

NEW YORK STATE LIQUOR AUTHORITY
FULL BOARD AGENDA
MEETING OF APRIL 7, 2015
REFERRED FROM: COUNSEL'S OFFICE

2015-00737

REASON FOR REFERRAL
REQUEST FOR DIRECTION

FOOD & BEVERAGE INNOVATIONS, LLC

(DECLARATORY RULING)

The Members of the Authority at their regular meeting held at the Zone I New York City office on APRIL 7, 2015 determined:

March 10, 2015

BY EMAIL

Office of Counsel
New York State Liquor Authority
Attn: Jacqueline P. Flug, Esq.
317 Lennox Avenue
New York, NY 10027

Re: Petition For Declaratory Statement on behalf of Food & Beverage Innovations, LLC

Dear State Liquor Authority:

This Petition for Declaratory Ruling (this "**Petition**") is submitted to the State Liquor Authority (the "**Authority**") pursuant to Section 98.1 et seq of the Rules of the State Liquor Authority (9 NYCRR subtitle B). Petitioner Food & Beverage Innovations, LLC ("**F+BI**")¹ requests a declaratory ruling that its proposed business model does not violate the Alcoholic Beverage Control Law or the Rules of the Authority, including all applicable laws pertaining to advertising and promotional activities conducted on the licensed premises of a vendor engaged in the retail sale of alcoholic beverages.

ISSUE PRESENTED

Whether the Alcoholic Beverage Control Law permits a licensed on-premises retail vendor (a "**licensed retailer**") to install and use on its premises a "specialty cocktail" machine under the following circumstances:

- (a) F+BI will sell or lease the machine directly to the licensed retailer. F+BI may assist the licensed retailer with installation of the machine and will provide service and repair assistance for the machine if necessary.
- (b) F+BI is not licensed to sell alcoholic beverages, and is not affiliated with any manufacturer, wholesaler or retailer of alcoholic beverages (each an "**Industry Member**"). The purchase or lease terms offered to the licensed retailer are not subsidized, directly or indirectly, by any Industry Member.
- (c) The machine has three digital display screens which are capable of displaying product brand logos and other branded digital advertising content.
- (d) F+BI intends to sell marketing and advertising rights to beverage manufacturers and wholesalers, including alcoholic beverage manufacturers and wholesalers, so as to permit advertisers to display on the machine the product brand logos and branded digital advertising content selected by the advertisers.

¹ Food & Beverage Innovations, LLC has its principal place of business located at 696 McVey Avenue, Suite 202, Lake Oswego, Oregon 97034. Petitioner's telephone number is (888) 491-3772.

- (e) F+BI will retain fees it receives from the sale of marketing and advertising rights. F+BI will pay no fees, directly or indirectly, to a licensed retailer who purchases or leases a machine.
- (f) F+BI may permit a licensed retailer to create some portion of the content displayed on the machine.

RELEVANT FACTS

F+BI sets forth the following facts which the Authority may rely upon in issuing the requested Declaratory Ruling:

1. F+BI is the designer and manufacturer of Jevo™, the first fully-automated jello making machine (“Jevo™”). Using proprietary technology and design, Jevo™ reduces what is normally a 4 to 5 hour process for making jello to under 10 minutes.
2. Jevo™ makes jello in various proprietary flavors developed by F+BI and will only operate with flavor mixes purchased from F+BI. The flavor mixes are gelatin powders contained in “pods” similar to those used in various coffee machines. See illustration attached as **Exhibit A**.
3. Jevo™ has multiple applications in consumer markets. In addition to making jello for everyday home consumption and for delivering vitamins and medicines for healthcare purposes, Jevo™ is designed to mix alcohol spirits (as well as non-alcoholic juices or liquids) with its proprietary flavor pods to make edible cocktails. Edible cocktails are a popular specialty item sold by licensed retailers. The edible cocktail concept is also promoted by major gelatin producers. See illustrations attached as **Exhibit B**. Until now, edible cocktails have been manually made by licensed retailers, typically in bulk amounts and in limited flavors because of the lengthy preparation time, and stored in on-site refrigerators. Jevo™ allows a licensed retailer to make on-demand edible cocktails in a variety of flavors with a variety of spirits in less than 10 minutes.
4. Jevo™ is designed to sit on a counter with a footprint of approximately 16”x18”x20”. See illustrations attached as **Exhibit C**. Jevo™ is intended to be *operated only by the licensed retailer and not by customers*, similar to other chilling dispensers now in widespread use in licensed locations (for example, machines which dispense Fireball Cinnamon Whisky and Jägermeister). See illustration attached as **Exhibit D**.
5. Jevo™ functions in the manner of a “high tech” blender and chiller appliance. The licensed retailer selects the specific gelatin flavor mix to be used for a batch of edible cocktails and inserts the selected flavor pod into Jevo™. The desired alcohol spirit or non-alcoholic liquid to be combined with the gelatin flavor mix is simultaneously poured into a reservoir in Jevo™. When the mixing process is started by a push of the Jevo™ touchscreen, Jevo™ automatically combines and mixes the ingredients. The mixed ingredients are automatically dispensed into small specially designed disposable cups and go through a rapid chilling process. Individual edible cocktails

are ready for consumption by customers in less than 10 minutes after the mixing process is started.

6. Jevo™ machines installed in licensed retail locations will be equipped with three small (approximately 9"x5") digital screens that can display pre-programmed digital content such as brand or logo branded digital images and videos promoting alcohol spirits or other beverages. Display content is provided to each Jevo™ by means of a wireless internet connection and is controlled by F+BI. As a condition of any sale or lease of a Jevo™ machine to a licensed retailer, F+BI will retain the right to display advertising content while the Jevo™ machine is in operation.
7. F+BI intends to sell marketing and advertising rights to various companies who wish to display their brands or similar content on Jevo™'s digital display screens or on the specially designed cups in which the edible cocktails are dispensed. It is anticipated that advertisers will be licensed manufacturers and wholesalers as well as makers or distributors of non-alcoholic beverages. Arrangements with advertisers will provide for advertising content to be displayed on Jevo™ machines in specific geographic regions and not in particular licensed locations designated by an advertiser. F+BI will have the sole discretion to accept or reject any proposed content. Advertisers receive no guarantee that products advertised will be sold, served or provided by any licensed retailer. No alcohol-related advertisement displayed on Jevo™ will reference or identify a licensed retailer.
8. F+BI intends to collect marketing fees from its participating advertisers. Marketing fees will be negotiated at arm's length based on market values and will entitle advertisers to display content on Jevo™ machines for a specific period of time. **F+BI will retain all marketing fees it collects and will not pay, act as a conduit or otherwise pass through to any licensed retailer, directly or indirectly, any fees collected from advertisers.** Unless otherwise required by law, there will be no requirement that a licensed retailer sell, serve or provide products that are advertised on Jevo™.
9. In addition to any advertising content arranged by F+BI, F+BI may permit a licensed retailer to create its own content to be displayed on Jevo™'s screens. Examples of such content might be notice of food and beverage "specials" available to customers and upcoming events.
10. F+BI is an independent for-profit company that is not licensed to sell alcoholic beverages. F+BI has no interest in any Industry Member. No Industry Member will have an interest in F+BI. F+BI will have no arrangement with any Industry Member to provide a Jevo™ machine to any particular licensed retailer.
11. F+BI's primary business model is to sell or lease Jevo™ machines to licensed retailers and to sell its proprietary flavor mix pods to retailers for use in Jevo™. In some cases, a retailer's lease obligation will consist of an agreement to purchase periodic minimum quantities of the Jevo™ flavor pods. F+BI's secondary business model is to sell rights to display advertising content on Jevo™ machines installed in

licensed retail locations. The Jevo™ purchase and lease terms offered to retailers are determined solely by F+BI based on market value considerations. Purchase and lease terms are not subsidized, directly or indirectly, by any Industry Member and no Industry Member has any influence regarding the terms established by F+BI.

LEGAL ANALYSIS

F+BI believes that the installation and operation of a Jevo™ machine in a licensed retail location, and the display of advertising content arranged by F+BI on behalf of alcoholic beverage manufacturers on Jevo™'s screens, is permitted by the Alcoholic Beverage Control Law and the Rules of the Authority under the following circumstances: (i) the advertising displayed on the Jevo™ machine does not violate interior sign restrictions imposed on licensed retailers; (ii) licensed retailers do not receive any direct or indirect payments or credits from manufacturers or wholesalers of alcoholic beverages with respect to advertising content displayed on the Jevo™ machine; and (iii) the use of the Jevo™ machine and the advertising arrangements made by F+BI do not operate as a direct or indirect gift or rendering of services whereby alcohol manufacturers and/or alcohol wholesale distributors furnish or supply items of value to licensed retailers in violation of the Alcoholic Beverage Control Law.²

A. F+BI Is Not A Licensee

F+BI is not engaged, either directly or indirectly, in the sale of alcoholic beverages and it does not generate or receive revenue based on the sale of alcoholic beverages. The revenues that F+BI will derive from the sale (or lease) of Jevo™ machines and gelatin flavor pods to licensed retailers, and from the sale of advertising to licensed manufacturers and/or distributors, are solely through a contractual relationship with licensed Industry Members which is not related to the control of the sale of alcoholic beverages.

As a result, F+BI is not required to obtain an alcoholic beverage license under the Alcoholic Beverage Control Law in order to sell or lease its Jevo™ products or to sell advertising displayed on the Jevo™ machine or on the disposable cups used in connection with Jevo™.

B. Installation/Operation of the Jevo™ Machine and Display of Advertising Content on the Machine Does Not Violate Interior Sign Laws For Licensed Retail Premises

Section 83.3 of the Rules of the State Liquor Authority provides that signs may be displayed in the interior of premises licensed to sell alcoholic beverages for on-premises consumption subject to various sign content restrictions.

Section 83.3(c)(1) also provides that signs having "a utility or secondary use or value aside from their actual advertising value" are also covered by Part 86 of subtitle B. Section 86.4 provides that a manufacturer or wholesaler may furnish signs to a licensed retailer to be used in

² See Section 101(1) of the Alcoholic Beverage Control Law and Section 86.1 of the Rules of the State Liquor Authority.

internal portions of the licensed premises so long as there is no direct or indirect payment or credit to the retailer for displaying the inside sign or for any expense incidental to its operation.

The Jevo™ digital display should be considered an “inside sign” within the meaning of these Rules. As noted in the Relevant Facts section above, the Jevo™ machine is intended to be positioned on a back bar counter (in a bar or night club), not in a window. Jevo™’s display screens are relatively small and will be visible primarily to persons in licensed premises who are in close proximity to the screens. Jevo™’s display screens are not intended to be viewed by members of the public at large outside the licensed premises. No direct or indirect payments or credits will be made to licensed retailers by F+BI or by any manufacturer or wholesaler for displaying advertising content on Jevo™’s display screens or for any expense incidental to the operation of a Jevo™ machine. As a result, and regardless of whether the Jevo™ displays are considered as “signs” furnished by a manufacturer or wholesaler, Jevo™’s display screens are permissible interior signs provided that the content restrictions in Section 83.3(c)(2) are observed.

C. Installation/Operation of the Jevo™ Machine and F+BI’s Business Model Does Not Violate Section 101(1)(c) of the Alcoholic Beverage Control Law

Section 101(1)(c) of the Alcoholic Beverage Control Law provides that no manufacturer or wholesaler shall make any gift or render any service of any kind whatsoever, directly or indirectly, to any licensee which, in the judgment of the State Liquor Authority, may tend to influence such licensee to purchase the product of such manufacturer or wholesaler. Section 86.1 of the Rules of the State Liquor Authority prohibits licensed retailers from accepting such gifts or services.

The Authority has previously stated that the purpose of the “tied-house” and “gifts and services” laws is to prevent suppliers of alcoholic beverages from having an interest in, or undue influence over, retailers.³

The business model proposed by F+BI does not violate Section 101(1)(c) of the Alcoholic Beverage Control Law. As noted in the Relevant Facts section above, F+BI (not the licensed retailer) controls the advertising content displayed on Jevo™ and no alcohol-related advertisement will reference or identify the licensed retailer. The advertising that F+BI arranges will not result in any obligation between an advertiser and a licensed retailer. **No licensed retailer will receive any compensation or other items of material value, directly or indirectly, from F+BI or from any alcoholic beverage advertiser with respect to operation of a Jevo™ machine or display of advertising content.** There is no impermissible gift or rendering of service by any manufacturer or wholesaler, either direct or indirect, as a result of the sale or lease of a Jevo™ machine by F+BI to a licensed retailer on market terms and as a result of the display of advertising on behalf of a manufacturer or distributor. The sale or lease of Jevo™ to licensed retailers, and display of advertising arranged by F+BI without direct or indirect compensation to licensed retailers, does not result in (i) creation of any financial interest in the business of a licensed retailer, or (ii) any other direct or indirect relationship between

³ See for example Declaratory Ruling 2012-00957D dated March 27, 2012 (Brooklyn Events Center LLC) and Declaratory Ruling 2014-00421B dated February 11, 2014 (RiverWorks).

manufacturers or distributors and licensed retailers. Advertisers secured by F+BI have no control over the licensed retailers who choose to do business with F+BI, they are not able to influence purchases of products by licensed retailers, and licensed retailers have no obligations to any advertiser.

If a licensed retailer is permitted by F+BI to create its own content to be displayed on Jevo™, that benefit comes directly and solely from F+BI and not from any manufacturer or distributor and the licensed retailer does not receive any impermissible gift or service.⁴

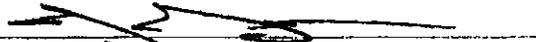
CONCLUSION

Based on the facts presented by Petitioner, and consistent with the Authority's conclusions set forth in its prior Declaratory Ruling for Display Points Group, Inc.,⁵ the advertising and business model proposed by F+BI is in compliance with the Alcoholic Beverage Control Law so long as licensed retailers receive no compensation, directly or indirectly, with respect to the advertising arranged by F+BI. The operation of the Jevo™ machine in licensed premises and the advertising proposed for display on the Jevo™ screens: (i) are in compliance with the interior sign laws (subject to satisfying applicable content restrictions); and (ii) do not operate as a direct or indirect gift or rendering of services whereby alcohol manufacturers and/or alcohol wholesale distributors furnish or supply items of value to licensed retailers in violation of the Alcoholic Beverage Control Law. The result should be the same if licensed retailers are permitted to create their own content for display on the Jevo™ screens.

F+BI requests that the Authority grant this Petition and issue a Declaratory Ruling pursuant to Section 98.1 of the Rules of the State Liquor Authority declaring that F+BI's proposed business model does not violate the Alcoholic Beverage Control Law.

Please let us know if the Authority needs additional information to consider this Petition or if it is necessary to appear in person before the Authority.

Respectfully submitted,


Jeffrey R. Jetton
President
Food & Beverage Innovations, LLC
696 McVey Avenue, Suite 202
Lake Oswego, OR 97034
Phone: (888) 491-3772
Email: jeffj@foodbevinnovations.com

⁴ Declaratory Ruling 2014-00488, dated February 25, 2014 (Display Points Group, Inc.).

⁵ Id.

EXHIBIT A

JEVO™ FLAVOR PODS.



JEVO
PINA COLADA



ENDLESS FLAVOR PRESENTATION

ENDLESS FLAVOR POSSIBILITIES.

TRADITIONAL, EDIBLE COCKTAILS & DESSERTS



TRADITIONAL

- Cherry Comotion
- Grape Escape
- Orange Blossom
- Lemon Burst
- Waldmeister Wcive
- Mixed Berry Buzz
- Apple Appeal
- Strawberry Breeze



EDIBLE
COCKTAILS

- Margarita
- Pina Colada
- Pomegranate Martini
- Lemon Drop



DESSERT
CUPS

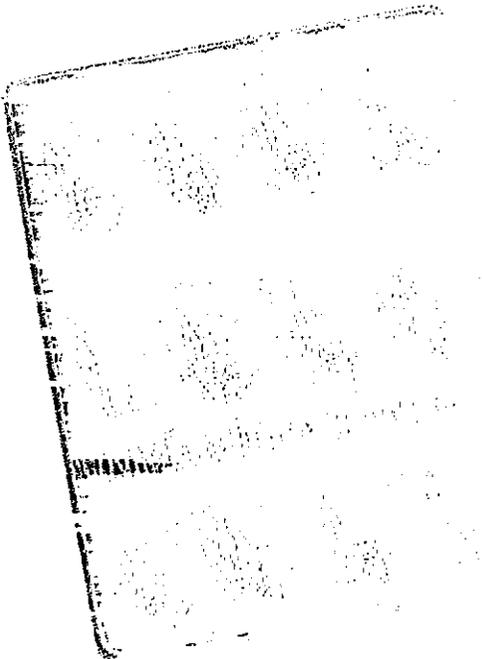
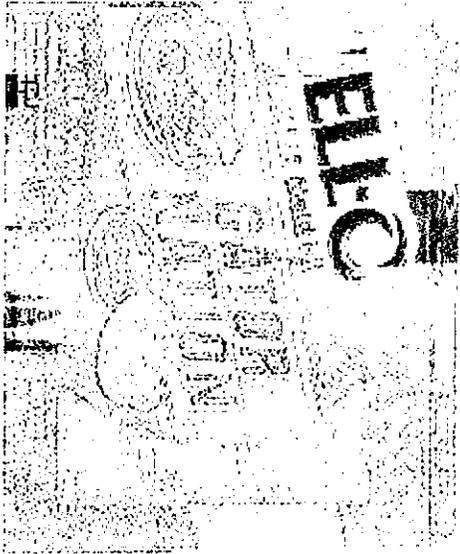
- Celebration Cake
- Banana Dream Pie
- Coffee Bean



CUSTOM
EDIBLE COCKTAILS

- Strawberry Lemon Drop

EXHIBIT B (2 OF 2)



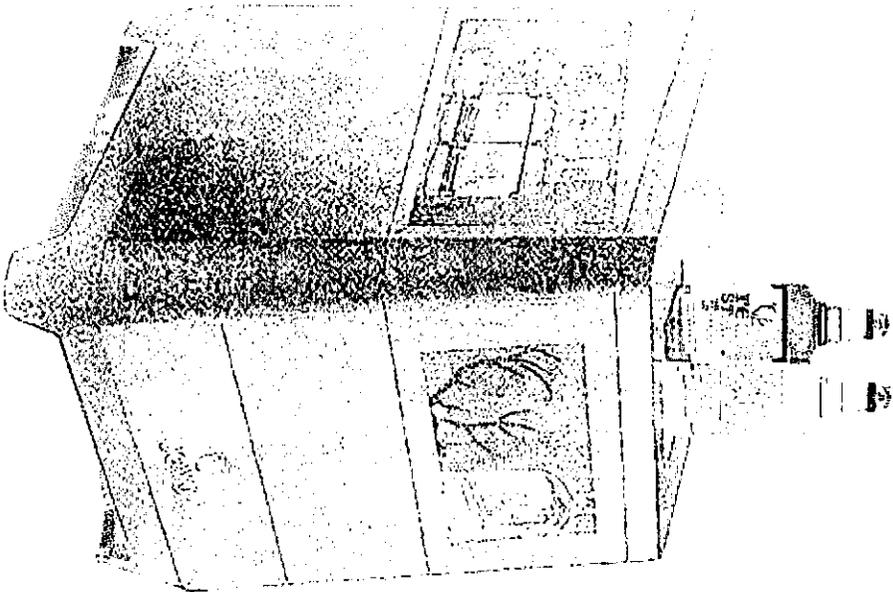


EXHIBIT C (1 of 4)

THE FIRST FULLY AUTOMATED EDIBLE COCKTAIL MAKER.

EXHIBIT C (2 of 4)

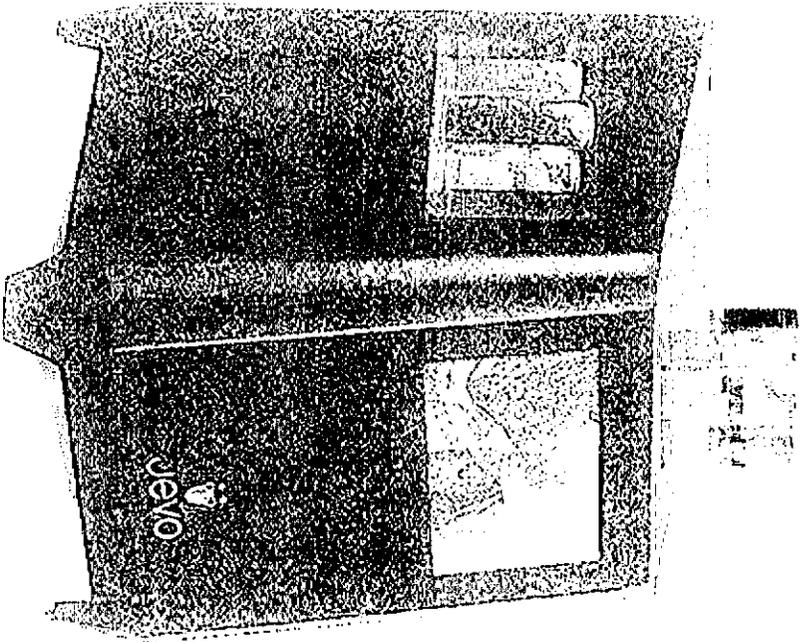


EXHIBIT C (3 of 4)

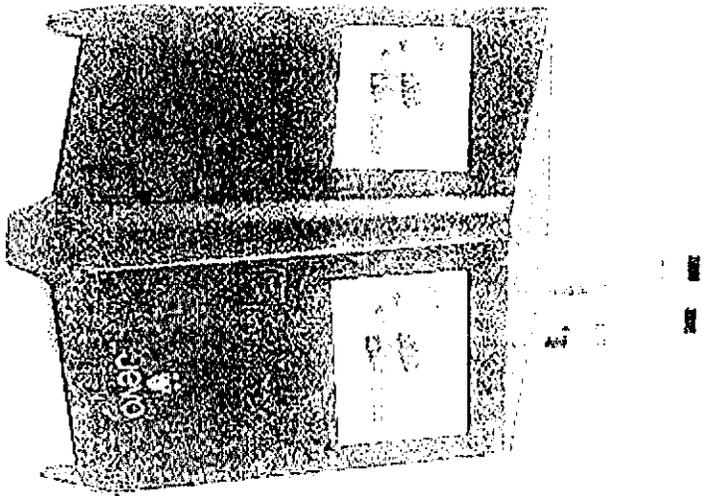
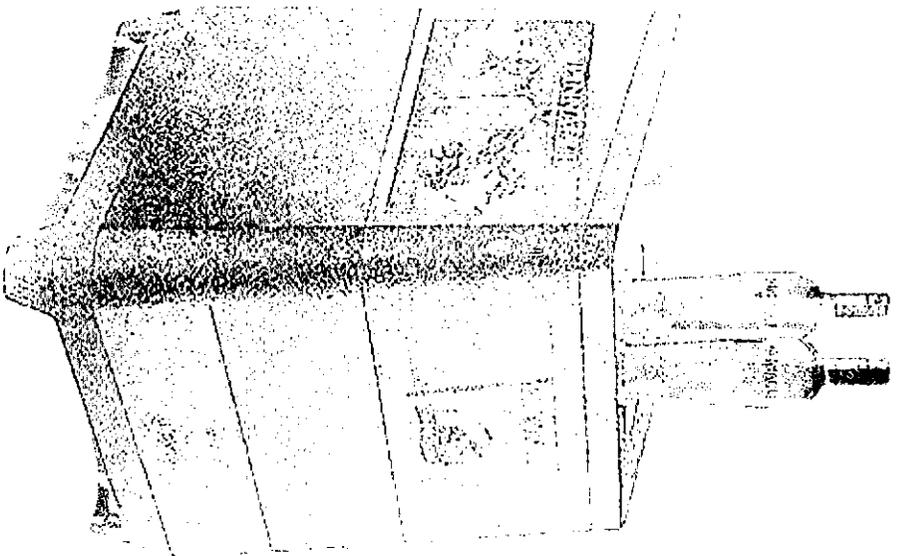
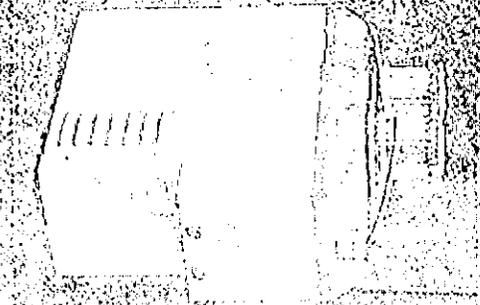
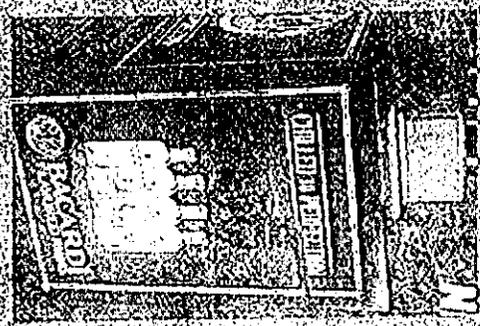
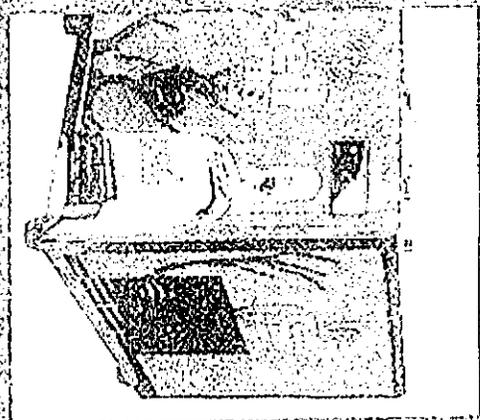
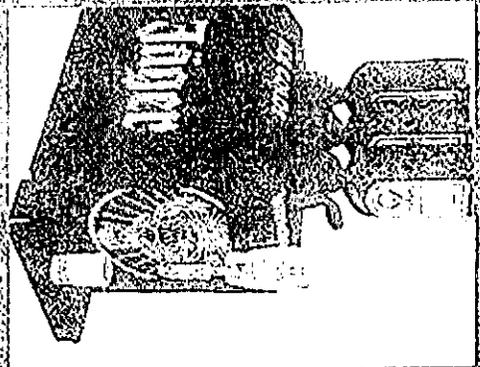
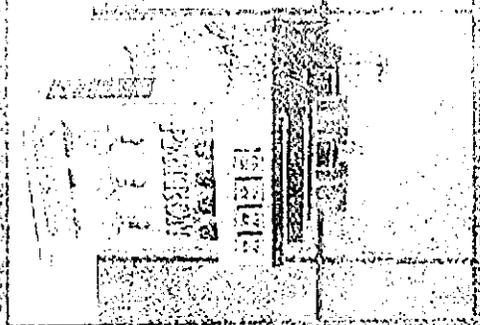


EXHIBIT C (4 of 4)



QUICK CHILL MACHINES

There are over 10,000+ quick chill machines in the U.S. and...



NEW YORK STATE LIQUOR AUTHORITY
FULL BOARD AGENDA
MEETING OF MARCH 24, 2015
REFERRED FROM: COUNSEL'S OFFICE

2015-00641(OVER)
2015-00774

REASON FOR REFERRAL
REQUEST FOR DIRECTION

TASTINGS, "SALES BY THE GLASS", AND
"SALES BY THE BOTTLE" CONDUCTED AT A
MANUFACTURER'S LICENSED PREMISES

(PROPOSED ADVISORY)

The Members of the Authority at their regular meeting held at the Zone I New York City office on MARCH 24, 2015 determined:

Item carried over to 4/07/2015

The Members of the Authority at their regular meeting held at the Zone I New York City office on April 7, 2015 determined:

NEW YORK STATE LIQUOR AUTHORITY
FULL BOARD AGENDA
MEETING OF MARCH 24, 2015
REFERRED FROM: COUNSEL'S OFFICE

2015-00640 (OVER)
2015-00775

REASON FOR REFERRAL
REQUEST FOR DIRECTION

SUPPLIER/DISTRIBUTOR MARKETING PERMIT

(PROPOSED ADVISORY)

The Members of the Authority at their regular meeting held at the Zone I New York City office on MARCH 24, 2015 determined:

Item carried over to 4/07/2015

The Members of the Authority at their regular meeting held at the Zone I New York City office on April 7, 2015 determined:

NEW YORK STATE LIQUOR AUTHORITY
FULL BOARD AGENDA
MEETING OF MARCH 24, 2015
REFERRED FROM: COUNSEL'S OFFICE

2015-00639 (OVER)
2015-00776

REASON FOR REFERRAL
REQUEST FOR DIRECTION

DONATIONS OF ALCOHOLIC BEVERAGES
TO CHARITABLE AND/OR NOT-FOR-PROFIT
ORGANIZATIONS

(PROPOSED ADVISORY)

The Members of the Authority at their regular meeting held at the Zone I New York City office on MARCH 24, 2015 determined:

Item carried over to 4/07/2015

The Members of the Authority at their regular meeting held at the Zone I New York City office on April 7, 2015 determined:

NEW YORK STATE LIQUOR AUTHORITY
FULL BOARD AGENDA
MEETING OF MARCH 24, 2015
REFERRED FROM: WHOLESALE BUREAU

2015-00686A (OVER)
2015-00783

REASON FOR REFERRAL
REQUEST FOR AMEND

ADVISORY 2014-23

The Members of the Authority at their regular meeting held at the Zone I New York City office on MARCH 24, 2015 determined:

Keven Danow, Esq. appeared

Keven Danow, Esq. is requesting two barrels of 1792 bourbon to be grandfathered.
Request granted.

Item carried over to 4/07/2015

The Members of the Authority at their regular meeting held at the Zone I New York City office on April 7, 2015 determined:

NEW YORK STATE LIQUOR AUTHORITY
FULL BOARD AGENDA
MEETING OF APRIL 7, 2015
REFERRED FROM: COUNSEL'S OFFICE

2015-00783A

REASON FOR REFERRAL
REQUEST FOR DIRECTION

BRONX OP 1223878
PLATINUM PLEASURES OF NY, INC.
1098 LAFAYETTE AVENUE
BRONX, NY 10474

CASE NO. 88914

(REPORT OF LITIGATION)

The Members of the Authority at their regular meeting held at the Zone I New York City office on APRIL 7, 2015 determined:

Matter of Platinum Pleasures of NY, Inc. v New York State Liq. Auth.
2015 NY Slip Op 02406
Decided on March 24, 2015
Appellate Division, First Department
Published by <u>New York State Law Reporting Bureau</u> pursuant to Judiciary Law § 431.
This opinion is uncorrected and subject to revision before publication in the Official Reports.

Decided on March 24, 2015

Sweeny, J.P., Andrias, Saxe, DeGrasse, Gische, JJ.

13840 100371/13

[*1] In re Platinum Pleasures of NY, Inc., Petitioner,

v

New York State Liquor Authority, Respondent.

Albert J. Pirro, Jr., White Plains, for petitioner.

Jacqueline P. Flug, Albany (Mark D. Frering of counsel), for respondent.

Determination of respondent, dated February 15, 2013, cancelling petitioner's on-premises liquor license and imposing a \$1,000 bond forfeiture, upon a finding of violations of the Alcoholic Beverage Control Law and the Rules of the State Liquor Authority (9 NYCRR 53.1), modified, on the facts, to vacate the penalty of cancellation and remand the matter to respondent for the imposition of a lesser penalty, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Doris Ling-Cohan, J.], entered March 13, 2013), otherwise disposed of by confirming the remainder of the determination, without costs.

Substantial evidence supports respondent's findings that petitioner violated the Alcoholic Beverage Control Law and the Rules of the State Liquor Authority (9 NYCRR 53.1) (*see Matter of Purdy v Kreisberg*, 47 NY2d 354, 358 [1979]). With respect to rule 36.1(d) (9 NYCRR 53.1[d]), failing to operate a "bona fide premises," petitioner argues that the language "in the judgment of the Authority" in the rule deprives the licensee of due process by presupposing guilt. However, necessarily implicit in the rule is that the agency will exercise its judgment rationally and in good faith (*see Matter of Ray v Haveliwala*, 107 AD2d 316, 319 [3d Dept 1985]). Moreover, the determination that petitioner's premises were not "bona fide" was made after an administrative hearing at which petitioner was afforded due process.

Substantial evidence supports the findings that petitioner violated Alcoholic Beverage Control (ABC) Law § 110(4) and rule 36.1(b) (9 NYCRR 53.1[b]) by failing to disclose loans from a corporate affiliate used to fund renovations to the premises and that it violated rule 36.1(b) by misrepresenting its ability to open and operate, notwithstanding petitioner's showing that its failings were the result of negligence or ignorance of the law, rather than willfulness or an intent to deceive (*see Matter of Taverna El Pulpo v New York State Liq. Auth.*, 103 AD2d 701, 703 [1st Dept 1984]). Petitioner's argument that the misrepresentation in its original application is outside the applicable limitations period (*see ABC Law § 118 [2]*) is unpreserved and in any event without merit.

With respect to the determination that petitioner violated ABC Law § 99-d(1) by failing to obtain permission from respondent to effect a "substantial alteration" of the premises, the [*2]record shows that the renovations at issue cost over \$100,000 and included opening up a dressing room and converting it into a seating area.

Petitioner's argument that all the charges are barred by a prior determination of respondent based on petitioner's plea of no contest to a charge of failure to timely renew its license is unpreserved, since petitioner failed to raise it before respondent (*see Matter of Cipollaro v New York State Dept. of Motor Vehs.*, 101 AD3d 508 [1st Dept 2012]). Were we to consider the argument, we would reject it (*see Matter of Shercyn Toppin Mktg. Consultants, Inc. v New York State Liq. Auth.*, 103 AD3d 648, 651 [2d Dept 2013], *lv denied* 21 NY3d 858 [2013]).

In the absence of a finding of willfulness or an intent to deceive in connection with the

foregoing violations, the violations do not warrant cancellation of petitioner's license (see e.g. *Matter of Farina v State Liq. Auth.*, 20 NY2d 484, 493 [1967]; *Matter of La Trieste Rest. & Cabaret v New York State Liq. Auth.*, 228 AD2d 172 [1st Dept 1996]; *Matter of Vicky's Grocery v New York State Liq. Auth.*, 213 AD2d 206 [1st Dept 1995]). Accordingly, we remand the matter to respondent for the imposition of an appropriate lesser penalty.

All concur except Sweeny J.P. and DeGrasse, J.

who dissent in part in a memorandum by

DeGrasse J. as follows:

DEGRASSE, J. (dissenting in part)

The majority and I agree that substantial evidence supports respondent's determination that petitioner violated Alcoholic Beverage Control Law (ABC Law) § 99-d(1) and § 110 (4), as well as Rules of the State Liquor Authority (9 NYCRR) § 53.1. I disagree, however, with the majority's finding that the penalty of cancellation imposed by respondent is excessive. As noted by the Court of Appeals, "[T]he role of the courts in reviewing the penalty imposed by an administrative agency is extremely limited" (*Matter of 17 Cameron St. Rest. Corp. v New York State Liq. Auth.*, 48 NY2d 509, 512 [1979]). Where the finding of guilt has been confirmed, the test is whether the punishment imposed is "so disproportionate to the offense, in light of all of the circumstances, as to be shocking to one's sense of fairness" (*id.* [internal quotation marks omitted]). That test has not been met in this case.

Respondent sustained eight separate charges following a revocation hearing. Three of the sustained charges involved the submission of false material statements or the suppression of information in connection with petitioner's original application and renewal application. The record does not support the majority's conclusion, on the basis of a purported lack of willfulness on petitioner's part, that the penalty of cancellation was unwarranted. Petitioner's argument regarding its purported lack of willfulness is based on the assertion that it was unaware of its duty to disclose its financial obligations, place its license in safekeeping with respondent and otherwise comply with the ABC Law and respondent's rules. The majority apparently accepts this argument in reaching its conclusion. I reach a different conclusion because the common-law maxim that ignorance of the law is

no excuse applies in the context of article 78 proceedings (*see Matter of Obiora v New York State Div. of Hous. & Community Renewal*, 77 AD3d 755, 756 [2d Dept 2010] [landlord's ignorance of the law held insufficient to show that a rent overcharge was not willful]; *Matter of Rubin v Tax Appeals Trib. of State of N.Y.*, 29 AD3d 1089, 1091-1092 [3d Dept 2006][ignorance of the law held insufficient as a basis for the abatement of penalties]). [*3]*Matter of Farina v State Liq. Auth.* (20 NY2d 484 [1967]), which the majority cites, is distinguishable because it involved an annulment of a determination on the distinct ground that it "was arbitrary and capricious, being based upon conclusory reasons, unsupported by factual considerations" (*id.* at 493). *Matter of La Trieste Rest. & Cabaret v New York State Liq. Auth.* (228 AD2d 172 [1st Dept 1996]) and *Matter of Vicky's Grocery v New York State Liq. Auth.* (213 AD2d 206 [1st Dept 1995]), which the majority also cites, are inapt because they do not implicate the purported ignorance of the law excuse proffered by petitioner in this proceeding.

It should also be noted that the penalty of cancellation imposed here does not carry the most severe consequences permitted by law. Upon sustaining the charges following the revocation hearing, respondent could have revoked, cancelled or suspended petitioner's license (*see* 9 NYCRR 54.6 [a]; *see also* ABC Law § 17 [3]). "A licensee whose license has been revoked for cause must wait two years before applying for a new liquor license" (*Matter of Braden Food & Drink, Inc. v New York State Liq. Auth.*, 72 AD3d 956, 957 [2d Dept 2010], citing ABC Law § 126 [5][a]; [6]). However, where a license has been cancelled, the affected licensee may, theoretically, make an immediate application for a new license (72 AD3d at 957). I would confirm respondent's determination.

THIS CONSTITUTES THE DECISION AND ORDER

OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: MARCH 24, 2015

CLERK

[Return to Decision List](#)