

STATE OF NEW YORK: LIQUOR AUHORITY

Application of the Alcoholic Beverage
Control Law to Forbes Wine Club by Lot 18

DECLARATORY
RULING
2014-01059

Preliminary Statement

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

By letter dated February 21, 2014, a request was submitted by Dini Rao, on behalf of Lot 18, a package store in Mahopac, New York. Ms. Rao requests a declaratory ruling as to whether the operation of an Internet wine club co-branded with a marketing company violates the Alcoholic Beverage Control Law.

Statement of Facts

Lot 18 operates a website for their brick and mortar package store. Listed on their website is their wine club called “Tasting Room.” Members of the Tasting Room wine club receive a tasting kit from Lot 18 containing several small bottles of various wines. Customers are asked to taste each wine and report their likes and dislikes to Lot 18. Based on this information Lot 18 creates “a wine profile” for each customer and each customer then receives shipments of wine suited for their wine profile.

All orders for the Tasting Room club are received via the website and reviewed and accepted (or rejected) at the Lot 18 package store in Mahopac, NY during store hours. Lot 18 employees then send orders electronically to a public warehouse in Wurtsboro, NY. Lot 18 keeps inventory in the public warehouse permitted to We Ship for both their package store and Internet sales. We Ship receives directions from Lot 18 and then takes the wine from the Lot 18 inventory

and boxes the wine accordingly. The wine is then picked up for delivery by a common carrier and delivered directly to the New York customer.

The Tasting Room wine club as described above and these specific operations were presented to the Members and approved by the Board on January 14, 2014 when the Full Board approved Lot 18's package store application. Additionally, when reviewing and approving the package store application the Board reviewed Lot 18's use of non-licensed third party marketing companies.

The Board approved Lot 18's use of marketing companies such as Google, which Lot 18 pays on a per click basis. The Board also approved the use of marketing companies that are paid based on the number of customers they obtain for Lot 18. Such marketing companies included Geist Media and Commission Junction. Lot 18 reported all third party marketing companies which they utilize. All are paid flat fees. No marketing company receives a percentage of the sales of alcoholic beverages.

Lot 18 now asks the Board if it is permissible to co-brand this wine club with a non-licensed marketing partner. Specifically, Lot 18 asks if it is permissible to co-brand the wine club with Forbes, and title the club *Forbes Wine Club by Lot 18*.

As set out in Ms. Rao's letter, the co-branded wine club would operate in the same manner as the Tasting Room wine club with the following exceptions: (1) the wine club would be called "Forbes Wine Club by Lot 18"; and (2) Forbes would circulate advertisements for the wine club in print, online, or through other means.

Applicable Law

Section 100.1 of the Alcoholic Beverage Control Law states that no person shall sell alcoholic beverages in New York without obtaining the appropriate license.

Section 105.14 of the Alcoholic Beverage Control Law prohibits liquor stores from: (1) operating on Sundays before noon and after 9 p.m.; (2) operating

between midnight and 8 a.m. on any day; (3) operating on Christmas and; (4) selling alcoholic beverages when the store is closed to the public.

Section 105.15 of the Alcoholic Beverage Control Law requires all liquor stores to maintain adequate books and records at the licensed location.

SLA Rule § 99.2 prohibits retailers from engaging in any deceptive or misleading advertising.

Section 111 of the Alcoholic Beverage Control Law states that a license "... shall not be transferable to any other person or to any other premises...it shall be available only to the person therein specified"

Issues Presented

Does the co-branding of the wine club with Forbes, and marketing by Forbes violate the ABCL?

Determination of the Board

When examining Internet sales involving product being shipped directly to New York customers there are some basic questions that must first be addressed. ABCL §100 requires all those selling alcoholic beverages in New York to hold the appropriate license. Therefore, the Board must first ask who may sell wine shipped directly to New York customers. Only New York licensed package stores or wineries with direct shipping permits may sell and ship wine directly to New York customers. Lot 18 holds a New York package store license and operates a bona fide package store; therefore, they may legally engage in direct sales and shipments to New York customers.

Next, pursuant to ABCL §111, a license to sell alcoholic beverages is applicable to only the specific location licensed and the specific person licensed. Accordingly, sales may only be made from the licensed premise by the licensee or employees of the licensee. All *Forbes Wine Club by Lot 18* orders are received, reviewed and accepted (or rejected) by Lot 18 employees at the licensed premises.

Finally, ABCL §105.14 also governs the times during which sales of alcoholic beverages may take place. The hours for the Lot 18 store comply with ABCL §105.14. *Forbes Wine Club by Lot18's* sales occur only during the store's operating hours in Mahopac, NY and all records are maintained at the licensed location pursuant to ABCL §105.15

With these basic questions answered, the Board must now examine the more complex issues of the co-branding and marketing agreement between Lot 18 and Forbes. When reviewing the use of non-licensed third party marketers by retailers the Board carefully examines the relationship, written agreements and actions of each party to ensure that the licensee retains control of the sale of all alcoholic beverages and that the licensee receives the profits from the sales. In order to make this determination, the Board refers to the standard established in Declaratory Ruling 2013-01006A regarding ShipCompliant. Pursuant to 2013-01006A, the Board must examine:

- (1) The role of the retail licensee.
- (2) The role of the non-licensed marketing company.
- (3) The compensation to the non-licensed marketing company.

1. The role of Lot 18 in the *Forbes Wine Club by Lot 18*.

A review of the business model from start to finish shows that Lot 18 retains full control over the retail sale of the wine. Lot 18 has sole discretion over the wine sold via the wine club. All wine comes from Lot 18's inventory. It is wine selected by Lot 18, purchased from New York State licensed wholesalers, and paid for by Lot 18 prior to the customer's purchase. *Forbes Wine Club by Lot 18* does not operate on a just-in-time basis. Lot 18 has invested in inventory for this wine club and therefore assumes risk. Additionally, the price of the wine is set by Lot 18. There is no consultation with, or recommendations from, Forbes concerning wine selection or price or any other facet of the wine club. The role of Forbes is limited to marketing.

All orders for the wine club are reviewed and received by Lot 18 employees at the licensed premises. All directions to We Ship, the fulfillment company, come from Lot 18 employees.

All payments for wine club purchases are made directly to Lot 18. Credit card information is received and processed with deposits made directly into the bank account of Lot 18. Payments are made by Lot 18 to We Ship for packaging services and payments are made by Lot 18 to the common carriers used for delivery. With the exception of actually packaging the boxes of wine and delivering them, Lot 18 employees actively execute all aspects of the sale.

2. The role of Forbes.

Forbes provided the Authority with the contract to be executed with Lot 18 and appeared before the Full Board to answer questions. All responses and the contract show that Forbes' involvement in the wine club is twofold. First, Forbes co-brands the wine club with its trade name, and second, Forbes markets the wine club. The contract specifically enumerates the services of Forbes as follows:

1. [Forbes] will market Wine Club through agreed-upon tactics using online and offline distribution methods.
2. [Forbes] does not and shall not influence the selection or the pricing of the wines offered by the Wine Club.

Based upon this contract and the questions answered by both Forbes and Lot 18, the Board finds that Forbes plays no role in the retail sale of the wine. More plainly stated, it cannot be argued that Forbes is selling wine.

As for the co-branding of the wine club, this is also addressed in the contract between Lot 18 and Forbes. When reviewing the use of the Forbes trademark it is of great importance to the Board that the agreement for trademark use is directly between Lot 18 and Forbes and not through a third party. By this direct agreement the responsibilities of each party, and the agreed upon consideration, are clear and unequivocal.

As for the actual usage of the Forbes trademark, all webpages and materials clearly label the wine club as *Forbes Wine Club by Lot 18*. Every portion of the website states that Lot 18, a New York retailer in Mahopac, NY, is selling the wine. A customer does not have to look for the fine print for this information because the name Lot 18, and references to the brick and mortar store, appear throughout every portion of the website. There is no confusion regarding whether or not this wine club is operated by Lot 18. The Board finds that this website complies with SLA Rule §99.2 and cannot reasonably be viewed as deceptive.

3. The Compensation to Forbes.

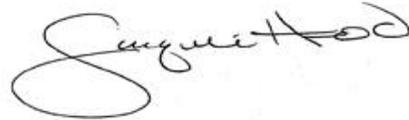
The Board notes that all monies paid by wine club customers go directly into an account fully controlled by Lot 18. With the exception of the credit card gateway and processor, there is no third party interception of funds between the customer and retailer.

Forbes receives compensation from Lot 18 for both the use of its trademark and the marketing services provided. The marketing services provided by Forbes do not differ from the services provided by other marketing companies already used by Lot 18 and approved in their package store application. Pursuant to their agreement, Forbes will attempt to market the company via their media company and they will be paid by Lot 18 for every customer they obtain for the club. They will be paid a flat fee for the use of the trade name and for each customer enrolled in the club. At no point does Forbes receive any percentage of the sales from wine. Their compensation is based on the number of customers, not the value of a customer's purchase. Because Forbes is paid merely for the services provided, they cannot reasonably be viewed as receiving a portion of the wine sales by Lot 18.

Pursuant to the above analysis, which comports with Declaratory Ruling 2013-01006A, the Board finds that Lot 18 retains total control of every retail function and utilizes Forbes as a trademark partner and marketing company. Accordingly, the *Forbes Wine Club by Lot 18* model as presented by Ms. Rao does not violate the ABCL. Licensees are reminded that this ruling is limited to the

facts set forth herein. This ruling should not be considered approval for any other proposal which deviates, in any respect, from the representations as set forth above.

The forgoing Declaratory Ruling was approved by the Members of the Authority at a Full Board meeting held on May 6, 2014.

A handwritten signature in black ink, appearing to read "Jacqueline Held". The signature is written in a cursive style with a large initial "J" and "H".

Jacqueline Held
Secretary to the Authority