

Application of the “tied-house” and “gifts & services”
laws to naming agreement

DECLARATORY
RULING

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 application of the Alcoholic Beverage Control Law (“ABCL”), or the Rules of the Authority, to any person, property or state of facts. The Authority is in receipt of a request from Donald Bernstein, Esq., on behalf of the New York Palace Hotel and Northwood Hotel Management LLC¹, for a declaratory ruling as to whether, under the facts presented, a naming rights agreement with respect to suites in their licensed hotel would be considered a violation of the “tied-house” and/or “gifts and services” prohibitions in the ABCL.

As explained by Mr. Bernstein in his letter as well as during his appearance before the Members of the Authority at the August 13, 2013 Full Board meeting, the hotel, as a marketing tool, seeks to identify certain suites with companies and/or products that are consistent with the hotel’s status as a “first class” luxury venue. A sign identifying the company or product name trademarked would be posted at the entrance to the suite. These companies or products would include trademarked names owned by liquor manufacturers and wholesalers. As an example, Mr. Bernstein suggested that one suite might be named the “Dom Perignon” suite.

Under this arrangement, the hotel would enter into an agreement assigning the naming rights to suites in the hotel to a third party. The third party would not have any common ownership with either the New York Palace Hotel or Northwood Hotel Management LLC. The third party would have the right to enter into agreements with, among others, licensed manufacturers or wholesalers, to use their trademarks or registered names on suites in the hotel. No proceeds, if any, received by the third party would be paid to or shared with the hotel or the retail

¹ The two entities jointly hold an on-premises liquor license for the Palace Hotel, located at 455 Madison Avenue in Manhattan.

licensees operating within it. Mr. Bernstein stated that the naming of the suites would make them “more attractive” to potential hotel guests.

It is the policy of the State of New York that “it is necessary to regulate and control the manufacture, sale and distribution within the state of alcoholic beverages for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to the law.”² Consistent with that policy, the distribution of alcoholic beverages in this state is generally accomplished though what is referred to as the “three tier system.”³ With certain exceptions, manufacturers sell their products to wholesalers who, in turn, distribute the products to retailers.

The ABCL contains numerous provisions that regulate the relationships between the three tiers. These restrictions are intended, inter alia, to prohibit manufacturers and wholesalers from having an undue influence over retail licensees. For example, manufacturers and wholesalers may not offer discounts, rebates, etc., to selected retailers.⁴ While manufacturers may limit which wholesalers sell their product,⁵ each of those wholesalers must be able to purchase the product at the same price from the manufacturer.⁶ A wholesaler must offer the same price, and any discounts, for liquor and wine to all retailers.⁷ With certain exceptions, manufacturers and wholesalers may not provide any gifts or free services to retail licenses.⁸

To further prevent manufacturers and wholesalers from exerting inappropriate control over retail licensees in this state, the ABCL places restrictions on the ability of an entity in one tier from having an interest in an entity in another tier of the industry. These restrictions are commonly known as the “tied house” laws. Licensed manufacturers and wholesalers are prohibited from having any interest, direct or indirect, in any premises where alcoholic beverages are sold at retail.⁹ Retail liquor and wine stores may not have an interest in a business that

² ABCL §2.

³ The United States Supreme Court has held that a state, in the exercise of its authority under the Twenty-First Amendment, can mandate a three-tier distribution system. See *North Dakota v. United States*, 495 US 423, 432 (1990).

⁴ ABCL §101-b(2)(a).

⁵ ABCL §101-b(4-a)(a).

⁶ ABCL §101-b(3)(a).

⁷ ABCL §101-b(3)(b).

⁸ ABCL §101(1)(c).

⁹ ABCL §101(1)(a).

manufactures or wholesales alcoholic beverages.¹⁰ Those holding a retail on-premises license are banned from having any interest in a business that manufactures or wholesales alcoholic beverages.¹¹ The New York State Court of Appeals has held that even de minimis ownership is a disqualifying interest under the tied house laws.¹²

The Authority has issued declaratory rulings in three matters that allow for retailers to transfer “sponsorship rights” for the licensed venue to third parties who, in turn, may sell such rights to other companies.¹³ The Authority has approved, in those situations, liquor manufacturers and wholesalers obtaining the sponsorship rights from the third party. Each of those situations, and several others where retail licensees have acted in reliance on those rulings, involve sports/concert venues.

Mr. Bernstein contends that the proposed arrangement presented in his request is consistent with the guidance provided by the Authority in those three rulings. However, in each of those rulings it was noted that the conclusion reached by the Members of the Authority was based on the specific set of facts being considered. As noted above, each of those rulings involved sports/concert venues. Large public sports and performing arts venues serve a unique role in society. In addition, brands of alcoholic beverages have been associated with the sponsorship of sports teams, concerts and similar events at venues designed for such events.

In the view of the Members of the Authority, there are material distinctions between the types of traditional sponsorship arrangements that were the subject of the three rulings, and similar arrangements with other retail premises. In addition to the history of manufacturers and wholesalers being involved in the sponsorship of sports/concert venues, the purpose behind the sponsorship of those venues and premises such as this hotel are different. Neither the alcoholic beverage manufacturers and wholesalers, nor the venue operator, seek those sponsorships to draw business for the retailer. However, as conceded by Mr. Bernstein, the primary purpose of this arrangement is to “make the suites more attractive” to potential guests. Above and beyond any payment made to or by the parties involved, the retailer is using the arrangement to obtain a financial benefit from the

¹⁰ ABCL §105(16). The restriction applies only to those with retail licenses to sell liquor and/or wine for off-premises consumption. It does not apply to retail licensees who are limited to selling beer for off-premises consumption.

¹¹ ABCL §106(13).

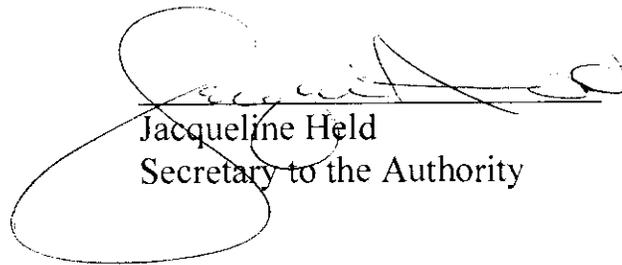
¹² *Rihga International USA Inc. vs. State Liquor Authority*, 84 NY2d 876 (1993)

¹³ See declaratory rulings issued in Agenda Nos.2009-00615, 2011-01646C and 2012-00957D.

use of the name of the alcoholic beverage. This financial interest is impermissible under the tied house laws. In addition, the Members of the Authority are not convinced that such arrangements will not be used by manufacturers and wholesalers to illegally control, or at least attempt to influence, the choice of alcoholic beverages offered for sale in the suites or elsewhere on the premises.

Accordingly, the Members of the Authority find that the naming agreement proposed in this request is not permissible under the ABCL.

The foregoing Declaratory Ruling was formally approved by the Members of the Authority at a Full Board meeting held on November 21, 2013.



Jacqueline Held
Secretary to the Authority