

STATE OF NEW YORK: LIQUOR AUTHORITY

Palate Wizard LLC

DECLARATORY
RULING
2016-00547

Preliminary Statement

Section 98.1 of the Rules of the State Liquor Authority, (9 NYCRR subtitle B) provides that any person may request the Authority to issue a declaratory ruling on the applicability of the Alcohol Beverage Control Law (ABCL), or the Rules of the Authority, to any person, property or set of facts.

By letter dated December 8, 2015, a request was submitted by Elizabeth DeConti, Esq. on behalf of her client Palate Wizards, LLC ("PW"), a limited liability company. PW does not hold any licenses in relation to alcoholic beverages and has created a web-based smart phone application ("app") that pertains to alcoholic beverages. Ms. DeConti requests a declaratory ruling on whether or not her client's app violates the tied-house laws or gifts and services laws of the ABCL.

Statement of Facts

Per Ms. DeConti, the PW app creates "skins" that are similar to web pages for off-premises retailers. Retailers pay PW for this service and pay an annual fee to PW. Any retailer who wishes to utilize PW's services may.

Retailers utilizing PW will advertise the app to their customers. The app is free for customers; it permits customers to take a photo of a product they like and find out if the retailer has the product or can obtain the product for them. If the retailer has the product or states that they can obtain it for the customer, the app permits the customer to "reserve" the product with the retailer for purchase when the customer comes to the retailer's store. The reservation is not a sale. The reservation does not obligate the customer to purchase the product and the app does not permit the sale of alcoholic beverages nor the delivery of alcoholic beverages. All sales that take place based on reservations will take place in the retailer's brick and mortar store. Additionally, some reservations may never result in a sale. PW does not receive information concerning reservations that then become sales.

In instances when the retailer does not have the product, PW enables the retailer to recommend a similar item to the customer that they may currently have or are able to obtain. PW also offers surveys regarding alcoholic beverages and permits consumers to create a palate profile assisting retailers in making appropriate suggestions for the customer.

Manufacturers of alcoholic beverages may pay PW a flat fee to use pictures of their product labels that appear in the app as product recommendations and advertisements. Additionally, manufacturers pay PW a flat fee for every reservation of their product. The fee is paid regardless of whether a sale is ultimately made.

Applicable Law

ABCL §101.1.a prohibits a licensed manufacturer or wholesaler from having any interest, direct or indirect, in any premises where alcoholic beverages are sold at retail.

ABCL §105.16 prohibits a licensed off-premises retailer from having any interest in a business that manufactures or wholesales alcoholic beverages.

ABCL §101.1(c) prohibits a licensed manufacturer or wholesaler from making any gift, or rendering any service, to a licensed retailer if, in the judgment of the Authority, the gift or service might tend to influence the retailer to purchase the manufacturer's or wholesaler's products.

Section 86.1 of the Rules of the Authority prohibits retail licensees from accepting gifts or services from manufacturers or wholesalers unless otherwise specified within the Rules.

Question Presented:

Does the operation of PW violate tied-house laws?

Does the operation of PW create an indirect gift or service from a manufacturer to a retailer?

Tied-House Question

Tied-House laws (ABCL Sections 101.1(a) and 105.16) prohibit manufacturers and retailers from having an interest in each other. The standard or typical example of a tied-house prohibited interest or a violation is for a manufacturer to own a portion of a retailer or vice versa. Without a specific court ruling defining an interest, the Authority and courts have found the prohibited interests to be financial or even control in the licensed entity.

Accordingly, under the facts presented by Ms. DeConti there is no relationship between the manufacturers and retailers that may be deemed an interest. Manufacturers never receive profits from the retailers. Manufacturers do not indirectly receive profits from retailers as retailers do not share profits with PW and PW never pays anything to manufacturers.

Vice versa, retailers do not receive any payments from manufacturers directly. Neither do they receive payments from manufacturers indirectly as PW never makes payments to retailers. The customer using PW selects the retailer in the app. Other apps which have been reviewed by the Members direct the customer to a certain store based on their geographic location. However, with PW, the customer may choose any retailer they wish. There is nothing to suggest a special relationship between a specific store and specific manufacturer because the customer selects the store and products they are searching for.

There is nothing presented by Ms. De Conti which necessitates a tied-house analysis. There is no relationship between the retailer's store and the manufacturer, no money exchange and no release of control. There is no basis by which one could argue that the manufacturer holds an interest in the retailer or vice versa. The relevant analysis is under the gifts and services prohibitions.

Gifts and Services Issues

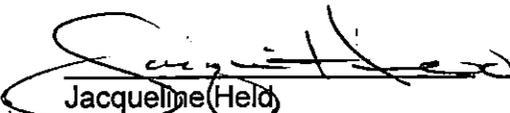
ABCL 101.1.(c) and SLA Rule 86.1 prohibit manufacturers and wholesalers from making any gift or rendering any service directly, or indirectly which in the judgment of the Authority may tend to influence the retailer to buy their product. Therefore, it is necessary for the Members to determine if manufacturer participation and payments to PW in any way influences the retailer to purchase the manufacturer's product.

All retailers are free to use PW's services so there can be no argument that the app permits manufacturers to favor one retailer over another. Additionally, retailers do not receive any compensation or benefit dependent upon the sale of a certain product. In fact, retailers do not receive any payment from PW. PW does not even obtain sales data which can often be of value to retailers and manufacturers. PW and in turn manufacturers, have no information on sales to be used as a reward. PW only retains information on recommendations and reservations and in turn pays manufacturers not retailers.

Retailers are not informed as to what manufacturers engage PW's services and all retailers who engage PW will have the same ads by manufacturers. A non-digital comparison might be that any retailer who advertises in the New York Times may also be next to an ad for Bacardi or Smirnoff. The opportunity to advertise together is equal to all those who participate.

The Members of the Authority thus find no violations of the ABCL or its Rules by PW's proposed app as above set forth.

This ruling should not be considered approval for any other proposal which deviates in any respect from the representations as set forth above. The foregoing Declaratory Ruling was formally approved by the Members of the Authority at a Full Board meeting held on March 1, 2016.


Jacqueline Held
Acting Secretary to the Authority