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

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

JOINT APPENDIX – VOLUME VIII

Patrick J. Reilly, Esq. (Nevada Bar No. 6103)
Eric D. Walther (Nevada Bar No. 13611)
BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
Tel: 702.382.2101 / Fax: 702.382.8135
Email: preilly@bhfs.com
ewalther@bhfs.com
Attorneys for Nevada Collectors Association

JOINT APPENDIX – VOLUME VIII

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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
Las Vegas, NV 89106-4614

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 VIII** 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:

Aaron D. Ford, Attorney General
Michelle D. Briggs, Chief Deputy Attorney General
Donald J. Bordelove, Deputy Attorney General
State of Nevada
Office of the Attorney General
555 E. Washington Avenue, Suite 3900
Las Vegas, Nevada 89101
mbriggs@ag.nv.gov
dbordelove@ag.nv.gov

Attorneys for State Respondent

/s/ Mary Barnes
An employee of Brownstein Hyatt Farber Schreck, LLP

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Steven D. Grierson
CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

NEVADA COLLECTORS ASSOCIATION, a Nevada non-profit corporation, Plaintiff(s), vs. STATE OF NEVADA DEPARTMENT OF BUSINESS AND INDUSTRY FINANCIAL INSTITUTIONS DIVISION, et al., Defendant(s).	CASE NO: A-19-805334-C DEPT. XXVII

BEFORE THE HONORABLE NANCY ALLF, DISTRICT COURT JUDGE

WEDNESDAY, JULY 1, 2020

RECORDER'S TRANSCRIPT OF PROCEEDINGS
RE: PENDING MOTIONS

APPEARANCES (VIA VIDEO CONFERENCE):

For the Plaintiff(s): PATRICK J. REILLY, ESQ.

For the Defendant(s): THOMAS D. DILLARD JR., ESQ.
VIVIENNE RAKOWSKY, ESQ.

RECORDED BY: BRYNN WHITE, COURT RECORDER

LAS VEGAS, NEVADA; WEDNESDAY, JULY 1, 2020

[Proceedings commenced at 9:30 a.m.]

THE COURT: It's 9:30. I'm calling the case of Nevada Court Association versus O'Laughlin. Appearances, please, for the first -- for the plaintiff.

And a polite reminder to unmute yourself when you're speaking.

Is there an appearance from the plaintiff?

Is there an appearance from the defendant?

MR. DILLARD: Good morning, Your Honor. Tom Dillard on behalf of the Las Vegas Justice Court.

MS. RAKOWSKY: Good morning, Your Honor. Vivienne Rakowski on behalf of the Financial Institutions Division.

THE COURT: Thank you. So let's wait just a moment until the plaintiff gets on the line.

And (indiscernible), you're in the courtroom?

THE COURT RECORDER: Yes, I am.

THE COURT: And will you be able to see when Mr. Reilly joins us?

THE COURT RECORDER: Possibly. If his name shows up. If he shows up with a number, I won't know if it's him or not.

THE COURT: Okay. If something pops up, will you let us know?

THE COURT RECORDER: Yes.

MR. GREY SUIT: I'll reach out to him as well, Judge, just in case he didn't receive the minute order.

THE COURT: Thank you. So Mr. Dillard and Ms. Rakowsky, have either of you been in touch with Mr. Reilly about today's hearing?

MR. DILLARD: Your Honor, I can tell you Mr. Reilly was kind of a mover and shaker to get this set up after the last one so -- there was a series of minute orders that came out -- I don't know if there was different information on them in terms of the link -- that's the only thing I can speculate.

THE COURT: There was some confusion on our end. I agree. And to all of you, I apologize here.

Go ahead.

MR. DILLARD: No, Your Honor. In fact, I need to apologize to you. It was me and my being a technological dufus that interrupted your last hearing. I apologize for that but --

THE COURT: It's all right.

MR. DILLARD: -- from our office, we can call now as well.

THE COURT: Okay. So let's -- let me just put you guys on mute for a minute while we reach Mr. Reilly.

MR. REILLY: Good morning.

THE COURT: Okay. This --

MR. REILLY: Good morning, Judge.

THE COURT: Good morning.

(Indiscernible) starting with the plaintiff first.

MR. REILLY: Pat Reilly appearing on behalf of the Nevada Collectors Association.

MR. DILLARD: Tom Dillard, Your Honor, on behalf of the Las Vegas Justice Court.

MS. RAKOWSKY: Good morning, Your Honor. Vivienne Rakowski from the Attorney General's Office on behalf of the Financial Institution Division.

THE COURT: Thank you all.

This is the plaintiff's motion for preliminary junction, the defendant's Motion to Dismiss. I believe that the motions are case dispositive. I also think they can be argued together.

What I would suggest is that the plaintiff argue the Motion for Preliminary Injunction. In your opposition to that, defendants, please address your Motion to Dismiss. Then in the reply, Mr. Reilly can address the things he needs to address.

I -- we have some limited time this morning. We really only have until 10:00. I am fully briefed -- briefs both from my law clerk and an extern -- so you can assume that we are well prepared.

Is there any objection to going forward on that basis?

MR. DILLARD: No objection, Your Honor.

MS. RAKOWSKY: No, Your Honor.

MR. REILLY: No objection at this time.

THE COURT: All right. So let's hear from Mr. Reilly first then Mr. Dillard then Ms. Rakowsky.

MR. REILLY: Good morning, Your Honor. Pat Reilly

appearing on behalf of the Nevada Collectors Association.

I will skip to the Motion for Preliminary Injunction first. The parties to have dispute as to what the standard of review is, whether it's strict scrutiny or rational basis. It's said that NCA's position that because this case involves fundamental rights that strict scrutiny does apply, and the rights that we're talking about are access to courts, access to an attorney, right to a jury trial, and the equal protection of rights and due process among litigants in a courtroom.

The defendants assert that a rational basis standard is appropriate. AB 477 fails under either standard even under rational basis because there's no rational basis for the bank/payday lender exception or for the amount of the attorney's fees cap.

And I want to start with a proposition that determining reasonableness of attorney's fees in civil cases is unquestionably a court function. There was an argument that was made that this involves separation of powers and that my client has not contested that.

I think the whole point of this case is about separation of powers and kind of the invasion of the Court's fundamental and traditional assessment of reasonableness of claimed attorney's fees.

And I want to be clear, this is not about my client's whining that they aren't going to be able to recover all of their fees in a given case. This is about a cap that is so oppressive and burdensome that it effectively makes it cost prohibitive for them to access justice court cases when they have a jurisdictional right to be there.

So -- and let me start with legislative bodies, which generally set jurisdictional boundaries for courts. And the perfect example is federal diversity cases. You have diversity plus an amount in controversy in excess of $75,000. That dollar amount's changed over the years. It used to be $50,000, and I think before that it was $10,000.

So these boundaries can be changed, and there's no issue with that. But the boundaries apply to everyone, and what you can't do, is you can't erect -- you cannot erect barriers for some people but not others within those jurisdictional boundaries. And there's not a single case cited to by the defendants where the Court has approved to scheme that is specifically designed to discourage people with lawful claims who are entitled to access to a specific court from filing those claims.

AB 477 cynically leverages attorney representation rules, particularly Justice Court Rule 16, and puts a cap on fees at 15 percent. There's no discussion of why it's 15 percent, and it's arbitrary and capricious on that basis alone. This was designed to force consumer debt collectors out of justice court simply because they are consumer debt collectors.

So we're on a Motion for Preliminary Injunction. Let me skip ahead. We have an unopposed factual record. That's very significant in this hearing because the defendants don't dispute the math. They don't dispute Mr. Meyers' declaration in Exhibits 38 and 39, which show specific actual accounts that have been placed for collection

where my clients can't go to justice court because they'll only recover $34.92 on the $232.78 unpaid account. So even if the case is uncontested and a default judgment is issued, that's a guaranteed money loser for the prevailing party, and they're better off not filing the lawsuit. There's no dispute to that.

And so, I mean, Judge, you were a practicing lawyer, would you take one of these cases? Would Mr. Dillard? I -- I mean, I know I wouldn't. And neither would Mr. Eisen and Mr. Langsdale, because they have submitted declarations that are undisputed.

And, really, there is no factual dispute that AB 477 combined with Justice Court Rule 16 makes it cost prohibitive for debt collectors to pursue small dollar debts in justice court, even though there's jurisdiction over those claims themselves.

And this affects all consumer claims. So we're not just talking about small businesses like landscapers. We're talking about utility debts, medical debts. I mean, for the last several months we've been talking about healthcare workers and what heroes they are, and yet this law deliberately and specifically gets in the way of these types of professionals getting paid. Many of these debts are medical debts.

Here's what's also significant about this motion. There are a number of legal arguments that are undisputed. The bank and payday loan exceptions to the -- to AB 477 violate equal protection. There's no argument against it, and there's no way you could argue against it. Because a caterer could extend credit and would be

subject to this cap, but a bank wouldn't be when it makes a loan and tries to recover in justice court.

There's no dispute that the 15 percent cap is arbitrary and capricious. Why isn't it 30 percent? Why isn't it 50 percent? There's no discussion of it in the legislature. It simply rubber-stamped Mr. Goetz's request for this law.

So there -- and there's no dispute that the fee shifting provision in favor of debtors is a violation of equal protection. These are deficiencies, double standards, and fundamental unfairness taking place in, of all places, a courtroom. A courtroom is not a place where we should be playing favorites. We have sky boxes and cheap seats in baseball stadiums, not courtrooms. Yet my clients, with this law, are being treated like second-class citizens.

The responses go to small claims court. To me that's the surest sign that this was an indefensible law, and the defendants know it. No one is arguing that this doesn't create unfairness, but logically the argument doesn't make any sense. For the argument to make sense, you have to have an apples-to-apples comparison.

Small claims court needs to give you the same types of rights and remedies that you would have in justice court, but we know you don't have that. You have this Hobson's choice of deciding if you're going to not file a lawsuit because you'll lose money in a justice court case even if you win, or go to small claims court and give up your statutory right to execute on your judgment, give up your right to prejudgment execution, give up your right to a jury trial,

give up your right to counsel, give up your right to discovery, and go to a summary proceeding where you have your case heard with basic procedures. This is not an apples-to-apples trade-off.

In terms of the remedy, I -- we've asked for an injunction against both laws. I would suggest to the Court that an injunction or a writ of prohibition against the enforcement of AB 477's provisions might be the more measured approach because by doing that, you would preserve the lawyer representation rule, which standing on its own is otherwise constitutional. And I think it's a good -- it's a good rule. And it also might not be at the need for an injunction against the FID because there's really effectively no likelihood that the FID would be entering into any kind of administrative discipline proceeding for violating a rule that's been enjoined.

So with that let me briefly address the motions to dismiss. There are several arguments. One is judicial immunity, which I don't really understand because justice court is not immune from local rules being unconstitutional, and it's not immune from a challenge. We cited to a number of Ninth Circuit cases that identify that, yes, indeed you can challenge a local rule.

I don't think that anybody suggests that if you -- if a court issued a local rule that discriminated based on race or national origin, that it would be immune from a challenge. That's an astonishing argument. So I don't think immunity applies.

Both defendants have argued in favor of rightness, that the case isn't right, the case does not involve an actual injury. I'd like to

point out the obvious. There is a declaratory relief claim that we're not dealing with today, but AB 477 conflicts with a number of other rules, offers of judgment rules, mechanics liens statutes, attorney liens, and other rules that are right today and that need to be decided ultimately by this Court if AB 477 does indeed survive.

But even setting that aside, the -- there are a number of allegations in the first amended complaint, and I could go through the numerous paragraphs that allege actual injury and actual harm occurring right now. Right now.

And then we've got, as I said, an unopposed factual record and a Motion for Preliminary Injunction where we have actual accounts, unpaid accounts that have been sent to collection where my clients effectively can't go to justice court. So it's -- the ripeness and actual injury arguments simply do not prevail.

Finally, that the FID makes an argument that -- it's an interesting one -- it says, well, we don't have any jurisdiction over NRS Chapter 97(b). This law falls under NRS Chapter 97(b), and we've been given no jurisdiction over these types of laws. They're absolutely correct about that. The problem with it is that it misses the point entirely. The FID regulates debt collectors. My client's members are licensed debt collectors under NRS Chapter 649, and I've been defending consumer FDCPA cases for years.

The argument that I hear over and over again is that someone misrepresents a debt and violates the FDCPA by seeking a dollar amount in excess to which it is entitled. I don't think it's a great

argument, but it gets made all the time by consumer protection attorneys, and there's no reason why the FID wouldn't make it an administrative proceeding. In fact, it was just made in *Gomez v. Calvary Portfolio Services*, which was decided by the Seventh Circuit less than two weeks ago. I cited to it in Footnote 11 on page 24 of my opposition brief.

And while it's great that the FID contends that it doesn't have jurisdiction over NRS Chapter 97(b), there's really nothing to stop it from commencing regulatory proceedings against licensees for seeking the full 100 percent of their attorney's fees in justice court.

The other problem with it is that how do you challenge an unconstitutional state law when there's no agency assigned to the law? That's a neat trick. That's a great way for the State to avoid a constitutional challenge, but, you know, how do you challenge a law that isn't assigned to a particular regulatory agency? And it's too clever by half.

We sited to NRS 41.031 Sub 2. When you sue the State of Nevada, you have to sue an official. So who do I sue? I've been asking the FID this question for six months. I'll be glad to amend. In fact, I've already amended once to have Commissioner O'Laughlin after the FID objected that she wasn't named as a party. So who do I sue? The attorney general? The governor? Deputy Attorney General is still going to come in here and still try to defend this unconstitutional law.

So -- and then finally there's an argument about separation

of powers. And, again, I want to get back to the fact that we've -- that's one of our -- the principle point of this lawsuit is that the legislature has invaded the separation of powers where the -- where the courts are the primary place where attorney's fees and the reasonableness of those attorney's fees are decided in cases. Maybe we didn't articulate it as well as we should have, but this is definitely a separation of powers case, and AB 477 is an invasion of that separation of powers.

I don't want to hog all the time. Ms. Rakowski and Mr. Dillard should get a chance to go as well. So if the Court doesn't have any questions, I'll be glad to submit to this Court. And thank you for the time.

THE COURT: I don't. Thank you.

Mr. Dillard then Ms. Rakowski.

MR. DILLARD: Thank you, Your Honor.

Let me ask at the beginning -- and I'm happy to respond -- I'm mindful of our time limitation. If the Court is familiar with our briefs, I think the question -- the conclusion immediately suggests itself.

There's very little from a constitutional doctrinal standpoint that I agree with from -- by the plaintiff's argument there. There was no case citations to any of that mantra at all. We went through in great detail citing case after case about the -- what's problematic constitutionally with this. I should say, the justice court does not have any skin in the game about AB 477 or how -- where it's been

codified -- I don't know -- in Title 8.

The justice court rule in question is reiteration of both common law, clear law from the Supreme Court, and indeed the Nevada Supreme Court and that -- the most recent passage of that local rule was 2007, some twelve years before the passage of AB 477.

I say that for a couple reasons. One, I think the plaintiff's argument here in how it's being rephrased or reframed by the plaintiff seems to me quite -- don't quite understand why they don't understand what we are saying, other than wanting to set up a strongman.

An argument for immunity is this: A lower court has immunity for following the law of the -- a controlling court. Justice Court Rule 16 is nothing more than a reiteration of not only common law, what's been set by the United States Supreme Court, and, indeed, I think on three occasions, Nevada Supreme Court. It just memorializes that case law. So that's the basis of our immunity. It has nothing to do with arguing that justice court is cloaked with immunity when passing local rules. We've never argued that. But that's the response.

The argument is, Your Honor, which was never engaged in all the briefing, is there immunity for simply following the controlling law? And if the answer is yes, then we need not delve into these constitutional issues, I think which -- I'm going to need a lot of time to respond if the Court has any questions.

So let me ask it this way. To set up argument briefly, our

position is: These cases that we've been sued under federal law for denial of access to the court. In the '80s and '90s, these cases took a very specific grounding in the first amendment. They had to do with the prisoner law library cases and this 2002 *Christopher v. Harbury* case, and it set up very specific elements. Now, those access to court cases deal with what I would call an obstacle to a remedy.

Plaintiff is coming back and citing, at least in the preliminary injunction, cases beginning with *Boddie* that talk about an absolute closure of the Courthouse doors, complete denial of access. And that is -- that *Boddie* case involves installing mandatory filing fees for seeking a divorce. And the Court found in that case, yes, Connecticut can put in constitutionally an irrational basis scrutiny filing fees in general. But when you make that a mandate for such a fundamental basis as the union of marriage -- and that's the only place one can go to get dissolved -- that's an absolute denial and a fundamental right. For that limited area they apply strict scrutiny.

Now, we have cited case after case in terms of every other litigant that's come up and tried to use *Boddie* as a basis to suggest strict scrutiny ought to apply. We cited the *Crass* case where they rejected it for bankruptcy. We cited the *Horween* case which rejected it for modifying welfare benefits, the *MIB v. SGB* case -- they're footnoted -- and I won't go through all of them, but time after time that case has been set forth to say when only you install an absolute bar to the courthouse doors on a fundamental interest, does strict scrutiny apply.

And so these cases are litigated and all the cases having to do with bar restrictions about licensed or disciplined attorneys trying to appear, about foreclosures of attorneys appearing in other jurisdictions, about all the ethical rules that we have and all of them are applied under a rational basis scrutiny against the argument that, well, you're imposing on my access to courts. And that in and of itself is a universal fundamental right.

If there's any constitutional provision that can be drawn from the cases we cited, it is absolutely true there is no absolute right access to the Court. And to make a suggestion otherwise is defying countless years of case law.

What we pointed out, Your Honor -- and as crazy as it might be -- a lot of constitutional Law I students in law school say, why are we studying so much these 1930 cases about the New Deal that have to do with the Lochner era of elevating some economic right as subject to strict scrutiny? Well, those cases died 80 years ago. To have this Court in an economic standpoint come in and step in and second-guess the legislature.

As I said, we don't have any dog in the fight about AB 477, but in light of the claims brought against the justice court, we cited case law regarding vexatious litigants that the legislatures pass laws that foreclose the courthouse doors when a litigant has filed three vexatious claims. Upheld is constitutional rational basis. We cited the PLR cases that are so directly on point here in addition to the federal context.

Congress passed a law in 1997 that substantially modified Section 1988 in civil rights cases for prisoner plaintiffs. Section 1988 gives -- would have given any prevailing party all their attorney's fees on -- in a meritorious case, mind you.

In 1997 Congress said, yes, but we're limiting that to only recovery of 25 percent based on the amount of dollars recovered, substantial limitation in 1988. Normally the issue in 1988 is, you get a dollar in nominal damage for a constitutional right. You can turn around and get hundreds of thousands of dollars under 1988, but there they said, we're not allowing that for these particular plaintiffs. Why? Economic reasons. And we've cited ten cases from all the appeals courts that have looked at that and decided they were constitutional, including -- I really want to point out because I think it's brilliant language in the *Johnson* case from Judge Easterbrook about what's going on here.

All arguments that counsel made, I think, have merit but are properly made in a legislative body. What rational basis is, Your Honor, is: There is a presumption that what the legislature has done is constitutional. That's the presumption in this case, and someone attacking that -- a law or legislative act based on rational abuse -- rational basis must negate every single colorable basis for that law.

The title of this law is Consumer Protection from the Accrual of Predatory Interest After Default Act. And seemingly -- and wasn't there, but the basis for it is the Court can draw objectively, the

legislature wanted to protect consumers to get a low-level debt from then coming out of court with a huge debt. Right or wrong, good or indifferent, rash -- wise or not, is not this Court's prerogative with all due respect. And that's what you're asked to do to validate AB 477.

It's a point of indifference the justice courts, whether you do it or not, other than it's a predicate for the claim against the justice court. I would just -- so for the oppositions the preliminary junction there certainly has not been a basis to show a probable, favorable outcome when it comes to these issues of law.

Secondly, I don't think this was briefed, but I have to concur that if the Court is looking at keeping the justice court in this case, the preliminary junction, now modified to just AB 477, is the more prudent choice because obviously there's a public interest in having attorneys represent corporations in justice court that have to, by ethical rule, take Rule 11, as their guide when a pro per litigant does not.

With respect to the Motion to Dismiss, these -- the first amendment cases that talk about a denial of some remedy is that *Harbury* case, it's those elements that have not been met, including showing an actual injury. So the justice court is not arguing rightness; they're arguing the element of actual injury as required by the *Christopher v. Harbury* case to put on an access to court's section 1983 has not been met.

There's no foresee ability causation because the justice court rule came in 12 years before the AB 477, so there can be no

foreseeability that the justice court stepped in to frustrate some claim for the plaintiff. And there is no absolute right to access -- and I'll just rely upon the briefs in terms of all the cases we cited here, Your Honor -- dealing with *Boddie* and it's progeny and the litany of litigation that also imposes restrictions on litigants, including statutes of limitations.

The ultimate argument, here, from plaintiff is you have to apply strict scrutiny to a statute of limitations. You have to apply strict scrutiny for NRS 41.035 that would limit $100,000 recovery when you sue a governmental entity.

And we cited the *Duke* case for the Nevada -- where the U.S. Supreme Court put a cap on Federal claims, and the *Duke* case held that that was just an economic legislation that subject to rational basis scrutiny and not appropriate for judicial second-guessing.

Thank you, Your Honor.

THE COURT: Ms. Rakowsky. Ms. Rakowsky, do you have something to add? Please unmute yourself.

MS. RAKOWSKY: I was muted. I apologize, Your Honor.

Yeah. The only reason that Mr. Reilly has named the (indiscernible), and he admits it, is because he didn't know who else to name. And he goes (indiscernible) claiming that he had to name some agency, but he doesn't read the whole rule.

The (indiscernible) has to be the one (indiscernible) actions are the basis for the suit. The FID has not done anything. They -- the legislature did not give this jurisdiction to the FID, and Pat -- Mr. Reilly

brings up the association services case, and that case is clear that the FID or any other state agency cannot -- outside the jurisdiction given to (indiscernible) legislature. So that case shows it. The FID can't turn around and -- and enact the regulation expanding its jurisdiction. The jurisdiction's very limited to the four corners of Chapter 649.

So the legislature did not designate the FID to enforce AB 477. Chapter 649 only regulates collection agencies that collects debt owed to another. They do not -- and there's a lot of exemptions from that, including attorneys that do collections. We don't regulate attorneys.

Most of Mr. Reilly's examples had -- had attorneys that were sued under the federal act, not collection agencies themselves. We also -- the FID also does not regulate all the little businesses he was talking about, like landscapers and caterers and anybody that extends credit on their own products, are not regulated by the FID. So it's only a very small portion of the plaintiff's clients that are -- that are actually regulated.

And they don't regulate -- the FID absolutely does not regulate the amount of attorney's fees the justice court can award. They don't regulate JR16 requiring attorney to appear. They've not enforced AB 477 or even made any threats of -- enforcing AB 477 because they cannot do it. So if the legislature didn't grant jurisdiction, the FID can't do anything about it.

Now, while the FID does enforce (indiscernible), it's only violation by licensees. It's not by violations of -- of people who

finance their own products. And if up against collection attorneys (indiscernible) -- but with only against our specific licensees and if -- and if violate the FDCPA, they -- they will be subject, they are subject to discipline, but it has to be the violation under FDCPA. And the cases that Mr. Reilly cited are not for asking for too much attorney fees. One of them was for asking for attorney fees when attorney fees were not allowed under the contract. And that has always been a violation of FDCPA. It's not -- it's not changed under AB 477. So the FID really can't even grant any relief that Mr. Reilly has requested, and I think he believes to too.

There's also interesting questions that Mr. Reilly didn't address. AB 477 was first introduced on March 25th, 2019, to the assembly. Section 18 calls for 15 percent. It was not enrolled until June 1st, 2019. It passed the assembly on 4/23/19 by a 29-to-12 vote. It was read three times, three different occasions before being moved to the Senate. It's passed by May 24th, 2019, by a 20-to-0 vote, which is pretty -- it's (indiscernible) as it gets. And it was also read three times on three different occasions.

Where was Mr. Reilly's clients when this was being enacted by the legislature? Because that's where Mr. Reilly's clients should have been. They should've made comments. They should've contacted their lobbyist. They should have contacted the legislature. They didn't do that and now -- now that it's enacted, all of a sudden they want to have an injunction and they want this Court to declare it unconstitutional when the legislative intent was very clear on what

they did. So I take issue with that issue.

Also, Mr. Reilly sat here and said that nobody objected to his facts. Well, in the -- in our -- in the FID's opposition, they talk about Mr. Reilly's facts throughout the brief. They talk about the -- the declarations, and they talk about the invoices. And they ask specifically, when you have a debt of $426 and there's a collection fee of $229.40 added, where is that going to? Is that going to attorney fees? These collection matters that he put in there -- and it was brought up in the brief -- don't say that it was gone -- that it went to court. It says that the entity itself was trying to collect the money, and they were charging collection fees.

So I don't see anything about attorney fees. We don't know if the entity went to justice court themselves or went to small claims court themselves -- we don't know any of that. These examples are irrelevant and so are the attorney's declaration (indiscernible). There has been no active enforcement, and this is all prior -- the case has not become ripe because you can't have a ripe case on speculative or hypothetical injuries.

The FID has to be dismissed because he doesn't have standing against the FID. The -- for standing you need an actual (indiscernible) controversy. Where the parties are adverse, there has to be controversy and it has to be ripe, and he doesn't meet any of those factors as discussed in our brief.

The prudential portion got the fitness of issues for judicial and the hardships of the parties. His discussion of the hardships of

the parties are only discussions of the hardships of the clients, if they have to pay for an attorney. But it didn't discuss the hardship to a -- who may owe a $250 debt who gets pulled into justice court against an attorney who is driving up the fees, and then suddenly the $250 fee that they wanted to dispute -- because they don't owe it or maybe they were out of work at the particular time -- all of a sudden, that $250 fee becomes a $2,000 debt and their -- and their paychecks are gone.

There's a reason that the legislature and that the State Senate voted 20-to-0 in favor of this particular bill. And it's not for the FID to decide because -- and it's not for justice courts to decide; it's something that the legislature had to decide.

And as far as failure to state a claim, he -- as Mr. Reilly admitted, our regulatory powers do not go to AB 477. So there's nothing that the FID could do even if you were to give him an injunction or not dismiss us.

And I know you're running short of time, Your Honor, so if you have any questions, I believe most of this -- oh, except for one more thing: Strict scrutiny doesn't apply because he's not a suspect (indiscernible), and he was not denied a fundamental right.

For example, he's not without a court venue because there is a venue where $250 debts can be taken. And he can hire a lawyer if he wants, that's a business decision, or he can go to small claims court.

He -- there's no (indiscernible) right to a jury trial. For

example, even in the *Chung* case that Mr. Reilly referenced, the Court says that even a person in a criminal situation who's only facing a misdemeanor with up to six months in jail, they're not entitled to a jury trial. So what makes a debt collector for a$250 debt think that he's entitled to waste judicial resources to have a jury trial?

So with that, Your Honor, if you have any -- I'll submit. If you have any questions, I'll be happy to answer them.

MR. REILLY: Judge, if I may just take a minute to make a couple of reply points.

THE COURT: You have the right to respond, both to the Motion to Dismiss plus to reply in your support.

If you need more than five minutes, I'm more than happy to reschedule you guys to 12:30 today to conclude your arguments.

MR. REILLY: I don't need more than five minutes. I have three quick points.

THE COURT: And then, also, for Mr. Dillard and Ms. Rakowski, if you're going to need to respond, I'll have to continue the hearing until 12:30.

Do either of you believe you'll need to respond to Mr. Reilly?

MR. DILLARD: Your Honor, I don't believe so. As you said, I think this has been really fully briefed, and so we'll rely upon the briefs, Your Honor. Thank you.

THE COURT: Thank you. Ms. Rakowski?

MS. RAKOWSKY: Yes, Your Honor. I believe, also, that the briefs are very complete as to our position. Thank you.

THE COURT: All right. I agree, the briefs are beautiful, all three. So let me hear then, Mr. Reilly, your reply. And that'll be the last word, and then I'll be prepared to rule.

MR. REILLY: Thank you, Your Honor.

First point, Mr. Dillard and I are somewhat in agreement with regard to Justice Court Rule 16. My clients have no issue with that rule standing alone. And that's why a number of the cases that have been cited by the justice court aren't really applicable. It's when Justice Court Rule 16 gets combined and really co-opted by AB 477 that there's a problem.

We don't need to speculate as to what the conceivable rational basis for this law might be because the basis for the law was stated in the record. Peter Goetz specifically said that design was to force litigants -- this class of litigants into claims court. And it's simply not an apples-to-apples comparison.

Where were my clients in the legislative session? They weren't there. That doesn't make the law constitutional. The fact that somebody, had they raised their and said, Hey, wait a minute this -- this doesn't make sense for this reason, this reason, and this reason; and it might present a constitutional challenge. I would like to think that the legislature would have taken a different approach, but it simply underscores the fact that this was a rubber-stamped law without any real thought behind it.

And, again, through all of this, there's still no discussion of the bank exception to this law and the payday lender exception to this

law and the fact that that standing alone makes this law unconstitutional. And, again, no attempt to defend the 15 percent cap and its arbitrariness as opposed to some other amount.

On that we'll submit. Judge, thank you very much for your time and your your staff's time.

THE COURT: Okay. Thank you to everyone. The matter is now submitted. This is the ruling of the Court.

This case involves a professional association of collection agencies who are challenging AB 477, which limits the recovery of attorneys' fees in justice court to 15% on consumer debts. And that's cases where the parties are entitled to which (indiscernible) by the jury.

I am going to deny the plaintiffs' request for a preliminary injunction. I don't believe that there's a likelihood of success on the merits. I don't find that there's irreparable harm and in balancing the hardships. While I recognize that it's a monetary relief being sought by the plaintiffs here, I don't believe that the hardship balances in favor of the plaintiff.

The facts here are not in dispute. It deals simply with the application of law and the constitutionality of the law. I believe the plaintiffs claims fail under either of the standards of review, and I don't believe that the fact that there were – there are conflicts in our statutes with regard to recoverability of attorneys' fees matters here, because we have that with regard to banks, payday lenders, offers of judgment, and other statutes. So I don't find that that creates a lack

of equal protection to this plaintiff.

And frankly, the argument that there's a lack of access to the court fails for the reason that the plaintiffs have every right to pursue. What their concern is, is that they can't recover their attorneys' fees. But they certainly have access to the court; there's no question about that.

I don't find that there's a lack of due process. I had some -- I make a finding that the plaintiff here as a professional association and not the individual litigants also lacks standing and that there's also an issue with rightness here. It's up (indiscernible) the justice immunity from forcing the statute as well, and I also recognize the financial institution is deficient as a regulatory agency. It's also immune from enforcing the law.

So for all of those reasons, I am denying the request for a preliminary injunction and granting the Motion to Dismiss. The facts are not in dispute. This is simply an application of law.

So I will task Mr. Dillard and Ms. Rakowsky with preparing proposed orders. I would like one order on both motions. It should include findings of fact and conclusions of law. And before it's submitted to me for my review, Mr. Reilly must have it for one week before it's submitted to me.

Mr. Reilly, if you can approve the form only, that's fine. If you have concerns with regard to the drafting, let us know. I will not accept a competing order, but let us know and I'll either review, interlineate, or set a telephonic.

Are there any questions before we conclude the hearing?

MS. RAKOWSKY: No, Your Honor.

MR. REILLY: Yes, Your Honor. Briefly.

Given that the Court's – yes, given that the Court's making a ruling that there's no standing and that the dispute is not right, is it wise for the Court to make a substantive determination on the merits of the case?

THE COURT: I believe that I did make a substantive ruling on the merits of the case. This is intended to be a final order and appealable.

MR. REILLY: Thank you.

THE COURT: Any other questions?

Then thank you all for your appearance. And until I see you see you next, stay safe and stay healthy.

[Proceedings adjourned at 10:17 a.m.]

* * * * * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

Shannon Day
Independent Transcriber

RPLY
Patrick J. Reilly, Esq.
Nevada Bar No. 6103
BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
Telephone: 702.382.2101
Facsimile: 702.382.8135
preilly@bhfs.com

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 MEMORANDUM IN SUPPORT OF MOTION TO AMEND FINDINGS OF FACT AND CONCLUSIONS OF LAW AND TO ALTER OR AMEND JUDGMENT

Hearing Date: September 9, 2020

Hearing Time: 9:00 a.m.

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BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

REPLY MEMORANDUM IN SUPPORT OF MOTION TO AMEND FINDINGS OF FACT AND CONCLUSIONS OF LAW AND TO ALTER OR AMEND JUDGMENT

The opposition briefs filed by the Defendants miss the point of this Motion entirely. In making this Motion, NCA does not seek to substantively change the ultimate end result (i.e., a dismissal) of the Court's Findings of Fact, Conclusions of Law and Order (July 20, 2020) (the "Order"). NCA does not seek to "change" substantive factual findings. NCA also does not seek to remove this Court's findings related to its rulings on standing and ripeness. In fact, NCA has specifically identified the amendments it urges this Court to make, and none of those requested changes affect this Court's rulings on standing, ripeness, or subject matter jurisdiction.

Rather, NCA asks this Court to issue an amended order (1) removing the substantive factual findings and conclusions of law contained in the Order; and (2) dismissing the action without prejudice instead of with prejudice. That is all.

There is a right way to do things and a wrong way to do things. It is wrong for this Court to conclude on the one hand that this matter is not ripe for decision, and then on the other hand decide the case on the merits. It is equally wrong for this Court to decide on the one hand NCA has no standing to sue, and then on the other hand similarly decide the case on the merits. By proceeding in this manner, the Court's decision is not only inconsistent on its face; it turns these jurisprudential doctrines on their proverbial heads. Simply put—what is the point of these doctrines of restraint if the Court does not actually exercise restraint after applying them?

Defendants spend much of their briefs merely rehashing the Court's prior ruling and how they prevailed on the previous motion. Both Defendants inexplicably rehash the dispute over the contents of the Court's Order, even though that dispute had nothing to do with this Motion. *See, e.g.,* Justice Court Opposition at 3:20-27. The FID even contends that NCA wants to "re-write history." FID Opposition at 2:18. But neither defendant addresses the issues before this Court in this Motion, notably, that a district court is prohibited from ruling on the merits of a case when there is no standing, no ripeness, and no subject matter jurisdiction.

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A. Defendants Do Not Dispute That The Order Itself States the Court Is "Prohibit[ed]" from Ruling on the Merits.

Significantly, the Oppositions offer **no response** to the point that, by applying the doctrines of standing and ripeness, this Court deprived itself of jurisdiction to act on the merits. Defendants ignore the very language of the Court's Order that they drafted. This Court specifically cited to *City of North Las Vegas v. Cluff*, 85 Nev. 200, 452 P.2d 461 (1969), for the proposition that district courts are "**prohibit[ed] . . . from ruling on cases that are not ripe**." Order (July 20, 2020) at 5:7-10 (emphasis added). Indeed, this Court's Order held that the foregoing prohibition is a **jurisdictional issue derived from the Nevada Constitution**.

This is the Court's edict. It comes from language submitted to this Court by the Defendants themselves. The Court's language directs that the Nevada Constitution and binding Nevada Supreme Court case law "prohibit" this Court from adjudicating this case on the merits and, as a result, the Court lacks subject matter jurisdiction under NRCP 12(b)(1) to rule on this case. The Order is unequivocal and applies to all substantive claims and all substantive issues. Prohibited means prohibited. Period.

Instead of addressing the obvious consequences of this Court's decision regarding ripeness, standing, and subject matter jurisdiction, they make some astonishing arguments. Perhaps the most shocking is when the FID actually states "Plaintiff's reference to *Cluff* is inapplicable. *Cluff* concerned declaratory relief from a statue [sic] that was not enacted at the time." FID Opposition at 6:8-10. The FID cannot be serious. *Cluff* is the case specifically mentioned in the Court's Order. The Court's express reference to *Cluff* was the very basis for concluding that it is "prohibit[ed]" from deciding this case. NCA is **quoting** the Court's Order, which was drafted by Defendants' counsel. How could it suddenly be "inapplicable?" And, what difference does it make if a case involves declaratory relief, constitutional violations, or a dog bite? If there is no standing, no ripeness, and no subject matter jurisdiction, the nature of the claim for relief is utterly irrelevant. There is no jurisdiction and no decision can be made on the merits of the dispute.

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BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

B. Defendants' Opposition Briefs Do Not Address the Consequences of a Rule 12(b)(1) Dismissal.

Defendants repeatedly dance around the main issue—the consequence of this Court's conclusion that it lacked jurisdiction to hear the case. They ignore NCA's citation to *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000), a federal case holding that application of FED. R. CIV. P. 12(b)(1) prohibits a district court from adjudicating a case on the merits, no matter how inconvenient. Indeed, a case can be litigated on the merits all the way to the United States Supreme Court, but those merits will be wiped away as if they never existed if the court concludes (even if raised *sua sponte* for the first time) there is no subject matter jurisdiction. "[H]arsh consequences attend the jurisdictional brand." *Fort Bend County v. Davis*, — U.S. —, 139 S. Ct. 1843, 1849 (2019) (quotation omitted).

Makarova, of course, is merely consistent with this Court's own conclusion in its Order, which cites to *Cluff* and states that a court is "depriv[ed]" of jurisdiction under the Nevada Constitution when a matter is not ripe for decision. The Nevada Supreme Court stated in *Cluff*:

> This court is confined to controversies in the true sense. The parties must be adverse and the issues ripe for determination. *Kress v. Corey*, 65 Nev. 1, 189 P.2d 352 (1948). We do not have constitutional permission to render advisory opinions. NEV. CONST. art. 6, § 4.

85 Nev. 200, 201, 452 P.2d 461, 462 (1969). While NCA disagrees with this Court's conclusion that there is no standing, no ripeness, and no subject matter jurisdiction, now that this Court has made such a determination, it is "prohibit[ed]" from taking further action.

Instead of addressing these issues or offering contrary legal authority, Defendants go on the attack, accusing NCA of trying to change the outcome, using disparaging comments like "end run" and claiming NCA is now changing its litigation strategy. Respectfully, Defendants were the ones who raised issues of ripeness, standing, and subject matter jurisdiction. NCA consistently and vigorously opposed those requests and maintained that there was standing, that the matter was ripe for decision, and that there was subject matter jurisdiction. Defendants had to understand that if they were successful on these threshold procedural issues the Court could not take any further action. In fact, they raised these issues because, at the time, they had no idea

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100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

how this Court might rule on the merits of the dispute. Defendants cannot have it both ways and cannot have their cake and eat it, too.

In reality, the Justice Court's Opposition is extremely limited, and seems to concede that a dismissal under Rule 12(b)(1) requires a dismissal without prejudice. "It is true to say that if this was the one and only basis for dismiss of the claim against the Justice Court, the complaint would be appropriately dismissed without prejudice." Justice Court Opposition at 5:11-13. Justice Court then fudges the obvious by ignoring the consequences of a Rule 12(b)(1) dismissal and contending there were two other bases for dismissal that somehow (without legal authority provided) make a difference. Justice Court argues that the Court made the following separate rulings: (1) that JCR 16 did not deny access to the court; and (2) that Justice Court is immune from suit. The first issue is obviously a substantive determination. Both determinations necessarily follow the threshold issue of subject matter jurisdiction. As this Court already ruled, once the Court declares there is no subject matter jurisdiction, there is nothing else to decide, as the court is "prohibit[ed]" from going any further. Regardless, Justice Court offers absolutely no legal authority supporting the notion that these decisions may exist side by side with a determination that there is no standing, no ripeness, and no subject matter jurisdiction as an "alternative" basis for dismissal. In fact, it misses the point of subject matter jurisdiction entirely

This Court ruled that there was no subject matter jurisdiction **over the entirety of the case**. This Court ruled NCA had no standing as to **any** claim. This Court ruled the **no** claim was ripe. Justice Court muses "[t]he finding of no actual injury suffered by Plaintiff clearly did not preclude the Court from reaching" its substantive conclusions of law. Opposition at 6:24-26. If it were so "clear" (perhaps the most overused word in the history of modern legal briefing) one would expect Justice Court to cite a case to that effect. Remarkably, it does not. It does not respond to *Makarova* or *Cluff*. It does not address this Court's express conclusion in the very order at issue here that the Nevada Constitution and Nevada Supreme Court "prohibit" this Court from making substantive decisions in this case once it decides there is no subject matter jurisdiction.

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100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

It is unclear why Justice Court believes (again without legal authority) the matter can be "ameliorated" simply by having the Court remove the word "ripe" from a single paragraph in the conclusions of law. Justice Court Opposition at 6:10 and 7:3-6. If Justice Court is now suggesting this matter is now ripe for decision, it is a flip-flop of staggering proportions. If Justice Court is merely attempting to avoid a sticky issue by deleting the word "ripe" while retaining every other aspect of a ripeness decision (i.e., failure to allege actual injury) in the Order, it is quintessential form over substance, and it does not change the nature of this Court's Rule 12(b)(1) dismissal. One cannot cure a constitutional defect with a nudge and a wink.

As for the FID, it cites to *Garcia v. Scolari's Food & Drug*, 125 Nev. 48, 55, 200 P.3d 514 (2009), apparently for the proposition that it is improper to add exhibits to pursue a new theory of the case after an adverse ruling. This citation makes no sense here. NCA is not trying to add evidence or change its theory of the case. It is holding this Court to its conclusion that it is "prohibit[ed]" from ruling on the merits of the case because it lacks subject matter jurisdiction. It is holding the parties to the fact that they moved to dismiss the case—and were successful—based on lack of standing, ripeness, and subject matter jurisdiction.

The FID takes another astonishing position. It argues (again without citation to any case law or other legal authority) that "[t]here were no manifest errors of law…." FID Opposition at 5:12. NCA can think of no greater error of law than a Court asserting jurisdiction where it states specifically in a court order it has none to assert.

The FID argues that certain findings of fact are necessary for a court to make determinations of standing and ripeness. NCA agrees, so long as those findings are limited to the issues of standing and ripeness. In fact, NCA asks this Court to delete only the findings and legal conclusions made on the merits of the case (Paragraphs 11-13 of the Findings of Fact and Paragraphs 7-22 of the Conclusions of Law). NCA does **not** ask this Court to delete Paragraphs 1-10 of the Findings of Fact or Paragraphs 1-6 of the Conclusions of Law because these findings and conclusions relate to ripeness, standing, and subject matter jurisdiction. And, despite FID's argument to the contrary (again made without supporting legal authority), nothing about the Rule 12(b)(5) dismissal was "essential" or "required." *See* FID Opposition at 7:15-25. That is the

BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

entire point of this Motion—that once a court concludes there is no subject matter jurisdiction over a case, it is a "pencils down" moment for the court and the litigants.

This Court ignored its own order by ruling substantively on a case even though, per its own conclusion, it was "prohibited" from doing so. This Court decided a case on the merits even though, according to its own order, it lacked subject matter jurisdiction. And Defendants, who drafted this very language for the Court's signature, now ignore that language in the hope that this Court will similarly ignore it to achieve a desired result.

Accordingly, NCA asks this Court to alter or amend the Court's Order to remove substantive findings of fact and conclusions of law, and to change this Court's dismissal to a dismissal without prejudice.

DATED this 2nd day of September, 2020.

/s/Patrick J. Reilly
Patrick J. Reilly, Esq.
BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614

Attorneys for Nevada Collectors Association

BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

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 MEMORANDUM IN SUPPORT OF MOTION TO AMEND FINDINGS OF FACT AND CONCLUSIONS OF LAW AND TO ALTER OR AMEND JUDGMENT** was served via electronic service on the 2nd day of September, 2020, to the addresses shown below:

Thomas D. Dillard, Jr. Esq.
Olson Cannon Gormley & Stoberski
9950 West Cheyenne Avenue
Las Vegas, NV 89129
tdillard@ocgas.com

Attorneys for Justice Court of Las Vegas Township

Vivienne Rakowsky, Esq.
Office of the Attorney General
550 E. Washington Avenue
Suite 3900
Las Vegas, NV 89101
vrakowsky@ag.nv.gov
(702) 486-3103

Attorneys for Sandy O' Laughlin and State of Nevada, Department of Business And Industry Financial Institutions Division

/s/Mary Barnes
An employee of Brownstein Hyatt Farber Schreck, LLP

THOMAS D. DILLARD, JR., ESQ.
Nevada Bar No. 006270
OLSON CANNON GORMLEY
& STOBERSKI
9950 W. Cheyenne Avenue
Las Vegas, Nevada 89129
(702) 384-4012 - telephone
(702) 383-0701 - facsimile
Attorney for Defendant
Justice Court of Las Vegas
Township

DISTRICT COURT

CLARK COUNTY, NEVADA

NEVADA COLLECTORS ASSOCIATION, a Nevada non-profit corporation, Plaintiff, vs. 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. 27

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that the **ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION TO AMEND FINDINGS OF FACT AND CONCLUSIONS OF LAW**, was filed on September 10, 2020, in the above-captioned matter.

A copy of said Order is attached hereto.

DATED this 10th day of September, 2020.

OLSON CANNON GORMLEY
& STOBERSKI

BY: /s/ Thomas D. Dillard
THOMAS D. DILLARD, JR., ESQ.
9950 W. Cheyenne Avenue
Las Vegas, Nevada 89129
Attorney for Defendant
Justice Court of Las Vegas
Township

Law Offices of
OLSON CANNON GORMLEY & STOBERSKI
A Professional Corporation
9950 West Cheyenne Avenue
Las Vegas, Nevada 89129
(702) 384-4012 Telecopier (702) 383-0701

Law Offices of
OLSON CANNON GORMLEY & STOBERSKI
A Professional Corporation
9950 West Cheyenne Avenue
Las Vegas, Nevada 89129
(702) 384-4012 Telecopier (702) 383-0701

CERTIFICATE OF MAILING

On the 10th day of September, 2020, the undersigned, an employee of Olson, Cannon, Gormley, Angulo & Stoberski, hereby served a true copy of **NOTICE OF ENTRY OF ORDER**, to the parties listed below via the EFP Program, pursuant to the Court's Electronic Filing Service Order effective June 1, 2014, or mailed to the following:

Patrick J. Reilly, Esq.
Marckia L. Hayes, Esq.
BROWNSTEIN HYATT
FARBER SCHRECK, LLP
100 N. City Parkway, Ste. 1600
Las Vegas, Nevada 89106-4614
P: 702-382-2101
F: 702-382-8135
preilly@bhfs.com
mhayes@bhfs.com
Attorneys for Plaintiff

Aaron D. Ford, Esq.
Vivienne Rakowsky, Esq.
David J. Pope, Esq.
State of Nevada
Office of the Attorney General
555 E. Washington Ave., Ste. 3900
Las Vegas, Nevada 89101
P: 702-486-3103
F: 702-486-3416
vrakowsky@ag.nv.gov
dpope@ag.nv.gov
Attorneys for State Defendant

/s/ Melissa Burgener
An employee of OLSON CANNON GORMLEY& STOBERSKI

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09/10/2020 4:22 PM
CLERK OF THE COURT

ORDR

AARON D. FORD
Attorney General
VIVIENNE RAKOWSKY (Bar No. 9160)
Deputy Attorney General
State of Nevada
Office of the Attorney General
555 E. Washington Avenue, Suite 3900
Las Vegas, Nevada 89101
(702) 486-3103
(702) 486-3416 (fax)
vrakowsky@ag.nv.gov
Attorneys for State Defendant

THOMAS D. DILLARD, JR., ESQ.
Nevada Bar No. 006270
OLSON CANNON GORMLEY
& STOBERSKI
9950 W. Cheyenne Avenue
Las Vegas, Nevada 89129
(702) 384-4012 - telephone
(702) 383-0701 - facsimile
Attorney for Defendant
Justice Court of Las Vegas
Township

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

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION TO AMEND FINDINGS OF FACT AND CONCLUSIONS OF LAW

Case Number: A-19-805334-C

This matter came on for hearing on September 9, 2020, (the "Hearing") with the Plaintiff filing their Motion to Amend Findings of Fact and Conclusions of Law and to Alter or Amend Judgment on August 3, 2020, Defendant Justice Court of Las Vegas Township filing its Opposition on August 14, 2020, State Defendant filing its Opposition on August 17, 2020 and Plaintiff filing its Reply thereto on September 2, 2020.

The Court hearing arguments from the parties and reviewed the pleadings therto,

IT IS HEREBY ORDERED that the Motion is GRANTED IN PART AND DENIED IN PART. The Court has GRANTED the Motion as to removing the last sentence of paragraph five (5) of the previous order that states:

> Plaintiff's claim of possible future injury if the Plaintiffs do not have access to the court of their choice is not ripe because the Plaintiff has not been denied access to court and there has not been any enforcement activities or threat of enforcement of AB477.

IT IS FURTHER ORDERED that the Motion is denied as to all other respects.

DATED this ___ day of September, 2020.

Dated this 10th day of September, 2020

By: Nancy L Allf
DISTRICT COURT JUDGE

D79 742 9B6B 8278
Nancy Allf
District Court Judge

Submitted by:
AARON D. FORD
Attorney General

By: /s/ Vivienne Rakowsy
VIVIENNE RAKOWSKY
Deputy Attorney General
555 E. Washington Ave. Ste 3900
Las Vegas, Nevada 89101
Attorneys for State Defendants

///

OLSON CANNON GORMLEY
& STOBERSKI

By: /s/ Thomas D. Dillard, Jr.
THOMAS D. DILLARD, JR., ESQ.
9950 W. Cheyenne Avenue
Las Vegas, Nevada 89129
Attorney for Defendant
Justice Court of Las Vegas
Township

Approved as to form and content by:

BROWNSTEIN HYATT
FARBER SCHRECK, LLP

By: /s/ Patrick J. Reilly
Patrick J. Reilly, Esq.
Marckia L. Hayes, Esq.
100 N. City Parkway, Ste. 1600
Las Vegas, Nevada 89106-4614
P: 702-382-2101
F: 702-382-8135
preilly@bhfs.com
mhayes@bhfs.com
Attorneys for Plaintiff

Melissa Burgener

From: Reilly, Patrick J. <preilly@bhfs.com>
Sent: Wednesday, September 9, 2020 1:09 PM
To: Vivienne Rakowsky; Melissa Burgener
Cc: Tom Dillard
Subject: RE: NV Collectors v. LVJC, et al.

Approved as to form on my end as well. You may use my electronic signature.

Thank you.

Patrick J. Reilly
Brownstein Hyatt Farber Schreck, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106
702.464.7033 tel
702.882.0112 cell
preilly@bhfs.com

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Thank you. I am fine with the Amended Order and the Order on the hearing today. You may use my electronic signature.

Sincerely,
Vivienne

Vivienne Rakowsky, Deputy Attorney General
State of Nevada
Office of the Attorney General
555 East Washington Avenue, Suite 3900
Las Vegas, Nevada 89101
vrakowsky@ag.nv.gov
Phone: (702) 486-3103
Fax: (702) 486-3416

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Cc: Tom Dillard <tdillard@ocgas.com>
Subject: NV Collectors v. LVJC, et al.

Good Morning,

Please find the attached orders in the above mentioned matter for your review.

Thank you,
Melissa Burgener
Assistant to Thomas D. Dillard, Jr., Esq.
and Michael Mcloughlin, Esq.
Olson Cannon Gormley & Stoberski
9950 W. Cheyenne Ave.,
Las Vegas, Nevada 89129
Phone: (702) 384-4012 ext. 158
Fax: (702) 383-0701

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Nevada Collectors Association, Plaintiff(s) vs. State of Nevada Department of Business and Industry Financial Institutions Div., Defendant(s)	CASE NO: A-19-805334-C DEPT. NO. Department 27

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 9/10/2020

Tom Dillard	tdillard@ocgas.com
Melissa Burgener	mburgener@ocgas.com
Wendy Fiore	wfiore@ocgas.com
Vivienne Rakowsky	vrakowsky@ag.nv.gov
Michele Caro	mcaro@ag.nv.gov
Debra Turman	dturman@ag.nv.gov
David Pope	dpope@ag.nv.gov
Patrick Reilly	preilly@bhfs.com
Susan Roman	sroman@bhfs.com
Mary Barnes	mabarnes@bhfs.com

THOMAS D. DILLARD, JR., ESQ.
Nevada Bar No. 006270
OLSON CANNON GORMLEY
& STOBERSKI
9950 W. Cheyenne Avenue
Las Vegas, Nevada 89129
(702) 384-4012 - telephone
(702) 383-0701 - facsimile
Attorney for Defendant
Justice Court of Las Vegas
Township

DISTRICT COURT

CLARK COUNTY, NEVADA

NEVADA COLLECTORS ASSOCIATION, a Nevada non-profit corporation, Plaintiff, vs. 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. 27

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that the **AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER**, was filed on September 10, 2020, in the above-captioned matter. A copy of said Order is attached hereto.

DATED this 10th day of September, 2020.

OLSON CANNON GORMLEY
& STOBERSKI

BY: /s/ Thomas D. Dillard
THOMAS D. DILLARD, JR., ESQ.
9950 W. Cheyenne Avenue
Las Vegas, Nevada 89129
Attorney for Defendant
Justice Court of Las Vegas
Township

Law Offices of
OLSON CANNON GORMLEY & STOBERSKI
A Professional Corporation
9950 West Cheyenne Avenue
Las Vegas, Nevada 89129
(702) 384-4012 Telecopier (702) 383-0701

Law Offices of
OLSON CANNON GORMLEY & STOBERSKI
A Professional Corporation
9950 West Cheyenne Avenue
Las Vegas, Nevada 89129
(702) 384-4012 Telecopier (702) 383-0701

CERTIFICATE OF MAILING

On the 10th day of September, 2020, the undersigned, an employee of Olson, Cannon, Gormley, Angulo & Stoberski, hereby served a true copy of **NOTICE OF ENTRY OF ORDER**, to the parties listed below via the EFP Program, pursuant to the Court's Electronic Filing Service Order effective June 1, 2014, or mailed to the following:

Patrick J. Reilly, Esq.
Marckia L. Hayes, Esq.
BROWNSTEIN HYATT
FARBER SCHRECK, LLP
100 N. City Parkway, Ste. 1600
Las Vegas, Nevada 89106-4614
P: 702-382-2101
F: 702-382-8135
preilly@bhfs.com
mhayes@bhfs.com
Attorneys for Plaintiff

Aaron D. Ford, Esq.
Vivienne Rakowsky, Esq.
David J. Pope, Esq.
State of Nevada
Office of the Attorney General
555 E. Washington Ave., Ste. 3900
Las Vegas, Nevada 89101
P: 702-486-3103
F: 702-486-3416
vrakowsky@ag.nv.gov
dpope@ag.nv.gov
Attorneys for State Defendant

/s/ Melissa Burgener
An employee of OLSON CANNON GORMLEY& STOBERSKI

ELECTRONICALLY SERVED
9/10/2020 1:54 PM

Electronically Filed
09/10/2020 1:53 PM
CLERK OF THE COURT

ORDR
AARON D. FORD
Attorney General
VIVIENNE RAKOWSKY (Bar No. 9160)
Deputy Attorney General
State of Nevada
Office of the Attorney General
555 E. Washington Avenue, Suite 3900
Las Vegas, Nevada 89101
(702) 486-3103
(702) 486-3416 (fax)
vrakowsky@ag.nv.gov
Attorneys for State Defendant

THOMAS D. DILLARD, JR., ESQ.
Nevada Bar No. 006270
OLSON CANNON GORMLEY
& STOBERSKI
9950 W. Cheyenne Avenue
Las Vegas, Nevada 89129
(702) 384-4012 - telephone
(702) 383-0701 - facsimile
Attorney for Defendant
Justice Court of Las Vegas
Township

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

AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Case Number: A-19-805334-C

This matter came on for hearing on July 1, 2020, (the "Hearing"). Plaintiff, Nevada Collectors Association, represented by Patrick J. Reilly of the law firm of Brownstein Hyatt Farber Schreck, LLP appeared at the Hearing. Thomas D. Dillard, Jr. of Olson Cannon Gormley & Stoberski appeared for Defendant Justice Court and Vivienne Rakowsky, Deputy Attorney General with the Nevada Attorney General's Office, appeared on behalf of Sandy O'Laughlin in her official capacity as Commissioner of the Financial Institutions Division and the State of Nevada Department of Business and Industry Financial Institutions Division ("FID").

At the hearing, the Court heard the Justice Court's and the FID's separate Motions to Dismiss and the Plaintiff's Motion for a Temporary Injunction and Alternative Motion for a Writ of Mandamus or Prohibition. After considering the briefs and the respective arguments, and having considered the evidence introduced by the parties and being fully advised, this Court enters the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

Based upon the papers filed and arguments at the time of the hearing, this Court finds that by a preponderance of the evidence in the record the following facts have been proven.

1. The current version of Las Vegas Justice Court Rule 16 ("LVJC Rule 16") was made effective on January 1, 2007. LVJC Rule 16 states:

> Unless appearing by an attorney regularly admitted to practice law in Nevada and in good standing, no entry of appearance or subsequent document purporting to be signed by any party to an action shall be recognized or given any force or effect unless the same shall be notarized, or signed with an unsworn declaration pursuant to NRS 53.045, by the party signing the same. Corporations and limited liability corporations (LLC) shall be represented by an attorney. [Added; effective January 1, 2007.]

2. The Nevada State Legislature unanimously passed A.B. 477 (entitled the "Consumer Protection from the Accrual of Predatory Interest After Default Act") in the 2019 Nevada State Legislative Session.

3. On November 13 2019, Plaintiff, on behalf of its members, filed a complaint in the Eighth Judicial District Court naming the FID and Justice Court as Defendants alleging that sections 18 and 19 of AB 477, codified as NRS 97B.160 and NRS 97B.170, violate the due process and equal protection guarantees of the State and federal constitutions. Plaintiff further alleged that these sections when combined with LVJC Rule 16 denied it access to the courts because the legislation limited attorney fees recovery to 15% of the underlying judgment involving consumer debt contract cases of less than $5,000 (for which there is concurrent jurisdiction in the Justice Courts and the Small Claims Courts). Plaintiff also requested declaratory and injunctive relief.

4. On January 2, 2020, Defendant Justice Court removed the case to the U.S. District Court based on federal question jurisdiction (Case No. 2:20-CV-0007-JCM-EJY).

5. Based on a motion to dismiss filed by the FID and a motion for judgment on the pleadings filed by Justice Court, on February 3, 2020, Plaintiff successfully sought leave to file an Amended Complaint. Amongst other changes, Plaintiff amended the Complaint to add the Commissioner of the FID in her official capacity.

6. On April 13, 2020, the U.S. District Court *sua sponte* applied *Burford* abstention and remanded the matter back to State Court, finding that it would be "intervening in Nevada's efforts to establish a coherent policy if it were to adjudicate the instant action." ECF No. 39, p. 7:3-4.

7. Upon remand, the FID and Justice Court each filed Motions to Dismiss, and Plaintiff filed a motion for a Preliminary Injunction or, Alternatively for a Writ of Mandamus or Prohibition along with exhibits including declarations and exemplar small dollar collections. The motions were fully briefed by all parties. A hearing was held for all motions on July 1, 2020.

8. Plaintiff claims that its members are primarily concerned with collecting small debts under $5,000, and argued that the limitations on attorney fees codified in AB 477 is unconstitutional. Plaintiff moved for a temporary injunction, writ of

mandamus or writ or prohibition claiming: (1) a creditor will not be able to hire an attorney to represent them in Justice Court; (2) attorneys may refuse to represent creditor entities; and (3) that credit may be tightened for all consumers.

9. Defendant Justice Court argued Plaintiff did not plausibly allege that Las Vegas Justice Court Rule 16 caused Plaintiff to suffer an actual injury relating to its right to have access to the courts protected by the First Amendment and/or the Fourteenth Amendment Due Process Clause; and the Justice Court relied upon well-established and controlling law from the U.S. Supreme Court and the Nevada Supreme Court when enacting, years prior to this suit, Rule 16 and therefore possessed immunity from suit for simply following the law.

10. The FID argued that dismissal is justified pursuant to NRCP 12(b)(1) and NRCP 12(b)(5). Plaintiff lacks standing because there is no justiciable controversy. The case is not ripe for adjudication because ripeness cannot be based on speculative or hypothetical prospect of a future harm. The Nevada Legislature did not designate the FID to administer AB 477 and the FID does not regulate many of the Plaintiffs members including attorneys and businesses that extend credit to their own customers. An agency cannot expand the powers delegated by the legislature through regulations. Plaintiffs 42 USC § 1983 claims for violations of due process and equal protection do not apply to the FID and its Commissioner because neither the agency nor its commissioner in her official capacity are persons subject to section 1983.

11. Plaintiff failed to provide facts to establish that it was substantially denied access to the Justice Courts in Nevada or negate all plausible justifications for the Nevada Legislature to pass AB 477 and LVJC Rule 16.

12. Plaintiff in the FAC further failed to allege that it or any affiliated company took any matter to Justice Court and received an order reducing requested attorney fees pursuant to the 2019 Legislative Act.

13. Plaintiff's allegations fail to detail official acts foreseeably frustrating litigation and foreclosing relief in a future suit.

///

CONCLUSIONS OF LAW

Based on the foregoing factual findings, this Court makes the following conclusions of law:

1. Plaintiff has the burden to show by a preponderance of the evidence that the allegations are sufficient to invoke this Court's jurisdiction. *Leite v. Crane Co.* 749 F.3d1117, 1122 (9th Cir. 2014)

2. The Nevada Constitution provides that its courts have jurisdiction over civil and criminal cases, which has been interpreted to prohibit courts from ruling on cases that are not ripe. *City of North Las Vegas v. Cluff,* 85 Nev. 200, 452 P.2d 461 (1969)

3. Dismissal is required pursuant to NRCP 12(b)(1) because Plaintiff failed to establish subject matter jurisdiction. Plaintiff did not show that the parties were adverse, that a controversy existed between the parties and that the issues were ripe for adjudication. See *Kress v. Cory*, 65 Nev. 1, 26, 189 P. 2d 352 (1948). The FID and Plaintiff are not adverse. There is no controversy between the Plaintiff and FID because the Nevada Legislature did not delegate the authority to enforce AB 477 to the FID, and the FID does not regulate activities of the Justice Court including the amount of attorney fees it can award to a prevailing party or the requirement that an entity must appear with counsel.

4. Plaintiff failed to show a hardship or that the issues were fit for judicial decision. *Herbst Gaming, Inc. v. Heller,* 122 Nev. 877, 887, 141 P.3d 1224 (2006). Plaintiff did not meet the prudential considerations because Plaintiff's claim of potential hardship if the members cannot access the Court system for small debt collection cases is speculative. Plaintiffs lacked an actual injury because there has not been any enforcement or a threat of enforcement of AB 477.

5. This case is not ripe for determination. A case is not ripe for review when the degree to which the harm alleged by the party seeking review is not sufficiently concrete and any alleged injury is remote or hypothetical. *Cote H. v. Eighth Judicial*

Dist. Court ex rel County of Clark, 124 Nev. 36 n.1, 175 P.3d 906 (2008). Speculative or hypothetical future harm is not sufficient to invoke jurisdiction. *Doe v. Bryan,* 102 Nev. 523, 525, 728 P.2d 443, (1986).

6. In considering the ripeness doctrine in pre-enforcement cases, the court looks to see if there is a "credible threat," or an "actual and well-founded fear" that enforcement action would be taken against the plaintiff by the defendant. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 15 (2010); *Virginia v. American Booksellers Assn. Inc.*, 484 U.S. 383, 393 (1988); *see also Delew v. Wagner*, 143 F.3d 1219, 1223 (9th Cir. 1988). In the nine months since AB 477 went into effect, there has not been any imminent threat that the FID will or even can enforce Sections 18 or 19 of AB 477 against Plaintiff's members.

7. Plaintiff failed to provide a set of facts which would entitle Plaintiff to relief, pursuant to NRCP 12(b)(5). The FID's regulatory ability is limited to the powers provided in NRS chapter 649. The Nevada Legislature did not delegate the authority to enforce AB 477 to the FID, nor does the FID regulate activities of the Justice Court including the amount of attorney fees it can award to a prevailing party or the requirement that an entity must appear with counsel. See *State of Nevada v. Nevada Association Services,* 128 Nev. 362, 294 P.3d 1223 (2012).

8. NRS 41.031 requires that the agency's action must provide the *basis* for the lawsuit, Plaintiff has not shown that the FID has taken any action that can be interpreted as a basis for declaratory, injunctive or any relief against the FID. The FID enforces the law with respect to its licensees, but not with respect to a small business that extend credit to its own customers or with respect to attorneys.

9. The FID has the power to adopt regulations, as long as the regulations do not broaden the powers of the FID past the limitations found in statutes. There is no statute in Chapter 649 that allows the FID to regulate attorney fees in a contract between a creditor and a debtor.

10. Judicial notice of facts outside of the complaint is only applicable to facts

not subject to reasonable dispute or facts that are capable of verification from a reliable source. NRS 47.130, *Mack .v Estate of Mack*, 125 Nev. 80, 92, 206 P.3d 98 (2009). Plaintiff's declarations do not fit the criteria for judicial notice.

11. Neither the FID nor its commissioner sued in her official capacity is a person subject to section 1983. *Will v. Michigan Dept. of State Police,* 491 U.S. 58, 69 (1989). Therefore all official capacity 42 USC § 1983 claims against the FID must be dismissed.

12. Claims for denial of access to the courts may arise from the frustration or hindrance of "a litigating opportunity yet to be gained" (forward-looking access claim) or from the loss of a meritorious suit that cannot now be tried (backward-looking claim). *Christopher v. Harbury*, 536 U.S. 403, 412–415, 122 S.Ct. 2179 (2002). For access to the court's claims, the plaintiff must show: (1) the loss of a 'nonfrivolous' or 'arguable' underlying claim; (2) the official acts frustrating the litigation; and (3) a remedy that may be awarded as recompense but that is not otherwise available in a future suit. *Id.* at 413–14.

13. LVJC Rule 16 and A.B. 477 do not unduly infringe any identified fundamental right and also does not target or impose a disparate impact on a protected class; therefore, the Justice Court Rule as well as the subject legislation imposed by the State are subject to only a rational basis type of review. *See Romer v. Evans*, 517 U.S. 620, 631–32, 116 S.Ct. 1620 (1996); *FCC v. Beech Communications, Inc.*, 508 U.S. 307, 313-14, 113 S.Ct. 2096 (1993).

14. To prevail on a rational basis challenge, Plaintiff therefore must "negate every conceivable basis" that could support a rational basis for the alleged regulation. *Medina Tovar v. Zuchowski*, 950 F.3d 581, 593 (9th Cir. 2020); *Fournier v. Sebelius*, 718 F.3d 1110, 1123 (9th Cir. 2013); *see also Armour v. City of Indianapolis, Ind.*, 566 U.S. 673, 681, 132 S.Ct. 2073 (2012). Plaintiff certainly has not in this case negated all the conceivable rationale regarding the corporate representation rule codified by LVJC Rule 16 or, for that matter, the consumer protection rationale for A.B. 477. *See* Sec. 3 (stating

"[t]he purpose of this chapter is to protect consumers").

15. Also, A.B. 477's "cap on attorney's fees is not a barrier to court access, but a limitation on relief." *Boivin v. Black*, 225 F.3d 36, 45 (1st Cir. 2000). LVJC Rule 16 thus does not deny litigants "a reasonably adequate opportunity to present" their case to the Justice Court. *Lewis v. Casey*, 518 U.S. 343. 351, 116 S.Ct. 2174 (1996) (quoting *Bounds v. Smith*, 430 U.S. 817, 825, 97 S.Ct. 1491 (1977).

16. The Nevada Supreme Court has held long before the enactment of LVJC Rule 16 that a legal entity such as a corporation cannot appear except through counsel, and non-lawyer principals are prohibited from representing these types of entities. *See In re: Discipline of Schaefer*, 117 Nev. 496, 509 (2001); *see also Rowland v. California Men's Colony*, 506 U.S. 194, 201–02, 113 S.Ct. 716 (1993) ("It has been the law for the better part of two centuries ... that a corporation may appear in the federal courts only through licensed counsel.")(citing *Commercial & R.R. Bank of Vicksburg v. Slocomb, Richards & Co.*, 39 U.S. (14 Pet.) 60, 65, 10 L.Ed. 354 (1840) ("[A] corporation cannot appear but by attorney ....") *overruled in part by* 43 U.S. (2 How.) 497, 11 L.Ed. 353 (1844); and *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 830, 6 L.Ed. 204 (1824) ("A corporation, it is true, can appear only by attorney, while a natural person may appear for himself.")).

17. A defendant that is charged with the duty of executing a facially valid court order enjoys absolute immunity from liability for a suit challenging the propriety of that court order. *See Turney v. O'Toole*, 898 F.2d 1470, 1472 (10th Cir. 1990); *see also Engebretson v. Mahoney*, 724 F.3d 1034, 1038 (9th Cir. 2013) ("[P]ublic officials who ministerially enforce facially valid court orders are entitled to absolute immunity.").

18. The Justice Court appropriately followed that law when enacting and publishing LVJC 16 in accordance with controlling law from the Nevada Supreme Court. Plaintiff cannot prevail then against the Justice Court as a matter of law that is solely based on the propriety of that valid and controlling case law. The Justice Court effectively is immune from Plaintiff's suit by virtue of quasi-judicial immunity for

following the extant law announced by the Nevada Supreme Court.

19. A temporary injunction is an extraordinary remedy "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24 (citation omitted). As a threshold inquiry, when a plaintiff fails to show the likelihood of success on the merits, the court need not consider the remaining factors. *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015). Plaintiff is not likely to succeed on the merits and has failed to show that they are subject to irreparable harm if a temporary injunction is not issued. Balancing the competing claims, along with the effect on each party does not weigh in favor of the Plaintiff.

20. Plaintiff has failed to provide a basis to issue a writ of mandamus or a writ of prohibition. *Nevada Restaurant Services, Inc. v. Clark County,* 2018 WL 1077279*7, *Stearns v, Eighth Judicial District Court in and for Clark County,* 62, Nev. 102,112, 12 P.2d 206 (1943).

21. NRS 73.010(1) provides that "[a] justice of the peace has jurisdiction and may proceed as provided in this chapter and by rules of court in all cases arising in the justice court for the recovery of money only, where the amount claimed does not exceed $10,000. Plaintiff's members have not been denied access to court for their small collection cases; it is only that Plaintiff's members chose not to use the court with jurisdiction for their claims that will allow them to appear without an attorney.

22. An injury does not take place when the Plaintiffs have access to another court with jurisdiction for their claims and does not require an entity to appear with an attorney.

///

///

///

ORDER

This Court being fully apprised in the premises, and good cause appearing to the Court ORDERS as follows:

1. Plaintiff's Motion for a Preliminary Injunction or, alternatively for a writ of mandamus or prohibition is denied. The Plaintiff is not likely to succeed on the merits and has not suffered irreparable harm. The balance of the hardships do not weigh in favor of the Plaintiff.
2. Defendants FID and Justice Court's Motions to Dismiss are granted with prejudice.

DATED this 9 day of September, 2020.

Dated this 10th day of September, 2020

By: Nancy L Allf
DISTRICT COURT JUDGE

56A D48 D9D3 9D4A N
Nancy Allf
District Court Judge

Submitted by:
AARON D. FORD
Attorney General

By: /s/ Vivienne Rakowsky
VIVIENNE RAKOWSKY
Deputy Attorney General
555 E. Washington Ave. Ste 3900
Las Vegas, Nevada 89101
Attorneys for State Defendants

OLSON CANNON GORMLEY
& STOBERSKI

By: /s/ Thomas D. Dillard, Jr.
THOMAS D. DILLARD, JR., ESQ.
9950 W. Cheyenne Avenue
Las Vegas, Nevada 89129
Attorney for Defendant
Justice Court of Las Vegas
Township

///

Approved as to form and content by:

BROWNSTEIN HYATT
FARBER SCHRECK, LLP

By: /s/ Patrick J. Reilly
Patrick J. Reilly, Esq.
Marckia L. Hayes, Esq.
100 N. City Parkway, Ste. 1600
Las Vegas, Nevada 89106-4614
P: 702-382-2101
F: 702-382-8135
preilly@bhfs.com
mhayes@bhfs.com
Attorneys for Plaintiff

Melissa Burgener

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Approved as to form on my end as well. You may use my electronic signature.

Thank you.

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702.464.7033 tel
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Sincerely,
Vivienne

Vivienne Rakowsky, Deputy Attorney General
State of Nevada
Office of the Attorney General
555 East Washington Avenue, Suite 3900
Las Vegas, Nevada 89101
vrakowsky@ag.nv.gov
Phone: (702) 486-3103
Fax: (702) 486-3416

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Good Morning,

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Thank you,
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Assistant to Thomas D. Dillard, Jr., Esq.
and Michael Mcloughlin, Esq.
Olson Cannon Gormley & Stoberski
9950 W. Cheyenne Ave.,
Las Vegas, Nevada 89129
Phone: (702) 384-4012 ext. 158
Fax: (702) 383-0701

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Nevada Collectors Association, Plaintiff(s) vs. State of Nevada Department of Business and Industry Financial Institutions Div., Defendant(s)	CASE NO: A-19-805334-C DEPT. NO. Department 27

AUTOMATED CERTIFICATE OF SERVICE

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Vivienne Rakowsky	vrakowsky@ag.nv.gov
Michele Caro	mcaro@ag.nv.gov
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