

Application of Thirst for Night

DECLARATORY
RULING
2015-01717F

Preliminary Statement

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, on any person, property or state of facts.

By letter dated November 20, 2014, a request was submitted by Alex Victor, Esq. on behalf of his client Thirst for Night ("Thirst"). Thirst does not hold licenses relating to alcoholic beverages. As described by Mr. Victor, Thirst is an application ("app") that permits customers to order and pay for food and alcoholic beverages at participating on-premises locations. Mr. Victor asks if Thirst's proposed method of operation violates the ABCL.

Statement of Facts

Thirst is a smart phone app that permits users to order food and drinks via their phone while at a licensed premises. Users may also pay for their food and drinks using the Thirst app. Every participating on-premises licensee selects menu items and the prices at which they will be displayed and sold to customers via the app.

Customers open a Thirst account using a credit card and can therefore pay their tab via the app including a gratuity payment. All payments go directly via the credit card processing company to the licensed retailer. Customers also upload a photo of themselves. When they place an order via the app it goes to a tablet at the licensed premises and includes the customer's photo. The licensee must confirm and accept all orders as well as ensure the person they serve is of legal drinking age.

Licensed retailers will pay Thirst based upon a percentage of the sales made via the app. The percentage payments will vary but Thirst states that no licensed retailer will be charged more than 10 percent of the sales made via the app.

Additionally, Thirst would operate a loyalty program providing a free item to a user who visits a particular venue and makes eight to 25 purchases there. Thirst will then pay the licensed premises for that item. Thirst also tracks the purchases of their customers permitting other users to send a credit for a previously purchased item to a friend. Thirst will not include advertising from alcoholic beverage manufacturers but will include banner ads.

Applicable Law

Section 111 of the ABCL prevents a licensee from making their license "available" to anyone. Section 11 states a license issued "... shall not be transferable to any other person or to any other premises...it shall be available only to the person therein specified ...".

Section 110(1)(g) requires disclosure of anyone with a financial interest in a licensed premises.

Issues Presented

- (1) Does the operating method of Thirst constitute an availing of an on-premises license?
- (2) Does Thirst have an ownership/financial interest in the licensed premises?

Determination of the Members

When reviewing the operation of third party providers the Members have examined the role of the third party to see if: (1) an unlicensed person is acting in place of the licensee and; (2) does the unlicensed party have an ownership/financial interest in the licensed premises.

The Members have traditionally held that basic retailer responsibilities such as product selection and pricing must be controlled by a licensee. Accordingly, Thirst ensures that all product selection and pricing decisions are made by licensees. Additionally, licensees control each sale by delivering the products and ensuring that all customers are of legal drinking age. Under Mr. Victor's statement of facts, the licensee is in full control of all sales.

Per Mr. Victor's description the app fully discloses to customers that they are ordering and paying the licensee so there should be no claim by Thirst they sell alcoholic beverages. Lastly, as explained by Mr. Victor, 100 percent of the customer payments go directly to an account controlled by the licensee and licensee only. All of the above ensures the licensees control over the sales and profits and that Thirst, an unlicensed entity has not substituted itself for the licensee.

As for the means by which licensees compensates Thirst for their services Mr. Victor states that the amount will be based upon a percentage of sales from the licensed venue though the percentage will never be more than 10 percent of the sales made via Thirst. Sharing a percentage of sales of alcoholic beverages has traditionally raised issues of ABCL Section 111 and availing, in that a party who receives a percentage of the sales can be viewed as someone with an interest in the licensed business. For example, in Advisory 2015-9 the Members stated that retailers who receive compensation for the use of trademark by alcoholic beverages manufacturers based on a percentage of the sales of the trademarked product are considered to have an interest in manufacturing alcoholic beverages.

However, the Members have found some entities to not have an ownership/financial interest in an entity when reviewing third parties who deal with on-premises licensees. Since 2011 the Members have reviewed the operations of numerous third party providers dealing with on-premises licensees. In declaratory ruling 2011-3001 concerning Groupon, declaratory ruling 2011- 3527C concerning Living Social and declaratory ruling 2013-02826B concerning Slinger the Members found that each third party provider's operation to complied with the ABCL. In each ruling the Members held that the percentage of sales which the third party claimed were de minimis in light of total sales by the licensee.

As stated by Mr. Victor, sales via Thirst will always be a small portion of the sales made by the licensee never exceeding 10 percent of total sales. Accordingly, because the licensee exercises total control over sales via Thirst including collection of customer's payments and because the percentage by which Thirst is compensated is de minimis to the overall sales of the licensed venue, the Members find that Thirst's operation comply with the ABCL and do not violate ABCL Section 111.

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 Full Board meeting held on July 21, 2015.



Jacqueline Held
Secretary to the Authority