

COMMONWEALTH OF MASSACHUSETTS

CITY OF CAMBRIDGE

IN RE: LICENSE COMMISSION
DECISIONMAKING MEETING

LICENSE COMMISSION BOARD MEMBERS:

Richard V. Scali, Chairman
Robert C. Haas, Police Commissioner

STAFF:

Elizabeth Y. Lint, Executive Officer

- held at -

Michael J. Lombardi Municipal Building
831 Massachusetts Avenue
Basement Conference Room
Cambridge, Massachusetts 02139
Thursday, October 1, 2009
10:20 a.m.

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P R O C E E D I N G S

MR. SCALI: We're ready to begin. I'm sorry for the delay. We were just waiting to see if the Chief or the Deputy Chief was going to be attending and they're not going to be here. We do have a quorum with the Police Commissioner and myself, so we're all set.

MS. LINT: If anybody has a cell phone on, please turn it off.

MR. SCALI: The fire exits are here to the right front and to the back left, and that door stays open at all times for fire exiting purposes unless we're in Executive Session and that's a different situation.

MS. LINT: License Commission Decisionmaking Hearing, Thursday, October 1, 2009. It's 10:20 a.m. We're in the Michael J. Lombardi Municipal Building, 831 Massachusetts Avenue, Basement Conference Room. Before you the Commissioners: Chairman Richard Scali and Commissioner Robert Haas.

MR. SCALI: Motion to accept the minutes from September 22.

MR. HAAS: Motion.

MR. SCALI: Moved and seconded. All in favor?

MR. HAAS: Aye.

MR. SCALI: I know that we have the Law Department here to advise us with regards to Idenix, so I believe that we need to go into Executive Session, Mrs. Lint; is that correct?

MS. LINT: Yes. You need to make a motion.

MR. HAAS: I make a motion that we go into Executive Session for advice from the City Solicitor's Office.

MR. SCALI: Seconded. All in favor?

MR. HAAS: Aye.

MR. SCALI: Aye.

So we'll go off the record.

(Adjourned to Executive Session.)

P R O C E E D I N G S (cont'd):

MR. SCALI: We're going back on the record and come out of Executive Session. Did you already announce our meeting?

MS. LINT: I already did that.

MR. SCALI: We're going to go to decisions from September 8 and September 22. We'll go to the Idenix issue because that's what we were in Executive Session about.

Why don't you all come forward? I think we have a couple of questions for you in terms of your latest memo that you just submitted in terms of realistic things that you really can accomplish and do as part of a way to reduce the noise. I think the original discussion had to do with four units, older units that are up there. How likely is that to happen? How realistic is that that you're going to be doing and changing those units?

You just have to state your name for the record when you come up to speak so that our

stenographer gets you.

MR. FANNING: Paul Fanning.

MR. GILMAN: Chris Gilman.

MR. FANNING: The actual next set of changes or the things that we were going to do was actually going to be more of the curtains around some of the units that don't have anything right now. We have panels and partial curtains, and in a couple of cases, really not much at all. So the thrust of the next effort -- and we've ordered the materials actually because it seems to have worked. What we did do over the last couple of months was putting new curtains.

MR. SCALI: Which is that right here; those additional curtains?

MR. GILMAN: Yeah. Originally we only came down so far because of snow load. And that unit in particular, last winter, we had snow pile up that we had to shovel away from it. What we've done with these is they're just hooked on. In November, when all the compressors and things would not run all winter, we'll drop those down so we're

not piling up snow. And we're looking at some other units that we could do that to, also. We originally had not wanted to do that for obvious reasons.

MR. SCALI: These are kind of removable. If it snows, it's no problem, you can move them up and then dust them off?

MR. GILMAN: Yeah.

MR. SCALI: So that makes it easier for snow removal and you can barricade the noise if need be.

MR. FANNING: It actually was effective, probably more effective than we thought it was.

MR. GILMAN: Even back when we first started putting those on, Andrea would come out and you could just tell walking from one side to the other that it was helping quite a bit, but the sound was coming underneath. So in essence it wasn't doing all it could do.

MR. FANNING: And then there were some other that we just hadn't done it to at all. Or,

like I said, there were some panels on a couple so the thrust really is to finish that.

MR. SCALI: How many more do you have to do? Is it a lot more?

MR. GILMAN: We probably have five or six. There's an opening right now. I don't know if you remember when you came over a year ago looking at it. We have one cluster that we've remediated, another cluster, and there's an opening in the middle. We're going to close off that middle.

MR. FANNING: Our consultants thought that it actually almost would provide like a double wall for one of the louder ones. He suggested kind of enclosing one of the ones that doesn't have much of there now, and then where the opening is, the gap that Chris was just talking about, putting another one. So that would almost provide a bit of a double buffer.

MR. SCALI: And you're still doing that as you speak now?

MR. FANNING: We've already ordered

the materials.

MR. SCALI: What about the four units? I'm not sure if that's the exact number but are those the ones that are like 18 years old?

MR. FANNING: There's one in particular. The RT08, it's the loudest one.

MR. GILMAN: It dominates everything.

MR. FANNING: So that's the one we've really been looking at for potential replacement. and our consultants have indicated that that one would get us something. The models are anywhere from half-a-decibel to a decibel. So one consultant says one decibel, the other consultant said it was half.

MR. SCALI: That's a big thing. That could help you a lot.

MR. FANNING: There were three others but when we were kind of experimenting with them with the consultant it was much less of my a pick up actually than that one. I don't remember, Chris. I don't even know when --

MR. GILMAN: Four-tenths of a decibel.

MR. SCALI: So it's likely that you could replace that one and maybe three others; is that what you're saying?

MR. FANNING: The three others were that old. Are they old? I don't think they're necessarily old; right?

MR. GILMAN: One of the other things I think you're confusing a little bit, Richard, is we've got four or five exhaust fans that we've considered tying into one.

MR. SCALI: That's a separate issue. I remember at the last hearing you mentioned, or Mr. Tocci mentioned that there were four older units up on the roof.

MR. GILMAN: And three of the four are those exhaust fans that we would tie --

MR. SCALI: Those are exhaust fans?

MR. GILMAN: Yes. And we would tie those into one new fan that they could put some frequency drives on and things like that, which would in essence take five fans, quite them down into the one. And we could also relocate that

further back to get it behind some shielding.

MR. SCALI: So that is possible?

MR. FANNING: Yes.

MR. SCALI: I just want to know what's realistic and what's not realistic.

MR. FANNING: And that one actually reduces -- well, because it takes some stacks off the roof. So from an optical, it looks, it probably has that advantage as well.

MR. HAAS: So there's no structural issues with any of this stuff; right, as far as moving equipment around?

MR. GILMAN: Those kinds of things are okay. Like the one big unit, it would actually be replaced so we'd take it in the same structure. The five into one, they're all close enough together that we can use the superstructure that is supporting those now for that. So structurally, we're okay with those things.

MR. FANNING: I think we mentioned this before: we probably would move that over to the other side of the roof as well.

MR. GILMAN: To get some shielding.

MR. FANNING: And actually have the exhaust, for lack of a better word, to go out towards the CDM side.

MR. HAAS: I just remember the conversation we had, I forget when but we talked about the notion that if we were going to put the wall up that the present building would not be able to support a wall. You actually have to build a superstructure around the building.

So I just want to make sure that when you start moving equipment around or you start putting equipment in one place on the roof that you're not putting an undo load in one area as opposed to another, and you find you've got a whole other set of issues, and you come back and say --

MR. GILMAN: We're okay with those. We have gotten completed designed for this 14-foot wall, and probably 90 percent of the cost of it is the superstructure. The wall itself is minimal.

MR. SCALI: I don't know that we're leaning too much toward that big wall.

MR. GILMAN: I was just saying to Bob's point that everything has been structurally looked at so these are all viable options.

MR. PRUSSIA: If I may, Mr. Chairman?

MR. SCALI: Just tell us your name.

MR. PRUSSIA: Kevin Prussia from the Wilmer/Hale Law Firm.

The rationale behind the request for 60 was to allow the company to do these various things. Without that, spending the amount of money it will cost to move something to the other side of the building, to consolidate things into one, considering that it isn't going to gain very much with regards to decibel level, it's sort of a cost without any real guarantees for the company with regards to compliance.

So the thought behind going to 60 is fluctuation in the background levels, which at any point in time can be as low as 50 but as high as upwards of 60, will allow the company to do all these things, to make the effort to you and the community to say we're trying to be a good neighbor

to do what we can with what's under our control, but the variance itself accounts for things that are outside the company's control.

MR. SCALI: I know your argument was that you probably will not get to 60 but possibly you could get to 60, and therefore, you don't want to get caught in a violation if something happens to go to 60. But that was my other question about whether you applied for 57 and now you're applying for 60. I guess you want to make sure that you're safe.

One of the questions we had was in regards to buffer zones and what that means. We were kind of questioning as to what that meant. I think we realize now that in the zone you are in it's an office zone that allows 65 decibels, but you're abutting or buffer zoning next to a residential, which is 60 during the day and 50 at night. So you're at 65 and they're at 50, and I guess your argument is we'll meet 60 as a compromise I guess is what your argument is.

MR. PRUSSIA: Right, and even one

block over you have these several buildings that emit at 70 all the time, regardless of what time of day.

MR. GILMAN: Industrial zones which under the ordinance they can emit at 70, 24 hours a day as of right. So as we all know in this one magical block it doesn't go from 70 all the way down to 50; there's something in between that has to be taken into account. That's what our point was in regard to the buffer zone.

MR. SCALI: We get that.

MR. HAAS: The issue that I'm still kind of troubled by is the representation that you are not able to completely isolate your noise levels from the ambient noise around you, which puts the Commission, and I think it also puts you in somewhat of a bind with respect to if in fact something happens in that area or the industrial zone behind you, how do we separate that out if you can't do that in the first place?

So I'm really struggling with that issue altogether, and I'm just trying to figure out

a way that we can establish some kind of baseline if we're going to entertain your petition for a special variance, that we can in fact hold you to that noise level. That is one of many issues that are still unresolved in my mind and I'm thinking a lot about.

I think in some respects you see yourself up for being the poster child for that whole area every time the noise goes up, because you're now pegged as being within that buffer zone. You've established yourself and drawn a line in the sand saying we're going to stay at 60 or below and then something happens. Then how do we point back to Idenix and say that's your responsibility, or it's someplace else?

That's an issue I'm really having a lot of problems with. I'm still very much thinking about the hardship issues and balancing that. It's extremely problematic for me. As I said before, and I told the Chairman, I'm thinking a lot about that and trying to figure out how you balance that.

MR. PRUSSIA: If I may?

MR. HAAS: Yes.

MR. PRUSSIA: Two quick points to address that. Our application was presented in a manner in which the Commission has taken its measurements before. There is a way through modeling to measure what precisely Idenix is responsible for. We've done that through our experts. So there is a way to do that. I think it would impose some expense on the part of the Commission in order to employ these sophisticated tools in which you can model out what an individual is emitting, as opposed to what someone reads on the street as Ms. Boyer is.

Number two, and I think as we pointed out in our most recent memos, other ways in which this can be done is to ping something to ambient level so as to say as under the Mass. DEP policy interpretation, plus or minus 10 decibel levels over ambient. So if we know what ambient is, and if you're within 10 of that then you're okay. That's what the Mass. DEP says.

We're not going that far. Our number

is lower than that. We thought that it would be more beneficial to have a fixed number out there as a show of good faith than to have a fluctuating number that depends on time of night, weather, so on and so forth, as a plus or minus 10 DBA does.

To address your concern you could go to a step like that which says at any point in time, if you are with 10 of ambient in the area then you're within compliance.

MR. HAAS: As I understood the discussion from the acoustic engineers is that the problem you're having is distinguishing Idenix' contribution to the noise level and the ambient noise. They're having a hard time taking it apart and being able to really point to saying that Idenix is responsible for so much noise in the area. And this is a moving target.

MR. PRUSSIA: It is.

MR. HAAS: You can't control for what's going to go on around you as well. It's really not a simple matter. I understand what you're saying.

MR. WEIDENBRUCK: Mr. Chairman, John Weidenbruck, also with Idenix.

As Mr. Prussia mentioned, there is a way to get to that, that our engineers are comfortable with, but again, it's an algorithm, a reverse algorithm. So that if the meter reads X, there's a way to reverse back into it to figure out coming from us. Again, it's never going to be precise because of all the other buildings there, but by isolating ambient there is a way to determine what we are emitting. So having the standard be the emission standard as opposed to the reading, that requires buying into from the Commission's standpoint, the algorithm that our acoustical engineers have used.

MR. SCALI: I know at the last hearing you mentioned there's no intention to do any more expanding. I know I really can't hold you to that; we don't have the authority to do that.

MR. GILMAN: You have our word, nothing new is going to go on that roof. That's it.

MR. FANNING: From our standpoint -- MetLife being the owner, so to reinforce that -- as far as we're concerned, our laboratory needs have been satisfied.

MR. GILMAN: Then also given the last two-and-a-half years of this particular issue, it would be silly on our part to add something to the problem. So we're committed to not adding anything new up there outside of changing old for new equipment and that kind of thing.

MR. WEIDENBRUCK: I think it's also important to understand the history of the company in terms of growth or lack of growth. In the last two years, we have gone from a company of 300 worldwide to now a company of 150. We have recently laid off some employees over in Italy and our -- that trend is not changing. We do not envision any growth within the company, and in fact, it could be the exact opposite. There could be further reductions based upon where the company is and is going. At this point, we have no plans to enhance anything in that building.

MR. SCALI: Any questions?

MR. HAAS: No other questions.

MR. SCALI: I know that I'm not prepared to make a decision today, Commissioner. I think that the Fire Department, particularly the Chief and the Deputy Chief would like more time to review your memo and review some other ideas that we have as well. So I don't think we're prepared to vote today. I guess the suggestion would be that we take another four weeks or so to decide or to review.

MR. HAAS: We've gotten a lot of material over the last two years. I need to go back and go through that material again. I need to digest this memo and there's still some inherent issues that I'm kind of grappling with that I haven't resolved for myself either.

MR. GILMAN: Would it help for a site visit to see what we're proposing?

MR. SCALI: I don't know that that would help me in particular because I think you really have to be an engineer to kind of figure out

what that means. I think we're depending on the experts that are telling us what that means.

I think it's more in terms of what's realistic that's going to happen, and then how does that affect both parties, the residential versus your business; and we're going to make sure that we consider everybody's point of view, and whether or not that means conditions or no conditions, or what that entails I guess is the big issue for us, and how that will affect both sides.

MR. WEIDENBRUCK: We're also happy to make available our experts if that would be helpful to you to provide you further information and anything else that he provides for us for clarification. Granted, there has been a lot of information in the last couple of years. If there is any further information, we'd be happy to provide that to you.

MR. HAAS: I guess the issue for us, and again, we're not experts so whatever methodology we're going to agree upon that is going to be the standard for measuring any potential

future violations, I mean, I wouldn't be able to --

MR. SCALI: We have to depend on what the experts tell us that would be the case.

I know Ms. Boyer has a relationship with Cavanaugh/Tocci, and she knows their operation very well. I know if we have Mrs. Lint perhaps meet with you or your expert with Ms. Boyer, they can come up with the answer to some of our questions in the meantime.

MR. HAAS: I guess my final question is that everything you've represented in this memo dated September 30, you're comfortable with and you can stand by?

MR. FANNING: Yes.

MR. WEIDENBRUCK: That is correct.

MR. SCALI: Mr. Lindquist.

MR. LINDQUIST: Just two quick things. One, this application I understand has been filed by Idenix. If a variance were granted, would the variance be to the company and the operations of the company, or to the building?

MR. SCALI: We'll let Mrs. Lint take

that question.

MS. LINT: It runs strictly to the company. It does not run to the building. So that if they left, it's gone. There is no grandfather.

MR. LINDQUIST: That was question number one. Question number two: It was my understanding that after the last hearing nothing else could be filed. Would you accept a rebuttal to their report?

MR. SCALI: Yes.

MR. LINDQUIST: Because I have some very serious concerns about many parts of that.

MR. SCALI: These are in answer to the questions that we gave them that evening. You certainly can respond to that in writing. Just make sure that they get -- that everyone gets a copy of that. We'll get a copy to Idenix as well.

MR. LINDQUIST: Thank you very much.

MR. HAAS: I make a motion that we continue this matter until our next Decision hearing, which would be --

MR. SCALI: November 5 is our next

Decisionmaking meeting at 10:00 a.m. Motion is moved. I second it. All in favor?

MR. HAAS: Aye.

MR. SCALI: So November 5, Thursday, here at 10:00 a.m. either for decision or further discussion I guess. Hopefully we'll have a decision at the point for you as to what the future will hold. Thank you all very much. See you November 5.

MR. SCALI: Sticking with the
September 8, Mrs. Lint.

MS. LINT: 120 Realty Trust.

MR. SCALI: Anyone here for that
matter?

MR. RAFFERTY: Yes.

MR. SCALI: This is with regards to
the noise violation.

MR. RAFFERTY: The noise that almost
happened. Remember the neighbor called, the police
came, and then nothing ever got started. That's
the case.

MS. LINT: They were taking the --

MR. RAFFERTY: It's an inchoate crime
as we were talking about. How do you pronounce
that word?

MS. LINT: Inchoate.

MR. SCALI: Four attorneys in the room
and no one knows how to say the word. Oh, one
person.

MS. LINT: I knew.

MR. RAFFERTY: She was a prosecutor.

It's a criminal concept. We don't deal with that in the real estate side. It's like you were about to do something but you never got the chance to do it.

MR. SCALI: So from the record there was allegedly a violation on August 12 at 6:45. The police responded and talked to workers.

MR. RAFFERTY: No, no. We got noticed on a Sunday violation. That's all the hearing is about.

MR. HAAS: The truck that came in to move the equipment.

MR. RAFFERTY: He arrived in his truck, he was going to take the concrete forms -- a hardworking man -- and take them to another job, but before he could lift them, he called the police and they had a conversation. He said you know what, I don't want any trouble, I'll leave. So even the neighbor admitted he never moved the forms, and we acknowledge he had every intention of it but the neighbor intervened.

MR. SCALI: Just in time.

MR. RAFFERTY: That was fortuitous. I think it was a win-win for everyone.

MR. HAAS: Is there a way -- I mean because this is going to continue I think.

MR. RAFFERTY: No, this isn't going to continue. I can assure you this isn't going to continue.

MR. SCALI: It's not going to continue?

MR. RAFFERTY: It is not going to continue.

MR. HAAS: I guess that's my question. Is there a way to make sure that we don't find -- again, because of subcontractor issues and things like that. I appreciate all that; that sometimes you can't control that. So how do we control it? How do we make sure that we don't have prior-to hours allowed, or after-hours allowed, or during the course of the weekend, we don't find ourselves in this situation? I think we're all aware of the fact that the neighbors are at their wits end at this point in time.

MR. RAFFERTY: Well, at that moment there is no activity going on and there is no indication that that is going to change anytime soon.

MR. SCALI: Has construction stopped temporarily?

MR. RAFFERTY: Mr. Green is missing, big time, as in --

MR. SCALI: So there's some operational issues going on there.

MR. RAFFERTY: The reason I can say with high confidence that there will be no noise violation is probably within a week after this incident, there has been no activity. Hopefully at some point in the future that will change, but frankly, this has the sense that it's slipping away at the moment unfortunately. There's two buildings not yet completed.

The lender was at ISD yesterday looking at documentation. It would appear that they are about to do something here.

But as to the bigger issue, in

fairness to the guy, it was a subcontractor picking up concrete forms who worked for the contractor. I called him the next day, he had a hands-on-deck meeting with everyone and said no one is getting paid if I hear any more -- he went around and around.

The irony here is that there is such scant activity going on that they would choose to then do it when they couldn't because it's a very quiet construction site 98 percent of the time. So when they finally do chose to do a little work, they have to do in hours when it can't be done. But he's really driven that point home.

This was a subcontractor of the contractor going to pick up forms which he believed didn't constitute work, and thus didn't trip over he -- Most of the contractors are more familiar with the building code restriction on Sunday construction activity. They're not particularly familiar with the local noise ordinance.

He knew he couldn't do work but he claims that in other jurisdictions if he has a job

starting on Monday, this particular subcontractor's practice is to pick up the forms, load them on a truck on a Sunday so he can arrive to his new job on Monday with his forms in place. He doesn't cart them -- so he was intending to do that but he never did it.

MR. SCALI: Just so I'm clear, who hired you? Is it the realty trust that hired you?

MR. RAFFERTY: Yes.

MR. SCALI: Not the owner of the --

MR. RAFFERTY: The realty trust is the owner of the property.

MR. SCALI: You had said "the ownership," and I wasn't quite sure whether it was a management company, or whether it was the owner, or whether it was the construction people.

MR. RAFFERTY: No. It's owned by the realty trust, and the realty trust hired me. The realty trust has a contract with a contractor who is doing the job. This particular incident involved a concrete subcontractor who arrived on a Sunday with his truck with the intention of

removing these forms, which he didn't understand constitute a violation of the Sunday work.

In fairness, the police arrived and I don't think there was any contradiction. When he had the conversation he said, you know what, I'll leave. I don't want any trouble. So he never lifted a single form, never moved one. What the guy heard was the truck. The neighbor heard the truck, he came out and called the police right away, which was probably a smart thing to do.

MR. SCALI: Questions?

MR. HAAS: I guess the problem that's going to happen is at some point, I would imagine the project is going to start up again.

MR. RAFFERTY: I hope so.

MR. HAAS: That's where I think we're going to run into another problem because then there's been a period of time where there's been no activity and then you have contractors coming back on the site. I just want to make sure there is something in place that we don't find ourselves in a situation where we have to start all over again

because we've had this hiatus, and all of a sudden, now you've got to start up again and then we'll have to go through these growing pains when they start to ramp back up again.

MR. RAFFERTY: I do believe that the contractor, it really -- I know the way the ordinance reads, it's whoever causes the noise and under the theory of liability he's responsible for his contractor -- this is two steps removed -- doesn't inoculate him, but I would say that any -- I mean the person that's really at risk on the Sunday violation is the contractor because it's a violation of his - and the building permit is pulled under his license. I would say we could live with the condition that's before any work resumes, we provide evidence from the contract that he understands the rules and he'll be responsible if this doesn't happen.

MR. HAAS: Who would he meet with to first give us notice that they're going to start up the construction again?

MR. RAFFERTY: At the moment -- I

shouldn't get too ahead - at the moment, he has a valid building permit and the contractor still is in place but there are funding challenges with the lender. There are a couple of options: the lender could step in, which I suspect because it's so far along. The more likely scenario is that the lender would turn to the contractor and deal directly with the contractor and finish the project.

MR. SCALI: Are you saying what City department would meet with them; ISD or us?

MR. HAAS: I'm just making sure that we're clear about the ground rules when the construction resumes again so that we don't -

MS. LINT: They should notify all of us.

MR. SCALI: I guess a mechanism to notify when that will start up again and that they understand the conditions.

MR. RAFFERTY: In theory, they could work tomorrow. I'm not representing him.

MR. SCALI: That's fine. Just notifying us and ISD that that will happen and that

they understand the rules, the noise rules.

MR. RAFFERTY: I would say that we could definitely get from the contractor that he understands and will instruct all his subs. If you want to require a communication from the landowner and the contractor that they understand, and before work returns, they understand the work hours.

MR. SCALI: And the noise ordinance.

MR. RAFFERTY: In fairness to this particular guy, I don't think he ever communicated to the contractor his intention to arrive on Sunday to get his forms. So he wasn't aware of it. He knew he couldn't work on Sunday, he just didn't believe this represented work.

MR. SCALI: Pleasure of the Commission? I guess place on file with the understanding that they notify us and the ISD department when they do resume work; that they understand the noise ordinance.

MR. HAAS: I just want to make sure that we get some assurances that there is some oversight that's taking place to make sure we don't

have any more violations on the construction site, and then if there in fact is a violation then it's not a situation where I didn't know the contractor was coming.

MR. RAFFERTY: If you required the owner to produce correspondence for both himself and his contractor that they are. This was a close call had it not been for the intervention of the neighbor. Presumably there could have been a finding that would have been adverse. We could produce the communication so that in the future no one could say they didn't have an understanding of the rules.

MR. SCALI: So I'll amend the motion. Motion to place the matter on file with the understanding or condition that the owner along with notifying the License Commission and the ISD department that they have communicated with the contractor and subcontractors; that they understand that noise ordinance and the dates and times that they can work, load, unload; and that that be communicated in writing to us.

MR. RAFFERTY: In writing.

MR. HAAS: Second.

MR. SCALI: Moved, seconded. All in
favor?

MR. HAAS: Aye.

MR. RAFFERTY: Thank you very much.

MR. HAAS: I'm just trying to figure out on President and Fellows of Harvard College, under advisement.

MS. LINT: That's on October 6.

MR. HAAS: What about Sunshine Transportation?

MR. SCALI: We voted that on the 22nd. They came in again.

MR. HAAS: Okay.

MR. SCALI: And then Avis is coming in October 6. We already voted Bon Appetite.

So September 22, we have to decide Middlesex, Vail Court, and Hotel Veritas.

MS. LINT: I have a note on C'est Bon about the pledge. It's on the last page.

MR. SCALI: We'll take that one at the end. That was continued until today, that's right.

Vail Court, good morning.

MS. JALLAD: Good morning.

MR. SCALI: Here's the situation as we talked about last time at our other hearing: There's still the issue with Zoning and with

Traffic and Parking. I know that the Commission asked Mrs. Lint to refer that to the Law Department for them to review your attorney's memo on those positions.

So that means there really isn't much for us to do at this point until we get an opinion back from the City Solicitor on those items. We can't override Zoning, we can't override Traffic and Parking. If they come back to us and say yes, indeed, she's grandfathered and we're willing to go ahead with Zoning, we're willing to go ahead with the parking plan under Traffic and Parking, then we can consider your license at that point.

I guess the only issue for us, Commissioner, is under our license, do we then say that she continues to operate as is until those matters are resolved to our satisfaction?

MR. HAAS: From my perspective I would want to know what the City Solicitor's position is with respect to what your attorney presented as an argument, and then be guided by the City Solicitor's opinion.

MS. JALLARD: I really promise next year we will have the new building.

MR. HAAS: I just want to caution you that we might not be able to go that far.

MS. JALLAD: I want to see it as long as I am alive, and I want to see it for my brothers and I want to take one apartment in it. This is what I look for.

MR. HAAS: I understand. I just don't want to create any false hopes. For the sake of argument, let's say the City Solicitor totally disagrees with your attorney's position, then it's going to put us back in a situation where we're going to need to make a decision. We haven't gotten there yet, but I don't want you believing that everything is all set until we hear back from the City Solicitor.

MS. JALLARD: Let me tell you something, if there is no parking now and there is no residents, nobody will be much more in the area which is around us and that will affect the society. This is my opinion, because several times

I call the police for people who come to other people. I don't go out at night so I look normal at the parking when I was there. So whenever I see nobody I just call the police when I was there. When there is parking they call me at once if there is something wrong. So just consider this, too.

MR. SCALI: There's no argument that parking is needed in the City of Cambridge, and people are looking for spaces. If we were talking about need, we wouldn't even be here. It's really just more about legality as to what's allowed and what's not allowed under the regulations.

I would just make a motion, Commissioner, that we continue this matter until we hear back from the City Solicitor with regards to your attorney's memo, and then we'll take it back up on our agenda at that point; and that nothing change at this point then until that happens. So that's a motion.

MS. JALLARD: This is good. At least you'll think about it. This is lovely. Thank you very much.

MR. SCALI: Moved.

MR. HAAS: Second.

MR. SCALI: Moved and second. All in favor?

MR. HAAS: Aye.

MR. SCALI: Mrs. Lint will notify you when she hears back from the City Solicitor. I'm not sure how long that will take. Then we'll put it back on the agenda for you at that point.

MS. JALLARD: That's excellent. Thank you.

MR. SCALI: Let's go to Hotel Veritas.
Mr. Tocchio is here.

MR. TOCCHIO: Good morning.

MR. SCALI: Thank you for waiting
patiently.

MR. TOCCHIO: I understand I'm here
just to answer any questions, if you folks have
any.

MR. HAAS: I've got notes that say we
had three remaining issues that we're going to
hopefully get resolved today. SO I just want to
make sure that we get those resolved.

MR. SCALI: There was a memo that you
submitted to us and to Mrs. Lint, and I think the
Commissioner saw that. Did you see the memo?

MR. HAAS: I did see it.

MR. SCALI: There are three concerns.
One is the common patio up on the third-floor which
faces or abuts the resident in the back. You
clarified in your memo here that there are eight
seats and two standing.

MR. TOCCHIO: Yes.

MR. SCALI: Is that really a realistic number? Only two people are going to be standing up there at any one time?

MR. TOCCHIO: What we'd like to do is we'd like just to limit it to eight seats. We think that ten is a realistic number. We don't want to give you an overly high number and shoot for that.

What we understood from the last meeting was that you folks wanted some assurances that this was going to be tightly controlled, and that's why we're so specific on the numbers. If we've got the eight which are seated, the two others, we think given the size it's nice. We don't want to be in the situation where somebody goes up and there are eight seats and there are two people standing, and somebody says, listen, you've exceeded the occupancy.

With the neighbor they were talking about can we call -- you know, we're not anticipating this is going to be a problem but if it's something that becomes a little bit of you

know, I'm going to show you, et cetera, we just want to make sure that we give you some solid numbers that we know we can stick to.

MR. SCALI: I agree that that's a good way to handle it. I'm just wondering whether someone -- four people wander out there and are standing up there, as opposed to two, and how specific are we getting with all these numbers? You can fit comfortably eight seats up there without it looking like a vast wasteland of space?

MR. TOCCHIO: Yes.

MR. SCALI: Is that a reasonable number that people will --

MR. TOCCHIO: That's a reasonable number. We're going to have planters and things like that.

MR. SCALI: So it won't be like open, like a lot of open space where people could come out and say, "Oh, I'm looking for a seat"?

MR. TOCCHIO: No.

MR. SCALI: You can just fit that?

MR. TOCCHIO: Yeah.

MR. SCALI: Because people are going to be out on the -- come down the hallway, and look out the door and see a beautiful day, and they see eight seats taken. Then they come out and they want to stand. So I just want to make sure that's a real number.

MR. TOCCHIO: Yeah, it's a real number. We really don't expect a lot of usage there because it is limited to the hotel. Some rooms do have decks and it's the intent that the folks that don't say it's a nice night, I'm going to see what it's like out. They're not going to have to go and walk outside onto Mass. Avenue to find out. They can just go out on this deck.

MR. SCALI: The other question had to do with the patio on the street level, which was 16 seats; am I right?

MR. TOCCHIO: Yes.

MR. SCALI: Is that tables, and 16 chairs with eight tables, or eight table with --

MR. TOCCHIO: The plans that you folks have show four tables with four seats each.

Earlier iterations that we had show three. It's going to be somewhere -- we're anticipating three to four seats. There isn't room really for anything more. We're going to a small point-of-sale little register next to the door so if someone is out there and they order something, we've got that terminal. We're not even going to have like a real waitstaff that's necessarily out there. It's more just going to be service out of the lobby.

MR. SCALI: So people will buy their drink or whatever it is and they'll carry it out themselves to the patio?

MR. TOCCHIO: That's - well, two scenarios. What we think is going to be the vast majority is people are going to go in, in the morning -- we're going to have a coffee service - grab a coffee, go out and read the paper, be on their laptop. Once the alcoholic beverage window opens it could either be that the person would get up, go into the front desk where the beverages are actually locked up, and ask for a drink, or depending on how many people are out there, we

could have somebody go out and say, "May I get you a drink? What's your room number"?

MR. SCALI: So it's not like a formal menu type of thing where people come out and there's waitstaff? You would casually sit out there and read your paper.

MR. TOCCHIO: Correct, but there is a menu which was supplied to you folks. It's got like a cheese plate, a cold-cut type plate. SO it's going to be flexible depending on how many people are actually on that shift. Our vision is that folks that are staying at the hotel, it's a nice day, they get to go outside, have a drink, read the newspaper, talk to some folks.

MR. SCALI: And you're going to adhere to the noise ordinance, making sure that people are not loud or playing music out there?

MR. TOCCHIO: Yes.

MR. SCALI: Making sure that your staff or the security understand that you can't have noise out on the patio.

MR. TOCCHIO: Absolutely, 50 decibels

50 feet. We understand that.

MR. SCALI: That's on both, up and down.

MR. TOCCHIO: Yes.

MR. SCALI: The hours of operation?

MR. TOCCHIO: Hours of operation proposed for just operation: We've got the common patios from 6:00 to 11:00, and then the alcoholic beverage service would be from 11:00 to 11:00.

MR. SCALI: So patios from 6:00 to 11:00, and 11:00 to 11:00 on the alcohol.

MR. TOCCHIO: Right.

MR. SCALI: Plus inside would be until 2:00.

MR. TOCCHIO: Yes. May I ask a question?

MR. SCALI: Yes.

MR. TOCCHIO: On the room service, if somebody calls at 2:05 and says, "Could you send up a beverage," is it subject to the 2:00?

MR. SCALI: Yes.

MS. LINT: That's State law; no

alcohol sales.

MR. SCALI: No alcohol between 2:00 and 8:00 a.m.

MR. TOCCHIO: Okay, excellent. I just know that question would be asked and I didn't know the answer.

MR. SCALI: Food would be allowed but no alcohol.

The other question had to do with abutters and notifying abutters. You have a list of abutters?

MR. TOCCHIO: Yes.

MR. SCALI: I guess you have submitted an electronic version.

MS. LINT: We have hundreds of abutter notifications.

MR. SCALI: So abutters were notified?

MR. TOCCHIO: And you have more coming.

MR. LINT: I heard that.

MR. TOCCHIO: I didn't go by my office to pick up the green cards but they're in the mail.

Our folks are trained to get all the notifications in.

What we've done is we purchased an electronic version of your official abutters notification. That allows us to put together a mail merge. I reviewed it as of last week. It's not out yet because we haven't finished the mail merge, but Mr. Willis put together an introduction letter himself explaining what our timing is, explaining that we do have a website, and he also provided his number if people don't have web access, you know. Please give me a call and we'll arrange to get some of the information over to those folks.

MR. SCALI: Those people that were here, your direct abutter, she was notified? She got her abutter notification?

MR. TOCCHIO: Absolutely, yes.

MR. SCALI: I wasn't quite sure what she was referring to; that she didn't get notice or did get notice. But I guess she did.

MS. LINT: I know Jenny Nathans had

called and said she hadn't gotten notice but it's because she doesn't live at that property anymore, even though she owns it. So it went round and round and round, and she did finally get it.

MR. SCALI: I went to the assessed owner which is I guess not her.

MS. LINT: It is her, but she doesn't live there. So everything gets forwarded until it caught up with her.

MR. SCALI: I guess the last item is with regard to your direct abutter, Ms. Von Stiger. I thought from her testimony that somehow she didn't have any communication with you at all, and she had all these issues that she hadn't negotiated with you. Then come to find out I see from your memo and e-mails and other things that there's quite a long list of things that you've already conceded to and given her, and I guess I was surprised at that.

MR. TOCCHIO: The looks on our team were wild-eyed that evening.

MR. SCALI: You all looked so calm and

cool. I didn't know anyone even flinched.

MR. TOCCHIO: My clients' instructions were that we weren't going to get into a situation where he said, she said. We figured obviously you'd hear her version, what we said there at the meeting, and we would have plenty of time to respond.

Our people see her regularly. They're almost like personal contractors of hers. I've given you only a partial list of what's in our abutters agreement. We've done numerous other things because our people are there and because they've asked.

The home is comprised of two Condominiums. There is Mr. Obo Lee and Ms. Von Stiger there. Mr. Obo Lee has been a beneficiary of a lot of this but he's just a wonderful gentleman. He asks us to address things. We responded that we would put the arborvitae up, et cetera. He's a pleasure to work with.

Ms. Von Stiger, it's almost a situation where she's used this to really leverage

a lot of property improvements. Going forward, you notice that she's asking for things like deeded parking space, use of rooms, but they're things that aren't related to mitigation and things that we're charged with providing. We hope - I own a house and if I can improve it as part of something, that's wonderful. But at a certain point, we just need to draw the line where if she's asking for something which is going to modify sound, make the neighborhood better, by all means.

Part of our motivation was because we would like to have an abutting property which looks really great.

MR. SCALI: And she's right there, her driveway. I went by there a number of times and her garage is right there abutting. I understand all the issues about her driveway and her front porch and all that. I'm not sure about the wood shed and all the other things you agreed to but I guess you've done a great deal of negotiating with her already. So I fully understand.

This is all in writing you have with

her; a written agreement you have with her?

MR. TOCCHIO: Yes.

MR. SCALI: So there is proof that that does exist if we should so need it in the future?

MR. TOCCHIO: Absolutely.

MR. SCALI: I guess I'd want to make sure that we just not take this for granted.

MR. TOCCHIO: If you would like I could definitely provide that. I'll just put it in the mail when I get back. Believe me, I didn't type all this up. This is a nice cut and paste.

MR. SCALI: Does the Commissioner wish a copy of that? I don't think we need proof of that. Do you need proof of that agreement with the abutting resident?

MR. TOCCHIO: If you want to have Ms. Lint give me a call -

MR. SCALI: I guess for the record it would be helpful to have.

MR. HAAS: Again, because I think at some point in time if something should ever come up

again. Basically I think you've demonstrated that you've tried to work in good faith with the neighborhood. You've notified them; you've tried to maintain communications with them. It all speaks well of your intent to be a good neighbor so I think it would be good to have that in the file.

It occurred over and over again, and I think Mr. Chairman, you actually asked the question about the 10:00 as opposed to 11:00. I think the other thing you stated was sometimes what we like to try to do is start with an earlier time, gauge it, and then revisit it again. So I see in your memo, you're proposing 11:00 again. I'm just trying to figure out if it would make more sense to mitigate some of the concerns of the people who were here to start at 10:00, see how that plays out. If it really becomes an issue in terms of your clientele wanting to spend an extra hour on the porch and things like that, then I don't think it's going to be a complicated matter providing there were no other issues.

MR. TOCCHIO: You mentioned that last

time and we discussed it after the meeting. I understand the way of granting smaller, and then if there's the need, to expand.

What we're dealing with in this situation is we believe it's so diminimous, so under the radar, so passive a use that we believe that if you folks listen to the totality of what we're proposing and say, all right, we like the concept, we like management, we think they're responsible. Let's give them the 11:00, and then if it's a problem, let's pull it down.

What's going to happen is it's not a money generator up there. If we tell the people it's 11:00, it's 10:00, people aren't going to complain because we're going to have business travelers and they're just going to say, it so nice. It would have been nice to be out there. It's not a big driver for us. I really can't see us coming in, taking the time, spending the money to say we really need that extra hour, because what's going to happen is people are just going to be docile and say, oh well, it's only 10:00. But I

think visitor after visitor is going to say, it's so nice, it's so quiet out there. Why couldn't we have just been out there until 11:00? It's unfortunate.

So I guess that's the best way that I can characterize it and say if there's a problem, then by all means, we - we kind of laid it on the line and said it's going to be very mellow, very controlled, just a very professional crowd just based on the demographics.

Our entire bet -- and in this economy a lot of people look and say who is building anything -- our entire bet is that we're going to be able to get visiting professors, folks who are going to be speaking at the business school or at the school, and the way that we're going to get our room rates is this place is just going to be knock-out beautiful and extremely high-end. So that's our bet.

So what we ask is if we can do the 11:00 and try to prove that on the front side, that would be something that if there is a problem, call

us on in.

MR. SCALI: It's always harder to take away than to give you know. That's our philosophy.

MR. TOCCHIO: Understood, but unlike probably most of the other places that you deal with, you saw my group here. This isn't going to be a group that's going to come in fighting, saying we have to have 11:00.

MR. SCALI: It may not be 11:00. You may want 12:00 or 1:00, which probably would be not unreasonable, because most of our patios are 12:00 or 1:00, not abutting residential property.

MR. TOCCHIO: We won't have that incentive. It's not going to be, "Mr. Chairman, we have to do this." It's just such an understated amenity particularly if we've got people from Europe where things stay open all night to say, "Come on folks, grab your cocktails, it's 10:00." On some level people say what, it's 10:00. The 11:00 we think is a decent compromise.

MR. HAAS: I guess it was clear to me that it was pretty much undecided. You know, well

maybe we'll do 11:00. But then the other thing that struck me was - if anything was kind of a repeating theme, maybe granted it was only three or four people, but all of them kind said they thought 10:00 was a more reasonable time. I'm just trying to figure out if it makes sense for you all to demonstrate good faith. I don't know how pervasive it is in the neighborhood. Is it just those four people, or is it a larger concern? It's hard for us to gauge.

MR. TOCCHIO: One of the four people was against alcoholic stimulus 100 percent. I think there were hundreds and hundreds -- our certified mailing I think approached \$2,000 in costs. We gave you letters in support, et cetera. What I'd ask is if you folks can go with the 11:00. If there's a problem -- truly I don't see a problem really, if it's that important to go to the 10:00.

The reason when we came in if we seemed like we were unsure, our instructions to the folks were this isn't a revenue driver for us. This isn't something that's driving this business.

This is a nice extra nice amenity. And if you folks said there's no way you're going to -- it's 10:00 o'clock, that's it. Then our instructions were to say okay, thank you. To the extent that you folks see where we're coming from and 11:00 is possible, it's important.

MR. SCALI: What we can do is what we do many times, Commissioner: we set up an automatic review like in six months so it wouldn't cause you to have any kind of application process. It would just automatically come up for a review. So we can go either way. Make it 10:00 and come back and review it for 11:00 in six months, or make it 11:00 and review it. I'm not leaning one way or the other.

MR. HAAS: I'm not.

MR. SCALI: Whatever you'd prefer, Commission. I'm okay with 11:00. I know we did tell the neighbors at the meeting - I think they assume we were leaning towards 10:00. I understand where you're coming from.

MR. HAAS: I think the indecision was

where we were waffling. I'm okay with 11:00 with a six-month review stipulation. I think that's fine.

MR. SCALI: When are you planning on opening?

MR. TOCCHIO: January.

MR. SCALI: Nobody is going to be outside.

MR. TOCCHIO: It's silent out there.

MR. HAAS: In June you'll get to --

MR. SCALI: Actually April, May, June, you'll be using the patio by then.

MR. TOCCHIO: Right.

MR. SCALI: Any other questions?

MR. HAAS: No other questions.

MS. LINT: I have an issue.

MR. SCALI: Yes.

MS. LINT: I received a copy of the pledge. It was mentioned at the original hearing but it has not been advertised.

MR. SCALI: This is the pledge for the loan on the construction of the building itself?

MR. TOCCHIO: Yes. We thought --

MR. SCALI: Pledge does not require advertisement under the ABCC. Under our own local rules, we would require an advertisement.

MR. TOCCHIO: We did say at the open hearing that it was pledged, et cetera, and that will be part of our ABCC package going forward.

MR. SCALI: Who was it?

MR. TOCCHIO: Peoples Federal Savings.

MR. SCALI: The loan is just for the construction? I mean the pledge.

MR. TOCCHIO: It's a construction loan, a substantial construction loan.

MR. SCALI: Do you have any feeling on the pledge issue, Commissioner?

MR. HAAS: I'll rely upon your opinion.

MR. SCALI: Motion then to approve with the following conditions: One, that the third-floor common patio be a total of 10, combining seats and standing; that the first-floor patio be a total of 16 seats and standing; that the management monitor such patios for noise and

service, obviously; that the hours of operation for the patio be 6:00 a.m. to 11:00 p.m. for food, or just common use, and 11:00 to 11:00 for alcohol; and that we also receive a copy of the abutter agreement; and that the pledge be included in the approval as well. Discussion?

MR. HAAS: And then just the six-month review.

MR. SCALI: Six-month review as well.

MS. LINT: 21-Proof?

MR. SCALI: Yes. Also all new licensees in the City are required to go through our 21-Proof training, which is like a TIPS training, but much better. It's Cambridge oriented which requires management and all staff. They will do it on premises for you when you're ready to operate. They'll come out and do it right there at the hotel. You can do it in staggered shifts or on different days. It's very very amenable to your client's schedule.

MR. TOCCHIO: Excellent.

MR. SCALI: That's moved.

MR. HAAS: Second.

MR. SCALI: All in favor?

MR. HAAS: Aye.

MR. TOCCHIO: Thank you very much.

The six-month review will be based on which --

MS. LINT: From when you open.

MR. SCALI: Six months from opening.

MR. HAAS: So June or July probably.

MR. TOCCHIO: Thank you so much. It has been a pleasure working with you folks.

MR. SCALI: Middlesex with regards to the violation allegedly from June 28.

MS. LINT: They submitted a letter to me after the hearing, which I can summarize for you. What they understood was that the issues were that they failed to notify the police when a fight took place outside, failing to assist patrons in distress, and serving an intoxicated person.

His answer is that they did call the police, and I do have a copy of their cell phone records if you would like to see that. They also state that the door attendant did attempt to help the injured individual but his friends helped them all scurry away when they heard the police were on the way. According to responding officer, the only person who seemed intoxicated was the injured individual. If you recall, Chris Lutes asked the if that maybe it could have been explained by the fact that he had been punched in the head and was bleeding from the mouth. The officer said yes. However, that doesn't account for the odor of alcohol.

MR. SCALI: The odor of alcohol from the injured party?

MS. LINT: Yes, who had been at Middlesex Lounge.

MR. HAAS: So why did they call the police at 9:36?

MS. LINT: That was a different day. They said they sometimes call just for general questions.

MR. HAAS: Just to check in?

MS. LINT: Yeah. How are you doing?

MR. SCALI: The only thing that disturbs me is that they kind of supposedly pushed people out into the street, but I guess it was closing. It was closing I guess. I thought it was before 2:00 but it was after at 2:15 so I guess they wanted people to leave. SO I find a discrepancy with the phone issue. I'm not really sure. Do you want more information?

MR. HAAS: No. I think we're going have to do some follow-up with ECC and just figure out why they're not - I mean, because it's critical

to our deliberations that we know, especially if there's a situation where we're expecting them to call and there's no record. If they're only logging one phone call, it makes it difficult for us. I think we have to go back to ECC and just verify that they will log all calls relative to a situation particularly when it involves a liquor establishment so we can determine if it's just a patron walking down the street that sees a fight, and then the management calls subsequently, or not. I think that's going to be critical to our finding.

But I'm satisfied based on the phone records that they did in fact satisfy the intent of the regulation.

MR. SCALI: So place it on file?

MR. HAAS: Yes.

MR. SCALI: Motion to place the matter on file.

MR. HAAS: Motion.

MR. SCALI: Due to the information submitted on the phone call to police, and then a motion with that to verify the ECC's login process

of all calls. Moved and seconded. All in favor?

MR. HAAS: Aye.

MR. SCALI: Aye.

MS. LINT: C'est Bon, the pledge. He stated on the record that it was because he didn't get the back rent. He was going to provide me with more information and he did not.

MR. SCALI: I don't believe it has to do with any kind of construction. I think he just wants to pay his bills.

MR. HAAS: I think he's financially in trouble, absolutely.

MR. SCALI: I don't know whether that will prevent him from getting a loan altogether if he doesn't pledges the license, but I don't think we have an option.

MS. LINT: The pledge is to the landlord.

MR. SCALI: Landlords really can't control licenses so I really feel we have to deny it.

MR. HAAS: I agree.

MR. SCALI: Motion to deny.

MR. HAAS: Motion.

MR. SCALI: Moved, seconded. All in

favor?

MR. HAAS: Aye.

MR. SCALI: Aye.

MR. SCALI: Put in there why, if you would, as to the reasoning for the loan so he understands why.

I think there's one other item.

MS. LINT: That was it.

MR. SCALI: Anything else before the Commission?

MS. LINT: Nothing else.

MR. SCALI: I wanted to make sure that we have on the record the issue with regards to the cab driver, Mr. Carboni. I did notify the City Manager of what happened on Monday with the Commission and that I'm asking the advice of the Law Department as to how to handle it in the future. Rich Rossi asked that we ask the Police Department what we should do. If the police officers had been in the office, of course, I would have let them handle the situation at that point, but they both were out on the street at that time

when they came in the afternoon.

I just want to make sure that it wasn't a matter that wasn't recognized by all of us as being a problem.

MR. HAAS: I picked up the letter this morning. I just haven't had a chance to read it yet. I saw the City Manager's e-mail so I wanted to look at the letter and get back to you on it. So I didn't get a chance to read the letter.

MR. SCALI: There is also an e-mail with regard to Mr. Gervais' issue about the taxi school, so that's another subject matter for a discussion, but I don't want it to be just me making the responses. If there's a City Council notice, I want to make sure we're all in agreement as to what the response should be.

Thank you all. Motion to adjourn.

Moved.

MR. HAAS: Seconded.

MR. SCALI: All in favor?

MR. HAAS: Aye.

MR. SCALI: Aye.

(Whereupon, the deposition was
concluded at 12:10 p.m.)

CERTIFICATE

COMMONWEALTH OF MASSACHUSETTS
BRISTOL COUNTY, SS

I, Anne Ouellette, a Professional Court Reporter, the undersigned Notary Public certify that:

I am not related to any of the parties in this matter by blood or marriage and that I am in no way interested in the outcome of these matters.

I further certify that the proceedings hereinbefore set forth is a true and accurate transcription of my record to the best of my knowledge, skill and ability.

In Witness Whereof, I have hereunto set my hand this 6th day of October, 2009.

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