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

DECISION OF THE BUSINESS INTEGRITY COMMISSION DENYING THE EXEMPTION APPLICATIONS OF TOP SHELF SUPPLIES INC. AND TOP GUN SUPPLIES CORP. FOR REGISTRATIONS TO OPERATE AS A TRADE WASTE BUSINESSES

Top Shelf Supplies Inc. ("Top Shelf") and Top Gun Supplies Corp. ("Top Gun") (collectively, "the Applicants") have each applied to the New York City Business Integrity Commission ("Commission"), formerly known as the New York City Trade Waste Commission, for an exemption from licensing requirements and a registration to operate a trade waste business pursuant to Local Law 42 of 1996. See Title 16-A of the New York City Administrative Code ("Admin. Code"), § 16-505(a). Local Law 42, which created the Commission to regulate the trade waste removal industry in New York City, was enacted to address pervasive organized crime and other corruption in the commercial carting industry, to protect businesses using private carting services, and to increase competition in the industry and thereby reduce prices.

On January 28, 2008 and June 24, 2008, Top Shelf and Top Gun, respectively, applied to the Commission for exemptions from licensing requirements and for registrations enabling them to operate as trade waste businesses "solely engaged in the removal of waste materials resulting from building demolition, construction, alteration or excavation" – a type of waste commonly known as construction and demolition debris, or "c & d." Admin. Code § 16-505(a). Local Law 42 authorizes the Commission to review and determine such applications for exemptions. See id. If, upon review and investigation of the exemption application, the Commission grants the applicant an exemption from licensing requirements applicable to businesses that remove other types of waste, the applicant will be issued a registration. See id.

In determining whether to grant an exemption from licensing requirements and a registration to operate a construction and demolition debris removal business, the Commission considers the same types of factors that are pertinent to the Commission's determination whether to issue a license to a business seeking to remove other types of waste. See, e.g., Admin Code § 16-504(a) (empowering Commission to issue and establish standards for issuance, suspension, and revocation of licenses and registrations); compare Title 17, Rules of the City of New York ("RCNY") §§ 1-06 & 2-02 (specifying

information required to be submitted by license applicant) with id. §§ 1-06 & 2-03(b) (specifying information required to be submitted by registration applicant); see also Admin. Code §16-513(a)(i) (authorizing suspension or revocation of license or registration for violation of Local Law 42 or any rule promulgated pursuant thereto). Central to the Commission's investigation and determination of an exemption application is whether the applicant has business integrity. See 17 RCNY § 1-09 (prohibiting numerous types of conduct reflecting lack of business integrity, including violations of law, knowing association with organized crime figures, false or misleading statements to the Commission, and deceptive trade practices); Admin. Code § 16-509(a) (authorizing Commission to refuse to issue licenses to applicants lacking "good character, honesty and integrity"); Breeze Carting Corp. v. The City of New York, 52 A.D.3d 424, 860 N.Y.S.2d 103 (1st Dept. 2008).

Based upon the record as to the Applicants, the Commission denies their exemption/registration applications on the ground that these Applicants lack good character, honesty, and integrity for the following independent reasons:

A. Top Gun failed to disclose Donald Cleary as a principal of the company in both of the exemption applications it submitted to the Commission.

B. Donald Cleary, a principal of both applicants, was convicted of possession of stolen property and conspiracy, both connected to the trade waste industry.

C. Top Shelf has repeatedly engaged in unregistered trade waste removal activity.

D. The Applicants have failed to pay fines that are directly related to the Applicants' businesses for which the Department of Consumer Affairs has entered judgment.

I. REGULATORY BACKGROUND

A. The New York City Carting Industry

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

Extensive testimonial and documentary evidence adduced during lengthy City Council hearings addressing the corruption that historically has plagued this industry

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

The City Council's findings of extensive corruption in the commercial carting industry have been validated by the successful prosecution of many of the leading figures and companies in the industry. In 1995 and 1996, the Manhattan District Attorney obtained racketeering indictments against more than sixty individuals and firms connected to the City's waste removal industry, including powerful mob figures such as Genovese organized crime family capo Alphonse Malangone and Gambino soldier Joseph Francolino. Simply put, the industry's entire modus operandi, the cartel, was indicted as a criminal enterprise. Since then, all of the defendants have either pleaded guilty or been found guilty of felonies; many have been sentenced to lengthy prison terms, and many millions of dollars in fines and forfeitures have been imposed.

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

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

949 F.2d at 1188. The trial judge described this scheme as "one of the largest and most serious frauds involving environmental crimes ever prosecuted in the United States." United States v. Paccione, 751 F. Supp. 368, 371 (S.D.N.Y. 1990).

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

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

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

B. Local Law 42

Upon the enactment of Local Law 42, the Commission assumed regulatory authority from the Department of Consumer Affairs ("DCA") for the licensing and registration of businesses that remove, collect, or dispose of trade waste. See Admin. Code § 16-503. "Trade waste" is broadly defined and specifically includes "construction and demolition debris." Id. § 16-501(f)(1). The carting industry quickly challenged the new law, but the courts have consistently upheld Local Law 42 against repeated constitutional challenges (both facial and as applied) by New York City carters. See,

e.g., Sanitation & Recycling Industry, Inc. v. City of New York, 928 F. Supp. 407 (S.D.N.Y. 1996), aff'd, 107 F.3d 985 (2d Cir. 1997); Universal Sanitation Corp. v. Trade Waste Comm'n, No. 96 Civ. 6581 (S.D.N.Y. Oct. 16, 1996); Vigliotti Bros. Carting Co. v. Trade Waste Comm'n, No. 115993/96 (Sup. Ct. N.Y. Cty. Dec. 4, 1996); Fava v. City of New York, No. CV-97-0179 (E.D.N.Y. May 12, 1997); Imperial Sanitation Corp. v. City of New York, No. 97 CV 682 (E.D.N.Y. June 23, 1997); PJC Sanitation Services, Inc. v. City of New York, No. 97-CV-364 (E.D.N.Y. July 7, 1997). The United States Court of Appeals has definitively ruled that an applicant for a trade waste removal license under Local Law 42 has no entitlement to and no property interest in a license, and the Commission is vested with broad discretion to grant or deny a license application. SRI, 107 F.3d at 995; see also Daxor Corp. v. New York Dep't of Health, 90 N.Y.2d 89, 98-100, 681 N.E.2d 356, 659 N.Y.S.2d 189 (1997).

Local Law 42 specifically permits the Commission to refuse to issue a registration to an applicant "who has knowingly failed to provide the information and/or documentation required by the commission pursuant to [Title 16 of the Administrative Code or any rules promulgated thereto]" or "who has otherwise failed to demonstrate eligibility for such license." Admin. Code §16-509(b). Applicants who knowingly fail to provide information required by the Commission (whether they fail to provide the information altogether or they provide false and misleading information) fall under the first prong. In Attonito v. Maldonado, 3 A.D.3d 415 (1st Dept. 2004); *leave denied*, 2 N.Y.3d 705 (2004), the Appellate Division affirmed the authority of the Commission to "review" exemption applications, to fully investigate any matter within its jurisdiction and to deny such applications in those cases "where the applicant fails to provide the necessary information, or knowingly provides false information." It further affirmed the authority of the Commission to investigate the accuracy of the information provided in an application. Id.

Applicants who fail to demonstrate good character, honesty and integrity using the criteria by which license applicants are judged fall under the second prong of §16-509(b). While the Appellate Division in Attonito did not directly address the second prong, by affirming the Commission's authority to investigate matters within the trade waste industry, it necessarily follows that the Commission need not ignore the results of its investigation that bear on an applicant's good character, honesty and integrity. Id.; Accord Breeze Carting Corp. v. The City of New York, 52 A.D.3d 424, 860 N.Y.S.2d 103 (1st Dept. 2008) (Commission denial based on a criminal conviction, identification as an organized crime associate and false and misleading statements not considered arbitrary and capricious). Accordingly, the Commission evaluates whether applicants meet the fitness standard using the same criteria upon which license applicants may be denied, including:

1. failure by such applicant to provide truthful information in connection with the application;

2. a pending indictment or criminal action against such applicant for a crime which under this subdivision would provide a basis for the refusal of such

license, or a pending civil or administrative action to which such applicant is a party and which directly relates to the fitness to conduct the business or perform the work for which the license is sought, in which cases the commission may defer consideration of an application until a decision has been reached by the court or administrative tribunal before which such action is pending;

3. conviction of such applicant for a crime which, considering the factors set forth in section seven hundred fifty-three of the correction law, would provide a basis under such law for the refusal of such license;

4. a finding of liability in a civil or administrative action that bears a direct relationship to the fitness of the applicant to conduct the business for which the license is sought;

5. commission of a racketeering activity or knowing association with a person who has been convicted of a racketeering activity, including but not limited to the offenses listed in subdivision one of section nineteen hundred sixty-one of the Racketeer Influenced and Corrupt Organizations statute (18 U.S.C. § 1961 et seq.) or of an offense listed in subdivision one of section 460.10 of the penal law, as such statutes may be amended from time to time, or the equivalent offense under the laws of any other jurisdiction;

6. association with any member or associate of an organized crime group as identified by a federal, state or city law enforcement or investigative agency when the applicant knew or should have known of the organized crime associations of such person;

7. having been a principal in a predecessor trade waste business as such term is defined in subdivision a of section 16-508 of this chapter where the commission would be authorized to deny a license to such predecessor business pursuant to this subdivision;

8. current membership in a trade association where such membership would be prohibited to a licensee pursuant to subdivision j of section 16-520 of this chapter unless the commission has determined, pursuant to such subdivision, that such association does not operate in a manner inconsistent with the purposes of this chapter;

9. the holding of a position in a trade association where membership or the holding of such position would be prohibited to a licensee pursuant to subdivision j of section 16-520 of this chapter;

10. failure to pay any tax, fine, penalty, or fee related to the applicant's business for which liability has been admitted by the person liable

therefor, or for which judgment has been entered by a court or administrative tribunal of competent jurisdiction.

Admin. Code § 16-509(a)(i)-(x). While the presence of one of the above factors in the record of a registration applicant would not necessarily require a denial as a matter of law, the Commission may consider such evidence as a factor in determining overall eligibility.

II. DISCUSSION

On November 30, 2005, Top Gun applied to the Commission for an exemption from licensing and registration as a trade waste business that removes construction and demolition debris. See Top Gun Registration Application filed on November 30, 2005 ("2005 Top Gun Application"). The Application disclosed "Gloria Lucia Gonzalez King" ("King") as the sole principal. See id. at 9. King married Donald Cleary ("Cleary") in December 2005. See Questionnaire at 4. Cleary's name does not appear anywhere in the 2005 Top Gun application. See 2005 Top Gun Application. On March 22, 2006, unaware of Cleary's role in Top Gun, the Commission granted Top Gun's application. See Registration Order issued to Top Gun.

King filed for divorce in 2007, and Top Gun's registration expired on February 28, 2008.[1] See February 20, 2009 Deposition Transcript of Gloria King ("King Tr.") at 28. King admitted that she allowed the registration to expire because she and Cleary divorced. See King Tr. at 47. After King and Cleary filed for divorce, on August 21, 2007, Cleary formed Top Shelf. See New York State Department of State, Division of Corporations and State Records Filing Receipt. On January 28, 2008, Top Shelf applied to the Commission for an exemption from licensing and registration as a trade waste business that removes construction and demolition debris.[2] See Top Shelf Registration Application filed on January 28, 2008. Cleary was disclosed as the sole principal of Top Shelf.[3] See Id. at 9.

On June 24, 2008, after King and Cleary reconciled, Top Gun reapplied to the Commission by submitting a new application for an exemption from licensing and registration as a trade waste business that removes construction and demolition debris.[4]

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[1] The divorce was finalized in July 2008. See Questionnaire at 4.

[2] On January 19, 2007, G Force Industries, Ltd. ("G Force") also applied to the Commission for an exemption from licensing and registration as a trade waste business that removes construction and demolition debris. See April 14, 2009 G Force Denial Decision. The original application filed by G Force only disclosed Cleary's sister-in-law, Gina Bordino, as the sole principal. After it became clear that the Commission knew about Cleary's half brother, Arthur Bordino's role in the company, on May 15, 2007, G Force amended its application and disclosed Arthur Bordino as a principal. Arthur Bordino and Donald Cleary were codefendants in a trade waste industry related criminal case. See infra. The Commission denied G Force's application on April 14, 2009. See April 14, 2009 G Force Denial Decision.

[3] On its application, Top Shelf disclosed one vehicle- a 2003 Peterbuilt tractor. See Top Shelf Application at 15. However, Top Shelf did not disclose the existence of a trailer which would be necessary in order to transport waste. See id.

[4] King testified that she and Cleary "are back together again." See King Tr. at 22. "That's the name [Top Gun] he [Cleary] made up for his company. We parted company and he went on his way. Like I said, I went on my way and I didn't think that I was actually going to need a license back because I wasn't going back into the trucking business. But like I said, unfortunately, I haven't made enough money and I was really be [*sic*] anxious to get back into the trucking business to make money." See id. at 31.

See Top Gun Registration Application filed on June 24, 2008 ("2008 Top Gun Application"); see also King Tr. at 22. "Gloria Cleary" was disclosed as the sole principal of Top Gun.[5] See 2008 Top Gun Application at 9. Again, Donald Cleary's name does not appear anywhere on the application. Id. The totality of the evidence, as described below, clearly demonstrates that the Applicants are so intertwined with each other that their applications are reasonably be considered together. See infra.

On April 16, 2010, the staff issued a 13-page recommendation that the applications be denied. The Applicants were served with the recommendation on or about April 16, 2010 and was granted ten business days to respond (May 3, 2010). See 17 RCNY §2-08(a). The Applicants failed to submit a response (or a request for additional time to respond) by that deadline.

The Commission has carefully considered the staff's recommendation and for the independently sufficient reasons set forth below, the Commission finds that Top Gun Supplies Corp. and Top Shelf Supplies, Inc. lack good character, honesty, and integrity, and denies their registration applications.

III. GROUNDS FOR DENIAL

A. Top Gun failed to disclose Donald Cleary as a principal of the company in both of the exemption applications it submitted to the Commission.

All Applicants must provide truthful and non-misleading information to the Commission. A knowing failure to do so is a ground for denial of the application. See Admin. Code §16-509(b); Attonito v. Maldonado, 3 A.D.3d 415 (1st Dept. 2004); *leave denied* 2 N.Y.3d 705 (2004); Breeze Carting Corp. v. The City of New York, 52 A.D.3d 424, 860 N.Y.S.2d 103 (1st Dept. 2008).

Question 12 of the application filed by Top Gun on June 23, 2008 directs, "On Schedule A, identify all individuals who are principals of applicant business and provide the information requested." See 2008 Top Gun Application at 2. Schedule A of both applications submitted by Top Gun disclose one principal – "Gloria Lucia Gonzalez King" / "Gloria L. Cleary." See 2005 Top Gun Application at 9; 2008 Top Gun Application at 9. Donald Cleary's name does not appear anywhere in either application submitted by Top Gun. See 2005 Top Gun Application; 2008 Top Gun Application.[6]

The definition of "principal" (which is included in the instructions for the application) includes corporate officers and directors, all stockholders holding ten percent or more of the outstanding shares of the corporation *and all other persons participating*

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[5] On this application, Top Gun disclosed one vehicle- a 1998 Spec Tec trailer. See 2008 Top Gun Application at 15. However, Top Gun did not disclose the existence of a tractor that could be used to pull this trailer. See id. Thus, Top Shelf's application only disclosed a tractor and Top Gun's application only disclosed a trailer.

[6] Question 18 of the application also requires applicants to disclose "each employee and principal who will operate a vehicle during the conduct of the applicant's business..." See 2005 Top Gun Application; 2008 Top Gun Application. Donald Cleary's name was not disclosed. See Id.

directly or indirectly in the control of such business entity. See Admin. Code § 16-501(d) (italics added).

Cleary is a principal of Top Gun. At her deposition, King admitted that Cleary's name is on the Top Gun business bank account; that Cleary has authority to sign checks on behalf of Top Gun; that Cleary procured Top Gun's tractor (the same tractor is now in the possession of Top Shelf); [7] that "basically, most of the business came from Donald Cleary;" that Cleary has the authority to resolve problems on behalf of Top Gun; and that customers contact Cleary "for the most part" when they require trucking services. See King Tr. at 16; 19; 29-30; 59-60. Finally, King testified that although Cleary was never disclosed to the Commission as a principal or a driver, he "ran" Top Gun from the company's inception in 2005 to their divorce in 2008. See King Tr. at 11. King also testified that Cleary would continue to be involved in the operations of Top Gun, if the Commission grants Top Gun's application. See King Tr. at 38. In a practical sense, Cleary would have to continue to run the Top Gun business, as King currently works thirty to forty hours a week on Long Island in a sales job. See King Tr. at 8, 51. Furthermore, King testified that she plans to keep her sales job on Long Island. Id.

When King realized that she implicitly admitted that Cleary was a principal of Top Gun, King clarified that Cleary "doesn't run the company, he was driving the truck."[8] See Id. at 11. King testified that Cleary was not disclosed as a principal or vehicle operator "because he was my husband. So, I didn't think it was a big deal for him to- - you know, since my father's information was here, I didn't think that it would make a difference whether my husband drove or not."[9] See Id. at 26. At another point, King testified that "I just thought it was my husband and we shared a home, business, moneys, so I didn't think he was a driver per se..." See Id. at 27. While the Commission does not need to prove motive, this explanation is implausible. It is more likely that Cleary and King deliberately did not want to place Cleary's name anywhere on the Top Gun applications because of the likelihood that such an application would be denied based on Cleary's criminal record and history in the trade waste industry.

The failure of the Applicants to provide truthful and non-misleading information to the Commission about who are principals of the companies is evidence that the Applicants lack good character, honesty and integrity. As Cleary is a person who participated directly or indirectly in the control of Top Gun, he is a principal, and as such was not disclosed to the Commission in any of the applications submitted by Top Gun. The Applicants did not dispute this point, leaving this ground uncontested. Accordingly, the Commission concludes that these Applicants lack good character, honesty, and integrity and denies the Applicants' registration applications on this independently sufficient ground. See Admin. Code §§16-509(b); 16-509(a)(i).

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[7] "The Peterbuilt [tractor], that I still owe money on it, which is registered to Top Shelf Supplies; that I'm taking back if this thing pans out. Because I don't have a truck..." See King Tr. at 30. King also admitted that Cleary is presently "borrowing" and using the trailer that is disclosed on Top Gun's application. See Id at 39. Gloria even had to correct herself when she testified that "we" purchased the tractor: "So, there is a loan that's under my maiden name, Gloria King, which has still owed about $25,000; it was a $45,000 loan. With that money, we bought the truck- - sorry, I bought the- - the Peterbuilt, the truck." See Id. at 20

[8] Again, Cleary was never disclosed to the Commission to be a driver for Top Gun.

[9] The name of King's father does not appear anywhere on the application either. See King Tr. at 26.

B. Principal Donald Cleary was convicted of possession of stolen property and conspiracy, both connected to the trade waste industry.

On January 9, 2004, Donald Cleary, Arthur Bordino, Adam Hyzdu, Leonard Larosa, and Gregory Swenson were indicted for running a heavy equipment theft ring involving the theft and sale of twelve garbage compactors and containers owned by ten competing trade waste companies located in Brooklyn, Queens, Staten Island, Long Island, and New Jersey. See Indictment No 2490/2003, Supreme Court of the State of New York, County of Queens; see also Queens County District Attorney Press Release, dated January 9, 2004. The sixteen-count indictment was the result of an eight-month investigation known as Operation Carted Away. Specifically, the defendants were charged with stealing nine containers and three compactors, obscuring all identifying markings on the containers and compactors, and then using unmarked roll-off garbage trucks to carry off the property. Following the thefts, the defendants sold the stolen property on the black market and divided the proceeds.

Cleary was charged with grand larceny in the third degree, a class D felony, three counts of criminal possession of stolen property in the third degree, a class D felony, six counts of criminal possession of stolen property in the fourth degree, a class E felony, conspiracy in the fourth degree, a class E felony, and conspiracy in the fifth degree, a class A misdemeanor. See Indictment No 2490/2003, Supreme Court of the State of New York, County of Queens.

On May 28, 2004, Cleary pleaded guilty to criminal possession of stolen property in the third degree, a class D felony, and conspiracy in the fourth degree, a class E felony. On July 13, 2004, Judge Randall Eng sentenced Cleary to five years probation and ten thousand dollars in restitution. See Certificate of Conviction.

In determining whether an applicant possesses good character, honesty, and integrity, the Commission may consider prior convictions of the Applicant (or any of its principals) for crimes which, in light of the factors set forth in section 753 of the Correction Law, would provide a basis under that statute for refusing to issue a license. See Admin. Code §16-509(a)(iii); see also Admin. Code §16-501(a). Those factors are:

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

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

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

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

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

(f) The seriousness of the offense or offenses.

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

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

N.Y. Correct. Law §753 (1).

Applying the above factors, the Commission finds that, notwithstanding the public policy of the State of New York to encourage licensure of persons convicted of crimes, the crimes committed by Cleary were serious felonies and are antithetical to the very purpose of Local Law 42, which is to root out organized crime and other corruption from the trade waste industry. This criminal case involved a complex conspiracy involving, among other things, the theft, transportation, and resale of stolen containers and compactors used in the trade waste industry. The conviction is recent, is for activity directly related to the waste industry, and happened when Cleary was 34 years old-plainly old enough to know what the law is and how to obey it. His crimes were the result of a conscious decision to choose another path and are an all too accurate reflection of the cynical disregard for the law that corrupted the City's waste removal industry for decades. Finally, the public interest in eliminating the entrenched corruption that has plagued the New York City carting industry for decades is clear. Public confidence in the integrity of the carting industry would be undermined if those proven to have ignored the law received licenses or registrations from the Commission. Cleary's guilty plea to crimes involving the waste industry compels the conclusion that the Applicants lack good character, honesty, and integrity. The Applicants did not dispute this point, leaving this ground uncontested. Accordingly, in the exercise of its discretion, the Commission concludes that, by reason of his crimes, Cleary lacks good character, honesty, and integrity and denies the Applicants' registration applications on this independently sufficient ground.

C. Top Shelf Supplies Inc. has repeatedly engaged in unregistered trade waste removal activity.

Top Shelf has been operating and hauling debris in the five boroughs of New York City without a license or registration from the Commission. This company never held a Department of Consumer Affairs, Trade Waste Commission or Business Integrity Commission carting license or registration, and has never been legally authorized to operate in the City of New York.

On April 22, 2008, the Commission charged Top Shelf administratively with operating an unlicensed or unregistered waste removal business on April 7, 2008, in violation of §16-505(a) of the New York City Administrative Code. See Affidavit of Staff Attorney John Fellin. On or about May 12, 2008, Top Shelf and the Commission entered into a Stipulation of Settlement, wherein Top Shelf agreed to pay a total fine of two thousand five hundred ($2,500) dollars in two equal installments. Id. Although Top Shelf remitted one thousand two hundred fifty ($1,250) dollars to the Commission on July 1, 2008, as of the date of this recommendation, Top Shelf has failed to remit the remaining one thousand two hundred fifty ($1,250) dollars and has breached the terms of the Stipulation of Settlement. Id.

On December 4, 2008, again, the Commission charged Top Shelf administratively with operating an unlicensed or unregistered trade waste removal business on November 20, 2008, in violation of §16-505(a) of the New York City Administrative Code. See DCA Notice of Violation, #TW-3174. On or about February 26, 2009, a hearing was held at DCA. Top Shelf did not appear at this hearing and a Default Decision and Order was issued by Administrative Law Judge ("ALJ") Esther Simon on March 23, 2009. The Default Decision and Order found Top Shelf guilty as charged by the Commission and Ordered Top Shelf to pay a five thousand ($5,000) dollar fine. See March 23, 2009 Default Decision and Order. Again, as of the date of this recommendation, Top Shelf has failed to abide by ALJ Simon's Default Decision and Order.

Donald Cleary and his companies have exhibited a pattern of violating Local Law 42 and disregarding the consequences. Top Shelf admitted liability once and was found liable in another action that bears a direct relationship with the his ability to conduct business in compliance with Local Law 42 in the New York City trade waste industry. The two violations resulted in total fines and penalties of seven thousand five hundred ($7,500) dollars, of which the Applicant has failed to pay six thousand two hundred fifty ($6,250) dollars. Under the circumstances, Top Shelf's unregistered carting merits the denial of its registration application. Unregistered trade waste removal activity is further evidence of the Applicants' lack of honesty, integrity and good character, and is an independently sufficient basis upon which to deny these exemption applications. The Applicants did not dispute this point, leaving this ground uncontested. For this independently sufficient ground, these applications are denied.

D. The Applicants have failed to pay fines that are directly related to the Applicants' businesses for which the Department of Consumer Affairs entered judgment.

The commission may refuse to issue a license to an applicant "upon the failure of the applicant to pay any tax, fine, penalty, fee related to the applicant's business...for which judgment has been entered by a[n] ... administrative tribunal of competent jurisdiction..." See Admin. Code §16-509(a)(x); see also §16-509(c)(ii); see also §16-513(a)(iv).

As discussed above, by decision dated March 23, 2009, Department of Consumer Affairs ALJ Esther Simon found Top Shelf guilty of violating §16-505(a) of the New York City Administrative Code, and ordered Top Shelf to pay a fine of five thousand ($5,000) dollars. As of the date of this decision, Top Shelf has not paid the fine ordered by the Department of Consumer Affairs and has not fully paid the fine it agreed to pay in a separate Stipulation of Settlement. The Applicants did not dispute this point, leaving this ground uncontested. Based on this independently sufficient ground, these applicants are denied.

IV. CONCLUSION

The Commission is vested with broad discretion to refuse to issue a license or registration to any applicant that it determines lacks good character, honesty, and integrity. The evidence recounted above demonstrates convincingly that Top Gun Supplies Corp. and Top Shelf Supplies, Inc. fall far short of that standard. Based upon the above independently sufficient reasons, the Commission denies Top Gun Supplies Corp. and Top Shelf Supplies, Inc. exemption applications and registrations.

This renewal exemption/registration denial is effective immediately. Top Gun Supplies Corp. and Top Shelf Supplies, Inc. may not operate as a trade waste business in the City of New York.

Dated: June 28, 2010

THE BUSINESS INTEGRITY COMMISSION

Michael J. Mansfield
Commissioner/Chair

John Doherty, Commissioner
Department of Sanitation

Andrew Eiler, Director of Legislative Affairs (designee)
Department of Consumer Affairs

Jayme Naberezny, Inspector General (designee)
Department of Investigation

Deborah Buyer, General Counsel (designee)
Department of Business Services

Brian O'Neill, Inspector (designee)
New York City Police Department