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DECLARATORY RULING

Levy Premium Foodservice and Amex Exclusive Point of Sale at Barclays Center

Agenda # 2021- 01415

Introduction

The Office of Counsel is in receipt of a request for a declaratory ruling dated April 12, 2021 from Levy Premium Foodservice LP (“Levy”), a licensee at Barclays Center (“Arena”) in Brooklyn, New York. Levy holds the main license plus approximately 55 add bar licenses at the Arena. Licensee requests a declaratory ruling on whether the NYS ABCL permits the licensee to alter the premises to have an add bar selling liquor, wine and beer in an area of the Arena that would only be accessible to American Express (Amex) credit card holders or to people who purchase an Amex gift card in the amount of \$50 or more.

Licensee previously filed an alteration and add bar application with a similar method of operation on February 13, 2020, which the Licensing Board disapproved on August 27, 2020. It was determined that requiring a patron to be an Amex card holder to enter the area meant that the licensed area was not open to the general public as required of all license holders.

With this request for a declaratory ruling, the licensee has added to the proposed method of operation that a patron who does not hold an Amex credit card may purchase an Amex gift card in an amount of \$50 or more, plus a \$2.95 card fee, to enter the Amex area. The licensee claims that the purchase of an Amex gift card is the equivalent of an entry fee, rendering this bar area of the Arena open to any member of the public who is able and willing to pay to enter it. The licensee states that if the public does not wish to pay to enter the Amex area, they can purchase their drinks at other locations within the Arena. Items at this bar can only be purchased with an Amex credit or Amex gift card.

Statute Involved

NYS Alcoholic Beverage Control Law (ABCL) § 2 provides that the regulation of alcoholic beverages by the State Liquor Authority should be for public convenience and advantage.

Case Law Involved

A series of anti-discrimination cases in the 1940s and 1950s led the New York courts to interpret ABCL § 2 to require premises holding public retail liquor licenses (as opposed to private club licenses) to be “open to the public.” In *Playboy Club of New York, Inc. v. Hostetter*, 40 Misc2d 449, *aff’d* 19 AD2d 822, *aff’d* 14 NY2d 933 (1964), the lower court carved out an exception: a one-time admission fee of \$25 charged to all who wanted to dine there did not mean that the premises were not “open to the public,” had no relation to the promotion of temperance, and was therefore permissible. The appellate courts upheld the court’s decision without significant discussion.

In *330 Restaurant Corp. v. State Liquor Authority*, 26 NY2d 375 (1970), the NYS Court of Appeals held that there was substantial evidence to support the Authority’s determination that the licensee’s method of operation, which involved giving exclusive hours and preferences to members enrolled in its membership

club over nonmembers, was *designed to discourage the general public from seeking admission* and therefore was not open to the general public as required by the case law interpreting the ABCL.

Question

Does the requirement of owning an Amex credit card or purchasing an Amex gift card to gain access to the Amex bar area, and which requires a patron to use such cards to purchase items within it, render the licensed area as not open to the public?

Determination

An “Amex members only” method of operation would, without question, be a violation of the “open to the general public” requirement. The question presented is whether allowing access to the purchasers of Amex gift cards fixes this violation. The requesting licensee suggests that the fee for the gift card is akin to the *Playboy Club* case and is, thus, legal. The Members disagree and find that the licensee’s proposed method goes further in restricting access to a licensed premises than the type of general admission charge found to be lawful in the *Playboy Club* decision.

Unlike a general admission charge, which would be the same for all patrons, the licensee’s proposed method creates more arduous financial obligations for non-Amex card holders, who have to pay a \$2.95 fee for the card and must make a minimum purchase of a \$50 card. This method is either designed to favor, or has the effect of favoring, those who hold Amex credit cards. Just as in *330 Restaurant Corp.*, this licensee’s proposed method of operation is designed to discourage the general public from seeking admission. Indeed, the intent here appears to be to reward American Express, a paying corporate sponsor at the Arena, by catering to Amex card holders and/or to help American Express sign up new members who might want to visit an Amex- card-holders-only bar at the Arena.

The Members find that the licensee’s proposed method of operation restricting access to the licensed premises and the ability to purchase alcoholic beverages to only those holding Amex credit cards or Amex gift cards on the terms described herein violates the NYS Alcoholic Beverage Control Law.

This matter was heard and determined by the Members of the Authority at a Full Board meeting held on May 12, 2021 before Chairman Vincent Bradley, Commissioner Lily Fan and Commissioner Greeley Ford. The above written ruling was approved by Chairman Bradley on behalf of the Members on December 20, 2021.

Dated: 12/29/21



Thomas J. Donohue
Secretary to the Authority