**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

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| FRANK DAVID SEINFELD,<br><br>Plaintiff,<br><br>v.<br><br>DONALD W. SLAGER, JAMES E. O'CONNOR, JOHN W. CROGHAN, TOD C. HOLMES, DAVID I. FOLEY, RAMON A. RODRIGUEZ, MICHAEL W. WICKHAM, JAMES W. CROWNOVER, NOLAN LEHMANN, ALLAN C. SORENSEN, WILLIAM J. FLYNN, W. LEE NUTTER, JOHN M. TRANI, MICHAEL LARSON and REPUBLIC SERVICES, INC.,<br><br>Defendants. | ) | Civil Action No. 6462-VCG |

**ANSWER OF THE INDIVIDUAL DEFENDANTS TO PLAINTIFF'S AMENDED STOCKHOLDER'S DERIVATIVE COMPLAINT**

Defendants, James E. O'Connor, John W. Croghan, David I. Foley, Ramon A. Rodriguez, Michael W. Wickham, James W. Crownover, Nolan Lehmann, Allan C. Sorensen, William J. Flynn, W. Lee Nutter, Michael Larson and John M. Trani (the "Defendants"),[1] by and through their undersigned counsel, hereby respond to the Amended Stockholder's Derivative Complaint, Trans. ID No. 39493936 (the "Complaint"), as follows:

**1.** The plaintiff is a stockholder of defendant Republic Services, Inc. ("Republic" or the "Company") and was a stockholder at the time of the transactions complained of herein and has been such continuously since then.

[1] Defendants Donald W. Slager and Tod C. Holmes were dismissed from this action with prejudice pursuant to the Court's June 29, 2012 Memorandum Opinion (Trans. ID 45084839) and Order Implementing Rulings on Defendants' Motion to Dismiss (the "Order") (Trans. ID 45651713). Also pursuant to the Order, defendant Larson was dismissed from this action with prejudice from the Director Stock Awards Claim (as defined therein) only as to the 2009 award of restricted stock units.

**ANSWER:** The Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 1 and therefore denies them.

**2.** Defendants James E. O'Connor, Tod C. Holmes, and Donald W. Slager (the "Officer Defendants" or "Covered Employees") are three of the Company's Covered Employees and three of the non-resident officers of the Company, as defined in 10 Del. C. § 3114(b).

**ANSWER:** The claims to which the allegations in this paragraph are directed have been dismissed with prejudice, and therefore no response to this paragraph is required.

**3.** Defendants James E. O'Connor, Donald W. Slager, John W. Croghan, James W. Crownover, William J. Flynn, David I. Foley, Michael Larson, Nolan Lehmann, W. Lee Nutter, Ramon A. Rodriguez, Allan Sorensen, John M. Trani, and Michael W. Wickham, (sometimes the "Director Defendants"), thirteen in number, are all the members of the Company's board of directors.

**ANSWER:** The Defendants admit that Republic's board of directors is currently composed of Donald W. Slager, James W. Crownover, William J. Flynn, Michael Larson, Nolan Lehmann, W. Lee Nutter, Ramon A. Rodriguez, Allen Sorensen, John M. Trani, and Michael Wickham. By way of further response, the Defendants admit that James E. O'Connor and David I. Foley are former directors of Republic who did not stand for re-election at the May 12, 2011 annual meeting of stockholders, and that John W. Croghan is a former director of Republic who did not stand for re-election at the May 17, 2012 annual meeting. The Defendants admit that the plaintiff purports to give the term "Director Defendants" the definition set forth in paragraph 3, but deny that said definition is accurate or appropriate for any purpose in this matter. The Defendants deny the remaining allegations in paragraph 3.

**4.** Defendants Flynn, Wickham, Foley, Larson, and Sorensen, five in number, are all the members of the compensation committee of the Company's board of directors. Previously, defendants Lehmann and Rodriguez were members of the compensation committee.

**ANSWER:** The claims to which the allegations in this paragraph are directed have been dismissed with prejudice, and therefore no response to this paragraph is required.

**5.** Republic's fiscal year ends December 31. On February 10, 2011, it had outstanding 384,060,682 shares of common stock, which are traded on the New York Stock Exchange.

**ANSWER:** The Defendants admit the allegations in paragraph 5.

**6.** This is a stockholder's derivative action on behalf of Republic to recover from the Director Defendants for committing waste by paying non-tax-deductible compensation to the Officer Defendants. In addition, the Director Defendants paid defendant O'Connor for past services for which he had already been paid. O'Connor was unjustly enriched thereby. This is also an action on behalf of Republic to recover against the Officer Defendants for unjust enrichment at the Company's expense for receiving and accepting compensation that the Director Defendants wrongfully caused the Company to pay to them in the form of non-tax-deductible annual cash incentives under the Company's Executive Incentive Plan (the "EIP") and restricted stock and restricted stock units under the Company's 2007 Stock Incentive Plan. This is an action on behalf of Republic to recover the excessive compensation that the directors paid themselves as members of the board. Finally, this is an action on behalf of Republic to prevent the payment of incentive awards under the Company's Synergy Incentive Plan.

**ANSWER:** Paragraph 6 states legal conclusions to which no answer is required. To the extent that an answer may be required, the Defendants deny the allegations in paragraph 6, except admit the plaintiff purports to bring this action as a derivative action on behalf of Republic. By way of further answer, the Defendants state that all of the allegations in paragraph 6, except for the allegation relating to the Stock Plan, have been dismissed with prejudice and therefore no answer is required. The Defendants deny the allegations in paragraph 6 relating to the Stock Plan. The Defendants deny the remaining allegations in paragraph 6.

**7.** This action follows an action in the United States District Court for the District of Delaware entitled *Seinfeld v. O'Connor,* 09-cv-887 (LPS), where Judge Stark dismissed the direct (not derivative) federal claims for failure to state a claim for relief. *Seinfeld v. O'Connor,* 774 F. Supp. 2d 660 (D. Del. March 30, 2011). But Judge Stark held that the stockholder's derivative claims were all based on Delaware state law and dismissed them for lack of federal jurisdiction, prefacing that disposition to say, "The Court notes that Seinfeld also arguably raises theories of waste and unjust enrichment in his derivative action." *Id.* at p. 12 fn. 12.

**ANSWER:** Paragraph 7 states legal conclusions to which no answer is required. To the extent that an answer may be required, the Defendants admit that the United States District Court for the District of Delaware dismissed certain claims in *Seinfeld v. O'Connor,* 774 F. Supp. 2d 660 (D. Del. March 30, 2011). By way of further response, the Defendants state that

the opinion speaks for itself and respectfully refer the Court to the opinion for its full, complete and accurate contents. The Defendants deny the remaining allegations in paragraph 7.

**8.** The Internal Revenue Code ("IRC") § 162(m) subjects the Company to special treatment with respect to its compensation of the Covered Employees. Whereas IRC § 162 (a)(1) allows the Company an income tax deduction for "a reasonable allowance for salaries or other compensation for personal services actually rendered," IRC § 162(m) imposes restrictions on that deduction for the compensation of the Company's Covered Employees. The Covered Employees are the CEO and the "four highest compensated officers." Treas. Reg. § 1. 1 62-27(c)(2)(i)(B). Defendant O'Connor was the CEO from 2009 and earlier until January 1, 2011, when his retirement became effective. Defendant Slager then succeeded him as CEO.

**ANSWER:** The claims to which the allegations in this paragraph are directed have been dismissed with prejudice, and therefore no response to this paragraph is required.

**9.** Specifically, IRC § 162(m) provides that annual compensation of covered employees in excess of $1 million is not tax-deductible unless the compensation is performance-based, pursuant to a plan containing pre-established, objective criteria that the stockholders have approved. The Joint Committee on Taxation specifically addressed the relevance of this provision of the Code in a report that expressly recognizes its role as a tool of corporate governance: **"The $1 million deduction limitation reflects corporate governance issues regarding excessive compensation, rather than issues of tax policy."** JOINT COMMITTEE OF TAXATION, REPORT OF INVESTIGATION OF ENRON CORPORATION AND RELATED ENTITIES REGARDING FEDERAL TAX AND COMPENSATION ISSUES AND POLICY RECOMMENDATIONS, 2003 WL 25599037 n.2211 and accompanying text (2003). The Treasury has promulgated regulations concerning IRC § 162(m) at Treas. Reg. § 1.162-27.

**ANSWER:** The claims to which the allegations in this paragraph are directed have been dismissed with prejudice, and therefore no response to this paragraph is required.

**10.** It is the public policy of the United States that corporate senior executive compensation must be reasonable, performance based, objectively determined, and pre-approved by stockholders. The purpose of the IRC § 162(m) is to align the performance incentive with the interests of shareholders. *See* Internal Revenue Service Chief counsel Attorney Memorandum, IRS AM 2009-006, 2009 WL 2138881 (July 17, 2009). In furtherance of this public policy, another purpose of IRC § 162(m) is to give stockholders a say on corporate executive compensation. H.R. Conf. Rep. 103-213, 1993 WL 302291 at *587 ("the compensation must be approved by a majority of shares voting in a separate vote"). More recently, the United States has increased the voice of stockholders on corporate executive compensation with the advisory say-on-pay provisions of the Dodd-Frank Act. PL 111-203, July 21, 2010, 15 U.S.C. § 78n-1.

**ANSWER:** The claims to which the allegations in this paragraph are directed have been dismissed with prejudice, and therefore no response to this paragraph is required.

**11.** The EIP is the Company's cash incentive plan that pays the participant a cash bonus for meeting or exceeding performance goals measured by the Company's financial results. Defendant O'Connor was a participant in the EIP in 2009 and 2010.

**ANSWER:** The claims to which the allegations in this paragraph are directed have been dismissed with prejudice, and therefore no response to this paragraph is required.

**12.** The EIP provides for annual bonuses for meeting performance goals in one year and for long term bonuses for meeting performance goals in periods longer than one year. In 2009 and 2010, defendant O'Connor participated in the EIP for annual bonuses and for three year bonuses, i.e., for the periods January 1, 2009, through December 31, 2011, and for January 1, 2010, through December 31, 2012.

**ANSWER:** The claims to which the allegations in this paragraph are directed have been dismissed with prejudice, and therefore no response to this paragraph is required.

**13.** On June 24, 2010, Republic's board of directors accepted defendant O'Connor's retirement as CEO, effective January 1, 2011.

**ANSWER:** The claims to which the allegations in this paragraph are directed have been dismissed with prejudice, and therefore no response to this paragraph is required.

**14.** Section 5.2 of the EIP provides that, if a participant retires during a period in which his performance is in progress and not yet completed, the Company will pay him a fractional amount of what he would have received had he continued working until the end of the period. The fraction is the number of completed calendar months over the total number of months in the period. For defendant O'Connor the fraction under the EIP for the 2009-2011 period was 24/36.

**ANSWER:** The claims to which the allegations in this paragraph are directed have been dismissed with prejudice, and therefore no response to this paragraph is required.

**15.** But § 5.2 of the EIP is expressly subject to § 5.3 of the EIP, which provides that § 5.2 is inapplicable to the extent provided in any employment agreement between a participant and the Company.

**ANSWER:** The claims to which the allegations in this paragraph are directed have been dismissed with prejudice, and therefore no response to this paragraph is required.

**16.** There was an employment contract effective February 21, 2007, between the Company and O'Connor, which provided that upon his retirement the Company would pay O'Connor an amount equal to the "full target amount" for each performance award in which he was then participating as to which the award had "not been determined to have been earned." The target

amount is the amount that O'Connor would get if he met his goal. If he exceeded his target goal he would get more. If he met less than his target goal, he would get less, and if he met it enough less, he would get zero. So, if the February 21, 2007, contract had been in place when he retired on June 24, 2010, under § 5.3 of the EIP the Company would have paid him targets rather than pro-rated incentive awards, and the contract did not require that the performance goals be met for the Company to pay the full target amounts.

**ANSWER:** The claims to which the allegations in this paragraph are directed have been dismissed with prejudice, and therefore no response to this paragraph is required.

**17.** But on February 21, 2008, the Internal Revenue Service (the "IRS" or the "Service") released Rev. Rul. 2008-13, 2008-10 I.R.B. 518, 2008 WL 451876 (IRS Feb. 21, 2008). There, the Service ruled that compensation is not performance-based if the Covered Employee would receive all or even part of the compensation ***regardless*** of whether the performance goal is met, citing Treas. Reg. § 1.162-27(e)(2)(v). The Service went on to note that the regulation provided an exception if the plan allows unearned compensation to be paid upon death, disability, or change of ownership or control, but not upon retirement. Accordingly, the IRS ruled that a plan that paid "performance-based" compensation upon retirement during the performance period was not a performance-based plan, so that no compensation paid under such a plan would be tax-deductible.

**ANSWER:** The claims to which the allegations in this paragraph are directed have been dismissed with prejudice, and therefore no response to this paragraph is required.

**18.** The Service was aware, however, that there were plans in existence that had provisions similar to the retirement provision in the February 21, 2007, employment contract and that it would be unfair to deny tax deductions to companies that were bound by such agreements made before the release of Rev. Rul. 2008-13. Accordingly, the IRS stated that Rev. Rul. 2008-13 would not be applied to disallow a deduction paid pursuant to an employment contract in effect on February 21, 2008. The IRS acted thus under IRC § 7805(b)(8) and specifically cited that statute, which provides:

> The Secretary may prescribe the extent, if any, to which any ruling (including any judicial decision or any administrative determination other than by regulation) relating to the internal revenue laws shall be applied without retroactive effect.

But the IRS went further and also stated that Rev. Rul. 2008-13 would not be applied to disallow a deduction if the performance period for such compensation begins on or before January 1, 2009. In so stating the Service exceeded the authority delegated to it under IRC § 7805(b), and to that extent the January 1, 2009 provision is ineffective. An administrative rule out of harmony with the statute is void.

**ANSWER:** The claims to which the allegations in this paragraph are directed have been dismissed with prejudice, and therefore no response to this paragraph is required.

**19.** The IRS's administrative rulings have both prospective and retroactive effect. But the IRS may limit the retroactive effect of a ruling under IRC § 7805(b)(8). Allowing the IRS to apply rulings only prospectively, and not retroactively, was to avoid the inequity for persons who had completed transactions in reliance upon pre-existing practices.

**ANSWER:** The claims to which the allegations in this paragraph are directed have been dismissed with prejudice, and therefore no response to this paragraph is required.

**20.** The Company and O'Connor entered into new employment contracts twice in 2009, on February 21, and May 4, which they entitled, respectively, the Second Amended and Restated Employment Agreement and the Amended and Restated Agreement. In both contracts they limited O'Connor's right, upon retirement, to be paid the "full target amount" for each performance award in which he was then participating as to which the award had "not been determined to have been earned," to those award periods beginning on or before January 1, 2009. But for award periods beginning after January 1, 2009, both contracts limited O'Connor's payment to a pro-rata share of the actual result, as provided in 5.2 of the EIP in which O'Connor was then a participant. The January 1, 2009, "full target amount" is what O'Connor would have been paid under the February 21, 2007, employment contract, but that 2007 contract was no longer in effect.

**ANSWER:** The claims to which the allegations in this paragraph are directed have been dismissed with prejudice, and therefore no response to this paragraph is required.

**21.** As part of O'Connor's retirement the Company agreed to pay him the "full target amount" of his incentive award for 2009-2011, i.e., $1,250,000. This payment was in contravention of Treas. Reg. §1.162(e)(2)(v) because it was paid even though O'Connor had not met his performance goal. That payment was also in contravention of the substance of Rev. Rul. 2008-13.

**ANSWER:** The claims to which the allegations in this paragraph are directed have been dismissed with prejudice, and therefore no response to this paragraph is required.

**22.** To the extent that Rev. Rul. 2008-13 states that it will not be applied to performance periods beginning as late as January 1, 2009, it is inconsistent with IRC §7805(b)(8) because such non-applicability is prospective and not retroactive, and it is inconsistent with Treas. Reg. § 1.162-27(e)(2)(v) because it treats as deductible a payment even though a Covered Employee did not meet his performance goal.

**ANSWER:** The claims to which the allegations in this paragraph are directed have been dismissed with prejudice, and therefore no response to this paragraph is required.

**23.** Section 5.3 of the EIP, requiring the payment to defendant O'Connor of a bonus that is unearned because of his retirement, renders the entire EIP non-tax-deductible, and all payments under it constitute waste. Defendants O'Connor, Slager, and Holmes were or are participants in the EIP.

**ANSWER:** The claims to which the allegations in this paragraph are directed have been dismissed with prejudice, and therefore no response to this paragraph is required.

**24.** The language concerning the payment to O'Connor of the "full target amount" in the 2009 employment contracts was hidden. When the Company's board solicited the stockholders to approve the EIP, the 2009 proxy statement and the supplement to it made representations concerning the February 21, 2009, O'Connor employment contract and the May 4, 2009, O'Connor employment contract, but they both omitted to disclose the requirement to pay him the "full target amount" upon his retirement. In the federal court, Seinfeld argued that the EIP contravened IRC § 162(m) because it paid compensation regardless of whether performance goals were met, but the Company's reply brief stated that under § 5.2 of the EIP, a participant would only receive a pro-rata share of his bonus if he retired before the end of the performance period, and the federal court accepted that as a fact. *Seinfeld v. O'Connor,* 774 F. Supp. 2d 660 at P.8. The Company's reply brief omitted to disclose the "full target amount" payment even though that brief was filed on August 2, 2011, shortly after O'Connor and the Company's general counsel signed the retirement contract containing the target payment language. The federal court went on to say, "Seinfeld might have a point if the EIP provided for payments based solely on retirement, but . . . it does not." But it does. The federal court was misinformed.

**ANSWER:** The claims to which the allegations in this paragraph are directed have been dismissed with prejudice, and therefore no response to this paragraph is required.

**25.** On June 24, 2010, when the Company's board accepted O'Connor's retirement, he had been the Company's CEO and a member of its board of directors for ten years. During that time the Company compensated defendant O'Connor for his work. From 2006, for which the annual proxy statement first disclosed defendant O'Connor's total annual compensation, through 2010, the Company paid O'Connor total annual compensation of between $5 million and $10 million.

**ANSWER:** The claims to which the allegations in this paragraph are directed have been dismissed with prejudice, and therefore no response to this paragraph is required.

**26.** At the time that the board accepted his retirement, O'Connor had an employment agreement with the Company that became effective May 14, 2009, and which contained provisions concerning his retirement. In addition to continuing various health benefits, stock options, and other retirement benefits, the agreement provided for the payment to O'Connor of $10 million.

**ANSWER:** The claims to which the allegations in this paragraph are directed have been dismissed with prejudice, and therefore no response to this paragraph is required.

**27.** But on or about June 25, 2010, the Company's board resolved to give O'Connor an additional lump sum cash retirement payment of $1,800,000. The express purpose of this payment was "to reward you for your long service to the Company." This payment was not authorized by the May 14, 2009, employment agreement. The Company had paid O' Connor for his long service to the

Company, and there is nothing in the expressed purpose of this payment to show that is was based on an implied contract or that the amount is not unreasonable in view of the services rendered, especially in light of the other payments by the Company to O'Connor. This payment was for no consideration and was a gift or waste.

**ANSWER:** The claims to which the allegations in this paragraph are directed have been dismissed with prejudice, and therefore no response to this paragraph is required.

**28.** The $1,800,000 payment from the Company to O'Connor is recited in a retirement agreement dated June 25, 2010. That agreement recites that the consideration from O'Connor for the $1,800,000 and other benefits to him is a general release of all claims, of any nature arising from the employment relationship between O'Connor and the Company. The retirement agreement omits to state any facts to support such released claims or even the existence of any claims O'Connor has against the Company or that there is a dispute between O'Connor and the Company. The releases given by O'Connor for non-existing claims have no value and do not constitute consideration. The $1,800,000 payment by the Company to O'Connor is not allowed under Delaware law, which looks to whether or not there is consideration for the contract.

**ANSWER:** The claims to which the allegations in this paragraph are directed have been dismissed with prejudice, and therefore no response to this paragraph is required.

**29.** Under the Company's 2007 Stock Incentive Plan (the "Stock Plan"), the Company can grant restricted stock and restricted stock units. The Stock Plan defines restricted stock as Republic common stock, $.01 par value per share, subject to certain restrictions, as determined by the compensation committee, granted pursuant to section 9 of the Stock Plan. The Stock Plan defines restricted stock units as the right to receive a fixed number of shares of Republic common stock, $.01 par value per share, or the cash equivalent, granted pursuant to section 9 of the Stock Plan.

**ANSWER:** The Defendants deny that the allegations in paragraph 29 accurately and completely describe the Stock Plan, but admit that awards of restricted stock or restricted stock units may be granted pursuant to the Stock Plan. By way of further response, the Defendants state that the Stock Plan speaks for itself and respectfully refer the Court to the Stock Plan for its full, complete and accurate contents. The Defendants deny the remaining allegations in paragraph 29.

**30.** Pursuant to section 9(b) of the Stock Plan, restricted stock and restricted stock units can have time based vesting restrictions, i.e., they vest after the mere passage of time and are not tax-deductible compensation under IRC § 162(m), or performance based restrictions, i.e., they vest upon the attainment of performance goals, so that they may qualify as tax-deductible compensation

under IRC § 162(m). The Company reports that it has only granted time based, non-tax-deductible restricted stock and restricted stock units to its Covered Employees under the Stock Plan. These grants have been in amounts ranging from $1 million to $5 million per year to each Covered Employee and have constituted between 25% and 65% of their total compensation.

**ANSWER:** The claims to which the allegations in this paragraph are directed have been dismissed with prejudice, and therefore no response to this paragraph is required.

**31.** The Stock Plan by its terms invites the award of some performance based restricted stock and restricted stock units, but the Republic board makes no awards at all of such tax deductible stock-based compensation. It contravenes the Stock Plan to award so much time-based restricted stock and restricted stock units instead of performance-based stock to Covered Employees because the purpose of the Stock Plan is to align the interests of Covered Employees with those of the Company's stockholders and to incentivize the Covered Employees to expend the maximum effort for the growth and success of the Company. Granting so much time-based restricted stock defeats those purposes.

**ANSWER:** The claims to which the allegations in this paragraph are directed have been dismissed with prejudice, and therefore no response to this paragraph is required.

**32.** It is highly unusual for Republic to pay so much non-tax-deductible compensation to Covered Employees. For example, Waste Management, Inc., a Delaware corporation, is one of Republic's peer group companies, which Republic uses as a meaningful comparison for senior executive compensation. Waste Management has a stock plan, but when it grants stock compensation to its covered employees almost all of it is performance based, not time based. The same is true of Norfolk Southern Corporation, a Virginia corporation, also in Republic's peer group, which granted Covered Employees five times as much performance based stock as time based stock. The same is also true of CSX Corporation, a Virginia corporation, also in Republic's peer group, which granted covered employees three times as much performance based stock as time based stock.

**ANSWER:** The claims to which the allegations in this paragraph are directed have been dismissed with prejudice, and therefore no response to this paragraph is required.

**33.** Defendants O'Connor, Slager, and Holmes were or are participants in the Stock Plan.

**ANSWER:** The claims to which the allegations in this paragraph are directed have been dismissed with prejudice, and therefore no response to this paragraph is required.

**34.** The Director Defendants are all participants in the Stock Plan, and they award themselves as directors, except in past years O'Connor and now Slager, time-based restricted stock units from it.

**ANSWER:** The Defendants admit the allegations of paragraph 34.

**35.** In 2010, the board awarded the Director Defendants, except O'Connor, $215,000 each in restricted stock units, which brought their annual compensation to between $320,000 and $345,000 each. In 2009, the board awarded the Director Defendants, except O'Connor, $743,700 each in restricted stock units, which brought their annual compensation to between $843,000 and $891,000 each. The annual compensation of the Republic directors far exceeds the annual compensation of the Waste Management directors of between $205,000 and $240,000, except for the non-executive chairman of the board, who was paid $422,000 in 2010. The Director Defendants have paid themselves excessive compensation, which constitutes waste and unjust enrichment and is unreasonable and non-tax-deductible under IRC § 162(a)(1).

**ANSWER:** The Defendants deny the allegations in sentences 1 and 2 of paragraph 35, except the Defendants admit that defendants Croghan, Crownover, Flynn, Foley, Lehmann, Nutter, Rodriguez, Sorenson, Trani and Wickham received $743,700 in restricted stock units (the valuation calculated in accordance with FASB ASC Topic 718) in 2009, and $215,100 in restricted stock units in 2010 (valued similarly). By way of further answer, Defendants admit that defendant Larson also received $215,100 in restricted stock units in 2010. Defendants respectfully refer the Court to Republic's definitive proxy statements on Schedule 14A, filed with the United States Securities and Exchange Commission on April 1, 2010, and April 1, 2011, for the full and complete contents thereof. The Defendants deny the allegations in sentence 3 of paragraph 35, except admit that, upon information and belief, Waste Management, Inc. disclosed in a Schedule 14A filed with the SEC on March 30, 2011 that, in 2010, its chairman of the board received $422,000 in total compensation, and its non-employee directors received total compensation of between $219,500 and $240,000. The allegations in sentence 4 of paragraph 35 are legal conclusions to which no response is required. To the extent a response is required, the Defendants deny the allegations in sentence 4 of paragraph 35.

**36.** As the result of the acts of the Individual Defendants, the Company has faced and will continue to face substantial and avoidable income tax liabilities.

**ANSWER:** The Defendants deny the allegations in paragraph 36.

**37.** The Director Defendants have committed waste, and they and the Individual Defendants have enjoyed unjust enrichment.

**ANSWER:** The allegations in paragraph 37 are legal conclusions to which no response is required. To the extent a response is required, the Defendants deny the allegations in paragraph 37.

**38.** The Company's stockholders approved the Synergy Incentive Plan (the "Synergy Plan") at their 2009 annual meeting. The Synergy Plan was to pay incentive awards to officers and employees if the merger of the Company and Allied Waste Industries, Inc., a Delaware corporation ("Allied"), on December 5, 2008, were to achieve synergies of between $100 million and $150 million. As to the performance goal under the Synergy Plan, the Company stated, "There is only one goal: measurable earnings improvement over baseline through cost improvements as a result of the integration of the two predecessor companies." If the synergies were to amount to $150 million the maximum incentives were to be $15 million for O'Connor, $10 million for Slager, $8 million for Holmes, and $36 million for additional executives and managers, or a total of $69 million. If the synergies were $100 million, the incentive amounts would be 25% of the maximum amounts.

**ANSWER:** The claims to which the allegations in this paragraph are directed have been dismissed with prejudice, and therefore no response to this paragraph is required.

**39.** The Company has stated that the synergies achieved were $190 million and that it has accrued liabilities of $68.1 million under the Synergy Plan to be paid during the first quarter of 2012.

**ANSWER:** The claims to which the allegations in this paragraph are directed have been dismissed with prejudice, and therefore no response to this paragraph is required.

**40.** In 2007, the last full year before the merger, Allied had earnings of $309.8 million, and Republic had earnings of $290.2 million, for a total of $600.0 million. In the first nine months of 2008, Allied had earnings of $296.5 million, and Republic had earnings of $205.5 million, for a total of $502.0 million. The Company had earnings of $495.0 million in 2009 and $506.5 million in 2010. There has been no "measurable earnings improvement" at all. The Company should not pay anything under the Synergy Plan.

**ANSWER:** The claims to which the allegations in this paragraph are directed have been dismissed with prejudice, and therefore no response to this paragraph is required.

**41.** One of the purposes of the annual meeting on May 12, 2011, was a solicitation by the Company's board for the stockholders to approve the covered employees' compensation. Such a resolution was required by 15 U.S.C. § 78n-1. Such stockholder vote is not binding on the Company. 15 U.S.C. § 78n-1(c).

**ANSWER:** The claims to which the allegations in this paragraph are directed have been dismissed with prejudice, and therefore no response to this paragraph is required.

**42.** The stockholder vote to approve or reject executive compensation is popularly known as say-on-pay. A report from the corporate governance firm Laurel Hill Advisory Group for the week ended January 7, 2011, stated, "The 50% plus of companies surveyed on the question believe a vote of 80% or more in favor of their pay plan is a positive." There was substantial opposition by the Company's stockholders to the say-on-pay proposal. The stockholders submitted proxies well in advance of the meeting and only, approximately, 63% of the votes were being cast in favor. The result of the say-on-pay vote should weigh in favor of the relief that the plaintiff seeks.

**ANSWER:** The claims to which the allegations in this paragraph are directed have been dismissed with prejudice, and therefore no response to this paragraph is required.

**43.** The plaintiff has not made any demand upon Republic's board of directors to institute this action because demand is excused as futile. Eleven members of the board, a majority, are interested in their own excessive compensation as directors. In addition, all the members of the board are interested because they participate in and are unjustly enriched by the Stock Plan which is unreasonable and non-tax-deductible under IRC § 162(a)(1).

**ANSWER:** The allegations in paragraph 43 contain legal conclusions to which no response is required. To the extent a response is required, the Defendants deny the allegations in paragraph 43, except admit that the plaintiff has not made a demand upon Republic's board, and that employee and non-employee directors participate in the Stock Plan.

**44.** Defendant O'Connor is interested in the payment to him of unearned long-term incentive compensation in the amount of $1,250,000 for the period January 1, 2009, through December 31, 2011. Defendant O'Connor is also interested in the payment to him of $1,800,000 for past services for which he has already been fully compensated.

**ANSWER:** The claims to which the allegations in this paragraph are directed have been dismissed with prejudice, and therefore no response to this paragraph is required.

**45.** The board has made gifts and committed waste in the payments to O'Connor of $1,250,000 and $1,800,000. Those acts are not the product of business judgment.

**ANSWER:** The claims to which the allegations in this paragraph are directed have been dismissed with prejudice, and therefore no response to this paragraph is required.

**46.** Defendants Slager and O'Connor are interested in the payments to them under the EIP and the awards to them of restricted stock and restricted stock units.

**ANSWER:** The claims to which the allegations in this paragraph are directed have been dismissed with prejudice, and therefore no response to this paragraph is required.

**47.** A majority of the board has made awards to the Covered Employees of non-tax-deductible restricted stock and restricted stock units. Those awards constitute waste, and they are highly unusual. It would be a simple matter to make awards where the restrictions were performance-based because the Stock Plan already contains provisions for such awards. The board majority's waste and highly unusual conduct excuses demand because they are not the product of business judgment.

**ANSWER:** The claims to which the allegations in this paragraph are directed have been dismissed with prejudice, and therefore no response to this paragraph is required.

**48.** The proposed payments of incentives under the Synergy Plan contravenes that Plan because the goal of "measurable earnings improvement" was not met. Such payment is not protected by the business judgment rule. Defendants O'Connor and Slager are interested in those payments.

**ANSWER:** The claims to which the allegations in this paragraph are directed have been dismissed with prejudice, and therefore no response to this paragraph is required.

**49.** Waste and unjust enrichment are not the products of business judgment.

**ANSWER:** The allegations in paragraph 49 are legal conclusions to which no response is required. To the extent a response is required, the Defendants deny the allegations in paragraph 49.

**50.** Based on substantially similar allegations, the federal court held that the plaintiff raised arguable theories of waste and unjust enrichment in his derivative action. *Seinfeld v. O'Connor,* 774 F. Supp. 2d 660 at p.12 fn.12. The defendants were all parties there, and they are precluded from denying it.

**ANSWER:** Paragraph 50 states legal conclusions to which no answer is required. To the extent that an answer may be required, the Defendants deny the allegations in sentence 1 of paragraph 50. The Defendants also deny the allegations in sentence 2 of paragraph 50, except admit that the defendants in this action were also defendants in the federal court action. By way

of further response, the Defendants state that the federal court's opinion speaks for itself and respectfully refer the Court to the opinion for its full, complete and accurate contents. The Defendants deny the remaining allegations in paragraph 50.

## AFFIRMATIVE DEFENSES

1. The Amended Stockholder's Derivative Complaint fails to state a claim upon which relief may be granted.

2. All grants made pursuant to the Stock Plan were entirely fair, and are protected by application of the business judgment rule.

3. Plaintiff's claim is barred by the doctrine of ratification as a result of the vote of the Republic stockholders on May 12, 2011.

4. The Defendants are protected from liability under 8 *Del. C.* § 141(e).

5. The Company has not suffered any damages as a result of any purported misconduct by the Defendants.

6. The claim against the Defendants is barred by the Company's certificate of incorporation and 8 *Del. C.* § 102(b)(7).

7. The Defendants reserve the right to assert additional defenses as may be warranted by future discovery or investigation in this action.

WHEREFORE, the Defendants respectfully pray for judgment and relief as follows:

A. The Plaintiff's Amended Stockholder's Derivative Complaint be dismissed with prejudice and that judgment be entered against the plaintiff and in favor of the Defendants;

B. That the Defendants be awarded the costs and disbursements of this action, including reasonable accountants', experts' and attorneys' fees; and

C. That the Defendants be awarded such other and further relief as this Court deems necessary and appropriate.

*/s/ Allen M. Terrell*
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Dated: August 3, 2012