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 VICTORY SANITATION, LTD.

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.

[1] The Commission has yet to issue any licenses. Applications for licenses -- which will only be issued after full background reviews -- were required to be submitted for ongoing trade waste removal businesses by August 30, 1996.

Victory Sanitation, Ltd., ("Victory") has applied for a waiver. For each of the following independent reasons, among others, the Commission now denies Victory's waiver application as inconsistent with the purposes of Local law 42 because of the applicant's questionable background and contracting practices:

(1) a principal of the applicant, Richard Bizenza, has been indicted for conspiracy and mail fraud for allegedly obtaining fraudulent State Insurance Fund premium reductions;

(2) the applicant is located at the same address as another refuse company implicated in the same scheme;

(3) the applicant was a member of a trade waste association indicted for enforcing an illegal customer-allocation and price-fixing scheme;

(4) the applicant uses standard contracts with onerous terms, including "evergreen clauses";

(5) the applicant administers its contracts in an abusive and coercive manner characteristic of the industry's criminal cartel;

(6) the applicant has failed to provide complete and accurate information in connection with this waiver application; and

(7) 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.[2] Local Law 42, § 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"; and (5) a copy of the form written notice to customers regarding the applicant's submission of a waiver application.

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 meeting 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 18-page recommendation of the Commission's executive staff that the Commission deny this waiver application.[3] The Commission considered all of the applicant's waiver application submissions -- including that response -- before rendering this decision.

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[2] 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, United States 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 United States Court of Appeals for the Second Circuit has already rejected the carters' motion for emergency relief in another attempt by these carters to block implementation of Local Law 42's 30-day contract termination right.

[3] While Local Law 42 did not require the Commission to act in that manner, the Commission nevertheless afforded the applicant the opportunity to respond before rendering this decision.

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";
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> (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";
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> (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
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> (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, No. 96-7788 (2d Cir.).

(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, United States 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,[4] 17 individuals, and 23 carting companies, charging enterprise corruption, attempted murder, arson, criminal antitrust violations, coercion, extortion, and numerous other crimes. This applicant was a member of QCTW, one of the indicted trade associations.[5]

Simultaneous to 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, 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,

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[4] The four indicted trade associations were the Association of Trade Waste Removers of Greater New York ("GNYTW"), the Greater New York Waste Paper Association, Inc. ("WPA"), the Kings County Trade Waste Association, Inc. ("KCTW"), 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, Indictment No. 93-294 (E.D.N.Y.); U.S. v. International Brotherhood of Teamsters (Adelstein), 998 F.2d 120 (2d Cir. 1993).

[5] 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 associations, 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:
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> - 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;
> - 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.

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).

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.

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

The City Council found and Judge Pollack recognized that 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 at the premises of QCTW, of which this applicant was a member, recites in extensive detail, illegal practices by QCTW and other participants in the illegal cartel.[6] 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.").

Abusive contracting practices became prevalent in 1993, when an outside national competitor attempted to enter the New York City market. Before then, 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 suddenly began to appear and under questionable circumstances. Often, these written contracts were procured by trick and coercion in an attempt to put a legitimate veneer on the 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, Frank Giovinco who, according to the New York City Police department is a Genovese soldier and the principal representative of the WPA, also stated plainly in another electronic eavesdrop: "We ain't going to let the customers

[6] 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 QCTW, of which the applicant was a member.

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.

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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> * * *
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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. As discussed below, this applicant engaged in abusive contracting practices. Section 11, among other provisions, was specifically intended to redress these industry-wide 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 denies this applicant's waiver application because (1) the applicant has failed to satisfy the procedural requirements of Local Law 42, and (2) the applicant has failed to establish that the grant of a waiver would be consistent with the purposes of Local Law 42, given the applicant's background and contracting practices. Either ground alone would provide an independent basis for denying the applicant's waiver application. Taken together, they compel that conclusion.

A. This Applicant Has Failed to Satisfy Local Law 42's Procedural Requirements

Question 3(a) of the application required the applicant to provide a list of customers for whose contracts it seeks a waiver, and the date it executed a contract with each of those customers. This applicant seeks a waiver of the 30-day termination provision for roughly 1000 customers, but fails to state the dates on which it executed contracts with any of those

customers. In its response to the recommendation to deny Victory's application, the applicant states that "prior to filing the waiver application, there was significant confusion in the industry as to what submissions were required." (Response at 2). The applicant claims that, after the industry was informed that "the submission of copies of all customer contracts was not required", Victory's principals "mistakenly believed that since copies of the contracts were not required, the dates of execution of each contract were not required as well". The applicant's proferred justification is unavailing. While the application clearly did not require a copy of every contract to be submitted, it also unambiguously required the applicant to submit a list of all customers for which a waiver was sought, and "the date of contract execution by each such customer" (Application, Part I, 3[a][emphasis added]). This and other required information was necessary for the Commission to evaluate the applicant's contracting practices.[7]

Moreover, on page three of the waiver application, the applicant listed the names and addresses of five individuals and companies, but failed to explain their relationship to this applicant or the reason for their inclusion in the application. In its response to the recommended decision, the applicant explained that the listed companies "were thought to have had a beneficial interest in Victory...". If so, the application still would be procedurally deficient because the applicant failed to provide the information the application expressly demands about entities or individuals that held a beneficial interest in the applicant during the past ten years. The applicant similarly failed to supply this information with respect to three individuals who, according to the applicant, also held promissory notes. Without any further information concerning the amount of the notes or the dates on which they have or will become due, the Commission is unable to determine the extent of the listed parties' beneficial interest, if any, in the applicant.

While the applicant dismisses each of these omissions as "procedural infractions" amounting to "harmless error", all of this material information, expressly required by the application, is necessary for the Commission to evaluate the applicant's background and contracting practices, and is

[7] The applicant's contention that the five-day response period afforded it insufficient time to retrieve this information from its files is equally unpersuasive inasmuch as this information was clearly required as part of the original application.

material to the application. Consequently, the application is procedurally defective and is denied.

B. This Applicant Has Failed to Establish that the Grant of a Waiver Would be Consistent with Local Law 42's Purposes

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) eliminate abuses in the contracting processes that have solidified the cartel's control. Either ground alone would provide an independent basis for denying the applicant's waiver application. Taken together, they compel that conclusion.

(1) Applicant's Background

The applicant's President, Richard Bizenza, the applicant's President, was indicted by a federal grand jury in 1995 for conspiracy and mail fraud in connection with a scheme to defraud the State Insurance Fund.[8] Specifically, the indictment charged that, between September 1990 and December 1991, the defendants obtained fraudulent reductions in the insurance premiums their businesses were charged by the State Insurance Fund by paying off an insurance broker and two employees who worked for the State Insurance Fund. May 3, 1995 Statement from U.S. Attorney's Office.[9] A. Sirico & Sons, Inc. and Robert Sirico were also named defendants in that same indictment. Robert Sirico is a principal of Mid-Bronx Haulage, which is located at the applicant's address, 408 Coster Street, Bronx.[10]

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[8] According to the applicant, the U.S. Attorney has granted Richard Bizenza a deferred prosecution.

[9] Victory Sanitation of Westchester, Inc., was also implicated in the State Insurance Fund fraud indictment. It is not clear what relationship exists, if any, between that company and this applicant..

[10] A statement issued by the U.S. Attorney's office on May 3, 1995, stated that A. Sirico & Sons, Inc., another company for whom the fraudulent insurance premium deductions were allegedly obtained was, as of that date, located at the same address as the applicant. Although the applicant disputes that contention, it nevertheless appears to be affiliated in some manner with that company's former principal, Arnold Sirico, a principal of Hunt's Point Corp. According to documents submitted by the applicant, Hunt's Point has negotiated collectively with the applicant, Mid-Bronx Haulage and CJB Sanitation, for the anticipated sale

Furthermore, in May 1995, the two sole officers of the applicant, Richard Bizenza and Nunzio Squillante, were indicted by a New York State grand jury for "enterprise corruption based upon the alleged filing of false instruments". Waiver Application at 5. According to the applicant's response, the charges are related to another carting company, Asbestos Carting Corp. The applicant does not explain how its principals are affiliated with Asbestos Carting or why these indictments of its sole officers and Bizenza's indictment for conspiracy and mail fraud do not reflect adversely on the applicant's character.[11]

In addition, it is noteworthy that the applicant was a member of the indicted trade association, the QCTW. According to the Manhattan District Attorney's Office, the QCTW was one of the organizations through which the organized crime-dominated cartel that controls New York City's private carting industry orchestrated its criminal activity. See June 1995 D.A.'s Statement at 2.

Finally, it is noteworthy that the applicant bears the burden of establishing "why a waiver would not be inconsistent with the purposes of

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of those four companies to Waste Management of New York City, L.P. The applicant contends that the Commission's denial of its waiver application would hinder the sale of its business to Waste Management. Local Law 42 expressly sought to protect customers from the corrupt practices of the past and to redress their unequal bargaining position by affording them for the first time the opportunity to choose their carter in a free and competitive market. It is for the customers, therefore, that the Commission must now deny this waiver application. Moreover, if this carter is correct that it enjoys good relations with its customers, it need not fear application of Local Law 42's 30-day contract termination right, for all that right entails is freedom of choice. In any event, as the applicant notes, Local Law 42 would permit customers whose contracts have been assigned to reject the assignment within 90 days and select another carter.

[11] The applicant argues that its indicted principals are entitled to a "presumption of innocence" and that the Commission thus cannot rely upon the pending indictments. This is incorrect as a matter of law and fact. First, the pending indictments -- which are not the sole reason for this Commission's decision -- certainly constitute findings by grand juries of "probable cause" that the defendants committed the crimes with which they are charged. The applicant certainly has not proffered any documentation to establish that the indictments' allegations are false. Furthermore, even in the context of judicial proceedings, an indictment alone may be the basis to defeat an entire lawsuit. See, e.g., Colon v. City of New York, 60 N.Y.2d 78 (1983) (malicious prosecution lawsuit may be dismissed); see also Barts v. Joyner, 865 F.2d 1187, 1195-96 (11th Cir. 1989) (civil rights lawsuit); Hand v. Gary, 838 F.2d 1420, 1427 (5th Cir. 1988) (same). In this context -- involving an administrative agency's exercise of "discretion" -- this Commission would be derelict in its duty if it ignored the import of these indictments. Indeed, the Commission **must** consider an indictment or other pending criminal charge under Local Law 42 in order to decide whether to grant a license to even operate in this industry. Thus, it would undermine the very basis of Local Law 42 if this Commission were not to consider the pending indictment on this waiver application.

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. Therefore, on that basis alone, Commission denies this waiver application.

(2) Applicant's Contracting Practices

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

First, this applicant's background, including its membership in an indicted trade association, the QCTW, necessarily draws into question its own contracting practices. Second, the contracts submitted by this applicant contain terms that perpetuate the dubious contracting practices that Local Law 42 seeks to address. Third, a review of this applicant's waiver application submissions and interviews with several of this applicant's customers support the conclusion that this applicant has engaged in abuses in the contracting process.

For purposes of this review, the applicant's standard contract terms are particularly instructive. The applicant submitted two contracts: a "WASTE AGREEMENT" and a form "SERVICE AGREEMENT".[12] Despite the applicant's claims to the contrary, the "SERVICE AGREEMENT" contains an "evergreen clause" which permits the applicant to incorporate a contract term and renewal period of any possible length. The "SERVICE AGREEMENT" also permits oral modification of its terms, contrary to DCA regulations requiring that amendments to executed contracts be in writing. Finally, the "SERVICE AGREEMENT" contains an

[12] **The applicant has clarified that it executed its "WASTE AGREEMENT" with only one specified customer, Calvary Hospital, and that the hospital itself prepared the agreement.**

onerous liquidated damages provision requiring the customer to honor the full contract price for its entire duration and, thus, is of dubious enforceability.

Furthermore, even in the absence of Local Law 42, the applicant's contracts appear to violate New York State law, and, therefore, are terminable at will in any event. General Obligations Law § 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.[13] 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

[13] 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.

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.[14]

This Commission is obligated to enforce the public policy embodied in General Obligations Law § 5-903 and in Local Law 42. Therefore, this waiver application is denied on this ground as well.

Furthermore, of ten randomly selected customers of the applicant that Commission investigators interviewed, six reported that they did not have a written waste carting agreement.[15] To the extent that the application suggests that these customers are bound by written contracts, this information reflects, at the very least, customer confusion reflective of an unequal bargaining relationship. One of the remaining four customers interviewed by Commission investigators stated that it had used Victory's services for the past twelve years, but that Victory proffered a written agreement for the first time approximately one year ago.[16] This customer report comports with testimony before the City Council on December 12, 1995 that when outside national competitors recently attempted to enter the New York City market, local carters, who had previously relied upon the cartel to protect their customers and routes against competition, sought to procure written contracts.

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[14] The applicant's statement in its response that it incorporates original and renewal terms of the same length is irrelevant, inasmuch as any renewal term would commence, under the express terms of the agreement, "without further action of the parties". The applicant also claims that all of its contracts are in their original term and, consequently, have not yet required the applicant to issue the notice mandated by General Obligations Law § 5-903(2). However, as noted above, the applicant failed to include any details about the dates of execution or length of any of its contracts, as is expressly required by the application materials. Thus, its contention is unsupported and unpersuasive.

[15] Oral contracts are terminable at will under DCA rules.

[16] DCA regulations require carters to seek to execute written contracts with all their customers Chapter 2, Rules of the City of New York, § 2-182. Only where a customer refuses to sign a profferred written agreement and the carter complies with other specific administrative requisites will it be deemed to have satisfied this requirement. Indeed, in its written statement in support of its waiver application, the applicant states that "Victory has of course entered into contracts with its customers...". Conspicuously absent is even a contention that the applicant has complied with the requirement that it offer to enter into written agreements.

Moreover, it can reasonably be inferred from the customer surveys that the applicant participated in "customer allocation", customer "ownership" and other anti-competitive practices, each of which evidences the parties' unequal bargaining positions and the absence of fair competition. One customer reported that it previously used another carter but that, three years ago, a representative of the applicant visited the customer's establishment and informed the customer that the applicant would be collecting its waste. That customer stated it believed it had no choice but to use Victory's services. Two customers stated that, upon opening their businesses, a representative of Victory visited their premises and informed them that Victory was the carter "for the area". In another case, a customer inquired of the surrounding businesses about waste removal and was informed that they all used the applicant's services.

It also appears that the applicant routinely overcharges its customers, and that the fees charged bear virtually no relation to the amount of waste removed. In one instance, the customer is charged in excess of $300 per month. Based upon information supplied by the customer concerning its waste stream, however, it should not be charged more than $70 per month. Another customer whose reported waste volume would justify an approximate monthly rate on only $65 is charged $150. Even assuming that these customers reported the lower range of their monthly waste volume, the applicant's "flat rate" charges are grossly excessive. In any event, although the applicant apparently bills every one of its customers at a "flat rate", each of the ten customers interviewed reported that the applicant has never conducted a waste stream survey.[17] Consequently, the rates the applicant charges those customers do not appear to reflect an actual average amount of refuse collected over a representative period of time, as required by DCA regulations.

[17] The applicant submits affidavits from three of its employees ostensibly supporting its contention that it regularly conducts waste stream surveys. The applicant also submits signed statements obtained from twenty of its customers, but apparently written by the applicant, attesting to their satisfaction with the applicant's services. Nevertheless, the Commission credits the reports prepared by its investigators that each of the ten customers interviewed stated that the applicant has never conducted a waste stream survey. In any event, the applicant does not even claim to have conducted waste stream surveys for every customer for whom it charges a flat rate, as required by DCA regulation. Instead, the applicant's Sales and Collection Supervisor states merely that such surveys are "not at all unusual" (See Del Prete Affidavit).

Local Law 42 aims to eliminate 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. The applicant, thus, has failed to carry its burden under Local Law 42 of showing the propriety of granting this waiver application. Indeed, to grant a waiver to this applicant -- given the information available regarding its abusive and anti-competitive contracting practices -- would be inconsistent with the legislation's essential purposes. Therefore, on that basis alone, the Commission denies this waiver application.

V. CONCLUSION

For each and all of these reasons, the Trade Waste Commission denies the application for a waiver for Victory Sanitation, Ltd. The applicant has failed to satisfy 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.[18]

A copy of this decision will be served upon the applicant today by hand at the "principal office" address listed on its waiver application. The Commission will provide written notice of this decision to the applicant's

[18] This decision should not be construed as any conclusion on the ultimate issue of this applicant's fitness for a trade waste removal license.

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
September 6, 1996

Randy M. Mastro
Acting Chair

John Doherty
Sanitation Commissioner

Jose Maldonado
Consumer Affairs Commissioner

Rudy Washington
Business Services Commissioner

Richard W. Mark
Acting Investigation Commissioner