

In the Matter of:)	
)	
BEG Investments, LLC,)	License Number: 76366
t/a Twelve)	Case Number: 13139 and 13139B
)	ORDER NUMBER: 2009-149
)	
Holder of a Retailer's Class CT License)	
at premises)	
1125 H Street, N.E.)	
Washington, D.C. 20002)	
)	

Martha Jenkins, Acting General Counsel
Alcoholic Beverage Regulation Administration

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Charge II: Respondent produced sound, noise, or music of such intensity that it could be heard in premises other than the licensed establishment, in violation of D.C. Code § 25-725. The date of this alleged violation is August 30, 2008.

These aforementioned charges were heard before the Board at a Show Cause Hearing on April 29, 2009. The Board, having considered the evidence, the testimony of witnesses, the arguments of counsel, and the documents comprising the Board's official file, makes the following:

FINDINGS OF FACT

1. The Board issued a Notice of Status Hearing and Show Cause hearing, dated January 28, 2009. (See Alcoholic Beverage Regulation Administration (ABRA) Show Cause File Number 13139 and 13139B). The Respondent holds a Retailer's Class CT License and is located at 1125 H Street, N.E., Washington, D.C.
2. The Show Cause Hearing in this matter occurred on April 29, 2009, at which time the Office of the Attorney General for the District of Columbia (the Government) prosecuted two charges against the Respondent based on incidents that occurred on May 25, 2008, and August 30, 2008. See *ABRA Show Cause File Number 13139 and 13139B and Transcript, 4/29/09* (hereinafter "*Tr.*"), at 8-9. Charge I alleges that Respondent violated the terms of its Voluntary Agreement by failing to sound proof the interior walls of the establishment, in violation of D.C. Code § 25-446(e). See *ABRA Show Cause File Number 13139 and 13139B*. The Board takes notice of its Official file for the Respondent's License which contains the Voluntary Agreement entered on March 19, 2007, between the Respondent and the Chair of Advisory Neighborhood Commission 6A. This Voluntary Agreement states, *inter alia*: "Applicant agrees to ensure that sounds emanating from within the establishment are mitigated by installing adequate sound proofing. *Alcoholic Beverage Regulation Administration (ABRA) Licensing File*, License Number 76366. Charge II alleges that Respondent produced music that was of such intensity that it could be heard in premises other than the licensed establishment, in violation of D.C. Code § 25-725. See *ABRA Show Cause File Number 13139 and 13139B*.
3. The Government presented its case through the testimony of Steven Johnson, a private citizen, and ABRA Investigator Susan Mitchell. *Tr.* at 11, 29. Mr. Johnson lives behind the Respondent's place of business. *Tr.* at 11-14. On August 30, 2008,¹ Mr. Johnson was awoken by music from Respondent's establishment and he called ABRA Investigator Susan Mitchell. *Tr.* at 12. He had reported this problem previously to ABRA and the Metropolitan Police Department (MPD) on at least a dozen occasions, but this date was the first time that the ABRA Investigator was actually able to come to his house. *Tr.* at 12-13. Mr. Johnson's house is about 17 feet from Respondent's establishment. *Tr.* at 14 (*Government's Exhibits 1 and 2, Photographs depicting*

¹ The Board notes that although the Transcript testimony says "August 20," it was later corrected to August 30, 2008, as the date of the incident this witness was referring to.

Respondent's establishment and the front of Mr. Johnson's house). Before Respondent moved into this location, it was a "Cluck-U Chicken" and Mr. Johnson did not have any problems with the establishment when it operated as such. *Tr.* at 15. Also, there are several other bars and restaurants near Mr. Johnson's house, but none other than Respondent's can be heard from his house. *Tr.* at 15. Mr. Johnson has called MPD about the noise emanating from Respondent's establishment as recently as April 13, 2009, but MPD did not enter his house to observe the music audible inside, although they did hear it from his front yard. *Tr.* at 18. Mr. Johnson confirms that the noise is coming from Respondent's establishment before he calls ABRA or MPD. *Tr.* at 22. Investigator Mitchell has been inside Mr. Johnson's house when there was music emanating from Respondent's establishment on more occasions than are stated in her report. *Tr.* at 25. MPD has also been inside his house and heard the noise emanating from Respondent's establishment on about three occasions. *Tr.* at 25-26. Mr. Johnson hears noise from Respondent's establishment almost every Thursday, Friday, Saturday, and most Mondays. *Tr.* at 27.

4. The Government's next witness was ABRA Investigatory Susan Mitchell. *Tr.* at 29. She is familiar with Respondent's establishment. *Tr.* at 30. She visited the establishment on May 25, 2008, because she received a noise complaint from Mr. Johnson. *Tr.* at 30. First, she went inside Mr. Johnson's residence and into the living room, where she was able to hear noise coming from Respondent's establishment. *Tr.* at 30. She then went over to Respondent's establishment and advised the owner, Bernard Gibson, of the violation. *Tr.* at 30-31. Mr. Gibson said he would turn down the music, which he did slightly. *Tr.* at 31. Investigator Mitchell reviewed the Voluntary Agreements governing the operation of Respondent's establishment and observed two provisions pertaining to sound proofing, the first Voluntary Agreement requiring sound proofing and the second Voluntary Agreement requiring commercial sound proofing. *Tr.* at 31-32. Investigator Mitchell has spoken with Mr. Gibson three times this year about providing sound proofing and requested that he provide invoices showing that he had done so, but such did not occur. *Tr.* at 33-34.

5. On August 30, 2008, Investigator Mitchell again visited Respondent's establishment in response to a call from Mr. Johnson. *Tr.* at 34. She, again, entered Mr. Johnson's residence first to hear the noise emanating from Respondent's establishment. *Tr.* at 34-35. She has never been called about noise violations for the other nearby establishments. *Tr.* at 35. She has testified about noise problems at Respondent's establishment previously before the Board. *Tr.* at 35. As recently as approximately two or three weeks before this hearing, Investigator Mitchell observed noise emanating from Respondent's establishment. *Tr.* at 38. At that time, she asked Mr. Gibson about the sound proofing and he said he had purchased the materials but had not gotten it installed yet. *Tr.* at 38. Investigator Mitchell has observed triple-pane glass on the windows of the establishment, however, there is no sound proofing on the walls. *Tr.* at 40-41. When Investigator Mitchell has been inside of Mr. Johnson's residence, she primarily heard the bass line of the music, but could also hear the rest of the score. *Tr.* at 43. She has heard music emanating from Respondent's establishment from inside of Mr. Johnson's home on three occasions. *Tr.* at 47-48.

6. The Respondent called as its first witness Mr. Bernard Gibson, the managing partner of the entity that operates the Twelve Restaurant and Lounge. *Tr.* at 51-52. They began operations in April of 2008. *Tr.* at 53. When the establishment was originally constructed, the sound proofing that they did was to install triple-pane windows. *Tr.* at 53. Mr. Gibson also installed sound proofing installation on the windows and a sound proof door in late March of 2009. *Tr.* at 57 (whereupon Respondent submitted an invoice from Classic Windows and Doors by Design, dated February 28, 2009, as *Respondent's Exhibit 2*; *Respondent's Exhibit 1* referred to the initial construction which included installation of the triple-pane windows prior to the opening of the establishment). Mr. Gibson presented plans to the counterpart of the Voluntary Agreement for sound proofing of the windows of the establishment. *Tr.* at 61. He did not produce any plans regarding sound proofing of the walls because the parties agreed that the walls did not need sound proofing. *Tr.* at 61. Mr. Gibson has installed a sound proof door near the back hallway of the establishment. *Tr.* at 62. Mr. Gibson has also purchased a decibel meter to monitor the sound coming from the establishment every night. *Tr.* at 63. His discussions with the Protestants (signatories to the Voluntary Agreements) agreed with him that sound proofing of the walls was not necessary in 2007, pre-construction. *Tr.* at 66. However, the Voluntary Agreement does state that the walls shall be sound proofed. *Tr.* at 67. Mr. Gibson agreed that he signed the Voluntary Agreements and that both had provisions requiring sound proofing of the walls. *Tr.* at 71. He further agreed that during the time period relevant to the charges in this matter, there was no sound proofing of the walls. *Tr.* at 72. He has been inside of Mr. Johnson's home and faintly heard music coming from Respondent's establishment, but this was prior to the additional sound proofing of the windows that he did in March 2009. *Tr.* at 75-77. Mr. Gibson believes that the Respondent's establishment has adequate sound proofing per his understanding of the Voluntary Agreements. *Tr.* at 79. He stated that he has ordered additional sound proofing material specifically designed for absorbing bass. *Tr.* at 89-90.

7. The Respondent's next witness was Robert Pittman. *Tr.* at 101. Mr. Pittman lives in the vicinity of the Respondent's establishment. *Tr.* at 102. Mr. Pittman is familiar with the Respondent's establishment and is familiar with the Voluntary Agreements which were entered into at the time the establishment was changing over from the "Cluck-U Chicken" to the current establishment, Twelve. *Tr.* at 103-104. The language in the agreements concerning sound proofing of the interior walls came from a standard agreement that they used previously. *Tr.* at 104. Mr. Pittman stated that the language regarding sound proofing of the walls was overlooked when they were signing the agreement. *Tr.* at 105. He does not believe that these types of walls in the establishment require sound proofing because they are very thick and it was only the windows that were the concern. *Tr.* at 107-108. When the Respondent's establishment first opened, Mr. Pittman could hear sound coming from there and he addressed this with Mr. Gibson. *Tr.* at 110-111. He does not hear sound coming from there anymore and believes Mr. Gibson is responsive to his concerns about sound. *Tr.* at 111-113. There are eight houses that buffer Mr. Pittman's home from the Respondent's establishment. *Tr.* at 115. Mr. Pittman has spoken with other area residents and they do not share the same concern as Mr. Johnson. *Tr.* at 122.

8. The Respondent's next witness was Tracey Kennybrew. *Tr.* at 129. Ms. Kennybrew lives next to Mr. Johnson. *Tr.* at 131. She knows Mr. Gibson as the owner of the previous establishment, "Cluck-U Chicken," and as owner of the current establishment, "Twelve," at the Respondent's location and also knows Mr. Johnson, her neighbor. *Tr.* at 132. She has never heard noise emanating from the Respondent's establishment. *Tr.* at 132-133.

CONCLUSIONS OF LAW

9. The Board has the authority to suspend or revoke the license of a licensee who violates any provision(s) of Title 25 of the D.C. Official Code pursuant to D.C. Official Code § 25-823(1)(2001). Additionally, pursuant to the specific statutes under which the Respondent was charged, the Board is authorized to levy fines. D.C. Code § 25-830 and 23 D.C.M.R. 800, *et seq.*

10. With regards to Charge I, that the Respondent violated the terms of its Voluntary Agreement, in violation of D.C. Code § 25-446(e), by failing to sound proof the walls of the establishment, the Board finds the testimony of Mr. Johnson and Investigator Mitchell to support the fact that music emanating from the Respondent's establishment was audible in Mr. Johnson's private residence. The Board is not swayed by the testimony of Mr. Gibson and Mr. Pittman that the language in the Voluntary Agreements was an "overlooked" template from similar Voluntary Agreements and should not have applied to this building. The Board heavily relies on parties engaging in negotiations regarding the protest of an ABC license and the resultant Voluntary Agreement to reduce their thoughts and intentions to writing and is not now inclined to ignore language therein. If the parties to the Voluntary Agreements wanted that language out because it was inappropriate, they certainly could have done so – and the Board notes that Mr. Gibson had every incentive to seek this change lest he find himself in the exact position he is in at this juncture.

11. There is no contradiction to the testimony of Mr. Johnson and Investigator Mitchell that the music heard inside of Mr. Johnson's home came from the Respondent's establishment. Although Mr. Johnson's neighbor, Ms. Kennybrew, said she could not hear music from the Respondent's establishment at her home, she did not enter Mr. Johnson's home to discount his testimony. Moreover, Mr. Gibson admitted that he did not sound proof the walls of the establishment, as required by the Voluntary Agreements. Accordingly, the record evidence satisfies not only Charge I, that the Respondent violated the terms of the Voluntary Agreement that required him to install sound proofing of the walls, but also satisfies Charge II, that the Respondent's establishment emanated sound that could be heard inside of Mr. Johnson's private residence, in violation of D.C. Code § 25-725.

12. The Board reviewed the invoices submitted by the Respondent and can only wonder why Mr. Gibson did not act sooner knowing these charges were forthcoming. However, the Board does recognize that the Respondent has made significant

expenditures on sound proofing measures. Unfortunately, it has been too little, too late, and though the Board encourages the continued efforts, it does not change the fact that sound proofing measures were not previously taken to comport with the existing Voluntary Agreements and the noise violation law. Mr. Gibson has known for quite some time that sound proofing concerns were more than just the windows, according to the testimony of Investigator Mitchell about her discussions with him. The Board reminds the Respondent that it cannot adjudicate what parties to a Voluntary Agreement *mean*, only what they put in writing, sign, and submit to the Board for approval.

ORDER


Based on the foregoing findings of fact and conclusions of law, the Board finds on this 24th day of June, 2009, that the Respondent, BEG Investments, LLC, t/a Twelve, violated D.C. Code § 25-446(e) by violating the terms of its Voluntary Agreements and violated D.C. Code § 25-725. It is hereby **ORDERED** that Respondent shall:


1. For Charge I, whereby Respondent violated the terms of its Voluntary Agreements, remit a fine in the amount \$250.00, and
2. For Charge II, whereby Respondent's establishment emanated sound that could be heard in other premises, remit a fine in the amount of \$500.00.
3. **The total amount of fines that the Respondent must pay is \$750.00**, and Respondent must make this payment **within 30 days** from the date of this Order.

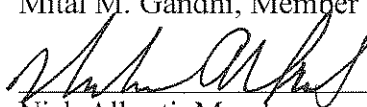
It is **FURTHER ORDERED**:

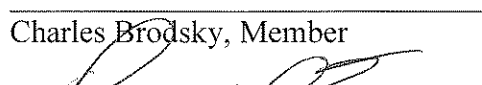
1. That Respondent shall comply with the terms of its existing Voluntary Agreements which require the installation of sound proofing of the interior walls. If Respondent seeks to renegotiate the terms of its Voluntary Agreement, it must do so through the proper channels.
2. Aside from the Voluntary Agreements, Respondent must comply with D.C. Code § 25-725, whereby sound from the establishment cannot be of such intensity that it can be heard in other premises.

District of Columbia
Alcoholic Beverage Control Board



Peter B. Feather, Chairperson


Mital M. Gandhi, Member


Nick Alberti, Member


Charles Brodsky, Member


Donald Brooks, Member


Herman Jones, Member

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 the service of this Order, with the District of Columbia Court of Appeals, 500 Indiana Avenue, N.W., Washington D.C. 20001.

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 (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).