

IN THE SUPREME COURT OF THE STATE OF NEVADA

NEVADA COLLECTORS
ASSOCIATION, a Nevada non-profit
corporation,

Appellant,

v.

SANDY O'LAUGHLIN, in her
official capacity as Commissioner of
the State of Nevada Department of
Business and Industry and Financial
Institution Division; STATE OF
NEVADA DEPARTMENT OF
BUSINESS AND INDUSTRY
FINANCIAL INSTITUTIONS
DIVISION; JUSTICE COURT OF
LAS VEGAS TOWNSHIP; DOE
DEFENDANTS 1 through 20; and
ROE ENTITY DEFENDANTS 1
through 20,

Respondents.

Supreme Court Case No.: 81930

District Court Case No.: A-19-805334-C

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Elizabeth A. Brown
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Appeal from Eighth Judicial District Court, State of Nevada, County of Clark
The Honorable Nancy L. Allf, District Judge

JOINT APPENDIX – VOLUME VI

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JOINT APPENDIX – VOLUME VI

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Notice of Entry of Order Granting in Part and Denying in Part Plaintiff's Motion to Amend Findings of Fact and Conclusions of Law	09/10/2020	VIII	JA1327 – 1334
Notice of Entry of Order of Amended Findings of Fact and Conclusions of Law and Order	09/10/2020	VIII	JA1335 – 1350
Notice of Entry of Order of Findings of Fact, Conclusions of Law, and Order	07/20/2020	VII	JA1222 – 1235
Notice of Remand to State Court	04/30/2020	I	JA0040 – 0050
Notice of Removal of Civil Action to the United States District Court for the District of Nevada	01/02/2020	I	JA0015 – 0039
Opposition to Motion for Preliminary Injunction or, Alternatively, for a Writ of Mandamus or Prohibition	05/28/2020	V	JA0857 – 0886
Opposition to Motion to Dismiss	05/26/2020	V	JA0721 – 0856
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Opposition to Plaintiff's Motion to Amend Findings of Fact and Conclusions of Law and to Alter or Amend Judgment	08/14/2020	VII	JA1244 – 1272
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Reply Memorandum in Support of Motion to Amend Findings of Fact and Conclusions of Law and to Alter or Amend Judgment	09/02/2020	VIII	JA1319 – 1326
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State Defendant's Opposition to Amend Findings of Fact and Conclusions of Law and to Alter or Amend Judgment	08/17/2020	VII	JA1273 – 1291
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State Defendant's Reply to Plaintiff's Opposition to Motion to Dismiss	06/29/2020	VII	JA1202 – 1221
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DATED this 23rd day of September, 2021.

/s/ Patrick J. Reilly

Patrick J. Reilly

Eric D. Walther

BROWNSTEIN HYATT FARBER

SCHRECK, LLP

100 North City Parkway, Suite 1600

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Attorneys for Nevada Collectors Association

CERTIFICATE OF SERVICE

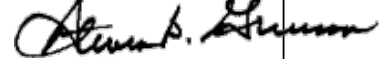
Pursuant to Nevada Rule of Appellate Procedure 25(b), I certify that I am an employee of BROWNSTEIN HYATT FARBER SCHRECK, LLP, and that the foregoing **JOINT APPENDIX – VOLUME VI** was served by submitting electronically for filing and/or service with Supreme Court of Nevada’s EFlex Filing system and serving all parties with an email address on record, as indicated below, pursuant to Rule 8 of the N.E.F.C.R. on the 23rd day of September, 2021, to the addresses shown below:

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9 **DISTRICT COURT**
10
11 **CLARK COUNTY, NEVADA**

12 NEVADA COLLECTORS ASSOCIATION, a)
13 Nevada non-profit corporation,)
14)
15 Plaintiff,)
16 v.)
17)
18 SANDY O'LAUGHLIN, in her official)
19 capacity as Commissioner of State of)
20 Nevada Department of Business and)
21 Industry and Financial Institutions)
22 Division; STATE OF NEVADA)
23 DEPARTMENT OF BUSINESS AND)
24 INDUSTRY FINANCIAL INSTITUTIONS)
25 DIVISION; JUSTICE COURT OF LAS)
26 VEGAS TOWNSHIP; DOE DEFENDANTS)
27 1 through 20; and ROE ENTITIY)
28 DEFENDANTS 1 through 20,)
Defendants.)

Case No.: A-19-805334-C
Dept. No.: XXVII

**ERRATA TO STATE
DEFENDANT'S
MOTION TO DISMISS
AMENDED COMPLAINT**

24 Defendant, State of Nevada Department of Business and Industry Financial
25 Institutions Division and Commissioner O'Laughlin (collectively "FID"), by and
26 through counsel, Aaron D. Ford, Nevada Attorney General and Vivienne Rakowsky,
27 Deputy Attorney General, hereby file this Errata to Motion to Dismiss the Amended
28

1 Complaint.

2 Due to a clerical error, attached is this is the same document filed moments
3 ago with a corrected date of June 8, 2020 instead of June 6, 2020.

4 Respectfully submitted this 8th day of June, 2020.

5 AARON D. FORD
6 Nevada Attorney General

7 By: /s/ Vivienne Rakowsky
8 VIVIENNE RAKOWSKY (Bar No. 9160)
9 Deputy Attorney General
10 *Attorneys for State Defendant FID*

11 **CERTIFICATE OF SERVICE**

12 I hereby certify that I electronically filed the foregoing **ERRATA TO STATE**
13 **DEFENDANT'S MOTION TO DISMISS AMENDED COMPLAINT** with the
14 Clerk of the Court by using the electronic filing system on the 8th day of June,
2020.

15 Registered electronic filing system users will be served electronically.

16
17 /s/ Michele Caro
18 Michele Caro, an Employee of the
19 office of the Nevada Attorney General
20
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DISTRICT COURT
CLARK COUNTY, NEVADA

12 NEVADA COLLECTORS ASSOCIATION, a)
13 Nevada non-profit corporation,)
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15 Plaintiff,)
16 v.)
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18 SANDY O'LAUGHLIN, in her official)
19 capacity as Commissioner of State of)
20 Nevada Department of Business and)
21 Industry and Financial Institutions)
22 Division; STATE OF NEVADA)
23 DEPARTMENT OF BUSINESS AND)
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25 DIVISION; JUSTICE COURT OF LAS)
26 VEGAS TOWNSHIP; DOE DEFENDANTS)
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Defendants.)

Case No.: A-19-805334-C
Dept. No.: XXVII

**STATE DEFENDANT'S
MOTION TO DISMISS
AMENDED COMPLAINT**

Defendant, State of Nevada Department of Business and Industry Financial
Institutions Division and Commissioner O'Laughlin (collectively "FID"), by and
through counsel, Aaron D. Ford, Nevada Attorney General and Vivienne Rakowsky,
Deputy Attorney General, hereby file this Motion to Dismiss the Amended

1 Complaint.

2 This Motion is based on the memorandum of points and authorities below, all
3 papers and pleadings on file, and such other evidence as this Honorable Court
4 deems just and appropriate to make a determination.

5 INTRODUCTION

6 Prior to the remand, Plaintiff filed Leave to Amend the Complaint with the
7 U.S. District Court in the District of Nevada. ECF No. 20-1. In its Motion for
8 Leave, Plaintiff clearly stated: “NCA seeks amendment to its original complaint
9 *solely* to add a party” ECF No 20, p. 2:16 (emphasis added). Plaintiff went on to
10 state the reason for amending the complaint was to add the newly appointed
11 Commissioner of the FID in her official capacity. ECF No. 20, p. 2:16-28, p. 1-13.
12 The District Court allowed the Amendment, correcting the caption and adding
13 Commissioner O’Laughlin as a defendant in her official capacity. ECF No. 20, p.
14 3:13-14, ECF 20-1, p. 2-4.

15 Nevertheless, Plaintiff neglected to notice the Court and the parties that the
16 Amended Complaint also includes several other relevant changes, including the
17 removal of several allegations from the original Complaint, thereby abandoning
18 those claims and facts. (*Compl.* ¶¶ 43, 61, 62, 95), and the addition of requests for
19 attorney fees (*Am. Compl.* ¶¶ 56, 68, 77, 88, 98).

20 Interestingly, Plaintiff has withdrawn ¶43 which alleges that the Plaintiffs
21 are at risk of enforcement of AB 477 if they seek amounts in excess of AB 477 limits,
22 and ¶95 asking for a declaration that Sections 18 and 19 “unduly conflict and
23 interfere” with “numerous provisions of the Nevada and Federal Constitutions.”
24 Plaintiff has changed its prayer for relief and eliminated its request for a writ of
25 prohibition against the Justice Court’s enforcement of sections 18 and 19. Other
26 changes were made as well, such as eliminating the definition in ¶12 that “small
27 dollar debts” refer to debts of less than \$5,000.

28 Plaintiff has alleged five causes of action including Violation of Substantive

1 Due Process based on Section 18 of AB 477 and JCR 16; Violation of Substantive
2 and Procedural Due Process based on Section 19 of AB 477; Violation of Equal
3 Protection based on Section 18 of AB 477; Violation of Equal Protection based on
4 Section 19 of AB 477; and Declaratory Relief. None of the claims apply to the
5 regulatory function of the FID. As a result, all Plaintiffs claims against
6 Commissioner O’Laughlin and the Financial Institutions Division (FID) must be
7 dismissed.

8 This Court lacks subject matter jurisdiction pursuant to NRCP 12(b)(1)
9 because Plaintiff lacks standing and its claims are not ripe. The section 1983 due
10 process and equal protection claims against the FID and Commissioner O’Laughlin
11 must be dismissed because neither the agency nor its Commissioner are persons
12 subject to section 1983. Pursuant to NRCP 12(b)(5), the FID cannot give Plaintiffs
13 any relief is it seeking because the FID does not regulate AB 477 or the amount of
14 attorney fees that can be awarded by the Justice Court. Finally, Plaintiff is not
15 entitled to an award of attorney fees, which will be addressed in the event that the
16 Amended Complaint against the FID and Commissioner O’Laughlin is not
17 dismissed.

18 **FACTS**

19 The Financial Institutions Division, headed by Commissioner O’Laughlin is
20 an administrative agency of the State of Nevada. (“FID”). It’s mission is to
21 “maintain a financial institutions system for the citizens of Nevada that is safe and
22 sound, protects consumers and defends the overall public interest, and promotes
23 economic development through the efficient, effective and equitable licensing,
24 examination and supervision of depository fiduciary and non-depository financial
25 institutions.” <http://fid.nv.gov>.

26 The FID regulates collection agencies pursuant to NRS Chapter 649.
27 NRS 649.051. Chapter 649 may govern the contracts between the collection agency
28 and its Nevada customers that retain collection agency services, but does not

1 regulate other members of the Nevada Collector's Association ("Plaintiff") including
2 law firms and asset buying companies. NRS 649.020; *Am. Compl.* ¶11. Relevant to
3 this matter, Chapter 649 absolutely does not regulate the relationship between a
4 collection agency and its attorney that represents them in Justice Court. NRS Ch.
5 649. Nor does the FID regulate the amount of fees that the Justice Court can award
6 to either the collection agency or the debtor prevailing party.

7 AB 477 is a new chapter codified in the Nevada Revised Statutes as
8 NRS 97B.¹ The title of the chapter is the Consumer Protection from Predatory
9 Interest After Default Act, which is incorporated into Title 8. Title 8 regulates
10 Commercial Instruments and Transactions. AB 477 was passed by the Nevada
11 Legislature in June 2019 and went into effect on October 1, 2019. Plaintiffs never
12 articulate that they are subject to an imminent threat of investigation or
13 enforcement by the FID concerning attorney fees, or even that the FID has the
14 power to investigate or enforce AB 477. Instead, Plaintiff merely alleges that the
15 existence of AB 477 will prevent Plaintiffs' members from fair access to courts
16 because they will not be able to retain counsel to represent them for small dollar
17 collection cases. See e.g. *Am. Compl.*, ¶¶ 34, 36, 37, 38.

18 Plaintiff references two specific sections of AB 477 alleging that the
19 statutes deprive them of substantial and procedural due process and equal
20 protection. The two sections state:

21 **Sec. 18 (NRS 97B.160).**

22 1. If the plaintiff is the prevailing party in any action to collect a
23 consumer debt, the plaintiff is entitled to collect attorney's fees only if
24 the consumer form contract or other document evidencing the
indebtedness sets forth an obligation of the consumer to pay such
attorney's fee and subject to the following conditions:

25 (a) If a consumer form contract or other document evidencing
26 indebtedness provides for attorney's fees in some specific percentage,

27 ¹ Because Plaintiff continues to reference AB 477 and does not reference
28 NRS 97B, Defendants will also use AB 477 and cross reference the appropriate
statute in NRS 97B.

1 such provision and obligation is valid and enforceable for an amount
2 not to exceed 15 percent of the amount of the debt, excluding
attorney's fees and collection costs.

3 (b) If a consumer form contract or other document evidencing
4 indebtedness provides for the payment of reasonable attorney's fees by
5 the debtor, without specifying any specific percentage, such provision
6 must be construed to mean the lesser of 15 percent of the amount of
7 the debt, excluding attorney's fees and collection costs, or the amount
of attorney's fees calculated by a reasonable rate for such cases
multiplied by the amount of time reasonably expended to obtain the
judgment.

8 2. The documentation setting forth a party's obligation to pay
9 attorney's fees must be provided to the court before a court may
enforce those provisions.

10 **Sec. 19** (NRS 97B.160). If the debtor is the prevailing party in any
11 action to collect a consumer debt, the debtor is entitled to an award of
12 reasonable attorney's fees. The amount of the debt that the creditor
sought may not be a factor in determining the reasonableness of the
award

13 AB 477 (2019).

14 The FID must be dismissed because the FID does not regulate a collection
15 agency's ability to retain counsel to represent them in court, or a licensee's access to
16 justice court, or the amount of attorney fees that may be awarded to the prevailing
17 party by the justice court. Moreover, AB 477 does not delegate any powers or
18 responsibilities to the FID. In fact, Plaintiff's Amended Complaint fails to provide
19 any facts to support any of the claims against the FID.

20 Pursuant to NRCP 12(b)(1), this Court lacks subject matter jurisdiction
21 because Plaintiff lacks standing and this case is not ripe. Additionally, under
22 NRCP 12(b)(5) Plaintiff has failed to state a claim for which relief can be granted.
23 Finally, the due process and equal protection official claims against Commissioner
24 O'Laughlin along with the claims against the FID cannot stand because the
25 Commissioner as the face of the FID as well as the FID itself are not "persons"
26 under 42 U.S.C. § 1983.

27 ///

1 **POINTS AND AUTHORITIES**

2 **1. This case must be dismissed for lack of subject matter jurisdiction.**

3 **A. Legal standards for NRCP 12(b)(1)**

4 NRCP 12(b)(1) provides that when a court lacks subject matter jurisdiction,
5 the claims must be dismissed. NRCP 12(h)(3). Without first establishing
6 jurisdiction, the court cannot proceed to hear the case. *Steel Co. v. Citizens for a*
7 *Better Environment*, 523 U.S. 83, 95 (1998).

8 Plaintiff has the burden to show that the court has subject matter
9 jurisdiction. *Castillo v. United Federal Credit Union*, 134 Nev. 13,16, 409 P.3d 54
10 (2018); *Morrison v. Beach City LLC*, 116 Nev. 34, 36, 991 P.2d. 982, 983 (Nev. 2000)
11 (The burden proving the jurisdictional requirement is properly placed on the
12 plaintiff). Subject matter jurisdiction does not exist if there is no standing. See
13 e.g. *Ohfuji Investments Inc. v. Citibank, N.A.* 2019 WL 682503 (*unpublished*). In
14 addition a case must be ripe for review.

15 Standing requires an “actual justiciable controversy as a predicate to judicial
16 relief... not merely the prospect of a future problem.” *Doe v. Bryon*, 102 Nev. 523,
17 525, 728 P.2d 443, 444 (1986). A justiciable controversy is a controversy “in which
18 a claim of right is asserted against one who has an interest in contesting it.” *Id.*
19 Thus, for a case or controversy to exist and invoke jurisdiction, the parties must be
20 adverse, there must be a controversy, and the issues must be ripe for determination.
21 *Kress v. Cory*, 65 Nev. 1, 26, 189 P. 2d 352 (1948). Ripeness is similar to standing,
22 except ripeness looks at the timing of the action. *In re. T.R.*, 119 Nev. 646, 651, 80
23 P.3d 1276 (2003).

24 The FID and Plaintiff are not adverse because the FID does not enforce
25 Chapter 97B (AB 477) or regulate a collection agencies choice of attorney. There is
26 nothing that the FID can do to change Justice Court Rule 16 which requires
27 Corporations and LLC’s to be represented by an attorney in Justice Court. In fact, it
28 would violate separation of powers for an executive agency such as the FID to

1 dictate how a court enforces its rules. In addition, this case is not ripe.

2 A justiciable controversy cannot be based on harm which is speculative or
3 hypothetical. *Herbst Gaming, Inc. v. Heller*, 122 Nev. 877, 887, 141 P.3d 1224
4 (2006). Here, there is no controversy between the Plaintiff and the FID. Plaintiff
5 does not allege that the FID has done anything to limit Plaintiffs' access to Justice
6 Court, and has, in fact, backed off its claim that the FID can even enforce Section
7 18. (Paragraph 43 was eliminated from the original Complaint when the Plaintiff
8 filed the Amended Complaint). Plaintiff does not allege that the FID regulates the
9 amount of attorney fees Justice Court awards. Plaintiff does not allege that the FID
10 has any power to enforce AB477. Plaintiff does not allege that the FID has taken or
11 threatened any action against any of their members based on AB 477. Thus, there
12 is no case or controversy and Plaintiffs' claims of what can potentially happen in the
13 future are hypothetical at best.

14 The Plaintiff has only speculated about a possible injury *if* they are unable to
15 retain counsel to access the court system. In the eight months that this law has
16 been in effect, Plaintiff has not produced any evidence that the FID has caused an
17 actual injury that can in anyway be traceable to actions by the FID. Most relevant,
18 there is no relief this Court can grant the Plaintiff that is within the power or
19 jurisdiction of the FID to redress the Plaintiff's claims. *See e.g. Allen v. Wright*, 468
20 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984) (overruled on other grounds).

21 **B. Plaintiff does not have standing against the FID because there**
22 **is no case or controversy**

23 A case or controversy must be present at all stages of the litigation.
24 *Personhood v. Bristol*, 126 Nev. 599, 602, 245 P.3e 572, 574 (2010). A case or
25 controversy requires standing, which enables the court to decide the merits of the
26 case. *Allen v. Wright*, 468 U.S. 737, 750-751 (1984) (overruled on other grounds). To
27 establish standing the Plaintiff has the burden to show; (a) an injury in fact, (b)
28 causation, and (c) redressability. *Steel Co.*, 523 U.S. at 103-104.

1 a. **There is no actual injury in fact.**

2 Plaintiff cannot establish an injury in fact. The Plaintiff has only speculated
3 about a possible injury if they are unable to retain counsel to access the court
4 system. To the contrary, Plaintiff has not been denied access to any court in the
5 State of Nevada, and has not been threatened with any administrative enforcement
6 of AB 477.

7 Plaintiff's members are primarily concerned with small dollar consumer
8 debts. *Am. Compl.*, ¶13. This Court should take judicial notice of NRS Chapter 73
9 which provides for access to the Nevada court system without an attorney for claims
10 under \$10,000. NRS 73.010(1) provides that "[a] justice of the peace has jurisdiction
11 and may proceed as provided in this chapter and by rules of court in all cases
12 arising in the justice court for the recovery of money only, where the amount
13 claimed does not exceed \$10,000"), and NRS 73.012 provides that "[a] corporation,
14 partnership, business trust, estate, trust, association or any other nongovernmental
15 legal or commercial entity may be represented by its director, officer or employee in
16 an action mentioned or covered by this chapter...").

17 Thus, Plaintiff's members are not forced to retain counsel or denied access to
18 court; it is only that Plaintiff's members chose not to use the court with jurisdiction
19 for the size of their claims that will allow them to appear without an attorney.
20 Notwithstanding, Plaintiff's members are not can still opt to use an attorney and
21 access the court of their choice, but will only be able to recover the attorney fees
22 pursuant to AB 477. If a creditor or collection agency decides to hire an attorney to
23 go to justice court to collect a \$500 debt rather than small claims court without an
24 attorney, it is a business decision that the creditor and/or collection agency will
25 have to make at the time, knowing the limitations on the award of attorney fees
26 that Justice Court will award. *See e.g. Am. Compl.* ¶¶27-30.

27 Thus, there is no actual injury. Any injury would be self-inflicted based on
28 business decisions made by the Plaintiff. At this point, approximately eight (8)

1 months after this statute has gone into effect, none of the Plaintiff's members have
2 suffered an injury due to any actions or threatened actions by the FID. Plaintiff
3 additionally has not pled a single instance where they were have been denied access
4 to court.

5 **b. Plaintiff fails to show any causal link that would give them**
6 **standing.**

7 The Plaintiff cannot show a causal link between any actions that the FID has
8 taken or can take to address any alleged potential injuries. To establish the causal
9 element for standing, the injury alleged to be suffered must be "fairly traceable to
10 the agencies alleged misconduct." *Washington Environmental Counsel v. Bellon*,
11 732 F.3d 1131, 1141 (9th Cir. 2013). The links cannot be hypothetical or tenuous.
12 *Id.* When the causal chain involves other "third parties whose independent
13 decisions collectively have a significant effect on plaintiffs injuries, the causal chain
14 is too weak to support standing." *Bellon*, 732 F.3d at 1142. Any prospective injury
15 would be related to an insufficient award of attorney fees which would be
16 determined by the third party justice court and not the FID. Thus the Plaintiff
17 cannot establish a causal link between AB 477 and the FID.

18 Moreover, in its Motion for a Preliminary Injunction² Plaintiff uses
19 hypotheticals involving businesses that are not regulated by the FID to allege a
20 potential injury. Small businesses such as caterers, landscapers, small medical
21 providers, dental clinics, accountants, therapists, property managers, child care
22 provides, dry cleaners, bakers, security providers and even the "buy here pay here"
23 auto dealers that extend credit to their customers for goods or services, are not
24 regulated by the FID. The fact that the FID regulates collection agencies pursuant
25

26
27 ² The Court can take judicial notice of Plaintiffs Motion for Injunction which
28 was filed on May 15, 2020. The Motion for Preliminary Injunction will be heard in
conjunction with the Motion to Dismiss.

1 to NRS Chapter 649 does not provide a causal connection to attorney fees awarded
2 by the court on the basis of AB 477.

3 Even if a business employs a licensed collection agency to collect a defaulted
4 debt, the FID only looks at the original contract with its Nevada client (creditor)
5 and the contract between the creditor and its customer that established the debt.
6 The FID looks to verify that the collection agency has complied with the contract
7 that it has with its Nevada client and that the contract with the Nevada client does
8 not violate State or Federal law. The FID does not look at the amount of attorney
9 fees the contract allows, and does not look at a contract between a collection agency
10 and the attorney that appears for them in court. The fees are up to the court to
11 award. The contract between the creditor and its debtor is in existence prior to the
12 time that a defaulted debt is turned over to a collection agency.

13 Accordingly, Plaintiff cannot show a causal link because there is no plausible
14 connection between AB 477, JCR 16, and the FID.

15 **c. Plaintiff cannot show that the FID can redress any alleged injury.**

16 There is no relief this Court can grant within the power or jurisdiction of the
17 FID that can redress the Plaintiff's claims. *See e.g. Lujan v. Defenders of Wildlife*,
18 504 U.S. 555, 568-569 (1992) (Standing was denied based on the lack of
19 redressability because "it was entirely conjectural whether the non-agency activity
20 that affects respondents will be altered or affected by the agency activity they seek
21 to achieve"). The Plaintiff cannot meet the redressability prong because the FID
22 does not regulate AB 477 or regulate the Justice Court award of attorney fees.

23 AB 477's limitation on attorney fees is something that a creditor or a
24 collection agency should consider when bringing an action in Justice Court. AB 477
25 does not limit access, it just limits the amount of attorney fees that can be collected.
26 The FID does not have the jurisdiction to redress any of Plaintiff's alleged potential
27 injuries because it does not regulate JCR 16 or AB 477.

28 ///

1 **C. The Due Process and Equal Protection Claims must be Dismissed**
2 **because they are not Ripe**

3 Similar to standing, ripeness is also necessary to establish a case or
4 controversy. Ripeness is concerned with timing, because if there is no injury in
5 fact, there is no case or controversy. An alleged injury that is too imaginary or
6 speculative will not support jurisdiction. *Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d
7 443, (1986); *Thomas v. Anchorage Equal Rights Com'm*, 220 F.3d 1134, 1138
8 (2000). A justiciable controversy is the first hurdle to an award of declaratory relief.
9 *Southern Pacific Co. v. Dickerson*, 80 Nev. 572, 576, 397 P.2d 187 (1964). Claims
10 based on future events that may or may not occur is not ripe. *Texas v. U.S.*, 523
11 U.S. 296, 300 (1998). Because AB 477 is a newly enacted law which has not been
12 enforced, this case is not ripe, and dismissal is warranted.

13 To elaborate, a case is not ripe for review when the degree to which the harm
14 alleged by the party seeking review is not sufficiently concrete, but rather any
15 alleged injury is remote or hypothetical. *Cote H. v. Eighth Judicial Dist. Court ex rel*
16 *County of Clark*, 124 Nev. 36 n.1, 175 P.3d 906 (2008).

17 Plaintiff's injury arguments are nothing more than hypotheticals and/or
18 speculation that a creditor will not be able to hire an attorney to represent them in
19 justice court, and that credit may be tightened for all consumers. *Am Compl.* ¶¶
20 37, 38. This argument is a red herring because a creditor can hire an attorney to
21 comply with Justice Court rule 16, but he will have to make a business decision
22 whether he may have to pay the attorney more fees than can be recovered in a small
23 dollar case. It is not a due process or equal protection issue, it is simply a business
24 decision that Plaintiff will make when analyzing each case. He can also use small
25 claims court without an attorney for the small debts.

26 Moreover, even if Plaintiff was to somehow provide a basis for relief, the FID
27 is not in a position to provide that or any relief. The FID does not govern the
28 attorney fees that justice court can award nor does it regulate the agreement

1 between a collection agency and its counsel that represents them in court in a
2 collection matter.

3 Plaintiff filed its original complaint November 13, 2019- a little over a month
4 after AB 477 went into effect. In its original complaint, Plaintiff alleged that “NCA’s
5 members are at risk of administrative enforcement to the extent that they seek
6 amounts in excess of those allowed by AB 477.” *Compl.* ¶ 43. Plaintiff removed that
7 allegation from the Amended Complaint because they finally realize that the FID
8 does not enforce the amount of attorney fees that the Justice Court can award.

9 Plaintiff alleges violations of substantive and procedural due process and
10 equal protection resulting from the mere existence of Sections 18 and 19 of AB 477.
11 Based on the alleged violations, Plaintiff has requested that the Court declare AB
12 477 unconstitutional and grant injunctive and declaratory relief.

13 Plaintiff has not alleged a specific due process or equal protection violation
14 by the FID. Instead, Plaintiff pleads due process and equal protection constitutional
15 guarantees and then speculates about a possible future injury through Justice
16 Court’s enforcement of AB477. *Am Compl.* ¶¶44-54, 58-65, 69-75, 80-87.

17 Plaintiff’s claims are premature.³ The mere existence of a statute that may
18 or may not ever be applied to the Plaintiffs members is not sufficient, in and of
19 itself, to meet ripeness requirements. *San Diego Gun Rights Comm. v. Reno*, 98
20 F.3d 1121, 1126-27 (9th Cir. 1996). Moreover, Plaintiff never asserts how or if the
21 FID has the power or responsibility to regulate the attorney fees only Justice Court
22 can award. *Am. Compl.* ¶ 3. This Court should immediately dismiss these claims
23
24

25 ³ Plaintiff additionally alleges that the “language of AB 477 is inherently
26 vague and ambiguous.” *Am. Compl.* ¶23. Although no regulations have been
27 adopted to provide direction for the application of the law, Plaintiff prematurely
28 claims that in the future, its members will be unable to retain counsel to represent
them in small dollar consumer cases.” *Am. Compl.* ¶35. It is noteworthy that any
regulations would not be adopted by the FID, since they do not govern Chapter 97B
(AB 477).

1 against the FID and further refuse to adjudicate prematurely the constitutionality
2 of AB 477.

3 **D. Plaintiff's Declaratory Relief claims are not ripe.**

4 Plaintiffs' request for a declaratory judgment based on allegations of possible
5 future injury from this brand new statute is also not ripe. *Am. Compl.* ¶91. "The
6 constitutional ripeness of a declaratory judgment action depends upon whether the
7 facts alleged ... show that there is a substantial controversy, between parties having
8 adverse legal interests, of sufficient immediacy ... [that] warrant the issuance of a
9 declaratory judgment." *United States v. Braren*, 338 F.3d 971, 975 (9th Cir. 2003).
10 Prudential ripeness requires the fitness of issues for judicial decision and the
11 hardship to the parties if the court withholds consideration. *Braren*, 338 F.3d at
12 975. Again, Plaintiffs cannot meet the immediacy requirement and prudential
13 ripeness doctrine on this new statute.

14 The factors considered when determining if a case is ripe for a declaratory
15 judgment include a constitutional component that asks, "whether the facts alleged,
16 under all the circumstances, show that there is a substantial controversy, between
17 parties having adverse legal interests, of sufficient immediacy and reality to
18 warrant the issuance of a declaratory judgment." *U.S. v. Braren*, 338 F.3d 971, 975
19 (9th Cir. 2003). A justiciable controversy is a preliminary hurdle to an award of
20 declaratory relief. *Southern Pacific Co. v. Dickerson*, 80 Nev. 572, 576, 397 P.2d 187,
21 190 (1964)

22 The case or controversy issue which includes discussion of Plaintiff's lack of
23 injury in fact, the lack of a causal link, and the lack of redressability are addressed
24 above with regard to standing. The same factors are considered along with
25 prudential factors in determining whether a case is ripe for decision. The
26 prudential portion of the ripeness evaluation weighs the fitness of the issues for
27 judicial decision and the hardship to the parties of withholding the court's
28 consideration. *U.S. v. Braren*, 338 F.3d 971, 975 (9th Cir. 2003).

1 Generally, an agency's action must be final before a declaratory judgment
2 action is ripe. *Braren*, 338 F.3d at 975. This way, before declaratory action is
3 taken, the effects of the agency's action is "felt in a concrete way by challenging
4 parties." *Id.* Here there has been no agency action -- or even a threat of agency
5 action since the FID does not enforce AB 477.

6 There is also no hardship to the parties since Plaintiff's members do not have
7 an injury in fact and only speculate about a potential future injury if they cannot
8 access the court system for small collection cases. Moreover, Plaintiff's speculative
9 injuries are all potentially financial in nature and fail to meet the hardship
10 requirement. *See e.g. Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1126 (9th Cir.2009)
11 (To meet the hardship requirement, a litigant has the burden to show more than a
12 financial loss). Plaintiffs only complain about financial loss. As a result, this
13 matter is not fit for judicial decision against the FID.

14 Plaintiff never alleges or argues that the FID has any authority over AB 477
15 or that the FID can enforce Sections 18 or 19 of AB477. There is not a single factual
16 allegation in the Amended Complaint claiming the FID has any regulatory ability to
17 govern any activities that the Justice Court engages in, including the attorney fees
18 awarded by the Justice Court. It would be a violation of separation of powers to
19 intervene or regulate Justice Court's jurisdiction. Moreover, neither AB 477 nor
20 Chapter 649 provide the FID with this ability.⁴ Thus, even if this Court grants the
21 Plaintiff all the relief it seeks, the FID is powerless because its regulatory ability is
22 limited to the provisions of Chapter 649. Equally important, the FID absolutely does
23 not have any authority over the fees that Justice Court can award under AB 477.
24 Moreover, there has not been and cannot be any threat of enforcement by the FID
25 regarding AB 477, because the Nevada legislature did not delegate the enforcement
26

27 ⁴ The FID only regulates collection agencies and does not regulate many of the
28 Plaintiff's members including those who extend credit for their own products, law
firms or asset buying companies

1 of AB 477 to the FID.

2 **E. The FID is not a person subject to Section 1983 due process and equal**
3 **protection claims.**

4 Plaintiff alleges that its due process and equal protection claims are brought
5 under 42 U.S.C. §1983. *Am. Compl.* ¶¶ 45, 58, 69, 80. The provisions of 42 U.S.C.
6 § 1983 provide access to Court when any person, under the color of state law,
7 deprives any person of the rights, privileges or immunities secured by the
8 Constitution and laws. The section 1983 claims against the State, the FID and its
9 Commissioner must be dismissed because neither the State of Nevada nor its
10 agencies are “persons” under section 1983. *Maldonado v. Harris*, 370 F.3d 945, 951
11 (9th Cir. 2004); *Wolfe v. Strankman*, 392 F.3d 358, 364 (“[S]tate agencies are also
12 protected from suit under § 1983.”); *see also Will v. Michigan Dept. of State Police*,
13 491 U.S. 58, 69 (1989). The *Will* court looked at the legislative history of Section
14 1983 and determined that Congress did not intend for the state itself to be the
15 subject of liability. *Will*, 491 U.S. at 68-69. As a result all Section 1983 claims
16 against the FID must be dismissed.

17 **F. Commissioner O’Laughlin in her official capacity is not a person and**
18 **must be dismissed from the Section 1983 due process and equal**
19 **protection claims.**

20 The Supreme Court has held that a suit against officers or employees in their
21 official capacity are really another way of pleading a lawsuit against the State.
22 *Hafer v. Melo*, 502 U.S. 21, 25 (1991); *Will v. Michigan Dept. of State Police*, 491
23 U.S. 58, 71 (1989). Thus, when a person sues state employees of officers in their
24 official capacities, the suit is actually against Nevada and not the individual. *Craig*
25 *v. Donnelly*, 439 P.3d 413, 135 Nev. Adv Op. 6 (2019); *see also Kentucky v. Graham*,
26 473 U.S. 159, 166 (1985) (an official capacity suit is “*not* a suit against the official
27 personally, for the real party in interest is the entity.”) (emphasis in original).

28 In *Hafer v. Melo*, 502 U.S. 21, 112 S. Ct. 358 (1991), the United States

1 Supreme Court discussed the differences between an individual is sued in his or her
2 individual capacity verses when he or she is sued in an official capacity. The court
3 held that treating claims brought in an official capacity as claims against a state
4 permits an official's successor to assume his or her role in litigation if an individual
5 sued in an official capacity dies or leaves office. *Id.* Damages in an official capacity
6 suit are imposed on the government entity and not on the individual. *Kentucky v.*
7 *Graham*, 473 U.S. 159, 166 (1995).

8 Just like the State, Commissioner O'Laughlin is not a person under Section
9 1983. *Will v. Michigan Dep't. of State Police*, 492 U.S. 58, 71 (1989). Thus, because
10 an official-capacity suit against a state official is a suit against his or her office and
11 the state itself, all section 1983 claims for due process and equal protection must be
12 dismissed against Commissioner O'Laughlin.

13 **2. Dismissal is warranted because Plaintiff has failed to state a claim**
14 **pursuant to NRCP 12(b)(5).**

15 **A. Legal Standards for NRCP 12(b)(5)**

16 NRCP 12(b)(5) permits a defendant to bring a motion to dismiss a plaintiff's
17 claim in a complaint for failure to state a claim upon which relief can be granted.
18 Pursuant to Rule 12(b)(5), a complaint should be dismissed for failure to state a
19 claim "if it appears beyond a doubt that [plaintiff] could prove no set of facts, which,
20 if true, would entitle it to relief." *Buzz Stew, LLC v. City of North Las Vegas*, 124
21 Nev. 224, 228, 181 P.3d 670, 672 (Nev. 2008). The pleadings must be liberally
22 construed, and all factual allegations in the complaint accepted as true. *Blackjack*
23 *Bonding v. City of Las Vegas Municipal Court*, 116 Nev. 1213, 1217, 14 P.3d 1275,
24 1278 (Nev. 2000). Plaintiff's allegations must be legally sufficient to constitute the
25 elements of the claim asserted. *Munda v. Summerlin Life & Health Ins. Co.*, 127
26 Nev. 918, 923, 267 P.3d 771, 774 (2011). Dismissal is required where it appears
27 beyond a doubt the plaintiff could prove no set of facts entitling him to relief. *Id.*
28 Here, even if this Court finds that any claims remain against the State Defendants,

1 Plaintiff has failed to state a claim where any relief can be provided by the FID.

2 **B. The FID's regulatory power over a collection agency is**
3 **governed by Chapter 649.**

4 The FID's regulatory power over a collection agency is limited to the duties
5 and responsibilities found in NRS Chapter 649. NRS 649.051. The FID does not
6 regulate the contracts between collection agency and their attorneys, and does not
7 regulate the Justice Court's award of attorney fees.

8 Briefly, a collection agency includes all persons engaging in the business of
9 collecting, soliciting or obtaining the payment of a claim owed or due to another.
10 NRS 649.020. The customer is the person who authorizes or employs a collection
11 agency for any purpose authorized by Chapter 649. NRS 649.030. A collection
12 agency enters into a written agreement with its customer to collect the debt that is
13 owed to the customer by a third party creditor. NRS 649.334. The terms of the
14 contract between the collection agency and its customer must be clear and specific.
15 NRS 649.334.

16 The agreement between the collection agency and its creditor customer may
17 or may not provide for attorney fees. If interest is to be paid on the debt, it is
18 determined through the agreement between the customer and the collection agency.
19 NRS 649.334. When the collection agency remits the proceeds to its customer, it
20 may first deduct its court costs NRS 649.334(2).

21 The FID is empowered to adopt regulations concerning collection agencies,
22 but only concerning items such as; record keeping, preparing and filing reports,
23 handling trust funds and accounts, the transfer or assignment of accounts and
24 agreements, and the investigations and examinations performed by the FID.
25 NRS 645.056.

26 Aside from requiring that the contract between the collection agency and its
27 customer be specific and unambiguous, (NRS 649.334) the statutes and regulations
28 do not provide the FID the power or jurisdiction to investigate or enforce the

1 amount of money that a collection agency pays its attorney for court appearances or
2 any collection fees that justice court may impose. *See* Declaration of Mary Young,
3 Deputy Director of FID, attached hereto as Exhibit “A.”

4 The FID performs an annual examination of collection agencies. During the
5 examination, the examiner reviews the books and records of the collection agency to
6 ensure compliance with Chapter 649 and the Fair Debt Collection Practices Act.
7 Exhibit “A.” The FID reviews the contracts between the collection agency and its
8 customer as well as the contract that created the debt between the creditor and
9 debtor. The FID reviews the contract to see if interest, fees and costs can be
10 collected per the Contract, but not how much can be collected. Exhibit “A.” The
11 FID does not examine the agreement between a collection agency and its legal
12 representative. Awarding attorney fees are a function of the Justice Court and not a
13 function of the FID. As a result, dismissal of the FID is appropriate because the
14 FID cannot provide the relief that Plaintiff is seeking.

15 CONCLUSION

16 Based on the foregoing, Defendant FID must be dismissed from this case.
17 Plaintiff has failed to invoke subject matter jurisdiction because there is no case or
18 controversy between the FID and the Plaintiff and this case is not ripe. The
19 constitutional claims must be dismissed because the FID is not a person under 42
20 U.S.C. § 1983. Moreover, the FID cannot provide the relief that Plaintiff has
21 requested, because even if this Court grants declaratory and/or injunctive relief, the
22 FID does not have the power to regulate or enforce AB 477.

23 Respectfully submitted this 8th day of June, 2020.

24 AARON D. FORD
25 Nevada Attorney General

26 By: /s/ Vivienne Rakowsky
27 VIVIENNE RAKOWSKY (Bar No. 9160)
28 Deputy Attorney General
Attorneys for State Defendant FID

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **STATE DEFENDANT’S MOTION TO DISMISS AMENDED COMPLAINT** with the Clerk of the Court by using the electronic filing system on the 8th day of June, 2020.

Registered electronic filing system users will be served electronically.

/s/ Michele Caro
Michele Caro, an Employee of the
office of the Nevada Attorney General

EXHIBIT “A”

EXHIBIT “A”

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12. My understanding is that the Department of Business and Industry Consumer Affairs can act upon any complaint that is not regulated by a specific B&I agency.

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Dated this 22__ day of January 2020.

By: 

Mary M. Young
Deputy Commissioner
Nevada Department of Business & Industry
Financial Institutions Division



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8 **DISTRICT COURT**
9
10 **CLARK COUNTY, NEVADA**

11
12 NEVADA COLLECTORS ASSOCIATION, a)
13 Nevada non-profit corporation,)

14 Plaintiff,)

15 v.)

16 SANDY O'LAUGHLIN, in her official)
17 capacity as Commissioner of State of)
18 Nevada Department of Business and)
19 Industry and Financial Institutions)
20 Division; STATE OF NEVADA)
21 DEPARTMENT OF BUSINESS AND)
22 INDUSTRY FINANCIAL INSTITUTIONS)
23 DIVISION; JUSTICE COURT OF LAS)
24 VEGAS TOWNSHIP; DOE DEFENDANTS)
25 1 through 20; and ROE ENTITIY)
26 DEFENDANTS 1 through 20,)

27 Defendants.)
28

Case No.: A-19-805334-C
Dept. No.: XXVII

**SECOND ERRATA TO STATE
DEFENDANT'S
MOTION TO DISMISS
AMENDED COMPLAINT**

24 Defendant, State of Nevada Department of Business and Industry Financial
25 Institutions Division and Commissioner O'Laughlin (collectively "FID"), by and
26 through counsel, Aaron D. Ford, Nevada Attorney General and Vivienne Rakowsky,
27 Deputy Attorney General, hereby file this Second Errata to Motion to Dismiss the
28

1 Amended Complaint.

2 Due to clerical errors, attached is this document filed June 8, 2020 with a
3 corrected date of June 8, 2020 instead of June 6, 2020. Also corrected is the
4 document code; MDSM instead of MDC.

5 Respectfully submitted this 9th day of June, 2020.

6 AARON D. FORD
7 Nevada Attorney General

8 By: /s/ Vivienne Rakowsky
9 VIVIENNE RAKOWSKY (Bar No. 9160)
10 Deputy Attorney General
11 *Attorneys for State Defendant FID*

12 **CERTIFICATE OF SERVICE**

13 I hereby certify that I electronically filed the foregoing **SECOND ERRATA**
14 **TO STATE DEFENDANT'S MOTION TO DISMISS AMENDED COMPLAINT**
15 with the Clerk of the Court by using the electronic filing system on the 9th day of
16 June, 2020.

17 Registered electronic filing system users will be served electronically.

18 /s/ Michele Caro
19 Michele Caro, an Employee of the
20 office of the Nevada Attorney General
21
22
23
24
25
26
27
28

1 **MDSM**
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8 **DISTRICT COURT**
9 **CLARK COUNTY, NEVADA**

11
12 NEVADA COLLECTORS ASSOCIATION, a)
13 Nevada non-profit corporation,)
14)
15 Plaintiff,)
16 v.)
17)
18 SANDY O'LAUGHLIN, in her official)
19 capacity as Commissioner of State of)
20 Nevada Department of Business and)
21 Industry and Financial Institutions)
22 Division; STATE OF NEVADA)
23 DEPARTMENT OF BUSINESS AND)
24 INDUSTRY FINANCIAL INSTITUTIONS)
25 DIVISION; JUSTICE COURT OF LAS)
26 VEGAS TOWNSHIP; DOE DEFENDANTS)
27 1 through 20; and ROE ENTITIY)
28 DEFENDANTS 1 through 20,)
Defendants.)

Case No.: A-19-805334-C
Dept. No.: XXVII

**STATE DEFENDANT'S
MOTION TO DISMISS
AMENDED COMPLAINT**

24 Defendant, State of Nevada Department of Business and Industry Financial
25 Institutions Division and Commissioner O'Laughlin (collectively "FID"), by and
26 through counsel, Aaron D. Ford, Nevada Attorney General and Vivienne Rakowsky,
27 Deputy Attorney General, hereby file this Motion to Dismiss the Amended
28

1 Complaint.

2 This Motion is based on the memorandum of points and authorities below, all
3 papers and pleadings on file, and such other evidence as this Honorable Court
4 deems just and appropriate to make a determination.

5 INTRODUCTION

6 Prior to the remand, Plaintiff filed Leave to Amend the Complaint with the
7 U.S. District Court in the District of Nevada. ECF No. 20-1. In its Motion for
8 Leave, Plaintiff clearly stated: “NCA seeks amendment to its original complaint
9 *solely* to add a party” ECF No 20, p. 2:16 (emphasis added). Plaintiff went on to
10 state the reason for amending the complaint was to add the newly appointed
11 Commissioner of the FID in her official capacity. ECF No. 20, p. 2:16-28, p. 1-13.
12 The District Court allowed the Amendment, correcting the caption and adding
13 Commissioner O’Laughlin as a defendant in her official capacity. ECF No. 20, p.
14 3:13-14, ECF 20-1, p. 2-4.

15 Nevertheless, Plaintiff neglected to notice the Court and the parties that the
16 Amended Complaint also includes several other relevant changes, including the
17 removal of several allegations from the original Complaint, thereby abandoning
18 those claims and facts. (*Compl.* ¶¶ 43, 61, 62, 95), and the addition of requests for
19 attorney fees (*Am. Compl.* ¶¶ 56, 68, 77, 88, 98).

20 Interestingly, Plaintiff has withdrawn ¶43 which alleges that the Plaintiffs
21 are at risk of enforcement of AB 477 if they seek amounts in excess of AB 477 limits,
22 and ¶95 asking for a declaration that Sections 18 and 19 “unduly conflict and
23 interfere” with “numerous provisions of the Nevada and Federal Constitutions.”
24 Plaintiff has changed its prayer for relief and eliminated its request for a writ of
25 prohibition against the Justice Court’s enforcement of sections 18 and 19. Other
26 changes were made as well, such as eliminating the definition in ¶12 that “small
27 dollar debts” refer to debts of less than \$5,000.

28 Plaintiff has alleged five causes of action including Violation of Substantive

1 Due Process based on Section 18 of AB 477 and JCR 16; Violation of Substantive
2 and Procedural Due Process based on Section 19 of AB 477; Violation of Equal
3 Protection based on Section 18 of AB 477; Violation of Equal Protection based on
4 Section 19 of AB 477; and Declaratory Relief. None of the claims apply to the
5 regulatory function of the FID. As a result, all Plaintiffs claims against
6 Commissioner O’Laughlin and the Financial Institutions Division (FID) must be
7 dismissed.

8 This Court lacks subject matter jurisdiction pursuant to NRCP 12(b)(1)
9 because Plaintiff lacks standing and its claims are not ripe. The section 1983 due
10 process and equal protection claims against the FID and Commissioner O’Laughlin
11 must be dismissed because neither the agency nor its Commissioner are persons
12 subject to section 1983. Pursuant to NRCP 12(b)(5), the FID cannot give Plaintiffs
13 any relief is it seeking because the FID does not regulate AB 477 or the amount of
14 attorney fees that can be awarded by the Justice Court. Finally, Plaintiff is not
15 entitled to an award of attorney fees, which will be addressed in the event that the
16 Amended Complaint against the FID and Commissioner O’Laughlin is not
17 dismissed.

18 **FACTS**

19 The Financial Institutions Division, headed by Commissioner O’Laughlin is
20 an administrative agency of the State of Nevada. (“FID”). It’s mission is to
21 “maintain a financial institutions system for the citizens of Nevada that is safe and
22 sound, protects consumers and defends the overall public interest, and promotes
23 economic development through the efficient, effective and equitable licensing,
24 examination and supervision of depository fiduciary and non-depository financial
25 institutions.” <http://fid.nv.gov>.

26 The FID regulates collection agencies pursuant to NRS Chapter 649.
27 NRS 649.051. Chapter 649 may govern the contracts between the collection agency
28 and its Nevada customers that retain collection agency services, but does not

1 regulate other members of the Nevada Collector's Association ("Plaintiff") including
2 law firms and asset buying companies. NRS 649.020; *Am. Compl.* ¶11. Relevant to
3 this matter, Chapter 649 absolutely does not regulate the relationship between a
4 collection agency and its attorney that represents them in Justice Court. NRS Ch.
5 649. Nor does the FID regulate the amount of fees that the Justice Court can award
6 to either the collection agency or the debtor prevailing party.

7 AB 477 is a new chapter codified in the Nevada Revised Statutes as
8 NRS 97B.¹ The title of the chapter is the Consumer Protection from Predatory
9 Interest After Default Act, which is incorporated into Title 8. Title 8 regulates
10 Commercial Instruments and Transactions. AB 477 was passed by the Nevada
11 Legislature in June 2019 and went into effect on October 1, 2019. Plaintiffs never
12 articulate that they are subject to an imminent threat of investigation or
13 enforcement by the FID concerning attorney fees, or even that the FID has the
14 power to investigate or enforce AB 477. Instead, Plaintiff merely alleges that the
15 existence of AB 477 will prevent Plaintiffs' members from fair access to courts
16 because they will not be able to retain counsel to represent them for small dollar
17 collection cases. See e.g. *Am. Compl.*, ¶¶ 34, 36, 37, 38.

18 Plaintiff references two specific sections of AB 477 alleging that the
19 statutes deprive them of substantial and procedural due process and equal
20 protection. The two sections state:

21 **Sec. 18 (NRS 97B.160).**

22 1. If the plaintiff is the prevailing party in any action to collect a
23 consumer debt, the plaintiff is entitled to collect attorney's fees only if
24 the consumer form contract or other document evidencing the
indebtedness sets forth an obligation of the consumer to pay such
attorney's fee and subject to the following conditions:

25 (a) If a consumer form contract or other document evidencing
26 indebtedness provides for attorney's fees in some specific percentage,

27 ¹ Because Plaintiff continues to reference AB 477 and does not reference
28 NRS 97B, Defendants will also use AB 477 and cross reference the appropriate
statute in NRS 97B.

1 such provision and obligation is valid and enforceable for an amount
2 not to exceed 15 percent of the amount of the debt, excluding
attorney's fees and collection costs.

3 (b) If a consumer form contract or other document evidencing
4 indebtedness provides for the payment of reasonable attorney's fees by
5 the debtor, without specifying any specific percentage, such provision
6 must be construed to mean the lesser of 15 percent of the amount of
7 the debt, excluding attorney's fees and collection costs, or the amount
of attorney's fees calculated by a reasonable rate for such cases
multiplied by the amount of time reasonably expended to obtain the
judgment.

8 2. The documentation setting forth a party's obligation to pay
9 attorney's fees must be provided to the court before a court may
enforce those provisions.

10 **Sec. 19** (NRS 97B.160). If the debtor is the prevailing party in any
11 action to collect a consumer debt, the debtor is entitled to an award of
12 reasonable attorney's fees. The amount of the debt that the creditor
sought may not be a factor in determining the reasonableness of the
award

13 AB 477 (2019).

14 The FID must be dismissed because the FID does not regulate a collection
15 agency's ability to retain counsel to represent them in court, or a licensee's access to
16 justice court, or the amount of attorney fees that may be awarded to the prevailing
17 party by the justice court. Moreover, AB 477 does not delegate any powers or
18 responsibilities to the FID. In fact, Plaintiff's Amended Complaint fails to provide
19 any facts to support any of the claims against the FID.

20 Pursuant to NRCP 12(b)(1), this Court lacks subject matter jurisdiction
21 because Plaintiff lacks standing and this case is not ripe. Additionally, under
22 NRCP 12(b)(5) Plaintiff has failed to state a claim for which relief can be granted.
23 Finally, the due process and equal protection official claims against Commissioner
24 O'Laughlin along with the claims against the FID cannot stand because the
25 Commissioner as the face of the FID as well as the FID itself are not "persons"
26 under 42 U.S.C. § 1983.

27 ///

1 **POINTS AND AUTHORITIES**

2 **1. This case must be dismissed for lack of subject matter jurisdiction.**

3 **A. Legal standards for NRCP 12(b)(1)**

4 NRCP 12(b)(1) provides that when a court lacks subject matter jurisdiction,
5 the claims must be dismissed. NRCP 12(h)(3). Without first establishing
6 jurisdiction, the court cannot proceed to hear the case. *Steel Co. v. Citizens for a*
7 *Better Environment*, 523 U.S. 83, 95 (1998).

8 Plaintiff has the burden to show that the court has subject matter
9 jurisdiction. *Castillo v. United Federal Credit Union*, 134 Nev. 13,16, 409 P.3d 54
10 (2018); *Morrison v. Beach City LLC*, 116 Nev. 34, 36, 991 P.2d. 982, 983 (Nev. 2000)
11 (The burden proving the jurisdictional requirement is properly placed on the
12 plaintiff). Subject matter jurisdiction does not exist if there is no standing. See
13 e.g. *Ohfuji Investments Inc. v. Citibank, N.A.* 2019 WL 682503 (*unpublished*). In
14 addition a case must be ripe for review.

15 Standing requires an “actual justiciable controversy as a predicate to judicial
16 relief... not merely the prospect of a future problem.” *Doe v. Bryon*, 102 Nev. 523,
17 525, 728 P.2d 443, 444 (1986). A justiciable controversy is a controversy “in which
18 a claim of right is asserted against one who has an interest in contesting it.” *Id.*
19 Thus, for a case or controversy to exist and invoke jurisdiction, the parties must be
20 adverse, there must be a controversy, and the issues must be ripe for determination.
21 *Kress v. Cory*, 65 Nev. 1, 26, 189 P. 2d 352 (1948). Ripeness is similar to standing,
22 except ripeness looks at the timing of the action. *In re. T.R.*, 119 Nev. 646, 651, 80
23 P.3d 1276 (2003).

24 The FID and Plaintiff are not adverse because the FID does not enforce
25 Chapter 97B (AB 477) or regulate a collection agencies choice of attorney. There is
26 nothing that the FID can do to change Justice Court Rule 16 which requires
27 Corporations and LLC’s to be represented by an attorney in Justice Court. In fact, it
28 would violate separation of powers for an executive agency such as the FID to

1 dictate how a court enforces its rules. In addition, this case is not ripe.

2 A justiciable controversy cannot be based on harm which is speculative or
3 hypothetical. *Herbst Gaming, Inc. v. Heller*, 122 Nev. 877, 887, 141 P.3d 1224
4 (2006). Here, there is no controversy between the Plaintiff and the FID. Plaintiff
5 does not allege that the FID has done anything to limit Plaintiffs' access to Justice
6 Court, and has, in fact, backed off its claim that the FID can even enforce Section
7 18. (Paragraph 43 was eliminated from the original Complaint when the Plaintiff
8 filed the Amended Complaint). Plaintiff does not allege that the FID regulates the
9 amount of attorney fees Justice Court awards. Plaintiff does not allege that the FID
10 has any power to enforce AB477. Plaintiff does not allege that the FID has taken or
11 threatened any action against any of their members based on AB 477. Thus, there
12 is no case or controversy and Plaintiffs' claims of what can potentially happen in the
13 future are hypothetical at best.

14 The Plaintiff has only speculated about a possible injury *if* they are unable to
15 retain counsel to access the court system. In the eight months that this law has
16 been in effect, Plaintiff has not produced any evidence that the FID has caused an
17 actual injury that can in anyway be traceable to actions by the FID. Most relevant,
18 there is no relief this Court can grant the Plaintiff that is within the power or
19 jurisdiction of the FID to redress the Plaintiff's claims. *See e.g. Allen v. Wright*, 468
20 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984) (overruled on other grounds).

21 **B. Plaintiff does not have standing against the FID because there**
22 **is no case or controversy**

23 A case or controversy must be present at all stages of the litigation.
24 *Personhood v. Bristol*, 126 Nev. 599, 602, 245 P.3e 572, 574 (2010). A case or
25 controversy requires standing, which enables the court to decide the merits of the
26 case. *Allen v. Wright*, 468 U.S. 737, 750-751 (1984) (overruled on other grounds). To
27 establish standing the Plaintiff has the burden to show; (a) an injury in fact, (b)
28 causation, and (c) redressability. *Steel Co.*, 523 U.S. at 103-104.

1 a. **There is no actual injury in fact.**

2 Plaintiff cannot establish an injury in fact. The Plaintiff has only speculated
3 about a possible injury if they are unable to retain counsel to access the court
4 system. To the contrary, Plaintiff has not been denied access to any court in the
5 State of Nevada, and has not been threatened with any administrative enforcement
6 of AB 477.

7 Plaintiff's members are primarily concerned with small dollar consumer
8 debts. *Am. Compl*, ¶13. This Court should take judicial notice of NRS Chapter 73
9 which provides for access to the Nevada court system without an attorney for claims
10 under \$10,000. NRS 73.010(1) provides that "[a] justice of the peace has jurisdiction
11 and may proceed as provided in this chapter and by rules of court in all cases
12 arising in the justice court for the recovery of money only, where the amount
13 claimed does not exceed \$10,000"), and NRS 73.012 provides that "[a] corporation,
14 partnership, business trust, estate, trust, association or any other nongovernmental
15 legal or commercial entity may be represented by its director, officer or employee in
16 an action mentioned or covered by this chapter...").

17 Thus, Plaintiff's members are not forced to retain counsel or denied access to
18 court; it is only that Plaintiff's members chose not to use the court with jurisdiction
19 for the size of their claims that will allow them to appear without an attorney.
20 Notwithstanding, Plaintiff's members are not can still opt to use an attorney and
21 access the court of their choice, but will only be able to recover the attorney fees
22 pursuant to AB 477. If a creditor or collection agency decides to hire an attorney to
23 go to justice court to collect a \$500 debt rather than small claims court without an
24 attorney, it is a business decision that the creditor and/or collection agency will
25 have to make at the time, knowing the limitations on the award of attorney fees
26 that Justice Court will award. *See e.g. Am. Compl.* ¶¶27-30.

27 Thus, there is no actual injury. Any injury would be self-inflicted based on
28 business decisions made by the Plaintiff. At this point, approximately eight (8)

1 months after this statute has gone into effect, none of the Plaintiff's members have
2 suffered an injury due to any actions or threatened actions by the FID. Plaintiff
3 additionally has not pled a single instance where they were have been denied access
4 to court.

5 **b. Plaintiff fails to show any causal link that would give them**
6 **standing.**

7 The Plaintiff cannot show a causal link between any actions that the FID has
8 taken or can take to address any alleged potential injuries. To establish the causal
9 element for standing, the injury alleged to be suffered must be "fairly traceable to
10 the agencies alleged misconduct." *Washington Environmental Counsel v. Bellon*,
11 732 F.3d 1131, 1141 (9th Cir. 2013). The links cannot be hypothetical or tenuous.
12 *Id.* When the causal chain involves other "third parties whose independent
13 decisions collectively have a significant effect on plaintiffs injuries, the causal chain
14 is too weak to support standing." *Bellon*, 732 F.3d at 1142. Any prospective injury
15 would be related to an insufficient award of attorney fees which would be
16 determined by the third party justice court and not the FID. Thus the Plaintiff
17 cannot establish a causal link between AB 477 and the FID.

18 Moreover, in its Motion for a Preliminary Injunction² Plaintiff uses
19 hypotheticals involving businesses that are not regulated by the FID to allege a
20 potential injury. Small businesses such as caterers, landscapers, small medical
21 providers, dental clinics, accountants, therapists, property managers, child care
22 provides, dry cleaners, bakers, security providers and even the "buy here pay here"
23 auto dealers that extend credit to their customers for goods or services, are not
24 regulated by the FID. The fact that the FID regulates collection agencies pursuant
25

27 ² The Court can take judicial notice of Plaintiffs Motion for Injunction which
28 was filed on May 15, 2020. The Motion for Preliminary Injunction will be heard in
conjunction with the Motion to Dismiss.

1 to NRS Chapter 649 does not provide a causal connection to attorney fees awarded
2 by the court on the basis of AB 477.

3 Even if a business employs a licensed collection agency to collect a defaulted
4 debt, the FID only looks at the original contract with its Nevada client (creditor)
5 and the contract between the creditor and its customer that established the debt.
6 The FID looks to verify that the collection agency has complied with the contract
7 that it has with its Nevada client and that the contract with the Nevada client does
8 not violate State or Federal law. The FID does not look at the amount of attorney
9 fees the contract allows, and does not look at a contract between a collection agency
10 and the attorney that appears for them in court. The fees are up to the court to
11 award. The contract between the creditor and its debtor is in existence prior to the
12 time that a defaulted debt is turned over to a collection agency.

13 Accordingly, Plaintiff cannot show a causal link because there is no plausible
14 connection between AB 477, JCR 16, and the FID.

15 **c. Plaintiff cannot show that the FID can redress any alleged injury.**

16 There is no relief this Court can grant within the power or jurisdiction of the
17 FID that can redress the Plaintiff's claims. *See e.g. Lujan v. Defenders of Wildlife*,
18 504 U.S. 555, 568-569 (1992) (Standing was denied based on the lack of
19 redressability because "it was entirely conjectural whether the non-agency activity
20 that affects respondents will be altered or affected by the agency activity they seek
21 to achieve"). The Plaintiff cannot meet the redressability prong because the FID
22 does not regulate AB 477 or regulate the Justice Court award of attorney fees.

23 AB 477's limitation on attorney fees is something that a creditor or a
24 collection agency should consider when bringing an action in Justice Court. AB 477
25 does not limit access, it just limits the amount of attorney fees that can be collected.
26 The FID does not have the jurisdiction to redress any of Plaintiff's alleged potential
27 injuries because it does not regulate JCR 16 or AB 477.

28 ///

1 **C. The Due Process and Equal Protection Claims must be Dismissed**
2 **because they are not Ripe**

3 Similar to standing, ripeness is also necessary to establish a case or
4 controversy. Ripeness is concerned with timing, because if there is no injury in
5 fact, there is no case or controversy. An alleged injury that is too imaginary or
6 speculative will not support jurisdiction. *Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d
7 443, (1986); *Thomas v. Anchorage Equal Rights Com'm*, 220 F.3d 1134, 1138
8 (2000). A justiciable controversy is the first hurdle to an award of declaratory relief.
9 *Southern Pacific Co. v. Dickerson*, 80 Nev. 572, 576, 397 P.2d 187 (1964). Claims
10 based on future events that may or may not occur is not ripe. *Texas v. U.S.*, 523
11 U.S. 296, 300 (1998). Because AB 477 is a newly enacted law which has not been
12 enforced, this case is not ripe, and dismissal is warranted.

13 To elaborate, a case is not ripe for review when the degree to which the harm
14 alleged by the party seeking review is not sufficiently concrete, but rather any
15 alleged injury is remote or hypothetical. *Cote H. v. Eighth Judicial Dist. Court ex rel*
16 *County of Clark*, 124 Nev. 36 n.1, 175 P.3d 906 (2008).

17 Plaintiff's injury arguments are nothing more than hypotheticals and/or
18 speculation that a creditor will not be able to hire an attorney to represent them in
19 justice court, and that credit may be tightened for all consumers. *Am Compl.* ¶¶
20 37, 38. This argument is a red herring because a creditor can hire an attorney to
21 comply with Justice Court rule 16, but he will have to make a business decision
22 whether he may have to pay the attorney more fees than can be recovered in a small
23 dollar case. It is not a due process or equal protection issue, it is simply a business
24 decision that Plaintiff will make when analyzing each case. He can also use small
25 claims court without an attorney for the small debts.

26 Moreover, even if Plaintiff was to somehow provide a basis for relief, the FID
27 is not in a position to provide that or any relief. The FID does not govern the
28 attorney fees that justice court can award nor does it regulate the agreement

1 between a collection agency and its counsel that represents them in court in a
2 collection matter.

3 Plaintiff filed its original complaint November 13, 2019- a little over a month
4 after AB 477 went into effect. In its original complaint, Plaintiff alleged that “NCA’s
5 members are at risk of administrative enforcement to the extent that they seek
6 amounts in excess of those allowed by AB 477.” *Compl.* ¶ 43. Plaintiff removed that
7 allegation from the Amended Complaint because they finally realize that the FID
8 does not enforce the amount of attorney fees that the Justice Court can award.

9 Plaintiff alleges violations of substantive and procedural due process and
10 equal protection resulting from the mere existence of Sections 18 and 19 of AB 477.
11 Based on the alleged violations, Plaintiff has requested that the Court declare AB
12 477 unconstitutional and grant injunctive and declaratory relief.

13 Plaintiff has not alleged a specific due process or equal protection violation
14 by the FID. Instead, Plaintiff pleads due process and equal protection constitutional
15 guarantees and then speculates about a possible future injury through Justice
16 Court’s enforcement of AB477. *Am Compl.* ¶¶44-54, 58-65, 69-75, 80-87.

17 Plaintiff’s claims are premature.³ The mere existence of a statute that may
18 or may not ever be applied to the Plaintiffs members is not sufficient, in and of
19 itself, to meet ripeness requirements. *San Diego Gun Rights Comm. v. Reno*, 98
20 F.3d 1121, 1126-27 (9th Cir. 1996). Moreover, Plaintiff never asserts how or if the
21 FID has the power or responsibility to regulate the attorney fees only Justice Court
22 can award. *Am. Compl.* ¶ 3. This Court should immediately dismiss these claims
23

24
25 ³ Plaintiff additionally alleges that the “language of AB 477 is inherently
26 vague and ambiguous.” *Am. Compl.* ¶23. Although no regulations have been
27 adopted to provide direction for the application of the law, Plaintiff prematurely
28 claims that in the future, its members will be unable to retain counsel to represent
them in small dollar consumer cases.” *Am. Compl.* ¶35. It is noteworthy that any
regulations would not be adopted by the FID, since they do not govern Chapter 97B
(AB 477).

1 against the FID and further refuse to adjudicate prematurely the constitutionality
2 of AB 477.

3 **D. Plaintiff's Declaratory Relief claims are not ripe.**

4 Plaintiffs' request for a declaratory judgment based on allegations of possible
5 future injury from this brand new statute is also not ripe. *Am. Compl.* ¶91. "The
6 constitutional ripeness of a declaratory judgment action depends upon whether the
7 facts alleged ... show that there is a substantial controversy, between parties having
8 adverse legal interests, of sufficient immediacy ... [that] warrant the issuance of a
9 declaratory judgment." *United States v. Braren*, 338 F.3d 971, 975 (9th Cir. 2003).
10 Prudential ripeness requires the fitness of issues for judicial decision and the
11 hardship to the parties if the court withholds consideration. *Braren*, 338 F.3d at
12 975. Again, Plaintiffs cannot meet the immediacy requirement and prudential
13 ripeness doctrine on this new statute.

14 The factors considered when determining if a case is ripe for a declaratory
15 judgment include a constitutional component that asks, "whether the facts alleged,
16 under all the circumstances, show that there is a substantial controversy, between
17 parties having adverse legal interests, of sufficient immediacy and reality to
18 warrant the issuance of a declaratory judgment." *U.S. v. Braren*, 338 F.3d 971, 975
19 (9th Cir. 2003). A justiciable controversy is a preliminary hurdle to an award of
20 declaratory relief. *Southern Pacific Co. v. Dickerson*, 80 Nev. 572, 576, 397 P.2d 187,
21 190 (1964)

22 The case or controversy issue which includes discussion of Plaintiff's lack of
23 injury in fact, the lack of a causal link, and the lack of redressability are addressed
24 above with regard to standing. The same factors are considered along with
25 prudential factors in determining whether a case is ripe for decision. The
26 prudential portion of the ripeness evaluation weighs the fitness of the issues for
27 judicial decision and the hardship to the parties of withholding the court's
28 consideration. *U.S. v. Braren*, 338 F.3d 971, 975 (9th Cir. 2003).

1 Generally, an agency's action must be final before a declaratory judgment
2 action is ripe. *Braren*, 338 F.3d at 975. This way, before declaratory action is
3 taken, the effects of the agency's action is "felt in a concrete way by challenging
4 parties." *Id.* Here there has been no agency action -- or even a threat of agency
5 action since the FID does not enforce AB 477.

6 There is also no hardship to the parties since Plaintiff's members do not have
7 an injury in fact and only speculate about a potential future injury if they cannot
8 access the court system for small collection cases. Moreover, Plaintiff's speculative
9 injuries are all potentially financial in nature and fail to meet the hardship
10 requirement. *See e.g. Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1126 (9th Cir.2009)
11 (To meet the hardship requirement, a litigant has the burden to show more than a
12 financial loss). Plaintiffs only complain about financial loss. As a result, this
13 matter is not fit for judicial decision against the FID.

14 Plaintiff never alleges or argues that the FID has any authority over AB 477
15 or that the FID can enforce Sections 18 or 19 of AB477. There is not a single factual
16 allegation in the Amended Complaint claiming the FID has any regulatory ability to
17 govern any activities that the Justice Court engages in, including the attorney fees
18 awarded by the Justice Court. It would be a violation of separation of powers to
19 intervene or regulate Justice Court's jurisdiction. Moreover, neither AB 477 nor
20 Chapter 649 provide the FID with this ability.⁴ Thus, even if this Court grants the
21 Plaintiff all the relief it seeks, the FID is powerless because its regulatory ability is
22 limited to the provisions of Chapter 649. Equally important, the FID absolutely does
23 not have any authority over the fees that Justice Court can award under AB 477.
24 Moreover, there has not been and cannot be any threat of enforcement by the FID
25 regarding AB 477, because the Nevada legislature did not delegate the enforcement
26

27 ⁴ The FID only regulates collection agencies and does not regulate many of the
28 Plaintiff's members including those who extend credit for their own products, law
firms or asset buying companies

1 of AB 477 to the FID.

2 **E. The FID is not a person subject to Section 1983 due process and equal**
3 **protection claims.**

4 Plaintiff alleges that its due process and equal protection claims are brought
5 under 42 U.S.C. §1983. *Am. Compl.* ¶¶ 45, 58, 69, 80. The provisions of 42 U.S.C.
6 § 1983 provide access to Court when any person, under the color of state law,
7 deprives any person of the rights, privileges or immunities secured by the
8 Constitution and laws. The section 1983 claims against the State, the FID and its
9 Commissioner must be dismissed because neither the State of Nevada nor its
10 agencies are “persons” under section 1983. *Maldonado v. Harris*, 370 F.3d 945, 951
11 (9th Cir. 2004); *Wolfe v. Strankman*, 392 F.3d 358, 364 (“[S]tate agencies are also
12 protected from suit under § 1983.”); *see also Will v. Michigan Dept. of State Police*,
13 491 U.S. 58, 69 (1989). The *Will* court looked at the legislative history of Section
14 1983 and determined that Congress did not intend for the state itself to be the
15 subject of liability. *Will*, 491 U.S. at 68-69. As a result all Section 1983 claims
16 against the FID must be dismissed.

17 **F. Commissioner O’Laughlin in her official capacity is not a person and**
18 **must be dismissed from the Section 1983 due process and equal**
19 **protection claims.**

20 The Supreme Court has held that a suit against officers or employees in their
21 official capacity are really another way of pleading a lawsuit against the State.
22 *Hafer v. Melo*, 502 U.S. 21, 25 (1991); *Will v. Michigan Dept. of State Police*, 491
23 U.S. 58, 71 (1989). Thus, when a person sues state employees of officers in their
24 official capacities, the suit is actually against Nevada and not the individual. *Craig*
25 *v. Donnelly*, 439 P.3d 413, 135 Nev. Adv Op. 6 (2019); *see also Kentucky v. Graham*,
26 473 U.S. 159, 166 (1985) (an official capacity suit is “*not* a suit against the official
27 personally, for the real party in interest is the entity.”) (emphasis in original).

28 In *Hafer v. Melo*, 502 U.S. 21, 112 S. Ct. 358 (1991), the United States

1 Supreme Court discussed the differences between an individual is sued in his or her
2 individual capacity verses when he or she is sued in an official capacity. The court
3 held that treating claims brought in an official capacity as claims against a state
4 permits an official's successor to assume his or her role in litigation if an individual
5 sued in an official capacity dies or leaves office. *Id.* Damages in an official capacity
6 suit are imposed on the government entity and not on the individual. *Kentucky v.*
7 *Graham*, 473 U.S. 159, 166 (1995).

8 Just like the State, Commissioner O'Laughlin is not a person under Section
9 1983. *Will v. Michigan Dep't. of State Police*, 492 U.S. 58, 71 (1989). Thus, because
10 an official-capacity suit against a state official is a suit against his or her office and
11 the state itself, all section 1983 claims for due process and equal protection must be
12 dismissed against Commissioner O'Laughlin.

13 **2. Dismissal is warranted because Plaintiff has failed to state a claim**
14 **pursuant to NRCP 12(b)(5).**

15 **A. Legal Standards for NRCP 12(b)(5)**

16 NRCP 12(b)(5) permits a defendant to bring a motion to dismiss a plaintiff's
17 claim in a complaint for failure to state a claim upon which relief can be granted.
18 Pursuant to Rule 12(b)(5), a complaint should be dismissed for failure to state a
19 claim "if it appears beyond a doubt that [plaintiff] could prove no set of facts, which,
20 if true, would entitle it to relief." *Buzz Stew, LLC v. City of North Las Vegas*, 124
21 Nev. 224, 228, 181 P.3d 670, 672 (Nev. 2008). The pleadings must be liberally
22 construed, and all factual allegations in the complaint accepted as true. *Blackjack*
23 *Bonding v. City of Las Vegas Municipal Court*, 116 Nev. 1213, 1217, 14 P.3d 1275,
24 1278 (Nev. 2000). Plaintiff's allegations must be legally sufficient to constitute the
25 elements of the claim asserted. *Munda v. Summerlin Life & Health Ins. Co.*, 127
26 Nev. 918, 923, 267 P.3d 771, 774 (2011). Dismissal is required where it appears
27 beyond a doubt the plaintiff could prove no set of facts entitling him to relief. *Id.*
28 Here, even if this Court finds that any claims remain against the State Defendants,

1 Plaintiff has failed to state a claim where any relief can be provided by the FID.

2 **B. The FID's regulatory power over a collection agency is**
3 **governed by Chapter 649.**

4 The FID's regulatory power over a collection agency is limited to the duties
5 and responsibilities found in NRS Chapter 649. NRS 649.051. The FID does not
6 regulate the contracts between collection agency and their attorneys, and does not
7 regulate the Justice Court's award of attorney fees.

8 Briefly, a collection agency includes all persons engaging in the business of
9 collecting, soliciting or obtaining the payment of a claim owed or due to another.
10 NRS 649.020. The customer is the person who authorizes or employs a collection
11 agency for any purpose authorized by Chapter 649. NRS 649.030. A collection
12 agency enters into a written agreement with its customer to collect the debt that is
13 owed to the customer by a third party creditor. NRS 649.334. The terms of the
14 contract between the collection agency and its customer must be clear and specific.
15 NRS 649.334.

16 The agreement between the collection agency and its creditor customer may
17 or may not provide for attorney fees. If interest is to be paid on the debt, it is
18 determined through the agreement between the customer and the collection agency.
19 NRS 649.334. When the collection agency remits the proceeds to its customer, it
20 may first deduct its court costs NRS 649.334(2).

21 The FID is empowered to adopt regulations concerning collection agencies,
22 but only concerning items such as; record keeping, preparing and filing reports,
23 handling trust funds and accounts, the transfer or assignment of accounts and
24 agreements, and the investigations and examinations performed by the FID.
25 NRS 645.056.

26 Aside from requiring that the contract between the collection agency and its
27 customer be specific and unambiguous, (NRS 649.334) the statutes and regulations
28 do not provide the FID the power or jurisdiction to investigate or enforce the

1 amount of money that a collection agency pays its attorney for court appearances or
2 any collection fees that justice court may impose. *See* Declaration of Mary Young,
3 Deputy Director of FID, attached hereto as Exhibit "A."

4 The FID performs an annual examination of collection agencies. During the
5 examination, the examiner reviews the books and records of the collection agency to
6 ensure compliance with Chapter 649 and the Fair Debt Collection Practices Act.
7 Exhibit "A." The FID reviews the contracts between the collection agency and its
8 customer as well as the contract that created the debt between the creditor and
9 debtor. The FID reviews the contract to see if interest, fees and costs can be
10 collected per the Contract, but not how much can be collected. Exhibit "A." The
11 FID does not examine the agreement between a collection agency and its legal
12 representative. Awarding attorney fees are a function of the Justice Court and not a
13 function of the FID. As a result, dismissal of the FID is appropriate because the
14 FID cannot provide the relief that Plaintiff is seeking.

15 CONCLUSION

16 Based on the foregoing, Defendant FID must be dismissed from this case.
17 Plaintiff has failed to invoke subject matter jurisdiction because there is no case or
18 controversy between the FID and the Plaintiff and this case is not ripe. The
19 constitutional claims must be dismissed because the FID is not a person under 42
20 U.S.C. § 1983. Moreover, the FID cannot provide the relief that Plaintiff has
21 requested, because even if this Court grants declaratory and/or injunctive relief, the
22 FID does not have the power to regulate or enforce AB 477.

23 Respectfully submitted this 8th day of June, 2020.

24 AARON D. FORD
25 Nevada Attorney General

26 By: /s/ Vivienne Rakowsky
27 VIVIENNE RAKOWSKY (Bar No. 9160)
28 Deputy Attorney General
Attorneys for State Defendant FID

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **STATE DEFENDANT’S MOTION TO DISMISS AMENDED COMPLAINT** with the Clerk of the Court by using the electronic filing system on the 8th day of June, 2020.

Registered electronic filing system users will be served electronically.

/s/ Michele Caro
Michele Caro, an Employee of the
office of the Nevada Attorney General

EXHIBIT “A”

EXHIBIT “A”

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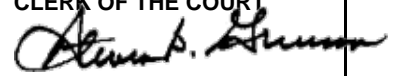
12. My understanding is that the Department of Business and Industry Consumer Affairs can act upon any complaint that is not regulated by a specific B&I agency.

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Dated this 22__ day of January 2020.

By: 

Mary M. Young
Deputy Commissioner
Nevada Department of Business & Industry
Financial Institutions Division



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Attorneys for Nevada Collectors Association

**DISTRICT COURT
CLARK COUNTY, NEVADA**

NEVADA COLLECTORS
ASSOCIATION, a Nevada non-profit
corporation,

Plaintiff,

v.

SANDY O'LAUGHLIN, in her official
capacity as Commissioner of State Of
Nevada Department Of Business And
Industry Financial Institutions Division;
STATE OF NEVADA DEPARTMENT
OF BUSINESS AND INDUSTRY
FINANCIAL INSTITUTIONS DIVISION;
JUSTICE COURT OF LAS VEGAS
TOWNSHIP; DOE DEFENDANTS 1
through 20; and ROE ENTITY
DEFENDANTS 1 through 20,

Defendants.

Case No.: A-19-805334-C

Dept. No.: XXVII

**REPLY IN SUPPORT OF NCA'S MOTION
FOR PRELIMINARY INJUNCTION, OR
ALTERNATIVELY, FOR A WRIT OF
MANDAMUS OR PROHIBITION¹**

Hearing Date: June 17, 2020

Hearing Time: 10:00 a.m.

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¹Unless otherwise stated, this Reply employs the same defined terms at the Motion. Additionally, NCA incorporated by reference its arguments made in its Opposition to Justice Court's Motion to Dismiss, filed on May 26, 2020.

1 **A. The Facts Are Undisputed.**

2 This is a Motion for Preliminary Injunction. NCA submitted its Motion containing dozens
3 of exhibits, including sworn declarations from the NCA, licensed attorneys, and small businesses,
4 all of whom contend that A.B. 477, particularly when applied in conjunction with JCR 16, makes
5 it cost prohibitive to file suit in Las Vegas Justice Court in Small Dollar Debt cases. Remarkably,
6 **Justice Court did not submit a single piece of evidence in response and did not dispute a**
7 **single fact asserted by NCA.**

8 Most notably, Justice Court does not dispute the existence of actual unpaid consumer
9 accounts received by NCA members for services rendered. Justice Court does not dispute that
10 these rules of law make it cost prohibitive to proceed to Justice Court in Small Dollar Cases. To
11 this extent, NCA's Motion for Preliminary Injunction is unopposed. *Schuck v. Signature Flight*
12 *Support of Nev., Inc.*, 126 Nev. 434, 436, 245 P.3d 542, 544 (2010) (when a party fails to make
13 arguments against the grant of summary judgment in the district court, that party waives the right
14 to make those arguments on appeal); *Insegna-Nieto v. State Farm Mut. Auto. Ins. Co.*, 2013 WL
15 101400, at *7 (unpublished) (D. Nev. Jan. 7, 2013) (Mahan, J.) ("Failure to at least counter any of
16 the substantive arguments could alone be construed as consenting to all of the points in [the]
17 motion.").

18 Accordingly, because Justice Court did not dispute the facts contained in the Motion,
19 Justice Court has consented to the following facts:

- 20 • Nearly all of NCA members' accounts receivable consists of unpaid small dollar
21 consumer debts in the amounts of \$5,000 or less. Motion, Appendix at NCA000488
22 and NCA000496.
- 23 • The average hourly rate for a consumer attorney in Las Vegas in 2015 was \$420.00
24 and the average hourly rate for a paralegal in Las Vegas in 2015 was \$144.00.
Motion, Appendix at NCA000296.
- 25 • According to the December 2017 issue of *Communique*, the publication of the Clark
26 County Bar Association, rates for Nevada attorneys have been approved by courts as
27 high as \$750.00 per hour, including rates as high as \$350.00 per hour for senior
28 associates. Motion, Appendix at NCA000424.

- Given these high hourly rates in the market, the attorney's fees that accrue in small dollar consumer cases will often approach or exceed the amount of the unpaid debt, depending upon the amount owed. Motion, Appendix at NCA000491 and NCA000499.
- A.B. 477 imposes an *arbitrary*² 15% rate cap regardless of the amount of the unpaid principal amount. Motion, Appendix at NCA000492 and NCA000500.
- Section 19 of A.B. 477 provides that a **debtor** in an action involving the collection of consumer debt may receive any attorney's fees that are considered reasonable, without any cap, restriction, or limitation. Motion, at 9:13-15.
- Sections 18 and 19 of A.B. 477 were enacted with no evidentiary support. Motion, at 9:25.
- Sections 18 and 19 were designed specifically to block debt collectors and small businesses from obtaining access to Justice Court. Motion, 11:15-16.
- Because the attorney's fee limitation in A.B. 477 is so severe, NCA's members will be unable to retain counsel to represent them in small dollar consumer cases for contracts entered into after October 1, 2019. Motion, 12:5-7.
- NCA members have already been notified by their attorneys that they will not continue to represent them in Small Dollar Cases.
- Without an attorney, NCA members cannot pursue debt collection cases in Justice Court because JCR 16 prohibits entities from appearing in Justice Court without an attorney.
- Since October 1, 2019, the date A.B. 477 became effective, NCA members, have been receiving unpaid accounts for collection for services that were performed but not yet paid by the consumers. These accounts receivable include unpaid medical debt and utilities, including doctor's offices and even NV Energy. Yet, NCA's members cannot move forward on these cases in Justice Court because, under A.B. 477, the attorney's fees are capped so low. Motion, Appendix at NCA000502.
- A.B. 477 and JCR 16 do not merely affect debt collection agencies, debt purchasers, and attorneys. Rather, these rules affect **all** businesses that work for and extend credit to consumers. Motion, at 14:2-3.

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² Justice Court does not even attempt to defend the arbitrary nature of the 15% cap on attorney's fees, and thus concedes that the amount of the cap is, in fact, arbitrary. *See supra*.

B. Defendants Have Failed to Oppose Numerous Legal Issues.

In addition to failing to dispute any facts, Justice Court has also ignored—and thus does not oppose—a number of legal issues raised in NCA’s Motion for Preliminary Injunction. Most notably:

- Defendant failed to address the obvious equal protection defect arising from A.B. 477’s express exemption for banks and payday lenders. It offers no explanation, justification, or rationalization as to why some consumer creditors have their attorney’s fees capped, while other consumer creditors do not. As a result, Justice Court does not dispute that this exemption violates equal protection, and a preliminary injunction is warranted on this basis alone.
- Defendant offers no explanation, justification, or rationalization as to why the attorney’s fee cap in A.B. 477 is set at 15%, as opposed to some other amount. As a result, Justice Court does not dispute that the amount of the 15% attorney fee cap is arbitrary and capricious, and a preliminary injunction is warranted on this basis alone.
- There is no dispute that NCA members are required by the FDCPA to file their lawsuits in the judicial district in which the debtor resides, or where the contract was formed, effectively precluding NCA members from filing in a forum outside of Nevada. *See* 15 U.S.C. § 1692i.
- There is no dispute that NCA members have a constitutional right to retain counsel. *See e.g., Powell v. Alabama*, 287 U.S. 45, 68-69 (1932).
- There is no dispute that NCA members have a constitutional right to a jury trial in Justice Court. *See Cheung v. Eighth Judicial Dist. Ct. ex rel. Cty. of Clark*, 121 Nev. 867, 870, 124 P.3d 550, 553 (2005).

Justice Court’s failure to oppose the foregoing legal issues is, again, a consent that these arguments have legal merit and that the Court should grant NCA’s Motion as to these issues. *Schuck* 126 Nev. at 436, 245 P.3d at 544; *Insegna-Nieto*, 2013 WL 101400, at *7.

C. NCA Is Likely to Succeed on the Merits.

“[A]ccess to the courts means the opportunity to prepare, serve and file whatever pleadings or other documents are necessary or appropriate in order to commence or prosecute court proceedings affecting one’s personal liberty....” *Hatfield v. Bailleux*, 290 F.2d 632, 637 (1961). This definition could not fit more squarely with the reason why NCA initiated the instant lawsuit—its members’ right to meaningful access to Justice Court, a forum in which these members have a vested right to access, is being infringed upon by the combined effect of A.B. 477 and JCR 16.

1 A.B. 477 arbitrarily caps the amount a debt collector, in a lawsuit for unpaid debt, can
2 recover in attorney fees to 15%. NCA has provided ample undisputed demonstrating showing
3 that this cap makes it cost prohibitive for attorneys to represent debt collectors in Small Dollar
4 Cases in Justice Court. For example, while the average hourly rate for a consumer law attorney
5 with 3-5 years of experience is \$290.00, A.B. 477 makes it so that a prevailing plaintiff would be
6 limited to an award of a **total** of \$75.00 in attorney fees on an unpaid \$500.00 consumer debt, or
7 \$150.00 in attorney fees on a \$1,000.00 consumer debt.

8 NCA members have already been notified by their attorneys that they will not continue to
9 represent them in Small Dollar Cases now that A.B. 477 is effective.³ Without an attorney, NCA
10 members cannot pursue debt collection cases in Justice Court because JCR 16 prohibits entities
11 from appearing in Justice Court without an attorney. A.B. 477, in conjunction with JCR 16,
12 effectively prevents NCA members from having “the opportunity to prepare, serve and file
13 whatever pleadings or other documents are necessary or appropriate in order to commence or
14 prosecute court proceedings affecting one’s personal liberty....” *Hatfield*, 290 F.2d at 637. In
15 other words, A.B. 477, in conjunction with JCR 16, violates NCA members’ right to meaningful
16 access to the courts.

17 In its Opposition, Justice Court fails to take into account those accounts received by NCA
18 members of unpaid debts for collection of services that were performed but not yet paid by the
19 consumers. Motion, Appendix at NCA000502. NCA members cannot retain an attorney
20 because, under A.B. 477, the attorney’s fees are capped so low. For example, on unpaid debts
21 with amounts of \$232.78 and \$706.65, the total amount NCA members can collect in attorney’s
22 fees is \$34.92 and \$106.00, respectively. Without an attorney, NCA members cannot appear in
23 Justice Court pursuant to JCR 16. Accordingly, A.B. 477, in conjunction with JCR 16, causes
24 NCA members actual injury, which is the lack of meaningful access to the courts.

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26 _____
27 ³ A.B. 477 is now effective and applies to all consumer form contracts entered into on or
28 after October 1, 2019.

Here, A.B. 477 undeniably imposes crushing burdens on the ability of creditors and debt collectors to obtain legal representation in consumer debt cases. Section 18 caps the amount a creditor or debt collector can obtain in a consumer debt lawsuit to 15%. This cap on attorney's fees makes it cost prohibitive for creditors and debt collectors to commence civil actions in Justice Court in Small Dollar Debt cases. Under a regime where Section 18 is enforced, **creditors and debt collectors either cannot retain an attorney on contingency in Small Dollar Debt actions, or will lose money if charged on an hourly basis, even when they are the prevailing party.** Indeed, to avoid a debt in Nevada, a consumer now need only refuse to

⁵ The fundamental right to a jury trial under the Seventh Amendment is also implicated by Defendants’ “go to small claims court” mantra. There is an unqualified right to a jury trial in Justice Court. There is no such right in Small Claims Court. By being forced into small claims court, NCA members are effectively being denied their right to a jury trial.

1 most will simply throw up their hands and not file a lawsuit in the first place. If a creditor
2 actually were to file a lawsuit, a consumer need only dispute the debt in court to ensure that the
3 lawsuit is dragged out and thus force a money-losing proposition for a creditor. Again, neither
4 Defendant disputes this proposition.

5 As such, not only would the arbitrary 15% cap limit NCA members' ability to recover
6 attorney's fees to such an extreme that is it cost prohibitive to hire counsel, it is undisputed that
7 the cap also discourages attorneys from taking such cases in the first place. Since the 15% cap
8 only affects creditors and debt collectors in consumer debt lawsuits, attorneys may avoid these
9 problems by refusing to represent entities such as NCA members or their creditor clients.

10 This problem is only aggravated by the fact that entities such as NCA members are
11 prohibited from appearing in proper person in the Justice Court, as JCR 16 explicitly states
12 requires a business entity to obtain counsel to appear in court. As a result, JCR 16, in conjunction
13 with A.B. 477, effectively leaves NCA members without any recourse to collect on unpaid debts
14 from those debtors who refuse to pay the amount for which they contracted.

15 Further, and perhaps the scariest aspect of A.B. 477—and another fact demonstrating its
16 irrationality—is that **it was specifically designed** (and not incidental as Justice Court contends) to
17 tilt the scales of justice and keep a certain class of litigant out of Justice Court. As the principal
18 proponent of A.B. 477, Peter Goatz openly testified that Sections 18 and 19 were written to block
19 debt collectors from obtaining meaningful access to Justice Court. Indeed, Mr. Goatz stated that
20 the purpose of the attorney fee cap in A.B. 477 was to effectively eliminate access to courts for
21 small businesses “because there would not be an incentive for an attorney to take on a small
22 dollar debt case. . . .” Motion for Preliminary Injunction, Appendix, at NCA000577 and
23 NCA000582. This reasoning is not only unsound, it is *per se* irrational.

24 “The general rule in our legal system is that each party must pay its own attorney’s
25 fees....” *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 550 (2010). But Nevada law contains
26 multiple applicable fee-shifting provisions, one of which provides that “[t]he prevailing party in
27 any civil action at law in the justice courts of this State shall receive, in addition to the costs of
28 court as now allowed by law, a reasonable attorney fee.” NRS 69.030. With the exception of

1 debt collector pursuing unpaid debts, all other prevailing litigants in Justice Court are entitled to
2 reasonable attorney fees. Indeed, Section 19 of A.B. 477 explicitly states that **debtors** who
3 successfully defend the collection of unpaid debt may receive whatever attorney fees the court
4 deems reasonable.

5 **2. Small Claims Court is Not an Adequate or Appropriate Remedy.**

6 Most of Justice Court's Opposition seems to ignore the fact that NCA members' issue in
7 this matter is not solely with the existence of JCR 16. The issue presented here is that A.B. 477,
8 acting in conjunction with JCR 16, is unconstitutional because they have the combined effect of
9 blocking NCA members' ability to pursue unpaid debt in Justice Court. Justice Court responds
10 by contending that "[NCA] members can certainly still bring any claim it chooses in that
11 jurisdiction through lawful legal representation." Justice Court's Opp'n, at 12:1-2. This is an
12 astonishing assertion. This Court could not enact a local rule restricting the recovery of
13 attorney's fees under 42 U.S.C. § 1988 in civil rights cases, and then justify that restriction by
14 telling civil rights victims, "go sue in state court." Such reasoning is fundamentally flawed.

15 Indeed, the "go to small claims court" response does not address the hurdles that were
16 deliberately erected to discourage lawsuits from a specific forum—Justice Court—as the
17 undisputed legislative history states. It would be one thing to limit jurisdiction by changing an
18 amount in controversy, as Congress has raised the jurisdictional minimum multiple times in cases
19 arising under 28 U.S.C. § 1332. It is entirely another thing to erect barriers to entry in that court
20 for *some* persons who are otherwise entitled to be there. Worse yet, by effectively forcing certain
21 parties into small claims court, they are, in turn, robbed of their right to obtain their own counsel
22 and their right to a jury trial. *See infra*.

23 The cases cited by Justice Court fall woefully short of supporting its proposition. In
24 *Paciulan v. George*, 38 F. Supp. 2d 1128, 1137-38 (N.D. Cal 1999), *aff'd*, 229 F.3d 1226 (9th Cir.
25 2000), the plaintiffs brought a claim challenging the constitutionality of a California rule limiting
26 *pro hac vice* admission to nonresidents licensed in other states. The Court concluded that the
27 plaintiffs' right to access to the courts was not violated because "[p]laintiffs may still bring their
28 claims in California courts as litigants; they simply may not bring claims as lawyers without first

1 satisfying California's rules for admission to the state bar." *Paciulan*, 38 F. Supp. 2d at 1138.
2 Unlike the plaintiffs in *Paciulan*, NCA members can never appear in Justice Court *pro se*
3 because JCR 16 prohibits them from representing themselves.

4 In *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985), the Supreme
5 Court upheld a due process attack on a statutory \$10 limitation on attorney's fees payable by
6 veterans seeking disability or death benefits in proceedings before the Veterans' Administration.
7 Acknowledging that the fee limitation would make attorneys unavailable, the Supreme Court
8 nonetheless upheld the fee limitation statute because attorneys were not essential to vindicate
9 claims before the Veterans' Administration. *Walters*, 473 U.S. at 334. Unlike in *Walters*,
10 attorneys are essential to vindicate NCA members' claims' for unpaid debts in Justice Court
11 because, pursuant to JCR 16, they are entities and cannot under any circumstances appear in
12 Justice Court without an attorney.

13 As a solution to the obvious constitutional infirmities presented in this case, Justice Court
14 suggests that NCA members can still bring their claims in small claims court because entities may
15 appear in proper person in small claims court. Justice Court's Opp'n, at 10:1-14. Yet, Justice
16 Court and Small Claims Court have very different rights and remedies. The Nevada Supreme
17 Court has note that one major difference is that there is a right to a jury trial in Justice Court,
18 while there is no such right in small claims court. *Cheung*, 121 Nev. at 874, 124 P.3d at 556;
19 JCRCP 38(a). Furthermore, unlike Justice Court, "in small claims court a party is not permitted
20 to conduct depositions or other discovery; neither party may obtain attorney fees; the plaintiff
21 may not seek any prejudgment collection; the proceedings are summary, excusing strict rules; and
22 the collection of any judgment may be deferred and otherwise determined by the justice of the
23 peace." *Cheung*, 121 Nev. 867, 872, 124 P.3d 550, 554 (2005).

24 This last noted difference is particularly troubling—in Small Claims Court, collection of a
25 valid judgment may be delayed or blocked willy-nilly, for any reason and for any length of time.
26 The express design of A.B. 477 was to treat businesses that serve consumers as second class
27 citizens in the courtroom, and in fact to deter them from even suing in Justice Court. If NCA
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1 members (and other businesses) are as entitled to be in Justice Court like everyone else (and they
2 are), they may not be treated like second class citizens.

3 Simply put, class warfare should be reserved to the realm of politics. It has no place in the
4 courtroom.

5 The civil matters in which Justice Courts have jurisdiction over are dictated by NRS
6 4.370. Specifically, Justice Courts have jurisdiction over civil “actions arising on contract for the
7 recovery of money only, if the sum claimed, exclusive of interest, does not exceed \$15,000.”
8 NRS 4.370(1)(a). Nearly all of NCA members’ accounts receivable consists of unpaid small
9 dollar consumer debts in amounts of \$5,000.00 or less. Motion, Appendix, at NCA000489 and
10 NCA000497. Accordingly, NCA members have rightfully brought debt collection lawsuits to
11 Justice Court. Such a right cannot be chipped away by imposing artificial barriers such as those
12 present in this case. This is especially true when those barriers are only imposed on debt
13 collectors for no other reasons beyond the fact that they are debt collectors. Small claims court is
14 simply not a solution.

15 Nevada district courts and federal district courts are also not solutions. Nevada district
16 courts require the amount in controversy to exceed \$15,000.00 to invoke jurisdiction. *See* NRS
17 3.221 and 4.370. As stated above, most of NCA members’ accounts receivable consists of unpaid
18 debts in the amount of \$5,000.00 or less. Federal district courts require a federal question
19 jurisdiction or diversity jurisdiction to appear before them. U.S. Const. art. 3, § 2; 28 U.S.C. §
20 1332(a). Small Dollar Debt cases, by definition, never involve a federal question jurisdiction or
21 diversity jurisdiction.

22 **3. NCA Members Claim is Ripe for Judicial Review.**

23 Justice Court argues that this case is not ripe for judicial review because NCA members
24 have not alleged that is suffered an actual injury. Justice Court’s Opp’n, at 22:10-23:13.

25 Under the ripeness doctrine, courts weigh the following factors: “(1) the hardship to the
26 parties of withholding judicial review, and (2) the suitability of the issues for review.” *Herbst*
27 *Gaming, Inc. v. Heller*, 122 Nev. 877, 887, 141 P.3d 1224, 1230-31 (2006). Further, a “plaintiff
28 must have suffered an ‘injury in fact’—an invasion of a legally protected interest which is (a)

1 concrete and particularized, and (b) ‘actual or imminent, not conjectural or hypothetical.’” *Lujan*
2 *v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Further, “a claim is not ripe for judicial resolution
3 if it rests upon contingent future events that may not occur as anticipated, or indeed may not
4 occur at all.” *Wolfson v. Brammer*, 616 F.3d 1045, 1064 (9th Cir. 2010). Lastly, “[o]ne does not
5 have to await the consummation of threatened injury to obtain preventative relief.” *Reg’l Rail*
6 *Reorg. Act Cases*, 419 U.S. 102,143 (1974) (quotation marks and citation omitted); *see also*
7 *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298 (1979) (a plaintiff need not
8 expose himself to prosecution in order to challenge the constitutionality of a statute “that he
9 claims deters the exercise of his constitutional rights.”). For a claim to be ripe, the plaintiff must
10 be subject to a “genuine threat of *imminent* prosecution.” *San Diego County Gun Rights Comm.*
11 *v. Reno*, 98 F.3d 1121, 1126 (9th Cir.1996).

12 Here, NCA injury in this matter is neither hypothetical nor speculative. And, in fact,
13 because the factual record is undisputed, Justice Court concedes the following:

- 14 • Section 18 of A.B. 477 effectively prevents Aisen Gill, counsel for Clark County
15 Collection Service, from representing clients in Small Dollar Debt Cases because it is
16 cost prohibitive to do so. Motion, Appendix, at NCA000506-510.
- 17 • The Langsdale Law Firm and all lawyers within the purview of A.B. 477 will be
18 forced to either give up work or to continue accepting placements at such a low fee
19 cap that quality and attorney oversight will suffer, given that litigation will be subject
20 to the 15% cap of Section 12 and patently unfair provisions of Section 19. Motion,
21 Appendix, at NCA000513.

22 Indeed, when this case was before him, United States District Court Judge James C.
23 Mahan acknowledged that “the complaint arguably shows that NCA will suffer immediate and
24 irreparable injury.” Case No. 2:20-cv-0007-JCM-EJY, ECF No. 13. As shown from the
25 testimony of Mr. Goatz, A.B. 477 was enacted with the targeted purpose of deterring attorneys to
26 take on Small Dollar Debt Cases. The damage was done once A.B. 477 took effect and worsens
27 with each passing day, as unpaid accounts continue to pile up.

Specifically, since A.B. 477 took effect on October 1, 2019, NCA members have accounts that are subject to this new law that have been placed for collection where those members effectively cannot proceed in Justice Court because it would be cost prohibitive to do so. Motion, Decl. of T. Myers at ¶ 10; Exhibits 12 and 13. Because of the crippling effects of A.B. 477, in conjunction with JCR 16, NCA members' ability to sue on unpaid debts is already being interfered with. In sum, this matter is very much ripe for judicial review to determine the solitary issue in this matter: Whether A.B. 477, in conjunction with JCR 16, is unconstitutional.

4. Justice Court is not Immune from Suit.

Justice Court argues that it is immune from suit because it merely enacted JCR 16 based on controlling state law and Justice Court owes no constitutional duty to revoke JCR 16. Justice Court's Opp'n, at 23:14-25:14. Justice Court's argument is without merit. First, Justice Court has not cited any authority providing that a court is immune from liability when it is sued based on the constitutionality of its own rules. The cases relied on by Justice Court stand for the lonely proposition that public officials cannot be sued when acting in accordance with a facially valid court order. *See* Justice Court's Opp'n, at p. 23 fn. 5. This is not the case here. Further, the Ninth Circuit has decided cases to their merits, where a court was sued based on the constitutionality of its own rules. *See e.g., Giannini v. Real*, 911 F.2d 354 (9th Cir. 1990). And, the Ninth Circuit has specifically held that the constitutionality of a local court rule may be challenged. *Standing Committee on Discipline v. Yagman*, 55 F.3d 1430, 1436-37 (9th Cir. 1995) (Local Rule 2.5.2 in Central District of California prohibiting criticism of federal judges held unconstitutional). Accordingly, Justice Court is not immune from suit challenging the constitutionality of its own rules.

Second, JCR 16 should not be a hard-and-fast rule when civil liberties are at stake. Some courts in other states have allowed non-lawyers to represent entities in court under certain circumstances. *See e.g., Vermont ANR v. Upper Valley Reg. Landfill*, 621 A.2d 225, 228 (Vt. 1992) ("Courts that have made exceptions to the lawyer-representation rule have generally relied on the rationale that where imposition of the rule conflicts with its purposes, lay representation should be permitted."). The *Vermont ANR* court explained that "[a]lthough the lawyer-

1 representation rule serves important public interests, it should not be rigidly enforced in cases
2 where those interests are not threatened and enforcement would preclude appearance by the
3 organization.” *Id.* For instance, a New York court noted that the lawyer-representation rule
4 serves to protect the public from unscrupulous or inexperienced representatives. *A. Victor & Co.*
5 *v. Sleininger*, 9 N.Y.S.2d 323, 326 (App. Div. 1939). Nevertheless, the court concluded that
6 where a corporation cannot afford counsel or cannot find an attorney to represent it, the
7 corporation should not be denied its day in court. *Id.* Further, there are some jurisdictions that
8 allow businesses to appear without an attorney in justice court. *Oregon State Bar v. Wright*, 573
9 P.2d 283 (Or. 1977); *Sparks v. Johnson*, 826 P.2d 928 (Mont. 1992). Based on the foregoing, it is
10 not an extraordinary ask of Justice Court to permit entities to represent themselves in Justice
11 Court.

12 It is important to reiterate that JCR 16 is only implicated because of the enactment of A.B.
13 477. So although the Nevada Supreme Court has held that legal entities cannot appear pro se in
14 Nevada Courts, the Nevada Supreme Court has never addressed the overriding constitutional
15 issue where, as here, legal entities cannot retain counsel to represent them in Nevada courts. In
16 its opposition, Justice Court, seeming to acknowledge the issue at the center of this dispute, has
17 not provided either a solution or logical reason as to why legal entities cannot appear pro se in
18 Justice Court—beyond stating that JCR 16 is a long standing rule. And, Justice Court does not
19 explain why or how fundamental Constitution rights must take a back seat to attorney admission
20 rules.

21 **E. NCA Will Suffer Irreparable Harm.**

22 Justice Court inexplicably argues that NCA’s claim is only one for monetary relief only.
23 Justice Courts Opp’n at 25:15-26:6. Justice Court also asserts that NCA has not demonstrated
24 irreparable harm because a monetary compensatory damage award of alleged lost reimbursement
25 of attorney fees paid to obtain judgments in Justice Court will make NCA whole.⁶ *Id.*

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28 ⁶ NCA interprets Justice Court’s argument as stating that NCA can recover damages against Justice Court
for attorney’s fees NCA does not recover against the debtor.

1 This is not a collection case, and, using Justice Court's reasoning, an unconstitutional law
2 could never be enjoined simply if it implicated a civil action. The issues presented in this case
3 implicate *constitutional* rights—rights of speech, due process, equal protection, right to counsel,
4 and the right to a jury trial. These issues also arise before a lawsuit is even filed, specifically
5 because these rules chill and discourage the lawsuit from being filed in the first place. The
6 lengthy and undisputed record is that, under A.B. 477 and JCR 16, businesses that provide goods
7 and services to consumers in advance of payment will effectively have no ability to proceed in
8 Justice Court in Small Dollar Debt cases because (1) they are required to have an attorney to
9 pursue Small Dollar Debts in Justice Court; and (2) will not be able to hire an attorney given the
10 15% cap of Section 18 and the patently unfair hammer of Section 19.

11 **F. The Interests Of NCA And The Public Will Be Best Served If Defendants Are**
12 **Enjoined From Harming NCA.**

13 Justice Court argues that these factors weigh in its favor. Justice Court's Opp'n, at 26:7-
14 28:21. NCA, of course, disagrees. A.B. 477's broad sweeping language essentially applies to
15 every consumer contract under the sun—except for the unconstitutional exceptions for banks and
16 payday lenders. Thus, A.B. 477 also affects doctors, electricians, car dealers, and any other
17 company that sells a product or service for a profit. Similar to NCA members, those companies
18 have an interest that involves being able to collect on unpaid debt by way of the courts. Because
19 Sections 18 and 19 will effectively prohibit creditors from commencing civil actions in Justice
20 Court in Small Dollar Cases, many debts will go unpaid, leaving many creditors unwilling to
21 provide services without advance payment. This will tighten access to credit for all consumers
22 and will effectively punish consumers who pay their debts in full and on time.

23 Once again, Justice Court has not disputed any of the foregoing facts. It simply ignores
24 them, yet somehow contends that the public interest weight against an injunction. Here too,
25 Justice Court's failure to oppose the factual record dooms their unsupported argument.

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1 **G. Alternatively, NCA Is Entitled To A Writ Of Mandamus Or A Writ Of Prohibition.**

2 Justice Court argues that NCA has neither shown that Justice Court engaged in arbitrary
3 or capricious conduct or failed to discharge any absolute duty owed to NCA. Justice Court's
4 Opp'n, at 28:22-29:7.

5 In Nevada, a writ of mandamus is available "to compel the performance of an act that the
6 law requires or to control an arbitrary and capricious exercise of discretion." *See Kay v. Nunez*,
7 146 P.3d 801, 805 (Nev. 2006). A mandamus petition is appropriate if no adequate or speedy
8 legal remedy exists. *Id.*

9 Here, Justice Court should be directed to revoke JCR 16 and allow entities to appear in
10 Justice Court in proper person. Or in the alternative, the FID and Justice Court should be directed
11 to not enforce A.B. 477. Without such relief, A.B. 477, in conjunction with JCR 16, will violate
12 NCA members' rights to meaningful access to the courts, retain counsel, and to a jury. The
13 reality of the situation is that A.B. 477 does now affect the way in which JCR 16 should be
14 applied. While JCR 16 was previously never an issue for NCA members because they were able
15 to retain counsel (because they were awarded reasonable attorney fees just like any other litigant
16 in Justice Court), now, with the enactment of A.B. 477, and with considering NCA members'
17 lack of ability to retain counsel, Justice Court's enforcement of JCR 16 would be an arbitrary a
18 capricious exercise of discretion. On the flip side, if the FID enforces A.B. 477 and imposes
19 administrative penalties on collection agencies for requesting fees over and beyond the 15% cap,
20 such enforcement would not only support a law that includes invidious classification, but also
21 support the intended purpose of the law: to eliminate access to courts for small businesses. Justice
22 Court only awarding collection agencies 15% of the amount of the debt would also have the same
23 affect. Lastly, writ relief is appropriate because no adequate or speedy legal remedy exists until
24 the next legislative session. Thus, this Court should grant NCA's requests for writ relief.

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CONCLUSION

DATED this 10th day of June, 2020.

Attorneys for Nevada Collectors Association

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), and Section IV of District of Nevada Electronic Filing Procedures, I certify that I am an employee of BROWNSTEIN HYATT FARBER SCHRECK, LLP, and that the foregoing **REPLY IN SUPPORT OF NCA'S MOTION FOR PRELIMINARY INJUNCTION, OR ALTERNATIVELY, FOR A WRIT OF MANDAMUS OR PROHIBITION** was served via electronic service on the 10th day of June, 2020, to the addresses shown below:

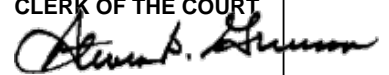
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8 **DISTRICT COURT**
9
10 **CLARK COUNTY, NEVADA**

11
12 NEVADA COLLECTORS ASSOCIATION, a)
13 Nevada non-profit corporation,)

14 Plaintiff,)

15 v.)

16 SANDY O'LAUGHLIN, in her official)
17 capacity as Commissioner of State of)
18 Nevada Department of Business and)
19 Industry and Financial Institutions)
20 Division; STATE OF NEVADA)
21 DEPARTMENT OF BUSINESS AND)
22 INDUSTRY FINANCIAL INSTITUTIONS)
23 DIVISION; JUSTICE COURT OF LAS)
24 VEGAS TOWNSHIP; DOE DEFENDANTS)
25 1 through 20; and ROE ENTITIY)
26 DEFENDANTS 1 through 20,)

27 Defendants.)
28

Case No.: A-19-805334-C
Dept. No.: XXVII

**STATE DEFENDANT'S
MOTION TO DISMISS
AMENDED COMPLAINT**

[HEARING REQUESTED]

24 Defendant, State of Nevada Department of Business and Industry Financial
25 Institutions Division and Commissioner O'Laughlin (collectively "FID"), by and
26 through counsel, Aaron D. Ford, Nevada Attorney General and Vivienne Rakowsky,
27 Deputy Attorney General, hereby file this Motion to Dismiss the Amended
28

1 Complaint.

2 This Motion is based on the memorandum of points and authorities below, all
3 papers and pleadings on file, and such other evidence as this Honorable Court
4 deems just and appropriate to make a determination.

5 INTRODUCTION

6 Prior to the remand, Plaintiff filed Leave to Amend the Complaint with the
7 U.S. District Court in the District of Nevada. ECF No. 20-1. In its Motion for
8 Leave, Plaintiff clearly stated: “NCA seeks amendment to its original complaint
9 *solely* to add a party” ECF No 20, p. 2:16 (emphasis added). Plaintiff went on to
10 state the reason for amending the complaint was to add the newly appointed
11 Commissioner of the FID in her official capacity. ECF No. 20, p. 2:16-28, p. 1-13.
12 The District Court allowed the Amendment, correcting the caption and adding
13 Commissioner O’Laughlin as a defendant in her official capacity. ECF No. 20, p.
14 3:13-14, ECF 20-1, p. 2-4.

15 Nevertheless, Plaintiff neglected to notice the Court and the parties that the
16 Amended Complaint also includes several other relevant changes, including the
17 removal of several allegations from the original Complaint, thereby abandoning
18 those claims and facts. (*Compl.* ¶¶ 43, 61, 62, 95), and the addition of requests for
19 attorney fees (*Am. Compl.* ¶¶ 56, 68, 77, 88, 98).

20 Interestingly, Plaintiff has withdrawn ¶43 which alleges that the Plaintiffs
21 are at risk of enforcement of AB 477 if they seek amounts in excess of AB 477 limits,
22 and ¶95 asking for a declaration that Sections 18 and 19 “unduly conflict and
23 interfere” with “numerous provisions of the Nevada and Federal Constitutions.”
24 Plaintiff has changed its prayer for relief and eliminated its request for a writ of
25 prohibition against the Justice Court’s enforcement of sections 18 and 19. Other
26 changes were made as well, such as eliminating the definition in ¶12 that “small
27 dollar debts” refer to debts of less than \$5,000.

28 Plaintiff has alleged five causes of action including Violation of Substantive

1 Due Process based on Section 18 of AB 477 and JCR 16; Violation of Substantive
2 and Procedural Due Process based on Section 19 of AB 477; Violation of Equal
3 Protection based on Section 18 of AB 477; Violation of Equal Protection based on
4 Section 19 of AB 477; and Declaratory Relief. None of the claims apply to the
5 regulatory function of the FID. As a result, all Plaintiffs claims against
6 Commissioner O’Laughlin and the Financial Institutions Division (FID) must be
7 dismissed.

8 This Court lacks subject matter jurisdiction pursuant to NRCP 12(b)(1)
9 because Plaintiff lacks standing and its claims are not ripe. The section 1983 due
10 process and equal protection claims against the FID and Commissioner O’Laughlin
11 must be dismissed because neither the agency nor its Commissioner are persons
12 subject to section 1983. Pursuant to NRCP 12(b)(5), the FID cannot give Plaintiffs
13 any relief is it seeking because the FID does not regulate AB 477 or the amount of
14 attorney fees that can be awarded by the Justice Court. Finally, Plaintiff is not
15 entitled to an award of attorney fees, which will be addressed in the event that the
16 Amended Complaint against the FID and Commissioner O’Laughlin is not
17 dismissed.

18 **FACTS**

19 The Financial Institutions Division, headed by Commissioner O’Laughlin is
20 an administrative agency of the State of Nevada. (“FID”). It’s mission is to
21 “maintain a financial institutions system for the citizens of Nevada that is safe and
22 sound, protects consumers and defends the overall public interest, and promotes
23 economic development through the efficient, effective and equitable licensing,
24 examination and supervision of depository fiduciary and non-depository financial
25 institutions.” <http://fid.nv.gov>.

26 The FID regulates collection agencies pursuant to NRS Chapter 649.
27 NRS 649.051. Chapter 649 may govern the contracts between the collection agency
28 and its Nevada customers that retain collection agency services, but does not

1 regulate other members of the Nevada Collector's Association ("Plaintiff") including
2 law firms and asset buying companies. NRS 649.020; *Am. Compl.* ¶11. Relevant to
3 this matter, Chapter 649 absolutely does not regulate the relationship between a
4 collection agency and its attorney that represents them in Justice Court. NRS Ch.
5 649. Nor does the FID regulate the amount of fees that the Justice Court can award
6 to either the collection agency or the debtor prevailing party.

7 AB 477 is a new chapter codified in the Nevada Revised Statutes as
8 NRS 97B.¹ The title of the chapter is the Consumer Protection from Predatory
9 Interest After Default Act, which is incorporated into Title 8. Title 8 regulates
10 Commercial Instruments and Transactions. AB 477 was passed by the Nevada
11 Legislature in June 2019 and went into effect on October 1, 2019. Plaintiffs never
12 articulate that they are subject to an imminent threat of investigation or
13 enforcement by the FID concerning attorney fees, or even that the FID has the
14 power to investigate or enforce AB 477. Instead, Plaintiff merely alleges that the
15 existence of AB 477 will prevent Plaintiffs' members from fair access to courts
16 because they will not be able to retain counsel to represent them for small dollar
17 collection cases. See e.g. *Am. Compl.*, ¶¶ 34, 36, 37, 38.

18 Plaintiff references two specific sections of AB 477 alleging that the
19 statutes deprive them of substantial and procedural due process and equal
20 protection. The two sections state:

21 **Sec. 18 (NRS 97B.160).**

22 1. If the plaintiff is the prevailing party in any action to collect a
23 consumer debt, the plaintiff is entitled to collect attorney's fees only if
24 the consumer form contract or other document evidencing the
indebtedness sets forth an obligation of the consumer to pay such
attorney's fee and subject to the following conditions:

25 (a) If a consumer form contract or other document evidencing
26 indebtedness provides for attorney's fees in some specific percentage,

27 ¹ Because Plaintiff continues to reference AB 477 and does not reference
28 NRS 97B, Defendants will also use AB 477 and cross reference the appropriate
statute in NRS 97B.

1 such provision and obligation is valid and enforceable for an amount
2 not to exceed 15 percent of the amount of the debt, excluding
attorney's fees and collection costs.

3 (b) If a consumer form contract or other document evidencing
4 indebtedness provides for the payment of reasonable attorney's fees by
5 the debtor, without specifying any specific percentage, such provision
6 must be construed to mean the lesser of 15 percent of the amount of
7 the debt, excluding attorney's fees and collection costs, or the amount
of attorney's fees calculated by a reasonable rate for such cases
multiplied by the amount of time reasonably expended to obtain the
judgment.

8 2. The documentation setting forth a party's obligation to pay
9 attorney's fees must be provided to the court before a court may
enforce those provisions.

10 **Sec. 19** (NRS 97B.160). If the debtor is the prevailing party in any
11 action to collect a consumer debt, the debtor is entitled to an award of
12 reasonable attorney's fees. The amount of the debt that the creditor
sought may not be a factor in determining the reasonableness of the
award

13 AB 477 (2019).

14 The FID must be dismissed because the FID does not regulate a collection
15 agency's ability to retain counsel to represent them in court, or a licensee's access to
16 justice court, or the amount of attorney fees that may be awarded to the prevailing
17 party by the justice court. Moreover, AB 477 does not delegate any powers or
18 responsibilities to the FID. In fact, Plaintiff's Amended Complaint fails to provide
19 any facts to support any of the claims against the FID.

20 Pursuant to NRCP 12(b)(1), this Court lacks subject matter jurisdiction
21 because Plaintiff lacks standing and this case is not ripe. Additionally, under
22 NRCP 12(b)(5) Plaintiff has failed to state a claim for which relief can be granted.
23 Finally, the due process and equal protection official claims against Commissioner
24 O'Laughlin along with the claims against the FID cannot stand because the
25 Commissioner as the face of the FID as well as the FID itself are not "persons"
26 under 42 U.S.C. § 1983.

27 ///

1 **POINTS AND AUTHORITIES**

2 **1. This case must be dismissed for lack of subject matter jurisdiction.**

3 **A. Legal standards for NRCP 12(b)(1)**

4 NRCP 12(b)(1) provides that when a court lacks subject matter jurisdiction,
5 the claims must be dismissed. NRCP 12(h)(3). Without first establishing
6 jurisdiction, the court cannot proceed to hear the case. *Steel Co. v. Citizens for a*
7 *Better Environment*, 523 U.S. 83, 95 (1998).

8 Plaintiff has the burden to show that the court has subject matter
9 jurisdiction. *Castillo v. United Federal Credit Union*, 134 Nev. 13,16, 409 P.3d 54
10 (2018); *Morrison v. Beach City LLC*, 116 Nev. 34, 36, 991 P.2d. 982, 983 (Nev. 2000)
11 (The burden proving the jurisdictional requirement is properly placed on the
12 plaintiff). Subject matter jurisdiction does not exist if there is no standing. See
13 e.g. *Ohfuji Investments Inc. v. Citibank, N.A.* 2019 WL 682503 (*unpublished*). In
14 addition a case must be ripe for review.

15 Standing requires an “actual justiciable controversy as a predicate to judicial
16 relief... not merely the prospect of a future problem.” *Doe v. Bryon*, 102 Nev. 523,
17 525, 728 P.2d 443, 444 (1986). A justiciable controversy is a controversy “in which
18 a claim of right is asserted against one who has an interest in contesting it.” *Id.*
19 Thus, for a case or controversy to exist and invoke jurisdiction, the parties must be
20 adverse, there must be a controversy, and the issues must be ripe for determination.
21 *Kress v. Cory*, 65 Nev. 1, 26, 189 P. 2d 352 (1948). Ripeness is similar to standing,
22 except ripeness looks at the timing of the action. *In re. T.R.*, 119 Nev. 646, 651, 80
23 P.3d 1276 (2003).

24 The FID and Plaintiff are not adverse because the FID does not enforce
25 Chapter 97B (AB 477) or regulate a collection agencies choice of attorney. There is
26 nothing that the FID can do to change Justice Court Rule 16 which requires
27 Corporations and LLC’s to be represented by an attorney in Justice Court. In fact, it
28 would violate separation of powers for an executive agency such as the FID to

1 dictate how a court enforces its rules. In addition, this case is not ripe.

2 A justiciable controversy cannot be based on harm which is speculative or
3 hypothetical. *Herbst Gaming, Inc. v. Heller*, 122 Nev. 877, 887, 141 P.3d 1224
4 (2006). Here, there is no controversy between the Plaintiff and the FID. Plaintiff
5 does not allege that the FID has done anything to limit Plaintiffs' access to Justice
6 Court, and has, in fact, backed off its claim that the FID can even enforce Section
7 18. (Paragraph 43 was eliminated from the original Complaint when the Plaintiff
8 filed the Amended Complaint). Plaintiff does not allege that the FID regulates the
9 amount of attorney fees Justice Court awards. Plaintiff does not allege that the FID
10 has any power to enforce AB477. Plaintiff does not allege that the FID has taken or
11 threatened any action against any of their members based on AB 477. Thus, there
12 is no case or controversy and Plaintiffs' claims of what can potentially happen in the
13 future are hypothetical at best.

14 The Plaintiff has only speculated about a possible injury *if* they are unable to
15 retain counsel to access the court system. In the eight months that this law has
16 been in effect, Plaintiff has not produced any evidence that the FID has caused an
17 actual injury that can in anyway be traceable to actions by the FID. Most relevant,
18 there is no relief this Court can grant the Plaintiff that is within the power or
19 jurisdiction of the FID to redress the Plaintiff's claims. *See e.g. Allen v. Wright*, 468
20 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984) (overruled on other grounds).

21 **B. Plaintiff does not have standing against the FID because there**
22 **is no case or controversy**

23 A case or controversy must be present at all stages of the litigation.
24 *Personhood v. Bristol*, 126 Nev. 599, 602, 245 P.3e 572, 574 (2010). A case or
25 controversy requires standing, which enables the court to decide the merits of the
26 case. *Allen v. Wright*, 468 U.S. 737, 750-751 (1984) (overruled on other grounds). To
27 establish standing the Plaintiff has the burden to show; (a) an injury in fact, (b)
28 causation, and (c) redressability. *Steel Co.*, 523 U.S. at 103-104.

1 a. **There is no actual injury in fact.**

2 Plaintiff cannot establish an injury in fact. The Plaintiff has only speculated
3 about a possible injury if they are unable to retain counsel to access the court
4 system. To the contrary, Plaintiff has not been denied access to any court in the
5 State of Nevada, and has not been threatened with any administrative enforcement
6 of AB 477.

7 Plaintiff's members are primarily concerned with small dollar consumer
8 debts. *Am. Compl*, ¶13. This Court should take judicial notice of NRS Chapter 73
9 which provides for access to the Nevada court system without an attorney for claims
10 under \$10,000. NRS 73.010(1) provides that "[a] justice of the peace has jurisdiction
11 and may proceed as provided in this chapter and by rules of court in all cases
12 arising in the justice court for the recovery of money only, where the amount
13 claimed does not exceed \$10,000"), and NRS 73.012 provides that "[a] corporation,
14 partnership, business trust, estate, trust, association or any other nongovernmental
15 legal or commercial entity may be represented by its director, officer or employee in
16 an action mentioned or covered by this chapter...").

17 Thus, Plaintiff's members are not forced to retain counsel or denied access to
18 court; it is only that Plaintiff's members chose not to use the court with jurisdiction
19 for the size of their claims that will allow them to appear without an attorney.
20 Notwithstanding, Plaintiff's members are not can still opt to use an attorney and
21 access the court of their choice, but will only be able to recover the attorney fees
22 pursuant to AB 477. If a creditor or collection agency decides to hire an attorney to
23 go to justice court to collect a \$500 debt rather than small claims court without an
24 attorney, it is a business decision that the creditor and/or collection agency will
25 have to make at the time, knowing the limitations on the award of attorney fees
26 that Justice Court will award. *See e.g. Am. Compl.* ¶¶27-30.

27 Thus, there is no actual injury. Any injury would be self-inflicted based on
28 business decisions made by the Plaintiff. At this point, approximately eight (8)

1 months after this statute has gone into effect, none of the Plaintiff's members have
2 suffered an injury due to any actions or threatened actions by the FID. Plaintiff
3 additionally has not pled a single instance where they were have been denied access
4 to court.

5 **b. Plaintiff fails to show any causal link that would give them**
6 **standing.**

7 The Plaintiff cannot show a causal link between any actions that the FID has
8 taken or can take to address any alleged potential injuries. To establish the causal
9 element for standing, the injury alleged to be suffered must be "fairly traceable to
10 the agencies alleged misconduct." *Washington Environmental Counsel v. Bellon*,
11 732 F.3d 1131, 1141 (9th Cir. 2013). The links cannot be hypothetical or tenuous.
12 *Id.* When the causal chain involves other "third parties whose independent
13 decisions collectively have a significant effect on plaintiffs injuries, the causal chain
14 is too weak to support standing." *Bellon*, 732 F.3d at 1142. Any prospective injury
15 would be related to an insufficient award of attorney fees which would be
16 determined by the third party justice court and not the FID. Thus the Plaintiff
17 cannot establish a causal link between AB 477 and the FID.

18 Moreover, in its Motion for a Preliminary Injunction² Plaintiff uses
19 hypotheticals involving businesses that are not regulated by the FID to allege a
20 potential injury. Small businesses such as caterers, landscapers, small medical
21 providers, dental clinics, accountants, therapists, property managers, child care
22 provides, dry cleaners, bakers, security providers and even the "buy here pay here"
23 auto dealers that extend credit to their customers for goods or services, are not
24 regulated by the FID. The fact that the FID regulates collection agencies pursuant
25

26
27 ² The Court can take judicial notice of Plaintiffs Motion for Injunction which
28 was filed on May 15, 2020. The Motion for Preliminary Injunction will be heard in
conjunction with the Motion to Dismiss.

1 to NRS Chapter 649 does not provide a causal connection to attorney fees awarded
2 by the court on the basis of AB 477.

3 Even if a business employs a licensed collection agency to collect a defaulted
4 debt, the FID only looks at the original contract with its Nevada client (creditor)
5 and the contract between the creditor and its customer that established the debt.
6 The FID looks to verify that the collection agency has complied with the contract
7 that it has with its Nevada client and that the contract with the Nevada client does
8 not violate State or Federal law. The FID does not look at the amount of attorney
9 fees the contract allows, and does not look at a contract between a collection agency
10 and the attorney that appears for them in court. The fees are up to the court to
11 award. The contract between the creditor and its debtor is in existence prior to the
12 time that a defaulted debt is turned over to a collection agency.

13 Accordingly, Plaintiff cannot show a causal link because there is no plausible
14 connection between AB 477, JCR 16, and the FID.

15 **c. Plaintiff cannot show that the FID can redress any alleged injury.**

16 There is no relief this Court can grant within the power or jurisdiction of the
17 FID that can redress the Plaintiff's claims. *See e.g. Lujan v. Defenders of Wildlife*,
18 504 U.S. 555, 568-569 (1992) (Standing was denied based on the lack of
19 redressability because "it was entirely conjectural whether the non-agency activity
20 that affects respondents will be altered or affected by the agency activity they seek
21 to achieve"). The Plaintiff cannot meet the redressability prong because the FID
22 does not regulate AB 477 or regulate the Justice Court award of attorney fees.

23 AB 477's limitation on attorney fees is something that a creditor or a
24 collection agency should consider when bringing an action in Justice Court. AB 477
25 does not limit access, it just limits the amount of attorney fees that can be collected.
26 The FID does not have the jurisdiction to redress any of Plaintiff's alleged potential
27 injuries because it does not regulate JCR 16 or AB 477.

28 ///

1 **C. The Due Process and Equal Protection Claims must be Dismissed**
2 **because they are not Ripe**

3 Similar to standing, ripeness is also necessary to establish a case or
4 controversy. Ripeness is concerned with timing, because if there is no injury in
5 fact, there is no case or controversy. An alleged injury that is too imaginary or
6 speculative will not support jurisdiction. *Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d
7 443, (1986); *Thomas v. Anchorage Equal Rights Com'm*, 220 F.3d 1134, 1138
8 (2000). A justiciable controversy is the first hurdle to an award of declaratory relief.
9 *Southern Pacific Co. v. Dickerson*, 80 Nev. 572, 576, 397 P.2d 187 (1964). Claims
10 based on future events that may or may not occur is not ripe. *Texas v. U.S.*, 523
11 U.S. 296, 300 (1998). Because AB 477 is a newly enacted law which has not been
12 enforced, this case is not ripe, and dismissal is warranted.

13 To elaborate, a case is not ripe for review when the degree to which the harm
14 alleged by the party seeking review is not sufficiently concrete, but rather any
15 alleged injury is remote or hypothetical. *Cote H. v. Eighth Judicial Dist. Court ex rel*
16 *County of Clark*, 124 Nev. 36 n.1, 175 P.3d 906 (2008).

17 Plaintiff's injury arguments are nothing more than hypotheticals and/or
18 speculation that a creditor will not be able to hire an attorney to represent them in
19 justice court, and that credit may be tightened for all consumers. *Am Compl.* ¶¶
20 37, 38. This argument is a red herring because a creditor can hire an attorney to
21 comply with Justice Court rule 16, but he will have to make a business decision
22 whether he may have to pay the attorney more fees than can be recovered in a small
23 dollar case. It is not a due process or equal protection issue, it is simply a business
24 decision that Plaintiff will make when analyzing each case. He can also use small
25 claims court without an attorney for the small debts.

26 Moreover, even if Plaintiff was to somehow provide a basis for relief, the FID
27 is not in a position to provide that or any relief. The FID does not govern the
28 attorney fees that justice court can award nor does it regulate the agreement

1 between a collection agency and its counsel that represents them in court in a
2 collection matter.

3 Plaintiff filed its original complaint November 13, 2019- a little over a month
4 after AB 477 went into effect. In its original complaint, Plaintiff alleged that “NCA’s
5 members are at risk of administrative enforcement to the extent that they seek
6 amounts in excess of those allowed by AB 477.” *Compl.* ¶ 43. Plaintiff removed that
7 allegation from the Amended Complaint because they finally realize that the FID
8 does not enforce the amount of attorney fees that the Justice Court can award.

9 Plaintiff alleges violations of substantive and procedural due process and
10 equal protection resulting from the mere existence of Sections 18 and 19 of AB 477.
11 Based on the alleged violations, Plaintiff has requested that the Court declare AB
12 477 unconstitutional and grant injunctive and declaratory relief.

13 Plaintiff has not alleged a specific due process or equal protection violation
14 by the FID. Instead, Plaintiff pleads due process and equal protection constitutional
15 guarantees and then speculates about a possible future injury through Justice
16 Court’s enforcement of AB477. *Am Compl.* ¶¶44-54, 58-65, 69-75, 80-87.

17 Plaintiff’s claims are premature.³ The mere existence of a statute that may
18 or may not ever be applied to the Plaintiffs members is not sufficient, in and of
19 itself, to meet ripeness requirements. *San Diego Gun Rights Comm. v. Reno*, 98
20 F.3d 1121, 1126-27 (9th Cir. 1996). Moreover, Plaintiff never asserts how or if the
21 FID has the power or responsibility to regulate the attorney fees only Justice Court
22 can award. *Am. Compl.* ¶ 3. This Court should immediately dismiss these claims
23

24
25 ³ Plaintiff additionally alleges that the “language of AB 477 is inherently
26 vague and ambiguous.” *Am. Compl.* ¶23. Although no regulations have been
27 adopted to provide direction for the application of the law, Plaintiff prematurely
28 claims that in the future, its members will be unable to retain counsel to represent
them in small dollar consumer cases.” *Am. Compl.* ¶35. It is noteworthy that any
regulations would not be adopted by the FID, since they do not govern Chapter 97B
(AB 477).

1 against the FID and further refuse to adjudicate prematurely the constitutionality
2 of AB 477.

3 **D. Plaintiff's Declaratory Relief claims are not ripe.**

4 Plaintiffs' request for a declaratory judgment based on allegations of possible
5 future injury from this brand new statute is also not ripe. *Am. Compl.* ¶91. "The
6 constitutional ripeness of a declaratory judgment action depends upon whether the
7 facts alleged ... show that there is a substantial controversy, between parties having
8 adverse legal interests, of sufficient immediacy ... [that] warrant the issuance of a
9 declaratory judgment." *United States v. Braren*, 338 F.3d 971, 975 (9th Cir. 2003).
10 Prudential ripeness requires the fitness of issues for judicial decision and the
11 hardship to the parties if the court withholds consideration. *Braren*, 338 F.3d at
12 975. Again, Plaintiffs cannot meet the immediacy requirement and prudential
13 ripeness doctrine on this new statute.

14 The factors considered when determining if a case is ripe for a declaratory
15 judgment include a constitutional component that asks, "whether the facts alleged,
16 under all the circumstances, show that there is a substantial controversy, between
17 parties having adverse legal interests, of sufficient immediacy and reality to
18 warrant the issuance of a declaratory judgment." *U.S. v. Braren*, 338 F.3d 971, 975
19 (9th Cir. 2003). A justiciable controversy is a preliminary hurdle to an award of
20 declaratory relief. *Southern Pacific Co. v. Dickerson*, 80 Nev. 572, 576, 397 P.2d 187,
21 190 (1964)

22 The case or controversy issue which includes discussion of Plaintiff's lack of
23 injury in fact, the lack of a causal link, and the lack of redressability are addressed
24 above with regard to standing. The same factors are considered along with
25 prudential factors in determining whether a case is ripe for decision. The
26 prudential portion of the ripeness evaluation weighs the fitness of the issues for
27 judicial decision and the hardship to the parties of withholding the court's
28 consideration. *U.S. v. Braren*, 338 F.3d 971, 975 (9th Cir. 2003).

1 Generally, an agency's action must be final before a declaratory judgment
2 action is ripe. *Braren*, 338 F.3d at 975. This way, before declaratory action is
3 taken, the effects of the agency's action is "felt in a concrete way by challenging
4 parties." *Id.* Here there has been no agency action -- or even a threat of agency
5 action since the FID does not enforce AB 477.

6 There is also no hardship to the parties since Plaintiff's members do not have
7 an injury in fact and only speculate about a potential future injury if they cannot
8 access the court system for small collection cases. Moreover, Plaintiff's speculative
9 injuries are all potentially financial in nature and fail to meet the hardship
10 requirement. *See e.g. Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1126 (9th Cir.2009)
11 (To meet the hardship requirement, a litigant has the burden to show more than a
12 financial loss). Plaintiffs only complain about financial loss. As a result, this
13 matter is not fit for judicial decision against the FID.

14 Plaintiff never alleges or argues that the FID has any authority over AB 477
15 or that the FID can enforce Sections 18 or 19 of AB477. There is not a single factual
16 allegation in the Amended Complaint claiming the FID has any regulatory ability to
17 govern any activities that the Justice Court engages in, including the attorney fees
18 awarded by the Justice Court. It would be a violation of separation of powers to
19 intervene or regulate Justice Court's jurisdiction. Moreover, neither AB 477 nor
20 Chapter 649 provide the FID with this ability.⁴ Thus, even if this Court grants the
21 Plaintiff all the relief it seeks, the FID is powerless because its regulatory ability is
22 limited to the provisions of Chapter 649. Equally important, the FID absolutely does
23 not have any authority over the fees that Justice Court can award under AB 477.
24 Moreover, there has not been and cannot be any threat of enforcement by the FID
25 regarding AB 477, because the Nevada legislature did not delegate the enforcement
26

27 ⁴ The FID only regulates collection agencies and does not regulate many of the
28 Plaintiff's members including those who extend credit for their own products, law
firms or asset buying companies

1 of AB 477 to the FID.

2 **E. The FID is not a person subject to Section 1983 due process and equal**
3 **protection claims.**

4 Plaintiff alleges that its due process and equal protection claims are brought
5 under 42 U.S.C. §1983. *Am. Compl.* ¶¶ 45, 58, 69, 80. The provisions of 42 U.S.C.
6 § 1983 provide access to Court when any person, under the color of state law,
7 deprives any person of the rights, privileges or immunities secured by the
8 Constitution and laws. The section 1983 claims against the State, the FID and its
9 Commissioner must be dismissed because neither the State of Nevada nor its
10 agencies are “persons” under section 1983. *Maldonado v. Harris*, 370 F.3d 945, 951
11 (9th Cir. 2004); *Wolfe v. Strankman*, 392 F.3d 358, 364 (“[S]tate agencies are also
12 protected from suit under § 1983.”); *see also Will v. Michigan Dept. of State Police*,
13 491 U.S. 58, 69 (1989). The *Will* court looked at the legislative history of Section
14 1983 and determined that Congress did not intend for the state itself to be the
15 subject of liability. *Will*, 491 U.S. at 68-69. As a result all Section 1983 claims
16 against the FID must be dismissed.

17 **F. Commissioner O’Laughlin in her official capacity is not a person and**
18 **must be dismissed from the Section 1983 due process and equal**
19 **protection claims.**

20 The Supreme Court has held that a suit against officers or employees in their
21 official capacity are really another way of pleading a lawsuit against the State.
22 *Hafer v. Melo*, 502 U.S. 21, 25 (1991); *Will v. Michigan Dept. of State Police*, 491
23 U.S. 58, 71 (1989). Thus, when a person sues state employees of officers in their
24 official capacities, the suit is actually against Nevada and not the individual. *Craig*
25 *v. Donnelly*, 439 P.3d 413, 135 Nev. Adv Op. 6 (2019); *see also Kentucky v. Graham*,
26 473 U.S. 159, 166 (1985) (an official capacity suit is “*not* a suit against the official
27 personally, for the real party in interest is the entity.”) (emphasis in original).

28 In *Hafer v. Melo*, 502 U.S. 21, 112 S. Ct. 358 (1991), the United States

1 Supreme Court discussed the differences between an individual is sued in his or her
2 individual capacity verses when he or she is sued in an official capacity. The court
3 held that treating claims brought in an official capacity as claims against a state
4 permits an official's successor to assume his or her role in litigation if an individual
5 sued in an official capacity dies or leaves office. *Id.* Damages in an official capacity
6 suit are imposed on the government entity and not on the individual. *Kentucky v.*
7 *Graham*, 473 U.S. 159, 166 (1995).

8 Just like the State, Commissioner O'Laughlin is not a person under Section
9 1983. *Will v. Michigan Dep't. of State Police*, 492 U.S. 58, 71 (1989). Thus, because
10 an official-capacity suit against a state official is a suit against his or her office and
11 the state itself, all section 1983 claims for due process and equal protection must be
12 dismissed against Commissioner O'Laughlin.

13 **2. Dismissal is warranted because Plaintiff has failed to state a claim**
14 **pursuant to NRCP 12(b)(5).**

15 **A. Legal Standards for NRCP 12(b)(5)**

16 NRCP 12(b)(5) permits a defendant to bring a motion to dismiss a plaintiff's
17 claim in a complaint for failure to state a claim upon which relief can be granted.
18 Pursuant to Rule 12(b)(5), a complaint should be dismissed for failure to state a
19 claim "if it appears beyond a doubt that [plaintiff] could prove no set of facts, which,
20 if true, would entitle it to relief." *Buzz Stew, LLC v. City of North Las Vegas*, 124
21 Nev. 224, 228, 181 P.3d 670, 672 (Nev. 2008). The pleadings must be liberally
22 construed, and all factual allegations in the complaint accepted as true. *Blackjack*
23 *Bonding v. City of Las Vegas Municipal Court*, 116 Nev. 1213, 1217, 14 P.3d 1275,
24 1278 (Nev. 2000). Plaintiff's allegations must be legally sufficient to constitute the
25 elements of the claim asserted. *Munda v. Summerlin Life & Health Ins. Co.*, 127
26 Nev. 918, 923, 267 P.3d 771, 774 (2011). Dismissal is required where it appears
27 beyond a doubt the plaintiff could prove no set of facts entitling him to relief. *Id.*
28 Here, even if this Court finds that any claims remain against the State Defendants,

1 Plaintiff has failed to state a claim where any relief can be provided by the FID.

2 **B. The FID's regulatory power over a collection agency is**
3 **governed by Chapter 649.**

4 The FID's regulatory power over a collection agency is limited to the duties
5 and responsibilities found in NRS Chapter 649. NRS 649.051. The FID does not
6 regulate the contracts between collection agency and their attorneys, and does not
7 regulate the Justice Court's award of attorney fees.

8 Briefly, a collection agency includes all persons engaging in the business of
9 collecting, soliciting or obtaining the payment of a claim owed or due to another.
10 NRS 649.020. The customer is the person who authorizes or employs a collection
11 agency for any purpose authorized by Chapter 649. NRS 649.030. A collection
12 agency enters into a written agreement with its customer to collect the debt that is
13 owed to the customer by a third party creditor. NRS 649.334. The terms of the
14 contract between the collection agency and its customer must be clear and specific.
15 NRS 649.334.

16 The agreement between the collection agency and its creditor customer may
17 or may not provide for attorney fees. If interest is to be paid on the debt, it is
18 determined through the agreement between the customer and the collection agency.
19 NRS 649.334. When the collection agency remits the proceeds to its customer, it
20 may first deduct its court costs NRS 649.334(2).

21 The FID is empowered to adopt regulations concerning collection agencies,
22 but only concerning items such as; record keeping, preparing and filing reports,
23 handling trust funds and accounts, the transfer or assignment of accounts and
24 agreements, and the investigations and examinations performed by the FID.
25 NRS 645.056.

26 Aside from requiring that the contract between the collection agency and its
27 customer be specific and unambiguous, (NRS 649.334) the statutes and regulations
28 do not provide the FID the power or jurisdiction to investigate or enforce the

1 amount of money that a collection agency pays its attorney for court appearances or
2 any collection fees that justice court may impose. *See* Declaration of Mary Young,
3 Deputy Director of FID, attached hereto as Exhibit “A.”

4 The FID performs an annual examination of collection agencies. During the
5 examination, the examiner reviews the books and records of the collection agency to
6 ensure compliance with Chapter 649 and the Fair Debt Collection Practices Act.
7 Exhibit “A.” The FID reviews the contracts between the collection agency and its
8 customer as well as the contract that created the debt between the creditor and
9 debtor. The FID reviews the contract to see if interest, fees and costs can be
10 collected per the Contract, but not how much can be collected. Exhibit “A.” The
11 FID does not examine the agreement between a collection agency and its legal
12 representative. Awarding attorney fees are a function of the Justice Court and not a
13 function of the FID. As a result, dismissal of the FID is appropriate because the
14 FID cannot provide the relief that Plaintiff is seeking.

15 CONCLUSION

16 Based on the foregoing, Defendant FID must be dismissed from this case.
17 Plaintiff has failed to invoke subject matter jurisdiction because there is no case or
18 controversy between the FID and the Plaintiff and this case is not ripe. The
19 constitutional claims must be dismissed because the FID is not a person under 42
20 U.S.C. § 1983. Moreover, the FID cannot provide the relief that Plaintiff has
21 requested, because even if this Court grants declaratory and/or injunctive relief, the
22 FID does not have the power to regulate or enforce AB 477.

23 Respectfully submitted this 6th day of June, 2020.

24 AARON D. FORD
25 Nevada Attorney General

26 By: /s/ Vivienne Rakowsky
27 VIVIENNE RAKOWSKY (Bar No. 9160)
28 Deputy Attorney General
Attorneys for State Defendant FID

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **STATE DEFENDANT’S MOTION TO DISMISS AMENDED COMPLAINT** with the Clerk of the Court by using the electronic filing system on the 6th day of June, 2020.

Registered electronic filing system users will be served electronically.

/s/ Michele Caro
Michele Caro, an Employee of the
office of the Nevada Attorney General

EXHIBIT “A”

EXHIBIT “A”

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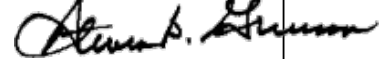
12. My understanding is that the Department of Business and Industry Consumer Affairs can act upon any complaint that is not regulated by a specific B&I agency.

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Dated this 22__ day of January 2020.

By: 

Mary M. Young
Deputy Commissioner
Nevada Department of Business & Industry
Financial Institutions Division



OPP

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**DISTRICT COURT
CLARK COUNTY, NEVADA**

NEVADA COLLECTORS ASSOCIATION, a
Nevada non-profit corporation,

Plaintiff,

v.

SANDY O'LAUGHLIN, in her official
capacity as Commissioner of State of
Nevada Department of Business and
Industry and Financial Institutions
Division; STATE OF NEVADA
DEPARTMENT OF BUSINESS AND
INDUSTRY FINANCIAL INSTITUTIONS
DIVISION; JUSTICE COURT OF LAS
VEGAS TOWNSHIP; DOE DEFENDANTS
1 through 20; and ROE ENTITIY
DEFENDANTS 1 through 20,

Defendants.

Case No.: A-19-805334-C
Dept. No.: XXVII

**STATE DEFENDANT'S
OPPOSITION TO PLAINTIFF'S
MOTION FOR A PRELIMINARY
INJUNCTION, WRIT OF
MANDAMUS OR PROHIBITION**

Defendant, State of Nevada Department of Business and Industry Financial
Institutions Division and Commissioner O'Laughlin in her official capacity ("FID"),
by and through counsel, Aaron D. Ford, Nevada Attorney General and Vivienne
Rakowsky, Deputy Attorney General, hereby file this Motion in Opposition to
Plaintiff's Motion for a Preliminary Injunction, Writ of Mandamus or Prohibition.

1 This Motion is based on the memorandum of points and authorities below, all
2 papers and pleadings on file, and such other evidence as this Honorable Court
3 deems just and appropriate to make a determination.

4 I. INTRODUCTION

5 On June 8, 2020, the FID filed a meritorious motion to dismiss based on
6 NRCP 12(b)(1) and NRCP 12(b)(5). The Motion to Dismiss is grounded on this
7 Court's lack of jurisdiction as there is no case or controversy and this case is not ripe.
8 In addition, because the FID does not administer AB 477, pursuant to NRCP
9 12(b)(5), no relief can be granted.

10 Without alleging that the FID has any power to regulate the attorney fees
11 that the Justice Court can award, or that the FID has any authority over Justice
12 Court Rule 16, Plaintiff filed the instant motion for a preliminary injunction, a writ
13 of mandamus and/or a writ of prohibition to stop the enforcement of SB 477.

14 The FID only regulates collection agencies, and the scope of regulation must
15 fit squarely within in the limitations of Chapter 649, which applies to those that
16 collect debts *owed to another*.¹ NRS 649.020 (emphasis added). Plaintiff's members
17 consist of therapists, property managers, childcare providers, dry cleaners, bakers,
18 caterers, security providers, landscapers, auto dealers law firms, asset buying
19 companies, and collection agencies. *Plaintiff's Motion ("Motion")*, p. 11:11, p.14:3-7,
20 p. 13:13-19, NCA 486-487, 496-497. Many of Plaintiff's members extend credit for
21 purchases of their own products.

22 The FID does not regulate businesses that extend credit to their own
23 customers, such as many of Plaintiffs members listed above. Additionally, the FID
24 does not regulate attorneys that collect debts for creditors such as the example
25 described in Plaintiff's *Motion*, at p. 10:19-22, or asset buying companies. NRS
26 649.020(2) Plaintiff references testimony that took place during the enactment of

27
28 ¹ Subject to certain exclusions found in NRS 649.020(2)(1)-(g), including attorneys,
non-profit cooperative associations, banks, unit owners associations, etc.

1 AB 477, and it is clear that the FID was not involved in the process of drafting AB
2 477.

3 Plaintiff recognizes that it is up to the Legislature to make changes to the
4 jurisdiction of the district court. *Motion*, p. 23:24-25. There is no reason to name the
5 FID in this litigation while knowing that the FID cannot do anything to change the
6 amount of attorney fees that the Justice Court can award, or enforcement of JCR 16,
7 which requires an entity to appear Justice Court with counsel.

8 Plaintiff attempts to drag the FID into this litigation by alleging that the FID
9 enforces the Fair Debt Collection Act (FDCPA, 15 U.S.C. §§ 1682 et seq.) through
10 NRS 649.370. Granted a violation of FDCPA by using abusive, deceptive, and
11 unfair debt collection practices can subject a licensee to discipline, both state and
12 federal. But, Justice Court Rule 16 requiring an entity to have legal representation
13 and the decision to grant attorney fees is within the sole discretion of the Justice
14 Court, and not the FID.

15 The FID cannot enforce section 18 or section 19 of AB 477. The Legislature
16 did not designate that authority to the FID, *See e.g. Clark County. School Dist. v.*
17 *Clark County Classroom Teachers Ass'n*, 115 Nev. 98 103, 977 P.2d. 1008, (1999)
18 (The Court may not confer power to an administrative agency in excess of the powers
19 authorized by the Legislature.). A state agency only has original jurisdiction over
20 legislative enacted administrative and regulatory schemes delegated to the agency.
21 *Allstate v. Thorpe*, 123 Nev. 553, 572, 170 P.3d 989 (2007) In *Allstate*, the
22 insurance commissioner was granted authority by the Nevada Legislature to enforce
23 Title 57 which concerns the Nevada Insurance Code. The Court found that because
24 the legislature granted this authority to the insurance commissioner, there was no
25 private right of action. Here, the legislature has not given the FID the power to
26 determine the amount of attorney fees that the Justice Court can award. That
27 power belongs to the Justice Court. If the FID were to interfere, it would go beyond
28 the legislative mandate and violate separation of powers. Because the FID does not

1 enforce AB 477, this Court should not issue an injunction, writ of prohibition or a
2 writ of mandamus against the FID.

3 This Motion has the same factual basis and will be heard at the same time as
4 the FID's Motion to Dismiss filed June 8, 2020. To avoid repetition, the FID hereby
5 incorporates by reference its Motion to Dismiss as if fully contained herein.

6 **A. Plaintiff's motion for a writ of prohibition or mandamus should be**
7 **denied.**

8 Other than a very brief mention as to when a writ of prohibition or a writ of
9 mandamus may be used by a court, Plaintiff never articulates how its circumstances
10 provide a basis for requesting either type of writ or why a writ is applicable to the
11 facts in this matter. *Motion*, p. 26:5-28. Plaintiff only suggests in one sentence that
12 the District Court has discretion to consider a writ of mandamus, but provides
13 nothing further as to why they would be entitled to such a writ. *Motion*, p. 26:13-14.
14 Without more, it appears that the Plaintiff is not requesting such relief.

15 Regarding the writ of prohibition, Plaintiff never argues why an extraordinary
16 remedy, which allows a court to usurp the power of another branch, is appropriate in
17 this case. *Nevada Restaurant Services, Inc. v. Clark County*, 2018 WL 1077279*7.
18 To the contrary, a writ of prohibition should only be issued where there it is clear
19 there is an absence or an excess of jurisdiction. *Stearns v. Eighth Judicial District*
20 *Court in and for Clark County*, 62, Nev. 102,112, 12 P.2d 206 (1943). Here, Plaintiff
21 only speculates, "if the FID enforces AB 477..." *Motion*, p. 26:24-25. Plaintiff knows
22 that the FID does not regulate whether an entity needs an attorney to be heard in
23 Justice Court or how much in fees and costs can be awarded by the Justice Court.
24 Plaintiff must be aware that the FID cannot violate the separation of powers.

25 A writ of prohibition should not issue based on speculation. Thus,
26 extraordinary relief against the FID is not warranted in this case and Plaintiffs
27 request for a writ of prohibition and/or mandamus relief should be denied.

28 ///

1 **B. Plaintiff's claims are not ripe.**

2 A court does not have subject matter jurisdiction when a case is not ripe.
3 *Aydin Corp. v. Union of India*, 940 F.2d 527, 528 (Ninth Cir. 1991). As argued in the
4 FID's Motion to Dismiss filed on June 8, 2020, this Court lacks subject matter
5 jurisdiction because there is no case or controversy between the Plaintiff and the
6 FID. For the same reason, Plaintiffs are not likely to succeed on the merits of their
7 claims or their motion for a preliminary injunction or writ of mandamus or
8 prohibition against the FID.

9 When claims are based on future events that may or may not occur, a case is
10 not ripe. *Texas v. U.S.*, 523 U.S. 296, 300 (1998). Plaintiff's irreparable injury
11 arguments are nothing more than speculation that: (1) a creditor will not be able to
12 hire an attorney to represent them in Justice Court; (2) attorneys may refuse to
13 represent creditor entities; and, (3) that credit may be tightened for all consumers.
14 *Motion*, p. 12:6-11, p.19:14-16, 27-28. Speculative injury does not meet the standard
15 to grant a preliminary injunction.² *Winter v. Natural Resources Defense Counsel*,
16 555 U.S. 7, 22 (2008) (Issuing a preliminary injunction based only on a possibility of
17 irreparable harm is inconsistent with our characterization of injunctive relief as an
18 extraordinary remedy that may only be awarded upon a clear showing that the
19 plaintiff is entitled to such relief.”)

20 Moreover, even if Plaintiff was to somehow provide a basis for relief, the FID
21 does not govern JCR 16 which requires an entity to have counsel to appear in Justice
22 Court, the attorney fees that Justice Court can award, or the agreement between a
23 collection agency and its counsel that represents them in a collection matter. *FID*
24 *Mot. to Dismiss*, Exhibit “A.”

25 Because the FID's Motion to Dismiss is potentially dispositive of this case, for
26 the sake of judicial economy, the FID respectfully requests that this Court rule on

27
28 ² Plaintiff's declarations are unavailing. One or two attorneys do not speak
for the entire profession.

1 FID's Motion to Dismiss prior to the instant Motion for an Injunction. In the
2 alternative, this Court should deny Plaintiff's Motion in its entirety because the
3 Plaintiff has failed to meet the standards to provide any basis for a preliminary
4 injunction.

5 II. BACKGROUND

6 A. Plaintiff's action

7 Plaintiff is an organization of collection agencies, law firms and asset buying
8 companies which engage in the business of collecting unpaid debt on consumer
9 accounts that are past due or in default. NCA000496. The Plaintiff's members
10 "collect monies on behalf of, for the account of, or as assignees of business that sell
11 goods and/or services to consumers which are primarily for personal, family or
12 household purposes." NCA000496-497. Plaintiff's Amended Complaint alleges
13 constitutional violations of due process and equal protection and seeks prospective
14 declaratory and injunctive relief. Plaintiff's theory is that a newly enacted Nevada
15 law stands as an obstacle to access the Justice Court. *Am. Compl.*

16 B. Nevada law

17 Plaintiff challenges Sections 18 and 19 of AB 477 and wants this Court to
18 award relief from enforcement. AB 477 has now been codified as NRS 97B titled the
19 Consumer Protection From the Accrual of Predatory Interest After Default Act.
20 NRS 97B. 010. The two sections that are at issue provide:

21 **(Section 18) NRS 97B.160 Award of attorney's fees when**
22 **plaintiff is prevailing party in action to collect consumer**
23 **debt.**

24 1. If the plaintiff is the prevailing party in any action to
25 collect a consumer debt, the plaintiff is entitled to collect attorney's
26 fees only if the consumer form contract or other document
evidencing the indebtedness sets forth an obligation of the
consumer to pay such attorney's fees and subject to the following
conditions:

27 (a) If a consumer form contract or other document evidencing
28 indebtedness provides for attorney's fees in some specific
percentage, such provision and obligation is valid and enforceable
for an amount not to exceed 15 percent of the amount of the debt,

1 excluding attorney's fees and collection costs.

2 (b) If a consumer form contract or other document evidencing
3 indebtedness provides for the payment of reasonable attorney's
4 fees by the debtor, without specifying any specific percentage, such
5 provision must be construed to mean the lesser of 15 percent of the
6 amount of the debt, excluding attorney's fees and collection costs,
7 or the amount of attorney's fees calculated by a reasonable rate for
8 such cases multiplied by the amount of time reasonably expended
9 to obtain the judgment.

10 2. The documentation setting forth a party's obligation to pay
11 attorney's fees must be provided to the court before a court may
12 enforce those provisions.

13 (Added to NRS by 2019, 2310)

14 **(Section 19)NRS 97B.170 Award of attorney's fees**
15 **when debtor is prevailing party in action to collect**
16 **consumer debt.** If the debtor is the prevailing party in any
17 action to collect a consumer debt, the debtor is entitled to an award
18 of reasonable attorney's fees. The amount of the debt that the
19 creditor sought may not be a factor in determining the
20 reasonableness of the award.

21 (Added to NRS by 2019, 2311)

22 Because Plaintiff's Amended Complaint and its Motion for a Preliminary
23 Injunction refer to AB 477 rather than the version codified in NRS Chapter 97B, the
24 FID will use AB 477 in order to avoid confusion.

25 **C. Plaintiff never claims that the FID can provide any relief.**

26 Plaintiffs have named the FID alleging a clear violation of constitutional
27 rights if AB 477 becomes effective. *Motion*, p. 26:2-3. Yet, Plaintiff never alleges or
28 argues that: (1) the FID has been delegated any authority related to AB 477; (2) that
the FID can enforce Sections 18 or 19; (3) that the FID has any influence regarding
attorney fees that Justice Court can award; or (4) that the FID has any control of
JCR 16, the Justice Court rule requiring an entity must appear with counsel.

Plaintiffs are asking for an injunction to preserve the status quo. *Motion*, p.
26:1. Nevertheless, Plaintiff cannot meet the standards for an injunction because
Plaintiff cannot show that they have a likelihood to succeed on the merits against
the FID, and that damages would be an inadequate remedy. *Dixon v. Thatcher*, 103
Nev. 414, 415-416, 742 P.2d 1029 (1987).

There is not a single factual allegation in the Amended Complaint claiming

1 the FID has any regulatory ability to govern the attorney fees awarded by the
2 Justice Court. Equally important, the FID certainly does not have any authority
3 over whether an entity litigant must appear in Justice Court with counsel. Even if
4 this Court grants the Plaintiff all the relief it seeks, the FID is powerless because it
5 does not enforce the provisions at issue. For an agency of the executive department
6 to interfere with the powers allocated to the judicial department would violate
7 separation of powers. Thus, Plaintiff has not and cannot show a likelihood of success
8 on the merits against the FID or an injury that can be prevented if an injunction is
9 issued against the FID.

10 Plaintiff lists a number of different types of consumer creditors which are part
11 of their association and are not regulated by the FID. Plaintiff goes on to argue
12 “[t]hese rules affect all businesses that work for and extend credit to consumers.”
13 *Motion*, p. 14:3-4 (emphasis in original). Plaintiff then presents examples including
14 “medical providers, dental clinics, accountants, therapists, property managers, child
15 care provides, dry cleaners, bakers, security providers and landscapers,” none of
16 which are regulated by the FID. *Motion*, p. 14:3-7, *see also* Declaration of Tim
17 Myers, ¶3, NCA 000496-497.

18 Plaintiff tries to use an example of a \$706.65 collection matter, *Motion*, p.
19 20:12-13. Interestingly, none of the debts referenced in NCA 585-594 support a debt
20 of \$706.65. Instead, the debts referenced in NCA 585- 594 show debts of \$423.06 + a
21 collection fee of \$229.40. a debt of \$245 + a collection fee of \$131.92, a debt of
22 \$705.65 + a collection fee of \$380.50, a debt of \$384.67 + \$207.13 and a debt of
23 \$232.78 +a collection fee of \$125.34. The documents in NCA 585-594 are specific to
24 a medical provider and *their* attempts to collect a debt. The cover sheets for the
25 debts contain collection fees of more than 50% added to each debt, and there is no
26 evidence that any of those debts have been sent to a Nevada licensed collection
27 agency that is regulated by the FID, or to a collection attorney that is not regulated
28 by the FID, or whether the creditor went to small claims court on their own.
Moreover, there is no evidence as to who receives the collection fee and if the fee goes

1 towards legal fees.

2 As stated in numerous identical declarations attached by the Plaintiff, it is
3 only the creditor's "understanding" that they are "required to retain a debt collection
4 agency [regulated by the FID] or a debt collection attorney [not regulated by the
5 FID] to recover the unpaid debt." See e.g. NCA 514-14¶3, 517¶3, 521¶3, 523¶3,
6 525¶3, 527¶3, 529¶3, 532¶3, 534¶3, 536¶3, 538-39¶3, 541-42¶3, 544-45¶3, 548¶3,
7 550¶3, 552-53¶3, 554¶3, 556¶3, 559¶3, 561¶3, 564-65¶3, 5677-68¶3, 570-71¶3
8 (emphasis added). Not one of the declarants stated that they have ever retained a
9 collection agency or a collection attorney to collect a small dollar debt, or that they
10 have suffered an injury based on AB 477. Thus, a chance of injury based on AB477
11 is only speculative.

12 Plaintiff's request for the extraordinary remedy of an injunction based on a
13 hypothesis that the 15% cap on attorney fees will potentially (in the future) prevent
14 a creditor's ability to retain an attorney, prevent access to Justice Court, and tighten
15 credit is unsubstantiated. See *Motion* p. 12:6-11, p. 14:12, p. 19:14-16, 26-28.
16 Plaintiffs agree that the specific purpose of Small Claims Court is for "speedy and
17 effective remedies in civil actions involving minimal sums." *Motion*, p. 11 n.6, NRS
18 723.010. Plaintiff further agrees that a creditor can adjudicate many of the small
19 dollar collections in amounts up to \$10,000, without attorney representation in
20 Small Claims Court. *Motion*, p. 11 n.6, NRS 723.010.

21 After showing that Small Claims Court is a viable alternative for collection of
22 small debts, Plaintiff outwardly rejects Small Claims Court, claiming that Small
23 Claims Court provides an inadequate remedy because creditors have a constitutional
24 right to discovery, depositions, and a jury trial in Justice Court. *Motion* p. 12:18-22,
25 p. 11 n. 6. Plaintiff's argument actually reinforces the Legislature's purpose for AB
26 477 by citing to examples of small dollar cases and examples of minimal collections
27 in the \$200-\$700 range, while arguing the small dollar creditor's right for a
28 depositions and a jury trial.

1 Plaintiff additionally fails to demonstrate that any enforcement action has
2 been taken or threatened against it by the FID. In sum, Plaintiff offers this Court
3 speculative and conclusory arguments, rather than real evidence, to justify
4 extraordinary relief.

5 III. LEGAL STANDARDS

6 A preliminary injunction is an “extraordinary remedy never awarded as of
7 right.” *Winter v. NRDC*, 555 U.S. 7, 24, (2008) (citation omitted). To prevail, the
8 moving party must show “that the nonmoving party's conduct, if allowed to continue,
9 will cause irreparable harm for which compensatory relief is inadequate and that
10 the moving party has a reasonable likelihood of success on the merits.” *Boulder*
11 *Oaks Community Ass’n v. B. & J. Andrews Enterprises, LLC*, 125 Nev. 397, 403, 215
12 P.3d 27 (2009). The irreparable harm asserted must be more than economic harm,
13 and be an injury where compensatory damages provide an inadequate remedy.
14 *Excellence Cmty. Mgmt. v. Gilmore*, 131 Nev. 347, 352, 351 P.3d 720, 723 (2015).
15 Moreover, the irreparable harm must be articulated in specific terms. *Department of*
16 *Conservation and Natural Resources, Div. of Water Resources v. Foley*, 121 Nev. 77,
17 80, 109 P.3d 760 (2005).

18 When considering the factors, the Court “must balance the competing claims
19 of injury and must consider the effect on each party of the granting or withholding of
20 the requested relief.” *Winter*, 555 U.S. at 24 (citation omitted). As a threshold
21 inquiry, when a plaintiff has failed to show the likelihood of success on the merits,
22 the court need not consider the remaining factors. *Garcia v. Google, Inc.*, 786 F.3d
23 733, 740 (9th Cir. 2015) (internal citations and quotations omitted).

24 Plaintiff’s discussion of the relative public interests is not balanced. *Motion*,
25 p.25:12-25. Plaintiff’s analysis is purely based on the interests of the Plaintiff
26 without consideration of the consumer who may owe a small debt of a few hundred
27 dollars which they do not believe they owe or cannot pay for another reason. The
28 consumer attempts to fight the debt without an attorney in Justice Court and must

1 face a creditor with an attorney, which, under Plaintiffs structure results in a
2 judgment plus costs (attorney fees) in an amount many times the original debt. The
3 consumer, who could not or should not have paid the original small dollar debt, ends
4 up with a high dollar judgment garnished from their paycheck with truly irreparable
5 harm far in excess of the original debt. This scenario chills a debtor from even
6 fighting a debt that they believe is not justified.

7 With respect to the credit market, to have fewer defaults, creditors might
8 practice better underwriting practices instead of extending credit in questionable
9 circumstances just to make a sale.

10 Thus balancing the relative interests does not favor the creditors in a small
11 debt situation.

12 IV. LEGAL ARGUMENT

13 A. Plaintiff is not likely to succeed on the merits against the FID

14 Plaintiff does not have a reasonable likelihood of success on the merits
15 because this Court lacks subject matter jurisdiction. Plaintiff's request for
16 declaratory relief and injunctive relief are not ripe. In addition, all section 1983
17 constitutional claims against the FID and the Commissioner in her official capacity
18 must be dismissed because neither the State nor its officers are persons subject to
19 section 1983 claims. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 69 (1989).

20 1. There is no case or controversy against the FID and this case is 21 not ripe.

22 As argued in the FID's Motion to Dismiss, the Court only has power to hear
23 "cases or controversies." A case and controversy is a prerequisite to all actions,
24 including those for declaratory or injunctive relief. *See Cardinal Chem. Co. v.*
25 *Morton Int'l, Inc.*, 508 U.S. 83, 95 (1993). There must be a justiciable controversy
26 which simply stated requires a claim of right is asserted against a person who has
27 an interest in contesting it. *Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443(1986).
28 As explained in the FID's Motion to Dismiss, there is no justiciable controversy

1 between Plaintiff and the FID.

2 “The constitutional ripeness of a declaratory judgment action depends upon
3 ‘whether the facts alleged ... show that there is a substantial controversy, between
4 parties having adverse legal interests, of sufficient immediacy ... [that] warrant the
5 issuance of a declaratory judgment.’” *United States v. Braren*, 338 F.3d 971, 975
6 (9th Cir. 2003). Prudential ripeness requires the fitness of issues for judicial
7 decision and the hardship to the parties if the court withholds consideration. *Braren*,
8 338 F.3d at 975. Again, Plaintiffs cannot hope to meet the “substantial controversy”
9 requirement between the Plaintiff and the FID or the “immediacy requirement”
10 because the FID does not regulate the Justice Court or AB 477.

11 The ripeness doctrine, which is more concerned with timing, requires a case or
12 controversy as well as prudential concerns. *See Maldonado v. Morales*, 556 F.3d
13 1037, 1044 (9th Cir.2009), *cert. denied*, 558 U.S. 1158, 130 S.Ct. 1139, 175 L.Ed.2d
14 991 (2010). *See e.g. FID Motion to Dismiss*, pp. 6-14

15 Plaintiff’s request for declaratory relief is not ripe. A case is not ripe unless
16 there is an actual controversy and the harm alleged is sufficiently concrete.
17 Declaratory relief is not appropriate unless “there is a substantial controversy,
18 between parties having adverse legal interests, of sufficient immediacy and reality to
19 warrant the issuance of declaratory judgment.” *Boeing Co. v. Cascade Corp.*, 207
20 F.3d 1177, 1192 (9th Cir. 2000). The essential facts that establish the right to
21 declaratory judgment must have already occurred. *Id.*

22 Here, Plaintiff is alleging a possible future injury, *i.e.*, that their members
23 will, in the future, not be able to access the judicial system for small dollar claims
24 because they will not be able to retain an attorney to represent them in Justice
25 Court. Plaintiff’s claim is somewhat misleading because AB 477 does not preclude
26 Plaintiffs from hiring counsel or accessing the Justice Court. AB 477 just limits the
27 amount of attorney fees that Justice Court can award a prevailing plaintiff.
28 Moreover, AB 477 does not leave creditors “without any recourse to collect on

1 unpaid debts...” as claimed by Plaintiffs in their *Motion* at p. 20:4-5, because a
2 business plaintiff can access Justice Court with an attorney or have the matter
3 determined in Small Claims Court without an attorney. Small Claims Court hears
4 claims for up to \$10,000 which more than covers Plaintiff small dollar debts.

5 In considering the ripeness doctrine in pre-enforcement cases, the court has
6 asked whether there was a “credible threat,” or an “actual and well-founded fear”
7 that enforcement action would be taken against the plaintiff by the defendant.
8 *Holder v. Humanitarian Law Project*, 561 U.S. 1, 15 (2010); *Virginia v. American*
9 *Booksellers Assn. Inc.*, 484 U.S. 383, 393 (1988). In the eight months that this
10 statute has been in effect, there has not been any imminent threat that the FID will
11 or even can enforce Sections 18 or 19 of AB 477 against Plaintiff’s members.

12 To show a case is ripe when future events are uncertain or contingent, it must
13 be probable that further harm will occur. *Resnick v. Nevada Gaming Commission*,
14 104 Nev. 60, 66, 752 P.2d 229 (1988). Plaintiff claims center around the allegations
15 that in the future they will not be able to retain counsel to appear in Justice Court
16 based on AB 477, but Plaintiff fails to establish a link between AB 477, Justice
17 Court Rule 16 and the FID. Plaintiff’s claim is too conjectural because the mere
18 existence of a statute that proscribes requirements is not sufficient, in and of itself,
19 to make a case ripe. *San Diego Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126-27
20 (9th Cir. 1996).

21 This case is also not ripe under prudential ripeness jurisprudence. To
22 evaluate the prudential component of ripeness, the court weighs two considerations:
23 “the fitness of the issues for judicial decision and the hardship to the parties of
24 withholding court consideration.” *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967).
25 “A claim is fit for decision if the issues raised are primarily legal, do not require
26 further factual development, and the challenged action is final.” *US West Commc’ns*
27 *v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1118 (9th Cir.1999), quoting *Standard Alaska*
28 *Prod. Co. v. Schaible*, 874 F.2d 624, 627 (9th Cir.1989). Since Plaintiff’s claims are

1 not ripe, this matter is not fit for decision.

2 “To meet the hardship requirement, a litigant must show that withholding
3 review would result in direct and immediate hardship and would entail more than
4 possible financial loss.” *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1126 (9th
5 Cir.2009), quoting *US West Commc'ns*, 193 F.3d at 1118. Here, Plaintiffs only
6 allege a financial loss which may be incurred if they have to pay an attorney more
7 than Justice Court can award, stating in bold underlined letters **“Creditors and**
8 **debt collectors either cannot retain an attorney on contingency in Small**
9 **Dollar Debt actions, or will lose money if charged on an hourly basis, even**
10 **when they are the prevailing party.”** *Motion*, p. 19:14-16 (emphasis in original).

11 Plaintiffs in their amended complaint never articulate a reason why the FID
12 has been named as a Defendant or what they think the FID can do. Plaintiffs must
13 show a “likelihood” and not a “possibility” that they will succeed, and they have not
14 done so. *Winter*, 555 U.S. at 22. Based on the lack of subject matter jurisdiction and
15 the speculative nature of Plaintiffs claims, Plaintiffs are not likely to succeed on the
16 merits.

17 **2. None of Plaintiffs Constitutional Claims can survive against the**
18 **FID.**

19 Plaintiffs’ due process and equal protection claims are brought under color
20 of law, and cannot survive against the FID or the Commissioner in her official
21 capacity. As argued in the FID’s Motion to Dismiss, neither the FID nor the
22 Commissioner are persons for the purpose of section 1983. *Will v. Michigan Dept. of*
23 *State Police*, 491 U.S. 58, 69 (1989).

24 Moreover, Plaintiffs have not been denied a fundamental right which would
25 subject their constitutional claims to strict scrutiny analysis. Plaintiffs have not
26 been foreclosed from taking a debtor to court, they simply must make a decision
27 about which venue they choose to use—Justice Court represented by an attorney or
28 small claims court without an attorney.

1 **B. There is no imminent threat of irreparable harm**

2 Plaintiff's motion is approximately 26 pages long. Irreparable harm garners
3 barely a mention. At some point Plaintiff cites to the rules for issuing an injunction,
4 but fail to argue what injury would be redressed if an injunction is issued against
5 the FID. *Motion*, p. 15: 13-28, 16:1-10. Irreparable harm is "an injury for which
6 compensatory damage is an inadequate remedy. *Excellence Comty, Mgmt. v.*
7 *Gilmore*, 131 Nev. 347, 353, 351 P.3d 720 (2015). Plaintiff's solely argues potential
8 future financial harm.

9 Moreover, Plaintiff has not met its burden to show the other essential element
10 of irreparable harm- an immediate threatened injury. Speculating that an injury
11 may occur is not an irreparable injury sufficient to warrant granting a preliminary
12 injunction. "A plaintiff must do more than merely allege imminent harm sufficient to
13 establish standing; a plaintiff must *demonstrate* immediate threatened injury as a
14 prerequisite to preliminary injunctive relief." *Caribbean Marine Servs. Co. v.*
15 *Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) (citation omitted) (emphasis in original).
16 Plaintiffs do not provide any evidence supporting their theory that they will suffer
17 an immediate non-financial injury.

18 Plaintiff's claim that its members will not be able to hire an attorney because
19 the attorney will charge more than they can recover under SB 477 is purely financial
20 in nature. Likewise, Plaintiff's claim that its members will not be able to collect
21 small dollar debts because it will be too expensive is also financial in nature.
22 Additionally, without any basis, Plaintiff asserts that many debts will go unpaid
23 leaving creditors unwilling to provide services without advance payment, which is
24 also financial in nature. *Motion* p. 20:4-5. Thus, none of Plaintiff's claims are
25 imminent or more than financial in nature, and cannot meet the standard for a
26 preliminary injunction.

27 **V. CONCLUSION**

28 For the foregoing reasons as well as reasons put forth in FID's Motion to

1 Dismiss, this Court should deny Plaintiff's Motion for a Preliminary Injunction, Writ
2 of Mandamus or Prohibition.

3 Dated: June 15, 2020.

4 AARON FORD
Attorney General

5 By: /s/ Vivienne Rakowsky
6 Vivienne Rakowsky (Bar No. 9160)
7 Deputy Attorney General
8 David J. Pope (Bar No. 8617)
9 Chief Deputy Attorney General

10 **CERTIFICATE OF SERVICE**

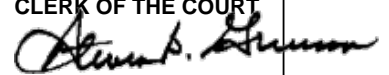
11 I hereby certify that I electronically filed the foregoing **STATE**
12 **DEFENDANT'S MOTION IN OPPOSITION TO PLAINTIFF'S MOTION FOR**
13 **A PRELIMINARY INJUNCTION, A WRIT OF MANDAMUS OR**
14 **PROHIBITION** with the Clerk of the Court by using the electronic filing system
15 on the 15th day of June, 2020.

16 Registered electronic filing system users will be served electronically.

17
18 /s/ Marilyn Millam
19 Marilyn Millam, an Employee of the
20 office of the Nevada Attorney General

EXHIBIT A

EXHIBIT A



1 **MDSM**
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8 **DISTRICT COURT**
9
10 **CLARK COUNTY, NEVADA**

11
12 NEVADA COLLECTORS ASSOCIATION, a)
13 Nevada non-profit corporation,)

14 Plaintiff,)

15 v.)

16 SANDY O'LAUGHLIN, in her official)
17 capacity as Commissioner of State of)
18 Nevada Department of Business and)
19 Industry and Financial Institutions)
20 Division; STATE OF NEVADA)
21 DEPARTMENT OF BUSINESS AND)
22 INDUSTRY FINANCIAL INSTITUTIONS)
23 DIVISION; JUSTICE COURT OF LAS)
24 VEGAS TOWNSHIP; DOE DEFENDANTS)
25 1 through 20; and ROE ENTITIY)
26 DEFENDANTS 1 through 20,)

27 Defendants.)
28

Case No.: A-19-805334-C
Dept. No.: XXVII

**STATE DEFENDANT'S
MOTION TO DISMISS
AMENDED COMPLAINT**

[HEARING REQUESTED]

24 Defendant, State of Nevada Department of Business and Industry Financial
25 Institutions Division and Commissioner O'Laughlin (collectively "FID"), by and
26 through counsel, Aaron D. Ford, Nevada Attorney General and Vivienne Rakowsky,
27 Deputy Attorney General, hereby file this Motion to Dismiss the Amended
28

1 Complaint.

2 This Motion is based on the memorandum of points and authorities below, all
3 papers and pleadings on file, and such other evidence as this Honorable Court
4 deems just and appropriate to make a determination.

5 INTRODUCTION

6 Prior to the remand, Plaintiff filed Leave to Amend the Complaint with the
7 U.S. District Court in the District of Nevada. ECF No. 20-1. In its Motion for
8 Leave, Plaintiff clearly stated: “NCA seeks amendment to its original complaint
9 *solely* to add a party” ECF No 20, p. 2:16 (emphasis added). Plaintiff went on to
10 state the reason for amending the complaint was to add the newly appointed
11 Commissioner of the FID in her official capacity. ECF No. 20, p. 2:16-28, p. 1-13.
12 The District Court allowed the Amendment, correcting the caption and adding
13 Commissioner O’Laughlin as a defendant in her official capacity. ECF No. 20, p.
14 3:13-14, ECF 20-1, p. 2-4.

15 Nevertheless, Plaintiff neglected to notice the Court and the parties that the
16 Amended Complaint also includes several other relevant changes, including the
17 removal of several allegations from the original Complaint, thereby abandoning
18 those claims and facts. (*Compl.* ¶¶ 43, 61, 62, 95), and the addition of requests for
19 attorney fees (*Am. Compl.* ¶¶ 56, 68, 77, 88, 98).

20 Interestingly, Plaintiff has withdrawn ¶43 which alleges that the Plaintiffs
21 are at risk of enforcement of AB 477 if they seek amounts in excess of AB 477 limits,
22 and ¶95 asking for a declaration that Sections 18 and 19 “unduly conflict and
23 interfere” with “numerous provisions of the Nevada and Federal Constitutions.”
24 Plaintiff has changed its prayer for relief and eliminated its request for a writ of
25 prohibition against the Justice Court’s enforcement of sections 18 and 19. Other
26 changes were made as well, such as eliminating the definition in ¶12 that “small
27 dollar debts” refer to debts of less than \$5,000.

28 Plaintiff has alleged five causes of action including Violation of Substantive

1 Due Process based on Section 18 of AB 477 and JCR 16; Violation of Substantive
2 and Procedural Due Process based on Section 19 of AB 477; Violation of Equal
3 Protection based on Section 18 of AB 477; Violation of Equal Protection based on
4 Section 19 of AB 477; and Declaratory Relief. None of the claims apply to the
5 regulatory function of the FID. As a result, all Plaintiffs claims against
6 Commissioner O’Laughlin and the Financial Institutions Division (FID) must be
7 dismissed.

8 This Court lacks subject matter jurisdiction pursuant to NRCP 12(b)(1)
9 because Plaintiff lacks standing and its claims are not ripe. The section 1983 due
10 process and equal protection claims against the FID and Commissioner O’Laughlin
11 must be dismissed because neither the agency nor its Commissioner are persons
12 subject to section 1983. Pursuant to NRCP 12(b)(5), the FID cannot give Plaintiffs
13 any relief is it seeking because the FID does not regulate AB 477 or the amount of
14 attorney fees that can be awarded by the Justice Court. Finally, Plaintiff is not
15 entitled to an award of attorney fees, which will be addressed in the event that the
16 Amended Complaint against the FID and Commissioner O’Laughlin is not
17 dismissed.

18 **FACTS**

19 The Financial Institutions Division, headed by Commissioner O’Laughlin is
20 an administrative agency of the State of Nevada. (“FID”). It’s mission is to
21 “maintain a financial institutions system for the citizens of Nevada that is safe and
22 sound, protects consumers and defends the overall public interest, and promotes
23 economic development through the efficient, effective and equitable licensing,
24 examination and supervision of depository fiduciary and non-depository financial
25 institutions.” <http://fid.nv.gov>.

26 The FID regulates collection agencies pursuant to NRS Chapter 649.
27 NRS 649.051. Chapter 649 may govern the contracts between the collection agency
28 and its Nevada customers that retain collection agency services, but does not

1 regulate other members of the Nevada Collector's Association ("Plaintiff") including
2 law firms and asset buying companies. NRS 649.020; *Am. Compl.* ¶11. Relevant to
3 this matter, Chapter 649 absolutely does not regulate the relationship between a
4 collection agency and its attorney that represents them in Justice Court. NRS Ch.
5 649. Nor does the FID regulate the amount of fees that the Justice Court can award
6 to either the collection agency or the debtor prevailing party.

7 AB 477 is a new chapter codified in the Nevada Revised Statutes as
8 NRS 97B.¹ The title of the chapter is the Consumer Protection from Predatory
9 Interest After Default Act, which is incorporated into Title 8. Title 8 regulates
10 Commercial Instruments and Transactions. AB 477 was passed by the Nevada
11 Legislature in June 2019 and went into effect on October 1, 2019. Plaintiffs never
12 articulate that they are subject to an imminent threat of investigation or
13 enforcement by the FID concerning attorney fees, or even that the FID has the
14 power to investigate or enforce AB 477. Instead, Plaintiff merely alleges that the
15 existence of AB 477 will prevent Plaintiffs' members from fair access to courts
16 because they will not be able to retain counsel to represent them for small dollar
17 collection cases. See e.g. *Am. Compl.*, ¶¶ 34, 36, 37, 38.

18 Plaintiff references two specific sections of AB 477 alleging that the
19 statutes deprive them of substantial and procedural due process and equal
20 protection. The two sections state:

21 **Sec. 18 (NRS 97B.160).**

22 1. If the plaintiff is the prevailing party in any action to collect a
23 consumer debt, the plaintiff is entitled to collect attorney's fees only if
24 the consumer form contract or other document evidencing the
indebtedness sets forth an obligation of the consumer to pay such
attorney's fee and subject to the following conditions:

25 (a) If a consumer form contract or other document evidencing
26 indebtedness provides for attorney's fees in some specific percentage,

27 ¹ Because Plaintiff continues to reference AB 477 and does not reference
28 NRS 97B, Defendants will also use AB 477 and cross reference the appropriate
statute in NRS 97B.

1 such provision and obligation is valid and enforceable for an amount
2 not to exceed 15 percent of the amount of the debt, excluding
attorney's fees and collection costs.

3 (b) If a consumer form contract or other document evidencing
4 indebtedness provides for the payment of reasonable attorney's fees by
5 the debtor, without specifying any specific percentage, such provision
6 must be construed to mean the lesser of 15 percent of the amount of
7 the debt, excluding attorney's fees and collection costs, or the amount
of attorney's fees calculated by a reasonable rate for such cases
multiplied by the amount of time reasonably expended to obtain the
judgment.

8 2. The documentation setting forth a party's obligation to pay
9 attorney's fees must be provided to the court before a court may
enforce those provisions.

10 **Sec. 19** (NRS 97B.160). If the debtor is the prevailing party in any
11 action to collect a consumer debt, the debtor is entitled to an award of
12 reasonable attorney's fees. The amount of the debt that the creditor
sought may not be a factor in determining the reasonableness of the
award

13 AB 477 (2019).

14 The FID must be dismissed because the FID does not regulate a collection
15 agency's ability to retain counsel to represent them in court, or a licensee's access to
16 justice court, or the amount of attorney fees that may be awarded to the prevailing
17 party by the justice court. Moreover, AB 477 does not delegate any powers or
18 responsibilities to the FID. In fact, Plaintiff's Amended Complaint fails to provide
19 any facts to support any of the claims against the FID.

20 Pursuant to NRCP 12(b)(1), this Court lacks subject matter jurisdiction
21 because Plaintiff lacks standing and this case is not ripe. Additionally, under
22 NRCP 12(b)(5) Plaintiff has failed to state a claim for which relief can be granted.
23 Finally, the due process and equal protection official claims against Commissioner
24 O'Laughlin along with the claims against the FID cannot stand because the
25 Commissioner as the face of the FID as well as the FID itself are not "persons"
26 under 42 U.S.C. § 1983.

27 ///

1 **POINTS AND AUTHORITIES**

2 **1. This case must be dismissed for lack of subject matter jurisdiction.**

3 **A. Legal standards for NRCP 12(b)(1)**

4 NRCP 12(b)(1) provides that when a court lacks subject matter jurisdiction,
5 the claims must be dismissed. NRCP 12(h)(3). Without first establishing
6 jurisdiction, the court cannot proceed to hear the case. *Steel Co. v. Citizens for a*
7 *Better Environment*, 523 U.S. 83, 95 (1998).

8 Plaintiff has the burden to show that the court has subject matter
9 jurisdiction. *Castillo v. United Federal Credit Union*, 134 Nev. 13,16, 409 P.3d 54
10 (2018); *Morrison v. Beach City LLC*, 116 Nev. 34, 36, 991 P.2d. 982, 983 (Nev. 2000)
11 (The burden proving the jurisdictional requirement is properly placed on the
12 plaintiff). Subject matter jurisdiction does not exist if there is no standing. See
13 e.g. *Ohfuji Investments Inc. v. Citibank, N.A.* 2019 WL 682503 (*unpublished*). In
14 addition a case must be ripe for review.

15 Standing requires an “actual justiciable controversy as a predicate to judicial
16 relief... not merely the prospect of a future problem.” *Doe v. Bryon*, 102 Nev. 523,
17 525, 728 P.2d 443, 444 (1986). A justiciable controversy is a controversy “in which
18 a claim of right is asserted against one who has an interest in contesting it.” *Id.*
19 Thus, for a case or controversy to exist and invoke jurisdiction, the parties must be
20 adverse, there must be a controversy, and the issues must be ripe for determination.
21 *Kress v. Cory*, 65 Nev. 1, 26, 189 P. 2d 352 (1948). Ripeness is similar to standing,
22 except ripeness looks at the timing of the action. *In re. T.R.*, 119 Nev. 646, 651, 80
23 P.3d 1276 (2003).

24 The FID and Plaintiff are not adverse because the FID does not enforce
25 Chapter 97B (AB 477) or regulate a collection agencies choice of attorney. There is
26 nothing that the FID can do to change Justice Court Rule 16 which requires
27 Corporations and LLC’s to be represented by an attorney in Justice Court. In fact, it
28 would violate separation of powers for an executive agency such as the FID to

1 dictate how a court enforces its rules. In addition, this case is not ripe.

2 A justiciable controversy cannot be based on harm which is speculative or
3 hypothetical. *Herbst Gaming, Inc. v. Heller*, 122 Nev. 877, 887, 141 P.3d 1224
4 (2006). Here, there is no controversy between the Plaintiff and the FID. Plaintiff
5 does not allege that the FID has done anything to limit Plaintiffs' access to Justice
6 Court, and has, in fact, backed off its claim that the FID can even enforce Section
7 18. (Paragraph 43 was eliminated from the original Complaint when the Plaintiff
8 filed the Amended Complaint). Plaintiff does not allege that the FID regulates the
9 amount of attorney fees Justice Court awards. Plaintiff does not allege that the FID
10 has any power to enforce AB477. Plaintiff does not allege that the FID has taken or
11 threatened any action against any of their members based on AB 477. Thus, there
12 is no case or controversy and Plaintiffs' claims of what can potentially happen in the
13 future are hypothetical at best.

14 The Plaintiff has only speculated about a possible injury *if* they are unable to
15 retain counsel to access the court system. In the eight months that this law has
16 been in effect, Plaintiff has not produced any evidence that the FID has caused an
17 actual injury that can in anyway be traceable to actions by the FID. Most relevant,
18 there is no relief this Court can grant the Plaintiff that is within the power or
19 jurisdiction of the FID to redress the Plaintiff's claims. *See e.g. Allen v. Wright*, 468
20 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984) (overruled on other grounds).

21 **B. Plaintiff does not have standing against the FID because there**
22 **is no case or controversy**

23 A case or controversy must be present at all stages of the litigation.
24 *Personhood v. Bristol*, 126 Nev. 599, 602, 245 P.3e 572, 574 (2010). A case or
25 controversy requires standing, which enables the court to decide the merits of the
26 case. *Allen v. Wright*, 468 U.S. 737, 750-751 (1984) (overruled on other grounds). To
27 establish standing the Plaintiff has the burden to show; (a) an injury in fact, (b)
28 causation, and (c) redressability. *Steel Co.*, 523 U.S. at 103-104.

1 a. **There is no actual injury in fact.**

2 Plaintiff cannot establish an injury in fact. The Plaintiff has only speculated
3 about a possible injury if they are unable to retain counsel to access the court
4 system. To the contrary, Plaintiff has not been denied access to any court in the
5 State of Nevada, and has not been threatened with any administrative enforcement
6 of AB 477.

7 Plaintiff's members are primarily concerned with small dollar consumer
8 debts. *Am. Compl.*, ¶13. This Court should take judicial notice of NRS Chapter 73
9 which provides for access to the Nevada court system without an attorney for claims
10 under \$10,000. NRS 73.010(1) provides that "[a] justice of the peace has jurisdiction
11 and may proceed as provided in this chapter and by rules of court in all cases
12 arising in the justice court for the recovery of money only, where the amount
13 claimed does not exceed \$10,000"), and NRS 73.012 provides that "[a] corporation,
14 partnership, business trust, estate, trust, association or any other nongovernmental
15 legal or commercial entity may be represented by its director, officer or employee in
16 an action mentioned or covered by this chapter...").

17 Thus, Plaintiff's members are not forced to retain counsel or denied access to
18 court; it is only that Plaintiff's members chose not to use the court with jurisdiction
19 for the size of their claims that will allow them to appear without an attorney.
20 Notwithstanding, Plaintiff's members are not can still opt to use an attorney and
21 access the court of their choice, but will only be able to recover the attorney fees
22 pursuant to AB 477. If a creditor or collection agency decides to hire an attorney to
23 go to justice court to collect a \$500 debt rather than small claims court without an
24 attorney, it is a business decision that the creditor and/or collection agency will
25 have to make at the time, knowing the limitations on the award of attorney fees
26 that Justice Court will award. *See e.g. Am. Compl.* ¶¶27-30.

27 Thus, there is no actual injury. Any injury would be self-inflicted based on
28 business decisions made by the Plaintiff. At this point, approximately eight (8)

1 months after this statute has gone into effect, none of the Plaintiff's members have
2 suffered an injury due to any actions or threatened actions by the FID. Plaintiff
3 additionally has not pled a single instance where they were have been denied access
4 to court.

5 **b. Plaintiff fails to show any causal link that would give them**
6 **standing.**

7 The Plaintiff cannot show a causal link between any actions that the FID has
8 taken or can take to address any alleged potential injuries. To establish the causal
9 element for standing, the injury alleged to be suffered must be "fairly traceable to
10 the agencies alleged misconduct." *Washington Environmental Counsel v. Bellon*,
11 732 F.3d 1131, 1141 (9th Cir. 2013). The links cannot be hypothetical or tenuous.
12 *Id.* When the causal chain involves other "third parties whose independent
13 decisions collectively have a significant effect on plaintiffs injuries, the causal chain
14 is too weak to support standing." *Bellon*, 732 F.3d at 1142. Any prospective injury
15 would be related to an insufficient award of attorney fees which would be
16 determined by the third party justice court and not the FID. Thus the Plaintiff
17 cannot establish a causal link between AB 477 and the FID.

18 Moreover, in its Motion for a Preliminary Injunction² Plaintiff uses
19 hypotheticals involving businesses that are not regulated by the FID to allege a
20 potential injury. Small businesses such as caterers, landscapers, small medical
21 providers, dental clinics, accountants, therapists, property managers, child care
22 provides, dry cleaners, bakers, security providers and even the "buy here pay here"
23 auto dealers that extend credit to their customers for goods or services, are not
24 regulated by the FID. The fact that the FID regulates collection agencies pursuant
25

26
27 ² The Court can take judicial notice of Plaintiffs Motion for Injunction which
28 was filed on May 15, 2020. The Motion for Preliminary Injunction will be heard in
conjunction with the Motion to Dismiss.

1 to NRS Chapter 649 does not provide a causal connection to attorney fees awarded
2 by the court on the basis of AB 477.

3 Even if a business employs a licensed collection agency to collect a defaulted
4 debt, the FID only looks at the original contract with its Nevada client (creditor)
5 and the contract between the creditor and its customer that established the debt.
6 The FID looks to verify that the collection agency has complied with the contract
7 that it has with its Nevada client and that the contract with the Nevada client does
8 not violate State or Federal law. The FID does not look at the amount of attorney
9 fees the contract allows, and does not look at a contract between a collection agency
10 and the attorney that appears for them in court. The fees are up to the court to
11 award. The contract between the creditor and its debtor is in existence prior to the
12 time that a defaulted debt is turned over to a collection agency.

13 Accordingly, Plaintiff cannot show a causal link because there is no plausible
14 connection between AB 477, JCR 16, and the FID.

15 **c. Plaintiff cannot show that the FID can redress any alleged injury.**

16 There is no relief this Court can grant within the power or jurisdiction of the
17 FID that can redress the Plaintiff's claims. *See e.g. Lujan v. Defenders of Wildlife*,
18 504 U.S. 555, 568-569 (1992) (Standing was denied based on the lack of
19 redressability because "it was entirely conjectural whether the non-agency activity
20 that affects respondents will be altered or affected by the agency activity they seek
21 to achieve"). The Plaintiff cannot meet the redressability prong because the FID
22 does not regulate AB 477 or regulate the Justice Court award of attorney fees.

23 AB 477's limitation on attorney fees is something that a creditor or a
24 collection agency should consider when bringing an action in Justice Court. AB 477
25 does not limit access, it just limits the amount of attorney fees that can be collected.
26 The FID does not have the jurisdiction to redress any of Plaintiff's alleged potential
27 injuries because it does not regulate JCR 16 or AB 477.

28 ///

1 **C. The Due Process and Equal Protection Claims must be Dismissed**
2 **because they are not Ripe**

3 Similar to standing, ripeness is also necessary to establish a case or
4 controversy. Ripeness is concerned with timing, because if there is no injury in
5 fact, there is no case or controversy. An alleged injury that is too imaginary or
6 speculative will not support jurisdiction. *Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d
7 443, (1986); *Thomas v. Anchorage Equal Rights Com'm*, 220 F.3d 1134, 1138
8 (2000). A justiciable controversy is the first hurdle to an award of declaratory relief.
9 *Southern Pacific Co. v. Dickerson*, 80 Nev. 572, 576, 397 P.2d 187 (1964). Claims
10 based on future events that may or may not occur is not ripe. *Texas v. U.S.*, 523
11 U.S. 296, 300 (1998). Because AB 477 is a newly enacted law which has not been
12 enforced, this case is not ripe, and dismissal is warranted.

13 To elaborate, a case is not ripe for review when the degree to which the harm
14 alleged by the party seeking review is not sufficiently concrete, but rather any
15 alleged injury is remote or hypothetical. *Cote H. v. Eighth Judicial Dist. Court ex rel*
16 *County of Clark*, 124 Nev. 36 n.1, 175 P.3d 906 (2008).

17 Plaintiff's injury arguments are nothing more than hypotheticals and/or
18 speculation that a creditor will not be able to hire an attorney to represent them in
19 justice court, and that credit may be tightened for all consumers. *Am Compl.* ¶¶
20 37, 38. This argument is a red herring because a creditor can hire an attorney to
21 comply with Justice Court rule 16, but he will have to make a business decision
22 whether he may have to pay the attorney more fees than can be recovered in a small
23 dollar case. It is not a due process or equal protection issue, it is simply a business
24 decision that Plaintiff will make when analyzing each case. He can also use small
25 claims court without an attorney for the small debts.

26 Moreover, even if Plaintiff was to somehow provide a basis for relief, the FID
27 is not in a position to provide that or any relief. The FID does not govern the
28 attorney fees that justice court can award nor does it regulate the agreement

1 between a collection agency and its counsel that represents them in court in a
2 collection matter.

3 Plaintiff filed its original complaint November 13, 2019- a little over a month
4 after AB 477 went into effect. In its original complaint, Plaintiff alleged that “NCA’s
5 members are at risk of administrative enforcement to the extent that they seek
6 amounts in excess of those allowed by AB 477.” *Compl.* ¶ 43. Plaintiff removed that
7 allegation from the Amended Complaint because they finally realize that the FID
8 does not enforce the amount of attorney fees that the Justice Court can award.

9 Plaintiff alleges violations of substantive and procedural due process and
10 equal protection resulting from the mere existence of Sections 18 and 19 of AB 477.
11 Based on the alleged violations, Plaintiff has requested that the Court declare AB
12 477 unconstitutional and grant injunctive and declaratory relief.

13 Plaintiff has not alleged a specific due process or equal protection violation
14 by the FID. Instead, Plaintiff pleads due process and equal protection constitutional
15 guarantees and then speculates about a possible future injury through Justice
16 Court’s enforcement of AB477. *Am Compl.* ¶¶44-54, 58-65, 69-75, 80-87.

17 Plaintiff’s claims are premature.³ The mere existence of a statute that may
18 or may not ever be applied to the Plaintiffs members is not sufficient, in and of
19 itself, to meet ripeness requirements. *San Diego Gun Rights Comm. v. Reno*, 98
20 F.3d 1121, 1126-27 (9th Cir. 1996). Moreover, Plaintiff never asserts how or if the
21 FID has the power or responsibility to regulate the attorney fees only Justice Court
22 can award. *Am. Compl.* ¶ 3. This Court should immediately dismiss these claims
23

24
25 ³ Plaintiff additionally alleges that the “language of AB 477 is inherently
26 vague and ambiguous.” *Am. Compl.* ¶23. Although no regulations have been
27 adopted to provide direction for the application of the law, Plaintiff prematurely
28 claims that in the future, its members will be unable to retain counsel to represent
them in small dollar consumer cases.” *Am. Compl.* ¶35. It is noteworthy that any
regulations would not be adopted by the FID, since they do not govern Chapter 97B
(AB 477).

1 against the FID and further refuse to adjudicate prematurely the constitutionality
2 of AB 477.

3 **D. Plaintiff's Declaratory Relief claims are not ripe.**

4 Plaintiffs' request for a declaratory judgment based on allegations of possible
5 future injury from this brand new statute is also not ripe. *Am. Compl.* ¶91. "The
6 constitutional ripeness of a declaratory judgment action depends upon whether the
7 facts alleged ... show that there is a substantial controversy, between parties having
8 adverse legal interests, of sufficient immediacy ... [that] warrant the issuance of a
9 declaratory judgment." *United States v. Braren*, 338 F.3d 971, 975 (9th Cir. 2003).
10 Prudential ripeness requires the fitness of issues for judicial decision and the
11 hardship to the parties if the court withholds consideration. *Braren*, 338 F.3d at
12 975. Again, Plaintiffs cannot meet the immediacy requirement and prudential
13 ripeness doctrine on this new statute.

14 The factors considered when determining if a case is ripe for a declaratory
15 judgment include a constitutional component that asks, "whether the facts alleged,
16 under all the circumstances, show that there is a substantial controversy, between
17 parties having adverse legal interests, of sufficient immediacy and reality to
18 warrant the issuance of a declaratory judgment." *U.S. v. Braren*, 338 F.3d 971, 975
19 (9th Cir. 2003). A justiciable controversy is a preliminary hurdle to an award of
20 declaratory relief. *Southern Pacific Co. v. Dickerson*, 80 Nev. 572, 576, 397 P.2d 187,
21 190 (1964)

22 The case or controversy issue which includes discussion of Plaintiff's lack of
23 injury in fact, the lack of a causal link, and the lack of redressability are addressed
24 above with regard to standing. The same factors are considered along with
25 prudential factors in determining whether a case is ripe for decision. The
26 prudential portion of the ripeness evaluation weighs the fitness of the issues for
27 judicial decision and the hardship to the parties of withholding the court's
28 consideration. *U.S. v. Braren*, 338 F.3d 971, 975 (9th Cir. 2003).

1 Generally, an agency's action must be final before a declaratory judgment
2 action is ripe. *Braren*, 338 F.3d at 975. This way, before declaratory action is
3 taken, the effects of the agency's action is "felt in a concrete way by challenging
4 parties." *Id.* Here there has been no agency action -- or even a threat of agency
5 action since the FID does not enforce AB 477.

6 There is also no hardship to the parties since Plaintiff's members do not have
7 an injury in fact and only speculate about a potential future injury if they cannot
8 access the court system for small collection cases. Moreover, Plaintiff's speculative
9 injuries are all potentially financial in nature and fail to meet the hardship
10 requirement. *See e.g. Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1126 (9th Cir.2009)
11 (To meet the hardship requirement, a litigant has the burden to show more than a
12 financial loss). Plaintiffs only complain about financial loss. As a result, this
13 matter is not fit for judicial decision against the FID.

14 Plaintiff never alleges or argues that the FID has any authority over AB 477
15 or that the FID can enforce Sections 18 or 19 of AB477. There is not a single factual
16 allegation in the Amended Complaint claiming the FID has any regulatory ability to
17 govern any activities that the Justice Court engages in, including the attorney fees
18 awarded by the Justice Court. It would be a violation of separation of powers to
19 intervene or regulate Justice Court's jurisdiction. Moreover, neither AB 477 nor
20 Chapter 649 provide the FID with this ability.⁴ Thus, even if this Court grants the
21 Plaintiff all the relief it seeks, the FID is powerless because its regulatory ability is
22 limited to the provisions of Chapter 649. Equally important, the FID absolutely does
23 not have any authority over the fees that Justice Court can award under AB 477.
24 Moreover, there has not been and cannot be any threat of enforcement by the FID
25 regarding AB 477, because the Nevada legislature did not delegate the enforcement
26

27 ⁴ The FID only regulates collection agencies and does not regulate many of the
28 Plaintiff's members including those who extend credit for their own products, law
firms or asset buying companies

1 of AB 477 to the FID.

2 **E. The FID is not a person subject to Section 1983 due process and equal**
3 **protection claims.**

4 Plaintiff alleges that its due process and equal protection claims are brought
5 under 42 U.S.C. §1983. *Am. Compl.* ¶¶ 45, 58, 69, 80. The provisions of 42 U.S.C.
6 § 1983 provide access to Court when any person, under the color of state law,
7 deprives any person of the rights, privileges or immunities secured by the
8 Constitution and laws. The section 1983 claims against the State, the FID and its
9 Commissioner must be dismissed because neither the State of Nevada nor its
10 agencies are “persons” under section 1983. *Maldonado v. Harris*, 370 F.3d 945, 951
11 (9th Cir. 2004); *Wolfe v. Strankman*, 392 F.3d 358, 364 (“[S]tate agencies are also
12 protected from suit under § 1983.”); *see also Will v. Michigan Dept. of State Police*,
13 491 U.S. 58, 69 (1989). The *Will* court looked at the legislative history of Section
14 1983 and determined that Congress did not intend for the state itself to be the
15 subject of liability. *Will*, 491 U.S. at 68-69. As a result all Section 1983 claims
16 against the FID must be dismissed.

17 **F. Commissioner O’Laughlin in her official capacity is not a person and**
18 **must be dismissed from the Section 1983 due process and equal**
19 **protection claims.**

20 The Supreme Court has held that a suit against officers or employees in their
21 official capacity are really another way of pleading a lawsuit against the State.
22 *Hafer v. Melo*, 502 U.S. 21, 25 (1991); *Will v. Michigan Dept. of State Police*, 491
23 U.S. 58, 71 (1989). Thus, when a person sues state employees of officers in their
24 official capacities, the suit is actually against Nevada and not the individual. *Craig*
25 *v. Donnelly*, 439 P.3d 413, 135 Nev. Adv Op. 6 (2019); *see also Kentucky v. Graham*,
26 473 U.S. 159, 166 (1985) (an official capacity suit is “*not* a suit against the official
27 personally, for the real party in interest is the entity.”) (emphasis in original).

28 In *Hafer v. Melo*, 502 U.S. 21, 112 S. Ct. 358 (1991), the United States

1 Supreme Court discussed the differences between an individual is sued in his or her
2 individual capacity verses when he or she is sued in an official capacity. The court
3 held that treating claims brought in an official capacity as claims against a state
4 permits an official's successor to assume his or her role in litigation if an individual
5 sued in an official capacity dies or leaves office. *Id.* Damages in an official capacity
6 suit are imposed on the government entity and not on the individual. *Kentucky v.*
7 *Graham*, 473 U.S. 159, 166 (1995).

8 Just like the State, Commissioner O'Laughlin is not a person under Section
9 1983. *Will v. Michigan Dep't. of State Police*, 492 U.S. 58, 71 (1989). Thus, because
10 an official-capacity suit against a state official is a suit against his or her office and
11 the state itself, all section 1983 claims for due process and equal protection must be
12 dismissed against Commissioner O'Laughlin.

13 **2. Dismissal is warranted because Plaintiff has failed to state a claim**
14 **pursuant to NRCP 12(b)(5).**

15 **A. Legal Standards for NRCP 12(b)(5)**

16 NRCP 12(b)(5) permits a defendant to bring a motion to dismiss a plaintiff's
17 claim in a complaint for failure to state a claim upon which relief can be granted.
18 Pursuant to Rule 12(b)(5), a complaint should be dismissed for failure to state a
19 claim "if it appears beyond a doubt that [plaintiff] could prove no set of facts, which,
20 if true, would entitle it to relief." *Buzz Stew, LLC v. City of North Las Vegas*, 124
21 Nev. 224, 228, 181 P.3d 670, 672 (Nev. 2008). The pleadings must be liberally
22 construed, and all factual allegations in the complaint accepted as true. *Blackjack*
23 *Bonding v. City of Las Vegas Municipal Court*, 116 Nev. 1213, 1217, 14 P.3d 1275,
24 1278 (Nev. 2000). Plaintiff's allegations must be legally sufficient to constitute the
25 elements of the claim asserted. *Munda v. Summerlin Life & Health Ins. Co.*, 127
26 Nev. 918, 923, 267 P.3d 771, 774 (2011). Dismissal is required where it appears
27 beyond a doubt the plaintiff could prove no set of facts entitling him to relief. *Id.*
28 Here, even if this Court finds that any claims remain against the State Defendants,

1 Plaintiff has failed to state a claim where any relief can be provided by the FID.

2 **B. The FID's regulatory power over a collection agency is**
3 **governed by Chapter 649.**

4 The FID's regulatory power over a collection agency is limited to the duties
5 and responsibilities found in NRS Chapter 649. NRS 649.051. The FID does not
6 regulate the contracts between collection agency and their attorneys, and does not
7 regulate the Justice Court's award of attorney fees.

8 Briefly, a collection agency includes all persons engaging in the business of
9 collecting, soliciting or obtaining the payment of a claim owed or due to another.
10 NRS 649.020. The customer is the person who authorizes or employs a collection
11 agency for any purpose authorized by Chapter 649. NRS 649.030. A collection
12 agency enters into a written agreement with its customer to collect the debt that is
13 owed to the customer by a third party creditor. NRS 649.334. The terms of the
14 contract between the collection agency and its customer must be clear and specific.
15 NRS 649.334.

16 The agreement between the collection agency and its creditor customer may
17 or may not provide for attorney fees. If interest is to be paid on the debt, it is
18 determined through the agreement between the customer and the collection agency.
19 NRS 649.334. When the collection agency remits the proceeds to its customer, it
20 may first deduct its court costs NRS 649.334(2).

21 The FID is empowered to adopt regulations concerning collection agencies,
22 but only concerning items such as; record keeping, preparing and filing reports,
23 handling trust funds and accounts, the transfer or assignment of accounts and
24 agreements, and the investigations and examinations performed by the FID.
25 NRS 645.056.

26 Aside from requiring that the contract between the collection agency and its
27 customer be specific and unambiguous, (NRS 649.334) the statutes and regulations
28 do not provide the FID the power or jurisdiction to investigate or enforce the

1 amount of money that a collection agency pays its attorney for court appearances or
2 any collection fees that justice court may impose. *See* Declaration of Mary Young,
3 Deputy Director of FID, attached hereto as Exhibit “A.”

4 The FID performs an annual examination of collection agencies. During the
5 examination, the examiner reviews the books and records of the collection agency to
6 ensure compliance with Chapter 649 and the Fair Debt Collection Practices Act.
7 Exhibit “A.” The FID reviews the contracts between the collection agency and its
8 customer as well as the contract that created the debt between the creditor and
9 debtor. The FID reviews the contract to see if interest, fees and costs can be
10 collected per the Contract, but not how much can be collected. Exhibit “A.” The
11 FID does not examine the agreement between a collection agency and its legal
12 representative. Awarding attorney fees are a function of the Justice Court and not a
13 function of the FID. As a result, dismissal of the FID is appropriate because the
14 FID cannot provide the relief that Plaintiff is seeking.

15 CONCLUSION

16 Based on the foregoing, Defendant FID must be dismissed from this case.
17 Plaintiff has failed to invoke subject matter jurisdiction because there is no case or
18 controversy between the FID and the Plaintiff and this case is not ripe. The
19 constitutional claims must be dismissed because the FID is not a person under 42
20 U.S.C. § 1983. Moreover, the FID cannot provide the relief that Plaintiff has
21 requested, because even if this Court grants declaratory and/or injunctive relief, the
22 FID does not have the power to regulate or enforce AB 477.

23 Respectfully submitted this 6th day of June, 2020.

24 AARON D. FORD
25 Nevada Attorney General

26 By: /s/ Vivienne Rakowsky
27 VIVIENNE RAKOWSKY (Bar No. 9160)
28 Deputy Attorney General
Attorneys for State Defendant FID

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **STATE DEFENDANT’S MOTION TO DISMISS AMENDED COMPLAINT** with the Clerk of the Court by using the electronic filing system on the 6th day of June, 2020.

Registered electronic filing system users will be served electronically.

/s/ Michele Caro
Michele Caro, an Employee of the
office of the Nevada Attorney General

EXHIBIT “A”

EXHIBIT “A”

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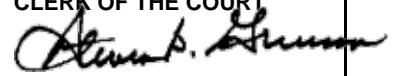
12. My understanding is that the Department of Business and Industry Consumer Affairs can act upon any complaint that is not regulated by a specific B&I agency.

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Dated this 22__ day of January 2020.

By: 

Mary M. Young
Deputy Commissioner
Nevada Department of Business & Industry
Financial Institutions Division



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Attorneys for Nevada Collectors Association

**DISTRICT COURT
CLARK COUNTY, NEVADA**

NEVADA COLLECTORS
ASSOCIATION, a Nevada non-profit
corporation,

Plaintiff,

v.

SANDY O'LAUGHLIN, in her official
capacity as Commissioner of State Of
Nevada Department Of Business And
Industry Financial Institutions Division;
STATE OF NEVADA DEPARTMENT
OF BUSINESS AND INDUSTRY
FINANCIAL INSTITUTIONS DIVISION;
JUSTICE COURT OF LAS VEGAS
TOWNSHIP; DOE DEFENDANTS 1
through 20; and ROE ENTITY
DEFENDANTS 1 through 20,

Defendants.

Case No.: A-19-805334-C

Dept. No.: XXVII

**SECOND REPLY IN SUPPORT OF NCA'S
MOTION FOR PRELIMINARY
INJUNCTION, OR ALTERNATIVELY,
FOR A WRIT OF MANDAMUS OR
PROHIBITION¹**

Hearing Date: June 17, 2020

Hearing Time: 10:00 a.m.

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¹This Reply Memorandum addresses issues raised in the FID's Opposition Brief, which was filed on June 15, 2020. Unless otherwise stated, this Reply employs the same defined terms at the Motion. Additionally, because the FID and Justice Court's Oppositions contain similar arguments, NCA incorporates by reference its arguments made in its Reply in support of its Motion for Preliminary Injunction ("First Reply"), filed on June 10, 2020.

1 **A. The Facts Are Undisputed.**

2 This is a Motion for Preliminary Injunction. NCA submitted its Motion containing dozens
3 of exhibits, including sworn declarations from the NCA, licensed attorneys, and small businesses,
4 all of whom contend that A.B. 477, particularly when applied to JCR 16, makes it cost prohibitive
5 to file suit in Las Vegas Justice Court in Small Dollar Debt cases. Remarkably, although this is a
6 Motion for Preliminary Injunction, **the FID did not submit a single piece of evidence in**
7 **response** and did not dispute a single fact asserted by NCA. The FID therefore does not contest
8 that these rules of law make it cost prohibitive to proceed to Justice Court in Small Dollar Cases.
9 Rather, its limited response is purely procedural—and wrong. Regardless, the FID’s total failure
10 to dispute the facts is telling, and because they do not dispute the facts, this Court may treat
11 NCA’s Motion—to that extent—as unopposed. *Schuck v. Signature Flight Support of Nev., Inc.*,
12 126 Nev. 434, 436, 245 P.3d 542, 544 (2010) (when a party fails to make arguments against the
13 grant of summary judgment in the district court, that party waives the right to make those
14 arguments on appeal); *Insegna-Nieto v. State Farm Mut. Auto. Ins. Co.*, 2013 WL 101400, at *7
15 (unpublished) (D. Nev. Jan. 7, 2013) (Mahan, J.) (“Failure to at least counter any of the
16 substantive arguments could alone be construed as consenting to all of the points in [the]
17 motion.”).

18 **B. The FID Has Primary Regulatory Authority Over Licensed Collection Agencies**
19 **Which Includes NCA’s Members.**

20 The FID contends that this Court has no jurisdiction over it because it is not expressly
21 empowered to regulate A.B. 477. FID Opp’n, at 2:10-4:2. This argument can only be described
22 as “too clever by half.” *No state agency is expressly assigned to regulate NRS Chapter 97B.* At
23 the same time, Nevada law *requires* a party suing the State of Nevada to name the appropriate
24 agency. NRS 41.031(2) (“In any action against the State of Nevada, the action must be brought
25 in the name of the State of Nevada on relation of the particular department, commission, board or
26 other agency of the State whose actions are the basis for the suit.”).

27 Tellingly, the FID does not suggest which state agency should be sued in its place.
28 Therefore, under the FID’s reasoning, the State could enact an unconstitutional rule of law, but

1 avoid constitutional challenge simply by neglecting to assign a government agency to the chapter
2 under which the law rests. The FID offers no legal authority for this nonsensical proposition and
3 its position offers no respite from the claims in this lawsuit.

4 Setting aside the foregoing, the FID is very much an appropriate defendant in this action
5 because it licenses and regulates NCA's members, namely, collection agencies. In Nevada, any
6 entity that recovers funds that are past due, or from accounts that are in default, is governed by
7 NRS Chapter 649 and NAC Chapter 649. *See* NRS 649.020 (defining "collection agency" as "all
8 persons engaging, directly or indirectly, and as a primary or a secondary object, business or
9 pursuit, in the collection of or in soliciting or obtaining in any manner the payment of a claim
10 owed or due or asserted to be owed or due to another."). NRS Chapter 649's stated purpose is to:
11 "(a) bring licensed collection agencies and their personnel under more stringent public
12 supervision;" "(b) establish a system of regulation to ensure that persons using the services of a
13 collection agency are properly represented;" and "(c) discourage improper and abusive collection
14 methods." NRS 649.045(2)(a)-(c). To that end, NRS Chapter 649 established a broad regulatory
15 scheme that covers all aspects of collections practices.

16 The Nevada Legislature granted the FID and its Commissioner primary jurisdiction for the
17 licensing and regulation of persons operating and/or engaging in collection services. *See*
18 *generally* NRS Chapter 649. Indeed, in order to operate as a collection agency in the State of the
19 Nevada, a collection agency must first submit an application and obtain a license from the
20 Commissioner. NRS 649.075(1). And just as the Commissioner is empowered to grant a
21 collection agency license to operate in the State of Nevada, the Commissioner can also administer
22 fines to a collection agency and/or suspend or revoke such license, if it is found that a collection
23 agency has violated a law prescribed to it. *See e.g.*, NRS 649.395.

24 The Commissioner is also charged with administering and enforcing the provisions in
25 NRS Chapter 649. The Commissioner is not solely limited to the powers under NRS Chapter 649,
26 as such chapter encourages the Commissioner to adopt provisions that may be necessary to carry
27 out the provisions of NRS Chapter 649. NRS 649.053 ("The Commissioner shall adopt such
28 regulations as may be necessary to carry out the provisions of this chapter.").

1 The FID minimizes its power by citing to NRS 645.056 for the proposition that the “FID
2 is empowered to adopt regulations concerning collection agencies, but only concerning items
3 such as: record keeping, preparing and filing reports, handling trust funds and accounts, the
4 transfer or assignment of accounts and agreements, and the investigations and examinations
5 performed by the FID.” This statement ignores the very regulations promulgated by the FID in
6 Nevada Administrative Code Chapter 649. See, e.g., NAC 649.105 (governing exemptions from
7 licensing), NAC 649.130 and NAC 649.140 (governing branch offices), NAC 649.2109 and NAC
8 649.220 (governing the responsibilities of managers), NAC 649.250 through NAC 649.280
9 (governing locations of agencies, fictitious names, and approval of machine-driven form letters).
10 Most notably, NAC 649.320 states that the Commissioner of the FID must deem a violation of the
11 FDCPA to be “to be an act or omission inconsistent with the faithful discharge of the duties or
12 obligations of a collection agency or collection agent and grounds for the suspension or
13 revocation of the license of the collection agency or collection agent.” NAC 649.320. In other
14 words, the Commissioner has the power to suspend or revoke the license of a collection agency,
15 or impose other lesser discipline, if she deems that a licensee has violated the FDCPA.

16 Collection agencies are also heavily regulated by federal law. The Fair Debt Collection
17 Practices Act (the “FDCPA”) is the main federal law that governs debt collection practices. 15
18 U.S.C. § 1692 *et seq.* In general, the FDCPA prohibits debt collection companies from using
19 abusive, unfair, or deceptive practices to collect debts from consumers. *See id.* The stated
20 purposes of the FCDPA is “to eliminate abusive debt collection practices by debt collectors, to
21 insure that those debt collectors who refrain from using abusive debt collection practices are not
22 competitively disadvantaged, and to promote consistent State action to protect consumers against
23 debt collection abuses.” 15 U.S.C. § 1692(e).

24 The Nevada Legislature granted the FID and its Commissioner authority to regulate
25 collection agency violations of the FDCPA. *See* NRS 649.370. In particular, NRS 649.370
26 provides that “[a] violation of any provision of the federal [FDCPA], 15 U.S.C. §§ 1682 *et seq.*,
27 or any regulation adopted pursuant thereto, shall be deemed to be a violation of this chapter.”
28 Relevant here, the FDCPA broadly prohibits a debt collector from using “any false, deceptive, or

misleading representation or means in connection with the collection of any debt.” 15 U.S.C. § 1692e. This includes the “false representation of the character, amount, or legal status of any debt; or any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.” 15 U.S.C. § 1692e(2)(A)-(B). And, as previously mentioned, NAC 649.320 empowers the Commissioner of the FID to suspend or revoke a license for a violation of the FDCPA.

As a general matter, there is no dispute that “litigation activity is subject to the FDCPA.” *Sayed v. Wolpoff & Abramson*, 485 F.3d 226, 231 (4th Cir. 2007); *see also Heintz v. Jenkins*, 514 U.S. 291, 299 (1995) (holding that a car loan borrower could pursue FDCPA claims against the lender’s counsel for falsely asserting in a letter that the borrower owed money for a particularly broad substitute insurance policy on the car); *McCollough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939, 951 (9th Cir. 2011) (“[T]he FDCPA applies to the litigating activities of lawyers.”) (quotation marks omitted)). FDCPA violations may even be found based on false allegations and requests contained in a complaint. *See Donohue v. Quick Collect, Inc.*, 592 F.3d 1027, 1032 (9th Cir. 2010) (“To limit the litigation activities that may form the basis of FDCPA liability to exclude complaints served personally on consumers to facilitate debt collection, the very act that formally commences such a litigation, would require a nonsensical narrowing of the common understanding of the word ‘litigation’ that we decline to adopt.”).

In the context of this case, there exist many cases where consumers have initiated lawsuits against collection agencies for requesting attorney fees that are not permitted under state law. *See e.g., Kirk v. Gobel*, 622 F. Supp. 2d 1039, 1046 (2009) (finding a violation of the FDCPA when a debt collection attorney claimed fees under a settlement statute where no settlement offer had yet been made, or could be made). Additionally, there are cases where consumers are challenging attorney fees in debt collection cases where no basis for such challenge exists. *See e.g., Elyazidi v. SunTrust Bank*, 780 F.3d 227, 231 (4th Cir. 2015) (where a consumer unsuccessfully alleged that an attorney misrepresented the requested attorney fees even though such fees were permitted by state law).

This Court is no doubt familiar with the FDCPA’s prohibition against a debt collector

1 making a false or misleading representation of “the character, amount, or legal status of any
2 debt.”² Indeed, since the FDCPA was enacted, the “false or misleading representation” prong has
3 become a classic “gotcha” provision for anyone seeking to assert a claim against a licensed debt
4 collector—with or without actual merit—arising from the mere assertion by a debt collector of
5 the amount of a debt owed by a creditor. If consumer protection attorneys can make such
6 assertions, so can the FID.

7 Here, as outlined in the Complaint, NCA members consist of licensed collection agencies
8 that are subject to the provisions of NRS Chapter 649. Specifically, NCA members consist of
9 small businesses such as collection agencies, law firms, and asset buying companies that engage
10 in the business of collecting unpaid debt on consumer contracts that are past due or in default.
11 Accordingly, the FID and its Commissioner regulate the conduct of many NCA members.³

12 It is clear that the perimeters of what constitutes as a violation under the FDCPA are
13 broad. And, there can be no reasonable dispute that the FID and its Commissioner have the
14 authority to regulate collection agencies based upon purported violations of the FDCPA. Under
15 this regulatory framework, simply requesting attorney fees above and beyond the 15 percent
16 allowed under A.B. 477 subjects collection agencies to possible discipline under NRS Chapter
17 649. Accordingly, the FID cannot credibly deny that it has the regulatory authority to regulate the
18 conduct of collection agencies under A.B. 477.

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22 ² See e.g., *Seare v. Bank of New York Mellon*, No. 2:16-cv-00907-JCM-CWH, 2017 WL 736878,
23 at 4 (D. Nev. 2017) (where a plaintiff unsuccessfully attempted to initiate a suit under 15 U.S.C. §
24 1692e for a non-judicial foreclosure); *Bradford v. Patenaude & Felix*, No. 2:12-CV-42 JCM
(GWF), 2012 WL 5288765, at *5 (D. Nev. 2012) (“The factual allegations included in the
25 complaint, including those incorporated by reference in paragraph 16, fail to allege in any
26 modicum of detail exactly what P & F did that violated [the FDCPA].”).

27 ³ The FID is correct that NCA cannot sue a state agency under 42 U.S.C. § 1983. See *Wolfe v.*
28 *Strankman*, 392 F.3d 358, 364 (9th Cir. 2004). At the time it initiated this lawsuit, NCA was
unaware of the identity of the FID’s Commissioner because the prior Commissioner had stepped
down. It was not until January 2020 that NCA learned of the newly-appointed Commissioner’s
identity. NCA will file a Motion to Seek Leave to Amend the Complaint concurrently with this
Opposition.

C. The FID Failed To Oppose Numerous Legal Issues.

In addition to failing to dispute any facts, the FID has also ignored—and thus does not oppose—a number of legal issues raised in NCA’s Motion for Preliminary Injunction. Most notably:

- The FID failed to address the obvious equal protection defect arising from A.B. 477’s express exemption for banks and payday lenders. It offers no explanation, justification, or rationalization as to why some consumer creditors have their attorney’s fees capped, while other consumer creditors do not. As a result, the FID does not dispute that this exemption violates equal protection, and a preliminary injunction is warranted on this basis alone.
- The FID offers no explanation, justification, or rationalization as to why the attorney’s fee cap in A.B. 477 is set at 15%, as opposed to some other amount. As a result, the FID does not dispute that the amount of the 15% attorney fee cap is arbitrary and capricious, and a preliminary injunction is warranted on this basis alone.
- There is no dispute that NCA members are required by the FDCPA to file their lawsuits in the judicial district in which the debtor resides, or where the contract was formed, effectively precluding NCA members from filing in a forum outside of Nevada. *See* 15 U.S.C. § 1692i.
- There is no dispute that NCA members have a constitutional right to retain counsel. *See e.g., Powell v. Alabama*, 287 U.S. 45, 68-69 (1932).
- There is no dispute that NCA members have a constitutional right to a jury trial in Justice Court. *See Cheung v. Eighth Judicial Dist. Ct. ex rel. Cty. of Clark*, 121 Nev. 867, 870, 124 P.3d 550, 553 (2005).

The FID’s failure to oppose the foregoing legal issues is, again, a consent that these arguments have legal merit and that the Court should grant NCA’s Motion as to these issues. *Schuck* 126 Nev. at 436, 245 P.3d at 544; *Insegna-Nieto*, 2013 WL 101400, at *7.

D. NCA is Likely to Succeed on the Merits.

A.B. 477 arbitrarily caps the amount a debt collector, in a lawsuit for unpaid debt, can recover in attorney fees to 15%. NCA has provided ample undisputed evidence showing that this cap makes it cost prohibitive for attorneys to represent debt collectors in Small Dollar Cases in Justice Court. For example, while the average hourly rate for a consumer law attorney with 3-5 years of experience is \$290.00, A.B. 477 makes it so that a prevailing plaintiff would be limited to an award of a **total** of \$75.00 in attorney fees on an unpaid \$500.00 consumer debt, or \$150.00 in attorney fees on a \$1,000.00 consumer debt. NCA members have already been notified by their attorneys that they will not continue to represent them in Small Dollar Cases once A.B. 477

1 is effective.⁴ Without an attorney, NCA members cannot pursue debt collection cases in Justice
2 Court because JCR 16 prohibits entities from appearing in Justice Court without an attorney.
3 A.B. 477, in conjunction with JCR 16, effectively prevents NCA members from having “the
4 opportunity to prepare, serve and file whatever pleadings or other documents are necessary or
5 appropriate in order to commence or prosecute court proceedings affecting one’s personal
6 liberty....” *Hatfield*, 290 F.2d at 637. In other words, A.B. 477, in conjunction with JCR 16,
7 violates NCA members’ right to meaningful access to the courts.

8 **1. Small Claims Court is Not an Adequate or Appropriate Remedy.**

9 The FID argues that smalls claims court is a viable alternative to Justice Court. FID
10 Opp’n, at 11:24-25. As fully explained in NCA’s First Reply, smalls claims court is not a
11 solution to A.B. 477 and JCR 16’s infringement on NCA members’ constitutional rights.

12 The Nevada Supreme Court has stated, “[h]istorically, there is a distinct difference
13 between justice court and small claims court, and this difference is found in the sole reason for
14 small claim courts’ existence: to provide an avenue for speedy and effective remedies in civil
15 actions involving minimal sums.” *Cheung*, 121 Nev. at 874, 124 P.3d at 556. One major
16 difference is that there is a right to a jury trial in Justice Court, while there is no such right in
17 small claims court. *Id.*; JCRCP 38(a). Furthermore, unlike Justice Court, “in small claims court a
18 party is not permitted to conduct depositions or other discovery; neither party may obtain attorney
19 fees; the plaintiff may not seek any prejudgment collection; the proceedings are summary,
20 excusing strict rules; and the collection of any judgment may be deferred and otherwise
21 determined by the justice of the peace.” *Cheung v. Eighth Judicial Dist. Court ex rel. Cty. of*
22 *Clark*, 121 Nev. 867, 872, 124 P.3d 550, 554 (2005).

23 The civil matters in which Justice Courts have jurisdiction over are dictated by NRS
24 4.370. Specifically, Justice Courts have jurisdiction over civil “actions arising on contract for the
25 recovery of money only, if the sum claimed, exclusive of interest, does not exceed \$15,000.”
26

27 ⁴ A.B. 477 is now effective and applies to all consumer form contracts entered into on or
28 after October 1, 2019.

1 NRS 4.370(1)(a). Nearly all of NCA members' accounts receivable consists of unpaid small
2 dollar consumer debts in amounts of \$5,000.00 or less. ECF No. 12, Appendix Vol. III, at
3 NCA000489 and NCA000497. Accordingly, NCA members have rightfully brought debt
4 collection lawsuits to Justice Court. Such a right cannot be chipped away by imposing extra
5 barriers such as A.B. 477 and JCR 16's combined effect. This is especially true when those
6 barriers are only imposed on debt collectors for no other reasons beyond the fact that they are
7 debt collectors. Small claims court is simply not a solution.

8 **3. NCA Members Claim is Ripe for Judicial Review.**

9 The FID also claims that this matter is not ripe because NCA members' injury is only
10 speculative. FID's Opp'n, at 3:14-4:11.

11 Under the ripeness doctrine, courts weigh the following factors: "(1) the hardship to the
12 parties of withholding judicial review, and (2) the suitability of the issues for review." *Herbst*
13 *Gaming, Inc. v. Heller*, 122 Nev. 877, 887, 141 P.3d 1224, 1230-31 (2006). Further, a "plaintiff
14 must have suffered an 'injury in fact'—an invasion of a legally protected interest which is (a)
15 concrete and particularized, and (b) 'actual or imminent, not conjectural or hypothetical.'" *Lujan*
16 *v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

17 Here, NCA injury in this matter is neither hypothetical nor speculative. And, in fact,
18 because the factual record is undisputed, the FID concedes the following:

- 19
- 20 • Section 18 of A.B. 477 effectively prevents Aisen Gill, counsel for Clark County
21 Collection Service, from representing clients in Small Dollar Debt Cases because it is
22 cost prohibitive to do so. Motion, Appendix, at NCA000506-510.
 - 23 • The Langsdale Law Firm and all lawyers within the purview of A.B. 477 will be
24 forced to either give up work or to continue accepting placements at such a low fee
25 cap that quality and attorney oversight will suffer, given that litigation will be subject
26 to the 15% cap of Section 12 and patently unfair provisions of Section 19. Motion,
Appendix, at NCA000513.

27 Indeed, when this case was before him, United States District Court Judge James C.
28

1 Mahan acknowledged that “the complaint arguably shows that NCA will suffer immediate and
2 irreparable injury.” Case No. 2:20-cv-0007-JCM-EJY, ECF No. 13. As shown from the
3 testimony of Mr. Goatz, A.B. 477 was enacted with the targeted purpose of deterring attorneys to
4 take on Small Dollar Debt Cases. The damage was done once A.B. 477 took effect and worsens
5 with each passing day, as unpaid accounts continue to pile up.

6 Specifically, since A.B. 477 took effect on October 1, 2019, NCA members have accounts
7 that are subject to this new law that have been placed for collection where those members
8 effectively cannot proceed in Justice Court because it would be cost prohibitive to do so. Motion,
9 Decl. of T. Myers at ¶ 10; Exhibits 12 and 13. Because of the crippling effects of A.B. 477, in
10 conjunction with JCR 16, NCA members’ ability to sue on unpaid debts is already being
11 interfered with. In sum, this matter is very much ripe for judicial review to determine the solitary
12 issue in this matter: Whether A.B. 477, in conjunction with JCR 16, is unconstitutional.

13 **III.**

14 **CONCLUSION**

15 For the foregoing reasons, NCA respectfully requests that the Court grant its Motion for
16 Preliminary Injunction, or Alternatively, for a Writ of Mandamus or Prohibition and thanks the
17 Court for its time and attention to this matter.

18 DATED this 16th day of June, 2020.

19
20 /s/Patrick J. Reilly
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), and Section IV of District of Nevada Electronic Filing Procedures, I certify that I am an employee of BROWNSTEIN HYATT FARBER SCHRECK, LLP, and that the foregoing **SECOND REPLY IN SUPPORT OF NCA'S MOTION FOR PRELIMINARY INJUNCTION, OR ALTERNATIVELY, FOR A WRIT OF MANDAMUS OR PROHIBITION** was served via electronic service on the 16th day of June, 2020, to the addresses shown below:

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