LAW OFFICES OF
SCOTT W. GORDON
A PROFESSIONAL CORPORATION
1990 NORTH CALIFORNIA BLVD. SUITE 620
WALNUT CREEK, CALIFORNIA 94596

SCOTT W. GORDON
SWGORDON@SBCGLOBAL.NET

215 W. 7TH STREET, NO. 509
LOS ANGELES, CALIFORNIA 90014

ENVIRONMENTAL, LAND USE
PUBLIC AGENCY PRACTICE

REPLY TO: WALNUT CREEK

925-295-3133
FAX: 925-295-3132

February 12, 2014

Via E-Mail and US Mail
The Hon. Karen Mitchoff, Chair
and Members of the Board
Contra Costa County Board of Supervisors
651 Pine Street
Martinez, CA 94553

Re: CCCSWA RFP and Contractor Selection Process
Recent Claims of Contra Costa Waste Services, Inc.,
Mt. Diablo/Recology

Dear Chair Mitchoff and Members of the Board:

This undersigned serves as outside counsel to Allied Waste Systems, Inc. *dba* Republic Services of Contra Costa County and its affiliates (collectively, "Republic") in connection with Republic's proposal submitted in response to the Central Contra Costa Solid Waste Authority ("CCSWA") Request for Proposals ("RFP") for collection and processing services, now in the final contractor selection stage. I am writing to address certain specific unfair trade practices claims previously asserted on the eve of the January 30, 2014 CCCSWA meeting by the principal competitors of Republic in the RFP process, Contra Costa Waste Services, Inc. ("CCWS") and Mt. Diablo/Recology ("MDR", a joint venture) in letters dated January 27, 2014 and January 29, 2014. I understand that counsel for CCWS and MDR has submitted an additional, lengthy letter to your Board during public comment at the Tuesday, February 11, 2014 Board meeting, which we will review and respond to under separate cover. I believe that many of the claims asserted by CCWS/MDR counsel are likely addressed in this letter.

The January 27 and January 30 CCWS/MDR letters (1) incorrectly assert that the US Department of Justice Antitrust Division ("DOJ") and State of California, in approving Republic Services, Inc.'s 2008 acquisition of Allied Waste Services, found that Republic was operating or could operate in Contra Costa County in a way that harms competition; (2) incorrectly assert that Republic has violated both the antitrust laws and California's unfair competition law, Cal. Bus. & Profs. Code § 17200 et seq. ("Section 17200"), by submitting a combined proposal for collection

and disposal services, and (3) incorrectly assert that Republic's waste acceptance obligations under the terms of the Keller Canyon Landfill conditional use permit require Republic to accept waste at prices and conditions determined *not* by Keller Canyon, but as demanded by facility customers such as CCWS and MDR.

As I indicated in my brief testimony Tuesday morning, these claims are baseless and interposed to delay and cloud the CCSWA's RFP process. The plan appears to be to have your Board spend time and staff resources investigating myriad specious claims, in order to try and delay the CCCSWA's process for contractor selection pending completion (if ever) of your Board's investigations.

We are confident in our legal opinions regarding Republic's compliance with antitrust and unfair business practice laws in participating in the CCCSWA's RFP. The bottom line is that applicable law squarely holds that Republic owes no duty to deal with its rivals on terms and conditions that its rivals would find commercially advantageous. There is no Keller Canyon Landfill use permit requirement that would obligate Republic to offer disposal rates and terms to competitors in order to allow a competitor to bid against Republic in seeking business. The Keller Canyon Landfill Franchise Agreement authorizes Keller Canyon to establish disposal rates in its sole discretion. CCWS and MDR have cited no case or statutory authority requiring Republic to offer them disposal rates to allow them to use the Keller Canyon facility and bid against Republic, because they can't. These unsupported unfair business practice claims of CCWS and MDR are more fully addressed below.

The 2008 Republic/Allied Waste Merger and Settlement

CCWS and MDR have asserted that the Department of Justice Antitrust Division ("DOJ") and State of California found in 2008 that Republic was operating or could operate in Contra Costa County in a way that harms competition in connection with the DOJ approving Republic Inc.'s acquisition of Allied Waste Services. This assertion is flatly untrue. The complaint referenced by CCWS and MDR was filed by the DOJ, State of California and other states as part of a settlement of the plaintiffs' claims that Republic's 2008 merger with Allied Waste Industries would harm competition in certain markets *unless Republic divested the landfills and other assets agreed to by the parties.* In other words, by agreeing to settle its civil antitrust lawsuit filed in connection with Republic's merger with Allied, the DOJ and the plaintiff states, including California, expressly determined that, post-merger, and upon the sale of the agreed-upon divestiture assets, there would be *ample competition* in the market for municipal solid waste ("MSW") disposal services in certain areas, including the Bay Area. Thus, as the DOJ explains in its Competitive Impact Statement ("CIS") filed in connection with the settlement, Republic was required to divest, and did divest, its Potrero Hills Landfill ("PHL") in Suisun, California to address the alleged MSW disposal market concerns in the area.

The DOJ's CIS statement explicitly states that Republic's divestiture of PHL will "*preserve competition*" in the San Francisco area, which includes Contra Costa, Solano and Alameda Counties, between the PHL and the Keller Canyon Landfill for the disposal of MSW.

The CIS referenced by CCWS/MDR was filed by the DOJ "together with its complaint [and] a stipulation and order under which the parties consented to entry of a proposed final judgment *aimed at remedying the alleged anticompetitive effects of the merger*." *United States of America et al. v. Republic Services, Inc. et al.*, Civ. No. 08-2076 (RWR), Memo. Opinion at 3 (filed July 15, 2010). In subsequently entering that proposed judgment as final, the U.S. Court for the District of Columbia held that it was doing so "[b]ecause there is a reasonable basis upon which to conclude that the divestitures in the proposed final judgment will adequately remedy the competitive harms alleged in the government's complaint, entry of the proposed final judgment is in the public interest."

Accordingly, the CCWS/MDR suggestion that the 2008 case reflects a view of the DOJ that Republic enjoys a disposal "monopoly" in the San Francisco area are completely unfounded and misleading. In fact, PHL is the identified best disposal site option in the analysis of the CCWS/MDR proposal, underscoring that the PHL facility is a viable competitor in the Bay Area disposal market.[1] PHLF was less expensive than Recology's own Hay Road Landfill in Solano County and Waste Management's Redwood Landfill in Novato, Marin County. The Hay Road Landfill is located just a few miles north from PHL on State Route 113. CCWS own a transfer station on Loveridge Road in Pittsburg that currently hauls waste to PHL and can easily access Hay Road Landfill and other more distant facilities. The PHL and Hay Road landfill facilities are important participants in the Bay Area landfill disposal market.

Bus. & Profs. Code §17200 *et. seq.* Does Not Apply

Republic submitted a combined proposal for collection and transfer/disposal services that the CCCSWA staff, consultant and ad hoc committee has determined is in the best overall value and lowest cost proposal to benefit the CCCSWA and its constituents, and have therefore unanimously recommended Republic. CCWS and MDR assert that in presenting a combined (bundled) services and pricing proposal, Republic has violated both the antitrust laws and California's unfair competition law, Cal. Bus. & Profs. Code § 17200 et seq. ("Section 17200").

CCWS and MRD are mistaken, however, for any number of reasons, including that:

1. CCCSWA authorized such pricing in its RFP and has broad discretion to determine not only to whom it will award franchises for waste hauling and disposal, but

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1 Recology, along with other companies, urged the State of California to insist on the divestiture of PHL in the Republic/Allied merger evaluation. Recology also made a proposal to acquire PHL in the divestiture process, but was unsuccessful in doing so. The PHL site was divested to Waste Connections, Inc. on April 21, 2009.

how it will make such determinations2: and Republic did nothing more than submit a proposal in response to the RFP;

2. Contrary to CCWS and MDR's assertion, Republic does not have market or monopoly power in Contra Costa County in waste disposal services, and their assertion that the DOJ took such a position in 2008 is both inaccurate and misleading; and

3. Even, if Republic has market power, which it does not, CCWS and MDR do not remotely raise a genuine issue as to whether Republic's combined RFP proposal violates Section 17200 or had an effect on CCWS and MDR's ability to submit a competitive bid.

Furthermore as explained in more detail below, Republic violated no law by submitting a competitive RFP proposal based upon its ability to take advantage of the efficiencies arising from its investments in both hauling and disposal capabilities, which benefits the County residents and businesses within the CCCSWA. Perhaps more to the point, CCWS and MDR appear confused about the purpose of the unfair competition and antitrust laws. The purpose of such laws is to protect *competition* from conduct that tends to restrict production, raise prices or otherwise control the market to the detriment of consumers. They were not adopted, and are not enforced, to protect *competitors from* competition; which is what CCWS and MDR argue.

The Integrated Waste Management Act of 1989 ("the Act") and the RFP developed in accordance with the Act provide CCCWSA with wide latitude in not only determining RFP terms and to whom it will award contracts for waste hauling and disposal, but how it will make such decisions. Specifically, the Act permits the CCCWSA to determine whether collection and disposal services are to be provided by one or more contractors, to determine whether to use an RFP or other procurement processes, and to determine the various options, pricing, terms and conditions upon which such services will be provided. Furthermore, the CCCSWA's RFP encouraged combined proposals with discounted services for various services and facilities compared to stand alone pricing. (*See,* RFP for Collection Services, Announcement at p. 3.)[3]

Here, the CCSWA staff, HFH Consultants and the *ad hoc* committee recommended that Republic's proposal combining collection and disposal represents the overall best value for services that would best serve the needs of Central Contra Costa County. CCWS and MDR's further assertions regarding the CCSWA allegedly abandoning a "mix and match" approach are also not only within the CCWSA's authority and discretion, but are simply irrelevant. The Act

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2 *See,* Public Resources Code section 40059

3 "Each proposer will be required to provide stand-alone pricing for collection services and each of the processing services it proposes; *and will be invited, at its option, to provide a discounted rate for a combined collection and processing services proposal,* and for transfer and/or disposal services if it submitted a proposal for those services in response to the CCCSWA's March 29, 2013 RFP for Transfer and Disposal Services." [Emphasis added]

and the RFP clearly establish the CCCSWA's right to adopt any approach that it sees fit, "mix and match" or otherwise.

CCWS and MDR cannot credibly assert to your Board that Republic's participation in conformance with the CCCSWA's RFP constitutes "unfair competition" under Section 17200. To establish a violation of Section 17200, a complainant must show that alleged unlawful conduct violates the antitrust laws. *See, e.g., Docmagic, Inc. v. Ellie Mae, Inc.* 745 F.Supp.2d 1119, 1131 (N.D. Cal., 2010) ("where the same conduct is alleged to support both a plaintiff's federal antitrust claims and state-law unfair competition claim, a finding that the conduct is not an antitrust violation precludes a finding of unfair competition"). As noted above, there is no violation of the antitrust laws. A further analysis follows.

No Section 17200 Duty to Provide an Advantage to a Rival Company

CCWS and MDR do not cite a single case holding that Republic charging *itself* less for services than it charges third parties such as MDR or CCWS can provide a basis for a claim under Section 17200. Nor can they. Whatever Republic decides to have one affiliate charge itself in a packaged price simply cannot affect competition under these circumstances. In fact, this issue has been expressly addressed by a number of courts applying the federal antitrust laws.

The Clayton Act Section 2(a) establishes a claim for price-discrimination under certain circumstances.[4] That provision requires that the seller discriminate between two or more "purchasers." However, whatever one Republic company decides to charge a sister company, both of which are owned ultimately by the same company – Republic Services, Inc. – cannot serve as the basis of a price-discrimination claim by another purchaser. The subsidiaries are treated as one and the same entity for purposes of Clayton Act Section 2(a), and there is simply no sale to two or more purchasers for price discrimination analysis purposes. *See, e.g., Caribe BMW, Inc. v. BMW AG*, 19 F.3d 745, 750-51 (1st Cir. 1994) (in *dictim,* holding that a transfer to a subsidiary can never be considered a "sale" for Robinson-Patman Act purposes); *City of Mt. Pleasant v. Associated Elec. Coop.*, 838 F.2d 268, 278-79 (8th Cir. 1988) (same); *Russ's Kwik Car Wash v. Marathon Petroleum Co.*, 772 F.2d 214, 217-20 (6th Cir. 1985) (same); *O'Byrne v. Cheker Oil Co.*, 727 F.2d 159, 164 (7th Cir. 1984) (same); *Sec. Tire & Rubber Co. v. Gates Rubber Co.*, 598 F.2d 962, 966 (5th Cir. 1979) (same).5

Nor can MDR and CCWS credibly assert that Republic's conduct can constitute "unfair

4 Section 2(a) provides that "It shall be unlawful for any person engaged in commerce ... to discriminate in price between different purchasers of commodities of like grade and quality ... where the effect of such discrimination may be substantially to lessen competition." 15 U.S.C. § 13(a).

5 Any Clayton Act price-discrimination claim predicated upon the facts here would also fail because Section 2(a) applies only to the sale of "commodities" not services. *See, e.g., Yeager v. Waste Mgmt.*, 1994 WL 761959 (N.D. Ohio 1994) (granting defendants' motion for summary judgment with respect to plaintiff's Robinson-Patman claims where plaintiff alleged that defendants conspired to discriminate in the price of landfill services.)

competition" under monopolization or any other theory. Except under very limited circumstances not present here – such as those governed by the Clayton Act – firms may charge their customers, including their customer-competitors, whatever they wish to charge. *See Pacific Bell Telephone Co. v. LinkLine Communications*, 555 U.S. 438, 450 (2009) ("*Trinko* ... makes clear that if a firm has no antitrust duty to deal with its competitors at wholesale, it certainly has no duty to deal under terms and conditions that the rivals find commercially advantageous"); *see also Person v. Google, Inc.*, 2007 U.S. Dist. LEXIS 22499, at *14 (N.D. Cal., 2007) (reinforcing precedent that "high prices, by themselves, are not anticompetitive or exclusionary," and that "[a]bsent predatory practices, discriminating pricing does not threaten competition").

For these reasons, the so-called antitrust and unfair competitive claims of MDR and CCWS are completely without merit.

The Keller Canyon Use Permit Argument Is Unavailing.

The CCWS/MDR use permit argument is based on the erroneous and unsupported assertion that condition 5.1 of the Keller use permit – a general condition that says Keller must accept solid waste originating in Contra Costa County if delivered to the facility in compliance with applicable permits *and* if appropriate disposal fees are paid - would somehow obligate Republic to make its Keller Canyon Landfill available to a marketplace competitor at the same rates and on the same terms as Republic would provide to its affiliated companies. To the contrary, Keller Canyon is authorized by its use permit and Franchise Agreement to charge different rates to different users. There is no obligation, express or implied, to offer disposal rates that are either (1) demanded by a rival/customer, or (2) equivalent to rates Keller Canyon would charge its affiliates or other customers.

The County Does Not Set or Regulate Landfill Rates. Contrary to the assertion made by counsel for CCWS/MDR at your February 11 Board meeting, the County does not and cannot regulate disposal rates established by Keller Canyon for customers and/or competitors under the terms of the Franchise Agreement governing the relationship between the County and Keller Canyon Landfill. The County does not have authority to set rates for the landfill, including a rate demanded by a competitor. Rate setting was initially included in the use permit and Franchise Agreement, however the Franchise Agreement was amended and restated in September 1994 expressly removing provisions authorizing County rate setting and regulation, and establishing in their place provisions that Keller Canyon Landfill will establish disposal rates in its sole discretion. That amended and restated Franchise Agreement has been in effect between the parties for over 19 years.

CCWS and MDR Have Access to Several Landfills in the Region. There are many landfills in the Bay Area including PHL and Hay Road Landfill in Solano County, (owned by Waste Connections, Inc. and Recology respectively), the Altamont Landfill in Alameda County

and the Redwood Landfill in Marin County (owned by Waste Management) that can easily be accessed using transfer vans hauling waste from a transfer station, such as the transfer station located in the City of Pittsburg and owned by CCWS. Indeed, CCWS and MDR would do just that in their proposal as evaluated by CCCSWA—use the Pittsburg transfer station to haul waste requiring landfill disposal to PHL – just a short distance from the Pittsburg transfer station. As I indicated in my testimony to the Board, it is common knowledge that MDR's sister companies, Concord Disposal and Pittsburg Disposal have for the past 20 years used the Pittsburg transfer station owned by CCWS to transfer waste collected from the cities of Concord and Pittsburg to the nearby PHL in Suisun. In addition to making the obvious point that Keller Canyon enjoys no monopoly, the out-of-county waste outflow represents a significant amount of solid waste that has escaped the County's established franchise fee and other governmental charges, irretrievably lost revenue for the past 20 years.

CCWS and its affiliated entities have not in the past sent any significant quantities of the waste collected in Contra Costa County to the Keller Canyon Landfill, because these Garaventa affiliates have claimed they obtained a better economic package from PHL for disposal of waste from their franchised cities. And with less and less solid waste collected by franchised haulers actually being landfill as opposed to recycled, and with state law requiring imposing even greater recycling goals in the future under AB 341 and other laws and regulations, disposal pricing is becoming less and less of a factor in a collection company's overall cost structure. CCWS and MDR are hard pressed to argue "monopoly' and being deprived of access to Keller Canyon Landfill when they have voluntarily chosen an out of county disposal site for their disposal needs. CCWS and MDR thus concede that the disposal market is competitive and that they have chosen a different service provider for many years.

CCWS and MDR Concede that Republic Has Submitted a More Favorable Combined Price. In making groundless "monopoly" claims, CCWS and MDR are also conceding that Republic has submitted a more favorable combined (bundled) price for collection, transfer and disposal in response to the CCCSWA's RFP. Just because CCWS and MDR have submitted a more expensive competing proposal using an alternative landfill disposal provider -- their long-utilized disposal site, PHL -- does not mean that Republic has somehow unfairly eliminated MDR from competition. Rather, it reflects the essence of competition. It is common practice in a free enterprise society for companies to compete with each other using their own facilities that they spent literally millions of dollars on to permit, construct and develop. The Garaventa's transfer station in Pittsburg is one such example. Would Mt. Diablo Recycling charge a competitor wanting to use its Pittsburg transfer station the same internal company rate that it charges it sister companies Concord Disposal and Pittsburg Disposal, so that their competitors could then compete with more favorable pricing for collection services contracts in Concord and Pittsburg?

Republic Owes No Duty Under Federal Or State Laws To Provide A Pricing Advantage To A Rival. Company Republic owes no duty under federal or state antitrust laws or unfair

competition laws to provide a pricing advantage to a rival company. Condition 5.1 of the Keller Canyon use permit also does not require -- and cannot be reasonably read to require -- that Republic must accept waste at disposal rates dictated by a competitor in an RFP process (or through any other process for that matter). CCWS and MDR cite no relevant law or other support for this ridiculous assertion.

I am hopeful that your Board sees the CCWS and MDR tactics for what they are – a desperate last minute smear campaign from a sour grapes competitor who did not receive a favorable recommendation from the CCCSWA staff, an independent consultant and the ad hoc committee of the CCCSWA Board that unanimously recommended Republic as the best overall value and lowest cost provider for recyclables/solid waste collection and disposal services.

I respectfully ask your Board to avoid the trap of endless County staff work projects and investigations of unsupported claims that were first asserted on the eve of the CCCSWA's final contractor selection meeting. The CCCSWA is, of course, already evaluating claims that have now been brought to your Board. The delay strategy of CCWS and MDR most likely means there will be new claims, new questions, more testimony and strategically delivered last minute lawyer letters from CCWS and MDR submitted for any further Board od Supervisors meetings. The entire effort has been orchestrated and carefully choreographed in an effort to cloud the CCCSWA process and interpose delay. I would urge your Board to resist the temptation to participate in such a contorted process, and allow the CCCSWA to complete its process.

Thank you for your consideration of these matters.

Very truly yours,

Scott W. Gordon

SWG:cg
cc: Tim Benter, Republic Services, Inc. Vice-President
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Edward B. Schwartz, Esq., Steptoe & Johnson LLP
Damon Kalt, Esq., Steptoe & Johnson LLP
Thomas M. Bruen, Esq., Law Offices of Thomas M. Bruen, PC
Paul Morsen, Executive Director, CCCSWA
Kenton L. Alm, Esq., Meyers Nave et al, Counsel to CCCSWA
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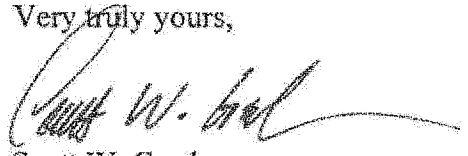

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Robert Hilton, Principal, HFH Consultants

Mr. David Twa, CCC County Administrator
Ms. Sharon L. Anderson, CCC County Counsel
Ms. Catherine Kutsouris, Director, CCC Conservation & Development
Ms. Deidra Dingman, CCC Solid Waste Programs Manager