

NEW YORK STATE LIQUOR AUTHORITY
FULL BOARD AGENDA
MEETING OF OCTOBER 15, 2015
REFERRED FROM: COUNSEL'S OFFICE

2015-02286D

REASON FOR REFERRAL
REQUEST FOR DIRECTION

DARLINGS CONCESSIONS LLC
USE OF
ATG LTD. MOBILE APPLICATION

(DECLARATORY RULING)

The Members of the Authority at their regular meeting held at the Zone I New York City office on OCTOBER 15, 2015 determined:

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August 5, 2015

Jacqueline P. Flug,
General Counsel
New York State Liquor Authority
317 Lenox Avenue
New York, New York 10027

Re: Darlings Concessions LLC

Dear Counsel Flug:

INTRODUCTION

Pursuant to Section 98.1 of the Rules of the State Liquor Authority (9 NYCRR subtitle B), the undersigned respectfully requests that the Authority issue a declaratory ruling with respect to the applicability of certain provisions of the Alcoholic Beverage Control Law ("ABC" Law) to the state of facts hereafter presented.

FACTS

Darlings Concessions LLC, d/b/a "Lyric Theatre" ("Darlings"), holds an On-Premises Liquor License (Serial No. 1278480), for premises located at 214 West 43rd Street, New York, NY 10036 from which it operates a concessions business in a live Broadway Theater. Darlings wishes to make available to its theater patrons a downloadable App that will permit patrons to place orders from its food and beverage (including alcohol) menu for delivery directly to the patrons at their seats prior to performances or at intermission of the show the patron is attending.

The App is provided by ATG, Ltd. ("ATG"). A patron will select on the App the venue, i.e. the Lyric Theatre, the particular theater performance which the patron will attend that day (i.e. matinee or evening), and designates the specific location of his/her seat. The patron selects the food and beverage items from the theater's menu, the quantity of each item desired and when they wish the item(s) delivered to their seat (pre-show or intermission). For any alcoholic beverage item ordered by a patron a message on the App cautions them that the patron must be over 21 years of age and that proper identification will be required before the item is served. The patron proceeds to the "check out" page and confirms the order and the cost. The patron is directed to the "payment" page. If the patron is placing his/her first order on the App, he/she will be asked for his/her name and e-mail address. The patron is then transferred to the "PayPal" payment page where they can select to pay using a PayPal account or a credit card. The patron completes the payment page and is directed to an order summary on their history page on the App, which confirms that the order has been processed. The patron is assigned an order number. At the time and seat designated by the patron, a member of the theater staff will deliver the order and, if the order contains alcohol, check the proper identification of the patron. If the identification produced is not valid or show that the patron is not of legal drinking age, the staff member will refuse to serve the alcoholic beverage(s) and that portion of the order will be cancelled and the patron will receive a refund for the value of the cancelled portion of the order.

There will be no advertisements or sponsorships by any manufacturers or wholesalers unless first approved by the Authority.

Payment for each transaction is made by the patron utilizing either PayPal account or a customary credit card account. The full amount of the payment for each transaction, less applicable credit card fees and/or PayPal fees, which will never exceed 4% of the total cost of each transaction (and are not based on the quantity of alcohol purchased), is paid directly to Darlings by PayPal or the credit card company.

ATG, the provider of the App, does not receive any compensation for its services. It is providing the App as a means to test the App's integrity and viability, as well as to collect the names and e-mail addresses of the patrons of the theater. If, at any time in the future, ATG is paid a fee, the fee will be either a flat fee per transaction or a percentage of the total cost paid by the patron in each transaction. If the latter, the percentage ATG will receive will not exceed ten (10%) percent of the total cost paid by the patron in each transaction.

APPLICABLE LAW

Section 110(1) (g) of the ABC Law requires disclosure of any person who has a financial interest in a licensed premises.

Section 111 of the ABC Law prohibits a licensee from making their license "available" to anyone. Specifically, it states that a license issued "... shall not be transferable to any other person or to any premises ... It shall be available only to the person specified therein ..."

ISSUE

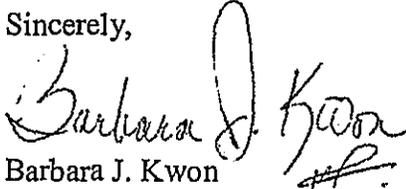
1. Does ATG, Ltd. acquire an ownership interest in the licensed premises by virtue of the above operating method?
2. Does the above described operating procedure constitute an "availing" of an on-premises license by ATG, Ltd.?

DISCUSSION

ATG, Ltd. does not have any role in the operation of Darlings' licensed premises. Darlings' retains and exercised controls over the items which appear on the menu (including alcoholic beverage items), the prices of those items and the delivery of those items. All payments (less applicable credit card or PayPal fees (which will not exceed 4% of the cost of each transaction) are transferred directly to Darlings by PayPal or the credit card company selected by the patron. Since Darlings retains all essential control of the operations of the licensed premises, it has not permitted an "availing" of its license by an unlicensed party.

At the present time, ATG, the App provider, will not receive any fee or compensation for its services. It is providing the App as a means to test the App's integrity and viability, as well as to collect the names and e-mail addresses of the patrons of the theater. If, at any time in the future, ATG is paid a fee, the fee will be either a flat fee per transaction or a percentage of the value of each transaction. If the latter, the percentage ATG will receive will not exceed ten (10%) percent of the total cost paid by the patron in each transaction. This percentage will be an insignificant amount of the total revenue generated from the sale of alcoholic beverages at the licensed premises.

Sincerely,


Barbara J. Kwon