

NEW YORK STATE LIQUOR AUTHORITY
FULL BOARD AGENDA
MEETING OF JULY 1, 2014
REFERRED FROM: COUNSEL'S OFFICE

2014-01592

REASON FOR REFERRAL
REQUEST FOR DIRECTION

OTG MANAGEMENT, LLC

(DECLARATORY RULING)

The Members of the Authority at their regular meeting held at the Zone I New York City office on JULY 1, 2014 determined:

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RECEIVED

MAY - 1 2014

STATE LIQUOR AUTHORITY
OFFICE OF COUNSEL

April 30, 2014

VIA EMAIL AND OVERNIGHT MAIL

Attn: Jacqueline Flug, General Counsel
New York State Liquor Authority
317 Lenox Avenue,
New York, NY

Re: Request for Declaratory Ruling
OTG Management, LLC

Dear Ms. Flug:

Please be advised that we represent OTG Management, LLC ("OTG"), along with its subsidiaries, in their alcohol beverage regulatory control matters. OTG, through its subsidiaries, currently operates numerous food and beverage and retail concessions, including restaurant premises, at JFK International Airport ("JFK") and La Guardia International Airport ("LGA"). As part of its method of operation in such airports, OTG has, through its non-restaurant technology and intellectual property development subsidiaries, incorporated modern technology in the form of tablet computers ("Tablets") into many of the licensed premises it operates therein. Its Tablets afford airport patrons the ability to place orders for food and beverages and various other retail products goods and services electronically, and have their orders delivered directly to their seats. The Tablets can also be used by patrons to track the status of their flight, play games, watch videos, access social media accounts and browse the internet.

OTG recognizes that its Tablets provide a vehicle for valuable advertisement space. However, it is also aware of the fact that the New York tied house laws prohibit OTG (including its non-restaurant technology and intellectual property development subsidiaries) from selling such space to alcoholic beverage manufacturers directly. Therefore, in consideration of the facts and circumstances further set forth herein, OTG requests that the Authority render a Declaratory

Ruling with respect to its ability to sell such advertising space to a third party entity which is not licensed in any tier of the alcoholic beverage industry.

Proposed Plan

If deemed permissible, OTG wishes to sell the advertising rights for the Tablets in place at its various licensed premises to Allure Media, LLC (“Allure”), an independent third party company and non-licensee. In exchange for such advertising rights, Allure would pay OTG a predetermined amount which is not based in any way on a percentage of the sales of such advertising space made by Allure. While it is contemplated that there will be many types of companies advertising on the Tablets, given the nature of the various venues, it is likely that a certain number of such entities will be those involved in the manufacturer of alcohol beverages.

Despite that a certain amount of ad space may be sold to alcoholic beverage manufacturers, we respectfully contend that there is no modicum of “undue influence” which the New York tied house laws seek to prevent. By selling its advertising rights to Allure, OTG will cede all control over the types of companies which are permitted to advertise on its space (albeit within basic advertising guidelines and parameters established by the Port Authority of New York and New Jersey (the “Port Authority”) and OTG’s airline partners). Thus, OTG will have no control over the specific products being advertised.

Permitted Practices of Similarly Situated Licensees

Our client is aware of the Authority’s Declaratory Ruling with respect to the alcohol beverage licensing at Yankee Stadium (2009-00615). We respectfully submit that the method of operation described above is identical in concept to the practices the Authority has approved with respect to Yankee Stadium. Essentially, the holder of the retail license for the Stadium is selling its advertising rights for a predetermined flat rate fee to a separate, independent third party company. OTG is seeking to sell the advertising rights on its Tablets in the same manner that the Yankees have sold the rights to advertise all over Yankee Stadium.

Similarly, in its ruling regarding the Bethel Woods Center for the Arts (2011-01646C), the Members of the Authority were asked to determine whether a licensed manufacturer and wholesaler could continue a sponsorship agreement with an entertainment venue holding a retail license. In such ruling, the Authority noted that the purpose of New York tied house law is “to prevent suppliers of alcoholic beverage from having an interest in, or undue influence over, retailers”. In this instance, as with Yankee Stadium, the retail licensee proposed to sell its sponsorship rights to the Museum at Bethel Woods, an independent entity which does not hold a license to traffic in alcoholic beverages. Although both the Center and the Museum were operated by separate trustee boards, the sole member of each entity was the same. Nonetheless, the Authority found that the proposed scenario was indeed permissible since (a) the Center would not receive the proceeds of the sponsorship agreement, and (b) the Center would have no control over the party or parties to which the Museum decided to sell the sponsorship rights. As noted by the Authority, “given the separation between the retailer and the supplier . . . the proposed sponsorship agreement does not violate either the ‘tied-house’ or ‘gift or services’ law”.

In another more recent ruling with respect to the Brooklyn Events Center (2012-00957D), the Authority was again asked to determine whether the sale of sponsorship rights would be considered a violation of New York tied house law given a set of facts and circumstances very similar to that of the Yankee Stadium decision. In such ruling, Brooklyn Events Center, LLC (“BEC”) was to be jointly licensed with the food and beverage operator for a professional basketball arena to be constructed for the New Jersey Nets. BEC had assigned its rights to sell sponsorships to third party companies to an independent third party, New Jersey Basketball, LLC (“NJB”). NJB does not hold a license to traffic in alcoholic beverages, nor would it receive any of the proceeds from the sale of alcoholic beverages at the arena. Moreover, the fee paid by NJB to BEC for the sponsorship rights was in no way conditioned upon the third party to whom NJB granted the sponsorship rights or the amount paid to NJB for same. Taking such circumstances into consideration, the Authority determined once again that, “given the separation between BEC and any potential supplier or distributor that enters into an agreement with NJB”, the proposed sponsorship agreement was not in violation of New York tied house law.

In the instant case, our client is proposing a sponsorship arrangement which is virtually identical to the scenarios expressly permitted by the Authority in its previous rulings. OTG proposed to sell the advertising rights for its Tablets to an independent third party and non-licensee, Allure. The fee paid by Allure to OTG for the advertising rights would be a predetermined amount which is in no way conditioned upon a percentage of the sales of such advertising space achieved by Allure, and OTG would have no control over the specific products being advertised. Moreover, unlike the scenario with Bethel Woods Center for the Arts, there is no thread of common ownership between OTG and Allure. Accordingly, given the separation between OTG and any potential supplier or distributor that enters into an agreement with Allure, we assert that the proposed arrangement does not violate New York tied house law.

Special Consideration Given to Similar Types of Premises

Our client is also aware of the Authority’s Declaratory Ruling with respect to the Branding of Railroad Commissary Carts (2010-04418L). In such Ruling, the Members of the Authority granted permission for the Metropolitan Transit Authority (“MTA”) to enter into sponsorship agreements with alcoholic beverage manufacturers. Such advertising would appear within rail cars which are owned and operated by subsidiaries of MTA. In allowing for the sponsorship agreement, the Members of the Authority recognized railroads as unique entities regulated under ABCL 106(11), which allows for the sale of alcoholic beverages on an aircraft or railroad car as well as from portable carts located on certain railroad station platforms.

Examining the instant situation in view of the MTA Declaratory Ruling, we assert that airports are akin to stadiums, concert venues and railroads and should also be recognized as rather unique entities subject to special consideration. The instant airports, JFK and LGA, are especially unique in that they are owned by the Port Authority, a bi-state public authority. Although ABCL 106(11) does not refer to airports specifically, it should be noted that in 1934, when the ABCL was initially drafted, railroads were the more primary form of transportation. Today, however, air travel is by far is the most popular form of transportation and airports in general are a critical component in any state’s economy.

Moreover, OTG's premises are often licensed in virtually the same way as stadiums and concert venues are licensed under New York law. The license for a typical stadium premises will cover the entire area of the stadium and designate multiple points of sale within such area. Similarly, with respect to OTG's licensed premises at JFK Terminal 2 and LGA Terminals C and D, the respective licenses cover the entire post-security area inclusive of multiple, distinct points of sale. Thus, as airport premises are substantially akin to railroads, stadiums and concert venues, we respectfully assert that airports should be also given special consideration in these circumstances.

Differentiation from Impermissible Practices

Notwithstanding the foregoing, our client is also aware of the very recent Declaratory Ruling of the Authority with respect to a request submitted by Display Points Group. In this Ruling, the Members of the Authority denied the petitioner's request to feature alcohol beverage manufacturer advertising on electronic devices that it would install on a retail licensed premises. In such case, Display Points Group was to receive a percentage of the revenue from non-alcohol related advertising on the devices. We assert that our client's request differs from the Display Points Group submission in significant ways.

As we understand, Display Points Group intended to bring the proposed electronic hardware into the licensed retail premises for the specific purpose of advertising. Such devices are not already in place to serve a functional purpose at the licensed locations. In the instant submission, we are requesting that our client be permitted to sell advertising space on equipment that is pre-existing and already serving multiple other purposes. In our case, the necessary equipment is present at the licensed premises and is not being brought in for the purpose of obtaining new advertising sales agreements.

Moreover, as we understand it, the Display Points Group proposal would have been applicable to all types of licensed premises, including the average restaurant and sports bar. In the instant request, we emphasize the fact that our client only intends to utilize this advertising concept within airport locations, many of which, while part of a larger terminal wide licensed premises, are not located in a distinct restaurant premises (*e.g.*, the gate holdrooms). As noted above, airports, like stadiums, concert venues and rail stations, are unique facilities which should not be deemed equivalent to general retail licensees.

In fact, the unique situation existing at airports was actually our client's original reason for deploying Tablets at JFK and LGA. Our client found that the traveling public, particularly post 9-11, was very apprehensive about air travel. Many individuals were reluctant to stray far from the gate hold areas fearing that they would miss an important announcement. To alleviate these concerns (which our client coined as "gate anxiety"), OTG installed restaurant style seating and Tablets into the gate hold areas. By having table seating within the gate hold areas, the traveling public could, with the use of the aforementioned Tablets, order food and beverage and retail items and entertain themselves in close proximity to the gate without ever leaving such area. While OTG has since added Tablets to its restaurant spaces, the Tablets' ability to solve for "gate anxiety" (through its flight status tracker and ease and speed of ordering and check out) spurred these successful additional deployments.

Because of the practical uses and functionality of OTG's electronic ordering systems and the unique airport venues in which they are deployed, the instant Declaratory Ruling request differs greatly from that of Display Points Group. Our client had a logical basis for establishing its Tablet ordering system which was completely independent of concerns about advertising. Indeed, our client has been operating with these Tablets for several years at some of its locations and is only now considering the economic advantage of utilizing this previously unused advertising space. We should note that a portion of that economic advantage will ultimately inure to the benefit of the New York airports and the Port Authority based on the rents paid to the Port Authority.

Public Benefit

Finally, as asserted above, it cannot be denied that airports are unique entities in many respects. The same is also true with respect to alcohol beverage licensing. Both JFK and LGA are owned by the Port Authority, a public entity, and are key components to New York's economy. In our client's proposed arrangement, a portion of the advertising revenue and the financial benefit created by same will inure directly to a publicly owned entity, the Port Authority, and thus indirectly to the New York public. In this way, it actually goes one step further than the stadium concept examined in previous rulings, as there is a substantial public benefit involved.

Moreover, our client's method of operation was developed in direct response to the issue of gate anxiety. Its Tablet system offers a more comfortable and less stressful experience for travelers in the post 9-11 world. Considering these facts and circumstances, it is clear that airports, like sports stadiums, concert venues and railroads, should be given special consideration with respect to advertising and sponsorship agreements. Accordingly, our client should be permitted to sell its advertising rights to a third party for a flat rate fee at locations it operates within New York airports.

Conclusion

For the foregoing reasons, we respectfully request the Authority to grant our client's request for Declaratory Ruling as set forth above. Thank you for your time and consideration in this matter.

Sincerely,


Robert D. Skene

Cc: Kerri O'Brien, Deputy Commissioner
Jacqueline Held, Secretary to the Authority