IN THE SUPREME COURT OF THE STATE OF NEVADA

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NEVADA RECYCLING AND SALVAGE, LTD, a Nevada Limited Liability Company; AMCB, LLC, a Nevada Limited Liability Company d/b/a RUBBISH RUNNERS,

Appellants,

vs.

RENO DISPOSAL COMPANY, INC, a Nevada Corporation doing business as WASTE MANAGEMENT; REFUSE, INC., a Nevada Corporation; WASTE MANAGEMENT OF NEVADA, INC., a Nevada Corporation,

Respondents.

71467

Supreme Ct. Case No.: ~~71497~~

District Ct. Case No.: CV15-00497

APPELLANTS' JOINT OPENING BRIEF- REDACTED

Appeal from the Second Judicial District Court's grant of Summary Judgment.

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17-20859

IN THE SUPREME COURT OF THE STATE OF NEVADA

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NEVADA RECYCLING AND SALVAGE, LTD, a Nevada Limited Liability Company; AMCB, LLC, a Nevada Limited Liability Company d/b/a RUBBISH RUNNERS, Appellants, vs. RENO DISPOSAL COMPANY, INC, a Nevada Corporation doing business as WASTE MANAGEMENT; REFUSE, INC., a Nevada Corporation; WASTE MANAGEMENT OF NEVADA, INC., a Nevada Corporation, Respondents.	Supreme Ct. Case No.: 71497 District Ct. Case No: CV15-00497

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. All parent corporations and publicly-held companies owning 10 percent or more of the party's stock: None

2. Names of all law firms whose attorneys have appeared for the party or amicus in this case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court:

Winter Street Law Group*

(*formerly Hardy Law Group)

Robison, Belaustegui, Sharp & Low

3. If litigant is using a pseudonym, the litigant's true name: AMCB, LLC doing business as "Rubbish Runners"

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JURISDICTIONAL STATEMENT

A. Basis for Supreme Court's Appellate Jurisdiction

The District Court's order granting Reno Disposal Company, Inc. (doing business as Waste Management), Refuse, Inc. and Waste Management of Nevada, Inc.'s Motion for Summary Judgment re: Liability and Motion for Summary Judgment re: Damages are appealable under NRAP 3A(b)(1).

B. Filing Dates Establishing Timeliness of Appeal

A Joint Notice of Appeal was filed on October 6, 2016 appealing from:

1. Order granting Summary Judgment re: Liability and Damages filed on September 19, 2016 and Notice of Entry of Order entered on September 20, 2016; and,

2. Order granting Entry of Final Judgment and Notice of Entry of Order, both filed October 25, 2016.

C. Order Appealing From

This appeal is from an order granting RDC, Refuse, and WM's Second Motion for Summary Judgment re: Liability and Motion for Summary Judgment re: Damages.

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V.
ROUTING STATEMENT

Although this antitrust matter is presumptively to be routed to the Court of Appeals, it would more properly be routed to the Supreme Court (NRAP 17(a)(10) and (11)). This is an appeal from an order granting summary judgment in the District Court involving state antitrust claims under Nevada's Unfair Trade Practices Act.

The very basic, fundamental subject of this appeal is that the District Court erred in its application of *Noerr Pennington* immunity to matters falling outside of protected petitioning activity; specifically, to an agreement between two private entities conspiring to create a monopoly.

It is believed that this court has not previously considered the circumstances under which *Noerr* protects anticompetitive agreements between two private parties who then, several months later, use the government petitioning process as a conduit to carry out their private, anticompetitive scheme.

Appellants further contend that this appeal concerns an issue of public importance. Therefore, this appeal should be directed to the Supreme Court.

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VI.
STATEMENT OF ISSUES ON APPEAL

1. The District Court erred by applying *Noerr* immunity to a private agreement between private parties who only used the petitioning process as an incidental conduit to carrying out their anticompetitive conspiracy to create a monopoly.

2. The District Court erred by considering inadmissible evidence, relying on an absence of evidence, ruling on the weight and credibility of evidence, including but not limited to conflicting affidavits, and construing the foregoing in light favorable *only* to the *moving party*.

3. The District Court failed to apply the appropriate substantive law as required when evaluating damages under the Nevada Unfair Trade Practices Act, thereby committing reversible error.

4. The District Court committed reversible error in failing to consider, rule on, or grant Appellants' request for relief pursuant to NRCP 56(f) and other pending discovery motions prior to ruling on the Motions for Summary Judgment.

VII.
STATEMENT OF THE CASE

This case arises from the anticompetitive scheme by Reno Disposal Company, Inc. ("RDC"), Refuse, Inc. ("Refuse") and Waste Management of Nevada, Inc. ("WM") (collectively referred to at times as the "Waste Management Parties"), in conspiring with Castaway Trash Hauling ("Castaway"), whereby, among other things, RDC and Castaway colluded to combine and effectuate a secret acquisition at the very latest, as of April of 2012, the explicit purpose of which was to create a monopoly and unlawfully exclude Nevada Recycling and Salvage, Ltd. ("NRS") and AMCB, LLC doing business as Rubbish Runners ("RR"), and other competitors from the market.

The Waste Management Parties have utilized this anticompetitive scheme to foreclose competition and unlawfully gain a monopolistic advantage, to the detriment of NRS and RR, in violation of Nevada's Unfair Trade Practice Act. ("NUTPA"). In carrying out this anticompetitive conspiracy, RDC and Refuse, along with Castaway, and later used the municipal process as a conduit to carry out the private agreement between the Waste Management Parties and Castaway, to create a monopoly.

As a result, NRS and RR filed their Verified First Amended Complaint on March 25, 2015, alleging in part, unfair trade practices/conspiracy to create a

monopoly in violation of the NUTPA. Joint Appendix ("JA") Vol. 2, JA000191-384.

After obtaining leave to do so, NRS and RR filed their Second Amended Complaint on June 8, 2016, adding WM as a party. Vol. 18, JA003528-3530; Vol. 18, 19, JA003536-3729. WM appeared for the first time in this case on June 15, 2016, after being joined on June 8, 2016. Vol. 21, JA004113-4137. Literally the day after its first appearance, WM filed Joinders in RDC and Refuse's previously filed Motions for Summary Judgment re: Liability and Damages, which NRS and RR had already timely opposed. Vol. 21, JA004138-4146. The Court held oral arguments on the summary judgment motions on August 18, 2016 and subsequently entered its Order thereon on September 19, 2016. Vol. 26, JA005176, JA005289-5294. The Court did not rule on WM's Joinders prior to, during or at the time it issued its Order granting RDC and Refuse's Motions for Summary Judgment.

As such, after the Waste Management Parties filed a Motion for Entry of Final Judgment, on October 25, 2016 the District Court entered Judgment in favor of all the Waste Management Parties, explicitly retroactively granting the Joinder of WM, on all claims. Vol. 26, JA005397-5399.

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VIII.
STATEMENT OF FACTS

In late 2011 and early 2012, the Reno City Council was looking at options to provide residents with single stream recycling services. Early in the process of single stream recycling discussions, the Reno City Council decided and made it clear that it was not going to grant the Waste Management Parties an exclusive Franchise Agreement or give them any sort of exclusive rights to service all the commercial customers in the City of Reno. *Affidavit of Sharon Zadra,* (Reno City Councilwoman, 2002-2014), Vol. 17, JA003266 at ¶3; Deposition Transcript of Greg Martinelli (Waste Management Parties Area Manager), Vol. 7, JA001330:13-15, JA001334:5-6, (The City of Reno made it clear that it was "not going to create an exclusive franchise").

On [redacted], [redacted] emailed [redacted]

[redacted] stating:

[redacted]

[redacted]

[redacted] responded to [redacted] as follows:

[redacted]

[Emphasis Added]. Vol. 13, JA002562-2563. On [redacted], the parties [redacted] that, [redacted] Vol. 11, JA002308.

In mid-2012 RDC approached the City and proposed having two different zones and two different providers for commercial services. Vol. 17, JA003266 at

¶4; See also, Vol. 7, JA001330:20-21, ("[A]t some point in mid 2012 I [Martinelli] took a concept to them [City of Reno] of creating franchise zones").

At the time, there were no City imposed qualifications for haulers or facilities to be considered for the Franchise or Disposal Agreements or the Franchised zones. Vol. 17, JA003266 at ¶5. The City did not solicit bids for those who wanted to be considered as a franchisee for commercial waste and recycling services; RDC went to the City with the zone proposal with RDC having one zone and Castaway having the other zone. *Id.* See also, Email between Gary Duhon (then Attorney for the Waste Management Parties) and Jason Geddes (former City of Reno Sustainability Manger), whereby Mr. Geddes asks Mr. Duhon for the final map for the percentage of the franchise zones, Vol. 20, JA003862, ("Jason, the labeled maps I sent previously are final and agreed to by Castaway and Reno Disposal and we can adjust if necessary as provided in the agreement. The proportionate share is to be changed 19.50% in the commercial agreement;" "So 19.5 for CTH and 80.5 for WM. Correct?" "Correct").

In approximately September of 2012, then Councilwoman Zadra "specifically asked whether there were any other Commercial solid waste, trash and/or recycling businesses in the City of Reno who should be included in the Franchise negotiation process and the answer [she] received was along the lines of 'maybe, well sort of but not really.'" Vol. 17, JA003266, at ¶6.

It was not until the day before the October 10, 2012 Reno City Council meeting that Councilwoman Zadra learned that "there were in fact others, including Nevada Recycling and Salvage and Rubbish Runners, who were engaged in the Commercial solid waste, trash and recycling industries in the City of Reno." Vol. 17, JA003267 at ¶7. However, by the time Councilwoman Zadra learned of the other interested stakeholders like NRS and RR, "the zones for [RDC] and Castaway had already been decided." *Id.* See also, Reno City Council Presentation, Vol. 20, JA003902. (RDC presented to the City "2 Service Areas and 2 Service Providers ('Zones')").

The first meeting the City had with the other businesses operating in the City of Reno in the commercial waste and recycling industries was the day before the October 10, 2012 City Council meeting. Vol. 17, JA003267 at ¶8. RDC and Castaway and their respective zones were selected before any public meetings were held regarding the Commercial Franchise Agreements. *Id.* at ¶9.

The City Council held several public meetings on the topic of single stream recycling in general, but held a total of three meetings in October and November of 2012 specifically regarding the Franchise and Disposal Agreements that RDC and Refuse were proposing. *Id.* at ¶10.

During the October and November public meetings regarding the Franchise and Disposal Agreements proposed by RDC and Refuse, it became clear that the

other local stakeholders were not previously aware of the contract negotiations between RDC, Refuse, Castaway and the City. *Id.* at ¶11. At the October 10, 2012 City Council meeting, then Vice Mayor, David Aiazzi, stated, "There's a group of people here who-who have been left out but to defend [City] staff a little bit, this is a Waste Management proposal not a proposal by the City of Reno, I think it's there- it was their job to go talk to everyone and bring them in."[1]

In Zadra's opinion, NRS's facility and operations and RR were just as qualified for a Franchise zone either individually or collectively, as RDC and Castaway, but because RDC and Castaway had already been accepted as franchisees before the other haulers and facilities even knew the franchises were being considered, no other stakeholders had the opportunity to be considered. Vol. 17, JA003268 at ¶16 and ¶17.

At no time prior to granting either RDC or Castaway a Franchised zone, did RDC or Castaway inform Councilwoman Zadra, or anyone else to her knowledge, that there was already an agreement to acquire Castaway in place. Vol. 17, JA003267, ¶12.

Had Councilwoman Zadra known of the secret, planned acquisition of

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[1]http://renocitynv.iqm2.com/Citizens/SplitView.aspx?Mode=Video&MeetingID=1011&MinutesID=1011&FileFormat=doc&Format=Minutes&MediaFileFormat=wmv#

Castaway sooner, she would not have voted in support of the Franchises that were approved and it's her belief that, had the other Council Members known about the secret purchase plans at the time, the City Council would have never approved the Franchise and Disposal Agreements as they were approved on November 7, 2012. *Id.* at ¶13. Then Councilman Aiazzi testified similarly at his Deposition, as follows:

> "Q: Do you feel that was a material fact that the city council, as you as a city councilperson would like to know if there were negotiations occurring between Castaway and Waste Management before this franchise agreement was put before you? . . .
>
> THE WITNESS: I don't know if this whole city council would have liked to know about it but I certainly would have liked to know about it.
>
> . . .
>
> Q: You mentioned that Waste Management – if Waste Management and Castaway had been negotiating with each other regarding the buyout of Castaway, you at least as a council member would have liked to have known. Why would you have liked to have known?
>
> A: Well, that's the whole purpose of the public process, to see what's going on. . .."

Vol. 8, JA001476:22-1477:24.

The City made it clear from the outset, it would not award RDC an exclusive monopoly for commercial waste or recycling for all of Reno, which is why the City explicitly entered multiple agreements (two franchised zones). Vol. 17, JA003267, ¶14.

While the current Commercial Franchise Agreements allow an assignment by a franchisee of the franchisee's rights under its Agreement to a permitted Transferee without the City's written consent, the entire premise and intent of the Agreements was to preclude one entity from having a monopoly or sole exclusive rights over the entire City of Reno. Vol. 17, JA003268 at ¶18.

The City of Reno never expressly pre-approved or agreed to any pre-arranged secret agreement to acquire Castaway prior to approval of the Franchise Agreements because the City did not know of the acquisition until after that time. *Id.* at ¶19.

From Councilwoman Zadra's perspective, RDC engaged in a fraud on the City because it knew of the City's explicit intent to have and maintain multiple providers in the Reno area and it intentionally developed a plan to circumvent the City of Reno's express wishes, while concealing their plan to create an exclusive monopoly. *Id.* at ¶21.

The anticompetitive motive and intent of the Waste Management Parties' conspiracy to create a monopoly are explicitly stated in the [redacted]

[redacted]

[redacted].

Vol. 11, JA002279 at Section 5.01.

IX.
SUMMARY OF ARGUMENT

In addressing summary judgment motions in antitrust cases, courts have traditionally proceeded with caution in granting such motions. *Poller v. Columbia Broadcasting System Inc.,* 368 U.S. 464, 473 (1962) ("summary judgment procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot"). Here, the District Court misapplied the applicable law in antitrust cases as well as the *Noerr-Pennington* immunity defense, which as set forth herein, is inapplicable in this case.

Summary judgment may not be used as a shortcut to resolving disputes upon facts material to the determination of the legal rights of the parties." *Parman v. Petricciani,* 70 Nev. 427, 436, 272 P.2d 492, 496 (1954). See also, *Mullis v. Nevada National Bank,* 98 Nev. 510, 654 P.2d 533 (1982). The Court must view the evidence in the light most favorable to the nonmoving party. *Pegasus v. Reno Newspapers, Inc.,* 118 Nev. 706, 713, 57 P.3d 82, 87 (2002).

While in this case, NRS and RR demonstrated clear credibility issues on the part of RDC and Refuse and their witnesses, even when a plaintiff has not presented any evidence discrediting the honesty of the defendant, summary judgment is still not proper because a plaintiff must have the opportunity to examine the declarants and witnesses at trial, "especially as to matters peculiarly within defendant's knowledge." *Short v. Hotel Riviera, Inc.,* 79 Nev. 94, 378 P.2d 979 (1963).

Furthermore, where evidence must be derived from the defendants and from their acts, conduct, speech, writings, and documents, the statements of the declarants should be explained at trial. *Id.* at 101. Where a defendant denies the plaintiff's allegations, it is for the trier of fact to determine the weight of the defendant's testimony. *Id.* at 102. In citing *Colby v. Klune,* 178 F.2d 872 (1949), *Short* noted:

> '[T]rial by affidavit,' [is] improper because there is involved an issue of fact, turning on credibility...the opportunity to examine and cross-examine witnesses in open court, has often been acclaimed as one of the persistent, distinctive, and most valuable features of the common-law system. For only in such a trial can the trier of the facts (trial judge or jury) observe the witnesses' demeanor; and that demeanor-absent, of course, when trial is by affidavit or deposition-is recognized as important clues to witness credibility. When...the ascertainment (as near as may be) of the facts of a case turns on credibility, a triable issue of fact exists, and the granting of a summary judgment is error Particularly where...the facts are peculiarly in the knowledge of defendants or their witnesses, should the plaintiff have the opportunity to impeach them at trial . . ..

Id. Furthermore, a court should not evaluate the credibility of a witness for the purposes of summary judgment, as a plaintiff has the right to a trial where there is the slightest doubt as to the facts. (Citations Omitted). *Id.* at 102-03.

With respect to antitrust actions, in *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962), the United States Supreme Court held:

> [S]ummary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury ....

Due to the conflicting evidence and Affidavits, as well as the countless genuine issues of material facts herein; summary disposition should be reversed.

X.
ARGUMENT

A. Standard of Review

This court reviews a district court's order granting summary judgment de novo, without deference to the district court's findings. *Wood v. Safeway, Inc.*, 121 Nev. 724, 121 P.3d 1026, 1029 (2005). De novo review of an order granting summary judgment is made "to determine whether the evidence properly before the district court demonstrate[s] that no genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of

law." *Torrealba v. Kesmetis,* 124 Nev. 95, 100, 178 P.3d 716, 720 (2008) (Citations Omitted).

B. The District Court erred by applying *Noerr Pennington* immunity to a private agreement between private parties who only used the petitioning process an incidental conduit to carrying out their anticompetitive conspiracy to create a monopoly.

In granting summary judgment, the District Court erroneously found:

> The Nevada Revised Statutes clearly contemplate the safe harbor described in the Noerr decision. NRS 598A.040(3)(b) says that the provisions of this chapter do not apply to conduct which is expressly authorized, regulated, or approved by an ordinance of any city or county of this state. ..... The Court finds that this contract, although it limits competition in the waste disposal industry, is a valid exercise of a proper government power and is specifically exempted from antitrust supervision and antitrust application. Further, the Defendants' conduct is exempt from liability because it involves a political and not business conduct under the Noerr Doctrine discussed above.

JA005292:17-28. NRS 598A.060(1)(e) provides, "Every activity enumerated in this section constitutes a contract, combination or conspiracy in restraint of trade **and it is *unlawful* to conduct any part of any such activity in this state**:... (e) monopolization of trade or commerce in this state, including, without limitation, **attempting to monopolize or otherwise combining or conspiring to monopolize** trade or commerce in this state." [Emphasis Added].

In late 2011 and early 2012, the Reno City Council decided they were not going to grant an Exclusive Franchise Agreement to any one entity. Vol. 17, JA003266 at ¶3; Vol. 7, JA001330:13-15, JA001334:5-6. Only after which, the Waste Management Parties entered into a secret private agreement with Castaway, conspiring with Castaway to monopolize the waste and recycling market. After entering into the private agreement with Castaway, RDC then went to the City and proposed two zones.

On [redacted], [redacted] emailed [redacted]

[redacted] explicitly stating in relevant part:

[redacted].

[Emphasis Added]. Vol. 13, JA002562-2563. The sole purpose of the private agreement in [redacted] was to exclude competitors as [redacted]

[redacted]. *Id.* This private agreement falls completely outside of any type of "petitioning activity" that may be protected by the *Noerr Pennington* Doctrine.

On [redacted], the parties exchanged [redacted]." Vol. 11, JA002308. This was a private agreement between the Waste Management Parties and Castaway whereby they agreed to seek two franchise zones, knowing that Castaway would never service a single day of its zone, in order to create an exclusive monopoly for RDC. There was no "petitioning activity" whatsoever involved at that time.

Actionable conspiracy consists of combination of two or more persons who, by some concerted action, intend to accomplish unlawful objective to harm another, and damage results therefrom. *Southerland v. Gross,* 105 Nev. 192, 772 P.2d 1287 (1989). As of [redacted], at the latest, in direct violation of the

NUTPA, the Waste Management Parties and Castaway began working together, agreed to combine and conspired to create a monopoly in violation of NRS 598A.060(1)(e). "... [W]here private parties take unlawful action merely hoping the government will later ratify it, government action is not an intervening cause, and *Noerr-Pennington* immunity does not arise." *Allied Tube & Conduit Corp. v. Indian Head*, 486 U.S. 492, 503-04 (1988); *In re Brand Name Prescript. Drugs Antitrust Litig.*, 186 F.3d 781, 789 (7th Cir. 1999).

After the Waste Management Parties and Castaway spent several months orchestrating their conspiracy, in mid-2012, RDC petitioned the City of Reno and proposed having two different zones and two different providers for commercial services- RDC and Castaway. Vol. 17, JA003266 at ¶4; Vol. 7, JA001330:20-21.

The District Court erroneously found the pre-petition activity of RDC and Castaway was afforded *Noerr* immunity. However, RDC's petitioning activity did not begin until July or August of 2012, while the conspiracy to monopolize the Reno market occurred several months prior, with a contract proposal and agreement to monopolize the entire market. Vol. 13, JA002562-2563; Vol. 11, JA002306-2309. The District Court also incorrectly held that, because the Franchise Agreements and coordinating Ordinances contained an assignment provision allowing the Franchisees to assign their respective franchise interests, that the City of Reno somehow ratified and approved RDC and Castaway's prior,

anticompetitive private agreement. Vol. 26, JA005291:14-21, JA005216:5-JA005221:13. Specifically, the District Court held,

> Looking to the United States Supreme Court in Eastern Railroad President's Conference v. Noerr Motor Freight, 365 U.S. 127, 135 (1961) (rehearing denied 365 U.S. 875), Justine Hugo Black stated: 'We accept as the starting point for our consideration of the case the same basic construction of the Sherman Antitrust Act adopted by the courts below that no violation of the act can be predicated upon mere attempts to influence the passage or enforcement of laws. It has been recognized at least since the landmark decision of this Court in Standard Oil Company of New Jersey v. United States, that the Sherman Act forbids only those trade restraints and monopolizations that are created or attempted by the acts of individuals or combination of individuals or corporations. Accordingly, it has been held that where a restraint upon trade or monopolization is the result of valid government action, as opposed to private action, no violation of the act can be made out.'
>
> Further in the Noerr decision, Justice Black states: 'we think it equally clear that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive', which in this case was the City of Reno 'to take particular action with respect to a law that would produce a restraint or a monopoly.' Id. at 136.

Vol. 26, JA005291:26-JA005292:16. However, the very next sentence in the *Noerr Motor Freight* case, which was not included in the District Court's Order, provides,

> Although such associations could perhaps, through a process of expansive construction, be brought within the general proscription of combination(s) *** in restraint of trade, they bear very little if any resemblance to the combinations normally held violative of the Sherman Act, **combinations ordinarily characterized by an express**

> **or implied agreement or understanding that the participants will jointly give up their trade freedom, or help one another to take away the trade freedom of others** through the use of such devices as price-fixing agreements, boycotts, market-division agreements, and other similar arrangements.

(Citations Omitted). The Waste Management Parties and Castaway entered into a private agreement whereby Castaway agreed to give up its trade freedom to help RDC take away the trade freedom of others. While the City of Reno is permitted to displace competition in certain circumstances, the City does not have the ability to approve or ratify a prior unlawful conspiracy agreement to secure a monopoly for RDC.

NRS 598A.040(3)(c) provides that the provisions of NRS 598A do not apply to "Conduct which is expressly authorized, regulated or approved by. . . An ordinance of any city or county of this State . . .." This provision does not grant the City the authority to ratify or as the District Court erroneously characterizes as "pre-approve" (Vol. 26, JA005291:18-19), a private business agreement between to private parties conspiring to create a monopoly, to the detriment of NRS and RR.

In any event, the City of Reno could not have pre-approved an agreement by way of permissible assignment language contained in the Franchise Agreements and coordinating ordinance that were passed on November 7, 2012, when several of the Reno City Council Members did not even know about the private agreement

between the Waste Management Parties and Castaway until after the Franchises were voted on and approved. See, Vol. 17, JA003267 at ¶12; Vol. 8, JA001476:22-JA001477:24.

Contrary to the District Court's finding that the Waste Management Parties and Castaway's private agreement and collusive scheme to create a monopoly is immunized by *Noerr*, the United States Supreme Court explicitly held that anticompetitive conduct, agreements and overall schemes by private parties is not immunized by *Noerr*, when it falls outside the petitioning process. If such conduct were immunized by the First Amendment, then competitors would be free to exact economic advantages from local governing bodies based solely on the premise that "they are genuinely intended to influence the government to agree to the conspirators' terms." *F.T.C. v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 425 (1990); *Allied Tube,* 486 U.S. at 492; *In re Brand Name Prescript. Drugs*, 186 F.3d at 789.

Noerr-Pennington, a First Amendment-based doctrine that protects private parties from liability under the Sherman Act in connection with efforts to petition the government, only extends so far as necessary to steer the Sherman Act clear of violating the First Amendment. *Freeman v. Lasky, Haas & Cohler*, 410 F.3d 1180 (9th Cir. 2005). *Noerr* cannot be used to shelter joint activity that creates a monopoly independent of any decision by a court or agency. *United Airlines, Inc.*

v. U.S. Bank N.A., 406 F.3d 918 (7th Cir. 2005).

The only activities protected under *Noerr* are those designed to secure favorable *government* action. There is no law supporting the proposition that *Noerr* protects the Waste Management Parties' private agreement and conspiracy with a direct competitor, Castaway, that "predated their protected petitioning activity, such that the [government petitioning] process was merely a vehicle to effectuate [the anticompetitive] scheme." *California Pharmacy Mgmt., LLC v. Zenith Ins. Co.*, 669 F. Supp. 2d 1152, 1168 (2009); Citing, *Allied Tube,* 486 U.S. at 506–07, ("[T]he mere fact that an anticompetitive activity is also intended to influence governmental action is not alone sufficient to render that activity immune from antitrust liability").

The Ninth Circuit has issued stern warnings to antitrust defendants like that of those herein, stating:

> An antitrust violation does not enjoy immunity simply because an element of that violation involves an action which itself is not illegal. In *Trucking Unlimited* the Court emphasized the existence of liability for antitrust violations, even though an integral part of the violation may involve otherwise legal and protected activity. The court stated:
>
> > . . . 'It is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute.'
>
> Similarly, we hold that when there is a conspiracy prohibited by the antitrust laws, and the otherwise legal [petitioning] is nothing but an

> act in furtherance of that conspiracy, general antitrust principles apply, notwithstanding the existence of Noerr immunity. In so holding we are acting consistently with the theoretical underpinnings of the Noerr doctrine. As we noted above, Noerr immunity is based on the first amendment right to petition and to seek to influence governmental action. **When, however, the petitioning activity is but a part of a larger overall scheme to restrain trade, there is no overall immunity**. . ..
>
> > **'First Amendment rights may not be used as the means or the pretext for achieving 'substantive evils'** ... which the legislature has power to control. Certainly the constitutionality of the antitrust laws is not open to debate.... If the end result is unlawful, it matters not that the means used in violation may be lawful.'

[Emphasis Added]; (Citations Omitted). *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau,* 690 F.2d 1240, 1263-64 (9th Cir. 1982). In *Clipper Exxpress*, the Ninth Circuit reversed the lower Court's dismissal holding *Noerr* did not immunize Defendants, "[e]ven if the protests to the ICC were legitimate, **if they were part of a larger antitrust conspiracy, the conspiracy is subject to the antitrust laws**." [Emphasis Added]. *Id.* The *Clipper Exxpress* Court explicitly recognized "the ***existence of liability for antitrust violations, even though an integral part of the violation may involve otherwise legal and protected activity***." [Emphasis Added]. *Id.*

Analogous to *Clipper Exxpress*, here NRS and RR are "not challenging merely the petitioning activity," but instead "challenge [the conspirators'] entire course of conduct," which, as alleged, violates the NUTPA as set forth in NRS

598A. *Id.* at 1265. As in *Clipper Exxpress*, the Waste Management Parties' "actions do not enjoy immunity, even though a part of the actions may have involved protected first amendment petitioning. The reach of the *Noerr-Pennington* doctrine is not that extensive, and the antitrust laws are not that impotent." *Id.*

Noerr antitrust immunity does not extend to matters occurring in an essentially private context. *Agritronics Corp. v. Nat'l Dairy Herd Ass'n*, 914 F.Supp. 814 (1996). The United States Supreme Court held in *Allied Tube*,

> We cannot agree with petitioner's absolutist position that the *Noerr* doctrine immunizes every concerted effort that is genuinely intended to influence governmental action. If all such conduct were immunized then, for example, competitors would be free to enter into horizontal price agreements as long as they wished to propose that price as an appropriate level for governmental ratemaking or price supports. ***Horizontal conspiracies*** or boycotts ***designed to exact*** higher prices ***or other economic advantages from the government would be immunized on the ground that they are genuinely intended to influence the government to agree to the conspirators' terms***. Firms could claim immunity for boycotts or horizontal output restrictions on the ground that they are intended to dramatize the plight of their industry and spur legislative action. **Immunity might even be claimed for anticompetitive mergers on the theory that they give the merging corporations added political clout.** . . . and we have never suggested that that kind of attempt to influence the government merits protection.

[Emphasis Added]; (Citations Omitted). *Allied Tube*, 486 U.S. at 503-04; See also, *F.T.C. v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 424-25 (1990).

"The policies of the Sherman Act should not be sacrificed simply because

defendants employ governmental processes to accomplish anti-competitive purposes. Otherwise, with governmental activities abounding about us, government could engineer many to antitrust havens." *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286, 1296-97 (5th Cir. 1971).

Noerr "**does not authorize anticompetitive *action* in advance of government's adopting the industry's anticompetitive proposal**." [Emphasis Added]. *In re Brand Name Prescription Drugs Antitrust Litig.*, 186 F.3d 781, 789 (7th Cir.1999). *Noerr* immunity applies when such action is the consequence of legislation or other governmental action, **not when it is the means for obtaining such action**," which is the exact case here. [Emphasis Added]. *Id.*

"The *Noerr* doctrine does not extend to horizontal boycotts designed to exact higher prices from the government **simply because they are genuinely intended to influence the government to agree to the conspirators' terms**. [Emphasis Added]. *F.T.C. v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 412 (1990).

C. The District Court erred by considering inadmissible evidence, relying on an absence of evidence, ruling on the weight and credibility of evidence, including but not limited to conflicting affidavits, and construing the foregoing in light favorable *only* to the *moving party*.

Public policy favors resolution of disputes on their merits rather than by default. *Yochum v. Davis,* 98 Nev. 484, 487 (1982); *Franklin v. Bartsas Realty,* 95

Nev. 559, 563 (1979). On summary judgment, all facts and inferences must be viewed in light most favorable to the nonmoving party, and the moving party has the burden to establish the nonexistence of any triable issue of fact. *Clipper Exxpress, v. Rocky Mountain Motor*, 690 F.2d 1240 (9th Cir. 1982). That did not happen in this case.

To withstand summary judgment, the nonmoving party cannot rely solely on general allegations and conclusions, but must present specific facts demonstrating the existence of a genuine factual issue supporting his claims. *Choy v. Ameristar Casinos, Inc.*, 127 Nev. Adv. Op. 78 (2011). The nonmoving party's statements must be accepted as true and the court may not pass on the credibility of affidavits. *Sawyer v. Sugarless*, 106 Nev. 265 (1990). That did not happen here.

To the contrary, here the District Court improperly ruled on the credibility of the facts and the weight of the evidence, and for that reason alone, reversal is warranted. *Parman v. Petricciani,* 70 Nev. 427, 436, 272 P.2d 492, 496 (1954). The following are examples of issues of material facts that the District Court impermissibly ruled in light most favorable to the *moving* party, disregarding long-standing precedent:

a. Example 1

The Waste Management Parties' Allegations: Relying on the Agreements and the Deposition Testimony WM's area manager, the Waste

Management Parties alleged, "The franchise agreements also conclusively demonstrate that it was the City who pursued the crafting of the new solid waste franchises for the City and that it was the City who selected those waste haulers that it deemed 'qualified' to be the recipient of a franchised area." Vol. 13, JA002627:1-5. Relying on Affidavits from former City Councilmen Dwight Dortch and Mayor Cashell, the Waste Management Parties further claimed, "It is also an undisputed fact, that the City only selected Reno Disposal and Castaway as qualified contractors to receive a franchise agreement." Vol. 13, JA002627:5-6.

NRS and RR' Conflicting Evidence Disputing the Allegations: When the City refused to grant RDC an exclusive monopoly, they conspired with Castaway, and approached the City proposing two different zones and two different providers for commercial services. Vol. 17, JA003266 at ¶4; Vol. 7, JA001330-1331. There were no City imposed qualifications to be considered for a Franchise, Disposal Agreement or Franchised zone; It was not the City of Reno who solicited bids for those who wanted to be considered for commercial waste and/or recycling services, it was RDC who proposed the zones to the City, with RDC having one zone and Castaway the other. *Id.* See also, Vol. 20, JA003862. Previous Counsel for the Waste Management Parties, also confirmed that the zone percentages and maps were provided to him by WM and he then provided them to

the City. Vol. 16, JA003096:23-JA003097:14. "[T]he City did not evaluate whether any other entity would have qualified." Vol. 17, JA003268 at ¶15. NRS' facility and operations and RR would have both been just as qualified for a franchise zone as RDC and Castaway. *Id.* at ¶16.

In opposition to the Declaration of Mayor Cashell relied upon by the movants, the credibility of which was called into question before the District Court as follows:

> [D]espite the statement set forth in the Declaration of Mayor Cashell..., stating, 'Prior to voting to approve the Commercial Franchise Agreements, I participated in three (3) public Reno City Council meetings at which the contents, terms and conditions of the Commercial Franchise Agreements were explained and discussed in detailed staff reports, in comprehensive presentations by City staff, by the Qualified waste haulers Castaway and Reno Disposal, as well as in extensive public testimony and comment;' and although the unsworn Declaration itself fails to comply with the provisions of NRS 53.045 . . .Cashell's statement does not appear to be factually accurate in that the minutes from two of the only three Reno City Council meetings where the specific proposed contents, terms and conditions of the Franchise Agreement(s) indicate that **contrary to Mayor Cashell's statement, he was in fact not in attendance at two of those three meetings**.

[Emphasis Added]. Vol. 17, JA003245 at FN1, JA003354, JA003402.

Holding: Despite the questionable credibility of some of the evidence relied upon by the movants as well as the rebutting Affidavit(s) provided by NRS and RR, the District Court's Order granting Summary Judgment includes the movants' argument that NRS and RR "lack standing to assert their claim,

because they were not qualified to service a franchise zone, that they never sought to be considered by the City of Reno to serve a franchise zone, and that the City of Reno determined they were not qualified waste haulers;" all of which was refuted with admissible evidence, either deposition testimony or an Affidavit under oath by a then Reno Councilmember, which was ignored. Vol. 26, JA005293:1-5.

Notably, while competing evidence has been submitted as to who qualified to service a franchise zone, the record is devoid of any set of qualifications. There were no qualifications, and the Waste Management Parties' premise that any company or person did not qualify is without any factual support. Based upon the information adduced, the District Court could not render summary judgment, because there were no qualifications; and, in any event, competing facts and evidence material to the issue of qualifications was placed before the Court. Nonetheless, the District Court adopted the Waste Management Parties' alleged proof of qualifications, or lack thereof, over those submitted in support of the non-moving parties' position, even though the District Court was precluded from doing so.

b. Example 2-

The Waste Management Parties' Allegations: "[NRS and RR's] contention that the City would not have entered into the Franchise Agreements

if the City was aware of the assignment is pure speculation." Vol. 13, JA002643:7-9.

NRS and RR' Conflicting Evidence Disputing the Allegations: Early in the process when single stream recycling was being discussed, the City Council made it clear it was not going to grant RDC an exclusive Franchise or any sort of exclusive rights to service all commercial customers in Reno. Vol. 17, JA003266 at ¶3; Vol. 7, JA001330:13-15, JA1334:5-6. Had the City known about the secret purchase agreement prior to when the Franchise was executed, the City of Reno would not have granted Castaway a zone because, having already been subsumed by Waste Management, it would have ceased operational existence, leaving only RDC and the City already refused to give RDC an exclusive monopoly. Vol. 17, JA003267 at ¶13.

Stated differently, if WM had simply written [redacted] check to purchase Castaway when they entered into their private agreement in early 2012, RDC would have been unable to circumvent the City's refusal to grant it an exclusive monopoly, and then competitors, NRS and RR, would have instead been able to be considered for a franchise.

Holding: The District Court erroneously favored the movants' holding, the "City of Reno expressly approved [WM's] acquisition of Castaway's franchise rights thereby establishing a single franchise situation." Vol. 26,

JA005291:20.

As such and at the very least, the District Court erred in disposing this matter by summary judgment as in its findings, the District Court appears to have relied on several material issues of disputed facts and erroneously finding thereon in favor of the movants.

In any event, there is ample evidence that establishes NRS and RR were in the same business and capable of seeking a franchise, but for the Waste Management Parties' unlawful acts. Nonetheless, the court weighed the evidence and decided that NRS and RR's failure to request a zone, even if made impossible to do so by the unlawful conduct, did not create a factual dispute for a jury. Contrary to the District Court's erroneous finding, the forgoing demonstrates that there are disputed material facts at issue in this case. While these facts are not material or appropriate for consideration with respect to damages, as set forth more fully herein, there is no doubt the District Court failed to view the evidence in light most favorable to the nonmoving party, thereby precluding summary judgment.

D. The District Court failed to apply the appropriate substantive law as required when evaluating damages under the Nevada Unfair Trade Practices Act, thereby committing reversible error.

a. <u>The Order Granting Summary Judgment is procedurally deficient.</u>

NRCP 56(c) states, "An order granting summary judgment shall set forth the

undisputed material facts and legal determinations on which the court granted summary judgment." These requirements were clearly overlooked in this case. Here, the Order contains only conclusory statements, failing to set forth any alleged undisputed material facts or legal determinations as required. With respect to damages, the District Court's Order states:

> In terms of damages, the Defendants argue that the Plaintiffs lack standing to assert their claim, because they were not qualified to service a franchise zone, that they never sought to be considered by the City of Reno to serve as a franchise zone, and that the City of Reno determined that they were not qualified waste haulers.
>
> The Court finds that pursuant to NRS 598A.040(3) the Plaintiffs have not sustained any injury and the Plaintiffs have not alleged an antitrust injury sufficient to confer standing to prove any claim under NRS 598A.060.

Vol. 26, JA005293:1-9. The District Court's Order is framed on what Defendants argued and failing to state the undisputed facts, making this appellate process difficult (if not impossible) and leaving both parties to guess at what the District Court actually found to be "undisputed facts."

b. <u>The District Court failed to properly apply the substantive law on damages for NUTPA Claims.</u>

The Court misapplied the substantive law on damages in NUTPA claims, which allows for proof of damages through both direct *and indirect evidence* that NRS and RR were excluded from participating in areas of the market due to

RDC's monopoly. Instead, the District Court erroneously applied some other unknown standard.

i. NRS and Rubbish Runners Have Standing

Antitrust standing generally refers to the requirement that an antitrust plaintiff demonstrates injury to his business or property by reason of anything forbidden in the antitrust laws, and the prudential pre-requisites associated with those requirements. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990). A determination of antitrust standing centers on the relationship between a given plaintiff's alleged harm, and the alleged wrongdoing by defendants. *Associated General Contractors of California, Inc. v California State Council of Carpenters*, 459 U.S. 519, 535 (1983). The United States Supreme Court identified a number of factors for determining whether a plaintiff who has alleged an injury under the antitrust laws has standing, including: (1) the nature of the plaintiffs' injury; (2) the directness of the injury; (3) the speculative nature of the harm; (4) the risk of duplicative recovery; and (5) the complexity in apportioning damages. *Id* at 538-545, 907-912.

Instead of evaluating standing from the point of damages, the District Court evaluated NRS and RR's ability to qualify for a franchise holding, (1) "...they were not qualified to service a franchise zone..." (2) "... they never sought to be considered by the City of Reno to serve as a franchise zone ....", and (3) "... the

City of Reno determined that they were not qualified waste haulers." These are improper elements to determine standing. See test for standing articulated in *Associated General Contractors of California, Inc.*, supra. The District Court Order failed to cite a single relevant element. Despite the fact that NRS and RR are direct competitors of RDC and Refuse, the District Court granted summary judgment, finding that NRS and RR could not have suffered damages because they lacked standing to assert their claims, both of which are inaccurate.

ii. The NUTPA claims use a relaxed standard of proof for damages.

The NUTPA was designed to prevent anticompetitive conduct similar to its federal counterpart(s), the Sherman and Clayton Antitrust Acts. NRS 598A.210(1)-(2); NRS 598A.050 ("The provisions of this chapter shall be construed in harmony with prevailing judicial interpretations of the federal antitrust statutes."); *Boulware v. Nev.*, 960 F.2d 793, 800 (9th Cir. 1992) ("The Nevada statute also adopts by reference the case law applicable to the federal antitrust laws."). Because provisions of the NUTPA must be construed in harmony with the judicial interpretations of the federal antitrust statutes, the well-settled federal law regarding causation and damages applies herein.

"The general proposition underlying [anti-competitive behavior cases] is that only a person whose **competitive business position** was harmed by the

anticompetitive effects of the alleged restraint of trade can maintain a treble damage action." [Emphasis Added]. *GAF Corp. v. Circle Floor Co.*, 463 F.2d 752, 758-59 (2d Cir. 1972). The issue of damages is determined by proof that the illegal conduct injured Plaintiffs competitive position, and nothing more.[2]

Thus, the Waste Management Parties' assertions that NRS and RR were not qualified for a franchise, did not bid on the franchise, and did not get a franchise (in addition to the inaccuracy of such contentions as set forth herein), are all irrelevant. The causal connection in a monopoly or restraint of trade case requires proof that "... the illegal restraint of trade injured [the plaintiffs] competitive position in the business in which he is or was engaged." *GAF Corp., supra*, 463 F.2d 752, 758. The causal connection between injury and damages in an unfair trade practice or monopoly case is the exclusionary effect of the illegal act which excludes a plaintiff's participation in the market, and does not require proof that plaintiff was qualified to get or would have gotten the business.

In *Zenith Radio Corp. v. Hazeltine Research, Inc*, 395 U.S. 100 (1969), the Court addressed the practical limits of proof for plaintiffs seeking recovery for injuries from partial or total exclusion from a market, stating:

---

2 This court has emphasized that, to recover, the plaintiff must allege and prove that the illegal restraint of trade injured his *competitive position* in the business in which he is or was engaged. *GAF Corp. v. Circle Floor Co.*, 463 F.2d 752, 758 (2d Cir. 1972), (Citations Omitted).

> Trial and appellate courts alike must also observe the practical limits of the burden of proof which may be demanded of a treble-damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a market; damage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts. The Court has repeatedly held that in the absence of more precise proof, the factfinder may 'conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs.' (Citations Omitted).

Id. at 123-24. As set forth in *Zenith,* even if NRS and RR had not disputed such claims with admissible evidence, they do not have the burden to prove they were qualified to obtain a franchise, that the City qualified them for a franchise, or that they would have gotten a franchise. Pursuant *to Zenith,* it is the Waste Management Parties' burden, as a matter of law, to prove that some other reason caused the Plaintiffs' damages, which may be a mitigation of damages argument, but not a bar to proving damages. So even assuming the District Court found mitigating factors, there is simply no rational way the District Court could conclude that no damages exist. The District Court should have concluded as a matter of just and reasonable inference from the Waste Management Parties' wrongful conduct and its tendency to injure NRS and RR's businesses, that these wrongful acts caused damages to NRS and RR.

These standards of proof on damages are consistent with NRS 598A.210(2),

which also allows for a reduced level of proof or connection between damages and injuries providing, "Any person **injured or damaged directly or indirectly** in his or her business or property by reason of a violation of the provisions of this chapter may institute a civil action and shall recover treble damages, together with reasonable attorney fees and costs." [Emphasis Added]. NRS 598A.210(2) is consistent with the complicated nature of proving damages set forth in *Zenith*. NRS 598A.210 recognized this difficulty with proving damages, and as such, legislatively mandated a lesser standard for damages by direct or indirect causes. *Id.*

While the District Court's Order does not address the elements of damages or standing, the Court clearly did not apply the proper test on damages or standing applicable to NUPTA claims.

In *Bigelow v. RKO Pictures, Inc.*, 327 US 251 (1946), the Petitioner sued a movie distributor for anti-trust violations, because the distributor set up a scheme to give first run movies to certain vendors and not to the Petitioner. The movie distributor claimed the damages were speculative because the movie theater owner could not prove conditions that would have existed, but for the conspiracy. The *Bigelow* Court recognized this spurious argument, and the court held that a fact finder can infer damages by proof of a defendant's wrongful act. "Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his

victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery." (Citations Omitted). *Id.* at 263-65.

Here, the Court failed to infer damages from the facts that tend to show that NRS and RR's losses were a result of the Waste Management Parties' conduct, which is the standard to use in determining whether damages exist in a NUPTA claim. The Court failed to consider the causal connection between injury and damages applicable in unfair trade practice cases, which is the exclusionary effect of the unlawful act(s) which excludes the plaintiffs' participation in the market, without regard to whether plaintiffs were qualified or would have gotten the business, mandating reversal. Because the Court used the wrong standard to determine damages, reversal is appropriate.

E. The District Court committed reversible error in failing to consider, rule on, or grant Appellants' request for relief pursuant to NRCP 56(f) and other pending discovery motions prior to ruling on the Motions for Summary Judgment.

NRCP 56(f) provides:

Should it appear from the affidavits of a party opposing the motion

> [for summary judgment] that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

A district court's refusal of an NRCP 56(f) continuance is reviewed for an abuse of discretion. *Francis v. Wynn Las Vegas, LLC*, 127 Nev. 657, 669, 262 P.3d 705, 713 (2011); *Aviation Ventures v. Joan Morris,* 121 Nev. 113, 118, 110 P.3d 59, 62 (2005).

NRCP 56(f) requires the movant to demonstrate how further discovery will lead to creation of a genuine issue of material fact, and must diligently pursue discovery. *Chance v. Pac–Tel Teletrac,* 242 F.3d 1151, 1161 (9th Cir.2001) (where movant was diligent conducting discovery, case was less than eight months old, and discovery had not started, the court abused its discretion not granting NRCP 56(f) motion).

Furthermore, the NRCP 56(f) affidavit concisely states the reasons for the requested continuance, the discovery contemplated, and the evidence to potentially be obtained. The timeline below clarifies both NRS and RR were diligent in pursuing discovery, and how the Waste Management Parties obstructed every step of the way.

April 15, 2016, NRS and RR filed a Motion to Amend to add Waste Management of Nevada, Inc. ("WM") as a Defendant. Vol. 11, JA002250.

May 2, 2016, RDC and Refuse filed their Opposition to Motion to Amend. Vol. 12, JA002358.

May 9, 2016, NRS and RR filed their Reply and Submitted the Motion to Amend for decision. Vol. 13, JA002544 and JA002613.

May 10, 2016, RDC and Refuse filed their Second Motion for Summary Judgment ("MSJ") re: Liability. *Id.* at JA002615.

May 11, 2016, RDC and Refuse filed a MSJ re: Damages. Vol. 14, JA002923.

May 25, 2016 NRS and RR opposed the MSJ re: Damages. Vol. 11, JA002341.

June 2, 2016, RDC and Refuse filed their Reply to MSJ re: Damages, and a Request for Submission. Vol. 18, JA003508.

June 7, 2016, the Court granted the Motion to Amend adding WM as a party and a Notice of Entry of Order was filed. *Id.* at JA003528, JA003531.

June 8, 2016, NRS and RR filed the Second Amended Complaint adding WM as a Defendant. *Id.* at JA003536.

June 10, 2016, NRS and RR filed their Opposition to RDC and Refuse's MSJ re: Liability. Vol. 19, JA003734.

June 16, 2016, RDC, Refuse and WM filed their Answer to Second

Amended Complaint and that same day, WM filed a Joinder in RDC and Refuse's MSJ re: Liability and Damages. Vol. 21, JA004113, JA004138, JA004141.

June 20, 2016, RDC and Refuse replied to MSJ re: Liability. *Id.* at JA004152.

June 30, 2016 NRS and RR opposed WM's Joinders. Vol. 23, JA004610.

July 7, 2016, WM filed its Reply to Joinder in RDC and Refuse's Second MSJ re: Liability and Damages. Vol. 23, JA004639, JA004696.

July 7, 2016, RDC and Refuse submitted their Second MSJ re: Liability and Damages for decision. Vol. 23, JA004633, JA004636.

July 14, 2016, the Waste Management Parties filed a Motion for Protective Order Precluding Further Discovery. *Id.* at JA004706. Notably, this Motion was filed regarding documents the Court previously Ordered Defendants produce. Nonetheless, Defendants refused to produce the same.

July 15, 2016, NRS and RR filed a Motion to Compel Production of Documents. Vol. 24, JA004761.

July 18, 2016, NRS and RR filed its Opposition to Motion for Protective Order Precluding Further Discovery.

July 20, 2016, the Waste Management Parties filed their Reply to

Motion for Protective Order Precluding Additional Discovery.

July 21, 2016, NRS and RR filed their Reply to Motion to Compel Production of Documents. Vol. 25, JA005052.

July 25, 2016, NRS and RR submitted the Motion to Compel Production of Documents for decision. Vol. 25, JA005086.

August 2, 2016, the Court granted the Waste Management Parties Motion to Preclude Further Discovery, staying the deposition of City Attorney Shipman, which was scheduled for August 8, 2016; and further stating, "Plaintiffs' Motion to Compel Production of Documents ... is under submission and this court will enter an order and fashion remedy." *Id.* at JA005145-5163, JA005164.

August 18, 2016, the Court heard oral arguments on RDC and Refuse's MSJ re: Liability and Damages, and granted both motions. Vol. 26, JA005177-5267.

During this time, NRS and RR sought 1500 pages of records related to the Waste Management Parties and Castaway, which Defendants refused to produce.

Prior to the August 18, 2016 Oral Arguments, the Court had not addressed or granted WM's Joinder in RDC and Refuse's Motions for Summary Judgment, nor were arguments heard regarding such Joinder at the August 18, 2016 oral

arguments. Even so, somehow, after the fact, the court applied the orders granting summary judgment in favor of RDC and Refuse, to WM as well. Vol. 26, JA005397-5398.

When WM filed its Joinders in the Motions for Summary Judgment already filed by RDC and Refuse, WM had only been a party to the action for eight (8) days. Vol. 21, JA004113, JA004138, JA004141. As such, supporting NRS and RR's opposition to WM's Joinders, NRS and RR's requested an opportunity to do discovery pursuant to NRCP 56(f). Vol. 23, JA004622-4623. However, at the time of the oral arguments on the summary judgment motions, the Court had not considered or ruled on the Joinders or NRS and RR's NRCP 56(f) requests. Vol. 26, JA005397-5399.

In addition, the Court did not rule on NRS and RR's Motion to Compel Production of Documents in advance of oral arguments on the summary judgment motions. At the time of the oral arguments, WM had only been a party in the action for less than sixty (60) days prior to the District Court's granting the Waste Management Parties' Motion to Stay Discovery, leaving NRS and RR absolutely no opportunity to conduct discovery with respect to the allegations against WM set forth in the Second Amended Complaint. Vol. 18, JA003536; Vol. 26, JA005165-5167.

The NRCP 56(f) Affidavit attached to NRS and RR's Opposition to Joinders

provides that written discovery and/or depositions of a person most knowledgeable as to the corporate formalities governing the joint practices of WM and RDC, the exchange and transfer of monies and assets between the two entities, the utilization of the same dba or trade name and other matters specifically related to the claims set forth in the Second Amended Complaint, would likely be obtained through such discovery.

NRS and RR's NRCP 56(f) request for additional time was properly supported, and there is no evidence that either was dilatory in conducting discovery. Vol. 23, JA004622-4623. WM was not a party to the summary judgment motions argued and decided on August 18, 2016. Vol. 26, JA005177-5267. The Court abused its discretion by not ruling on the Joinders or the NRCP 56(f) request for time to perform discovery before the summary judgment motions were heard and only later arbitrarily ordering that WM be included in its order granting summary judgment. *Id.* at JA005397-5399.

Equally perplexing is the fact that [redacted]; however, WM did not petition for and was not granted a franchise by the Reno City Council, only RDC and Castaway. Vol. 13, JA002673; Vol. 14, JA002741; Vol. 20, JA003969. In addition to its failure to allow any discovery as to WM, the District Court had no basis to include WM in its order granting summary judgment, because its order is essentially based on

assignment provisions in the Franchise Agreements and *Noerr*, but WM did not engage in any "petitioning" activity nor were they granted a Franchise which provided for acceptable assignments. As such, the District Court abused its discretion and erred by including WM in its Order Granting Summary Judgment.

XI.
CONCLUSION

Notwithstanding the existence of *Noerr* immunity, when there is a conspiracy prohibited by the antitrust laws like the private agreement and scheme to create a monopoly, and the otherwise lawful petitioning activity is nothing more than an act in furtherance of that conspiracy, general antitrust principles apply, mandating reversal.

Granting Summary Judgment while there are contested and disputed facts fundamentally flaws the underlying District Court's Order because the Court exceeded its authority. Where facts are properly supported and contested, a jury, not a court is authorized to make factual determinations.

In making determinations on liability, standing and damages, the Court erred in misapplying the NUPTA substantive law. As a result, the Court's analysis was devoid of a proper legal assessment of the elements and facts that determine NUTPA liability, standing or damages. As such, the Court granted summary judgment on elements and facts that were not "material" to the determination of

liability, standing or damages.

Finally, the Court never ruled on NRS and RR's NRCP 56(f) request prior to the Summary Judgment hearing. The NRCP 56(f) request was properly supported, and there has been no dilatory discovery. In fact, at the time of the summary judgment hearing, pending before the Court were discovery motions, where the Waste Management Parties withheld hundreds of documents, and NRS and RR motioned the Court to compel disclosure. Without addressing the NRCP 56(f) request and knowing significant discovery disputes were pending, the Court deprived NRS and RR the opportunity to obtain discovery, directly related to the issues on summary judgment.

Based upon the foregoing, the Court erred in granting the Waste Management Parties' Motions for Summary Judgment. Justice and long-standing precedent mandates that genuine, disputed and material fact issues herein must be resolved by the jury. Accordingly, NRS and RR respectfully request that this Court reverse the Court's orders disposing of this case, remanding the matter for further proceedings.

Dated this ___ day of June, 2017.

STEPHANIE RICE, ESQ. (SBN 11627)
DEL HARDY, ESQ. (SBN 1172)
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Attorney for Appellants

XII.
ATTORNEY'S CERTIFICATE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, size 14 font; or

[ ] This brief has been prepared in a monospaced typeface using *[state name and version of word processing program] with [state number of characters per inch and name of type style].*

2. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRCP 32(a)(7)(C), it is either:

[X] Proportionately spaced, has a typeface of 14 points or more and contains 12,125 total words; or,

[ ] Monospaced, has 10.5 or fewer characters per inch, and contains ___ words or ___ lines of text; or

[ ] Does not exceed ___ pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for

any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 22nd day of June, 2017.

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XIII.
PROOF OF SERVICE

I hereby certify pursuant to NRAP 25(c), that on the 22 day of June, 2017, I caused service of a true and correct copy of the above and foregoing **JOINT APPELLANTS' OPENING BRIEF- REDACTED** on all parties to this action by the method(s) indicated below:

X by using the Supreme Court Electronic Filing System:

Mark Simons, Esq.
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