

1 GOVERNMENT OF THE DISTRICT OF COLUMBIA
2 ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
3 ALCOHOLIC BEVERAGE CONTROL BOARD
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6 IN THE MATTER OF: : Case Nos. 15-CMP-00221,
7 Daci Enterprises, LLC : 15-CMP-00222, 15-CMP-00223,
8 t/a Dacha Beer Garden : 15-CMP-00249, 15-CMP-00250,
9 1600 7th Street NW : 15-CMP-00251, 15-CMP-00338,
10 License 92773, Retailer DT : 15-CMP-00339, 15-CMP-00353,
11 ANC-6E : et seq.
12 Substantial Change : Show Cause Hearing

13 - - - - -X

14

15 Wednesday, October 21, 2015

16

17 Whereupon, the above-referenced matter
18 came on for hearing at the Alcoholic Beverage
19 Control Board, Reeves Center, 2000 14th Street,
20 N.W., Suite 400S, Washington, D.C. 20009.

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22

1 CHAIRPERSON:

2 RUTHANNE MILLER, Presiding

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4 BOARD MEMBERS:

5 DONALD BROOKS

6 NICK ALBERTI

7 HECTOR RODRIGUEZ

8 MICHAEL SILVERSTEIN

9 JAMES SHORT

10

11 ALSO PRESENT:

12 AMY SCHMIDT, ESQ.

13 on behalf of the District of Columbia

14 ANDREW J. KLINE, ESQ.

15 on behalf of the Licensee

16 ILYA ALTER

17 DIMITRI CHEKALDIN

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

2 [10:13 a.m.]

3 CHAIRPERSON MILLER: Okay. The next case
4 is Case No. CMP-00221, Dacha Beer Garden located
5 at 1600 7th Street Northwest, License No. 92773,
6 in ANC-6E.

7 [Pause.]

8 CHAIRPERSON MILLER: Could you identify
9 yourselves for the record, please.

10 MS. SCHMIDT: Good morning. Amy Schmidt,
11 Assistant Attorney General, on behalf of the
12 District of Columbia.

13 MR. KLINE: Good morning. Andrew Kline
14 on behalf of the Licensee.

15 MR. ALTER: Good morning, Ilya Alter,
16 Licensee.

17 MR. CHEKALDIN: Good morning. Dimitri
18 Chekaldin, Licensee.

19 CHAIRPERSON MILLER: So, it's been
20 brought to my attention that you may want to
21 address more than this one case.

22 MS. SCHMIDT: Yes. There's nine cases.

1 CHAIRPERSON MILLER: Right.

2 MS. SCHMIDT: But, individually, however,
3 all today.

4 CHAIRPERSON MILLER: Individually, but
5 all today. Okay.

6 MR. KLINE: So if I can clarify, there is
7 a package proposed, OIC, that encompasses all
8 nine cases, two cases scheduled for hearing
9 today. If for whatever reason the Board were not
10 to accept the OIC, then, presumably, we would go
11 forward on those two cases today.

12 So for purposes of resolution, we're
13 asking that they be called today, but if for
14 whatever reason they're not resolved or doesn't
15 accept the OIC, then we would -- we're prepared
16 to go forward on the two that are scheduled for
17 today for hearing.

18 CHAIRPERSON MILLER: Okay. So I think
19 what I'd like to do is call all the cases now
20 because you may be talking about all of them, and
21 you're here for all of them. And then you can
22 let me know if I'm missing any or if any number

1 is not correct.

2 Do you need to talk about something first
3 before starting?

4 MR. KLINE: No.

5 MS. SCHMIDT: No.

6 CHAIRPERSON MILLER: Okay. So the case I
7 just called is 00221, and I have 222, 223, 249,
8 250, 251, 338, 339, 353. Those are the cases
9 that will be tried?

10 MS. SCHMIDT: Yes.

11 CHAIRPERSON MILLER: That is nine, I
12 believe.

13 MS. SCHMIDT: Yes, that's -- those are
14 the cases.

15 Would the Board like to hear -- we can do
16 each case individually, and at the end, I will
17 tell you the collective -- the collective fine
18 and days served. However, I did -- I think we
19 did provide to the Board a copy of the OIC, so
20 they can follow along with it. It will get a
21 little complicated.

22 CHAIRPERSON MILLER: Okay.

1 MS. SCHMIDT: So, for the record, in Case
2 15-CMP-221, for Charge 1, a \$2,000 fine with 2
3 days served and Charge 2, a \$500 fine.

4 In 15-CMP-222, charge 1, a \$2,000 fine, 2
5 days served, and Charge 2, a \$500 fine, and
6 Charge 3 will be dismissed.

7 In 15-CMP-223, Charge 1, \$2,000 and 2
8 days server, and Charge 2 and 3 dismissed.

9 In 15-CMP-249, Charge 1 is \$2,000 fine
10 and 2 days stayed for 1 year, and Charge 2 and 3
11 dismissed.

12 In 15-CMP-250, Charge 1 is \$2,000 and 2
13 days stayed for 1 year, and Charge 2 is \$500, and
14 Charge 3 dismissed.

15 In 15-CMP-251, Charge 1, \$2,000, 2 days
16 stayed for 1 year, Charge 2 and 3 dismissed.

17 In 15-CMP-338, Charge 1, \$2,000, 3 days
18 server, and Charge 2 \$500, Charge 3 dismissed.

19 And then 15-CMP-339, Charge 1, \$2,000, 3
20 days served, Charge 2 \$500, and Charge 3
21 dismissed.

22 And 15-CMP-353, Charge 1 is \$2,000,

1 Charge 2 is \$500, and 2 days stayed for 1 years.

2 This will total \$21,000 in fine, which
3 will be paid in how many days?

4 MR. KLINE: Within 30 days.

5 MS. SCHMIDT: Within 30 days. And a
6 20-day suspension with 12 days served and 8 days
7 stayed for 1 year, and the suspension take place
8 from November 19th to November 30th of this year.

9 MR. SILVERSTEIN: The dates that these
10 will be served again?

11 MS. SCHMIDT: The dates will be served
12 November 19th through November 30th of this year
13 -- 19th, I'm sorry. One-nine.

14 MR. SILVERSTEIN: Thank you.

15 CHAIRPERSON MILLER: Mr. Kline, do you
16 want to make any comments on this?

17 MR. KLINE: No, other than the Licensee
18 agrees with the OIC. If this is accepted by the
19 Board, then the Licensee its right to hearing,
20 waives any right to appeal. We do reserve our
21 right to assert issues with respect to any other
22 cases that might come down the pike or there

1 might be similar issues, but this would be a
2 resolution of nine cases.

3 I think in terms of penalty where we
4 don't have situations that the Board has seen
5 that involve drastic public safety and what have
6 you, this represents a pretty extraordinary
7 sanction. The Licensee is agreeable to it, but I
8 think that it represents a fair resolution and
9 furthers the interest of administrative economy
10 because in the event that we don't have a
11 resolution, we will be trying nine cases.

12 There are issues, there are defenses that
13 the licensee has to some or all of those charges,
14 but the Licensee understands by entering into
15 this OIC, it waives its right to present its
16 defenses, and this will be a final resolution of
17 these nine cases.

18 MS. SCHMIDT: And the Government has one
19 more comments to make.

20 CHAIRPERSON MILLER: Okay.

21 MS. SCHMIDT: If we go forward, it will
22 be dismissing all charges related to the Summer

1 Garden, so I think that should be known. We were
2 going to amend -- rather than amend all the --
3 rather than amend the notices, we were planning
4 on dismissing the Summer Garden charges in all
5 the cases. Even if the OIC is not accepted, they
6 will still be dismissed.

7 MR. KLINE: And for clarity's sake, just
8 so we're all clear as to what we're talking
9 about, those I think are all Charge 3, which
10 relate to the Licensee's alleged failure to
11 obtain a Summer Garden endorsement.

12 MR. SHORT: Madam Chair?

13 CHAIRPERSON MILLER: Yes, Mr. Short.

14 MR. SHORT: Again, what are the days that
15 will be served?

16 MR. KLINE: November 19th through
17 November 30th.

18 CHAIRPERSON MILLER: Any other questions
19 or comments?

20 MR. ALBERTI: Yes.

21 CHAIRPERSON MILLER: Mr. Alberti.

22 MR. ALBERTI: Ms. Schmidt, so this OIC

1 comes to us, is it -- does it come to us with the
2 understanding that each of these nice cases will
3 be treated as individual violations on the
4 establishment's history?

5 MS. SCHMIDT: Yes.

6 MR. ALBERTI: Okay.

7 MR. KLINE: But not successive, not
8 compounding.

9 MR. ALBERTI: What does that mean, Mr.
10 Kline?

11 MR. KLINE: Well, not -- I mean, they
12 don't have nine primary tier violations at this
13 point. They're all being adjudicated at the same
14 time.

15 MR. ALBERTI: The way the Board has
16 interpreted this in the past, every other case is
17 that even though cases are adjudicated on the
18 same day, as long as -- cases that occur on the
19 same day are a different story. The cases that
20 are adjudicated on the same day count
21 subsequently in the history as individual cases.

22 So that if you are found -- if you enter

1 into an OIC for two primaries on a given day and
2 you commit a third primary sometime in the
3 future, you have two prior primaries on your
4 record.

5 And that's the way I am interesting this.
6 I don't know what Ms. Schmidt's -- and your
7 intention was, but can you tell us before I
8 consider this OIC?

9 MR. KLINE: So our position is if there
10 were another primary within the relevant period
11 of time, that that would mandate revocation?

12 MR. ALBERTI: That would mean that it
13 would count as their 10th primary.

14 MR. KLINE: That, we cannot agree to.

15 MS. SCHMIDT: Well, that would be the
16 Government's interpretation because we could have
17 just waited to adjudicate these, every --

18 MR. SILVERSTEIN: I'm sorry, Ms. Schmidt.
19 If you could --

20 MS. SCHMIDT: We could have -- I could
21 come back in the next 5 weeks and adjudicate each
22 one serially, so it would be the same effect.

1 MR. ALBERTI: So you agree with Mr.
2 Kline?

3 MS. SCHMIDT: No, I do not agree with Mr.
4 Kline. I agree that I say that if we adjudicate
5 these and they are one -- let's say there are
6 eight primary violations, the next one will be
7 the ninth primary violation, if it occurs after
8 today.

9 MR. ALBERTI: After today, after the
10 order is out or whatever.

11 MS. SCHMIDT: Yes. The case in the
12 pipeline, they will not be the next primary, no.

13 MR. ALBERTI: No, no, no, no. But if
14 something occurs after this, it will be the 10th
15 primary. You may -- Mr. Kline was a -- Mr. Kline
16 appears to have a different interpretation.

17 So it appears to me that you and he are
18 not on the same page, and so maybe you -- the two
19 of you need to settle that before we consider
20 this OIC because I can't consider this OIC when I
21 have different understandings from the OAG's
22 office and from the attorney for the client.

1 MR. SHORT: Madam Chair, I agree with Mr.
2 Alberti.

3 MR. ALBERTI: So do we want to postpone
4 this for a moment?

5 MR. KLINE: Yes.

6 MR. ALBERTI: All right.

7 CHAIRPERSON MILLER: How long do you want
8 --

9 MR. ALBERTI: I didn't want anyone to go
10 away without understanding.

11 MR. KLINE: We appreciate that.

12 CHAIRPERSON MILLER: So, okay. Okay.

13 MR. KLINE: So does the Board want to
14 pass up for --

15 CHAIRPERSON MILLER: That's what I wanted
16 to ask you. Do you want us to pass and come
17 back, or do you want a longer postponement? Do
18 you want us to pass for now and see if you
19 resolve it?

20 MR. KLINE: Sure.

21 CHAIRPERSON MILLER: Okay.

22 MR. ALBERTI: Well, are we going to hear

1 these cases today if we don't --

2 MS. SCHMIDT: Yes.

3 MR. ALBERTI: Okay. How long do we want
4 to give them?

5 CHAIRPERSON MILLER: Let me look at the
6 calendar and see what else we have.

7 MR. ALBERTI: Okay.

8 CHAIRPERSON MILLER: Okay. We can go --
9 I mean, the Board has work to do. So how much
10 time would you like? We have an eleven o'clock
11 hearing, I believe.

12 MS. SCHMIDT: One of them is ours,
13 anyway.

14 MR. ALBERTI: Are the parties here?

15 MS. SCHMIDT: Yes.

16 MR. ALBERTI: Oh. Are you representing
17 --

18 MR. KLINE: We have a hearing at ten.
19 Between these parties, a hearing at ten and a
20 hearing at eleven.

21 MR. ALBERTI: Right. But we -- Ms.
22 Schmidt, we have a hearing at eleven for another

1 establishment.

2 MS. SCHMIDT: It's not my establishment.

3 MR. ALBERTI: So my suggestion is if the
4 parties are here, maybe we could move forward to
5 that? That's just a suggestion.

6 CHAIRPERSON MILLER: If they're here?

7 MR. ALBERTI: If they're here.

8 MS. SCHMIDT: I don't see anyone else
9 from my office here.

10 MR. ALBERTI: Okay. So that's not going
11 to work.

12 CHAIRPERSON MILLER: Okay. So we can do
13 other work in the meantime.

14 Do you think that you'll be ready to
15 report back to us before eleven or --

16 [No audible response.]

17 CHAIRPERSON MILLER: Okay, all right. So
18 you can just let our attorney know. Then we'll
19 get ready.

20 Okay. So the Board is going to -- well,
21 I'm going to announce that another hearing has
22 been continued, and then we'll recess.

1 [Whereupon, at 10:26 a.m., the
2 above-entitled matter was recessed and reconvened
3 at 1:48 p.m.]

4 CHAIRPERSON MILLER: Okay. We are back
5 on the record in the case of Dacha Beer Garden,
6 and when we left off, the parties had presented
7 an Offer in Compromise but then took a break to
8 reexamine it and re-discuss it, so we're now back
9 on the record.

10 MS. SCHMIDT: And we have a brand-new
11 Offer in Compromise --

12 CHAIRPERSON MILLER: Okay.

13 MS. SCHMIDT: -- since that time.

14 And I can read it into the record or I
15 can just give a copy to the court reporter, but I
16 would like to make -- well, I guess I will read
17 most of it.

18 In this instance, we are going to be --
19 just for purposes of settlement only, we're going
20 to be consolidating the groups of cases, so this
21 way there will only be -- so we end up with three
22 primary tier violations. So, if there's a fourth

1 tier violation within the next 4 years, rather
2 than automatic revocation, they could still be
3 fined up to \$30,000 and 30-day suspension. So
4 there still is that -- there is still that
5 incentive there, which is part of the reasoning.

6 CHAIRPERSON MILLER: Could you repeat
7 that?

8 MS. SCHMIDT: We are going to be grouping
9 this to three different cases.

10 CHAIRPERSON MILLER: Right.

11 MS. SCHMIDT: So for purposes of -- just
12 for this, for this OIC -- okay. For purposes of
13 settlement, these are going to be grouped into
14 three cases, and that way there will only be
15 three primary violations. There will be three
16 primary violations today, and if there is a
17 fourth over the next 4 years, the Board still
18 under the statute still has a prerogative of
19 fining them -- either revoking the license or
20 fining them \$30,000 and a 30-day suspension.

21 So, with that premise, I'm going to --
22 I'm going to start.

1 Also, this will include all cases are
2 presently in the ABRA system, including some
3 reports that the Board does not even have at this
4 point. However, I am told that one of the
5 purposes is that the owners wish a clean slate,
6 so they can start again and --

7 Is that correct, Mr. Kline?

8 MR. KLINE: Yes.

9 MS. SCHMIDT: Okay.

10 So, in case one, there are going to be
11 four -- these four cases will be part of case
12 one. 15-CMP-221, Charge 1 \$2,000, 2 days served;
13 Charge 2, a \$500 fine; and Charge 3 will be
14 dismissed. In 15-CMP-222, Charge 1, substantial
15 change, \$2,000, and 2 days served; Charge 2, \$500
16 fine; and Charge 3 dismissed. In 15-CMP-223,
17 Charge 1, \$2,000, 2 days served; Charge 2
18 dismissed; and Charge 3 dismissed. In
19 15-CMP-249, Charge 1, \$2,000 and 2 days stayed
20 for 1 year; and Charges 2 and 3 dismissed. So
21 that would be the first case, so that's 221, 222,
22 223, and 249.

1 The second case would consist of
2 15-CMP-250, Charge 1, \$2,000, 2 days stayed for 1
3 year; Charge 2, \$500; Charge 3 dismissed.
4 15-CMP-251, Charge 1, \$2,000, 2 days stayed for 1
5 year; and Charges 2 and 3 dismissed. 15-CMP-338,
6 Charge 1, \$2,000, 3 days served; Charge 2, \$500;
7 Charge 3 dismissed. And 15-CMP-339, Charge 1,
8 \$2,000, 3 days served; Charge 2, \$500; and Charge
9 3 dismissed.

10 And now in the third group -- and here is
11 the third group which will include the cases
12 which are still -- which have not even been gone
13 before the Board yet. These will be all the
14 citations that are left.

15 Well, the first two -- the first one has
16 been before the Board. 15-CMP-353, Charge 1,
17 \$2,000; Charge 2, \$500; and 2 days stayed for one
18 year. 15-CMP-439, \$2,000 fine, and 2 days stayed
19 for one year. 15-CMP-503, \$2,000. 15-CMP-576,
20 Charge 1, \$2,000; Charge 2, \$500; 2 days stayed
21 for one year. 15-CMP-521, \$2,000 for Charge 1.
22 15-CMP-577, Charge 1, \$2,000; Charge 2, \$500; 2

1 days stayed for 1 year. And 15-CMP-529, Charge
2 1, \$2,000. 15-CMP-512, Charge 1, \$2,000.
3 15-CMP-410, Charge 1, 2,000. 15-CMP-536,
4 dismissed. That case will be dismissed.
5 15-CMP-667, Charge 1, \$2,000; Charge 2, \$500; 2
6 days stayed for 1 year. And 15-CMP-693, Charge
7 1, \$2,000. And that will be a total fine of
8 \$42,500 payable within 60 days, a 28-day
9 suspension, with 12 days served, the same dates,
10 November 19th -- through the 30th, was that?

11 MR. KLINE: Correct.

12 MS. SCHMIDT: Through the 30th, yes. And
13 16 days stayed for 1 years.

14 And as part of admitting to these
15 charges, as stated, the Licensee under this OIC
16 is guilty of three primary tier violations, and
17 the Licensee must pick up a Summer Garden
18 endorsement from ABRA within 3 business days.

19 CHAIRPERSON MILLER: Okay, thank you.

20 Well, first of all, Mr. Kline, is your
21 client agreeable to this Offer in Compromise?

22 MR. KLINE: Yes. My clients are

1 agreeable to this Offer in Compromise, understand
2 that if it's accepted by the Board, they would
3 waive their right to hearing on all of these
4 charges and waive their right to appeal.

5 I do want the Board to understand -- and
6 I appreciate, Mr. Alberti, you bringing to light
7 earlier the issues and clarifying the issues with
8 respect to the multiple violations. This was an
9 effort to reach a compromise.

10 There are significant legal issues
11 concerning whether there are really this many
12 violations or whether there's one primary
13 violation, which we would probably litigate for
14 the next 2 years, frankly, before this body, and
15 then I would expect, subsequently, before the
16 D.C. Court of Appeals. But this is an effort to
17 resolve all of that to give this Licensee a fresh
18 start. With three primary tier violations, that
19 means there is a bit of a sword hanging over
20 their head because, as the Board knows and as Mr.
21 Alberti pointed out, if there's a fourth primary
22 tier violation within 4 years, then the license

1 is either revoked or it is a \$30,000 fine and a
2 30-day suspension, and if there were two, it
3 would be mandatory revocation.

4 In addition to that, there are 16 stayed
5 days that would be triggered not by a primary
6 tier violation, but by any violation. This
7 establishment has, as the Board knows, been under
8 a great deal of scrutiny, so they will really
9 need to watch their step because in the coming
10 year, they could be quickly serving an additional
11 16 days, and then the subsequent two primaries
12 would be the death knell.

13 So we would hope that the Board would
14 seriously consider this offer and accept it
15 because I believe the alternative is we're going
16 to try nine cases that are currently in the
17 system and before you and are pending, and it
18 sounds like a whole lot more. And, ultimately,
19 if there's findings against this Licensee,
20 they're going to end up in the Court of Appeals.

21 And the issue is what's a substantial
22 change, how many times can we be cited for the

1 same substantial change violation, and I'm not
2 going to argue that now. But the issue is there,
3 and it's a significant legal issue, and we
4 believe what the Licensee has offered is, in my
5 experience, in terms of a fine -- and the Board
6 obviously hears cases every week that I'm not
7 involved in, but in my experience, it's
8 unprecedented and particularly with respect to a
9 situation that did not involve an act of violence
10 or involve directly the public safety.

11 So we would submit to you that this
12 represents a fair compromise and effort on the
13 part of the Licensee and the Government to save
14 all of the parties a lot of time, a lot of
15 headache, a lot of heartache, a lot of lawyers'
16 time, and give this Licenses a fresh start with
17 all of the previous incidents being folded in so
18 that it's clear that if they violate the next
19 year, they're going to have an immediate problem.
20 And if there are two major violations, they
21 really have a problem.

22 Thank you.

1 CHAIRPERSON MILLER: Okay. I have a
2 couple questions, and then I think others may.

3 So we don't have a lot of information
4 about these cases, but it looks to me like the
5 settlement the OIC does is charge you with --
6 charge your client with the highest fine in the
7 range, primaries 1 to 2, and these are all
8 charged as 2, the settlement, correct?

9 MR. KLINE: Correct.

10 CHAIRPERSON MILLER: And the same with
11 the -- is that true of the settlement agreement,
12 that that's the high range, the 500?

13 MR. KLINE: Correct.

14 CHAIRPERSON MILLER: Okay. My other
15 question is this seems like something the Board
16 has never done before, at least I haven't when
17 I've been on the Board, a grouping, separate
18 primaries together, and calling them one primary.

19 SO do you have any comment about that,
20 whether there's any precedent for that or whether
21 what the justification for that would be?

22 MR. KLINE: The justification for it,

1 from our standpoint -- and Ms. Schmidt can
2 certainly address it -- is that in reality, we
3 think it's all the same violation in that -- I
4 mean, I'll use the example. Again, I don't want
5 to argue the merits, I think an example is
6 helpful.

7 If you make a substantial change and you
8 add a room to your premises and you use the room
9 every night, you've only made one change. So we
10 think that there is a real legal argument there
11 in terms of how many times can you cite one
12 Licensee for the same thing, and there are issues
13 there.

14 And the effort here was to come up with a
15 solution that was meaningful, that was painful,
16 and we think \$42,500 is pretty painful, and
17 certainly the 12-day suspension is pretty
18 painful, without putting the Licensee out of
19 business, because given the range of situations
20 that the Board sees, we don't think -- and maybe
21 Board members disagree, which, of course, they're
22 entitled to do -- we don't think that this is a

1 case that mandates revocation, and we don't know
2 of anything that prohibits the Board from
3 treating the offenses in this way, and we are in
4 a situation where we are offering. It is an
5 Offer in Compromise, so we have worked hard to do
6 that, which is compromise and try to be in a
7 compromise. What you try to do is meet all the
8 parties' interest, and we hope that we've done
9 that. And we hope the Board will believe that
10 we've done that will accept this.

11 MS. SCHMIDT: If I may respond to one --

12 CHAIRPERSON MILLER: Mm-hmm.

13 MS. SCHMIDT: The Government, of course,
14 is not agreeing with Mr. Kline's analogy that if
15 you build a room and that you use the same room
16 every night, that's one change. No, because once
17 you're warned, it's a substantial change every
18 single time.

19 But that notwithstanding, the reason --
20 first of all, even if this had gone to trial, the
21 maximum fine has been imposed. So the
22 Government's interest in settling all these cases

1 is to conserve our -- to be quite frank, it's to
2 conserve our resources because I would have --
3 myself or someone from my office would have to be
4 down here for the next 9 weeks trying cases every
5 week, the same cases, when we could be doing
6 other cases. That's probably the rationale for
7 -- that's probably our rationale.

8 Of course, we do not want to see these --
9 these people, as far as the Government is
10 concerned, blatantly violated -- you know,
11 blatantly violated what the investigators told
12 them. They did not change their operation.

13 However, it will be the maximum fine, and
14 there will be teeth. In other words, they do it
15 again, there's 16 days hanging over them plus
16 revocation and/or another substantial fine and
17 suspension. The Government is satisfied that
18 given those considerations, while it's not the
19 best solution, it is a viable solution.

20 MR. KLINE: And I might point out not
21 only would we be down here in the next few weeks
22 trying nine cases, but we'd be down here weeks

1 after that trying 10 more at some point, we
2 suspect, because of the other ones in the
3 pipeline that have been folded into this.

4 So, I mean, the idea is, as we said, to
5 create a situation where the penalties are
6 meaningful and substantial, but otherwise give
7 the Licensee a fresh start, but a limited fresh
8 start because of the three primary tiers to which
9 they would be conceding and which would trigger
10 substantial penalties even further if there are
11 subsequent violations.

12 CHAIRPERSON MILLER: Okay. And this is
13 just for curiosity, but following up on your
14 argument, Mr. Kline, about some of them being one
15 continuous violation, which I know Ms. Schmidt
16 doesn't agree with, but are they grouped that way
17 with respect to subject matter of the substantial
18 change for Case 1, Case 2, and Case 3? I mean, a
19 substantial change -- I don't know what the
20 substantial change is, particularly, when I
21 looked at this.

22 MS. SCHMIDT: The substantial change is

1 violation of their Certificate of Occupancy and
2 -- and the Certificate of Occupancy, in other
3 words, having more -- overcrowding, basically.

4 MR. KLINE: We won't concede that because
5 the Certificate of Occupancy is actually for 61,
6 so we don't concede that.

7 What's been charged is exceeding what is
8 alleged to be the Board-approved number for
9 occupancy, so we don't concede that it involves
10 any violation of the Certificate of Occupancy. I
11 want to be clear about that because I know that
12 Board members are, rightfully so, concerned about
13 public safety, which is a different issue and
14 arises when one violates their Certificate of
15 Occupancy, and that's not what we're talking
16 about here. So I want to be crystal clear on
17 that point.

18 But, yes, the cases involve repeated
19 violations of what the Board, I believe, has
20 deemed the maximum occupancy, and we can agree to
21 disagree on the point that I raised. And I don't
22 expect Ms. Schmidt to agree with me necessarily,

1 but it is an issue.

2 I don't think I'm crazy. Let's put it
3 that way. So I think it is an issue that could
4 be litigated as an argument, and it is an
5 argument that we would make to you. And,
6 ultimately, if you disagree to it, it would be an
7 argument that we would make to the Court of
8 appeals. And I think it has merit. I don't ever
9 promise anybody that anyone is going to prevail
10 in the Court of Appeals, but, you know, those are
11 the considerations that have gone into trying to
12 reach an agreement that would put all of this
13 behind the Licensee and the agency.

14 CHAIRPERSON MILLER: Okay. But my
15 question just really went to substantial change,
16 are there different -- like could Case 2, hours
17 or something.

18 MR. KLINE: No, no. They all relate --
19 they all relate to occupancy.

20 CHAIRPERSON MILLER: Okay.

21 All right. Others?

22 Mr. Alberti?

1 MR. ALBERTI: I have two questions. The
2 first one is to both of you, and both of you
3 address it. You are basically combining cases --
4 you are combining violations of the same statute
5 that occurred on different days and treating them
6 as one case. Is there any precedent that you
7 know of for doing that before this Board?

8 MR. KLINE: Not that I can think of off
9 the top of my head.

10 MR. ALBERTI: Okay. Ms. Schmidt?

11 MS. SCHMIDT: I don't know of any, but I
12 don't see there's any reason why it cannot be
13 done.

14 MR. ALBERTI: Okay. So that goes to my
15 next question, since you stepped in that. Why
16 wouldn't the same rationale have to apply to
17 other Licensees in similar cases?

18 So let me give you an example, a couple
19 examples. The first one has two sale to minors
20 in a month. That's the same action, same
21 violation. Why wouldn't it apply there?

22 Someone has four times that they fail to

1 have an ABC Manager on duty, and we've seen a
2 case where that happened four times in a year,
3 just today, and that was the history. Why
4 wouldn't someone be allowed to or have cause to
5 argue that those shouldn't be all combined into
6 one case?

7 Ms. Schmidt?

8 MS. SCHMIDT: I'm not saying they
9 couldn't do that; however, I'm just looking at
10 the circumstance of this case. This is a very
11 unusual case with so many violations, and just as
12 I said before, this is more of a -- the
13 Government is looking at it as more of, you know,
14 how many resources do we have? What is the best
15 use of our resources, to be quite blunt?

16 If we're going to get the same fine and
17 basically the same days and I have to prepare --
18 I or my coworkers have to prepare for all these
19 cases when there are other cases that could be
20 worked on, sometimes you have to compromise a
21 little bit just to -- I'm looking more as a
22 cost-benefit analysis.

1 MR. ALBERTI: Okay.

2 MS. SCHMIDT: Not a moral one at this
3 point.

4 MR. ALBERTI: I understand that. So put
5 yourself in someone who has to go to the Court of
6 Appeals, and the Court of Appeals, I have three
7 sales to minors, and I want to just wrap them all
8 into one case. And I point to this case.

9 MS. SCHMIDT: Well, first of all --

10 MR. ALBERTI: How would you argue that --
11 how would you argue -- Mr. Kline, this is to Ms.
12 Schmidt. How would you argue it? She is the
13 OAG. She would be prosecuting. How would you
14 argue that this doesn't set a precedent?

15 MS. SCHMIDT: Well, first of all, I
16 believe, as a legal basis, sales to minors -- and
17 Mr. Kline can correct me -- is a separate
18 statutory scheme, and so --

19 MR. ALBERTI: Okay.

20 MS. SCHMIDT: Yeah.

21 MR. ALBERTI: So let's talk about --

22 MS. SCHMIDT: So this is a --

1 MR. ALBERTI: I think it's an analogy,
2 but let's go to no ABC manager on duty or your
3 example.

4 MS. SCHMIDT: Well, no ABC manager is a
5 secondary.

6 MR. ALBERTI: You build a room, and then
7 you start using it repeatedly.

8 MS. SCHMIDT: Again --

9 MR. ALBERTI: Using your analogy, how
10 would you argue to the Court of Appeals that this
11 case does not set a precedent for how to treat
12 that case?

13 MS. SCHMIDT: Because I would -- it's not
14 a matter of precedent. It's a matter of when you
15 do an OIC, it's -- when you do a plea agreement,
16 it's totally different. Even in the criminal --
17 in the criminal context, a lot of times you do
18 things sometimes because -- prosecutors will do
19 this if they don't have the evidence, whatever,
20 and it's not a matter of everyone is equal. It's
21 a matter of sometimes you have to do it with the
22 facts before you, and that's what this is.

1 I'm not saying -- I'm not saying you're
2 not right -- I'm not saying you're wrong, Mr.
3 Alberti, but I'm saying in this case, this is
4 what -- this is the most expedient -- I'm looking
5 for the expediency for my office, and that's what
6 we think of this case.

7 Of course, I will go and try and I will
8 treat every one, as a separate violation, if the
9 Board rejects, but at this point, we'd like to
10 just give -- we'd like to have the option of
11 possibly being expedient.

12 MR. ALBERTI: Okay. And so, again,
13 you're arguing expediency, so you're assuming
14 that every other case would be tried, and there
15 wouldn't be an Offer in Compromise in those
16 individual cases. I mean, is that your
17 assumption here? Because --

18 MS. SCHMIDT: I think --

19 MR. ALBERTI: -- I mean, that goes --

20 MS. SCHMIDT: I can't speak --

21 MR. ALBERTI: -- to the expediency.

22 MS. SCHMIDT: I can't speak to Mr. Kline.

1 However, I --

2 MR. ALBERTI: And I'm not asking Mr.
3 Kline to comment on that.

4 MS. SCHMIDT: I know. I'm saying I can't
5 -- I'm saying based on my conversation with Mr.
6 Kline, he gave the impression that if we -- you
7 know, that it's either one -- it's either
8 compromise them all or we go one by one.

9 MR. ALBERTI: So that's your assumption,
10 okay. Thank you.

11 MR. KLINE: May I respond? Because you
12 said you were asking both of us.

13 MR. ALBERTI: No, I was asking Ms.
14 Schmidt those questions, but if you'd like to add
15 something to it, I'm not going to put -- if the
16 Chair wants to allow it, she can.

17 CHAIRPERSON MILLER: Sure.

18 MR. KLINE: I mean, the only thing I want
19 to add is there's no precedent, precedential
20 value here, because this is an Offer in
21 Compromise. Before it even gets to you, the
22 Government and the Licensee's lawyer have to

1 reach an agreement, and then it's presented to
2 you. So no one can say, "Well, but you did this
3 in this case." No, you didn't do this. What you
4 did is said, "Ms. Schmidt and Mr. Kline presented
5 an Offer in Compromise. Our job was to determine
6 whether it was a reasonable resolution of this
7 particular case," and we would submit that it is.
8 So that's how I'd answer your underlying question
9 in terms of why do we do it here and not in
10 another case, because this is this case, and
11 there are, you know, peculiar facts, as there are
12 in every case, but this is this case.

13 MR. ALBERTI: Thank you. I mean, you and
14 Ms. Schmidt agree on that point.

15 MR. KLINE: Yeah, we do.

16 MS. SCHMIDT: One of the few. One of the
17 few.

18 [Laughter.]

19 MR. KLINE: Thank you.

20 MR. SHORT: I'd just like to ask -- you
21 mentioned public safety, and we know some of the
22 charges were overcrowding, and then there was a

1 dispute about how many legal people could be in
2 this business. Okay.

3 So I heard the number 461. Is that the
4 number that ABRA recognizes? Is that the number
5 that the Licensee recognizes?

6 MR. KLINE: Yes, sir. That's the number
7 that is on the Certificate of Occupancy.

8 MR. SHORT: Issued by?

9 MR. KLINE: Department of Consumer and
10 Regulatory Affairs, which is charged with
11 enforcing fire life safety along with the Fire
12 Department.

13 So, as you know -- I don't need to tell
14 you -- all too well that when the C of O is
15 issued, determinations are made as to what the
16 safe occupancy is. ABRA and this Board certainly
17 has separate jurisdiction over certain aspects of
18 capacity, but I just wanted to clarify.

19 It doesn't relate to whether there is or
20 is not a violation here, but I just wanted to
21 swage any concerns that there is a public safety
22 issue. And ABRA and ABC have other issues, but

1 from a fire life safety issue, I just wanted to
2 make sure that there wasn't any belief that they
3 were in violation of fire life safety
4 requirements, which are different from ABRA.

5 MR. SHORT: Okay. Well, just one more on
6 that subject.

7 MR. KLINE: Sure.

8 MR. SHORT: Have they ever been over 461?

9 CHAIRPERSON MILLER: I don't think we
10 want to get into the merits here, though.

11 MR. SHORT: It's going to have the way I
12 vote, Madam Chair.

13 MR. ALBERTI: The problem is we don't
14 have the reports for these. We don't even know
15 what the allegations are on some of these, and
16 that's -- I think that's where Mr. Short is
17 going.

18 MR. SHORT: Madam Chair, if I could say
19 this, I know we're going to talk about this --

20 CHAIRPERSON MILLER: Okay.

21 MR. SHORT: -- at, what, later?

22 CHAIRPERSON MILLER: Yeah.

1 MR. SHORT: But if I don't have some
2 information to make a right decision -- and I'm
3 not trying anything, I'm just getting to the
4 facts that we do have, the facts we have on nine
5 cases this morning, not the other 10. So I
6 wouldn't have any idea about the other 10 that
7 are folding into this.

8 And I really think that if we're going to
9 make any kind of an agreement with the OIC today,
10 it should be just on those nine cases, if that's
11 going to happen, not on 19 cases, which I find to
12 be egregious.

13 And I just want to go on the record as
14 saying 19 violations is egregious.

15 And I'll also say to Mr. Kline, if I ran
16 a stop sign 19 times, I couldn't tell the police
17 officer, "You can wrap it all up into one because
18 it was the same stop sign."

19 MR. KLINE: No, you couldn't, but that's
20 a very different situation.

21 MR. SHORT: All right. Okay, that's
22 good.

1 That's all I have, Madam Chair.

2 CHAIRPERSON MILLER: Okay. Mr.
3 Rodriguez?

4 MR. RODRIGUEZ: Mr. Kline --

5 MR. KLINE: But I want to respond to
6 that, but go ahead.

7 CHAIRPERSON MILLER: Do you want to wait
8 for a second?

9 MR. RODRIGUEZ: Yeah, sure.

10 CHAIRPERSON MILLER: He wants to respond
11 to Mr. -- respond to Mr. Short, and then we'll
12 change --

13 MR. KLINE: May I?

14 CHAIRPERSON MILLER: Yeah.

15 MR. KLINE: I agree with you, Mr. Short;
16 however, if you were heading down Connecticut
17 Avenue --

18 MR. SHORT: Mm-hmm.

19 MR. KLINE: -- and you were speeding at
20 Connecticut and N and you were then speeding at
21 Connecticut and M and you were speeding at
22 Connecticut and P and you were speeding at

1 Connecticut and Q, I don't think you were
2 speeding four times. I think you were speeding
3 once.

4 MR. SHORT: If I ran a red light on every
5 one of those speeding, yes, I would be.

6 MR. KLINE: Because those would be four
7 separate red lights.

8 MR. SHORT: That's a rationale about red
9 lights, and that's about speed.

10 MR. KLINE: I understand, but --

11 MR. SHORT: If I ran four red lights, it
12 would not be the same charge. Point?

13 MR. KLINE: Correct.

14 But if you continued speeding down the
15 road, it would be.

16 CHAIRPERSON MILLER: Okay. Mr.
17 Rodriguez?

18 MR. RODRIGUEZ: Mr. Kline, can you
19 enlighten me about how you look at this case in
20 terms of precedent setting?

21 You know, how do I know that other
22 establishments will not want to take and wrap

1 everything up into a sandwich here and do the
2 same thing here? What am I -- you know, I need
3 to understand this a little better.

4 MR. KLINE: Yes, sir. Other
5 establishments may want to. As I said
6 previously, whether they are able to is really
7 going to depend upon what the Government and the
8 agency are willing to do because there are
9 obviously two sides that are coming before you,
10 two opposite sides that are coming before you
11 today and saying, "This makes sense. We hope you
12 will accept that."

13 The point is every case is different.
14 There are different sets of facts, and under some
15 circumstances, it might make sense to take an
16 approach similar to the one that we're taking
17 here.

18 However, in each case, it would be up to
19 the Government on the one hand, the Licensee on
20 the other, and ultimately the ABC Board as to
21 whether that's an acceptable approach.

22 So there is no precedent set because this

1 is an agreement, and if there were no agreement,
2 then that couldn't happen. And then you have the
3 authority and the ability to look at it and say,
4 "Under the facts of this case, is this a
5 reasonable approach? This makes sense for this
6 licensee given what we know about the charge
7 violations," without getting into the underlying
8 merits of each case, because that would require
9 that you try the case, which is why you don't
10 have -- Mr. Short said that he's frustrated that,
11 "Well, gee. We don't have all the information on
12 the other cases." Well, we have the charges, and
13 that's what's important in terms of an Offer in
14 Compromise because once you start getting into
15 the details of the other cases, then you're
16 talking about trying the cases and looking at
17 them on their merits.

18 And what we're trying to do here is,
19 again, a global settlement that will, we hope,
20 achieve the objectives of the parties.

21 MR. RODRIGUEZ: Okay. For now, thank
22 you.

1 CHAIRPERSON MILLER: I'd like to follow
2 up on that just for the sake of clarity, for
3 Board members understanding what I think is a
4 legal concept.

5 So it's my understanding that the law
6 treats orders, Board orders approving Offers in
7 Compromise differently than Board orders on
8 contested hearings. That if we had contested
9 hearings and we come out with a Board order, then
10 we need to be pretty much consistent when the
11 next case comes along, as opposed to approving an
12 Offer in Compromise, which you're presenting --
13 which I think the concern is that once we approve
14 this kind of grouping, then we need to be
15 consistent, which is not my view of the law, but
16 I just would like you all, if you could just
17 confirm if what I'm saying is correct that there
18 is a very big dc in applying precedent in those
19 two different types of cases.

20 MS. SCHMIDT: Precisely, not every -- not
21 every group of cases would be -- it's depending
22 on the violation also.

1 For example, if these were like six
2 fights in 2 weeks, of course, the Government
3 would not agree to grouping them together. If
4 there were six stabbings in 2 weeks or something
5 like that, each case is different.

6 The Government is only saying that for
7 today's purposes because you're going to end up
8 at the same -- when you finish, if we try all 19
9 cases or if we have an Offer in Compromise,
10 you're ending up in the same place as far as the
11 Board's power to sanction. You're ending up with
12 the same fine of \$42,500 and 28-day suspension.

13 MR. SILVERSTEIN: Say that again, please?

14 MS. SCHMIDT: You're ending up with the
15 same fine of \$42,500, paid within 60 days, and
16 you will get 12 days served and 16 days stayed
17 for one year.

18 The Government is not -- of course, if
19 the case is tried, maybe there would be more
20 suspension days. However, given the expense and
21 time involved, that's why -- you know, it would
22 be one thing if we only asked for like \$1,000 for

1 each case. No, the Government would not agree to
2 that, but since we're doing a cost-benefit
3 analysis, we're ending up at the same place, and
4 if there is a fourth violation, you still have
5 teeth. It's not as if he's getting a free pass.

6 It's not a perfect solution. Look, this
7 establishment did do numerous violations. The
8 Government is not saying it's an ideal solution;
9 however, just looking at it, you're ending up at
10 the same place. This is why the Government is
11 agreeing to this compromise.

12 CHAIRPERSON MILLER: So it's almost the
13 same place because if there's another violation,
14 the Board could revoke --

15 MS. SCHMIDT: Could revoke.

16 CHAIRPERSON MILLER: But it wouldn't be
17 mandatory.

18 MS. SCHMIDT: No.

19 CHAIRPERSON MILLER: Okay.

20 MR. KLINE: That's one point, and the
21 other point is just to expound on the question
22 that you asked.

1 When you try contested cases, the parties
2 are entitled to an expectation that you're not
3 going to be arbitrary and capricious. You're not
4 going to treat one case differently than another
5 case.

6 Well, in an Offer in Compromise, the
7 Government has broad discretion, and the
8 Government's discretion is actually broader than
9 the Board's because it's a little difficult to
10 accuse the Government of being arbitrary and
11 capricious in coming up with a settlement
12 agreement because they have discretion. They get
13 to look at each case, and no one could come
14 before you and say, "Well, gee, they got a better
15 deal."

16 Your response -- and this is taking it to
17 its basis level -- is "Well, what are you talking
18 to us about? Talk to the Government. The
19 Government ended into this deal. We only looked
20 at it to determine whether it was reasonable,
21 whether it made sense, giving all the facts and
22 circumstances, and that's what we concluded. And

1 if you reach a similar deal with the Government,
2 then we'll look at it the same way." And that's
3 all we're asking you to do, and I think that's
4 all you can be expected to do.

5 In a situation where you're making a
6 decision, then, yes, it has precedential value.
7 Other parties can cite it as precedent and say,
8 "But you did this in this case over there." In
9 these cases, you're able to say, "We didn't do
10 it. The Government did it. We just looked at
11 it, and it was within parameters, and it was
12 reasonable."

13 MS. SCHMIDT: And this is also not
14 appealable, also, which is --

15 MR. KLINE: It's not appealable.

16 MS. SCHMIDT: Which is also a big
17 consideration. So again --

18 CHAIRPERSON MILLER: Okay. Mr.
19 Silverstein? Anybody?

20 [No audible response.]

21 CHAIRPERSON MILLER: All right. So I
22 think that the Board would like to recess to

1 discuss the Offer in Compromise, now that there
2 aren't any more questions.

3 As Chairperson of the Alcoholic Beverage
4 Control Board for the District of Columbia and in
5 accordance with Section 405 of the Open Meetings
6 Amendment Act of 2010, I move that the ABC Board
7 hold a closed meeting for the purpose of seeking
8 legal advice from our counsel on Case No. 00221
9 and the 18 others that follow, and deliberating
10 upon them for the reasons cited in Section
11 405(b)(13) of the Open Meetings Amendment Act of
12 2010.

13 Is there a second?

14 MR. SHORT: Second.

15 CHAIRPERSON MILLER: Mr. Short seconded
16 the motion.

17 I'll now take a roll call vote on the
18 motion before us, now that it's been seconded.

19 Mr. Brooks?

20 MR. BROOKS: I agree.

21 CHAIRPERSON MILLER: Mr. Alberti?

22 MR. ALBERTI: I agree.

1 CHAIRPERSON MILLER: Mr. Rodriguez?

2 MR. RODRIGUEZ: I agree.

3 CHAIRPERSON MILLER: Ms. Miller agrees.

4 Mr. Silverstein?

5 MR. SILVERSTEIN: I agree.

6 CHAIRPERSON MILLER: Mr. Short?

7 MR. SHORT: I agree.

8 CHAIRPERSON MILLER: It appears that the
9 motion has passed by a 6-zero-zero vote. I
10 hereby give notice that the ABC Board will recess
11 this meeting to a meeting in the ABC Board
12 conference room pursuant to the Open Meetings
13 Amendment Act of 2010 to evaluate the Offer in
14 Compromise and will return shortly.

15 [Whereupon, at 2:22 p.m., the
16 above-entitled matter recessed and reconvened at
17 2:54 p.m.]

18 CHAIRPERSON MILLER: Okay. The Board is
19 back on the record, having discussed the proposed
20 Offer in Compromise that was presented to the
21 Board when we came back from lunch.

22 Just for the record, Mr. Kline, I think

1 that -- I think you said this, but I assume that
2 your client agrees with the Offer in Compromise,
3 which I'm not going to read out because it's
4 three pages, and I think it's in the record. But
5 it's the one dealing with 19 different cases, and
6 I believe a total fine of -- \$42,000?

7 MR. KLINE: \$42,500, with 28 days
8 suspended, 12 days served, 16 days stayed for 1
9 year. And, yes, the Licensee finds it agreeable
10 and understands it and waives its right to
11 hearing and right to appeal if it's accepted by
12 the Board.

13 CHAIRPERSON MILLER: Thank you. Okay.

14 So I'm going to move that we approve this
15 offer and compromise. Do I have a second?

16 MR. SILVERSTEIN: I second.

17 CHAIRPERSON MILLER: In my view, it's a
18 good solution to so many cases dealing with the
19 same or similar issue, and it does involve
20 maximum penalties for each case that the
21 Government could get if we proceeded case by
22 case. And I don't believe it has precedential

1 effect, given the nature of it being an Offer in
2 Compromise as opposed to a contested case
3 decision. So, basically, that's where -- I
4 support it and with respect to preserving the
5 resources of General Counsel's office, OAG's
6 office, and this Board's.

7 Any other comments?

8 [No audible response.]

9 CHAIRPERSON MILLER: All right. There's
10 been a motion. It's been seconded.

11 All those in favor say "aye."

12 [Chorus of ayes.]

13 CHAIRPERSON MILLER: All those opposed?

14 MR. SHORT: Opposed.

15 MR. ALBERTI: Opposed.

16 MR. BROOKS: Opposed.

17 CHAIRPERSON MILLER: All those
18 abstaining?

19 [No audible response.]

20 CHAIRPERSON MILLER: Okay. Then the
21 vote, I believe, fails for it being a tie of 3 to
22 3 to zero. Silverstein, Miller, and Rodriguez

1 for it, and Short, Brooks, and Alberti against.

2 Okay. So it fails. And we are now at --

3 I don't believe we need another motion. Okay.

4 So, at this point, we had on the calendar

5 Case No. 00221, and it's 2:57, and we have a

6 Protest Hearing scheduled. It was scheduled for

7 1:30, and we told the parties to come at three.

8 So we do not wish to postpone the other

9 Protest case any longer, so we're going to have

10 to reschedule the case for hearing, the cases

11 starting with 221.

12 But I'm going to have to have our General

13 Counsel be in touch with you all about

14 scheduling.

15 Okay, thank you.

16 MR. KLINE: Thank you.

17 MS. SCHMIDT: Thank you.

18 CHAIRPERSON MILLER: Mr. Kline -- well,

19 let me see. Okay, that ends this case.

20 [Whereupon, at 2:59 p.m., the

21 above-entitled matter concluded.]

22