

INTRODUCTION

This case arises from a Notice of Status and Show Cause Hearings (“Notice”), which the Alcoholic Beverage Control Board executed on June 26, 2013. The Alcoholic Beverage Regulation Administration (ABRA) served the Notice on the Respondent, located at 1318 9th Street, N.W., Washington, D.C., on July 1, 2013.

Procedural Background

The Notice charged the Respondent with violating its Settlement Agreement, which if proven true, would justify imposition of a fine, suspension, or revocation of the Respondent’s ABC license.

Specifically, the Notice in Case No. 13-CMP-00104, charged the Respondent with the following violation:

Charge I: [On February 24, 2013,] the Respondent failed to adhere to the Settlement Agreement by not taking the necessary actions to ensure that music, noise, and vibrations from the establishment were not audible within any adjacent residential properties at all times during business hours when music is being played, in violation of D.C. Official Code § 25-446 (e) (2001), for which the board may take the proposed action pursuant to D.C. Official Code § 25-823(6) (2001).

ABRA Show Cause File No., 13-CMP-00104, Notice of Status and Show Cause Hearings, 2 (June 26, 2013).

The Office of the Attorney General (OAG) and the Respondent appeared at the Show Cause Status Hearing on September 11, 2013. The Board set the matter for a Show Cause Hearing on October 16, 2013. The Board continued the Hearing to January 29, 2014. On January 29, 2014, the Board continued the Hearing to March 5, 2014. On March 5, 2014, the Hearing was continued to May 7, 2014. On May 7, 2014, the Hearing was continued to July 30, 2014. Respondent requested a continuance for the July 30, 2014 Hearing. The Board denied the request with a 3-3-0 vote. The Respondent did not appear before the Board for the Hearing prompting the OAG to proceed *ex parte* at the Hearing on July 30, 2014.

I. Issue for the Board’s Consideration

The issue in this matter is whether the Respondent failed to adhere to the Settlement Agreement that required it to ensure that music, noise, and vibrations from the establishment were not audible within any adjacent residential properties. Pursuant to D.C. Official Code § 25-823(6) (2001), the Board may revoke or suspend and fine a Respondent for violation of a Settlement Agreement.

FINDINGS OF FACT

At the conclusion of the Show Cause Hearing, the Board took the matter under advisement. 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. Background

1. The Respondent holds a Retailer's Class CT License, ABRA License No.86037. *See ABRA Licensing File No. 86037*. The establishment is located at 1318 9th Street, N.W., Washington, D.C. 20001. *Id.*
2. The Respondent is bound by a Settlement Agreement (formerly known as a Voluntary Agreement) that the previous establishment entered into with the Advisory Neighborhood Commission (ANC) 2F dated March 10, 2008. *See ABRA Show Cause File 13-CMP-00104, Exhibit 1.*
3. The Respondent's Settlement Agreement provides in § 6 that it will take all necessary actions to ensure that music, noise and vibrations from the establishment are not audible within any adjacent residential properties. *See ABRA Show Cause File 13-CMP-00104, Exhibit 1.*

II. Former ABRA Investigator Brian Molloy

4. On February 24, 2013 at approximately 1:10 a.m., former ABRA Investigator Brian Molloy investigated the Respondent in response to a complaint submitted to ABRA. *Transcript (Tr.)*, 07/30/14 at 28.
5. Mr. Molloy testified that former ABRA Investigator Brian Owens arrived at the establishment at approximately 1:30 a.m. to assist Mr. Molloy with the investigation. *Tr.*, 07/30/14 at 29.
6. Mr. Molloy and Mr. Owens attempted to contact the complainant, Mr. Martin Smith, to verify the noise complaint. *Tr.*, 07/30/14 at 29. They were not able to contact him upon their arrival at Vita Lounge. *Tr.*, 07/30/14 at 29. Mr. Molloy stated that it is ABRA's standard operating procedure to enter the complainant's home to corroborate their claim that noise emitted by the ABC licensed establishment is heard inside their residence. *Tr.*, 07/30/14 at 29. Mr. Molloy did not speak with Mr. Smith until later in the evening. *Tr.*, 07/30/14 at 29.
7. When Mr. Molloy could not reach Mr. Smith, he entered Vita Lounge in an attempt to speak with the owner regarding the noise complaint. *Tr.*, 07/30/14 at 29. Upon entering the establishment, Mr. Molloy and Mr. Owens identified themselves as ABRA Investigators. *Tr.*, 07/30/14 at 30. Ms. Abebe Beyene introduced herself and confirmed that she was the owner of Vita Lounge. *Tr.*, 07/30/14 at 30.

8. Mr. Molloy testified that upon entering the establishment, he immediately observed that the music was very loud. *Tr.*, 07/30/14 at 30. He told Ms. Beyene to lower the volume of the music. *Tr.*, 07/30/14 at 30.

9. Mr. Molloy testified that Mr. Beyene stated that she would decrease the volume of the music and that she “would take care of everything.” *Tr.*, 07/30/14 at 30. Ms. Beyene spoke with the D.J., but Mr. Molloy did not hear what was said because the music was so loud. *Tr.*, 07/30/14 at 31-32.

10. Mr. Molloy stated that Ms. Beyene informed him that she had received previous noise complaints. *Tr.*, 07/30/14 at 31. According to Mr. Molloy, Ms. Beyene was aware that the source of the noise emitted from the establishment was the emergency exit door located in the rear of the establishment. *Tr.*, 07/30/14 at 31. Mr. Molloy testified that Ms. Beyene knew that she needed to apply sound-proof insulation to the door. *Tr.*, 07/30/14 at 31.

11. Mr. Molloy informed Ms. Beyene that the volume of the music was still too loud. *Tr.*, 07/30/14 at 31. According to Mr. Molloy, although Ms. Beyene informed him that she would instruct the D.J. to decrease the volume of the music, the music remained extremely loud. *Tr.*, 07/30/14 at 31.

12. Mr. Molloy observed Ms. Beyene speaking with the D.J. again; but he could not hear what was said because the volume of the music was still very loud. *Tr.*, 07/30/14 at 31. Mr. Molloy informed Ms. Beyene that he could not discern whether or not the D.J. lowered the volume of the music because the volume was just as loud as when he first entered the establishment. *Tr.*, 07/30/14 at 32.

13. Mr. Molloy informed Ms. Beyene that she must lower the volume of the music or she would receive another noise complaint from the neighbors. *Tr.*, 07/30/14 at 32. He informed Ms. Beyene that ABRA investigators would return to her establishment, corroborate the noise complaint and she could possibly be charged with violating her Settlement Agreement. *Tr.*, 07/30/14 at 32.

14. According to Mr. Molloy, Ms. Beyene told him not to worry because she would speak with the D.J. about lowering the volume of the music. *Tr.*, 07/30/14 at 32.

15. Upon exiting the establishment, Mr. Molloy was contacted by Mr. Smith, the complainant. *Tr.*, 07/30/14 at 32. Mr. Smith invited Mr. Molloy into his residence to observe the level of noise heard inside the residence that was emitted from Vita Lounge. *Tr.*, 07/30/14 at 32-33, 40.

16. Mr. Molloy testified that at approximately 1:45 a.m., while he and Mr. Owen were standing in the living room of Mr. Smith’s residence, he observed that the windows and door were closed, and that he could hear music emitted from Vita Lounge. *Tr.*, 07/30/14 at 33, 41, 42, 43. According to Mr. Molloy, he could easily hear the music which impaired his ability to hear Investigator Owens’ conversational tone. *Tr.*, 07/30/14 at 42. He observed that the music was

louder than any other “street noise,” and loud enough to disrupt your sleep. *Tr.*, 07/30/14 at 42, 43.

17. Mr. Molloy asserted that there were no other establishments in the vicinity of Mr. Smith’s residence that emitted noise. *Tr.*, 07/30/14 at 33. Mr. Molloy was certain that the noise originated from the inside of Vita Lounge. *Tr.*, 07/30/14 at 33.

18. After approximately eight (8) minutes the noise emitted from the establishment subsided. *Tr.*, 07/30/14 at 33. However, Mr. Smith informed Mr. Molloy that he wished to proceed with filing an official noise complaint against the Respondent. *Tr.*, 07/30/14 at 33.

19. Mr. Molloy informed Ms. Beyene that he corroborated the noise complaint and that she violated her Settlement Agreement to ensure that noise was not emitted from her establishment into a neighboring residence. *Tr.*, 07/30/14 at 33, 39, 40, *ABRA Show Cause File 13-CMP-00104, Exhibit 1*, § 6.

20. Mr. Molloy observed Ms. Beyene and the D.J. in the alley behind the establishment supposedly trying to determine the appropriate volume level for the music. *Tr.*, 07/30/14 at 34. Mr. Molloy informed Ms. Beyene that he warned her to lower the volume of the music but she failed to comply before he could corroborate the noise complaint. *Tr.*, 07/30/14 at 34.

21. Mr. Molloy testified that Ms. Beyene eventually lowered the volume of the music inside the establishment. *Tr.*, 07/30/14 at 34. He advised Ms. Beyene that she must maintain the lowered volume level of the music. *Tr.*, 07/30/14 at 34. Additionally, Mr. Molloy reminded Ms. Beyene that her response to the noise complaint was insufficient and that she was in violation of her Settlement Agreement. *Tr.*, 07/30/14 at 34.

CONCLUSIONS OF LAW

22. The Board has the authority to fine, suspend or revoke the license of a Respondent who violates any provision of Title 25 of the D.C. Official Code pursuant to D.C. Official Code § 25-823(1). D.C. Code § 25-830 (West Supp. 2013); 23 DCMR § 800, *et seq.* (West Supp. 2013). Furthermore, after holding a Show Cause Hearing, the Board is entitled to impose conditions if it determines “that the inclusion of the conditions would be in the best interests of the locality, section, or portion of the District in which the establishment is licensed.” D.C. Code § 25-447 (West Supp. 2013).

23. The Board is tasked with enforcing the Respondent’s Settlement Agreement. D.C. Code § 25-446(c) (West Supp. 2011). The Board interprets the Agreement according to the principles of contract law and thus the Board looked to the Settlement Agreement’s terms. *North Lincoln Park Neighborhood Ass’n v. District of Columbia Alcoholic Beverage Control Bd.*, 727 A.2d 872 (D.C. 1999).

24. As such, pursuant to D.C. Official Codes §§ 25-446 and 25-823(6), the Board finds the Respondent guilty of failure to adhere to a Settlement Agreement to ensure that music, noise, and vibrations from the establishment were not audible within any adjacent residential properties at

all times during business hours when music is being played. *See ABRA Show Cause File 13-CMP-00104, Exhibit 1, § 6.*

25. The Board credits the testimony of Investigator Molloy. The Board finds that the Government has shown through substantial evidence that the Respondent violated the terms of its Settlement Agreement by failing to ensure that music, noise, and vibrations from the establishment were not audible within any adjacent residential properties.

26. The Settlement Agreement states that the Respondent must “take all necessary actions to ensure that music, noise, and vibrations from the establishment are not audible within any adjacent residential properties.” *ABRA Show Cause File 13-CMP-00104, Exhibit 1, § 6.*

27. Nevertheless, on February 24, 2013, ABRA received a noise complaint from Mr. Martin Smith, who resides in a neighboring residential property against the Respondent. *Supra* at ¶ 4.

28. Section 6 of the Settlement Agreement is clear that Respondent will ensure that music, noise, and vibrations from the establishment are not audible within any adjacent residential properties. In light of the clear language of the Settlement Agreement, the excessive noise observed in a neighboring residential property by Investigator Molloy is evidence of Respondent’s violation of § 6 of the Settlement Agreement. *Supra* at ¶ 16, 17.

29. Specifically, Investigator Molloy observed that the volume of the music emitted from the Respondent’s establishment was audible inside the neighboring residential property. *Supra* at ¶ 16. The volume of the music was loud enough to disrupt a person’s reasonable ability to sleep. *Id.* Additionally, the music was so loud that it impaired Investigator Molloy’s ability to hear Investigator Owens’ conversational tone inside the living room of the residence with the windows and door closed. *Id.*

30. Furthermore, the Respondent was the only establishment in the vicinity of Mr. Smith’s residence that emitted music during the investigation. *Supra* at ¶ 16. Moreover, the music emitted by the Respondent was louder than any “street noise” observed by ABRA investigators. *Id.*

31. This is Respondent’s seventh (7th) secondary tier violation within a four year period. *ABRA Licensing File No. 086037, Investigative History* (See Case #13-CMP-00120, Case #12-CMP-00091, Case #12-CMP-00074, Case #11-CMP-0511, Case #11-CMP-00470, Case #11-CMP-00175). Pursuant to 23 DCMR § 802.1 (D), a Licensee that is convicted of more than four (4) secondary tier violations within a four (4) year period shall be fined according to the fine schedule provided for primary tier violations.

32. For the foregoing reasons, Respondent must pay a total fine within the range of one-thousand dollars (\$1,000.00) and two-thousand dollars (\$2,000.00) because a seventh secondary tier violation within a four (4) year period shall be fined as a first primary tier violation. 23 DCMR § 801.1(a).

ORDER

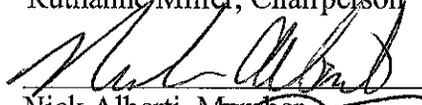
Based on the foregoing findings of fact and conclusions of law, it is hereby **ORDERED**, on this 12th day of November 2014, by the Board, that Mimi & D, LLC., t/a Vita Restaurant and Lounge/Penthouse Nine, is in violation of D.C. Official Code § 25-446 (e) (2001), in Case No. 13-CMP-00104.

IT IS FUTHERED ORDERED that the Respondent pay a total fine of one-thousand dollars (\$1,000.00), which the Respondent must pay within thirty (30) days from the date of this Order or its license shall be suspended until all outstanding fines are paid.

District of Columbia
Alcoholic Beverage Control Board



Ruthanne Miller, Chairperson



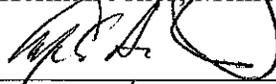
Nick Alberti, Member



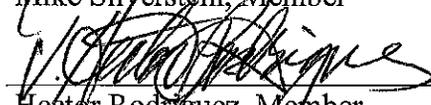
Donald Brooks, Member



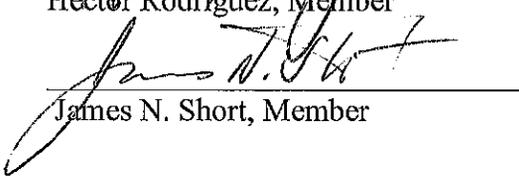
Herman Jones, Member



Mike Silverstein, Member



Hector Rodriguez, Member



James N. Short, Member

Pursuant to 23 DCMR §1719.1 (2008), 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, 2000 14th Street, N.W., Suite 400S, Washington, D.C. 20009.

Also, pursuant to section 11 of the District of Columbia Administrative Procedure Act, Pub. L. 90-614, 82 Stat. 1209, D.C. Official Code §2-510 (2001), 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, 430 E Street, N.W., Washington, D.C. 20001; (202/879-1010). However, the timely filing of a Motion for Reconsideration pursuant to 23 DCMR §1719.1 (2008) 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) (2004).