

Capital Reporting Company

In the Matter of: CVS Pharmacy, LLC t/a CVA Pharmacy #1354 11-14-2012

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DISTRICT OF COLUMBIA

ALCOHOLIC BEVERAGE CONTROL BOARD

MEETING

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IN THE MATTER OF: :
 :
CVS Pharmacy, LLC., :
t/a CVS Pharmacy #1354 :
2601 Connecticut Avenue, NW :
Retailer B : Protest
License No. 88912 : Hearing
ANC 3-C :
Case No. 12-PRO-00078 :
New application :
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November 14, 2012

The Alcoholic Beverage Control

Board met in the Alcoholic Beverage Control Hearing
Room, Reeves Building, 2000 14th Street, N.W.,
Washington, D.C., Ruthanne Miller, Chairperson,
presiding.

PRESENT

RUTHANNE MILLER, Chairperson
NICK ALBERTI, Member
DONALD BROOKS, Member
HERMAN JONES, Member
MIKE SILVERSTEIN, Member

ALSO PRESENT

SCOTT ROME, ATTORNEY FOR PROTESTANTS
RISA HIRAO, ATTORNEY FOR LICENSEE

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

2 10:11 a.m.

3 CHAIRPERSON MILLER: Okay. Thank you
4 everyone. The next case on our calendar is a protest
5 status hearing, Case Number 12-PRO-00078, CVS Pharmacy
6 number 1354 located at 2601 Connecticut Avenue, NW,
7 License Number 88912, an ANC 3-C. So have a seat.

8 Sign in at the table, and when you're ready,
9 I'll take introductions from the parties.

10 MR. ROME: All right. Good morning, board
11 members. My name is Scott Rome. I'm the attorney on
12 behalf of the protestants. That is both the ANC and
13 the Group of Five. I'll let their representatives
14 introduce themselves.

15 MR. REBA: Good morning. My name is Lee
16 Brian Reba. I'm the ANC commissioner for 3-C01.

17 CHAIRPERSON MILLER: Morning.

18 MS. WEAVER: My name is Penny Weaver.

19 MS. MORILLO: Good morning. My name is Ruth
20 Ellis-Morillo.

21 CHAIRPERSON MILLER: I'm sorry. I didn't
22 catch your name.

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1 MS. MORILLO: Ruth Ellis-Morillo.

2 CHAIRPERSON MILLER: Okay. Got it. All
3 right. And you are?

4 MS. HIRAO: Risa Hirao, on behalf of the
5 applicant, CVS. Last name H-I-R-A-O. I'm here on
6 behalf of Paul Pascal.

7 CHAIRPERSON MILLER: Okay. So this is a
8 protest hearing. It's currently scheduled for February
9 15th, at 1:30 p.m. I want to ask you if you have some
10 preliminary issues that you want to bring to the
11 board's attention at this status hearing.

12 MR. ROME: We do. We have filed a motion to
13 dismiss yesterday, and we would request a hearing on
14 that motion prior to the protest hearing, which I
15 believe is now in December.

16 CHAIRPERSON MILLER: Oh, this one has been
17 moved to --

18 MR. ROME: It's actually been moved twice.
19 It was originally in February. It was moved to
20 January. Then it was moved to December.

21 CHAIRPERSON MILLER: Right.

22 MR. ROME: And now we're coming up close on

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1 the hearing. My clients, in emergency basis, retained
2 me recently. We've just filed our motion. I believe
3 it was received by the board yesterday, and being that
4 the hearing's now been moved up twice and is now a
5 month away, I understand that it's difficult, but I
6 think it's proper to have a hearing on that motion to
7 dismiss before we hold a full protest hearing, as the
8 witnesses would need to be brought, and a whole lot of
9 administration expense would be involved in a protest
10 hearing. Where we think that there are threshold
11 issues raising that motion to dismiss that would, if we
12 win, prevent the need for a full protest hearing. And
13 if we lose, might make it unnecessary, because there
14 maybe could be some agreement reached.

15 But in any event, there is a need for a
16 hearing. Whether that hearing is heard on the protest
17 date hearing that's set now, and that protest hearing
18 is moved back to one of the other two original dates,
19 or if we have a hearing sometime between now and then.
20 Either is fine.

21 MS. HIRAO: I believe a date has already been
22 selected for counsel's motion. I think the date was

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1 selected for, it's supposed to be before the board on
2 November 28th. This was an email that our office
3 received yesterday.

4 CHAIRPERSON MILLER: Okay. I'm not sure what
5 that is, but I'm going to entertain what you have to
6 say, I mean, today, and we'll get back to you about a
7 date. I want to hear what you all have to say, and
8 then we'll look at the calendar.

9 I haven't even seen the motion to dismiss,
10 so, none of the board members have, as far as I know.
11 You know, it just came in yesterday. It wasn't enough
12 time to get to the boards for this hearing. So I hear
13 that there's a motion to dismiss and you're requesting
14 a hearing on it. Okay. So we will take that under
15 advisement. I under, did you say your preference is
16 that it be on a date before the hearing date? So the -
17 -

18 MR. ROME: Or instead of the hearing date.
19 Holding --

20 CHAIRPERSON MILLER: Or the other hearing
21 date, but not --

22 MR. ROME: Either one is fine, as long as we

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1 have this hearing separate and apart from the protest
2 hearing so that we don't have to prep all of our
3 witnesses, bring all the witnesses here, prepare all
4 that evidence for a protest hearing, when there's this
5 threshold issue on our motion to dismiss.

6 MS. HIRAO: I'd like to make it clear that we
7 would prefer that the protest hearing does not change.
8 It's been shifted around several times, and we've made
9 commitments with our witnesses to appear on the 13th, I
10 believe it was December 12th at 1:30, 13th.

11 CHAIRPERSON MILLER: I'm sorry. The wrong
12 day - - the old day is on my briefing sheet, but it is
13 in December, December 10, 12, or somewhere, whatever
14 that Wednesday is.

15 MR. ROME: It's moved between the last couple
16 days, between December 12th and 13th, I believe. It
17 was in February. It was then moved to January.

18 CHAIRPERSON MILLER: Right.

19 MR. ROME: It was then moved to a date in
20 December, and then was moved to the date right next to
21 it in December, but still in December.

22 CHAIRPERSON MILLER: I see. Okay.

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1 MR. ROME: Each time it was moved
2 significantly up.

3 CHAIRPERSON MILLER: Okay.

4 MR. ROME: So it's hard to see how the
5 licensee could claim that they have gotten all their
6 witnesses in line.

7 CHAIRPERSON MILLER: Okay. And are you, I
8 mean it's hard for me to even asses. Not all motions
9 get a hearing, but some do, especially if it's
10 requested. I can't -- I don't even know, you know, the
11 basis for the motion, so it's hard to tell whether this
12 one -- is there anything you want to speak to --

13 MR. ROME: I can address that briefly.

14 CHAIRPERSON MILLER: Okay.

15 MR. ROME: I mean the idea here is that they
16 have applied for a B license, despite a moratorium, and
17 despite a quota. Their claim is that they fit under
18 the grocery store exception to that. There was an
19 advisory opinion that was entered earlier in this
20 action, before the protests were even filed.

21 Even if we accept that advisory opinion as
22 absolutely correct, that advisory opinion asks for more

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1 evidence, and it says that they would be qualified,
2 provided that they meet some circumstances, and on
3 number four on the five-part test, the advisory order
4 even states that they qualify as a full-service grocery
5 store under one of the sections, provided that it
6 dedicates greater shelf space and floor space to the
7 sale of food items than other products.

8 So even under the advisory opinion, the board
9 has asked for more input on at least that one issue,
10 and we'd like to present evidence that they do not.
11 For the advisory opinion, there was no -- there was no
12 testimony taken. There were no witnesses called.
13 There was no evidence put on the record. It was just
14 an advisory opinion.

15 CHAIRPERSON MILLER: Now just, I don't want
16 to get into the merits too much either of the motion,
17 but why is -- you were going to address really briefly
18 why the motion should have a hearing, as opposed --

19 MR. ROME: Oh, why it should have a hearing?

20 CHAIRPERSON MILLER: Yeah.

21 MR. ROME: Well, because that ties in with
22 the same issue that there haven't been witnesses

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1 called. If you're going to grant our motion without a
2 hearing, I assume they would protest and say, you know,
3 we didn't have witnesses to put on that evidence. We
4 also, similarly, have to put on witnesses --

5 CHAIRPERSON MILLER: No. Okay. I don't want
6 to belabor this. I just meant why we should have a
7 hearing on the motion. Some motions you just rule on
8 the papers. Is this, do you think this raises to some
9 significance -- greater significance?

10 MR. ROME: I do. I mean this is, for one,
11 this is a threshold issue. This is whether they fit,
12 and they've actually had at some point, the protestant
13 said that we shouldn't be able to raise this as part of
14 the protest hearing. So we should be able to raise it
15 at some point, and we think that it's an important
16 enough issue, given that there was already an advisory
17 opinion entered. The board has devoted great time to
18 this. We think that this rises to the level of
19 something that needs to be heard.

20 CHAIRPERSON MILLER: Okay. Thank you. And
21 Ms. Hirao, am I pronouncing your -- how do I pronounce
22 your name?

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1 MS. HIRAO: Pardon? Yes, you are.

2 CHAIRPERSON MILLER: Okay.

3 MS. HIRAO: Yes, you are. One thing, counsel
4 was just asked why should a motion -- I mean basically
5 I heard an argument on the merits of this motion. So I
6 hope the board disregards --

7 CHAIRPERSON MILLER: No, we're not
8 entertaining the merits. We haven't even read the
9 motion, so. I understand you went into that, and I
10 tried to steer him off of it. Okay.

11 MS. HIRAO: And another thing is we do have a
12 pending motion to strike, which is before the board. I
13 believe when I looked at the docket, it's before the
14 board today for its consideration, and as far as CVS is
15 concerned, that motion is unopposed.

16 Protestants have not timely filed an
17 opposition to raise issues beyond peace, order and
18 quiet for purposes of a protest hearing is
19 inappropriate and for purpose of this motion, motion to
20 dismiss, is just another back door way for the
21 protestants to sneak in issues that go beyond
22 protestable issues and in fact he - - whether or not

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1 our client meets the supermarket exception, that's for
2 the board's consideration, and not something for the
3 protestants to argue. This issue was raised during the
4 Walgreens protest hearing. The board was quite firm on
5 that.

6 CHAIRPERSON MILLER: Again, I don't want to
7 get into the merits of your argument either.

8 MS. HIRAO: Right.

9 CHAIRPERSON MILLER: So do you want to
10 respond?

11 MR. ROME: Sure. They do have a motion in
12 limine --

13 CHAIRPERSON MILLER: Right.

14 MR. ROME: -- which states that we should not
15 be able to raise these issues as part of the protest
16 hearing. We disagree with that. I was just retained.
17 No opposition was filed. I'm now orally opposing that.
18 But in addition, we file our motion to dismiss, which
19 addresses those very same issues, and on Page 6 of our
20 motion, which I understand you haven't read yet --

21 CHAIRPERSON MILLER: Right.

22 MR. ROME: -- we address that we do have

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1 standing to raise those issues, and that we have
2 standing to raise those issues either now, which we
3 would prefer, at a motion hearing that's set, or as
4 part of the protest hearing, of not both.

5 This is something that the protestants can
6 raise, as it always is, you know, other concerns
7 besides peace, order and quiet are raises, such as are
8 they a certain distance from a school. You know, if
9 the protestants can't bring up that issue, then who is
10 to bring it up, and we've filed a separate and discrete
11 motion on that.

12 CHAIRPERSON MILLER: Okay.

13 MS. HIRAO: Board members, if I may respond
14 to that. There's a certain time period when you're
15 supposed to file a timely opposition. Here we filed a
16 motion to eliminate and, uh, within the time period,
17 you're supposed to file an opposition. Counsel hasn't
18 to raise an opposition actually, Again, backdoor way
19 through his motion to dismiss and couch it as an
20 opposition. I would like the board to consider my oral
21 motion to strike that portion, opposing our motion to
22 eliminate, which is in his motion to dismiss. His --

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1 basically --

2 CHAIRPERSON MILLER: May I ask you this?

3 MS. HIRAO: -- his motion to dismiss contains
4 an opposition to our motion to eliminate, which I think
5 is improper, and that should be stricken, because it's
6 untimely.

7 CHAIRPERSON MILLER: You're making an oral
8 motion that it be stricken?

9 MS. HIRAO: Yes.

10 CHAIRPERSON MILLER: Are you not going to
11 refile an opposition then?

12 MS. HIRAO: I will file an opposition --

13 CHAIRPERSON MILLER: You'd like to file.

14 MS. HIRAO: -- to the motion to dismiss.

15 CHAIRPERSON MILLER: Okay. Okay. Any other?

16 MR. ROME: Just so we're clear on one last
17 thing, I believe their motion to eliminate is to have
18 these items to not be a part of the protest hearing.
19 So even if you treat that motion as conceded, we want
20 them addressed prior to the protest hearing, so that
21 they wouldn't be a part of the protest hearing, and if
22 the protest hearing is strictly confined to peace,

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1 order and quiet, or the standard that's set forth for a
2 protest hearing, then we still have our motion, which
3 needs to be dealt with, on this other issue, which is
4 whether they meet the grocery store exception from the
5 moratoria on the quota.

6 MS. HIRAO: Board members, I see this still
7 as a juggling tactic. The opposition was not timed
8 finely. It's set forth in the regulations when you're
9 supposed to file an opposition. Again, protestants
10 have lost their opportunity to file to oppose our
11 motion to eliminate, and based on the merits of our
12 motion to eliminate, we'd like the board to consider it
13 as unopposed.

14 CHAIRPERSON MILLER: Okay. I understand your
15 argument. I think we all do. I just want to ask the
16 protestants, do you have any other, anything else to
17 say with respect to not filing a timely opposition,
18 other than counsel was just retained?

19 MR. ROME: Well, also, like I've said before,
20 our motion is separate. Even if that motion is treated
21 as conceded, that doesn't prevent our motion from going
22 forward --

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1 CHAIRPERSON MILLER: Okay.

2 MR. ROME: -- on elimination to meet the
3 grocery store test. Now we also understand that, yes,
4 we were just retained last week and have not had a
5 chance to file a motion to opposition sooner, and given
6 the ANC status and the protestant's status, we think
7 it's appropriate to be this oral opposition and our
8 motion to be treated as such an opposition.

9 CHAIRPERSON MILLER: Okay.

10 MS. HIRAO: May I respond?

11 CHAIRPERSON MILLER: I think -- if you're
12 going to say the same thing.

13 MS. HIRAO: No.

14 CHAIRPERSON MILLER: Okay. Because we do
15 understand you think it's untimely.

16 MS. HIRAO: It's not issue of failing to file
17 an opposition, because they just retained counsel. The
18 ANC is quite experienced in protest issues. They've
19 been involved in a lot of protests against other
20 licensees. I don't understand why just because a last
21 minute retention of counsel prevented them from filing
22 the opposition on their own. I do not understand that.

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1 They are quite experienced in the protest process, and
2 if they had an opposition to file, it could have been
3 done even without counsel.

4 CHAIRPERSON MILLER: Okay.

5 MR. ROME: I could restate all the same
6 arguments, but I understand you probably --

7 CHAIRPERSON MILLER: Okay. If you've said
8 everything you need to say with respect to that, then
9 that's fine. Okay. So we have -- the board has before
10 them a motion to eliminate, a motion to dismiss,
11 licensees -- I forget what you call it. I mean I know
12 you're opposed to their filing of motion as untimely.

13 MS. HIRAO: I am --

14 CHAIRPERSON MILLER: Yeah, but --

15 MS. HIRAO: My oral motion was to strike the
16 portion of their motion to dismiss.

17 CHAIRPERSON MILLER: Okay.

18 MS. HIRAO: Which addresses our motion to
19 eliminate.

20 CHAIRPERSON MILLER: I think it'd be good if
21 you'd put it in writing.

22 MS. HIRAO: Okay.

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1 CHAIRPERSON MILLER: Okay. Are there any
2 other preliminary matters that --

3 MS. HIRAO: We will be filing an opposition
4 to their entire motion to dismiss.

5 CHAIRPERSON MILLER: Okay. Yes, that would
6 be a good idea. And you will not be filing an
7 opposition to their motion to eliminate?

8 MR. ROME: If you'd prefer, we can --

9 CHAIRPERSON MILLER: No, I'm not telling you
10 what I prefer. I'm just trying to figure out the
11 status. I haven't seen your motion to dismiss. I don't
12 know, you know, how it addresses the motion to
13 eliminate. I just want to know when we leave here,
14 what the board will be considering. You know? I hear
15 that the licensee --

16 MR. ROME: We'll file an opposition to their
17 motion to eliminate.

18 CHAIRPERSON MILLER: You'd like to file a
19 motion --

20 MR. ROME: That points out what I've said
21 forth today.

22 CHAIRPERSON MILLER: Okay. That's not to

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1 pre-empt the board, if the board finds it untimely at
2 this point, but I just want to understand what the
3 parties want to do, or intend to do, and then the board
4 will rule on them. Okay.

5 MS. HIRAO: I would just like to clarify if
6 the motion to eliminate would the motion to eliminate
7 be considered by the board today, as it was indicated
8 on the docket?

9 CHAIRPERSON MILLER: I think that it is on
10 the agenda and the board will decide what to do about
11 it today.

12 MS. HIRAO: Thank you.

13 CHAIRPERSON MILLER: So we may not address
14 the merits or we may say, you know, we're going wait
15 till we hear an opposition. I don't know. We will
16 address that though.

17 MS. HIRAO: Okay.

18 CHAIRPERSON MILLER: Okay. All right. So,
19 anything else? Okay.

20 MS. HIRAO: Is the protest hearing still
21 scheduled for December 13th at 1:30? I just wanted to
22 be --

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1 CHAIRPERSON MILLER: I know. I'm sorry.
2 I'll get it right.

3 (Members confer off the record.)

4 CHAIRPERSON MILLER: I was just looking at
5 the calendar. I apologize that this case has been
6 moved around a bit. At our hearing before Council
7 Member Graham, there was concern by some applicants
8 that hearings were being pushed too far out, and so we
9 tried to move them up, and we found a place in the
10 schedule, and that's what happened to this case.

11 Now it seems like this case may be getting
12 certain pressure on it time wise, but I just want to
13 throw out to you, and get your feedback, and then we
14 will come back to you with all our answers. Apparently
15 this case is now set for protest hearing on December
16 13th, and we're going to take a look at the motions
17 that you all have filed today, you know, and we will
18 address, you know, if we're going to take action on the
19 motion to eliminate. That's scheduled for this
20 afternoon.

21 But anyway, looking at the big picture, this
22 is now scheduled for December 13th and then there is a

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1 hearing date available, if we wanted to give this case
2 more time. That would be January 10 at 1:00 p.m. So
3 you may need to consult your calendars, but if we find
4 that it would work to have a motions hearing, we could
5 do that on the December 13th date and move the case to
6 January 10th for the hearing on the protest. I'm not
7 saying we're going to do that, but I would like, since
8 you're here, to hear from you whether you think that's
9 a good idea or not a good idea.

10 MR. ROME: January 10th does work for
11 everyone on our side.

12 CHAIRPERSON MILLER: Okay. So the
13 protestants would be in favor of that kind of a
14 schedule. Okay.

15 MS. HIRAO: We're ready to go full in on the
16 13th. I need to check with several schedules before I
17 can say yes.

18 CHAIRPERSON MILLER: Okay.

19 MS. HIRAO: Right now we're going full in on
20 the 13th.

21 CHAIRPERSON MILLER: Okay. So we are going
22 to leave that open, but put those dates down, and you

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1 can contact our attorney, Martha Jenkins, if she
2 doesn't contact you, but I think you might -- we're
3 going to know, you know, after we take a look at all
4 the motions to whether, you know, we're going to have a
5 hearing, and whether that makes sense to do this. So,
6 okay. Do you have any other questions?

7 MR. ROME: No.

8 CHAIRPERSON MILLER: All right. I have some
9 instructions that I just usually give out verbally
10 about the protest, in case we don't see you again
11 before the protest, about just being prepared for that.
12 You're going to be receiving in the mail, from Sarah
13 Fashfel (ph), a letter explaining the protest process
14 and a copy of protest information form, also known as a
15 PIF. If you don't have these documents, please see Ms.
16 Fashfel at the conclusion of the hearing.

17 Look at the rules closely. You're required
18 to complete and submit the protest information form
19 seven days before the date of the hearing, and the
20 document needs to be submitted to ABRA, and the
21 opposing parties in this matter. If we don't receive a
22 copy of your PIF, your application, or your protest,

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1 whichever side you're on, may be subject to dismissal.
2 That has happened, so don't -- if you don't want that
3 to happen, get it in on time.

4 It also calls for you to clearly identify
5 your witnesses and your exhibits so that everybody is
6 on focus for the hearing. So if you have any other
7 questions, you can contact Ms. Jenkins, or if it's
8 related to the PIF, you can contact Ms. Fashfel and her
9 number is 202-397- 3971. Okay. So if you don't have
10 any other questions --

11 MS. HIRAO: Actually, I --

12 CHAIRPERSON MILLER: You do?

13 MS. HIRAO: If I may, if we cannot reach an
14 agreed upon date, in light of the PIF deadline, there
15 are two, I guess, proposed hearing dates for the
16 protest. When shall we hear from the board as far as a
17 firm date for the protest? Once I confirm whether or
18 not this January 10th date works.

19 CHAIRPERSON MILLER: Hold on a second.

20 (Members confer off the record.)

21 CHAIRPERSON MILLER: Okay. If we -- we'll be
22 able to tell you within a week whether or not we're

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1 going to postpone the hearing until January. So if you
2 could let us know whether the 10th would work for you,
3 and if not, what date would, we'd be able to have a
4 definitive answer within a week.

5 MS. HIRAO: Okay. Thank you.

6 CHAIRPERSON MILLER: We just have to -- we're
7 just going to take a look at the whole motions issue
8 and decide whether it makes sense to bifurcate this
9 case that way.

10 MS. HIRAO: All right.

11 CHAIRPERSON MILLER: Okay.

12 MS. HIRAO: Thank you very much.

13 CHAIRPERSON MILLER: All right. And so you
14 should be in contact with Ms. Jenkins, and my
15 understanding is that you don't know about the 10th.
16 You've got to go back and check, correct, with your --

17 MS. HIRAO: Yes.

18 CHAIRPERSON MILLER: -- everyone. All right.
19 Any other questions? Okay. So we will be in touch
20 with you and let you all know if we're going to have
21 another postponement date and if there's going to be a
22 motions hearing date. We'll let you know.

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1 MR. ROME: Thank you.

2 CHAIRPERSON MILLER: And you all in the
3 meantime, go forward. You're going to be filing with
4 whatever filings you said you plan to do. Okay.

5 MS. HIRAO: Thank you very much.

6 MR. REBA: Thank you.

7 MS. WEAVER: Thank you.

8 (The hearing was concluded at 10:35 a.m.)

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CERTIFICATE OF NOTARY PUBLIC

I, ANDREW KNOUS, the officer before whom the foregoing hearing was taken, do hereby certify that the testimony appearing in the foregoing pages was recorded by me and thereafter reduced to typewriting under my direction; that said transcription is a true record of the testimony given by said parties; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken; and, further, that I am not a relative or employee of any counsel or attorney employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

ANDREW KNOUS

Notary Public in and for the
District of Columbia

Capital Reporting Company

In the Matter of: CVS Pharmacy, LLC t/a CVA Pharmacy #1354 11-14-2012

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CERTIFICATE OF TRANSCRIPTION

I, SUSAN LaPOOH, hereby certify that I am not the Court Reporter who reported the proceeding and that I have typed the transcript of the proceeding using the Court Reporter's notes and recordings. The foregoing/attached transcript is a true, correct and complete transcription of the proceedings.

Date

SUSAN LaPOOH

Transcriptionist

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In the Matter of: CVS Pharmacy, LLC t/a CVA Pharmacy #1354 11-14-2012

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