

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

2 (11:10 a.m.)

3 CHAIRPERSON MILLER: Okay, the
4 Board is back on the record and calling Case
5 Number 12-CMP-0431, which is Lounge located at
6 H Street NE, License number 85329. And would
7 the parties in this case please come forward
8 and take a seat at the table.

9 (Off microphone comments)

10 CHAIRPERSON MILLER: Is that the
11 wrong case? Twelve? Twelve. 00431. If I
12 said something different I apologize, but
13 that's what I thought I said.

14 MR. LAFANDE: Misheard you.

15 CHAIRPERSON MILLER: Okay.

16 MR. LAFANDE: Matthew LaFande, a
17 member of the District of Columbia bar for and
18 on behalf of the respondent, BEG Investments,
19 LLC, a limited liability company organized
20 under the laws of the District of Columbia.

21 Present with me today is a
22 representative from that limited company,

1 Bernard Gibson.

2 CHAIRPERSON MILLER: Good morning.

3 MR. GIBSON: Good morning. I'm

4 Bernard Gibson.

5 (Off microphone comments)

6 CHAIRPERSON MILLER: Okay. And

7 for the government?

8 MS. SCHMIDT: Good morning. Amy

9 Schmidt, assistant attorney general on behalf
10 of the District of Columbia.

11 CHAIRPERSON MILLER: Okay. And
12 this is a show cause hearing. The Board has
13 a couple of preliminary matters. The first
14 one I'm going to let Mr. Alberti address.

15 MEMBER ALBERTI: Thank you, Ms.
16 Miller. One of the charges in this matter
17 involves a -- of the settlement agreement. I
18 am currently chair of the ANC 6A which is a
19 signer to the settlement agreement, and as
20 such I will be recusing myself from this
21 matter to avoid any conflicts of interest.

22 CHAIRPERSON MILLER: Thank you

1 very much. Okay, our second preliminary
2 matter is that I believe there was a motion
3 filed that the Board has not ruled on, and
4 that is a motion to dismiss filed by the
5 licensee to which the government responded and
6 then the licensee also filed a reply.

7 It was a motion to dismiss for
8 failure to comply with D.C. Official Code 25-
9 832 which is a provision that addresses the
10 government's duty to serve a licensee within
11 90 days upon issuance of the report, and that
12 wasn't done in this case.

13 The Board took that issue under
14 advisement, and that issue came up in another
15 case in which the Board has issued a written
16 opinion. That's the Little Miss Whiskey's
17 case, and that's Order Number 2013-440 that
18 did address the same point.

19 And in that order the Board found
20 that that provision in the D.C. Code is
21 directory and not mandatory, and that the case
22 did not need to be dismissed unless prejudice

1 is found for the late service. And in this
2 case I don't believe that a prejudice was, I
3 don't find prejudice in this case from the
4 late filing of the report. So I would move
5 that we deny the motion to dismiss.

6 MEMBER BROOKS: Second.

7 CHAIRPERSON MILLER: Mr. Brooks
8 has seconded the motion. I'd say we had heard
9 some, I'm not going to hear all argument on
10 this right now, but we heard oral argument
11 initially and even before the written papers
12 were filed, I believe, and we fully addressed
13 the legal issue in the Little Miss Whiskey
14 case, and we will address this writing in the
15 written order that is ultimately issued on
16 this case.

17 So there's a motion that's been
18 seconded to deny the motion to dismiss. All
19 those in favor say aye.

20 (Chorus of ayes)

21 CHAIRPERSON MILLER: All those
22 opposed? All those abstaining?

1 MEMBER SILVERSTEIN: Abstain.

2 MEMBER ALBERTI: Abstain.

3 CHAIRPERSON MILLER: Okay, then
4 the motion passes by a vote of 3-0-2.

5 Okay. Now we can get to the
6 hearing. Are there preliminary issues with
7 respect to the hearing?

8 MR. LAFANDE: On behalf of the
9 respondent, Matthew LaFande. I again renew my
10 motion asking that those Board members who are
11 defendants in a civil lawsuit filed by this
12 respondent that they recuse themselves from
13 this matter as a matter of profound conflict
14 of interest, particularly as the subject of
15 the racketeering lawsuit filed by this
16 respondent is closely paralleled to the issues
17 that are in the matter before the Board today.

18 And that we assert that this would
19 not have arisen but for the retaliatory motive
20 in filing this lawsuit and bringing these
21 issues to the attention of the --

22 (Off microphone comments)

1 CHAIRPERSON MILLER: Ms. Schmidt,
2 do you have any response to that?

3 MS. SCHMIDT: Yes, I do. This
4 case is before the U.S. District Court as Mr.
5 LeFande stated. We should let them decide and
6 we should let them decide this matter. You do
7 not have the jurisdiction to even decide this
8 case.

9 And we can hold the hearing today
10 and you can hold your decision in abeyance
11 until the case is decided. I checked last
12 week, and as of last week the case had not
13 been yet decided. I did not see the attorney
14 assigned to this case this week so I was
15 unable to ask him.

16 Also, and this is the first time
17 he actually filed a formal motion in this
18 case. I'm aware of the case. I'm aware of
19 the case through conversations with Mr.
20 LaFande, however, there is no written formal
21 motion filed to recuse yourselves from this
22 case at all the other previous hearings. And

1 therefore we ask this case go forward today.

2 MR. LAFANDE: Mrs. Schmidt's
3 arguments --

4 CHAIRPERSON MILLER: Okay, we
5 heard the arguments before about this, and I
6 believe we addressed this before from the
7 bench. So at this time I would move to deny
8 the motion that the Board members that are
9 named in that suit, myself included, and I'm
10 sure Mr. Brooks and Mr. Silverstein included,
11 recuse ourselves. Is there a second?

12 MEMBER BROOKS: Second.

13 CHAIRPERSON MILLER: Any other
14 comments? All those in favor say aye.

15 (Chorus of ayes)

16 CHAIRPERSON MILLER: All those
17 opposed? All those abstaining? The motion
18 passes 5-0-0. Okay, next? Anything else? On
19 motions.

20 MR. LAFANDE: I again move to
21 dismiss this matter, and as the attorney for
22 the respondent who has been present from the

1 onset of this matter has never been served
2 with any amended notice of retraction or
3 notice of a show cause hearing. The only
4 person that has been served in that matter has
5 been the, some employee of the respondent's
6 establishment apparently in violation of the
7 zoning laws --

8 (Off microphone comments)

9 MR. LAFANDE: -- respondent's
10 representative once entering his appearance,
11 all papers shall be served upon that
12 representative. That has not happened in this
13 case, and this matter is not properly before
14 the Board.

15 The prior notice of show cause has
16 been demonstrated to be fictitious and without
17 factual findings, and there is no other matter
18 that has been given proper notice to the
19 respondent. The Board is without jurisdiction
20 to proceed and I insist that it be dismissed
21 at this time.

22 CHAIRPERSON MILLER: Ms. Schmidt?

1 MS. SCHMIDT: I addressed these
2 issues in my District of Columbia response
3 reply in support of motion to dismiss, which
4 was filed with this Board, I believe, on
5 October 23rd.

6 And in that motion, which I have
7 in writing, first of all, since this matter
8 was, there was no obligation from the attorney
9 because this is a notice from the Board.
10 Office of the Attorney General does not issue
11 that notice.

12 Yes, it is true we assisted in
13 writing that notice, however, it is issued by
14 this Board. And as such, it is the Board's
15 rules that apply to the service of this motion
16 of this amended notice.

17 And if the first argument is that
18 the licensee's attorney is stating that since
19 it's a limited liability corporation this is
20 a fictitious organization. Not fictitious,
21 this is an organization by the operation of
22 law and as such that it cannot be served.

1 However, D.C. statutes which are in my written
2 motion, D.C. Official Code Section 25-101,
3 which is the definitional section of the
4 proceedings relevant to this states that a
5 limited liability corporation is a person, and
6 thus the fact that the Board served the
7 limited liability corporation using its
8 standard procedures is valid.

9 And therefore there was proper
10 service on the limited liability corporation
11 and on the licensee. And there is also a
12 service form which was signed by -- and I know
13 there is one on August 9th, 2013 that was
14 served on BEG Investments. That's Exhibit A
15 to the District's response.

16 I'm sorry. I apologize. I have
17 the wrong certificate. However, there is a
18 certificate of service in the record. I do
19 not have it on me this second for that but
20 it's in the Board's records.

21 CHAIRPERSON MILLER: I have an
22 Exhibit A to your response. I have that in

1 front of me. Is that what you're talking
2 about? It says service form?

3 MS. SCHMIDT: That's the original
4 service of August 10th.

5 CHAIRPERSON MILLER: That's the
6 original one, then you did another one.

7 MS. SCHMIDT: Yes, October.

8 CHAIRPERSON MILLER: Okay.

9 MS. SCHMIDT: Hold on. I'm sorry,
10 maybe it is here. Let me see what day I
11 served the amendment notice. I apologize.
12 It's been awhile. I want to make sure I have
13 the right date. No, that is the correct one.
14 I'm sorry. August 9th, that is the correct
15 one. And that was served using standard
16 procedures, as provided by the statute, on the
17 licensee.

18 CHAIRPERSON MILLER: And the
19 statute you're referring to that you can
20 serve, that the licensee, or the licensee
21 officer is which? Did you say it was in the
22 definitions?

1 MS. SCHMIDT: Well, it's a person.
2 It's a person. A limited liability
3 corporation is not purely a construction of
4 law. It is a person. It's 25-101(37). And
5 it's served pursuant to 23 DCMR 1604.1.

6 CHAIRPERSON MILLER: Okay.

7 MR. LAFANDE: I draw to the
8 Board's attention during the August 7th
9 hearing transcripts at Page 24. Chair
10 specifically directed the Office of the
11 Attorney General to file as soon as possible
12 an amended statement of charges with the
13 Board.

14 It is patently disingenuous for
15 the Attorney General to now argue that a paper
16 it drafted and was directed to and did so file
17 with the Board, was not in violation of 1703,
18 this Board's requirements for service of
19 papers or a paper that was filed with the
20 Board.

21 It is making a fully superfluous
22 argument that it was not the Attorney General

1 that made this amended notice, I'm sorry,
2 amended show cause hearing notice, when it
3 drafted it. It was instructed to file it. It
4 did so, and then failed to give the
5 representative who had appeared in these
6 proceedings as suggested by Section 1703.3 --

7 CHAIRPERSON MILLER: Is your point
8 that they filed, they served the licensee
9 instead of you and therefore --

10 (Off microphone comments)

11 MR. LAFANDE: It's beyond that.
12 It's beyond that. It certainly, we don't
13 dispute that someone at the establishment was
14 served. However, until this was brought to
15 the attention of the Board months later, there
16 was never any attempt whatsoever to give
17 actual notice to the attorney who was in the
18 midst of representation in this matter, any
19 notice of that service of that amended notice
20 of hearing.

21 CHAIRPERSON MILLER: Where was the
22 provision in filing that?

1 MR. LAFANDE: 1703.3, Service Of
2 Papers, in your regulations. It's part of the
3 District of Columbia Municipal Regulations.

4 CHAIRPERSON MILLER: Okay.

5 MR. LAFANDE: And this has been a
6 fundamental problem.

7 CHAIRPERSON MILLER: Let me ask
8 you. Did you get service? Did you get this?

9 MR. LAFANDE: I've never --

10 CHAIRPERSON MILLER: You didn't
11 get serviced. Do you have a copy of what was
12 served?

13 MR. LAFANDE: It was attached
14 eventually as an exhibit to their unauthorized
15 Sureply, I believe.

16 CHAIRPERSON MILLER: You got a
17 copy of the notice attached to the --

18 MR. LAFANDE: Sureply which was
19 dated the 23rd of October.

20 CHAIRPERSON MILLER: The Sureply
21 to your motion to dismiss?

22 MR. LAFANDE: Right.

1 CHAIRPERSON MILLER: Okay, which
2 was what date?

3 MR. LAFANDE: The 23rd of October.

4 CHAIRPERSON MILLER: 23rd of
5 October. So here we are in January, and how
6 have you been prejudiced at all? Or you're
7 not asserting any prejudice?

8 MR. LAFANDE: Oh, we're asserting
9 profound prejudice and certainly distinction
10 from the Little Miss Whiskey's case where I
11 did also represent the respondent.

12 CHAIRPERSON MILLER: Let me ask
13 you just specifically, you got notice four
14 months ago. You're prejudiced to go forward
15 in this case?

16 MR. LAFANDE: Absolutely. We
17 don't have the ability to bring witnesses or
18 DVR tapes or other records. We are not
19 required to maintain these records, but as a
20 period of time when the initial notice came
21 out it was for a completely different workday
22 cycle. We came prepared on August 7th with

1 our evidence, our records, to defend against
2 what was the allegation of events on July
3 26th.

4 Once the allegations of July 26th
5 in the early morning were thoroughly refuted,
6 the government then simply revised its
7 allegations to make it the late evening of the
8 26th.

9 And then here we are now almost a
10 year and a half later attempting to litigate
11 allegations and produce evidence in rebuttal.
12 And this is profound prejudice as has already
13 has been determined by the City Council in
14 making this limitation on no time for notice.

15 CHAIRPERSON MILLER: Okay. Any
16 final response?

17 MS. SCHMIDT: On August 8th, we
18 were both at this hearing. Mr. LaFande knew
19 that I'd be amending the notice at that time.
20 And yes, I did draft an amendment. However,
21 it is not the responsibility of the Office of
22 the Attorney General to do the service. It is

1 ABRA's responsibility and they followed the
2 procedures according to the statute.

3 And any prejudice, Mr. LaFanda
4 knew on August 8th that this would be coming
5 and not to come in saying -- and this case had
6 been continued due to a bulging calendar on
7 behalf of ABRA, and I do admit that this had
8 to be postponed until October because of my
9 personal schedule.

10 Nevertheless, he knew on August
11 8th that there was a difference in time. Plus
12 we are focusing on the time versus the
13 conduct. There will be irrefutable evidence
14 that it doesn't matter what day Investigator
15 Jones went to the establishment. There was
16 music playing in violation of the agreement.
17 There was no reimbursable detail.

18 It could happen -- that is the
19 main point, not when and what, where it
20 happened. He had notice that that was the
21 date. So that is the crux of the matter.

22 CHAIRPERSON MILLER: Okay, I think

1 we've heard enough, especially those of us who
2 were at that hearing. And we decided to
3 postpone in order that the licensee have the
4 most accurate notice. And then there was many
5 months after that for the licensee to prepare
6 the case.

7 And I agree with Ms. Schmidt.

8 Very few facts, if any, were different except
9 for making the time accurate. So I don't see
10 any prejudice, and I think that the service of
11 papers issue, while it does say to serve the
12 representative, I don't think that that means
13 that you dismiss the case.

14 The licensee got notice and the
15 representative got notice in enough time to
16 prepare for this case and should have been in
17 contact with his own client. And also, he
18 knew this was coming and could have asked Ms.
19 Schmidt where it is or checked with the Board.
20 So I would move to deny this motion to dismiss
21 as well.

22 MS. SCHMIDT: If I may for the

1 record just make one comment. The statute of
2 1604 says, it doesn't say representative. It
3 says it should notify the person to whom the
4 license or permit is issued by personal
5 service or certified mail at the last address
6 recorded by that person with the Board.

7 And therefore, when it's served in
8 the establishment it means it has to be
9 restricted to the establishment. If it has an
10 attorney that's a courtesy copy. However, the
11 primary service should be to the
12 establishment.

13 (Crosstalk)

14 CHAIRPERSON MILLER: No, actually
15 we had a motion. We shouldn't have
16 entertained any other comments on it. I am
17 going to allow Mr. LaFanda about 1703 which
18 I'm sure you were going to jump to.

19 So the Board will vote on the
20 motion and then address in writing on the
21 order its reasons more fully than I'm
22 certainly articulating. So at this point I

1 think we need to move on. I have a motion to
2 dismiss this. Motion to deny dismissal of the
3 case based on service. Do I have a second?

4 MEMBER SILVERSTEIN: Second.

5 CHAIRPERSON MILLER: Mr.
6 Silverstein seconded the motion. All those in
7 favor to deny the motion to dismiss say aye.

8 (Chorus of ayes)

9 CHAIRPERSON MILLER: All those
10 opposed? All those abstaining? The motion
11 passes then 6-0-0. Okay. I don't think we
12 need to be, we don't want to open the door to
13 rearguing all motions. But I think that does
14 address the arguments for the most part in
15 that motion that was filed regarding service
16 in both cases, the report and the amended
17 notice.

18 Okay, let me ask each of you how
19 many witnesses you expect to call so I can get
20 a feel for what we're doing here.

21 MS. SCHMIDT: The District has
22 one.

1 CHAIRPERSON MILLER: Okay.

2 MR. LAFANDE: We have no
3 witnesses. Too much time has passed and
4 there's no longer --

5 CHAIRPERSON MILLER: Okay, the
6 answer is no. Okay, no witnesses. All right,
7 then why don't we start the case. Ms.
8 Schmidt, do you have an opening statement?

9 MS. SCHMIDT: Yes, I do. This
10 case is a very cut and simple case. There
11 were a voluntary agreement as to, entered
12 between the establishment and the
13 neighborhood, and one of the provisions was
14 that specifically that there be no microphones
15 or amplification of any music, and that is
16 Section 1.3 of that voluntary agreement. And
17 this was approved by ABRA.

18 And also, the Board also issued an
19 order modifying that agreement and in that
20 order it stated that any time there was to be
21 music that there should be a reimbursable
22 detail, and neither of these conditions were

1 followed on Thursday night July 26th, 2012.

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

5 MR. LAFANDE: With regards to the
6 VA, the government is unable to demonstrate
7 the actual date which it claims that these
8 events occurred. It will be unable to
9 demonstrate that there was any violation of
10 the VA.

11 And as to any order imposed by
12 this Board regarding a reimbursable detail,
13 that is absolutely in violation of District of
14 Columbia statutes with regards to the
15 authority of this Board to set hours for, or
16 require reimbursable details.

17 It's in direct violation of the
18 District of Columbia law, and during this
19 matter, the policy and illegal order by this
20 Board cannot be enforced by punitive measures
21 by the Board. For that reason this matter
22 cannot be sustained and must be dismissed.

1 CHAIRPERSON MILLER: Thank you.

2 Okay, Ms. Schmidt, are you ready to go forward
3 with your case?

4 MS. SCHMIDT: Yes.

5 CHAIRPERSON MILLER: All right.

6 MS. SCHMIDT: The government calls
7 Investigator Earl Jones.

8 CHAIRPERSON MILLER: Good morning.

9 MR. JONES: Good morning.

10 CHAIRPERSON MILLER: Do you swear
11 to tell the truth, the whole truth and nothing
12 but the truth?

13 MR. JONES: I do.

14 CHAIRPERSON MILLER: Thank you.

15 MS. SCHMIDT: Good morning,
16 Investigator. Can you please state your name
17 and by whom you're employed?

18 MR. JONES: Investigator Earl
19 Jones, and I'm employed with the Alcoholic
20 Beverage Regulation Administration.

21 MS. SCHMIDT: And how long have
22 you been employed by ABRA?

1 MR. JONES: Since September 2009.

2 MS. SCHMIDT: And drawing your
3 attention to Thursday, July 26th,
4 approximately 9:45 p.m., did you have occasion
5 to go to Twelve, at 1123-1125 H Street NE?

6 MR. JONES: Yes, ma'am.

7 MS. SCHMIDT: And why did you go
8 there?

9 MR. JONES: I went because my
10 supervisor at the time received a call on our
11 ABRA Hotline from a complainant, a neighbor,
12 who indicated that she was experiencing music
13 in her residence coming from the
14 establishment.

15 MS. SCHMIDT: And did you go to
16 that neighbor's house?

17 MR. JONES: Yes, ma'am.

18 (Off the record discussion)

19 MS. SCHMIDT: Mr. LaFanda would
20 like copies of that document that was --

21 CHAIRPERSON MILLER: The case
22 report? Is that what you're referring to?

1 MS. SCHMIDT: No, no. The
2 exhibits that ABRA filed.

3 CHAIRPERSON MILLER: Okay.

4 MS. SCHMIDT: He's been provided
5 those. However, if you'd like copies again,
6 sir, we'd be glad to get them.

7 (Off microphone comments)

8 CHAIRPERSON MILLER: Are you on
9 the microphone?

10 MS. SCHMIDT: So do you recall
11 where the neighbor was located?

12 MR. JONES: She was located on
13 Linden Street which is a cross street to 12th
14 Street, and located probably about 200 to 300
15 feet away from Twelve Lounge.

16 MS. SCHMIDT: And when you were
17 there were you able to hear anything?

18 MR. JONES: When I pulled up to
19 the establishment I can hear --

20 MS. SCHMIDT: I'm sorry, at the
21 neighbor. At 12th and Linden.

22 MR. JONES: I understand.

1 MS. SCHMIDT: Yes.

2 MR. JONES: When I pulled up to
3 her neighborhood I could hear music being
4 echoed from the top of the establishment. I
5 knocked on the door. She allowed me to come
6 in to listen to any sort of music that I may
7 have encountered that I heard from outside.

8 I had her close the door and make
9 sure all windows were closed. No air
10 conditioning unit running, so I could pretty
11 much tell or see if that was the same music
12 that I heard from outside, and I could hear
13 the music inside of her residence.

14 MS. SCHMIDT: And did you hear any
15 other type of noise from Twelve besides music
16 in her establishment?

17 MR. JONES: There was a gentlemen
18 who was on a microphone.

19 MS. SCHMIDT: And what kind of
20 things was, what does he say on the
21 microphone? What kind of --

22 MR. JONES: I can't tell you -- I

1 mean, this happened a year and a half ago. I
2 can't tell you exactly what he was saying. I
3 know that I do recall hearing him kind of
4 announce the song that was on and kind of
5 giving shout-outs to people who were there on
6 the rooftop.

7 MS. SCHMIDT: If I may, I'm now
8 going to hand you what's been marked for
9 identification. It says Exhibits 3 and 4,
10 however, they will be Government's Exhibits 1
11 and 2. Let's do Exhibits Number 1, please,
12 which is marked Exhibit Number 3 right now.
13 Can you tell the Board what that is?

14 MR. JONES: This is the street
15 that the complainant lives on, on Linden
16 Street.

17 MS. SCHMIDT: And who took that
18 picture?

19 MR. JONES: I took the picture.

20 MS. SCHMIDT: And do you recall
21 when you took that picture?

22 MR. JONES: I took the picture, I

1 want to say a day or two later during the day
2 time.

3 CHAIRPERSON MILLER: Excuse me,
4 Ms. Schmidt. So the Board has copies of the
5 investigative report. What photo, are you at
6 Exhibit 3 of the investigative report?

7 (Off microphone comments)

8 CHAIRPERSON MILLER: Okay, thank
9 you.

10 MR. JONES: Is there any reason
11 why you need to renumber the exhibits?
12 Couldn't we just use the exhibit numbers here?

13 MS. SCHMIDT: That's fine.

14 CHAIRPERSON MILLER: You can
15 identify your exhibit for admission, you know,
16 however it makes sense in your case.

17 MS. SCHMIDT: Okay, thank you.
18 I'll stick with the Board's numbers. That
19 would be the investigative report right now.

20 CHAIRPERSON MILLER: Okay.

21 MR. LAFANDE: Thank you.

22 MS. SCHMIDT: And did that

1 depiction, has that changed in any way since
2 you were there the day the night of the
3 incident?

4 MR. JONES: Not that I know of,
5 no.

6 MS. SCHMIDT: And I'm now going to
7 hand you what's marked as Government's Exhibit
8 Number 4. Can you tell the Board what that
9 is?

10 MR. JONES: The red brick house is
11 the complainant's home, to the left.

12 MS. SCHMIDT: And who took that
13 picture?

14 MR. JONES: I took the picture.

15 MS. SCHMIDT: And when did you
16 take that picture?

17 MR. JONES: The same time that I
18 took Exhibit Number 3.

19 MS. SCHMIDT: And did anything
20 change from the time you were there on the
21 26th until the time you took the picture?

22 MR. JONES: Not that I know of,

1 no.

2 MS. SCHMIDT: So after you left
3 the complainant's residence, what did you do
4 next?

5 MR. JONES: At that point in time
6 I advised the complainant that I would speak
7 with management of the establishment in an
8 effort to mitigate the noise that she was
9 experiencing.

10 I then visited the establishment
11 and spoke with the owner Mr. Gibson, and I
12 advised him as to the reason that I was
13 visiting his establishment and I asked him if
14 he could take me up to the rooftop.

15 MS. SCHMIDT: And so did he do so?

16 MR. JONES: Yes, ma'am.

17 MS. SCHMIDT: And what happened
18 when he took you up there?

19 MR. JONES: Once we got up to the
20 rooftop I did see there were maybe seven to
21 eight people who were there. It seemed to be
22 kind of a happy hour crowd. People were

1 dressed in suits and dress attire. I observed
2 there was an individual who was playing music
3 and who was on the microphone as I walked into
4 the rooftop area.

5 MS. SCHMIDT: And what kind of
6 music was being played?

7 MR. JONES: At that time he was
8 playing go-go music.

9 MS. SCHMIDT: May I approach the
10 witness?

11 CHAIRPERSON MILLER: Yes.

12 MS. SCHMIDT: I'm now handing you
13 what's been marked as Exhibit Number 5. Did
14 you take that picture?

15 MR. JONES: Yes, ma'am.

16 MS. SCHMIDT: And when did you
17 take that picture?

18 MR. JONES: On the night of the
19 26th.

20 MS. SCHMIDT: And does it
21 accurately reflect what you saw that night?

22 MR. JONES: Yes, ma'am.

1 MS. SCHMIDT: And what is that a
2 picture of?

3 MR. JONES: That's a picture of
4 the DJ equipment that the individual was
5 using.

6 MS. SCHMIDT: And just to be
7 clear, so when he was playing music was he
8 actively engaged at all with the music at all?

9 MR. JONES: Could you clarify that
10 statement?

11 MS. SCHMIDT: Was he introducing
12 music?

13 MR. JONES: Yes, he was behind the
14 rack that I took the picture of and you could
15 clearly see that he was manipulating the
16 computerized system that he was using to play
17 the music.

18 MS. SCHMIDT: And did he say
19 anything about the music?

20 MR. JONES: Who are you referring
21 to?

22 MS. SCHMIDT: I'm sorry, the DJ.

1 MR. JONES: What do you mean, did
2 he say anything about the music?

3 MS. SCHMIDT: In between songs did
4 he --

5 MR. JONES: In between songs he
6 would get on the microphone and say, you know,
7 things to the crowd. Again, this happened in
8 2012. I can't tell you exactly what was being
9 said, but he was using the microphone.

10 MS. SCHMIDT: Would you
11 characterize him as acting like a DJ?

12 MR. JONES: Yes.

13 MS. SCHMIDT: Based on that?

14 MR. JONES: Yes.

15 MS. SCHMIDT: I'm now going to
16 hand you what's been marked as Exhibit Number
17 6. Can you tell the Board what that is?

18 MR. JONES: This is Twelve's, at
19 that time it was called a volunteer agreement
20 which is now a settlement agreement.

21 MS. SCHMIDT: And what's the date
22 of that?

1 MR. JONES: September 26, 2007.

2 MS. SCHMIDT: And can you read for
3 the record this Section 1.3B --

4 MR. LAFANDE: Objection as to the
5 foundation of the witness's knowledge of what
6 this document is.

7 MS. SCHMIDT: In the course --
8 Investigator Jones, when you do an
9 investigation do you ever deal with voluntary
10 agreements?

11 MR. JONES: Yes, ma'am.

12 MS. SCHMIDT: And what part of the
13 investigation, how does voluntary agreements
14 enter into investigations in general?

15 MR. JONES: Settlement agreements
16 come into place with establishments.
17 Basically settlement agreements are agreements
18 between the establishment owner and the ANC
19 committee for that area.

20 They normally have provisions in
21 the settlement agreement to indicate what the
22 ANC wishes to happen for that area. They

1 could comply with certain stipulations, and if
2 they do then they would allow them to open.

3 MS. SCHMIDT: And how did you
4 obtain a copy of this settlement agreement?

5 MR. JONES: We have a copy on our
6 system as well as Mr. Gibson had a copy at his
7 establishment.

8 MS. SCHMIDT: And to the best of
9 your knowledge, is this the settlement
10 agreement that he had at his establishment
11 that night?

12 MR. JONES: Yes, ma'am.

13 MS. SCHMIDT: Drawing your
14 attention to Section 1.3 Sound Management B.
15 Could you please read B1 and 2 for the Board?

16 MR. JONES: "1.3 Sound Management.
17 Twelve agrees to comply with the Title 25 D.C.
18 Code Enactment and related amendments after
19 2001 which stipulates in part, the licensee
20 under an on-premise retailer's license shall
21 not produce any sound, noise or music of such
22 intensity that it may be heard in any premises

1 other than the licensed establishment by the
2 use of any mechanical device, machine,
3 apparatus or instrument for amplification of
4 the human voice or any sound or noise."

5 MS. SCHMIDT: And so Exhibit 5,
6 that turntable, and based on your experience
7 as an investigator would that fall into that
8 category?

9 MR. JONES: Yes, ma'am.

10 MS. SCHMIDT: Thank you. And
11 could you read Number 2 please?

12 MR. JONES: Number 2.

13 MS. SCHMIDT: Okay.

14 MR. JONES: That's the one. I
15 just read that. Yes, ma'am.

16 MS. SCHMIDT: Okay. And so based
17 on your experience as an investigator, was
18 Twelve in violation of this agreement that
19 night?

20 MR. JONES: I would say so. Yes,
21 ma'am.

22 MS. SCHMIDT: And did you speak to

1 the owner at all?

2 MR. JONES: Yes, I did.

3 MS. SCHMIDT: What did he say
4 about this music?

5 MR. JONES: While we were up on
6 the rooftop I asked Mr. Gibson to, well, I
7 advised him that of his settlement agreement,
8 at that time again it was a voluntary
9 agreement, and that per the voluntary
10 agreement that there were provisions
11 indicating that he could not have someone
12 using a microphone.

13 And he immediately complied and
14 had the individual who was manipulating music
15 cut the microphone off. He also had the
16 individual stop playing music at that time.
17 So he did comply.

18 MS. SCHMIDT: And now I have
19 what's marked as Government Exhibit Number 7.
20 Can you tell me what that is?

21 MR. JONES: This would be a Board
22 order modification of Twelve Restaurant &

1 Lounge from the ABC Board. I'm sorry, from --
2 yes, from the ABC Board.

3 MS. SCHMIDT: Thank you. And how
4 did you obtain a copy of that?

5 MR. JONES: This was also within
6 our system, computerized system.

7 MS. SCHMIDT: Exhibit Number 7.

8 (Off microphone comments)

9 MS. SCHMIDT: On Page 2, can you
10 please read Number 2, read the first sentence.

11 MR. JONES: The applicant shall
12 have the MPD reimbursed with detail whenever
13 the establishment provides any entertainment
14 permitted by the establishment's entertainment
15 endorsement.

16 MS. SCHMIDT: And that night did
17 you see any reimbursable detail at the
18 establishment?

19 MR. JONES: No, not at that time,
20 ma'am.

21 MS. SCHMIDT: And did you ask Mr.
22 Gibson about that?

1 MR. JONES: Yes. Mr. Gibson
2 indicated that he has paid for reimbursable
3 detail. And I will say, visiting the
4 establishments prior to that evening he and I
5 have had this conversation before, and I've
6 seen documentation where he has paid the
7 reimbursable detail.

8 On this evening he indicated that
9 he has had issues with paying and them not
10 showing up. So that's what he told me at that
11 time as to why they weren't there.

12 MS. SCHMIDT: But there still was
13 music that night?

14 MR. JONES: Yes, ma'am.

15 MS. SCHMIDT: There was still
16 entertainment that night?

17 MR. JONES: Yes, ma'am.

18 MS. SCHMIDT: And so in your
19 opinion as a Board investigator was that
20 followed? Was the Board's order followed?

21 MR. LAFANDE: Objection as to the
22 fact witness offering a conclusion of law.

1 It's certainly only within the purview of the
2 Board.

3 MS. SCHMIDT: He is offering
4 whether there was a -- I withdraw. No further
5 questions at this time.

6 CHAIRPERSON MILLER: Okay, is
7 there cross?

8 MR. LAFANDE: Yes, thank you.

9 CHAIRPERSON MILLER: Okay.

10 MR. LAFANDE: Good morning, Mr.
11 Jones.

12 MR. JONES: Good morning, sir.

13 MR. LAFANDE: What is the name of
14 the complainant that you met with on Linden
15 Street?

16 MR. JONES: I don't have her name
17 at this time, sir.

18 MR. LAFANDE: Do you have an
19 address of the person at Linden Street?

20 MR. JONES: It was, I don't have
21 the exact address. I want to say it was 1241,
22 sir. I'm not too sure though.

1 MR. LAFANDE: Have you brought for
2 us today any other diagrams or representations
3 of where 1241 Linden Street is?

4 MR. JONES: I'm sorry, sir. I
5 can't hear you.

6 MR. LAFANDE: I'm sorry. Have you
7 brought for us today any other representations
8 in regards to where 1241 Linden Street is?

9 MR. JONES: No, sir.

10 MR. LAFANDE: You testified that
11 when you were in the complainant's house on
12 Linden Street you heard music.

13 MR. JONES: Yes, sir.

14 MR. LAFANDE: You also testified
15 it was coming from Restaurant Twelve. Is that
16 correct?

17 MR. JONES: Yes, sir.

18 MR. LAFANDE: And how did you make
19 that determination?

20 MR. JONES: When I initially
21 pulled up to the residence, I guess let me
22 give you kind of an approximation as far as

1 the spacing between the establishment and the
2 residence.

3 The residence, she almost lives
4 almost on the corner of Linden and 12th
5 Street. She's maybe the second house from the
6 corner. Linden Street makes a T on 12th
7 Street in which Twelve Restaurant Lounge, it
8 kind of runs into the back of Twelve
9 Restaurant Lounge.

10 So when I arrived at the
11 establishment I parked almost in the alleyway
12 of Twelve Restaurant Lounge and I could see
13 her home from across the street. Once I got
14 out of the car I could hear music kind of
15 bouncing off of the homes from the rooftop
16 area.

17 I heard a certain type of song as
18 well as an individual on the microphone. I
19 went into the resident's home and I heard the
20 exact same thing.

21 MR. LAFANDE: And you stated that
22 Linden Street runs parallel to H Street --

1 MR. JONES: To 12th Street.

2 MR. LAFANDE: Runs parallel to
3 12th Street.

4 MR. JONES: Not parallel. It Ts.
5 It runs into 12th Street.

6 MR. LAFANDE: Let me rephrase that
7 then. Is Linden Street parallel to H Street?

8 MR. JONES: Yes, sir.

9 MR. LAFANDE: Are there any
10 streets that are in between Linden and H
11 Street?

12 MR. JONES: No, sir.

13 MR. LAFANDE: Turning your
14 attention to what has previously been marked
15 for identification as 5, the photograph of the
16 DJ equipment, can you identify in this
17 photograph the microphone that you state the
18 DJ was using?

19 MR. JONES: I don't know if I can,
20 sir. No, you can't see it in this picture,
21 sir.

22 MR. LAFANDE: Is it present in

1 this photograph?

2 MR. JONES: I would say probably
3 not. Well, no, I do see it. I see it. I
4 need something to highlight, I can't walk over
5 there.

6 MR. LAFANDE: Okay. May I
7 approach the witness?

8 CHAIRPERSON MILLER: Yes, sure.

9 MR. LAFANDE: I'm sorry?

10 CHAIRPERSON MILLER: Yes, you may.

11 MR. LAFANDE: Thank you.

12 Could you point to us --

13 MR. JONES: There's the microphone
14 right there. Yes, sir.

15 MR. LAFANDE: Thank you. What is
16 the name of the DJ who was playing that night?

17 MR. JONES: I have no idea, sir.

18 MR. LAFANDE: You did speak to
19 him?

20 MR. JONES: I didn't speak to the
21 DJ. I spoke to Mr. Gibson.

22 MR. LAFANDE: Board's indulgence,

1 please.

2 The attorney general asked a
3 question about what kind of music --

4 MS. SCHMIDT: The assistant
5 attorney general. I don't need a promotion
6 today please.

7 MR. LAFANDE: I refer to the
8 office not the person. She does represent the
9 Office of the Attorney General.

10 CHAIRPERSON MILLER: You should
11 refer to her appropriately. You should.

12 MR. LAFANDE: Assistant Attorney
13 General Schmidt asked the question, what kind
14 of music was being played?

15 MR. JONES: Yes, sir.

16 MR. LAFANDE: Was that important
17 to you in any way?

18 MR. JONES: It was important when
19 it's concerning the voluntary agreement at
20 that time.

21 MR. LAFANDE: How so?

22 MR. JONES: The voluntary

1 agreement indicates that soft background music
2 should be played. Again, I'm not a judgment
3 on what should be soft background music, but
4 I know that if I go to a nice restaurant with
5 a suit on I'm don't want to experience hearing
6 go-go music.

7 So I would think that soft
8 background music could be considered jazz,
9 could be considered some sort of slow music
10 like sounding music. But again, I don't make
11 the judgment on what that is. So I think that
12 that's kind of vague to some degree.

13 MR. LAFANDE: Thank you. That was
14 my next question. So in fact, there is no
15 definition of what soft background music is in
16 --

17 MR. JONES: No, sir.

18 MR. LAFANDE: -- in the voluntary
19 agreement.

20 MR. JONES: No, not a definite
21 definition. No, sir.

22 MR. LAFANDE: Is there any

1 specific thing that addresses go-go music in
2 the voluntary agreement?

3 MR. JONES: I don't have it in
4 front of me, sir.

5 MR. LAFANDE: May I approach the
6 witness?

7 CHAIRPERSON MILLER: Yes.

8 MR. LAFANDE: I believe this is
9 what's been marked as Government's Exhibit 6.
10 Again, the question is, is there any
11 prohibition to the types of music, other than
12 the vague statement of soft background music,
13 within the voluntary agreement? I'm asking --

14 (Off microphone comments)

15 MR. JONES: I don't see anything
16 within the settlement agreement that indicates
17 go-go music cannot be played.

18 MR. LAFANDE: Thank you. Turning
19 your attention to the last page of document,
20 whose signature is here on the document?

21 MR. JONES: There are none.

22 MR. LAFANDE: Do you in fact have

1 a signed copy of this agreement?

2 MR. JONES: I don't have any
3 exhibits with me, sir.

4 MR. LAFANDE: You stated that you
5 spoke to the establishment regarding the
6 absence of a reimbursable detail. Did you
7 have an opportunity to speak to anyone in the
8 police department regarding the reimbursable
9 detail?

10 MR. JONES: No, sir.

11 MR. LAFANDE: Are you aware of any
12 occasions where members of the reimbursable
13 detail may be called away to address other
14 issues in the area?

15 MR. JONES: Yes, sir.

16 MR. LAFANDE: Have you witnessed
17 this occurring in the past?

18 MR. JONES: Yes, sir.

19 MR. LAFANDE: Do you have any
20 information that would indicate that the
21 reimbursable detail that the establishment
22 paid for that evening had not been called away

1 for some other emergency?

2 MR. JONES: I don't have any
3 documentation on that, sir.

4 MR. LAFANDE: So you don't know
5 where the reimbursable detail --

6 MR. JONES: Don't know.

7 MR. LAFANDE: Do you have anywhere
8 that you do a report regarding this incident,
9 a time in which it occurred?

10 MR. JONES: No, sir.

11 MR. LAFANDE: Do you have any
12 notes regarding what time this may have
13 occurred?

14 MR. JONES: I don't, no, sir.

15 MR. LAFANDE: So there is in fact
16 no document that indicates this time that it
17 occurred on that day?

18 MR. JONES: The only documentation
19 would be the call that came into our ABRA
20 Hotline, and we're not privy to that
21 information.

22 MR. LAFANDE: You don't have it.

1 MR. JONES: I don't, no. We don't
2 keep that documentation.

3 MR. LAFANDE: But you never saw
4 it.

5 MR. JONES: No, I didn't.

6 MR. LAFANDE: I have no further
7 questions.

8 CHAIRPERSON MILLER: Thank you.

9 MS. SCHMIDT: I have two quick
10 questions on redirect.

11 CHAIRPERSON MILLER: All right.

12 MS. SCHMIDT: Now in the
13 cooperative agreement, would you please read
14 on Sound Management 1.3C?

15 MR. JONES: It says "Twelve agrees
16 to no live bands or musical entertainment on
17 the roof deck, but soft background music that
18 would be played for dining subject to the
19 above restrictions."

20 MS. SCHMIDT: That evening, what
21 sort of activities was happening on the roof
22 deck while the music was being played?

1 MR. JONES: As I stated before,
2 there were approximately seven to eight
3 individuals who appeared to be there right
4 after work. They were all dressed in suits
5 and that type of thing. And they were sitting
6 down and they had plates in front of them.

7 MALE PARTICIPANT: Say that again
8 please?

9 MR. JONES: And they had plates in
10 front of them.

11 MS. SCHMIDT: Was there any
12 movement -- so what did the DJ -- no further
13 questions at this time.

14 CHAIRPERSON MILLER: Okay, are
15 there Board questions?

16 Mr. Silverstein?

17 MEMBER SILVERSTEIN: Mr. Jones,
18 can you hear me?

19 MR. JONES: Yes, sir. I can hear
20 you.

21 MEMBER SILVERSTEIN: If the music
22 was being played at a level the disc jockey

1 was playing it in this room at that level,
2 could you hear me if I was speaking at this
3 level?

4 MR. JONES: No.

5 MEMBER SILVERSTEIN: The Oxford
6 Dictionary describes background music, here's
7 the definition. "Music intended as an
8 obtrusive accompaniment to some activity such
9 as dining in a restaurant or to provide
10 atmosphere in a movie."

11 Was the music that in which a
12 group could have a quiet conversation over a
13 table?

14 MR. JONES: No, sir.

15 MEMBER SILVERSTEIN: Was it
16 anywhere near that?

17 MR. JONES: No, sir.

18 MEMBER SILVERSTEIN: Was there
19 dancing going on?

20 MR. JONES: No, sir.

21 MEMBER SILVERSTEIN: But you could
22 not, is there any possibility that anyone

1 using the Oxford Dictionary definition would
2 consider that as background music?

3 MR. JONES: I would say no.

4 MEMBER SILVERSTEIN: Close call?

5 MR. JONES: I would say no.

6 MEMBER SILVERSTEIN: No further
7 questions.

8 CHAIRPERSON MILLER: Okay, Mr.
9 Brooks?

10 MEMBER BROOKS: Yes, thank you,
11 Madam Chair. Investigating the gentleman's,
12 did you speak with the owner that night?

13 MR. JONES: Yes, sir.

14 MEMBER BROOKS: And what did you
15 say to him?

16 MR. JONES: Again, when I went
17 into the establishment I identified myself.
18 I advised him as to why I was there. I asked
19 him to take me to the rooftop because of the
20 complaint of noise being heard into a
21 residence around the corner, or across the
22 street I should say.

1 Once we got up to the rooftop deck
2 I heard an individual who was again behind
3 this computerized rack that I showed an
4 exhibit of, on the microphone. I immediately
5 told Mr. Gibson to have him get off the
6 microphone.

7 You know, and I told him that
8 because of me previously reading his
9 settlement agreement before I got there. And
10 as soon as I told him that he complied. He
11 told the guy to get off the microphone and he
12 had them cut the music off, and then we talked
13 while we were upstairs.

14 Then we went down to -- I asked
15 him at that point in time, did he have a copy
16 of his settlement agreement, or his voluntary
17 agreement at that time, and he said yes, he
18 did. And we went down to his office and we
19 talked more and we went over the voluntary
20 agreement in his office.

21 MEMBER BROOKS: Okay. Do you
22 think he was surprised to see you there?

1 MR. JONES: No.

2 MEMBER BROOKS: Did he act
3 startled or --

4 MR. JONES: No.

5 MEMBER BROOKS: Or did he know
6 exactly what you wanted when you showed up?

7 MR. JONES: No, I don't think so.

8 MEMBER BROOKS: Okay. Did he
9 realize after you left or while you were
10 leaving that there might be a possibility of
11 a fine from ABRA or ABC?

12 MR. JONES: Yes, sir.

13 MEMBER BROOKS: Known violations.

14 MR. JONES: Yes, sir.

15 MEMBER BROOKS: And did he say
16 anything about that?

17 MR. JONES: He was concerned about
18 it and I understood why. But like I said
19 before, you know, whatever I asked him to do
20 that evening he did. And I took the time to
21 go over the voluntary agreement with him in
22 his office. There was things that he refuted

1 and I understood what he was trying to say at
2 that time.

3 One issue was the reimbursable
4 detail, and like I said before, I have seen
5 documentation from Mr. Gibson before where
6 he's paid the reimbursable detail and they
7 weren't there.

8 The other issue was the soft
9 background music piece where we kind of went
10 back and forth where, you know, it was kind of
11 like, who's to say what soft background music
12 is.

13 But I think all in all, I think he
14 understood, you know, what was happening at
15 that point in time. He understood what I was
16 saying. I understood what he was saying. And
17 as I left, you know, he understood that there
18 was going to be some sort of notice from the
19 ABRA Board.

20 MEMBER BROOKS: Okay. And you
21 mentioned that he indicated that sometimes the
22 RDO, the reimbursable detail would not show

1 up?

2 MR. JONES: Yes, sir.

3 MEMBER BROOKS: Any idea, did he
4 tell you why that occurred occasionally?

5 MR. JONES: I know that there have
6 been instances where, and I have been privy to
7 observe it, that he's had detail and they had
8 to be called away to somewhere else, further
9 down H Street or across the street or down the
10 street, whatever the case may be.

11 But the other piece to that is, I
12 don't think that at that point in time there
13 was really no explanation as to why they
14 wouldn't show up. It was just he knows that
15 he would pay and they just didn't show up.

16 MEMBER BROOKS: Have you heard of
17 any occasion where he might have RDO,
18 reimbursable detail, and then changed his mind
19 at the last minute?

20 MR. JONES: I'm not aware of that,
21 sir.

22 MEMBER BROOKS: Okay. And if they

1 don't show up and he's paid for them, do you
2 think he's entitled to a refund or does he get
3 a refund for that?

4 MR. JONES: Again, I don't know
5 anything about that, sir.

6 MEMBER BROOKS: Okay. Thank you,
7 Madam Chair.

8 CHAIRPERSON MILLER: Okay, others?
9 I have a few, okay. So to follow up on Mr.
10 Brooks' question, did Mr. Gibson tell you that
11 night that he ordered reimbursable detail and
12 paid for them and they just didn't show up?

13 MR. JONES: I believe so. This
14 was a year and a half ago, but I do believe
15 so. Because we had the conversation and he
16 did bring that point up.

17 CHAIRPERSON MILLER: And did you
18 ask for any proof of payment or anything like
19 that?

20 MR. JONES: Yes, I did. And he
21 did show where he did pay for that.

22 CHAIRPERSON MILLER: Okay. And

1 I'm sure, well, we'll probably hear from him.
2 But he didn't say that that night they were
3 called off for another reason?

4 MR. JONES: No, ma'am.

5 CHAIRPERSON MILLER: Okay. The
6 rooftop garden, I'm just kind of interested in
7 this setting. How high is it? How many
8 stories up, or especially compared to the
9 residences below?

10 MR. JONES: Yes, it would be, I
11 guess it would be the third or fourth level.
12 I guess it would be the third level I'm
13 assuming. There's a one level and then
14 there's a second level and then you go up to
15 the rooftop.

16 CHAIRPERSON MILLER: It's higher
17 than, I assume, the residences?

18 MR. JONES: Yes.

19 CHAIRPERSON MILLER: By what?

20 MR. JONES: It's a pretty tall
21 building.

22 CHAIRPERSON MILLER: Oh, okay.

1 MR. JONES: Actually, when you
2 climb the stairs inside of the establishment
3 it seems like you're going up to at least four
4 floors.

5 CHAIRPERSON MILLER: Okay. And
6 the residence that you went into, how many
7 stories was that?

8 MR. JONES: She has a two-level
9 row house.

10 CHAIRPERSON MILLER: Okay. And
11 does the rooftop have anything that buffers
12 the noise on it, like plants?

13 MR. JONES: Yes. Mr. Gibson did
14 put the, I guess, planters that are on the
15 edge of the building as well as on the front
16 side on H Street. We talked about putting in
17 more shrubs in order to hopefully mitigate
18 some more of the noise. But he did make an
19 effort to put planters up.

20 CHAIRPERSON MILLER: Was this the
21 first noise complaint that you responded to
22 with respect to this rooftop?

1 MR. JONES: With respect to the
2 rooftop, yes, ma'am.

3 CHAIRPERSON MILLER: Was this the
4 only one? The only complaint that you've
5 responded to?

6 MR. JONES: No, it's not the only
7 one. I've gone before with reference to
8 noise, but when I spoke with Mr. Gibson there
9 was, most of the time there was music that was
10 coming from another establishment that was
11 bouncing off the residence building across the
12 street, or some of the complainants had issues
13 with certain verbiage in the voluntary
14 agreement with reference to provisions that
15 he's supposed to do.

16 So I would visit to make sure that
17 that's what he did. Soundproofing, those
18 types of things, the planters. So those
19 things were found that he did do. So in those
20 instances I didn't find any violations.

21 CHAIRPERSON MILLER: Okay. So
22 just one more question to kind of understand

1 if you have an understanding of how this noise
2 travels. When you say it bounces off the
3 residences --

4 MR. JONES: Yes, ma'am.

5 CHAIRPERSON MILLER: -- can you
6 explain that any more?

7 MR. JONES: Because the building
8 is taller than a lot of the buildings in the
9 surrounding area, the music would come off of
10 the rooftop and kind of drift down and hit the
11 walls and bounce back and forth, reverberate
12 back and forth off of the walls.

13 Sometimes there have been times
14 when I've gone and there's been a complaint on
15 his establishment and it's actually been a
16 place across the street, or a block down. So
17 those are the types of things that he has to
18 encounter when using the rooftop.

19 CHAIRPERSON MILLER: Okay, thank
20 you. So you know in this case, I believe you
21 testified you knew the music was coming from
22 his establishment because you heard the same

1 music in his establishment before you went
2 into the residence.

3 MR. JONES: Well, I heard the same
4 music prior to me going in, and then as well
5 as the individual who was utilizing the
6 microphone. And then once we got up to the
7 roof, I asked him to take me up to the
8 rooftop, there was an individual on the
9 microphone and he was playing the same type of
10 music.

11 CHAIRPERSON MILLER: You didn't
12 take a picture of the DJ playing the music?

13 MR. JONES: I didn't take a
14 picture of the DJ playing because as soon as
15 we got into the rooftop area I observed it and
16 I asked Mr. Gibson to immediately take him off
17 the microphone. Once I did that the guy hung
18 the mic up and walked off.

19 CHAIRPERSON MILLER: Okay. Can
20 you look at the voluntary agreement, I
21 believe? Do you have that?

22 MS. SCHMIDT: I can give it to

1 him.

2 CHAIRPERSON MILLER: Okay, so it's
3 Exhibit 6, and I think you addressed this
4 before but I'm just not clear. So it's in
5 Sound Management, 1.3 Sound Management.

6 MR. JONES: Yes, ma'am.

7 CHAIRPERSON MILLER: Where does
8 the DJ's music fall in those provisions? I'm
9 not sure. I think you might have said 1.3B(2)
10 that the playing equipment fell within
11 mechanical device, but --

12 MR. JONES: That would be 1.3
13 Sound Management Item B, Number 2.

14 CHAIRPERSON MILLER: 2, so where
15 in there?

16 MR. JONES: Mechanical device,
17 machine, apparatus or instrument for
18 amplification of the human voice or any sound
19 or noise.

20 CHAIRPERSON MILLER: Okay, but
21 could you say how it falls in it, the DJ
22 playing?

1 MR. JONES: Oh, because the DJ was
2 utilizing a machine that amplified the
3 microphone that he was using.

4 CHAIRPERSON MILLER: So the
5 machine that you're talking about, is that
6 where he plays all the different CDs or
7 whatever he does?

8 MR. JONES: Yes, ma'am.

9 CHAIRPERSON MILLER: Is that the
10 machine you mean?

11 MR. JONES: Yes, ma'am.

12 CHAIRPERSON MILLER: Okay. And
13 then the amplification, is that the microphone
14 or --

15 MR. JONES: The amplification is
16 the microphone as well as the speakers that
17 were being used, the device that was being
18 used to play the music as well as the
19 microphone that was hooked up to it. All of
20 that is part of the instrumentation for my
21 amplification.

22 CHAIRPERSON MILLER: Okay, good.

1 Yes, I wasn't clear about the speakers. So
2 that's the amplification part of the machine.

3 MR. JONES: Yes, ma'am.

4 CHAIRPERSON MILLER: Okay. I know
5 that you were asked what time you made this
6 investigation and you didn't really know
7 exactly, it was a year and a half ago. But do
8 you remember whether it was late in the
9 evening or earlier?

10 MR. JONES: No, I'm sorry. The
11 question was asked, did I put a time in the
12 report, and I said no.

13 CHAIRPERSON MILLER: Oh, okay.
14 Well, can you state about what time this
15 investigation took place?

16 MR. JONES: I got to the
17 establishment at 9:45.

18 CHAIRPERSON MILLER: Oh, okay.

19 MR. JONES: Yes.

20 CHAIRPERSON MILLER: All right,
21 thank you. Any other Board questions? Any
22 questions on Board questions?

1 MS. SCHMIDT: None from the
2 government.

3 CHAIRPERSON MILLER: Okay. We're
4 not hearing any -- all right. Am I?

5 MR. LAFANDE: No.

6 CHAIRPERSON MILLER: No, okay.
7 Thank you very much, Mr. Jones.

8 MR. JONES: Thank you, ma'am.
9 Thank you both.

10 CHAIRPERSON MILLER: All right,
11 now Ms. Schmidt that's your only witness. Is
12 that correct?

13 MS. SCHMIDT: Yes. The government
14 wishes to move into evidence Government's
15 Exhibits Number 3, 4, 6 and 7, and 5. I'm
16 sorry, 3, 4, 5, 6 and 7.

17 CHAIRPERSON MILLER: 3, 4, 5, 6
18 and 7.

19 MS. SCHMIDT: Yes.

20 CHAIRPERSON MILLER: It's all
21 right. Is there an objection?

22 MR. LAFANDE: Objections as to 3

1 and 4. Fails to establish as to relevance,
2 fails to establish any relationship as
3 spatially with the establishment. Pretty
4 pictures of row houses, and here we're in the
5 District of Columbia, I don't see any
6 relevance there.

7 No objection to Number 5, and I do
8 object to Number 6 as being unsigned and
9 otherwise that it's not an agreement, it
10 appears to be a draft of an agreement, and
11 it's certainly not before the Board. If the
12 government wished to enforce an agreement,
13 seems they would have an extra copy of this --

14 (Off microphone comments)

15 MR. LAFANDE: No objection as to
16 7. That appears to be an order of the Board
17 to which this Board may take administrative
18 notice. I'm not sure it needs to be an
19 exhibit at all. No objection on it though.

20 (Off the record discussion)

21 CHAIRPERSON MILLER: All right,
22 Number 3 you're objecting to based on

1 relevance?

2 MR. LAFANDE: Relevance. Yes.

3 CHAIRPERSON MILLER: Okay, I heard
4 your argument. And Ms. Schmidt, do you want
5 to say anything about the relevance of Number
6 3?

7 MS. SCHMIDT: Well, Investigator
8 Jones testified as to location and proximity
9 of these establishments to the licensee,
10 therefore it is relevant and these are just
11 pictures to help. And the Board can give
12 whatever weight it wants to these pictures.
13 They're just illustrations of the location of
14 where he testified to.

15 CHAIRPERSON MILLER: Okay, I'm
16 going to overrule the objection and admit
17 Exhibit Number 3. Okay. What's the next one,
18 6? Or was there another --

19 MR. LAFANDE: I did not object to
20 5. I think you overruled both 3 and 4, so
21 that would bring us to 6.

22 CHAIRPERSON MILLER: And 4 is the

1 actual picture of the residence where the
2 noise was heard. Okay. So I think that's
3 very relevant. Okay, and you didn't object to
4 5 and then there's 6, the cooperative
5 agreement you object to on the basis that it's
6 not signed, correct?

7 MR. LAFANDE: It's not -- yes.

8 CHAIRPERSON MILLER: Ms. Schmidt,
9 do you want to address that?

10 MS. SCHMIDT: This is the
11 agreement that is in the official records of
12 ABRA, and also this is what was referenced in
13 the Board order which is the subject of
14 Exhibit Number 7 which is, this is a copy of
15 the agreement that they represent therefore it
16 is the one that is in effect at this
17 establishment.

18 And there's also, at the back of
19 the agreement there appears to be, it was
20 listed on March 19th, 2007, the preamble to
21 this agreement. And I think it appears to be
22 an agreement to enter into the agreement. So

1 there's an attempt to enter into that
2 agreement.

3 (Off microphone comments)

4 MS. SCHMIDT: And also if the
5 Board wishes the government to call Mr. Gibson
6 because he would be, since he's a party to the
7 agreement he could testify as to whether or
8 not there is an actual voluntary agreement.

9 CHAIRPERSON MILLER: All right,
10 this is what we're going to do. We have the
11 official signed agreement on file, and since
12 there may be a question as to whether this is
13 a final agreement we're going to look to this
14 agreement which is, everybody has public
15 notice that this is on file, this is the
16 record, this is the agreement.

17 So the order for this agreement is
18 Order Number 2007-140. So we know that this
19 is the official agreement so the Board will
20 look to this agreement. So we don't need that
21 as an exhibit, since there's some questions
22 raised about whether that's the official

1 agreement that's been attached.

2 MR. LAFANDE: If that's the case
3 then I'm going to ask that the Board strike
4 any testimony by the investigator that
5 represents the agreement which is not the
6 agreement.

7 CHAIRPERSON MILLER: We don't know
8 it's not the agreement. I'm saying, unless
9 you can prove that the official agreement, the
10 first one that I would not strike. And also
11 we don't know that the investigator didn't use
12 the agreement on file. So they should be the
13 same, but if there's any question we're going
14 to look to the official.

15 Okay, anything else?

16 MR. LAFANDE: We need a ruling.

17 CHAIRPERSON MILLER: On what?

18 MR. LAFANDE: Whether to strike
19 his testimony.

20 CHAIRPERSON MILLER: Okay, I deny
21 your motion to strike. Okay.

22 MS. SCHMIDT: Nothing further from

1 the government.

2 CHAIRPERSON MILLER: Anything
3 else? Okay, so the exhibits that have been
4 admitted are 3, 4, 5 and 7, and the Board will
5 be giving administrative notice on the
6 official order on voluntary agreement that's
7 set forth in Order Number 2007-140. Okay.

8 Mr. LaFande, do you have a case to
9 present?

10 MR. LAFANDE: It's the
11 government's burden to give argument first, so
12 defer to.

13 CHAIRPERSON MILLER: But you're
14 not first. You're not putting on any
15 testimony or evidence?

16 MR. LAFANDE: Oh, I already said
17 that. I thought we were done.

18 CHAIRPERSON MILLER: Just wanted
19 to make sure. Okay, closing.

20 MS. SCHMIDT: Closing, yes. It
21 was quite clear from the testimony today that
22 the licensee is in violation of the voluntary

1 agreement that he was a signatory to, in that
2 the music that was played on the rooftop of
3 his establishment was heard outside of the
4 premises of the establishment.

5 The testimony is quite clear as to
6 the fact that Investigator Jones went to the
7 establishment to establish what kind of music
8 was being played and he also heard a DJ speak.
9 And then when he went to the complainant's
10 house at 12th and Linden then he heard the
11 same type of music and he heard the same
12 voice.

13 And it isn't relevant as to what
14 type of music is played. It could have been
15 opera or Disney music. If it's music that's
16 loud enough to be heard in another residence
17 that's contrary to the settlement agreement
18 which specifically states that the licensee
19 shall not produce any sound, noise or music of
20 such intensity that it made be heard in any
21 premises other than the licensed
22 establishment. So that charge has been

1 proved.

2 And with regard to the second
3 charge about not having a reimbursable detail,
4 well, it's regrettable that there are flaws in
5 the system. Once Mr. Gibson realized that
6 there was no reimbursable detail available
7 that evening, even though it's no fault of his
8 own he is under obligation. The Board has set
9 forth an order and he must comply with that
10 order, and therefore he should not have had
11 that music that evening.

12 Therefore the government requests
13 that this Board find that Mr. Gibson is in
14 violation of 25-446 and D.C. Municipal Code
15 Section 25-823(6). Thank you.

16 CHAIRPERSON MILLER: Okay.

17 MR. LAFANDE: Thank you. The
18 government has alleged a violation of the
19 voluntary agreement by a violation of District
20 of Columbia code 25-725. The government has
21 failed to demonstrate at least half of the
22 elements required for a violation under 25-

1 725.

2 Even accepting, as was pointed
3 out, the mechanical device, machine, apparatus
4 or, for the amplification of the human voice
5 or any sound of noise, accepting that that
6 happened and accepting that such sound was
7 heard within the complainant's premises, we
8 still have failed to demonstrate other
9 necessary critical elements to this offense.

10 The investigator was unable to
11 produce a map showing the relationship to the
12 complainant's premises to the establishment.
13 He was unable to identify this person by name.
14 He was uncertain as to the address.

15 What he did state was that this
16 person lived on the street immediately
17 parallel to a H Street where the establishment
18 is. District of Columbia 25-725 requires that
19 for there to be a violation, the complainant's
20 establishment or premises may not be within a
21 C1, C2, C3, C4, CM, or N zoning. We have
22 heard no testimony whatsoever as to the zoning

1 of the complainant's premises therefore
2 omitting a critical element required to
3 establish a violation.

4 Further, 25-725 also requires that
5 that complainant's premises not abut the
6 establishment, and this is 725B(2). What we
7 did hear is that those streets are directly
8 parallel to each other.

9 There are no other streets, and we
10 have failed to establish where on that street
11 the complainant's premises are. Therefore we
12 have failed to demonstrate that these
13 buildings are not abutting or within the
14 zoning which exempts the establishment from
15 such limitations.

16 Speaking as to the potential for
17 the violation of 1.3C, as Mr. Silverstein
18 amply demonstrates and the witness concedes,
19 this language regarding background music to be
20 played for dining is so vague as to Mr.
21 Silverstein having to employed a dictionary
22 definition.

1 However, District of Columbia
2 Noise Control Act of 1977, D.C. Law 2-53, sets
3 forth very specific provisions under Title 20
4 Chapter 29 of the District of Columbia
5 Municipal Regulations as to very specific
6 noise measuring test procedures that specify
7 and I quote under 2900-2A, "specifies
8 straightforward procedures that are applicable
9 to the large majority of expected situations"
10 where these sorts of complaints may arise.

11 We have heard no testimony
12 whatsoever as to any definition of soft
13 background music other than what Mr.
14 Silverstein offers in a dictionary. That is
15 not what the law provides.

16 The law provides very specific
17 test procedures and this regime has been in
18 place for going on over 35 years and requires
19 sound meter calibrations, equipment settings,
20 specific locations, specific procedures,
21 specific means for maintaining data and
22 reports. None of that has been provided in

1 this instance.

2 What we did hear was that there
3 was seven to eight persons on the rooftop in
4 business suits with plates in front of them,
5 certainly indicating that there was dining
6 going on. I can't imagine any other reason
7 why we would have plates in front of persons.

8 And regardless of the kind of
9 music, if they wish to listen to go-go for
10 soft background music they may do so. To do
11 anything other than that is to make this
12 regulation content-based and offensive to the
13 First Amendment. Therefore, we have failed to
14 establish that there is any violation of 1.3C.

15 With regard to the reimbursable
16 detail, we have heard unrebutted testimony
17 from the investigator that Mr. Gibson employed
18 the detail, paid for the detail, expected them
19 to be there. The investigator did not at any
20 point inquire as to why they were not there.

21 The District of Columbia
22 Metropolitan Police Department General Order

1 201 specifically provides that the officers on
2 these reimbursable details shall be available
3 to call in the event of an emergency in the
4 proximity.

5 Mr. Gibson and this establishment
6 that responded have absolutely no control
7 whatsoever as to the presence and ongoing
8 diligence of these police officers assigned on
9 these details.

10 We have heard nothing as to the
11 establishment's notice that the officers were
12 not present at the moment the investigator was
13 there or any other reason for him to believe
14 that he was not in complete compliance with
15 this requirement, which we object to for the
16 reasons already stated in the civil claim with
17 regards to the unlawful imposition of these
18 details which I incorporate by reference.

19 For these reasons the government
20 has completely failed to establish any
21 violation whatsoever and this matter must be
22 dismissed. Thank you.

1 CHAIRPERSON MILLER: Thank you.

2 Is there any rebuttal?

3 MS. SCHMIDT: Yes, very quickly.

4 First of all, with respect to the settlement
5 agreement, if that makes sense that with
6 respect to the question of zoning that they
7 would enter into an agreement which would be
8 invalid based on zoning, and we don't need to
9 produce a testimony because if voluntary
10 agreement is on its face they basically said,
11 it was stipulated to the parties they agree to
12 comply.

13 And it could be assumed that they
14 would not be entering, they must be zoned for
15 the same type of zoning that would be
16 applicable to this. And in other words that
17 the voluntary agreement does state that it
18 should not be heard in any of the residences.

19 And also when asked, as with
20 regard to abutting, whether it abutted the
21 establishment, Investigator Jones testified it
22 was on a T Street and it was on a different

1 street, it was a street parallel.

2 It did not -- and there was no
3 testimony that it was not abutting -- I'm
4 sorry. Let me start again. I apologize.
5 Okay, let's start again with this.

6 Okay, it would be logical that if
7 the premises was abutting, Investigator Jones
8 would have said so because he described quite
9 thoroughly exactly where the residence was to
10 the establishment and he did not say abutting.

11 He was very clear saying it was on
12 a T Street and it was parallel. And he would
13 have said abutting because he knew he had to
14 describe where the establishment was located.

15 And again as to music, it doesn't
16 matter what kind of music. Background music
17 is supposed, we don't have to get into the
18 definition of background music. As you heard,
19 both Investigator Jones and the complainant
20 heard the music in a place that was not the
21 rooftop, in a residence, and therefore the
22 government has proven its case.

1 CHAIRPERSON MILLER: Okay. Thank
2 you very much. So the record is closed in
3 this case here, except that I want to ask if
4 you want to file proposed findings of facts
5 and conclusions of law. What?

6 MR. LAFANDE: Yes, thank you.

7 CHAIRPERSON MILLER: Okay, so the
8 record will be open for that alone. Okay, no
9 further evidence, but proposed findings of
10 fact and conclusions of law. And Ms. Schmidt,
11 do you want to waive your right to do so or
12 maintain your right to do so?

13 MS. SCHMIDT: At this point I'll
14 maintain my right to do so.

15 CHAIRPERSON MILLER: Okay. So it
16 takes a few weeks for the transcript.

17 MR. LAFANDE: Of course.

18 CHAIRPERSON MILLER: Okay.

19 MR. LAFANDE: Thirty days after
20 that, I believe.

21 CHAIRPERSON MILLER: Yes, 30 days
22 from when you get the transcript, but my

1 understanding is it's sent to you. But if
2 you'd --

3 MR. LAFANDE: We usually go to
4 email with that. That's not a --

5 CHAIRPERSON MILLER: You haven't
6 had a problem with that.

7 MR. LAFANDE: -- subject to the
8 limitations. It's actually more useful to
9 have it electronically sent.

10 MS. SCHMIDT: The only thing is
11 I'm going to ask it be done after March 9th.
12 I'll be out of town for two weeks during that
13 -- if it comes in the next two weeks I will be
14 out of town when it's due.

15 MR. LAFANDE: And I'll be out of
16 town the 15th through the 21st of March. So
17 at the earliest could we have it at the end of
18 March?

19 CHAIRPERSON MILLER: We're in mid-
20 January so you should get it early February,
21 February 1.

22 MR. LAFANDE: Yes, we're just

1 concerned that it's going to fall --

2 CHAIRPERSON MILLER: I know. I
3 just want to know what --

4 (Crosstalk)

5 CHAIRPERSON MILLER: So you're
6 asking for another 30 days.

7 MS. SCHMIDT: Yes.

8 MR. LAFANDE: Depending on when
9 your transcript arrives. Just not before
10 March 30th.

11 CHAIRPERSON MILLER: Since we are
12 planning, so if we give you this extension
13 which I think the Board will do, I want to get
14 on the record now, since you know you're going
15 to have the transcript unless something
16 strange happens in which case you need to call
17 the office, because they're very reliable in
18 our Records Division, let's set a date for
19 when you both will be filing and serving each
20 other.

21 MR. LAFANDE: I thought we said --

22 MS. SCHMIDT: That's fine.

1 MR. LAFANDE: March 30th if fine.

2 CHAIRPERSON MILLER: Okay, do you
3 know what day of the week that is?

4 MR. LAFANDE: I'm sorry, I didn't
5 even look. Board's indulgence. That falls on
6 a Sunday of course, so how about the 31st?

7 CHAIRPERSON MILLER: Okay. Any
8 objections by Board members?

9 MALE PARTICIPANT: None.

10 CHAIRPERSON MILLER: All right, so
11 March 31st will be the due date for filing
12 proposed findings of facts and conclusions of
13 law.

14 Okay, so that completes this
15 hearing. And we will be issuing an order
16 within 90 days after receipt of your proposed
17 findings of facts and conclusions of laws.
18 And I am just going to now take a roll call
19 vote on considering this, adjudicating this
20 case in closed session.

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

1 Columbia, in accordance with D.C. Official
2 Code Section 2-574(b) of the Open Meetings
3 Act, I move that the ABC Board hold a closed
4 meeting upon receipt of the proposed findings
5 of facts and conclusions of law in order to
6 seek legal advice from our counsel on Case
7 Number 12-CMP-00431, pursuant to Section 2-
8 574(b) for the Open Meetings Act and
9 deliberating upon this case for the reasons
10 cited in Section 2-574(b)(13) of the Open
11 Meetings Act.

12 Is there a second?

13 MEMBER BROOKS: Second.

14 CHAIRPERSON MILLER: Mr. Brooks
15 has seconded the motion. I'll now take a roll
16 call vote. Mr. Brooks?

17 MEMBER BROOKS: I agree.

18 CHAIRPERSON MILLER: Mr.
19 Rodriguez?

20 MEMBER RODRIGUEZ: I agree.

21 CHAIRPERSON MILLER: Ms. Miller
22 agrees. Mr. Silverstein?

1 MEMBER SILVERSTEIN: I agree.

2 CHAIRPERSON MILLER: And Mr.

3 Short?

4 MEMBER SHORT: I agree.

5 CHAIRPERSON MILLER: Okay, then
6 the motion passes by a vote of 5-0-0 and the
7 Board will hold that meeting. Okay, so that
8 concludes the hearing. Thank you all very
9 much.

10 MS. SCHMIDT: Will we be coming in
11 at 1:30 or a little later?

12 CHAIRPERSON MILLER: No, wait a
13 second. And we'll issue an order with 90 days
14 after we receive your proposed findings of
15 fact and conclusions of law.

16 Okay, 1:30, I --

17 MEMBER BROOKS: Madam Chair?

18 CHAIRPERSON MILLER: Let's --
19 okay, let me just --

20 (Off microphone comments)

21 CHAIRPERSON MILLER: Okay, you can
22 go. Thank you.

1 (Off microphone comments)

2 CHAIRPERSON MILLER: Is anybody
3 here in the audience for a case that they're
4 a party in?

5 (Off the record discussion)

6 CHAIRPERSON MILLER: We can go to
7 lunch and you can talk to our legal counsel.
8 Okay. All right, then the Board's going to
9 take a recess now.

10 (Whereupon, the foregoing matter
11 went off the record at 12:44 p.m.)

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