**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.: 71467

District Ct. Case No.: CV15-00497

# APPELLANTS' JOINT REPLY BRIEF

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

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## 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, Simons, Sharp & Brust**

(**formerly 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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This case arises from Respondents' anticompetitive scheme with Castaway, whereby, Respondents and Castaway colluded to combine and effectuate a secret acquisition, the explicit purpose of which was to create a monopoly and unlawfully exclude Appellant-competitors from the market. Respondents have utilized this anticompetitive scheme to foreclose competition, unlawfully gain a monopolistic advantage, and destroy Appellant-competitors, in violation of Nevada's Unfair Trade Practice Act. ("NUTPA").

Addressing the genuine factual disputes rampantly present in this case, all factual allegations repeatedly raised in Respondents' Answering Brief ("AB") will be addressed one time only and should be considered a full and complete opposition to all mentions of each respective allegation made by Respondents-Reno Disposal Company ("RDC"), Refuse, Inc. ("Refuse") and Waste Management of Nevada, Inc. ("WMON").[1]

### A. Respondents Misrepresent that RDC and Castaway Were Found to be the Only "Qualified Haulers."

While the Franchise Agreements provide that, "Prior to the Effective Date, City requested collective advice of certain commercial solid waste haulers meeting

[1] See, *Edwards v. Emperor's Garden Rest.*, 130 P.3d 1280, 1288 (2006) (FN 38)(This Court need not address or consider arguments ***not cogently argued or supported by authority***.) [Emphasis].

the Contractor Qualifications and then providing solid waste and related hauling services concerning recommended boundaries for the Exclusive Service Areas" (13 JA002685), the City never established any such qualifications. AB, 4:22-28, 5:1-7.

While Respondents' rely upon Declarations of former City Councilmen Dwight Dortch and Mayor Cashell for the proposition that Appellants were not qualified to be Franchisees (AB, 5:14-18), Ms. Zadra's Affidavit as well as other evidence offered by Appellants directly disputes all such representations. 20 JA003737; 17 JA003247.

In her Affidavit, Councilwoman Zadra declares under penalty of perjury and with personal knowledge that, "Nevada Recycling and Salvage's facility and operations and Rubbish Runners would have both been just as qualified for a franchise zone either individually or collectively, as Waste Management and Castaway." 20 JA003771, ¶17.

In addition to Zadra's testimony directly stating, "**there were no City imposed qualifications for haulers or facilities in order to be considered for the Franchise or Disposal Agreements or the Franchised zones**" (20 JA003769, ¶5); at the October 10, 2012 City Council meeting, then Vice Mayor Aiazzi, stated, "There's a group of people here who-who have been left out but to defend 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**." [Emphasis]. 18 JA003416.[2]

In line with these statements, Councilman Aiazzi further testified as follows:

> Q: -- do you have any knowledge of what the process was that was implemented by the city with regards to selection of the qualified contractors to have exclusive service areas?
>
> A (Aiazzi): **I couldn't tell you whether there was a formal process or not**.
>
> . . .
>
> Q: ... I think you said the second part was once that was implemented, the process by the city, it was then brought to the city council to vote on.
>
> A (Aiazzi): I'm saying that's a possibility. **I don't know if there was a process established before**.
>
> . . .
>
> Q: Are you aware of any other service provider that qualified for an exclusive service area in the city of Reno?
>
> A (Aiazzi): Since I don't recall the zones, I just know that there were other haulers. I don't know whether they were given zones or not right now.
>
> . . .
>
> Q: We're looking at those contractor qualifications for an assignee and you mentioned that being in existence for five years. Do you remember that being one of the

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2 http://renocitynv.iqm2.com/Citizens/SplitView.aspx?Mode=Video&MeetingID=1011&MinutesID=1011&FileFormat=doc&Format=Minutes&MediaFileFormat=wmv, 3:19:40.

parameters required to be an original contractor under a franchise agreement?

A (Aiazzi): No.

[Emphasis]. 20 JA003878, 49:11-16, 19-24; 20 JA003878, 51:3-14; 20 JA003880, 58:12-18. With no criteria, it is disingenuous and factually incorrect to argue that RDC and Castaway were "found to be" the only "qualified haulers."

Not only were there no identifiable qualifications to be eligible for a Franchisee, Respondents' effectively blocked Appellants' access to the process and instead, conspired with Castaway to carry out their anticompetitive scheme privately between themselves long before any actual "petitioning activity" commenced. 18 JA003416.

**B. Respondents Misrepresent that Appellants and Other Members of the City Knew that Respondents were Acquiring Castaway.**

The representation that Appellants "knew and informed the City that Respondents had either acquired or was in the process of acquiring Castaway well before the City moved forward with entering into the Franchise Agreements" and that NRS testified that it informed the City Attorney about the pending acquisition prior to the City's approval of the Franchises, are inaccurate grossly taken out of context. AB, 6:15-7:12. While Respondents cite to a few select lines of NRS' Deposition to support their representations, the following portions, conveniently omitted by Respondents, clearly refute such claims:

Q: … if you've heard and been told that an acquisition of Castaway had occurred in September 2012, why aren't you bringing it up to the City and saying, "Hey, this is what we've already heard"?

A: I didn't handle that part of it, but I think it went on deaf ears. Mr. Shipman could care less.

. . .

Q: Okay. What are you saying to Mr. Duque? Are you saying, "Steve" [Castaway] -- I'm sure you talked to him on a first-name basis.

A: Yes.

Q: Steve, I've heard Waste Management is buying you. What's going on with that?"

A: And, of course, his answer would be "Of course not."

Q: Did you ask him that?

A: Yes.

Q: And what did he say to you?

A: "No." And I believe Spike Duque was asked the same question, and his answer was the same.

Q: You asked the same question of Spike, and his answer was "No"?

A: Correct.

20 JA003798, 71:5-10; 20 JA003807, 105:14-106:4. There was testimony that buy-out rumors were swirling, but when an attempt was made to confirm such rumors by asking Castaway directly, the response was unequivocally "no." *Id.*

Respondents also fail to address the evidence substantiating that multiple then Members of the City Council provided testimony that **they did not know** of Respondents secret plan to acquire Castaway until **after** the Franchises were executed. Councilman Aiazzi testified 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? . . .
>
> A (Aiazzi): 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**.

[Emphasis]. 8 JA001476.

Councilwoman Zadra presented similar testimony that, at no time prior to granting either RDC or Castaway a Franchise, did RDC or Castaway inform her, or anyone else to her knowledge, that there was already an agreement to acquire Castaway in place. 17 JA003267, ¶12.

Had Zadra known of the secret, planned acquisition at that time, she would not have voted in support of the Franchises and had the other Council Members known about the secret purchase plans at the time, the City Council would have never approved the Franchises as they were approved on November 7, 2012. 17 JA003267.

Accordingly, Respondents' allegations that Appellants and other members of the City knew about Respondents' secret plans prior to execution of the Franchise, is inaccurate and a clear genuine issue of disputed fact.

**C. The Fact That the Franchise Provided for Transfer to a Permitted Transferee is of No Effect Herein.**

The Franchises were approved in November 2012, but the illegal conspiracy occurred in early 2012- well in advance of RDC's alleged petitioning activity. 20 JA004035. Respondents incorrectly maintain that subsequent approval of the Franchises in November 2012, which included a permissible assignment provision, somehow validates the illegal conspiracy created and participated in by Respondents in early 2012. AB, 8:1-26. However, a pre-petition conspiracy to create a monopoly, in violation of NRS 598A.060(1)(e), is not protected by the *Noerr* doctrine.

**1. <u>The City can displace competition in certain circumstances, but the City cannot ratify a prior unlawful agreement.</u>**

That the *Noerr* doctrine might immunize defendants from liability for petitioning the government to impose market restraints does not prevent the District Court from considering whether such petitions make the alleged anticompetitive agreement plausible; **<u>the underlying private agreement is not</u>**

**immunized by the doctrine**. [Emphasis]. *SigmaPharm, Inc. v. Mut. Pharm. Co.*, 772 F. Supp. 2d 660 (3d Cir. 2011).

NRS 268.081(3) provides, "The governing body of an incorporated city may, ***to provide adequate, economical and efficient services to the inhabitants of the city and to promote the general welfare of those inhabitants,*** displace or limit competition" in the area of "Collection and disposal of garbage and other waste." [Emphasis]. However, what these provisions don't do is grant the City the authority to somehow ratify or, as Respondents' allege, pre-approve or post-approve, private business agreements or an overall anticompetitive scheme between two private entities who deliberately conspired to put Appellant-competitors out of business and monopolize the market. See, *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).

Contrary to Respondents' argument that their collusive scheme 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. *F.T.C. v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 425 (1990). If such conduct were immunized, 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." *Id.*

Accordingly, while the City does have the authority to enter franchises, they do not have the authority to ratify private anticompetitive pre-petitioning, private agreements and plans to combine to create a monopoly, in order to insulate the private conspirators from liability.

**2. <u>Illegal pre-petition activity cannot be converted to protected speech by simply seeking government approval</u>.**

*Noerr* immunity is rooted in the First Amendment right to Free Speech, but immunity, like the First Amendment right to free speech, is not limitless. "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." *Schenck v. United States*, 249 U.S. 47, 52 (1919). Likewise, *Noerr* immunity does not apply when such activity falls outside a legitimate petitioning process. In *In re Lipitor Antitrust Litig.,* 868 F.3d 231 (3d Cir. 2017), several drug companies were involved in patent litigation, and agreed to settle. The court subsequently issued a consent decree with the terms of the settlement. Similar to the facts in this case, the *Lipitor* Defendants argued that, "…because they submitted the proposed settlement agreement to the District Court for confirmation, *Noerr-Pennington* immunity inoculates the settlement agreement from antitrust scrutiny." *Id.* at 264. Notwithstanding, the court opined:

> "[t]he scope of *Noerr-Pennington* immunity ... depends on the 'source, context, and nature of the competitive restraint at issue.'" ... "[i]f the restraint directly results from private action there is no immunity." ***That is, immunity will not categorically apply to private actions somehow involving government action.*** **"Passive government approval is insufficient. Private parties cannot immunize an anticompetitive agreement merely by subsequently requesting legislative approval."** A distinction therefore exists between merely urging the government to restrain trade and asking the government to adopt or enforce a private agreement. **Government advocacy is protected by *Noerr-Pennington* immunity; seeking governmental approval of a private agreement is not**.

(Citations Omitted). [Emphasis]. *Id.* In early 2012, Respondents and Castaway entered into a secret agreement to combine and create a monopoly in violation of NRS 598A.060(1)(e). 20 JA004035. Upon their agreement and participation therewith, the conspiracy to create a monopoly was born.

Actionable conspiracy consists of combination of two or more persons who, by some concerted action, intend to accomplish an unlawful objective to harm another, and damage results therefrom. *Southerland v. Gross,* 105 Nev. 192, 772 P.2d 1287 (1989). "Summary judgment is appropriate in an action for civil conspiracy **if there is no evidence of an agreement or intent to harm the plaintiff**." [Emphasis]. *Guilfoyle v. Olde Monmouth Stock Transfer Co.*, 130 Nev. Adv. Op. 78, 335 P.3d 190 (2014). That is not the case here. The sole purpose of the private agreement here was to exclude competitors as Respondent's Vice President of Business Development, said just that in his April 25, 2012 email to

Castaway. 13 JA002562-2563. This private agreement falls outside of any type of "petitioning activity" that may be protected by *Noerr*.

In early 2012, Respondents and Castaway created a living, breathing unlawful conspiracy to monopolize the local waste industry. Thereafter, RDC and Castaway attempted to inoculate their illegal conspiracy through City approval, but the City was no cure, because there was no pre-petitioning activity that could transmute an unlawful conspiracy into a lawful one. Just as the *Lipitor* Court concluded, "...[D]efendants argue that the effect of the settlement agreement at issue "was dependent entirely on the action of the court" and is therefore protected.... **We are not persuaded**"; the District Court errored by holding that such unlawful private agreements can be immunized by simply seeking the approval of the City. [Emphasis]. *Id.* at 264.

"Those differences fail to convert the otherwise passive government approval of a private settlement agreement into a protected government action" and do not qualify for *Noerr* immunity or protection. *Id.* at 266. RDC cannot transmute an illegal conspiracy to legitimate petitioning activity.

**D. The District Court Erred in Finding Respondents Immune from Antitrust Liability.**

The District Court erred in finding that Respondents are immune from liability under (1) NRS 598A.040(3) and (2) the *Eastern Railroad Presidents*

*Conference v Noerr Motor Freight, Inc.* 365 U.S. 127 (1961), because both are based on petitioning activity, not pre-petitioning activity.

**1. Respondents are not immune from NRS 598A.040(3) liability.**

While franchise agreements are exempt from anti-trust liability under NUTPA, this "safe harbor" only applies to "[conduct which is expressly authorized, regulated or approved by . . . [a] statute of this State or the United States[.]" NRS 598A.040(3). Here, the conspiracy to create a monopoly was born in early 2012. 20 JA004035. Thus, NRS 598A.040(3) does not provide a "safe harbor" as the Franchise on which Respondents rely did not exist at that time. As clearly articulated in *Lipitor, supra* at 264, a party may be immune from liability for antitrust injuries when the claim arises from petitioning the government. On the other hand, where the restraint results from private action or conduct, there is no immunity. *Id.* Governmental approval of an otherwise illegal activity does not and cannot immunize the activity from prosecution, because *Noerr* immunity does not apply. *Id.* Respondents' conspiracy to create a monopoly pre-dated the Franchise and any petitioning activity, as such, there is anti-trust liability as a matter of law.

**2. *Parker* Immunity is inapplicable and not before this Court.**

Respondents make various arguments which appear to be an attempt to assert *Parker* immunity, a type of governmental immunity arising out of state action. Respondents assert "Exclusive Franchises For Collection of Waste

Materials Are Constitutional" (AB, 17:7-8); and, "The Legislature Granted the City Authority to Award an Exclusive Franchise for the Collection of Waste." AB, 18:23-24.

Appellants do not contest these contentions. However, Respondents never raised *Parker* immunity in the District Court and, as such, are precluded from raising it for the first time herein.[3]

*Parker* immunity does not immunize private entities, only the government. "An entity may not invoke *Parker* immunity unless the actions in question are an exercise of the State's sovereign power." *Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 374 (1991).

While the Sherman Act does not apply to state or local government action, *Parker* immunity does not extend to Respondents, as they are not a government actor.

### 3. Respondents are not immune under *Noerr*.

Respondents offer no evidence of petitioning activity at the time they engaged in collusive behavior. *Noerr* immunity applies to petitioning activity, **not** to activity between two private entities outside and long before the petitioning process.

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[3] *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.").

*Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961), involved long-distance trucking companies and others against 24 major railroads and others for violation of the Sherman Anti-Trust Act. The railroads conspired and conducted a publicity campaign against the trucking industry.

> . . . [T]he campaign was conducted in furtherance of their rights 'to inform the public and the legislatures of the several states of the truth with regard to the enormous damage done to the roads by the operators of heavy and especially of overweight trucks, with regard to their repeated and deliberate violations of the law limiting the weight and speed of big trucks, with regard to their failure to pay their fair share of the cost of constructing, maintaining and repairing the roads, and with regard to the driving hazards they create * * *.' Such a campaign, the defendants maintained, did not constitute a violation of the Sherman Act, presumably because that Act could not properly be interpreted to apply either to restraints of trade or monopolizations that result from the passage or enforcement of laws or to efforts of individuals to bring about the passage or enforcement of laws.

*Id.* at 131–32. *Noerr* further emphasized that the Sherman Act's purpose was to regulate business activity, not political activity, and the railroads' campaign was directed to influence legislatures. *Id.* at 529. The *Noerr* Court also stated "... that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or monopoly." *Id.* at 136.

In early 2012, there was no petitioning activity when RDC and Castaway agreed to create a monopoly. 20 JA004035. Months later, RDC and Castaway did engage in petitioning activity, but the addition of some petitioning activity, after the monopoly was created, does not change the illegal nature of the initial private business activity into protected petitioning activity.

In *Noerr*, "the Court rejected an attempt to base a Sherman Act conspiracy on evidence consisting entirely of activities of competitors seeking to influence public officials." *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 669, 85 S. Ct. 1585, 1593, 14 L. Ed. 2d 626 (1965). The conspiracy did not violate the Sherman Act because the acts were directed to influencing public officials. That is not the case here. When RDC and Castaway engaged in their conspiracy to create a monopoly, there was no petitioning, it was simply a private business agreement.

In *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 366 (1991), Columbia Outdoor Advertising ("COA"), an advertising company, which owned 95% of billboards *petitioned* the City to eliminate further billboard construction, which adversely affected competitors. The purpose of the Sherman Act condemns trade restraints, not political activity. *Omni* held COA was immune from liability for activities relating to enactment of the ordinances, and remanded the case to determine whether COA engaged in private anticompetitive action

verses petitioning action. *Id.* The critical link to immunity is whether there was petitioning activity at the time of the conspiracy.

"[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." *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 506–07 (1988).

**E. The District Court Abused Its Discretion in Not Considering Evidence and Deciding Factual Questions with Competing Evidence**

It was an abuse of discretion to grant summary judgment on the evidence, because the District Court did not evaluate the evidence and its inference in the light most favorable to the non-moving party as required when considering summary judgment.

The court may not in granting summary judgment pass upon the credibility or weight of the opposing affidavits or evidence. That function is reserved for trial. On a summary judgment motion the court is obligated to accept as true all evidence favorable to the party against whom the motion is made. *Hidden Wells Ranch, Inc. v. Strip Realty, Inc.*, 83 Nev. 143, 425 P.2d 599 (1967).

This Court has held, "In evaluating the propriety of a summary judgment, all evidence favorable to the party against whom summary judgment was rendered

will be accepted as true." *Drummond v. Mid-West Growers,* 91 Nev. 698, 704, 542 P.2d 198 (1975).

In *Price v. Blaine Kern Artista, Inc.,* 111 Nev. 515, 893 P.2d 367 (1995) this Court held: Summary judgment is appropriate only when a review of the record in light most favorable to the nonmoving party reveals no genuine issues of material fact and judgment is warranted as a matter of law. In determining whether summary judgment is proper, the nonmoving party is entitled to have the evidence and all inferences reasonably drawn therefrom accepted as true. *Wiltsie v. Baby Grand Corp.,* 105 Nev. 291, 292, 774 P.2d 432, 433 (1989).

Accordingly, a district court may not grant summary judgment if a reasonable jury could return a verdict in favor of the non-moving party. *Oehler v. Humana, Inc.,* 105 Nev. 348, 350, 775 P.2d 1281, 1282 (1989).

Respondents maintain the Zadra Affidavit is somehow inadmissible- yet, at the same time urge the Court to consider and rely upon Affidavits from two other former City Council Members to support their claims. AB, 5:14-18. Respondents incorrectly paint Zadra's statements as conclusory and argue they cannot be considered. AB, 30-34. However, a close analysis of the Affidavit points to factual statements, **not** conclusory summaries. As to qualifications of contractors, the Zadra affidavit states there were no City imposed qualifications to be considered for a Franchise. 20 JA003769, ¶5. This is a pure statement of fact, not opinion. The

Franchise Agreements indicate an intent to institute qualifications, but that is not evidence that qualifications were actually instituted. Simply put, neither litigant found any evidence of City qualifications to be considered for a Franchise, yet the District Court's Order granting Summary Judgment found Appellants "lack standing to assert their claim, because they were not qualified to service a franchise zone...." 26 JA005293:1-3.

Essentially, the District Court held that Appellants were not qualified to obtain a franchise, when there was no evidence of any qualifications. Finding in favor of Respondents on Summary Judgment by relying upon Respondents' argument that Appellants were not qualified and thus lack standing, without a single shred of evidence or example of how or why Appellants were not qualified, contradicts decades of legal precedent herein. See, *Cuzze v. Univ. & Cmty. Coll. Sys. of Nevada*, 123 Nev. 598, 172 P.3d 131 (2007) holding, ("The party moving for summary judgment bears the initial burden of production to show the absence of a genuine issue of material fact; if such a showing is made, then the party opposing summary judgment assumes a burden of production to show the existence of a genuine issue of material fact.").

Respondents also attack the fact that, had Zadra been aware of the private RDC and Castaway agreement, she would not have approved the Franchise. AB, 31:25-32:2. This may appear to be an opinion, but Zadra was a voting member of

the City Council at the time and did in fact vote in favor of the franchise *because* it was being broken up into two zones. 17 JA003402; 17 JA003267-JA003268 at ¶14, ¶15. The reason for voting in favor of the Franchise is equal evidence of why she would reject the same. Zadra's decision was not arbitrarily made, it was made on the basis of there being two zones, and the absence of two zones would have caused her to reject the franchise. *Id.*

Respondents incorrectly argue the Franchise Agreement is unambiguous, and therefore, no evidence can properly be admitted contradicting its terms. AB, 32:21-25. Respondents also argue Zadra's affidavit was properly excluded because of the Parol Evidence Rule. AB, 33:4-5. Just because the Franchise states there will be contractor "qualifications," does not mean that the City actually instituted qualifications. Particularly because there is no evidence or identification of any qualification let alone one Appellants did not meet- not one single qualification. Challenging whether something that should have been done under the franchise and whether it actually occurred, are not properly excluded on the basis of parole evidence or because the franchise was unambiguous.

"Extrinsic or parol evidence is not admissible ***to contradict or vary the terms of an unambiguous written instrument***..." [Emphasis]. (Citations Omitted). *Frei ex rel. Litem v. Goodsell*, 129 Nev. Adv. Op. 43, 305 P.3d 70, 73 (2013). Appellants are not attempting to contradict or vary the terms of any agreement. To

the contrary, Appellants herein have shown that by orchestrating their secret acquisition deal and concealing their private, anticompetitive scheme, all such conduct was engaged in by Respondents to carry out their anticompetitive conspiracy to create a monopoly and force Appellant-competitors out of the market- not to somehow vary the terms of the Agreements.

The Parol Evidence Rule **may not operate to exclude evidence of fraud in the inducement of contract**, even where the court finds an integrated agreement. [Emphasis]. *Havas v. Haupt,* 94 Nev. 591, 583 P.2d 1094, 1095 (1978).

In determining the motives and intent of the parties in an antitrust case, the court may properly consider extrinsic evidence including underlying contractual agreements, as the Parol Evidence Rule does not bar consideration of external evidence in such instances. See, Restatement (Second) of Torts § 885 (1979). As such, Respondents' Parol Evidence Rule arguments fail as a matter of law.

**F. Respondents Failed to Adequately Oppose Appellants Discovery/ NRCP 56(f) Issues, Warranting a Finding in Favor of Appellants.**

NRCP Rule 56(f) takes into consideration situations in which the non-moving party may reasonably need more time to develop discovery to a point to make it clear that genuine issues of material fact exist so as to defeat a motion for summary judgment. Failure of an opposing party to oppose an issue may be

construed as "... an admission that the motion is meritorious and a consent to granting the same." *Walls v. Brewster*, 112 Nev. 175, 178 (1996).

Respondents herein filed a 43 page Answering Brief, very briefly responding to Appellants NRCP 56(f) arguments as to alter ego liability of WMON, but failing to respond to or even acknowledge the direct liability of WMON or Appellants discovery issues regarding RDC and Refuse, which constitutes an admission that the appeal as to those specific matters, are meritorious and Respondents' consent to this Court granting (reversing) the same. *Id.*

The District Court did not rule on Appellants' Motion to Compel Production of Documents in advance of oral arguments on the summary judgment motions. WMON had been a party in the action for less than sixty (60) days prior to the District Court's granting Respondents' Motion to Stay Discovery, leaving Appellants absolutely no opportunity to conduct discovery with respect to the allegations against WMON set forth in the Second Amended Complaint. 18 JA003536; 26 JA005165-5167.

As set forth in Appellants' Second Amended Complaint, Appellants asserted claims against all Respondents herein, including WMON. See, 18 JA003557, ("Based on the foregoing, WM has engaged in unfair trade practices in violation of the law").

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

WMON is the actual party who signed the purchase agreement with Castaway; however, WMON did not petition for and was not granted a franchise by the Reno City Council, only RDC and Castaway. 13 JA002673; 14 JA002741; 20 JA003969.

Appellants' Unfair Trade Practices/Conspiracy to Restrain Trade claims were dismissed by the court, based on *Noerr* immunity. The District Court held that NRS 598A.040(3)(b) precluded the claims against RDC, because the City was authorized to act to create a monopoly and RDC was a party to one of the Franchise Agreements with the City. 26 JA005289-5294. However, WMON is situated differently. WMON was a party to the Asset Purchase Agreement with Castaway. 20 JA003970-JA004004. WMON was never a party to any Franchise Agreement. 18 JA003585. This factual difference changes the legal analysis. The

fact that there was no actionable conduct by one party, does not mean that another party did not independently commit a cognizable claim under Nevada's Unfair Trade Practices/Conspiracy to Restrain Trade statutes.

Additionally, since WMON was not a party to either Franchise Agreement, WMON cannot gain the benefit of the safe harbor provisions contained in NRS 598A.040(3)(b) or *Noerr*, because WMON's activity was not expressly authorized, regulated, or approved by any ordinance of the city or state. That is a distinction which makes a substantial difference, and the District Court never implicitly or explicitly ruled on this issue.

**G. The District Court Erred in Finding Appellants Had No Standing and Sustained No Damages.**

The District Court improperly held Appellants did not have standing. In doing so, the District Court conflates standing with damages, and failed to use the appropriate test to determine standing.

**1. Standing.**

The NUTPA provides for a private cause of action for violations of NRS. Chapter 598A for:

> 1. Any person threatened with injury or damage to his or her business or property by reason of a violation of any provision of this chapter, may institute a civil action or proceeding for injunctive relief. ....
> 2. 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....

NRS 598A.210(1)(2). The NUTPA tracks the provisions of federal antitrust laws. In fact, the statute explicitly states that the analysis under NUTPA does not differ from the federal antitrust statutes. See, 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 the provisions of the NUTPA must be construed in harmony with the judicial interpretations of the federal antitrust statutes, Appellants must satisfy the test established by the United States Supreme Court in *Associated Gen. Contractors of Cal v. Cal State Council of Carpenters,* 459 U.S. 519 (1983) to establish antitrust 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 pre-requisites associated with these requirements. *Atl Ric Co. v. USA Petroleum,* 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. See, *Associated General Contractors,* 459 U.S. at 535.

In *Associated General Contractors, supra,* the Supreme Court identified a number of factors for determining whether a plaintiff who has alleged an injury under the antitrust laws has standing. Those factors include: (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. See, *Am. Ad gmt., Inc. v. Gen. Tel. Co. of Cal,* 190 F.3d 1051, 1054-55 (9th Cir. 1999). In determining appellants' standing to bring a claim under the NUTPA, the District Court failed to address these factors. A brief review of the factors shows Appellants do have standing to bring a claim under the NUTPA.

***a. Appellants suffered a direct antitrust injury.***

The first two factors focus on whether the appellant suffered antitrust injury: that is, an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Am. Ad Mgmt., Inc.,* 190 F.3d at 1055. The Supreme Court has made it clear that the antitrust laws were created to protect the economic freedom of participants in the relevant market. *Associated General Contractors,* 459 U.S. at 538. In this case, Appellants both maintained businesses in the subject market. 17 JA003447-JA003448; 18 JA003784-JA003787. They are direct competitors of Respondents, they were both operating in the City of Reno at the time of the alleged anti-trust violations, and they were precluded from even participating in the process of qualifying for a

franchise because of the antitrust violations.19 JA003771 at 3:1-11; 19 JA003801 at 82:7-12.

***b. Appellants' injuries are direct.***

To assess the directness of a plaintiff's injury courts look "to the chain of causation between [plaintiffs] injury and the alleged restraint in the [relevant] market." *Am. Ad Mgmt., Inc.,* 190 F.3d at 1058. As noted earlier, Appellants maintained similar businesses and were direct competitors in a restrained market, and Respondents anticompetitive acts directly caused Appellants' exclusion from not only the market, but even the process to be considered by the City of Reno for a franchise. See, 17 JA003447-JA003448; 18 JA003784-JA003787; 19 JA003771 at 3:1-11; 19 JA003801 at 82:7-12. Respondents actions (to monopolize both franchises- ultimately the entire market) directly prevented Appellants from even being considered for a franchise.

Direct competitors have standing to assert anti-trust violations. In *Bigelow v. RKO Pictures, Inc.,* 327 US 251, 90 L Ed 652, 66 S Ct 574, the petitioner, an owner of a movie theatres had standing to sue a movie distributor for various anti-trust violations, because the distributor set up a scheme to give first run movies to certain vendors and not to the appellant. See also, *Columbia*, 499 U.S. at 366, in which Columbia Outdoor Advertising, an advertising company, which owned 95% of billboards *petitioned* the City to eliminate further billboard construction, which

adversely affected a competitor, and the competitor had standing to sue Columbia for anti-trust violations. Here, Appellants both maintained competitive businesses in the target market. 17 JA003447-JA003448; 18 JA003784-JA003787. Appellants are direct competitors of Respondents, they were both operating in the City of Reno at the time of the alleged antirust violations, and they were precluded from even participating in the process of qualifying for a franchise because of the antitrust violations. 19 JA003771 at 3:1-11; 19 JA003801 at 82:7-12.

***c. The harm is not speculative, there is no risk of duplicative recovery, and there is no complexity in apportioning damages.***

Here, there is no risk of speculative harm. Appellants' injuries flow directly from Respondents' conspiracy to create a monopoly by eliminating competition from Appellants. Further, just as in *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of California*, there has been no suggestion at any point whatsoever, that Appellants injuries may be the result of factors other than Respondents anticompetitive scheme. See, *Am. Ad Mgmt.,* 190 F.3d at 1059–61.

Although ascertaining the amount of Appellants' damages is complicated by the fact that different rates were charged to Appellants' customers over time prior to losing them because of Respondents' conduct, this complexity is not so unusual as to distinguish this case from other complex business disputes. See, *Id.* "Complex

antitrust cases ... invariably involve complicated questions of causation and damages." *Forsyth v. Humana, Inc.,* 114 F.3d 1467, 1478 (9th Cir.1997). It is not uncommon for prices to fluctuate over time or by customer. *Id.* Furthermore, evidence of the amount of damages Appellants have suffered have been calculated to a reasonable degree of certainty by Appellants' expert and timely disclosed to Respondents in the District Court.

Thus, this is not a situation in which the determination of damages is so speculative as to call into question the existence of a link between Respondents' anticompetitive behavior and Appellants' injuries. *Id.*

Further, no similar suit for conspiring to create a monopoly regarding Respondents' anticompetitive agreement has been filed to date. As such, there is no danger of duplicative recoveries at issue herein. See, *Eagle v. Star-Kist Foods, Inc.*, 812 F.2d 538, 542-543 (1987), (finding existence of related suit to pose danger of duplicative recoveries). Because Respondents' conspiracy began in early 2012 and Appellants filed suit in 2015, makes it unlikely that another suit is forthcoming at this time.

The calculation of damages in this case is not exceedingly complicated. Unlike *Associated General* in which damages would have had to have been apportioned among "directly victimized contractors and subcontractors and indirectly affected employees and union entities," *Associated General,* 459 U.S. at

545, 103 S.Ct. 897, apportioning damages in this case would require only a determination of the damages suffered by Appellants themselves. See, *Am. Ad Mgmt., supra.*

**2. Damages.**

Respondents suggest that RDC and Castaway were "the only qualified solid waste haulers to receive a franchise." AB, 35-19-20. While RDC and Castaway received a franchise, they were not the only qualified entities. Neither RDC nor Castaway "qualified," because there were no qualifications. Not a scintilla of evidence supports the contention that there were qualifications, and that RDC or Castaway met those qualifications, as none existed.

Respondents further argue, without factual support, that the City of Reno determined that Appellants were not capable of competing in the market. Again, the City of Reno did grant RDC and Castaway separate franchises, but this does not mean that Appellants were not competitors or not qualified.

Thereafter, Respondents cite to a variety of inapplicable cases, which generally guide tort injury claims, not antitrust injury claims. AB, 35:8-15. Respondents also cite to cases that discuss the causal connection between an antitrust claim and damages, but 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. v. Circle Floor Co.*, 463 F.2d 752, 758 (2d Cir. 1972).

The causal connection between injury and damages in a deceptive trade practice or monopoly case does not require proof that Appellants were qualified to get or would have gotten the business. *Zenith Radio Corp. v. Hazeltine Research, Inc*, 395 U.S. 100 (1969). These relaxed rules on causation of damages are consistent with NRS 598A.210(2), which provides for direct **and indirect damages** by reason of a violation of the statute. [Emphasis]. Finally, Respondents argue that "exclusion" from the market is not sufficient proof of causation, but fail to provide any supporting precedent. This unsupported argument is directly contradicted by the *Zenith* case which held,

> 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 123-124.

In determining causation, the court should examine "...the form of violation alleged and the nature of its effect on a plaintiff's own business activities." *GAF Corp., supra*, 463 F.2d 752, 758. (Citations Omitted). Here, Respondents have been injured by the violations of antitrust laws because the alleged damages are the

economic result of those violations. 18 JA003557; See also, 26 JA005177-JA005267. Respondents' position in the target waste disposal market has been effected, because they were precluded from the target market. *Id.* The damages stem from Respondents' diminution of competitive position, and complete preclusion from the target market. *Id.* As direct market competitors, Respondents have standing as well as cognizable damages.

The District Court did not use the relaxed standard of proof of damages under the NUTPA, which is proof that "... the illegal restraint of trade injured [Appellants] 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 a deceptive 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 Appellants were qualified to get or would have gotten the business. While the District Court's Order does not address the level of proof of damages in a NUTPA claim, the Court impliedly misapplied the relaxed standard. 26 JA005289-JA005294. Without doing so, the District Court could not have concluded that no damages exist.

## V.
## CONCLUSION

*Noerr* immunity does not extend to pre-petitioning activity. A conspiracy prohibited by the antitrust laws mandates reversal.

There are contested and disputed facts and a jury, not a court is authorized to make factual determinations, which mandates reversal.

As to liability, standing and damages, the Court misapplied the NUPTA substantive law. As such, the District Court considered elements and facts that were not "material" to the determination of liability, standing or damages.

Finally, the District Court failed to rule on the NRCP 56(f) request and knowing significant discovery disputes were pending, deprived NRS and RR the opportunity to obtain discovery, directly related to the issues on summary judgment.

Based upon the foregoing, Respondents respectfully request that this Court reverse the District Court's orders disposing of this case, remanding the matter for further proceedings.

Dated this 26th day of October, 2017.

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## VI.
## 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 6,999 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 26th day of October, 2017.

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## XIII.
## PROOF OF SERVICE

I hereby certify pursuant to NRAP 25(c), that on the 26th day of October, 2017, I caused service of a true and correct copy of the above and foregoing **APPELLANTS' JOINT REPLY BRIEF** on all parties to this action by the method(s) indicated below:

____ by using the Supreme Court Electronic Filing System:

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DATED this 26 day of October, 2017.

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