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: 79383

Second Judicial District Court Case No. CV17-00143

PETITIONER'S APPENDIX VOL. 4

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CHRONOLOGICAL			
DOCUMENT	**DATE**	**VOL.**	**BATES**
Order (2nd Judicial Case No. CV15-00497)	9/19/16	1	PA_0001-0006
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Order (on Motion to Dismiss) (ECF Dkt. #47)	3/27/17	1	PA_0024-0030
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Affidavit of Greg Martinelli in Support of Defendants' Motion for Summary Judgment re: Enforceability of Franchise Agreement (Dkt 106-1)	8/16/18	4	PA_0404-405
Reno Disposal's Motion to Vacate Order to Stay	1/25/19	2	PA_0345-0394
City of Reno's Notice of Non-Opposition to Motion to Vacate Order to Stay	2/8/19	2	PA_0395-0397
Order Denying Motion to Vacate Stay	4/18/19	3	PA_0398-0403
Appellees Reno Disposal Company, Inc.'s and Waste Management of Nevada, Inc.'s Answering Brief filed with the United States Court of Appeals for the Ninth Circuit in Case No. 19-15201	8/13/19	4	PA_0406-473

ALPHABETICAL			
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Affidavit of Greg Martinelli in Support of Defendants' Motion for Summary Judgment re: Enforceability of Franchise Agreement (Dkt 106-1)	8/16/18	4	PA_0404-405
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CERTIFICATE OF SERVICE

I hereby certify pursuant to NRAP 25(c), that on the 4th day of December, 2019, I caused service of a true and correct copy of the above and foregoing **PETITIONER'S APPENDIX VOL. 4** 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

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Assistant City Attorney
P.O. Box 1900
Reno, NV 89505
Attorneys *for the City*

DATED this 4th day of December, 2019.

An employee of Simons Hall Johnston PC

AFFIDAVIT OF GREG MARTINELLI IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT RE: ENFORCEABILITY OF FRANCHISE AGREEMENT

STATE OF NEVADA)
)ss.
COUNTY OF WASHOE)

I, Greg Martinelli, being duly sworn, depose and state under penalty of perjury the following:

1. I am the area manager for Reno Disposal Company, Inc., dba Waste Management ("Reno Disposal").

2. I have personal knowledge of the facts set forth in this affidavit, and if I am called as a witness, I would and could testify competently as to each fact set forth herein.

3. I submit this affidavit in support of Defendants' Motion for Summary Judgment re: Enforceability of Franchise Agreement ("Motion") to which this Affidavit is attached as Exhibit 1.

4. On November 7, 2012, the City of Reno ("City") entered into a franchise agreement with Reno Disposal.

5. The City originally entered into two (2) franchise agreements, one with Reno Disposal and one with Castaway Trash Hauling ("Castaway").

6. Reno Disposal subsequently acquired the franchise rights under the Castaway agreement, therefore, although technically there exists two franchises, they are treated as a single franchise serviced by Reno Disposal.

7. Exhibit 2 to the Motion is a true and correct copy of Judge Flanagan's September 19, 2016 order Granting Summary Judgment issued in the Prior Action.

8. GSR, NRS and RR and all interrelated businesses.

9. Chris Bielser and Charles "Pat" Pinjuv are co-owners and operators of GSR.

10. Chris Bielser owns NRS with Annemarie Carey.

11. Exhibit 3 to the Motion is a true and correct copy of Nevada Supreme Court decision in Nevada Recycling and Salvage, Ltd. et al v. Reno Disposal Company, Inc. et al., 134

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Nev. Ad. Op. 55 (2018).

12. Exhibit 4 to the Motion are true and correct excerpts of GSR's Response to Request for Admissions.

13. Exhibit 5 to the Motion are true and correct excerpts of testimony of the November 28, 2017 Motion to Dismiss and Motion for Preliminary Injunction hearing in this matter.

14. Exhibit 6 to the Motion are true and correct excerpts of Rick Lake's deposition transcript taken in Second Judicial District Court Case No. CV17-01143.

15. Exhibit 7 to the Motion is a true and correct copy of document bates labeled QUAIL_049, produced in this matter.

16. Exhibit 8 to the Motion is a true and correct copy of the Hearing Officer Decision on case No. ENF18-C00573 Quail Creek Business Park Appeal.

FURTHER AFFIANT SAETH NAUGHT.

DATED this 16 day of August, 2018.

GREG MARTINELLI

STATE OF NEVADA)
)ss.
COUNTY OF WASHOE)

Subscribed and sworn to before me
on this 16 day of August, 2018 by
Greg Martinelli at Reno, Nevada.

NOTARY PUBLIC

JODI L. ALHASAN
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 14-15489-2 - Expires January 9, 2022

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NO. 19-15201

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GREEN SOLUTIONS RECYCLING, LLC

PLAINTIFF-APPELLANT,

V.

RENO DISPOSAL COMPANY, INC., ET AL.

DEFENDANTS-APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA
NO. 3:16-CV-00334
HON. MIRANDA DU

APPELLEES RENO DISPOSAL COMPANY, INC.'S AND WASTE MANAGEMENT OF NEVADA, INC'S ANSWERING BRIEF

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Attorneys for Appellees Reno Disposal Company, Inc. and Waste Management of Nevada, Inc.

FRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities described in FRAP 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 Reno Disposal, Inc. and Waste Management of Nevada, Inc.;

b. Argentum Law for Green Solutions Recycling, LLC;

c. Karl Hall and William McCune, Reno City Attorney's Office for City of Reno.

It is anticipated that these attorneys will represent the parties upon appeal.

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

DATED this 13th day of August, 2019.

SIMONS HALL JOHNSTON, PC
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BY: /s/ Mark G. Simons
Mark G. Simons, Esq.
Nevada Bar No. 5132
Attorneys for Appellees

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INTRODUCTION[1]

The City of Reno ("City") has traditionally broad authority to regulate the collection of solid waste under its well-established police powers to protect the health, safety and welfare of its citizenry. This authority includes the authority to enter into an exclusive franchise agreement with Reno Disposal and grant it the exclusive right to collect solid waste throughout the City. As a necessary, reasonable and foreseeable extension of such statutory authority, the City also has the authority to define what wastes are subject to the franchises. Pursuant to the same grant of power, the City may exclude other business from performing solid waste collection services.

The City mandates that Reno Disposal perform all waste collection services in the City, which service includes offering citizens the opportunity to dispose of their recyclable waste materials in separately designated waste bins. To achieve the City's mandate, Reno Disposal implements "single stream" recycling for residential customers and it also offers recycling containers for commercial customers.[2] The rates that Reno Disposal may charge its customers

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

[2] In the City, regular waste carts are designed by a green lid on the container while waste materials capable of recycling are disposed of into a cart with a blue lid. For

are established by the City and imposed by the City's Franchise Agreement.[3] Reno Disposal cannot change the City's approved franchise rates for service except as allowed by the City's Franchise Agreement.

Some businesses seek to circumvent the City's exclusive franchise by undercutting the City's franchise rates Reno Disposal must charge. These businesses charge a cheaper rate for waste collection service primarily because they do not have to provide the level of service Reno Disposal must provide under the Franchise Agreement and they do not pay the City franchise fees that Reno Disposal must pay to the City.[4]

Reno Disposal is contractually obligated to provide residential and commercial waste collection services to City residents and businesses pursuant to

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commercial customers, waste materials capable of recycling are disposed of into a yellow bin while regular waste is disposed of into a green bin.

[3] The City originally entered into a second exclusive franchise agreement with another entity and Reno Disposal subsequently acquired the franchise rights under this agreement as well. 1 ER 6. The District Court singularly referred to both agreements as the "Franchise Agreement." Id. For purposes of this brief, both agreements will also be referred to singularly as the Franchise Agreement.

[4] In addition, Reno Disposal must collect and dispose of the City's waste from City facilities (such as City Hall, City parks and City recreational facilities). 1 ER 100 at ¶3.7. The City's Franchise Agreement is intended to ensure Reno Disposal is appropriately compensated for the expense of servicing City facilities. This example demonstrates one reason why municipalities desire and implement franchises for waste collection. Businesses operating illegally by collecting and disposing of waste do not pay the City any franchise fees.

the terms of the Franchise Agreement and N.R.S. § Chapter 268. These services also include the collection of waste materials that can be recycled, which are regulated and defined under the Franchise Agreement as "Approved Recyclable Materials".[5]

Of singular relevance in these proceedings are those waste materials that can be recycled. A large portion of the solid waste stream is not recyclable and must be landfilled. Of the materials that can be recycled, most have no value or negative value to the business or resident that generate them. A small subset of the solid waste stream might consist of certain waste materials having sufficient independent monetary value (*e.g.*, aluminum cans sorted from the rest of the waste stream) such that the generator may be able sell those materials to a third-party for a profit. In such instances, the materials may not be "waste" if sold as a commodity to a third-party. Under the City's Franchise Agreement, these recyclable materials that are sold by the generator as a commodity are not classified as "waste" but are instead designed as "Excluded Recyclable

[5] "Approved Recyclable Materials" include such things a newspapers, chipboard, cardboard, mixed paper, glass, aluminum, steel or tin cans and plastic. The definition of "Recyclable Materials" in the Franchise Agreement is virtually identical to the statutory definition of "Recyclable Material" contained in NRS 444A.013. *Compare* 1 ER 90 ("Recyclable Materials" definition) with NRS 444A.013.

Materials".[6] The sale of such commodity is outside the scope of and excluded from the City's Franchise Agreement.

The City's Franchise Agreement clearly calls out the distinction between recyclable materials that are treated by a customer as waste, (*i.e.*, "Approved Recyclable Materials") and recyclable materials that are treated as a commodity, (*i.e.*, "Excluded Recyclable Materials"). Here is where GSR tries to evade the Franchise Agreement. GSR has created a scheme to charge a customer to collect their "Approved Recyclable Materials" as waste yet pretends that it is purchasing the waste so that GSR can claim the materials are "Excluded Recyclable Materials."[7]

GSR's contention is a farce. Instead, solely to undercut the City's franchise rates, GSR concocted a scheme to "buy" a customer's waste materials by offering a small discount against the much higher waste collection costs GSR charges. GSR artificially labels this trivial discount a "rebate" and claims it is "buying" the materials with the "rebate". GSR asserts this scheme magically makes the waste materials "Excluded Recyclable Materials" which are not

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[6] *See* footnote 14 and accompanying text discussing "Excluded Recyclable Materials".

[7] 3 ER 661, GSR's Amended Complaint, ¶42 ("Plaintiff is engaged in the business of purchasing 'excluded recyclable materials' as defined by the franchise agreement.").

subject to the City's Franchise Agreement.[8]

A. GSR'S VACILLATING POSITION.

In GSR's Amended Complaint, GSR claimed that the City's conduct in "entering into" the Franchise Agreement violated Section 1, of the Sherman Antitrust Act because the City did not have any authority to do so. Specifically, GSR alleged:

> 52. As described above, on or about November 7, 2012, the City of Reno and RDC **entered into** the Franchise Agreement that displace and limit competition **without any legal authority** because the Nevada Legislature never granted the authority in NRS Ch. 268 **for the City to do so, and thus are in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. section 1.**

3 ER 662, ¶52 (emphasis added). GSR subsequently abandoned this contention. In fact, GSR conceded, and the District Court found as a matter of law, that the City did in fact have the authority to enter into the Franchise Agreement. SOC, ¶¶E, F, G.

Conceding the City has the statutory authority to enter into the Franchise Agreement for the collection of solid waste and "recyclable materials treated as waste", GSR next claimed it was not collecting waste and instead was "buying" those recyclable materials using its discount/rebate scheme. GSR then claimed that, because it was "buying" these materials, they are not waste subject to the

[8] The District Court detailed GSR's discount/rebate scheme in support of its ruling. *See* footnotes 18 and 19 and accompanying text.

City's Franchise Authority. Yet, while discounting pennies to its customers pretending "to buy" their recyclables, these customers were paying GSR significant amounts to haul their materials away.

Reno Disposal highlights GSR's shifting claims to show the failings of GSR's contentions on appeal. This appeal is not about regulating a generic category of recyclable materials, instead, it is about whether the District Court correctly found that the City's authority "to regulate" what is classified as waste was a proper, reasonable and incidental use of the City's police powers. The District Court correctly concluded that the City could and did determine that recyclable wastes are solid wastes under the City's franchise authority.

B. GSR'S USE OF GENERIC TERMINOLOGY IN ITS OPENING BRIEF.

GSR confuses its verbiage in its Opening Brief in an attempt to misrepresent the substance of its contentions. This action is not about "collection of recyclable materials"; this case is about "waste" and the City's authority to regulate and define what is waste. Waste materials that are capable of being recycled are still waste and are subject to the City's franchise authority and the Franchise Agreement. This case is about GSR's transparent scheme to subvert the Franchise Agreement and the City's authority by falsely labelling its discount/rebate scheme a "purchase" of recyclables, rather than describing what it is: a sham transaction whereby the customer pays GSR to remove its waste,

including its recyclable waste.

C. OVERVIEW OF DISTRICT COURT'S DECISION.

On January 7, 2019, the district court (Honorable Judge Miranda Du), entered its order finding in favor of Reno Disposal, WMON and the City (the "Order"). 1 ER 5-19. The District Court's decision was well-supported and based upon undisputed facts.[9]

The District Court determined that the City's franchise authority included the authority to regulate and oversee the collection and disposal of waste in the City, and such authority included the ability to define and regulate those materials classified as "waste". Further, the City's definition of "waste" as something a customer paid to have collected and disposed of is valid and well within the City's vested authority. As such, the District Court correctly determined that GSR failed to allege an antitrust claim because the City's conduct defining and regulating waste fell squarely within the State's constitutional authority to regulate waste collection activities under its police powers. As such, the City's actions are exempt from antitrust scrutiny under the state immunity doctrine.

The District Court also correctly determined that Reno Disposal and WMON had no liability since they were not implicated in the City's definition or

[9] 1 ER 6, fn. 2 ("The facts recited below are undisputed unless noted otherwise.").

regulation of "waste" (*i.e.*, not involved in regulatory activities) and, they had no liability since they were also performing a traditional municipal function.

STATEMENT OF THE ISSUES

Reno Disposal disagrees with GSR's statement of the issues presented for review. This case is not about the City's authority to grant a monopoly over the "collection of recyclable materials" as framed by GSR in Issue I. This case is about the regulation of the collection of waste, including waste materials capable of being recycled. This distinction is critical to recognizing the fallacy of GSR's contentions to this Court.

The District Court considered N.R.S. § 268.081(3) which addresses "collection and disposal of garbage and other waste". GSR concedes in this action, and the District Court expressly found, that pursuant to N.R.S. § 268.081(3) the City has "authority to displace competition for the collection of recyclable materials that are treated as waste." *See infra* SOC, ¶¶ E, F, G. GSR's Opening Brief is silent on its admissions and concessions in this case.

GSR did not appeal the actual ruling by the District Court, which was limited in scope to the activity of collecting and disposing of "recyclable materials treated as waste". Instead, GSR mischaracterizes the District Court's ruling as applying to a generically designated class of "recyclable materials" not "recyclable materials that are treated as waste."

GSR did not appeal the District Court's analysis (based in part on GSR's admissions and concessions) that "other waste" contained in N.R.S. § 268.081(3) included "recyclable materials that are treated as waste" by the customer. GSR also did not appeal the District Court's determination that the City has the authority to define "other waste" to include recyclable materials a customer is paying out-of-pocket costs to have disposed. These issues are not framed as errors by the District Court and GSR's Opening Brief is entirely silent on both.

The actual issue presented to the District Court was whether the City properly invoked its authority to regulate the collection of "recyclable materials treated as waste by a customer" by defining recyclable materials as "waste" subject to the City's franchise authority if a customer is paying out-of-pocket to have the materials collected and disposed of by a third-party.[10]

With regard to the second issue as framed by GSR, GSR again incorrectly characterizes the District Court's ruling. The District Court ruled that active state supervision is not required when (1) the "challenged activity is within a traditional municipal function"; and (2) the actor is the municipality and not a private actor. 1 ER 16-17. GSR's formulation of the District Court's holding incorrectly asserts that the anticompetitive activity was carried out by **both** the

[10] As explored in more detail at Argument I, Reno Disposal asserts that GSR's failure to appeal the actual findings and rulings entered into by the District Court is fatal to appellate review of GSR's Issue I as framed by GSR.

City and Reno Disposal. OB, p. 33 ("both the City and Reno Disposal acted to ensure that Reno Disposal would have a monopoly over the collection of recyclable materials.").

The District Court did not find that the anticompetitive act was performed by "both" the City and Reno Disposal. The District Court held that only the City undertook the anticompetitive act—*i.e.*, the regulation of what the City classifies as "other waste" subject to the City's franchise authority. 1 ER 17 ("The actor here is the City rather than Reno Disposal . . . ."). Because Reno Disposal and WMON were not involved in any regulatory activity, they are not subject to any antitrust liability. Consequently, GSR's formulation of this issue also materially misstates the District Court's ruling.

STATEMENT OF THE CASE

Again, as stated, this is not a case about the generic term "recyclable materials". It is a case about the collection and disposal of waste in violation of the City of Reno's Franchise Agreement and the City's statutory authority "to regulate" waste collection. Collection and disposal of waste is, and has always been, recognized as an area of local concern to be regulated and controlled by local municipalities. The District Court's Order and Judgment must be affirmed because (1) the State has a clearly articulated public policy to regulate collection and disposal of waste; (2) as a reasonable, necessary and foreseeable consequence

and/or result of the State's clearly articulated public policy, the City has the authority to regulate and define that materials are waste if a customer pays out of pocket to have the materials collected; and (3) GSR's business activity is not buying and selling recyclable materials but is instead collecting waste materials in violation of the City's Franchise Agreement.

A. NEVADA LAW AUTHORIZES THE CITY TO FRANCHISE THE COLLECTION AND DISPOSAL OF WASTE.

Reno is an incorporated City.[11] Pursuant to N.R.S. § 268.081(3), "**incorporated cities**" such as Reno, can "**displace or limit competition**" for the "**[c]ollection and disposal of garbage and other waste.**" N.R.S. § 268.081(3) (emphasis added). The District Court's Order acknowledged and affirmed this statutory grant of power in its Order as follows:

> Nevada law allows the City to "[g]rant an exclusive franchise to any person" for the "[c]ollection and disposal of garbage and other waste." NRS §§268.081, 268.083.

1 ER 6:4-5.

Nevada, like many states, has "clearly articulated and affirmatively expressed state policy" to create a monopoly for the public good relating to the

[11] 1 SER 101-123 (The Charter of the City of Reno, §1.020, Chap. 622, Art. 1, 1971 Nev. Stat. p. 1962). *See also* Junction R. Co. v. Bank of Ashland, 79 U.S. 226, 229, 20 L. Ed. 385 (1870) (federal courts take judicial notice of the laws of the respective states).

collection and disposal of waste and the anti-trust laws do not apply to prohibit such anti-competitive conduct by municipalities. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 413, 98 S.Ct. 1123, 1137, 55 L.Ed.2d 364 (1978) (municipalities exempt from antitrust scrutiny if conduct occurs "pursuant to state policy to displace competition with regulation or monopoly public service.").

Nevada's policy is stated in N.R.S. § 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). Accordingly, Nevada has a well-established policy vesting municipalities with the authority to grant exclusive franchises for the "[c]ollection and disposal of garbage and other waste" and such activity is exempt from antitrust scrutiny.[12]

B. THE FRANCHISE AGREEMENT'S SCOPE.

On November 7, 2012, the City entered into a Franchise agreement with Reno Disposal. The purpose and scope of the Franchise Agreement was to "maintain reasonable rates for reliable, proven collection and transportation of

[12] In Douglas Disposal, Inc. v. Wee Haul, LLC, 170 P.3d 508, 513-514 (2007), the Nevada Supreme Court discussed the State's police power as follows: "Police power confers upon the states the ability to enact laws in order to protect the safety, health, morals, and general welfare of society. Municipalities have the right to exercise their police powers and enact ordinances related to the protection of the public health, even if their ordinances interfere with private property rights."

Solid Waste and Recyclable Material in an environmentally sound manner, within the City." 1 ER 82 (6th "Whereas" clause).

The Franchise Agreement applies to "Approved Recyclable Materials" as materials subject to the City's franchise. 1 ER 83. Similarly, these materials are defined in the City's Municipal Code as "recyclable materials approved for recycling under an agreement" with the City.[13] However, the Franchise Agreement excludes recyclable materials that are sold by a customer to a third party for monetary consideration and defines those materials as "Excluded Recyclable Materials."[14] These materials are also defined in the City's Municipal Code.[15]

C. EXCLUSIVITY OF THE FRANCHISE AGREEMENT.

The Franchise Agreement defines Reno Disposal's sole and exclusive collection and waste hauling obligation as follows:

> City hereby grants to [Reno Disposal] . . . the exclusive rights, privilege, franchise and obligation . . . to provide Collection Services to Commercial Customers. . . . No other person or entity other than [Reno Disposal] . . .

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[13] RMC § 5.90.010 ("'Approved recyclable materials' means the recyclable materials approved for recycling under an agreement . . . between contractor and city, excluding certain materials excluded under the agreements.").

[14] 1 ER 95, ¶3.2.A ("the exclusive right of Contractor hereunder shall not apply to . . . Excluded Recyclable Materials . . . ."); *see also* 1 ER 86, (definition of "Excluded Recyclable Materials").

[15] RMC § 5.90.010 ("Excluded Recyclable Materials" means recyclable materials that are sold by a generator of the materials).

> shall i) collect . . . ii) transport . . . or iii) deliver any Collection Materials . . .except as expressly provided under this Agreement. The preceding sentence is intended to be broadly interpreted to preclude . . . any activity relating to the collection or transportation of Collection Materials from Commercial Activities.

1 ER 95, ¶3.2(A). "Collection Materials" are defined as "Solid Waste" and "Approved Recyclable Materials" and "Collection Services" are defined as the means of collecting the solid waste and recyclable materials from customers in the City. 1 ER 84. Accordingly, the clear and unambiguous language of the Franchise Agreement provides that Reno Disposal is the sole and exclusive business authorized by the City to collect, transport and/or dispose of solid waste and approved recyclable waste materials in the City.

D. THE DISTRICT COURT'S FIRST ORDER GRANTING MOTION TO DISMISS: AFFIRMING THE CITY'S FRANCHISE AUTHORITY OVER RECYCLABLE WASTE MATERIALS.

On June 16, 2016, almost four (4) years after the Franchise Agreement was entered into, GSR filed its original complaint. Defendants Reno Disposal and WMON filed their initial motion to dismiss. 2 SER 216-334. In its Order granting the Motion to Dismiss, the District Court made numerous findings that are relevant to this appeal. 1 SER 142-148.

The District Court highlighted GSR's concessions that the City has the authority to enter the Franchise Agreement to franchise the collection and disposal of recyclable materials under N.R.S. § 268.081's provisions if those materials are

treated as waste. Specifically, the Court found:

> **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. (EDF 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 SER145:26-146:1 (emphasis added). As noted by the District Court, GSR admitted that the City was fully vested with the authority to regulate the collection of recyclable materials that were treated as waste by the customer pursuant to the statutory authority granted to the City under N.R.S. § 268.081.[16]

E. GRS'S FIRST AMENDED COMPLAINT: ADMITTING THE CITY'S FRANCHISE AUTHORITY OVER RECYCLABLE WASTE MATERIALS.

In response to the District Court's Order dismissing its claims, GSR filed its First Amended Complaint. 1 ER 656-669. GSR again concedes the City's Franchise Agreement is valid as to recyclable materials treated as waste:

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[16] GSR repeatedly admits in the underlying proceedings that the City's Franchise Agreement was a valid exercise of the City's franchise authority to regulate the collection of recyclable waste materials under NRS 268. 1 SER 199-215, GSR's Opp. to Mot. to Dis., 1 SER 203:12-15 ("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."); 1 SER 203:20-23 ("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)).

> 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.

3 ER 659, ¶23. Accordingly, GSR admits that recyclable materials discarded and treated as waste are "other wastes" subject to the City's franchise authority.

F. GRS'S JOINT CASE MANAGEMENT REPORT: ADMITTING THE CITY'S FRANCHISE AUTHORITY OVER RECYCLABLE WASTE MATERIALS.

Again, on March 2, 2018, GSR filed and executed the Joint Case Management Report, which confirmed its concession that recyclable materials treated as wastes fall within the City's Franchise Agreement:

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

1 SER 125:9-13. Again, GSR's concession and admission should be dispositive of this appeal because GSR does "**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."

G. GSR DOES NOT "BUY" THE MATERIALS THAT IT COLLECTS.

GSR seeks to circumvent the Franchise Agreement by renting containers to its customers then claiming to purchase the customer's recyclable materials by

rebating a small amount as a discount to the much larger rental container charge. OB, p. 6. However, GSR's Opening Brief is fatally silent on the scheme GSR has employed to pretend to "purchase" these materials.

GSR does not "buy" the materials. Instead, GSR simply discounts the fee it charges for the collection and disposal service and then claims the discount is a "rebate" that it pretends is used as a payment for the materials. The economic reality of GSR's transaction is that a customer pays a fee for the waste container, then GSR picks up the waste and pays to dump it at another location. GSR discounts its "waste collection service", calls the discount a "rebate", and then contends this transaction is a "purchase" so as to circumvent the City's Franchise Agreement and franchise authority.

The District Court's Order specifically examined GSR's conduct and stated: "[GSR] operates by providing its customers with recycling containers in exchange for payment offset by a rebate." 1 ER 6:16-18. The District Court and found that GSR's conduct was factually "undisputed".[17] The District Court also found that the City informed GSR that its "rebate" would have to exceed the cost of the rental container fee otherwise the customer was merely paying GSR to collect and dispose of the material as waste. 1 ER 6:21-7:6. The District Court then determined that because the City had the authority to regulate waste collection and

[17] 1 ER 6, fn. 2.

disposal pursuant to a clearly articulated state policy, the City's determination that if GSR charged its customers a greater price to collect and remove the material than GSR paid the customer via the "rebate", then the material was waste subject to the City's franchise authority and the Franchise Agreement. 1 ER 15.

H. GSR'S DIRECTOR OF SALES DETAILS GSR's DISCOUNT/REBATE SCHEME.

Demonstrating the undisputed facts underlying the District Court's Order, in support of its motion for summary judgment, Reno Disposal provided the District Court with the testimony of Richard "Rick" Lake, who was GSR's director of sales. 1 SER 13. Mr. Lake testified that GSR intended to and sought to compete directly against Reno Disposal for the collection, transportation and disposal of waste, but at a cheaper price:

> Q Okay. So . . . the objective was to conduct collection services in the City of Reno at a rate that would be cheaper than what [Reno Disposal dba] Waste Management could provide under their franchise agreement?
>
> A. Correct.

Id. Mr. Lake testified his job was to try to circumvent the City's Franchise Agreement so GSR could replace Reno Disposal's waste collection services:

> 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 [Reno Disposal dba] Waste Management under the terms of the franchise agreement and transfer them over to . . . GSR . . . ?
>
> A Yes . . . .

1 SER 14.[18]

Mr. Lake further testified that GSR knew the City considered its collection of recyclable wastes to be illegal:

> Q Okay. So you knew, I'm just going with your knowledge, that the services you were out there promoting on behalf of . . . GSR . . . was illegal according to what the City of Reno was saying?
>
> A Yes.
>
> . . .
>
> Q Okay. And even after you knew and had been advised in your capacity as an employee for . . . GSR . . . you were still advised . . . to stay out there in the community, keep going after customers, even though the business model you were promoting was deemed illegal by the city? . . .
>
> THE WITNESS: Yes.

1 SER 14-15.

---

[18] Mr. Lake was also told as part of his job duties to secretly record conversations with Reno Disposal. Id. Mr. Lake testified there were 10-100 of these secretly recorded calls made. Id. These calls were recorded so GSR could find ways to circumvent what Reno Disposal was advising customers about the restrictions of the City's Franchise Agreement. Id.

Mr. Lake then detailed GSR's scheme. GSR renamed its illegal waste collection service a "program" and pretended to "buy" the waste material from the customers by giving a discount and calling the discount a "rebate". In this regard, Mr. Lake testified:

> 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 [GSR] 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?
>
> 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] GSR . . . would use the term rebate to, essentially, pretend to buy the material?
>
> A Yes.

1 SER 15-16.

Mr. Lake testified that GSR's scheme was solely to undercut the rate Reno

Disposal could charge under the City's Franchise Agreement:

> A. And I would meet with a customer, and I would discuss their current bill, snapshot fees, gate enclosure fees, the additional fees that were charged by [Reno Disposal dba] Waste Management, and show them that we didn't have any of those, and that we would still process and recycle their material at a lesser rate, and would you like to use a local company.
>
> . . .
>
> Q Was it to provide a cheaper rate to the customer than –
>
> A Yes.
>
> Q -- what [Reno Disposal dba] Waste Management was entitled to under the terms of the franchise agreement?
>
> A Yes.

1 SER 16-17.

I. THE QUAIL CREEK BUSINESS PARK INVOICING.

The District Court exposed GSR's sham by analyzing one business transaction between GSR and Quail Creek Business Park ("Quail Creek"). 1 ER 6.[19] In the Quail Creek example, GSR charged Quail Creek for two 6-yard bins

[19] The Quail Creek example was one example provided by Reno Disposal to demonstrate GSR's illegal scheme. 1 SER 17. In another example GSR testified in the preliminary injunction hearing that it charged another customer (Klaich), $104 a month for waste collection service and provided a "rebate" of $7 dollars a month for a total net cost to the customer of $97 per month to have its waste collected and disposed of by GSR. 1 SER 20.

emptied two (2) times a week for $440.00 per bin/per month. 1 ER 6:18-20; *see also* 1 SER 17. The discount/rebate provided by GSR was $2.52 per bin/per month for these two bins. 1 ER 6. So, GSR charged the customer $880.00 per month to collect and dispose of the waste and gave the customer a whopping discount of $5.04 as a discount/rebate.[20]

J. GSR ADMITS IT DOES NOT BUY RECYCLABLE MATERIALS.

GSR admits the amount it pays to a customer as a "rebate" is less than the amount the customer pays for the collection of the recyclable waste materials. 1 SER 172, ¶4 (GSR admits it cannot pay "customers more for the recyclables than our cost to collect the materials . . . . [and if GSR paid more than the cost of collection and disposal to the customer, GSR] would cease its current collection business."). This admission is dispositive as GSR admits it is not paying for the materials it collects but is instead charging to collect them.

---

[20] The complete billing by GSR to Quail Creek also included two 6-yard bins emptied three (3) times a week for $640.00 per pin/per month. The discount was $2.52 per bin/per month. So, for a weekly service for collecting, transporting and disposing of all waste for Quail Creek for all four (4) containers, the total service fees charged by GSR was $2,160. GSR provided a grand total of $10.08 in discounts/rebates. **Thus, for a single week of waste collection service by GSR, Quail Creek paid $2,149.92**. 1 SER 17-18. This example clearly demonstrates why GSR's Opening Brief goes to great lengths to deceive this Court into believing it is merely a green company that is "purchasing" recyclable materials. It is not. It is performing waste collection services in the City for a fee solely to undercut the City's Franchise Agreement.

Further, Reno Disposal's motion was supported by the testimony of GSR's president and principal Charles "Pat" Pinjuv from an early hearing in which GSR sought a preliminary injunction. 1 SER 20-21. The District Court denied GSR's request for a preliminary injunction and simultaneously granted Reno Disposal's original Motion to Dismiss. 2 ER 409-411.

Of relevance, during the preliminary injunction hearing, Mr. Pinjuv admitted that all GSR is doing is charging a customer to collect and dispose of waste at a cheaper rate than Reno Disposal can charge under the Franchise Agreement. Specifically, he testified:

> Q And so one of your marketing themes to your customers is you come in and you say, look, we'll rent you this container. We'll give you a rebate. And it's actually going to be cheaper than what you have to pay Reno Disposal under the Franchise Agreement.
> Right?
>
> A Absolutely.

1 SER 19. When questioned about GSR's solicitation of customers in the City, Mr. Pinjuv admitted:

> Q Okay. And this is proposal being made to [a customer to] replace Waste Management's collection services with Green Solutions Recycling services, right?
>
> A Absolutely.

Id. GSR even admits that it is specifically targeting Reno Disposal customers to perform waste collection services as follows:

> Q And so you're [GSR] specifically targeting these customers because you want to replace their Waste Management dumpster service and put yours in its place.
> Is that accurate?
>
> A Yes.

1 SER 20.

K. GSR ADMITS KNOWING ITS CONDUCT IS ILLEGAL.

Also at the preliminary injunction hearing, Mr. Pinjuv admitted that when GSR expanded its business operations into the City in 2013 (which was after the City had already entered into its Franchise Agreement with Reno Disposal) the City advised GSR that its scheme was illegal. Specifically, Mr. Pinjuv testified:

> MR. PINJUV: So from 2013 to present, we've received letters from the City, from Mr. Simons' office. We've been visited by Joe Henry, their Compliance Officer, who goes directly to the client. And I'm not sure where Lynne Barker comes in as a City official, but she's also been involved with both conversations directly with our clients, and possibly letters to the clients. All pretty much stating that we're in, GSR is in violation.
>
> THE COURT: Of the Franchise Agreement?
>
> THE WITNESS: Correct.

1 SER 20. GSR testified that in October, 2015, it was again notified by the City that it was violating the Franchise Agreement. 1 SER 21. Thereafter, in March, 2016, GSR again testified it was fully aware that the City continued to advise it that its rebate scheme was illegal. Id.

L. GSR IS NOT LICENSED TO CONDUCT A RECYCLING BUSINESS OR TO CONDUCT WASTE COLLECTION SERVICES IN THE CITY.

In an attempt to bolster its recycling business argument, GSR's Opening Brief falsely represents to this Court that it is a recycling business. OB, p. 7 ("GSR's recycling business . . . ."); p. 21 ("GSR is a private recycling company . . . ."). GSR's representations to this Court are false. GSR is not a recycling business and is not licensed to be a recycling company. GSR is also not licensed to be a waste collection company in the City.

On May 14, 2015, the City notified GSR it was "**not licensed to collect, transport, process, recycle or dispose of Solid Waste . . . or Recycled Materials . . . [or] Excluded Recyclable Materials within the City of Reno." (underline in original) (bold added).** 1 SER 135-137, 138-141 (City's Violation Notice, p. 2). Accordingly, when GSR represents to this Court it is licensed as a private recycling business in the City, this statement is not true, and GSR is also not licensed to perform waste collection services in the City.

M. GSR DOES NOT RESELL THE MATERIALS THAT IT COLLECTS.

GSR does not resell the materials it picks up from customers using its discount/rebate scheme. GSR delivers 100% of the material it collects to the business entity Nevada Recycling and Salvage, Ltd. ("NRS"). OB, p. 6. GSR admits that it pays NRS a fee to throw the materials it charged a customer to pick

up and dispose of at NRS's facility. Specifically, GSR answered the following Requests for Admissions establishing the following dispositive facts:

REQUEST NO. 6:

Admit that GSR does not sell recyclable materials.

RESPONSE TO REQUEST NO. 6:

Admit.

1 SER 50 GSR's Response to Request for Admissions, ¶6. GSR's answers to Requests for Admissions are binding and dispositive on GSR in this action. FRCP 36(b) ("A matter admitted under this rule is conclusively established . . . .").

During the preliminary injunction hearing in this action, Chris Bielser, the principal of NRS (and part owner of GSR) also specifically testified that GSR **pays to dump the waste** it collects at NRS's facility:

Q And then what they'll [GSR] do is they will take all of the stuff they've [GSR] collected, at an amount that is less than what [Reno Disposal dba]Waste Management would charge, and come over to your facility [NRS], **and pay you [NRS] some money to dump it at your location**?

A **Correct.**

1 SER 65:21-25 excerpts of Chris Bielser testimony (emphasis added); *see also* 1 SER 66:7-9 ("So GSR is not selling you this recycled materials, are they? A No.").

As demonstrated by the undisputed evidence presented to the District Court,

GSR is not buying recyclable materials from customers and GSR is not reselling any of the materials. GSR is not a recycling company. GSR is a waste collection company charging a customer to collect and dispose of the customer's waste materials in violation of the City's Franchise Agreement and franchise authority.

STATEMENT OF THE STANDARD OF REVIEW

Reno Disposal agrees that review of a summary judgment order based upon undisputed facts is a de novo review since the issue only concerns an issue of law. Bianchi v. Walker, 163 F.3d 564, 568 (9th Cir. 1998). However, this standard of review still mandates GSR articulate the specific issue and/or issues it claims were errors committed by the district court. Kopczynski v. The Jacqueline, 742 F.2d 555, 560 (9th Cir. 1984) (claims of error on appeal "must be specific"). As discussed at Argument I, GSR did not appeal the District Court's legal ruling, instead, GSR propounds an entirely different issue seemingly to avoid the merits of the legal decision rendered by the District Court.

Further, Reno Disposal disagrees with GSR's assertion that this case involves interpretation of a statute. The primary statute at issue in the underlying action was N.R.S. § 268.081(3) which provides "incorporated cities" can "displace or limit competition" for the "[c]ollection and disposal of garbage and other waste." Interpretation of this statute is not at play in this case because GSR has stipulated and admitted that the term "other waste" includes "recyclable

materials that are treated as waste" as that term is used in N.R.S. § Chapter 268. *See* SOC ¶¶ E, F, G. Because GSR has stipulated to the foregoing interpretation and application of N.R.S. § 268.081(3), GSR's stipulations and admissions are binding on GSR in this appeal.[21]

SUMMARY OF THE ARGUMENT

GSR does not buy and does not resell recyclable material. GSR simply undercuts the franchise rates Reno Disposal is allowed to charge customers for the collection and disposal of waste. GSR "pretends" it is purchasing "recyclable materials" yet GSR does not recycle. GSR charges a fee to collect and dispose of waste materials then pays another fee to another business so it too can dispose of the materials as waste. GSR's profit is the difference between what a customer pays it to collect and dispose of the waste and GSR's cost of paying to dispose of the waste.

The City notified GSR its conduct was illegal and in violation of the City's exclusive Franchise Agreement with Reno Disposal. GSR admits and concedes,

[21] Am. Title Ins. Co. v. Lacelaw Corp., 861 F.2d 224, 226 (9th Cir. 1988) ("Factual assertions in pleadings and pretrial orders, unless amended, are considered judicial admissions conclusively binding on the party who made them."). To be clear, Reno Disposal does not contend that stipulations and admissions as to the interpretation of a statute are binding on an appellate court, instead, Reno Disposal argues that GSR is bound by its own stipulations and admissions as applied to the issues before this Court.

and the District Court specifically found, that recyclable materials treated as waste by the customer fall squarely within the definition of "other waste" in N.R.S. § 268.081(3). The District Court correctly held that it is a proper exercise of the City's statutory authority and there is no antitrust violation because the recyclable materials are "waste" if a customer pays to have the materials collected and treated as waste.

Further, the District Court correctly ruled active state supervision is not required when (1) the "challenged activity is within a traditional municipal function"; and (2) the actor is the municipality and not a private actor. The District Court correctly held that only the City undertook the anticompetitive act since the City set the standard for regulating and defining what is "other waste" and not Reno Disposal. 1 ER 17:9 ("The actor here is the City rather than Reno Disposal . . ."). As demonstrated herein, GSR's arguments are baseless and this appeal should be denied and the District Court's Order and Judgment affirmed.

ARGUMENT

I. GSR DID NOT APPEAL THE LEGAL ISSUE CONSIDERED BY THE DISTRICT COURT.

GSR's Opening Brief does not assert as error the District Court's holding that the City has the authority to regulate collection of "recyclable materials treated as waste by the customer" under the State's clearly articulated and affirmatively expressed policy. Further, GSR does not assert as error the District

Court's ruling that the City's determination that recyclable materials are "other waste" under the City's Franchise Agreement if a customer pays out-of-pocket for the collection of the materials was a proper exercise of the City's authority. Instead, GSR incorrectly asserts that the District Court found that the City could franchise the "collection of recyclable materials." That is not what the District Court held. It held that the City could franchise the collection of wastes, including those wastes that can be recycled.

GSR's failure to appeal the District Court's actual legal holdings should be fatal to GSR's appeal because GSR's Opening Brief is silent on identifying the foregoing issues for review.[22] Further, GSR does not address the District Court's finding that GSR requires customers to pay a fee for the collection and disposal of materials as waste, and this issue is, therefore, also not subject to review on appeal. Ind. Towers of Washington v. Washington, 350 F.3d 925, 929 (9th Cir. 2003) ("we will not consider any claims that were not actually argued in appellant's opening brief.")); Greenwood v. FAA, 28 F.3d 971, 977 (9th Cir. 1994) ("We review only issues which are argued specifically and distinctly in a party's opening brief. We will not manufacture arguments for an appellant . . . ."). Based upon these grounds, Reno Disposal submits that GSR's appeal is

[22] Kopczynski v. The Jacqueline, 742 F.2d 555, 560 (9th Cir. 1984) (claims of error on appeal "must be specific").

without basis and should be dismissed.

II. A FRANCHISE AND THE POWER TO REGULATE.

A "franchise" is an agreement whereby a municipality hires a third-party to perform public services on behalf of the municipality. Franchises are common and lawful grants of a public-sanctioned monopoly over waste collection and disposal services. United Haulers Assoc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 347 (2007) ("[W]aste disposal is typically and traditionally a function of local government exercising its police power.").

The exercise of the police power to protect the health, safety and welfare of the citizenry is so critically important that it is deemed an inherent attribute of State sovereignty. California-Oregon Power Co. v. Beaver Portland Cement Co., 73 F.2d 555, 566 (9th Cir. 1934), *aff'd sub nom.* California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 55 S. Ct. 725, 79 L. Ed. 1356 (1935) ("The police power is an attribute of sovereignty and is founded on the duty of the state to protect its citizens and provide for the safety, good order, and well-being of society."); Premier-Pabst Sales Co. v. State Bd. of Equalization, 13 F. Supp. 90, 96 (S.D. Cal. 1935) ("The police power of the state is an indispensable prerogative of sovereignty.").

Municipalities in Nevada are vested with the authority to grant franchises for the collection and disposal of waste under the State's police powers because waste

collection and disposal is of paramount public importance in Nevada. N.R.S. § 444.440 states:

> It is hereby declared to be the policy of this State to regulate the collection and disposal of solid waste in a manner that will:
>
> 1. Protect public health and welfare.
> 2. Prevent water or air pollution.
> 3. Prevent the spread of disease and the creation of nuisances.
> 4. Conserve natural resources.
> 5. Enhance the beauty and quality of the environment.

Id. (emphasis added).

To implement this policy, the Nevada Legislature vested each "governing body of an incorporated city" with the authority to "displace or limit competition" for the "collection and disposal of garbage and other waste." N.R.S. § 268.081(3). N.R.S. § 268.083 then allows the City to grant an "exclusive franchise" to a company to perform the waste collection services on behalf of the City.

In addition, the City enacted numerous ordinances authorizing the implementing the City's Franchise Agreement. For instance, City's Municipal Code states that the City has determined the solid waste and recyclable material collection services are subject to the City's franchise authority as follows:

> **Sec. 5.90.005. - Preamble.**
>
> The Reno City Council has determined that the health, safety and welfare of its residents require that **certain solid waste and recyclable material collection services be provided under one or more exclusive municipal franchise agreements pursuant to NRS 268.081.** The franchise agreements shall contain the terms, covenants and conditions required in this

> article, as the same may be modified as provided in the franchise agreements, and such other terms, covenants and conditions approved by the Reno City Council.

Id. RMC § 5.90.020 similarly provides: "An Agreement for the Collection of Residential or Commercial Collection Materials will only be granted as provided in this article." Further, RMC § 5.90.030(b) then states: "Contractors . . . shall have the exclusive privilege of providing 'Collection Services of Collection Materials' subject to the limitations of any applicable Agreement, and city, state and federal law."[23] Further, RMC § 5.90.060(b) expressly states that "no commercial customer in contractor's exclusive service area may allow or retain any person or entity other than contractor to collect, pickup, transport or deliver approved recyclable materials in violation of contractor's exclusive right under the commercial agreement."

Demonstrating the validity of the City's action, and that the Franchise Agreement is valid and enforceable in accordance with Nevada statutes and Reno

[23] Additional applicable RMC provisions are: RMC § 5.90.030(a) and (b) (establishing exclusive waste collection rights under the City's Franchise Agreement); RMC § 5.90.060(a) and (b) (mandating every residential and commercial customer in the City to only use the City's designated waste collection and disposal company Reno Disposal for waste collection and disposal services); RMC § 5.90.110 (prohibiting any person to "violate or impair the exclusive rights" of Reno Disposal's exclusive franchise); and RMC § 10.08.045 (mandating all generators of "solid waste" to comply with the City's Franchise Agreement and franchise authority.

ordinances, the Franchise Agreement itself states that it is being entered into with Reno Disposal pursuant to the provisions of N.R.S. § 268.081, 268.083 and Chapter 5.90 of the Reno Municipal Code. 1 ER 82 (1st, 2nd and 3rd Whereas Clauses).[24]

On appeal, GSR has not challenged the City's authority to enter into the franchise agreement with Reno Disposal and has not challenged the City's enactment of ordinances relating to the City's Franchise Agreement. GSR has also not challenged the City's exercise of its regulatory authority to define what materials are classified as waste subject to the City's franchise authority; that the City's definition of waste as being materials a customer pays out-of-pocket to dispose of was improper; or that GSR is charging customers a fee to collect and dispose of materials making those materials waste subject to the City's franchise authority and Franchise Agreement. GSR merely complains that the City has

[24] In an almost identical situation, the Nevada Supreme Court conducted an in-depth analysis of the public policy underlying the enactment of NRS 444.440 and affirmed the authority and validity of a county's determination that construction debris materials were "other waste" subject to the county's franchise authority. Specifically, in Douglas Disposal, Inc. v. Wee Haul, LLC, 170 P.3d 508 (Nev. 2007), the Nevada Supreme Court examined and affirmed the enabling statutes that allowed counties to enter into franchise agreements for the collection of "other waste" finding that the counties regulation of "construction waste" as falling within the county's franchise authority was valid pursuant to NRS 244.187 and 244.188. Id. at 514. NRS 244.187's and 244.188's provisions are identical to NRS 268.081 and 268.083, except 244.187 and 244.188 apply to counties while NRS 268.081 and 268.083 applies to municipalities.

wrongfully determined that the generic term "recyclable materials" is not subject to the City's franchise authority. As repeatedly stated herein, this appeal is not about some undefined category of recyclable materials, it is all about the City's authority to regulate and define what is "waste". The City's determination of what is waste falls squarely within the City's authority "to regulate" the collection and disposal of waste. *See e.g.,* Douglas Disposal, Inc. v. Wee Haul, LLC, 170 P.3d 508, 515 (Nev. 2007) (County's "construction waste regulation falls within the County's police powers . . . .").

N.R.S. § 268.081(3) and 444.440 vest the City with the authority "to regulate" the collection and disposal of waste including the authority to determine what is waste. N.R.S. § 444A.013 also includes "recyclable material" as material that is a "solid waste". The City's determination that recyclable materials treated as waste are subject to the City's franchise authority and Franchise Agreement is an approved and appropriate exercise of the City's police powers furthering the implementation of the State's public policy. Douglas Disposal, Inc. 170 P.3d at 514 (affirming State policy authorized counties to determine that "construction waste" was subject to county's franchise authority). Because the City is vested with the authority to regulate and implement regulation over "solid waste" and its subset "recyclable materials", the City's conduct is exempt from any antitrust liability or scrutiny.

III. STATE ACTION IMMUNITY APPLIES EXEMPTING THE CITY'S ACTION FROM SCRUTINY.

The well-recognized exception to the Sherman Act is the "state action" exemption. Under the state action exemption, anticompetitive practices are permitted when authorized by a state pursuant to a "clearly articulated and affirmatively expressed" state policy displacing competition and is referred to as the "*Parker* Doctrine". *See* Parker v. Brown, 317 U.S. 341, 350-351, 63 S. Ct. 307, 87 L. Ed. 315 (1943) ("nothing in the language of the Sherman Act or in its history . . . suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature . . . .").

The *Parker* doctrine is simply a recognition that the State may frequently choose to implement its policies through its cities and towns and such action is appropriate when the "state policy" is "clearly articulated and affirmatively expressed." City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410, 98 S.Ct. 1123, 1135, 55 L.Ed.2d 364 (1978). The *Parker* doctrine also recognizes the "dual system of federalism" and allows municipalities to "administer regulatory policies free of the inhibitions of the federal antitrust law."[25]

[25] City of Lafayette, at 415, 98 S. Ct. at 123 ("The *Parker* doctrine . . . preserves to the States their freedom under our dual system of federalism to use their municipalities to administer state regulatory policies free of the inhibitions of the

The ability "to regulate" is the authority "to make rules or laws" and to implement other regulations that cover the subject matter of the State's public policy. *See e.g.*, Smith v. Turner, 48 U.S. 283, 351, 12 L. Ed. 702 (1849); Mayor, Aldermen & Commonalty of City of New York v. Miln, 36 U.S. 102, 126, 9 L. Ed. 648 (1837) ("A power to regulate . . . must necessarily include the means and manner of carrying it on.").

In California Aviation, Inc. v. City of Santa Monica, 806 F.2d 905 (9th Cir. 1986), this Court explained the application of the *Parker* Doctrine:

> To establish that the state's policy is clearly articulated and affirmatively expressed, the City must show that there is a state policy to displace competition and that the legislature contemplated the kind of municipal actions alleged to be anticompetitive. . . . We have consistently assumed that a state legislature contemplated a municipal restraint on competition if the restraint was a necessary or reasonable consequence of engaging in anticompetitive activity authorized by the legislature.

Id. at 907. Accordingly, actions by a City displacing competition include all necessary or reasonable consequences of the authorized anticompetitive activity.

In addition, a state policy has been clearly articulated and affirmatively

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federal antitrust laws."); *see also* Cmty. Commc'ns Co. v. City of Boulder, Colo., 455 U.S. 40, 54, 102 S. Ct. 835, 842, 70 L. Ed. 2d 810 (1982) (citing *Parker* 317 U.S. at 350–351) ("[N]othing in the language of the Sherman Act or in its history . . . suggests that its purpose was to restrain a state or its officers or agents from activities *directed by its legislature* . . . . [And] an unexpressed purpose to nullify a *state's control over its officers and agents* is not lightly to be attributed to Congress." (italics in original)).

expressed "if the anticompetitive effect was the 'foreseeable result' of what the State authorized." FTC v. Phoebe Putney Health System, Inc., 568 U.S. 216, 227, 133 S. Ct. 1003, 1011, 185 L.Ed.2d 43 (2013). An anticompetitive effect is foreseeable if it is "the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature." Id. at 1012–13.

A. THE DISTRICT COURT'S ANALYSIS.

Initially, the District Court articulated the issue before it: "[t]he case is about the City of Reno's authority to grant a monopoly for the collection and disposal of certain recyclable materials." 1 ER 5:13-14.[26] The District Court correctly concluded that N.R.S. § 268.081 "expressly authorizes anticompetitive conduct." 1 ER 14:7. The District Court then 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." 1 ER 6:10-12.

The District Court concluded because collection and disposal of certain waste is an area of local concern to be regulated and controlled by local government, the City's determination of what is waste was within its authority under Nevada and federal law. In granting judgment in favor of the City and Reno

[26] As explained in Argument I, GSR did not appeal the actual issue considered by the District Court.

Disposal, the District Court ruled as follows:

1. that N.R.S. § 268.081 "expressly authorizes anticompetitive behavior." 1 ER 14:7-9.

2. that "the City is immune . . . even though the state statute authorizing the City to grant a monopoly over the collection and disposal of garbage and other waste does not specifically list all the material that might constitute 'other waste.'" 1 ER 14:25-27.

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." 1 ER 14:27-15:3.

4. that "the Court finds that the City and Reno Disposal's anticompetive conduct has been articulated and affirmatively expressed as state policy." 1 ER 16:7-8.

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**." 1 ER 15:6-10. The District Court 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." 1 ER 15:10-12.

(Emphasis added). The District Court then held:

> 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.

1 ER 17:24-27. In support of its holding, the District Court additionally found that

the City's definition and regulation over the materials that qualified as "other waste" was a "foreseeable" and "necessary" result and consequence of the implementation of the State's "clearly articulated public policy. 1 ER 14:2-15:12.

B. THE CLEAR ARTICULATION TEST IS SATISFIED.

The District Court's Order specifically addressed the *Midcal* test and the analysis of the clear articulation prong.[27]

1. THE CHALLENGED ACTIVITY.

GSR contends the District Court "failed to determine what the challenged activity was" and did not determine "whether that activity falls within the state authorizing statute." OB, p. 15. GSR is wrong on both assertions. Initially, however, GSR's argument is disingenuous because GSR admits the District Court did in fact articulate GSR's contention. OB, p. 17 ("The district court did not define the challenged restraint until the very end of the Order . . . ."). GSR's Opening Brief, therefore, admits that the District Court did in fact properly articulate the challenged activity and this argument lacks merit.

Next, the District Court's Order examined in great detail the challenged activity. The District Court examined GSR's discount/rebate scheme (established

[27] 1 ER 13-16 (*citing* Chamber of Commerce of the United States of Am. v. City of Seattle, 890 F.3d 769, 781 (9th Cir. 2018) ("The Supreme Court uses a two-part test, sometimes referred to as the *Midcal* test, 'to determin[e] whether the anticompetitive acts of private parties are entitled to immunity.'").

by undisputed facts). 1 ER 6:16-18 ("[GSR] operates by providing its customers with recycling containers in exchange for payment offset by a rebate."). The District Court then examined the City's determination that GSR's conduct was illegal and in violation of the City's Franchise Agreement and franchise authority:

> 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.)

1 ER 6:21-7:6.

The District Court summarized that based upon the undisputed facts "[GSR's] customers were essentially paying for [GSR] to remove waste when Reno Disposal had the exclusive rights to remove waste." 1 ER 6:21-23. The District Court then found that the City's definition and regulation of waste easily fell within the scope of the City's regulatory authority and held:

> all the City has done is "adopted a definition of waste—as it must—incorporates monetary value to the producer: the City has defined waste as materials that the generator pays someone to take it away."

1 ER 15:6-10.

Further, the District Court found that the State's anticompetitive policy was expressly authorized (1 ER 14:7-9 ("[NRS 268.081] expressly authorizes anticompetitive behavior")) and "the Court finds that the City and Reno Disposal's anticompetive conduct has been articulated and affirmatively expressed as state policy." 1 ER 16:7-8. Accordingly, GSR's contention that the District Court did not examine the challenged activity and did not analyze whether the challenged activity fell within the State's authorizing statute are baseless contentions.

2. REGULATION OF WASTE APPLYING A MONETARY VALUATION METHODOLOGY IS APPROPRIATE.

As previously noted, GSR's Opening Brief fails to address the State's statute encompassing the "collection and disposal of recycling materials treated as waste". N.R.S. § 268.081(3). GSR's Opening Brief also fails to challenge the City's regulation and monetary definition of waste as something a customer pays to have taken away.[28]

[28] Instead, GSR's Opening Brief generally references the distinction between recycling companies and waste collection companies and how their business operations are different. OB, pp. 15-27. While these two industries may have distinct operations, GSR is not a recycling company and the materials GSR collects and disposes of are waste. GSR is not even a recycling business licensed to operate in the City. SOC, ¶L.

To the extent this Court considers the District Court's analysis, it undertook a thorough analysis of the City's definition and regulation of materials that constitute "other waste". First, the District Court noted that requiring the Nevada Legislature to define each item that would constitute "other waste" would likely have been an impossible task. I ER 15.[29] Instead, the District Court found that the City's use of definition to regulate what is "other waste" that incorporates a "monetary value" was entirely proper as a foreseeable and necessary implementation of the State's anticompetitive activity.[30]

Similarly, finding that materials are waste if a customer pays to have materials collected and disposed of comports with the legal definition of waste as applied by other courts. For example, in Pleasant Hill Bayshore Disposal, Inc. v. Chip-It Recycling, Inc., 91 Cal. App. 4th 678, 110 Cal. Rptr. 2d 708, fn. 10 (2001) the court held: "waste is discarded if someone is paid to take it away". In Pleasant

[29] The District Court employed the example of a spoon to highlight how "the concept of waste is subjective" since a person may subjectively believe "something" has value, when in reality, the "something" has no objective monetary value, and it actually costs money to dispose of the "something". 1 ER 14. Therefore, it was foreseeable the City would define what is "waste" as a necessary and reasonable exercise of its police power authority.

[30] The City's adoption of a monetary definition is also consistent with the "economic" consideration applicable to recyclable waste materials. *See e.g.,* NRS 444A.013 ("'Recyclable material' means solid waste that can be processed and returned to the economic mainstream . . . .").

Hill the court held that it was a "legal" issue of whether a customer's payment for removal of materials made the materials "waste":

> **The dispositive issue is not factual but legal.** It is undisputed that the generators . . . **paid Chip–It to remove that material from jobsites.** Under the Waste Management Act **that makes the materials discarded "waste"** and therefore subject to Pleasant Hill's exclusive franchises.

Id. (emphasis added).

The Pleasant Hill Court also undertook an economic analysis of waste and held that material is "discarded" if it is shown to be "without value". Id. The Pleasant Hill Court analyzed the concept of "negative value" of the materials, meaning that if there was a negative net cost to have the material disposed of rather than a positive net value from any sale of the materials, then such material was by definition "waste". Id. at 719 ("The crucial definition of discarded material as waste having only '"negative"' property value' accords with the definition of waste . . . .").

Similarly, in Waste Management of the Desert, Inc. v. Palm Springs Recycling Center, Inc., 7 Cal. 4th 478, 869 P.2d 440, 28 Cal. Rptr. 2d 461 (Cal. 1994) ("WM of the Desert") the court examined whether a city could regulate and franchise the collection of recyclable materials that had no market value. The California Supreme Court undertook an analysis of the "**Economic value to the owner**" of the materials and answered this question by examining the distinction between waste and the sale of something of value such as a commodity. The court

started its analysis with the following: "The concept of market value is perhaps most clearly stated in the poetic axiom that, 'The worth of a thing, is the price it will bring.'" Id. at 485, 869 P.2d at 443 (citation omitted). The court stated that the "concept of value is in this sense related to the manner in which the property is disposed." Id. The WM of the Desert Court then stated: "The commonly understood meaning of 'waste' is something discarded 'as worthless or useless.'" Id., (*citing* Amer. Heritage Dict. (1985) p.1365, col. 1; Oxford English Dict. (2d ed. 1989 (p. 985, col. 1)). With these foundational premises established, the WM of the Desert Court concluded that a customer either disposes of materials or sells them "but either method of disposition necessarily precludes the other." Id.[31]

Similarly, a city's use of its franchise powers to regulate monetary values relating to franchised services is also directly in line with this Court's analysis in California Aviation, Inc. v. City of Santa Monica, 806 F.2d 905 (9th Cir. 1986). Although California Aviation did not address a waste collection setting, the analysis of a city's regulatory authority extending to monopolistic services using a monetary standard is compelling. In California Aviation, the City of Santa Monica entered into a lease with California Aviation for performance of certain services on

[31] *See also* City of San Marcos v. Coast Waste Management, Inc., 47 Cal. App. 4th 320, 326 (Cal. Ct. App. 1996) ("[R]ecyclable solid wastes that are collected for a fee paid by a customer would necessarily be deemed to be discarded" as waste and therefore subject to the exclusive franchise agreement).

behalf of the city at the city's airport. The lease provided that the aviation company could charge no less for fuel than the city charged. California Aviation subsequently brought suit claiming that the fuel price limitation was a violation of the Sherman Antitrust Act because the city was attempting to regulate fuel prices. Id. at 907.

This Court noted that while there was no specific statute addressing the price of fuel, California had nonetheless "enacted a comprehensive statutory scheme that articulates a state policy to displace competition at municipal airports." Id. This Court then agreed that the state legislature clearly contemplated that regulating the price of fuel as falling within the state's policy to displace competition at the airport. Id. at 908. Further, this Court held that such monetary restriction was "clearly a reasonable consequence of engaging in the authorized activity of limiting business competition at municipal airports." Id. This Court then concluded that state action immunity applied and such activity was, therefore, "exempt from scrutiny under the federal antitrust laws" because "the state legislature has gone beyond the minimum expression of state policy required to establish municipal immunity under the state action immunity doctrine." Id. at 910, fn. 3.

Here, the City has mandated that waste is subject to its franchise authority if the materials are collected and disposed of for a fee. The State's authority to

regulate "other waste" using a monetary methodology is a necessary, reasonable and foreseeable consequence of the State's "articulated and expressed policy to displace competition with regulation." *See e.g.,* 1 ER 14:10-12 ("Any 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."); 1 ER 16:5-6 ("it is foreseeable that the City would have to define 'other waste' for itself in light of the term's subjectivity.").

IV. STATE SUPERVISION DOES NOT APPLY.

GSR also contends that the District Court erred in failing to make Reno Disposal and the City "prove" active state supervision in order to meet the requirements of the *Parker* doctrine. OB, p. 28. This argument fails for a number of reasons. First, the burden of proof was not upon Reno Disposal or the City to prove state supervision. Second, GSR provides no cogent legal argument why waste collection is not a traditional municipal function. Third, GSR fails to define how Reno Disposal was subject to antitrust liability when the City implemented the definition of waste subject to its franchise authority.

A. NEITHER THE CITY NOR RENO DISPOSAL HAVE TO PROVE ACTIVE STATE SUPERVISION.

Reno Disposal disagrees with GSR's contention that the City and Reno Disposal had "to prove" active state supervision. If GSR believed active state supervision was a requirement preventing entry of summary judgment, then it

was GSR's responsibility to prove such contention. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257, 106 S. Ct. 2505, 2514, 91 L. Ed. 2d 202 (1986) ("the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment."). Reno Disposal and the City did not have the burden to prove the non-existence of a non-existent issue.

B. REGULATION AND FRANCHISING OF WASTE COLLECTION ACTIVITIES IS A TRADITIONAL MUNICIPAL FUNCTION.

The District Court correctly found that the active supervision requirement does not apply when the "challenged activity is within a traditional municipal function". 1 ER 16 (*string cite omitted*). GSR undertakes no analysis in its Opening Brief to contest that waste collection is a traditional municipal function.[32]

To the extent this Court considers this argument, GSR's contention is wrong. The collection and disposal of waste, and the regulation of waste through

[32] GSR's Opening Brief merely inserts a heading claiming that the District Court erred in determining that the challenged activity was within a traditional municipal function but failed to present any cogent argument supporting this bland assertion. Greenwood v. FAA, 28 F.3d 971, 977 (9th Cir. 1994) ("We review only issues which are argued specifically and distinctly in a party's opening brief. We will not manufacture arguments for an appellant . . . .").

franchise agreements issued by a municipality is a traditional municipal function.[33] Given GSR's failure to present any cogent argument in its Opening Brief that waste collection and disposal is not a traditional municipal function, GSR's argument should be rejected. To the extent GSR supported such an argument, it fails as a matter of law.

C. THE CITY IS THE ONLY ACTOR REGULATING THE DEFINITION OF WASTE.

In Chamber of Commerce of the United States of Am. v. City of Seattle, 890 F.3d 769, 782 (9th Cir. 2018) this Court held:

> Local governmental entities, "unlike private parties, . . . are not subject to the 'active state supervision requirement' because they have less of an incentive to pursue their own self-interest under the guise of implementing state policies." *Id.* (quoting *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46–47, 105 S.Ct. 1713, 85 L.Ed.2d 24 (1985)).

Id. As a local government, the City has no obligation to satisfy the active state

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[33] United Haulers Assoc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 347 (2007) ("[W]aste disposal is typically and traditionally a function of local government exercising its police power."); AGG Enterprises v. Washington County, 281 F.3d 1324, 1328 (9th Cir. 2002) ("One could hardly imagine an area of regulation that has been considered to be more intrinsically local in nature than collection of garbage and refuse, upon which may rest the health, safety, and aesthetic well-being of the community."); Kleenwell Biohazard Waste and General Ecology Consultants, Inc. v. Nelson, 48 F.3d 391, 398 (9th Cir. 1995) ("Congress has explicitly found that the field of solid waste collection is properly subject to state regulation. . . . The Supreme Court has consistently held that a state's power to regulate commerce is at its zenith in areas traditionally of local concern."); *see also* USA Recycling, Inc. v. Babylon, 66 F.3d 1272, 1275 (2nd Cir. 1995) ("For ninety years, it has been settled law that garbage collection and disposal is a core function of local government in the United States").

supervision requirement.

Further, the District Court dismissed the claims against Reno Disposal and WMON finding these parties were not "engaged in municipal regulation" and were instead private actors acting under the authority of the City. 1 ER 17:9-10. GSR's sole argument in support of this issue on appeal is that because Reno Disposal may enforce the terms of the City's Franchise Agreement and/or the City's ordinances relating to waste collection, then this makes Reno Disposal an actor subject to antitrust liability. OB, pp. 32-33. However, enacting and defining regulations is clearly distinct from enforcement of such regulations. Here, the District Court correctly found that Reno Disposal has no authority to "set pricing or in any way regulate the collection and disposal of garbage and other waste." 1 ER 17:17-18. Pursuant to the terms of the Franchise Agreement, the City dictates the franchise rates. 1 ER 116, ¶6.1. Again, GSR's argument fails.

V. APPLICATION OF THE NOERR-PENNINGTON DOCTRINE.

Reno Disposal also has no liability for entering into and performing the Franchise Agreement on behalf of the City. Sanders v. Brown, 504 F.3d 903, 912 (9th Cir. 2007) ("Noerr–Pennington immunity protects private actors when they . . . enter contracts with the government."). The *Noerr-Pennington* doctrine is the corollary to the *Parker* Doctrine and immunizes private actors from antitrust liability if the private actors enter into contracts with municipalities to

further state action. City of Columbia v. Omni Outdoor Adver, Inc., 499 U.S. 365, 383 (1991) ("*Parker* and *Noerr* are complementary expressions of the principle that the antitrust laws regulate business, not politics . . . .").

While the District Court did not perform a *Noerr-Pennington* analysis relating to Reno Disposal, it is believed that under the authority vested in this Court, should the Court deem it necessary, this Court can also find Reno Disposal and WMON immune from any antitrust liability pursuant to the *Noerr-Pennington* doctrine. *See e.g.*, Jaffke v. Dunham, 352 U.S. 280, 281, 77 S. Ct. 307, 308, 1 L. Ed. 2d 314 (1957) ("A successful party in the District Court may sustain its judgment on any ground that finds support in the record.").

VI. CONCLUSION.

Based upon the foregoing, GSR's appeal should be denied in total and the District Court's Order and Judgment affirmed in all respects.

DATED this 13th day of August, 2019.

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STATEMENT OF RELATED CASES

Pursuant to Cir. R. 28-2.6 Appellees know of no other related cases pending in this Court.

DATED this 13th day of August, 2019.

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CERTIFICATE OF COMPLIANCE

I am the attorney for Appellees identified herein and that this this brief contains 12,386 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and that this brief complies with the word limit of Cir. R. 32-1.

This brief's typeface and type size comply with Fed. R. App. P. 32(a)(5) and (6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word For Office 365 MSO using Times New Roman 14-point font.

DATED this 13th day of August, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on August 13, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in this case who are registered CM/ECF users will be served by the appellate CM/ECF system.

DATED: August 13, 2019.

/s/ Jodi Alhasan
An Employee of Simons Hall Johnston PC

ADDENDUM

Nev. Rev. Stat. § 268.081 **Displacement or limitation of competition: Services.** (2009)

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 any of the following areas:

...

3. Collection and disposal of garbage and other waste.

Nev. Rev. Stat. § 268.083 **Displacement or limitation of competition: Methods.** (2001)

The governing body of an incorporated city may:

1. Provide those services set forth in NRS 268.081 on an exclusive basis or, by ordinance, adopt a regulatory scheme for providing those services or controlling development on an exclusive basis within the boundaries of the city; or

2. Grant an exclusive franchise to any person to provide those services within the boundaries of the city.

Nev. Rev. Stat. § 444.440 **Declaration of state policy.** (1971)

It is hereby declared to be the policy of this State to regulate the collection and disposal of solid waste in a manner that will:

1. Protect public health and welfare.
2. Prevent water or air pollution.
3. Prevent the spread of disease and the creation of nuisances.
4. Conserve natural resources.
5. Enhance the beauty and quality of the environment.

Nev. Rev. Stat. § 444A.013 "Recyclable material" defined. (1993)

"Recyclable material" means solid waste that can be processed and returned to the economic mainstream in the form of raw materials or products, as determined by the State Environmental Commission.

Reno Muni. Code § 5.90.005. Preamble. (2012)

The Reno City Council has determined that the health, safety and welfare of its residents require that certain solid waste and recyclable material collection services be provided under one or more exclusive municipal franchise agreements pursuant to NEV. REV. STAT. 268.081. The franchise agreements shall contain the terms, covenants and conditions required in this article, as the same may be modified as provided in the franchise agreements, and such other terms, covenants and conditions approved by the Reno City Council.

Reno Muni. Code § 5.90.010. Definitions. (2012)

The following words and phrases, when used in this article, shall have the meanings respectively ascribed to them:

. . .

"Agreement" means a commercial or residential franchise agreement for an exclusive service area between the city and a contractor to collect, haul and/or dispose of collection materials.

. . .

"Approved recyclable materials" means the recyclable materials approved for recycling under an agreement, and which may be changed from time to time by mutual agreement between contractor and city, excluding certain materials excluded under the agreements.

. . .

"Excluded recyclable materials" means either or both

> (i) Approved recyclable materials from commercial activity that are: (a) separated by the generator thereof from all other materials and which contain not less than 90 percent approved recyclable materials; and, (b) sold by the generator thereof directly to a buyer of recyclable material at market price, title to which materials transfers to the buyer upon collection or pickup of such materials, but excluding such materials collected and transported as a service; and (ii) Any other recyclable materials that are not approved recyclable materials.

Reno Muni. Code § 5.90.020. Granting of franchise. (2012)

> An agreement for the collection of residential or commercial collection materials will only be granted as provided in this article.

Reno Muni. Code § 5.90.030. Franchise right. (2012)

> (a) This article establishes the exclusive right for contractors to provide collection services of collection materials pursuant to NRS 268.081, as amended. (b) Contractors, and their respective successors or assigns, shall have the exclusive privilege of providing collection services of collection materials, subject to the limitations of any applicable agreement, and city, state and federal law.
>
> (b) Contractors, and their respective successors or assigns, shall have the exclusive privilege of providing collection services of collection materials, subject to the limitations of any applicable agreement, and city, state and federal law.
>
> ...

Reno Muni. Code § 5.90.060. Obligation to provide collection services; mandatory service; exemption. (2012)

(a) Residential agreements. . . . no residential customer in an exclusive service area may allow or retain any person or entity other than the designated contractor to collect, pickup, transport or deliver approved recyclable materials or other collection materials that would be a violation of contractor's exclusive right under the residential agreement. With the approval of the owner of a residence, a tenant or occupant thereof may subscribe for collection services, but the owner of the residence shall remain responsible for compliance with all requirements of the residential agreement and the Reno Municipal Code.

(b) Commercial agreements. . . . no commercial customer in contractor's exclusive service area may allow or retain any person or entity other than contractor to collect, pickup, transport or deliver approved recyclable materials in violation of contractor's exclusive right under the commercial agreement.

. . .

Reno Muni. Code § 5.90.110. **Compliance.** (2012)

Persons generating, producing or accumulating collection materials in the city shall comply with the applicable terms, conditions and requirements of this article and the agreements. No person shall violate or impair the exclusive rights of any contractor under this article or any agreement. Contractor shall be entitled to independently enforce against third parties the terms, covenants, conditions and requirements of this and related articles and the agreements, including without limitation defending challenges thereto and to prevent violations by third parties thereof (including without limitation the exclusive right and obligation of contractor to provide the collection services).

Reno Muni. Code § 10.08.045. **Mandatory use of solid waste and recyclable materials collection service within the city.** (2012)

Every responsible person which accumulates or causes the accumulation of solid waste upon any premises in the city shall subscribe to the collection, hauling and disposal of solid waste pursuant to the provisions of RMC chapter 5.90 and the applicable agreements.