

**THE DISTRICT OF COLUMBIA
ALCOHOLIC BEVERAGE CONTROL BOARD**

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In the Matter of:)	
)	
Mimi & D, LLC)	License No.: 86037
t/a Mood)	Case No.: 11-CMP-00175
)	Order No.: 2012-050
)	
Holder of a Retailer's Class CT License)	
at premises)	
1318 9th Street, N.W.)	
Washington, D.C. 20008)	
_____)	

BEFORE: Nick Alberti, Interim Chairperson
Donald Brooks, Member
Herman Jones, Member
Calvin Nophlin, Member

ALSO PRESENT: Mimi & D, LLC, t/a Mood, Respondent

Abeba Beyene, Owner, on behalf of the Respondent

Tori Gordon, Esq., Holland & Knight LLP, on behalf of the Respondent

Roderic Woodson, Esq., Holland & Knight LLP, on behalf of the Respondent

Louise Phillips, Assistant Attorney General,
on behalf of the District of Columbia

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

**FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND ORDER**

On August 5, 2011, the Alcoholic Beverage Regulation Administration (ABRA) served a Notice of Status Hearing and Show Cause Hearing (Notice), dated July 3, 2011, on Mimi & D, LLC, (Respondent) at premises 1318 9th Street, N.W., Washington, D.C., charging the Respondent, in Case No. 11-CMP-00175, with the following violation, which if proven true,

would justify the imposition of a fine, suspension, or revocation of the Respondent's ABC-license:

Charge I: The Respondent violated District of Columbia Official Code § 25-823(6) by failing to comport with the establishment's Voluntary Agreement, dated March 10, 2008, by breaching stipulation six of the agreement. Specifically, the establishment played music at the establishment at volumes that were audible by the occupants of adjacent residential properties, for which the Board may take the proposed action under District of Columbia Official Code § 25-823 and 23 DCMR § 800, *et seq.*

The parties came before the Alcoholic Beverage Control Board (Board) for a Show Cause Status Hearing on September 21, 2011. The matter proceeded to a Show Cause Hearing on December 7, 2011, where the Government and the Respondent presented evidence through the testimony of witnesses and the submission of documentary evidence.

The Board, having considered the evidence, the testimony of witnesses, the arguments of the parties, and the documents comprising the Board's official file, makes the following:

FINDINGS OF FACT

1. The Respondent holds a Retailer's Class CT License, ABRA License No. 86037. *See ABRA Licensing File No. 86037.* The establishment's premises are located at 1318 9th Street, N.W., Washington, D.C. *See ABRA Licensing File No. 86037.* The establishment neighbors The Nine condominium building. *Transcript (Tr.)*, December 7, 2011 at 21, 28. The establishment and the second floor of The Nine share a wall. *Tr.*, 12/7/11 at 28; *Government Exhibit H.* The third and fourth floors of The Nine rise above the Respondent's establishment and do not share a wall. *Tr.*, 12/7/11 at 27-28.
2. Abeba Beyene has owned Mood since January 2011. *Tr.*, 12/7/11 at 150. Ms. Beyene has received frequent complaints regarding noise from her neighbors in The Nine and Advisory Neighborhood Commission (ANC) 2F since January 2011. *Tr.*, 12/7/11 at 45, 161, 177-78, 181; *Government Exhibit C.*
3. The Respondent entered into a Voluntary Agreement, dated March 10, 2008, with ANC 2F, which addresses noise. *ABRA Show Cause File No. 11-CMP-00175, Voluntary Agreement.* In pertinent part, the Voluntary Agreement contains the following provision regarding noise:

Noise and Privacy. Applicant will comply with Title 25, Section 725 of the D.C. code, make architectural improvements to the property, and take all necessary actions to ensure that music, noise and vibrations from the establishment are not audible within any adjacent residential properties. Applicant will also take all necessary steps to ensure that the music, noise and vibrations are not disruptive to the adjacent residential property occupants' reasonable use of outdoor areas of their property. Should any sound, noise, or music be heard in any residential premises, Applicant will take immediate remedial

action. If necessary, Applicant will take reasonable steps to reduce noise emanating from the establishment from the opening of the entry and exit doors.

Id. at § 6.

4. The Voluntary Agreement also contains the following provision regarding notice and enforcement:

Notices and Enforcement Before ABC Board. In the event of a violation of the provisions of this Voluntary Agreement, Applicant shall be notified in writing by the person alleging such violation and given an opportunity to cure such violation within thirty (30) days unless the violation be of such a nature that more immediate action is required, in which case, the period for opportunity to cure shall be reduced to a reasonable time commensurate with the violation (Such 30-day or shorter period is hereinafter referred to as the “cure period”). A material violation of this Agreement or its ABC license by Applicant, which has not been cured within the cure period, shall constitute cause for seeking a Show Cause Order from the ABC Board.

Id. at § 16.

5. On March 9, 2011, Rishi Hingoraney sent an email to the Respondent, with the subject line: “Letter from The Nine owners.” *Government Exhibit A, Exhibit 3; Tr.*, 12/7/11 at 42, 77-78. The email contained a letter from four owners of condominium units in The Nine. Id. The letter notified the Respondent that “the volume of the music played frequently at Mood Lounge is so loud that not only is it clearly audible inside our condo units, it physically vibrates the walls.” *Government Exhibit A, No. 3, 2.* The condominium owners then requested that the Respondent comply with the terms of the Voluntary Agreement. *Government Exhibit A, No. 3, 2.*

6. ABRA received two complaints regarding noise from the establishment. *Tr.*, 12/7/11 at 25, 48. First, Rishi Hingoraney, who manages The Nine, submitted a complaint via email to ABRA on April 13, 2011, which noted that the noise issues persisted. *Government Exhibit A, No. 1; Tr.*, 12/7/11 at 48. Second, George Danilovics, who lives in Unit 4 of The Nine, sent an online complaint to ABRA on May 15, 2011. *Tr.*, 12/7/11 at 25.

7. We also note that on several occasions, Mr. Hingoraney has entered Unit 3 in response to his tenant’s noise complaints. *Tr.*, 12/7/11 at 73. Upon entering the unit, on several occasions, Mr. Hingoraney has heard loud thumping and observed the walls of the unit vibrating. *Tr.*, 12/7/11 at 73. In addition, Mr. Hingoraney has seen his tenant’s light fixtures and dresser vibrate due to the noise and vibrations. *Tr.*, 12/7/11 at 73-74.

8. Investigator Jabriel Shakoor began investigating the complaints on April 13, 2011. *Tr.*, 12/7/11 at 102. As part of his investigation, Investigator Shakoor scheduled a time with Mr. Danilovics and Mr. Hingoraney to visit their residences and listen for noise. *Tr.*, 12/7/11 at 105.

9. On May 15, 2011, at 12:10 a.m., Investigator Shakoor visited Mr. Hingoraney's residence. *Tr.*, 12/7/11 at 112; *Government Exhibit No. A*. Investigator Shakoor heard bass noises and vibrations coming from the Respondent's establishment in the bedroom of one of The Nine condominium units. *Tr.*, 12/7/11 at 112-13. Investigator Shakoor then went to the Respondent's establishment and notified Abeba Beyene that he had heard noise from the establishment in one of the adjacent residences in The Nine. *Tr.*, 12/7/11 at 114. Upon entering the establishment, Investigator Shakoor spoke with Ms. Beyene and she followed his instruction to lower the volume on the establishment's sound system. *Tr.*, 12/7/11 at 151.

10. After hearing noise in The Nine condominiums on May 15, 2011, Investigator Shakoor returned to the establishment on May 19, 2011, to conduct a sound test. *Government Exhibit No. 2*; *Tr.*, 12/7/11 at 117. Investigator Shakoor, Ms. Beyene, one of Ms. Beyene's employees, Mr. Danilovics, and Mr. Hingoraney participated in the test. *Tr.*, 12/7/11 at 87, 117-18, 152. As part of the test, Investigator Shakoor asked Ms. Beyene to adjust the sound on her sound system to a point where it no longer disturbed nearby residents. *Tr.*, 12/7/11 at 117.

11. During the test, Mr. Hingoraney, in Unit 3, and Mr. Danilovics, in Unit 4, remained in The Nine and sent text messages to Investigator Shakoor when the noise was set at an acceptable level. *Tr.*, 12/7/11 at 26-27, 87, 90-91, 118, 127-28, 132. In addition, Investigator Shakoor also walked back and forth between the condominiums and the establishment to hear the sound level himself. *Tr.*, 12/7/11 at 129. Mr. Hingoraney noted that an acceptable sound level does not equate to complete silence, but, rather, a volume level that he believes his tenants can tolerate. *Tr.*, 12/7/11 at 91. At the conclusion of the test, Ms. Beyene locked the closet containing the sound limiter and volume controls in order to ensure that establishment's sound system would remain at the agreed upon levels. *Tr.*, 12/7/11 at 36, 122, 153-54; *see also Government Exhibit B, No. 2*.

12. Nevertheless, the sound test on May 19, 2011, did not resolve the noise complaints. *Tr.*, 12/7/11 at 36, 92. As noted by Mr. Danilovics, the sound only remained at an acceptable level for approximately two weeks. *Tr.*, 12/7/11 at 36. Further, three weeks after the test, Mr. Hingoraney began receiving noise complaints from the new tenants of Unit 3. *Tr.*, 12/7/11 at 92. Finally, Investigator Shakoor has had to return to the establishment almost every weekend in response to noise complaints. *Tr.*, 12/7/11 at 122, 126.

13. Ms. Beyene has taken a number of steps to try to reduce the noise emanating from the establishment. *Tr.*, 12/7/11 at 167. First, she has disconnected a number of the establishment's speakers. *Tr.*, 12/7/11 at 167. Second, in February 2011, she specifically disconnected the speakers located on the wall shared with The Nine. *Tr.*, 12/7/11 at 167, 184. Third, the establishment purchased and installed a sound limiter in March 2011. *Tr.*, 12/7/11 at 167, 183. Nevertheless, Ms. Beyene admitted that the laptops used by the establishment's DJs appear to evade the sound control measures that she has put in place. *Tr.*, 12/7/11 at 189, 194.

CONCLUSIONS OF LAW

14. The Board has the authority to suspend or revoke the license of a licensee who violates any provision of Title 25 of the District of Columbia Official Code pursuant to District of Columbia Official Code § 25-823(1). Additionally, pursuant to the specific statutes under which the Respondent was charged, the Board is authorized to levy fines. D.C. Code § 25-830; 23 DCMR § 800, *et seq.*

15. The Board bases its factual findings on the substantial evidence contained in the record. 23 DCMR § 1718.3 (2008). The courts define substantial evidence as evidence that “reasonable minds might accept as adequate to support the [Board’s] conclusions.” 2641 Corp. v. District of Columbia Alcoholic Beverage Control Bd., 950 A.2d 50, 52 (D.C. 2008) *citing* Kopff v. District of Columbia Alcoholic Beverage Control Bd., 381 A.2d 1372, 1387 (D.C. 1977).

16. We find that the Government has shown through substantial evidence that the Respondent violated the terms of its Voluntary Agreement by playing music audible in The Nine condominiums and failing to cure the noise issues within the 30-day cure period.

17. The Board is tasked with enforcing the Respondent’s Voluntary Agreement. D.C. Code § 25-446(c) (West Supp. 2011). We interpret the agreement according to the principles of contract law; thus, we look to the Voluntary Agreement’s terms. North Lincoln Park Neighborhood Ass’n v. District of Columbia Alcoholic Beverage Control Bd., 727 A.2d 872, 875 (D.C. 1999).

18. The Voluntary Agreement states that the Applicant shall “take all necessary actions to ensure that music, noise and vibrations from the establishment are not audible within any adjacent residential properties.” *Voluntary Agreement*, at § 6. Further, “Should any sound, noise, or music be heard in any residential premises, Applicant will take immediate remedial action.” *Id.*

19. The Voluntary Agreement then states that “In the event of a violation of [the] Voluntary Agreement, Applicant shall be notified in writing by the person alleging such violation and given an opportunity to cure such violation within (30) days” *Voluntary Agreement*, at § 16. “A material violation of [the Voluntary] Agreement or its ABC license by [the] Applicant, which has not been cured within the cure period, shall constitute cause for seeking a Show Cause Order from the ABC Board.” *Id.*

20. Section 6 of the Voluntary Agreement is clear that music and vibrations from Mood’s sound system shall not be audible in adjacent residences. There is no other way to interpret § 6’s mandate that the Respondent “take all necessary action to ensure that . . . noise and vibrations from the establishment are not audible within any adjacent residential properties” or that the Respondent “take immediate remedial action” if such noise is heard in a neighboring residence. *Id.* at § 6. Therefore, in light of the clear language of the Voluntary Agreement, the noises and vibrations heard by The Nine complainants and Investigator Shakoor violated § 6 of the Voluntary Agreement. *Supra*, ¶¶ 5, 9.

21. Under these circumstances, the March 9, 2011, letter from the condominium owners of The Nine properly triggered the cure period and required the Respondent to ensure that music and vibrations could not be heard in The Nine's condominiums. This means that under the 30-day cure period, the Respondent had until April 8, 2011, to resolve the problem.

22. Nevertheless, on April 13, 2011, ABRA received a complaint from Mr. Hingoraney indicating that the problem had not been resolved. *Supra*, at ¶ 6. Furthermore, even after the sound test on May 19, 2011, the very same noise issues returned. *Supra*, at ¶¶ 10, 12. Under these circumstances, the Board can only conclude that the Respondent has failed to cure the violation.

23. We are not persuaded by the Respondent's arguments that its actions in this matter were reasonable or that the noise and vibrations observed in The Nine are not a material violation of the agreement. The Respondent's arguments regarding reasonableness are irrelevant in this matter. Section 6 of the Voluntary Agreement is clear that the neighboring residents should not hear noise or vibrations from the establishment in their residences. The establishment had 30 days after receiving notice from The Nine condominium owners to resolve the problem; yet, the noise issues returned two to three weeks after the sound test on May 19, 2011. *Supra*, at ¶ 12. As such, because the establishment failed to cure the violation, it is liable for violating the Voluntary Agreement.

24. In addition, we also find that the noise experienced by The Nine condominium owners is a material violation of the Voluntary Agreement. "At common law, the 'material terms' are the provisions necessary to create an enforceable contract." *1836 S Street Tenants Ass'n, Inc., v. Estate of B. Battle*, 965 A.2d 832, 839 (D.C. 2009). The Voluntary Agreement is clear that the establishment's neighbors have a right not to hear noise and vibrations in their residences. Thus, this prohibition is an essential term of the agreement, and necessary to ensure the neighborhood's peace, order, and quiet. Any other interpretation would deny ANC 2F the benefit of its bargain with the Respondent.

25. For the foregoing reasons, we find that the Respondent guilty of the violation described in Charge I.

ORDER

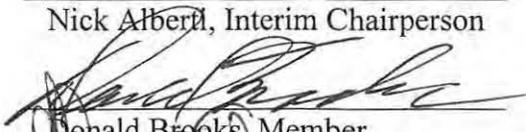
Based on the foregoing findings of fact and conclusions of law, the Board, on this 1st day of February 2012, finds that the Respondent, Mimi & D, LLC, t/a Mood, violated D.C. Official Code § 25-823(6). The Board hereby **ORDERS** that

- (1) the Respondent shall pay a fine of \$500.00 no later than thirty (30) days from the date of this Order.

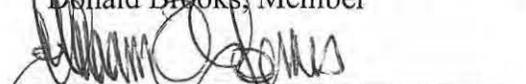
The Alcoholic Beverage Regulation Administration shall deliver copies of this Order to the Government and the Respondent.

District of Columbia
Alcoholic Beverage Control Board

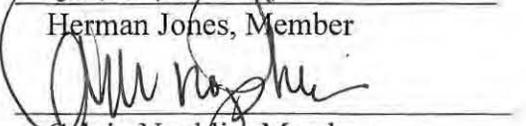
Nick Alberti, Interim Chairperson



Donald Brooks, Member



Herman Jones, Member



Calvin Nophlin, Member

Pursuant to 23 DCMR § 1719.1 (April 2004), any party adversely affected may file a Motion for Reconsideration of this decision within ten (10) days of service of this Order with the Alcoholic Beverage Regulation Administration, Reeves Center, 2000 14th Street, N.W., 400S, Washington, D.C. 20009.

Also, pursuant to section 11 of the District of Columbia Administrative Procedure Act, Pub. L. 90-614, 82 Stat. 1209, District of Columbia Official Code § 2-510 (2001), and Rule 15 of the District of Columbia Court of Appeals, any party adversely affected has the right to appeal this Order by filing a petition for review, within thirty (30) days of the date of service of this Order, with the District of Columbia Court of Appeals, 500 Indiana Avenue, N.W., Washington, D.C. 20001. However, the timely filing of a Motion for Reconsideration pursuant to 23 DCMR § 1719.1 (April 2004) stays the time for filing a petition for review in the District of Columbia Court of Appeals until the Board rules on the motion. See D.C. App. Rule 15(b).