

Sleepy's Consent Resolution

A regular meeting of the Nassau County Industrial Development Agency (the "Agency") was convened in public session at the offices of the Agency at 1550 Franklin Avenue, Mineola, Nassau County, New York, on November 16, 2017, at 9:00 a.m. local time.

The meeting was called to order by the Chairman and, upon roll being called, the following members of the Agency were:

PRESENT:

Timothy Williams	Chairman
John Coumatos	Vice Chairman
Christopher Fusco	Asst. Secretary
Michael Rodin	

NOT PRESENT:

THE FOLLOWING ADDITIONAL PERSONS WERE PRESENT:

Joseph J. Kearney	Executive Director
Colleen Pereira	Administrative Director
Nicholas Terzulli	Director of Business Development
Paul O'Brien, Esq.	Bond/Transaction Counsel

The attached resolution no. 2017-60 was offered by J. Coumatos, seconded by C. Fusco:

RESOLUTION OF THE NASSAU COUNTY INDUSTRIAL
DEVELOPMENT AGENCY AUTHORIZING CERTAIN
MATTERS IN CONNECTION WITH ITS STRAIGHT-LEASE
TRANSACTION WITH SLEEPY'S, LLC

WHEREAS, the Nassau County Industrial Development Agency (the "Agency") is authorized and empowered by the provisions of Chapter 1030 of the 1969 Laws of New York, constituting Title I of Article 18-A of the General Municipal Law, Chapter 24 of the Consolidated Laws of New York, as amended (the "Enabling Act"), and Chapter 674 of the 1975 Laws of New York, as amended, constituting Section 922 of said General Municipal Law (said Chapter and the Enabling Act being hereinafter collectively referred to as the "Act") to promote, develop, encourage and assist in the acquiring, constructing, reconstructing, improving, maintaining, equipping and furnishing of manufacturing, industrial and commercial facilities, among others, for the purpose of promoting, attracting and developing economically sound commerce and industry to advance the job opportunities, health, general prosperity and economic welfare of the people of the State of New York, to improve their prosperity and standard of living, and to prevent unemployment and economic deterioration; and

WHEREAS, on or about May 15, 2006, Sleepy's, LLC, a limited liability company organized and existing under the laws of the State of Delaware (successor in interest to Sleepy's, Inc., a corporation organized and existing under the laws of the State of New York) (the "Applicant" or "Sublessee"), presented an application (as amended, the "Application") to the Agency, which Application requested that the Agency consider undertaking a project (the "Project") consisting, *inter alia*, of the following: (A) (1) the acquisition of an interest in an approximately 18.88 acre parcel of land located at 1000 Oyster Bay Road including certain adjoining property, all located in Hicksville, Town of Oyster Bay, County of Nassau, New York (collectively, the "Land"), (2) the construction of a new approximately 450,000 square foot warehouse and office building on the Land (collectively, the "Building"), and (3) the acquisition and installation therein and thereon of certain furniture, fixtures, machinery and equipment (the "Equipment"), all for use by the Applicant as its corporate headquarters and regional distribution center (collectively, the "Project Facility"); (B) the granting of certain "financial assistance" (within the meaning of Section 854(14) of the Act) with respect to the foregoing in the form of potential exemptions or partial exemptions from sales and use taxes, mortgage recording taxes and real property taxes (but not including special assessments and ad valorem levies) (collectively, the "Financial Assistance"); (C) the lease (with an obligation to purchase) or sale of the Project Facility to the Applicant or such other entity(s) as may be designated by the Applicant and agreed upon by the Agency; and (D) the sublease of the Project Facility to the Applicant or such other entity(s) as may be designated by the Applicant and agreed upon by the Agency; and

WHEREAS, the Applicant proposed that STEEL CIRCUIT, LLC, a limited liability company duly organized and existing under the laws of the State of Delaware and qualified to do business in the State of New York as a foreign limited liability company ("Steel Circuit"), and SOUTH OYSTER BAY REALTY, LLC, a limited liability company duly organized and

existing under the laws of the State of New York ("Bay Realty" and together with Steel Circuit, collectively, the "Original Company") be the lessee under the Lease (as defined below) and the Agency approved such proposal; and

WHEREAS, the Agency appointed the Original Company as agent of the Agency to undertake the acquisition, construction, installation and equipping of the Project Facility and the Agency leased the Project Facility to the Original Company, all pursuant to the terms and conditions set forth in the Lease Agreement dated as of November 1, 2007 between the Original Company and the Agency (as amended, the "Lease"), and the other Transaction Documents (as defined in the Lease); and

WHEREAS, the Original Company subleased the Project Facility to the Sublessee, all pursuant to the terms and conditions set forth in the Sublease Agreement dated as of November 1, 2007 between the Original Company and the Sublessee (as amended, the "Sublease Agreement") and the other Transaction Documents; and

WHEREAS, Steel Circuit and Bay Realty previously requested that the Agency consent to the conversion of their tenant-in-common interests in the Project Facility to membership interests in SS Oyster Bay Realty, LLC, a Delaware limited liability company (the "Company"), the sole owners of which would be Steel Circuit and Bay Realty; and

WHEREAS, the Agency approved the foregoing request pursuant to a resolution approved by the members of the Agency on August 27, 2014; and

WHEREAS, the Company and the Sublessee have advised the Agency that the Sublessee was not in compliance with job retention and creation requirements set forth in the Lease as of December 31, 2016 (the "Job Default") and have requested that the Agency enter into an amendment of the Lease and the other Transaction Documents in connection with the imposition of "Recapture of Benefits" relating to the Job Default and amending certain other provisions of the Transaction Documents (collectively, the "Proposed Transaction"); and

WHEREAS, the Agency is willing to consent to such requests, subject to the terms of this resolution;

NOW, THEREFORE, BE IT RESOLVED BY THE MEMBERS OF THE NASSAU COUNTY INDUSTRIAL DEVELOPMENT AGENCY, AS FOLLOWS:

1. Capitalized terms used but not otherwise defined herein shall have the meanings given to them in the Lease.

2. The Agency determines that the Company's request with respect to a previously approved and unchanged Project is a Type II Action pursuant to SEQRA involving "continuing agency administration" which does not involve "new programs or major reordering of priorities that may affect the environment" (6 NYCRR §617.5(c)(20)) and therefore no Findings or determination of significance are required under Article 8 of the New York Environmental Conservation Law.

3. No additional "financial assistance" is being requested by the Company with respect to the transactions contemplated by this Resolution and therefore no public hearing of the Agency is required pursuant to Section 859-a of the Act.

4. The Agency hereby ratifies, confirms and approves all actions heretofore taken by the Executive Director and the staff of the Agency with respect to the matters contemplated by this Resolution, including, without limitation, those actions required to ensure full compliance with the requirements of the Act and all other Applicable Laws that relate thereto.

5. The Agency hereby consents to the Proposed Transaction as outlined in the request letter dated October 18, 2017 from the Sublessee's counsel to the Agency, subject, however, to the delivery of evidence satisfactory to the Executive Director that neither the Company nor the Sublessee is otherwise in default of any obligation under the Transaction Documents. The execution and delivery of amendment documents and agreements required to effectuate the Proposed Transaction (collectively, the "Amendment Documents"), being substantially in the forms presented to the Agency at this meeting, are hereby authorized and approved. The Chairman, Executive Director and Administrative Director of the Agency are each hereby authorized, acting individually or jointly, to execute, acknowledge and deliver the Amendment Documents. The execution and delivery of the Amendment Documents by any one of said officers shall be conclusive evidence of due authorization and approval.

6. The Chairman, Executive Director and Administrative Director of the Agency are each hereby designated the Authorized Representative of the Agency and each of them is hereby authorized and directed, acting individually or jointly, to execute and deliver any and all consents, agreements, papers, instruments, opinions, certificates, affidavits and other documents required in connection with the Amendment Documents (collectively, the "Consent Documents"), and to do and cause to be done any and all acts and things necessary or proper for carrying out this Resolution, including, without limitation, taking any necessary action to obtain consent of any other person or party necessary with respect to execution, delivery and approval of the Consent Documents.

7. The authorizations set forth in this Resolution are subject to the condition that the Company shall reimburse the Agency for all costs and expenses incurred by the Agency in connection with the transactions contemplated herein, including, without limitation, the Agency's consent and amendment fees and all reasonable attorneys' fees and disbursements incurred by the Agency, including without limitation, the fees and expenses of Special Counsel, Phillips Lytle LLP.

8. All covenants, stipulations, obligations and agreements of the Agency contained in this Resolution, the Amendment Documents and the Consent Documents shall be deemed to be the covenants, stipulations, obligations and agreements of the Agency to the full extent authorized or permitted by law, and such covenants, stipulations, obligations and agreements shall be binding upon the Agency and its successors from time to time; provided, however, that no covenants, stipulations, obligations or agreements of the Agency contained in this Resolution, any Amendment Document or any Consent Document shall give rise to any

pecuniary liability of the Agency or a charge against its general credit or shall obligate the Agency in any way except to the extent that the same can be paid or recovered from the Project Facility or the sale or liquidation of the Project Facility or revenues therefrom.

No covenant, stipulation, obligation or agreement herein contained or contained in any Amendment Document or any Consent Document shall be deemed to be a covenant, stipulation, obligation or agreement of any member, officer, agent or employee of the Agency in his or her individual capacity and neither the members of the Agency nor any officer executing any Amendment Document or any Consent Document shall be liable personally on the Amendment Documents or the Consent Documents or be subject to any personal liability or accountability by reason of the issuance thereof.

9. The Chairman and Executive Director of the Agency are each hereby authorized to approve modifications to the terms approved herein which are not inconsistent with the intent and substance of this Resolution, such approval to be evidenced by the execution by any one of such officers of the Amendment Documents and the Consent Documents containing such modifications.

10. This Resolution shall take effect immediately.

The question of the adoption of the foregoing Resolution was duly put to a vote on roll call, which resulted as follows:

Timothy Williams	VOTING	Aye
John Coumatos	VOTING	Aye
Christopher Fusco	VOTING	Aye
Michael Rodin	VOTING	Aye

The foregoing Resolution was thereupon declared duly adopted.

STATE OF NEW YORK)
) SS.:
COUNTY OF NASSAU)

We, the undersigned officers of the Nassau County Industrial Development Agency (the "Agency"), do hereby certify that we have compared the foregoing extract of the minutes of the meeting of the members of the Agency, including the Resolution contained therein, held on November 16, 2017, with the original thereof on file in our office, and that the same is a true and correct copy of said original and of such Resolution set forth therein and of the whole of said original so far as the same relates to the subject matters therein referred to.


WE FURTHER CERTIFY that (A) all members of the Agency had due notice of said meeting; (B) said meeting was in all respects duly held; (C) pursuant to Article 7 of the Public Officers Law (the "Open Meetings Law"), said meeting was open to the general public, and due notice of the time and place of said meeting was duly given in accordance with such Open Meetings Law; and (D) there was a quorum of the members of the Agency present throughout said meeting.

WE FURTHER CERTIFY that, as of the date hereof, the attached Resolution is in full force and effect and has not been amended, repealed or rescinded.

IN WITNESS WHEREOF, we have hereunto set our respective hands and affixed the seal of the Agency this 16th day of November, 2017.



[Vice] Chairman



[Assistant] Secretary

(SEAL)

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October 18, 2017

Nassau County Industrial Development Agency
Theodore Roosevelt County Executive & Legislature Bldg.
1550 Franklin Avenue, Suite 235
Mineola, NY 11501

Attn: Joseph J. Kearney, Executive Director

Re: *Sleepy's LLC*
Premises: 1000 Oyster Bay Road, Hicksville, New York
Proposal on Employment Compliance Resolution

Dear Mr. Kearney:

Please be advised that this firm represents Sleepy's, LLC, a Delaware limited liability company ("Sleepy's" or "Company") in connection with financial assistance provided by the Nassau County Industrial Development Agency ("Agency") with respect to the above-referenced project ("Project"). As set forth below, we are asking the Agency to consider a proposal from the Company to address the employment commitment shortfall at the Project.

As you know, this Project closed with the Agency in November 2007 and contemplated the construction of a new approximately 450,000 square foot warehouse and office building located at 1000 Oyster Bay Road, Hicksville, New York for use by Sleepy's as its corporate headquarters and regional distribution facility (the "Project Facility"). The Project Facility was constructed and has been operational since completion.

As you are aware, Sleepy's was recently acquired by Texas-based Mattress Firm Inc. As a result of said acquisition there have been various consolidations of functions and employment which have resulted in a reduction of the employment levels at the Project Facility as reflected in the most recent annual compliance report submitted to the Agency.

FORCHELLI, CURTO, DEEGAN, SCHWARTZ, MINEO & TERRANA, LLP

COUNSELORS AT LAW

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While the Project has historically been in full compliance and a great success for nearly a decade, providing employment for hundreds of Nassau County residents in a new state-of-the-art facility, the most recent employment numbers are below the compliance level set forth in the IDA Project transaction documents. Those transaction documents, and the employment covenants therein, contemplated a 10-year term and are scheduled to expire next year.

The Agency transaction documents require an FTE employment of level of 491 (counting 34 required part time jobs as 17 full time jobs) at the Project. The 2016 Job Confirmation Form, submitted to the Agency by Company on March 23, 2017, reported an employment level of 342 FTE for 2016. As such, the last required job report indicates a FTE employment level that is 30% lower than the Agency transaction documents require.

Based on the construction of the very large Project Facility and the 8+ years of full compliance, it is clear that the Company has been in substantial compliance with the transaction documents for most of the contemplated 10-year term. Given this track record of performance, we propose that a "recapture payment" be made to the Agency in the sum of \$240,000 to address the employment shortfalls in a proportional and fair manner, and that same be deemed as full satisfaction of the Company's obligations under the recapture provisions of the transaction documents. This \$240,000 proposal is based on the 70% employment compliance level in the last report and represents 30% of the potential recapture amount of approximately \$800,000 as set forth in the transaction documents and described by the Agency.

While the transaction documents are set to expire next year, depending on negotiations with the landlord and the ultimate business decisions of Mattress Firm, there is a good possibility that the Company may continue its presence at the Project Facility; however, economic factors dictate that it would only do so with a reduced foot-print and commensurate lower levels of employment. If, as and when that is solidified, we would expect that any such future continued occupancy would be the subject of a new application to the Nassau County IDA.

In the interim, after the payment of the above referenced proposed recapture payment, we would request that the final year of the PILOT term remain intact, but that the Agency consider a modification of the year 10 PILOT payment to reflect the changed employment condition at the Project Facility. This will allow the Company to continue to explore the potential for adding new employment at the Project Facility either through additional operations at the site or attracting another business to the site.

FORCHELLI, CURTO, DEEGAN, SCHWARTZ, MINEO & TERRANA, LLP

COUNSELORS AT LAW

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Thank you for consideration in this matter.

Very truly yours,

A handwritten signature in dark ink, appearing to read 'D. Deegan', written in a cursive style.

DANIEL P. DEEGAN

DPD/ac

Disposition of Recapture Amounts (Sleepy's)

New York State General Municipal Law ("GML") Section 859-a(6)(f) requires industrial development agencies ("IDAs") to adopt a uniform project agreement which shall, among other things:

"provide for the return of all or a part of the financial assistance provided for the project, including all or part of the amount of any tax exemptions, which shall be redistributed to the appropriate affected tax jurisdiction, as provided for in policies developed by the agency pursuant to section eight hundred seventy-four of this title, unless agreed to otherwise by any local taxing jurisdiction or jurisdictions".

Further, GML Section 874(11) requires each IDA to

"develop policies for the return of all or a part of the financial assistance provided for the project, including all or part of the amount of any tax exemptions, as specified in the policy, which may include but shall not be limited to material shortfalls in job creation and retention projections or material violations of the terms and conditions of project agreements. All such returned amounts of tax exemptions shall be redistributed to the appropriate affected tax jurisdiction, unless agreed to otherwise by any local taxing jurisdiction."

The Nassau County Industrial Development Agency (the "NCIDA"), as part of paragraph 6 of its Uniform Tax Exemption Policy (Re-Adopted April 4, 2017) (the "Policy"), has adopted such a Recapture of Benefits policy. Subparagraphs (h) and (i) of the Policy provide:

(h) Unless otherwise provided for by Applicable Law, upon the collection of a recapture of Benefits from an Applicant, the Agency shall redistribute or cause to be redistributed such recaptured Benefits to the appropriate affected tax jurisdiction(s), unless agreed to otherwise by any local taxing jurisdiction.

(i) Notwithstanding any provision of this Section 6 to the contrary, upon a finding by the Agency that a Recapture Event has occurred at any time during the term of the Project Documents, the Agency shall require that the Applicant pay to the Agency as a return of sales and use tax benefits conferred by the Agency, an amount equal to 100% of the amount of sales and use tax exemptions claimed by or on behalf of the Applicant in connection with a Project. The Agency shall remit to the State of New York the portion of such benefits constituting "State Sales and Use Taxes" to the extent required by Section 875 of the General Municipal Law."

Lastly, Section 875(3)(b) of the GML requires IDAs to recapture "state sales and use exemptions" under certain enumerated circumstances, as reflected in the Policy. GML Section 875(3)(c) provides that:

“If an IDA recovers, recaptures, receives, or otherwise obtains, any amount of state sales and use tax exemption benefits from an agent, project operator or other person or entity, the IDA shall, within thirty (30) days of coming into possession of such amount, remit it to the commissioner, together with such information and report that the commissioner deems necessary to administer payment over of such amount.”

NCIDA has the right to recover \$800,199.22 from Sleepy’s LLC pursuant to the attached recapture calculation.

Of such amount recaptured, the disposition of the state sales and use tax exemption benefits amount (\$100,168.99) is clear: it must be remitted to the commissioner of taxation and finance together with any required backup information.

As to the balance of the recaptured amount, both the GML and the Policy require such amounts be redistributed to “the appropriate affected tax jurisdictions(s)”.

GML Section 854(16) defines an “affected tax jurisdiction” as:

“any municipality or school district, in which a project is located, which will fail to receive real property tax payments, or other tax payments which would otherwise be due, except for the tax exempt status of an agency involved in a project.”

and Section 854(3) defines a “municipality” as:

“any county, city, village, town or Indian reservation in the state.”

Thus, the State of New York is not “an affected tax jurisdiction” under the GML because it is neither a municipality nor a school district. However, the GML does not provide guidance on the meaning of which affected tax jurisdiction(s) is “appropriate”.

The “appropriate” affected tax jurisdiction could be the jurisdiction that otherwise collects the tax in question or the jurisdiction that ultimately receives the taxes in question. As the “collector” of the taxes is in the best position to allocate or distribute them, we believe that, until more guidance is available from the State, the collector of the taxes recaptured by NCIDA is the most “appropriate” tax jurisdiction.

New York’s Sales and Use Tax has a State component and a Local component. In Nassau County, the State component is 4.375% (including 0.375% allocated to the Metropolitan Transportation Authority (the “MTA”)) and the Local component is 4.25%. The Local component is partially allocated to the cities, towns and villages in the County, with the balance going to the Nassau County Interim Finance Authority before being remitted to Nassau County.

Thus, as indicated above, the State Commissioner of Taxation and Finance should receive the State Sales and Use Tax recapture amount (\$100,168.99). The Local portion

of the Sales and Use Tax (\$97,307.02) should also be remitted to the State with instructions that same be “redistributed” to the appropriate tax jurisdiction.

The New York Mortgage Recording tax consists of a “basic” tax, an “additional” tax and a “special additional” tax. The additional tax (25 cents per \$100) is distributed to the MTA (which is not an “affected tax jurisdiction” under the GML). The special additional tax (30 cents per \$100 in Nassau County) is distributed to the State of New York Mortgage Agency (the “SNMA”) (which is also not an “affected tax jurisdiction” under the GML) (or in some cases, the special additional tax is distributed to the MTA). [Note that effective July 1, 2017, IDAs are no longer exempt from the special additional mortgage recording tax.] The basic tax (50 cents per \$100) is distributed to the local county treasurer. Nassau County is an “affected tax jurisdiction”.

Thus, the Nassau County treasurer should receive the basic mortgage recording tax portion (\$28,545.00) of the recaptured amount. Of the remaining recaptured mortgage recording tax, there does not seem to be any requirement under the GML or the NCIDA’s policies that it be remitted to any entity because none of the State, the MTA or the SNMA are “affected tax jurisdictions” and the County would not seem to be an “appropriate” recipient of more than the basic mortgage recording tax.

As Nassau County is the collector of the real property taxes, the real property recapture amount (\$542,778.62) should be remitted to the County with instructions to redistribute same to the appropriate tax jurisdictions.

NCIDA/Sleepy's
Recapture Schedule

Sales and Use Tax

Annual Amount of Sales Tax Exemption:		
2007		\$ 31,472.00
2008		\$1,094,922.00
2009		<u>\$ 848,367.00</u>
Total Sales Tax Exemption:		\$1,974,761.00
Recapture Rate:	10%	
Recapture Amount:		\$ 197,476.10

Mortgage Recording Tax

Aggregate Principal Amount of Mortgages:		\$48,534,972.00
		\$ 8,555,028.00
Mortgage Tax Rate:	1.05%	
Mortgage Tax (but for Exemption):		\$ 599,445.00
Recapture Rate:	10%	
Recapture Amount:		\$ 59,944.50

Real Property Taxes

PILOT Savings		
2009		\$ (363,957.36)
2010		\$ 676,618.51
2011		\$ 714,712.72
2012		\$ 623,288.08
2013		\$ 737,267.65
2014		\$ 796,001.19
2015		\$ 791,897.74
2016		\$ 671,556.47
2017		<u>\$ 780,401.18</u>
	TOTAL	\$ 5,427,786.18
Recapture Rate:	10%	
Recapture Amount:		\$ 542,778.62
	<u>TOTAL</u>	<u>\$ 800,199.22</u>

Total Sales and Use Tax Recaptured (\$197,476.01) as allocated between State portion ($4.375 \div 8.625 \times 197,476.01$, or \$100,168.99) and Local portion ($4.25 \div 8.625 \times 197,476.01$, or \$97,307.02).

Total Mortgage Recording Tax Recaptured (\$59,944.50) as allocated between basic tax ($0.50 \div 1.05 \times 59,944.50$, or \$28,545.00) and additional/special additional tax ($0.55 \div 1.05 \times 59,944.50$, or \$31,399.50).