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THE CITY OF NEW YORK
BUSINESS INTEGRITY COMMISSION
100 CHURCH STREET, 20TH FLOOR
NEW YORK, NEW YORK 10007

DECISION OF THE BUSINESS INTEGRITY COMMISSION DENYING THE EXEMPTION APPLICATION OF ALEX FIGLIOLIA PLUMBING CO., INC. FOR A REGISTRATION TO OPERATE AS A TRADE WASTE BUSINESS

Alex Figliolia Plumbing Co., Inc. ("Figliolia Plumbing" or the "Applicant") has applied to the New York City Business Integrity Commission, formerly the Trade Waste Commission (the "Commission"), for an exemption from licensing requirements and a registration to operate a trade waste business pursuant to Local Law 42 of 1996. See Title 16-A of the New York City Administrative Code ("Admin. Code"), § 16-505(a). Local Law 42, which created the Commission to regulate the commercial carting industry in New York City, was enacted to address pervasive organized crime and other corruption in the industry, to protect businesses using private carting services, and to increase competition in the industry and thereby reduce prices.

Figliolia Plumbing applied to the Commission for an exemption from licensing requirements and a registration to operate a trade waste business "solely engaged in the removal of waste materials resulting from building demolition, construction, alteration or excavation" – a type of waste commonly known as construction and demolition debris, or "c & d." Admin. Code § 16-505(a). Local Law 42 authorizes the Commission to review and determine such exemption applications. See id. If, upon review and investigation of an exemption application, the Commission grants the applicant an exemption from licensing requirements applicable to businesses that remove other types of waste, the applicant will be issued a registration. See id.

In determining whether to grant an exemption from licensing requirements and a registration to operate a construction and demolition debris removal business, the Commission considers the same types of factors that are pertinent to the Commission's determination whether to issue a license to a business seeking to remove other types of waste. See, e.g., Admin Code § 16-504(a) (empowering Commission to issue and establish standards for issuance, suspension and revocation of licenses and registrations); compare Title 17, Rules of the City of New York ("RCNY") §§ 1-06 & 2-02 (specifying information required to be submitted by license applicant) with id. §§ 1-06 & 2-03(b) (specifying information required to be submitted by registration applicant); see also Admin. Code § 16-513(a)(i) (authorizing suspension or revocation of license or registration for violation of Local Law 42 or any rule promulgated pursuant thereto). Central to the Commission's investigation and determination of an exemption application is whether the applicant has business integrity. See

17 RCNY § 1-09 (prohibiting numerous types of conduct reflecting lack of business integrity, including violations of law, knowing association with organized crime figures, false or misleading statements to the Commission, and deceptive trade practices); Admin. Code § 16-509(a) (authorizing Commission to refuse to issue licenses to applicants lacking "good character, honesty and integrity").

Based on Figliolia Plumbing's record, the Commission denies its exemption application on the ground that the Applicant lacks good character, honesty and integrity based on the following independently sufficient reasons:

(1) The Applicant and its principal, Alex Figliolia, have been convicted of crimes relating directly to their fitness to participate in the trade waste industry.

(2) The Applicant and its principal, Alex Figliolia, have engaged in racketeering activity.

I. BACKGROUND

A. The New York City Carting Industry

Virtually all of the more than 200,000 commercial business establishments in New York City contract with private carting companies to remove and dispose of their refuse. Historically, those services have been provided by several hundred companies. Beginning in the late 1950's, and until only a few years ago, the commercial carting industry in the City was operated as an organized crime-controlled cartel engaging in a pervasive pattern of racketeering and anticompetitive practices. The United States Court of Appeals for the Second Circuit has described that cartel as "a 'black hole' in New York City's economic life." Sanitation & Recycling Industry, Inc. v. City of New York, 107 F.3d 985, 989 (2d Cir. 1997) ("SRI").

Extensive evidence presented at lengthy City Council hearings addressing the corruption that historically has plagued this industry revealed the nature of the cartel: an entrenched anticompetitive conspiracy carried out through customer-allocation agreements among carters, who sold to one another the exclusive right to service customers, and enforced by organized crime-connected racketeers who mediated disputes among carters. See generally Peter Reuter, Racketeering in Legitimate Industries: A Study in the Economics of Intimidation (RAND Corp. 1987). After hearing the evidence, the City Council made numerous factual findings concerning organized crime's longstanding and corrupting influence over the City's carting industry and its effects, including the anticompetitive cartel, exorbitant carting rates and rampant customer overcharging. More generally, the Council found "that unscrupulous businesses in the industry have taken advantage of the absence of an effective regulatory scheme to engage in fraudulent conduct." Local Law 42, § 1.

The City Council's findings of extensive corruption in the commercial carting industry have been validated by the successful prosecution of many of the leading figures and companies in the industry. In 1995 and 1996, the Manhattan District Attorney obtained racketeering indictments

against more than sixty individuals and firms connected to the City's waste removal industry. The industry's entire modus operandi, the cartel, was indicted as a criminal enterprise. All of those defendants were convicted of felonies; many were sentenced to lengthy prison terms, and many millions of dollars in fines and forfeitures were imposed.

The Commission's regulatory and law-enforcement investigations have confirmed that organized crime has long infiltrated the construction and demolition debris removal sector of the carting industry as well as the garbage hauling sector that was the focus of the Manhattan District Attorney's prosecution. In light of the close nexus between the c & d sector of the carting industry and the construction industry, mob influence in the former should come as no surprise. The construction industry in New York City has been corrupted by organized crime for decades. See, e.g., James B. Jacobs, Gotham Unbound: How New York City Was Liberated from the Grip of Organized Crime 96-115 (1999) (detailing La Cosa Nostra's influence and criminal activity in the concrete, masonry, drywall, carpentry, painting, trucking and other sectors of the City's construction industry).

Moreover, the c & d sector of the carting industry has been a subject of significant federal prosecutions. In 1990, Anthony Vulpis, an associate of both the Gambino and the Genovese organized crime families, Angelo Paccione, and six waste hauling companies owned or controlled by them were convicted of multiple counts of racketeering and mail fraud in connection with their operation of a massive illegal landfill on Staten Island. See United States v. Paccione, 949 F.2d 1183, 1186-88 (2d Cir. 1991), cert. denied, 505 U.S. 1220 (1992). Many c & d haulers dumped their loads at this illegal landfill, which accumulated 550,000 cubic yards of refuse over a mere four-month period in 1988; during that period, "the City experienced a sharp decline in the tonnage of construction waste deposited" at its Fresh Kills landfill, as well as "a concomitant decline in revenue" from the fees that would have been charged for dumping at a legal landfill. 949 F.2d at 1188. The trial judge described this scheme as "one of the largest and most serious frauds involving environmental crimes ever prosecuted in the United States." United States v. Paccione, 751 F. Supp. 368, 371 (S.D.N.Y. 1990).

Another illegal waste disposal scheme also prominently featured haulers of construction and demolition debris. This scheme involved certain "cover" programs instituted by the City of New York at Fresh Kills, under which the City obtained materials needed to cover the garbage and other waste dumped at the landfill. Under the "free cover" program, transfer stations and carting companies could dispose of "clean fill" (i.e., soil uncontaminated by debris) at Fresh Kills free of charge. Under the "paid cover" program, the City contracted with and paid carting companies to bring clean fill to Fresh Kills. Numerous transfer stations and carters, however, abetted by corrupt City sanitation workers, dumped non-qualifying materials (including c & d) at Fresh Kills under the guise of clean fill. This was done by "cocktailing" the refuse: refuse was placed beneath, and hidden by, a layer of dirt on top of a truckload. When the trucks arrived at Fresh Kills, they appeared to contain nothing but clean fill, which could be dumped free of charge.

In 1994, twenty-eight individuals, including numerous owners of transfer stations and carting and trucking companies, were indicted in connection with this scheme, which deprived the City of approximately $10 million in disposal fees. The indictments charged that from January 1988 through April 1992, the defendants participated in a racketeering conspiracy and engaged in bribery and mail fraud in connection with the operation of the City's "cover" programs. The various hauling companies, from Brooklyn, Queens and Staten Island, were charged with paying hundreds of thousands of dollars in bribes to Department of Sanitation employees to allow them to dump non-qualifying materials at Fresh Kills without paying the City's tipping fees. See United States v. Cafra, et al., No. 94 Cr. 380 (S.D.N.Y.); United States v. Barbieri, et al., No. 94 Cr. 518 (S.D.N.Y.); see also United States v. Caccio, et al., Nos. 94 Cr. 357,358, 359, 367 (four felony informations). Twenty-seven defendants pleaded guilty in 1994 and 1995, and the remaining defendant was found guilty in 1996 after trial.

In sum, the need to root organized crime and other forms of corruption out of the City's waste removal industry applies with equal force to the garbage hauling and the c & d sectors of the industry. Local Law 42 recognizes this fact in requiring c & d haulers to obtain registrations from the Commission in order to operate in the City.

B. Local Law 42

Upon the enactment of Local Law 42, the Commission assumed regulatory authority from the Department of Consumer Affairs (the "DCA") for the licensing of businesses that remove, collect or dispose of trade waste. See Admin. Code §16-503. "Trade waste" is broadly defined and specifically includes "construction and demolition debris." Id. § 16-501(f)(1). The carting industry immediately challenged the new law, but the courts have consistently upheld Local Law 42 against repeated facial and as-applied constitutional challenges by New York City carters. See, e.g., Sanitation & Recycling Industry, Inc. v. City of New York, 928 F. Supp. 407 (S.D.N.Y. 1996), aff'd, 107 F.3d 985 (2d Cir. 1997); Universal Sanitation Corp. v. Trade Waste Comm'n, 940 F. Supp. 656 (S.D.N.Y. 1996); Vigliotti Bros. Carting Co. v. Trade Waste Comm'n, No. 115993/96 (Sup. Ct. N.Y. Cty. Dec. 4, 1996); Fava v. City of New York, No. 97 CV 0179 (E.D.N.Y. May 12, 1997); Imperial Sanitation Corp. v. City of New York, No. 97 CV 682 (E.D.N.Y. June 23, 1997); PJC Sanitation Services, Inc. v. City of New York, No. 97 CV 364 (E.D.N.Y. July 7, 1997). The United States Court of Appeals has definitively ruled that an applicant for a trade waste removal license under Local Law 42 has no entitlement to and no property interest in a license, and the Commission is vested with broad discretion to grant or deny a license application. SRI, 107 F.3d at 995; see also Daxor Corp. v. New York Dep't of Health, 90 N.Y.2d 89, 98-100, 681 N.E.2d 356, 659 N.Y.S.2d 189 (1997).

II. DISCUSSION

Figliolia Plumbing filed an application for exemption from licensing requirements for removal of demolition debris (the "application") on July 6, 2001. The only principal disclosed by the Applicant is Alex Figliolia ("Figliolia"). See Schedule A of the application. The Commission's staff has conducted an investigation of the Applicant and its principal and, on April 28, 2005, the staff issued a ten-page recommendation that the application be denied. In response, the Applicant submitted a letter, dated May 6, 2005, referring to a previous attempt to withdraw the application and claiming that it does not need a license or registration from the Commission for the hauling that it does in the course of its business. The Commission has carefully considered the staff's recommendation and the Applicant's response. For the reasons set forth below, the Commission finds that Figliolia Plumbing lacks good character, honesty and integrity and denies its application.

A. The Applicant and its principal, Alex Figliolia, have been convicted of crimes relating directly to their fitness to participate in the trade waste industry.

On December 16, 2003, the Manhattan District Attorney announced the racketeering indictment[1] of the Applicant and its disclosed principal, Alex Fligliolia,[2] along with five other individuals, including Alex Figliolia's wife, Janet Figliolia, his son, Alex Figliolia, Jr.,[3] and three former Metropolitan Transportation Authority ("MTA") employees (the "MTA officials").[4] Under the 116-count indictment,[5] the defendants were charged with engaging in a criminal enterprise,

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[1]Indictment No. 6842/2003. A news release concerning the announcement was issued on December 16, 2003 by the District Attorney's Office. The news release outlined the charges against the defendants and discussed the grounds for the charges. It also quoted the MTA Inspector General who referred to the criminal case as "the largest blow against corruption in the twenty-year history of the MTA Inspector General's Office."

[2]Identified in the indictment as Alex Figliolia, Sr.

[3]Although Alex Figliolia is the only principal disclosed in the application, his wife, Janet, and son, Alex, Jr., were identified as corporate officers of the Applicant in the indictment, and they later acknowledged holding those positions in their sworn allocutions when they pled guilty on September 22, 2004. See Schedule A of the application; Indictment No. 6842/2003, pp. 3 and 4; minutes of the September 22, 2004 plea hearing for the Figliolias and the Applicant, pp. 6 and 39. Thus, there is evidence that the Applicant failed to disclose all of its principals as required in the application, which would constitute yet another basis for denial. See 16 RCNY §2-05, Admin. Code §16-505(a).

[4]The other three individual defendants are former MTA Director of Facility Operations and Support Howard Weissman, former MTA Facilities Manager Ronald Allan, and former MTA Building Manager Gary Weissbard.

[5]As to the specific charges, the Applicant, the Figliolias and the other defendants were each charged with one count of enterprise corruption under New York's Organized Crime Control Act, a class B felony punishable by up to 25 years in prison. All of the defendants, except Weissbard, were charged with grand larceny in the first degree for stealing over $1 million from the MTA, also a class B felony. The Applicant and the Figliolias were charged with two counts of bribery in the second degree, a class C felony. The various defendants were also charged

denominated the "Figliolia Group," for the purpose of stealing millions of dollars from the MTA in connection with plumbing work that the Applicant had contracted to perform.[6]

The indictment charged the Applicant and the Figliolias with fraudulently inflating the costs of materials[7] billed on MTA jobs, falsely claiming to pay prevailing wages while actually paying far less and pocketing the difference[8], and falsifying and forging business records filed with the MTA to support and cover up their fraudulent billing. They were also charged with paying bribes and rewards to their co-defendants, the MTA officials, in exchange for their cooperation in the criminal enterprise.[9] That cooperation consisted of awarding work to the Applicant, authorizing its fraudulent overcharges, and otherwise providing approvals, assistance and acquiescence in connection with these criminal business activities. Additionally, the indictment charged that the Applicant and the Figliolias laundered millions of dollars in proceeds from their criminal activities by diverting receipts from the Applicants' business for the Figliolias' personal use and by claiming phony business expenses,[10] and that they and two of the MTA officials filed false tax returns and evaded taxes by

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with numerous related crimes, which in the case of the Applicant and the Figliolias included multiple counts of bribe receiving in the second degree, rewarding official misconduct in the second degree, offering a false instrument for filing in the first degree, falsifying business records in the first degree, forgery in the second degree, criminal possession of a forged instrument in the second degree, and hindering prosecution in the second degree. See Indictment No. 6842/2003.

[6]The work involved maintenance and repair services for plumbing systems at a number of MTA locations, as well as subcontractor services in connection with renovations of certain MTA facilities. The work locations included MTA's headquarters and the MTA Office of the Inspector General. The Manhattan District Attorney's investigation found that approximately $18.7 million in payments were made by the MTA to the Applicant under these contracts from January 1, 1999 to November 5, 2002.

[7]As an inducement to obtain the MTA contracts, the Applicant promised in its bids that there would be no markup on materials used on MTA jobs. Contrary to this representation and contractual obligation, the criminal investigation revealed that, in fact, the Applicant marked up material prices billed to the MTA by as much 5,000%. As charged in the indictment, more than $800,000 was stolen by inflating prices for materials.

[8]The Applicant and the Figliolias were charged with stealing more than $1.1 million by failing to pay prevailing wages as required under the terms of the MTA contracts.

[9]According to the Manhattan District Attorney's investigation, co-defendants Weissman, Allan and Weissbard received approximately $625,000 in bribes and rewards from the Applicant and the Figliolias for cooperating in the various schemes to bilk their employer, the MTA. The largest share went to Weissman, who was given cash payments, jewelry and free trips totaling approximately $550,000 in value.

[10]From 1999 through 2002, the Applicant issued over $5.4 million in corporate checks for what were characterized as business expenses in the Applicant's records, although these expenses were obviously personal in nature (more than $1 million was paid to jewelry retailers and an antique furniture retailer; over $3.6 million was paid to numerous contractors for work on the Figliolia home in Holmdel, New Jersey; nearly $250,000 went to a kitchen designer and manufacturer for installing a luxury kitchen at the Figliolia home; and $615,000 was used to purchase stock for Alex Figliolia). During the same period, the Applicant also issued over $4.3 million in corporate checks to Alex Figliolia for "business expenses" that were phony. This included $442,000 in checks deposited into the personal bank accounts of Alex Figliolia, his wife, Janet, and his son, Alex, Jr. The rest of the checks, totaling

failing to report or pay New York State tax on their illicit income for several years starting with 1999.[11]

In addition to the indictment, the Manhattan District Attorney's Office brought a civil asset forfeiture action against all of the defendants seeking the return of criminal proceeds totaling approximately $18.7 million.

On September 22, 2004, all seven defendants entered guilty pleas.[12] Alex Figliolia pleaded guilty to enterprise corruption, a class B felony. See Penal Law § 460.20. The Applicant pleaded guilty to grand larceny in the first degree, also a class B felony. See Penal Law § 155.42. Their co-defendants pleaded guilty to various charges.[13] In a sworn statement made with his guilty plea, Alex Figliolia admitted to participating in the Figliolia Group criminal enterprise and in a pattern of criminal activity that he recounted.[14]

The Figliolias and the Applicant were sentenced on January 28, 2005. In accordance with the terms of their plea agreements, Alex Figliolia was sentenced to one and three-quarters to five and one-quarter years in state prison, Alex Figliolia, Jr. received a sentence of two and three-quarters to eight and one-quarter years, and Janet Figliolia was sentenced to probation for five years. The

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nearly $4 million, were cashed. Virtually all of these money transactions were structured to keep the amounts below $10,000, a common money laundering technique used to avoid the generation of the Currency Transaction Reports that must be filed with the Internal Revenue Service for cash transactions of $10,000 or more.

[11]The money laundering and tax crimes were among the numerous criminal acts constituting the crime of Enterprise Corruption alleged under Count One of the indictment. See Indictment No. 6842/2003, pp. 66-78. Gary Weissbard was not charged with any tax crime.

[12]The District Attorney's Office issued a news release on September 22, 2004 detailing all of the pleas.

[13]Alex Figliolia, Jr. and Howard Weissman also pleaded guilty to enterprise corruption. Janet Figliolia pleaded guilty to bribery in the second degree, a class C felony. See Penal Law § 200.03. Ronald Allan pleaded guilty to bribe receiving in the second degree, a class C felony. See Penal Law § 200.11. Gary Weissbard pleaded guilty to receiving a reward for official misconduct in the second degree, a class E felony. See Penal Law § 200.25.

[14]Alex Figliolia, Jr. made a similar allocution, and Mrs. Figliolia also admitted her criminal behavior. In connection with the guilty plea entered on its behalf, the Applicant adopted the allocution of Alex Figliolia as it related to the crime of grand larceny in the first degree. See minutes of the September 22, 2004 plea hearing for the Figliolias and the Applicant.

The other individual defendants also admitted their wrongdoing when they entered their pleas. Weissman admitted that he accepted money and other things of value from the Figliolias in exchange for allowing them to overcharge the MTA for goods and services and obtain millions of dollars of work. Weissman, who is awaiting sentence, will pay $100,000 in restitution to the MTA, but has not been promised a sentence. Allan admitted accepting money and other things of value from the Figliolias in exchange for allowing them to submit fraudulent invoices for goods and services. He was sentenced on November 1, 2004 to three years in prison, and he must pay $20,000 in restitution to the MTA. Weissbard admitted that he allowed the Figliolias to submit incomplete invoices for goods and services. He was sentenced on October 8, 2004 to five years' probation, and he must pay $9,000 in restitution to the MTA.

Applicant received a conditional discharge, the only sentence permitted for a corporation under New York law.[15] In settlement of the civil asset forfeiture action, the Figliolias also agreed to forfeit a total of $6 million in cash and approximately $750,000 worth of jewelry seized pursuant to search warrants.[16] In addition, the Figliolias and the Applicant agreed to file amended state and federal tax returns for the years 1999 through 2002.

Subject to the factors set forth in Section 753 of New York's Correction Law, criminal convictions of an applicant (or any of its principals) may be considered by the Commission in refusing to grant a license, or an exemption from the license requirement. See Admin. Code §16-509(a)(iii); see also id. §16-501(a). Those factors are:

(a) The public policy of this state, as expressed in [the Correction Law], to encourage the licensure . . . of persons previously convicted of one or more criminal offenses.

(b) The specific duties and responsibilities necessarily related to the license . . . sought.

(c) The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties and responsibilities.

(d) The time which has elapsed since the occurrence of the criminal offense or offenses.

(e) The age of the person at the time of occurrence of the criminal offense or offenses.

(f) The seriousness of the offense or offenses.

(g) Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct.

(h) The legitimate interest of the public agency . . . in protecting property, and the safety and welfare of specific individuals or the general public.

Correction Law § 753 (1).

Applying these factors, the Commission should find that, notwithstanding the public policy of the State of New York to encourage licensure of persons convicted of crimes, the crimes committed by the Applicant and Alex Figliolia are antithetical to the very purpose of Local Law 42, which is to root out organized crime and other corruption from the trade waste industry. Alex Figliolia was 54 years old in 1999 when the criminal conduct charged in the indictment began, so

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[15] See minutes of the January 28, 2005 sentencing hearing for the Figliolias and the Applicant.

[16] Of this amount, the MTA will receive at least $4 million in restitution. The rest of the money will be set aside to pay prevailing wage claims of Figliolia employees, after which any remaining funds will be turned over to the MTA.

his behavior cannot be described as a "youthful indiscretion." The convictions are recent and are for activity directly related to the business for which an exemption and registration are sought. There is ample proof of a blatant disregard for the law on the part of the Applicant and its principal. Finally, the public interest in eliminating the entrenched corruption that has plagued the New York City carting industry for decades is clear. Public confidence in the integrity of the carting industry would be undermined if those who have violated the law receive licenses or license exemptions from the Commission. In pleading guilty to his crime, Alex Figliolia admitted that he engaged in a criminal enterprise to steal millions of dollars from the Metropolitan Transportation Authority through various illegal schemes. The Applicant's business, for which exemption and registration are sought, was part of the criminal enterprise. The convictions and underlying criminal activity bear directly on the Applicant's fitness to participate in the trade waste industry and compel the conclusion that the Applicant lacks good character, honesty, and integrity. Accordingly, the Commission denies the application on this independently sufficient ground.

B. The Applicant and its principal, Alex Figliolia, have engaged in racketeering activity.

Engaging in racketeering activity is evidence that an applicant lacks good character, honesty and integrity and should not be granted a license or an exemption from the license requirement. See Admin. Code §16-509(a)(v). The crime of enterprise corruption, of which Alex Figliolia now stands convicted, constitutes "racketeering activity" within the meaning of Local Law 42. Under the statute, the term "racketeering activity" includes, but is not limited to, the various criminal offenses listed in New York's Organized Crime Control Act upon which the crime of enterprise corruption may be predicated. See id.; see also Penal Law §§ 460.10(1) and 460.20. It follows, therefore, that a conviction for enterprise corruption is proof of racketeering activity.

Moreover, in the case of an application filed by or on behalf of a business entity, the term "applicant" is defined by Local Law 42 to mean the entity and each principal. Consequently, the criminal conduct of Alex Figliolia, which includes racketeering activity, is fully imputable to the Applicant for purposes of the pending application. The corporation's plea of guilty to a different crime, entered on its behalf, in no way diminishes the responsibility that it shares with its principal for the latter's admitted criminality. Indeed, the Applicant's conviction for the crime of grand larceny in the first degree, one of the predicate criminal offenses constituting the crime of enterprise corruption, simply provides further confirmation that, as a corporate entity, the Applicant was merely a Figliolia alter ego and an integral part of the Figliolia Group criminal enterprise.

As already discussed, the crimes admittedly committed by the Applicant and its principal are a grave matter. To the extent those crimes also constitute racketeering activity, such activity is further proof that the Applicant and its principal lack good character, honesty and integrity and provides another independent basis for denying the exemption application.[17]

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[17]Additionally, on October 30, 2003, shortly before the state racketeering indictment was announced, the United States Department of Justice announced the unsealing of a federal criminal complaint in the Eastern District of New York charging fourteen plumbing contractors and two developers with bribing a New York City Department

C. The points raised by the Applicant in response to the staff recommendation do not justify departing from the staff's recommended course of action.

The Applicant's response to the recommendation of the Commission's staff largely revisits old ground. This response consists of a one-page letter enclosing a copy of an administrative decision, Business Integrity Commission v. MVP Trucking Service d/b/a Sureway (Department of Consumer Affairs, Violation No. TW-572, decided April 28, 2003). In its response, the Applicant asserts that it was "misled" by the Commission's staff—in unspecified ways—into filing an application for a registration which the Applicant now contends it does not need and had therefore previously instructed its attorney to withdraw. Citing MVP in support, the Applicant now suggests that the Commission has no jurisdiction over the company's hauling activities because Figliolia Plumbing only hauls dirt and debris that it removes from under New York City roadways to do its plumbing work.[18]

The Applicant's contentions are not persuasive for at least two reasons: first, because the Applicant's own description of its activities indicates that its operations fall within the Commission's jurisdiction; and, second, because the Applicant's reliance on the MVP decision is misplaced and its restrictive reading of Local Law 42 is unsupported.

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of Buildings ("DOB") inspector and mail fraud. One of the charged contractors, Wojciech Krzyzak,is identified as an employee of the Applicant. See October 30, 2003 press release issued by the Department of Justice. This individual is listed in the application as a vehicle operator employed by the Applicant. See Schedule H of the application. The nature of the charges in the pending federal case, involving bribery of government officials and other illegal conduct in connection with the plumbing trade in New York City, suggests that the crime benefitted the Applicant rather than its employee, Krzyzak, and so provides a further reason for questioning the Applicant's good character, honesty and integrity.

A Temporary Permission to Operate Without Registration (the Temporary Permission"), effective October 1, 2003, was routinely granted to the Applicant pending the Commission's final determination concerning the application. However, in view of the Manhattan District Attorney's announcement on December 16, 2003 of the racketeering indictment against the Applicant, the Figliolias and their co-defendants, and also considering the pending federal criminal complaint brought against a Figliolia Plumbing employee and others in the Eastern District of New York, the Commission exercised its discretion and terminated the Temporary Permission on December 17, 2003.

[18]Significantly, the Applicant came to this interpretation of the Commission's jurisdiction only after the Commission, in the wake of the State racketeering indictment, revoked the Temporary Permission that gave the company temporary hauling privileges pending a final determination on the application. See n.17, supra.

The description of its own business that the Applicant included in the application makes clear that its hauling activities are governed by the provisions of local Law 42. That description states in relevant part:

> Applicant business consists of the repair and or installation of sewers and watermains [sic]. Customers of applicant business consist of both commercial and private property owners. Applicant also has major contracts with utility companies (KeySpan) and governmental agencies such as the Metropolitan Transportation Authority (MTA). "Applicant business removes no waste other than materials resulting from building demolition, construction, alteration, or excavation." The waste removed by applicant business consists of soil, rock, asphalt, and concrete. This waste is generated during the course of applicant's excavation of street [sic] and sidewalks as necessary to expose the watermain [sic] and or sewer needing repair or replacement. Applicant business disposes of waste at recycling centers in a proper manner . . . .[19]

The Applicant's statement that, inter alia, it services commercial customers and repairs and replaces sewers and water mains necessarily means that it generates construction and demolition debris from commercial establishments and thus brings its operations squarely within the ambit of Local Law 42.[20] The fact that the Applicant may—or may not—have been misinformed as to whether other business it conducts is covered by Local Law 42 is simply irrelevant.

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[19]Schedule I of the application. The information contained in Schedule I, as well as the rest of the application, was certified by Alex Figliolia as being full, complete and truthful. The declaration that the Applicant "removes no waste other than materials resulting from building demolition, construction, alteration or excavation," which is included in the Applicant's Schedule I statement and also appears in the Certification form executed by Mr. Figliolia, mirrors the statutory criteria for exemption from the license requirement and issuance of a registration. See Admin. Code §16-505(a).

[20]Under Admin. Code §16-501(f)(1), the term "trade waste" or "waste"is defined as "all putrescible and non-putrescible materials or substances . . . that are discarded or rejected by a *commercial establishment* required to provide for the removal of its waste pursuant to section 16-116 of this code as being spent, useless, worthless or in excess to the owners at the time of such discard or rejection, including but not limited to . . . construction and demolition debris . . . ." [Emphasis supplied.]

Admin. Code §16-116 provides that "every owner, lessee or person in control of a *commercial establishment* shall provide for the removal of waste by a business licensed by the New York City Trade Waste Commission as required by subdivision a of section 16-505 of this code or register and obtain a registration number from the New York City Trade Waste Commission as required by subdivision b of section 16-505 of this code to remove its own waste. . . ." [Emphasis supplied.]

The MVP decision, which was decided by an administrative law judge employed by the Department of Consumer Affairs and on which Figliolia places major reliance, has been implicitly overruled by two recent decisions of the New York State Supreme Court. In the earlier of these two decisions, Rapid Demolition Container Services Inc. v. Maldonado, Index No. 105305/04 (N.Y. Sup. Ct., N.Y. Cnty., decided November 8, 2004), the Court stated:

> At least to the extent that BIC interprets the phrase "commercial establishment" to apply to the entity that generates the waste, the Court does not find BIC's interpretation to be either irrational or unreasonable. Thus, a commercial contractor which carries out either construction or demolition, and contracts to have the wastes removed from the site, constitutes a "commercial establishment" for the purposes of the [statutory] scheme, the wastes generated constitute trade waste, and the licensing provisions are triggered.[21]

In DeCostole Carting, Inc. v. Maldonado, Index No. 29281/04 (N.Y. Sup. Ct., Kings Cnty., decided March 31, 2005), the Court went a step further than the Rapid decision. In discussing the term "commercial establishment" and how to determine whether an entity is a "commercial establishment required to provide for the removal of its waste," the Court considered the Commission's "interpretation of Local Law 42 as prohibiting a company from hauling construction and demolition debris from any location without a license or registration from the Commission as neither unreasonable or irrational, or inconsistent with the regulatory scheme."[22] In other words, under DeCostole, an entity that hauls construction and demolition debris would have to obtain a registration from the Commission whether it generates the waste or not. Under Rapid, the more restrictive of the two decisions, the "commercial establishment" requirement is satisfied if the hauler generates the waste.

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[21] Id.

[22] Id. In DeCostole, the plaintiff conceded that its business included the carting of construction and demolition waste from residential and not-for-profit institutions, so the Court found there was no material issue of fact requiring a trial on the merits. Accordingly, the Court denied the plaintiff's motion for a preliminary injunction against the Commission and granted the Commission's motion for summary judgment and dismissed the complaint.

Under either Rapid or DeCostole, because the waste that Figliolia Plumbing hauls is generated by it in the course of its business, the Applicant is undoubtedly subject to the registration provisions of Local Law 42 and the Commission's regulatory authority.

As to the question of withdrawing the application, the Applicant only sought withdrawal after events took a bad turn and approval appeared unlikely. The Commission has previously rejected other applicants' eleventh-hour purported withdrawals of their applications as "a transparent attempt to evade review of the merits" of their applications and "frustrate the purposes of Local Law 42."[23] The Commission rejects this attempt as well.

The investigation revealed serious grounds to disqualify the Applicant from holding a registration (or license). The gravity of the derogatory information uncovered by the investigation is a key factor weighing against withdrawal of the application. Another important consideration here is that the Applicant may reapply in the future, in the same form or in a different guise, and once again seek a registration, or possibly a license, from the Commission.[24] The Commission will not allow the application to be withdrawn merely to give the Applicant an opportunity to postpone the day of reckoning on the question of its fitness for registration. Having invoked the Commission's processes, the Applicant is not free to terminate them at its convenience and then invoke them again at a later date.[25]

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[23] See Decision Denying License Applications of Suburban Carting Corp. and Prime Carting, Inc., dated January 9, 1998, at 18-19, n.3.

[24] The January 29, 2004 letter from Applicant's counsel includes the following statement: "Should my client ever seek to expand its business to encompass the hauling of trade waste, I shall advise it to reapply for Class 2 registration as a construction and demolition debris hauler and not to engage in such activity until such time as this application is approved by the Commission." The clear implication of this statement is that, should the Commission permit the application to be withdraw now, the Applicant may very well file another application at its convenience. In that event, the Commission will not have the benefit of a final determination regarding the present application, which would deprive the Commission of useful precedent and generally undermine the goal of administrative efficiency.

[25] See Decision Denying License Applications of Suburban Carting Corp. and Prime Carting, Inc., dated January 9, 1998, at 18-19, n.3. The Commission's decision to deny the application will, of course, figure prominently in its consideration of any future application by the Applicant, however organized and constituted.

III. CONCLUSION

The Commission is vested with broad discretion to refuse to issue a license, or to refuse to grant an exemption from the license requirement and issue a registration in lieu of a license, to any applicant who it determines lacks good character, honesty and integrity. The record as detailed above demonstrates convincingly that the Applicant falls far short of that standard. Accordingly, the Commission finds that Figliolia Plumbing lacks good character, honesty and integrity and denies the Applicant's exemption application.

This decision is effective immediately.

Dated: June 9, 2005

THE BUSINESS INTEGRITY COMMISSION

Thomas McCormack
Chair

for John Doherty, Commissioner
Department of Sanitation

Jonathan Mintz, Acting Commissioner
Department of Consumer Affairs

Rose Gill Hearn, Commissioner
Department of Investigation

Robert Walsh, Commissioner
Department of Small Business Services

for Raymond Kelly, Commissioner
New York City Police Department