THE DISTRICT OF COLUMBIA
ALCOHOLIC BEVERAGE CONTROL BOARD

In the Matter of:	Case No.:	14-CMP-00110
JC 7, LLC		14-CMP-00103
t/a NY NY Diva		14-CMP-00048
		14-CMP-00085
Holder of a		14-CMP-00089
Retailer's Class CR License	License No:	92380
	Order No:	2014-435
at premises		
2406 18th Street, N.W.		
Washington, D.C. 20009		

BEFORE: Ruthanne Miller, Chairperson
Nick Alberti, Member
Donald Brooks, Member
Herman Jones, Member
Mike Silverstein, Member
Hector Rodriguez, Member
James Short, Member

ALSO PRESENT: Michael Stern, Senior Assistant Attorney General
Office of the Attorney General for the District of Columbia

Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

INTRODUCTION

The Alcoholic Beverage Control Board (Board) finds JC 7, LLC, t/a NY NY Diva, (hereinafter "Respondent" or "NY NY Diva") guilty of permitting a pattern unlawful and disorderly conduct at the establishment, which included fighting and overcrowding, as well as allowing the use of marijuana on the premises. The evidence and testimony demonstrate that the Respondent operates with a reckless, if not intentional, disregard for the law and the safety of the public, making it one of the most poorly operated businesses in the District of Columbia. Based on the violations committed by the Respondent, the Board finds ample justification for revoking NY NY Diva's liquor license.

Procedural Background

This case arises from several Notices of Status Hearing and Show Cause Hearing issued by the Board.

I. Case Number 14-CMP-00103

The Alcoholic Beverage Regulation Administration (ABRA) served the notice in Case Number 14-251-00103 on the Respondent, located at premises 2406 18th Street, N.W., Washington, D.C., on May 22, 2014, along with the Investigative Report related to this matter. *ABRA Show Cause File No., 14-PRO-00103*, Service Form. The notice charges the Respondent with one violation, which if proven true, would justify the imposition of a fine, as well as the suspension or revocation of the Respondent's license.

Specifically, the notice charges the Respondent with the following violation:

> Charge I: [On February 4, 2014,] [y]ou violated Section 4 of the establishment's settlement agreement in violation of D.C. Official Code § 25-823[(6)] . . .

ABRA Show Cause File No., 14-PRO-00103, Notice of Status Hearing and Show Cause Hearing, 2-3 (May 15, 2014).

II. Case Number 14-251-00048

The Alcoholic Beverage Regulation Administration (ABRA) served the notice in Case Number 14-251-00103 on the Respondent, located at premises 2406 18th Street, N.W., Washington, D.C., on June 20, 2014, along with the Investigative Report related to this matter. *ABRA Show Cause File No., 14-PRO-00048*, Service Form. The notice charges the Respondent with one violation, which if proven true, would justify the imposition of a fine, as well as the suspension or revocation of the Respondent's license.

Specifically, the notice charges the Respondent with the following violation:

> Charge I: [On February 9, 2014,] [y]ou violated D.C. Official Code §25-823[(2)] . . . by allowing the licensed establishment to be used for a disorderly purpose . . . .

ABRA Show Cause File No., 14-PRO-00048, Notice of Status Hearing and Show Cause Hearing, 2-3 (May 15, 2014).

III. Case Number 14-CMP-00110

The Alcoholic Beverage Regulation Administration (ABRA) served the notice in Case Number 14-251-00110 on the Respondent, located at premises 2406 18th Street, N.W., Washington, D.C., on May 22, 2014, along with the Investigative Report related to this matter. *ABRA Show Cause File No., 14-PRO-00110*, Service Form. The notice charges the Respondent

with one violation, which if proven true, would justify the imposition of a fine, as well as the suspension or revocation of the Respondent's license.

Specifically, the notice charges the Respondent with the following violation:

Charge I: [On March 20, 2014,] [y]ou violated Section 3 of the establishment's settlement agreement in violation of D.C. Official Code § 25-823[(6)] . . .

ABRA Show Cause File No., 14-PRO-00110, Notice of Status Hearing and Show Cause Hearing, 2-3 (May 15, 2014).

IV. Case Number 14-251-00085

The Alcoholic Beverage Regulation Administration (ABRA) served the notice in Case Number 14-251-00085 on the Respondent, located at premises 2406 18th Street, N.W., Washington, D.C., on May 22, 2014, along with the Investigative Report related to this matter. *ABRA Show Cause File No., 14-PRO-00085*, Service Form. The notice charges the Respondent with multiple violations, which if proven true, would justify the imposition of a fine, as well as the suspension or revocation of the Respondent's license.

Specifically, the notice charges the Respondent with the following violations:

Charge I: [On March 2, 2014,] [y]ou allowed the use of tobacco products inside the establishment in violation of the District of Columbia ban on the use of such products in public accommodations [in violation of] 23-823[(1)] . . .

Charge II: [On March 2, 2014,] [y]ou knowingly permitted in the establishment the use of a controlled substance identified in the CSA in violation of D.C. [Official] Code § 25-822[(2)] . . . .

ABRA Show Cause File No., 14-PRO-00085, Notice of Status Hearing and Show Cause Hearing, 2-3 (May 15, 2014).

V. Case Number 14-251-00089

The Alcoholic Beverage Regulation Administration (ABRA) served the notice in Case Number 14-251-00089 on the Respondent, located at premises Street Address, Washington, D.C., on May 22, 2014, along with the Investigative Report related to this matter. *ABRA Show Cause File No., 14-PRO-00089*, Service Form. The notice charges the Respondent with multiple violations, which if proven true, would justify the imposition of a fine, as well as the suspension or revocation of the Respondent's license.

Specifically, the notice charges the Respondent with the following violations:

Charge I: [On March 15, 2014,] [y]ou allowed the sale or consumption of alcoholic beverages by persons under the age of 21 in violation of D.C. Official Code § 25-781 . . .

Charge II: [On March 15, 2014,] [y]ou failed to take adequate steps to check the identification of persons under the age of 21 in violation of D.C. Official Code § 25-783 . . .

Charge III: [On March 15, 2014,] [y]ou violated D.C. Official Code § 25-113[(a)(2)(A)(ii)] . . . by permitting alcohol consumption outside of the licensed establishment in violation of D.C. Official Code § 25-823(1) . . .

Charge IV: [On March 15, 2014,] [y]ou failed to gain approval for a substantial change in operation in violation of D.C. Official Code § 25-762 . . . by failing to operate in compliance with your Certificate of Occupancy and by expanding your operations to the third floor of the establishment . . .

Charge V: [On March 15, 2014,] [y]ou violated Section 6 of the establishment's settlement agreement in violation of D.C. Official Code § 25-823(6) . . .

Charge VI: [On March 15, 2014,] [y]ou allowed the use of tobacco products inside the establishment in violation of the District of Columbia ban on the use of such products in public accommodations [in violation of] D.C. Official Code § 25-823(1).

Charge VII: [On March 15, 2014,] [y]ou knowingly permitted in the establishment the use of a controlled substance identified in the CSA in violation of D.C. [Official] Code § 25-822[(2)].

Charge VIII: [On March 15, 2014,] you violated D.C. Official Code § 25-797(b) . . . by allowing a transfer of responsibility for security . . . .

ABRA Show Cause File No., 14-PRO-00089, Notice of Status Hearing and Show Cause Hearing, 2-5 (May 15, 2014).

The Show Cause Hearing occurred on October 1, 2014. Despite receiving proper notice, the Respondent did not appear at the hearing. The Government proceeded to argue the case ex parte in accordance with D.C. Official Code § 25-447(e).

FINDINGS OF FACT

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

I. Background

1. NY NY Diva holds a Retailer's Class CR License at 2406 18th Street, N.W., Washington, D.C. *ABRA License No. 92380.*

I. Case Number 14-251-00048

2. Alcoholic Beverage Regulation Administration (ABRA) Investigator Mark Brashears visited the Respondent's establishment on February 9, 2014. *Transcript* (*Tr.*), October 1, 2014 at 7 (14-251-00048).

3. On February 9, 2014, a fight occurred on both floors of the establishment. *Case Report 14-251-00048*, at 2. On the second floor, patrons used chairs and hookah pipes as weapons. *Case Report 14-251-00048*, 2. In response to the fight, the establishment called the police. *Id.* at 2. The Metropolitan Police Department (MPD) responded to a fight at the establishment and determined that the fight involved at least fifty people. *Tr.*, 10/1/14 at 9. After the fight, blood was found on a chair, although no injuries were reported. *Id.* at 18-19.

4. The Respondent's Head of Security, Orlando Anthony, admitted to Investigator Brashears that on February 9, 2014, the establishment had approximately 250 people inside. *Case Report 14-251-00048*, at 2.

5. The owner of the establishment, Sami Khan, informed Investigator Brashears that the establishment only had four security staff working on February 9, 2014. *Tr.*, 10/1/14 at 10. Mr. Khan admitted that he did not have enough security that night. *Id.*

6. ABRA Investigator John Suero also responded to incident that occurred at the Respondent's establishment on February 9, 2014. *Id.* at 22. Upon entering the establishment, he observed that items were strewn about the establishment, including broken glass, overturned chairs, and blood, which indicated to Investigator Suero that a fight had occurred. *Id.* at 23.

7. Investigator Suero has visited the Respondent's establishment on multiple occasions. *Id.* at 26. He noted that during his prior visits, the smell of marijuana outside the establishment has been obvious. *Id.* at 26.

II. Case Number 14-251-00085

8. On March 2, 2014, Investigator Mathieson visited the Respondent's establishment around 2:25 a.m. *Tr.*, 10/1/14 at 39 (14-251-00085). She observed that the smell of marijuana emanating from the establishment was so strong that it could be observed from the middle of 18th Street, N.W. *Id.* Furthermore, upon entering the Respondent's establishment the cloud of smoke was so thick that she could literally "taste it." *Tr.* 10/1/14 at 40 (14-251-00048), *Tr.* 10/1/14 at 4 (14-251-00085). Before leaving, she advised the owner that she could smell marijuana inside the establishment. *Tr.* 10/1/14 at 40 (14-251-00048). She further noted that she smelled like marijuana after she left the establishment. *Tr.* 10/1/14 at 6, 10-11 (14-251-00085).

9. During her visit, Investigator Mathieson also observed the use of tobacco products inside the establishment. *Id.* at 5. First, she observed packs of cigars inside the establishment, including those manufactured by Dutch Masters, White Owl, and Cigarillos. *Id.* at 5, 7. Second, she observed ash trays on tables and scattered cigar butts. *Id.* at 5. Third, she observed the establishment's manager smoke a cigarette inside the establishment. *Id.* at 6. Fourth, the establishment's manager further admitted that hookah was being smoked inside the establishment. *Id.* at 8. The Department of Health confirmed that the Respondent has not received an exemption from the District's laws regarding the use of tobacco at an establishment. *Id.* at 9.

III. Case Number 14-251-00089

10. MPD Sergeant Joseph Kuchta supervises the police unit that monitors Adams Morgan. *Tr.*, 10/1/14 at 3 (14-251-00089) at 5. He described the Respondent as the "number one problem in Adams Morgan . . ." based on the frequent fights that have occurred at the establishment. *Id.* at 5-6. He noted that large fights have occurred inside the premises on multiple occasions, which required twenty or thirty officers to push through the crowd in order to reach the second floor. *Id.* at 13-14.

11. MPD Sergeant Joseph Kuchta visited the Respondent's establishment on March 15, 2014, around 12:55 a.m. *Id.* at 6. Upon arriving at the establishment, he observed that the establishment lacked ". . . any room to walk or move." *Id.* at 7. He believed that the establishment was overcrowded on March 15, 2014. *Id.* The fire marshal informed Sgt. Kuchta on that day that the establishment was overcapacity. *Id.* at 18.

12. Sgt. Kuchta returned to the establishment on March 25, 2014, due to a call related to overcrowding. *Id.* at 8. Upon arriving, he directed other officers at the scene to contact the fire marshal. *Id.* He noted that the crowd inside the establishment had ". . . no room to move." *Id.*

13. On March 25, 2014, Sgt. Kuchta observed the strong smell of marijuana emanating from the establishment. *Id.* at 9. He further observed that the smell became stronger when he entered the establishment. *Id.* at 9-10. According to Sgt. Kuchta, it was obvious that people were smoking marijuana inside the establishment. *Id.* at 11. Indeed, Sgt. Kuchta observed ". . . a cloud of smoke inside the location . . . ." *Id.* Sgt. Kuchta also observed a cigar on the ground after he entered the establishment. *Id.* at 12.

14. ABRA Investigator Abyie Ghenene visited the establishment on March 15, 2014, with ABRA Investigator Erin Mathieson after being flagged down by MPD officers. *Id.* at 23. The investigators left their vehicle and begin speaking with officers in the area. *Id.* at 23-24. He noted that the smell of marijuana emanating from the establishment could be discerned from the middle of 18th Street, N.W. *Id.* at 29.

15. While outside the establishment, they observed a patron exit the establishment while carrying a cup containing an alcoholic beverage. *Id.* at 24, 27. He further noted that the patron was wearing a wrist band. *Id.* at 28. The investigators checked the patrons identification and

determined that the female patron was only twenty years old. *Id.* at 28. The female patron told the investigators that the establishment never checked her identification. *Id.* at 33.

16. Investigator Ghenene spoke with the owner, Mr. Khan. *Id.* at 25. Mr. Khan admitted that he had no method of determining the number of patrons inside the establishment. *Id.* He further observed that the establishment did not check the identification of patrons, and that patrons could exit and enter through multiple entrances. *Id.* at 25, 34. Investigator Mathieson separately observed that no security was posted at the summer garden entrance, even as patrons were exiting and entering through that part of the establishment. *Id.* at 34.

17. The fire marshal reported to the scene after being contacted by ABRA. *Id.* at 26-27. She reported that the establishment was overcrowded. *Id.* He noted that upon entering the establishment himself, he felt unsafe because the establishment was so packed. *Id.* at 29.

18. During the evening, ABRA Investigator Erin Mathieson spoke with Allen Ishiara, who was employed as a promoter. *Id.* at 36-37. In response to a question, Investigator Mathieson told Mr. Ishiara that the establishment had not been shut down. *Id.* at 37. Mr. Ishaira then instructed security to allow patrons to enter the establishment. *Id.* Investigator Mathieson also observed Mr. Ishaira allowing patrons to freely enter the establishment. *Id.* She noted that earlier in the evening, the owner had ordered security to bar patrons from entering the establishment, but Mr. Ishaira overrode his instructions when he ordered security to let patrons inside. *Id.*

19. Upon entering the establishment herself, she observed ". . . a very strong odor of marijuana . . . ." *Id.* at 38. Mr. Kahn informed Investigator Mathieson that the marijuana smell ". . .was not as bad as it had been two weeks ago." *Id.* at 42.

20. Investigator Mathieson also saw a full bar on the third floor of the establishment. *Id.* at 42. She observed discarded wrist bands laying on the floor. *Id.* She also saw a bar tender cleaning the bar. *Id.* at 43. Yet, the establishment's settlement agreement prohibits patron use of the third floor. *Id.* at 44. The Respondent's settlement agreement states, "[t]here will be no patron use of the 3rd floor of 2406 18th Street, N.W." *In re Peam Group, t/a Felix Restaurant*, Case No. 28059-2006P, Voluntary Agreement, § 6(g) (D.C.A.B.C.B. Apr. 25, 2001).

21. Lisa Davis from the Department of Health informed Investigator Mathieson that the Respondent never received an exemption from the District's ban on smoking. *Id.* at 43.

22. On March 15, 2014, Investigator Mathieson reviewed the establishment's certificate of occupancy with Inspector Gayla McDougal, an employee of the Office of the Fire Marshal. *Id.* at 45. The certificate stated that the establishment could hold up to 196 people. *Id.* Further, the certificate did not include the third floor. *Id.* Inspector McDougal further informed Investigator Mathieson that approximately 500 people had been inside establishment. *Id.* at 46.

IV. Case Number 14-251-00103

23. ABRA Investigator Felicia Dantzler visited the Respondent's establishment on February 5, 2014, February 12, 2014, February 15, 2014, and February 19, 2014 after receiving a complaint from a resident. *Tr.*, 10/1/14 at 4, 6-7 (14-251-00103).

24. The establishment's settlement agreement states,

> Applicant shall maintain regular trash/garbage removal service, regularly remove trash from the trash and dumpster area, and see that the trash and dumpster area remain clean. Applicant shall deposit trash and garbage only in rodent-proof dumpsters, and shall see that dumpster covers fit properly and remain fully closed except when trash or garbage is being added or removed. Applicant will make every reasonable effort to eliminate food sources for rodents and eliminate the rat population.

In re Peam Group, t/a Felix Restaurant, Case No. 28059-2006P, Voluntary Agreement, at § 4.

25. During her visits, she observed the establishment's trash area. *Tr.*, 10/1/14 at 7. She noted that the establishment did not have trash cans with securely closed lids. *Id.* She further noted that the Respondent's garbage cans were overflowing with trash, and that the trash area was littered with garbage. *Id.*

CONCLUSIONS OF LAW

26. The Board has the authority to fine, 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). D.C. Official Code § 25-830; 23 DCMR § 800, *et seq.* (West Supp. 2014). Furthermore, after holding a Show Cause Hearing, the Board is entitled to impose conditions if the Board determines "that the inclusion of the conditions would be in the best interests of the locality, section, or portion of the District in which the establishment is licensed." D.C. Official Code § 25-447.

27. The Board finds that the Government has shown sufficient evidence to sustain Charge I in Case Number 14-251-00048, Charge II in Case Number 14-251-00085, and Charge VII in Case Number 14-251-00089. Because these offenses merit the revocation of the Respondent's license, the remaining charges are rendered moot at this time.[1]

I. Case Number 14-251-00048

28. The Board finds that the Respondent permitted unlawful and disorderly conduct at the establishment in violation of § 25-832(2) on February 9, 2014.

29. Under § 25-823(2), "[t]he licensee [may not] allow[] the licensed establishment to be used for any unlawful or disorderly purpose." D.C. Official Code § 25-823(2).

[1] However, there are sufficient facts in the record to issue the appropriate conclusions of law on the remaining charges should the need arise.

30. In *1900 M Restaurant Associations*, the court provided two tests to determine whether a licensee violated § 25-832(2). *1900 M Rest. Associations, Inc. v. D.C. Alcoholic Beverage Control Bd.*, 56 A.3d 486, 493-94 (D.C. 2012). First, under the continuous course of conduct test, a violation may be found when ". . . there is substantial evidence of a course of conduct, continued over time, that reflects the licensee's adoption of a pattern or regular method of operation that encouraged, caused, or contributed to the unlawful or disorderly conduct at issue. *Id.* at 493. Under this test, "[t]he evidence upon which the Board rests its conclusion must have a 'demonstrable connection' to the establishment's operation." *Id.* Second, under the single instance test, "[i]n the absence of evidence of a continuous course of conduct, it may be sufficient that the licensee's method of operation created an environment that fostered or was conducive to the unlawful or disorderly conduct that inevitably took place." *Id.* at 493-94. In *Levelle*, the court affirmed that incidents caused by a ". . . lack of training and supervision of petitioner's security staff, the failure of petitioner to maintain a sufficient number of security personnel, the inadequacy of petitioner's security plan, petitioner's failure to fully enforce its security procedures, and petitioner's failure to properly communicate with police about incidents" constitute a violation of § 25-823(2). *Levelle, Inc. v. D.C. Alcoholic Beverage Control Bd.*, 924 A.2d 1030, 1037 (D.C. 2007)

31. Here, the incident on February 9, 2014 involved a fight between fifty patrons using chairs and hookah pipes as weapons. *Supra*, at ¶ 3. MPD reported that the establishment is the site of frequent fights that on multiple occasions have required twenty to thirty officers to respond to the establishment. *Supra*, at ¶ 10. The Respondent's head of security further admitted that on the night of the brawl the establishment was legally over its occupancy; indeed, the record shows that the establishment has operated in excess of its maximum occupancy on multiple occasions. *Supra*, at ¶¶ 4, 11, 22. The owner further admitted that he did not have enough security present to control the crowd. *Supra*, at ¶ 5. Based on these facts, it is clear that the Respondent engaged in a regular method of operation by permitting more patrons than allowed by its certificate of occupancy. The Board finds that this contributed to the frequent fighting observed by MPD, because operating above one's capacity, without adequate security, is conducive to crowd control issues such as fighting.

32. Overcrowding and fighting combined with a lack of security create an imminent danger to the safety of the public, culminating in the events of February 9, 2014. Based on the Respondent's failure to contain this danger on multiple occasions, the Board finds that this violation merits the revocation of the Respondent's license pursuant to § 25-823.

II. Case Numbers 14-251-00085 and 14-251-00089

33. The Board further finds that the Respondent committed two separate counts of violating § 25-822 by permitting the repeated use of marijuana inside the premises on March 2, 2014, and March 15, 2014.

34. Under § 25-822, "[t]he Board shall revoke the license of a licensee as a result of any of the following events during the period for which the license was issued: "[t]he licensee has knowingly permitted, in the licensed establishment . . . the use, of any controlled substance

identified in the [Controlled Substance Act (CSA)] . . . . D.C. Official Code § 25-822(2). The CSA identifies cannabis, also known as marijuana, as a schedule III drug. D.C. Official Code §§ 49-901.02(a)(3), 48-902.08(a)(6).

35. The record in this case shows that the Respondent knowingly permitted the use of marijuana inside the premises on multiple occasions. Here, Investigator Suero reported that he has smelled marijuana emanating from the Respondent's establishment on multiple occasions. *Supra*, at ¶ 7. On March 2, 2014, the smell of marijuana coming from the establishment was so strong, it could be observed in the middle of the street, while a cloud of smoke could be seen inside the establishment. *Supra*, at ¶ 8. Investigator Ghenene had the same observation regarding the smell of marijuana when he visited the establishment on March 15, 2014. *Supra*, at ¶ 14. Similarly, on March 25, 2014, Sgt. Kuchta observed that there was a cloud of smoke inside the establishment, and that it was obvious that people were smoking marijuana. *Supra*, at ¶ 13. Based on the repeated presence of marijuana odors inside the premises, the Board can only conclude that the ownership was aware and tolerated the use of marijuana inside the premises on March 2, 2014, and March 15, 2014.

36. Under Title 25 of the D.C. Official Code, a violation of § 25-822 is subject to mandatory revocation. § 25-822. Therefore, based on the two violations of § 25-822, the Board orders the mandatory revocation of the respondent's license.

ORDER

Therefore, for the foregoing reasons, the Board, on this 29th day of October 2014, finds that JC 7, LLC, t/a NY NY Diva, merits **REVOCATION** of its Retailer's Class CR License.

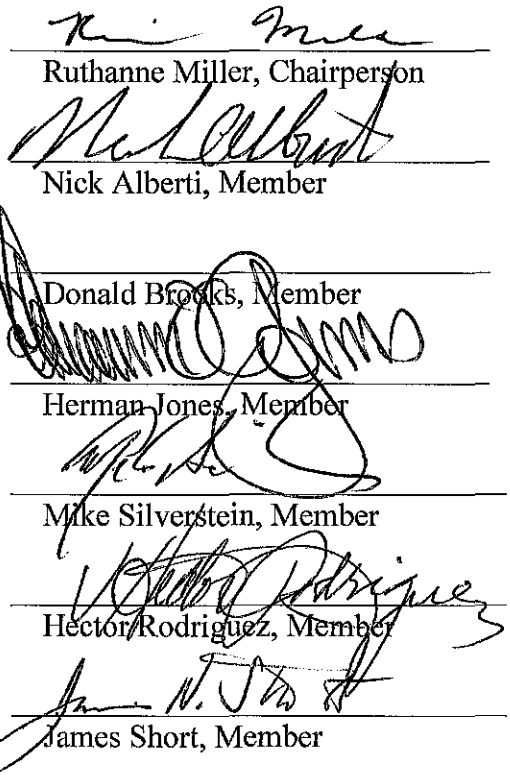
IT IS FURTHER ORDERED that the remaining charges brought by the Government are rendered moot; therefore, the Board's final determination of these remaining charges shall be held in permanent abeyance unless the license is reactivated.

IT IS FURTHER ORDERED that the pending Show Cause and Protest cases related to this license are moot; therefore, these matters shall be held in permanent abeyance unless the license is reactivated.

IT IS FURTHER ORDERED that the individual owners, members, and license holders shall be prohibited from holding an alcoholic beverage license in the District of Columbia for five years in accordance with D.C. Official Code § 25-821.

The ABRA shall deliver copies of this Order to the Government and the Respondent.

District of Columbia
Alcoholic Beverage Control Board



Ruthanne Miller, Chairperson

Nick Alberti, Member

Donald Brooks, Member

Herman Jones, Member

Mike Silverstein, Member

Hector Rodriguez, Member

James Short, Member

Pursuant to 23 DCMR § 1719.1, 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, NW, 400S, Washington, D.C. 20009.

Also, pursuant to section 11 of the District of Columbia Administrative Procedure Act, Pub. L. 90-614, 82 Stat. 1209, D.C. Official Code § 2-510 (2001), and Rule 15 of the District of Columbia Court of Appeals, any party adversely affected has the right to appeal this Order by filing a petition for review, within thirty (30) days of the date of service of this Order, with the District of Columbia Court of Appeals, 500 Indiana Avenue, N.W., Washington, D.C. 20001. However, the timely filing of a Motion for Reconsideration pursuant to 23 DCMR § 1719..1 stays the time for filing a petition for review in the District of Columbia Court of Appeals until the Board rules on the motion. See D.C. App. Rule 15(b) (2004).