

NEW YORK STATE LIQUOR AUTHORITY
FULL BOARD AGENDA
MEETING OF JUNE 30, 2015
REFERRED FROM: COUNSEL'S OFFICE

2015-01503

REASON FOR REFERRAL
REQUEST FOR DIRECTION

APPLICATION OF 200' LAW
FOR PROPERTY LOCATED AT:

1479 YORK AVENUE, MANHATTAN

(REQUEST FOR DECLARATORY RULING)

The Members of the Authority at their regular meeting held at the Zone I New York City office on JUNE 30, 2015 determined:

Donohue, Thomas (SLA)

From: Flug, Jacqueline (SLA)
Sent: Thursday, June 04, 2015 3:51 PM
To: Donohue, Thomas (SLA)
Cc: Held, Jacqueline (SLA)
Subject: FW: Declaratory Ruling Request
Attachments: Exhibits.pdf

Tom – please write up this 200ft declaratory ruling request for the Board.

Jacqueline P. Flug

General Counsel

New York State Liquor Authority

317 Lenox Avenue
New York, New York 10027
(212) 961-8342 Jacqueline.Flug@sla.ny.gov
www.sla.ny.gov

Follow us 

From: Terrence Flynn [<mailto:trflynnjr@gmail.com>]
Sent: Thursday, June 04, 2015 3:43 PM
To: Held, Jacqueline (SLA); Flug, Jacqueline (SLA)
Subject: Declaratory Ruling Request

Hello

I represent 1479 York Realty LLC, who is the owner of the building located at 1479 York Avenue, New York, New York 10075. There is currently a school PS 158 Bayard Taylor School, located at 1458 York Avenue, New York, New York and within 200 feet of 1479 York Avenue, New York, NY.

There was a licensed premises open and operating at 1479 York Avenue, NY, NY, since 1966. The original license holder was GWN Rest Inc. DBA Dresner's (1028522). That licensee was succeeded by Pry Restaurant Corp., DBA Dresner's (1210570). Pry Restaurant ceased operations on March 1, 2015.

I have attached photos and maps of both 1479 York Avenue and 1458 York Avenue for your review. I have also attached a copy of the surrender of premise by Pry Restaurant Corp.

We are seeking a declaratory ruling that the "grand fathering" provision will allow the owner or successor tenant 1 year, from the vacancy date, in which to make application to the NYS Liquor Authority for an On Premise License.

Please have this matter placed upon the first available Full Board Agenda. Thank you for your consideration.

Terrence R Flynn Jr., Esq.
198 Beach 102nd Street

Rockaway Park, NY 11694
718-945-1000

Surrender of Lease and Premises by Tenant Form

This Surrender of Lease ("Agreement") dated February 28, 2015, by and between Jamie Jim Realty ("Landlord") and Ray Res Inc ("Tenant").

Whereas by a lease ("Lease") dated July, 2009, the Landlord and Tenant entered not a Lease for the premises described in the attached Exhibit 1 ("Leased Premises") for a term of 2 years upon and subject to the terms and conditions contained in the Lease; and,

Subject to the provisions hereinafter contained, ~~the rents reserved and contained in the Lease have been completely paid~~, and the parties have agreed that the Tenant has surrendered the Leased Premises and the Lease to the Landlord as of Feb 28, 2015, ("Termination Date") in order that the estate, term and interest of the Tenant therein may merge and be extinguished upon the terms hereinafter contained.

of David Gattage


Therefore in consideration of the premises and the terms and conditions hereinafter set forth, other good and valuable consideration and the sum of one dollar now paid by each party to the other (the receipt and sufficiency of which are hereby acknowledged), the parties agree as follows:

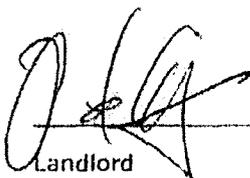
1. The parties acknowledge, confirm and agree that the foregoing recitals are true in substance and in fact.
2. Tenant surrenders to Landlord, as of Termination Date, Leased Premises and Lease and all rights hereunder to the intent that the unexpired residue of the term of Lease and any renewals shall be merged and extinguished in the reversion, and Tenant hereby releases in favor of Landlord, as of Termination Date, all of its right, title and interest in and to Leased Premises and Lease.
3. From and after Termination Date (but, for greater certainty, not before such date), each party releases, remises and forever discharges the other from the performance of all covenants contained in Lease and the obligation for all claims hereunder thereafter arising and the parties agree that as and from such date (but, for greater certainty, not before such date), Lease shall be of no further force and effect and the parties shall be relieved of all further liability and obligation under Lease.

4. Each party represents and warrants with the other that it has the good right, full power and authority to assign and surrender Leased Premises and Lease in the manner aforesaid, and that, as of Termination Date, none of the parties shall have executed any other instruments, deeds, or other documents pursuant to which Lease and the unexpired residue of the term thereof, shall in any way be charged, encumbered, assigned, or otherwise transferred.

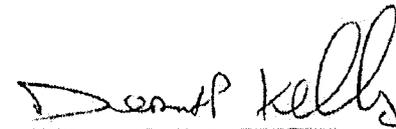
5. Each party agrees with the other that it will, at all times hereafter, upon the reasonable request of any of the other parties, execute all such further documents in respect of the surrender of Leased Premises and the lease as may be required to give effect to this Agreement.

6. This Agreement shall inure to the benefit and be binding upon the parties hereto, their respective successors and assigns.

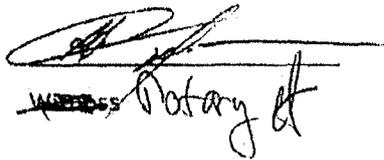
In witness whereof, the parties hereto have duly executed this Agreement as of the date first above written.



Landlord



Tenant

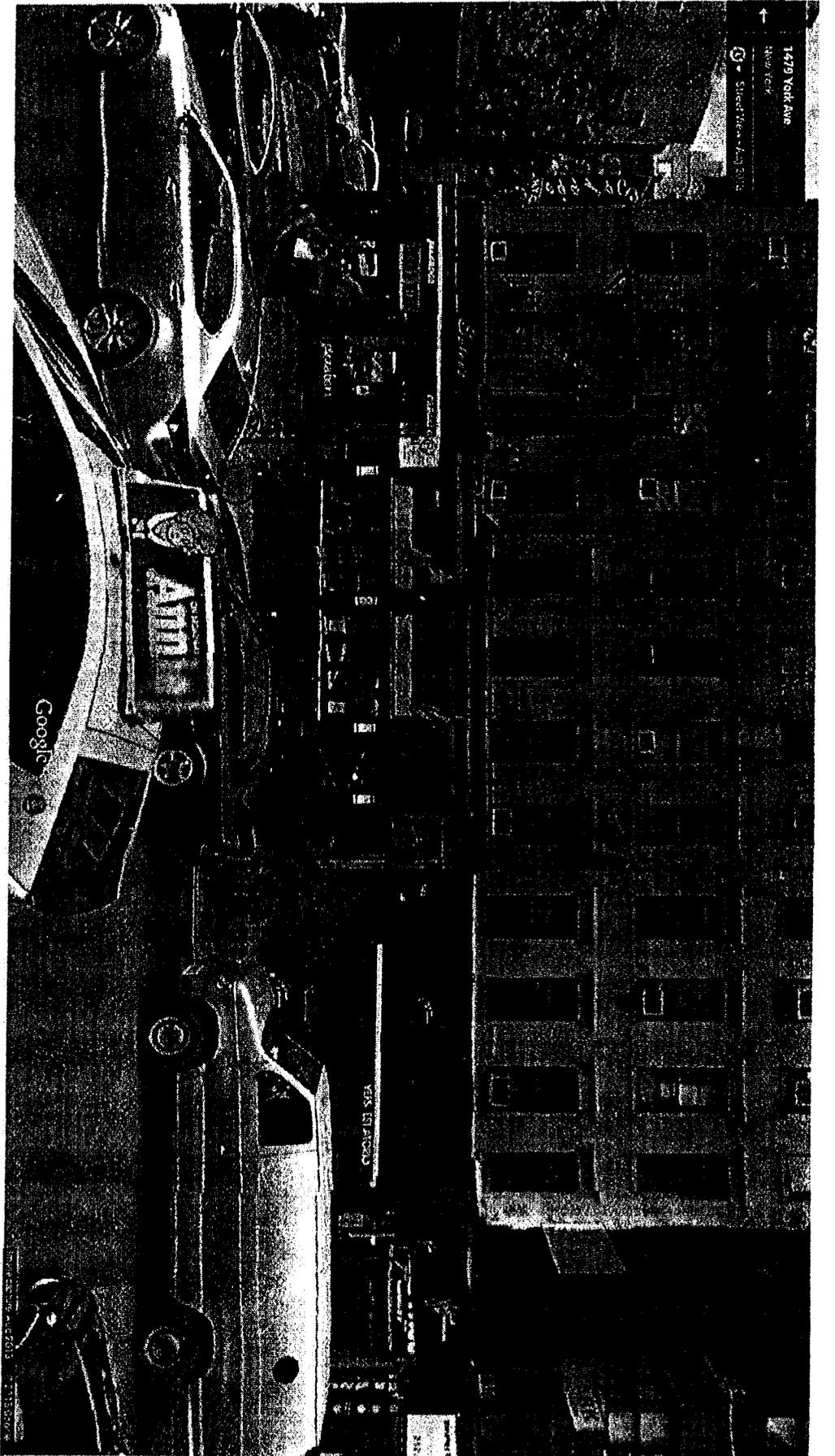


Notary

AKEEL WILLIAMSON
NOTARY PUBLIC, STATE OF NEW YORK
QUALIFIED IN KINGS COUNTY
REG. #01W16240414
MY COMM. EXP. 05/02/2015

Exhibit 1: Description of Leased Premises

1429 York Ave



Search nearby hotels restaurants

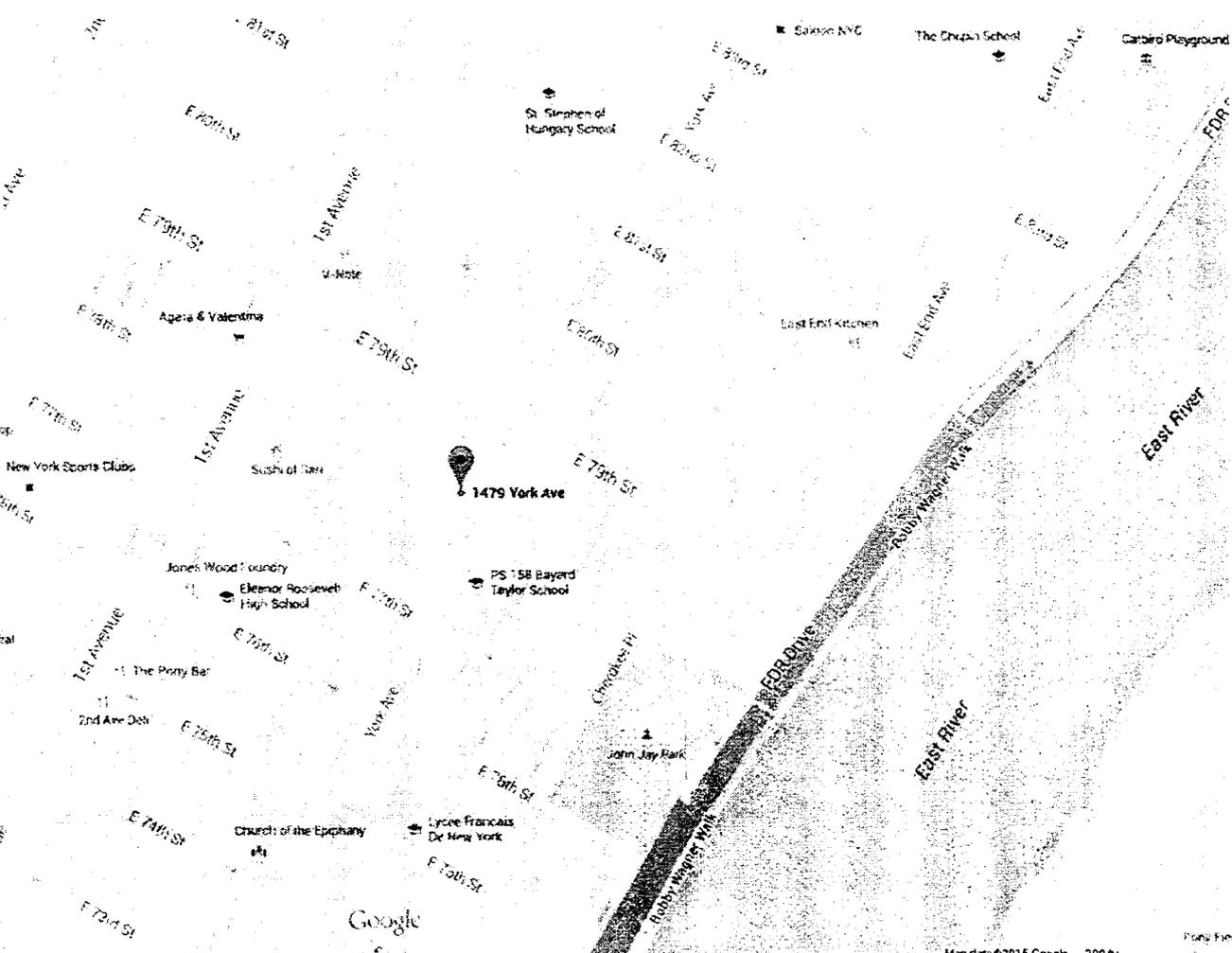
1479 York Ave
New York, NY 10075

Directions Save



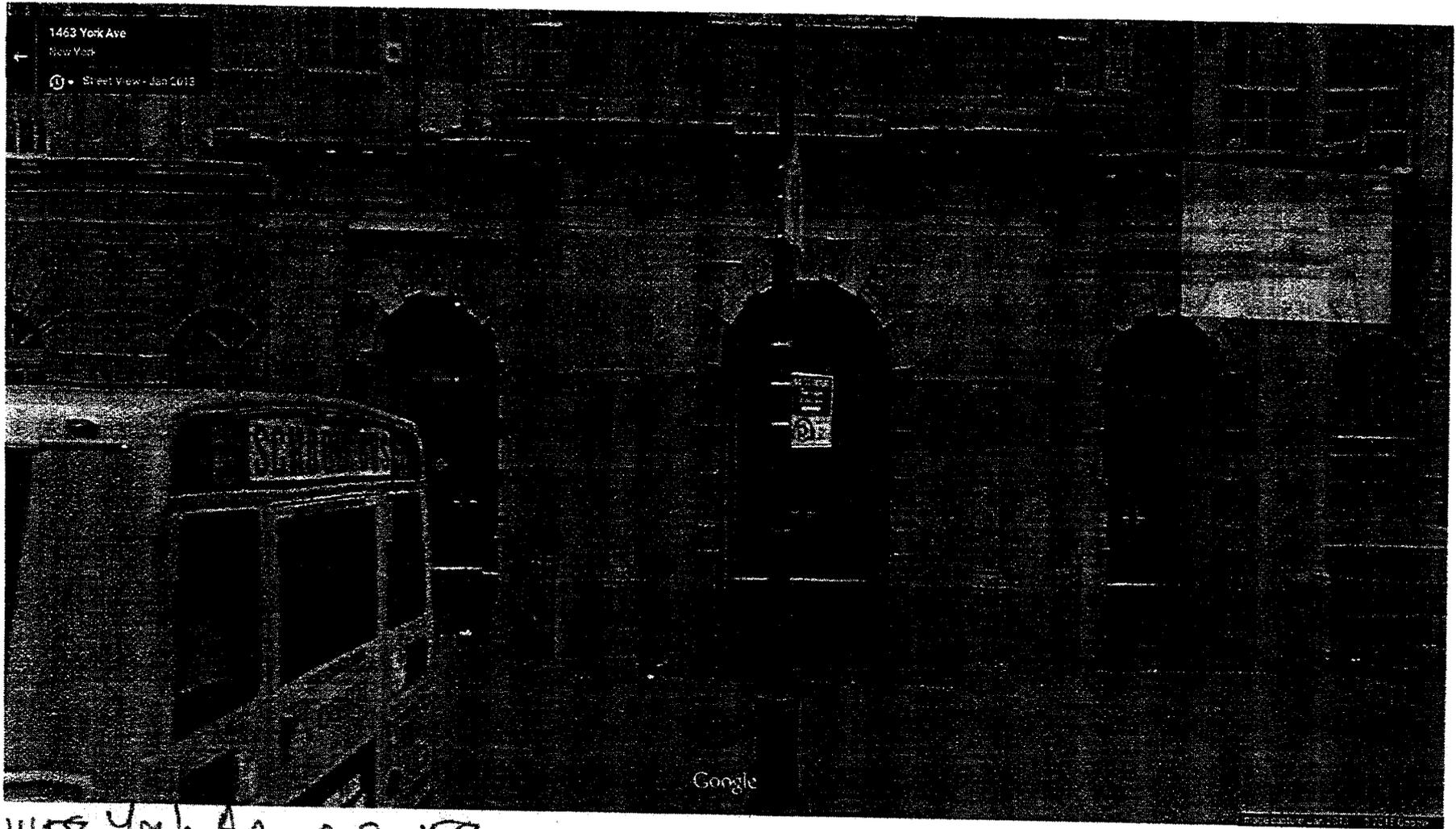
Explore this area
Search nearby

1479 York Ave



Google

Map data ©2015 Google 200 ft



1458 York Ave P.S. 158

NYPL 13753

RECEIVED

AMENDMENT TO APPLICATION OF G W N REST. INC. FOR A RESTAURANT LIQUOR LICENSE PREMISES 1479 YORK AVENUE, NEW YORK, NEW YORK. JUN 10 1966 NEW YORK CITY ABC BOARD

STATE OF NEW YORK)
CITY OF NEW YORK) SS:
COUNTY OF NEW YORK)

DONALD R. GETTINGS being duly sworn deposes and says: That I am the president of G W N REST. INC. That said corporation is an applicant and filed an application for a restaurant liquor license to premises 1479 York Avenue, New York, New York, and which is now pending before the ABC Board.

I wish to correct the present application as follows: Question "2a" should be YES. There is a public school No. 158 located on York Avenue. Question "2b" the answer is that the premises have been continuously occupied and has been in existence as a bona fide restaurant since 1918 and the present owner LOUIS DRESNER INC. has been operating same as a bona fide restaurant since February 15th, 1933.

Sworn to before me this 9th day of June, 1966

Handwritten signature of Donald R. Gettings

Handwritten signature of Abraham L. Kanter

ABRAHAM L. KANTER
Notary Public, State of New York
No. 03-2029000
Qualified in Bronx County
Commission Expires March 30, 1967

NEW YORK STATE LIQUOR AUTHORITY
FULL BOARD AGENDA
MEETING OF JUNE 30, 2015
REFERRED FROM: LICENSING BUREAU

2015-01522

REASON FOR REFERRAL
REQUEST FOR DIRECTION

THE OPERATION OF THIRST

(REQUEST FOR DECLARATORY RULING)

The Members of the Authority at their regular meeting held at the Zone I New York City office on JUNE 30, 2015 determined:

VICTOR & BERNSTEIN, P.C.
ATTORNEYS AT LAW

18 EAST 41ST STREET
NEW YORK, NEW YORK 10017

TEL 212/486-6000
FAX 212/486-8668

SAUL L. VICTOR
DONALD M. BERNSTEIN

MARTHA M. REDO
ALEXANDER B. VICTOR

June 8, 2014

VIA EMAIL: Jacqueline.Flug@sla.ny.gov

Jacqueline Flug, Esq.
Counsel
New York State Liquor Authority
317 Lenox Avenue, 4th Floor
New York, New York 10027

Re: ***Request for Declaratory Ruling on
Smart Phone Social Media & Payment Application***

Dear Ms. Flug:

This letter shall constitute a request for a declaratory ruling pursuant to Section 98.1 of the Rules of the New York State Liquor Authority that the proposed operation of a third-party mobile marketing and payment application as set forth and described below would not be inconsistent with or in violation of the Alcoholic Beverage Control Law or the Rules of the New York State Liquor Authority.

Conceptual Overview

Our client seeks to launch a mobile application, currently named "*Thirst for Night*" which would be accessible via smart phones and tablets that would enable its users to discover venues, browse menus, and order and pay for food and beverages, including alcoholic beverages.

Our client's vision is for *Thirst* to function as a marketing and payment platform to facilitate a customer's entire experience, from initially searching out a venue to paying for their food, beverage and services. The *Thirst* application will allow users to browse and sort venues based on particular keywords, location, price, etc., and to review each venue's *Thirst* menu before placing and paying for orders. Subscribers may also send gifts of menu items or credit amounts to each other for future redemption.

Each participating venue will have its own digital *Thirst* menu. The *Thirst* staff will assist with uploading and updating each menu but the venue itself will maintain complete control over

the selection of items to be offered and prices to be charged. Each venue's *Thirst* menu will include all or a selection of the items it otherwise offers on its regular menu at the same prices: *Thirst* is not a discount or coupon service.

A *Thirst* subscriber would use the application to place and pay for orders in real-time while at the venue, or to pay for particular items or credits of certain dollar amounts to be sent as gifts to other users, essentially functioning like a gift card. The recipient of any such gift or credit may convert a gifted item into a credit for its equivalent dollar value and/or apply any credit received towards the cost of a higher priced menu item.

Service and Payment Logistics

In order to use *Thirst* a subscriber must create an account and authorize one of their credit card companies to be billed by *Thirst* which will process the amount of each total order (including the gratuity) to be paid by the credit card processing company directly to the venue. Each new subscriber will also be prompted to provide their name and photograph as part of the account creation process and, whenever possible, *Thirst* will verify the age of each user via Facebook or Apple AppStore protocols. This measure is intended only to serve as a secondary check of an individual's identification: it is not intended in any way to substitute for the venue's existing and ongoing responsibility to verify each person's age with government identification.

Upon arriving at a participating venue, a *Thirst* subscriber would use the application to select the item(s) desired from the venue's *Thirst* menu. The order – along with a picture of the user – would be transmitted to an iPad or similar device used by the venue's bartender or servers and the user must inform a bartender or server that they placed an order via *Thirst*. At that point, the server/bartender would be responsible for verifying the user's identity and age before "confirming" the order for preparation and service.* Once an order is confirmed, *Thirst* processes the customer's credit card information to the venue. If an order is not confirmed for whatever reason, which decision is at the venue's sole discretion, then the customer retains the funds.

In the case where a user is sending a gift or credit to another user, such gifts or credit amounts would be pre-paid and accounted for in the recipient's *Thirst* account using a 'wallet system'. The customer service aspect is identical to the situation described above. The only distinction relates to the processing of funds since these gifts or credits are pre-paid by the sender. All pre-paid amounts would be held by *Thirst* until redeemed by the recipient at a participating venue, at which point *Thirst* would be automatically notified. Every two weeks *Thirst* would remit any outstanding balance on redeemed gifts/credits directly to the appropriate venue.

Thirst will also follow the loyalty of its users at participating venues by storing the number of times a particular user orders items at any particular venue. If a venue chooses to

* *Thirst* will include an option allowing a user to request items not on a venue's *Thirst* menu. If so requested, the server will obtain that order information at the same time they verify the user's identity.

participate in the *Thirst* loyalty program, a *Thirst* user at that venue would be able to redeem a complimentary item for every 8-25 items purchased (based on the customer's order history).

In exchange for its marketing and mobile payment services, *Thirst* charges a fee per each total transaction. The fees will vary and venues that are early to join the *Thirst* network will be given a preferred rate. In no event, however, would a fee ever exceed 10% of the total transaction. *Thirst* will not have any active role in the operations or management of any venue. Each participating venue will maintain complete title and control over the products offered, the prices to be charged, and the service to patrons.

Advertising

The *Thirst* application may include a variety of advertising commonly used by other popular mobile applications (e.g., banner ads). However, there will be no advertising of any kind for or by any manufacturers of alcoholic beverages unless and until such advertising is approved by the Authority.

Applicable Law and Prior Rulings of the Authority

The operation of *Thirst* by an unlicensed third-party raises two potential issues under the Alcoholic Beverage Control Law ("ABCL"). Specifically, Section 110(1)(g) of the ABCL requires disclosure of anyone with a financial interest in a licensed premises and Section 111 of the ABCL prohibits a licensee from making its license available to any other person or to any other premises.

The Authority has addressed these issues directly and tangentially in a number of prior rulings. In Declaratory Ruling 2013-02826B, a copy of which is enclosed, the Authority addressed both of these issues in connection with a similar mobile application called Slingr. In that ruling, the Authority approved a fee structure whereby Slingr captured all credit card funds from orders processed through its application and reconciled the amounts owed to each venue each week, less the Slingr fee of 25 cents per order plus 2.5% of each transaction, regardless of the cost of the item sold. The Authority determined that Slingr's application, including its fee arrangement, would not violate the ABCL since each licensee would retain all essential controls and the percentage fee would be an insignificant amount of the overall revenue generated by the licensed premises.

The Authority has also previously approved a third-party marketing service which promoted discount packages of food and beverage under the condition that the third-party not receive more than 10% of any licensee's revenue on an annual basis. See Living Social Declaratory Ruling 2011-03527C, and also Groupon Declaratory Ruling 2011-03001, copies of which are enclosed.

Here, any venue participating in the *Thirst* program would retain the same level of control of its premises and of each item offered, prepared and served to a patron as with the

Slingr application. The fee earned by *Thirst* would also never exceed 10% of the licensee's revenue per transaction, much less 10% of the licensee's annual revenue. *Thirst* also has no financial interest in any licensed premises since payments from the credit card company to the venue are processed directly in real-time or within two weeks of the pre-paid gift or credit being redeemed.

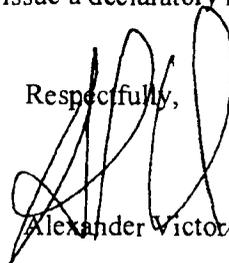
The only potentially distinguishing feature between this request and those submitted by Slingr and Living Social or Groupon is that a participating venue's *Thirst* menu may or may not include the food items sold at the venue. However, a *Thirst* user may always apply their *Thirst* credits towards the purchase of food items on the venue's regular menu. Notwithstanding this minor difference, we believe that *Thirst* does not run afoul of the ABCL or of the Authority's prior rulings since each participating venue is otherwise required to keep food available for sale (which may be purchased via *Thirst*) and we are not aware of any law or rule that requires an individual purchasing an alcoholic beverage to also purchase food.

Although the Authority's approval for the Living Social and Groupon proposals rely in part on the fact that the offers to be sold include a package of both food and beverages, that fact was raised as a factor in the Authority's conclusion that such an offer would not violate Section 117-a of the ABCL (regarding unlimited drink offerings). That section is not applicable here since there is no discounting of alcoholic beverages to be sold. The Authority's approval of this request would also be consistent with Slingr because that ruling did not require food to be sold with the purchase of alcoholic beverages.

Lastly, it is worth noting that in addition to Slingr there are a number of new applications that seek to offer similar payment services including, for example, Open Table, Cover, Dash and TabbedOut. We are not familiar with all payment logistics of these services and believe that *Thirst* has its unique advantages but we note the existence of these applications generally as indicative of mobile payment processing and marketing becoming part of industry practice.

We do not find any law, regulation or authority that allows for a denial of this request. Accordingly we request that the Authority issue a declaratory ruling approving this proposed operation.

Respectfully,



Alexander Victor

Encls.

NEW YORK STATE LIQUOR AUTHORITY
FULL BOARD AGENDA
MEETING OF JUNE 30, 2015
REFERRED FROM: COUNSEL'S OFFICE

2015-01557C

REASON FOR REFERRAL
REQUEST FOR DIRECTION

LICENSING/TRADEMARK AGREEMENTS
WITH RETAILERS

(PROPOSED ADVISORY)

The Members of the Authority at their regular meeting held at the Zone I New York City office on JUNE 30, 2015 determined:

To: Trademark holders, manufacturers and wholesalers

Re: Licensing/ trademark agreements with retailers

Date: June 22, 2015

The purpose of this Advisory is to provide guidance with respect to dealing with licensing and trademarks agreements when the trademark is owned by a retail licensee.

The Authority is aware that some retail licensees (both within New York state and out of the state) hold trademarks and enter into agreements permitting use of those trademarks by manufacturers of liquor, wine and/or beer. Section 105.16 of the Alcoholic Beverage Control Law prohibits a retail off- premises licensee from being interested, directly or indirectly, in any premises where liquors, wine or beer are manufactured or sold at wholesale. Section 106.13 of the Alcohol Beverage Control Law prohibits a retail on- premises licensee from being interested, directly or indirectly, in any premises where liquor, wine or beer are manufactured or sold at wholesale. Lastly, Section 101.1(a) prohibits manufacturers and wholesalers from being interested in any premises where alcoholic beverages are sold at retail.

The Authority finds that retail licensees that receive a percentage of a manufacturer's or wholesaler's sales, whether pursuant to a licensing/trademark agreement or otherwise, are "interested" in the manufacturer or wholesaler and in violation of Section 106.13 and 105.16. Additionally, a retail licensee who receives a flat fee for a trademark which correlates to the amount of product sold by the manufacturer or wholesaler is similarly "interested" in the manufacturer or wholesaler and is in violation of Section 106.13 and 105.16.

Licensing/ trademark agreements between retailers and manufacturers or wholesalers are records which are subject to inspection pursuant to ABCL Sections 105.15, 106.12 and 104.10.If

the trademarked item is intended for sale only in the State of New York and only to the retail licensee that owns the trademark, please refer to Advisory 2014-7 as it relates to Private Brands.

Where the Trademark is used as a Private Brand in the State of New York and product bearing the Trademark is sold by manufacturers or wholesalers in other states to retailers that are not the trademark owner, the receipt by the New York retailer who owns the Trademark of percentage sales from the manufacturers or wholesalers licensed to use the Trademark in those other states violates Section 105.16 (off premise) or 106.13 (on premise.)

The Authority does not intend, by this advisory, to prohibit all licensing/ trademark agreements between retailers, manufacturers and wholesalers; rather, this advisory addresses only those that are based upon a percentage of sales or correlate with sales in violation of Section 105.16 or 106.13. The legality of other trademark and licensing agreements must be determined based upon the applicable facts and circumstances.

NEW YORK STATE LIQUOR AUTHORITY
FULL BOARD AGENDA
MEETING OF JUNE 30, 2015
REFERRED FROM: COUNSEL'S OFFICE

2015-01557D

REASON FOR REFERRAL
REQUEST FOR DIRECTION

SWILLIO, INC.

(DECLARATORY RULING)

The Members of the Authority at their regular meeting held at the Zone I New York City office on JUNE 30, 2015 determined:



Law Office of Michael Bruk

138 West 25th St., 10th Floor, Suite C1001

New York, NY 10001

Phone.212-203-9303

Email. mb@bruklaw.com

Licensed in New York and California

DATE: June 5, 2015

TO: Jacqueline Flug, Counsel to the Authority
State Liquor Authority
317 Lenox Ave.
New York, New York 10027

RE: Petition for Declaratory Ruling re Swillio, Inc. (dba Swill)

INTRODUCTION AND INTEREST OF PETITIONER

Swillio, Inc., dba Swill, a New York corporation with offices at 25 Broadway, New York, NY, 10004, and which does business throughout the United States, is the owner, developer, and operator of a third-party internet application which allows licensed sellers of alcoholic beverages to offer their products for sale on the internet.

Swillio, Inc. (hereafter "Swill"), by and through its counsel, Michael Bruk, Esq., and pursuant to Section 98.1 of the Rules of the State Liquor Authority, (9 NYCRR Subtitle B), which allows any person to apply to the Authority for a "declaratory ruling with respect to the applicability to any person, property or state of facts of any rule or statute enforceable by the Authority," respectfully petitions this Authority for a declaratory ruling that its business model, operated as set forth in this Petition, does not violate the New York Alcoholic Beverage Control laws or related SLA Rules.

STATEMENT OF FACTS

Swill holds *no* alcoholic beverage license in any state or jurisdiction. Swill is the developer, owner, and operator of the Swill Mobile App (the “App”) and corresponding retailer platform. Operated together, this service allows participating brick and mortar retail establishments possessing a valid New York State alcoholic beverage license (or an analogous license from another state, but this Pctition focuses on NY) to advcrtisc and sell beer, wines and spirits (the “Product” or “Products”) on the internet through the App.

Swill’s App allows users to search for participating licensed retailers and their corresponding available inventory, including prices, in the user’s area. Swill has no control or influence over which Products are sold and at what price. Retailers are solely responsible for using their individual retailer portals to input the Products available for purchase through the App, as well as the corresponding price of those Products. Users who choose to purchase Products from participating retailers must provide the App with payment information upon checkout. The App then interacts with the retailer portal to notify the retailer of a customer’s order. All customer orders *must* be accepted or rejected by the retailer within three hundred (300) seconds.

If and once accepted, retailers are responsible for filling the order. Payments are processed through a third-party payment processing service of retailer’s choosing¹. *At no time* during this financial transaction does a customer pay Swill directly. Instead, all monies received and processed by the third-party payment processor are deposited in a bank account selected by

¹ The Payment Processor must be able to accept online credit card authorizations and payment requests. Swill suggests, but does not require, Braintree Payments be used as the payment processor.

the retailer. If a customer requests delivery, retailers are required to deliver all Products themselves. At no point does Swill have title to, or physical possession of, any Product.

Users of the App are required to represent that they are of legal drinking age before placing an order. In addition, Swill's retailer agreement requires that the retailer verify the legal age of all customers and comply with any and all applicable New York State Alcohol Beverage Control laws. Finally, because Swill is never a party to a financial transaction between a retailer and its customers, the retailer is responsible for the accuracy of each financial transaction processed through the Payment Processor, including calculations of sales tax.

COMPENSATION STRUCTURE

Swill charges retailers a monthly license fee ("License Fee") to use the customized, individual retailer portal. This License Fee is one hundred dollars (\$100) for the first six (6) months, one hundred and twenty-five dollars (\$125) for months seven (7) through nine (9), and one hundred and fifty dollars (\$150) for months ten (10) through twelve (12) of each one-year agreement. This monthly service fee does not accrue unless and until the App generates at least three thousand dollars (\$3000) in gross sales for the retailer for the month in question.

In addition to the License Fee, Swill charges each retailer a flat five dollar² (\$5) fee for every separate Product ordered through the App. A separate Product is any item that the Retailer offers for sale in its store in an undivided manner by use of an intervening barrier. For example, one six-pack of beer constitutes a single item, as does one bottle of wine. This flat fee structure means Swill's profit does not in any way depend on the price of an individual Product, only the

² Swill may from, time to time, in its discretion, and as a means of marketing, goodwill, new customer, or other promotion, discount or waive the Customer Service Fee.

quantity. Swill never takes payment of any kind directly from the customer. Instead, the flat fee is paid by the retailer directly to Swill.

THIRD PARTY ADVERTISEMENTS ON THE APP

Swill sells advertising space to third parties on the App in the form of banner advertisements. Upon clicking a banner ad, users are notified that they are leaving the Swill App and being redirected to a third party site **not** under the control of Swill. Swill does not provide any kind or type of online store to any third party. The only items actually available for sale on the App are those Products participating retailers choose to make available using the individual, customized, and dedicated retailer portal.

CONCLUSION

The Swill Mobile Application and corresponding retailer portal have been designed in attempt to achieve legal compliance with applicable alcoholic beverage and control laws. The App is a marketing service which merely increases consumer access to wines and spirits already available for sale at licensed brick and mortar establishments. Swill does not take a financial interest in any licensed premises, does not avails itself of any protection of licenses therein, and will never take title or physical possession of any Product.

For the foregoing reasons, Swillio, Inc. respectfully petitions this Authority for a declaratory ruling that its compensation structure and operating procedures do not violate the New York Alcoholic Beverage Control laws or State Liquor Authority Rules.

Annexed as Exhibits 1 and 2, respectively, are a flowchart of Swills transactional process and a Commonly Asked Questions section. In the event this Authority requires clarification regarding any method of operation described in this Petition or desires any additional information regarding Swill, the App, the retailer platform, or any other matter, we would be happy to oblige.

Respectfully submitted,

Michael Bruk, Esq.
Attorney and Counsel for Petitioner,
Swillio, Inc. dba Swill

Law Office of Michael Bruk
138 W. 25th St. 10th Floor, Suite C1001
New York, NY 10001
Phone. 212-203-9303
Fax. 347-710-1791
Email. mb@bruklaw.com