

**SUPREME COURT FOR THE STATE OF NEW YORK
COUNTY OF ALBANY**

In the Matter of the Application of

NEW YORK STATE DEPARTMENT OF HEALTH,

Petitioner,

For an Order, Pursuant to Article 75 of the CPLR, staying
an arbitration commenced by

RUSI TECHNOLOGY COMPANY, LIMITED,

Respondent.

Index No. _____

VERIFIED PETITION

Petitioner New York State Department of Health (“NY DOH”), by and through its undersigned attorneys, Binder & Schwartz LLP, hereby alleges for its petition pursuant to Article 75 of the New York Civil Practice Law and Rules as follows:

PRELIMINARY STATEMENT

1. This is a verified petition seeking an Order pursuant to [CPLR 7503\(b\)](#) to stay an arbitration proceeding purported to have been commenced by Respondent Rusi Technology Company, Limited (“Rusi”) against NY DOH in China that is not authorized by the parties’ written contract.

2. In March 2020, as the COVID-19 pandemic was first cresting in New York State, NY DOH sought to procure medical respirators—masks—to help cover the shortfall in personal protective equipment for medical personnel and first responders in the State of New York.

3. Rusi, a Chinese company headquartered in Hong Kong, offered to sell N-95 and KN-95 masks to NY DOH. This action involves the KN-95 masks. This offer was communicated through an individual working at a New York-based organization.

4. NY DOH and Rusi negotiated, and ultimately agreed, to a written contract for the sale of KN-95 masks, consisting of three parts. First, Rusi drafted a sales contract written in both English and Chinese. NY DOH then returned a purchase order that revised the sales price listed in the contract and incorporated two appendices: the standard terms for New York State contracts and additional COVID-19 standard terms. The parties then executed a written amendment to the sales contract that reflected the sales price term from the purchase order. The contract provided for, and NY DOH made, a partial payment to Rusi, and Rusi shipped the masks.

5. Upon receipt and inspection of Rusi's initial shipments of the KN-95 masks, NY DOH found that a substantial number of masks did not comply with the KN-95 standards specified in the contract. NY DOH thus concluded that Rusi was in breach and withheld the balance of payment due.

6. The English and Chinese text in the sales contract materially conflicts regarding dispute resolution. The English text specifies that the English language version precedes over the Chinese, and states that NY DOH and Rusi shall settle any dispute by friendly consultation. The Chinese text in the sales contract states that the Chinese language version precedes over the English, and states that any disputes shall be settled by friendly consultation or by arbitration in China.

7. The purchase order, which is entirely in English, was sent after the sales contract and provides that for COVID-19 contracts involving the international shipment of goods, any

disputes unable to be resolved by friendly consultation shall be resolved by arbitration in New York with the International Chamber of Commerce, with all proceedings to be in English.

8. On or about June 28, 2021, the New York State Office of General Services received a notice of arbitration issued by the China International Economic and Trade Arbitration Commission regarding a dispute submitted by Rusi with respect to the KN-95 masks. The arbitration petition itself was filed by Rusi in Chinese. The notice of arbitration, which was never sent to NY DOH, contains no date by which NY DOH must challenge the propriety of arbitration in China. It requests a response from NY DOH to Rusi's arbitration demand within 45 days of receipt, which would be August 12, 2021.

9. The initial sales contract executed by NY DOH and Rusi did not have the "meeting of the minds" required to refer any dispute between them to arbitration, let alone in China and to be handled in Chinese. If anything, under New York law, which incorporates the Convention for the International Sale of Goods (the "CISG"), Rusi agreed to NY DOH's additional terms set forth in the purchase order attachments requiring any arbitration proceeding to be brought in New York before the International Chamber of Commerce, to be handled in English. As there is no agreement to arbitrate in China, NY DOH seeks an order permanently staying the Chinese arbitration proceedings.

10. An immediate preliminary stay is also necessary to prevent an unauthorized proceeding from moving forward while this court hears this Petition. Failing a preliminary stay, NY DOH risks an unauthorized finding of default in the Chinese arbitration.

11. Service upon Rusi by certified or registered mail is authorized pursuant to the parties' agreement in the purchase order as well as CPLR Section 7503(c). Service upon Rusi

via email to its counsel in the Chinese arbitration and to the authorized email address in the parties' contract is also appropriate to ensure immediate notice to Rusi of the immediate stay.

THE PARTIES

12. NY DOH is an agency of the State of New York. Its offices are located at Corning Tower, Empire State Plaza, Albany, NY 12237.

13. Rusi is a Chinese corporation with its principal place of business at Flat1406A, 14/F Belgian Bank Building, NOIS 721-725 Nathan Road, Mongkok, Hong Kong, China.

JURISDICTION AND VENUE

14. This Court has jurisdiction over Rusi pursuant to [CPLR 301](#) and [302\(1\)](#). Rusi solicited the business of NY DOH in New York through an authorized representative, negotiated the contracts in New York, and shipped goods that it was aware would be used in New York.

15. Venue is proper pursuant to [CPLR 7502\(a\)\(i\)](#) because NY DOH is located in Albany County.

STATEMENT OF FACTS

16. In March 2020, New York became the global epicenter of the COVID-19 pandemic. The speed of the virus's spread led to shortages in personal protective equipment for hospital workers and first responders, including shortages of medical masks. In order to mitigate this shortfall, New York State took an active role in acquiring PPE for distribution to healthcare workers.

17. Numerous vendors solicited New York State to purchase their PPE, including Rusi. Rusi communicated with New York State through a local representative based in New York, who handled contract negotiations with NY DOH on behalf of Rusi. Rusi provided the initial draft of a contract for the purchase of masks, which was written in both English and

Chinese. NY DOH edited the English version and relied on the provision that stated that the English language version controlled. Ultimately, NY DOH and Rusi executed two contracts, one for N-95 masks and one for KN-95 masks. The contract at issue here is the one for KN-95 masks, agreed on March 27, 2020 (the “March 27 Contract”).

18. The March 27 Contract consists of three documents – (1) a Sales Contract, signed by NY DOH, attached as Exhibit A, (2) a purchase order with two Appendices, changing the price and adding standard New York State contracting terms, attached as Exhibit B (collectively, the “Purchase Order”), and (3) an Amendment to the Sales Contract, conforming the price to that listed in the Purchase Order, attached as Exhibit C.

19. The Sales Contract, drafted by Rusi, contains a section titled “Governing Law and Arbitration,” which provides, in English, that “All disputes arising from the execution of or in connection with the contract shall be settled through friendly consultation between both parties.”

20. In that same provision, there are Chinese terms. These terms purport to provide for application of Chinese law and arbitration in China. A certified translation of these Chinese terms is attached as Exhibit D.

21. The Sales Contract also contains a section titled “Remark” which states in English “This contract is written in both Chinese and English. In case of any discrepancies between the two versions, the English version shall prevail.” *See* Ex. A at page 5. However, the Chinese language in that same section purports to provide that the Chinese language version of the contract shall prevail over the English. *See* Ex. A at page 5; Ex. D (certified translation). The Chinese language version also states that the laws of China shall apply, and the United Nations Convention on Contracts for the International Sale of Goods (“CISG”) shall not apply. *Id.*

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