

Expert Report of Kevin D. Kim

October 21, 2019

I have been retained by TCG Debt Acquisitions 2 to provide expert testimony on the issue of availing under Section 111 of the New York State Alcohol Beverage Control Law (“ABCL”) with respect to the food and beverage operations at 9 West 26<sup>th</sup> Street, NY, NY 10010 (a/k/a 1141 Broadway, New York, New York, 10010), d/b/a the Flatiron Hotel.

### **Background and Qualifications**

I served as a Commissioner of the New York State Liquor Authority from July 2014 through August 2016. Prior to that, I served on Manhattan’s Community Board 5 (“CB5”) from August 2010-September 2012. During my service on CB5, I was a member of the Public Safety & Quality of Life Committee (“PSQL”). PSQL’s role was to evaluate, review, and vote on whether to recommend to the full CB5 Board approval of various liquor license applications in our district (midtown Manhattan).

As a former Commissioner of the SLA (also referred to as a Member of the Authority), my responsibilities included ruling on various disciplinary and licensing matters affecting the manufacturers (wineries, breweries, etc.), distributors and retailers (hotels, restaurants, bars, and liquor stores) of alcohol within New York State.

I am currently a partner at Yoon LLP specializing in NYS liquor licensing matters. My other professional work experiences include working as an associate at Davis Polk & Wardwell, clerking for then-SDNY Judge Denny Chin (now serving on the U.S. Court of Appeals – Second Circuit), serving as the Deputy Director of Community Affairs for retired Congressman Gary L. Ackerman (D-NY), and working on various entrepreneurial efforts.

I also currently volunteer for three non-profit organizations: City University of New York (Member, Board of Trustees), International Student Conference, Inc. (Member, Board of Directors), and the Korean American Association of Greater New York (Member, Board of Directors).

I hold a Bachelor of Arts and a Master of Arts from Stanford University, and a J.D. from Columbia University School of Law, where I was a *Harlan Fiske Stone Scholar* and a member of the *Columbia Law Review*.

### **Introduction to the SLA**

According to the SLA website, the core principles of the SLA mission to this day is “the protection, health, welfare and safety of the people of the State.” To achieve this goal, SLA responsibilities include:

- Reviewing applications;
- Issuing licenses and permits for the manufacture, wholesale distribution and retail sale of all alcoholic beverages;
- Regulating trade and credit practices related to the sale and distribution of alcoholic beverages at wholesale and retail;
- Inspecting premises where alcoholic beverages are manufactured or sold;
- Investigating licensees in connection with violations of the ABC Law, and working with local law enforcement to ensure compliance with the Law; and
- Conducting disciplinary proceedings and hearings, and revoking, canceling or suspending for cause any license or permit, and/or imposing monetary penalties where appropriate.

### **Decision-making process of the Commissioners**

The SLA “Full” Board consists of three Commissioners. Each Commissioner has an equal vote on regulatory, licensing, and disciplinary matters that come before the Members.<sup>1</sup> In general, the Commissioners meet at a public hearing on a bi-weekly basis to consider

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<sup>1</sup> The Governor appoints the three Commissioners who then require confirmation by the NY State Senate for a three-year term (or in my case, to finish out a term of a previous Commissioner who left prior to the expiration of her term). Prior to 2011, all Commissioner positions were full-time. Since 2011, the SLA reorganized to have only one full-time Commissioner – the Chair – and two per diem Commissioners. The Chair, who is appointed by the Governor, became the only Commissioner with day to day agency decision-making powers, including personnel decisions, etc. Each Commissioner, however, maintained equal voting power when it came to voting on matters related to regulatory, licensing, and disciplinary matters.

approximately 120-180 cases. In addition, the Commissioners, from time to time, convene to vote on emergency suspension matters when more immediate action is necessary for “the protection, health, welfare and safety of the people of the State.” Over the course of my time as Commissioner, I estimate that I have voted on over 7,500 regulatory, licensing, and disciplinary matters. These cases include a number of cases where the violation alleged included availing.

### **Assumption of Facts**

On April 16, 2015, 1141 Realty LLC (“Owner”) and You Gotta Have Faith Realty, LLC (the “Manager”) entered into a Management Agreement with an expiration date of December 31, 2015 (“Management Agreement”). The sole member of the Manager was Robert K.Y. Chan (“Chan”) and the Management Agreement stated that the Manager shall be paid a monthly flat fee of \$12,500 plus an amount defined as “Management Fee.”

On the same day that the Management Agreement was executed, an Agreement Regarding Liquor Licenses (“Liquor Agreement”) was executed by and among Rialto Mortgage Finance LLC (“Lender”), 9 West 26<sup>th</sup> Rest., LLC (“9 West 26”) and Toshi’s Penthouse Inc. (“Toshi”; together with 9 West 26, “Licensees”).

As of April 16, 2015, the SLA had issued licenses only to the following three entities listed below:

- 1) 9 West 26: License # 1257575
- 2) 9 West 26: License # 1266611
- 3) Toshi’s Penthouse: License # 1266607

Manager owned 100% of the Licensees and Chan, in turn, owned 100% of the Manager.

Subsequently, according to the Declaration of Robert K.Y. Chan dated September 29, 2017 (“Chan Declaration”), Owner terminated the Management Agreement in August 2015. Payment of managerial fees as per the Management Agreement (Chan Declaration, paragraph 6) also ceased at that time.

Furthermore, according to page 6, footnote 4, of the Declaration of Jagdish Vaswani (“Vaswani”) filed September 15, 2017 (“Vaswani Declaration”), Vaswani states “[w]e engaged a liquor license attorney to [assign all the Liquor Licenses to 1141 Realty] and all forms necessary

to effectuate the transfer of the Liquor Licenses were completed but Mr. Chan would not execute the required documents.”

In paragraph 8 of the Chan Declaration, Chan disputes Vaswani’s claim that he refused to execute any such documents, but that, in fact, no such transfer of the licenses occurred because an attorney that “Flatiron Hotel” had retained had advised that filing a new application at this point could result in the revocation of the current licenses, plus a “possible two year proscription on the hotel so that no liquor license could be obtained by the Flatiron Hotel.”

According to the SLA Website, it appears that the license applications filed by Vaswani under “Flatiron Hotel Operations LLC d/b/a Flatiron Hotel” “Flatiron Hotel Licenses” finally became effective on June 12, 2018 with an expiration date of May 31, 2020.

#### Availing

Article 8, Section 111 of the ABCL states in relevant part the following:

Licensed to be confined to the premises.

A license issued to any person, pursuant to chapter one hundred eighty of the laws of nineteen hundred thirty-three or this chapter, for any licensed premises **shall not be transferable to any other person** [emphasis added] or to any other premises or to any other part of the building containing the licensed premises except in the discretion of the authority. **It shall be available only to the person therein specified** [emphasis added], and only for the premises licensed and no other except if authorized by the authority.

In addition, according to the SLA website, “Availing is when a person who was not disclosed to the Authority has an ownership or other financial/controlling interest in a licensed business. . . .

Availing occurs when the licensee turns control of the business over to an undisclosed party without any direction, supervision or oversight by the licensee, even if the undisclosed party does not profit from the use of the license. Availing may involve a failure . . . to disclose the transfer of an interest.”

An unauthorized corporate change is a version of availing where the licensed corporation or LLC stays the same, but the principals of the licensed entity, undisclosed to the Authority, change. If a new person/entity is operating the business, that is an availing. If the licensed corporation or LLC is still in control but with different (unapproved) principal(s), that is an unauthorized corporate change.”

In *Happy Landing Lounge, Inc. v. State Liquor Authority*, the Third Department held that evidence that individuals unapproved by SLA operated licensee’s bar for extended periods of time without licensee’s participation was sufficient to support Authority’s determination that licensee permitted those individuals to avail of themselves of liquor license in contradiction of the ABCL. 631 N.Y.S.2d 466 (3d Dep’t 1995). The court also ruled that cancellation of the liquor license and imposition of a \$1,000 bond forfeiture was not a disproportionate penalty. *Id.*

In the First Department, the court also confirmed the SLA’s determination that the petitioner was guilty of permitting another to avail himself of the petitioner’s off-premises beer license as there was uncontroverted evidence showing that licensee had contracted to sell licensed premises and that vendee was in possession of and operating premises without licensee’s involvement. *De Leon v. New York State Liquor Authority*, 582 N.Y.S.2d 4 (1st Dep’t 1992). The court confirmed the cancellation of the petitioner’s liquor license and the imposition of a \$1,000 bond forfeiture.

Additionally, a licensee may not make its liquor license available to another by leaving the licensed premises under the control of an individual or entity without “direction, supervision or oversight,” even where that party receives no financial benefit. *Alla Capital Development Corporation v. New York State Liquor Authority*, 74 N.Y.S.3d 810, 812 (3d Dep’t 1995); *Happy Landing Lounge, Inc.*, 631 N.Y.S.2d at 467. The Third Department in *Alla Capital* case also confirmed the cancellation of the petitioner’s liquor license and the imposition of a \$1,000 bond forfeiture.

The act of availing undermines the SLA’s core efforts to properly regulate the alcohol industry, in part, because it prevents direct oversight over who actually enjoys the privilege of

benefitting from the liquor license. One of the critical ways it fulfills its regulatory purpose is to have a strict disclosure requirement of the ownership structures of all its licensees.<sup>2</sup>

Availing also goes directly against the SLA's publicly stated principle of maintaining and protecting a level playing field for all. Without the requirement to disclose, individuals could benefit financially from the licenses without having to undergo the extensive background check required of all other applicants. Thus, from my personal experience, the SLA regards availing to be one of the most serious violations of the ABCL.

### **My Opinion**

Assuming the aforementioned facts in this report, it is my opinion that an act of availing occurred when Owner terminated the Management Agreement but continued to operate the licensed businesses without applying for, and receiving, approval from the SLA. The new operation entity/individual, as well as the revised financial structure, was not disclosed to the SLA until late December 2017 or approximately 26 months after terminating the Management Agreement.

It is undisputed that the Manager, and the Manager alone, owned 100% of the membership interest in each of the Licensees. And Chan, as an individual, owned 100% of the Manager. Only the Licensees had been authorized by the SLA to operate these respective businesses and to profit from the sale of alcohol. The fact that the respective businesses continued to sell alcohol and food without receiving approval from the SLA of the significant changes stated above constituted availing.

Moreover, according to footnote 4 of page 6 of the Vaswani Declaration and, together with, paragraph 7 and 8 of the Chan Declaration, Vaswani and Chan both knew that upon termination of the Management Agreement, a "transfer" of the Liquor Licenses needed to occur to a new entity in which Vaswani was the sole member. In an email sent by Vaswani to Wells Fargo on 9/11/17, Vaswani states that 1141 Broadway Restaurant and Penthouse Operations

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<sup>2</sup> ABCL statutorily prohibits certain individuals from possessing a license. For example, felons (unless they can provide a certificate of relief/disposition) and those in law enforcement (for obvious reasons). In addition, SLA will more closely scrutinize the applications of anyone who has ever had their license previously revoked or cancelled or otherwise show a repeat pattern of violations, in particular, if those violations show a disregard for the health, safety, and welfare of the public.

were, in fact, operating food and beverage “under a license issued to [Chan], 9 W 26<sup>th</sup> LLC. Discussions to add my name to license are ongoing.” This acknowledgement that a violation of the ABCL law had occurred and was still ongoing would be an important factor when the SLA Board considers the severity of the penalty for availing in this case.

For example, as Commissioner, it was important to analyze and weigh the gravity of any offense, including availing. During any hearing, it was important for me to ascertain the actual mindset of the licensee:

- 1) Did they intentionally avail or was it out of pure ignorance of the law (which would not excuse the availing)? Here, it is apparent that the availing was intentional.
- 2) Did they stop availing immediately after they realized that they were in violation of the ABCL? Here, they continued to operate.
- 3) Did they take affirmative steps to hide from the SLA that they were availing? Here, a liquor attorney allegedly advised that the premises might incur a penalty of a two-year proscription if they indeed applied soon after the Management Agreement was terminated. Assuming that this advice was indeed given, then their failure to come forth shows evidence of taking affirmative steps to not comply with disclosure requirements under the ABCL.
- 4) How long did the availing actually take place? Here, a relatively long time of approximately 26 months.

Once Chan was terminated, Vaswani should have discontinued the sale of alcohol until the SLA had granted approval of a new license that did not include Manager or Chan who was no longer involved with the businesses.

The current licensee (Flatiron Hotel) knew that they were engaged in the act of availing, but yet, continued its operations for over two years before finally applying for their own license.

While there is a dispute as to why the new licenses were never filed, for the purposes of considering whether availing occurred or not, the reasons for the failure to effectuate this “transfer” to a new licensee is irrelevant. Even assuming that Chan had refused to execute the “transfer” documents, Manager no longer had: 1) any financial interest in the operations of the three businesses; 2) any involvement with the operations of the businesses; and 3) an entity or

individual(s) who had not been approved by nor disclosed to the SLA took over full-time operation of the businesses.

That these three prongs exist is compelling evidence that a classic case of availing occurred here from the time the Management Agreement was terminated in August 2015 through June 12, 2018 when the Flatiron Hotel Licenses became effective (i.e., that Vaswani had finally been fully disclosed and vetted by the SLA).<sup>3</sup>

### **Conclusion**

Here, it is clear that the availing was not only occurring, but that the parties were fully aware that a new license with a new principal was needed. Although some actions (including engaging a liquor attorney) had been taken to address the situation, the availing continued for approximately 26 months. Nevertheless, the businesses continued to operate even as its Manager, the only one authorized by the SLA to be operate from this business, was no longer involved in the business. Irrespective of whether the Manager had been terminated or its Management Agreement had merely expired, the continued sales of alcohol on the premises constituted availing. Neither the Owner nor Vaswani (or, for that matter, anyone not previously approved by the SLA) had any right to use the liquor licenses for their benefit until the SLA had approved of their involvement with the Licensees.

In sum, it is my opinion that as soon as the Manager - the sole SLA-approved entity - was no longer involved in the operation of the Licensees, the parties needed to immediately notify the SLA of a change in control and financial structure of the Licensees. Liquor sales should have also ceased immediately once Owner terminated the Management Agreement. None of these actions occurred, and thus, availing continued for approximately 26 months through June 12, 2018 when the new license finally became effective. Further, assuming the fact pattern set forth above, I would have voted to revoke this license and consider seriously whether all the parties

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<sup>3</sup> Although Vaswani filed its application for Flatiron Hotel in December 2017, the availing actually continued until June 12, 2018 when the new license became effective. The mere act of applying for a new license at this point does not "interrupt" the availing. During the time from when any applicant submits a new application and is awaiting a decision by the SLA, no alcohol sales may occur until the applicant actually picks up its physical liquor license and posts it prominently on its wall. In fact, there cannot be any alcohol on the premise until the license is physically on the premises.

involved would be proscribed from ever again becoming a licensee under SLA's character and fitness test.

Finally, I reserve the right to alter my opinion should any additional information become available to me.

By: Kevin D. Kim

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