STATE OF NEW YORK: LIQUOR AUTHORITY

Application of Free Poker Experience, LLC for a determination on whether certain events conducted by the entity constitute gambling	DECLARATORY RULING 2011-02844

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. Free Poker Experience LLC ("FPE") has submitted a request to ascertain whether poker tournaments that it conducts can be held in licensed premises without violating the prohibitions against gambling contained in the ABCL.

Applicable law

The Alcoholic Beverage Control Law "ABCL" § 106 (6) prohibits gambling in establishments licensed for the retail sale of alcoholic beverages for on-premises consumption. However, the ABCL does not define what constitutes "gambling."

The Authority has, as a matter of practice, relied on the definition of gambling that is in the Penal Law. In the case of *Plato's Cave Corporation v. State Liquor Authority,* 68 NY2d 791 (1986), the Court of Appeals upheld the Authority's reliance on the Penal Law definition contained in Section 225.00(2). That section defines "gambling" as: (1) a person risking something of value; (2) upon the outcome of a contest of chance or a future contingent event not under his control or influence; (3) upon an agreement or understanding that the person will receive something of value in the event of a certain outcome.

Therefore, in deciding whether an activity is gambling, the Authority will consider three questions. (1) Is it a contest of chance? (2) Is the person giving something of value to participate? (3) Is there something of value being offered as a prize? An answer of "yes" to each of these questions means that the activity will be considered to be gambling by the Authority.

A "contest of chance" is defined in Section 225.00(1) of the Penal Law as "any contest, game, gaming scheme or gaming device in which the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestant may also be a factor." The following are types of activities that have been determined to be contests of chance, rather than skill: card games; pools (for example, football pools); dice games; raffles; and pull tabs.

The Authority has also determined that certain other activities (such as dart or pool leagues) are contests of skill, not chance, and therefore not considered "gambling". However, individuals who are not participating in the event cannot place a wager on the outcome of a game.

Actual wagering or betting is not the only way someone may give "something of value to participate." If a person is required to pay an entry fee, or if there is a purchase of food, drink, etc., required to participate, then the person is giving "something of value." Under the Authority's interpretation of gambling, there is no distinction between professional (or criminal) betting and social (or casual) wagering. The Court of Appeals, in *Katz's Delicatessen Inc. v. State Liquor Authority*, 302 NY 286 (1951) has held that a friendly poker game for nominal stakes is considered gambling under the ABCL.

The proposed poker tournaments

FPE, as a franchisee of a Free Poker Network ("FPN"), proposes to conduct weekly "Texas Hold 'Em" tournaments in licensed premises. Texas Hold 'Em is a card game wherein each player receives two downcards as their personal hand (holecards), after which there is a round of betting. Then, five community cards that are shared by each of the players are placed. In the flop, the first three community cards are revealed followed by a round of betting. A fourth card – known as the turn – is revealed, followed by a round of betting. Finally, the fifth and final community card – the river – is revealed followed by a final round of betting. FPE does not appear to dispute that this would be a game of chance, rather than a game of skill.

As more fully explained in the materials submitted by FPE, it would enter into a contract with an on-premises licensee to have FPE host the tournaments at the licensed premises. The licensee pays a fee which is shared by FPE and FPN. The licensee also purchases all the necessary supplies for the tournaments from FPN.

As represented by FPE, contestants do not pay a fee to enter the game or tournament. Contestants are not required to pay a fee to enter the licensed premises in order to participate in the game or tournament, nor are they required to purchase anything from the licensee or FPE/FPN to participate. The licensee will not increase its food and beverage prices during the game or tournament and the licensed premises will remain open to the public during the event.

Each contestant is provided, without charge, with the same number of chips as every other contestant. These chips are used by the contestants to place bets and wager during each game of the tournament. The game continues until all but one contestant has lost all of their chips.

The remaining contestant, and the last third of the contestants who are eliminated, are awarded points by FPN. At the conclusion of the tournament, prizes are awarded to those who have accumulated the most points. Contestants cannot pay anything to gain any additional benefits, such as extra points. FPE has also represented that each contestant will be supplied with written materials explaining the above-referenced conditions under which the game or tournament will be conducted. A sign setting forth these conditions will also be posted in the licensed premises.

Determination of the Authority

As noted above, in determining whether a particular activity is gambling, the Authority looks to whether it is a contest of chance, whether the contestants are giving something of value to participate, and whether something of value being offered as a prize. With respect to FPE's event, there appears no question that it is a game of chance and that something of value is being provided to those who are successful.

However, based on the representations made in the material submitted by FPE, the contestants are not required to pay an entry fee or purchase anything to participate. Wagers, or bets, during each game are made using chips provided, at no cost, to the contestants. Each contestant is provided with the same number of chips and cannot purchase additional chips. Since the licensees will not be allowed to raise the prices of food and beverages during the events, there will not be any indirect cost to the contestants. Therefore, based on this record, one of the elements of gambling is missing from FPE's event.

The Authority is not persuaded that the licensee's payment to FPE and FPN is the equivalent of a payment on behalf of the contestants. Based upon the record, the payment appears to be a business expense made to attract customers to the licensed premises and the licensee is not sharing in any award obtained by any contestant that payment is not intended.

Therefore, the Authority concludes that FPE's event, if conducted in accordance with the representations made in the materials submitted, would not constitute gambling within the meaning of the ABCL. Furthermore, for the guidance of licensees and the public, the Authority finds that a poker game or tournament, if conducted in compliance with the following conditions, shall not constitute gambling within the meaning of the ABCL. Licensees are warned, however, that the failure to satisfy any of these conditions may result in a determination that the particular event is gambling, subjecting the licensee to disciplinary action by the Authority.

1. No fee, of any kind, is required to be paid by, or on behalf of, a contestant to participate in the game or tournament;

2. A contestant shall not be required to purchase anything from the licensee, or any other party, in order to participate in the game or tournament;

3. A contestant shall not be required to pay a fee to enter the licensed premises in order to participate in the game or tournament;

4. The price of food and beverages at the licensed premises during any game or tournament shall not be higher than the prices regularly charged by the licensee;

5. The licensed premises shall remain open to the public during any game or tournament with food and beverages available for purchase by non-contestants;

6. Each contestant shall be provided with the same number of poker chips and no additional chips may be purchased for use at the game or tournament;

7. No contestant shall have the ability to pay money to the licensee or any other party to gain benefits not provided to all contestants;

8. Any wagers or bets are to be made using chips or other tokens supplied free of charge to contestants;

9. Items #1 through #8 above shall be prominently displayed on signs publicly posted at the licensed premises and in written materials distributed to contestants.

The foregoing Declaratory Ruling was formally approved by the Members of the Authority at a Full Board meeting held on September 21, 2011.

Jacqueline Held
Secretary to the Authority