| The City of New York: Department of Consumer Affairs               | Y                     |
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| In the Matter of the Notice of Hearing For Unlicensed Activity of, | Cert No. 1052328      |
| Best Buy Stores LP,  | Judge Thomas P. Coyne |
| Respondent.  | X                     |

# **MEMORANDUM OF LAW**

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Submitted by: Adam M. Levy, Esq.

| Department of Consumer Affairs                                     |                       |
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| In the Matter of the Notice of Hearing For Unlicensed Activity of, | Cert No. 1052328      |
| Best Buy Stores LP,  | Judge Thomas P. Coyne |
| Respondent.  |                       |

Respondent Best Buy Stores LP, by its attorneys Simmons, Jannace & Stagg, LLP, submit this post-hearing memorandum of law pursuant to 6 RCNY § 6-37 in further support of its defense to the Department of Consumer Affairs ("DCA") Notice of Hearing For Unlicensed Activity dated July 21, 2008, heard before Judge Thomas P. Coyne on August 12, 2008.

### **Preliminary Statement**

The DCA claims Best Buy violated New York City Administrative Code § 20-387 by offering to sell home theater installation services. The claim is in direct opposition to the DCA's legal opinion and established case law.

As we discuss below, the DCA's Office of the General Counsel expressly represented that installers of home stereo and video equipment do not require home improvement licenses. See Ex. "A". Indeed, the definition of "home improvement" does not even include installations of stereo and video equipment.

Moreover, the New York County Supreme Court has expressly held that installers of stereo and video equipment do not require home improvement licenses. Therefore, according to the statute, the DCA's own interpretation of the statute, and the Supreme Court's interpretation of the statute, the installation of a home theater, which is to say the installation of stereo and video equipment, does not constitute a home improvement.

As such, Best Buy did not violate § 20-387 by offering to sell home theater installation services without a home improvement license and this action must be dismissed.

For the DCA to now claim that Best Buy violated the statute by offering to install home theaters is not only meritless, it is disingenuous. The DCA's attempt to circumvent its previously stated position and the intent of the statute by arguing that Best Buy requires a license to install speakers and run their wires behind sheetrock walls is unavailing. Merely removing small sections of sheetrock without otherwise affecting the structure or integrity of a home is insufficient to constitute an "alteration" or "renovation" as it is defined in the statute. As such, the DCA's argument should be disregarded.

#### Argument

"Home Improvement" is defined as follows:

"...the construction, repair, replacement, remodeling, alteration, conversion, rehabilitation, renovation, modernization, improvement, or addition to any land or building, or that portion thereof which is used or designed to be used as a residence or dwelling place and shall include but not be limited to the construction, erection, replacement, or improvement of driveways, swimming pools, terraces, patios, landscaping, fences, porches, garages, fallout shelters, basements, and other improvements to structures or upon land which is adjacent to a dwelling house. 'Home improvement' shall not include (i) the construction of a new home or building or work done by a contractor in compliance with a guarantee of completion of a new building project, (ii) the sale of goods or materials by a seller who neither arranges to perform nor performs directly or indirectly any work or labor in connection with the installation of or application of the goods or materials, (iii) residences owned by or controlled by the state or any municipal subdivision thereof, or (iv) painting or decorating of a building, residence, home or apartment, when not incidental or related to home improvement work as herein defined. Without regard to the extent of affixation, 'home improvement' shall also include the installation of central heating or air conditioning systems, central vacuum cleaning systems, storm windows, awnings or communication systems."

NYC Admin. Code 20-386(2).

As set forth, although the installation of central air conditioning systems, storm windows, awnings, etc., are expressly included in the definition of home improvement, the installation of home theater systems and/or other stereo and video equipment is <u>not</u>. Therefore, it must be presumed that the legislature did not intend to regulate these types of installations. <u>See Campagna v. Shaffer</u>, 73 N.Y.2d 237, 538 N.Y.S.2d 933 (agencies cannot regulate activities beyond the specific grants of authority conferred by the legislature).

Indeed, the New York County Supreme Court employed this reasoning to hold that installers of stereo and video equipment do not require home improvement licenses.

See Innovative Audio Video Showrooms Inc. v. Friedman, 7 Misc.3d 383, 789 N.Y.S.2d 417 (Sup. Ct. New York County 2005). In so holding, the court cited to the DCA's own interpretation of the statute. Id. at 387, fn. 3. See DCA response to inquiry regarding whether installers of audio and video equipment require home improvement licenses, dated October 5, 2004, attached as Ex. "A".

Like the plaintiff in <u>Innovative</u>, Best Buy installs home stereo and video equipment. As expressed at the August 12, 2008 hearing, a typical installation includes screwing brackets onto a wall to mount a flat screen television, connecting speaker and other component wire to the television and programming the settings of the television to ensure it functions properly. Nevertheless, the DCA took issue with the fact that during some installations, Best Buy: (i) cuts and removes small portions of sheet rock to imbed speakers into a wall; and (ii) drills small holes in sheetrock to conceal speaker wires.

The DCA's charge is misplaced because a home improvement license is not required for "every change" in a structure. <u>Power Cooling</u>, Inc. v. Wassong, 5 Misc.3d

22, 24, 783 N.Y.S.2d 741, 742 (App. Term 1st Dep't 2004). See also Joblon v. Solow, 91 N.Y.2d 457, 464, 672 N.Y.S.2d 286, 290 (1988) (interpreting the analogous Labor Law § 240(1) and expressing concern for allowing "every change" in a structure to qualify as an alteration). Minor changes to a wall, such as those contemplated here, are not significant enough to constitute an "alteration" or "renovation" as it is defined in the statute. See Innovative, 7 Misc.3d 386-387, 789 N.Y.S.2d at 419 (merely installing speaker wire into walls does not constitute a home improvement). Despite research, we failed to locate any legal authority holding that merely cutting and removing small sections of sheetrock is a "home improvement."

Moreover, the First Department's Appellate Term, in citing to <u>Innovative</u> with approval, cautioned against interpreting the home improvement statute too broadly. <u>See Precision Mirrors & Glass v. Dicostanzo</u>, 17 Misc.3d 30, 844 N.Y.S.2d 568 (App. Term 1st Dep't 2007). The court was unwilling to hold as a matter of law that installing four air conditioning units through walls, capping existing pipes and walls and performing exterior stone masonry, constituted a "home improvement." <u>Power Cooling</u>, 5 Misc.3d at 24-25, 783 N.Y.S.2d at 743. The court also cited to <u>Coggeshall Painting & Restoration Co. v. Zetlin</u>, N.Y.L.J.May 25, 1999 at 26, col 1 (App. Term 1st Dep't), <u>aff'd</u>, 282 AD2d 364 (1st Dept 2001), for the proposition that "limited carpentry" and tile work is not regulated by the statute.

As in <u>Power Cooling</u> and <u>Coggeshall Painting</u>, Best Buy's practice of making limited alterations to small sections of sheetrock to imbed speakers and run speaker wire behind a wall is far too insignificant to fall within the definition of the statute. To require Best Buy to obtain a home improvement license for these purposes would be to rule in

contravention to established precedent and in complete disregard of the cautions expressed by the Appellate Term and the Court of Appeals. As such, Best Buy does not require a home improvement license to install home theaters and as such, did not violate § 20-387.

## Conclusion

For the foregoing reasons, this action should be dismissed.

Dated:

Syosset, New York August 19, 2008

Yours, etc.,

Simmons, Jannace & Stagg, L.L.P.

Adda M. Lavy

Attorneys for Defendant Best Buy Stores LP Office & P.O. Address: 75 Jackson Avenue Syosset, New York 11791-3139 (516) 357-8100

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Please return completed form to Commissioner's Office. Thank you.

From:
Sent:
To:
Subject:

crmrepl@customerservice.nyc.gov

Wednesday, September 29, 2004 10:46 AM

DCAmail; Csmith1@cityhall.nyc.gov

City of New York - Correspondence #1-1-125874104 Message to Commissioner, DCA -

Home Improvement Contracting

\*Re-route to DCA: Please Process

Your City of New York - CRM Correspondence Number is 1-1-125874104

DATE RECEIVED: 08/13/2004 10:39:54

DATE DUE: 08/26/2004

SOURCE: WEB

The e-mail message below was submitted to the City of New York via NYC.gov or the 311 Call Center. It is forwarded to your agency by the Mayor's Office of Operations. In accordance with the Citywide Customer Service standard, your response is due in 10 business days.

If this message is to a Commissioner / Agency Head and needs to be re-routed to another agency or cc to another agency, forward the email to outgoingagency@customerservice.nyc.gov. Do not make any changes to the subject line. Include any comments and it will be processed by The Mayor's Office of Operations.

All other web forms are to be handled by the receiving agency.

----Original Message----

From: PortalAdmin@doitt.nyc.gov

Sent: 08/13/2004 10:39:45
To: sbladmp@customerservice.nyc.gov

Subject: < No Subject >

From: info@garywachtel.com (Gary Wachtel) Subject: Message to Commissioner, DCA

Below is the result of your feedback form. It was submitted by

Gary Wachtel (info@garywachtel.com) on Friday, August 13, 2004 at 10:39:45

This form resides at http://www.ci.nyc.ny.us/html/mail/html/maildca.html

Message Type: Request for Information

**Topic: Home Improvement Contracting** 

Contact Info: Yes

Middle Name. J

Last Name: Wachtel

Street Address: 545 Madison Avenue

Address Number: 703

City: New York

State: NY

Postal Code: 10022

**Country: United States** 

Work Phone #: 212 371-6500

Email Address: info@garywachtel.com

Message: Does a store in NYC that sells and installs stereo and video equipment in apts. need a home improvement

license?

REMOTE\_HOST: 162.83.197.180

HTTP\_USER\_AGENT: Mozilla/4.0 (compatible; MSIE 6.0; Windows NT 5.1; .NET CLR 1.1.4322)

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October 5, 2004 Department of Consumer Affairs 42 Broadway ne improvement license New York, NY 10004-1716 Gretchen Dykstra Commissioner 212.487.4342 summerst@dcs.nvc.gov Dear: Consumer In answer to your request for information: This business was licensed on the date or This business is currently licensed. during the period you specified ( This business is not licensed/failed to renew license/licensee alert. Out of This business category is not licensed by Consumer Affairs. Please contact the following NYC or NY State agency: \_ do mot need a home improvement A computer print-out is attached. Enclosed is a complaint form in case you wish to file one against this business. Sincerely,

(m)

(212)487-4342

Tammy M. Summers

Office of the General Counsel

INQUIRY DESK *Tel.* (212) 487–4342 **■** *Fax* (212) 487–4390 summerst@dca.nyc.gov

THE CITY OF NEW YORK
DEPARTMENT OF CONSUMER AFFAIRS
42 Broadway
New York, New York 10004



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# AFFIDAVIT OF SERVICE VIA OVERNIGHT DELIVERY SERVICE

Re:

In the Matter of the Notice of Hearing

for Unlicensed Activity of Best Buy Stores LP

Cert No. 1052328

STATE OF NEW YORK

) : ss.:

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**COUNTY OF NASSAU** 

Margaret M. Rose, being duly sworn, deposes and says:

I am not a party to the within action, am over 18 years of age and reside in Farmingdale, New York.

On August 19, 2008, I served the within **MEMORANDUM OF LAW** by depositing a true copy thereof, enclosed in a wrapper as addressed below, into the custody of DHL Express for delivery on Wednesday, August 20, 2008 by 12:00 p.m., prior to the latest time designated by that service for such delivery.

Judge Thomas P. Coyne Administrative Law Judge Department of Consumer Affairs 66 John Street, 11th Floor New York, NY 10038

Inspector Valentino
Enforcement Unit
Department of Consumer Affairs
66 John Street
New York, New York 10038

Graciela Torres
Settlement Officer
Adjudication Division
The New York City
Department of
Consumer Affairs
66 John Street
New York, New York 10038

Margaret M. Rose

Sworn to before me this 19th day of August, 2008.

Josephine Viselvato

JOSEPHINE RISELVATO
Notary Public, State of New York
No. 01Rl6169418
Qualified in Suffolk County
Commission Expires June 25, 2011