

STATE OF NEW YORK: LIQUOR AUTHORITY

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Application of Empire Estates

DECLARATORY  
RULING  
2015-2102C

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**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 August 12, 2015, a request was submitted by Robert Skene, Esq. on behalf of his clients William Guidara and Daniel Humm. Messrs. Guidara and Humm hold two on premises retail licenses in New York State. Messrs. Guidara and Humm wish to create and fund a trust that would invest in a Finger Lakes winery. Additionally, Messrs. Guidara and Humm wish to enter into a consulting agreement with the winery. Mr. Skene requests a declaratory ruling on whether the proposed investment via a trust and the proposed promotional and consulting agreement violate the tied-house and gifts and services prohibitions in the Alcoholic Beverage Control Law.

**Statement of Facts**

Messrs. Guidara and Humm both own portions of New York licensed on premises retailers. Olema Partners ("Olema") is a company that holds interests in wineries and operates wineries. Olema intends to establish and operate a winery in the Finger Lakes region of New York with the d/b/a Empire Estates. Messrs. Guidara and Humm would like to fund trusts that would invest in Empire Estates.

As stated by Mr. Skene the trusts would be irrevocable and the beneficiaries would be children of Messrs. Guidara and Humm. Mr. Skene states that all proposed beneficiaries do not hold any licenses relevant to alcoholic beverages, meaning that there are no tied-house law prohibitions relevant to the proposed beneficiaries. Similarly, Mr. Skene states the proposed trustees will not hold any interest in the retail sales of alcoholic beverages and are not felons nor law enforcement officers. Accordingly, the proposed trustees do not have tied-house or licensing prohibitions.

Once Empire Estates is licensed and operating, Mr. Skene asks if it would be permissible for the winery to contract with Messrs. Guidara and Humm to provide consulting and promotional services. Mr. Skene proposes that Messrs. Guidara and Humm would be paid at an hourly rate for these services.

**Statutes Involved**

ABCL §101(1)(a) prohibits a licensed manufacturer or wholesaler from having any interest, direct or indirect, in any premises where alcoholic beverages are sold at retail.

ABCL §106(13) prohibits a licensed on premises retailer from having any interest in a business that manufactures or wholesales alcoholic beverages.

ABCL §101(1)(b) prohibits a licensed manufacturer or wholesaler from making any gift, or rendering any service, to a licensed retailer if, in the judgment of the Authority, the gift or service might tend to influence the retailer to purchase the manufacturer's or wholesaler's products.

Section 86.1 of the Rules of the Authority prohibits retail licensees from accepting gifts or services from manufacturers or wholesalers unless otherwise specified within the Rules.

### **Issues Presented**

1. May retail licensees create an irrevocable trust to invest in a winery?
2. May retail licensees receive compensation from a winery for consulting and promotional services?

### **Determination of the Members**

#### **1. Licensing of a trust**

Historically, without any ruling from the Members, the Authority has licensed a large numbers of businesses, in each tier, where part or all of the business was owned by a trust. The Authority's practice has been to treat the trustee as the licensee since the trustee exercises control over the licensed business.

Under this practice, the Authority would review the trustee to ensure that they were eligible to hold a license. The Authority would examine whether the trustee was of legal age, had a felony conviction or was employed as law enforcement. The Authority would also inquire as to any possible tied-house interests the trustee might have. In May of 2015, the Authority began using a standard affidavit form for all applications that concerned trusts<sup>1</sup>. The trustee would attest to all of the above conditions in order to state they were eligible to be licensed.

Additionally, in May 2015 the Authority began using the same affidavits in regards to trust beneficiaries. Unlike trustees, beneficiaries do not control an entity owned by a trust. A trustee who exercises control over a licensed entity should be viewed as trafficking in alcoholic beverages. To the contrary, a beneficiary does not exercise control over an entity but by receiving the profits, or a portion of the profits from a licensed entity a beneficiary should be viewed as holding an interest in the licensed entity. Therefore, based on ABCL 101(1)(a) a beneficiary for a trust that owns a retail licensed premises may not also hold an interest in an entity that manufactures and/or wholesales alcoholic beverages and vice versa. On the affidavit, trustees attest to the fact that beneficiaries do not hold tied-house disqualifying interests.

Therefore, though the Members have never made a detailed ruling on the licensing of entities with trusts before today, the Authority has adopted this practice and has licensed

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<sup>1</sup> [https://www.sla.ny.gov/system/files/Trust Stipulation for Retail Applicants-120215.pdf](https://www.sla.ny.gov/system/files/Trust%20Stipulation%20for%20Retail%20Applicants-120215.pdf)  
[https://www.sla.ny.gov/system/files/Trust Stipulation for Wholesale Applicants-120215.pdf](https://www.sla.ny.gov/system/files/Trust%20Stipulation%20for%20Wholesale%20Applicants-120215.pdf)

entities owned by trusts. The Members now hold that the licensing of trusts is appropriate for the following reasons.

Business ownerships take on varied structures including partnerships, limited liability companies, public corporations, partnerships etc. Each ownership structure is unique to the business. Some include trusts and some do not. To hold that trusts may not own licensed entities would stifle businesses and have large ramifications for countless entities that are currently licensed. Because a trust must always have a trustee who bears the responsibility of control and operation the Members find that a trustee acts as a licensee.

Accordingly, the Members will require that the Authority be put on notice and approve any change in the trustee as long as the trust has an interest in a licensed premises.

As long as trustees are eligible to traffic in alcoholic beverages without tied-house restrictions and beneficiaries do not have interests in multiple tiers, the Authority will permit licensed entities to be owned wholly or partly by trusts.

#### **Tied-House issue in relation to trust grantors**

As to Mr. Skene's specific tied-house question, can a retail licensee fund an irrecoverable trust that will invest in a manufacturer with the retail licensee's family members as beneficiaries? The Members believe the answer is yes they may.

Legally, once a retailer irrevocably grants money to the trust they have no control over the money and how the trust uses it. Making the grant irrevocable removes the tied-house taint generally held by a retailer's investment. Therefore, with an independent trustee in control of the trust, the trust is free to invest in manufacturing or any other area the trustee wishes.

As for the beneficiaries, the Members find that the family members of a retailer may be beneficiaries to a trust that holds an interest in manufacturing. Under New York Domestic Relations Law anything obtained during a marriage is marital property.<sup>2</sup> However, under the ABCL one spouse's interest in a license does not give the other spouse an interest. When one spouse owns a winery the ABCL does not view the other spouse as having an interest in the winery unless they jointly own the winery and are on the winery license. The ABCL makes no mention of interests held by a spouse or family member. Licenses are issued individually and therefore the interest in the licensed tier is held individually as well. Interests considered pursuant to ABCL Sections 101(1)(a) and 106(13) are singular to each individual. Accordingly, a parent's interest in one tier does not transfer to their children or prevent their children from having an interest in another tier.

Accordingly, Messrs. Guidara and Humm may irrevocably grant money to a trust for the benefit of their children with an independent trustee who may choose to invest in a winery.

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<sup>2</sup> New York Domestic Relations Law Section 236(b): The term "marital property" shall mean all property acquired by either or both spouses during the marriage and before the execution of a separation agreement ...

## **2. Consulting and Promotional Services**

Mr. Skene states, "The ABCL in no way prohibits a retail licensee from working as an independent contractor for a manufacturer of alcoholic beverages". The Members do not agree with this conclusory statement.

ABCL Section 101(1)(b) prohibits a licensed manufacturer or wholesaler from making any gift, or rendering any service, to a licensed retailer if, in the judgment of the Authority, the gift or service might tend to influence the retailer to purchase the manufacturer's or wholesaler's products. Additionally, Section 86.1 of the Rules of the Authority prohibits retail licensees from accepting gifts or services from manufacturers or wholesalers unless otherwise specified within the Rules. Therefore, an analysis of what Mr. Skene calls a retailer's independent contracting must be undertaken before stating whether or not it is permitted by the ABCL.

The statute specifically grants the Members of the Authority the discretion to state what may or may not influence a retailer to purchase a product. It is not hard for the Members to assume that any restaurant owner paid to promote and or consult for a winery would be likely to sell that wine in their restaurant. Any paid spokesperson for a wine would be hard pressed to not sell the wine in their restaurants. It could be deemed damaging or embarrassing to the wine if the spokesperson or promoter did not serve that wine.

Via bulletins, consent decrees and declaratory rulings the Authority has made numerous statements over the years of what it deems to be a gift or service that tends to influence the retailer to purchase a product from a manufacturer or wholesaler. For example, in Bulletin 581 the Authority determined that permitting solicitors to carry boxes and stock shelves for retailers was a gift or service that tended to influence the retailer to buy a product. In a 2007 Consent Order, manufacturers were barred from directly or indirectly paying for all or a portion of any advertisement produced by or for a retailer as it was viewed to be an impermissible gift or service that tended to influence the retailer to buy a product.<sup>3</sup> In declaratory ruling 2014-02148E the Members held that services performed by a wholesaler for one and only one retailer influenced the retailer to purchase their product and was impermissible. The Members now rule that in their judgment paying a retailer to promote a product or consult for a manufacturer tends to influence whether or not the retailer will purchase the manufacturer's product and therefore is impermissible under ABCL Section 101(1)(c) and Rule 86.1.

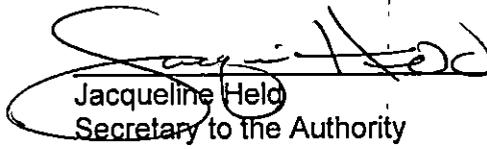
Any independent contract or relationship between manufacturers and retailers must be individually reviewed for the influence it bears on retailers to purchase product. Accordingly, after reviewing the facts as presented by Mr. Skene, the Members find that a contract from Empire Estates to pay Messrs. Guidara and Humm an hourly rate for promoting and consulting violates ABCL 101(1)(c) and Rule 86.1 as it would tend to influence their decisions to purchase product as retailers.

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 with the representations as set forth above.

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<sup>3</sup> People of the State of New York v. Charmer Industries et. al. Index No. I 2006-7562

The foregoing Declaratory Ruling was formally approved by the Members of the Authority at a Full Board meeting held on September 9, 2015.



Jacqueline Held  
Secretary to the Authority