01-08

THE CITY OF NEW YORK
TRADE WASTE COMMISSION
253 BROADWAY, 10TH FLOOR
NEW YORK, NEW YORK 10007

THE TRADE WASTE COMMISSION'S DECISION DENYING THE WAIVER APPLICATION OF CONSUMERS RUBBISH REMOVAL, INC.

I. INTRODUCTION

On June 3, 1996, Local Law 42 was adopted to regulate the trade waste removal industry in New York City.

Section 11 of Local Law 42 provides in pertinent part "that any contract entered into by a trade waste removal business ... that has not received a license from the New York City Trade Waste Commission ... shall ... be terminable by either party thereto upon thirty days written notice...."[1] Upon application, however, the Commission may exercise its discretion under the statute to waive this requirement, if certain criteria, both procedural and substantive, are met. The applicant must file with the Commission a timely and complete application to waive the termination clause requirement with respect to identified contracts. Id. Moreover, the applicant must explain in writing "why a waiver would not be inconsistent with the purposes of this act." Id. "In determining in its discretion whether a waiver of the termination requirement would be consistent with the purposes of this act, the commission shall consider background information concerning the business and its principals and the full circumstances surrounding the negotiation or administration of such contracts, including but not limited to the form and content thereof." Id. The City Council found that most carting company contracts were tainted by the cartel's distortion of the marketplace. The waiver application process was intended to provide carting companies with an opportunity to demonstrate that their contracts were not infected by the cartel's activities.

[1] The Commission has yet to issue any licenses. On August 30, 1996, the applicant business submitted an application an application for a waste removal license. Applications for licenses will only be issued after full background reviews.

Consumers Rubbish Removal, Inc.[2] ("Consumers Rubbish") has applied for a waiver. For each of the following independent reasons, among others, the Commission now denies Consumer Rubbish's waiver application as inconsistent with the purposes of Local Law 42 because of the applicant's questionable background and contracting practices:

(1) the applicant business belonged to and benefited from its membership in an indicted trade association that was used to enforce an illegal customer allocation and price fixing scheme;

(2) one of the applicant's principal and Secretary and Treasurer, Victor Lazaro, actively participated in the affairs of this indicted trade association as a director on the Board of Directors during the very period that the trade association was engaging in the criminal conduct for which it now faces prosecution, and took no steps to prevent such corrupt activities;

(3) the applicant's submissions contain false and/or misleading statements;

(4) the applicant's contracts reflect the anti-competitive effects of the criminal cartel and evidence the unequal bargaining power and abusive contracting practices that Local Law 42 was intended to address;

(5) the applicant's abusive contracting practices include standard contracts that feature "evergreen" clauses;

(6) the applicant's abusive contracting practices include standard contracts that feature other questionable terms such as an onerous liquidated damages clause and a request that the customer pay for waste collection, regardless of whether any waste is actually picked up;

(7) in addition to the liquidated damages clause, the applicant's abusive contracting practices include standard contracts that feature yet another onerous damages clause that requires customers to pay for all charges for the remaining duration of the contract term when the applicant itself terminates the contract for a cause determined solely by the applicant;

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[2] The applicant business also refers to itself as "Consumer Rubbish Removal, Inc."

(8) the applicant's abusive contracting practices include standard contracts that contain provisions that mislead customers into entering into written contracts;

(9) the applicant charged the maximum rates to its customers; and

(10) the applicant has failed to meet its burden of demonstrating that "a waiver would be consistent with the purposes" of Local Law 42.

II. PROCEDURAL REQUIREMENTS

To obtain an immediate suspension of the new legislation's contract termination right, a private carter seeking a waiver had to submit "in full" an application "prescribed in a form issued by the Commission" no later than July 18, 1996.[3] Local Law 42, sec. 11. The application instructions required the applicant to notify its customers in writing that it was seeking a waiver, and to attach a number of supporting documents. Specifically, each applicant was required to submit: (1) a complete application, including "**a statement explaining why a waiver would not be inconsistent with the purposes of Local Law No. 42**" (emphasis in original); (2) a complete list of the customers as to "whose contracts applicant business [was] seeking a waiver"; (3) "a copy of each form contract with respect to which a customer waiver [was] sought"; (4) a "sworn statement from an authorized representative of the carter verifying delivery of written notice of the waiver application to all customers as to whose contracts waiver [was] sought"[4]; and (5) a copy of the form written notice to customers regarding the applicant's submission of a waiver application.

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[3] The original statutory date for submission of waiver applications was extended on consent by the Trade Waste Commission to July 18, 1996, during the pendency of Sanitation & Recycling Industry Inc. v. City of New York, 96 Civ. 4131 (S.D.N.Y.) (MP), which has since been dismissed with prejudice. In rejecting a facial constitutional challenge to Local Law 42, U.S. District Judge Milton Pollack held that this new law is "essential, overdue, and carefully tailored" "surgery" for an industry that "required drastic corrections." The losing plaintiff carters in that action are now appealing that judgment, although a unanimous panel of the U.S. Court of Appeals for the Second Circuit has already rejected the carters' motion for emergency relief in another failed attempt by these carters to block implementation of Local Law 42's 30-day contract termination requirement.

[4] Applicants had until July 25, 1996, to provide the Commission with sworn statements that they delivered written notices to their customers.

In accordance with section 11 of Local Law 42, the application required answers to questions regarding the applicant's background and contracting practices and required a statement by the applicant addressing its burden of "explaining why the waiver would not be inconsistent with the purposes of Local Law 42."

After submitting its application, the applicant was afforded the opportunity to review and respond in writing to the 20-page recommendation of the Commission's executive staff that the Commission deny this waiver application. The Commission considered all of the applicant's waiver application submissions before rendering this decision. The applicant did not submit any responses to the executive staff's recommendation.

III. SUBSTANTIVE REQUIREMENTS

A. PURPOSES OF LOCAL LAW 42

In enacting Local Law 42, the City Council held lengthy hearings about the private carting industry, amassed extensive evidence, and made the following findings of fact which serve as a predicate for Local Law 42:

> (1) "that the carting industry has been corruptly influenced by organized crime for more than four decades";
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> (2) "that organized crime's corrupting influence over the industry has fostered and sustained a cartel in which carters do not compete for customers";
>
> (3) that to ensure their continuing unlawful advantages, "customers are compelled to enter into long-term contracts with onerous terms, including 'evergreen' clauses";
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> (4) "that the anti-competitive effects of this cartel have resulted, with few exceptions, in the maximum [permissible] rates being the only rate available to business";

(5) "that businesses often pay substantially higher amounts than allowed under the maximum rate because carters improperly charge or overcharge for more waste than they actually remove";

(6) "that organized crime's corrupting influence has resulted in numerous crimes and wrongful acts, including physical violence, threats of violence, and property damage to both customers and competing carting firms";

(7) "that recent indictments have disclosed the pervasive nature of the problem, the structure of the cartel, and the corruption it furthers through the activities of individual carters and trade associations";

(8) "that unscrupulous businesses in the industry have taken advantage of the absence of an effective regulatory scheme to engage in fraudulent conduct"; and

(9) that the result has been that "New York City businesses, both large and small, must pay a 'mob tax' in order to provide for removal of trade waste [which] is harmful to the growth and prosperity of the local economy".

Local Law 42, Section 1. Resting upon that foundation:

> The council therefore finds and declares that in order to provide for the more efficient and lawful conduct of businesses in the carting industry and to protect the public interest, it is necessary to establish a New York city trade waste commission that shall be responsible for the licensing and regulation of businesses in the carting industry.
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> Enactment of this chapter is intended to enhance the city's ability to address organized crime corruption, to protect businesses who utilize private carting services,

and to increase competition in the carting industry with the aim of reducing consumer prices.

The legislative purposes underlying Local Law 42 were validated by United States District Judge Milton Pollack of the Southern District of New York in his opinion dismissing with prejudice a constitutional challenge to Local Law 42, including specifically the provisions governing the 30-day contract termination right and waiver application process. In upholding the statute, Judge Pollack recognized two "legitimate and significant" legislative purposes underlying Local Law 42: "to eliminate the influence of corruption and organized crime in an industry," and to adjust "parties' contractual rights because of an improper disparity in bargaining position." Sanitation & Recycling Industry, Inc. v. City of New York, 96 Civ. 4161 (MP), slip op. at 9-10 (June 26, 1996 S.D.N.Y.), appeal docketed.

(1) Corruption and Organized Crime Influence in the Trade Waste Removal Industry

As the City Council found and Judge Pollack recognized, corruption and organized crime influence have dominated the trade waste removal industry for nearly four decades. As such, Judge Pollack held that the "public interest required drastic corrections," and that Local Law 42 "clearly was essential, overdue and carefully tailored to protect the public interest." Id., slip op. at 26.

This industry-wide corruption has included an anti-competitive antitrust cartel conspiracy involving "a customer allocation agreement" among New York City carters. See 1987 Rand study prepared for the National Institute of Justice, U.S. Department of Justice entitled Racketeering in Legitimate Industries: A Study in the Economics of Intimidation at 8-9. This cartel, which operated through the four principal New York City trade associations, enforced the rule that each customer or building "belongs' to the carter who services it; no other carter may attempt to 'take' that customer by offering a lower price or better service or any other means without suffering the consequences." Search Warrant Affidavit of Detective Joseph Lentini (sworn to June 1995) ("Search Aff.").

> [T]he cartel's basic rule was that no carting company be permitted to compete for the business of a customer serviced by another carter. The cartel, led by members and associates of the Gambino and Genovese Organized Crime Families, enforced this rule by acts of violence -- including attempted murder, assault, and arson -- threats of violence, and concerted economic pressure.

June 22, 1995 Statement from the office of Robert Morgenthau, New York County District Attorney ("June 1995 D.A.'s Statement").

In response to this pervasive and long-standing corruption in the trade waste removal industry, Manhattan District Attorney Robert Morgenthau initiated an intensive investigation that remains ongoing. Evidence from that investigation resulted, in June 1995, in the indictments of the four principal New York City trade waste associations representing virtually every sector of the industry,[5] 17 individuals, and 23 carting companies, charging enterprise corruption, attempted murder, arson, criminal antitrust violations, coercion, extortion, and numerous other crimes.[6]

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[5] The four indicted trade associations were the Greater New York Waste Paper Association, Inc. ("WPA"), the Kings County Trade Waste Association, Inc. ("KCTW"), the Association of Trade Waste Removers of Greater New York, Inc. ("GNYTW"), and the Queens County Trade Waste Association ("QCTW"). The "primary function [of these trade associations was] to provide a forum within which the carters agree[d] not to compete with each other." Id. at 2. Furthermore, these trade associations have been controlled by organized crime figures for many years. See, e.g., Rand Report at 2, 37; Seizure Aff. at 4; Search Aff. at 19 et seq.; United States v. James "Jimmy Brown" Failla, (E.D.N.Y.); U.S. v. International Brotherhood of Teamsters (Adelstein), 998 F.2d 120 (2d Cir. 1993).

[6] According to the June 1995 indictment now being prosecuted by the Manhattan District Attorney's office, the organized crime-dominated cartel that controls New York City's private carting industry "structured its criminal activity through the four defendant associations, a non-defendant association, and the associations' representatives." Indictment at 3. That indictment further charged (at 4-5):

> The association, which coordinated their activities with one another, played a central role in the formation, execution and enforcement of the CARTEL's criminal scheme, which included bid rigging, price fixing, customer allocation and concerted retaliation against carters who broke the CARTEL's rules. The associations:
>
> - had large and stable memberships, and those members were the primary participants in the CARTEL's criminal schemes;
> - served as forums where members engaged in the exchange of information necessary to the formation and enforcement of anti-competitive arrangements;

Simultaneous with the June 1995 indictments, the Manhattan District Attorney's office moved in the New York State Supreme Court to forfeit the defendants' assets and place the defendant companies into receivership. After a contested hearing, New York State Supreme Court Justice Walter Schackman found that the evidence marshaled by the Manhattan District Attorney's office during the course of its ongoing investigation demonstrated a "substantial probability" that the government "will prevail" against these defendants. Morgenthau v. Allocca, et al., Index No. 40328/95, slip op. at 5 (N.Y. Co. Sup. Ct. September 13, 1995). Justice Schackman kept in place an emergency order of asset attachment in the amount of $268 million and appointed receivers over several carters.

Indictments in the trade waste removal industry have continued since that time. For example, in June 1996, both the Manhattan District Attorney and the United States Attorney for the Southern District of New York handed down major indictments of New York metropolitan area carters. As a representative of the Manhattan District Attorney's Office emphasized at the time of its most recent indictments, there will "almost certainly be a round three and a round four" of carting industry indictments to come. See Crains Insider (June 19, 1996). "I don't think that it's realistic to think that a system in place for 40 years will disappear overnight." See Crains New York Business (June 24, 1996).

- provided agents and representatives who announced anti-competitive rules and policies and negotiated, imposed and enforced anti-competitive arrangements between and among members;
- expanded the CARTEL's power in the carting industry by pressuring non-member carters, who were called "outlaw," to become association members; and
- enforced the CARTEL's dominance of the New York City private carting industry by threatening and arranging concerted economic retaliation against carters who defied the CARTEL's authority.

The individual and corporate defendant carters, some of whom were also association representatives, were members of one or more of the associations and used the association structure to further their anti-competitive activities, maintain their prices and inflate their profits.

Thirteen individuals and eight companies were indicted by the Manhattan District Attorney in June 1996 for cartel-related crimes. Like the 1995 indictments, the June 1996 charges "contain further illustrations of the way the 'property rights' system restrained competition, [and] show how cartel members took advantage of their control over the industry to commit other crimes." District Attorney -- New York County, "News Release" at 1 (dated June 18, 1996). Additional undercover operations, including electronic surveillance intercepts, confirmed a trade waste removal industry still rife with corruption and organized crime influence. Id. et seq.

Similarly, the United States Attorney's latest prosecution "represents a major attack on the Genovese and Gambino Families' stranglehold on the waste hauling industry and related businesses in the New York metropolitan area. That influence has stifled competition and grossly inflated the prices of waste hauling and related services for decades." United States v. Mario Gigante et al., Press Release at 2 (dated June 24, 1996). Defendants in the federal indictment include seven individuals and fourteen corporations associated with the Genovese and Gambino Organized Crime Families, (including the brother and nephew of Genovese Family Boss Vincent "Chin" Gigante). These defendants were indicted on racketeering charges, including extortion, arson, and bribery. Id.

The accuracy of the Manhattan District Attorney's charges were recently confirmed on October 23, 1996, when defendant John Vitale pled guilty to a Donnelly Act, antitrust violation for his acknowledged participation in the anti-competitive criminal scheme. In his allocution, Vitale acknowledged that he turned to the trade associations, and specifically Genovese Family capo Alphonse Malangone and Gambino Family soldier Joseph Francolino, to obtain their assistance in preventing a competitor from bidding on a 'Vibro-owned' building, 200 Madison Avenue in Manhattan. Thus, the District Attorney's indictments are no longer "merely charges."

Moreover, on November 12, 1996, the Manhattan District Attorney announced a third round of indictments in his continuing investigation of the New York City private carting industry. The third round of indictments brought the total number of defendants charged to 34 individuals, 34 companies, and four trade waste associations. The Manhattan District

Attorney stated that the third round of indictments "demonstrate once again how widespread the criminality in the carting industry became. Blatant bid-rigging extended to contracts for every major federal office building in the metropolitan area, including the federal courthouses in Manhattan, Brooklyn, and Newark, New Jersey. The bid-rigging schemes, with their attendant price-inflation, cost taxpayers millions of dollars and were sometimes facilitated by kickbacks paid to property managers." People v. D'Ambrosio, Press Release at 1 (Nov. 12, 1996).

(2) Abuses in Contracting Practices Have Solidified the Cartel's Control

Again, the City Council found and Judge Pollack recognized, for many years, the trade waste removal industry has been rife with anti-competitive practices, such as customer allocation, price fixing, bid rigging, illegal boycotts, predatory pricing, illegal contracts, and other contractual abuses. The affidavit in support of the search warrant executed upon the premises of QCTW of which the applicant business was a member recites in extensive detail how the criminal cartel operated and was enforced by the QCTW, other trade associations, and other carting companies.[7] See, e.g., Search Aff. ¶ 37 at 24, ¶¶ 57-59 at 33-34, ¶¶ 70-72 at 40 (bid-rigging); ¶ 44 at 27-28, ¶¶ 53-54 at 31-32 (boycotts); ¶ 47 at 29 (predatory pricing). See also Affidavit of Investigator Robert O'Donoghue in Support of Plaintiff's Application for Provisional Remedies (sworn to June 16, 1995) ¶ 54 at 22 (fraud) ("Seizure Aff.").

Of particular relevance to this application are the abusive contracting practices that became prevalent as an outside national competitor attempted to enter the New York City market in 1993. Before 1993, local carters relied upon the cartel to protect their customers and routes against competition. When the national firm, Browning Ferris International ("BFI"), sought entry to the New York City market, written contracts began to appear extensively under questionable circumstances. Often, these written contracts were procured by trick and coercion in an attempt to put a legitimate veneer on the

[7] A New York Supreme Court Justice found this affidavit to contain credible and detailed evidence sufficient to establish probable cause to search the offices of the trade associations and various carting companies.

cartel's unlawful practices. For example, one criminal defendant in the pending criminal proceeding described in a 1994 electronic interception how cartel companies misled and coerced customers in order to lock those customers into long-term written contracts. Seizure Aff. ¶ 54 at 22. He simply directed his employees to tell customers: "'Look at me, I gotta get these ... or I can't get back to the office. They sign. They think it's nothing. Boom! **They don't know it's a five year contract**." Id. (emphasis added).

The same theme was echoed by other corrupt haulers. For example, another criminal defendant, Frank Giovinco, the head of the WPA trade association, also stated plainly in another electronic eavesdrop: "We ain't going to let the customers off the hook." See "Good Riddance To Bad Garbage, Daily News at 34 (July 5, 1996). And another carter, Louis Mongelli was similarly heard on an electronic surveillance saying: "If we fight with one another, the only person that's gonna win is the customer...." Id. Indeed, another co-conspirator, organized crime associate Carl Dell'Olio, the former WPA president, remarked: "[t]he f--king lock that we had on down here is gone. The gates are gone and this is it. So we...become a regular f--ing business, which we're gonna have to do." Daily News at 8 (December 4, 1995).

The abusive contracting practices uncovered by the Manhattan District Attorney's office also were the subject of extensive testimony before the City Council when it passed Local Law 42. For instance, a representative of Browning Ferris International ("BFI") testified regarding BFI's attempts to enter and compete in the New York City market in 1993. City Council Hearing Transcript (December 12, 1995) at 193-204. Until this year, BFI had been the first and only national company even to attempt to enter the New York City market. As the BFI representative recounted, when BFI began contacting customers in 1993 to break into the local market, cartel members responded by trying to lock in their unlawful advantage by procuring long-term contracts that contained "evergreen" clauses that permitted the carter to retain the customer automatically without notice.

> [C]ustomers were intimidated physically and verbally, contracts appear out of nowhere, contracts disguised as recycling agreements appear ....
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> * * *

> Right now, over 80 percent of the businesses that we solicit have no idea whether they have a carting contract or not. Those contracts are only produced by their waste hauler after a business signs up with us; their validity is questionable in some cases. This state of affairs makes the system susceptible to abuse and intimidation and it should be corrected.

Id. (Testimony of Assistant to BFI Chairman) at 196, 202. BFI further noted in its written statement to the City Council:

> Contracts are [a] critical issue for competition in the carting industry. We were sued by the Trade Waste Association shortly after we entered the market; they sought to enjoin us from soliciting any customer of an association member. They lost, and in the ensuing ruling in State Supreme Court, the use of evergreen contracts, those that are automatically renewable without notice, was struck down.

Written Statement of Philip Angell, Assistant to BFI Chairman Submitted to the City Council (dated December 12, 1995) at 4; see also A.V.A. Carting, Inc. v. BFI, (N.Y. Sup. Co.) (reprinted in N.Y. Law Jour. Feb. 25, 1994 at 22 col. 3).

Thus, the legislative record underlying Local Law 42 revealed and responded to a sordid history of contracting abuses in this industry: contracts of coercion, contracts of adhesion, long term contracts with onerous terms, excessive prices, and evergreen clauses that locked in customers to deter competition. Section 11, among other provisions, was specifically intended to redress these industry-wide contracting abuses by establishing the customer's right to terminate existing contracts on thirty days' notice except where the waste hauler has established individualized facts demonstrating the propriety of granting a waiver.

IV. THIS APPLICANT'S WAIVER APPLICATION IS DENIED

The Commission hereby denies the applicant's waiver application because this applicant has failed to establish that the grant of its waiver application would be consistent with either of the "legitimate and significant" legislative purposes recognized by Judge Pollack in his recent decision upholding the constitutionality of Local Law 42: (1) to eliminate corruption and organized crime influence in the industry, and (2) to eliminate abuses in the contracting processes that have solidified the cartel's control.[8] Either ground alone would provide an independent basis for denying the applicant's waiver application. Taken together, they compel that conclusion.

A. Applicant's Background and Contracting Practices

This applicant also has failed to demonstrate that a waiver would be consistent with another goal of Local Law 42 -- to address the abuses in contracting practices that have solidified the cartel's control over this industry. These abuses have included customer allocation, price fixing, lengthy and onerous contract terms, excessive price terms, use of evergreen clauses, and other illegal or anti-competitive practices.

First, this applicant was a member of an indicted trade association and improperly benefited from that membership. Second, a principal of the applicant business and its Secretary and Treasurer, Victor Lazaro, actively participated in the affairs of this indicted trade association in his capacity as a director on the Board of Directors. Third, those facts necessarily draw into question the applicant's contracting practices. Finally, the form contracts that this applicant use, and which it submitted with its waiver

[8] We have reviewed, among other documents, the seizure affidavit, the search warrant affidavit, the Rand Report, the record of the City Council hearings, the Report to the N.Y. State Assembly, Environmental Conserv. Comm., Organized Crime's Involvement in the Waste Hauling Industry, indictments by both the Manhattan District Attorney and the United States Attorney for the Southern District of New York, the public releases or written explanations from these prosecutor's offices, United States Senate-authored and other reports on organized crime in the United States and New York City, related court filings and judicial opinions, and other publicly available reports. In addition, the Commission has considered all of the applicant's submissions in connection with this waiver application.

application, contain terms that reflect the unequal bargaining power that Local Law 42 was intended to redress.

(1) Membership in and Receipt of Improper Benefits from Indicted Trade Association[9]

The applicant was a member of an indicted trade association, the KCTW, from 1976 through June 1996, a year after its indictment and passage of Local Law 42. One of the applicant's principal and its Secretary and Treasurer, Victor Lazaro, moreover, served in a "leadership role" of the KCTW, as a member on the Board of Directors, from 1990 until his resignation in June 1996. Waiver Application at 27, 28. Thus, the applicant business belonged to and attended meetings of the KCTW and Victor Lazaro actively participated in a leadership role of that trade association during the period that the indicted association played a central role in enforcing the organized crime-dominated illegal customer allocation and price-fixing schemes for which it now faces criminal prosecution by the Manhattan District Attorney. The applicant has proffered nothing to suggest that Lazaro did anything to prevent such corrupt activities.

The indictment, and the search warrant and asset seizure affidavits, details that the association, acting both independently and together with the three other indicted trade associations, served as a vehicle by which organized crime figures and cooperating carting companies carried out the anti-competitive cartel's criminal activities, including meetings to arrange extortion and cartel payoffs (see, e.g., Search Aff. at 20-21, 38-39, 41, 44-45, 52, 55, 56, 61), to make extortion and cartel payments (see, e.g., Search Aff. at 20-26, 30-31, 44-46, 47, 51-52, 53, 55, 56, 65-67), to discuss and arrange unlawful bid-rigging (see, e.g., Search Aff. at 24, 33-34, 36-37, 40-43), and to arrange illegal boycotts, predatory pricing, and other unlawful contracting practices (see, e.g., Search Aff. at 14-15, 17, 24-25, 29-30, 31-33, 43). Indeed, the Manhattan District Attorney's investigation revealed that to join and remain a member of one of the now-indicted trade associations, the carter had to accept their rules, which included not

[9] The Commission would deny the applicant's waiver application even if the applicant had not been a member of an indicted trade association.

competing with other carters (e.g. id. at 17, 23), compensating "competitors" for stops taken (id. at 23), compensating "competitors" for stops taken (id. at 23), bid-rigging (e.g. id. at 24), boycotting outlaws (e.g. id. at 28, 32), paying exorbitant membership fees knowing that a portion would be kicked back to organized crime figures (e.g. id. at 46-47), and refusing to deal with new entrants, like BFI (e.g. id. at 27-28, 41).

The applicant has failed to show individualized facts or present any persuasive evidence to support its conclusory assertions that it neither participated in, nor was aware of, these industry-wide unlawful activities perpetrated through the association during this applicant's membership and participation in the association. Given the applicant's membership in the association, the evidence concerning what membership in that association entailed, the evidence of this applicant's abusive contracting practices (set forth below), and the applicant's failure to present any proof to rebut the inference that it participated in, benefited from, or knew of these activities, the waiver application must be denied.

Finally, it is noteworthy that the applicant bears the burden of establishing "why a waiver would not be inconsistent with the purposes of Local Law 42." It is beyond dispute that an essential purpose of this act is to address corruption and organized crime influence that have plagued this industry for far too long. Nothing in this applicant's submission satisfactorily explains "why a waiver would not be inconsistent" with that essential purpose of this legislation. Indeed, to grant a waiver to this applicant -- given its questionable background -- would be inconsistent with the legislation's essential purposes.

(2) Applicant's Contracting Practices

Furthermore, the applicant's form contracts contain terms that perpetuate the improper contracting practices that Local Law 42 seeks to address.[10] For example, the applicant's standard contracts contain the following provision:

[10] The applicant business submitted two form contracts with its waiver application.

> This agreement is for the term of ___ years and shall be renewed for a similar period without further action by the parties, but may be terminated at the end of any contract period by either of the parties hereto, but not less than 60 days prior written notice, registered mail, return receipt requested.

This contract provision, which provides for automatic renewal of a contract without any notice to, or action by, the customer, is commonly referred to as an "evergreen clause". Local Law 42 was drafted, in part, to respond to such improper contract provisions. Indeed, the City Council expressly noted in its legislative findings of fact that "carters do not compete for customers and ... customers are compelled to enter into long-term contracts with onerous terms, including 'evergreen' clauses." Local Law 42, sec. 1. As Judge Pollack recognized, the "legislature attempted to limit the influence of corruption on carting contracts by adjusting the parties' contractual duties and rights so that contractual terms addressing the duration of contracts are less binding on businesses." SRI v. City, 928 F.Supp. 407, supra. Local Law 42's contract termination requirement was one of the "reasonable means" chosen by the City Council to accomplish this purpose. See id. at 12. The fact that all of this applicant's contracts include evergreen clauses is significant evidence that its contracts reflect the precise type of unequal bargaining power that Local Law 42 was intended to address. Thus, it would plainly be "inconsistent with the purposes of the act" to grant a waiver for this applicant's contracts, which contain the very type of contract provision that this legislation was intended to address.

Furthermore, even in the absence of Local Law 42, the applicant's contracts in this regard appear to violate New York State law, and, therefore, are terminable at will in any event. General Obligations Law sec. 5-903 (2) provides:

> No provision of a contract for service, maintenance or repair to or for any real or personal property which states that the term of the contract shall be deemed renewed for a specified additional period unless the [customer] gives notice to the [carter] of his intention to terminate the contract at the expiration of such term, shall be

enforceable against the [customer] unless the [carter], at least fifteen days and not more than thirty days previous to the time specified for serving such notice upon him, shall give to the [customer] written notice, served personally or by certified mail, calling the attention of [the customer] to the existence of such provision in the contract.

This state law is "designed to protect 'small businessmen who unwittingly find themselves "married" to contracts for sign, maintenance, laundry and linen supplies and a variety of other services.'" Donald Rubin, Inc. v. Schwartz, 160 A.D.2d 53, 56 (1st Dept. 1990) (quoting Telephone Secretarial Service v. Sherman, 49 Misc.2d 802, 804 (Nassau Co. Dist. Ct.), aff'd, 28 A.D.2d 1010 (2d Dept. 1966)). This very issue was recently addressed in A.V.A. Carting, Inc. v. BFI, (N.Y. Sup. Co.) (reported in N.Y. Law Jour. Feb. 25, 1994 at 22 col. 3). There, the court reviewed language in the carting contract essentially identical to the language in the contracts submitted by the applicant here.[11] First, the court found section 5-903 to apply to carting contracts which clearly are "service or maintenance contracts". Then, the Court found that the effect of section 5-903 is to render the term provisions of such contracts unenforceable, expressly holding: "Where contracts are in unenforceable 'renewal' periods, they are effective contracts with indefinite terms. An agreement with an indefinite duration is considered 'terminable at will'." Id. Thus, wholly apart from Local Law 42, this applicant's current contracts appear to be terminable at the will of the customer.[12]

This Commission is obligated to enforce the public policy embodied in General Obligations Law section 5-903 and Local Law 42. In Universal Sanitation Corp. v. The Trade Waste Commission, 96 Civ. 6581 (MP), slip op. (October 16, 1996, S.D.N.Y.), Judge Pollack specifically found that the presence of evergreen clauses in the waiver applicant's form contracts, inter

[11] The court explained: "[T]he contracts of the three moving former customers were be[ing] deemed renewed beyond their initial one year term by virtue of an 'evergreen' clause. These three contracts are presented and each specifically states that the contract is annually renewed unless notice of termination is given during the contract term." Slip op. at col 4.

[12] Nothing in the applicant's waiver application suggests that the applicant provided its customers with the notice required by §5-903.

alia, provided a rational basis for and justified the Commission's denial of the waiver application. Therefore, the applicant's waiver application must be denied on this ground as well.

Other provisions of this applicant's contracts also appear to be inconsistent with the purposes of Local Law 42. For example, the form contracts reference only the maximum rates permissible by the Department of Consumer Affairs. Given the manner in which the form contracts were drafted, the applicant presumably uses only those maximum permissible rates, which also shows the absence of arms-length negotiations that would necessarily have produced a fair and competitive price in a free market. As the City Council expressly found and sought to address, "the anti-competitive effects of this cartel have resulted, with few exceptions, in the maximum [permissible] rates being the only rate available to business" and "businesses often pay substantially higher amounts" than they should have to pay.

The applicant's form contracts also contain other one-sided terms such as providing that the customer must pay for waste pick ups -- whether or not the waste is picked up -- and an onerous liquidated damages provision, of dubious enforceability, that requires the customer to pay 65% of the total contract price in the event of a breach by the customer.[13] Moreover, the form contracts provide yet another onerous damages clause which states, that in the

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[13] A liquidated damages provision is unenforceable if it is "plainly or grossly disproportionate to the probable loss" in the event of a breach and, thus, tantamount to a penalty. Truck Rent-A-Center, Inc. v. Puritan Farms 2nd, Inc., 41 N.Y. 2d 420, 425 (1977) (citing Equitable Lumber Corp. v. IPA Land Dev. Corp., 38 N.Y. 2d 516, 521-522 (1976). Such provisions are "not intended to provide fair compensation, but to secure performance by the compulsion of the very disproportion." Id. at 424. As appears to be the case here, the customer would be compelled, out of fear of economic devastation, to continue to use a carter's services, while the carter, in the event of a default, would reap a windfall well above any actual harm sustained. See id. Contractual provisions fixing damages are appropriate only where the amount of liquidated damages bears reasonable proportion to the probable loss, and the amount of actual loss is difficult if not impossible to determine. See id. at 425 (citing City of Rye v. Public Serv. Mut. Ins. Co., 34 N.Y. 2d 470, 473 (1975). Here, not only does the liquidated damages clause appear to constitute a penalty, but also, it is not impossible or even difficult for the applicant to calculate its actual damages. Indeed, industry representatives have testified in detail about the components of a carter's costs and compiled the figures actually attributable to those various factors in New York City. See e.g., City Council Hearing Transcript (December 12, 1995) at 105-107; id. (March 4, 1996) at 124-133. see also generally President's Council of Trade Waste Assns., Inc. v. City of New York, 159 AD2d 428 (1990); Council of Trade Waste Assns. v. City of New York, 179 AD2d 413 (1992). Although carters may intentionally inflate costs reported to the City, it nevertheless is clear that this applicant could reasonably determine its actual damages.

event the customer fails to make payment when due, the applicant has the option of suspending waste removal services or terminating the contract, but the customer, nonetheless, would still be liable for all charges for the remaining duration of the contract term. In contrast, the contract provides for no damages in the event of a breach by the carter.[14]

In addition, on one of the applicant's form contracts, the applicant states the following: "If the Customer refuses to sign the [contract] [the] Carting Company is required to notify the Department of Consumer Affairs of the Customers [sic] failure or refusal to sign (Commercial Refuse Regulation 12)." The applicant has used this DCA rule to mislead customers into believing that they must enter into its written contracts, and that if they do not sign contracts, they will be reported to the DCA.[15] Title 6, Chapter 2, Subchapter R of the Rules of the City of New York ("RCNY"), §2-182(c) (formerly Regulation 12) is intended to ensure that the carting company offer written contracts to customers, not to be used as a coercive tactic to get customers to enter into written contracts. Thus, this applicant's contracts echo many of the corrupt practices used by carters to lock customers into onerous contracts that were revealed in the Manhattan District Attorney's investigation and that Local Law 42 was intended to remedy.

An essential purpose of Local Law 42 is to address the abusive contracting practices that have been prevalent in this industry for decades. Nothing in this applicant's submission satisfactorily explains "why a waiver would not be inconsistent" with that essential purpose. Indeed, to grant a waiver to this applicant -- given the information available regarding its dubious, indeed, illegal contracting practices -- would be inconsistent with the legislation's essential purposes. Therefore, on that basis alone, the applicant's waiver application must be denied.

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[14]Similarly, although the applicant's standard contracts impose onerous requirements on customers, it imposes only illusory obligations on the carter, merely granting it "rights" to the customer's refuse. In short, the applicant's form contract reflects precisely the "improper disparity in bargaining position" which Local Law 42 was designed to adjust. See SRI v. City of New York, 928 F.Supp. 407, supra.

[15] 6 RCNY §2-182 (formerly Regulation 12) only requires carting companies to offer contracts to their customers. In those instances where the customer does not enter into a written contract, the carting company is deemed to have complied with the proffered contract requirement by the notifying the DCA of the customer's refusal to sign, sending a contract to the customer within 75 days of the commencement of service by certified mail, and keeping a copy of the contract on file along with the signed returned postal receipt for a period of one year after discontinuance of service to the customer.

B. APPLICANT'S FAILURE TO DISCHARGE ITS BURDEN

Nothing in this applicant's waiver application submission satisfactorily explains "why a waiver would not be inconsistent" with the essential purposes of Local Law 42. The applicant, thus, has failed to carry its burden of showing the propriety of granting this waiver application. Indeed to grant a waiver to this applicant -- given its contracting practices -- would be inconsistent with the legislation's essential purposes.

The applicant states that it should be granted a waiver because: (1) it has used its "best efforts" to comply with DCA regulations and intends to continue to comply with any new rules and regulations of the Commission; (2) that the applicant has generally charged the rate allowed by the DCA; (3) that it used the form of contract previously approved by the DCA; (4) that the provisions of the contracts are based on the customers' needs as they expressed them during the negotiation process; (5) the applicant responds to customer complaints by re-surveying and adjusting the rate charged; and (6) it does business in a "fair and honest way."

The applicant's contentions are unpersuasive. First, the applicant has presented no proof that the DCA approved its form contract. The DCA informs the Commission that it did not approve the form contract containing the "evergreen clause." The applicant charges only the maximum rates permissible under DCA regulations and uses pre-printed form contracts containing onerous uniform provisions. The applicant consistently charges its customers the maximum rates, thus belying its claim that the contract terms were negotiated.

In sum, the applicant has not met its burden of demonstrating why a waiver would be justified. Indeed, to grant a waiver to this applicant -- given its questionable background and contracting practices -- would be inconsistent wit the legislation's essential purposes. Therefore, the applicant's waiver application must be denied.

V. CONCLUSION

For each and all of these reasons, the New York City Trade Waste Commission hereby denies the application for a waiver of Consumers

Rubbish Removal, Inc. The applicant has failed to meet its burden under Local Law 42 of demonstrating "why a waiver would not be inconsistent with the purposes of the Act". Indeed, it would, in fact, be inconsistent with the purposes of Local Law 42 to grant this waiver application in light of the applicant's questionable background and contracting practices.[14]

A copy of this decision will be served today by hand upon the applicant at the "principal office" address listed on its waiver application. The Commission will provide written notice of this decision to the applicant's customers for whose contracts a waiver was sought so that those customers will know that they now have the right under Local Law 42 to terminate those contracts on 30 days' notice.

Dated: New York, New York
November 22, 1996

Randy M. Mastro
Acting Chair

John Doherty
Sanitation Commissioner

José Maldonado
Consumer Affairs Commissioner

Rudy Washington
Business Services Commissioner

Frank Maas
Acting Investigation Commissioner

[14]This decision should not be construed as any conclusion on the ultimate issue of this applicant's fitness for a trade waste removal license. The applicant submitted an applicant for a trade waste removal license on August 30, 1996. Licenses will only be issued after full background review.