

DISTRICT OF COLUMBIA
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 ALCOHOLIC BEVERAGE CONTROL BOARD
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 MEETING

IN THE MATTER OF:

Los Cuates Restaurant, Inc.	
t/a Los Cuates Restaurant	Show Cause
1564 Wisconsin Ave., NW	Hearing
Retailer CR - ANC-2E	(Status)
License No. 79261	
Case #15-CC-00008	

(Sale to Minor Violation (2
 Counts), Failed to Take Steps
 Necessary to Ascertain Legal
 Drinking Age)

September 16, 2015

The Alcoholic Beverage Control Board
 met in the Alcoholic Beverage Control Hearing
 Room, Reeves Building, 2000 14th Street, N.W.,
 Suite 400S, Washington, D.C. 20009, Chairperson
 Ruthanne Miller, presiding.

PRESENT:

RUTHANNE MILLER, Chairperson
 NICK ALBERTI, Member
 DONALD BROOKS, Member
 MIKE SILVERSTEIN, Member
 HECTOR RODRIGUEZ, Member
 JAMES SHORT, Member

ALSO PRESENT:

FERNANDO RIVERO, OAG

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

10:27 a.m.

CHAIRPERSON MILLER: The next case is a Show Cause Hearing (Status) case, Case No. 15-CC-00008, Los Cuates Restaurant located at 1564 Wisconsin Avenue, N.W., License No. 79261.

MR. RIVERO: Good morning, Board Members. Fernando Rivero for the District of Columbia.

CHAIRPERSON MILLER: Good morning.

MEMBER RODRIGUEZ: Good morning.

MR. KLINE: Good morning. Andrew Kline for the licensee.

MR. MERCHAN: Good morning. Luis Merchan, owner of Los Cuates Restaurant.

CHAIRPERSON MILLER: Thank you.

MEMBER SILVERSTEIN: I'm sorry? Please speak into the mike. I didn't hear you.

MR. MERCHAN: Oh, good morning. My name is Luis from Los Cuates Restaurant. Luis Merchan from Los Cuates Restaurant.

CHAIRPERSON MILLER: Okay.

1 MEMBER RODRIGUEZ: All right.

2 MR. KLINE: That's M-E-R-C-H-A-N.

3 MR. MERCHAN: Correct.

4 CHAIRPERSON MILLER: Okay. Do you
5 have any preliminary matters?

6 MR. RIVERO: Yes, Board Members, the
7 parties have an Offer in Compromise which
8 consists of a written warning. This is the
9 statutory warning that is required. This is the
10 licensee's first offense and under the Code a
11 requirement is a written warning, unless the
12 evidence establishes that the violation was
13 egregious and the evidence is not sufficient in
14 this case.

15 Therefore, the Government is offering
16 the statutory written warning.

17 CHAIRPERSON MILLER: Can you be a
18 little bit more specific or refresh our memory as
19 to why this isn't egregious? What's the --

20 MR. RIVERO: Certainly. The --

21 CHAIRPERSON MILLER: Not just what the
22 law says, but, I mean, what were the -- briefly

1 the facts that --

2 MR. RIVERO: Yes.

3 CHAIRPERSON MILLER: -- may have
4 appeared egregious.

5 MR. RIVERO: This is a case of
6 multiple sales to minors.

7 CHAIRPERSON MILLER: Multiple sale,
8 okay.

9 MR. RIVERO: Multiple sales in and of
10 themselves do not establish egregious, because
11 the Board has issued a regulation that
12 establishes what egregious is. There are three
13 prongs under which the Government can approach
14 the evidence. Under D.C. Code 23 DCMR 807, I
15 believe, is the operating regulation. And we
16 don't have evidence here or a pattern, since this
17 is their first time, so that knocks it out of
18 that particular one.

19 We don't have evidence of intentional
20 sales actually here. Even if we had a
21 presumption of a sale, we have to actually show
22 the intent. And we also don't have a request of

1 a licensee for identification and then there
2 would be an identification that then there would
3 be a sale, that would be egregious. We don't
4 have that evidence here.

5 We have persons in possession of
6 alcoholic beverages. You can establish some kind
7 of or you can presume some kind of sale from
8 that, but the actual requirement for egregious is
9 very clear under the first prong, that we have to
10 establish that the licensee requested
11 identification and that was not part of the
12 investigatory report.

13 CHAIRPERSON MILLER: Excuse me. Okay.
14 What do you mean we had to -- where does it say
15 you have to request identification in the
16 egregious definition?

17 MR. RIVERO: Sure. 23 DCMR 807.

18 CHAIRPERSON MILLER: Yes.

19 MR. RIVERO: It says here that "The
20 Board may give warnings excluding, you know,
21 instances where there was an egregious sale," and
22 then it goes on to define what egregious is in

1 one of three categories. One of them being "Sold
2 or served an alcoholic beverage to a minor who
3 was unable to produce a valid identification" --

4 CHAIRPERSON MILLER: Oh, okay.

5 MR. RIVERO: -- "after a request from
6 the licensee to do so."

7 CHAIRPERSON MILLER: Number 1?

8 MR. RIVERO: It is up to the
9 Government to prove all of the elements of that
10 standard that has been listed there.

11 CHAIRPERSON MILLER: Isn't it written
12 as an or? 1, 2 or 3?

13 MR. RIVERO: Correct.

14 CHAIRPERSON MILLER: So you don't have
15 to prove 1, necessarily?

16 MR. RIVERO: Correct.

17 CHAIRPERSON MILLER: Oh, okay. Okay.

18 MR. RIVERO: Correct. We don't have
19 the evidence for the other two though.

20 CHAIRPERSON MILLER: Okay.

21 MR. RIVERO: This would be, of course,
22 a regular case if it were not the first time. I

1 would be moving forward with a regular case if
2 this was not the first time.

3 CHAIRPERSON MILLER: Yes.

4 MR. RIVERO: So we have evidence of a
5 sale.

6 CHAIRPERSON MILLER: Right.

7 MR. RIVERO: But the law says that the
8 first sale, you get a mandatory warning unless it
9 is shown to be egregious.

10 CHAIRPERSON MILLER: Okay. Mr.
11 Silverstein has a question.

12 MEMBER SILVERSTEIN: Yes. It's a
13 question of the law and this would be actually to
14 both sides here. So then it is your reading of
15 the law that if it is a first offense, there
16 could be multiple sales, 10, 20, 50, and a
17 warning would be mandatory because that is what
18 the law reads. Is that -- or am I reading too
19 much into this?

20 MR. RIVERO: Right. I'm not going to
21 -- it's not my goal today to start talking about
22 hypothetical situations, because when I look at

1 the evidence and look at what is actually in
2 front of me and the case that has been referred
3 by the Agency, so I'm not going to speculate on
4 hypotheticals today. Maybe there is a case of 50
5 sales where there is additional evidence that
6 will allow me to conclude egregious on the basis
7 -- again, I understand --

8 MEMBER SILVERSTEIN: Okay.

9 MR. RIVERO: -- the question to be the
10 first time same. If this were a second time
11 sale, we wouldn't be having this conversation.

12 MEMBER SILVERSTEIN: Exactly.

13 CHAIRPERSON MILLER: Right.

14 MR. RIVERO: So --

15 MEMBER SILVERSTEIN: But you are
16 saying there is no specific numeric limit in the
17 law, that if it goes beyond a certain number, it
18 is automatically or could be egregious --

19 MR. RIVERO: Well --

20 MEMBER SILVERSTEIN: -- as long as the
21 prongs themselves are not met?

22 MR. RIVERO: Right. The law doesn't

1 establish, for instance, that multiple sales
2 would be a violation.

3 MEMBER SILVERSTEIN: Very well.

4 MR. KLINE: Although if the multiple
5 sales were evidence of a pattern and there was
6 some other evidence, it might, which I think is
7 Mr. Rivero's hesitancy to talk about
8 hypothetically.

9 MR. RIVERO: Correct.

10 MR. KLINE: But sensing the Board's
11 discomfort on this issue, there is a couple of
12 things I want to add, which I think is helpful.
13 One is what we haven't talked about is yes, there
14 were multiple sales, but there were also multiple
15 instances of fake IDs.

16 Now, under the law, I'm not going to
17 sit here and argue that that excuses this
18 licensee's behavior, but that's the fact and I
19 hope that fact --

20 MEMBER ALBERTI: Right.

21 MR. KLINE: -- might, you know,
22 certainly add something to this discussion.

1 Secondly, Mr. Merchan understands the
2 seriousness of this situation. Unfortunately, he
3 just missed the ID training that just took place,
4 but we have already written the office to find
5 out when the next ID training will occur. We
6 understand there may be another case coming down
7 the pipe.

8 He understands that he needs to
9 address this issue. And the warning in this case
10 under the law is appropriate and we would ask
11 that you accept it, because it is consistent with
12 the law. But we do understand that there is an
13 issue here and Mr. Merchan understands that there
14 is an issue here and he is going to undertake to
15 address it.

16 MR. RIVERO: I have one final thing to
17 add, because this -- I have had a case, I can't
18 remember the name of it now, but I did actually
19 use multiple -- part of the facts included
20 multiple sales and I went forward indicating it
21 was egregious because there was additional
22 evidence that put together with multiple sales

1 was -- enabled me to make the argument that there
2 was a pattern in that particular case.

3 So it has happened in the past, but
4 I'm not -- I cannot sit here and then answer any
5 hypothetical because its assessment of a case
6 rarely turns on one piece of evidence. We have
7 to look at the totality of the circumstances that
8 are presented in an investigative report.

9 MEMBER SILVERSTEIN: Thank you very
10 much.

11 MR. RIVERO: I hope that clarifies
12 the --

13 MEMBER SILVERSTEIN: Thank you, Mr.
14 Rivero.

15 MR. RIVERO: -- the Government's
16 process.

17 MEMBER SILVERSTEIN: That has been
18 very helpful. That is very helpful.

19 CHAIRPERSON MILLER: Others? How many
20 individuals were involved in this case? What was
21 the multiple?

22 MR. RIVERO: Well, that's another

1 question actually. I believe the report
2 indicated up to nine persons, but the evidence --
3 we had some questions about the evidence that was
4 offered with respect to some of those. So I
5 cannot actually clearly state what I felt was the
6 actual number of sales.

7 I could tell you what the report
8 stated and, obviously, you see that the notice
9 does not mirror the number of sales alleged in
10 the investigative report. So there are some
11 concerns with the evidence as presented.

12 MEMBER SHORT: Madam Chair?

13 CHAIRPERSON MILLER: Yes, Mr. Short?

14 MEMBER SHORT: I did hear testimony
15 that or the attorney state that steps are being
16 taken to address this situation. Can I ask what
17 those steps are?

18 MR. KLINE: Yes. The first step that
19 has been taken is they are going to take the next
20 available ID training that is offered here and
21 they also are going to redouble their efforts in
22 making sure that their servers are Alcohol

1 Awareness trained, TIPS or one of the other
2 Alcohol Awareness Training Programs.

3 Mr. Merchan and I have spoken about
4 this issue and he understand that he is going to
5 need to be diligent and vigilant on this issue.
6 He is near the university. It's a fact of life
7 that those that are under 21 like to try to drink
8 even though it is in violation of the law and, of
9 course, one of the issues is they do so with
10 impunity. It's only the licensees that have
11 liability when this happens.

12 They walk in with their fake IDs and
13 intentionally try to break the law, but that's
14 not this Board's concern. That's for other
15 policy makers. He understands that he has got a
16 responsibility to police his establishment and
17 make sure that there are not people under the age
18 of 21 consuming beverages.

19 And he understands that if he does not
20 follow through on that responsibility, his
21 license is going to be in jeopardy.

22 MEMBER SHORT: Okay. Now, thank you

1 for that statement. Does he want to say anything
2 concerning that?

3 MR. KLINE: Mr. Merchan, is there
4 anything you would like to say?

5 MR. MERCHAN: Well, not much. Well,
6 like he say, that we have been working, you know,
7 to our servers and waiters to understand, you
8 know, what is the best and give us knowledge to
9 serve alcohol. And we are prepared for the next
10 training classes to be, you know, in here and do
11 better.

12 MEMBER SHORT: Okay. So you do
13 understand this Board is real concerned about
14 underage drinking?

15 MR. MERCHAN: Yes, sir.

16 MEMBER SHORT: Okay. Thank you.
17 That's all I have, Madam Chair.

18 CHAIRPERSON MILLER: Okay. Mr.
19 Rivero, I just want to follow-up on something you
20 said. Do you say that multiple sales can
21 sometimes equate to a pattern? That if you see
22 multiple sales you see a pattern?

1 MR. RIVERO: I had such a case in the
2 past.

3 CHAIRPERSON MILLER: But not other
4 cases? What's the deciding -- what makes one
5 group where it is -- why is a situation where
6 there are multiple sales not be a pattern, but --
7 I don't mean a pattern in time. I mean a pattern
8 in the restaurant that day versus others not
9 being a pattern?

10 MR. RIVERO: Again --

11 CHAIRPERSON MILLER: Not
12 hypothetically, just kind of like do you have a
13 distinction?

14 MR. RIVERO: -- that's precisely the
15 kind of information that I don't believe I'm in a
16 position to tell you other than, for example, an
17 actual observation of sales and transactions,
18 right?

19 CHAIRPERSON MILLER: Yes.

20 MR. RIVERO: You actually have a
21 witness that can tell us I saw this sale take
22 place. I saw the request for the ID. And I saw

1 them completely disregard -- I saw the seller
2 completely disregard the identification. I mean,
3 we have none of that related information that has
4 existed in prior cases that I have used to
5 bolster my theory that the -- what was happening
6 in that establishment was egregious as the law
7 defines it.

8 So it's any number of things that can
9 take place that when put together with the fact
10 that multiple sales happened, I can credibly move
11 forward with a theory of egregious. So the fact
12 of multiple sales in and of themselves do not
13 necessarily carry the day for me evidentially.

14 CHAIRPERSON MILLER: Okay. And I see
15 that the same point might be made with
16 intentional, that if you saw that there were
17 multiple sales, you know, say 50 or whatever
18 number, that it may look like that's intentional,
19 since there were so many?

20 MR. RIVERO: Correct.

21 CHAIRPERSON MILLER: But not
22 necessarily.

1 MR. RIVERO: And it's all a
2 possibility and again, these are hypotheticals.

3 CHAIRPERSON MILLER: Yes.

4 MR. RIVERO: And I'm not comfortable
5 answering yes or no one way or the other. I can
6 only tell you what my judgment is going to be
7 when I see an investigative report that has been
8 forwarded to our Agency and the case has been
9 assigned to me.

10 CHAIRPERSON MILLER: Okay. Thank you.
11 All right. Any other questions? Okay. So I
12 think there is a motion before us for an Offer in
13 Compromise, correct, for issuing a mandatory
14 warning in this case.

15 Mr. Kline, is your client amenable to
16 that Offer in Compromise?

17 MR. KLINE: Yes.

18 CHAIRPERSON MILLER: Okay. And he
19 knows that he waives his right to a hearing and
20 to an appeal by opting into the Offer in
21 Compromise?

22 MR. KLINE: Yes.

1 CHAIRPERSON MILLER: Okay. Is the
2 Board ready to proceed on this? Okay. Then
3 based on the arguments that were made here today,
4 I would move to grant the Offer in Compromise of
5 a mandatory warning. Do I have a second?

6 MEMBER RODRIGUEZ: Second.

7 CHAIRPERSON MILLER: Mr. Rodriguez has
8 seconded the motion. Any comments?

9 All those in favor then say aye.

10 ALL: Aye.

11 CHAIRPERSON MILLER: All those
12 opposed? All those abstaining? The motion
13 passes then 5-0-0.

14 Okay. Thank you.

15 MR. RIVERO: Thank you.

16 MR. MERCHAN: Thank you.

17 (Whereupon, the Show Cause (Status)
18 Hearing in the above-entitled matter was
19 concluded at 10:41 a.m.)
20
21
22

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