IN THE SUPREME COURT OF THE STATE OF NEVADA

RENO DISPOSAL COMPANY, INC., a Nevada Corporation,

Petitioner,

vs.

THE SECOND JUDICIAL DISTRICT COURT IN AND FOR THE COUNTY OF WASHOE, and THE HONORABLE KATHLEEN DRAKULICH, DISTRICT JUDGE,

Respondents.

GREEN SOLUTIONS RECYCLING, LLC, a Nevada limited liability company; NEVADA RECYCLING AND SALVAGE, LTD., a Nevada limited liability company; AMCB, LLC, a Nevada limited liability company dba RUBBISH RUNNDERS,

Real Parties in Interest (Defendants)

CITY OF RENO

Real Parties in Interest (Counter Defendant)

SUPREME COURT CASE NO: _____

Second Judicial District Court Case No. CV17-00143

PETITION FOR WRIT OF MANDAMUS

MARK G. SIMONS, ESQ.
Nevada Bar No. 5132
SIMONS HALL JOHNSTON PC
6490 S. McCarran Blvd., #F-46
Reno, Nevada 89509
T: (775) 785-0088
F: (775) 785-0089
Email: MSimons@SHJNevada.com
Attorneys for Petitioner Reno Disposal Company, Inc.

NRAP 26.1 STATEMENT

The undersigned counsel of record certifies that the following are persons and entities 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 disqualifications or recusal.

1. All parent corporations and publicly held companies owning 10 percent or more of the party's stock:

a. Reno Disposal Company, Inc. ("Reno Disposal") is a wholly owned subsidiary of Waste Management of Nevada Inc.

b. Waste Management of Nevada Inc. ("WMON") is a wholly owned subsidiary of Waste Management Holdings, Inc.

c. Waste Management Holdings, Inc. is a wholly owned subsidiary of Waste Management, Inc.

d. Waste Management, Inc. is publicly traded on the New York Stock Exchange symbol WM.

2. Names of all law firms whose partners or associates who have appeared for the parties in this case:

a. Simons Hall Johnston PC for Petitioner;

b. Winter Street Law Group for Real Parties in Interest Nevada Recycling and Salvage, Ltd., and AMCB, LLC dba Rubbish Runners;

c. Argentum Law for Real Party in Interest Green Solutions Recycling, LLC;

d. Karl Hall and William McCune, Reno City Attorney's Office for Real Party in Interest City of Reno.

It is anticipated that these attorneys will represent the parties in this matter.

3. If any litigant is using a pseudonym, the statement must disclose the litigant's true name: None.

DATED this 12th day of August, 2019.

SIMONS HALL JONSTON, PC
6490 S. McCarran Blvd., F-46
Reno, Nevada 89509

BY: _____
Mark G. Simons, Esq.
Nevada Bar No. 5132
Attorney for Petitioner

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INTRODUCTION AND SUMMARY OF WRIT PETITION.[1]

This case is about the illegal collection and disposal of waste in the City of Reno ("City") by defendants Green Solutions Recycling, LLC ("GSR"), Nevada Recycling and Salvage, Ltd. ("NRS") and AMCB, LLC dba Rubbish Runners ("RR"). These businesses are all interrelated, have co-ownership, and have worked individually and cooperatively to collect and dispose of waste in the City, including recyclable waste materials, using a scheme to undercut Reno Disposal's rights under the City Franchise Agreement and the rates imposed by the City thereunder.

The City Franchise Agreement vests Reno Disposal with the sole and exclusive authority to collect and dispose of waste, including all recyclable waste materials, in the City. Reno Disposal brought the underlying action to stop GSR's, NRS's and RR's illegal scheme to undercut and violate the City's Franchise. By undercutting the City's disposal franchise rates, these businesses violate Nevada Statutes, violate the City's Franchise Agreement, violate Reno Municipal Codes and are knowingly and intentionally breaking the law. GSR's, NRS's and RR's actions harm all City residents by, among other things, depriving the City of the payment of franchise fees and causing law abiding citizens and businesses to be

[1] For ease of reading, this introduction will omit appendix citations, but citations will be provided for factual statements in the body of the petition.

liable for rate increases to cover the costs of the lost revenue due to the illegal activity.

A. THE ILLEGAL SCHEME.

Reno Disposal is contractually obligated to provide residential and commercial waste collection services to citizens of the City pursuant to the terms of the Franchise Agreement and NRS Chapter 268. These services also include the collection and disposal of waste materials that can be recycled ("Approved Recyclable Materials").[2] GSR, NRS and RR collect, transport and dispose of waste in the City pretending that the waste is "recyclable material" that they are "buying" from a customer.

However, these businesses merely pretend to "buy" the waste material by giving the customer a discount on the waste disposal fee and calling the discount a "rebate".[3] Using this pretext, these business are illegally violating the City's Franchise Agreement, the City's Franchise Authority as well as Nevada Statutes

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[2] "Approved Recyclable Materials" are defined in the City's Franchise Agreement and include such things a newspapers, chipboard, cardboard, mixed paper, glass, aluminum, steel or tin cans and plastic. FA, Article 1, (definition of "Approved Recyclable Materials") and Exhibit A thereto. 1 PA_0229.

[3] "Excluded Recyclable Materials" are recyclable materials that are sold by a customer and are not waste materials subject to the City's Franchise Agreement. However, to qualify as a sale, the customer must not pay anything out-of-pocket for this service, otherwise, the customer is paying to have the recyclable materials disposed of which makes the materials waste as matter of law. FA, Article 1, (definition of "Excluded Recyclable Materials"). 1 PA_0232

and Reno Municipal Codes. Stated simply, these businesses are collecting, transporting and disposing of waste in the City (*i.e.*, the exact same thing that Reno Disposal is exclusively authorized to do under the City's Franchise Agreement) but at a cheaper cost by undercutting the City's franchise rates.

B. THE UNDERLYING ENFORCEMENT ACTION.

Reno Disposal initiated its action in the District Court seeking, among other things, injunctive relief preventing GSR, NRS and RR from continuing to implement their illegal scheme to collect and dispose of waste materials in the City in violation of the City's Franchise Agreement and Reno Disposal's exclusivity.

C. GSR'S FEDERAL ACTION.

Prior to the filing of this action, GSR previously filed an action in Federal Court alleging that the City's franchising over the collection and disposal of recyclable waste materials was a violation of the Sherman Antitrust Act (the "Federal Action").[4] In the Federal Action, GSR admitted that the City had the authority to enter into the City's Franchise Agreement with Reno Disposal, and that the Franchise Agreement was valid and enforceable, but that the City's attempt to franchise the collection and disposal of recyclable waste materials was in excess of the City's franchise authority.

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[4] Green Solutions Recycling, LLC v. Reno Disposal Company, Inc. et al., Case No. 3:16-cv-00334-MMD-VPC, United States District Court – District of Nevada, filed June 16, 2016.

D. BOTH ACTIONS PROCEED SIMULTANEOUSLY.

GSR filed a motion to stay the Enforcement Action with the District Court seeking to allow the Federal Action to proceed with priority. The District Court denied GSR's request to stay proceedings finding that the harm and prejudice to Reno Disposal and the City far outweighed any reason to stay these proceedings. Subsequently, however, when faced with addressing a number of dispositive motions, the District Court retracted its position and entered a *sua sponte* stay of proceedings (the "*Sua Sponte* Stay Order") until the Federal Action had "resolved". 2 PA_0341-344.

E. THE FEDERAL ACTION IS RESOLVED.

On January 7, 2019, Judge Miranda Du issued her Order in favor of Reno Disposal and the City ("Du Order") finding, among other things, that the City had correctly determined that GSR was acting illegally and violating the City's Franchise Agreement because "[GSR's] customers were essentially paying for [GSR] to remove waste when Reno Disposal had the exclusive rights to remove waste." 2 PA_0365:21-23. Judge Du then found that the City's definition of what is waste is within the scope of the City's powers vested in it pursuant to NRS 268.081. 2 PA_0374:10-12. Judge Du then entered Judgment in favor of Reno Disposal and the City dismissing GSR's suit ("Du Judgment"). 2 PA_0383. GSR

subsequently filed an appeal of Judge Du's Order and Judgment to the Ninth Circuit Court of Appeals.

F. RENO DISPOSAL'S MOTION TO VACATE THE STAY ORDER.

On January 25, 2019, Reno Disposal filed its Motion to Vacate the *Sua Sponte* Stay Order since Judge Du's Order and Judgment were *res judicata* ("Motion to Vacate Stay").[5] 2 PA_0345-394. On April 18, 2019, the District Court denied Reno Disposal's Motion to Vacate Stay Order erroneously contending that the Federal Action was not yet "resolved" since GSR had initiated an appeal of Judge Du's Order and Judgment. 3 PA_0398-403.

Because Judge Du's Order and Judgment must be treated by the District Court as res judicata, the District Court erred in refusing to vacate the *Sua Sponte* Stay Order. Accordingly, this writ petition follows.

ROUTING STATEMENT

This case is properly before this Court because this writ petition raises an issue of first impression and also involves "as a principal issue a question of statewide public importance," namely, whether a district court may stay proceedings in a state court action when there is a final federal decision that has res

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[5] *See e.g.*, Tripati v. Henman, 857 F.2d 1366, 1367 (9th Cir. 1988) ("The established rule in the federal courts is that a final judgment retains all of its res judicata consequences pending decision of the appeal . . . .").

judicata application to issues in the state action. *See e.g.*, NRAP 17(a)(11) and (12).[6]

In addition, this case is properly before this Court because the Supreme Court may issue a writ of mandamus to enforce "performance of an act which the law especially enjoins as a duty resulting from an office . . . or to compel the admission of a party to the use and enjoyment of a right . . . to which he is entitled and from which is unlawfully precluded by such inferior tribunal . . . ." NRS 34.160; *see also* Washoe County District Attorney v. District Court, 116 Nev. 629, 635, 5 P.3d 562, 566 (2000) (mandamus relief appropriate to compel NR 34.160 compliance); NRS 34.320. The District Court is obligated to proceed with the Enforcement Action. In addition, none of the categories presumptively assigned to the Court of Appeals are implicated in this writ petition. *See* NRAP 17(b).

RELIEF SOUGHT

Petitioner seeks an order from this Court compelling the District Court to vacate the S*ua Sponte* Stay Order and allow the underlying Enforcement Action to proceed.

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[6] Our sister state California clearly recognizes that a federal decision is final for res judicata purpose even if an appeal has been initiated. *See e.g.*, Martin v. Martin, 2 Cal. 3d 752, 761–62, 470 P.2d 662, 668 (1970) ("The federal rule is that a judgment or order, once rendered, is final for purposes of res judicata until reversed on appeal or modified or set aside in the court of rendition.").

ISSUES PRESENTED

1. Whether this court should exercise its discretion and entertain the writ?

2. Whether the District Court erred by refusing to vacate the *Sua Sponte* Stay Order after the Federal Court rendered its decision in favor of Reno Disposal and the City of Reno?

3. Whether the District Court erred in refusing to honor and abide by the Supremacy Clause of the United States Constitution?

STATEMENT OF FACTS.

A. THE CURRENT ENFORCEMENT ACTION.

The Enforcement Action seeks, among other things, injunctive relief preventing GSR, NRS and RR from actively breaking the law and violating the City's Franchise Agreement and the City's franchise authority. Reno Disposal also seeks millions in damages sustained as a result of the illegal activity of these defendants.

1. COUNTERCLAIMS ASSERTED BY GSR.

On December 4, 2017, GSR filed an Answer to Complaint and Counterclaim ("Counterclaim") and asserted claims for defamation, intentional interference and

declaratory relief against Reno Disposal and the City, among others.[7] 1 PA_0095-130.

GSR's Counterclaim was premised on the contention that the assertions by the City and Reno Disposal that GSR was conducting illegal operations and violating the City's Franchise Agreement was defamatory and interfered with GSR's business. NRS and RR filed answers and did not file any counterclaims.

2. GSR'S MOTION TO STAY.

On June 30, 2017, GSR filed a Motion to Stay or Dismiss ("GSR's Motion to Stay") the action arguing that because of the existence of the Federal Action the District Court should stay or dismiss Reno Disposal's Enforcement Action. GSR argued that the City's definition of waste (i.e., materials are waste if a customer pays more than $0 to have the materials disposed of) as applied to recyclable materials violated the Sherman Antitrust Act and the United States Constitution. 1 PA_0045-0087. GSR argued that even though its customers were still paying for the disposal of the recyclable waste materials, because they were getting a miniscule "rebate" (in reality the "rebate" was merely a discounted collection charge) then GSR was "buying" the waste material—and that this rebate counted

[7] GSR also named Reno Disposal's parent entities Waste Management of Nevada, Inc. ("WMON") and Waste Management National Services, Inc. ("WMNS") as counterdefendants. Reno Disposal is a wholly-owned subsidiary of WMON. WMNS has no involvement with the Reno Franchise and appears to have been named in error.

as a purchase even though the customer was still paying out-of-pocket to have the have the materials collected and disposed. Id.

In addition, Reno Disposal pointed out that the collection and disposal of waste was of paramount public concern; that the City's Franchise Agreement, and its terms, was a valid exercise of the City's franchise authority; that the District Court was obligated to exercise its authority to proceed with the Enforcement Action; that the pendency of the Federal Action was irrelevant to the exercise of the District Court's authority to proceed; that a stay is a rare and exceptional act that should be avoided; that a stay cannot be imposed when it would harm the public; that GSR's illegal business operations do not constitute a hardship warranting a stay; and a stay could not be imposed when the parties and issues are not substantially identical. Id.

3. THE DISTRICT COURT'S ORDER DENYING STAY.

On November 13, 2017, the District Court entered its Order denying GSR's Motion to Stay finding that: the parties in the Enforcement Action and the Federal Action were "not substantially identical"; the issues in the two actions "were not only not substantially identical . . . they are factually very different"; the resolution of the federal action may not resolve the state causes of action; and that because there was no estimated time frame for the conclusion of the Federal Action, the stay should be denied. 1 PA_0088-94.

Further, the District Court found that "[t]he uncertainty regarding the relief that the Federal Action may provide and the uncertainty regarding the timing for that relief **will result in prejudice to [Reno Disposal] who is entitled to timely relief before the Court**." 1 PA_0091:27-92:2 (emphasis added).

4. THE SPECIAL MOTIONS TO DISMISS.

On January 30, 3018, Reno Disposal, WMON and WMNS filed their Special Motion to Dismiss Counterclaims Pursuant to NRS 41.660 (the "Anti-SLAPP Motion").[8] The Anti-SLAPP Motion was based upon the fact that these parties cannot have any liability to GSR for saying GSR's conduct is illegal if the City has actually determined that GSR's conduct is illegal.[9] Since the City has been notifying GSR since 2013 that its waste collection operations in the City are illegal and violate the City's Franchise Agreement, then as a matter of law, these defendants cannot have any liability under Nevada's anti-SLAPP statutes. 1 PA_0131-138.

On February 5, 2018, the City filed its own anti-SLAPP motion and joined in the other defendant's pending motion. 1 PA_0139-184. The City's anti-SLAPP motion was premised on the contention that the City's statements as to GSR's

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[8] Strategic Lawsuits Against Public Participation ("SLAPP").

[9] This argument is even more powerful given Judge Du's Order and Judgment finding that the City has the full authority to define "waste" and the City's definition of "waste" does not violate the Sherman Antitrust Act.

illegal business operations were truthful at the time and were legitimate good faith communications in direct connection with the substantial public issue of solid waste collection and disposal and was therefore immune from any liability.

On May 29, 2018, the District Court conducted oral argument on the anti-SLAPP motions. 2 PA_0342.

5. THE DISTRICT COURT'S *SUA SPONTE* STAY ORDER.

On August 6, 2018, rather than address and resolve the pending anti-SLAPP motions, and in total disregard of its previous November 13, 2017, Order denying GSR's request for a stay, the District Court entered its *Sua Sponte* Stay Order staying all proceedings due to the pending Federal Action. 2 PA_0342:8-12. Given the Ninth Circuit can take years to render a decision,[10] the *Sua Sponte* Stay Order will cause extreme prejudice by allowing GSR to continue violating the City's Franchise Agreement without any recourse for the City or Reno Disposal.

The District Court did a complete about-face and *sua sponte* held that the Enforcement Action could not proceed while the Federal Action was pending because the "validity" of the City's Franchise Agreement was at issue in the

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[10] The Ninth Circuit notes that civil cases typically take 12-20 months to oral argument and another 3-12 months before a decision is rendered. https://www.ca9.uscourts.gov/content/faq.php (last visited Aug. 4, 2019).

Federal Action.[11] The District Court noted in its *Sua Sponte* Stay Order that it originally denied GSR's prior stay request finding that the parties were not identical and the causes of action were not identical and that "[t]his has not changed." 2 PA_0343:1-4. The District Court then identified that because of the arguments and issues raised during oral argument the Court found that it was:

> [A]t an impasse in its ability to rule on the Motion until the issues related to the validity of the Franchise Agreement are resolved in the Federal Case. That the decision in the Federal Case has a critical bearing on this case is now far more apparent to this Court, necessitating a resolution of the Federal Case before this action can proceed.

2 PA_0343:6-9.[12]

The District Court's *Sua Sponte* Stay Order directly contradicted the District Court's previous Order denying a stay and ignored the prejudice the District Court held would occur to Reno Disposal in the event a stay was issued.[13]

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[11] As stated herein, the validity of the Franchise Agreement is admitted and uncontested. So this assertion was also erroneous. The only issue in the Federal Action was whether the City's definition of "waste" as including recyclable materials that a customer pays out-of-pocket to have collected, transported and disposed of was a valid exercise of the City's regulatory authority—which Judge Du affirmatively ruled in the City's and Reno Disposal's favor.

[12] GSR's Motion to Stay acknowledged that the entire premise of its defense in this case and in the Federal Case "boil[ed] down to an analysis" of GSR's nominal rebate scheme whereby the customer still paid to have its recyclable waste materials collected and disposed of and whether that activity violated the City's exclusive Franchise Agreement. 1 PA_0049:4-9.

Further, the District Court's *Sua Sponte* Stay Order did not address the numerous factors that militated against a stay and the District Court abdicated its responsibility and obligation to address the merits of claims asserted in this action. Moreover, the *Sua Sponte* Stay Order ignored that the District Court was obligated to treat the Federal Action as "resolved" since Judge Du's Order and Judgment was *res judicata* as to the Federal Action. Finally, the District Court ignored that the issue of the validity of the City's Franchise Agreement was uncontested and, as such, was binding upon the District Court.

B. THE RESOLUTION OF THE FEDERAL ACTION: ORDER GRANTING SUMMARY JUDGMENT IN CITY'S AND RENO DISPOSAL'S FAVOR.

In the Federal Action, Reno Disposal and the City filed case-ending motions for summary judgment seeking a judicial determination that the City's Franchise Agreements were (1) valid and enforceable with regard to collection and disposal of recyclable waste materials, and (2) the City's definition that waste includes recyclable materials that a customer pays out-of-pocket to have collected and disposed of is a valid exercise of the City's authority under NRS 268.081.

On January 7, 2019, Judge Du entered her Order and Judgment granting summary judgment in favor the City and Reno Disposal and dismissing in total

[13] It is suggested to this Court that an analysis of the "prejudice" factor alone to Reno Disposal and the City militated against a stay in the Enforcement Action regardless of the District Court's desire to avoid addressing the merits of the action.

GSR's claims. The resolution of the Federal Action should have promptly allowed the Enforcement Action in the District Court to proceed since the Du Order and Judgment was resolved, *i.e.*, was res judicata.

Specifically, the Du Order discussed in detail NRS 268.081's provisions and "the City of Reno's authority to grant a monopoly for the collection and disposal of certain recyclable materials." 2 PA_0364:13-14. Judge Du specifically addressed and rejected GSR's argument that the "City had no such authority and unlawfully has restrained trade in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. §1 ("Act")." 2 PA_0364:15-16.

Judge Du found that the City's Franchise Agreement "basically grants Reno Disposal the exclusive right to pick up and remove solid waste and certain recyclable materials from commercial entities." 2 PA_0365:10-12. Judge Du found "[GSR's] customers were essentially paying for [GSR] to remove waste when Reno Disposal had the exclusive rights to remove waste." 2 PA_0365:21-23. Judge Du then found that the City's definition of what is waste was within the scope of the City's regulatory powers vested in it pursuant to NRS 268.081.

Judge Du addressed an actual example of GRS's illegal activity, whereby GSR charges to collect and dispose of recyclable waste materials in the City by charging a customer and then providing a nominal rebate to create the illusion that it was "purchasing" the customer's waste:

> [GSR] contracted with various commercial entities in the City to pick up and remove certain recyclable materials from their premises. . . . [GSR] operates by providing its customers with recycling containers in exchange for payment offset by a rebate. . . . For example, [GSR] charged one customer $440 per bin each month and provided that customer with a rebate of $2.52 per bin each month.

2 PA_0365:15-20. Judge Du then examined the City's response to GSR's rebate scheme that GSR employed in an attempt to circumvent the City's Franchise Agreement and the City's authority under NRS 268.081 as follows:

> The City eventually took the position that [GSR] was violating the Franchise Agreement based on its view that [GSR]'s customers were essentially paying for [GSR] to remove waste when Reno Disposal had the exclusive rights to remove waste. (*See* ECF No. 113 at 4.) The City informed [GSR]'s counsel that [GSR] could pick up and remove certain recyclable materials without violating the Franchise Agreement only if [GSR]'s customers actually sold the recyclable materials instead of paying for them to be removed. (*Id.*) In other words, [GSR]'s customers were essentially required to realize a net profit from the arrangement, and thus the rebate would have to exceed the container rental charges. (*See id.*) The City informed some of [GSR]'s customers that the customers were violating the Franchise Agreement. (*Id.* at 5.) In addition, counsel for Reno Disposal and WMON sent demand letters to some of [GSR]'s customers asserting that the customers were violating the Franchise Agreement. (ECF No. 113 at 7.)

2 PA_0365:21-366:6. **Judge Du found that all facts contained in her Order were undisputed**. 2 PA_0365, fn.2.

Judge Du concluded as undisputed that collection and disposal of waste is an area of local concern to be regulated and controlled by local government. United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330,

344 (2007) ("[W]aste disposal is typically and traditionally a local government function." (citation omitted)). Consequently, because the City's regulation over the collection and disposal of waste, including recyclable waste materials, was exclusively a function left to the City, the City's determination of what is waste was within the authority vested to the City pursuant to Nevada law and federal law.

In granting judgment in the City's and Reno Disposal's favor, Judge Du ruled as follows:

1. that NRS 268.081 "expressly authorizes anticompetitive behavior." 2 PA_0373:7-9.

2. that "the City is immune . . . even though the statute authorizing the City to grant a monopoly over the collection and dispose of garbage and other waste does not specifically list all the material that might constitute 'other waste.'" 2 PA_0373:25-27.

3. that "[i]t is clear that the Nevada Legislature contemplated a monopoly for the collection and disposal of garbage and other waste. It was not necessary—and was probably impossible—for the Nevada legislature to list every single thing that might constitute waste." 2 PA_0373:27-374:3.

4. that "the Court finds that the City and Reno Disposal's anticompetive conduct has been articulated and affirmatively expressed as state policy." 2 PA_0375:7-8.

5. GSR's argument that the City was "price fixing" was not persuasive because "it mischaracterizes Defendants' activity as price-fixing" and all the City has done is "adopted a definition of waste—that it must—incorporates monetary value to the producer: the City has defined waste as materials that the generator pays someone to take it away." 2 PA_0374:6-10. Judge Du then found that "[a]ny effect that the City's definition has on the price of recyclable materials is a necessary

> consequence of enforcing the exclusive franchise it is entitled to grant." 2 PA_0374:10-12.

Judge Du concluded by ruling as follows:

> Given that the challenged restraint in this case—the City's grant of monopoly over the collection of recyclable materials that [GSR] wishes to pick up—is clearly articulated and affirmatively expressed as state policy, state-action immunity applies. Accordingly, the Court grants summary judgment in favor of Defendants.

2 PA_0376:24-27.

Summarizing Judge Du's Order, Judge Du found that the City's Franchise Agreement was an approved and valid exercise of the City's authority under NRS Chapter 268, that the City had the statutory authority to define what is waste, and that the City's definition that "waste" as including recyclable materials that a customer pays out-of-pocket to have collected and disposed of is a valid exercise of the City's regulatory authority. Consequently, Judge Du found that GSR's claims failed as a matter of law because the facts were undisputed and the law was clear the City's actions did not create any anti-trust liability. Similarly, Judge Du dismissed the claims against the Reno Disposal parties because these parties were not "engaged in municipal regulation" and were instead private actors acting under the authority of the City. 2 PA_0376; 375:26-27.

C. GSR'S, NRS'S AND RR'S SCHEME IS EXPOSED BY UNDISPUTED EVIDENCE.

The following undisputed facts are provided to this Court to demonstrate the exigent need for the District Court to vacate its *Sua Sponte* Stay Order, and to further demonstrate the defendants' illegal scheme and the financial harm occurring every day while the Enforcement Action is stayed.

Prior to the stay, GSR's, NRS's and RR's employee Director of Sales, Rick Lake testified in his deposition that these businesses were intentionally and knowingly circumventing the City's Franchise Agreement and implementing their illegal scheme. 2 PA_0323, 324, 325:2-3, 326:25-327:2.

Mr. Lake testified that GSR, NRS and RR actually compete directly against Reno Disposal for the collection, transportation and disposal of waste in the City pretending that they are "buying" recyclable materials.[14] 2 PA_0321-322. Mr. Lake said his job was to circumvent the City's Franchise Agreement by providing

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[14] Q Okay. So . . . [GSR's, NRS's and RR's] objective was to conduct collection services in the City of Reno at a rate that would be cheaper than what Waste Management could provide under their franchise agreement?

A. Correct.

2 PA_0331:2-6.

customers with false information so that NRS, GSR or RR could replace Reno Disposal's waste collection services.[15]

Mr. Lake testified that GSR, NRS and RR knew they were violating the City's Franchise Agreement, so they concocted a scheme to "pretend" to buy the waste material by giving a discount on the customer's bill. In this regard, Mr. Lake testified as follows:

> Q **Okay. So, essentially, the rebate was just a discount that –**
>
> A **For hauling services.**
>
> Q **So there was actually no exchange of money. All NRS would do is say, we're just not going to charge you as much as we normally would?**
>
> A **And call the difference a rebate.**
>
> Q **Do you know why the language of rebate was selected?**

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[15] Q So your job was to try to circumvent the franchise agreement restrictions with the customers?

A Yeah.

Q And the purpose of making these calls was to try and take the customers that were paying and using service with Waste Management under the terms of the franchise agreement and transfer them over to either NRS or GSR or Rubbish Runners?

A Yes . . . .

2 PA_0328:7-14.

A **Because we had to buy the materials, and I could no longer call it a service. I had to call it a program.**

Q **So you just changed the name of the activity you -- the exact same activity from a service to a program?**

A **Yes.**

. . .

Q So . . . **NRS, GSR and Rubbish Runners, would use the term rebate to, essentially, pretend to buy the material?**

A **Yes.**

2 PA_0329:24-330:18 (emphasis added).

Ignoring this overwhelming evidence of intentionally and illegal activity presented to the District Court (and the prejudicial impact on Reno Disposal and the City), the District Court wrongfully refused to vacate the stay and allow the Enforcement Action to proceed—which enforcement action sought to stem the ongoing illegal activity.

D. RENO DISPOSAL'S MOTION TO VACATE *SUA SPONTE* STAY ORDER.

On January 25, 2019, Reno Disposal filed its Motion to Vacate Order to Stay because of the res judicata effect of Judge Du's Order and Judgment. 2 PA_0345-394. The City filed its Non-Opposition. 2 PA_0395-397.

Reno Disposal's motion emphasized that under federal law, because Judge Du's Order and Judgment were "final" for res judicata purposes the District Court had to honor and abide by the res judicata effect and had to deem the Federal Action resolved. Reno Disposal emphasized that due to the res judicata effect of the Du Order and Judgment, the clear and admitted illegal activity by the defendants, and the clearly established prejudice occurring to the City and Reno Disposal, the District Court was required to vacate the *Sua Sponte* Stay Order and to proceed with the Enforcement Action.

E. THE DISTRICT COURT'S REFUSAL TO VACATE THE *SUA SPONTE* STAY ORDER.

On April 18, 2019, the District Court denied the Motion to Vacate Stay. 3 PA_0398-403. The District Court entirely ignored the *res judicata* effect of Judge Du's Order and Judgment and ignored the finding a stay continues to prejudice and harm the City and Reno Disposal. Instead the District Court posited that the granting of a stay is "a matter of judicial discretion depending upon an equitable and practical assessment of relevant circumstances." 3 PA_0401:13-14. The District Court held that because GRS appealed Judge Du's Order and Judgment to the Ninth Circuit, the appeal "has extended the proceedings in the Federal Case" and a "final resolution" has not been met. 3 PA_0401:18. The District Court then concluded that it was in the "best interests of judicial economy" to continue the

stay until "the final resolution" of the Federal Action. 3 PA_0401:19-20. The District Court also ignored the clear admissions of illegal activity by the defendants and the severe prejudice to the City and Reno Disposal by a delay that could easily stretch into years before the Ninth Circuit makes a decision.

F. STAYED DISCOVERY MATTERS IN THE ENFORCEMENT ACTION.

In addition to the two (2) anti-SLAPP motions seeking dismissal of GSR's Counterclaims discussed above, the following are pending critical discovery motions that were stayed by the District Court's *Sua Sponte* Stay Order.

1. Motion to Compel: Re GSR. Filed July 7, 2018. Opposition filed July 30, 2018. Reply and Request for Submission to be completed but stayed. *Motion seeks disclosure of GSR's customers for whom they are providing illegal waste collection services in the City.*

2. Motion to Compel: Re NRS and RR and Countermotion for Attorney Fees. Filed July 11, 2018. Opposition and Countermotion filed July 25, 2018. Reply, Opposition to Countermotion and Counterreply and Requests for Submission to be completed but stayed. *Motion seeks disclosure of NRS's and RR's customers for whom they are providing illegal waste collection services in the City.*

3. Motion to Quash Subpoenas. Filed by NRS and RR and joined in by GSR. Fully briefed and submitted on May 21, 2018. *The subpoenas seek production of responsive documents from known customers in the City who have engaged GSR, NRS and/or RR under their illegal scheme.*

2 PA_0354.

This discovery is paramount given the City's franchise authority to require customers in the City to comply with State law and local ordinance to exclusively use Reno Disposal for their waste collection and disposal services.[16] There is no valid reason that the District Court can stay the Enforcement Action and preclude the City and Reno Disposal from undertaking discovery efforts to discover all the customers for whom GSR, NRS and RR are conducting illegal services—and to stem the flood of such illegal activity.

Instead of focusing on the knowing and illegal conduct of the defendants, the multimillion dollar harm being caused by the defendants' illegal conduct, and Judge Du's Order and Judgment holding that the City's definition of "waste" being something that costs a customer money to dispose of---the District Court wrongfully determined that its own calendar took precedence over the merits of the Enforcement Action. The District Court was wrong.

G. NRS AND RR ADMIT THE VALIDITY OF THE CITY'S FRANCHISE AGREEMENT.

As additional support demonstrating the need for this Court to issue the Writ as requested, the following demonstrates that the District Court's contention that the validity of the Franchise Agreement was unresolved was again an entirely incorrect contention. Demonstrating that the "validity" of the City's Franchise

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[16] *See e.g.,* Reno Municipal Code 5.90.030(a) and (b) (establishing exclusive waste collection rights under the Franchise Agreement); 5.90.060(a) and (b) (mandate every residential and commercial customer in the City to only use Reno Disposal for waste collection and disposal services); 5.90.110 (prohibiting any person to "violate or impair the exclusive rights" of Reno Disposal's exclusive franchise).

Agreement and Franchise authority are undisputed and warrant proceeding with the Enforcement Action, in 2015, NRS and RR filed suit against Reno Disposal, and others, in Case Number CV15-00497 before Judge Flanagan (the "Prior Action"). In the Prior Action, NRS and RR brought suit claiming that Reno Disposal violated Nevada's Unfair Trade Practices Act ("NUTPA") and/or conspired to do so in seeking and obtaining the City's Franchise Agreement. In the Prior Action both NRS and RR agreed that the Franchise Agreement was a valid and unambiguous contract and that the City was fully authorized to enter into the Franchise Agreement according to the statutory powers vested in the City.

Specifically, Judge Flanagan's September 19, 2016, Order Granting Summary Judgment in favor of Reno Disposal stated: **"[NRS and RR] concede the following: that the franchise agreements are valid and unambiguous contracts; that the City of Reno was authorized to enter into the franchise agreements** . . . ." (emphasis added)). 1 PA_0003, ¶8.[17] On August 2, 2018, the Nevada Supreme Court entered its decision affirming Judge Flanagan's summary judgment. *See* Nevada Recycling and Salvage, Ltd. et al v. Reno Disposal

[17] It is believed the Court can take judicial notice of Judge Flanagan's Decision and the proceedings in the Prior Action. Mack v. Estate of Mack, 125 Nev. 80, 91–92, 206 P.3d 98, 106 (2009) (court will take judicial notice of records in a different case "particularly when the cases are interconnected.").

Company, Inc. et al., 134 Nev. Ad. Op. 55 (2018).[18] The merits of the Prior Action and this Court's reported decision, demonstrate that NRS and RR have previously conceded and admitted the validity of the City's Franchise Agreement and the City's statutory authority to enter into the Franchise Agreement. 2 PA_0333-340.

H. GSR ADMITS THE VALIDITY OF THE CITY'S FRANCHISE AGREEMENT.[19]

Further demonstrating that the "validity" of the City's Franchise Agreement and Franchise authority are undisputed and warrant proceeding with the Enforcement Action, in the Federal Action, Judge Du granted an Order Dismissing GSR's original complaint (with leave to amend), and found that GSR admitted the validity of the City's Franchise Agreement as follows:

> The parties do not dispute that the [Sherman] Act is not implicated where the displacement or limitation on competition involves the services covered under NRS § 268.081. (ECF No. 15 at 8-9; ECF No. 20 at 5.) **GSR readily acknowledges that the City has "authority to displace competition for the collection of recyclable materials that are treated as waste."** (ECF No. 20 at 5).

1 PA_0027:26-28:1 (emphasis added).[20]

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[18] See fn 17.

[19] It is also believed this Court can take judicial notice of all documents filed in the Federal Action since the District Court's stay was premised on the activities in that proceeding.

In response to the Judge Du's Order dismissing its claims, GSR filed its First Amended Complaint. 1 PA_0031-44. GSR's First Amended Complaint states as an affirmative admitted fact that the City's Franchise Agreement is valid and applies to recyclable materials treated as waste as follows:

> **Recyclable materials that are discarded and treated as waste by the generator are "solid waste" and thus fall within "other waste" as that term is used in NRS Chapter 268.**

1 PA_0034, ¶23 (emphasis added). Accordingly, GSR admitted again that recyclable materials which are treated as waste are included as those materials that are subject to the City's franchise authority embodied in NRS Chapter 268.081(3) under the term "other waste".

Restating these concessions and admissions of fact, on March 2, 2018, in the Federal Action, GSR filed and executed the Joint Case Management Report, which states in relevant part, the following:

> **The parties do not dispute NRS 268.081(3) authorizes the City to displace or limit competition in the collection and disposal of garbage and other waste including waste materials that are capable of recycling. Specifically, the Court has already recognized the parties' concessions**

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[20] 1 PA_0011:12-15 ("**GSR agrees with WM: recyclable materials that are discarded and treated as waste are not in fact 'recyclable materials' but rather are considered 'other waste," and thus can be lawfully franchised pursuant to NRS 268.**" (emphasis added)); p. 5:20-23 ("GSR understands that recyclable materials that are *treated as waste* are not in fact "recyclable materials" but rather are "other waste" pursuant to NRS 268. WM takes two and a half pages in its Motion to come to the same conclusion. . . . **GSR completely agrees with that conclusion.**" (emphasis in original) (bold added)).

and has found that it is undisputed that City has "authority to displace competition for the collection of recyclable materials that are treated as waste."

1 PA_0186:9-13 (emphasis added).[21]

Again, as the Prior Action and the Federal Action have established, GSR, NRS and RR all admit and concede that the City's is statutorily vested with the authority to enter into the Franchise Agreement, that the Franchise Agreement is a valid exercise of the City's franchise authority and that the Franchise Agreement applies to recyclable materials that are treated as waste by a customer.

Judge Du found that as a matter of undisputed fact and law the City is also vested with the authority to regulate and define waste as including all recyclable materials that cost a customer an out-of-pocket fee to have collected and disposed of. Stated simply, if it costs the customer something more than $0 to have the recyclable materials collected, transported and disposed of, then the materials have no economic value and are waste as a matter of law. The resulting prejudice to the

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[21] These concessions and admissions of fact are conclusively binding upon GSR. Hakopian v. Mukasey, 551 F.3d 843, 846-47 (9th Cir. 2008) (holding "[a]llegations in a complaint are considered judicial admissions"); White v. ARCO/Polymers, Inc., 720 F.2d 1391, 1396 (5th Cir. 1983) ("factual assertions in pleadings and pretrial orders are considered to be judicial admissions conclusively binding on the party who made them."); 29A Am. Jur. 2d Evidence § 783 (July 2010) ("A judicial admission is a party's unequivocal concession of the truth of a matter, and removes the matter as an issue in the case. It is a voluntary concession of fact by a party or a party's attorney during judicial proceedings.").

City and Reno Disposal is severe, and if this Writ is not granted, it will likely be 2-3 years before the Ninth Circuit case will be argued and decided. *See infra* note 9.

SUMMARY OF THE ARGUMENT

The general premise of this writ is that the District Court erred in refusing to vacate the *Sua Sponte* Stay Order after Judge Du rendered her Order and Judgment. Once Judge Du entered her Order and Judgment in favor of Reno Disposal and the City, the Federal Action was concluded for res judicata purposes. The District Court was thereafter obligated to honor and abide by the res judicata effect of the Du Order and Judgment and was not entitled to artificially delay the Enforcement Action. Unfortunately, the District Court acted arbitrarily and capriciously in deciding to allow the defendants to continue perpetrating further illegal activity and causing prejudicial harm to Reno Disposal and the City under the pretext that the District Court's own calendar took precedence over the merits of the Enforcement Action.

ARGUMENT

I. WRIT RELIEF STANDARD OF REVIEW.

A. WRIT RELIEF IS APPROPRIATE.

NRS 34.160 provides that the Supreme Court may issue a writ of mandamus to compel a district court to act when the district court refuses to do so. Williams v. Eighth Judicial Dist. Court, 127 Nev. 518, 524, 262 P.3d 360, 364 (2011) ("A

writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office . . . .")). NRS 34.160 states:

> The writ may be issued by the Supreme Court, the Court of Appeals, a district court or a judge of the district court, to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station; or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled and from which the party is unlawfully precluded by such inferior tribunal, corporation, board or person. When issued by a district court or a judge of the district court it shall be made returnable before the district court.

Id.; *see also* NRS 34.320 (prohibition standard). Because the District Court is obligated to proceed with the Enforcement Action, mandamus relief is warranted and required to compel the District Court to proceed. Pan v. Eighth Judicial Dist. Court, 120 Nev. 222, 225, 88 P.3d 840, 842 (2004) ("a writ of mandamus is the proper way to compel the court to do what the law requires—assume jurisdiction and proceed . . . .").

In addition, a writ of mandamus will issue to control a district court's arbitrary or capricious act. Ryan v. Eighth Judicial Dist. Ct., 123 Nev. 419, 425, 168 P.3d 703, 707 (2007) ("A writ of mandamus should only issue to control discretionary actions when the district court has manifestly or arbitrarily and capriciously abused its discretion."). To the extent the District Court's refusal to vacate the *Sua Sponte* Stay Order was a discretionary act, a writ of mandamus to

address the District Court's arbitrary and capricious refusal to proceed with the Enforcement Action, is warranted.

Further, the District Court's refusal to vacate the *Sua Sponte* Stay Order since the law clearly establishes the Judge Du's Order and Judgment was final for res judicata purposes was plain error. *See* City of Las Vegas v. Eighth Judicial Dist. Ct., 405 P.3d 110, 112 (Nev. 2017) (plain error occurs when a district court's decision is "contrary . . . [to] established rules of law.").

Lastly, mandamus relief is also available where "'an important issue of law needs clarification and public policy is served by this court's invocation of its original jurisdiction.'" Paley v. Second Jud. Dist. Ct., 129 Nev. 701, 704, 310 P.3d 590, 592 (2013) (citation omitted). Because the res judicata effect of Judge Du's Order and Judgment is an important issue of law that needs to be clarified, and because public policy mandates the District Court proceed to address the public health, welfare and safety issues relating to waste collection and disposal, mandamus is warranted and required to compel the District Court to proceed.

B. NO ADEQUATE REMEDY AT LAW.

In addition, a writ of mandate is available where there is no plain, speedy and adequate remedy in the ordinary course of law. NRS 34.170; Aspen Fin. Servs., Inc. v. Eighth Jud. Dist. Ct., 129 Nev. 878, 881, 313 P.3d 875, 878 (2013) (same). Reno Disposal cannot appeal the Court's *Sua Sponte* Stay Order or its

Order Denying Stay Relief because these Orders are not a final appealable order. Compare NRAP 3(b) and NRCP 54(b). Because Reno Disposal cannot appeal the offending orders, it has no plain, speedy and adequate remedy at law other than to petition this Court for relief. See Washoe Cty. Dist. Atty. v. District Court, 116 Nev. 629, 635, 5 P.3d 562, 566 (2000) (because offending order could not be appealed, writ relief was appropriate remedy).

II. THE DISTRICT COURT ERRED IN REFUSING TO VACATE THE *SUA SPONTE* STAY ORDER DUE TO THE RES JUDICATA APPLICATION OF THE FEDERAL ACTION.

On January 7, 2019, Judge Du entered her Order and Judgment granting summary judgment in favor of Reno Disposal and the City and dismissing in total GSR's claims in the Federal Action. Judge Du ruled as a matter of undisputed fact and as a matter of law, the City had the statutory authority to define what is "waste" pursuant to its statutory authority vested in it pursuant to NRS 268.081. 2 PA 0373:17-21. Because the City defined "waste" to include recyclable materials that a customer pays out-of-pocket to have collected and disposed of, the City's action was not a violation of the Sherman Antitrust Act.

First, under federal law the Du Order is a final judgment for *res judicata* purposes. *See e.g.*, Tripati v. Henman, 857 F.2d 1366, 1367 (9th Cir. 1988) ("'The established rule in the federal courts is that a final judgment retains all of its res judicata consequences pending decision of the appeal . . . .' 18 C. Wright, A.

Miller & E. Cooper, *Federal Practice and Procedure* § 4433, at 308 (1981) . . . .To deny preclusion in these circumstances would lead to an absurd result: Litigants would be able to refile identical cases while appeals are pending, enmeshing their opponents and the court system in tangles of duplicative litigation.'"); Hawkins v. Risley, 984 F.2d 321, 324 (9th Cir. 1993) ("'in federal courts . . . the preclusive effects of a lower court judgment cannot be suspended simply by taking an appeal that remains undecided.'" (citation omitted)). Accordingly, the District Court erred as a matter of law in refusing to vacate the *Sua Sponte* Stay order because it is entirely irrelevant whether or not GSR appealed the Du Order since the Du Order and Judgment must be treated by the District Court as a "final judgment" for *res judicata* application.

Second, there is an extensive line of cases reaffirming that state courts are subject to and bound by federal decisions under the application of *res judicata*. And while it is understood that string-cites are disfavored, because this issue is controlling, an abundance of authority is provided to this Court to demonstrate the District Court's error.[22] In addition, this Court held in Garcia v. Prudential Ins. Co. of Am., 129 Nev. 15, 21, 293 P.3d 869, 873 (2013) that a state court is to apply the

[22] Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc., 803 S.E.2d 519, 529 (W. Va. 2017) ("in a state court proceeding, federal rules of res judicata or claim preclusion dictate the preclusive effect of a federal court judgment on a federal question."); Roos v. Red, 130 Cal. App. 4th 870, 886, 30 Cal. Rptr. 3d 446, 457 (Cal. Ct. App.

preclusive effect of a federal decision by applying federal law as follows: "'[t]o determine the preclusive effect of a federal decision, we apply federal law.'" (citing Bower v. Harrah's Laughlin, Inc., 125 Nev. 470, 482, 215 P.3d 709, 718, 125 Nev. at 482, 215 P.3d at 718).[23]

Because the District Court ignored the res judicata effect of Judge Du's Order and Judgment, the District Court committed clear error and this writ should be granted. Stated another way, the District Court acted in error by refusing to vacate the *Sua Sponte* Stay Order on the grounds that GSR had appealed Judge Du's Order and Judgment. As a matter of law, the District Court was required to treat Judge Du's Order and Judgment as final and not further delay the

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2005) ("Full faith and credit must be given to an order of the federal court and such an order has the same effect in the courts of this state as it would have in a federal court."); Reeder v. Succession of Palmer, 623 So. 2d 1268, 1271 (La. 1993) ("When a state court is required to determine the preclusive effects of a judgment rendered by a federal court exercising federal question jurisdiction, it is the federal law of res judicata that must be applied."); Jones v. Am. Family Mut. Ins. Co., 489 N.E.2d 160, 164 (Ind. Ct. App. 1986) ("when a federal court is one of competent jurisdiction and where there is identity of subject matter and parties, a federal decision on the merits is *res judicata* and may not be circumvented or undermined by a later state court judgment."); Anderson v. Phoenix Inv. Counsel of Boston, Inc., 440 N.E.2d 1164, 1167 (Mass. 1982) ("When a State court is faced with the issue of determining the preclusive effect of a Federal court's judgment, it is the Federal law of res judicata which must be examined.").

[23] Bower v. Harrah's Laughlin, Inc., 125 Nev. 470, 482, 215 P.3d 709, 718 (2009), *holding modified on other grounds by* Garcia v. Prudential Ins. Co. of Am., 129 Nev. 15, 293 P.3d 869 (2013) ("To determine the preclusive effect of a federal decision, we apply federal law.").

Enforcement Action under the contention that the Federal Action was not yet resolved.

III. THE DISTRICT COURT ERRED IN FAILING TO HONOR AND ABIDE BY THE SUPREMACY CLAUSE.

The preemption doctrine, which provides that federal law supersedes conflicting state law, arises from the Supremacy Clause of the United States Constitution. The Supremacy Clause, found in Article VI, requires that "the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[24]

In the present case, the District Court acted in error in failing to honor the Supremacy Clause and by disregarding controlling federal law relating to a federal decision that Judge Du's Order and Judgment are *res judicata*—regardless of the filing of any subsequent appeal. As a matter of controlling federal law, which the District Court was required to follow, the District Court's refusal to treat Judge

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[24] U.S. Constitution, Article VI, Clause 2 states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Du's Order and Judgment as "final" in these proceedings constitutes plain error.[25] *See e.g.,* Garcia v. Prudential Ins. Co. of Am., 129 Nev. 15, 21, 293 P.3d 869, 873 (2013) (district court obligated to apply federal law applicable to federal decisions in state court proceedings).

In Kline v. Burke Const. Co., 260 U.S. 226, 230, 43 S. Ct. 79, 81, 67 L. Ed. 226 (1922) the United States Supreme Court articulated exactly how the District Court was required to proceed:

> Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court. **Whenever a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by the application of the principles of res adjudicata by the court in which the action is still pending in the orderly exercise of its jurisdiction, as it would determine any other question of fact or law arising in the progress of the case.**

Id. (emphasis added). Accordingly, while both federal and state courts are free to proceed "in its own way", once a controlling decision is rendered in one

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[25] Torres v. Farmers Ins. Exch., 106 Nev. 340, 345, 793 P.2d 839, 842 (1990) ("[t]he ability of this court to consider relevant issues *sua sponte* in order to prevent plain error is well established." . . . An error is "plain" if "the error is so unmistakable that it reveals itself by a casual inspection of the record." (citations omitted)); City of Las Vegas v. Eighth Judicial Dist. Ct., 405 P.3d 110, 112 (Nev. 2017) (plain error occurs when a district court's decision is "contrary . . . [to] established rules of law."); Jeremias v. State, 134 Nev. Adv. Op. 8, 412 P.3d 43, 49, reh'g denied (Apr. 27, 2018), cert. denied, 139 S. Ct. 415, 202 L. Ed. 2d 320 (2018) ("plain error affects a [party's] substantial rights when it causes actual prejudice or a miscarriage of justice.").

proceeding, the decision applies to both federal and state proceedings under the application of *res judicata*.[26]

IV. THE DISTRICT COURT ACTED ARBITRARILY AND CAPRICIOUSLY AS A MATTER OF LAW.

In addition, it is believed that when a district court ignores applicable legal doctrines with no valid justification, a district court abuses its discretion as a matter of law. Hotel Last Frontier v. Frontier Prop., Inc., 79 Nev. 150, 154, 380 P.2d 293, 294 (1963) (an abuse of discretion is "[a] clear ignoring by the court of [applicable legal principles], without apparent justification."); Skender v. Brunsonbuilt Constr. & Dev. Co., 122 Nev. 1430, 1435, 148 P.3d 710, 714 (2006) ("An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason.").

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[26] Thein v. Feather River Cmty. Coll., No., 2008 WL 2783172, at *5 (E.D. Cal. 2008) ("Each tribunal is still free to proceed 'in its own way.' Should a judgment be rendered in these actions or in the state proceedings, the other tribunals would then consider the claim or issue preclusive effects as they would any other question of fact or law. Thus, 'concurrent consideration . . . is the solution.'"); Schrock v. Isuzu Motors Ltd., 2011 WL 2462667, at *1 (D. Idaho 2011) ("The mere pendency of an action in state court does not require a federal court to refuse to hear an action or stay an action, and both actions may go forward until one results in a judgment."). By refusing to honor and abide by the res judicata effects of the Judge Du Order and Judgment, the District Court committed plain error as a matter of law.

A. THE DISTRICT COURT ACTED ARBITRARILY AND CAPRICIOUSLY BY IGNORING THE RES JUDICATA EFFECT OF THE JUDGE DU ORDER AND JUDGMENT.

On the grounds stated above, the District Court acted arbitrarily and capriciously by ignoring the res judicata effect of the Judge Du Order and Judgment as such decision was directly contrary to controlling law.

B. THE DISTRICT COURT ACTED ARBITRARILY AND CAPRICIOUSLY BECAUSE THE PARTIES AND ISSUES ARE DIFFERENT.

The District Court stayed this action even though it found on two (2) separate occasions that the parties and claims were different in the two proceedings. 1 PA_0091; 2PA_0343:1-4. The District Court even noted with emphasis in its original Order Denying Stay that "**[w]here the issues or the parties are not substantially identical, there is no justification for a court to hold one proceeding in abeyance**." 1 PA_0089:22-23 (emphasis added). The irony of the District Court's prior ruling should not be lost on this Court.

In denying GSR's original motion to stay, the District Court found that the parties were not substantially identical in the Enforcement Action, therefore, the District Court ruled that "there is no justification" for it to stay the Enforcement Action. Then, *sua sponte*, the District Court entered its *Sua Sponte* Stay Order which the District Court previously stated had "no justification". Accordingly, applying the District Court's own words, the entry of the *Sua Sponte* Stay Order

was without justification and the subsequent refusal to vacate the *Sua Sponte* Stay Order was again without justification. Such conduct by the District Court is clearly arbitrary and capricious and its refusal to vacate the stay was a clear error of law. Kistler Instrumente A. G. v. PCB Piezotronics, Inc., 419 F. Supp. 120, 123 (W.D.N.Y. 1976) ("Where the issues or the parties are not substantially identical, there is no justification for a court to hold one proceeding in abeyance.").

C. THE DISTRICT COURT ACTED ARBITRARILY AND CAPRICIOUSLY BECAUSE PUBLIC POLICY MANDATES CASES BE DECIDED ON THE MERITS AND NOT STAYED.

Nevada law is clear that public policy is to decide cases on the merits and not stay actions. Franklin v. Bartsas Realty, Inc., 95 Nev. 559, 563, 598 P.2d 1147, 1149 (1979) ("One of the proper guides to the exercise of discretion is: The basic underlying policy to have each case decided upon its merits. In the normal course of events, justice is best served by such a policy."); Christy v. Carlisle, 94 Nev. 651, 654, 584 P.2d 697 (1978) ("It is our underlying policy to have each case decided upon its merits."). The District Court's refusal to comply with its duty and its disregard of public policy is again an arbitrary and capricious act requiring relief.

D. THE DISTRICT COURT ACTED ARBITRARILY AND CAPRICIOUSLY BECAUSE A STAY HARMS THE RESIDENTS OF THE CITY.

In Landis v. North American Company, 299 U.S. 248, 255, 57 S. Ct. 163, 166, 81 L. Ed. 153 (1936), the United States Supreme Court stated that a stay should not be considered when the "public welfare or convenience" will be harmed. Id. at 255. In the present case, the City's Franchise Agreement is in place exclusively to promote the public safety, health and general welfare of the citizens of Reno.[27] Accordingly, enforcement of the Franchise Agreement and allowing this case to proceed promotes a significant and overriding public benefit. Staying the action, however, allows the Defendants' to promote their own illegal conduct in violation of the interests of the citizens of Reno and contrary to public policy.

In addition, in denying Reno Disposal's motion to vacate stay, the District Court posited that the granting of a stay is "a matter of judicial discretion depending upon **an equitable** and practical **assessment of relevant circumstances**." 3 PA_0401:13-14 (emphasis added). However, as a matter of law, the equities also do not support a stay.

GSR's NRS's and RR's illegal conduct is inequitable. It is a truism that he who comes into court seeking equitable relief must do equity. Mahaffey v.

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[27]See NRS 444.440 which states: "It is hereby declared to be the policy of this State **to regulate** the collection and disposal of solid waste . . . ." (emphasis added).

Investor's Nat. Sec. Co.,103 Nev. 615, 618, 747 P.2d 890, 892 (1987) ("One who seeks equity must do equity."). Here, these defendants' intentional scheme to breach the City's Franchise Agreement is not equitable conduct. Accordingly, as a matter of law the equities precluded the District Court from staying the action and the District Court ignored this clear legal principal in refusing to lift the *Sua Sponte* Stay Order.

E. THE DISTRICT COURT ACTED ARBITRARILY AND CAPRICIOUSLY BECAUSE THE STAY PROMOTES AND SANCTIONS CONDUCT ALREADY FOUND TO BE ILLEGAL.

GSR's, NRS's and RR's conduct is illegal, these defendants know their conduct is illegal and admit being advised by the City since 2013 that their conduct is illegal. These defendants admit the validity of the City's Franchise Agreement and that the City has the authority to regulate the collection of recyclable materials treated as waste. Judge Du found that as a matter of undisputed fact and law that the City has the statutory authority to define waste as material a customer pays out-of-pocket to have collected and disposed of and such regulation is not a violation of the Sherman Antitrust Act and the City's conduct is not subject to federal scrutiny.

The District Court entirely ignored its own finding that the defendants' ongoing illegal conduct causing "prejudice" to the City and to Reno Disposal.[28] Instead, the District Court elected to find its own calendar took precedence. Such activity by the District Court promotes ongoing illegal conduct harming the citizens of the City and Reno Disposal.

The District Court's refusal to vacate the *Sua Sponte* Stay Order should be deemed arbitrary and capricious as a matter of law since the District Court has an affirmative duty to address the merits of the dispute and the District Court already acknowledged that Reno Disposal was "entitled to timely relief before the Court." Refusing to vacate the Sua Sponte Stay Order and subjecting Reno Disposal to 2-3 years of further litigation in the Ninth Circuit Court of Appeals on an issue Reno Disposal already won is not "timely relief".[29]

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[28] Order Denying Stay, 1 PA_0091:27-92:2 (a stay "**will result in prejudice to [Reno Disposal] who is entitled to timely relief before the Court.**" (emphasis added)).

[29] United States v. Hosteen Tse-Kesi, 191 F.2d 518, 520 (10th Cir. 1951) ("[court] is under a duty to decide cases upon their merits and may not arbitrarily refuse to exercise its jurisdiction when invoked by appropriate proceedings."); American Auto. Ins. Co. v. Freundt, 103 F.2d 613, 615 (7th Cir. 1939) ("a court having jurisdiction over parties and subject matter is under a duty to exercise its jurisdiction in a case falling within the purview of the jurisdiction."); 20 Am. Jur. 2d Courts § 93 (1965) ("A court having jurisdiction of a case has not only the right and the power or authority, but also the duty, to exercise that jurisdiction, and to render a decision in a case properly submitted to it.").

F. THE DISTRICT COURT ACTED ARBITRARILY AND CAPRICIOUSLY BECAUSE THE STAY ACTS AS A PRELIMINARY INJUNCTION IN FAVOR OF GSR WITHOUT THE POSTING OF A BOND BY GSR.

GSR's, NRS's and RR's illegal conduct is causing millions of dollars in harm to Reno Disposal and the City. It is also undisputed that these defendants knowingly and intentionally implemented their illegal scheme to circumvent the City's Franchise Agreement and franchise authority. Rather than allow Reno Disposal to seek to stem the flood of such illegal activity, the District Court effectively imposed an injunction upon Reno Disposal and the City from terminating the illegal activity without requiring GSR to post a bond or other form of security to compensate Reno Disposal and the City for the ongoing harm being sustained.

As stated above, initially, the District Court initially refused to grant a stay finding that the prejudice to Reno Disposal and the City that would be caused by a stay required denial of GSR's stay request. Strangely, and wrongfully, the District Court then ignored this "prejudice" and sua sponte granted a stay without imposing any kind of bond or other surety protecting Reno Disposal, the City and the City's residents from these defendants' illegal activity. It is again suggested such action by the District Court was arbitrary and capricious as a matter of law since the

District Court undertook no efforts to protect the City and Reno Disposal from the clear prejudice and harm that the stay is causing.

CONCLUSION

For the foregoing reasons, this Court should grant this Writ Petition and reverse the District Court's refusal to vacate the *Sua Sponte* Stay Order and order and remand with instruction for the District Court to immediately proceed with the Enforcement Action.

DATED this 12th day of August, 2019.

SIMONS HALL JONSTON, PC
6490 S. McCarran Blvd. F-46
Reno, Nevada 89509

BY: _____
Mark G. Simons, Esq.
Nevada Bar No. 5132
Attorney for Petitioner

AFFIDAVIT OF MARK G. SIMONS IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

STATE OF NEVADA)
: SS
COUNTY OF WASHOE)

MARK G. SIMONS, being first duly sworn depose and state under penalty of perjury, as follows:

1. I am over the age of 18 years and have personal knowledge of the facts stated herein, except for those stated upon information and belief, and as to those, I believe them to be true. I am an attorney at Simons Hall Johnston PC, and am counsel for Petitioner Reno Disposal Company, Inc.

2. This Petition deals with the issuance of a *Sua Sponte* Stay Order issued by the District Court and the District Court's erroneous decision to not vacate the stay order.

3. The Court's consideration of this Petition is necessary to clarify important issues of law and procedure on the proper application of a federal decision, and the res judicata effect thereof, on pending state court proceedings. In addition, public policy mandates the District Court vacate its *Sua Sponte* Stay Order and allow the Enforcement Action to proceed to address the public health, welfare and safety issues relating to waste collection and disposal which are being violated on a daily basis by the defendants.

4. Further, this Court's consideration of this Petition would also serve to resolve ongoing and systematic illegal activity in the City of Reno by the defendants named herein.

5. I certify and affirm that this Petition for Writ of Mandamus is made in good faith and not for delay.

FURTHER AFFIANT SAYETH NAUGHT.

DATED this 12th day of August, 2019.

MARK G. SIMONS

Subscribed and sworn to before me
this 12 day of August, 2019, by
Mark G. Simons, Esq. at Reno, Nevada.

JODI L. ALHASAN
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 14-13483-2 - Expires January 3, 2022

NOTARY PUBLIC

CERTIFICATE OF SERVICE

I hereby certify pursuant to NRAP 25(c), that on the 12th day of August, 2019, I caused service of a true and correct copy of the above and foregoing **PETITION FOR WRIT OF MANDAMUS** on all parties to this action by the method(s) indicated below:

X by placing an original or true copy thereof in a sealed envelope, with sufficient postage affixed thereto, in the United States mail at Reno, Nevada, addressed to:

Honorable Kathleen Drakulich
Second Judicial District Court
75 Court Street, Dept. 1
Reno, NV 89501

John P. Sande, Esq.
Chase Whittemore, Esq.
Argentum Law
6121 Lakeside Dr., Ste. 208
Reno, NV 89511
Attorneys for GSR

Stephanie Rice, Esq.
Richard Salvatore, Esq.
Winter Street Law
96 & 98 Winter Street
Reno, NV 89503
Attorneys for NRS and RR

Karl Hall, Esq.
William McCune, Esq.
Assistant City Attorney
P.O. Box 1900
Reno, NV 89505
Attorneys *for the City*

DATED this 12 day of August, 2019.

An employee of Simons Hall Johnston PC