

STATE OF NEW YORK DEPARTMENT OF LABOR

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In the Matter of

NY GREEN SOLUTIONS CORP., and
its substantially owned-affiliated entities,

ESEM SERVICE CORP.,

F.L.S.E. CORP.,

and

SAFETY LEAD SERVICES CORP.

for a determination pursuant to Section 909 of the New York Labor Law that violations of Labor Law, Article 30 and/or Code Rule 56 took place as hereinafter described.

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To: Honorable Roberta Reardon
Commissioner of Labor
State of New York

**DEFAULT
REPORT
&
RECOMMENDATION**

File # LIC-16-0001

Asbestos Case No(s).
26147045, 26128485,
26105520, 26047588,
26047346

Pursuant to a Notice of Hearing issued in this matter, a video hearing was held on September 29, 2016 between Albany, New York and New York, New York. The purpose of the hearing was to provide all parties an opportunity to be heard on the issues raised in the Notice of Hearing and to establish a record from which the Hearing Officer could prepare this Report and Recommendation for the Commissioner of Labor.

The hearing concerned an investigation conducted by the Asbestos Control Bureau (“Bureau”) of the Division of Safety and Health of the New York State Department of Labor (“Department”) into whether NY Green Solutions Corp. (“NY Green “or “Respondent”) complied with the requirements of article 30 of the Labor Law (§§ 900 *et seq.*) or 12 NYCRR part 56 when Respondent undertook five asbestos abatement projects at 300 Edwards Street, Roslyn Heights, NY 11577, Asbestos Control No. 26047588; 100 Merrick Road, Rockville

Centre, NY 11570, Asbestos Control No. 26047346; 90 South Grove Street, Valley Stream, NY 11580, Asbestos Control No. 26147045; 22 East 1st Street, Mount Vernon, NY 10550, Asbestos Control No. 26105520; and 59 East Main Street, Elmsford, NY 10523, Asbestos Control No. 26128485; whether NY Green, ESEM Service Corp. (“ESEM”), F.L.S.E. Corp. (“FLSE”), and Safety Lead Services Corp. (“Safety Lead”) hereinafter collectively referred to as “Respondents” are substantially owned-affiliated entities; and whether the Department properly denied NY Green’s Asbestos Handling License Renewal Application.

APPEARANCES

The Bureau was represented by Department Counsel, Pico Ben-Amotz (Evan S. Zablow, Attorney 1, of Counsel).

There were no appearances made by or on behalf of Respondents.

HEARING OFFICER

John W. Scott was designated as Hearing Officer and conducted the hearing in this matter.

FINDINGS AND CONCLUSIONS

On June 28, 2016, the Department duly served copies of the Notice of Hearing on Respondents by first class mail and by certified mail. Evidence supports the finding that ESEM Service Corp. and F.L.S.E. Corp received the certified mailings as the USPS tracking reports indicate that the mailings were delivered to the respondents’ addresses, and neither the certified mailings nor first class mailings to NY Green Solutions Corp. were returned to the Department. (HO Exhibit 2; T, 7-8) The Notice of Hearing scheduled a September 29 and 30, 2016 hearing

and required that the Respondents serve an Answer at least 14 days in advance of the scheduled hearing.

Respondent failed to answer the charges contained in the Notice of Hearing or appear at the hearing. As a consequence, Respondents are in default in this proceeding.

At the hearing, the Department produced sworn testimony and credible evidence substantially supporting the Department's charges that Respondent violated the particular provisions of the Labor Law or the Code Rule that are hereinafter particularized.¹

For the foregoing reasons, the findings, conclusions and determinations of the Department should be sustained.

RECOMMENDATIONS

Based upon the default of the Respondents in timely answering and contesting the charges contained in the Department's Notice of Hearing, and upon the sworn testimonial and documentary evidence adduced at hearing in support of those charges, I recommend that the Commissioner of Labor make the following determinations and orders in connection with the issues raised in this case:

Project 1

300 Edwards Street, Roslyn Heights, NY 11577, Asbestos Control No. 26047588

12 NYCRR 56-7.5 (b) (9) requires, in part, that showers in personal decontamination system enclosures supply hot and cold water that is adjustable at the tap and that shower enclosures be designed to ensure against leakage of any kind. On inspection, Ms. Eisenberg observed that the showers only had one knob that did not control the mix of hot and cold water,

¹ Certain violations were withdrawn by the Department at the time of the hearing and, as such, those violations are not considered herein.

that the shower stall was merely a poly-lined pan with wood grating, and that water from the showerheads sprayed in and out of the pans causing water to leak from the shower stalls (DOL Exs. 2-3; T. 15-17). Therefore, it is

DETERMINED that NY Green violated 12 NYCRR 56-7.5 (b) (9) because it failed to supply hot and cold water that is adjustable at the tap and to ensure against leaks from the shower enclosure. (DOL Ex. 6; T. 23-24); and it is further

DETERMINED & ORDERED that, pursuant to Labor Law § 909 (1) (b), Respondent be assessed the requested civil penalty of \$15,000.00 for one violation of 56-7.5 (b) (9).

Project 2

100 Merrick Road, Rockville Centre, NY 11570, Asbestos Control No. 26047346

12 NYCRR 56-3.4 (b) (2) (vii) requires asbestos abatement contractors notify the Bureau of any night, weekend, and shift work schedules. Mr. Billera inspected the project during the day time and observed that the personal decontamination system enclosure was locked, that NY Green was not onsite, and that NY Green had conducted and was scheduled to continue to conduct abatement during the night shift (DOL Ex. 5; T. 21-22). Mr. Billera obtained corroborating information from the building superintendent (DOL Ex. 5-6). Therefore, it is

DETERMINED that NY Green violated 12 NYCRR 56-3.4 (b) (2) (vii) because it failed to include any night shift work schedule in its notification (DOL Ex. 4; T. 21); and it is further

DETERMINED & ORDERED that, pursuant to Labor Law § 909 (1) (b), Respondent be assessed the requested civil penalty of \$15,000.00 for one violation of 56-3.4 (B) (2) (vii).

Project 3

90 South Grove Street, Valley Stream, NY 11580, Asbestos Control No. 26147045

12 NYCRR 56-7.5 (b) (8) requires asbestos abatement contractors provide a clean room that is a minimum of thirty-two square feet of floor space for every six full shift abatement workers and that the clean room will have benches, lockers, and hooks for street clothes. On inspection, Mr. Billera observed that the clean room was a three foot by three-foot air lock that lacked any lockers, benches, or hooks (DOL Exs. 8-9; T. 26-29, 31-32). Therefore, it

DETERMINED that NY Green violated 12 NYCRR 56-7.5 (b) (8) because it failed to provide its workers with clean room of sufficient size and with the required lockers, benches or hooks.

12 NYCRR 56-7.5 (e) (1) requires that the asbestos abatement contractor provide a waste decontamination system enclosure outside of, but attached to the regulated abatement work area. On inspection, Mr. Billera observed that NY Green did not have a waste decontamination system at the project (DOL Ex. 8-9; T. 26-27, 29-33). NY Green's supervisor admitted to Mr. Billera that NY Green had not constructed a waste decontamination system enclosure (DOL Ex. 8-9; T. 29-30). Therefore, it is

DETERMINED that, NY Green violated 12 NYCRR 56-7.5 (e) (1) because it failed to provide a waste decontamination system enclosure outside of, but attached to, the regulated abatement work area.

12 NYCRR 56-7.11 (b) (2) requires that the asbestos abatement contractor fasten plywood or oriented strand board that is at least 3/8-inch thick to the regulated abatement work area side of the barrier partition. On inspection, Mr. Billera observed that NY Green's containment was constructed out of plastic and framing and lacked any plywood sheeting or

hard-wall barrier (DOL Ex. 8-9; T. 26-27, 33). Therefore, it is

DETERMINED that, NY Green violated 12 NYCRR 56-7.11 (b) (2).

12 NYCRR 56-8.3 (a) (1) (iii) provides entry and exit procedures for the regulated abatement work area, to wit, all persons shall proceed first to the clean room, remove all street clothing, store these items in lockers and don personal protective equipment as appropriate for the abatement work area. NY Green's handlers could not have followed these entry and exit procedures because NY Green's handlers stored their street clothes on tables, chairs, and other furniture outside of the clean room (DOL Exs. 8-9; T. 29, 33-34). The violations NY Green committed at Project 3 are identical to the violations FLSE committed at an asbestos project at 45 North Ocean Avenue, Freeport, New York, Asbestos Control No. 25779632 (DOL Ex. 19; T. 35-40). Therefore, it is

DETERMINED that, NY Green violated 12 NYCRR 56-8.3 (a) (1) (iii) since NY Green's handlers could not have followed these entry and exit procedures because NY Green's handlers stored their street clothes on tables, chairs, and other furniture outside of the clean room (DOL Exs. 8-9; T. 29, 33-34); and it is further

DETERMINED & ORDERED that, pursuant to Labor Law § 909 (1) (b), Respondent be assessed the requested civil penalties of \$17,500.00 for one violation of 56-7.5 (b) (8), \$20,000.00 for one violation of 56-7.5 (e) (1), \$20,000.00 for one violation of 56-7.11 (b) (2), \$20,000.00 for one violation of 56-8.3 (a) (1) (iii).

Project 4

22 East 1st Street, Mount Vernon, NY 10550, Asbestos Control No. 26105520

12 NYCRR 56-7.8 (a) (11) requires that all OSHA Class I, Class III, and interior Class II

asbestos abatement projects employ negative air pressure equipment ventilation, that the exhaust from such ventilation be vented outside of the building to a controllable area away from public access, and that each negative pressure ventilation unit exhaust duct not terminate less than fifteen feet from a receptor or adversely affect the air intake of any building or structure.

12 NYCRR 56-2.1 (aj) defines Class I Asbestos Work as an “OSHA term meaning activities involving the abatement of Thermal System Insulation (TSI), and surfacing ACM and PACM.” Project 4 is an OSHA Class I asbestos abatement project because NY Green admitted that the project concerned the abatement of friable duct and pipe insulation asbestos on its notification and Mr. Lutzker observed the same on inspection (DOL Exs. 10-11; T. 43). On inspection, Mr. Lutzker further observed that a negative air machine’s exhaust hose had separated in the building’s basement before its terminus and that the exhaust hose was emptying into the basement (DOL Ex. 11-12; T. 45). Therefore, it is

DETERMINED that, NY Green violated 12 NYCRR 56-7.8 (a) (11) because it did not employ negative air pressure equipment ventilation with the exhaust from such ventilation vented outside of the building to a controllable area away from public access, and that each negative pressure ventilation unit exhaust duct not terminate less than fifteen feet from a receptor or adversely affect the air intake of any building or structure; and it is further

DETERMINED & ORDERED that, pursuant to Labor Law § 909 (1) (b), Respondent be assessed the requested civil penalty of \$15,000.00 for one violation of 56-7.8 (a) (11).

Project 5

59 East Main Street, Elmsford, NY 10523, Asbestos Control No. 26128485

12 NYCRR 56-7.8 (a) (4) requires that manometers be used to document the pressure differential for all OSHA Class I asbestos project regulated abatement work areas and that a

minimum of -0.02 column inches of water pressure differential, relative to pressure outside the regulated abatement work area, be maintained within the regulated abatement work area, as evidenced by manometric measurements. Project 5 is an OSHA Class I asbestos abatement project as defined by 12 NYCRR 56-2.1 (aj) because NY Green admitted that the project concerned the abatement of friable duct and pipe insulation asbestos on its notification and Mr. Lutzker observed the same on inspection (DOL Ex. 13-14; T. 50-53). On inspection, Mr. Lutzker observed that a manometer reported zero column inches of water pressure differential (DOL Ex. 14-15; T. 50-53). Therefore, it is

DETERMINED that NY Green violated 12 NYCRR 56-7.8 (a) (4) because it did not maintain a minimum of -0.02 column inches of water pressure differential, relative to pressure outside the regulated abatement work area, within the regulated abatement work area, as evidenced by manometric measurements.

12 NYCRR 56-7.5 (c) (1) makes certain provisions of 12 NYCRR 56-7.5 (b)—including 56-7.5 (b) (6) and (9)—applicable to Small asbestos projects. 12 NYCRR 56-2.1 (w) (2) (ii) defines a Small asbestos project as follows: “An asbestos project involving the removal, encapsulation, enclosure, repair, disturbance or any handling of more than 10 and less than 160 square feet of ACM, PACM or asbestos material or more than 25 and less than 260 linear feet of ACM, PACM or asbestos material.” Project 5 is a Small asbestos project because NY Green admitted that this project involved the removal, disturbance, enclosure, encapsulation, repair or handling of 35 square feet of ACM, PACM or asbestos material and 102 linear feet of ACM, PACM or asbestos material on its notifications to the Department (DOL Ex. 13; T. 48-49). Therefore, the requirements of 12 NYCRR 56-7.5 (b) (6) and (9) apply to this project.

12 NYCRR 56-7.5 (b) (6) requires that at least two layers of six mil fire-retardant

reinforced plastic sheeting be used for floor protection of the personal decontamination system enclosure. NY Green's decontamination enclosure system lacked reinforced floor plastic (DOL Exs. 14-15; T. 50, 53). Therefore, it is

DETERMINED that NY Green violated 12 NYCRR 56-7.5 (b) (6) because it did not use at least two layers of six mil fire-retardant reinforced plastic sheeting for floor protection of the personal decontamination system enclosure.

12 NYCRR 56-7.5 (b) (9) requires, in part, that showers in personal decontamination system enclosures be designed to ensure against leakage of any kind. NY Green did not install curtains in the shower room and used a mere plastic pan as a basin. Mr. Lutzker observed water from the showerhead spray in and out of the pan and leak from the shower stall (DOL Exs. 14-15; T. 50, 53). Therefore, it is

DETERMINED that NY Green violated 12 NYCRR 56-7.5 (b) (9) because it failed to ensure against leaks from the shower enclosure; and it is further

DETERMINED & ORDERED that, pursuant to Labor Law § 909, Respondent be assessed the requested civil penalties of (1) (b), \$20,000.00 for one violation of 56-7.8 (a) (4), \$15,000.00 for one violation of 56-7.5 (b) (6), and \$15,000.00 for one violation of 56-7.5 (b) (9).

SUBSTANTIALLY OWNED-AFFILIATED ENTITY

Labor Law § 909 (1) (b) provides that an asbestos contractor and any substantially owned-affiliated entity of such asbestos contractor shall be jointly and severally liable for the payment of any civil penalty assessed by the Commissioner. In pertinent part, Labor Law § 901 (18) defines a substantially owned-affiliated entity to include any successor of the asbestos contractor or any entity in which one or more of the top five shareholders of the asbestos

contractor individually or collectively also owns a controlling share of the voting stock. Labor Law § 901 (19) defines a successor as “an entity engaged in work substantially similar to that of the predecessor, where there is substantial continuity of operation with that predecessor.”

Chaya Bistritzky and Chaya Gorodetsky Are The Same Person

Chaya Bistritzky or Chaya Gorodetsky was listed as the sole owner on every asbestos handling license application for Safety Lead, FLSE, ESEM, and NY Green. On these applications, Bistritzky and Gorodetsky used two social security numbers interchangeably. The social security number ending in 7742 was used by Bistritzky in NY Green’s 2015 and 2016 applications and by Gorodetsky in ESEM’s 2015 application. The social security number ending in 8254 was used by Bistritzky in Safety Lead’s 2007, 2008, and 2009 applications and FLSE’s 2009 and 2010 applications and by Gorodetsky in NY Green’s 2014 application.

Additionally, while Bistritzky provided the 7742 social security number in NY Green’s 2016 application, when the Department asked for verification of Bistritzky’s social security number, Bistritzky provided a social security card with the 8254 number (DOL Ex. 18).

Therefore, the record contains sufficient evidence to conclude that Respondents are each owned by the same person.

Respondents Are Substantially Owned-Affiliated Entities

By Order and Determination dated and filed October 18, 2011, the Commissioner found FLSE and Safety Lead to be substantially owned-affiliated entities because Chaya Bistritzky was the duly authorized representative and sole owner of both companies; there was a continuity of operation of the two companies under the same ownership because ownership of the two companies did not change from Chaya Bistritzky; and both companies engaged in asbestos abatement work (DOL Ex. 19).

Here, Chaya Bistritzky is sole owner and duly authorized representative of NY Green, FLSE, and Safety Lead (DOL Exs. 17, 18, 21-25). There is a continuity of operation of the three companies under the same ownership because ownership of the three companies did not change from Chaya Bistritzky (DOL Exs. 17, 18, 21-25). Lastly, all three companies engage or engaged in asbestos abatement work (DOL Exs. 17, 18, 21-25). Therefore, NY Green, FLSE, and Safety Lead are substantially owned-affiliated entities.

Additionally, ESEM, NY Green, FLSE, and Safety Lead are also substantially owned-affiliated entities. Chaya Gorodetsky with the social security number ending in 7742 is listed as ESEM's sole owner on its only application. Gorodetsky is also the sole owner on NY Green's 2014 application. Gorodetsky also uses the same social security number that Bistritzky uses on NY Green's 2015 and 2016 applications. Therefore, there is a continuity of operation of the Respondents under the same ownership because ownership of the Respondents did not change from Bistritzky or Gorodetsky (DOL Exs. 17, 18, 21-25) and Respondents engage or engaged in asbestos abatement work (DOL Exs. 17, 18, 21-25).

The record contains sufficient evidence indicating that through identical ownership and engaging in the same type of business activity, Respondents ESEM, NY Green, FLSE, and Safety Lead are substantially owned-affiliated entities as the term is defined in Labor Law § 901 (18). Therefore, the Commissioner shall

DETERMINE & ORDER that, pursuant to Labor Law § 909 (1)(b), Respondents are liable for payment of: (1) any civil penalty assessed by the Commissioner for the violations at issue herein; and (2) the unpaid civil penalties and Project Notification fees in the amount of \$167,200.00 the Commissioner assessed against FLSE and Safety Lead by Order and Determination dated and filed October 18, 2011.

NY GREEN'S LICENSE APPLICATION DENIAL

Labor Law §903 (1) grants the Commissioner “the authority to deny the issuance or renewal of a license or certificate for good cause shown, including the serious violation of state, federal or local laws by the applicant or by any substantially owned-affiliated entity of the applicant with regard to the conduct of any job involving asbestos or asbestos material, or for any serious violation or violations that resulted in a suspended or revoked license or certificate during the previous five years.”

Here, the record demonstrates good cause to deny the renewal of Asbestos Handling License No. 75750 issued to NY Green. The facts elicited at the hearing disclosed that NY Green, FLSE, and Safety Lead are substantially owned-affiliated entities; FLSE and Safety Lead have been finally determined to have committed violations of Article 30 of the Labor Law and/or Industrial Code Rule 56; FLSE and Safety Lead have outstanding unpaid civil penalties for these violations as well as unpaid notification fees; and NY Green continues to commit repeat Labor Law article 30 and Code Rule 56 violations (DOL Ex. 18; T. 63). Therefore, the Commissioner shall

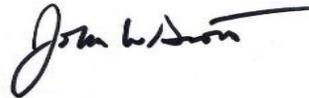
DETERMINE & ORDER that, pursuant to Labor Law §903 (1), the determination to deny the renewal of Asbestos Handling License No. 75750 issued to NY Green is sustained.

Finally

ORDER that Respondent immediately remit payment to the Division of Safety & Health, Asbestos Control Bureau, SOB Campus, Building 12, Room 157, Albany, NY 12240 of the total amount due of \$339,700.00 (\$172,500.00 assessed on all the Projects at issue herein plus \$167,200.00 the Commissioner assessed against FLSE and Safety Lead by Order and Determination dated and filed October 18, 2011), made payable to the Commissioner of Labor.

Dated: March 14, 2018
Albany, New York

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John Scott", with a long horizontal flourish extending to the right.

John Scott, Hearing Officer