

**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 5, 2015, a request was submitted by attorney Barbara J. Kwon, on behalf of her client, Darlings Concessions LLC ("Darlings"), which operates a concession business at a Broadway theater. As described by Ms. Kwon, Darlings would like to use a mobile phone application ("app") provided by ATG, Ltd. ("ATG") to allow patrons to purchase food and beverages (alcoholic and nonalcoholic) for delivery directly to their seats before and during intermission at shows. Ms. Kwon requests a declaratory ruling as to whether Darlings' use of ATG's app violates the ABCL.

**Statement of Facts**

Darlings holds an on-premises liquor license that operates a concession business in a Broadway theater. The app Darlings wants to use is provided by ATG, a party that does not hold any licenses related to alcoholic beverages. Patrons will download the app, free of charge, and select the theater, date, and time of the performance they are attending, along with their seat location.

The patron will view the venue's menu containing items selected and priced by Darlings. The items include food and beverages, both alcoholic and nonalcoholic. The patron can select the items they wish to purchase and the point in time that they wish the item to be delivered. All patrons who order alcoholic beverages will be reminded that they must be twenty-one years of age or older to make the purchase.

When patrons place an order, they are directed to PayPal, a credit card processing company, for payments via their credit card. At the time requested by the patron, the order will be delivered to them by Darlings staff, which will check for age identification. The patron's credit card payment is direct to Darlings minus the credit card processing fee of no more than 4% which is retained by PayPal. ATG does not receive any portion of the sale, nor do they receive any payment from Darlings for these services. ATG will retain the patron and theater information and in the future may wish to be compensated by Darlings by either a flat fee per sale or a percentage of each sale that will not exceed 10%. Presently, the app does not bear any advertising by other licensees.

## Applicable Law

Section 111 of the ABCL prevents a licensee from making their license "available" to anyone. Section 111 states 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

- (1) Is ATG trafficking in alcoholic beverages without a license and availing itself of Darlings' retail license?

## Determination of the Members

When reviewing the apps of unlicensed third party providers the Members ask if (1) an unlicensed party is acting in place of the licensee and; (2) does the unlicensed party have an ownership/ financial interest in the licensed premise.

The facts as presented by Ms. Kwon show that Darlings, the licensee, performs all the tasks traditionally conducted by a retailer. Darlings selects the products to be sold, the price at which it is sold, and delivers the item to the customer. Similarly, Darlings collects all of the customer funds. From the facts presented ATG's app plays no role in these tasks but merely provides the technology platform for Darlings. Accordingly, Darlings has not taken a passive role in the sale or permitted ATG to act in their place.

Lastly, under the current model Ms. Kwon describes ATG does not receive any compensation for the use of their platform. All customer payments go directly to Pay Pal and then to Darlings, the licensee. Accordingly, because no money is ever tendered to ATG, they cannot be deemed to have a financial interest in the licensed business or to be trafficking in alcoholic beverages.

However, the analysis would become more complex if and when ATG does receive compensation for their services. Since no definite facts were presented regarding future payment scenarios, the Members will limit their ruling to terms that ATG does not receive compensation as it currently operates.

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.

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

  
Jacqueline Held  
Secretary to the Authority