Business Integrity Commission

DECISION OF THE BUSINESS INTEGRITY COMMISSION TO DENY THE REGISTRATION APPLICATION OF S & M TROPICAL CORP. TO OPERATE AS A WHOLESALE BUSINESS IN A PUBLIC WHOLESALE MARKET

Introduction

Local Law 28 of 1997 ("Local Law 28") and the rules promulgated thereunder require that wholesale businesses located or operating within a public wholesale market register with the Commissioner of the Department of Business Services. See New York City Administrative Code ("Admin. Code") § 22-253; 66 RCNY §§ 1-12 and 1-13; 17 RCNY §§ 11-02 and 11-04. The duties of the Commissioner of the Department of Business Services were later transferred to the Commissioner of the Organized Crime Control Commission, pursuant to a charter revision provision approved by the voters in November 2001. The Organized Crime Control Commission was subsequently renamed the Business Integrity Commission ("Commission"), pursuant to Local Law 21 of 2002.

The Commission may refuse to register a wholesale business when any of its principals lacks good character, honesty and integrity. See Admin. Code §§ 22-253(b), 22-259(b) and New York City Charter § 2101(a) & (b). The Commission may also refuse to register an applicant that lacks good character, honesty and integrity and Local Law 28 provides a number of factors which the Commission may consider in determining the fitness of a wholesale business. See Admin. Code § 22-259(b). Among the factors that the Commission may consider in making a fitness determination are: (i) failure by an applicant to provide truthful information in connection with the application; (ii) a pending indictment or criminal action against such applicant for a crime which would provide a basis for the refusal of such registration, or a pending civil or administrative action to which such applicant is a party and which directly relates to the fitness to conduct the business or perform the work for which the registration or photo identification card is sought; (iii) conviction of such applicant for a crime which, under article 23-A of the correction law, bears a relationship to the fitness of such applicant or person to conduct a business or work in a market; (iv) commission of a racketeering activity or association with a person who has been convicted for a racketeering activity when the applicant knew or should have known of such activity, including, but not limited to, an offense listed in subdivision one of section nineteen hundred sixty-one of the Racketeer Influenced and Corrupt Organizations statute (18 U.S.C. § 1961 et seq.) or for an offense listed in subdivision one of section 460.10 of the penal law, as such statutes may be amended from time to time, or the equivalent offense under the laws of any other jurisdiction; (v) association with any member or associate of an organized crime group as identified by a federal, state or city law enforcement or investigative agency when the applicant for registration knew or should have known of the organized crime associations of such person; (vi) a principal of the applicant was a principal in a predecessor wholesale business or market business where the commissioner would be authorized to deny registration to such predecessor business; or (vii) in the case of an applicant business, failure to pay any tax, fine, penalty or fee related to the applicant's business for which liability has been admitted by the person liable therefor, or for which judgment has been entered by a court or administrative tribunal of competent jurisdiction and such judgment has not been stayed.

See Admin. Code § 22-259(b)(i) to (vii). Local Law 28 makes clear that the Commission is not limited to consideration of the enumerated factors; the list is meant to be illustrative and non-exhaustive.

S & M Tropical Corp. ("S & M Tropical" or the "Applicant") has applied to the Commission for a registration to operate a wholesale business located or operating within a public wholesale market pursuant to Admin. Code § 22-253 ("Registration").

On May 31, 2013, the staff issued and served the Applicant with Notice of the Grounds to Recommend that the application be denied. The Applicant was granted ten business days to respond, until January 2, 2013. See 17 Rules of the City of New York §2-08(a). The Applicant did not submit any response. Based upon the record as to the Applicant, the Commission now refuses to issue the requested Registration for the following independently sufficient reasons:

A. **The Applicant failed to provide truthful information to the Commission regarding the involvement of Dae Soo Yu, the former principal of another company whose wholesaler registration was denied by the Commission.**

B. **The Applicant failed to provide truthful information to the Commission by claiming that it was closing its business when in fact it continued to operate as a wholesale business without a registration issued by the Commission.**

C. **The Applicant unlawfully operated a wholesale business without a registration issued by the Commission from January 29, 2013 through May 8, 2013.**

D. **The Applicant failed to pay fines, penalties and fees related to the Applicant's business for which judgment has been entered by the New York City Environmental Control Board.**

E. **The Applicant knowingly failed to provide information and documentation required by the Commission.**

Statement of Facts

A. Applicant's Registration History

On or about February 21, 2013, S & M Tropical filed a Public Wholesale Markets Wholesaler Registration Application (the "Application") with the Commission. The Application identified Sam Nam Yu ("Yu") as S & M Tropical's sole principal and identified its business location as 435 Longfellow Avenue, Bronx, NY. See Application at 1 and 22. The Applicant's business address is located in the area adjacent to the New York City Terminal Cooperative Produce Market ("Adjacent Area"). Pursuant to 17 RCNY § 11-02, this area is subject to the Commission's jurisdiction as it is included within the definition of a public wholesale market.

Sam Nam Yu is the father of Dae Soo Yu. Dae Soo Yu was the sole principal of 3's Produce Corp. See Transcript of March 26, 2013 deposition of Sam Nam Yu ("Yu Dep.") at 25; Application at Addendum 3. On or about January 14, 2013, the Commission denied the wholesaler registration application of 3's Produce based on, inter alia, the felony conviction of Dae Soo Yu related to his embezzlement of a considerable amount of funds from his previous employer, another wholesale market business. See Decision of the Business Integrity Commission to Deny the Registration Application of 3's Produce Corp. to Operate as a Wholesale Business in a Public Wholesale Market, dated January 14, 2013, at 3-4.

After the Commission issued its January 14, 2013 denial decision, 3's Produce unlawfully continued to conduct wholesale operations. On or about January 28, 2013, Commission investigators issued a NYC Environmental Control Board ("ECB") notice of violation to Dae Soo Yu for unregistered wholesaling in violation of Admin. Code § 22-253(a).[1] Following the issuance of the January 28th violation, 3's Produce ceased operating at its former location. However, as set forth below, the Commission later learned that the very next day, S & M Tropical began operating with many of the same employees as 3's Produce, with much of 3's Produce's equipment, with largely the same customers of 3's Produce, and with the undisclosed, ongoing involvement of 3's Produce's sole principal. In other words, S & M Tropical is nothing more than a corporation created in an effort to evade the Commission's decision that 3's Produce and its principal, Dae Soo Yu, are barred from operating a wholesale market business because they lacked the requisite honesty and integrity.

B. S & M Tropical Operated Unlawfully Until the Commission Took Legal Action

On or about January 31, 2013, the Commission received information from a confidential source that 3's Produce had moved to another location within the Adjacent Area. On or about February 1, 2013, Commission investigators inspected the location and observed substantial amounts of perishable fruits and vegetables stacked on numerous pallets in the storage areas of the building. In addition, Commission investigators observed equipment such as hand trucks and power jacks, many of which were painted with the insignia "3'S." On the premises, investigators additionally observed an individual who investigators recognized to be Dae Soo Yu. Dae Soo Yu briefly spoke with the investigators, claiming that his father, Sam Nam Yu, and not him, was the owner of the company occupying the premises at 435 Longfellow Avenue. Dae Soo Yu then abruptly ended the conversation, fled the area and investigators observed him enter the walk-in freezer inside 435 Longfellow Avenue in an apparent attempt to avoid further inquiry.

Investigators then spoke to an individual inside 435 Longfellow Avenue who identified himself as Jeung S. Lee ("Lee"). Lee informed investigators that he was the manager of the business at 435 Longfellow Avenue. He further indicated that such business was called S & M Tropical Corp. Lee stated that the company had been conducting a wholesale business at 435 Longfellow Avenue since January 29, 2013. Lee additionally stated that Dae Soo Yu had been hired as a "consultant" to help S & M Tropical set up shop and acquire a customer list. When

[1] After a hearing, ECB found 3's Produce guilty of operating without the required registration. See ECB Decision and Order, Violation # 0177091613, dated April 9, 2013.

asked about Sam Nam Yu, the purported principal of S & M Tropical, Lee stated that Yu is elderly and has never come to the office.

Since S & M Tropical had not filed a Wholesale Business Registration Application with the Commission, investigators informed Lee that S & M Tropical could not operate without first obtaining an approved registration from the Commission to conduct a wholesale business at 435 Longfellow Avenue. Commission investigators issued ECB Notice of Violation No. E177091650 to S & M Tropical for unregistered wholesaling under Admin. Code § 22-253(a).

On February 13, 2013, Commission investigators inspected 435 Longfellow Avenue and observed produce being transported by S & M Tropical employees and customers entering and leaving the premises. Investigators spoke with Lee who claimed that he was removing all produce from the premises and closing the business. However, when Commission Investigators returned to the premises on February 19, 2013, it was clear that Lee's representation that he was closing the business was false, as substantial amounts of perishable produce stacked on numerous pallets in the storage areas of the building remained. When asked to explain why produce was being loaded by S & M Tropical employees into various trucks, including a truck owned by Best Point Tropicals Corp., Lee again claimed that he was in the process of removing all produce from the premises. Lee claimed that he was "giving some of the produce" to Best Point Tropicals Corp., another registered wholesaler that operates in the Adjacent Area. Investigators then interviewed one of the owners of Best Point Tropicals Corp. The owner of Best Tropicals Corp. informed the investigator that he was at the premises to collect money owed to him which was being repaid by the transfer of produce. This statement clearly contradicted Lee's claim that the produce was being given away in the process of closing the company. Lee's claim on February 13, 2013, as well as February 19, 2013, that he was closing the business proved to be false.

Indeed, from February 1, 2013 through May 8, 2013, investigators observed S & M Tropical unlawfully operating a wholesale business at the subject premises continuously. Two further ECB notices of violation were issued by Commission investigators to S & M Tropical for unregistered wholesaling in violation of Admin. Code § 22-253(a) - Violation No. E177091669 on February 4, 2013, and Violation No. E168737178 on February 25, 2013. By decision dated April 24, 2013, S & M Tropical Corp. was found guilty following a hearing of unregistered wholesaling in violation of Admin. Code § 22-253(a) in connection with all three notices of violation issued. See ECB Decision and Order, Violation Nos. 0168737178, 0177091650, and 0177091669, dated April 24, 2013. In a later decision, the ECB Appeals Unit denied the request of S & M Tropical Corp. to appeal this Decision and Order. See ECB Appeals Unit Decision,

dated May 17, 2013.[2] As of the date of this Decision to deny the Registration Application, the fines imposed by ECB for these violations remain unpaid.[3]

Despite having been found guilty by ECB after a hearing on three prior occasions of engaging in unregistered wholesaling in violation of Admin. Code § 22-253(a), S & M Tropical continued to engage in such unlawful, indeed criminal, activity with impunity. Therefore, on May 8, 2013, the Commission commenced a lawsuit in Bronx County Supreme Court under the Nuisance Abatement Law (see Admin. Code § 7-701, et seq.) in order to bring an end to the unlawful conduct. See City of New York v. Point H. Realty Corp., et al., Bronx County Supreme Court, Index No. 250632/13. While this court proceeding remains pending as of the date of this Decision, on or about May 10, 2013, the Applicant entered into a "so-ordered" stipulation agreeing to the following preliminary injunctive relief: cessation of the use and occupancy of 435 Longfellow Avenue for any purpose; non-removal of furniture, fixtures, and other movable property used in conducting unregistered wholesaling; and agreement to not use or occupy the premises for conducting a wholesale business.[4]

C. Deposition Testimony of Sam Nam Yu

As part of the Commission's investigation, Sam Nam Yu, sole principal of S & M Tropical, was interviewed under oath ("deposition") by the Commission on March 26, 2013. At his deposition, Yu acknowledged that he had no prior experience in the wholesale produce industry. His only connection and experience with the industry was through his son, Dae Soo Yu, and his son's business, 3's Produce. See Yu dep. at 32-36; 53. When asked questions regarding the location of S & M Tropical, the names of clients, as well as the names of employees, Yu had difficulty in recollecting this information. Yu could not remember the address of S & M Tropical, and relied on reading S & M Tropical's address, 435 Longfellow Avenue, Bronx, NY, from a copy of the Application. See id. at 22-23. Yu specified that he had around ten clients at the time of the deposition, but was unable to name any of them. See id. at 21; 29. He additionally was unable to remember the names of one of his three employees, and the first name of his manager, though he claimed to have hired these individuals. See id. at 49-53; 18.

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[2] The Appeals Unit's decision rejecting the appeal advised S & M Tropical that its failure to contest the decision by May 28, 2013 would render the decision final. The Commission has not received any further correspondence regarding this appeal rejection as of the date of this Decision to deny the Registration Application.

[3] A fourth ECB notice of violation (Violation No. E168737214) was issued by Commission investigators to Sam Nam Yu on May 11, 2013 for unregistered wholesaling in violation of Admin. Code § 22-253(a) on April 30, 2013. When this fourth ECB notice of violation was served, Commission investigators seized two trucks, pursuant to Admin. Code § 22-262.1, that are registered to S & M Tropical and that were used in connection with unregistered wholesaling by S & M Tropical. By decision dated May 29, 2013, Sam Nam Yu was found guilty as charged following a hearing and a $1,000.00 fine was imposed. ECB further ruled that the trucks seized by the Commission were unlawfully used in unregistered wholesaling operations on several dates. See ECB Decision and Order, Violation No. 0168737214, dated May 29, 2013.

[4] Another defendant in the proceeding, Point H. Realty Corp., owner of the property at 435 Longfellow Ave., settled the matter on other terms.

During the deposition Sam Nam Yu described S & M Tropical's relationship to 3's Produce using phrases such as "taking over," "keep running" and "restart." Id. at 25-26; 33; 35-36. Yu admitted to maintaining former clients of 3's Produce, receiving left-over inventory after 3's Produce's closure, transferring the ownership of both 3's Produce's trucks into S & M Tropical's name, taking equipment, such as dollies, as well as employing more than half of 3's Produce's former employees. All of these actions were taken at no cost to Yu and with the full consent and approval of Dae Soo Yu. Id. at 25-27; 30-32; 38-39; 42-48; 51-52; 68. Remarkably, Yu testified, under oath, that Dae Soo Yu is not involved in the business of S & M Tropical. Id. at 65-66. When asked whether Dae Soo Yu had ever been present at the premises of S & M Tropical, Yu admitted that Dae Soo Yu had been present, but was unable to provide any cohesive explanation of why Dae Soo Yu made such visits. Id. at 69.

Despite Yu's sworn statements to the Commission that his son had no role in the business, and that he "didn't know" whether his son continued to visit the premises, from April 26, 2013 through May 7, 2013, Commission investigators conducted daily weekday observations of the S & M Tropical premises at 435 Longfellow Avenue. Each day during that time period, with the exception of May 2, 2013, investigators observed a blue Acura MDX with New York State license plate number FYM7689, parked outside the premises. A New York State Department of Motor Vehicles records check revealed that Dae Soo Yu is both the titled and registered owner of this vehicle. See Memoranda of Inspector Eduardo Marrero, dated April 26, 2013 through May 7, 2013.

D. Commission's Demand for Documents

In a letter dated April 29, 2013, the Commission's legal staff wrote to counsel for the Applicant and requested production of copies of the following documents by May 15, 2013 in connection with the Commission's consideration of the Application:

1. Copies of the following concerning Sam's Y. Corp., 749 E. Tremont Avenue, Bronx, New York 10457: (a) detailed general ledger for 2010, 2011 and 2012, and first quarter of 2013; (b) corporate tax returns for 2010, 2011 and 2012; (c) any and all corporate bank statements for 2010, 2011 and 2012; and (d) any and all records related to brokerage accounts for 2010, 2011 and 2012.

2. Any and all sales invoices of S & M Tropical Corp.

See letter from Martin G. Gleeson, dated April 29, 2013.

On or about May 17, 2013, counsel for the Applicant sent an e-mail message to the Commission, advising as follows: "[i]n light of the pending litigation commenced by the BIC against SMTC, my client has been unable to focus on continued document production for its pending license application. We are discussing and evaluating whether to proceed with the application at this time, and will advise in writing by or before the end of next week." As of the

date of this Denial, the Applicant has neither provided the documents requested, nor otherwise communicated any reason for non-disclosure.

Basis for Denial

A. The Applicant failed to provide truthful information to the Commission regarding the involvement of Dae Soo Yu, the former principal of another company whose wholesaler registration was denied by the Commission.

Question 12 of the Application requires the Applicant to "identify all individuals who are current principals of the applicant business . . ."[5] The definition of "principal" (which is included in the instructions for the application) includes corporate officers and directors, all stockholders holding ten percent or more of the outstanding shares of the corporation *and all other persons participating directly or indirectly in the control of such business entity.* See Admin. Code § 22-251(g) (italics added). In response, the Applicant stated that Sam Nam Yu held the position of sole principal of the Applicant business and owned 100% of the Applicant business. The Applicant disclosed no other principals. In addition, Question 19 of the Application requires the Applicant to "list the names, resident addresses, phone numbers, dates of birth, social security numbers, positions, work hours per week, and date hired for all employees hired or will be hired by the applicant business." Again, the Applicant did not disclose Dae Soo Yu to the Commission. See Application at 8; 24. Furthermore, Sam Nam Yu steadfastly denied in his deposition that Dae Soo Yu has any involvement with S & M Tropical. However, the evidence uncovered by the Commission leads to a different conclusion. Dae Soo Yu was observed by Commission investigators at the Applicant's premises on February 1, 2013. At that time, Dae Soo Yu fled from Commission investigators, reflecting a clear consciousness of guilt on his part. Moreover, Jeung S. Lee, the manager of the Applicant, conceded to Commission investigators on that date that Dae Soo Yu had been hired as a consultant to help S & M Tropical set up shop and acquire a customer list. Mr. Lee also indicated to Commission investigators that Sam Nam Yu, the purported principal of S & M Tropical, has never come to the office.

Indeed, by all appearances, the Applicant is the successor corporation to 3's Produce. The record reveals that S & M Tropical "took over" the business of 3's Produce by acquiring its customers, employees, vehicles, equipment and inventory and seamlessly continued in operation. The timing of the beginning of S & M Tropical's operations alone (one day after the Commission took enforcement action against 3's Produce) suggests that the Applicant is nothing more than an already-denied company attempting to thwart the Commission's decision. Most damning is the fact that, although Sam Nam Yu has insisted that his son is not involved in operating S & M Tropical, a vehicle owned by and registered to Dae Soo Yu was observed

[5] Question 13 of the application requires the Applicant to "identify... any person or entity who was a principal of the applicant business at any point during the past (10) ten years." In response, the Applicant stated, "None." See Application at 3.

parked at the premises of S & M Tropical on every business day, besides May 2, 2013, between April 26 and May 7, 2013.

On or about January 14, 2013, the Commission denied the application of 3's Produce based on, inter alia, the recent felony conviction of 3's Produce's sole principal, Dae Soo Yu. Dae Soo Yu's conviction related to his embezzlement of a considerable amount of funds from his previous employer, another wholesale market business. The Applicant is nothing more than a successor company to 3's Produce. For this independently sufficient reason, this Registration Application should be denied.

B. The Applicant failed to provide truthful information to the Commission by claiming that it was closing its business when in fact it continued to operate as a wholesale business without a registration issued by the Commission.

On or about February 13, 2013, Commission investigators spoke with the Applicant's manager, Jeung S. Lee, who claimed that he was removing all produce from the premises and closing the business. However, when Commission investigators returned to the premises on February 19, 2013, it was clear that Lee's representation that he was closing the business was false, as substantial amounts of perishable produce stacked on numerous pallets in the storage areas of the building remained.

The Applicant's failure to truthfully report its intention to continue in business to the Commission is evidence that the Applicant lacks good character, honesty and integrity. Based on this independently sufficient ground, this Registration Application should be denied.

C. The Applicant unlawfully operated a wholesale business without a registration issued by the Commission from January 29, 2013 through May 8, 2013.

On or about January 29, 2013, the Applicant began to operate as a wholesale business in the Adjacent Area without registering with the Commission, as required by Local Law 28. Despite the fact that the Commission has not granted the Applicant authorization to operate as a wholesaler, the Applicant continued to do business with impunity as the successor to 3's Produce. The Commission has issued the Applicant numerous notices of violation for this unregistered activity for which it was found guilty and fined, yet daily inspections revealed that the Applicant continued to operate. Apparently, the Applicant was convinced that merely changing its corporate name and location would provide the cover necessary to continue in business. The Applicant did not cease and desist such unlawful operation until it was compelled to do so by court order.

The Applicant's open and obvious operation of an unregistered produce wholesale business for over three months is the very conduct Local Law 28 was enacted to protect against. Local Law 28 unambiguously requires wholesalers to register with the Commission. Public

confidence in the integrity of the public wholesale markets would be undermined if those proven to have ignored the law receive registrations from the Commission, whose governing law and regulations they have persistently violated. By continuing to operate in violation of market rules and regulations, the Applicant has demonstrated the lack of good character, honesty and integrity necessary to operate such a business. Therefore, this Registration Application should be denied on this independently sufficient ground.

D. The Applicant failed to pay fines, penalties and fees related to the Applicant's business for which judgment has been entered by the New York City Environmental Control Board.

In a decision dated April 24, 2013, the ECB found the Applicant guilty following a hearing of three separate instances of unregistered wholesaling and imposed a total fine of $4,500.00 against the Applicant. As of the date of this Decision, this ECB decision has not been overturned and the fine remains unpaid. For this independently sufficient ground, the Application should be denied.

E. The Applicant knowingly failed to provide information and documentation required by the Commission.

In a letter dated April 29, 2013, the Commission demanded that the Applicant produce certain specified documents that are material and relevant to the Commission's consideration of the Application. As of the date of this Decision, the Applicant has failed, refused or neglected to provide such documents, or provide a bona fide reason for such non-disclosure. For this independently sufficient ground, the Application should be denied.

Conclusion

Based on each of the independently sufficient reasons stated above, the Commission finds that S & M Tropical lacks good character, honesty and integrity and denies the Application of S & M Tropical for a registration as a wholesale business in the adjacent area to the New York City Terminal Cooperative Produce Market.

NYC
Business Integrity Commission

The Registration denial is effective immediately. S & M Tropical may not operate a wholesale business in a public wholesale market in the City of New York.

Dated: June 24, 2013

THE BUSINESS INTEGRITY COMMISSION

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Commissioner and Chair

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Janet Lim, Assistant General Counsel (designee)
Department of Consumer Affairs

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