

NEW YORK STATE LIQUOR AUTHORITY  
FULL BOARD AGENDA  
MEETING OF DECEMBER 30, 2014  
REFERRED FROM: COUNSEL'S OFFICE

2014-03189 (OVER)  
2015-00073

REASON FOR REFERRAL  
REQUEST FOR DIRECTION

APPLICATION OF THE "TIED-HOUSE" LAWS ON A  
LICENSED NEW YORK WINERY SEEKING TO HOLD AN  
OUT-OF-STATE ON-PREMISES LICENSE WITH A PERMIT  
TO MANUFACTURE WINE

(REQUEST FOR DECLARATORY RULING)

The Members of the Authority at their regular meeting held at the Zone I New York City office on DECEMBER 30, 2014 determined:

Mark Koslowe, Esq. and Valerie Kratz appeared

Item carried over to 1/27/2015

The Members of the Authority at their regular meeting held at the Zone I New York City office on JANUARY 27, 2015 determined:

NEW YORK STATE LIQUOR AUTHORITY  
FULL BOARD AGENDA  
MEETING OF DECEMBER 30, 2014  
REFERRED FROM: COUNSEL'S OFFICE

2014-03202 (OVER)  
2015-00074

REASON FOR REFERRAL  
REQUEST FOR DIRECTION

CENTURY CLUB

(DECLARATORY RULING)

The Members of the Authority at their regular meeting held at the Zone I New York City office on DECEMBER 30, 2014 determined:

Item carried over to 1/27/2015

The Members of the Authority at their regular meeting held at the Zone I New York City office on JANUARY 27, 2015 determined:

NEW YORK STATE LIQUOR AUTHORITY  
FULL BOARD AGENDA  
MEETING OF JANUARY 27, 2015  
REFERRED FROM: COUNSEL'S OFFICE

2015-00175B

REASON FOR REFERRAL  
REQUEST FOR DIRECTON

MONROE OP 3154747  
320 EAST AVE ASSOCIATED LLC  
DBA: R BAR  
320 EAST AVENUE  
ROCHESTER, NY 14604

PRIOR FB: 7/01/2014

(REPORT OF LITIGATION)

The Members of the Authority at their regular meeting held at the Zone I New York City office on JANUARY 27, 2015 determined:

NEW YORK STATE LIQUOR AUTHORITY  
FULL BOARD AGENDA  
MEETING OF JANUARY 27, 2015  
REFERRED FROM: COUNSEL'S OFFICE

2015-00175F

REASON FOR REFERRAL  
REQUEST FOR DIRECTON

REQUEST FOR DECLARATORY RULING:

MINIBAR DELIVERY

The Members of the Authority at their regular meeting held at the Zone I New York City office on JANUARY 27, 2015 determined:

# ELKE A. HOFMANN LAW, PLLC

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New York, New York 10038

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January 6, 2015

Ms. Jacqueline Flug, Esq.  
General Counsel  
New York State Liquor Authority  
80 South Swan Street, 9th Floor  
Albany, NY 12210

*Re: Request for Declaratory Ruling  
LLJ, Inc. d/b/a Minibar Delivery*

Dear Ms. Flug:

I represent LLJ, Inc., d/b/a "Minibar Delivery" ("Minibar"). Minibar is a marketing and technology company that operates an internet-based sales platform and smartphone application (hereinafter collectively referred to as the "Platform") that allows licensed local retail wine and liquor stores to advertise and market their products to consumers within a designated delivery area who want fast delivery of liquor, beer and wine. Minibar does not hold any licenses or permits from the New York State Liquor Authority.

Minibar hereby submits this request for a declaratory ruling pursuant to Section 98.1 of the Rules of the New York State Liquor Authority to request a determination from the New York State Liquor Authority that Minibar's method of operations, including the manner in which Minibar assesses fees for its services, does not violate the Alcoholic Beverage Control Law (the "ABCL").

### **How Minibar Works.**

The Minibar Platform is similar to that of "Drizly," which the Authority approved in *Declaratory Ruling 2013-02526*, and of "Bottle Rush," which the Authority voted to approve on October 21, 2014. Minibar's Platform, like those of Drizly and Bottle Rush, enables consumers to purchase alcoholic beverages from a local, licensed wine or liquor store (each, a "Retailer"), for delivery within one hour.

A Minibar user can browse the Minibar website, or download the Minibar application onto a smartphone, to create an account that includes the customer's address and credit card information; the customer is required to confirm that he or she is over 21 years of age. Based on the customer's address, and the hours of operations of the Retailers in the customer's area, the customer can select from the Retailer's products that are available to the customer for delivery from a Retailer; the name of the Retailer selling a particular product is clearly identified in the description of the product on Minibar's Platform.

When a customer places an order, the Retailer receives a notification via email, fax, phone, and/or an online retailer portal. The Retailer then has the option to accept or reject the customer order. If the Retailer accepts the order, an employee of the Retailer packages the order for delivery and delivers it to the consumer; the Retailer is responsible for verifying that the recipient is over 21, and that the name on the order placed through Minibar matches the identification documents of the recipient. Failure to provide a valid identification results in canceled delivery. If the Retailer rejects the order, the customer is notified and receives a refund for the transaction.

Minibar does not collect any money from the sales transaction; the customer submits payment through a third party credit card processing payment platform<sup>1</sup>; customer payments are paid directly to an account controlled by the applicable Retailer. The Retailer subsequently pays Minibar on a monthly basis for its marketing services, use of software/hardware and participation in the Minibar Platform. Minibar currently assesses the licensed retailer a fee of up to ten percent (10%) of the sales revenues of sales generated through Minibar, net of taxes and gratuities, which is invoiced to the Retailer at the end of each month.

**Minibar hereby requests the Authority to determine that Minibar's method of operation does not constitute "availing" in violation of Section 111 of the ABCL because (1) each Retailer controls the sales transaction, and (2) Minibar's fees do not amount to "an ownership interest" in any licensed retailer.**

In evaluating whether a retail licensee has made a license "available" to an unlicensed third party, the Members of the Authority are to consider: (1) whether the licensee is playing a passive role so that the unlicensed person is acting in place of the licensee, and (2) whether the unlicensed party has an ownership interest in the licensee. *See, e.g., Declaratory Ruling 2013-022526 ("Drizly")*.

1. Each Retailer controls the sales transaction of products sold through Minibar.

The "actual, practical, day-to-day functioning" of Minibar's Platform (*see Declaratory Ruling 2013-01006A ("ShipCompliant")*), demonstrates that the Retailers participating in Minibar's Platform control the terms and conditions of all sales transactions. Minibar's Platform clearly identifies the name of the Retailer providing a particular product. All offers, solicitations, the selection of products, sales (including acceptance of orders and payments), hours of operation, and delivery of products are under the control of the Retailer. Minibar does not play an active role with respect to any aspect of the sales transaction or the Retailer's business, nor does Minibar make any recommendations concerning the selection or price of any of the products to be offered by a Retailer (*see also Declaratory Ruling 2014-01059 ("Forbes Wine Club by Lot 18")*). Each Retailer chooses to accept or reject any orders placed through Minibar's Platform, delivers the products, verifies the age of the recipient of the products, and subsequently collects all of the proceeds from each sale from a third party payment processing company. *See, e.g., Declaratory Ruling 2013-022526 ("Drizly")*. Therefore, there is no doubt that each Retailer controls the sales transaction of products sold through Minibar's Platform.

2. Minibar's method of operations does not give Minibar an ownership interest in any retail licensee.

Minibar also does not acquire any financial or ownership in any licensed retailer, since (a) the small percentage fee assessed by Minibar represents an insignificant amount of the overall revenue generated at any licensed premises (*see Declaratory Ruling 2013-02826B ("Slinger")*); *see also Declaratory Ruling 2011-*

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<sup>1</sup> Minibar, like Bottle Rush, uses Braintree to process payments (<https://www.braintree.com>).

03301 (“Groupon”), and (b) represents reasonable compensation for the marketing services provided by Minibar (see, e.g., *Declaratory Ruling 2011-03527(C)* (“Living Social”).

A licensee’s payment of a “predominant proportion of the proceeds from the sale of alcoholic beverages” to an unlicensed third party generally violates Section 111 of the ABCL (see, e.g., *Declaratory Ruling 2013-01006A* (“ShipCompliant”). The Authority has, however, determined that the payment of a small percentage-based fee, which represents “an insignificant amount of the overall revenue generated from the sale of alcoholic beverages at a licensed premises,” does not violate the ABCL, provided that the licensee remains responsible for the service and sale of alcoholic beverages. (See *Declaratory Ruling 2013-02826B*; see also *Declaratory Ruling 2011-03301* (“Groupon”).

At the end of each month, Minibar bills Retailers a fee for Minibar’s marketing and technology services. The fee is calculated as a percentage of sales revenues (net of taxes and gratuities) from all orders processed through the Platform, which does not exceed ten percent (10%).

The small marketing and technology fee that Minibar charges participating licensed retailers, up to ten percent (10%) of sales generated through the platform, does not represent the “predominant proportion” of any sales transaction. Moreover, the fee represents reasonable compensation for the marketing services actually provided by Minibar, see, e.g., *Declaratory Ruling 2011-03527(C)* (“Living Social”), and is consistent with industry practices. The fee is only slightly higher than the percentage-based fees charged to retailers by payment processing companies for processing credit card payments.<sup>2</sup> In addition, the use of a percentage fee model is the standard model for enterprises with similar platforms, and Minibar’s fee is substantially below that charged by similarly situated enterprises. (See attached chart, showing comparative on-demand services fees.) The fees assessed by Minibar are also less than the fees charged by “Seamless,” which provides restaurants with a similar technology platform.<sup>3</sup>

The small percentage fee charged by Minibar for sales generated through its Platform represents an even smaller, insignificant percentage of the overall revenue generated by any licensed retailer (see *Declaratory Ruling 2013-02826B* (“Slingsr”); see also *Declaratory Ruling 2011-03301* (“Groupon”). Minibar does not receive any proceeds from sales made by Retailers through any other sales channels, or from sales physically made at the licensed premises, sales generated through a Retailer’s own website, or from sales made through any other third party marketing companies engaged by the Retailer. Therefore, the aggregate proceeds received from Minibar will always represent a “relatively insignificant percent of the retail licensee’s income from the sale of alcoholic beverages.” (See *Declaratory Ruling 2011-03527(C)* (“Living Social”).

Minibar has adopted a percentage model for the calculation of its fee because this model aligns Minibar’s incentives as a marketing partner with the Retailer’s interest in optimizing the value of orders for the Retailer, and more accurately reflects the actual value of the services provided by Minibar to Retailers, than does a flat monthly or transactional fee. In this model, Minibar and the Retailer are both incentivized to maintain a reputation for quality and convenience in order to encourage repeat business and to increase

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<sup>2</sup> Credit card processing fees generally range from 1.5-2.5%, but are frequently 4% of the transaction amount, especially in the case of online, “card not present” transactions, so that the effective rates charged by merchant processors often exceed the “discount rate” quoted by the processor.

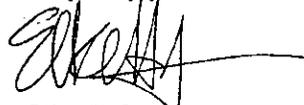
<sup>3</sup> The fees paid by licensed on-premises retailers to Seamless range from 10-14% per transaction. (See, e.g., attached from <http://www.businessweek.com/articles/2013-08-07/seamless-and-the-online-takeout-trend-makes-restaurants-queasy>)

sales. Minibar's small fee, calculated as a percentage of fees of the orders generated through the Platform, is reasonable in light of the services provided, and aligns the interests of Minibar and the Retailer, without being so excessive as to create a financial interest in a licensed premises that could be described as an "availing" of a retail license. (See *Declaratory Ruling 2013-02526*).

Minibar's Platform offers Retailers an additional sales channel to increase business and sales and to serve the interest and convenience of customers located in the Retailer's immediate area. The three-tier system is fully maintained, and each Retailer is identified, maintains control of the sales transaction, receives all revenues from sales, and only pays a fee to Minibar at the end of the billing cycle. The fees assessed by Minibar are both reasonable and consistent with industry practices, and, as set forth herein, conform to the guidelines of the New York State Liquor Authority with respect to fees charged by third party marketing companies. Accordingly, I respectfully request that the Authority determine that Minibar's method of operation does not violate the ABCL.

Please do not hesitate to contact me if you have any questions with regard to this request for a declaratory ruling, or if you require any further information.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Elke Hofmann', with a long horizontal flourish extending to the right.

Elke Hofmann

NEW YORK STATE LIQUOR AUTHORITY  
FULL BOARD AGENDA  
MEETING OF JANUARY 27, 2015  
REFERRED FROM: LICENSING BUREAU

2015-00175D

REASON FOR REFERRAL  
REQUEST FOR DIRECTON

DELEGATION OF AUTHORITY - LICENSING BOARD

The Members of the Authority at their regular meeting held at the Zone I New York City office on JANUARY 27, 2015 determined:

## NEW YORK STATE LIQUOR AUTHORITY

IT IS HEREBY RESOLVED, pursuant to Section 17 of the Alcoholic Beverage Control Law, that we, DENNIS ROSEN, JEANIQUE GREENE AND KEVIN KIM, Members of the State Liquor Authority, hereby delegate the following powers with respect to applications to the following employees of the Authority, collectively known as the Licensing Board:

- The power to act on any license or permit application statewide – Kerri O'Brien;
- The power to remove members of the Licensing Board when they are no longer employed by the Authority – Kerri O'Brien;
- The power to act on any license or permit application statewide that has no opposition or no complex or controversial issues – Amy Male & David Becker;
- The power to issue a 20 Day Temporary Letter when the only conditions of approval that have not been submitted to the Authority are: Certificate of Authority, Workers' Compensation & Disability Insurance, Newspaper Affidavit, photos showing the applicant is ready to open and operate and/or surrender of the current license in effect – Kerri O'Brien, David Edmunds & Amy Male;
- The power to act on permit applications statewide – Maureen Hughes, Lorraine Maloney, Michael Lejeune and Erin Connors;
- The power to act on Temporary Retail Permit and Liquidation Permit applications statewide – Susan Cappuccitti;
- The power to act on Temporary Retail Permit and Liquidation Permit applications in Zone 1 – Rosemary McKenna & Jennie Eastman;
- The power to act on any license or permit application in Zone 1 that has no opposition or no complex or controversial issues – Barry Sender & Juan Herrera;
- The power to act on any license or permit application statewide that has no opposition or no complex or controversial issues – Elizabeth Dygert, Amy Male, William Crowley & Erin Connors;

- The power to act on any license or permit application in Zone 3 that has no opposition or no complex or controversial issues – David Edmunds & Nancy Smith & William Crowley;
- The power to act on any renewal application that has no opposition or no complex or controversial issue – Erin Connors, Andrea Pomeroy, Amy Male, Lorraine Maloney, Maureen Hughes, Mike Lejeune, Elizabeth Dygert, Kaleena Stewart, Susan Cappuccitti, Peter Klein, James Martin, Scott Lindgren & Matthew White;

IT IS HEREBY FURTHER RESOLVED that, notwithstanding the aforesaid delegation of powers, the following licensing matters must be presented to the Full Board for consideration unless there is a statutory provision requiring the disapproval of the application by the Licensing Board:

- All new package stores, except for removals when there is no change in the 4 closest stores and the new location is:
  - 1) In New York City and is no more than 400 feet from the current location;  
or
  - 2) Outside of New York City and is no more than 1,500 feet from the current location.
- Applications where an application filed by the applicant or for the location has been disapproved within the last 2 years;
- Applications for a premises where the prior license was revoked or cancelled, unless:
  - 1) The prior license was cancelled and there is nothing in the record to show a connection between the prior licensee and the applicant;
  - 2) The prior license was revoked and there is nothing in the record to show a connection applicant and there is no “public convenience and advantage” or “focal point” issue involved;
  - 3) The application is subject to the 500 foot law, there are no objections and the applicant has submitted a “public interest” statement in support of the application;
  - 4) An application where the prior license was cancelled or revoked and that penalty was based solely on the prior licensee having been a prohibited person by revocation; and

5) The prior license was cancelled due to non-payment of a civil penalty and no other complex or controversial issues exist.

- Applications where there is a STOP on the applicant or premises;
- Applications involving questions of eligibility of applicant (citizenship, conviction record, police officer);
- Review of Licensing Board determinations disapproving an application;
- Reconsiderations of prior Full Board licensing determinations;
- Applications where a protest to an application has been received from a governmental/elected official, police agency or municipality;
- Applications for on-premises licenses in the city/town of Spring Valley, Rockland County;
- Applications for any license in the Village of Hempstead, Nassau County;
- Applications for establishments with an occupancy of 75 or more that require a waiver of Section 48.4(d)(2) of the Rules of the Authority;
- Applications for establishments serving beer for on premises consumption (class designation "EB") in the counties of New York, Queens, Kings, Richmond, Bronx, Suffolk, Nassau and Westchester that have a capacity of less than 20 seats, are open 24 hours a day or are requesting a change in the class of license from a Grocery Store (A or AX) to an Eating Place Beer (EB);
- All other applications which, in the judgment of the Deputy Commissioner of Licensing, involve unusual, complex matters or those involving the public interest;
- Any application for a temporary retail permit when it appears, as provided for herein, that the application for the underlying license must be presented to the Full Board for consideration; and
- Any application for a substantial corporate change where there is a change of 70% -79% of the officers and/or directors or LLC Members, a transfer of 70% -

79% of stock of the corporation or LLC or an existing stockholder obtaining 70% - 79% of stock of the corporation or LLC.

IT IS HEREBY FURTHER RESOLVED that the delegation of powers set forth herein is effective immediately and all prior delegations of power with respect to action on licensing applications are hereby rescinded.

We, DENNIS ROSEN and JEANIQUE GREENE, Members of the State Liquor Authority, certify that the foregoing is a true copy of the resolution duly adopted by the State Liquor Authority at a meeting of its Members held on January 27, 2015.

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Chairman, State Liquor Authority

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Member, State Liquor Authority

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Member, State Liquor Authority