondent to enter into a Settlement Agreement with Protestants is not a protest ground, not is the lack of a Settlement Agreement determinative of whether an establishment is or will negative impact on the peace, order and quiet of a neighborhood. The Board does, however, find merit in certain conditions requested by Protestants to prevent negative impacts on peace, order and quiet and therefore approves these applications subject to the conditions set forth below.

PROCEDURAL BACKGROUND

A. Case No. 13-PRO-00008

ABRA gave notice on February 1, 2013 of Respondent's Application for a Change in Hours for the Premises and the Sidewalk Café. The ANC, represented by William Simpson, the Chairperson of the ANC, filed a timely opposition to the Application under District of Columbia (D.C.) Official Code § 25-602. The protest ground was the adverse impact on the establishment of peace, order and quiet pursuant to D.C. Official Code § 25-313. The KCA, represented by Dennis James, the President of the KCA, also filed a timely opposition to the Application under D.C. Official Code § 25-602. The protest ground was the adverse impact on the establishment of peace, order and quiet pursuant to D.C. Official Code § 25-313. Both Protestants stated on their Protest Information Forms (PIF) that were filed with the Board that the lack of a Settlement Agreement with

Respondent would likely lead to the establishment having a negative impact on the peace, order and quiet of the community.

The parties came before the Board for a Roll Call Hearing on April 1, 2013 and a Protest Status Hearing on May 15, 2013. The Protest Hearing occurred on June 12, 2013.

B. Case No. 13-PRO-00034

ABRA gave notice on March 15, 2013 of Respondent's Application to Renew a Retailer's Class CR License. The ANC, represented by William Simpson, the Chairperson of the ANC, filed a timely opposition to the Application under D.C. Official Code § 25-602. The protest ground was the adverse impact on the establishment of peace, order and quiet pursuant to D.C. Official Code § 25-313. The KCA, represented by Denis James, the President of the KCA, also filed a timely opposition to the Application under D.C. Official Code § 25-602. The protest ground was the adverse impact on the establishment of peace, order and quiet pursuant to D.C. Official Code § 25-313.

The parties came before the Board for a Roll Call Hearing on May 13, 2013 and a Protest Status Hearing on June 19, 2013. The Protest Hearing occurred on August 7, 2013.

FINDINGS OF FACT

The Board, having considered the evidence, the testimony of the witnesses, the arguments of the parties, and all documents comprising the Board's official file, makes the following findings:

I. Protest No. 13-PRO-00008

A. Investigator Felicia Martin

1. ABRA Investigator Felicia Martin conducted an investigation of the Application, and authored the Protest Report submitted to the Board. *Transcript, June 12, 2013* at 20; see generally *ABRA Protest File No. 13-PRO-00008, Protest Report*. The Applicant's establishment sits in a C-3-B commercial zone, which permits matter-of-right medium density commercial development and housing. *Id.* at 3. ABRA's records show that there are seventy-one ABRA licensed establishments located within 1,200 feet of the establishment: forty-three restaurants, sixteen taverns, three Class A stores and nine Class B Stores. *Id.* at 4-5, *Tr.* at 26. There are no recreation centers, public libraries, schools, or day care centers operating within 400 feet of the establishment. *Id.* at 4. A review of Metropolitan Police Department (MPD) records indicates that seven calls for service were made to the establishment's address for the period from May 30, 2012 through May 29, 2013, but none involved or was related to the establishment's operation. *Id.* at 11.

2. The establishment's hours of operation are from 10:00 a.m. to 2:00 a.m. on Sunday, 5:00 p.m. to 1:30 a.m. Monday through Thursday, 5:00 p.m. to 3:00 a.m. on Friday and 10:00 a.m. until 3:00 a.m. on Saturday, with alcohol sales permitted during all hours of operation. *Protest Report* at 8. The establishment's hours of operation for the sidewalk café are 12:00 p.m. to 10:00 p.m. on Sunday, 5:00 p.m. to 1:30 a.m. Monday through Thursday and 5:00 p.m. until 2:00 a.m. on Friday and Saturday, with alcohol sales

permitted during all hours of operation. *Id.* The establishment's hours of operation for entertainment are Sunday between 10:00 p.m. and 1:00 a.m., Monday through Thursday from 8:00 p.m. until 1:00 a.m. and on Friday and Saturday from 9:00 p.m. until 1:00 a.m. *Id., Ex. 3*. The establishment's proposed hours of operation are 8:00 a.m. until 2:00 a.m. on Sunday through Thursday and 8:00 a.m. until 3:00 a.m. on Friday and Saturday, with alcohol sales permitted during all hours of operation. *Id.* at 9. The establishment's proposed hours of operation for the sidewalk café are 8:00 a.m. until 2:00 a.m. on Sunday through Saturday, with alcohol sales permitted during all hours of operation. *Id.* Investigator Martin testified that the proposed hours were consistent with those of other establishments within the area. *Transcript* at 27.

3. The establishment does not provide off-street parking, but there is on-street parking along 18th Street and Columbia Road, as well as a 262 space private parking garage on the same block. *Protest Report* at 7. There are five Metrobus routes within walking distance of the establishment. *Id.* at 8. Investigator Martin visited the Applicant's establishment on seven separate occasions between May 21, 2013 and May 28, 2013. *Id* at 9-10. None of the visits showed any issues with regard to adequate peace, order and quiet issues, as the establishment had not begun operations and was closed. *Id.* at 10.

4. Investigator Martin testified that she interviewed Mr. Denis James during the preparation of her Protest Report. *Protest Report* at 2, *Transcript* at 22. Mr. James stated that his concern was that loud music would emanate from the establishment and that there would be loud patrons on the sidewalk café. *Id.* He further stated that he wanted assurances that the music and sound would be contained within the establishment and that no music would be played on the sidewalk café. *Id.* Investigator Martin was unable to reach Mr. William Simpson. *Protest Report* at 3.

5. Investigator Martin also interviewed Ms. Amy Bowman, one of the owners of the establishment. *Protest Report* at 3, *Transcript* at 23. Ms. Martin testified that Ms. Bowman told her that she was not new to the restaurant business and that she understood the concerns that the restaurant might morph into a nightclub but that her intention was to operate a French bistro-style restaurant, which was the reason that they had hired a chef for this restaurant. *Id.*, *Tr.* at 23-25. Investigator Martin visited the establishment and saw a fully equipped kitchen with all new appliances, which she stated was consistent with Respondent's proposed operations as a restaurant. *Tr.* at 25, 39; *Protest Report, Ex. 14-14D.*

B. Brent Sick

6. Mr. Sick stated that he was the executive chef of the establishment as well as another establishment owned by Respondent's owners. *Transcript* at 59. Mr. Sick stated that the earlier opening hours would allow the establishment to serve breakfast and brunch. *Tr.* at 71. He also stated that his intent was, consistent with its operations as a French-bistro style restaurant, to keep the kitchen open at least until two hours before the proposed closing time. *Tr.* at 75.

C. Scott Auslander

7. Mr. Auslander testified concerning the application. *Transcript at* 93. He stated that his establishment was intending to operate similarly to a former French bistro located on Pennsylvania Avenue at which he used to work, which stayed open late, as did its kitchen. *Tr.* at 94-95. Mr. Auslander testified that the change in hours request was heavily weighted toward the beginning of the day so that the establishment could provide both breakfast and lunch. *Id.* He further testified that the request for an additional half hour in the evening during the week was simply to accommodate potential late night food business in Adams-Morgan and was consistent with the establishment's concept as a French Bistro. *Tr.* at 94-95, 127. According to Mr. Auslander, the establishment's proposed additional hours of operation for the premises and the sidewalk café would allow it to match those of his neighbors. *Tr.* at 96. He further stated his belief that having customers and employees outside on the sidewalk café reduced loitering and created order on the adjacent sidewalk. *Tr.* at 96-97. Mr. Auslander stated that he was a "hands-on" operator and generally stayed at the establishment until well after closing. *Id.* He also stated that he had met with Protestants a number of times and that he was told by Protestants that they did not have any issues with the establishment or with the part of the request that sought to authorize earlier hours for the establishment but that the crux of their objection was that the establishment would not enter into a settlement agreement with them. *Tr.* at 98, 122. Mr. Auslander acknowledged that there are residential buildings across the alley from the establishment but that the establishment was oriented toward 18th Street and therefore should not have any negative impact on residents. *Tr.* at 103. Moreover, he stated his belief that many residents of Adams-Morgan, like him, who do not have outdoor patios, terraces or backyards value sidewalk cafes as a way of having usable outdoor space in the neighborhood. *Tr.* at 110.

D. Denis James

8. Mr. James testified that the majority of crime calls in the Adams-Morgan area occurred between 12:00 a.m. and 4:00 a.m. and that patrons of sidewalk cafes were vulnerable to crime as well as being a source of noise complaints. *Transcript* at 187. He further testified about the number of police calls to the establishment's address over the past five years, not to establish that these calls had anything to do with the establishment's operations but to show the types of incidents that have occurred in the neighborhood. *Tr.* at 188. He then stated that many of the establishments along 18th Street had agreed not to request their full legally allowed hours for operation of either their inside premises or their outdoor sidewalk café, although he did concede that many establishments also are open both inside and outside up until the legally required closing hour. *Tr.* at 188-191, 205. Further, he referred to the Adams- Morgan moratorium rulemaking which he said contained a finding that there was a disturbance of the peace, order and quiet of residents in the later hours. *Tr.* at 192. He also stated that Respondent had not attempted to negotiate in good faith a settlement agreement with the KCA or the ANC. *Id.* Mr. James conceded that no one had ever raised a concern about the establishment at a KCA meeting. *Tr.* at 194. Under questioning by the Board, Mr. James agreed that a requirement for the establishment to keep its windows closed when entertainment was being provided on the inside and to refrain from having amplified music on the sidewalk café would help to alleviate some of his concerns. *Tr.* at 213-214. However, he still objected to the evening change of hours both for the inside and outside of the establishment. *Tr.* at 217.

E. William Simpson

9. Mr. Simpson expressed his concern about Respondent's unwillingness to enter into a settlement agreement similar to one into which many other establishments had entered and that the standard agreement's terms established an operational baseline for commercial establishments that the ANC had established over time. *Tr.* at 246. Under Board questioning, Mr. Simpson stated that he did not have enough of a track record with the establishment to express a view as to whether the establishment was problematic but that he had not had any issues with any of the other establishments operated by Respondent's owners. *Tr.* at 250. Mr. Simpson stated that, as conditions imposed on Respondent for Board approval of the additional evening hours, the Respondent should be prohibited from having amplified sound on the sidewalk café, should be required to keep its windows closed when entertainment is being provided on the premises and should be prohibited from participating in pub crawls. *Tr.* at 252-253.

II. Protest No. 13-PRO-00034

A. Felicia Martin

10. ABRA Investigator Felicia Martin presented her findings as contained in the Protest Report that she had prepared for this matter. See, *Transcript, August 7, 2013 at 13*; see generally *ABRA Protest File No. 13-PRO-00034, Protest Report.* Her Protest Report was essentially an update of the Protest Report that she had prepared for Protest No. 13-PRO-00008. Subsequent to the June 12, 2013 Protest Hearing in Case No. 13-PRO-00008, Investigator Martin again spoke both with Denis James, President of the KCA and Amy Bowman, one of the owners of the establishment, who both stated that they had nothing to add to their statements contained in the Protest Report for Case No. 13-PRO-00008. *Protest Report* at 2-3. Investigator Martin visited the Applicant's establishment on seven separate occasions between July 3, 2013 and July 20, 2013. *Protest Report* at 9-10; *Tr.* at 14. On each visit, the establishment was open and no noise was heard emanating from the establishment, nor was any loitering observed. *Id.* There had not been any new MPD calls for service since the date of the Protest Report in Case No. 13-PRO-00008. *Protest Report, Ex. 12.* Investigator Martin testified that there were no potential issues raised during her visits that would have indicated that the establishment had a negative impact on the peace, order and quiet of the neighborhood. *Tr.* at 21.

B. Scott Auslander

11. Mr. Auslander testified concerning the PIF submitted by Protestants and noted that, rather than state how the establishment's license renewal would negatively impact on the peace, order and quiet of the neighborhood, Protestants simply listed requested conditions for renewal that were nothing more than the conditions that Protestants would have had Respondent agree to in a settlement agreement. *Tr.* at 23-27. He further testified that, to his knowledge, there had not been any issues raised with regard to noise resulting from the establishment operations, either in its current iteration or as previously operated. *Tr.* at 51. Mr. Auslander testified that he did not have any intent to play music in the interior of the establishment so that it could be heard on the sidewalk café because the volume would have to be at such a level that it would disturb the inside patrons. *Tr.* at 77. He also stated

that he did not intend to play music on the sidewalk café. *Tr.* at 78. Mr. Auslander testified that, with regard to potential loitering, he addresses loitering in front of his establishments as it occurs, which is one of the reasons that he stations an employee outside of the establishment. *Tr.* at 82.

C. Denis James

12. Mr. James testified that his concerns were related to the lack of a settlement agreement with Respondent and that such concerns should therefore be addressed through Board ordered conditions on Respondent's renewal. *Transcript* at 129. He stated that there was not a sufficient baseline of operations for the establishment to determine whether the peace, order and quiet were negatively impacted by its operations but that conditions were necessary in order to ensure that the establishment operated in accordance with the representations made in Respondent's application and by Respondent before the Board. *Id.* Mr. James conceded that, in his experience, there have not been any noise issues with the establishment. *Tr.* at 142.

D. William Simpson

13. Commissioner Simpson testified that he was happy to see the establishment open for business and that it was an attractive establishment that seemed to have its act together. *Transcript* at 147. Nevertheless, it was his belief that conditions needed to be placed on Respondent to ensure that the establishment continued to operate as was represented in its renewal application and that it operated in a manner that respected the standards that the community was trying to establish for restaurants, taverns and nightclubs located on 18th Street in the Adams-Morgan area. *Tr.* at 151. Mr. Simpson stated that the main conditions that would be necessary would include (i) a prohibition on pub crawls, as they had historically been very unruly and disruptive to the neighborhood, (ii) a prohibition on cover charges and (iii) a requirement to keep exterior windows closed when entertainment was being provided or music being played. *Tr.* at 161-163.

CONCLUSIONS OF LAW

The Board has the authority both to approve a substantial change in an applicant's Retailer's Class CR license and to renew an establishment's license if we deem the license renewal and the substantial change appropriate for the neighborhood in which the establishment is located and the Applicant otherwise qualifies for licensure. D.C. Code §§ 25-762, 25-404, 25-301, 25-313, 25-315. We may also impose conditions on the renewal of an Applicant's license if we deem such conditions to "be in the best interest of the locality, section, or portion of the District where licensed establishment is . . . located." D.C. Code § 25-104(e).

I. Peace, Order, and Quiet

Protestants argue that (i) renewing the Applicant's license and (ii) approving additional hours for the premises and the sidewalk café will have a negative impact on the neighborhood's peace, order, and quiet. While we appreciate the Protestants' concerns about the effect of existing licensed establishments along 18th Street, NW on the quality of life for visitors and residents alike, Protestants' have provided absolutely no testimony or

documentary evidence that Respondent's establishment negatively impacts on the neighborhood's peace, order, and quiet.

By law, the Board is required to examine "[t]he effect of the establishment on peace, order, and quiet . . . ." D.C. Code § 25-313(b) (2). While we acknowledge the Protestant's concerns about issues of crime, loitering and late night noise in the Adams-Morgan corridor, we do not find that the establishment's operations or the proposed increase in the establishment's hours will have any significant negative impacts on the peace, order and quiet of the surrounding community. ABRA's investigation concluded that there was no such impact on the community by this establishment. *Protest Report* at 10. Testimony during the hearings did not disclose any negative impacts on the community by the restaurant currently located on the premises nor by the previous iterations of establishments occupying the premises. Moreover, testimony concerning MPD calls to the establishment's address did not establish that such calls were in any way related to Respondent's operations. Protestants simply appear to be attempting to correlate Respondent's unwillingness to enter into a settlement agreement with Protestants with the establishment having a negative impact on the peace, order and quiet of the neighborhood. This fact, in and of itself, does nothing to establish whether Respondent's establishment has or will have a negative impact on the community. Indeed, Respondent provided ample testimony and evidence that the establishment would be operated as a full-service restaurant that, because of its style, necessitated late evening hours. The evidence provided by Respondent and ABRA's investigator showed that Respondent has installed a culinary kitchen on the premises, which would not be necessary if Respondent intended to operate as a nightclub or a tavern. Moreover, should Respondent seek to operate other than as a full service restaurant, Respondent would have to apply to and seek the Board's approval for such a change, at which point Protestants would have ample opportunity to present their views as to the change.

By law, as part of its determination on the establishment's effect on peace, order and quiet the Board must also consider whether the establishment will create noise in violation of D.C. Official Code § 25-725. § 25-313(b) (2). Noise is Protestant's primary concern with the operation of the establishment. Inspector Martin noted in her report that, from her numerous observations of the establishment in connection with this application, there was no activity that would indicate an issue with noise. *Protest Report* at 10. No testimony was presented by Protestants establishing that Respondent's operations created any noise issues. However, the Board finds that Protestants did raise specific concerns regarding noise that may be considered generic to the establishments in Adams Morgan and that may reasonably be anticipated to disturb the neighborhood in the same manner. These concerns involve pub crawls and amplified music which historically have disturbed the peace, order and quiet in the neighborhood. The Board imposes conditions in this order to address those concerns.

In addition, the Board must further consider whether the establishment will create litter in violation of D.C. Official Code § 25-726. § 25-313(b) (2). Under §25-726, "The licensee under a retailer's license shall take reasonable measures to ensure that the immediate environs of the establishment, including adjacent alleys, sidewalks, or other public property immediately adjacent to the establishment, or other property used by the licensee to conduct its business, are kept free of litter." D.C. Code § 25-726(a). No testimony was provided indicating that the establishment's operations had any impact on

litter. Testimony was provided by Respondent that the two bins in the rear of the establishment, one for trash and one for recycling, were more than sufficient for Respondent's operations and were regularly emptied.

Therefore, we conclude that renewing the Application does not threaten the neighborhood's peace, order, and quiet.

II. Conclusion

We are only required to produce findings of fact and conclusions of law related to those matters raised by the Protestants in their protests. See Craig v. District of Columbia Alcoholic Beverage Control Bd., 721 A.2d 584, 590 (D.C. 1998) ("The Board's regulations require findings only on contested issues of fact."); 23 DCMR § 1718.2. Accordingly, based on our review of the two applications and the record, we find the Applicant has generally demonstrated its good character and fitness for licensure, and has satisfied all remaining requirements imposed by Title 25 of the D.C. Official Code and Title 23 of the D.C. Municipal Regulations. We find two of the conditions requested by Protestants are justified and will help to ensure that the establishment does not have a negative effect on the surrounding residential neighborhoods. Accordingly, we approve the two applications subject to the following conditions: (i) Respondent will not participate in any pub crawls, as such term is defined in 23 DCMR § 712; and (ii) Respondent will keep its exterior doors (except for normal and emergency ingress and egress) and windows closed when amplified music is being played inside the establishment.

ORDER

Therefore, the Board, on this 18th day of September, 2013, hereby **ORDERS** that

1. The Application to Renew a Retailer's Class CR License filed by Tas, LLC t/a Libertine is **GRANTED**.

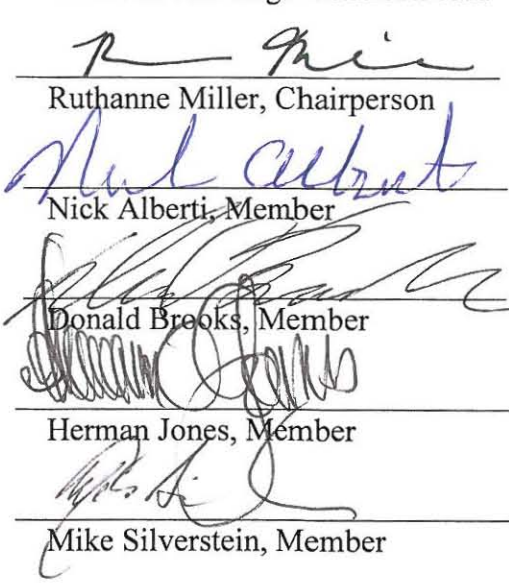
2. The Application to Change Hours of Operation and Sales/Service/Consumption of alcoholic beverages for the interior and the outdoor sidewalk café filed by Tas, LLC t/a Libertine is **GRANTED**.

3. Respondent shall not participate in any pub crawls, as such term is defined in 23 DCMR § 712.

4. During all hours of operation and sales, when Respondent is playing amplified music within the establishment, Respondent shall keep its exterior doors (except for normal and emergency ingress and egress) and windows closed.

5. The Alcoholic Beverage Regulation Administration shall distribute copies of this Order to the Applicant and the Protestant.

District of Columbia
Alcoholic Beverage Control Board



Ruthanne Miller, Chairperson

Nick Alberti, Member

Donald Brooks, Member

Herman Jones, Member

Mike Silverstein, Member

Under 23 DCMR § 1719.1 any party adversely affected may file a Motion for Reconsideration of this decision within ten (10) days of service of this Order with the Alcoholic Beverage Regulation Administration, Reeves Center, 2000 14th Street, NW, 400S, Washington, D.C. 20009.

Also, under section 11 of the District of Columbia Administrative Procedure Act, Pub. L. 90-614, 82 Stat. 1209, D.C. Official Code § 2-510 and Rule 15 of the District of Columbia Court of Appeals, any party adversely affected has the right to appeal this Order by filing a petition for review, within thirty (30) days of the date of service of this Order, with the District of Columbia Court of Appeals, 500 Indiana Avenue, N.W., Washington, D.C. 20001. However, the timely filing of a Motion for Reconsideration under 23 DCMR § 1719.1 stays the time for filing a petition for review in the District of Columbia Court of Appeals until the Board rules on the motion. See D.C. App. Rule 15(b).