UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MELISSA BUCK; CHAD BUCK; and SHAMBER FLORE; ST. VINCENT CATHOLIC CHARITIES,

Plaintiffs,

v.

ROBERT GORDON, in his official capacity as the Director of the Michigan Department of Health and Human Services; HERMAN MCCALL, in his official capacity as the Executive Director of the Michigan Children's Services Agency; DANA NESSEL, in her official capacity as Michigan Attorney General; ALEX AZAR, in his official capacity as Secretary of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants.

No. 1:19-cv-00286

HON. ROBERT J. JONKER

MAG. PHILLIP J. GREEN

NOTICE OF FILING

Defendants Michigan Department of Health and Human Services ("Department" or "MDHHS") Director Robert Gordon, MDHHS Children's Services Agency Executive Director Joo Yeun Chang,[1] and Michigan Attorney General Dana

[1] Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, this Notice reflects the substitution of Children's Services Agency Executive Director Joo Yeun Chang for former Children's Services Agency Executive Director Herman McCall, who was named in his official capacity.

Nessel (collectively, "State Defendants"), through their undersigned counsel, hereby notify the Court as follows:

1. This Court previously denied Dana and Kristy Dumont's motion to intervene in this case (ECF No. 52) and State Defendants' motion to transfer this case (ECF No. 52) to the Eastern District where the *Dumont v. Gordon* lawsuit, Case No. 2:17-cv-13080 (Borman, J.), now closed, was filed, and where the *Catholic Charities West Michigan v. Gordon* lawsuit, Case No. 2:19-cv-11661 (Hood, C.J.), remains pending.

2. On January 23, 2020, the Dumonts sent a demand letter to the Michigan Department of Health and Human Services (MDHHS), invoking the notice and cure provisions of the *Dumont* Settlement Agreement with regard to Catholic Charities West Michigan.

3. As a result, MDHHS filed the attached Notice in *Dumont* (Ex. A), and State Defendants filed the attached motion and brief in *Catholic Charities* (Ex. B).

4. State Defendants believe these filings have no bearing on any matter at issue in this case or State Defendants' appeal and motion for voluntary dismissal currently pending in the Sixth Circuit. Nevertheless, State Defendants bring these filings to the Court's attention in an abundance of caution and to avoid any claim that not doing so somehow constitutes a lack of candor.

Respectfully submitted,

Dana Nessel
Attorney General

/s/ Toni L. Harris
Toni L. Harris (P63111)
Attorney for State Defendants
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Dated: February 20, 2020

EXHIBIT A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KRISTY DUMONT; DANA DUMONT; ERIN BUSK-SUTTON; and REBECCA BUSK-SUTTON,

Plaintiffs,

v.

ROBERT GORDON, in his official capacity as the Director of the Michigan Department of Health and Human Services; and JENNIFER WRAYNO, in her official capacity as the Executive Director of the Michigan Children's Services Agency,

Defendants,

and

ST. VINCENT CATHOLIC CHARITIES; MELISSA BUCK; CHAD BUCK; and SHAMBER FLORE,

Defendants-Intervenors.
/

No. 17-cv-13080-PDB-EAS

HON. PAUL D. BORMAN

MAG. ELIZABETH A. STAFFORD

NOTICE OF DUMONTS' DEMAND THAT MDHHS ENFORCE ITS LONGSTANDING NONDISCRIMINATION POLICY AND, UNLESS THIS COURT DIRECTS OTHERWISE, MDHHS'S PLAN TO WAIT PENDING CHIEF JUDGE HOOD'S RULING

Defendants Robert Gordon, in his official capacity as Director of the Michigan Department of Health and Human Services (MDHHS), and Joo Yeun Chang, in her official capacity as Executive Director of the Michigan Children's Services Agency[1] (collectively, "the Department"), by and through undersigned counsel, notify this Court that Plaintiffs Kristy and Dana Dumont have invoked the notice and cure provision of the Settlement Agreement (ECF No. 82) executed in this case. The Dumonts allege the Department is in breach of the Agreement by not enforcing its longstanding nondiscrimination policy. (Exhibit A.) The Dumonts also demand the Department take action to achieve compliance. *Id.*

The Department fully intends to continue enforcing its long-established nondiscrimination policy and meeting its obligations under the Settlement Agreement. But the Department is faced with a dilemma of potentially competing and contrary legal obligations. It is a named defendant in a separate lawsuit—also pending in this district—

[1] Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, this Notice reflects the substitution of Children's Services Agency Executive Director Joo Yeun Chang for former Acting Children's Services Agency Executive Director Jennifer Wrayno, who was named in her official capacity.

challenging the nondiscrimination policy. (*Catholic Charities West Michigan v. Gordon et al.*, Case No. 2:19-cv-11661, Hood, C.J.). Catholic Charities West Michigan, the plaintiff in that case, filed a preliminary injunction motion to enjoin the Department from enforcing its policy. The motion is fully briefed and currently pending before Chief Judge Denise Page Hood.

These potentially competing obligations put the Department between a rock and a hard place. Consequently, unless otherwise directed by this Court, the Department will take no action while waiting for Chief Judge Hood to rule on the preliminary injunction motion.

The following details are relevant to this Notice:

1. On March 22, 2019, the Department entered into a settlement agreement with Plaintiffs, the Dumonts and Rebecca and Erin Busk-Sutton, to dispose of the claims in this action (the "Settlement Agreement"). That same day, the Department and Plaintiffs filed with this Court a Stipulation of Voluntary Dismissal with Prejudice, with the executed Settlement Agreement attached as Exhibit A. (ECF No. 82.) This Court entered an Order dismissing

Plaintiffs' claims "with prejudice pursuant to the terms of the Settlement Agreement" and retaining jurisdiction over the enforcement of the Settlement Agreement. (ECF No. 83, PageID.1469.)

2. Under the terms of the Settlement Agreement, unless prohibited by law or court order, the Department is required to enforce its long-standing nondiscrimination policy (Non-Discrimination Provision) against a child placing agency (CPA) "that the Department determines is in violation of, or is unwilling to comply with" the Provision, up to and including terminating the CPA's foster care case management services contract or adoption services contract.[2] (ECF No. 82, PageID.1445-1446, Settlement Agreement, Section 1(c).)

3. On April 25, 2019, Catholic Charities West Michigan (Catholic Charities) filed a new lawsuit against the Department and Michigan Attorney General Dana Nessel in her official capacity

[2] The Settlement Agreement acknowledges that the Department's contracts for foster care case management services and adoption services mandate "that contracted CPAs comply with the Department's non-discrimination statement prohibiting discrimination 'against any individual or group because of race, sex, religion, age, national origin, color, height, weight, marital status, gender identity or expression, sexual orientation, political beliefs, or disability' in the provision of services under contract with the Department (the 'Non-Discrimination Provision')."

(collectively, State Defendants), challenging the Department's long-established nondiscrimination policy as violative of state and federal law and the Michigan and U.S. constitutions. The litigation is currently pending in the United States District Court for the Eastern District of Michigan and assigned to Chief Judge Denise Page Hood. (*Catholic Charities West Michigan v. Gordon et al.*, Case No. 2:19-cv-11661, Hood, C.J.[3])

4. On June 26, 2019, Catholic Charities filed a motion for preliminary injunction, seeking to enjoin the State from taking adverse action against Catholic Charities for refusing to comply with the terms of it foster care case management services contract and adoption services contract with the Department, as well as the Non-Discrimination Provision. (Case No. 2:19-cv-11661, ECF No. 11.) That motion was fully briefed as of August 7, 2019, and remains pending. (Case No. 2:19-cv-11661, ECF Nos. 22 and 25.)

[3] Catholic Charities West Michigan originally filed its state *and* federal claims in the Michigan Court of Claims. (Court of Claims Case No. 19-cv-000072MM, Stephens, J.) Michigan law prohibits claimants from filing claims against the State and its departments in the Court of Claims where the claimant "has an adequate remedy upon his claim in the federal courts." Mich. Comp. Laws § 600.6440.

5. In correspondence dated January 23, 2020, and attached as Exhibit A, the Dumonts invoked the notice and cure provision in Section 7 of the Settlement Agreement, demanding that the Department enforce the nondiscrimination provisions in its contracts with Catholic Charities, stating:

a. "Catholic Charities West Michigan ("Catholic Charities"), a Michigan state-contracted CPA, has made clear in its litigation against the State, *Catholic Charities* v. *Michigan Department of Health and Human Services et al.,* No. 2:l 9-cv-11661-DPHDRG (E.D. Mich.), that it will not comply with the Non-Discrimination Provision of its Contracts and that it has engaged and will continue to engage in practices prohibited by the Non-Discrimination Provision. (Exhibit A, p. 1.)

b. Pursuant to Section 7 of the Settlement Agreement, the Department has ninety (90) days to cure noncompliance allegations. If the alleged breach is not cured within 90 days of notice, the Dumonts may take appropriate action to enforce their rights and seek specific performance of the Settlement Agreement. (Exhibit A, p. 2.)

6. State Defendants believe the Settlement Agreement comports with state and federal law and is constitutionally firm. They are defending the Non-Discrimination Provision in the litigation filed by Catholic Charities.

7. The Dumonts' January 23, 2020 demand letter and Catholic Charities' motion for preliminary injunction seek to impose potentially

competing and contrary legal obligations on the Department. In the absence of further direction from this Court, the Department believes it is constrained by the pending preliminary injunction motion and will wait for Chief Judge Hood's decision.

8. Concurrent with filing this Notice, State Defendants submitted a motion in the lawsuit filed by Catholic Charities, asking Chief Judge Hood (i) for expedited consideration of Catholic Charities' pending motion for preliminary injunction, and (ii) to certify the question of state law interpretation, more specifically Mich. Comp. Laws §§ 722.124e and 124f, to the Michigan Supreme Court.

Respectfully submitted,

Dana Nessel
Attorney General

Dated: February 20, 2020

/s/ *Toni L. Harris*
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CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2020, I electronically filed a Notice of Dumonts' Demand That MDHHS Enforce Its Longstanding Nondiscrimination Policy And, Unless This Court Directs Otherwise, MDHHS's Plan To Wait Pending Chief Judge Hood's Ruling with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record.

/s/ Toni L. Harris
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EXHIBIT A

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January 23, 2020

Via Certified Mail and E-mail

Return Receipt Requested

Michigan Department of Health and Human Services, State of Michigan,
Director, Bureau of Legal Affairs,
333 South Grand Avenue,
Lansing, Michigan 48909.

Re: *Dumont et al.* v. *Gordon et al.*, No. 2:17-cv-13080-PDB-EAS

To Whom It May Concern:

On behalf of Kristy Dumont and Dana Dumont (the "Dumonts"), we write in connection with the settlement agreement entered on March 22, 2019 between the Dumonts and Robert Gordon, in his official capacity as Director, Michigan Department of Health and Human Services and Jennifer Wrayno, in her official capacity as Acting Executive Director, Michigan Children's Services Agency (together, the "State"). *See Dumont et al.* v. *Gordon et al.*, Case No. 2:17-cv-13080-PDB-EAS (E.D. Mich. Mar. 22, 2019) (the "Settlement Agreement").[1]

In the Settlement Agreement, the Department agreed to "enforce the Non-Discrimination Provision . . . against a [child placing agency ("CPA")] that the Department determines is in violation of, or is unwilling to comply with, such provisions, up to and including termination of the Contracts . . . including without limitation . . . [i]n the event a CPA refuses to comply with the Non-Discrimination Provision . . . the Department will terminate the CPA's Contracts." (Settlement Agreement Section 1(c)).

Catholic Charities West Michigan ("CCWM"), a Michigan state-contracted CPA, has made clear in its litigation against the State, *Catholic Charities* v. *Michigan Department of Health and Human Services et al.*, No. 2:19-cv-11661-DPH-DRG (E.D. Mich.), that it will not comply with the Non-Discrimination Provision of its Contracts and that it has engaged and will continue to engage in practices prohibited by

[1] Terms defined in the Settlement Agreement have the same meaning in this letter unless given a different meaning in this letter.

the Non-Discrimination Provision. Among other things, on May 15, 2019, in support of a motion seeking to enjoin the State from enforcing the Non-Discrimination Provision against CCWM, CCWM filed an official written policy stating it will only place children with "married couples made up of two parents of the opposite sex," ECF No. 1-2, and a sworn declaration of Christopher Slater, CEO of CCWM, dated May 15, 2019, stating that such policy "prohibits Catholic Charities from recommending or facilitating child placements with same-sex couples." ECF No. 1-3.

Notwithstanding the Department's knowledge of CCWM's refusal to comply with the Non-Discrimination Provision, on information and belief, on or about September 30, 2019, the Department renewed its Adoption Services Contracts, Nos. MA 190000001067, MA 190000001079 and MA 190000001093, with CCWM.

Accordingly, pursuant to Section 7 of the Settlement Agreement, which provides that "[i]n the event any Party . . . asserts that another Party is not in compliance with one or more of its obligations in this Agreement . . . [t]he asserting Party . . . shall provide the other Party with written notice of such assertion and a ninety (90) day opportunity to cure such noncompliance prior to taking legal action," the Dumonts hereby provide written notice to the Department that the Department has failed to comply with its obligation under the Settlement Agreement to enforce the Non-Discrimination Provision, which prohibits discrimination on the basis of sexual orientation in the provision of services under contract with the Department.

If this breach is not cured within 90 days of this notice, the Dumonts will take appropriate action to enforce their rights, including, without limitation, by seeking leave from the Eastern District of Michigan to reopen *Dumont et al.* v. *Gordon* so that they may seek specific performance of the Settlement Agreement.

Sincerely,

Ann-Elizabeth O

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Ann-Elizabeth Ostrager
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EXHIBIT B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CATHOLIC CHARITIES WEST MICHIGAN,

Plaintiff,

v.

MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES; ROBERT GORDON, in his official capacity as Director of the Michigan Department of Health and Human Services; MICHIGAN CHILDREN'S SERVICES AGENCY; JENNIFER WRAYNO, in her official capacity as Acting Executive Director of Michigan Children's Services Agency; DANA NESSEL, in her official capacity as Attorney General of Michigan,

Defendants.
_____/

No. 2:19-CV-11661-DPH-DRG

HON. DENISE PAGE HOOD

MAG. DAVID R. GRAND

DEFENDANTS' MOTION FOR EXPEDITED CONSIDERATION OF PRELIMINARY INJUNCTION MOTION AND TO CERTIFY THE QUESTION OF STATUTORY INTERPRETATION TO THE MICHIGAN SUPREME COURT

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DEFENDANTS' MOTION FOR EXPEDITED CONSIDERATION OF PLAINTIFF'S PRELIMINARY INJUNCTION MOTION AND TO CERTIFY THE QUESTION OF STATUTORY INTERPRETATION TO THE MICHIGAN SUPREME COURT

Defendants Michigan Department of Health and Human Services ("Department" or "MDHHS") Director Robert Gordon, MDHHS Children's Services Agency Executive Director Joo Yeun Chang,[1] and Michigan Attorney General Dana Nessel, through counsel, move this Court for expedited consideration of Plaintiff Catholic Charities West Michigan's pending Motion for Preliminary Injunction (ECF No. 11). Defendants also ask this Court to certify to the Michigan Supreme Court the question of the proper interpretation of 2015 Public Act 53, codified as Michigan Compiled Laws § 722.124e and § 722.124f (the "2015 Michigan law"), particularly:

> Whether the 2015 Michigan law authorizes a child placing agency (CPA) under contract with the State to provide foster care case management or adoption services, to refuse to provide state-supervised children with contracted services that conflict with the CPA's sincerely held religious beliefs.

In support of their motion, Defendants rely on the accompanying brief in support.

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[1] Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, this Notice reflects the substitution of Children's Services Agency Executive Director Joo Yeun Chang for former Acting Children's Services Agency Executive Director Jennifer Wrayno, who was named in her official capacity.

Pursuant to Local Rule 7.1(a), Defendants' counsel conferred with Plaintiff's counsel, Pursuant to Local Rule 7.1(a), Defendants' counsel conferred with Plaintiff's counsel, explained the nature of this motion and its legal basis, and requested concurrence. Plaintiff responded: "Catholic Charities West Michigan does not oppose the request to expedite consideration of the preliminary injunction motion but still contends that motion should be considered in the Western District, as explained in Catholic Charities West Michigan's motion to change venue. Catholic Charities West Michigan opposes the request to certify.".

Concurrent with filing this motion, Defendants filed a Notice (Brief, Exhibit 2) in *Dumont et al. v. Gordon et al.*, Case No. 17-cv-13080 (Borman, J.), notifying Judge Paul D. Borman that (i) Defendants would be filing this motion, and (ii) the *Dumont* plaintiffs served the Department with notice demanding that The Department enforce its longstanding nondiscrimination policy. This is the same policy Catholic Charities West Michigan moved this Court to enjoin Defendants from enforcing against it. (ECF No. 11.)

Respectfully submitted,

Dana Nessel
Attorney General

/s/ Toni L. Harris
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Dated: February 20, 2020

CERTIFICATE OF SERVICE (E-FILE)

I hereby certify that on February 20, 2020, I electronically filed State Defendants' Combined Motion for Expedited Consideration of Plaintiff's Motion for Preliminary Injunction, and to Certify the Question of Statutory Interpretation to the Michigan Supreme Court, and Brief in Support with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record.

/s/ Toni L. Harris
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CATHOLIC CHARITIES WEST MICHIGAN,

Plaintiff,

v.

MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES; ROBERT GORDON, in his official capacity as Director of the Michigan Department of Health and Human Services; MICHIGAN CHILDREN'S SERVICES AGENCY; JENNIFER WRAYNO, in her official capacity as Acting Executive Director of Michigan Children's Services Agency; DANA NESSEL, in her official capacity as Attorney General of Michigan,

Defendants.
_____/

No. 2:19-CV-11661-DPH-DRG

HON. DENISE PAGE HOOD

MAG. DAVID R. GRAND

BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR EXPEDITED CONSIDERATION OF PLAINTIFF'S PRELIMINARY INJUNCTION MOTION AND TO CERTIFY THE QUESTION OF STATUTORY INTERPRETATION TO THE MICHIGAN SUPREME COURT

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BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR EXPEDITED CONSIDERATION OF PLAINTIFF'S PRELIMINARY INJUNCTION MOTION AND TO CERTIFY THE QUESTION OF STATUTORY INTERPRETATION TO THE MICHIGAN SUPREME COURT

BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR EXPEDITED CONSIDERATION OF PLAINTIFF'S PRELIMINARY INJUNCTION MOTION AND TO CERTIFY THE QUESTION OF STATUTORY INTERPRETATION TO THE MICHIGAN SUPREME COURT

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Dated: February 20, 2020

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Rules

CONCISE STATEMENT OF ISSUES PRESENTED

1. Defendants are subject to potentially competing and contrary legal obligations to two different parties who sued or are suing the State in different courts. The first is two former plaintiffs in *Dumont et al. v. Gordon et al.*, Case No. 17-cv-13080 (E.D. Mich. Borman, J.), demanding that the Department enforce its nondiscrimination policy against Plaintiff Catholic Charities West Michigan and threatening to file an enforcement action with United States District Court Judge Borman. The second is Plaintiff Catholic Charities West Michigan requesting that this Court preliminarily enjoin Defendants from enforcing the State's nondiscrimination policy against it. Should this Court grant expedited consideration of Plaintiff's motion for preliminary injunction to avoid the risk of having different courts impose on Defendants competing and contrary legal obligations to two different parties?

2. Federal courts have discretion to certify questions of state statutory interpretation to a state's highest court to promote cooperative judicial federalism and efficiencies and to avoid the potential for friction-generating error. Michigan courts have not had the occasion to interpret 2015 PA 53, codified as Michigan Compiled Laws §§ 722.124e and 722.124f (2015), to determine whether it authorizes state-contracted child placing agencies to refuse to provide state-supervised children with state-contracted services that conflict with an agency's sincerely held religious beliefs. Should this Court certify to the Michigan Supreme Court the question of the proper interpretation of 2015 PA 53?

INTRODUCTION

Defendants are facing potentially competing and contrary legal obligations to two different parties who sued or are suing the State in different courts. The first is two former plaintiffs in *Dumont et al. v. Gordon et al.*, Case No. 17-cv-13080 (E.D. Mich. Borman, J.), demanding that the Department enforce its nondiscrimination policy against Plaintiff Catholic Charities West Michigan ("Catholic Charities") and threatening to file an enforcement action with United States District Court Judge Borman. The other is Plaintiff Catholic Charities West Michigan, seeking to preliminarily enjoin Defendants from enforcing the State's nondiscrimination policy against it. Stuck between a rock and a hard place, Defendants respectfully requested expedited consideration of Plaintiff's motion for preliminary injunction––namely to decide whether Catholic Charities is likely to succeed on the merits of its state and federal claims under its erroneous interpretation of state law. No state court has interpreted this statute, and an interpretation is critical before plenary litigation proceeds.

As for the state law at issue, the parties agree that Michigan law[1] authorizes a state-contracted child placing agency ("CPA") to reject a Michigan Department of Health and Human Services ("MDHHS" or "Department") referral of a state-supervised child needing foster care case management or adoption services for any reason, including the CPA's sincerely held religious beliefs.[2] Michigan law also authorizes a CPA to refuse to provide private and direct adoption services that conflict with the CPA's sincerely held beliefs.[3]

But the parties are diametrically opposed on the legal issue of whether Michigan law authorizes a state-contracted CPA to refuse to provide state-supervised children in the agency's care with state-contracted foster care case management and adoption services that conflict with the CPA's sincerely held religious beliefs. And no state court has interpreted Mich. Comp. Laws §§ 722.124e and 722.124f.

Michigan's highest state court is the proper court to have the first opportunity to interpret this important state-law question. The proper

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[1] The Michigan law at issue is 2015 Public Act 53, codified as Michigan Compiled Laws § 722.124e and § 722.124f.

[2] Mich. Comp. Laws § 722.124f (2015).

[3] Mich. Comp. Laws § 722.124e(2) and (4) (2015).

interpretation is a matter of first impression, unique to Michigan, and significant to the State's jurisprudence.

Rather than predicting what the state court might do, this Court should certify to the Michigan Supreme Court the question of the proper interpretation of 2015 Public Act 53, codified as Mich. Comp. Laws §§ 722.124e and 722.124f (the "2015 Michigan law"). Specifically, this Court should certify:

> Whether the 2015 Michigan law authorizes a child placing agency (CPA) under contract with the state to provide foster care case management or adoption services, to refuse to provide state-supervised children with contracted services that conflict with the CPA's sincerely held religious beliefs.

Certifying this question to the Michigan Supreme Court advances cooperative judicial federalism and conserves federal judicial resources. Certification also recognizes and respects the state court's authority and interest in interpreting state law in the first instance on significant state jurisprudential issues.

The Michigan Supreme Court's interpretation of the 2015 Michigan law will assist this Court in analyzing key issues in this case and could be dispositive. Moreover, certifying this question to the

Michigan Supreme Court will not cause undue delay or prejudice, as there is a Motion for Preliminary Injunction pending before this Court.

FACTS

On March 22, 2019, the Department entered into a settlement agreement with Dana and Kristy Dumont and Rebecca and Erin Busk-Sutton, the plaintiffs in *Dumont et al. v. Gordon et al.*, Case No. 17-cv-13080 (E.D. Mich. Borman, J.), to dispose of the claims in the litigation (the "Settlement Agreement"). (Exhibit 1.) That same day, the Department and the *Dumont* plaintiffs filed a Stipulation of Voluntary Dismissal with Prejudice, with the executed Settlement Agreement attached as Exhibit A. (*Dumont*, Case No. 17-cv-13080, ECF No. 82.) Judge Borman entered an order dismissing the *Dumont* plaintiffs' claims "with prejudice pursuant to the terms of the Settlement Agreement" and retaining jurisdiction over the enforcement of the Settlement Agreement. (*Dumont*, Case No. 17-cv-13080, ECF No. 83, PageID.1469.)

Under the terms of the Settlement Agreement, unless prohibited by law or court order, the Department is required to enforce its

longstanding nondiscrimination policy (Non-Discrimination Provision) against a child placing agency (CPA) "that the Department determines is in violation of, or is unwilling to comply with" the Provision, up to and including terminating the CPA's foster care case management services contract or adoption services contract.[4] (Exhibit 1, Settlement Agreement, Section 1(c).)

On April 25, 2019, Plaintiff Catholic Charities West Michigan (Catholic Charities) initiated the instant lawsuit against the Department and Michigan Attorney General Dana Nessel in her official capacity (collectively, Defendants), challenging the Department's long-established nondiscrimination policy as violative of state and federal law and the Michigan and U.S. constitutions.[5]

---

[4] The Settlement Agreement acknowledges that the Department's contracts for foster care case management services and adoption services mandate "that contracted CPAs comply with the Department's non-discrimination statement prohibiting discrimination "against any individual or group because of race, sex, religion, age, national origin, color, height, weight, marital status, gender identity or expression, sexual orientation, political beliefs, or disability" in the provision of services under contract with the Department (the "Non-Discrimination Provision").

[5] Catholic Charities West Michigan originally filed its state *and* federal claims in the Michigan Court of Claims. (Court of Claims Case No. 19-cv-000072MM, Stephens, J.) Michigan law prohibits claimants from filing claims against the State and its departments in the Court of

On June 26, 2019, Catholic Charities filed a motion for preliminary injunction, seeking to enjoin the State from taking adverse action against Catholic Charities for refusing to comply with the terms of it foster care case management services contract and adoption services contract with the Department, as well as the Non-Discrimination Provision. (ECF No. 11.) That motion was fully briefed as of August 7, 2019 and remains pending. (ECF Nos. 22 and 25.)

In correspondence dated January 23, 2020 (Exhibit 2, Exh. A), the Dumonts invoked the notice and cure provision in Section 7 of the Settlement Agreement, demanding that the Department enforce the nondiscrimination provisions in its contracts with Catholic Charities, stating:

> a. "Catholic Charities West Michigan ('Catholic Charities'), a Michigan state-contracted CPA, has made clear in its litigation against the State, *Catholic Charities* v. *Michigan Department of Health and Human Services et al.,* No. 2:l 9-cv-11661-DPHDRG (E.D. Mich.), that it will not comply with the Non-Discrimination Provision of its Contracts and that it has engaged and will continue to engage in practices prohibited by the Non-Discrimination Provision." (Exhibit 2, Exh. A, p. 1.)

Claims where the claimant "has an adequate remedy upon his claim in the federal courts." Mich. Comp. Laws § 600.6440.

b. Pursuant to Section 7 of the Settlement Agreement, the Department has ninety (90) days to cure noncompliance allegations. If the alleged breach is not cured within 90 days of notice, the Dumonts may take appropriate action to enforce their rights and seek specific performance of the Settlement Agreement. (Exhibit 2, Exh. A, p. 2.)

Defendants believe the Settlement Agreement comports with state and federal law and is constitutionally firm. They are defending the Non-Discrimination Provision in the instant case.

The Dumonts' January 23, 2020 demand letter and Catholic Charities' motion for preliminary injunction seek to impose potentially competing obligations on the Department. This tension necessitates expedited consideration of Catholic Charities' motion for preliminary injunction. Otherwise, Defendants will be subject to two separate lawsuits pending before different judges in the same district court. Each judge could reach different conclusions as to the main issue– whether 2015 Public Act 53, Mich. Comp. Laws §§ 124e and 124f (2015 Michigan law), authorizes a child placing agency under contract with the State to provide foster care case management or adoption services, to refuse to provide state-supervised children with contracted services that conflict with the CPA's sincerely held religious beliefs.

Michigan courts have not had occasion to interpret the 2015 Michigan law. In another case filed by St. Vincent Catholic Charities against Defendants (*Buck et al. v. Gordon et al.*, Case No. 1:19-cv-00286 (Jonker, J.))[6], pending in the Western District of Michigan, Defendants asked Judge Jonker certify the following question of state law interpretation to the Michigan Supreme Court:

> Whether the 2015 Michigan law authorizes a child placing agency (CPA) under contract with the State to provide foster care case management or adoption services, to refuse to provide state-supervised children with contracted services that conflict with the CPA's sincerely held religious beliefs. [*Buck*, E.D. Mich. Case No. 1:19-cv-00286, ECF Nos. 87 and 88.]

Defendants' certification motion in *Buck* is fully briefed and remains pending before Judge Jonker.[7] Defendants ask this Court to certify this same question to the Michigan Supreme Court.

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[6] Chad and Melissa Buck and Shamber Flore, the individual plaintiffs in *Buck v. Gordon*, were dismissed as plaintiffs for lack of standing. (*Buck*, E.D. Mich. Case No. 1:19-cv-00286, ECF No. 70.)

[7] Judge Jonker granted St. Vincent's motion for preliminary injunction, enjoining Defendants from enforcing the State's non-discrimination policy if St. Vincent refuses to provide state-contracted services to state-supervised children if such services conflict with its sincerely held religious beliefs. (*Buck*, E.D. Mich. Case No. 1:19-cv-00286, ECF No. 69.) Defendants appealed, and the Sixth Circuit denied Defendants' motion to stay the injunction pending appeal. (*Buck v. Gordon*, Sixth Cir. Case No. 19-2185, Docs. 29). Defendants moved to voluntarily

Concurrent with filing this motion, Defendants filed a Notice (Brief, Exhibit 2) in *Dumont et al. v. Gordon et al.*, Case No. 17-cv-13080 (Borman, J.), notifying Judge Paul D. Borman (i) that Defendants would be filing this motion, and (ii) that the *Dumont* plaintiffs served notice on the Department, demanding that it enforce its longstanding nondiscrimination policy—the same policy that Catholic Charities West Michigan moved this Court to enjoin Defendants from enforcing against Catholic Charities. (ECF No. 11.)

ARGUMENT

I. Expedited consideration of the motion for preliminary injunction is necessary to avoid subjecting the State to potentially competing obligations.

The Department fully intends to continue enforcing its long-established nondiscrimination policy in accordance with the 2015 Michigan law. But the Department is faced with a dilemma of potentially competing and contrary legal obligations. It is a named defendant in a separate lawsuit—also pending in this district—where it

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dismiss the appeal to file a motion to certify the question of statutory interpretation and, thereafter, hasten a decision on the merits. *Id.*, Docs. 33 and 38. St. Vincent opposed voluntarily dismissal, and the motion remains pending. *Id.*, Doc. 34.

executed the Settlement Agreement and agreed to continue enforcing its long-established nondiscrimination policy. (*Buck et al. v. Gordon et al.*, Case No. 1:19-cv-00286 (Jonker, J.)). Kristy and Dana Dumont, two of the plaintiffs in that case, allege the Department is not complying with the Settlement Agreement and demand the Department enforce its nondiscrimination policy against Catholic Charities for refusing to comply based on statements in its Complaint in this case. (Exhibit 2.) The Dumonts indicate that they may seek to re-open the *Dumont* case and file an enforcement action under the Settlement Agreement. (Exhibit 2.) Meanwhile, Catholic Charities' motion for preliminary injunction is pending and seeks to preliminarily enjoin the Defendants from enforcing the nondiscrimination policy.

These potentially competing and contrary legal obligations put the Department between a rock and a hard place. This Court's expedited decision on the preliminary injunction motion will guide the Department's conduct and minimize the risk of violating one court's order. Consequently, Defendants respectfully request that this Court grant expedited consideration of the motion.

II. An authoritative decision on the interpretation of the 2015 Michigan law by Michigan's highest court is necessary to determine the nature of this case going forward and could be outcome determinative.

Both federal and state courts recognize that a proper adjudication of a federal case may first require a state to authoritatively interpret its own law. *See, e.g., Cty. of Wayne v. Philip Morris, Inc.*, No. 99-76097, 2000 U.S. Dist. LEXIS 22956 (E.D. Mich. Aug. 25, 2000) (Exhibit 3); *In re Certified Question (Wayne Cty. v. Philip Morris, Inc.)*, 638 N.W.2d 409 (Mich. 2002). This Court's local court rules, as well as the Michigan Court Rules, facilitate cooperation between federal and state courts by providing mechanisms to request and accept certified questions of state law. *See* E.D. Mich. L.Civ.R 83.40; Mich. Ct. Rule 7.308(A)(2).

Certification benefits federal courts because it "save[s] time, energy, and resources and help[s] build a cooperative judicial federalism." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 77 (1997) (internal citation omitted). Moreover, "[s]ubmitting uncertain questions of state law to the state's highest court by way of certification acknowledges that court's status as the final arbiter on matters of state law and avoids the potential for 'friction-generating error' which exists whenever a federal court construes a state law in the absence of any

direction from the state courts." *Planned Parenthood of Cincinnati Region v. Strickland*, 531 F.3d 406, 410 (6th Cir. 2008) (quoting *Arizonans for Official English*, 520 U.S. at 79). Both principles apply here and warrant certifying the first-time question of the 2015 Michigan law's interpretation to the Michigan Supreme Court.

A. The Michigan Supreme Court should have the opportunity to decide issues of first impression to its courts and of primary and jurisprudential significance to its citizens.

The importance of the 2015 Michigan law's proper interpretation in this case cannot be overstated. The U.S. Supreme Court and the Sixth Circuit have recognized that importance. *See, e.g.*, *Arizonans for Official English*, 520 U.S. at 77; *Bankey v. Storer Broadcasting Co.*, 882 F.2d 208, 210 (6th Cir. 1989) (Sixth Circuit unanimously certified question where the interpretation "proffered by appellant presents a question of Michigan law that is not controlled by Michigan Supreme Court precedent.") Equally important is providing Michigan state courts the first opportunity to decide significant issues of state jurisprudence by interpreting state laws involving issues of state

concern—in this case, children under the State's care and supervision and in need of foster care case management and adoption services.

Similar to federal courts' recognition of the value of certified questions, the Michigan Supreme Court also recognizes the importance of accepting a certified question. And it has accepted certified questions in cases like this, which present the "opportunity to clarify an important aspect of Michigan [] law," and provide "practical guidance and certainty" for Michigan citizens.[8] *See In re Certified Questions* (*Bankey v. Storer Broadcasting Co.*), 443 N.W.2d 112, 114, n.4 (Mich. 1989) (accepting certified question in an employment law case because it would "resolve some of the uncertainty" concerning the scope of an exception to Michigan's at-will doctrine).

[8] The Michigan Supreme Court accepts certified questions from both federal district courts and the federal courts of appeal. *See In re Certified Question* (*Mattison v. Social Security Comm'r)*, 825 N.W.2d 566, 567 (Mich. 2012) (certifying question from the U.S. District Court for the Western District of Michigan); *In re Certified Question* (*Philip Morris Inc., v. Jennifer Granholm, Attorney General, ex rel., State of Michigan*), 638 N.W.2d 409 (Mich. 2002) (certifying question from the U.S. District Court for the Eastern District of Michigan); *In re Certified Question* (*Deacon v. Pandora Media, Inc.*), 885 N.W.2d 628 (Mich. 2016) (certifying question from the U.S. Court of Appeals for the Ninth Circuit).

Now is the appropriate time to present this certified question. The parties' briefing on preliminary injunction relief and other matters is complete. Neither federal judicial resources nor the parties' time or resources has been expended on discovery and dispositive briefing prior to a final adjudication on the issues in this case. *See Heimbach v. Amazon.com Inc. (In re Amazon.com),* 942 F.3d 297, 300 (6th Cir. 2019) (time to request certification is before the district court has resolved the issue*); State Auto Property & Cas. Ins. Co. v. Hargis*, 785 F.3d 189, 194 (6th Cir. 2015) (certification disfavored when it is sought only after the district court has entered an adverse ruling on summary judgment); see also *BKB Props., LLC v. Suntrust Bank*, 453 F. App'x 582, 588 (6th Cir. 2011) (denying request for certification where movant failed to request certification in the district court, "resulting in the considerable expenditure of judicial resources by the federal courts on the issue.").

Another important consideration is that a proper interpretation of the 2015 Michigan law is of significant interest to the State. Foster care legislation presents "issues of unusual delicacy, … where professional judgments regarding desirable procedures are constantly and rapidly changing[]" and warrants federal judicial restraint. *Smith*

v. Org. of Foster Families for Equality and Reform, 431 U.S. 816, 855–56 (1977). Additionally, Michigan courts recognize that "[t]he care and protection of children has long been a matter of utmost state concern," even when faced with allegations that state laws intended to facilitate care and protection of children contradict the free exercise of religion. *Fisher v. Fisher,* 324 N.W. 2d 582, 584 (Mich. Ct. App. 1982). Certifying the question of the 2015 Michigan law's interpretation will allow the Michigan Supreme Court to determine whether the statute authorizes CPAs to refuse to provide state-supervised children with state-contracted services that conflict with their sincerely held religious beliefs.

No Michigan state court has spoken on the proper interpretation of the 2015 Michigan law. The Michigan Supreme Court should have the first opportunity to interpret this important statute, and the posture of this case presents an opportune time to do that. If the Michigan Supreme Court interprets the 2015 Michigan law as proposed by Catholic Charities, then this Court may not need to reach the constitutional issues presented. If, however, the Michigan Supreme Court interprets the 2015 Michigan law as MDHHS does, then the

nature of this case could significantly change. In either scenario, the clarification would resolve a crucial issue in this case, which in turn would allow the case to proceed in a much more efficient manner.

1. The interpretation of the 2015 Michigan law is a threshold issue at the forefront of Catholic Charities' state and federal claims.

The proper interpretation of the 2015 Michigan law is at the heart of Catholic Charities' state and federal claims. Michigan courts have not considered this important issue of state law, and the importance of having the State's highest court interpret state law in the first instance cannot be overstated.

Count I of the Complaint alleges that Defendants violate the 2015 Michigan law by enforcing the State's longstanding nondiscrimination policy if Catholic Charities refuses to provide state-supervised children with state-contracted services that conflict with its sincerely held religious beliefs. (Compl., ECF No. 1-2, PageID.51.) And Catholic Charities describes the 2015 Michigan law as providing "proper protection" for its First Amendment rights. (PI Mot., ECF No. 11, PageID.609). Thus, the question of proper interpretation cannot be separated from Catholic Charities' federal claims.

Yet, throughout its Complaint and in briefs filed in support of its motion for preliminary injunction, Catholic Charities misinterprets and misapplies the 2015 Michigan law. Specifically, Catholic Charities claims that the 2015 Michigan law "protects" the agency from adverse action by the Department in the event Catholic Charities refuses to provide contracted-services to state-supervised children in care. (*See, e.g.*, Compl., ECF No. 1-2, PageID.41, ¶102 ["Generally, under these laws, a 'child placing agency'…cannot be required to provide services . . . ."]; PI Mot., ECF No. 11, PageID.603-604 ["Under these laws, a 'child placing agency' cannot be forced to provide services . . . that conflict with its 'sincerely held religious beliefs.'"]). But Plaintiff's interpretation is fatally flawed because it ignores the definition of "services" in Mich. Comp. Laws § 722.124e(7), which expressly excludes state-contracted foster care case management and adoption services from the services that an agency can refuse to provide if in conflict with its sincerely held religious beliefs. Thus, an agency can refuse to provide private and direct placement services that conflict with its sincerely held religious beliefs—not state-contracted services for state-supervised children in its care. *See* Mich. Comp. Laws § 722.124e.

In summary, the 2015 Michigan law allows a CPA to reject the Department's referral of a child or individual in need of foster care case management or adoption services. But the 2015 Michigan law does not allow a CPA to refuse state-contracted services for those children for whom the child-placing agency accepted the Department's referral. (*See* Resp. to PI Mot., ECF No. 22, PageID.931-33, 935-36.) To avoid this Court speculating on how state courts might rule on this important state law question involving a significant matter of state jurisprudence, the Michigan Supreme Court should be given the opportunity to decide this state law question first.

Because the proper interpretation of the 2015 Michigan law is at the forefront of this federal case and may control the outcome or, at the very least, impact the nature of this case as the parties proceed on the merits. *Cf.* L.Civ.R. 83.40(a)(2). This Court should grant the Defendants' Motion.

2. The importance of asking the Michigan Supreme Court to interpret state law first is not lessened because the State removed Plaintiff's state and federal claims from the Michigan Court of Claims to this Court.

As explained above, Catholic Charities originally filed its Complaint—which asserts violations of state and federal law—in the Michigan Court of Claims. (Court of Claims Case No. 19-cv-000072MM.) The case was assigned to Judge Cynthia Stephens. Rather than dismissing the federal claims under Mich. Comp. Laws § 600.6440 and litigating Catholic Charities' state claims in state court and its federal claims in federal court, Defendants removed the case to this Court (ECF No. 1). But "removal does not foreclose the opportunity to seek certification[.]" *Bailey v. State Farm Fire & Cas. Co.*, No. 14-53-HRW, 2015 U.S. Dist. LEXIS 87744 (E.D. Ky. July 7, 2015) (denying certification sought *after* receiving an unfavorable decision on a dispositive motion). (Exhibit 4.)

Federal courts—including this Court—regularly certify questions of state law in cases, like this one, that are properly removed to federal court. *See, e.g., Cty. of Wayne v. Philip Morris, Inc.*, 2000 U.S Dist LEXIS 22956, at *5 (Borman, J.) (granting certification after the case

was removed from Wayne County Circuit Court to the United States District Court for the Eastern District of Michigan) (Exhibit 3); *Eliason v. Clark County*, 2019 U.S. Dist. LEXIS 48486 (USDC for Nevada 2019)(granting defendant's motion to certify after co-defendant removed case) (Exhibit 5); *Wigginton v. Centracchio,* 205 F.3d 504, 507-08, 518 (1st Cir. 2000) (granting plaintiff's motion to certify after removal based on federal question jurisdiction); *Vitanza v. Upjohn Co.*, 214 F.3d 73, 75 (2d Cir. 2000) (certifying question at plaintiff's request after removal based on diversity jurisdiction); *Murray v. Alaska Airlines, Inc.*, 522 F.3d 920, 922-24 (9th Cir. 2008) (certifying question at plaintiff's request after removal based on diversity jurisdiction).

Unlike in *Bailey*, Defendants' request for certification here is timely, as no issues in this case have been adjudicated on the merits. Indeed, the Sixth Circuit has repeatedly held that "the appropriate time for a party to seek certification of a state-law issue is before, not after the district court has resolved the issue." *Vance v. Amazon.com, Inc.*, 852 F.3d 601, 607 (6th Cir. 2017) (internal citations and quotations omitted). *See also*, *Heimbach v. Amazon.com, Inc.*, 942 F.3d 297, 300 (6th Cir. 2019) (granting a timely filed motion to certify and pointing to

the timely filing as a distinction with an earlier case involving a similar question, but presented in a belated motion to certify. *Heimbach v. Amazon.com, Inc.*, 942 F.3d 297, 300 (6th Cir. 2019).

Furthermore, certification remains available and appropriate in the event this Court declines to exercise supplemental jurisdiction over Catholic Charities' state law claims. Although the Michigan Supreme Court's decision on the certified question will not adjudicate Catholic Charities' state law claims, its answer will provide an authoritative interpretation of a controlling legal issue, i.e., the 2015 Michigan law, relevant to Plaintiff's federal claims. *See Bohus v. Restaurant.com, Inc.*, 784 F.3d 918, 925-26 (3d Cir. 2015) (explaining that the answer to a certified question decides a controlling issue of state law but does not independently resolve a dispute in federal litigation).

In summary, that this case was removed from state court to federal court has no bearing on whether certification of a state law question is appropriate or available. Because the proper interpretation of the 2015 Michigan law will likely control the outcome of Catholic Charities' state and federal claims, this Court should exercise its discretion and grant Defendants' motion to certify.

B. Certification of the proper interpretation of the 2015 Michigan law would clarify unsettled issues, affect the nature of this case going forward, and would not cause undue delay or prejudice.

Certification rests in the discretion of this Court. *See* E.D. Mich. L.Civ.R 83.40; *Glover v. Nationwide Mutual Fire Ins. Co.*, 676 F. Supp. 2d 602, 622 (W.D. Mich. 2009) (citing *Lehman Brothers v. Schein,* 416 U.S. 386, 390–91 (1974)). And this Court should exercise its discretion to certify the question to the Michigan Supreme Court for three reasons.

First, there is no authoritative interpretation of the 2015 Michigan law on which this Court can rely, leaving it to predict how Michigan courts would decide the issue. And, the state court's interpretation of its own law is important here. An authoritative interpretation of the 2015 Michigan law from the Michigan Supreme Court could "avoid in whole or in part the necessity for federal constitutional adjudication" of Catholic Charities' federal claims because the Department is required to follow state law. *Am. Booksellers Found. for Free Expression v. Strickland*, 560 F.3d 443, 446 (6th Cir. 2009) (quoting *Bellotti v. Baird*, 428 U.S. 132 (1976)).

Federal courts in the Sixth Circuit, faced with unsettled questions of interpretation of state law, have recognized the value of allowing the

Michigan Supreme Court to carry out its appropriate role of interpreting Michigan law. *See, e.g.*, *Cty. of Wayne v. Philip Morris, Inc.*, 2000 U.S Dist LEXIS 22956, at *7 (certifying question concerning the scope of a Michigan official's authority because there was no controlling precedent) (Exhibit 3); *Thiss v. A.O. Smith Corp.*, No. 1:91-CV-239, 1993 U.S. Dist. LEXIS 11846, at *6 (W.D. Mich. June 29, 1993) (certifying question where district court had no basis to predict the course of state law on what was "essentially a policy decision between competing doctrines.") (attached as Exhibit 6).

Second, the Michigan Supreme Court's interpretation of the 2015 Michigan law could affect the outcome of this case, or at least materially change the nature of the issues. Even if having an authoritative interpretation does not completely dispose of the case, it would likely significantly narrow the issues to be decided by this Court.

Third, certification will not cause undue delay or prejudice. Any risk of delay is mitigated by having a proper interpretation of the 2015 Michigan law, which will conserve this Court's "time, energy, and resources." *Lindenberg v. Jackson Nat'l Life Ins. Co.*, 912 F.3d 348, 371

(6th Cir. 2018) (quoting *Lehman Bros.* 416 U.S. at 391) (internal citation and quotation marks omitted)).

In deciding Catholic Charities' motion for preliminary injunction, this Court will determine whether Plaintiff is likely to succeed on the merits of its claims *based on its proposed interpretation of the 2015 Michigan law*. But this Court's decision on the preliminary injunctive motion is not a decision on the merits of the case. Whether preliminary injunctive relief is granted, plenary litigation will proceed. And the interpretation of the 2015 Michigan law will play a pivotal role. Certifying the question of statutory interpretation now, rather than later, will avoid undue delay or prejudice and allow the parties to get to the merits of the case quicker and more efficiently.

CONCLUSION AND RELIEF SOUGHT

For the reasons stated in their motion and this brief in support, Defendants respectfully request that grant expedited consideration of Catholic Charities' motion for preliminary injunction, and certify to the Michigan Supreme Court the proper interpretation of 2015 PA 53, codified as Michigan Compiled Laws § 722.124e and § 722.124f.

Respectfully submitted,

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Dated: February 20, 2020

CERTIFICATE OF SERVICE (E-FILE)

I hereby certify that on February 20, 2020, I electronically filed Brief in Support of Defendant' Motion for Expedited Consideration of Plaintiff's Preliminary Injunction Motion and to Certify the Question of Statutory Interpretation to the Michigan Supreme Court with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CATHOLIC CHARITIES WEST MICHIGAN,

Plaintiff,

v.

MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES; ROBERT GORDON, in his official capacity as Director of the Michigan Department of Health and Human Services; MICHIGAN CHILDREN'S SERVICES AGENCY; JENNIFER WRAYNO, in her official capacity as Acting Executive Director of Michigan Children's Services Agency; DANA NESSEL, in her official capacity as Attorney General of Michigan,

Defendants.
_____/

No. 2:19-CV-11661-DPH-DRG

HON. DENISE PAGE HOOD

MAG. DAVID R. GRAND

INDEX OF EXHIBITS TO BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR EXPEDITED CONSIDERATION OF PLAINTIFF'S INJUNCTION MOTION AND TO CERTIFY THE QUESTION OF STATUTORY INTERPRETATION TO THE MICHIGAN SURPREME COURT

INDEX OF EXHIBITS TO BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR EXPEDITED CONSIDERATION OF PLAINTIFF'S INJUNCTION MOTION AND TO CERTIFY THE QUESTION OF STATUTORY INTERPRETATION TO THE MICHIGAN SURPREME COURT

Exhibit 1 - *Dumont et al v Gordon et al Settlement Agreement.* dated March 22, 2019

Exhibit 2 – Notice of Dumonts' Demand That MDHHS Enforce Its Longstanding Nondiscrimination Policy And, Unless This Court Directs Otherwise, MDHHS's Plan To Wait Pending Chief Judge Hood's Ruling

Exhibit 3 - *Cty of Wayne v Philip Morris Inc*, No 99-76097

Exhibit 4 - Bailey v State Farm Fire & Cas. Co. No. 14-53-HRW, 2015-U.S. Dist. LEXIS 87744

Exhibit 5 - *Eliason v Clark County, 2019 U.S. Dist. LEXIS 48486*

Exhibit 6 - *Thiss v A.O. Smith Corp., No. 1:91-CV-239, 1993 U.S. Dist. LEXIS 11846*

EXHIBIT 1

SETTLEMENT AGREEMENT

Dumont et al. v. Gordon et al.
USDC EDMI Case No. 2:17-cv-13080-PDB-EAS

This Settlement Agreement (the "Agreement") between Kristy Dumont, Dana Dumont, Erin Busk-Sutton and Rebecca Busk-Sutton (collectively, the "Plaintiffs"), and Robert Gordon, in his official capacity as the Director of the Michigan Department of Health and Human Services ("MDHHS"), and Jennifer Wrayno, in her official capacity as the Acting Executive Director of the Michigan Children's Services Agency ("MCSA") (Gordon, Wrayno, MDHHS and MCSA collectively referred to herein as the "Department"), resolves Plaintiffs' claims against the Department in the case captioned *Dumont et al. v. Gordon et al.*, Case No. 2:17-cv-13080-PDB-EAS, pending in the United States District Court for the Eastern District of Michigan (the "Litigation"), as stated herein. Throughout this Agreement, Plaintiffs and the Department may be referred to as a "Party" or collectively referred to as "Parties."

WHEREAS, the Department contracts with licensed child placing agencies ("CPAs") to provide adoption-related services for permanent wards placed with the Department for care, supervision, and adoption ("Adoption Services Contracts").

WHEREAS, the Department contracts with licensed CPAs to provide foster care case management related services for children placed with the Department for care, supervision, and foster care placement ("PAFC Services Contracts"). Throughout this Agreement, the Adoption Services Contracts and the PAFC Services Contracts are collectively referred to as "Contracts."

WHEREAS, the Department may contract with one or more licensed CPAs ("Contractors") to subcontract with other licensed CPAs to provide adoption related services, in substantial compliance with the terms of the Adoption Services Contract, for permanent wards placed with the Department for care, supervision, and adoption ("Adoption Services Subcontracts").

WHEREAS, the Department may contract with one or more Contractors to subcontract with other licensed CPAs to provide foster care case management related services, in substantial compliance with the terms of the PAFC Services Contracts, for children placed with the Department for care, supervision, and foster care placement ("PAFC Services Subcontracts"). Throughout this Agreement, Adoption Services Subcontracts and PAFC Services Subcontracts are collectively referred to as "Subcontracts."

WHEREAS, the Contracts and the Subcontracts include a non-discrimination provision mandating that contracted CPAs comply with the Department's non-discrimination statement prohibiting discrimination "against any individual or group because of race, sex, religion, age, national origin, color, height, weight, marital status, gender identity or expression, sexual orientation, political beliefs, or disability" in the provision of services under contract with the Department (the "Non-Discrimination Provision").

WHEREAS, on September 20, 2017, Plaintiffs filed a complaint asserting claims against the Department in the Litigation. Thereafter, St. Vincent Catholic Charities, Melissa Buck, Chad Buck, and Shamber Flore intervened as defendants (collectively, "Intervening Defendants") in the Litigation. Plaintiffs have asserted no claims, and have no current intention to assert any claims,

against Intervening Defendants in the Litigation. Likewise, the named Defendants have asserted no claims, and have no current intention to assert any claims, against Intervening Defendants in the Litigation. Intervening Defendants have not asserted any claims, counter-claims or cross-claims against Plaintiffs, Defendants, or any third party in the Litigation.

WHEREAS, Plaintiffs and the Department wish to resolve the Litigation; the Parties agree that they are entering into this Agreement for that purpose only and it is not to be construed as an admission of any liability or wrongdoing.

THEREFORE, in addition to the foregoing, and in the interest of resolving the Litigation, the Parties agree as follows:

Section 1. Unless prohibited by law or court order:

a. The Department shall continue including in Contracts, and shall continue requiring all Contractors to include in Subcontracts, the Non-Discrimination Provision, or a materially and substantially similar provision ("Similar Provision").

b. For the avoidance of doubt, policies and practices prohibited under the Non-Discrimination Provision include, without limitation,

i. turning away or referring to another contracted CPA an otherwise potentially qualified LGBTQ individual or same-sex couple that may be a suitable foster or adoptive family for any child accepted by the CPA for services under a Contract or a Subcontract;

ii. refusing to provide orientation or training to an otherwise potentially qualified LGBTQ individual or same-sex couple that may be a suitable foster or adoptive family for any child accepted by the CPA for services under a Contract or a Subcontract;

iii. refusing to perform a home study or process a foster care licensing application or an adoption application for an otherwise potentially qualified LGBTQ individual or same-sex couple that may be a suitable foster or adoptive family for any child accepted by the CPA for services under a Contract or a Subcontract; and

iv. refusing to place a child accepted by the CPA for services under a Contract or a Subcontract with an otherwise qualified LGBTQ individual or same-sex couple suitable as a foster or adoptive family for the child;

in each case, without regard to whether such individual or couple has identified any particular child for foster placement or adoption.

c. The Department shall enforce the Non-Discrimination Provision or Similar Provision against a CPA that the Department determines is in violation of, or is unwilling to comply with, such provisions (collectively, a "Contract

Violation"), up to and including termination of the Contracts in accordance with the termination provisions therein, including without limitation:

i. In the event a CPA refuses to comply with the Non-Discrimination Provision or Similar Provision within a reasonable time after notification by the Department of a Contract Violation, the Department will terminate the CPA's Contracts.

ii. The Department will initiate an investigation when made aware of an alleged Contract Violation. In the event the Department determines that a CPA has committed a Contract Violation, the Department will provide the CPA with notice and a reasonable opportunity to implement a Department-approved corrective action plan mandating immediate, regular, and continuous provision of foster care case management services or adoption services, as applicable, in compliance with the Non-Discrimination Provision or Similar Provision; where the CPA fails to demonstrate compliance after a reasonable opportunity to implement the approved corrective action plan, the Department will terminate the CPA's Contracts.

d. The Department shall require all Contractors to enforce the Non-Discrimination Provision or Similar Provision against a CPA that the Contractor or the Department determines is in violation of, or is unwilling to comply with, such provisions (collectively, a "Subcontract Violation"), up to and including termination of the Subcontracts in accordance with the termination provisions therein, including without limitation:

i. In the event a CPA refuses to comply with the Non-Discrimination Provision or Similar Provision within a reasonable time after notification by the Contractor or the Department of a Subcontract Violation, the Department will require the Contractor to terminate the CPA's Subcontracts.

ii. The Department will require a Contractor to initiate an investigation when made aware of an alleged Subcontract Violation. In the event the Contractor or the Department determines that a CPA has committed a Subcontract Violation, the Department will require the Contractor to provide the CPA with notice and a reasonable opportunity to implement a Contractor-approved corrective action plan mandating immediate, regular, and continuous provision of foster care case management services or adoption services, as applicable, in compliance with the Non-Discrimination Provision or Similar Provision; where the CPA fails to demonstrate compliance after a reasonable opportunity to implement the approved corrective action plan, the Department will require the Contractor to terminate the CPA's Subcontracts.

e. The Department shall provide ongoing training as part of the Department's existing training programs to Department employees, Contractors, and contracted CPAs with respect to:

i. the Litigation and the obligations under this Agreement;

ii. the obligations of, and reporting channels available to, the Department's employees and Contractors to report any Contract or Subcontract Violation or suspected Contract or Subcontract Violation by contracted CPAs, including, without limitation, to the Department's Division of Child Welfare Licensing via the "Online Complaint Form" accessible on the Department's website;

iii. the Department's obligations to investigate any Contract Violation or suspected Contract Violation reported verbally or in writing to the Department and to enforce the Non-Discrimination Provision or Similar Provision; and

iv. a Contractor's obligations to investigate any Subcontract Violation or suspected Subcontract Violation by contracted CPAs reported verbally or in writing to the Contractor, and to enforce the Subcontracts.

f. The Department shall publish and maintain a hyperlink to the Department's Division of Child Welfare Licensing "Online Complaint Form" in a prominent place on the landing page of the Department's website; and

g. The Department shall make a public announcement in substantially the following form:

> The Department's contracts with child placing agencies prohibit discrimination against any individual or group because of race, religion, age, national origin, color, height, weight, marital status, sex, sexual orientation, gender identity or expression, political beliefs or disability.
>
> Examples of prohibited discriminatory conduct include:
>
> - turning away or referring to another contracted CPA an otherwise potentially qualified LGBTQ individual or same-sex couple that may be a suitable foster or adoptive family for any child accepted by the CPA for contracted services;
>
> - refusing to provide orientation or training to an otherwise potentially qualified LGBTQ individual or same-sex couple that may be a suitable foster or adoptive family for any child accepted by the CPA for contracted services;

- refusing to perform a home study or process a foster care licensing application or an adoption application for an otherwise potentially qualified LGBTQ individual or same-sex couple that may be a suitable foster or adoptive family for any child accepted by the CPA for contracted services; and

- refusing to place a child accepted by the CPA for contracted services with an otherwise qualified LGBTQ individual or same-sex couple suitable as a foster or adoptive family for the child.

If you are aware of a violation or suspected violation of these nondiscrimination provisions, a complaint may be made via the Online Complaint Form accessible on the Department's website.

Section 2. For the avoidance of doubt, nothing in this Agreement shall require the Department to take adverse action against any CPA on the basis that such CPA has decided to accept or not accept a referral from the Department of a particular child for services under a contract with the Department.

Section 3. Subject to Section 1, nothing in this Agreement shall affect the Department's obligations, authority, or discretion to audit, train, diligently investigate, or vigorously enforce the terms of the Contracts or Subcontracts in accordance with applicable laws, rules, regulations, policies, court orders, and contract terms.

Section 4. Subject to Section 1, the Department retains sole authority and sole discretion on all matters pertaining to all Contracts and Subcontracts, including without limitation all training, all aspects of investigating an alleged Contract or Subcontract Violation, determining whether a Contract or Subcontract Violation occurred, and all enforcement measures.

Section 5. Subject to Section 1, nothing in this Agreement expands the Department's obligation to monitor CPA compliance with Contracts and Subcontracts beyond that which is required under applicable law, rules, regulations, and policies.

Section 6. This Agreement is intended for the direct benefit of the following individuals injured by a breach of this Agreement: (i) the Parties hereto, (ii) any LGBTQ individual or same-sex couple that seeks to foster a child accepted by a CPA for foster care case management services or adoption services under a Contract or Subcontract and the CPA is alleged to have committed a Contract Violation or Subcontract Violation directly involving the individual or couple, (iii) any LGBTQ individual or married same-sex couple that seeks to adopt a child accepted by a CPA for foster care case management services or adoption services under a Contract or Subcontract and the CPA is alleged to have committed a Contract Violation or Subcontract Violation directly involving the individual or couple, and (iv) any child accepted by a CPA for foster care case management services or adoption services under a Contract or Subcontract and the CPA is alleged to have committed a Contract Violation or Subcontract Violation directly involving the

child. Each person described in subclauses (ii), (iii) and (iv) of the immediately preceding sentence shall be a direct third-party beneficiary of, and may, to the extent of their injury and ability to satisfy standing requirements, independently enforce the terms of this Agreement as if it were a party hereto.

Section 7. In the event any Party or a third-party beneficiary asserts that another Party is not in compliance with one or more of its obligations in this Agreement, the Parties and any third-party beneficiaries shall address such alleged breach in good faith and act promptly in an attempt to resolve it. The asserting Party or third-party beneficiary shall provide the other Party with written notice of such assertion and a ninety (90) day opportunity to cure such noncompliance prior to taking legal action. Notice shall be made via certified mail, return receipt requested as follows:

Michigan Department of Health and Human Services **State of Michigan** Director, Bureau of Legal Affairs 333 South Grand Avenue Lansing, MI 48909 517.241.0048	**American Civil Liberties Union Fund of Michigan** Jay D. Kaplan / Michael J. Steinberg 2966 Woodward Avenue Detroit, MI 48201 (313) 578-6823 jkaplan@aclumich.org msteinberg@aclumich.org

Section 8. Specific performance shall be the sole and exclusive remedy available to each Party and each third-party beneficiary asserting any claim relating to the Department's failure to meet its obligations under this Agreement. Each Party and each third-party beneficiary asserting any claim relating to the Department's obligations under this Agreement waives all rights to recover any damage, loss, attorney fees, costs, or any other expense arising out of asserting such claims. The Parties also agree that, regardless of the failure of the sole and exclusive remedy, the Department will not be liable to any Party or third-party beneficiary asserting any claim relating to the Department's obligations under this Agreement for any incidental or consequential damages of whatsoever kind or nature. The Parties intend the exclusion of incidental and consequential damages as an independent agreement apart from the sole and exclusive remedy herein. The limitations of this Section 8 apply only to claims relating to the Department's obligations under this Agreement.

Section 9. Upon signing this Agreement, Plaintiffs shall file a Stipulation of Voluntary Dismissal with Prejudice substantially in the form attached to as Annex A and submit a Proposed Order on Stipulation of Dismissal substantially in the form attached hereto as Annex B. This Agreement becomes effective upon entry of the Proposed Order on Stipulation of Dismissal by the district court.

Section 10. The Parties shall bear their own attorneys' fees and costs associated with the Litigation.

Section 11. The Parties understand that this Agreement is a public record that may be disclosed in response to a proper request under Michigan's Freedom of Information Act.

Section 12. The Parties acknowledge and agree that this Agreement shall be governed by and construed in accordance with the laws of the State of Michigan without giving effect to conflict of laws, rules or statutes.

Section 13. The Parties acknowledge, understand, and agree that they are entering into this Agreement knowingly, voluntarily, and of their own free will and volition, without coercion or undue influence.

Section 14. Each Party has been represented by counsel and cooperated in the drafting and preparation of this Agreement. Hence, this Agreement shall not be construed against any Party on the basis that the Party was the drafter.

Section 15. This Agreement may be executed in any number of counterparts, and each such counterpart shall be deemed to be an original instrument, but all such counterparts shall constitute one Agreement.

Section 16. The undersigned represent that they are authorized to sign this Agreement.

Section 17. Each Party represents that they believe there is no state or federal law, rule, regulation, policy, contract term, or other obligation that prevents it from complying with its obligations under this Agreement; *provided*, that solely for purposes of this Section 17, the obligations in Section 1 shall be read without the introductory phrase "Unless prohibited by law or court order."

Section 18. This Agreement shall be binding upon and inure to the benefit of the Parties and their respective successors and permitted assigns. No Party may assign this Agreement or any rights or obligations hereunder without the prior written consent of each other Party hereto.

Section 19. No modification or waivers of any provision of this Agreement shall be valid or binding unless made in writing and signed by each Party or by a person authorized to sign on behalf of such Party.

[*Signature Page Follows*]

IN WITNESS WHEREOF, this Agreement is executed as of March 22, 2019.

PLAINTIFFS

Kristy Dumont

Dana Dumont

Erin Busk-Sutton

Rebecca Busk-Sutton

DEFENDANTS

Robert Gordon, in his official capacity as Director, Michigan Department of Health and Human Services

Jennifer Wrayno, in her official capacity as Acting Executive Director, Michigan Children's Services Agency

IN WITNESS WHEREOF, this Agreement is executed as of March 22, 2019.

PLAINTIFFS

Kristy Dumont

Dana Dumont

Erin Busk-Sutton

Rebecca Busk-Sutton

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Robert Gordon, in his official capacity as Director, Michigan Department of Health and Human Services

Jennifer Wrayno, in her official capacity as Acting Executive Director, Michigan Children's Services Agency

IN WITNESS WHEREOF, this Agreement is executed as of March 22, 2019.

PLAINTIFFS

Kristy Dumont

Dana Dumont

Erin Busk-Sutton

Rebecca Busk-Sutton

DEFENDANTS

Robert Gordon, in his official capacity as Director, Michigan Department of Health and Human Services

Jennifer Wrayno, in her official capacity as Acting Executive Director, Michigan Children's Services Agency

Annex A

Stipulation of Voluntary Dismissal with Prejudice

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KRISTY DUMONT; DANA DUMONT; ERIN BUSK-SUTTON; and REBECCA BUSK-SUTTON,

Plaintiffs,

v.

ROBERT GORDON, in his official capacity as the Director of the Michigan Department of Health and Human Services; and JENNIFER WRAYNO, in her official capacity as the Acting Executive Director of the Michigan Children's Services Agency,

Defendants,

and

ST. VINCENT CATHOLIC CHARITIES; MELISSA BUCK; CHAD BUCK; and SHAMBER FLORE,

Intervenor Defendants.

No. 2:17-cv-13080-PDB-EAS

HON. PAUL D. BORMAN

MAG. ELIZABETH A. STAFFORD

STIPULATION OF VOLUNTARY DISMISSAL WITH PREJUDICE

Plaintiffs Kristy Dumont, Dana Dumont, Erin Busk-Sutton, and Rebecca Busk-Sutton (collectively, "Plaintiffs") and Defendants Robert Gordon and

Jennifer Wrayno[1] (collectively, "State Defendants") file this stipulation of dismissal of the above-captioned action (the "Action") under Rule 41(a)(2) of the Federal Rules of Civil Procedure. Plaintiffs and State Defendants state as follows:

On September 20, 2017, Plaintiffs filed the complaint in the Action with the U.S. District Court for the Eastern District of Michigan against the State Defendants. (ECF No. 1.)

On December 18, 2017, St. Vincent Catholic Charities, Melissa and Chad Buck, and Shamber Flore ("Intervenor Defendants") moved to intervene in this case (ECF No. 18), which motion was granted on March 22, 2018. (ECF No. 34.)

On September 14, 2018, this Court denied in substantial part the motions to dismiss filed by State Defendants and Intervenor Defendants. (ECF No. 49 at 93.)

On September 17, 2018, the Court entered a schedule for discovery and briefing to "manage the progress of the case" (the "September 17 Scheduling Order"). (ECF No. 51 at 1.)

On October 31, 2018, all Parties jointly moved to modify the September 17 Scheduling Order. (ECF No. 61.) On November 2, 2018, this Court granted in part and denied in part that motion. (ECF No. 62.)

---

[1] Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, this stipulation reflects the substitution of Herman McCall, a party in his official capacity who has ceased to hold office during the pendency of the Action, for Jennifer Wrayno, who is "automatically substituted as a party."

On November 13, 2018, this Court issued an Amended Scheduling Order. (ECF No. 63.)

The Parties have engaged in substantial discovery, including the exchange of written discovery and document production.

On January 23, 2019, Plaintiffs and State Defendants moved this Court to stay proceedings as Plaintiffs and State Defendants actively worked to reach a resolution. (ECF No. 74.) On that same day, Plaintiffs filed a Joint Motion for Immediate Consideration of the Motion to Stay Proceedings. (ECF No. 75.)

On January 24, 2019, this Court granted in part Plaintiffs' and State Defendants' Joint Motion to Stay Proceedings, entering a thirty (30) day stay of proceedings. (ECF No. 76.)

On February 22, 2019, State Defendants moved this Court to stay proceedings as Plaintiffs and State Defendants actively worked to reach a resolution. (ECF No. 79.) On that same day, State Defendants filed a Motion for Immediate Consideration of the Motion to Stay Proceedings (ECF No. 80) and this Court granted State Defendants' Motion to Stay Proceedings, entering a thirty (30) day stay of proceedings (ECF No. 81).

Plaintiffs and State Defendants have since entered into a Settlement Agreement, disposing of all claims asserted in the Action. An executed copy of the Settlement Agreement is attached hereto as Exhibit A. Intervenor Defendants,

who have asserted no claims and against whom no claims have been asserted, are not party to the Settlement Agreement.

Plaintiffs and State Defendants have agreed that all costs and attorneys' fees are the responsibility of the party incurring same. For the foregoing reasons, Plaintiffs and State Defendants respectfully request that the Court enter an order to dismiss all of Plaintiffs' claims in the Action.

Dated: , 2019

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Michael J. Steinberg (P43085)
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Counsel for Plaintiffs

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(517) 373-7700
Smithj46@michigan.gov

Counsel for State Defendants

EXHIBIT A

Settlement Agreement

CERTIFICATE OF SERVICE

I hereby certify that, on March 22, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

Dated: , 2019

SULLIVAN & CROMWELL LLP
125 Broad Street
New York, NY 10004-2498
Telephone: (212) 558-4000
ostragerae@sullcrom.com

Annex B

Proposed Order on Stipulation of Dismissal

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KRISTY DUMONT; DANA DUMONT; ERIN BUSK-SUTTON; and REBECCA BUSK-SUTTON,

Plaintiffs,

v.

ROBERT GORDON, in his official capacity as the Director of the Michigan Department of Health and Human Services; and JENNIFER WRAYNO, in her official capacity as the Acting Executive Director of the Michigan Children's Services Agency,

Defendants,

and

ST. VINCENT CATHOLIC CHARITIES; MELISSA BUCK; CHAD BUCK; and SHAMBER FLORE,

Intervenor Defendants.

No. 2:17-cv-13080-PDB-EAS

HON. PAUL D. BORMAN

MAG. ELIZABETH A. STAFFORD

[PROPOSED] ORDER ON STIPULATION OF DISMISSAL

After considering the Stipulation of Voluntary Dismissal with Prejudice and the Settlement Agreement, attached thereto, provided by Plaintiffs Kristy Dumont, Dana Dumont, Erin Busk-Sutton, and Rebecca Busk-Sutton (collectively,

"Plaintiffs") and Defendants Robert Gordon and Jennifer Wrayno,[1] it is hereby ORDERED that Plaintiffs' claims in the above-captioned action (the "Action") are dismissed with prejudice pursuant to the terms of the Settlement Agreement.

The Court retains jurisdiction over the enforcement of the Settlement Agreement in the Action. *See Kokkonen* v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381 (1994) ("If the parties wish to provide for the court's enforcement of a dismissal-producing settlement agreement, they can seek to do so."); *RE/MAX Int'l, Inc.* v. *Realty One, Inc.*, 271 F.3d 633, 641 (6th Cir. 2001) ("[A] district court [has] the authority to dismiss pending claims while retaining jurisdiction over the future enforcement of a settlement agreement.").

All costs and attorneys' fees are the responsibility of the party incurring same.

PAUL D. BORMAN
UNITED STATES DISTRICT JUDGE

Dated: [*date*]

[1] Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, this order reflects the substitution of Herman McCall, a party in his official capacity who has ceased to hold office during the pendency of the Action, for Jennifer Wrayno, who is "automatically substituted as a party."

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means or first class U.S. mail on [*date*].

_____

Case Manager

EXHIBIT 2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KRISTY DUMONT; DANA DUMONT; ERIN BUSK-SUTTON; and REBECCA BUSK-SUTTON,

Plaintiffs,

v.

ROBERT GORDON, in his official capacity as the Director of the Michigan Department of Health and Human Services; and JENNIFER WRAYNO, in her official capacity as the Executive Director of the Michigan Children's Services Agency,

Defendants,

and

ST. VINCENT CATHOLIC CHARITIES; MELISSA BUCK; CHAD BUCK; and SHAMBER FLORE,

Defendants-Intervenors.
/

No. 17-cv-13080-PDB-EAS

HON. PAUL D. BORMAN

MAG. ELIZABETH A. STAFFORD

NOTICE OF DUMONTS' DEMAND THAT MDHHS ENFORCE ITS LONGSTANDING NONDISCRIMINATION POLICY AND, UNLESS THIS COURT DIRECTS OTHERWISE, MDHHS'S PLAN TO WAIT PENDING CHIEF JUDGE HOOD'S RULING

Defendants Robert Gordon, in his official capacity as Director of the Michigan Department of Health and Human Services (MDHHS), and Joo Yeun Chang, in her official capacity as Executive Director of the Michigan Children's Services Agency[1] (collectively, "the Department"), by and through undersigned counsel, notify this Court that Plaintiffs Kristy and Dana Dumont have invoked the notice and cure provision of the Settlement Agreement (ECF No. 82) executed in this case. The Dumonts allege the Department is in breach of the Agreement by not enforcing its longstanding nondiscrimination policy. (Exhibit A.) The Dumonts also demand the Department take action to achieve compliance. *Id.*

The Department fully intends to continue enforcing its long-established nondiscrimination policy and meeting its obligations under the Settlement Agreement. But the Department is faced with a dilemma of potentially competing and contrary legal obligations. It is a named defendant in a separate lawsuit—also pending in this district—

[1] Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, this Notice reflects the substitution of Children's Services Agency Executive Director Joo Yeun Chang for former Acting Children's Services Agency Executive Director Jennifer Wrayno, who was named in her official capacity.

challenging the nondiscrimination policy. (*Catholic Charities West Michigan v. Gordon et al.*, Case No. 2:19-cv-11661, Hood, C.J.). Catholic Charities West Michigan, the plaintiff in that case, filed a preliminary injunction motion to enjoin the Department from enforcing its policy. The motion is fully briefed and currently pending before Chief Judge Denise Page Hood.

These potentially competing obligations put the Department between a rock and a hard place. Consequently, unless otherwise directed by this Court, the Department will take no action while waiting for Chief Judge Hood to rule on the preliminary injunction motion.

The following details are relevant to this Notice:

1. On March 22, 2019, the Department entered into a settlement agreement with Plaintiffs, the Dumonts and Rebecca and Erin Busk-Sutton, to dispose of the claims in this action (the "Settlement Agreement"). That same day, the Department and Plaintiffs filed with this Court a Stipulation of Voluntary Dismissal with Prejudice, with the executed Settlement Agreement attached as Exhibit A. (ECF No. 82.) This Court entered an Order dismissing

Plaintiffs' claims "with prejudice pursuant to the terms of the Settlement Agreement" and retaining jurisdiction over the enforcement of the Settlement Agreement. (ECF No. 83, PageID.1469.)

2. Under the terms of the Settlement Agreement, unless prohibited by law or court order, the Department is required to enforce its long-standing nondiscrimination policy (Non-Discrimination Provision) against a child placing agency (CPA) "that the Department determines is in violation of, or is unwilling to comply with" the Provision, up to and including terminating the CPA's foster care case management services contract or adoption services contract.[2] (ECF No. 82, PageID.1445-1446, Settlement Agreement, Section 1(c).)

3. On April 25, 2019, Catholic Charities West Michigan (Catholic Charities) filed a new lawsuit against the Department and Michigan Attorney General Dana Nessel in her official capacity

[2] The Settlement Agreement acknowledges that the Department's contracts for foster care case management services and adoption services mandate "that contracted CPAs comply with the Department's non-discrimination statement prohibiting discrimination 'against any individual or group because of race, sex, religion, age, national origin, color, height, weight, marital status, gender identity or expression, sexual orientation, political beliefs, or disability' in the provision of services under contract with the Department (the 'Non-Discrimination Provision')."

(collectively, State Defendants), challenging the Department's long-established nondiscrimination policy as violative of state and federal law and the Michigan and U.S. constitutions. The litigation is currently pending in the United States District Court for the Eastern District of Michigan and assigned to Chief Judge Denise Page Hood. (*Catholic Charities West Michigan v. Gordon et al.*, Case No. 2:19-cv-11661, Hood, C.J.[3])

4. On June 26, 2019, Catholic Charities filed a motion for preliminary injunction, seeking to enjoin the State from taking adverse action against Catholic Charities for refusing to comply with the terms of it foster care case management services contract and adoption services contract with the Department, as well as the Non-Discrimination Provision. (Case No. 2:19-cv-11661, ECF No. 11.) That motion was fully briefed as of August 7, 2019, and remains pending. (Case No. 2:19-cv-11661, ECF Nos. 22 and 25.)

[3] Catholic Charities West Michigan originally filed its state *and* federal claims in the Michigan Court of Claims. (Court of Claims Case No. 19-cv-000072MM, Stephens, J.) Michigan law prohibits claimants from filing claims against the State and its departments in the Court of Claims where the claimant "has an adequate remedy upon his claim in the federal courts." Mich. Comp. Laws § 600.6440.

5. In correspondence dated January 23, 2020, and attached as Exhibit A, the Dumonts invoked the notice and cure provision in Section 7 of the Settlement Agreement, demanding that the Department enforce the nondiscrimination provisions in its contracts with Catholic Charities, stating:

a. "Catholic Charities West Michigan ("Catholic Charities"), a Michigan state-contracted CPA, has made clear in its litigation against the State, *Catholic Charities* v. *Michigan Department of Health and Human Services et al.,* No. 2:l 9-cv-11661-DPHDRG (E.D. Mich.), that it will not comply with the Non-Discrimination Provision of its Contracts and that it has engaged and will continue to engage in practices prohibited by the Non-Discrimination Provision. (Exhibit A, p. 1.)

b. Pursuant to Section 7 of the Settlement Agreement, the Department has ninety (90) days to cure noncompliance allegations. If the alleged breach is not cured within 90 days of notice, the Dumonts may take appropriate action to enforce their rights and seek specific performance of the Settlement Agreement. (Exhibit A, p. 2.)

6. State Defendants believe the Settlement Agreement comports with state and federal law and is constitutionally firm. They are defending the Non-Discrimination Provision in the litigation filed by Catholic Charities.

7. The Dumonts' January 23, 2020 demand letter and Catholic Charities' motion for preliminary injunction seek to impose potentially

competing and contrary legal obligations on the Department. In the absence of further direction from this Court, the Department believes it is constrained by the pending preliminary injunction motion and will wait for Chief Judge Hood's decision.

8. Concurrent with filing this Notice, State Defendants submitted a motion in the lawsuit filed by Catholic Charities, asking Chief Judge Hood (i) for expedited consideration of Catholic Charities' pending motion for preliminary injunction, and (ii) to certify the question of state law interpretation, more specifically Mich. Comp. Laws §§ 722.124e and 124f, to the Michigan Supreme Court.

Respectfully submitted,

Dana Nessel
Attorney General

Dated: February 20, 2020

/s/ *Toni L. Harris*

Toni L. Harris (P63111)
Attorney for the Department
Michigan Department of
Attorney General
Health, Education & Family
Services Division
P.O. Box 30758
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HarrisT19@michigan.gov

CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2020, I electronically filed a Notice of Dumonts' Demand That MDHHS Enforce Its Longstanding Nondiscrimination Policy And, Unless This Court Directs Otherwise, MDHHS's Plan To Wait Pending Chief Judge Hood's Ruling with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record.

/s/ Toni L. Harris
Michigan Department of
Attorney General
Health, Education & Family
Services Division
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EXHIBIT A

SULLIVAN & CROMWELL LLP

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BRUSSELS • FRANKFURT • LONDON • PARIS
BEIJING • HONG KONG • TOKYO
MELBOURNE • SYDNEY

January 23, 2020

Via Certified Mail and E-mail

Return Receipt Requested

Michigan Department of Health and Human Services, State of Michigan,
Director, Bureau of Legal Affairs,
333 South Grand Avenue,
Lansing, Michigan 48909.

Re: *Dumont et al.* v. *Gordon et al.*, No. 2:17-cv-13080-PDB-EAS

To Whom It May Concern:

On behalf of Kristy Dumont and Dana Dumont (the "Dumonts"), we write in connection with the settlement agreement entered on March 22, 2019 between the Dumonts and Robert Gordon, in his official capacity as Director, Michigan Department of Health and Human Services and Jennifer Wrayno, in her official capacity as Acting Executive Director, Michigan Children's Services Agency (together, the "State"). *See Dumont et al.* v. *Gordon et al.*, Case No. 2:17-cv-13080-PDB-EAS (E.D. Mich. Mar. 22, 2019) (the "Settlement Agreement").[1]

In the Settlement Agreement, the Department agreed to "enforce the Non-Discrimination Provision . . . against a [child placing agency ("CPA")] that the Department determines is in violation of, or is unwilling to comply with, such provisions, up to and including termination of the Contracts . . . including without limitation . . . [i]n the event a CPA refuses to comply with the Non-Discrimination Provision . . . the Department will terminate the CPA's Contracts." (Settlement Agreement Section 1(c)).

Catholic Charities West Michigan ("CCWM"), a Michigan state-contracted CPA, has made clear in its litigation against the State, *Catholic Charities* v. *Michigan Department of Health and Human Services et al.*, No. 2:19-cv-11661-DPH-DRG (E.D. Mich.), that it will not comply with the Non-Discrimination Provision of its Contracts and that it has engaged and will continue to engage in practices prohibited by

[1] Terms defined in the Settlement Agreement have the same meaning in this letter unless given a different meaning in this letter.

the Non-Discrimination Provision. Among other things, on May 15, 2019, in support of a motion seeking to enjoin the State from enforcing the Non-Discrimination Provision against CCWM, CCWM filed an official written policy stating it will only place children with "married couples made up of two parents of the opposite sex," ECF No. 1-2, and a sworn declaration of Christopher Slater, CEO of CCWM, dated May 15, 2019, stating that such policy "prohibits Catholic Charities from recommending or facilitating child placements with same-sex couples." ECF No. 1-3.

Notwithstanding the Department's knowledge of CCWM's refusal to comply with the Non-Discrimination Provision, on information and belief, on or about September 30, 2019, the Department renewed its Adoption Services Contracts, Nos. MA 190000001067, MA 190000001079 and MA 190000001093, with CCWM.

Accordingly, pursuant to Section 7 of the Settlement Agreement, which provides that "[i]n the event any Party . . . asserts that another Party is not in compliance with one or more of its obligations in this Agreement . . . [t]he asserting Party . . . shall provide the other Party with written notice of such assertion and a ninety (90) day opportunity to cure such noncompliance prior to taking legal action," the Dumonts hereby provide written notice to the Department that the Department has failed to comply with its obligation under the Settlement Agreement to enforce the Non-Discrimination Provision, which prohibits discrimination on the basis of sexual orientation in the provision of services under contract with the Department.

If this breach is not cured within 90 days of this notice, the Dumonts will take appropriate action to enforce their rights, including, without limitation, by seeking leave from the Eastern District of Michigan to reopen *Dumont et al.* v. *Gordon* so that they may seek specific performance of the Settlement Agreement.

Sincerely,

Ann-Elizabeth O

Jay Kaplan
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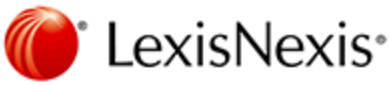
EXHIBIT 3



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1. *County of Wayne v. Philip Morris, Inc., 2000 U.S. Dist. LEXIS 22956*

Client/Matter: -None-

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Cases	Sources: MI, Related Federal

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County of Wayne v. Philip Morris, Inc.

United States District Court for the Eastern District of Michigan, Southern Division

August 25, 2000, Decided; August 25, 2000, Filed

99-76097

Reporter
2000 U.S. Dist. LEXIS 22956 *; 2000 WL 34226614

COUNTY OF WAYNE, Plaintiff, -vs- PHILIP MORRIS INCORPORATED; R.J. REYNOLDS TOBACCO CORP.; AMERICAN TOBACCO CORP.; BROWN & WILLIAMSON TOBACCO CORP.; LIGGETT & MEYERS, INC.; LORILLARD TOBACCO CO., INC,; UNITED STATES TOBACCO CO.; B.A.T. INDUSTRIES, P.L.C.; BRITISH AMERICAN TOBACCO COMPANY; THE COUNCIL FOR TOBACCO RESEARCH - U.S.A., INC.; SMOKELESS TOBACCO COUNCIL, INC.; TOBACCO INSTITUTE, INC.; Defendants.

Subsequent History: Motion granted by *County of Wayne v. Philip Morris Inc. (In re Certified Question), 622 N.W.2d 518, 2001 Mich. LEXIS 193 (Mich., 2001)*

Certified question answered by *Wayne County v. Philip Morris, Inc. (In re Certified Question), 465 Mich. 537, 638 N.W.2d 409, 2002 Mich. LEXIS 59 (2002)*

Core Terms

Tobacco, attorney general, Parties, federal court, Settling, certification, instant case, Manufacturers, courts, powers, settlement, covenant, entities, products, smoking

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For Philip Morris, Incorporated, Defendant: Richard D. Bisio, LEAD ATTORNEY, Kemp, Klein, Troy, MI; Richard E. Zuckerman, LEAD ATTORNEY, Honigman, Miller, Detroit, MI.

For R.J. Reynolds Tobacco Company, Lorillard Tobacco Companies, Incorporated, Defendants: Jack O. Kalmink, Mary A. Kalmink, LEAD ATTORNEYS, Clark Hill (Detroit), Detroit, MI; Richard E. Zuckerman, LEAD ATTORNEY, Honigman, Miller, Detroit, MI.

For American Tobacco Corporation, United States Tobacco Company, B. A. T. Industries, P. L. C., British American Tobacco Company, Limited, Smokeless Tobacco Council, Incorporated, Tobacco Institute, Incorporated, Defendants: Richard E. Zuckerman, LEAD ATTORNEY, Honigman, Miller, Detroit, MI.

For Brown and Williamson Tobacco Corporation, Defendant: Kenneth T. Brooks, LEAD ATTORNEY, Honigman, Miller, Lansing, MI; Richard E. Zuckerman, LEAD ATTORNEY, Honigman, Miller, Detroit, MI; Thomas J. Byrne, LEAD ATTORNEY, Foster, Swift, Lansing, MI.

For Liggett and Myers, Incorporated, Defendant: Aaron H. Marks, LEAD ATTORNEY, Kasowitz, Benson, New York, NY; James G. Derian - INACTIVE, **[*2]** LEAD ATTORNEY, Butzel Long, Bloomfield Hills, MI; Richard E. Zuckerman, LEAD ATTORNEY, Honigman, Miller, Detroit, MI.

For Council for Tobacco Research-U.S.A., Incorporated, Defendant: Bruce G. Merritt, LEAD ATTORNEY, Debevoise & Plimpton, New York, NY; Bruce T. Wallace, William J. Stapleton, LEAD ATTORNEYS, Hooper, Hathaway, Ann Arbor, MI; Harry Zirlin, LEAD ATTORNEY, Debevoise & Plimpton, New York, NY; Richard E. Zuckerman, LEAD ATTORNEY, Honigman, Miller, Detroit, MI.

Judges: PAUL D. BORMAN, UNITED STATES DISTRICT COURT JUDGE.

Opinion by: PAUL D. BORMAN

Opinion

OPINION AND ORDER (1) CERTIFYING QUESTION TO THE MICHIGAN SUPREME COURT, AND (2) STAYING PROCEEDINGS IN THIS CASE

Before the Court is a motion for judgment on the pleadings filed by certain defendants (Docket Entry # 23), The Court heard oral argument on this motion on June 21, 2000. Upon consideration of the motion, the submissions of the parties, and the applicable law the Court will stay the proceedings in this case pending resolution of the question the Court has hereinafter certified to the Michigan Supreme Court. This Court concludes both that the certified issue has "truly been left unsettled by the state courts," [1] and that the issue is one of paramount **[*3]** importance involving the structure, balance of power, separation of power, and functioning of Michigan governmental entities. That basic issue, elaborated upon, *infra,* is whether the Michigan Attorney General's settlement of a similar case against the instant defendants, which states that counties are bound by the settlement, prevents plaintiff Wayne County from bringing this lawsuit. More specifically, the issue is whether the Michigan Attorney General, in settling a lawsuit, has the power to bind Michigan counties, who have been given the power to sue and be sued by the Michigan Legislative. *MICH. COMP. LAWS ANN. § 45.3*.

This Court further concludes that the instant case presents sufficiently exceptional circumstances to justify the time and expense inherent in the certification procedure.

I. THE CASE

Plaintiff, County of Wayne, Michigan, ("Plaintiff," or "the County") filed the instant action against numerous enterprises in the tobacco industry. The defendants are American Tobacco Company, Inc.; [2] Liggett & Myers, Inc.; Lorillard Tobacco Company, Inc.; Philip Morris Inc.; R.J. Reynolds Tobacco Company; **[*4]** Brown & Williamson Tobacco Corporation; United States Tobacco Company; B.A.T. Industries, P.L.C.; British American Tobacco Company, Ltd.; The Council for Tobacco Research - U.S.A., Inc.; Smokeless Tobacco Council, Inc., and Tobacco Institute, Inc.

In its Complaint, Plaintiff alleges, in great detail, a nearly fifty year old conspiracy among Defendants to suppress the truth about the health effects of tobacco, to misrepresent the health effects of smoking, to conceal their knowledge that nicotine is addictive, to manipulate the level of nicotine in their products, to make an illegal agreement not to compete, to market false "health reassurance" products such as "light" and "ultra-light" cigarettes, to target minors for addiction to tobacco products, and to impose the medical costs of smoking on other sectors of the economy.

Based on these allegations, Plaintiff asserts five state law claims for relief: (1) Unreasonable Restraint of Trade, in violation of *MICH. COMP. LAWS ANN. § 445.772*; (2) Public Nuisance; (3) Negligent Entrustment; **[*5]** (4) Undertaking of and Willful Failure to Perform a Special Duty; and (5) Conspiracy. For these claims, Plaintiff seeks relief comprising, *inter alia:* (1) that the Court enjoin Defendants from engaging in such conduct detailed in the Complaint; (2) that the Court order Defendants to publicly disclose all research previously conducted that relates to the issue of smoking and health; (3) that the Court order Defendants to fund a corrective public education campaign relating to the issue of smoking and health, administered by an independent third party; (4) that the Court order Defendants to fund clinical smoking cessation programs in Wayne County; and (5) that the Court order Defendants to pay restitution which would restore Plaintiff to the financial position it would be in, absent Defendants' conduct.

On December 7, 1999, Plaintiff filed this action in Wayne County Circuit Court. On December 22, 1999,

[1] See *L. Cohen & Co. v. Dun & Bradstreet, 629 F. Supp. 1419, 1423 (D. Conn. 1986)*.

[2] In 1994, Defendant American Tobacco was sold to Defendant British American Tobacco Co., parent of Defendant Brown & Williamson Tobacco Corporation. (Compl. P 17.)

Defendants timely removed the case to this Court based on diversity of citizenship jurisdiction, *28 U.S.C. § 1332*, Currently before the Court is a motion for judgment on the pleadings filed by Defendants Philip Morris Inc., R.J. Reynolds Tobacco Co., Brown & Williamson Tobacco Corp. (individually **[*6]** and as successor by merger to The American Tobacco Company), Lorillard Tobacco Co., Liggett & Myers, Inc., and The Council for Tobacco Research-U.S.A., Inc. (hereinafter "Moving Defendants").

II. STANDARD OF REVIEW

The standard of review for motions for judgment on the pleadings under *FED. R. Civ. P. 12(c)* is the same standard applicable to motions to dismiss under *Rule 12(b)(6)*. *See* *Grindstaff v. Green, 133 F.3d 416, 421 (6th Cir. 1998)*. In evaluating such a motion, the Court construes the complaint in the light most favorable to the plaintiff, accepts all factual allegations in the complaint as true, and determines whether the plaintiff undoubtedly can prove no set of facts in support of the claims that would entitle relief. *See* *Bloch Ribar, 156 F.3d 673, 677 (6th Cir. 1998)*; *see also* *Morgan v. Church's Fried Chicken, 829 F.2d 10, 11 (6th Cir. 1987)*.

Because jurisdiction in this case is based on diversity of citizenship, this Court is required to apply the law of the forum state; *i.e.,* Michigan law. *See* *Erie R.R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938)*. Under *Erie* and its progeny, if the state's highest court has not addressed the issue, the federal court must ascertain how that court would **[*7]** rule if it were faced with the issue. *See* *Meridian Mut. Ins. Co. v. Kellman, 197 F.3d 1178, 1181 (6th Cir. 1999)*. In making this determination, the Court may use the decisional law of the state's lower courts, other federal courts construing state law, restatements of law, law review commentaries, and other jurisdictions on the "majority" rule. *See id.* (*citing Grantham & Mann v. American Safety Prods.,* 831 F.2d, 596, 608 (6th Cir. 1987)). A federal court should not disregard the decisions of intermediate appellate state courts unless it is convinced by other persuasive data that the highest court of the state would decide otherwise. *See id.* (citing *Commissioner v. Estate of Bosch, 387 U.S. 456, 465, 87 S. Ct. 1776, 18 L. Ed. 2d 886 (1967)*).

On the other hand, where there is no recent Michigan decision on the issue, and no clear precedent, and the issue is one of fundamental importance to the state, the federal court can certify the issue to the state supreme court for a determination of the issue.

III. RELEVANT BACKGROUND RELATING TO THE DESIGNATED RELEASE OF THE COUNTY'S CLAIMS

On or about August 21, 1996, the State of Michigan, through its Attorney General, filed an action against entities in the tobacco industry, including **[*8]** all of the defendants in the case at bar. *Kelley ex rel. State of Michigan v. Philip Morris Inc., et al.,* No. 96-84281-CZ (Ingham Co. Cir. Ct.) ("the *Michigan AG* case"). That action alleged, in essence, the same conspiracy by the defendants as the County alleges in the instant case. In that case, the State asserted five claims for relief: (1) violations of the Michigan Consumer Protection Act, [3] (2) violation of the Michigan Antitrust Reform Act, [4] (3) restitution based upon unjust enrichment, (4) indemnity, and (5) breach of duty voluntarily undertaken. (*Michigan AG* case Compl.; Def. Ex. A.) The Attorney General filed the *Michigan AG* case on behalf of the State of Michigan and certain agencies, including the Department of Community Health. (*Michigan AG* case Compl. P 17; Def. Ex. A.)

The *Michigan AG* case was settled in November 1998; defendants entered into a "Master Settlement Agreement" ("MSA") with-the State of Michigan and 45 other states. (Def. Ex. B.) [5] Under the MSA, the defendants agreed to pay Michigan approximately $ 8.9 billion over a period of 25 years. The defendants also agreed to the entry **[*9]** of a consent decree with broad injunctive provisions.

On December 7, 1998, following a fairness hearing, the Ingham County Circuit Court approved the *Michigan AG* case consent decree (the MSA), finding it to be "in the best interests of the State of Michigan," and ordered that the complaint be "dismissed with prejudice." (*Michigan AG* case Consent Decree and Final Judgment at 12; Def. Ex. C.) Wayne County did not seek to intervene in

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[3] *MICH. COMP. LAWS ANN. § 445.901, et seq.*

[4] *MICH. COMP. LAWS ANN. § 445.771, et seq.*

[5] Signatories to the MSA included the following defendants: Phillip Morris, Inc., R.J. Reynolds Tobacco Co., Brown & Williamson Tobacco Corp., and Lorillard Tobacco Co. As discussed *infra,* the MSA also covers other defendants as "related" entities. Consequently, all Moving Defendants are covered by the *Michigan AG* case settlement.

the *Michigan AG* case. (*Id.*) Moving Defendants argue, *inter alia,* that the County's instant claims are barred by the release and covenant not to sue contained in the MSA. Resolution of this argument would conclusively determine this case.

The parties do not dispute that under the MSA, the State explicitly released and covenanted not to sue Moving Defendants for a broad range of claims, including every claim the County asserts in the **[*10]** case at bar. Specifically, the MSA provides:

> (a) Release
>
> (1) Upon the occurrence of State-Specific Finality in a Settling State, such Settling State shall absolutely and unconditionally release and forever discharge all Released Parties from all Released Claims that the Releasing Parties directly, indirectly, derivatively or in any other capacity ever had, now have, or hereafter can, shall or may have.
>
> * * * *
>
> (3) Each Settling State (for itself and for the Releasing Parties) further covenants and agrees that it (and the Releasing Parties) shall not after the occurrence of State-Specific Finality sue or seek to establish civil liability against any Released Party based, in whole or in part, upon any of the Released Claims, and further agrees that such covenant and agreement shall be a complete defense to any such civil action or proceeding.

(MSA § XII(a)(1) and (3), pp. 110-11; Def. Ex. B) (emphasis added).

As to this release, there is no dispute that:

1. Michigan is a "Settling State;" [6]
2. "State-Specific Finality has occurred in Michigan; [7]
3. The Moving Defendants are "Released Parties;" [8] and
4. The claims in the case at bar are "Released Claims" as defined by the MSA, since the instant **[*11]** claims are essentially the same as those asserted in the *Michigan AG* case. [9]

This case revolves around the issue of whether Wayne County is a "Releasing Party," The MSA provides:

> "Releasing Parties" means each Settling State and any of its past, present, and future agents, officials acting in their official capacities, legal representatives, agencies, departments, commissions and divisions; and also means, to the full extent of the power of the signatories hereto release past, present and future claims, the following: (1) any Settling State's subdivisions (political or otherwise, including, but not limited to municipalities, counties, parishes, villages, unincorporated districts and hospital districts), public entities, public instrumentalities and public educational institutions….

MSA § II(pp) pp. 14-15 (emphasis added).

The **[*15]** Michigan Attorney General signed the MSA on behalf of the people of the State of Michigan under

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[6] The MSA defines "Settling State" (with certain exceptions not relevant to the instant case) as "any State that signs this Agreement on or before the MSA Execution Date." MSA § II(qq), p. 15. Michigan signed the MSA on the MSA Execution Date of November 23, 1998. *See* MSA § II(aa), p. 9, and the Michigan signature page.

[7] "State-Specific Finality" required (a) approval by the *Michigan AG* case court of the MSA and consent decree and dismissal of the *Michigan AG* case suit, all of which occurred on December 7, 1998; and (b) expiration of the period for any appeal therefrom (with no appeal having been filed), which occurred in January 1999. *See* MSA § II(ss), pp. 15-16.

[8] The MSA defines "Released Parties," in relevant part, as follows:

> "Released Parties" means all Participating Manufacturers, their past, present and future Affiliates, and the respective divisions, officers, directors, employees, representatives, insurers, lenders, underwriters, Tobacco-Related Organizations, trade associations, suppliers, agents, auditors, advertising agencies, public relations entities, attorneys, retailers and distributors of any Participating **[*12]** Manufacturers or of any such affiliate (and the predecessors, heirs, executors, administrators, successors and assigns of each of the foregoing).

MSA § II(oo), p. 14 (emphasis added). All Moving Defendants are covered by this provision. Philip Morris Inc., R.J. Reynolds Tobacco Co., Brown & Williamson Tobacco Corp. (individually and as successor by merger to The American Tobacco Co.), Lorillard Tobacco Co., and Leggett & Myers are "Participating Manufacturers." *See* MSA § II(jj), pp. 11-12. The Council for Tobacco Research-U.S.A., Inc. is a "Tobacco-Related Organization." *See* MSA § II(ww), p. 17.

[9] The MSA defines "Released Claims" as follows:

> "Released Claims" means:

both his [10] statutory and common law authority. (*Michigan AG* case Compl. P 17.) The Court must determine whether the Attorney General had the power to release Wayne County's claims against the tobacco industry in the instant case.

> (1) for past conduct, acts or omissions (including any damages incurred in the future arising from such past conduct, acts or omissions), those Claims directly or indirectly based on, arising out of or in any way related, in whole or in part, to (A) the use, sale, distribution, manufacture, development, advertising, marketing or health effects of, (B) the exposure to, or (C) research, statements, or warnings regarding, Tobacco Products (including, but not limited to, the Claims asserted in the actions identified in Exhibit **[*13]** D, or any comparable Claims that were, could be or could have been asserted now or in the future in those actions or in any comparable action in federal, state or local court brought by a Settling State or a Releasing Party (whether or not such Settling State or Releasing Party has brought such action)), except for claims not asserted in the actions identified in Exhibit D for outstanding liability under existing licensing (or familiar) fee laws or existing tax laws (but not excepting claims for any tax liability of the Tobacco-Related Organizations or of any Released Party with respect to such Tobacco-Related Organizations, which claims are covered by the release and covenants set forth in this Agreement);
>
> (2) for future conduct, acts or omissions, only those monetary Claims directly or indirectly based on, arising out of or in any way related to, in whole or in part, the use of or exposure to Tobacco Products manufactured in the ordinary course of business, including without limitation any future Claims for reimbursement of health care costs allegedly associated with the use of or exposure to Tobacco Products.

MSA §.II(nn), pp. 13-14. The MSA defines "Claims" as:

> any and all manner **[*14]** of civil (*i.e.,* non-criminal): claims demands, actions, suits, causes of action, damages (whenever incurred), liabilities of any nature including civil penalties and punitive damages, as well as costs, expenses and attorneys' fees (except as to the Original Participating Manufacturers' obligations under section XVII), known or unknown, suspected or unsuspected, accrued or unaccrued, whether legal, equitable, or statutory.

MSA § II(n), p. 7.

[10] Although Michigan's current Attorney General is the Honorable Jennifer Mulhern Granholm, the Honorable Frank J. Kelley held that office when the MSA was signed. Accordingly, this Opinion will use the masculine pronoun to refer to the Attorney General in the context of the MSA.

The Michigan Constitution of 1963 provides for the creation of counties and endows the legislature with the authority to establish their powers and immunities. *MICH. CONST. art. 7 § 1* ("Each organized county shall be a body corporate with powers and immunities provided by law"). Michigan counties have no inherent powers, and only possess those limited powers which have been granted to them by the State Legislature. *See Alan v. Wayne County, 388 Mich. 210, 245, 200 N.W.2d 628 (1972)*; *County of Saginaw v. John Sexton Corp., 232 Mich. App. 202, 220, 591 N.W.2d 52 (1998)*; *see also Hanselman v. Killeen, 419 Mich. 168, 187, 351 N.W.2d 544 (1984)*. **[*16]** The Michigan Legislature has delegated to each county the capacity to sue and be sued. *MICH. COMP. LAWS ANN. § 45.3*.

Michigan's Attorney General has broad authority to prosecute actions that are in the interest of the State. *See State of Michigan ex rel. Kelley v. C.R. Equip. Sales, Inc., 898 F. Supp. 509, 513 (W.D. Mich. 1995)*. Michigan statutory authority provides:

> The attorney general shall prosecute and defend all actions in the supreme court, in which the state shall he interested, or a party … and may, when in his own judgment the interests of the state require it, intervene in and appear for the people of this state in any other court or tribunal, in any cause or matter, civil or criminal, in which the people of this state may be a party or interested.

MICH. COMP. LAWS ANN. § 14.28 (West 1994). Although the statute states that the Attorney General may intervene in an action on behalf of the State, courts have interpreted it as allowing the Attorney General to initiate actions as well. *See Assoc. Builders and Contractors, Saginaw Valley Area Chapter v. Perry, 115 F.3d 386, 390 (6th Cir. 1997)*. In addition, "the attorney general has a wide range of powers at common law." *Mundy v. McDonald, 216 Mich. 444, 450, 185 N.W. 877 (1921)*. **[*17]** Thus, the Attorney General "has statutory and common law authority to act on behalf of the people of the State of Michigan in any cause or matter, such authority being liberally construed." *Michigan State Chiropractic Ass'n v. Kelley, 79 Mich. App. 789, 791, 262 N.W.2d 676 (1977)* (citation omitted). Moreover, "[s]uch liberally construed authority and discretion should only be interfered with where his actions are clearly inimical to the people's interest." *Id.*

The State of Michigan, through its Attorney General, has the power to institute actions on behalf of political subdivisions of the State. For example, in *C.R. Equip. Sales, supra*, the Attorney General filed an action "on

behalf of over five hundred public school districts in Michigan's Lower Peninsula" asserting antitrust claims against six corporate and six individual defendants who, the State alleged, "conspired and agreed not to compete on contracts for the sale of school buses, school bus bodies, and school bus parts." *C.R. Equip. Sales, 898 F. Supp. at 511-12*. The court found that the State of Michigan had standing in that case because it was not an action on behalf of a single unit of local government, and that every Michigan taxpayer had **[*18]** an interest in the case. *Id. at 514*.

However, a nineteenth century Michigan Supreme Court opinion held that the authority of the State to institute such actions is not boundless. In *Attorney General ex rel. Lockwood v. Moliter, 26 Mich. 444 (1873)*, the Attorney General brought an action to recover money illegally paid out of a county's treasury and to enjoin further payment. The Michigan Supreme Court noted that the claim was a "mere money demand, belonging to the county," and that "[t]he title to the claim, both legal and equitable, is exclusively in the county. If collected, the money must be instantaneously paid to the county treasury, and no state agency or official can touch or control it." *Id. at 447*. Accordingly, the court held that the State, through the Attorney General, had no right to sue for the funds, explaining that the case "is not, it its civil aspect, a matter of state concern, but is rather a local corporate interest or right of action, subject to be sued for by the county." *Id.*

The State of Michigan's complaint in the *Michigan AG,* case did not state that it brought that case on behalf of political subdivisons, or counties. The Attorney General filed the action "on **[*19]** behalf of the State itself and on behalf of certain of its agencies, including the Michigan Department of Community Health." (*Michigan AG* case Compl. P 17; *see also, id.* PP 2, 4, 15, 16, 43, 193, 194, 197, 216, 218-220, 222-224, 227.) However, in signing the MSA, the Michigan Attorney General released both the claims of the State of Michigan and, "to the full extent of [his] power" to do so, released the claims of Michigan's political subdivisions, including counties.

Whether the Attorney General had the power to release claims of Michigan counties is a fundamental issue concerning the separation of governmental powers and the balance of power between the various levels of government. In other words, the Court must determine the validity of the executive's attempt the (vis-a-vis Attorney General) to release claims of a county, in the face of a statute granting counties the capacity to file lawsuits. *MICH. COMP. LAWS ANN. § 45.3*. There is no appropriate Michigan Supreme Court precedent for this Court to utilize in resolving this significant state issue.

Recognizing the significance of both the State's interest in resolving this issue, as well as the relationship between the federal and **[*20]** state sovereigns, the Court will certify this issue to the Michigan Supreme Court. This Court finds support for its decision in recent decisions of both the Michigan Supreme Court and United States Supreme Court.

The Michigan Supreme Court recently set forth a clarion call for federal courts to, in essence, "let Michigan be Michigan". The Michigan Supreme Court criticized a federal district court order [11] granting hail to a defendant convicted in a state criminal case pending before state appellate courts:

> In our judgment, the district court erred in its exercise of authority in the instant case, impinging upon the traditional criminal jurisdiction of this state. . . . .

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[11] *Puertas v. Michigan Department of Corrections, 88 F. Supp. 2d 775 (E.D. Mich. 2000)* Gadola, J.). In *Puertas* Petitioner had been convicted of a state narcotics offense. After the trial court denied Petitioner's request for bail pending appeal, the Michigan Court of Appeals granted his request. The Michigan Supreme Court vacated the Court of Appeals order for failing to provide a reason for its holding. The Michigan Court of Appeals, on remand, provided a reason for its decision to grant bail pending appeal. The Michigan Supreme Court vacated the Michigan Court of Appeals opinion granting bail, but despite its having ordered the Michigan Court of Appeals to explain its decision, did not provide any rationale for the High Court's order.

Petitioner then sought a writ of habeas corpus in the Federal District Court for the Eastern District of Michigan, asserting a lack of due process in the Michigan Supreme Court order. U.S. District Judge Paul V. Gadola, granted petitioner's motion for **[*22]** a preliminary injunction preventing state corrections officials from taking him into custody to serve his state sentence. Judge Gadola set forth the issue before him, as follows:

> The issue before the Court is whether the order of the Michigan Supreme Court that vacated, without a statement of reasons, the Michigan Court of Appeals decision that granted Petitioner bond pending appeal, was a denial of Petitioner's federal constitutional right to due process.

Id. at 778, Judge Gadola concluded that the Michigan Supreme Court had deprived the petitioner of his federal constitutional right to due process.

> Apparently, the concurrence would limit the interaction between the federal and state judiciaries to a one-way street in which the federal judiciary is entitled to opine to whatever extent it chooses about constitutional matters impacting upon this relationship, while the state judiciary is forever denied the opportunity to respond. This is a prescription for the continual enhancement of the federal judiciary at the expense of the state judiciary.
> . . . .
>
> The district court's decision to intervene and assume effective jurisdiction **[*21]** over this state matter prevented enforcement of this Court's interpretation of Michigan law.

*People v. Puertas,; No, 116333, 462 Mich. 885, 613 N.W.2d 297, 2000 Mich. LEXIS 1194, *2, *3, *9(Mich. 2000)*. [12]

The instant case provides a signature opportunity, for the Michigan Supreme Court to exercise its appropriate role on a state law issue of overwhelming importance.

Further, the instant issue certified to the Michigan Supreme Court is sufficiently precise as to avoid the usual arguments against certification: abstractness and difficulty formulating the question. *See* **[*23]** M. Bryan Schneider, *"But Answer Came There None": The Michigan Supreme Court and the Certified Question of State Law,* *41 WAYNE L. REV. 273, 294-98 (1994)*. As to other possible concerns such as delay, and docket concerns, this Court assumes that the Michigan Supreme Court will both respond promptly to this request, and thereafter deal with this significant issue with dispatch.

This Court recognizes the significance of this issue to the State of Michigan, and assumes that the Michigan Supreme Court will concur in this assessment. Further, this Court's invitation to the Michigan Supreme Court is encouraged by that court's expressed concern that federal courts should neither infringe upon the traditional jurisdiction of the State of Michigan nor enhance themselves at the expense of the state judiciary. *See Puertas, supra.*

[12] Subsequently, the Michigan trial court (Hon. Colleen O'Brien, Oakland County Circuit Judge) granted the Defendant's Motion for New Trial on the grounds that the prosecution had failed to turn over evidence critical to the defense.

IV. CONCLUSION

The instant certification request provides the Michigan Supreme Court with an opportunity to engage in cooperative judicial federalism, so that the State of Michigan does not have Michigan law interpreted by and imposed upon it by the federal courts. [13]

As the United State Court of Appeals for the Sixth Circuit noted in *Geib v. Amoco Oil Co., 29 F.3d 1050, 1060-61 (6'h Cir. 1994)*:

> [T]his matter can most authoritatively be resolved by the Supreme Court of Michigan which bears ultimate responsibility for reconnecting that state's competing policy interests.
>
> . . . .
>
> We believe that judicious resort to the technique of certification in situations such as this, where an important question of state law has risen solely in federal court, "prevent[s] federal invasion of the state law-making function and [avoids] needless federal-state friction." (quoting Note, *Inter-Jurisdictional Certification: Beyond Abstention Toward Cooperative Individual Federalism,* 111 U. PA. L. REV. 344, 350 (1963)).

The United States Supreme Court has, this term, reserved judgment in a case, and certified a matter to the Pennsylvania Supreme Court for determination, *Fiore v. White, 528 U.S. 23, 120 S. Ct. 469, 145 L. Ed. 2d 353 (1999)*. Thus, the instant order of this Federal Court requesting Michigan Supreme **[*25]** Court determination has recent supporting precedent.

Because the issue certified to the Michigan Supreme Court will greatly affect the case at bar, because it raises an issue uniquely directed to that court's decision-making jurisdiction, and because the certification will not cause undue delay or prejudice to the parties, IT IS ORDERED that all proceedings in the above-entitled case shall be stayed until further order of

[13] *See* Philip B. Kurland, *Toward a Cooperative Judicial Federalism: The Federal Court Abstention Doctrine, 24 F.R.D. 481, 489-90 (1960)*, **[*24]** *Lehman Bros v. Stein, 416 U.S. 386, 391, 94 S. Ct. 1741, 40 L. Ed. 2d 215 (1974)*: ("[certification] does, of course, in the lone run save time, energy and resources and helps build a cooperative judicial federalism")

this Court.

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V. QUESTION CERTIFIED

The case at bar presents an issue, for which there is no controlling precedent, concerning the scope of the Michigan Attorney General's authority. Accordingly, pursuant to *Michigan Court Rule 7.305(B)*, this Court hereby certifies the following question of law for consideration by the Michigan Supreme Court:

> **Does the Michigan Attorney General have the authority to bind/release claims of a Michigan county as part of a settlement agreement in an action that the Attorney General brought on behalf of the State of Michigan?**
> As disclaimed by other courts,
>
> [t]he particular phrasing used in the certified question is not to restrict the Supreme Court's consideration of the problems involved and the issues as the Supreme Court perceives them to be **[*26]** in its analysis of the record certified in this case. This latitude extends to the Supreme Court's restatement of the issue or issues and the manner in which the answers are to be given, whether as a comprehensive whole or in subordinate or even contingent parts.

Dorse v. Armstrong World Industries Inc., 798 F.2d 1372, 1377 (11th Cir. 1986) (quoting *Martinez v. Rodriquez, 394 F.2d 156, 159 n. 6 (5th Cir. 1968)*).

VI. DIRECTIONS TO THE CLERK

The Court directs the Clerk of the United States District Court for the Eastern District of Michigan to forward to the Clerk of the Supreme Court of Michigan a certified copy of this Opinion and Order, and eight copies of the same.

SO ORDERED.

/s/ Paul Borman

PAUL D. BORMAN

UNITED STATES DISTRICT COURT JUDGE

Dated: Aug 25 2000

Detroit, Michigan

EXHIBIT 4

LexisNexis

User Name: Meghan Schaar
Date and Time: Thursday, February 6, 2020 12:58:00 PM EST
Job Number: 109348000

Document (1)

1. *Bailey v. State Farm Fire & Cas. Co., 2015 U.S. Dist. LEXIS 87744*

Client/Matter: -None-
Search Terms: 14-53-HRW, 2015 US Dist
Search Type: Natural Language
Narrowed by:

Content Type	Narrowed by
Cases	Sources: MI, Related Federal

Bailey v. State Farm Fire & Cas. Co.

United States District Court for the Eastern District of Kentucky, Northern Division

July 7, 2015, Decided; July 7, 2015, Filed

CIVIL ACTION NO. 14-53-HRW

Reporter
2015 U.S. Dist. LEXIS 87744 *; 2015 WL 4113137

JEFFREY BAILEY and SUSAN HICKS, individually and on behalf of others similarly situated, PLAINTIFFS, v. STATE FARM FIRE AND CASUALTY COMPANY, DEFENDANT.

Judges: Henry R. Wilhoit, Jr., United States District Judge.

Prior History: *Bailey v. State Farm Fire & Cas. Co., **2015** U.S. **Dist**. LEXIS 37568 (E.D. Ky., Mar. 25, **2015**)*

Opinion by: Henry R. Wilhoit, Jr.

Core Terms

certification, certify, district court, removal

Opinion

Counsel: **[*1]** For Jeffrey Bailey, individually and on behalf of all others similary situated, Susan Hicks, Individually and on behalf of all others similarly situated, Plaintiffs: Bartley K. Hagerman, Erik David Peterson, M. Austin Mehr, Philip G. Fairbanks, LEAD ATTORNEYS, Mehr Fairbanks Trial Lawyers, PLLC, Lexington, KY; Jessica Morgan Smith, LEAD ATTORNEY, Richardson & Smith, Owingsville, KY; Paula Richardson, LEAD ATTORNEY, Richardson, Barber & Williamson PSC - Owingsville, Owingsville, KY.

For State Farm Mutual Automobile Insurance Company, Defendant: David T. Klapheke, LEAD ATTORNEY, Boehl, Stopher & Graves - Louisville KY, Louisville, KY; Harnaik (Nick) Singh Kahlon, Heidi Dalenberg, Joseph A. Cancila, Jr., Tal C. Chaiken, LEAD ATTORNEYS, PRO HAC VICE, Schiff Hardin, LLP - IL, Chicago, IL.

For State Farm Fire and Casualty Company, Defendant: Heidi Dalenberg, LEAD ATTORNEY, Schiff Hardin, LLP - IL, Chicago, IL.

MEMORANDUM OPINION AND ORDER

This matter is before the Court upon Defendant State Farm Fire and Casualty Company's Motion to Certify a Question to the Kentucky Supreme Court [Docket No. 44], The motion has been fully **[*2]** briefed by the parties [Docket Nos. 44-1, 46 and 47]. For the reasons set forth herein, the motion will be overruled.

I.

This case arises from the manner in which Defendant State Farm Fire and Casualty Company ("State Farm") calculates the "actual cash value" of the damaged portion of an insured structure upon the occurrence of a loss. Plaintiffs Jeffrey Bailey and Susan Hicks filed this putative class action in Morgan Circuit Court, challenging State Farm's methodology. Specifically, Plaintiffs contend that State Farm miscalculates actual cash value by first estimating the total repair cost for the damaged portion of a home, and then applying an appropriate depreciation factor to that total repair cost, including both the estimated material cost as well as the estimated cost for certain repair labor for the damaged

property. . In their Complaint, they allege: breach of contract (Count I), unjust enrichment (Count II), statutory bad faith in violation of KRS 304.12-235 (Count III) and violations of KRS 367.170, the Consumer Protection Act (Count IV),

State Farm filed a Notice of Removal with this Court, alleging federal jurisdiction pursuant to 28 U.S.C. § 1332. The removal was sustained. Subsequently, the Complaint was amended **[*3]** to correctly name the Defendant [Docket Nos. 15 and 30].

Thereafter, State Farm sought dismissal of all claims alleged herein [Docket No. 35]. This Court overruled State Farm's motion as to Plaintiffs' breach of contract claim, but granted it as to Plaintiffs' unjust enrichment and bad faith claims [Docket No. 42]. In so ruling, the undersigned recognized that State Farm's dispositive motion presented a very narrow question: "whether the installation of materials, i.e. the labor, is subject to depreciation?" *Id.* at pg, 9. This Court further noted, while both parties had cited Kentucky law that they claimed supported their positions regarding that question, the Court concluded that "[t]his issue is one of first impression in Kentucky....[I]t is clear that there is no Kentucky law, statutory or case, which squarely addresses this issue." *Id.* The undersigned acknowledged that this Court "cannot divine with certainty what a Kentucky court would find," the conclusion reached "is consistent with Kentucky law and general principles of indemnity." *Id.*

State Farm now seeks to certify that precise question to the Kentucky Supreme Court pursuant to Kentucky Rule of Civil Procedure 76.37, to-wit, "[w]hether, under **[*4]** an insurance policy that provides for replacement cost coverage, an insurer may depreciate the cost of labor when it calculates the actual cash value of a structural loss. "[State Farm's Motion, Docket No. 44 at pg. I].

II.

Federal district courts may certify a question of Kentucky law to the Kentucky Supreme Court when (1) there is no controlling precedent from the Kentucky Supreme Court or any Kentucky Court of Appeals, and (2) the question may be determinative of the case pending before the federal court. Ky. CR 76.37.[1]

To be sure, the issue presented by this case, and briefed extensively by the parties with regard to State Farm's Motion to Dismiss, is not one which has been squarely **[*5]** addressed by Kentucky courts or the General Assembly. Nonetheless, this Court declines to certify the question to the Kentucky Supreme Court,

Defendant brought this matter to District Court, by way of removal and did not seek certification until after their dispositive motion was denied. While removal does not foreclose the opportunity to seek certification, the timing in this case smacks of duplicity. As the Sixth Circuit recently observed, "certification is disfavored where a plaintiff files in federal court but then, in light of an unfavorable judgment, seeks refuge in a state forum." Boyd County ex rel, Hedrick v. MERSCORP, Inc., 614 Fed. Appx. 818, **2015** U.S. App. LEXIS 9458, **2015** WL 3514361 (6th. Cir. **2015**). *See also* Geronimo v. Caterpillar, Inc., 440 F. App'x 442, 449 (6th Cir.2011). To the extent that State Farm urges that the Kentucky Supreme Court is the better forum to consider their argument, it should have refrained from removal or sought certification before this Court ruled on the merits of the claim. *Id. See also Town of Smyrna, Tenn. v. Mun. Gas Auth. Of Ga.* 723 F.3d 640, 649 (6th Cir.2013) ("The appropriate time to seek certification of a state-law issue is before a District Court resolves the issue, not after receiving an unfavorable ruling."). "Having availed itself of this Court's jurisdiction, [State Farm is] in a 'particularly poor position to seek certification.'" Boyd County, 985 F. Supp. 2d at 836.

Instead, State Farm takes great pains to explain why certification **[*6]** is required in this instance, citing the significance of the issue and concerns of efficiency. Yet, all grandstanding aside, it has presented nothing new to this Court, other than a thinly veiled attempt to have the proverbial second bite, Nothing has changed in this regard between the date State Farm filed its Motion to Dismiss briefs and today; the significance of the issue and the purported concerns were equally present when State Farm filed briefs in support of its Motion to Dismiss. The only thing which has changed is the fact that this Court ruled against State Farm and it now is

[1] This Court is very familiar with the Rule and its evolution. Prior 1984, the Kentucky Supreme Court would only accept certified questions from the Sixth Circuit. However, by amendment effective on January 1, 1984, District Courts became similarly authorized. The undersigned was the first District Court to certify a question of law to the Kentucky Supreme Court, doing so just three days following the amendment of the rule. In re Beverly Hills Fire Litig., 583 F. Supp. 1163, 1164 (E.D. Ky. 1984) (Wilhoit, J.). Indeed, in some circles, Rule 76.37, as amended, is known as "the Wilhoit Rule."

hoping for a different outcome. This is not the purpose for which certification was crafted.

III.

Accordingly, **IT IS HEREBY ORDERED** that Defendant State Farm Fire and Casualty Company's Motion to Certify a Question to the Kentucky Supreme Court [Docket No. 44] be **OVERRULED**.

This 7th day of July, ***2015***.

Signed By:

Henry R. Wilhoit, Jr.

United States District Judge

End of Document

EXHIBIT 5

LexisNexis

User Name: Meghan Schaar
Date and Time: Thursday, February 6, 2020 12:59:00 PM EST
Job Number: 109348182

Document (1)

1. *Eliason v. Clark Cty., 2019 U.S. Dist. LEXIS 48486*

Client/Matter: -None-
Search Terms: 2019 U.S. Dist. LEXIS 48486
Search Type: Natural Language
Narrowed by:

Content Type	Narrowed by
Cases	Sources: MI, Related Federal

Neutral
As of: February 6, 2020 5:59 PM Z

Eliason v. Clark Cty.

United States District Court for the District of Nevada

March 22, 2019, Decided; March 22, 2019, Filed

Case No.: 2:17-cv-03017-JAD-CWH

Reporter
2019 U.S. Dist. LEXIS 48486 *

Robert Eliason, an individual and in his official capacity as Constable of North Las Vegas Township, Plaintiff v. Clark County, a political subdivision of the State of Nevada; the State of Nevada ex rel. Nevada Commission on Peace Officer Standards and Training, Defendants

Prior History: *Eliason v. Clark Cty., 2019 U.S. Dist. LEXIS 48484 (D. Nev., Mar. 22, 2019)*

Core Terms

declare, forfeited, certification, forfeiture, state law, elected, Township, certifying, questions, quo warranto, vacancy, declaratory judgment, Disabilities, courts, preliminary injunction, claim for relief, state court, violates, alleges, parties, county commissioner, district court, federal court, enjoining, civil action, appointment, abstention, Training, forfeiture of office, agenda item

Counsel: **[*1]** For Robert Eliason, Plaintiff: Chad R. Fears, Kelly A. Evans, LEAD ATTORNEYS, Evans Fears & Schuttert LLP, Las Vegas, NV; Jeffrey F. Barr, LEAD ATTORNEY, Ashcraft & Barr | LLP, Las Vegas, NV.

For Clark County, Defendant: Thomas D Dillard, Olson, Cannon, Gormley, Angulo & Stoberski, Las Vegas, NV.

For Nevada Commission on Peace Officer Standards & Training, Interested Party: Michael D. Jensen, LEAD ATTORNEY, Motor Vehicle & Public Safety Department, Carson City, NV.

Judges: Jennifer A. Dorsey, United States District Judge.

Opinion by: Jennifer A. Dorsey

Opinion

Order Certifying Question to the Supreme Court of Nevada under NRAP 5

In July 2017, the Clark County Board of Commissioners sought to remove North Las Vegas Constable Robert L. Eliason from office by declaring that he had forfeited the office because he failed to obtain a statutorily required certification. The Board relied on *Nevada Revised Statute 258.007*, which requires constables to get certified by the Nevada Commission on Peace Officer Standards and Training (POST) as a category II peace officer within a year of appointment and provides that a constable who fails to do so "forfeits his . . . office and a vacancy is created . . . ." *Nevada Revised Statute 258.030* then authorizes the Board "to appoint a person to fill" **[*2]** that vacancy.

Eliason sued the County and POST in state court, and then-Eighth Judicial District Court Judge Elissa F. Cadish found that "a quo warranto action is the exclusive remedy to obtain a declaration that a forfeiture of public office has occurred," and she preliminarily enjoined the board from voting to declare Eliason's forfeiture or replacement. The County removed this case to federal court and asks to vacate the preliminary injunction, while Eliason seeks a declaratory judgment

in his favor. Because this case turns on a question of Nevada law, and it appears that there is no controlling precedent in the decisions of the Supreme Court or the Court of Appeals of this state, I certify the following question to the Honorable Supreme Court of Nevada under *Rule 5* of the Nevada Rules of Appellate Procedure:

> **Does *NRS 258.007* give the Clark County Board of County Commissioners the power to remove a constable from office, or can a constable be removed only with a quo warranto action?**

I. Statement of relevant facts and the nature of this controversy

NRS 258.007[1] states that constables in townships with populations of 100,000 or more who fail to complete certification to become a category II peace officer "forfeit" **[*3]** their office and create a vacancy that must be filled in accordance with *NRS 258.030*,[2] which allows the board of county commissioners to appoint someone to fill the vacancy. Robert F. Eliason was elected to the office of North Las Vegas Constable in November 2014 and took office in January 2015.[3] Because his office is subject to *NRS 258.007*, he was required to become certified by POST as a category II peace officer within a year of taking office.[4] As of July 4, 2016, he had not done so, and POST notified the Clark County Board of Commissioners of this failure.[5] A year later, the Assistant County Manager placed item 67 on the agenda for the Board's July 18, 2017, meeting. This agenda item proposed declaring Eliason to have forfeited his office and proceeding to fill the vacancy created by that forfeiture under *NRS 258.007* and *258.030*.[6]

Before the vote could occur, Eliason sued the County and POST in the Eighth Judicial District Court, asserting four causes of action: (1) declaratory relief stating that Clark County has no authority to declare a forfeiture of the office, that a *quo warranto* action under *NRS 35.010 et seq.* is the exclusive means of declaring a forfeiture of office, and that the Attorney General, at the Governor's direction, is the only party who can bring such an action; (2) injunctive relief or a writ of prohibition enjoining Clark County from adjudicating whether he had forfeited his office; (3) violation of *Article IV, Section 20 of the Nevada State Constitution*; and (4) violation of *Article IV, Section 25 of the Nevada Constitution*.[7] Eliason successfully moved for a preliminary injunction to restrain the County from removing him from office.[8] In granting the motion, the district court found that the Board lacks the power **[*5]** to remove Eliason and that the exclusive mechanism to do so is a quo warranto action by the Nevada Attorney General:

> 2. The issue before the Court . . . is whether Clark County has the authority to declare forfeiture of Constable Eliason's position pursuant to *NRS 258.007*.
> . . .
> 11. Clark County does not have the authority to maintain a Quo Warranto action.
>
> 12. Pursuant to *Heller v. Legislature, 120 Nev. 456, 463-64, 93 P.3d 746, 751 (2004)*, a Quo Warrant action is the exclusive remedy to obtain a declaration that a forfeiture of public office has occurred by provisions of law, including that in *NRS*

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[1] *NRS § 258.007* states:

> 1. Each constable in a township whose population is 100,000 or more which is located in a county whose population is 700,000 or more, and each constable of a township whose population is 250,000 or more and which is located in a county whose population is less than 700,000 shall become certified by the Peace Officers' Standards and Training Commission as a category II peace officer within one year **[*4]** after the date on which the constable commences his or her term of office or appointment unless the Commission, for good cause shown, grants an extension of time, which must not exceed 6 months.
>
> 2. If a constable does not comply with the provisions of subsection 1, the constable forfeits his or her office and a vacancy is created which must be filled in accordance with *NRS 258.030*.

[2] *NRS § 258.030* states that "if any vacancy exists or occurs in the office of constable in any township, the board of county commissioners shall appoint a person to fill the vacancy pursuant to *NRS 245.170*."

[3] ECF No. 1 at 13.

[4] *Id.* at 12.

[5] ECF No. 42 at 4.

[6] *Id.* at 4.

[7] ECF No. 1 at 16-20.

[8] ECF No. 41 at 8-11.

> 258.007.
> . . .
> 17. This Court finds that in terms of public policy, the Quo Warrant action is the established method to ensure due process is afforded and all rights are protected before an elected official is removed from office; therefore, public policy favors the grant of the preliminary injunction on that basis.[9]

Eliason later amended his complaint to add a claim for a violation of the Americans with Disabilities Act, and the County removed the action to federal court based on federal question and supplemental jurisdiction.[10] After removal, Eliason moved for a declaratory judgment, arguing that I should adopt the preliminary-injunction ruling and grant the declaratory relief he seeks **[*6]** in his first cause of action.[11] The County opposes that motion and countermoves for reconsideration of the state-court preliminary-injunction order.[12] POST filed a response to Eliason's motion in which it requests that I either abstain from deciding the state-law issues under the United States Supreme Court's decision in *Railroad Commission of Texas v. Pullman Co.*[13] or certify the question of Clark County's authority under NRS 258.007 and 258.030 to the Supreme Court of Nevada.[14] Eliason did not respond to POST's request.

Pullman abstention is unavailable because this case does not present a federal constitutional question—the federal question it presents is entirely statutory, and the constitutional questions it presents are state-based—and the *Pullman* doctrine is designed to avoid "the premature determination of constitutional questions" when "a *federal* constitutional issue might be mooted or presented in a different posture by a state court determination of pertinent state law."[15] But Eliason's state-law questions should nevertheless be resolved by Nevada's courts. Neither the Supreme Court nor the Court of Appeals of Nevada has interpreted NRS 258.007 or determined its application or constitutionality. The County **[*7]** maintains that the language of the statute is self-executing and that no judicial determination of forfeiture is required if a constable fails to become certified. Eliason counters that declaring a forfeiture of office is necessarily a judicial function, and a quo warranto action under NRS 35.010 et seq. is the exclusive remedy to remove a constable.[16] He further argues that NRS 258.007 violates Article IV Sections 20 and 25 of the Nevada Constitution.

No case answers the question of whether NRS 258.007 gives the Clark County Board of Commissioners the power to remove a constable from office or the constitutionality of such a procedure under the Nevada constitution. Clarification from the Supreme Court of Nevada about the applicability and constitutionality of NRS 258.007 will be outcome determinative of the central issue in this case.

II. Parties' names and designation of appellant and appellee

Go to table1

Because the most recent adverse order was the preliminary injunction entered against the defendant in state court, the defendants should be the appellants. **[*8]**

III. Names and addresses of counsel for the parties

Go to table2

IV. Any other matters the certifying court deems relevant to a determination of the questions certified

The Court defers to the Supreme Court of Nevada to

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[9] ECF No. 41.

[10] ECF No. 1.

[11] ECF No. 41.

[12] ECF Nos. 42, 43.

[13] R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 61 S. Ct. 643, 85 L. Ed. 971 (1941).

[14] ECF No. 44; *see also* ECF No. 54.

[15] *See* order denying motions and granting request to certify questions to the Supreme Court of Nevada, ECF No. 71 (citing C-Y Dev. Co. v. City of Redlands, 703 F.2d 375, 377 (9th Cir. 1983) (quoting Martin v. Creasy, 360 U.S. 219, 224, 79 S. Ct. 1034, 3 L. Ed. 2d 1186 (1959); County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 189, 79 S. Ct. 1060, 3 L. Ed. 2d 1163 (1959) (internal quotation marks and alterations omitted))(emphasis added).

[16] He also relies on Heller v. Legislature, 120 Nev. 456, 93 P.3d 746, 751 (Nev. 2004).

decide whether it requires any other information to answer the certified question. The Court does not intend its framing of the questions to limit the Supreme Court of Nevada's consideration of the issue. Nevertheless, for the Court's convenience, the crossbriefing by the parties is attached.

V. Conclusion

Having complied with the provisions of the *Nevada Rule of Appellate Procedure 5(c)*, I hereby direct the Clerk of Court for the U.S. District Court for the District of Nevada to **FORWARD this order and [*9] its attachments under official seal to the Supreme Court of the State of Nevada, 201 South Carson Street, Suite 201, Carson City, Nevada, 89701-4702**.

Dated: March 22, 2019

/s/ Jennifer A. Dorsey

U.S. District Judge Jennifer A. Dorsey

Go to table3

Exhibit A

ACOM

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Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

ROBERT ELIASON, an individual and in his official capacity as Constable of North Las Vegas Township,

Plaintiff,

v.

CLARK COUNTY, a political subdivision of the State of Nevada; NEVADA COMMISSION ON PEACE OFFICER STANDARDS & TRAINING,

Defendants.

Case No.: A-17-758319-C

Dept. No.: VI

FIRST AMENDED VERIFIED COMPLAINT

Exemption for Arbitration Requested: (1) Action involving Declaratory Relief (2)Action seeking Equitable Relief

Plaintiff ROBERT ELIASON, an individual and in his official capacity as Constable of North Las Vegas Township files this First Amended Verified Complaint as follows:

I. SUMMARY OF ACTION

1. Of the eleven Constables in Clark County, only two in North Las Vegas and Henderson are subject to a recently-enacted law, *NRS 258.007*, requiring those

constables to obtain Nevada Peace Officer Standards & Training certification.

2. Plaintiff Robert Eliason, the North Las Vegas Constable, has diligently pursued this certification, but he has a documented neurological condition that prevents him from meeting one part of the physical fitness test of the certification.

3. This action is now necessary because **[*11]** Defendant Clark County erroneously believes it holds the power to "declare that Robert L. Eliason, the elected North Las Vegas Constable, has forfeited his office." Clark County holds no such jurisdiction. Indeed, under well-established law, only the courts, and the courts alone, have the power to declare that an elected official has "forfeited" his office in a proceeding called a "writ quo warranto," in a civil action brought by the Attorney General of the State of Nevada. This action is necessary to restrain Clark County's excess of jurisdiction.

4. This action is also necessary because the law in question, *NRS 258.007*, violates both the Nevada Constitution and the Americans with Disabilities Act.

II. PARTIES AND JURISDICTION

5. Plaintiff, Constable Robert E. Eliason ("Constable Eliason"), is a resident of Clark County Nevada.

6. Constable Eliason is 55 years old.

7. Constable Eliason is the North Las Vegas Constable.

8. Constable Eliason was elected in November 2014 and entered office as North Las Vegas Constable on January 2, 2015.

9. Defendant County of Clark ("Clark County") is a political subdivision of the State of Nevada.

10. Defendant Nevada Commission on Peace Officer Standards & Training **[*12]** ("POST Commission") is the regulatory agency that establishes and maintains the laws, regulations, and acts as the governing authority for the behavior, hiring, basic and professional certification, course certification, and training requirements for all law enforcement officers in the state.

11. The POST Commission governing board is appointed by the Governor of the State of Nevada.

12. Six months after Constable Eliason took office, in June 2015, the Legislature passed *NRS 258.007* required constables in townships with a population in excess of 100,000 residents located in a county with a population in excess of 700,000 to obtain a category II peace officer certification from the POST Commission within twelve months of taking office (the "Certification Requirements").

13. Stated otherwise, only two constables of all the constables in Nevada are required to obtain Certification Requirements.

III. FACTS COMMON TO ALL CLAIMS

14. Constable Eliason has a documented neurological condition that prevents him from meeting one part of the physical fitness test of the Certification Requirements.

15. Constable Eliason's neurological condition thwarted his multiple attempts to receive the Certification Requirements **[*13]** required by the POST Commission.

16. In September 2015 Constable Eliason initiated a series of communications with Mike Sherlock, Executive Director of the POST Commission to explore alternatives to meet the Certification Requirements.

17. In September 2015, Constable Eliason verbally requested that Sherlock put his petition for waiver under *NAC 289.370* on an up-coming POST Commission public meeting. A true and correct copy memorializing this conversation is attached as Exhibit 1.

18. Sherlock refused to permit Constable Eliason to seek a medical waiver under *NAC 289.370*.

19. Because of Sherlock's refusal to permit Constable Eliason to seek a medical waiver, on September 18, 2015, Constable Eliason submitted a written request for an extension from the POST Commission pursuant to *NRS 258.007*. A true and correct copy of this written request is attached as Exhibit 2.

20. On November 5, 2015, Sherlock sent a letter to Constable Eliason confirming the POST Commission had considered and approved his extension request at its November 2015 public meeting. A true and correct copy of this approval is attached as Exhibit 3.

21. Subsequently, Constable Eliason received confirmation from his doctors that his neurological condition will **[*14]** continue to prevent him from

meeting one part of the physical fitness test of the Certification Requirements that he could not do beforehand.

22. On April 5, 2016, the Clark County Board of Commissioners authorized the filing of petition to the POST Commission on behalf of Constable Eliason for a waiver under NAC 289.370. A true and correct copy of the agenda item and some of its supporting materials for this petition is attached as Exhibit 4.

23. Upon information and belief; on June 29, 2016, Sherlock wrote to the Clark County Board of Commissioners stating that Constable Eliason had failed to meet POST Commission Certification Requirements and that Constable Eliason therefore had forfeited his office. Upon information and belief, a true and correct copy of this letter is attached as Exhibit 5.

24. Instead of simply notifying the Clark County Board of Commissioners about Constable Eliason's POST certification status, Sherlock advised and offered a legal opinion to the Clark County Board of Commissioners that it has "the authority regarding non-compliance and appointment to vacated offices.

25. Sherlock did not send a copy of Exhibit 5 to Constable Eliason. Constable Eliason received a copy of Exhibit **[*15]** 5 secondhand.

26. On October 3, 2016, and in light of the Clark County Board of Commissioners' request for waiver pursuant to NAC 289.370, private counsel for Constable Eliason wrote to Sherlock asking by what authority Sherlock sent his June 2016 letter. A true and correct copy of counsel's letter is attached as Exhibit 6.

27. Sherlock ignored counsel's letter.

28. Beginning in January 2017, Constable Eliason turned to the Clark County Office of Diversity to explore other alternatives under the Americans with Disabilities Act ("ADA").

29. On March 6, 2017, the Clark County Office of Diversity wrote to Constable Eliason confirming the receipt of Constable Eliason's formal request. A true and correct copy of the correspondence from the Office of Diversity is attached as Exhibit 7.

30. On or about June 30, 2017, the Office of Diversity informed Constable Eliason that although he was an individual with a disability within the meaning of the ADA, he was not eligible for an accommodation because he did not satisfy the requirements of his position. A true and correct copy of the correspondence from the Office of Diversity is attached as Exhibit 8.

31. On July 5, 2017, the Clark County Board of Commissioners **[*16]** met to consider Sherlock's unsolicited recommended course of action to declare Constable Eliason had forfeited his office, A true and correct copy of Agenda Item 59 is attached as Exhibit 9.

32. Exhibit 9 states, in part, that the purpose of the agenda item is for "the Board of County Commissioners [to] declare that Robert L. Eliason, the elected North Las Vegas Constable, has forfeited his office...."

33. At Constable Eliason's request, the Clark County Board of Commissioners continued its consideration of the forfeiture of office for two weeks.

IV. CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

(Declaratory Relief—Clark County and POST)

34. Plaintiff incorporates by reference the allegations of the preceding paragraphs as though fully set forth herein.

35. Under NRS 30.010 et seq., this Court has jurisdiction and authority to adjudicate the rights, status, and other legal relations of the parties.

36. A justiciable controversy exists between Plaintiff Constable Eliason and Defendants.

37. Specifically, a justiciable controversy exists between Constable Eliason and Clark County about Clark County's alleged authority to declare a "forfeiture" of the office of the North Las Vegas Township Constable, in that (1) NRS 258.007 confers **[*17]** no such authority on Clark County; (2) the courts are the exclusive province of declaring whether an elected officer has forfeited his office by way of a "writ quo warranto" under NRS 35.010 et seq.; and (3) only the Attorney General, when directed by the Governor, has standing to file a writ quo warranto.

38. A justiciable controversy also exists between Constable Eliason and the POST Commission because

NRS 258.007 violates the Nevada Constitution and the Americans with Disabilities Act, and the POST Commission is the entity charged with enforcing NRS 258.007.

SECOND CLAIM FOR RELIEF

(Injunctive Relief, or in the alternative, a Writ of Prohibition — Clark County)

39. Plaintiff incorporates by reference the allegations of the preceding paragraphs as though fully set forth herein.

40. NRS 34.320 et seq. grants this Court the power to issue a writ of prohibition to arrest "the proceedings of any tribunal, corporation, board or person exercising judicial functions, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person."

41. NRS 258.007 confers no authority on Clark County to "declare a forfeiture" of the office of the Constable of North Las Vegas Township.

42. NRS 35.010 et seq., grants the courts of the State of Nevada **[*18]** exclusive jurisdiction to determine if Constable Eliason has forfeited his office through the filing of a writ quo warranto.

43. NRS 35.010 et seq., grants the right to bring such an action the Attorney General of the State of Nevada and only when he is directed by the Governor.

44. Clark County is without jurisdiction and does not have the authority to make a determination whether Constable Eliason has forfeited his office.

45. Constable Eliason has no plain, speedy, and adequate remedy in the ordinary course of law to redress Clark County's excess of jurisdiction.

46. The Court should issue a writ of prohibition prohibiting or enjoining Clark County from usurping the jurisdiction to adjudicate whether Constable Eliason has forfeited his office.

THIRD CLAIM FOR RELIEF

(Title II of Americans with Disabilities Act, State and Local Governments)

47. Plaintiff incorporates by reference the allegations of the preceding paragraphs as though fully set forth herein.

48. At all times relevant to this action, the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 et seq. (the "ADA") was in force and effect in the State of Nevada.

49. The ADA expressly states that "no qualified individual with a disability shall, by reason of such disability, **[*19]** be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."

50. Constable Eliason is a qualified individual with a disability within the meaning of the ADA because Constable Eliason has a physical impairment that substantially limits one or more of Constable Eliason's major life activities, more specifically, a documented neurological condition.

51. POST is a public entity as that term is used in Title II of the ADA.

52. NRS 258.007 imposes a duty to meet the Certification Requirements within 18 months of taking the office of constable in only two townships.

53. NRS 258.007 discriminated against Constable Eliason on the basis of disability in violation of Title II of the ADA by requiring that Constable Eliason pass the Certification Requirements notwithstanding his neurological condition.

54. By enforcing NRS 258.007, the law denies Constable Eliason's access to programs, benefits and services provided to others solely on the basis of his disability, thereby violating Title II of the ADA.

55. As a direct and proximate result of the acts, omissions, and violations alleged above, Constable Eliason has suffered **[*20]** damages, including but not limited to pain and suffering, inconvenience, emotional distress, and impairment of quality of life.

56. Constable Eliason has been injured and aggrieved by and will continue to be injured and aggrieved by such discrimination.

57. The Court should enjoin POST from enforcing NRS.258.007 and declare the law invalid.

FOURTH CLAIM FOR RELIEF

(*Article IV, Section 20 of Nevada Constitution*, Certain Local and Special Laws Prohibited)

58. Plaintiff incorporates by reference the allegations of the preceding paragraphs as though fully set forth herein.

59. At all times relevant herein, Article IV, of the Nevada Constitution was in full force and effect in the State of Nevada.

60. Section 20 of the Nevada Constitution prohibits the legislature from passing local or special laws regulating the duties of the constables.

61. *NRS. 258.007* imposes a duty to meet the Certification Requirements within 18 months of taking the office of constable in only two townships in Clark County.

62. *NRS 258.007* is a special law relating to the duties of constable.

63. *NRS 258.007* should be declared unconstitutional as it violates *Article IV, Section 20 of the Nevada Constitution*.

FIFTH CLAIM FOR RELIEF

(*Article IV, Section 25 of Nevada Constitution*, Uniform County and Township Government)

64. Plaintiff incorporates by reference the allegations of the preceding paragraphs as though fully set forth herein.

65. At all times relevant herein, Article IV, of the Nevada Constitution was in full force **[*21]** and effect in the State of Nevada.

66. *Section 25 of the Nevada Constitution* requires that the legislature establish uniform laws throughout the state.

67. *NRS. 258.007* imposes a duty to meet the Certification Requirements within 18 months of taking the office of constable in only two townships.

68. *NRS 258.007* is not uniform as it relates to the duties of the office of constable because it does not impose the same requirements on all offices of constable within the state.

69. *NRS 258.007* should be declared unconstitutional as it violates *Article IV, Section 25 of the Nevada Constitution* because it does not impose the same requirements on all offices of constable within the state.

V. PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment in its favor and against Defendant as follows:

A. For a declaratory judgment finding that Clark County has no jurisdiction to "declare that Robert L. Eliason, the elected North Las Vegas Constable has forfeited his office";

B. For a Writ of Prohibition arresting any proceedings of the Clark County Board of County Commissioners to declare that Robert L. Eliason, the elected North Las Vegas Constable has forfeited his office";

C. For injunctive relief prohibiting any proceedings of the Clark County Board of County Commissioners to "declare that Robert L. Eliason, the elected **[*22]** North Las Vegas Constable has forfeited his office";

D. That this Court declare *NRS 258.007* to be in violation of Title II of the Americans with Disabilities Act;

E. That this Court enter an injunction ordering POST and Clark County to cease all discrimination on the basis of disability including but not limited to Constable Eliason;

F. That this Court declare *NRS 258.007* unconstitutional and invalid;

G. That this Court award Plaintiff compensatory damages;

H. For an award of reasonable attorney's fees and costs;

I. For any such other and further relief as the Court deems just and proper.

DATED this 2nd day of November, 2017.

EVANS FEARS & SCHUTTERT| LLP

/s/ Kelly A. Evans

KELLY A. EVANS, ESQ.

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Facsimile: (702) 805-0291

ASHCRAFT & BARR | LLP

/s/ Jeffre F. Barr

JEFFREY F. BARR, ESQ.

Nevada Bar No. 7269

barrj@AshcraftBarr.com

2300 West Sahara Avenue, Suite 900

Las Vegas, NV 89102

Telephone: (702) 631.7555

Facsimile: (702) 631.7556

Attorneys for Plaintiff Robert Eliason

VERIFICATION

ROBERT ELIASON, individually and in his capacity as Constable of North Las **[*23]** Vegas Township, declares under penalties of perjury the following:

- I have reviewed the instant First Amended Verified Complaint;
- Regarding the allegations of which I have personal knowledge, I believe them to be true;
- Regarding the allegations of which I do not have personal knowledge, I believe them to be true based on specific information, documents, or both.

I declare under penalty of perjury that the foregoing is true and correct

Executed on the 31st day of October, 2017.

/s/ Robert Eliason

ROBERT ELIASON, individually and in his Capacity as Constable of North Las Vegas Township

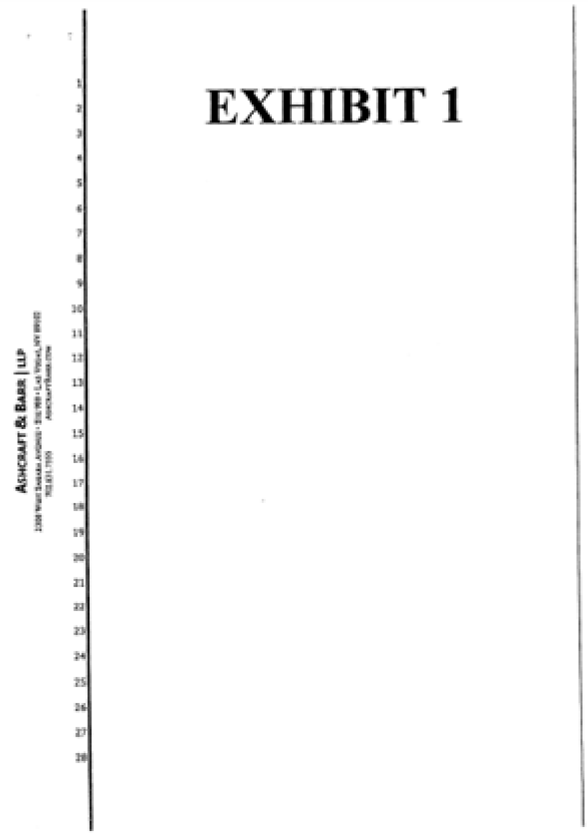
ASHCRAFT & BARR | LLP

EXHIBIT 1

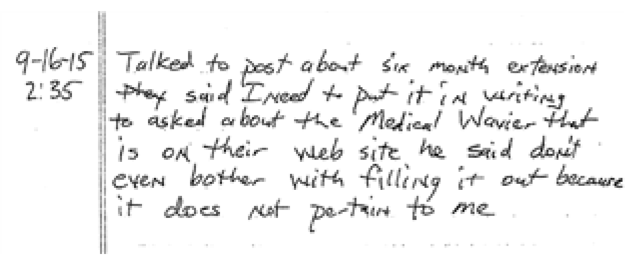
9-16-15
2:35
Talked to post about six month extension they said I need to put it in writing to asked about the Medical Wavier that is on their web site he said don't even bother with filling it out because it does not pertain to me

EXHIBIT 2

ROBERT L. ELIASON
CONSTABLE

CONSTABLE'S OFFICE
NORTH LAS VEGAS TOWNSHIP
2428 Martin Luther King Boulevard
North Las Vegas, Nevada 89032

TELEPHONE
(702) 455-7800
FAX: (702) 399-3099

9/18/2015

Via Email Only
Att: Mike Sherlock
msherlock@post.state.nv.us

Please allow this correspondence to serve as a follow up to our verbal conversation held on September 16, 2015 regarding my request to be placed on the November 3, 2015 meeting agenda before the Post Commission. I am requesting a six month extension pursuant to NRS 258.007 to complete the post certification requirement. I am requesting an extension at this time due to the fact that I am being treated for an abdominal tear. While attending the Clark County Juvenile Justice Academy on September 14, 2015 I was able to perform all requirements with the exception of the sit-ups. I am requesting this extension in hopes that I will be able to attend one of the two Post Certification Academy's held in January, 2016.

Respectfully Submitted,

Robert L. Eliason
Robert L. Eliason
North Las Vegas Constable

EXHIBIT 3

STATE OF NEVADA

COMMISSION ON PEACE OFFICERS' STANDARDS AND TRAINING
5587 Wa Pai Shone Avenue
CARSON CITY, NEVADA 89701
(775) 687-7678 FAX (775) 687-4911

BRIAN SANDOVAL
Governor

MICHAEL D. SHERLOCK
Executive Director

November 5, 2015

North Las Vegas Constables Office
Robert L. Eliason, Constable
2428 N. Martin L. King Blvd
North Las Vegas, NV 89032

RE: Constable Robert L. Eliason

Dear Constable Eliason:

This letter is to advise you on November 3, 2015 the POST Commission held a regularly scheduled meeting at the Palace Station Hotel and Casino in Las Vegas, Nevada. At this meeting your request for a six-month extension of time pursuant to NRS 289.550 to complete the certification process for your employee Constable Eliason, that has not completed the process within the one year time period, was reviewed.

After review of all information and consideration, the Commission approved the six-month extension of time pursuant to NAC 289.550. Constable Eliason will need to complete the certification process by July 4, 2016.

If you are in need of further assistance, please feel free to contact me.

Sincerely,

Michael D. Sherlock, Executive Director
Nevada Commission on Peace Officers' Standards and Training

MDS/dej
cc: Robert L. Eliason

EXHIBIT 4

CLARK COUNTY BOARD OF COMMISSIONERS
AGENDA ITEM

Petitioner:	Donald G. Burnette, County Manager
Recommendation:	That the Board of County Commissioners approve and authorize the Chairman to sign a petition to the Peace Officers' Standards and Training (POST) Commission of the State of Nevada seeking a waiver pursuant to NAC 289.370 for the Constable of the City of North Las Vegas relating to the requirements of NAC 289.150. (For possible action)

FISCAL IMPACT:

Fund #: N/A
Fund Center: N/A
Description: N/A
Added Comments: N/A
Fund Name: N/A
Funded Pgm/Grant: N/A
Amount: N/A

BACKGROUND:

NRS 258.007 requires the Constable of North Las Vegas to become certified by the Peace Officers' Standards and Training (POST) Commission within one year after the date on which the constable commences his or her term of office, or receive extensions of time to do so. To date, the North Las Vegas Constable has not achieved the required certification.

NAC 289.370 allows any administrator of an agency may petition for the Commission for a waiver of any provision of NAC 289 on behalf of an officer. Commissioner Weekly has asked that the Board consider such a petition on behalf of the North Las Vegas Constable for a waiver of the requirements of NAC 289.150.

Respectfully submitted,

DONALD G. BURNETTE, County Manager

Cleared for Agenda
4/5/2016
Agenda Item #
66

Commissioners,

I am providing this letter to ask you for your support regarding agenda # 66. I am asking that the post requirement for my position as the North Las Vegas Constable be waved. Also attached is a supportive letter from Dr. Dixit office.

Thank you for your time and consideration,

Robert Eliason

EXHIBIT 5

STATE OF NEVADA
COMMISSION ON PEACE OFFICER STANDARDS AND TRAINING
5587 Wa Pai Shone Avenue
Carson City, Nevada 89701
(775) 687-7678 FAX (775) 687-4911

BRIAN SANDOVAL
Governor

MICHAEL D. SHERLOCK
Executive Director

June 29, 2016

Clark County Commission
Commission Chairman Steve Sisolak
500 S. Grand Central Pkwy 6th Floor
Las Vegas, NV 89155

Clark County D.A., County Counsel
Mary Anne Miller
200 Lewis Ave
Las Vegas, NV 89101

To Whom It May Concern,

Nevada POST wishes to inform Clark County the status of elected North Las Vegas Township Constable Robert L. Eliason. As you may know, NRS 258.007 states the following: Certification as category II peace officer required in certain townships; forfeiture of office.

1. Each constable of a township whose population is 100,000 or more and which is located in a county whose population is 700,000 or more, and each constable of a township whose population is 250,000 or more and which is located in a county whose population is less than 700,000, shall become certified by the Peace Officers' Standards and Training Commission as a category II peace officer within 1 year after the date on which the constable commences his or her term of office or appointment unless the Commission, for good cause shown, grants in writing an extension of time, which must not exceed 6 months.
2. If a constable does not comply with the provisions of subsection 1, the constable forfeits his or her office and a vacancy is created which must be filled in accordance with NRS 258.030.
(Added to NRS by 2013, 2946; A 2015, 2516)

In addition, NRS 289.550 states: Persons required to be certified by Peace Officers' Standards and Training Commission; period by which certification is required.

1. Except as otherwise provided in subsection 2 and NRS 3.310, 4.353, 258.007 and 258.060, a person upon whom some or all of the powers of a peace officer are conferred pursuant to NRS 289.150 to 289.360, inclusive, must be certified by the Commission within 1 year after the date on which the person commences employment as a peace officer unless the Commission, for good cause shown, grants in writing an extension of time, which must not exceed 6 months, by which the person must become certified. A person who fails to become certified within the required time shall not exercise any of the powers of a peace officer after the time for becoming certified has expired.

Both statutes require a peace officer to be certified within 12 months of the date of hire or appointment and allow for one six month extension upon showing of good cause. Certification requires a person appointed to a peace officer position to 1. Successfully complete a basic training course (academy), 2. Pass the state certification written exam and 3. Pass the state physical fitness test.

Records show that North Las Vegas Township exceeds the minimum population of 100,000 and Clark County exceeds the minimum population of 700,000, meeting the requirement to be certified under NRS 258.007. It should also be noted that even in counties or townships below the population threshold, should the constable exercise some or all of the peace officer powers, the constable must be certified by POST.

Mr. Eliason was granted one six month extension by the POST Commission. That extension expires on July 4th, 2016. This was based on his taking office January 4th, 2015. At this point, it appears Mr. Eliason has not met any of the certification requirements. We have been notified by Clark County law enforcement academies that Mr. Eliason has not enrolled or has failed to attend a basic training course (academy). A check with our Training Division shows Mr. Eliason has not enrolled in our academy here at POST. In addition, he has not reported to us that he has passed the physical fitness test, nor has he attempted to schedule the state certification test. That said, it should be noted that the physical fitness test must be passed during the basic training course (academy) and the state certification test is only available after completion of the basic training course (academy). Clearly, he would not be able to complete an academy before the expiration of his extension.

This letter is to inform Clark County that Mr. Eliason has not met the requirements of NRS 289.550 nor has he met the specific requirements for constables in NRS 258.007. He has not met the certification requirements and as such, he is not a certified peace officer in Nevada. In addition to the requirement of the office being forfeited under NRS 258.007, it should be noted that a person who has not fulfilled the requirements for certification, does not have peace officer powers.

POST is providing this information as it is our duty to insure peace officer standards are met and agencies are in compliance with those standards. In this case (constables), the NRS indicates the County Commission as the authority regarding non-compliance and appointments to vacated offices.

Should you have any questions, do not hesitate in contacting me.

Sincerely,

M. Sherlock

Michael Sherlock
Executive Director, POST

EXHIBIT 6

ASHCRAFT & BARR | LLP
ATTORNEYS AT LAW

2300 West Sahara Avenue
Suite 1130
Las Vegas, NV 89102
702-631-7555

Ashcraftbarr.com

Writer's e-mail: Barrj@Ashcraftbarr.com

October 3, 2016
Mike Sherlock
Executive Director
Nevada Commission on Peace Officer Standards
5587 Wa Pai Shone Avenue
Carson City, NV 89701

Re: North Las Vegas Constable Robert Eliason

Dear Mr. Sherlock:

We represent North Las Vegas Constable Robert Eliason. We have received your letter to the Clark County Board of Commissioners about Constable Eliason.

We are admittedly a bit confused in light of the Clark County Board of Commissioners action on April 5, 2016. Could you kindly send us the legal citation authorizing you or the Nevada Commission on Peace Officer Standards to send the Clark County Board of Commissioners this correspondence? Could you also send us the meeting at which the Nevada Commission on Peace Officer Standards approved this action?

We thank you for your anticipated cooperation.

Sincerely,

ASHCRAFT & BARR | LLP

Jeffrey F. Barr, Esq.

EXHIBIT 7

CLARK COUNTY NEVADA

Office of Diversity

500 S Grand Central Pky 5th Fl • Box 551113 • Las Vegas NV 89155-1113
(702) 455-5760 • Fax (702) 455-5759

Sandy Jeantete, Human Resources Director

March 6, 2017

Robert Eliason
2016 Reynolds Avenue
North Las Vegas, NV 89030

RE: ADA ACCOMMODATION REQUEST

Dear Mr. Eliason:

You have requested a workplace accommodation pursuant to the Americans With Disabilities Act of 1990 (ADA). In order to be eligible for consideration of an accommodation, you must have a physical or mental impairment that substantially limits a major life activity. To assist in the assessment as to your eligibility for an accommodation, medical information is required.

Enclosed is a copy of the medical certification form you are to give your treating healthcare professional as authorization to provide the required medical information. Please ask your healthcare provider to complete and sign the medical certification form and return it by March 27, 2017 to the Office of Diversity (OOD) via mail or fax. Upon receipt of this information, the OOD will process your request.

An analyst will contact you to further discuss your eligibility for an accommodation and/or your accommodation needs. Your cooperation in this inter-active process is anticipated.

Please contact us at 455-5760 if you have any questions in regard to this matter.

Sincerely,

Sandy Jeantete
Director

By: Sheilia Brown
Sheilia Brown, Administrative Secretary

Enclosures (3)

BOARD OF COUNTY COMMISSIONERS
Steve Sisolak, Chairman • Chris Giunchigliani, Vice Chair
Susan Brager • Larry Brown • Marilyn Kirkpatrick • Mary Beth Scow • Lawrence Weekly
Yolanda King, County Manager

EXHIBIT 8

Office of Diversity

500 S Grand Central Pkwy 5th Flr • Box 55113 • Las Vegas NV 89155-1113
(702) 455-5760 • Fax (702) 455-5759

Sandy Jeantete, Director

June 30, 2017

Robert Eliason
2016 Reynolds Ave.
North Las Vegas, NV 89030

RE: ADA ACCOMMODATION REQUEST

Dear Mr. Eliason:

The Office of Diversity has completed its assessment of your request for an ADA accommodation. In order to be eligible for a workplace accommodation pursuant to the Americans with Disabilities Act as amended (ADAAA), you must have a physical or mental impairment that substantially limits a major life activity. In addition, you must satisfy the requirements of the position and be able to perform the essential functions of your job (with or without) an accommodation.

Based upon the information gathered during the course of this assessment, including information obtained through the interactive process, it is determined that you are an individual with a disability within the meaning of the ADA; however, you are not a qualified individual under the ADA, as you do not satisfy the requirements of your position. Therefore, you are not eligible for an accommodation.

As that is the case, our office will take no further action in this matter and will be administratively closing our file.

If you have any questions in regard to this letter, please don't hesitate to contact the Office of Diversity at (702) 455-5760.

Sincerely,

Sandy Jeantete

SJ/lb

In making this determination, the Board should consider whether there is an overlap of duties and functions between the elected Office of Constable for the North Las Vegas Township and the Office of the Sheriff, or any other private or public entity, or any combination thereof, that makes it unnecessary to maintain the elected Office of Constable for the North Las Vegas Township.

If the Board determines to continue the elected Office of Constable for the North Las Vegas Township, the vacancy will need to be filled in accordance with NRS 245.170 that provides that the Board appoint a suitable person who is an elector of the county to serve the remainder of the unexpired term (until January of 2019). The Board should direct staff on the appointment process.

If the Board makes a finding that there is an overlap of duties and functions between the Office of Constable for the North Las Vegas Township and the Office of the Sheriff, or any other private or public entity, or any combination thereof, and that it is not necessary to maintain the elected Office of Constable for the North Las Vegas Township, the Board should direct Staff to prepare an ordinance for introduction for the purpose of amending Chapter 2.15 of Title 2 of the Clark County Code to abolish the Office in the same manner that the elected Office of Constable for the Las Vegas Township was abolished.

Respectfully submitted,

Jeffrey M. Wells, Assistant County Manager

BOARD OF COUNTY COMMISSIONERS
Steve Sisolak, Chairman • Chris Giunchigliani, Vice Chair
Susan Brager • Larry Brown • Marilyn Kirkpatrick • Mary Beth Scow • Lawrence Weekly
Yolanda King, County Manager

EXHIBIT 9

CLARK COUNTY BOARD OF COMMISSIONERS
AGENDA ITEM

Petitioner:	Jeffrey M. Wells, Assistant County Manager
Recommendation:	That the Board of County Commissioners declare that Robert L. Eliason, the elected North Las Vegas Constable, has forfeited his office and that a vacancy in such office exists; discuss and determine whether to continue or abolish the elected office of the constable for said township; and direct staff accordingly. (For possible action).

FISCAL IMPACT:

Fund #: N/A
Fund Center: N/A
Description: N/A
Added Comments: N/A

Fund Name: N/A
Funded Program/Grant: N/A
Amount: N/A

BACKGROUND:

NRS 258.007 and NRS 289.550 require that a constable in a township whose population is 100,000 or more and that is located in a county whose population is 700,000 or more must be certified as a category II peace officer within one year after the date on which the constable commences their term of office or appointment unless the Peace Officers' Standards and Training Commission (POST), for good cause shown, grants an extension of time that cannot exceed 6 months. Pursuant to the statute, failure to comply results in forfeiture of office.

Robert L. Eliason was elected constable for the North Las Vegas Township and took office on January 4, 2015. He was granted one six-month extension for the purpose of complying with NRS 258.007 and that extension expired July 4, 2016. On June 29, 2016, POST notified the Board of County Commissioners that ". . . Mr. Eliason has not met the requirements of NRS 289.550 nor has he met the specific requirements for constables in NRS 258.007. He has not met the certification requirements and as such, he is not a certified peace officer in Nevada."

The Board of County Commissioners is requested to:

(1) Declare, pursuant to NRS 258.007, that Robert L. Eliason has forfeited the elected office of Constable for the North Las Vegas Township pursuant to NRS 258.007, effective immediately, because of his failure to be certified as a category II peace officer; and

(2) Declare that a vacancy in the elected office of Constable for the North Las Vegas Township exists; and

(3) Discuss and determine whether to: (a) Continue the elected office of Constable for the North Las Vegas Township and proceed to fill the vacancy pursuant to NRS 245.170; or (b) Abolish the elected office of Constable for the North Las Vegas Township in accordance with NRS 258.010 because the office is no longer necessary in that township.

Exhibit B

KELLY A. EVANS, ESQ.
Nevada Bar No. 7691
kevans@efstriallaw.com
CHAD R. FEARS, ESQ.
Nevada Bar No. 6970
cfears@efstriallaw.com
EVANS FEARS & SCHUTTERT L.L.P.
2300 West Sahara Avenue, Suite 900
Las Vegas, NV 89102
Telephone: (702) 805.0290
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JEFFREY F. BARR, ESQ
Nevada Bar No. 7269
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ASHCRAFT & BARR | LLP
2300 West Sahara Avenue, Suite 900
Las Vegas, NV 89102
Telephone: (702) 631.7555
Facsimile: (702) 631.7556
Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ROBERT ELIASON, an individual and in his official capacity as Constable of North Las Vegas Township, Plaintiff, v. CLARK COUNTY, a political subdivision of the State of Nevada; et al., Defendants.	**Case No.: 2:17-cv-03017-JAD-CWH** **PLAINTIFF'S MOTION FOR DECLARATORY JUDGMENT**

Plaintiff ROBERT ELIASON, an individual and in his official capacity as Constable of North Las Vegas Township ("Constable Eliason") files this PLAINTIFF'S MOTION FOR DECLARATORY JUDGMENT. This Motion is made and based upon the attached points and authorities, the papers and pleadings on file herein, and any oral argument the Court may entertain at any hearing.

I. INTRODUCTION

The gravamen of this action is that Defendant Clark County erroneously maintains that it possesses the unilateral and arbitrary power to remove a sitting, duly-elected constable from

office. Nevada law confers no such judicial authority on a local board, and prior to the removal of this action, the State Court enjoined Clark County from this very action.

Constable Eliason now seeks to formalize the State Court's preliminary injunction into a permanent, declaratory judgment from this Court, declaring Clark County's actions as illegal. Constable Eliason requests that the Court declare the following:

(1) Only the Nevada State courts may declare a forfeiture of an elected official's office;

(2) Clark County possesses no unilateral authority under Nevada law to "declare that Robert L. Eliason, the elected North Las Vegas Constable, has forfeited his office and that a vacancy in such office exists"; and

(3) Agenda Item 67 on the July 18, 2017 County Commission Meeting, which seeks to "declare that that Robert L. Eliason, the elected North Las Vegas Constable, has forfeited his office and that a vacancy in such office exists," is illegal under Nevada law.

II. UNDISPUTED FACTS and PROCEDURAL HISTORY

1. In July 2017, the Clark County Board of County Commissioners attempted to remove North Las Vegas Township Constable, Robert Eliason, by passing Item 67 on the July 17, 2017 Agenda ("Item 67").
2. Item 67 stated as follows: "That the Board of County Commissioners declare that Robert L. Eliason, the elected North Las Vegas Constable, has forfeited his office and that a vacancy in such office exists; and in the event of a declaration of vacancy, direct staff on methods for filling the vacancy. (For possible action)."
3. Before Clark County could "declare that Robert L. Eliason…has forfeited his office," Constable Eliason filed suit in the Nevada State Court, seeking among other relief, a preliminary injunction.
4. The State Court enjoined Clark County from declaring a forfeiture of the North Las Vegas Constable's Office (the "Preliminary Injunction"), making among others, the following Findings of Fact and Conclusions of Law:

- "NRS 258.030 authorizes Clark County to fill any vacancy in Constable Eliason's position." [Ex. "A," 2:13-14];
- "NRS 258.007 does not confer upon Clark County the authority to declare such a vacancy…." [Ex. "A," 2:15-16];
- "A Quo Warranto action is a formal and ancient proceeding to remove a person who has been duly elected to public office." [Ex. "A," 2:20-21];
- "A Quo Warranto action is the proper procedure for determining a forfeiture of office, including a forfeiture as a matter of law." [Ex. "A," 2:24-25];
- "Clark County does not have the authority to maintain a Quo Warranto action." [Ex. "A," 3:1];
- "This Court finds that Constable Eliason will likely succeed on the merits." [Ex. "A," 3:12].

After the State Court issued the Preliminary Injunction, Clark County removed this action to this Court.

III. LEGAL ANALYSIS: DECLARATORY JUDGMENT IS WARRANTED

The Declaratory Judgment Act permits a court to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 USC § 2201(a). "[D]eclaratory relief is appropriate (1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." *Eureka Fed. Sav. & Loan Asso. v. Am. Cas. Co.*, 873 F.2d 229, 231 (9th Cir. 1989) (internal citations and quotations omitted).

Here, the Court's declaratory judgment will serve a useful purpose in clarifying and settling the purely legal issue of whether, under Nevada law, Clark County has the unilateral power to remove a duly-elected officer from his elected-office without any court proceeding, whatsoever. The Court's declaratory judgment will also afford relief from the uncertainty surrounding Clark County's illegal actions—actions that gave rise to the instant proceeding.

No Nevada law grants Clark County the authority to unilaterally and arbitrarily declare a forfeiture of the constable's office. Declaring a "forfeiture" of an elected office is manifestly a judicial function performed by the courts by issuing a writ quo warranto. NRS 35.010(2). The statute provides that "[a] civil action may be brought in the name of the State [a]gainst a public officer…who does or suffers an act which, by the provisions of law, works a forfeiture of the office." *Id.* (Emphasis added.) Indeed, quo warranto is the "exclusive" remedy to challenge whether an elected official "has forfeited his or her right to enjoy the privilege" of office. *Heller v. Legislature*, 93 P.3d 746, 751 (Nev. 2004).[1] "Quo warranto generally is available to challenge an individual's right to hold office and to oust the individual from the office if the individual's claim to it is invalid or has been forfeited. *Lueck v. Teuton (In re Teuton)*, 219 P.3d 895, 898 (Nev. 2009) (emphasis added.)

Moreover, Clark County does not even possess the standing to file a writ quo warranto. In this case, standing to institute a civil action for quo warranto rests solely with the Attorney General at the direction of the Governor. NRS 35.030; *see also, Lueck v. Teuton (In re Teuton)*, 219 P.3d 895, 898 (2009) (no general standing to request writ quo warranto).

Indeed, prior to removal of this action, the Preliminary Injunction previously issued enjoined Clark County from declaring a forfeiture of the North Las Vegas Constable's Office. The State Court made, among others, the following Findings of Fact and Conclusions of Law:

- "NRS 258.030 authorizes Clark County to fill any vacancy in Constable Eliason's position." [Ex. "A," 2:13-14];
- "NRS 258.007 does not confer upon Clark County the authority to declare such a vacancy…." [Ex. "A," 2:15-16];

[1] *Accord* AGO 2017-14 (February 5, 2018) (holding that "Quo warranto is not the exclusive remedy to challenge the authority of a county official to hold office" because NRS 283.440 permits removal of an elected office holder for "nonfeasance" in an independent civil action). AGO 2017-14 serves to confirm that the Nevada courts, alone, have the power to remove an elected official from office—Clark County does not possess that authority.

- "A Quo Warranto action is a formal and ancient proceeding to remove a person who has been duly elected to public office." [Ex. "A," 2:20-21];
- "A Quo Warranto action is the proper procedure for determining a forfeiture of office, including a forfeiture as a matter of law." [Ex. "A," 2:24-25];
- "Clark County does not have the authority to maintain a Quo Warranto action." [Ex. "A," 3:1];
- "This Court finds that Constable Eliason will likely succeed on the merits." [Ex. "A," 3:12].

In accordance with the State Court's Preliminary Injunction, Constable Eliason now seeks a judgment from this Court declaring the following: (1) only the Nevada State courts may declare a forfeiture of an elected official's office; (2) Clark County possesses no unilateral authority under Nevada law to "declare that Robert L. Eliason, the elected North Las Vegas Constable, has forfeited his office and that a vacancy in such office exists"; and (3) Agenda Item 67 on the July 18, 2017 County Commission Meeting, which seeks to "declare that that Robert L. Eliason, the elected North Las Vegas Constable, has forfeited his office and that a vacancy in such office exists," is illegal under Nevada law.

DATED this 17th day of August, 2018.

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EXHIBIT A

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DISTRICT COURT

CLARK COUNTY, NEVADA

ROBERT ELIASON, an individual and in his official capacity as Constable of North Las Vegas Township,
Plaintiff,
v.
CLARK COUNTY, a political subdivision of the State of Nevada; MIKE SHERLOCK, in his official capacity as Executive Director of the Nevada Commission on Peace Officer Standards & Training,
Defendant.

Case No.: A-17-758319-C
Dept. No.: VI

ORDER GRANTING PRELIMINARY INJUNCTION

Plaintiff ROBERT ELIASON, an individual and in his official capacity as Constable of North Las Vegas Township ("Constable Eliason") filed his Motion for Issuance of Writ of Prohibition, or in the alternative Preliminary Injunction ("Motion"), against Defendant CLARK COUNTY ("Clark County"). Clark County filed an Opposition to the Motion. Constable Eliason filed a Reply in support of his Motion. The Court held a hearing and heard oral argument from counsel for both parties.

This Court, having reviewed and considered the papers and pleadings on file herein, and having entertained oral argument, and good cause appearing therefore, the Court hereby makes the following Findings of Facts, Conclusions of Law and Order.

FINDINGS AND CONCLUSIONS OF LAW

1. In light of the expedited nature of these proceedings, the Court addresses the Motion for Preliminary Injunction, the alternative relief sought by Constable Eliason, [ROP 29:9-14.] and declines to issue a writ of prohibition. EFC
2. The issue before the Court on the Motion for Preliminary Injunction is whether Clark County has the authority to declare forfeiture of Constable Eliason's position pursuant to NRS 258.007. [ROP 29:16-19.]
3. NRS 258.007 requires Constables in counties and townships over a certain population size to receive Peace Officer Standards and Training Certification. [ROP 29:25; 30:1-
4. NRS 258.030 authorizes Clark County to fill any vacancy in Constable Eliason's position. [ROP 30:8.]
5. NRS 258.007 does not confer upon Clark County the authority to declare such a vacancy, but instead provides if a constable does not comply with the required
6. NRS 35.010(2), provides, in relevant part, that "A civil action may be brought in the name of the State against a public officer who does or suffers an act which by the provisions of law works a forfeiture of the office." ("Quo Warranto action")
7. A Quo Warranto action is a formal and ancient proceeding to remove a person who has been duly elected to public office. [ROP 31:10-16.]
8. Writs quo warranto are set out in the Nevada Constitution as a remedy that is available to the courts of the State of Nevada and NRS ch. 35 outlines the process.
9. A Quo Warranto action is the proper procedure for determining a forfeiture of office, including a forefiture as a matter of law. [ROP 31:21-25.]
10. NRS 35.030 confers standing to institute a Quo Warranto action solely to the Attorney General at the direction of the Governor.
11. Clark County does not have the authority to maintain a Quo Warranto action. Pursuant to Heller v. Legislature, 120 Nev. 456, 463-64, 93 P.3d 746, 751 (2004), EFC
12. A Quo Warranto action is the exclusive remedy to obtain a declaration that a forfeiture of public office has occurred by provisions of law, [ROP 31:21-25.] industries that includes NRS 258.007. EFC
13. The following four factors are considered when determining whether to order preliminary injunctive relief: (a) The threat of immediate, irreparable harm; (b) the likelihood that the party seeking a preliminary injunction will be successful on the merits of the underlying action; (c) whether the balance of interests weighs in favor of the party seeking the preliminary injunction; and (d) whether issuance of the preliminary injunction is in the public's interest. *Clark County School District v. Buchanan*, 112 Nev. 1146, 1150, 924 P.2d 716, 719 (1996); *see also, Number One Rent-A-Car v. Ramada Inns*, 94 Nev. 779, 780, 587 P.2d 1329, 1330 (1978).
14. This Court finds that Constable Eliason will likely succeed on the merits. [ROP 31:21-25; 32:1.]
15. This Court finds that absent an injunction, irreparable injury to Constable Eliason would occur. [ROP 32:2-8.]
16. This Court finds that the balance of the hardships weighs in Constable Eliason's favor. There is no apparent substantial or certain irreparable injury to Clark County if an injunction is issued; however, Constable Eliason is likely to suffer substantial and irreparable injury if an injunction is not issued. [ROP 32.9:14.]
17. This Court finds that in terms of public policy, the Quo Warranto action is the established method to ensure due process is afforded and all rights are protected before an elected official is removed from office; therefore, public policy favors the grant of the preliminary injunction on that basis. [ROP 32:15-20.]

ORDER

IT IS HEREBY ORDERED that:

1. Plaintiff's Motion for Preliminary Injunction is hereby GRANTED,
2. Defendant Clark County and its governing body, the Board of County Commissioners, and its agents and employees are enjoined and restrained from proceeding during the pendency of this action in voting on or declaring the forfeiture of Robert Eliason of the Office of Constable of North Las Vegas Township;
3. Defendant Clark County and its governing body, the Board of County Commissioners, and its agents and employees are enjoined and restrained from proceeding during the pendency of this action in filling any vacancy in the Office of Constable of North Las Vegas Township, unless such vacancy is declared pursuant to a Nevada court in a writ quo warranto;
4. Plaintiff's bond posted pursuant to NRCP 65(c) with this Court in the amount of $1,000.00 on July 17, 2017, shall remain on file with this Court.

DATED this 16 th day of August 2017.

DISTRICT COURT JUDGE

ADO.

Prepared and submitted by
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Exhibit C

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * * *

ROBERT ELIASON, an individual and in his official capacity as Constable of North Las Vegas Township,	CASE NO. 2:17-cv-3017-JAD-CWH
Plaintiff,	
vs.	
CLARK COUNTY, a political subdivision of the State of Nevada; NEVADA COMMISSION ON PEACE OFFICER STANDARDS & TRAINING,	
Defendants.	

OPPOSITION TO PLAINTIFF'S MOTION FOR DECLARATORY JUDGMENT AND COUNTER MOTION FOR RECONSIDERATION OF THE ORDER GRANTING PLAINTIFF A PRELIMINARY INJUNCTION

COMES NOW Defendant CLARK COUNTY, by and through its counsel of record, THOMAS D. DILLARD, JR., ESQ., of the law firm of OLSON, CANNON, GORMLEY, ANGULO & STOBERSKI and hereby opposes Plaintiff's Motion for Declaratory Judgment [Doc. #41] and moves for reconsideration of the state court order dated August 18, 2018.

This Opposition is made and based upon all the pleadings and papers on file herein, the attached points and authorities, together with any argument that may be introduced at the time of hearing this matter.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The parties evidently agree that issues presented to the Court with regard to Plaintiff's claims against Clark County are questions of law. The facts are undisputed that Plaintiff, the last elected North Las Vegas Constable, has not become a category II, certified peace officer by the extended deadline permitted by NRS 258.007(1) even though more than two years has elapsed since the deadline passed.[1] The questions of law pertain to Clark County's potential statutory remedies to remove the non-compliant constable from office. Plaintiff has attempted to limit removal of public officers from office only to the procedure prescribed by NRS 35.010, or *quo warranto*. Plaintiff seeks to define quo warranto as the only "proper procedure" because "Clark County does not have the authority to maintain a *Quo Warranto* action." [#41, pg. 3 lines 7-10].

Plaintiff obtained a preliminary injunction order from the state court prior to removal that should have been narrowly tailored to whether NRS 258.007 provides an independent basis for removal.[2] Clark County argued that NRS 228.007(2) was a self-executing statute that caused Plaintiff to forfeit his office after he failed to obtain a category II certification by the time allotted set forth in NRS 228.007(1). In other words, Clark County interpreted the statute to hold that the forfeiture of Plaintiff's office went into effect immediately at that time without the need of

[1]NRS 258.007(1) states:

> Each constable of a township whose population is 100,000 or more and which is located in a county whose population is 700,000 or more, . . . shall become certified by the Peace Officers' Standards and Training Commission as a category II police officer within 1 year after the date on which the constable commences his or her term of office or appointment unless the commission, for good cause shown, grants in writing an extension of time, which must not exceed 6 months.

[2] NRS 258.007(2) states:

> If a constable does not comply with the provisions of subsection 1, the constable **forfeits** his or her office and a vacancy is created which **must be filled** in accordance with NRS 258.030 [by the board of county commissioners]. (emphasis added).

subsequent court action. The state court disagreed with Clark County's interpretation and concluded that NRS 228.007 was not self-executing, but required a separate judicial action to effect a forfeiture of office. Clark County maintains this interpretation was contrary to the legislative intent and the plain language of the statute and, thus, the state court order should be revisited by this Honorable Court. Clark County further contends now that this misinterpretation was aggravated by the inclusion of some *dicta* in the order indicating that *quo warranto* is the exclusive remedy to oust a Nevada public official from office. Plaintiff's motion seemingly seeks a declaratory order from the court that improperly elevates the exclusive remedy *dicta* part of this order to stand as the law of the case. The foregoing makes clear that *quo warranto* is not the only "proper procedure for determining a forfeiture of office " and this argument is plainly inconsistent with Nevada statutory law. The Court should now deny Plaintiff's motion for declaratory judgment by instead declaring that Clark County has alternative statutory authority to take action to remove Plaintiff from office pursuant to both NRS 283.440 (removal for nonfeasance) and NRS 258.010(3) (abolishing the office). The Court should also grant Clark County's motion for reconsideration of the order granting the preliminary injunction by finding the forfeiture clause of NRS 228.007 is self-executing and an independent statutory basis to remove Plaintiff from office.

II. PERTINENT FACTUAL AND PROCEDURAL BACKGROUND

1. In 2013, the Nevada Legislature passed NRS 258.007 placing requirements on certain constables of larger townships to comply with certain Nevada Peace Officers Standard and Training ("POST") requirements set forth in NRS Chapter 289.[3]

2. The City of North Las Vegas qualified as one of those townships at that time because it had a population well in excess of 220,000 and it is located in Clark County that had a

[3] There was an amendment to NRS 258.007 made on June 9, 2015 that did not change the requirements for Plaintiff to become a category II peace officer in Nevada that were put in place with the original legislation effective July 1, 2013. Contrary to Plaintiff's suggestion otherwise, the law did not place additional requirements on Plaintiff after he took office. The applicable two versions of this statute are attached as Exhibit ""A".

population then of approximately 2,000,000.[4]

3. Plaintiff Robert Eliason was elected in 2014 and took office as the North Las Vegas Constable on January 4, 2015.[5]

4. On November 5, 2015, Plaintiff obtained a six month extension from the State of Nevada POST Commission pursuant to NRS 289.550 and consequently had until July 4, 2016 to complete minimum standards of training for category II peace officers pursuant to NRS 289.150 to continue to hold his elected office.[6]

5. On June 29, 2016, the State of Nevada POST Commission sent the Clark County Commission a written notice that Plaintiff had not met the requirements of NRS 289.550; consequently, he was declared to not be a certified peace officer. The correspondence further stated that this failure to complete the training results in the forfeiture of his office pursuant to NRS 258.007 and provided Clark County a notification that he does not have any peace officer powers.[7]

6. On July 5, 2017, a year following the POST notification, the Assistant County Manager cleared item 67 for the agenda for the July 18, 2017 meeting to proceed with Clark County's statutory obligations under NRS 258.330[8] to fill the vacancy of the North Las Vegas Constable's office which had become forfeit pursuant to NRS 258.007(2).

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[4]www.cityofnorthlasvegas.com/Departments/CityManager/PDFs/EconomicDevelopment/North_Las_Vegas_Overview_March-2013.pdf

[5]www.nvsos.gov/SOSelectionPages/results/2014StateWideGeneral/Clark.aspx; Verified Complaint at para. 9.

[6] Exhibit 3 to Plaintiff's Motion for Writ of Prohibition.

[7] June 29, 2016 Correspondence from Execute Director Michael D. Sherlock to the Clark County Commission and Clark County Counsel, attached as Exhibit "B".

[8] NRS 258.030 states: "Except for those townships that the boards of county commissioners have determined do not require the office of constable, if any vacancy exists or occurs in the office of constable in any township, the board of county commissioners **shall** appoint a person to fill the vacancy pursuant to NRS 245.170." (emphasis added).

7. On July 14, 2017, Plaintiff obtained an *ex parte* order for a temporary restraining order enjoining the Board of County Commissioners ("BCC") from proceeding with item 67 on the agenda for meeting on July 18, 2017.

8. On August 16, 2017, the Eighth Judicial District Court of Nevada, the Honorable Judge Elissa F. Cadish, entered an order granting Plaintiff's motion for a preliminary injunction and enjoined Clark County from "proceeding during the pendency of this action in voting on or declaring the forfeiture of Robert Ellison of the Office of Constable of North Las Vegas Township or filling a vacancy for the office "unless such vacancy is declared pursuant to a Nevada court in a writ of quo warranto."[9] The district court declined to issue a writ of prohibition on the issue, however.[10] The order further, in dicta, stated the following:

> Pursuant to Heller v. Legislature, 120 Nev. 458, 463-64, 93 P.3d 746, 751 (2004), Quo Warranto is the exclusive remedy to obtain a declaration that a forfeiture of public office has occurred by provision of law including that in NRS 258.007.[11]

The district court further concluded as a matter of law that "Clark County does not have authority to maintain a Quo Warranto action."[12] The district court thus found that the only parties that had standing to pursue such an action were the State of Nevada and a person "who claims a right to hold, maintain, or assume a given public office when that right is disputed or contested."

9. Clark County then removed the item from the BCC meeting agenda scheduled for July 28, 2017 and has taken no action with respect to the issue since that time pursuant to the court's order.

10. On November 2, 2017, Plaintiff filed a First Amended Complaint and included, for the first time, a federal claim for relief pursuant to the American With Disabilities Act of 1990, 42 U.S.C. § 1201.

[9] Order Granting Preliminary Injunction, pg. 4 attached as Exhibit "C".

[10] Id. at pg. 2, lines 5-6.

[11] Id. at pg. 3, lines 1-4.

[12] Id. at pg. 3, line 1.

11. On December 8, 2017, Defendant Clark County removed the action to the U.S. District Court of Nevada based upon federal question jurisdiction.

12. On February 5, 2018, the State of Nevada Office of the Attorney General issued AG Opinion No. 2017-14.[13] In express disagreement with the court's order granting a preliminary injunction, the summary conclusion of the AG opinion states the following:

> *Quo warranto* is **not the exclusive remedy** to challenge the authority of a county official to hold office. Because a constable is not a state officer, his right to hold a public office, after failed to satisfy the requirements of NRS 258.007, may also be challenged pursuant to NRS 283.440.[14]

The AG opinion further stated:

> The question here concerns the removal of a constable for failure to fulfill a statutory duty, that is, becoming POST certified within the time required by statute or the reasonable extension of time. A constable's failure to become POST certified within the time required by statute is reasonably defined as "nonfeasance" or the "total neglect" of a duty necessary for the position. . . . Nonfeasance, as such, is a basis for removal pursuant to NRS 283.440.[15]

13. On August 17, 2018, Plaintiff filed a motion for declaratory judgment pursuant to 28 U.S.C. § 2801 requesting the U.S. District Court of Nevada to declare the following:

(a) only the Nevada State courts may declare a forfeiture of an elected official's office;

(b) Clark County possess no unilateral authority under Nevada law "to declare that Robert L. Ellison has forfeited his office and that a vacancy exists for the North Las Vegas Constable; and

(c) Agenda Item 67 which was on the BCC hearing over a year ago is illegal under Nevada law.

14. Plaintiff has still not obtained a Nevada POST category II certificate, despite being now well over two years late, that is required to continue to officiate in the office of the North Las Vegas Constable pursuant to NRS 258.007(1).

[13] State of Nevada Office of the Attorney General Opinion No. 2017-14 (issued February 5, 2018), attached as Exhibit "D".

[14] Id. at pg. 2 (emphasis added).

[15] Id. at pg. 4 (internal citations omitted).

III. LEGAL ARGUMENT

A. Clark County Has Standing to Pursue the Removal of the North Las Vegas Constable from Office for "Nonfeasance" Pursuant to NRS 283.440.

The Nevada Legislature in NRS 283.440 clearly gave Clark County standing to take action to remove Plaintiff as the Constable of North Las Vegas for "nonfeasance" when he failed to comply with the training and certification requirements imposed by NRS 258.007(1). The statute erects a procedure for persons, including municipal entities, to seek the removal of a person from any office in Nevada that is not expressly exempted for both malfeasance and nonfeasance. The district court's order making the determination that *quo warranto* was the exclusive procedure to remove Plaintiff from office and Clark County had no standing to file and such action is plainly inconsistent with this statute.[16] AG Opinion No. 2017-14 correctly determined that NRS 283.440 is an alternative basis for removal and Clark County has standing to file a complaint in court requesting removal of Plaintiff from the office. (Exhibit "C"). This Court, therefore, should not effectually affirm the legally unsound dicta in the order granting a preliminary injunction or grant Plaintiff's motion for a declaratory relief that is clearly inconsistent with NRS 258.440 as correctly interpreted by the Attorney General's office.

NRS 283.440 (Removal of certain public officers for malfeasance or nonfeasance: Procedure; appeal) is a separate procedure than quo warranto that the district court failed to account for when issuing the preliminary injunction order. NRS 283.440(1), in pertinent part, states the following:

> 1. Any person who is now holding or who shall hereafter hold any office in this State and who refuses or neglects to perform any official act in the manner and form prescribed by law, or who is guilty of any malpractice or malfeasance in office, may be removed therefrom as hereinafter prescribed in this section . . . .
>
> 2. Whenever a complaint in writing, duly verified by the oath of **any complainant**, is presented to the district court alleging that any officer within the jurisdiction of the court:
>
> . . .
>
> (b) Has refused or neglected to perform the official duties pertaining to the officer's office as prescribed by law; or
>
> (c) Has been guilty of any malpractice or malfeasance in office,
>
> the court shall cite the party charged to appear before it on a certain day, not more than 10 days or less than 5 days from the day when the complaint was presented. On that day, or some subsequent day not more than 20 days from that on which the complaint was presented, the court, in a summary manner, shall proceed to hear the complaint and evidence offered by the party complained of. If, on the hearing, it appears that the charge or charges of the complaint are sustained, the court shall enter a decree that the party complained of shall be deprived of the party's office.
>
> 3. The clerk of the court in which the proceedings are had, shall, within 3 days thereafter, transmit to the Governor **or the board of county commissioners of the proper county**, as the case may be, a copy of any decree or judgment declaring any officer deprived of any office under this section. The Governor or the board of county commissioners, as the case may be, shall appoint some person to fill the office until a successor shall be elected or appointed and qualified. . . .

(emphasis added).

The statute plainly gives "any complainant" standing to file a verified complaint in court alleging that the constable refused or neglected to perform duties prescribed by law for failure to the failure to comply with NRS 258.007(1). As summarized by the attorney general's office, "any person may make a certified complaint against a constable who has refused or neglected to perform his official duties as prescribed by law." (Exhibit "C" pg. 3). After the complaint if filed, "the court will issue an order to show cause to consider the charges of the complaint. NRS 283.440(2)." Id. Therefore, the district court's order, prepared by Plaintiff, stating in *dicta* that *quo warranto* was the one and only way to remove Plaintiff from office and Clark County does not have standing to pursue any such action is plainly erroneous.

The Court should not, therefore, grant Plaintiff declaratory judgment to the extent he seeks an order declaring that Clark County does not have the legal authority to seek his removal from office. Nevada law does not immunize office holders from removal from office outside of *quo warranto*, codified in NRS 35.010. Put differently, Nevada law does not limit actions to remove public officials from office to those brought by the State of Nevada or those persons

[16] In fairness to the district court, the issue of exclusive remedy was dicta as the conclusion of this language was not necessary to enjoin Clark County from declaring that the forfeiture already occurred and taking action to appoint a replacement without seeking a court order as would be required under either quo warranto or a complaint filed pursuant to NRS 283.440(2).

having an interest in the office themselves. The Court should affirmatively declare Clark County may file a complaint pursuant to NRS 283.440(2) without being in violation of any order in this instant action.

B. **Clark County Has Authority Under Nevada Law to Abolish the Office of the North Las Vegas Constable.**

Clark County also has authority under state law to abolish the office of the North Las Vegas Constable on a determination that the office is "not necessary." NRS 258.010, in pertinent part, states:

> (3) In a county whose population:
>
> . . .
>
> (b) Is 700,000 or more, if the board of county commissioners determines that the office of constable is not necessary in one or more townships within the county, it may, by ordinance, abolish the office in those townships.
>
> For a township in which the office of constable has been abolished, the board of county commissioners may, by resolution, appoint the sheriff ex officio constable to serve without additional compensation.

Clark County thus has lawful authority to remove Plaintiff from office, outside of *quo warranto*, through abolishing the office altogether. This is another avenue available for Clark County to remove Plaintiff from office upon exercising its discretion and finding the office is not necessary.[17] The law makes clear that, contrary to Plaintiff's assertion otherwise, that only the Nevada state courts may cause Plaintiff to be removed from office. Plaintiff cannot obtain a declaratory judgment that stands contrary to the clear authority given to Clark County pursuant to NRS 258.010. The Court should therefore deny Plaintiff's motion for declaratory judgment inasmuch as Plaintiff seeks an order indicating *quo warranto* is the proper procedure for removal and Clark County is precluded by law to remove Plaintiff from his office upon a finding that the office is no longer necessary.

///

[17] Clark County exercised this authority to abolish the City of Las Vegas' Constable office in 2013.

C. **The Eighth Judicial District Court Erred When It Held that NRS 258.007(2) Forfeiture of Office Clause for Failure of the Constable to Become POST Certified is Not Self-Executing and Can Only Be Enforced Through a *Quo Warranto* Action.**

Clark County maintains Plaintiff forfeited his office as a matter of self-executing statutory law pursuant to NRS 258.007(2) when he did not obtain a category II peace officer certification from Nevada POST by July 4, 2016. The district court failed to properly interpret NRS 258 creating an independent basis for ouster of a constable from office that failed to comply with the clear-cut training requirements of the office. NRS 258.007 states:

> 1. Each constable of a township whose population is 100,000 or more and which is located in a county whose population is 700,000 or more, and each constable of a township whose population is less than 700,000 shall become certified by the Peace Officers' Standards and Training Commission as a category II police officer within 1 year after the date on which the constable commences his or her term of office or appointment unless the commission, for good cause shown, grants in writing an extension of time, which must not exceed 6 months.
>
> 2. If a constable does not comply with the provision of subsection 1, the constable **forfeits** his or her office and a vacancy is created which **must** be filled in accordance with NRS 258.030. (emphasis added).

The word forfeit in the statute is dispositive–particularly because it is directly attached with the failure to comply with obtaining a category II certificate from the Nevada Peace Officers' Standards and Training Commission..

It has been widely recognized that the word in a statute involving the failure to meet necessary and unambiguous requirements is proof positive that the drafter intended the provision to be self-executing. See e.g., State v. Murphy, 347 Mo. 484, 148 S.W.2d 527 (S.C. 1941)(en banc); Oakland R. Co. v. Oakland, etc., R. Co., 45 Cal. 365 (1873); In re Brooklyn, etc., Ry. Co., 72 N. Y. 245 (1878); see also 63 Am.Jur.2d Public Officers and Employees § 188, p. 742; McQuillin, Municipal Corporations, vol. 4, § 1796. In other words, the word expresses the intention that the forfeiture shall take place upon the happening of the expressly identified contingency without the necessity of a judicial declaration or imprimatur of any other municipal entity. Los Angeles Athletic Club v. Board of Harbor Comm'rs of Los Angeles, 130 Cal.App 376, 387-88, 20 P.2d 130, 135 (1933)("Whether a breach of conditions, by the grantee of a franchise, works a forfeiture *ipso facto* depends on the language of the grant or the governing statute . . . If the statute provides that failure to complete the work within the time specified by the municipality works a forfeiture, the statute is self–executing, and failure to complete the work within the time specified ipso facto forfeits its franchise.").

In these circumstances, the courts should thus give effect to that intention whenever the question is presented in a judicial inquiry. The language of the law in question is plain and unambiguous and the court must give effect to the law according to its plain and obvious meaning. The statute affirmatively states the office is forfeited upon the failure to become a category II peace officer in the appointed time. The word forfeits makes clear that the triggering event has already occurred and requires no further action to be so. If the legislature intended that the lack of a POST certification certificate was not sufficient in and of itself, it would have used the language "may become forfeited," but it did not do so. The legislature also could have stated that the office holder "may be removed" had they intended for a separate court action be filed to effectuate the removal–as they did in NRS 283.440(1). There is no question of fact in this case that Plaintiff did not meet this requirement and so the forfeiture of his office has already occurred.

Plaintiff effectively rewrites the statute by ignoring the terms "forfeit" and "must" in an attempt to transform this mandatory, self-executing, and immediate forfeiture and office vacancy into a non-immediate, discretionary process (requiring a court to grant a petition which has limited standing). When interpreting a statutory provision, the court must first look to the plain language of the statute. Clay v. Eighth Jud. Dis. Ct., 305 P.3d 898, 902 (Nev. 2013). Legislative intent is the controlling factor in statutory construction. State v. Catanio, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004). The courts thus avoid statutory interpretation that renders language meaningless or superfluous and if the statute's language is clear and unambiguous, this court should enforce the statute as written. Clay, 305 P.3d at 902. "Likewise, this court will interpret a rule or statute in harmony with other rules and statutes." Id.

Plaintiff's interpretation would contravene a cardinal rule of statutory construction to avoid an interpretation that renders a statute in whole or in part superfluous or a nullity. See Miller v. Ignacio, 112 Nev. 930, 937, 921 P.2d 882, 886 (1996); see also Association for Los Angeles Deputy Sheriffs v. County of Los Angeles, 154 Cal.App.4th 1536, 1544, 65 Cal.Rptr.3d 665 (2007); In re Maricopa County Super. Ct. No., 54 P.3d 380, 383 (Ariz. App. 2002); Coon v. City & County of Honolulu, 98 Haw. 233, 250, 47 P.3d 348, 365 (2002); State v. Beard, 22 P.3d 116, 121 (Idaho Ct.App.2001). Plaintiff's failure to give heed to the forfeiture provision disregards the plain meaning and seeks to rewrite the statute and subvert the intent of the legislature. Application of Pioneer Mill Co., 53 Haw. 573, 497 P.2d 549, 552 (1972) (holding that the failure to effectuate the plain meaning of the forfeiture of judgeship provision would "rewrite the Constitution").

The case Plaintiff principally relied upon in his motion practice before the district court does not suggest that there is any other way to interpret the subject statute. The case of Lueck v. Teuton, 125 Nev. 674, 219 P.3d 895 (2009) has no legal or factual through-line connecting it to the statute or this case. The case involves a Nevada citizen's attempt to remove a temporarily appointed district court judge from office. The petitioner filed a writ of quo warranto to remove Judge Teuton from office after the attorney general refused to do so. The Court examined NRS Chapter 35, entitled Quo Warranto, and determined the legislature did not authorize quo warranto actions by private citizens with only a general interest in seeing state law upheld.[18] The Court noted that pursuant to NRS 35.050, only persons "claiming to be entitled to a public office," or otherwise through the attorney general and "on the leave of the court," may commence a quo warranto action against the alleged unlawful officeholder or usurper. Id. at 679, 219 P.3d at 898. The petitioner's writ was denied because he did not claim to be entitled to the office.

Plaintiff suggests this case stands for the proposition that only the Attorney General or a person claiming to be entitled to the office of North Las Vegas Constable's office represent the only persons having standing to remove him from his office. This is a fair reading of those having standing pursuant to NRS Title 35. The case however does not set the limits on the

[18] The writ of "quo warranto generally is available to challenge an individual's right to hold office to oust the individual from office if the individual's claim to it is invalid.

universe of possibilities as to how an office holder can lose his or her office due to nonfeasance or misfeasance. Clearly, the duly elected Nevada legislature is empowered to pass legislation creating alternative means of removal of a state officeholder from office, just like it did when it passed NRS Chapter 35 (*Quo Warranto*). This is of course precisely what occurred when the legislature passed NRS 258.007 creating a self-executing statute removing a constable from office upon failure to fulfill Nevada POST requirements in the allotted time.

In addition, the legislature also passed a very specific statute applying to constables directly, as opposed to the general *Quo Warranto* statute that has application to all state public offices.[19] The court should not construe the general *Quo Warranto* statute to preempt the very constable specific provision of NRS 258.007. See, e.g., Hinck v. United States, 550 U.S. 501, 506, 127 S.Ct. 2011 (2007) (describing the "well-established principle" that "a precisely drawn, detailed statute preempts more general remedies"; EC Term of Years Trust v. United States, 550 U.S. 429, 433, 127 S.Ct. 1763 (2007) (same); Radzanower v. Touche Ross & Co., 426 U.S. 148, 153, 96 S.Ct. 1989 (1976) ("Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.").

Plaintiff does not argue that he has complied with the POST certification requirements of NRS 258.007(1). He rather only contends Clark County lacks authority to move forward on replacing him as the North Las Vegas Constable under NRS 38.007(1). This argument is at odds with the plain language of the statute. Plaintiff's concession that he has not obtained a category II peace officer certification from Nevada POST by the extended deadline of July 4, 2016 triggers the self-executing forfeiture provision of NRS 38.007(2). Plaintiff consequently forfeited his office by operation of statutory law at that time. There is absolutely no statutory requirement for Clark County to obtain a judicial declaration before replacing Plaintiff in this public office. Clark County therefore has full authority afforded by NRS 38.007(2) and NRS 38.030 to put the matter on a public meeting agenda and fulfill its ministerial duty set forth in these statutes. The Court

[19] "*Quo warranto* proceedings originated at common law, but the right to commence an action in *quo warranto* has since been codified at NRS Chapter 35. As codified, *quo warranto* is sued at the prerogative of the government with few exceptions." AG Opinion No. 2017-14 pg. 2 (Exhibit "C").

should accordingly deny Plaintiff's motion, reverse the state court order and dismiss Plaintiff's claim for declaratory judgment and a writ of prohibition.

IV. LEGAL ARGUMENTS IN SUPPORT OF COUNTER-MOTION FOR RECONSIDERATION OF THE STATE COURT ORDER

Although the term "Motion for Reconsideration" is not specifically mentioned in the Federal Rules of Civil Procedure, motions for reconsideration are certainly permissible in Federal practice. "Reconsideration, as generally used, is a reconsideration by the same Court at which the original determination was made." Above-The-Belt, Inc. v. Merrill Bohannan Roofing, Inc., 99 F.R.D. 99, 101 (E.D. Va. 1983). A motion for reconsideration are properly considered in the circumstances of a non-final order pursuant to Federal Rule of Civil Procedure 60(b)(6).[20] See Fuller v. M.G. Jewelry, 950 F.2d 1437, 1442 (9th Cir. 1991). There are generally three grounds that warrant reconsideration: (1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct a clear error or prevent manifest injustice. See School District No. 1J, Multnomah County v. Acands, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993).

In the instant case and as set forth in section III, there are clear errors of law with the state court order granting the motion for preliminary injunction to warrant reconsideration of the issues now. In fact, the district court judge entered the order fully intending that it was not to be a permanent order and that reconsideration of the issues was expected because the court "declines to issue a writ of prohibition." (Exhibit "C" pg. 2 lines 5-6). The *dicta* portion of the order pertaining to *quo warranto* is particularly appropriate for reconsideration because it was included in the order even though it was not fully and fairly litigated before the district court, it is in clear error because it conflicts with Nevada statutes not considered by the state court and is

[20] For purposes of reconsideration, there is no difference between Rule 59(e) and Rule 60(b) pertinent to this instant case. The critical distinction between the two motions in a reconsideration context is that a timely filed Rule 59(e) motion tolls the time for filing a notice of appeal and a motion for reconsideration after the ten day period under Rule 60(b) does not. See United States v. Nutri-Cology, Inc., 950 F.2d 394, 396-97 (9th Cir. 1992). In this case, the order was entered on October 22, 2008 and Plaintiff's written request was received by the Court on November 7, 2008. Whether a timely Rule 59 motion filed within 10 days or a Rule 60 motion, the outcome is the same as Plaintiff has failed to demonstrate a basis to support reconsideration.

highly prejudicial to Clark County because it may foreclose clear-cut statutory rights. In addition, the portion of the order limiting the application of NRS 258.007 by misinterpreting the section regarding the office being forfeited upon failure to timely comply with the peace officer training requirement is also in clear error and worthy of reconsideration. Therefore, Clark County respectfully submits that the clear errors in the prior court order should be reconsidered and reversed by this Honorable Court.

V. CONCLUSION

IN ACCORDANCE WITH THE FOREGOING, the Court should deny Plaintiff's motion for a declaratory judgment pursuant to the Declaratory Judgment Act of 28 U.S.C. § 2201 because state law authorizes the removal of Plaintiff from office through several procedures and Clark County is not legally foreclosed from taking action to do so through the courts or by an independent action. The Court should also grant Clark County's motion for reconsideration of the Eighth Judicial District Court's order granting a preliminary injunction by declaring that *quo warranto* is not the exclusive remedy to be able to remove Plaintiff from office and that NRS 258.007 is an independent basis to declare that Plaintiff has forfeited his office.

RESPECTFULLY SUBMITTED this 30th day of August, 2018.

OLSON, CANNON, GORMLEY, ANGULO & STOBERSKI

By /s/ Thomas D. Dillard
THOMAS D. DILLARD, JR., ESQ.
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9950 West Cheyenne Avenue
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Attorneys for Defendant
Clark County

EXHIBIT A

NRS 258.007

258.007. Certification as category I or category II peace officer..., NV ST 258.007

West's Nevada Revised Statutes Annotated
Title 20. Counties and Townships: Formation, Government and Officers (Chapters 243-260)
Chapter 258. Constables

This section has been updated. Click here for the updated version.

N.R.S. 258.007

258.007. Certification as category I or category II peace officer required in certain townships; forfeiture of office

Effective: July 1, 2013 to June 8, 2015

1. Each constable of a township whose population is 15,000 or more or a township that has within its boundaries a city whose population is 15,000 or more shall become certified by the Peace Officers' Standards and Training Commission as a category I or category II peace officer within 1 year after the date on which the constable commences his or her term of office or appointment unless the Commission, for good cause shown, grants in writing an extension of time, which must not exceed 6 months.

2. If a constable does not comply with the provisions of subsection 1, the constable forfeits his or her office and a vacancy is created which must be filled in accordance with NRS 258.030.

Credits
Added by Laws 2013, c. 485, § 8.6, eff. July 1, 2013.

N. R. S. 258.007, NV ST 258.007
Current through the 79th Regular Session (2017) of the Nevada Legislature with all legislation operative or effective up to and including June 16, 2017 subject to change from the revisor of the Legislative Bureau.

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258.007. Certification as category II peace officer required in..., NV ST 258.007

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation
West's Nevada Revised Statutes Annotated
Title 20. Counties and Townships: Formation, Government and Officers (Chapters 243-260)
Chapter 258. Constables

N.R.S. 258.007

258.007. Certification as category II peace officer required in certain townships; forfeiture of office

Effective: June 9, 2015
Conventions

1. Each constable of a township whose population is 100,000 or more and which is located in a county whose population is 700,000 or more, and each constable of a township whose population is 250,000 or more and which is located in a county whose population is less than 700,000, shall become certified by the Peace Officers' Standards and Training Commission as a category II peace officer within 1 year after the date on which the constable commences his or her term of office or appointment unless the Commission, for good cause shown, grants in writing an extension of time, which must not exceed 6 months.

2. If a constable does not comply with the provisions of subsection 1, the constable forfeits his or her office and a vacancy is created which must be filled in accordance with NRS 258.030.

Credits
Added by Laws 2013, c. 485, § 8.6, eff. July 1, 2013. Amended by Laws 2015, c. 438, § 10, eff. June 9, 2015.

N. R. S. 258.007, NV ST 258.007
Current through the 79th Regular Session (2017) of the Nevada Legislature with all legislation operative or effective up to and including June 16, 2017 subject to change from the revisor of the Legislative Bureau.

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EXHIBIT B

Correspondence dated 6/29/16

STATE OF NEVADA
COMMISSION ON PEACE OFFICER STANDARDS AND TRAINING
5587 Wa Pai Shone Avenue
Carson City, Nevada 89701
(775) 687-7678 FAX (775) 687-4911

BRIAN SANDOVAL
Governor

MICHAEL D. SHERLOCK
Executive Director

June 29, 2016

Clark County Commission
Commission Chairman Steve Sisolak
500 S. Grand Central Pkwy 6th Floor
Las Vegas, NV 89155

Clark County D.A., County Counsel
Mary Anne Miller
200 Lewis Ave
Las Vegas, NV 89101

To Whom It May Concern,

Nevada POST wishes to inform Clark County the status of elected North Las Vegas Township Constable Robert L. Eliason. As you may know, NRS 258.007 states the following: Certification as category II peace officer required in certain townships; forfeiture of office.

1. Each constable of a township whose population is 100,000 or more and which is located in a county whose population is 700,000 or more, and each constable of a township whose population is 250,000 or more and which is located in a county whose population is less than 700,000, shall become certified by the Peace Officers' Standards and Training Commission as a category II peace officer within 1 year after the date on which the constable commences his or her term of office or appointment unless the Commission, for good cause shown, grants in writing an extension of time, which must not exceed 6 months.
2. If a constable does not comply with the provisions of subsection 1, the constable forfeits his or her office and a vacancy is created which must be filled in accordance with NRS 258.030.
(Added to NRS by 2013, 2946; A 2015, 2516)

In addition, NRS 289.550 states: Persons required to be certified by Peace Officers' Standards and Training Commission; period by which certification is required.

1. Except as otherwise provided in subsection 2 and NRS 3.310, 4.353, 258.007 and 258.060, a person upon whom some or all of the powers of a peace officer are conferred pursuant to NRS 289.150 to 289.360, inclusive, must be certified by the Commission within 1 year after the date on which the person commences employment as a peace officer unless the Commission, for good cause shown,

grants in writing an extension of time, which must not exceed 6 months, by which the person must become certified. A person who fails to become certified within the required time shall not exercise any of the powers of a peace officer after the time for becoming certified has expired.

Both statutes require a peace officer to be certified within 12 months of the date of hire or appointment and allow for one six month extension upon showing of good cause. Certification requires a person appointed to a peace officer position to 1. Successfully complete a basic training course (academy), 2. Pass the state certification written exam and 3. Pass the state physical fitness test.

Records show that North Las Vegas Township exceeds the minimum population of 100,000 and Clark County exceeds the minimum population of 700,000, meeting the requirement to be certified under NRS 258.007. It should also be noted that even in counties or townships below the population threshold, should the constable exercise some or all of the peace officer powers, the constable must be certified by POST.

Mr. Eliason was granted one six month extension by the POST Commission. That extension expires on July 4th, 2016. This was based on his taking office January 4th, 2015. At this point, it appears Mr. Eliason has not met any of the certification requirements. We have been notified by Clark County law enforcement academies that Mr. Eliason has not enrolled or has failed to attend a basic training course (academy). A check with our Training Division shows Mr. Eliason has not enrolled in our academy here at POST. In addition, he has not reported to us that he has passed the physical fitness test, nor has he attempted to schedule the state certification test. That said, it should be noted that the physical fitness test must be passed during the basic training course (academy) and the state certification test is only available after completion of the basic training course (academy). Clearly, he would not be able to complete an academy before the expiration of his extension.

This letter is to inform Clark County that Mr. Eliason has not met the requirements of NRS 289.550 nor has he met the specific requirements for constables in NRS 258.007. He has not met the certification requirements and as such, he is not a certified peace officer in Nevada. In addition, to the requirement of the office being forfeited under NRS 258.007, it should be noted that a person who has not fulfilled the requirements for certification, does not have peace officer powers.

POST is providing this information as it is our duty to insure peace officer standards are met and agencies are in compliance with those standards. In this case (constables), the NRS indicates the County Commission as the authority regarding non-compliance and appointments to vacated offices.

Should you have any questions, do not hesitate in contacting me.

Sincerely,

M. Sherlock

Michael Sherlock
Executive Director, POST

EXHIBIT C

Notice of Entry of Order re: Preliminary Injunction

Electronically Filed
8/21/2017 11:08 AM
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CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

ROBERT ELIASON, an individual Plaintiff, v. CLARK COUNTY, a political subdivision of the State of Nevada; MIKE SHERLOCK, in his official capacity as Executive Director of the Nevada Commission on Peace Officer Standards & Training; NEVADA COMMISSION ON PEACE OFFICER STANDARDS & TRAINING, Defendants.	CASE NO. A-17-758319-C DEPT NO. 6 VI NOTICE OF ENTRY OF ORDER

NOTICE OF ENTRY OF ORDER

TO: CLARK COUNTY.

TO: THEIR ATTORNEYS OF RECORD.

PLEASE TAKE NOTICE that an Order was entered in the above-entitled matter on August 18th, 2017.

A copy of said Order is attached hereto.

DATED this 21st day of August 2017.

ASHCRAFT & BARR | LLP
/s/Jeffrey F. Barr
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Attorneys for Plaintiff

CERTIFICATE OF SERVICE BY ELECTRONIC MEANS

I hereby certify that on this 21st day of August, 2017, the foregoing Notice of Entry of Order was electronically served to all registered parties in case number A-17-758319-C.

/s/Janelle Graft
An employee of ASHCRAFT & BARR | LLP

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DISTRICT COURT

CLARK COUNTY, NEVADA

ROBERT ELIASON, an individual and in his official capacity as Constable of North Las Vegas Township, Plaintiff, v. CLARK COUNTY, a political subdivision of the State of Nevada; MIKE SHERLOCK, in his official capacity as Executive Director of the Nevada Commission on Peace Officer Standards & Training, Defendant.	Case No.: A-17-758319-C Dept. No.: VI ORDER GRANTING PRELIMINARY INJUNCTION

Plaintiff ROBERT ELIASON, an individual and in his official capacity as Constable of North Las Vegas Township ("Constable Eliason") filed his Motion for Issuance of Writ of Prohibition, or in the alternative Preliminary Injunction ("Motion"), against Defendant CLARK COUNTY ("Clark County"). Clark County filed an Opposition to the Motion. Constable Eliason filed a Reply in support of his Motion. The Court held a hearing and heard oral argument from counsel for both parties.

This Court, having reviewed and considered the papers and pleadings on file herein, and

having entertained oral argument, and good cause appearing therefore, the Court hereby makes the following Findings of Facts, Conclusions of Law and Order.

FINDINGS AND CONCLUSIONS OF LAW

1. In light of the expedited nature of these proceedings, the Court addresses the Motion for Preliminary Injunction, the alternative relief sought by Constable Eliason, [ROP 29:9-14.] and declines to issue a writ of prohibition. efc
2. The issue before the Court on the Motion for Preliminary Injunction is whether Clark County has the authority to declare forfeiture of Constable Eliason's position pursuant to NRS 258.007. [ROP 29:16-19.]
3. NRS 258.007 requires Constables in counties and townships over a certain population size to receive Peace Officer Standards and Training Certification. [ROP 29:25; 30:1-
North Las Vegas meets these population requirements, and as the North Las Vegas Constable, Constable Eliason is required to receive POST certification. efc
4. NRS 258.030 authorizes Clark County to fill any vacancy in Constable Eliason's position. [ROP 30:8.]
5. NRS 258.007 does not confer upon Clark County the authority to declare such a vacancy, but instead provides if a constable does not comply with the required certification, the constable forfeits his office and a vacancy is created, which must be filled pursuant to NRS 258.030 efc
6. NRS 35.010(2), provides, in relevant part, that "A civil action may be brought in the name of the State against a public officer who does or suffers an act which by the provisions of law works a forfeiture of the office." ("Quo Warranto action")
7. A Quo Warranto action is a formal and ancient proceeding to remove a person who has been duly elected to public office. [ROP 31:10-16.]
8. Writs quo warranto are set out in the Nevada Constitution as a remedy that is available to the courts of the State of Nevada and NRS ch. 35 outlines the process.
9. A Quo Warranto action is the proper procedure for determining a forfeiture of office, including a forefiture as a matter of law. [ROP 31:21-25.]
10. NRS 35.030 confers standing to institute a Quo Warranto action solely to the Attorney General at the direction of the Governor.
11. Clark County does not have the authority to maintain a Quo Warranto action. Pursuant to Heller v. Legislature, 120 Nev. 456, 463-64, 93 P.3d 746, 751 (2004)
12. A Quo Warranto action is the exclusive remedy to obtain a declaration that a forfeiture of public office has occurred by provisions of law, [ROP 31:21-25.] including that in NRS 258.007. efc
13. The following four factors are considered when determining whether to order preliminary injunctive relief: (a) The threat of immediate, irreparable harm; (b) the likelihood that the party seeking a preliminary injunction will be successful on the merits of the underlying action; (c) whether the balance of interests weighs in favor of the party seeking the preliminary injunction; and (d) whether issuance of the preliminary injunction is in the public's interest. *Clark County School District v. Buchanan*, 112 Nev. 1146, 1150, 924 P.2d 716, 719 (1996); *see also, Number One Rent-A-Car v. Ramada Inns*, 94 Nev. 779, 780, 587 P.2d 1329, 1330 (1978).
14. This Court finds that Constable Eliason will likely succeed on the merits. [ROP 31:21-25; 32:1.]
15. This Court finds that absent an injunction, irreparable injury to Constable Eliason would occur. [ROP 32:2-8.]
16. This Court finds that the balance of the hardships weighs in Constable Eliason's favor. There is no apparent substantial or certain irreparable injury to Clark County if an injunction is issued; however, Constable Eliason is likely to suffer substantial and irreparable injury if an injunction is not issued. [ROP 32.9:14.]
17. This Court finds that in terms of public policy, the Quo Warranto action is the established method to ensure due process is afforded and all rights are protected before an elected official is removed from office; therefore, public policy favors the grant of the preliminary injunction on that basis. [ROP 32:15-20.]

ORDER

IT IS HEREBY ORDERED that:

1. Plaintiff's Motion for Preliminary Injunction is hereby GRANTED,
2. Defendant Clark County and its governing body, the Board of County Commissioners, and its agents and employees are enjoined and restrained from proceeding during the pendency of this action in voting on or declaring the forfeiture of Robert Eliason of the Office of Constable of North Las Vegas Township;
3. Defendant Clark County and its governing body, the Board of County Commissioners, and its agents and employees are enjoined and restrained from proceeding during the pendency of this action in filling any vacancy in the Office of Constable of North Las Vegas Township, unless such vacancy is declared pursuant to a Nevada court in a writ quo warranto;
4. Plaintiff's bond posted pursuant to NRCP 65(c) with this Court in the amount of $1,000.00 on July 17, 2017, shall remain on file with this Court.

DATED this 16 th day of August 2017.

DISTRICT COURT JUDGE ADO

Prepared and submitted by
ASHCRAFT & BARR LLP

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Page 4 of 4

EXHIBIT D

Opinion No. 2017-14 (2/5/18)

ADAM PAUL LAXALT
Attorney General

STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

100 North Carson Street
Carson City, Nevada 89701

J. BRIN GIBSON
First Assistant Attorney General

NICHOLAS A. TRUTANICH
Chief of Staff

KETAN D. BHIRUD
General Counsel

February 5, 2018

OPINION NO. 2017-14

OFFICE OF THE GOVERNOR; FORFEITURE OF OFFICE; COUNTY OFFICIAL - CONSTABLE: *Quo warranto* is not the exclusive remedy to challenge the authority of a county official to hold office. Because a constable is not a state officer, his right to hold a public office, after having failed to satisfy the requirements of NRS 258.007, may also be challenged pursuant to NRS 283.440.

The Honorable Brian Sandoval
Governor, State of Nevada
State Capitol Building
101 N. Carson Street
Carson City, NV 89701

Dear Governor Sandoval:

By letter dated September 29, 2017, you have requested an opinion from the Office of the Attorney General, under NRS 228.150, on one question:

QUESTION

What legal mechanisms exist by which a county may remove a constable or other official who has failed to fulfill the statutory requirements of office?

BACKGROUND

A constable in a township whose population is 100,000 or more, when located in a county whose population is 700,000 or more, must be certified as a

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Twitter: @NevadaAG • Facebook: /NVAttorneyGeneral • YouTube: /NevadaAG

The Honorable Brian Sandoval
Office of the Governor
Page 2
February 5, 2018

category II peace officer within one year after the date on which the constable commenced his or her term of office or appointment, unless the Peace Officers' Standards and Training Commission (POST), for good cause shown, grants an extension of time not to exceed 6 months. When the constable of such a township fails to become POST certified, the board of county commissioners may declare a forfeiture of the office. NRS 258.007, 289.550. Your question concerns the legal process by which a county must formalize or adjudicate the forfeiture of office. In this case, a district court has concluded that the constable may not be removed from office except by way of a *quo warranto* action filed at the request of the Governor and prosecuted by the Attorney General pursuant to NRS 35.030. The county in question has now requested the Governor to direct that the Attorney General file a *quo warranto* action to remove the constable from office.

SUMMARY CONCLUSION

Quo warranto is not the exclusive remedy to challenge the authority of a county official to hold office. Because a constable is not a state officer, his right to hold a public office, after having failed to satisfy the requirements of NRS 258.007, may also be challenged pursuant to NRS 283.440.

ANALYSIS

An action in *quo warranto* is an action directed against a person who usurps or unlawfully holds a public office, or against a public officer who does or suffers an act which, by the provisions of law, works a forfeiture of the office. NRS 35.010. *Quo warranto* proceedings originated at common law, but the right to commence an action in *quo warranto* has since been codified at NRS Chapter 35. As codified, *quo warranto* is used at the prerogative of the government with few exceptions.[1]

[1] The Attorney General is one of several persons who are expressly authorized to bring an action in *quo warranto*. Other persons who may bring an action are those who claim a right to hold, maintain, or assume a given public office when that right is disputed or contested. *See State ex rel. McMillan v. Sadler*, 25 Nev. 131, 58 P. 284 (1899). Here, our office has been informed that the constable has already filed an action that seeks to adjudicate whether the forfeiture statute is valid and enforceable. Although it is not styled in the nature of an action in *quo warranto*, it will effectively resolve any dispute concerning the constable's authority to continue to hold

The Honorable Brian Sandoval
Office of the Governor
Page 3
February 5, 2018

It has been argued that *quo warranto* is the exclusive means of challenging a county officer's right to hold office. Although cited as authority for this proposition, *Heller v. Legislature*, 120 Nev. 456, 93 P.3d 746 (2004), is not on point. *Heller* stands for the simple proposition that the separation of powers doctrine bars the exercise of *quo warranto* powers as a means to remove a legislator from his or her position in the legislature. *Id.* at 463-64, 93 P.3d at 751. In *Heller*, the Secretary of State had filed a petition for writ of mandamus, and, in dicta, the Court said the proper vehicle to challenge a legislator's title to public office is a writ of *quo warranto*. However, the Court did not hold that an action in *quo warranto* is the *exclusive* means by which to challenge a person's right to hold public office.

In fact, the Legislature has provided additional means to challenge the authority of an individual to hold public office. In 1909, the Legislature passed "an act providing for the removal from office of public officers for malfeasance or nonfeasance in office," now codified at NRS 283.440.[2] The statute provides in pertinent part that "[any] person who holds any office in this State and who refuses or neglects to perform any official act in the matter and form prescribed by law, may be removed pursuant to this section." Although the statute does not apply to judges, impeachable state officers, or state legislators, any person may make a certified complaint against a constable who has refused or neglected to perform his official duties as prescribed by law. Upon receipt of such a complaint the court will issue an order to show cause to consider the charges of the complaint. NRS 283.440(2).

Both NRS Chapter 35, which addresses actions in *quo warranto*, and NRS 283.440 provide methods to enforce a right that existed in the common law, namely the right of the public to ensure that public officers are qualified and fulfilling their duties under the law. A statute creating a method of enforcing a right which existed before the statute's enactment is regarded as cumulative rather than exclusive of preexisting remedies. *Ewing v. Fahey*, 86

the office. An action in *quo warranto* would tend to duplicate the purpose of the litigation that is currently underway.

[2] The Legislature adopted this statute to give effect to Article 7 of the Nevada Constitution, to make additional provision "for the removal from Office of any Civil Officer other than those [who are subject to impeachment]." The Governor and "other state and judicial officers" are subject to impeachment. Nev. Const., Art. 7, § 2.

The Honorable Brian Sandoval
Office of the Governor
Page 4
February 5, 2018

Nev. 604, 607, 472 P.2d 347, 349-50 (1970). Furthermore, there is no language in current statutes that suggests a legislative intent to abrogate common law remedies or replace them with mutually exclusive statutory remedies, *Orr Ditch & Water Co. v. Justice Court of Reno Tp., Washoe County*, 64 Nev. 138, 164, 178 P.2d 558, 571 (1947), so these remedies should be considered cumulative.

The question here concerns the removal of a constable for failing to fulfill a statutory duty, that is, becoming POST certified within the time required by statute or the reasonable extension of time. A constable's failure to become POST certified within the time required by statute is reasonably defined as "nonfeasance" or the "total neglect" of a duty necessary for the position. *See Schumacher v. State ex rel. Furlong*, 78 Nev. 167, 171, 370 P.2d 209, 211 (1962), *citing Moulton v. Scully*, 111 Me. 428, 434, 89 A. 944, 947 (1914). Nonfeasance, as such, is a basis for removal pursuant to NRS 283.440. *Id.*

It does not change the analysis that a constable's failure to become POST certified results in a "forfeiture" of the office of constable. *See* NRS 258.007(2) (stating that "the constable forfeits his or her office and a vacancy is created which must be filled in accordance with NRS 258.030"). Whether there has been a forfeiture of office is a question of fact that must be adjudicated by a court of competent jurisdiction. The commencement of a civil action would ordinarily, but not necessarily, lead to a finding by the court that the office is vacant and available for appointment. The civil action may be commenced as an action in *quo warranto*, pursuant to NRS 35.010, or as an action alleging nonfeasance in violation of NRS 283.440, as made applicable by operation of NRS 258.007.

Sincerely,

ADAM PAUL LAXALT
Attorney General

By: ______________________
Melissa L. Flatley
Deputy Attorney General
Bureau of Business and State Services
Business and Taxation

MLF/kh

Exhibit D

RESPONSE TO PLAINTIFF'S MOTION FOR DECLARATORY JUDGMENT

Comes Now Defendant, STATE OF NEVADA ex rel. its NEVADA COMMISSION ON PEACE OFFICERS' STANDARDS AND TRAINING (POST Commission), by and through its counsel, ADAM PAUL LAXALT, Attorney General for the State of Nevada, and MICHAEL D. JENSEN, Senior Deputy Attorney General and hereby files its Response to Plaintiff's Motion for Declaratory Judgment [Doc. #41]. The Commission's Response is based on the attached Memorandum of Points and Authorities, all relevant papers **[*24]** and pleading on file herein, and all relevant rules of law.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Plaintiff, ROBERT ELIASON, filed a First Amended Verified Complaint (Amended Complaint) in Eighth Judicial District Court, Clark County, Nevada on November 12, 2017. In his Amended Complaint, the Plaintiff alleges that he has a "documented neurological condition that prevents him from meeting one part of the physical fitness test for certification." Amended Complaint, page 2, lns. 1-3. The Plaintiff alleges that he has diligently pursued P.O.S.T. certification but he has not been able to meet one part of the physical fitness test for P.O.S.T. certification. With regard to the purpose of the lawsuit, the Plaintiff alleges:

> This action is necessary because Defendant Clark County erroneously believes it holds the power to "declare that Robert L. Eliason, the elected North Las Vegas Constable, has forfeited his office." Clark County holds no such jurisdiction. Indeed, under well-established law, only the courts, and the courts alone, have the power to declare that an elected official has "forfeited" his office in a proceeding called a "writ quo warranto," in a civil action brought **[*25]** by the Attorney General of the State of Nevada. The action is necessary to restrain Clark County's excess of jurisdiction." Amended Complaint, p. 2, lns. 4-11. The Plaintiff also alleges the action is necessary because the law in question, *NRS 258.007*, violates both the Nevada Constitution and the Americans with Disabilities Act.

Id. at lns. 12-13.

NRS 258.007 reads as follows:

> 1. Each constable in a township whose population is 100,000 or more which is located in a county whose population is 700,000 or more, and each constable of a township whose population is 250,000 or more and which is located in a county whose population is less than 700,000, shall become certified by the Peace Officers' Standards and Training Commission as a category II peace officer within one year after the date on which the constable commences his or her term of office or appointment unless the Commission, for good cause shown, grants an extension of time, which must not exceed 6 months.
>
> 2. If a constable does not comply with the provisions of subsection 1, the constable forfeits his or her office and a vacancy is created which must be filled in accordance with *NRS 258.030*.

NRS 258.030 reads as follows:

> Except for those townships that the boards of county **[*26]** commissioners have determined to require an office of constable, if any vacancy exists or occurs in the office of constable in any township, the board of county commissioners shall appoint a person to fill the vacancy pursuant to *NRS 245.170*.

In the "Parties and Jurisdiction" section of Plaintiff's Amended Complaint, he states that he was elected in November 2014 and entered office as North Las Vegas Constable on January 2, 2015. Amended Complaint, p. 2, lns. 19-20. The POST Commission, at its meeting in November 2015, granted the Plaintiff a six-month extension of time to obtain POST certification up to July 2016. The Plaintiff did not receive POST certification by July 2016. The Plaintiff alleges that on July 5, 2017, "the Clark County Board of Commissioners met to consider Sherlock's unsolicited recommended course of action to declare Constable Eliason had forfeited his office." The agenda item for the Board's meeting is alleged to provide as follows: "the Board of County Commissioner [to] declare that Robert L. Eliason, the elected North Las Vegas Constable, has forfeited his office..." Amended Complaint, p. 5, lns. 6-12. At Constable Eliason's request, the Clark County Board of Commissioners **[*27]** continued its consideration of the

forfeiture of office for two weeks.

The Plaintiff's Amended Complaint contains five claims for relief: (1) First Claim for Relief - Declaratory Relief - Clark County and POST, pursuant to NRS 30.010 et seq. seeking a declaration that NRS 258.007 confers no authority on Clark County to declare a forfeiture of the office of the North Las Vegas Township Constable, that the courts are the exclusive province of declaring whether an elected official has forfeited his office by way of a "writ quo warranto," under NRS 35.010 et seq., and that only the Attorney General, when directed by the Governor, may bring such an action. Additionally, under this Claim for Relief, the Plaintiff alleges NRS 258.007 violates the Nevada Constitution and the American with Disabilities Act and that the POST Commission is the entity charged with enforcing NRS 258.007; (2) Second Claim for Relief - Injunctive Relief, or in the alternative, a Writ of Prohibition - pursuant to NRS 34.320 et seq., seeking a writ of prohibition enjoining Clark County from "usurping the jurisdiction to adjudicate whether Constable Eliason has forfeited his office;" (3) Third Claim for Relief - Title II of the Americans with Disabilities Act, State and Local Governments - seeking to enjoin **[*28]** the POST Commission from enforcing NRS 258.007 and declaring the law invalid; (4) Fourth Claim for Relief - Article IV, Section 20 of Nevada Constitution, Certain Local and Special Laws Prohibited seeking a declaration that NRS 258.007 is a local or special law relating to the duties of the constable, and a declaration that the law is unconstitutional as it violates Article IV, Section 20 of the Nevada Constitution as a local or special law; and (5) Fifth Claim for Relief - Article IV Section 25 of the Nevada Constitution - Uniform County and Township Government - seeking a declaration that NRS 258.007 should be declared unconstitutional because it violates Article IV, Section 25 of the Nevada Constitution because it does not impose the same requirements on all offices of constable within the state. Amended Complaint, p. 5-9.

In the State District Court, the Plaintiff sought and obtained an Order Granting Preliminary Injunction through which the Court enjoins and restrains Clark County and its governing body, the Board of County Commissioners, from proceeding during the pendency of this action in voting or declaring the forfeiture of Robert Eliason from the Office of Constable for the North Las Vegas Township, enjoins Clark County and its governing body, the Board of County Commissioners, and its agents and employees from proceeding during the pendency of the action in filling any vacancy in the Office **[*29]** of the Constable of North Las Vegas Township, unless such vacancy is declared pursuant to a Nevada court in a *writ quo warranto*. The Order Granting Preliminary Injunction was issued on August 16, 2017.

On December 8, 2017, Clark County filed a Notice of Removal of Civil Action to the United States District Court for the District of Nevada. The removal to Federal District Court is supported by the single Federal law claim alleging NRS 258.007, by its own terms, violates Title II of the Americans with Disabilities Act. The parties are currently engaged in discovery, which ends on November 5, 2018. [Doc. #37].

On August 17, 2018, the Plaintiff filed his Motion for Declaratory Judgment, pursuant to 28 U.S.C. § 2201(a), through which he seeks a judgment from this Court declaring (1) only the Nevada State Courts may declare a forfeiture of an elected official's office; (2) Clark County possesses no unilateral authority, under Nevada law, to declare Robert L. Eliason, the elected North Las Vegas Constable, has forfeited his office and that the vacancy for such office exists; and (3) the agenda item, on the July 18, 2017 Clark County Commission meeting agenda, through which the Commission seeks to declare that the Plaintiff **[*30]** has forfeited his office and that a vacancy in such office exists is illegal under Nevada law.

The POST Commission files this response for the sole purpose of requesting the Court abstain from issuing a Federal Declaratory Judgment on these purely state law questions, and requests the Court certify these Nevada statutory and Nevada Constitutional questions to the Nevada Supreme Court.

II. ARGUMENT

A. Pursuant to *Pullman*, the Court Should Abstain From Issuing a Federal Declaratory Judgment in These Purely State Law Matters.

In R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L. Ed. 971 (1941), the United States Supreme Court held that federal courts should abstain from exercising jurisdiction in a matter when an unsettled area of state law has an effect on the outcome of a federal constitutional claim or would render a decision on the federal claim unnecessary. *See also,* San Remo Hotel v. City and County of San Francisco,

145 F.3d 1095, 1104-1105 (9th Cir. 1998). The equitable considerations of *Pullman* abstention are typically applied when an unsettled state law question is best decided by or is already pending in state court. *See,* Harris City Commissioner's Court v. Moore, 420 U.S. 77, 83-84, 95 S.Ct. 870, 43 L. Ed. 2d 32 (1975). In the face of novel questions of state law, many federal courts rely on state certification procedures, which avoid the significant financial and time burdens associated with *Pullman* abstention. Jones v. Coleman, 848 F.3d 744, 750 (6th Cir. 2017).

Plaintiff's request **[*31]** for a declaratory judgment involves unsettled questions of state law. While the State District Court entered a preliminary injunction, the Court's finding, for purposes of the preliminary injunction, was only that Plaintiff had a substantial likelihood of success on these state law matters. Significantly, the Nevada Supreme Court has not interpreted NRS 258.007. The plain language of the statute provides for the forfeiture of office if a constable fails to become certified by the POST Commission within one year of taking office, or within any extension granted by the POST Commission not to exceed 6 months.

The Nevada Office of the Attorney General has opined on a related question. *See* Nevada Attorney General Opinion 2017-14. By letter dated September 29, 2017, the Governor requested an opinion from the Office of the Attorney General on the following question: "What legal mechanisms exist by which a county may remove a constable or other official who has failed to fulfill the statutory requirements of office?" The section of the Opinion entitled "Summary of Conclusion" reads: "*Quo warranto* is not the exclusive remedy to challenge the authority of a county official to hold office. Because a constable **[*32]** is not a state office, his right to hold a public office, after failing to satisfy the requirements of NRS 258.007, may also be challenged pursuant to NRS 283.440." *Id.* at p. 2. In the concluding two paragraphs of the Opinion, the Nevada Office of the Attorney General opines:

> The question here concerns the removal of a constable for failing to fulfill a statutory duty, that is, becoming POST certified within the time required by statute or the reasonable extension of time. A constable's failure to become POST certified within the time required by statute is reasonably defined as "nonfeasance" or the "total neglect" of a duty necessary for the position. *See,* Schumacher v. State ex rel. Furlong, 78 Nev. 167, 171, 370 P.2d 209, 211 (1962), citing Moulton v. Scully, 111 Me. 428, 89 A. 944, 947 (1914). Nonfeasance, as such, is a basis for removal pursuant to NRS 283.440. *Id.*
>
> It does not change the analysis that a constable's failure to become POST certified results in the "forfeiture" of the office of constable. See NRS 258.007(2) (stating that "the constable forfeits his or her office and a vacancy is created which must be filled in accordance with NRS 250.030"). Whether there has been a forfeiture of office is a question of fact that must be adjudicated by a court of competent jurisdiction. The commencement of a civil action would ordinarily, but not necessarily, lead to a finding by **[*33]** the court that the office is vacant and available for appointment. The civil action may be commenced as an action in *quo warranto*, pursuant to NRS 35.010, or as an action alleging nonfeasance in violation of NRS 283.440, as made applicable by operation of NRS 258.007.

Id. at p. 4.

The Attorney General Opinion is not binding legal authority on this issue. Cannon v. Taylor, 88 Nev. 89, 91, 493 P.2d 1313, 1314 (1972). Additionally, the legal analysis in this opinion underscores the point that the legal issues related to the legal mechanisms to remove an elected constable from office, who fails to meet the statutory mandate set out in NRS 258.007, is far from settled law in Nevada. Per the Amended Complaint, the Plaintiff is seeking a declaration, pursuant to the state declaratory relief statutes, that the Clark County Commission does not have the authority to unilaterally declare he has forfeited his office for failure to meet the statutory POST certification mandate and it does not have authority to fill a vacancy in the office without a court declaration that he has forfeited his office. Per the Preliminary Injunction, the Plaintiff is protected from any action by the Clark County Commission to declare he has forfeited his office and filling his office during the pendency of this action. Additionally, **[*34]** the primary state law declarations the Plaintiff is seeking through this action are novel and unsettled. Through his Amended Complaint, Plaintiff is primarily seeking declarations, pursuant to the Nevada declaratory relief statutes (NRS Chapter 30), that NRS 258.007 is unconstitutional under two provisions of the Nevada State Constitution (Article IV, Section 20 and Article IV Section 25).

In determining whether to abstain under the *Pullman* abstention doctrine, the Ninth Circuit follows a three part test: (1) the complaint touches a sensitive area of social

policy upon which federal courts ought not to enter unless no alternative to its adjudication is open; (2) such constitutional adjudication plainly can be avoided if a definitive ruling on the state law issue would terminate the controversy; (3) the possibly determinative issue of state law is doubtful. *Canton v. Spokane Sch. Dist. # 81, 498 F.2d 840, 845 (9th Cir. 1974)*, *overruled on other grounds* as recognized by *Heath v. Cleary, 708 F.2d 1376, 1378 n.2 (9th Cir. 1983)*.

The first prong of the test is met. The process through which an elected constable "forfeits" his or her office and the constitutionality of a statute enacted by the Nevada Legislature related to the forfeiture of office of an elected constable touch upon sensitive areas of social policy upon which the federal courts **[*35]** ought not to enter unless no alternative to its adjudication exists. *See, People ex rel. Lockyer v. County of Santa Cruz, 416 F.Supp.2d 797 (N.D. Cal. 2006)* (The Federal court declined to exercise supplemental jurisdiction over a Californian Elections Code Cause of Action. "The cause of action qualifies as an exceptional circumstance under *28 U.S.C. § 1367(c)(4)*. The case is essentially an internal dispute between two segments of the California state government, the Attorney General and the County of Santa Cruz. Although economy and convenience favor having Lockyer's two causes of action heard before the same court, comity overwhelmingly favors allowing California to handle its internal disputes in its own court system. Remand of the Elections Code *§ 12280* cause of action is appropriate here."). The second prong of the test is met. The declarations sought by the Plaintiff relate purely to the interpretation of State law and the State Constitution. There is no U.S. Constitutional adjudication to avoid. Additionally, a state court ruling that *NRS 258.007* violates the Nevada Constitution would moot the Plaintiff's Title II ADA claim. The state court proceeding need not fully moot the federal issues; changing or narrowing the issues is enough. *Sinclair Oil Corp. v. City of Santa Barbara, 96 F.3d 401, 409 (9th Cir 1996)* ("[I]t is sufficient if the state law issues might narrow the **[*36]** federal constitutional question."). Finally, the state law on the matters for which the Plaintiff seeks declarations from this Court are novel and unsettled. An issue of state law is doubtful if a federal court cannot predict with any confidence how the state's highest court would decide the issue of state law. *Pearl Inv. Co. v. City and County of San Francisco, 774 F.2d 1460, 1464, 1465 (9th Cir. 1995)*. "Resolution of an issue of state law might be uncertain because the particular [state] statute is ambiguous, or because the precedents conflict, or because the question is novel and of sufficient importance that it ought to be addressed first by a state court." *Id.* The POST Commission could not find any case law through which the Nevada Supreme Court has interpreted the proper application of *NRS 258.007*. Finally, abstention on these state constitutional and statutory issues would substantially further important principles of federalism and comity underlying *Pullman* and it progeny.

B. The POST Commission Requests the Court Certify the State Law Questions to the Nevada Supreme Court.

While *Pullman* abstention on the state statutory and constitutional questions is warranted, the state law questions can be properly certified to the Nevada Supreme Court. *Nevada Rule of Appellate Procedure 5* **[*37]** reads in relevant part as follows:

> (a) Power to Answer. The Supreme Court may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States or the District of Columbia, a United States District Court, or a United States Bankruptcy Court when requested by the certifying court, if there are involved in any proceeding before those courts questions the law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decision of the Supreme Court or Court of Appeals of this state.
>
> (b) Method of Invoking. The Rule may be invoked by an order of any of the courts referred to in *Rule 5(a)* upon the court's own motion or upon the motion of any party to the cause.
>
> (c) Contents of Certification Order. A certification order shall set forth:
>
> (1) The question of law to be answered;
>
> (2) A statement of all facts relevant to the question certified;
>
> (3) The nature of the controversy in which the question arose;
>
> (4) A designation of the party or parties who will be the appellant(s) and the party or parties who will be the respondent(s) in **[*38]** the Supreme Court;
>
> (5) The names and addresses of counsel for the appellant and respondent; and
>
> (6) Any other matters the certifying court deems relevant to a determination of the questions certified.
>
> (d) Preparation of Certification Order. The

certification order shall be prepared by the certifying court, signed by the judge presiding at the hearing, and forwarded to the Supreme Court by the clerk of the certifying court under its seal. The Supreme Court may require the original or copies of all or of any portion of the record before the certifying court to be filed with the certification order, if, in the opinion of the Supreme Court, the record or a portion thereof may be necessary in answering the questions.

(e) Costs of Certification. Fees and costs shall be the same as civil appeals docketed before the Supreme Court and shall be equally divided between the parties unless otherwise ordered by the certifying court in its order of certification.

...

(h) Opinion. The written opinion of the Supreme Court stating the law governing the questions certified shall be sent by the clerk under the seal of the Supreme Court to the certifying court and to the parties and shall be res judicata as **[*39]** to the parties.

The State statutory and constitutional law questions raised by the Plaintiff meet the requirements of the Nevada Supreme Court Certification Rule. As discussed more fully above, the questions are determinative of the primary relief sought by the Plaintiff and there is no controlling precedent from the Nevada Supreme Court on the application and constitutionality of *NRS 258.007*. Certification of these purely state law questions related to the application and constitutionality of *NRS 258.007* is appropriate in this case.

Pursuant to *Pullman* abstention, the POST Commission respectfully requests that the Court abstain from issuing a Federal Declaratory Judgment on these novel, important and unsettled matters of State law. The POST Commission also requests the Court to certify these state statutory and constitutional questions to the Nevada Supreme Court.

DATED this 31st day of August, 2018.

ADAM PAUL LAXALT

Attorney General

By: /s/ Michael D. Jensen

MICHAEL D. JENSEN

Senior Deputy Attorney General

Attorneys for Defendant NEVADA COMMISSION ON PEACE OFFICER STANDARDS & TRAINING

Exhibit E

RESPONSE TO DEFENDANT CLARK COUNTY'S COUNTER MOTION FOR RECONSIDERATION OF THE ORDER GRANTING PLAINTIFF A PRELIMINARY INJUNCTION [*40]

Comes Now Defendant, STATE OF NEVADA ex rel. its NEVADA COMMISSION ON PEACE OFFICERS' STANDARDS AND TRAINING (POST Commission), by and through its counsel, ADAM PAUL LAXALT, Attorney General for the State of Nevada, and MICHAEL D. JENSEN, Senior Deputy Attorney General and hereby files its Response to Defendant Clark County's Counter Motion for Reconsideration of the Order Granting Plaintiff a Preliminary Injunction [DOC 43]. The Commission's Response is based on the attached Memorandum of Points and Authorities, all relevant papers and pleading on file herein, and all relevant rules of law.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Plaintiff, ROBERT ELIASON, filed a First Amended Verified Complaint (Amended Complaint) in Eighth Judicial District Court, Clark County, Nevada on November 12, 2017. In his Amended Complaint, the Plaintiff alleges that he has a "documented neurological condition that prevents him from meeting one part of the physical fitness test for certification." Amended Complaint, page 2, lns. 1-3. The Plaintiff alleges that he has diligently pursued P.O.S.T. certification but he has not been able to meet one part of the physical fitness test for P.O.S.T. **[*41]** certification. With regard to the purpose of the lawsuit, the Plaintiff alleges:

This action is necessary because Defendant Clark County erroneously believes it holds the power to "declare that Robert L. Eliason, the elected North Las Vegas Constable, has forfeited his office." Clark County holds no such jurisdiction. Indeed, under well-established law, only the courts, and the

> courts alone, have the power to declare that an elected official has "forfeited" his office in a proceeding called a "writ quo warranto," in a civil action brought by the Attorney General of the State of Nevada. The action is necessary to restrain Clark County's excess of jurisdiction." Amended Complaint, p. 2, lns. 4-11. The Plaintiff also alleges the action is necessary because the law in question, NRS 258.007, violates both the Nevada Constitution and the Americans with Disabilities Act.

Id. at lns. 12-13.

NRS 258.007 reads as follows:

> 1. Each constable in a township whose population is 100,000 or more which is located in a county whose population is 700,000 or more, and each constable of a township whose population is 250,000 or more and which is located in a county whose population is less than 700,000, shall become certified by **[*42]** the Peace Officers' Standards and Training Commission as a category II peace officer within one year after the date on which the constable commences his or her term of office or appointment unless the Commission, for good cause shown, grants an extension of time, which must not exceed 6 months.
>
> 2. If a constable does not comply with the provisions of subsection 1, the constable forfeits his or her office and a vacancy is created which must be filled in accordance with NRS 258.030.

NRS 258.030 reads as follows:

> Except for those townships that the boards of county commissioners have determined to require an office of constable, if any vacancy exists or occurs in the office of constable in any township, the board of county commissioners shall appoint a person to fill the vacancy pursuant to NRS 245.170.

In the "Parties and Jurisdiction" section of Plaintiff's Amended Complaint, he states that he was elected in November 2014 and entered office as North Las Vegas Constable on January 2, 2015. Amended Complaint, p. 2, lns. 19-20. The POST Commission, at its meeting in November 2015, granted the Plaintiff a six-month extension of time to obtain POST certification up to July 2016. The Plaintiff did not receive POST certification **[*43]** by July 2016. The Plaintiff alleges that on July 5, 2017, "the Clark County Board of Commissioners met to consider Sherlock's unsolicited recommended course of action to declare Constable Eliason had forfeited his office." The agenda item for the Board's meeting is alleged to provide as follows: "the Board of County Commissioner [to] declare that Robert L. Eliason, the elected North Las Vegas Constable, has forfeited his office..." Amended Complaint, p. 5, lns. 6-12. At Constable Eliason's request, the Clark County Board of Commissioners continued its consideration of the forfeiture of office for two weeks.

The Plaintiff's Amended Complaint contains five claims for relief: (1) First Claim for Relief - Declaratory Relief - Clark County and POST, pursuant to NRS 30.010 et seq. seeking a declaration that NRS 258.007 confers no authority on Clark County to declare a forfeiture of the office of the North Las Vegas Township Constable, that the courts are the exclusive province of declaring whether an elected official has forfeited his office by way of a "writ quo warranto," under NRS 35.010 et seq., and that only the Attorney General, when directed by the Governor, may bring such an action. Additionally, under this Claim for Relief, the **[*44]** Plaintiff alleges NRS 258.007 violates the Nevada Constitution and the American with Disabilities Act and that the POST Commission is the entity charged with enforcing NRS 258.007; (2) Second Claim for Relief - Injunctive Relief, or in the alternative, a Writ of Prohibition - pursuant to NRS 34.320 et seq., seeking a writ of prohibition enjoining Clark County from "usurping the jurisdiction to adjudicate whether Constable Eliason has forfeited his office;" (3) Third Claim for Relief - Title II of the Americans with Disabilities Act, State and Local Governments - seeking to enjoin the POST Commission from enforcing NRS 258.007 and declaring the law invalid; (4) Fourth Claim for Relief - Article IV, Section 20 of Nevada Constitution, Certain Local and Special Laws Prohibited seeking a declaration that NRS 258.007 is a local or special law relating to the duties of the constable, and a declaration that the law is unconstitutional as it violates Article IV, Section 20 of the Nevada Constitution as a local or special law; and (5) Fifth Claim for Relief - Article IV Section 25 of the Nevada Constitution - Uniform County and Township Government - seeking a declaration that NRS 258.007 should be declared unconstitutional because it violates Article IV, Section 25 of the Nevada Constitution because it does not impose the same requirements on all offices of constable within the state. Amended Complaint, p. 5-9.

In the State District Court, the Plaintiff **[*45]** sought and obtained an Order Granting Preliminary Injunction

through which the Court enjoins and restrains Clark County and its governing body, the Board of County Commissioners, from proceeding during the pendency of this action in voting or declaring the forfeiture of Robert Eliason from the Office of Constable for the North Las Vegas Township, enjoins Clark County and its governing body, the Board of County Commissioners, and its agents and employees from proceeding during the pendency of the action in filling any vacancy in the Office of the Constable of North Las Vegas Township, unless such vacancy is declared pursuant to a Nevada court in a *writ quo warranto*. The Order Granting Preliminary Injunction was issued on August 16, 2017.

On December 8, 2017, Clark County filed a Notice of Removal of Civil Action to the United States District Court for the District of Nevada. The removal to Federal District Court is supported by the single Federal law claim alleging *NRS 258.007*, by its own terms, violates Title II of the Americans with Disabilities Act. The parties are currently engaged in discovery, which ends on November 5, 2018. [Doc. #37].

On August 17, 2018, the Plaintiff filed his Motion for **[*46]** Declaratory Judgment, pursuant to *28 U.S.C. § 2201(a)*, through which he seeks a judgment from this Court declaring (1) only the Nevada State Courts may declare a forfeiture of an elected official's office; (2) Clark County possesses no unilateral authority, under Nevada law, to declare Robert L. Eliason, the elected North Las Vegas Constable, has forfeited his office and that the vacancy for such office exists; and (3) the agenda item, on the July 18, 2017 Clark County Commission meeting agenda, through which the Commission seeks to declare that the Plaintiff has forfeited his office and that a vacancy in such office exists is illegal under Nevada law.

The POST Commission files this response for the sole purpose of requesting the Court abstain from issuing a Federal Declaratory Judgment on these purely state law questions, and requests the Court certify these Nevada statutory and Nevada Constitutional questions to the Nevada Supreme Court.

II. ARGUMENT

A. Pursuant to *Pullman*, the Court Should Abstain From Issuing a Federal Declaratory Judgment in These Purely State Law Matters.

In *R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 61 S.Ct. 643, 85 L. Ed. 971 (1941)*, the United States Supreme Court held that federal courts should abstain from exercising jurisdiction in a matter when an unsettled **[*47]** area of state law has an effect on the outcome of a federal constitutional claim or would render a decision on the federal claim unnecessary. *See also, San Remo Hotel v. City and County of San Francisco, 145 F.3d 1095, 1104-1105 (9th Cir. 1998)*. The equitable considerations of *Pullman* abstention are typically applied when an unsettled state law question is best decided by or is already pending in state court. *See, Harris City Commissioner's Court v. Moore, 420 U.S. 77, 83-84, 95 S.Ct. 870, 43 L. Ed. 2d 32 (1975)*. In the face of novel questions of state law, many federal courts rely on state certification procedures, which avoid the significant financial and time burdens associated with *Pullman* abstention. *Jones v. Coleman, 848 F.3d 744, 750 (6th Cir. 2017)*.

Plaintiff's request for a declaratory judgment involves unsettled questions of state law. While the State District Court entered a preliminary injunction, the Court's finding, for purposes of the preliminary injunction, was only that Plaintiff had a substantial likelihood of success on these state law matters. Significantly, the Nevada Supreme Court has not interpreted *NRS 258.007*. The plain language of the statute provides for the forfeiture of office if a constable fails to become certified by the POST Commission within one year of taking office, or within any extension granted by the POST Commission not to exceed 6 months.

The Nevada Office of the Attorney General has opined **[*48]** on a related question. *See* Nevada Attorney General Opinion 2017-14. By letter dated September 29, 2017, the Governor requested an opinion from the Office of the Attorney General on the following question: "What legal mechanisms exist by which a county may remove a constable or other official who has failed to fulfill the statutory requirements of office?" The section of the Opinion entitled "Summary of Conclusion" reads: "*Quo warranto* is not the exclusive remedy to challenge the authority of a county official to hold office. Because a constable is not a state office, his right to hold a public office, after failing to satisfy the requirements of *NRS 258.007*, may also be challenged pursuant to *NRS 283.440*." *Id.* at p. 2. In the concluding two paragraphs of the Opinion, the Nevada Office of the Attorney General opines:

> The question here concerns the removal of a constable for failing to fulfill a statutory duty, that is, becoming POST certified within the time required by statute or the reasonable extension of time. A constable's failure to become POST certified within the time required by statute is reasonably defined as "nonfeasance" or the "total neglect" of a duty necessary for the position. *See,* Schumacher v. State ex rel. Furlong, 78 Nev. 167, 171, 370 P.2d 209, 211 (1962), citing Moulton v. Scully, 111 Me. 428, 89 A. 944, 947 (1914). Nonfeasance, **[*49]** as such, is a basis for removal pursuant to NRS 283.440. *Id.*
>
> It does not change the analysis that a constable's failure to become POST certified results in the "forfeiture" of the office of constable. See NRS 258.007(2) (stating that "the constable forfeits his or her office and a vacancy is created which must be filled in accordance with NRS 250.030"). Whether there has been a forfeiture of office is a question of fact that must be adjudicated by a court of competent jurisdiction. The commencement of a civil action would ordinarily, but not necessarily, lead to a finding by the court that the office is vacant and available for appointment. The civil action may be commenced as an action in *quo warranto*, pursuant to NRS 35.010, or as an action alleging nonfeasance in violation of NRS 283.440, as made applicable by operation of NRS 258.007.

Id. at p. 4.

The Attorney General Opinion is not binding legal authority on this issue. Cannon v. Taylor, 88 Nev. 89, 91, 493 P.2d 1313, 1314 (1972). Additionally, the legal analysis in this opinion underscores the point that the legal issues related to the legal mechanisms to remove an elected constable from office, who fails to meet the statutory mandate set out in NRS 258.007, is far from settled law in Nevada. Per the Amended Complaint, the Plaintiff is seeking a declaration, pursuant to the state **[*50]** declaratory relief statutes, that the Clark County Commission does not have the authority to unilaterally declare he has forfeited his office for failure to meet the statutory POST certification mandate and it does not have authority to fill a vacancy in the office without a court declaration that he has forfeited his office. Per the Preliminary Injunction, the Plaintiff is protected from any action by the Clark County Commission to declare he has forfeited his office and filling his office during the pendency of this action. Additionally, the primary state law declarations the Plaintiff is seeking through this action are novel and unsettled. Through his Amended Complaint, Plaintiff is primarily seeking declarations, pursuant to the Nevada declaratory relief statutes (NRS Chapter 30), that NRS 258.007 is unconstitutional under two provisions of the Nevada State Constitution (Article IV, Section 20 and Article IV Section 25).

In determining whether to abstain under the *Pullman* abstention doctrine, the Ninth Circuit follows a three part test: (1) the complaint touches a sensitive area of social policy upon which federal courts ought not to enter unless no alternative to its adjudication is open; (2) such constitutional adjudication plainly can be avoided **[*51]** if a definitive ruling on the state law issue would terminate the controversy; (3) the possibly determinative issue of state law is doubtful. Canton v. Spokane Sch. Dist. # 81, 498 F.2d 840, 845 (9th Cir. 1974), *overruled on other grounds* as recognized by Heath v. Cleary, 708 F.2d 1376, 1378 n.2 (9th Cir. 1983).

The first prong of the test is met. The process through which an elected constable "forfeits" his or her office and the constitutionality of a statute enacted by the Nevada Legislature related to the forfeiture of office of an elected constable touch upon sensitive areas of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication exists. *See,* People ex rel. Lockyer v. County of Santa Cruz, 416 F.Supp.2d 797 (N.D. Cal. 2006) (The Federal court declined to exercise supplemental jurisdiction over a Californian Elections Code Cause of Action. "The cause of action qualifies as an exceptional circumstance under 28 U.S.C. § 1367(c)(4). The case is essentially an internal dispute between two segments of the California state government, the Attorney General and the County of Santa Cruz. Although economy and convenience favor having Lockyer's two causes of action heard before the same court, comity overwhelmingly favors allowing California to handle its internal disputes in its own court system. Remand of the Elections Code § 12280 cause **[*52]** of action is appropriate here."). The second prong of the test is met. The declarations sought by the Plaintiff relate purely to the interpretation of State law and the State Constitution. There is no U.S. Constitutional adjudication to avoid. Additionally, a state court ruling that NRS 258.007 violates the Nevada Constitution would moot the Plaintiff's Title II ADA claim. The state court proceeding need not fully moot the federal issues; changing or narrowing the issues is enough. Sinclair Oil Corp. v. City of Santa Barbara, 96 F.3d 401, 409 (9th Cir 1996) ("[I]t is sufficient if the state law issues might narrow the federal constitutional question."). Finally, the state law on the matters for

which the Plaintiff seeks declarations from this Court are novel and unsettled. An issue of state law is doubtful if a federal court cannot predict with any confidence how the state's highest court would decide the issue of state law. *Pearl Inv. Co. v. City and County of San Francisco, 774 F.2d 1460, 1464, 1465 (9th Cir. 1995)*. "Resolution of an issue of state law might be uncertain because the particular [state] statute is ambiguous, or because the precedents conflict, or because the question is novel and of sufficient importance that it ought to be addressed first by a state court." *Id.* The POST Commission could not find any case law through which the Nevada Supreme **[*53]** Court has interpreted the proper application of *NRS 258.007*. Finally, abstention on these state constitutional and statutory issues would substantially further important principles of federalism and comity underlying *Pullman* and it progeny.

B. The POST Commission Requests the Court Certify the State Law Questions to the Nevada Supreme Court.

While *Pullman* abstention on the state statutory and constitutional questions is warranted, the state law questions can be properly certified to the Nevada Supreme Court. *Nevada Rule of Appellate Procedure 5* reads in relevant part as follows:

> (a) Power to Answer. The Supreme Court may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States or the District of Columbia, a United States District Court, or a United States Bankruptcy Court when requested by the certifying court, if there are involved in any proceeding before those courts questions the law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decision of the Supreme Court or Court of Appeals of this state. **[*54]**
> (b) Method of Invoking. The Rule may be invoked by an order of any of the courts referred to in *Rule 5(a)* upon the court's own motion or upon the motion of any party to the cause.
> (c) Contents of Certification Order. A certification order shall set forth:
> (1) The question of law to be answered;
> (2) A statement of all facts relevant to the question certified;
> (3) The nature of the controversy in which the question arose;
> (4) A designation of the party or parties who will be the appellant(s) and the party or parties who will be the respondent(s) in the Supreme Court;
> (5) The names and addresses of counsel for the appellant and respondent; and
> (6) Any other matters the certifying court deems relevant to a determination of the questions certified.
>
> (d) Preparation of Certification Order. The certification order shall be prepared by the certifying court, signed by the judge presiding at the hearing, and forwarded to the Supreme Court by the clerk of the certifying court under its seal. The Supreme Court may require the original or copies of all or of any portion of the record before the certifying court to be filed with the certification order, if, in the opinion of the Supreme Court, the record or a portion **[*55]** thereof may be necessary in answering the questions.
> (e) Costs of Certification. Fees and costs shall be the same as civil appeals docketed before the Supreme Court and shall be equally divided between the parties unless otherwise ordered by the certifying court in its order of certification.
> ...
> (h) Opinion. The written opinion of the Supreme Court stating the law governing the questions certified shall be sent by the clerk under the seal of the Supreme Court to the certifying court and to the parties and shall be res judicata as to the parties.

The State statutory and constitutional law questions raised by the Plaintiff meet the requirements of the Nevada Supreme Court Certification Rule. As discussed more fully above, the questions are determinative of the primary relief sought by the Plaintiff and there is no controlling precedent from the Nevada Supreme Court on the application and constitutionality of *NRS 258.007*. Certification of these purely state law questions related to the application and constitutionality of *NRS 258.007* is appropriate in this case.

Pursuant to *Pullman* abstention, the POST Commission respectfully requests that the Court abstain from issuing a Federal Declaratory Judgment on these **[*56]** novel, important and unsettled matters of State law. The POST Commission also requests the Court to certify these state statutory and constitutional questions to the Nevada Supreme Court.

DATED this 31st day of August, 2018.

ADAM PAUL LAXALT

Attorney General

By: /s/ Michael D. Jensen

MICHAEL D. JENSEN

Senior Deputy Attorney General

Attorneys for Defendant NEVADA COMMISSION ON PEACE OFFICER STANDARDS & TRAINING

Exhibit F

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR DECLARATORY JUDGMENT [ECF Nos. 41, 42 and 44]

Plaintiff ROBERT ELIASON, an individual and in his official capacity as Constable of North Las Vegas Township ("Constable Eliason") files this PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR DECLARATORY JUDGMENT [ECF Nos. 41, 42 and 44]. This Reply is made and based upon the attached points and authorities, the papers and pleadings on file herein, and any oral argument the Court may entertain at any hearing.

I. INTRODUCTION

The sole issue in the instant Motion for Declaratory Judgment is whether Clark County had the unilateral and arbitrary power to remove a sitting, duly-elected constable from office on July 18, 2017. Nevada law confers no such judicial authority on a local board, and prior to **[*57]** the removal of this action, the State Court agreed and enjoined Clark County from this very action.

Clark County argues that it has the plenary power to remove a duly-elected State officer from office without an order or input or even an iota of due process from a Nevada state court. The State Court in this case previously rejected Clark County's arguments.

Nothing in the Opposition changes Clark County's attempted illegal action to pass Agenda Item 67 on July 18, 2017 ("Item 67"). Significantly, nothing in its Opposition changes the Nevada State Court's legal conclusion that Clark County acted unlawfully by trying to remove Constable Eliason from office.

Instead, Clark County engages in misdirection by taking issue with the Nevada Court's legal conclusion that "A Quo Warranto action is the proper procedure for determining a forfeiture of office, including a forfeiture as a matter of law."[1]

Despite the County's misdirection, the sole issue in this Motion remains whether *NRS 258.007* grants Clark County the sole and unfettered power to remove an elected and sitting State Constable. Clark County manifestly does not possess this power.

Constable Eliason seeks to formalize the State Court's preliminary injunction into a permanent, declaratory judgment from this Court, declaring Clark County's actions as illegal. Constable Eliason requests that the Court declare the following:

(1) Only the Nevada State courts may declare a forfeiture of an elected official's office;

(2) Clark County possesses no unilateral authority under Nevada law to "declare that Robert L. Eliason, the elected North Las Vegas Constable, has forfeited his office and that a vacancy in such office exists"; and

(3) Agenda Item 67 on the July 18, 2017 County Commission Meeting, which seeks to "declare that that Robert L. Eliason, the elected North Las Vegas Constable, has forfeited his office and that a vacancy in such office exists," is illegal under Nevada law.

II. UNDISPUTED FACTS and PROCEDURAL HISTORY

In August 2017, the Nevada State Court enjoined Clark County **[*59]** from taking any action to unilaterally declare that Constable Eliason had forfeited his office.

In November 2017, Clark County removed this action to

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[1] Notably, Clark County has done nothing since August 2017 to redress this alleged legal error:

- It failed to timely move the State Court to reconsider its order pursuant to *Rule 2.24* of the Eighth Judicial District Court Rules.
- It failed to appeal this determination as was its right under *Rule 3A(b)(3)* of the Nevada Rules of Appellate Procedure.
- It failed to ask this Court to reconsider the propriety of the State **[*58]** Court injunction when it removed this case in November 2017.

this Court.

In August 2018, Constable Eliason filed the instant Motion for Declaratory Judgment, seeking to formalize the State Court's injunction.

III. LEGAL ANALYSIS: DECLARATORY JUDGMENT IS STILL WARRANTED

Clark County has no legal authority to "declare that Robert L. Eliason, the elected North Las Vegas Constable, has forfeited his office" or to "declare...that a vacancy in such office exists." Nothing in its Opposition changes this conclusion.

No statute specifically grants Clark County the authority to declare a forfeiture of the constable's office. Contrary to Clark County's assertion, no language in NRS 258.007 specifically authorizes Clark County to "declare" a forfeiture of any elected office. If there is any fair or reasonable doubt concerning the existence of a county's authority, the court must resolve that doubt against the board of county commissioners, and Nevada law denies the county that power. *See* NRS 244.137(4). *See also, First Nat'l Bank v. Nye County, 38 Nev. 123, 145 P. 932, 936-37 (1914)*; *Lyon County v. Ross, 24 Nev. 102, 50 P. 1, 3 (1897)*; and *Waitz v. Ormsby County, 1 Nev. 370, 377 (1865)*. *See generally*, B. Chally, *Dillon's Rule in Nevada*, 21 Nev. L. 6 (2013).

Here, NRS 258.007(2)'s silence creates doubt as to whether **[*60]** Clark County possesses the authority it claims. Therefore, Nevada law denies Clark County that power. The statute makes no mention of a county commission whatsoever, and Clark County makes no reference to any specific authority in its Opposition. The statute is utterly silent as to who has the authority to declare a forfeiture of an elective office. This is no accident, because other provisions of Nevada law supply the procedure.

Declaring a "forfeiture" of an elected office is manifestly a judicial function performed by the courts by issuing a writ quo warranto. NRS 35.010 et seq. From its first days as a State, the Nevada Supreme Court has consistently affirmed the right of the courts to declare a forfeiture under a writ quo warranto. *See e.g., State ex rel. Haydon v. Curry, 1 Nev. 251, 251-52 (1865)* (adjudicating statute passed by NV Territorial Legislature calling for automatic forfeiture of franchise by way of quo warranto); *see also, State v. Haskell, 14 Nev. 209, 210 (1879)* (state bears burden of proof to have court declare forfeiture of franchise under quo warranto).

More recently, NRS 35.010(2) codifies this unique power and provides that "[a] civil action may be brought in the name of the State [a]gainst a public officer...who does or suffers an act which, by the provisions of law, works a forfeiture **[*61]** of the office." (Emphasis added.)

The modern Nevada Supreme Court has been remarkably consistent and protective of the solitary power of the judiciary to declare the forfeiture of an elected office. "Quo warranto generally is available to challenge an individual's right to hold office and to oust the individual from the office if the individual's claim to it is invalid or has been forfeited." *Lueck v. Teuton (In re Teuton), 125 Nev. 674, 219 P.3d 895, 897 (2009)*. "Quo warranto is an ancient common law writ and remedy to determine the right to the use or exercise of a franchise or office and to oust the holder from its enjoyment...if he or she has forfeited his or her right to enjoy the privilege." *Heller v. Legislature, 120 Nev. 456, 93 P.3d 746, 751 (2004)* (citations and quotations omitted; emphasis added); *see also, Halverson v. Hardcastle, 123 Nev. 245, 163 P.3d 428, 437 n. 8 (2007)*. The *Heller* Court further elaborated on the ancient judicial authority to issue a writ quo warranto, asserting that not even the Legislature can infringe upon the court's power. *Heller, 93 P.3d at 751*.

Clark County, however, asserts that it somehow has this power by talismanically invoking the word, "forfeit," in NRS 258.007(2), as if the Legislature's mere use of the word confers on the Board some judicial authority because the Legislature allegedly "intended the provision to be self-executing." [Opp. 10:21-22.] For this dubious proposition, **[*62]** Clark County references a 1941 Missouri case, an 1873 California case, and an 1878 New York case, notably failing to cite to a single Nevada opinion. [Opp. 10:20-28.]

In addition to the dearth of Nevada authorities in support of its position, Clark County's argument fails for five reasons:

First, this line of reasoning ignores the plain language of NRS 35.010(2) that "[a] civil action may be brought in the name of the State [a]gainst a public officer...who does or suffers an act which, by the provisions of law, works a forfeiture of the office." Indeed, the phrase, "by the provisions of law," can fairly mean "self-executing." Thus, NRS 35.010(2) applies to "self-executing" forfeitures, like NRS 258.007(2), that arise by operation

of law.

In addition, it further ignores the modern interpretation of the powers of the courts set out in *Heller* and *Lueck*. It also completely disregards examples stretching back to the State's earliest days in the Union that the courts hold the power to declare a forfeiture.

Second, Clark County's position also ignores a canon of statutory construction that statutes must be read to make them "consistent and harmonious." *Rose v. First Federal Sav. & Loan Ass'n, 105 Nev. 454, 777 P.2d 1318, 1319 (1989)* (internal quotations and citations omitted). Clark County's position is this: an **[*63]** allegedly "self-executing" statute somehow grants Clark County the judicial power to "declare that Robert L. Eliason...has forfeited his office." But this position directly contravenes *NRS 35.010(2)*'s requirement that the courts adjudicate a civil action "against a public officer...who does or suffers an act which, by the provisions of law, works a forfeiture of the office." Clark County's reading of *NRS 258.007(2)* cannot be reconciled with *NRS 35.010(2)*. Indeed, there is nothing consistent or harmonious here. In contrast, Mr. Eliason's argument does. The Nevada Attorney General has standing to fill a writ; the Court has the power to adjudicate that writ once it is filed; and Clark County can fill a vacancy if the Court so declares.

Third, Clark County's position belies its own actions. Clark County nakedly asserts that *NRS 258.007(2)* is "self-executing." By "self-executing," Clark County means that the purported forfeiture occurs "without the necessity of a judicial declaration or imprimatur of any other municipal entity." [Opp. 10:27 (emphasis added).] Agenda Item 67--declaring "that Robert L. Eliason has forfeited his office"—is exactly an "imprimatur" that Clark County argues is unnecessary.

If Clark County truly believed that the forfeiture **[*64]** occurred without the necessity of any other action, then there is no reason for Item 67. If *NRS 258.007(2)* operates like Clark County insists, there is no reason for Clark County or anyone to "declare" anything.

But Clark County's action belies its current argument: arguing on one hand that there is no need for a declaration of a forfeiture because such forfeiture is "self-executing," and then arguing on the other hand, that the statute grants Clark County, alone (and not the courts), the authority to declare a forfeiture.

Fourth, Clark County's reliance on a recent Attorney General's Opinion, AGO 2017-14 is misplaced. As a preliminary matter, opinions of the Nevada Attorney General are not binding on the Nevada Judiciary. *Univ. & Cmty. Coll. Sys. v. DR Ptnrs, 117 Nev. 195, 18 P.3d 1042, 1048 (2001)*. In addition to the extent it applies at all, AGO 2017-14 serves only to confirm that the Nevada courts--and only the Nevada courts--have the power to remove an elected official from office; Clark County does not possess that authority. Thus, AGO 2017-14 further weakens Clark County's position in this case.

Finally, Clark County's position defies public policy considerations. Declaring a forfeiture of an elected officer's office disrupts the democratic process. In this case, it **[*65]** nullifies the votes of 220,000 residents of North Las Vegas, and the action should not be undertaken lightly. Nevertheless, there are legitimate occasions for doing so. The wisdom of the writ quo warranto (gained by centuries of application) balances these competing interests. Quo warranto properly implicates all three branches of government: The state legislative branch passes legislation to enumerate when an elected office is forfeit. The state executive branch determines when to bring a judicial action to declare an elected office forfeit under the legislature's laws. The state judicial branch adjudicates the fairness of the forfeiture, with all of its attendant procedural protections (rules of evidence, burden of proof, etc.). Clark County's unilateral action implicates none of these checks and balances. "Quo warranto generally is available to challenge an individual's right to hold office and to oust the individual from the office if the individual's claim to it is invalid or has been forfeited. *Lueck v. Teuton (In re Teuton), 125 Nev. 674, 219 P.3d 895, 898 (Nev. 2009)* (emphasis added.)

Moreover, Clark County does not even possess the standing to file a writ quo warranto. In this case, standing to institute a civil action for quo warranto rests solely **[*66]** with the Attorney General at the direction of the Governor. *NRS 35.030*; *see also, Lueck v. Teuton (In re Teuton), 125 Nev. 674, 219 P.3d 895, 898 (2009)* (no general standing to request writ quo warranto).

IV. CONCLUSION

In accordance with the State Court's Preliminary Injunction, a judgment from this Court is appropriate to declare the following: (1) only the Nevada State courts may declare a forfeiture of an elected official's office; (2) Clark County possesses no unilateral authority under Nevada law to "declare that Robert L. Eliason, the

elected North Las Vegas Constable, has forfeited his office and that a vacancy in such office exists"; and (3) Agenda Item 67 on the July 18, 2017 County Commission Meeting, which seeks to "declare that that Robert L. Eliason, the elected North Las Vegas Constable, has forfeited his office and that a vacancy in such office exists," is illegal under Nevada law.

DATED this 7th day of September, 2018.

ASHCRAFT & BARR | LLP

/s/ Jeffrey F. Barr

JEFFREY F. BARR, ESQ.

Nevada Bar No. 7269

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Exhibit G

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CLARK COUNTY

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * * *

ROBERT ELIASON, an individual and in his official capacity as Constable of North Las Vegas Township,

Plaintiff,

vs.

CLARK COUNTY, a political subdivision of the State of Nevada; NEVADA COMMISSION ON PEACE OFFICER STANDARDS & TRAINING,

Defendants.

CASE NO. 2:17-cv-3017-JAD-CWH

REPLY TO CLARK COUNTY'S COUNTER MOTION FOR RECONSIDERATION OF THE ORDER GRANTING PLAINTIFF A PRELIMINARY INJUNCTION

COMES NOW Defendant CLARK COUNTY, by and through its counsel of record, THOMAS D. DILLARD, JR., ESQ., of the law firm of OLSON, CANNON, GORMLEY, ANGULO & STOBERSKI and hereby replies to Plaintiff's Opposition to the Counter Motion for Reconsideration of the State Court Order [#48].

This Reply is made and based upon all the pleadings and papers on file herein, the attached points and authorities, together with any argument that may be introduced at the time of hearing this matter.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Clark County maintains that the state district court misinterpreted NRS 258.007 by viewing it through the lens of quo warranto alone and markedly aggravated this error when it embraced the unnecessary *dicta* placed in the order by Plaintiff; to wit, stating that *quo warranto* is the exclusive remedy to oust a Nevada public official from office. Plaintiff continues to employ this same tactic by requesting an order that arguably elevates the exclusive remedy *dicta* to immunize Plaintiff for his failure to become a category II peace officer. Plaintiff has made no argument to support the assertion that *quo warranto* is the only "proper procedure for determining a forfeiture of office ." The Court should now grant Clark County's counter motion by making clear that at least a portion of the state court order is legally unsound and that Clark County has alternative statutory authority to take action to remove Plaintiff from office pursuant to both NRS 283.440 (removal for nonfeasance) and NRS 258.010(3) (abolishing the office).

II. LEGAL ARGUMENT

A. The District Court's Order Granting a Preliminary Injunction is Still an Appealable Determination.

Plaintiff suggests the District Court is constrained from reaching any different conclusion than did the Eighth Judicial District Court when it granted Plaintiff's motion for preliminary injunction and also denied his petition for a writ without prejudice. Plaintiff's argument that the order granting the preliminary injunction is final because Clark County did not file a notice of interlocutory appeal is not well taken. Clark County, to be sure, has the legal right to appeal the propriety of the order granting a preliminary injunction following the issuance of a final order in this case. See Securities and Exchange Commission v. Murphy, 626 F.2d 633, 637 n. 1 (9th Cir. 1980)("Once an order of permanent injunction is entered, the preliminary injunction merges with it and appeal may be had only from the order of permanent injunction."); Alliance for Americas Future v. State, 128 Nev. 878, 381 P.3d 588 (2012)(unpublished)("On an appeal from a final, fully litigated judgment, rather than a hastily wrought preliminary injunction, this court's analysis would be fully informed, not piecemeal, which is of benefit to the public and the parties alike.").

Therefore, Plaintiff is simply incorrect in his assertion that Clark County has waived its appeal rights and therefore the order is immune from appellate review notwithstanding the fact that the case is still pending with this Honorable Court. Clark County can appeal the order if it becomes part of a permanent injunction as Plaintiff is attempting to do right now.

This Court is therefore not handcuffed in any way in independently reviewing the pertinent legal issues involving statutory interpretation because the preliminary injunction order is not final and is still subject to appellate review. In fact, Clark County further has no objection to the position of the Nevada Peace Officer Standards & Training to certify the pertinent legal issues regarding statutory interpretation to the Nevada Supreme Court now for review and instruction.

B. Plaintiff Made No Argument to Support the Position that Quo Warranto is the Exclusive Remedy to Challenge the Authority of a County Official to Hold Office.

Throughout the state court case and with his motion for a declaratory judgment, Plaintiff attempts to exclusively limit the procedure for the removal of the North Las Vegas Constable from office to the procedure prescribed by NRS 35.010, or *quo warranto* because Clark County does not have standing under that statute to remove Plaintiff from office. Clark County's opposition made clear that *quo warranto* is not the only "proper procedure for determining a forfeiture of office " and this argument is plainly inconsistent with Nevada statutory law because Clark County has alternative statutory authority to take action to remove Plaintiff from office pursuant to both NRS 283.440 (removal for nonfeasance) and NRS 258.010(3) (abolishing the office). Plaintiff failed to address either of these statutes and instead makes the generalized assertion that Clark County lacks standing to declare forfeiture of the office. Plaintiff seemingly is being purposefully vague in an attempt to extend the state court order and seek an order from this Court that stands contrary to the law with regard to these other statutes or that, at least, raises the prospect that Clark County will be in violation of a court order if it moves forward on the rights it has under either NRS 283.330 or NRS 258.010.

Regardless of this Court's view of the meaning and scope of NRS 258.007(2)(stating "[i]f

a constable does not comply [with the mandatory training requirements of subsection 1], the constable forfeits his or her office and a vacancy is created which must be filled"), any order in this case should be careful not to embrace the error-filled dicta in the state court order and make clear that Clark County's statutory rights under these other two statutes remain unimpaired. Plaintiff's intentional failure to address these legal arguments make clear that there is no colorable argument to suggest that Plaintiff can only be removed pursuant to quo warranto and the only persons with standing to do so is the State and a person holding some right to the office itself.

C. The Nevada Legislature Mandated Plaintiff Had to Become a Category II Police Officer Within 1.5 Years of Being Elected at the Latest or His Office Would Be Forfeited and the BCC Must Then Fill The Vacant Office.

The plain text of NRS 258.007 states that the Constable ipso facto forfeits his office when he does not have a category II police officer certification by the time period set forth in the statute. NRS 258.007 states:

> (1) Each constable of a township whose population is 100,000 or more and which is located in a county whose population is 700,000 or more, . . . **shall** become certified by the Peace Officers' Standards and Training Commission as a category II police officer within 1 year after the date on which the constable commences his or her term of office or appointment unless the commission, for good cause shown, grants in writing an extension of time, which must not exceed 6 months.
>
> (2) If a constable does not comply with the provisions of subsection 1, the constable **forfeits his or her office and a vacancy is created** which **must be filled** in accordance with NRS 258.030 [by the board of county commissioners]. (emphasis added).

Plaintiff immediately forfeited office when he failed to become certified by Nevada POST as a category II police officer after his six month extension lapsed (facts which are undisputed).

Plaintiff has insisted that the language in this statute that was initially introduced in 2013 and amended in 2015 must nonetheless be governed by the codification of the common law doctrine of *quo warranto* in NRS 35.010 (which is based upon limited standing extended only to the State and a person with a personal interest in holding the office). However, the automatic forfeiture meaning of the word "forfeits" in section (2) is consistent with other more applicable common law; specifically, common law held that residency is a requirement of election to office and the requirement is continuous. As such, any change of residency automatically vacates the county office.[1] See, e.g., Salamanca Township v. Wilson, 109 U.S. 627, 628-29 (1883) (ceasing to be a resident results in vacancy). A myriad of jurisdictions have followed suit by enacting statutes that holding that a public officer automatically forfeits his or her office and can no longer serve the public upon the occurrence of a particular condition. Public official being convicted of a felony offense or announcing candidacy for another office are examples of types of disqualifying conditions utilized in office forfeiture statutes. See Stipe v. State ex rel. Bd. of Trustees of Oklahoma Public Employees Retirement System, 188 P.3d 120, 123 (Okla. 2003); State v. Musto, 188 N.J. Super. 106, 108, 456 A.2d 114, 115 (1983); Pioneer Mill Co., Ltd., 53 Haw. 496, 498, 497 P.2d 549, 551 (1972); Matsen v. Kaiser, 74 Wash.2d 231, 235, 443 P.2d 843, 846 (1968)(en banc); Commonwealth v. Knox, 172 Pa. Super. 510, 523, 94 A.2d 128, 134 (1953); State ex rel. Giles v. Burke, 101 Utah 48, 117 P.2d 454, 455 (1941).

Plaintiff's argument that the case law supporting Clark County's position is sparse is not well taken. Plaintiff fails to identify any other jurisdiction that has rejected the interpretation of the word forfeit in similar statutes. Several other jurisdictions are in accord.

For example, the case of Lipscomb v. Randall, 985 S.W.2d 601 (Tex. Ct. App. 1999) is directly on point. In Lipscomb, the court held that similar "forfeiture" language indicated immediate, instantaneous, and self-executing loss of office without the necessity of further action. In that case, the city charter- like NRS 258.007(2)--provided "a Councilperson shall forfeit his office if he... is convicted of a crime." Id. at 603. A council member was arrested for assaulting his wife, and was convicted. The town council found he had forfeited office by virtue of his conviction, and appointed another person to fill the vacant seat. Id. at 604. The former council member sought and was granted a writ of mandamus, and the trial court ordered that he continue as a council member. Id. The other members of the council appealed, asserting "the charter provision at issue authorizes automatic forfeiture of office upon conviction of a crime involving moral turpitude." Id. The court of appeals agreed and reversed, holding the forfeiture provision was self-enacting and automatic:

> [the] charter provides that "[a] Councilperson shall forfeit his office if he... is convicted of a crime involving moral turpitude." It is undisputed that this provision is self-enacting. Thus, if applicable to [the former council member], the charter provision makes the forfeiture of office automatic upon conviction.

Id. at 605 (citing City of Alamo v. Garcia, 960 S.W.2d 221, 222 (Tex. Ct. App. 1997) (automatic forfeiture based on violation of absenteeism requirement); Harrison v. Chesshir, 316 S.W.2d 909, 914 (Tex. Ct. App. 1958) (automatic forfeiture when officeholder moved out of county), rev'd on other grounds, 320 S.W.2d 814 (Tex. 1959)). The court rejected the forfeited council member's argument that his appeal of the conviction suspended the forfeiture or made it contingent on some future event. The court, therefore, held that under the express provisions of the charter and applicable Texas law, the convicted councilman's seat on the city council was instantly forfeited when he was convicted in municipal court of assaulting his wife. His subsequent appeal to county court did not automatically restore him to office or otherwise entitle him to reclaim the forfeited seat. Lipscomb, 985 S.W.2d at 608.

A similar result occurred in the case of Dalton v. Mosley, 286 S.W.2d 721 (Mo. 1956). The case involved a state statute that provided that an officer who shall "fail or refuse to do or perform any official act or duty which by law it is his duty to do or perform with respect to the execution or enforcement of the criminal laws of the state, shall thereby forfeit his office." Id. at 731. A sheriff was adjudicated guilty of failing to enforce state law, and the court held that by force of this statute "the respondent had automatically lost his right to the office of Sheriff of St. Louis County prior to the institution of this proceeding." Id. The court further explained that after committing the forbidden act and forfeiting the office, the official became a mere "usurper, and thus his ouster must go as a matter of course." Id. at 731-32.

Also, in In re Simmons, 395 P.2d 1013 (Wash. 1964), the pertinent statute, like the instant case, provided that a felony conviction carried with it the automatic forfeiture of a judgeship and created an immediate vacancy in that office. The court held that legal proceedings to remove the official were merely ancillary to and in aid of the forfeiture, and not a condition precedent to the forfeiture. Id. at 1017. See also Alamo v. Strohm, 545 N.Y.S.2d 1 (N.Y.A.D.),

Page 6 of 11

affd, 544 N.E.2d 608 (N.Y. 1989) (senator who automatically forfeited seat under state law after conviction of a felony was ineligible to run in the election to fill out his remaining term); 63c Am. Jur. 2d Public Officers and Employees § 165 (2009) ("A provision that an officer who is guilty of specified conduct 'shall thereby forfeit his or her office' is self-executing.") (citing State ex rel. McKittrick v Whittle, 63 S.W.2d 100 (Mo.1933) (state constitution's requirement that official "shall thereby forfeit his or her office" upon some act was self-executing), superseded by statute on other grounds as stated in State ex rel. Attorney Gen. v Shull, 887 S.W.2d 397 (Mo. 1994)).[2]

The reasoning of these authorities and those cited in the opposition brief [#42] are in accord with the text of NRS 258.007(2) stating that failure to become trained and state certified sufficiently to hold the office of constable in the permitted time period causes "the constable forfeits his or her office and a vacancy is created." The statute further makes clear that the Clark County Board of County Commissioners also was doing nothing more than was required under state law which is to fill the vacancy in accordance with NRS 258.030. The state court committed a plain error of law when it superimposed the general quo warranto statute over the specific statute aimed at ensuring constables in urban areas become trained and certified to hold the office–which is clearly directly applicable to the facts here. The court should therefore grant Clark County's counter motion for reconsideration as to the order granting a preliminary injunction only by the state court. Alternatively, the court should certify the legal question to the Nevada Supreme Court as raised by Defendant Nevada Commission On Peace Officer Standards & Training.

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[1] See also case citations on pages 10-11 of Clark County's Opposition to Plaintiff's Motion for Declaratory Judgment and Counter Motion for Reconsideration of the Order Granting Plaintiff a Preliminary Injunction [#42 & #43].

[2] Just as these cases recognized that a subsequent court proceeding was merely ancillary to and in furtherance of the forfeiture as opposed to a condition precedent to the forfeiture, Plaintiff's argument predicated upon the Board setting this for a public hearing to declare the office forfeited is impertinent as well. The fact that the Board set this matter for a public hearing to discuss and here comment regarding the legal consequences of NRS 258.007 certainly does not negate the legitimacy of the argument that the statute itself was self-executing and triggered when Plaintiff did not get certified 18 months after taking office. The belt and suspender approach taken by the BCC, in affording additional process to Plaintiff than was due, which was obviously beneficial for Plaintiff as well, does not operate as a waiver of the statutory interpretation argument raised in this instant case.

D. Plaintiff's Participation in a Law Enforcement Function Without Fulfilling POST Training Requirements Presents a Danger to the Public.

Plaintiff admittedly has failed to complete academy training to become at least a category II peace officer despite the clear mandate to do so within a year of taking office as required by NRS 258.007(1). Plaintiff has argued that public policy is negatively impacted by the forfeiture provision of NRS 258.007(2) because it will "disrupt the democratic process" by interfering with the North Las Vegas voter's right to select by majority vote the candidate of their choice. It stands to reason, of course, that those that voted for Plaintiff expected him to follow the law. Moreover, Plaintiff ignores the public policy argument that he poses a risk to the public by acting a law enforcement function without fulfilling the state training requirements to do so.

Plaintiff accordingly is ill-equipped to handle a litany of law enforcement functions while serving in one of the highest populated urban areas in Nevada. Pursuant to NAC 289.150, the State of Nevada has deemed at least 200 hours of training necessary to fulfill this law enforcement function in the following areas:

1. Law and legal procedures, specifically:

   (a) Civil liability;
   (b) Constitutional law;
   (c) Crimes against persons;
   (d) Crimes against property;
   (e) Juvenile law;
   (f) Laws relating to arrest;
   (g) Laws relating to drugs, including, without limitation, current trends in drugs;
   (h) Miscellaneous crimes;
   (i) Probable cause;
   (j) Rights of victims;
   (k) Search and seizure; and
   (l) Use of force.

2. Operations and investigations, specifically:

   (a) Abuse of elderly persons;
   (b) Child abuse and sexual abuse of a child;
   (c) Domestic violence and stalking;
   (d) Investigation of crime scenes, collection and preservation of evidence and fingerprinting;
   (e) Principles of investigation; and
   (f) Techniques of interviewing and interrogation.

3. Performance skills, specifically:

   (a) Health, fitness and wellness;
   (b) Interpersonal communications;
   (c) Provision of emergency first aid and cardiopulmonary resuscitation;
   (d) Tactics for the arrest and control of suspects, including, without limitation, methods for arrest and the use of less than lethal weapons;
   (e) Training concerning active assailants;
   (f) Training in the use of firearms; and
   (g) Writing of reports.

4. The functions of a peace officer, specifically:

   (a) Care of persons in custody;
   (b) Counter-terrorism and weapons of mass destruction;
   (c) Courtroom demeanor, including, without limitation, the giving of testimony;
   (d) Crisis intervention;
   (e) Ethics in law enforcement;
   (f) Handling of persons with mental illness;
   (g) History and principles of law enforcement;
   (h) Management of stress;
   (i) National Crime Information Center procedures;
   (j) Survival of peace officers;
   (k) Systems of criminal justice; and
   (l) The realities of law enforcement.

5. Course administration and examinations.

Plaintiff's public policy argument about the right of franchise in support of his position of statutory authority is not well taken. To be sure, the acute danger to the public in permitting a person acting in a law enforcement function to carry a service weapon and take actions that directly affects the property and liberty interests of the public without the requisite training in these key areas is axiomatic. The Nevada legislature certainly shared this view when it required constables serving in urban areas in the State to receive this training on penalty of office forfeiture. Functioning as an untrained peace officer poses a much greater risk of harm to the public than simply not having an elected candidate complete a full term in office.

III. CONCLUSION

IN ACCORDANCE WITH THE FOREGOING, the Court should grant the counter motion for reconsideration [#43] and issue an order that is both compliant with Nevada law and furthers the actual text and the important public policy issues that underlie NRS 258.007.

RESPECTFULLY SUBMITTED this 19th day of September, 2018.

OLSON, CANNON, GORMLEY, ANGULO & STOBERSKI

By /s/ Thomas D. Dillard
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Table1 (Return to related document text)

Plaintiff/Appellee	Robert Eliason
Defendant/Appellant	Clark County, a political subdivision of the State of Nevada
Defendant/Appellant	State of Nevada ex rel. the Nevada Commission on Peace Officer Standards and Training (POST)

Table1 (Return to related document text)

Table2 (Return to related document text)

Counsel for Plaintiff/Appellee Robert Eliason	Kelly A. Evans Chad R. Fears Evans Fears & Schuttert LLP 2300 W. Sahara Avenue Suite 950 Las Vegas, NV 89102 Jeffrey E. Barr Ashcraft & Barr | LLP 2300 W. Sahara Avenue Suite 900 Las Vegas, NV 89102
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Counsel for Defendant/Appellant POST	Michael D. Jenson Senior Deputy Attorney General 555 Wright Way Carson City, NV 89711

Table2 (Return to related document text)

Table3 (Return to related document text)

Exhibit	Document	Fed. Ct. Dkt. #
A	First Amended Complaint	ECF No. 1
B	Eliason's Motion for Declaratory Judgment (contains Order Granting Preliminary Injunction at p.8)	ECF No. 41
C	Clark County's Opposition and Motion to Reconsider Order Granting Motion for Preliminary Injunction	ECF No. 43-43-4.
D	POST's Response to Eliason's Motion for Declaratory Judgment	ECF No. 44
E	POST's Response to Clark County's Motion for Reconsideration	ECF No. 45
F	Eliason's Reply in Support of Motion for	ECF No. 47

Exhibit	Document	Fed. Ct. Dkt. #
	Declaratory Judgment	
G	Clark County's Reply in Support of Motion for Reconsideration	ECF No. 49

Table3 (*Return to related document text*)

End of Document

EXHIBIT 6

LexisNexis

User Name: Meghan Schaar

Date and Time: Thursday, February 6, 2020 1:00:00 PM EST

Job Number: 109348306

Document (1)

1. *Thiss v. A.O. Smith Corp., 1993 U.S. Dist. LEXIS 11846*

Client/Matter: -None-

Search Terms: 1993 U.S. Dist. LEXIS 11846

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Sources: MI, Related Federal

Neutral
As of: February 6, 2020 6:00 PM Z

Thiss v. A.O. Smith Corp.

United States District Court for the Western District of Michigan

June 29, 1993, Decided ; June 29, 1993, Filed

File No. 1:91:CV:239

Reporter
1993 U.S. Dist. LEXIS 11846 *; 1993 WL 771013

ARTHUR THISS and MOLLY THISS, Plaintiffs, v. A.O. SMITH CORPORATION, Jointly and Severally, A.O. SMITH HARVESTORE PRODUCTS, INCORPORATED, Jointly and Severally, Defendants,

Core Terms

plaintiffs', enterprise, Defendants', Sickle, feed, entities, silos, herd, conspiracy, counts, association-in-fact, products, accrued, statute of limitations, summary judgment motion, summary judgment, oxygen, pattern of racketeering activity, matter of law, subsidiary, commit, farm, reasonable person, predicate crime, racketeering, time-barred, discovery, certify, storage, commit fraud

Case Summary

Procedural Posture

Defendants, corporation and subsidiary, filed motions for summary judgment in plaintiff dairy farmers' claim that alleged fraud, conspiracy to commit fraud, and violations of the Racketeer Influenced and Corrupt Organizations statute (RICO), *18 U.S.C.S. §§ 1962(c)* and *1962(a)*. The dairy farmers purchased a feed storage unit from the subsidiary that allowed the feed to be contaminated and poisoned the farmers' herd.

Overview

After their dairy herd became ill and died from eating contaminated feed, the farmers filed suit against the corporation that made the unit and the subsidiary that sold the unit. The corporation and the subsidiary both filed motions for summary judgment. The court denied in part and granted in part the motions. The court found that the relevant causal connection was between the problems on the dairy farm and the unit, and the farmers need not have known exactly why or how the units harmed the feed. The farmers should have discovered the pattern the same date they should have discovered the source of their injury. A jury must have decided when the farmers should have discovered the source of their injury. The court certified a question to the Michigan Supreme Court by separate order: "Under Michigan law, is it possible for a corporation to commit civil conspiracy with its wholly owned subsidiary?" The corporation's and subsidiary's motions for summary judgment as to one count under the Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C.S. § 1962(a)*, was granted.

Outcome
The court denied in part and granted in part the corporation's and subsidiary's motions for summary judgment in the farmers' fraud, conspiracy to commit fraud, and violations of the Racketeer Influenced and Corrupt Organizations Act claims. The court also certified a question to the state supreme court.

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Governments > Legislation > Statute of Limitations > Pleadings & Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > Judgments > Summary Judgment > Partial Summary Judgment

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > Timing of Motions & Responses

Governments > Legislation > Statute of Limitations > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

HN1[] Burdens of Proof, Movant Persuasion & Proof

All evidence in a motion for summary judgment must be considered in the light most favorable to the non-moving party, under Michigan law, the plaintiff has the burden to establish an exception to the statute of limitations.

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > ... > Statute of Limitations > Tolling > Discovery Rule

Governments > Legislation > Statute of Limitations > General Overview

Torts > Business Torts > Fraud & Misrepresentation > General Overview

Torts > Procedural Matters > Statute of Limitations > General Overview

HN2[] Statute of Limitations, Time Limitations

The statute of limitations for a conspiracy to commit fraud claim is six years. *Mich. Comp. Laws. § 600.5813*.

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Fraud & Misrepresentation

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

HN3[] Causes of Action, Fraud & Misrepresentation

The statute of limitations for Racketeer Influenced and Corrupt Organizations, *18 U.S.C.S. § 1962*, claims is four years.

Criminal Law & Procedure > Appeals > Appellate Jurisdiction > Certified Questions

Governments > Courts > Judicial Precedent

HN4[] Appellate Jurisdiction, Certified Questions

Mich. Ct. R. 7.305(B) states that when a federal court considers a question that Michigan law may resolve and that is not controlled by Michigan Supreme Court precedent, the court may on its own initiative certify the question to the Michigan Supreme Court. A certificated may be prepared by stipulation or at the certifying court's direction, and must contain (a) the case title; (b) a factual statement; and (c) the question to be answered. The presiding judge must sign it, and the clerk must certify it under seal. With the certificate, the parties shall submit (a) briefs conforming with Mich. Ct. R. 7.306 and 7.309; (b) a joint appendix conforming with Mich. Ct. R. 7.307, 7.308 and 7.309; and (c) request for oral argument, if oral argument is desired. If the Supreme Court responds to the question certified, the clerk shall send a copy to the certifying court under seal. The Supreme Court shall divide costs equally among the parties, subject to redistribution by the certifying court.

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Fraud & Misrepresentation

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN5[] Causes of Action, Fraud & Misrepresentation

A "reinvestment" theory, without allegations of distinct harm from that reinvestment, will not support a 18 U.S.C.S. § 1962(a) count.

Business & Corporate Law > ... > Management Duties & Liabilities > Rights of Partners > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN6[] Management Duties & Liabilities, Rights of Partners

18 U.S.C.S. § 1962(c) prohibits any person associated with any enterprise from conducting or participating in the conduct of such enterprise's affairs through a pattern of racketeering activity. 18 U.S.C.S. § 1961(3) defines "person" as any individual or entity capable of holding an interest in property. § 1961(4) defines "enterprise" as any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact, although not a legal entity.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN7[] Racketeering, Racketeer Influenced & Corrupt Organizations Act

18 U.S.C.S. § 1962(c) prohibits "persons" from doing certain acts, and therefore, the alleged persons in a Racketeer Influenced and Corrupt Organizations Act (RICO), claim will be the defendants. "Persons" are liable under this statute, not "enterprises," for the RICO 'person' is the active wrongdoer, while the RICO "enterprise" is the passive instrumentality through which the person performs the predicate acts.

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Fraud & Misrepresentation

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN8[] Causes of Action, Fraud & Misrepresentation

The three requirements of a Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.S. § 1962(c), enterprise defendants propose is: (1) there must be a shared purpose among the enterprise's members or participants; (2) the enterprise must be an ongoing organization with some sort of structure; (3) there must be an ascertainable structure distinct from that inherent in the pattern of racketeering activity.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN9[] Racketeering, Racketeer Influenced & Corrupt Organizations Act

The Racketeer Influenced and Corrupt Organizations Act is targeted at the element which makes the commission of some predicate crimes more dangerous than others, and that is the use of otherwise legitimate enterprises as a tool to commit predicate crimes. Use of such passive instruments makes those crimes harder to detect, and often enhances the scope and profitability of racketeering operations.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN10[] **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

It is not necessary to show that the enterprise has some function wholly unrelated to the racketeering activity, but rather that it has an existence beyond that which is necessary merely to commit each of the acts charged as predicate racketeering offenses.

Judges: [*1] ENSLEN

Opinion by: RICHARD A. ENSLEN

Opinion

HON. RICHARD A. ENSLEN

OPINION

Presently before the Court are two summary judgment motions; one submitted by each defendant. Because the issues raised by each apply to both defendants, I will consider both motions in this Opinion. The standard for summary judgment pursuant to *Fed. R. Civ. P. 56* is well-known, and I will not repeat it here.

Facts

Plaintiffs are Michigan dairy farmers. Defendant A.O. Smith Harvestore Products, Inc. ("Harvestore") is a wholly owned subsidiary of defendant A.O. Smith Corp. ("the Smith Corporation"). Both entities are in the business of designing, manufacturing, marketing and selling farm machinery and equipment.

In July of 1977, plaintiffs brought their first "Harvestore system," a feed storage structure designed to hold high moisture corn, and they began using it that fall. The system's highlighted feature was its alleged ability to prevent oxygen from coming into contact with the feed. This capacity is referred to as its "oxygen-limiting" feature, and it was purported to increase the nutritional value of feed. On or about October of 1980, plaintiffs bought their second Harvestore system. This one was designed **[*2]** for the storage of haylage. Haylage is the principle staple in dairy cows' ration; corn is used to a lesser extent. The sales representative who promoted and sold the products to plaintiffs is named Earl Smalligan. He was associated with a company named Michigan Glass Lined Storage, which is not a party to this action.

At some point after the installation of the second Harvestore system, plaintiffs' dairy herd began to suffer health problems. These problems affected production and, therefore, profits. Plaintiffs allege that when they recognized these problems they set about identifying their source. In 1990, they stopped using the Harvestore systems for a trial period, and the health of the herd improved. Plaintiffs allege that this is because defendants' storage silos are not oxygen-limiting. Instead, they allow oxygen to mix with the feed, causing spoilage which is not detectable by visual inspection, but significantly reduces the nutritional value of the feed. Plaintiffs' farm went bankrupt in 1990.

Plaintiffs' diversity claim contains five counts, and is governed by Michigan law. Count One alleges that through its promotional materials and its authorized sales representative, **[*3]** Harvestore fraudulently represented that the Harvestore system was oxyen-limiting. As a result, this Count asserts, the health and productivity of plaintiffs' herd, and plaintiffs' profits, suffered. Count Two makes the same fraud allegations against the Smith Corporation. Count Three alleges a conspiracy between the two defendants to commit fraud. Count Four alleges a violation of the Racketeer Influenced and Corrupt Organizations statute ("RICO"), *18 U.S.C. § 1962(c)*, and Count Five alleges violation of RICO *section 1962(a)*.

Defendants' Statute or Limitations Claim

Defendants first argue that they are entitled to summary judgment on all counts because the statute of limitations has run on plaintiffs' claims. I will consider defendants' argument on plaintiffs' fraud, conspiracy to commit fraud, and RICO claims separately.

Counts I and II: Common Law Fraud

The statute of limitations for plaintiffs' fraud claims is six years. *M.C.L. § 600.5813*. The present complaint was filed on March 8, 1991. Therefore, if plaintiffs' claim accrued earlier than March 8, 1985, their claim is time-barred. Although *HN1*[] all evidence in a motion for

summary **[*4]** judgment must be considered in the light most favorable to the non-moving party, under Michigan law, the plaintiff has the burden to establish an exception to the statute of limitations. *McLaughlin v. Aetna Life Insurance Co., 221 Mich. 479, 483, 191 N.W. 224 (1922)*; *1500 North Woodward Building v. U.S. Mineral Products Co.,* Slip Op., Case No. 91-CV-72491-DT, at 16 (E.D. Mich. Feb. 24, 1992) (Defendants' Ex. G).

In *Agristor v. Van Sickle, 967 F.2d 233 (6th Cir. 1992)*, a case involving the same attorneys and the instant defendants, the court held that the "discovery accrual standard" applies to this type of fraud action in Michigan. The *Van Sickle* court first describes this standard as dictating that plaintiffs' cause of action accrued when they knew or should have known of their injury. *Id. at 238*. However, in its case-specific analysis, it describes the point at which plaintiffs "should have known" as the time when "a reasonable person might [] have connected the problems on the dairy farm to the Harvestore silos, and therefore a reasonable person might [] have known of the alleged fraud . . .." **[*5]** *Id. at 240*.

This language clarifies two points. The first is that defendants are mistaken when they imply that they must only show when plaintiffs knew that their herd was suffering. The causal connection between the feed storage system and the problems is critical. However, I believe that plaintiffs also are mistaken when they assert that the relevant moment is when they identified the connection between the herd's health problems and the failure of the silos to limit oxygen intake. The relevant causal connection is between the "problems on the dairy farm [and] the Harvestore silos," *id.;* the plaintiffs need not know exactly why or how the silos harmed the feed.

The *Van Sickle* court went on to determine that a reasonable trier of fact could find that plaintiffs discovered or should have discovered the connection between their problems and the Harvestore system within the statute of limitations period. Therefore, the trial court's grant of summary judgment in favor of defendants on the statute of limitations issue was inappropriate. *See also, Agristor Leasing v. Saylor, 803 F.2d 1401, 1405-06 (6th Cir. 1986)*, **[*6]** *cert. denied, 493 U.S. 919 (1989)*; (remanding case for retrial; trial court should have submitted statute of limitations question to jury in form of interrogatories due to conflicting evidence on date of plaintiffs' actual discovery that Harvestore system caused herd's problems); *Hines v. A.O. Smith Harvestore Products, Inc., 880 F.2d 995 (8th Cir. 1989)* (reversing trial court's grant of summary judgment; evidentiary conflicts rendered when plaintiffs knew or should have known of defects a jury question); *Mohr v. A.O. Smith Corp.,* Slip Op., Case. No. 88-cv-10043-BC (E.D. Mich. March 25, 1993) (adopting magistrate's recommendation that statute of limitations issue should be left to the jury).

According to the uncontroverted affidavit of Arthur Thiss, he did not have actual knowledge of the connection between the injury to his herd and the Harvestore system until 1989 or 1990, well within the limitations period. Therefore, the only disputed issue is when plaintiffs should have learned of the connection.

Van Sickle dictates that the "should have learned" point is measured by a reasonable person standard. The appellate **[*7]** panel in *Van Sickle* affirmed the trial court's finding that the plaintiffs should have learned of the connection between their problems and the Harvestore system within two years of its installation. "Although [the *Van sickle* plaintiffs] experienced serious problems for many years, it was not until mid-1982 that the dairy herd experienced dramatic calf losses . . .." *967 F.2d at 240*. The panel held "as a matter of law, that a reasonable person should have determined that the calf losses of mid-1982 were caused by the 'poisoned' grain and hay." [1] *967 F.2d at 241*.

Therefore, the question posed by defendants' motion **[*8]** is whether a reasonable person, considering the circumstance on the Thisses' farm, should have determined the link between the herd's poor health and productivity and the first Harvestore system (corn), within seven and one-half years of its installation, and the second system (haylage), within four and one-half years of installation.

There is significant evidence that shortly after installation of the Harvestore systems, plaintiffs became aware of production problems. In their amended complaint plaintiffs allege that in the months after commencing use of the second Harvestore system plaintiffs' herd began to experience a number of problems. These included lower milk production,

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[1] However, because a reasonable trier of fact could also find the reverse, the court noted that defendants remained free to present evidence to the jury at trial to prove that plaintiffs knew or should have known of the alleged misrepresentations earlier, and that their claim was therefore time-barred. *Id. at 240*.

breeding problems, general unthrifty physical condition, and higher than normal cull rates based on production and health. Am. Comp. para. 26. In a deposition, Mr. Thiss asserted that the 1980 silo caused the four maladies listed above in the early 1980s. Defendants' Ex. 4 at 21.

However, according to the affidavit of Arthur Thiss, the productivity of a dairy farm ebbs and flows in response to numerous factors, including the herd's natural lactation cycles. He avers that although he was aware of specific production **[*9]** problems, the farm's overall "downward trend was not apparent until the late 1980's." Thiss Affidavit, Ex. 22, para. 7, para. 10. The Thisses looked for explanations for the downturn in production in several places. This investigation included consultation with their Harvestore sales representative. Ex. 22, para. 11. Unfortunately, the date of this consultation is not clear. [2]

Neither Mr. Thiss nor farmhand John Van Oordt noticed anything wrong with the feed; it looked and smelled fine, and the cows generally ate it. Plaintiffs' Ex. 22, para. 10; J. Van Oordt dep., Ex. 24, **[*10]** pp. 27-28. These observations are in accord with those of defendants. A 1967 internal memorandum of defendants states although oxygen could have detrimental effects on feed value, "it would be very difficult to establish any relation between amount of oxygen admitted and such additional loss in feed value." Ex. 29, p. 3.

There is a conflict between the parties' experts as to when plaintiffs could have learned about the oxygen damage to their feed through testing. Plaintiffs have submitted the affidavit of Lawrence Scott, an animal nutritionist and feed chemist. He avers that

> "the changes in protein content and complexing of the carbohydrate fraction of the feedstuffs with protein residues was not disclosed by the normal testing methodologies employed during the late 1970s and early 1980s. Thus the feedstuffs as analyzed might reflect an adequate or acceptable level of protein and energy. However, what the normal analytical tests would not disclose are that the changes that had taken place in the protein and carbohydrate composition of the feedstuffs made them in whole or in part unavailable for assimilation or utilization by the animals consuming the feed."

Ex. 23, para. 3-4. **[*11]** However, defendants respond with the affidavit of Robert Davis, a doctor of veterinary medicine. He states that a commonly used indicator of the excessive exposure of ensiled forage to oxygen is the amount of "acid detergent insoluble nitrogen" ("ADIN") in the feed. Dr. Davis further states that four laboratory feed analyses of feed stored on the Thiss farm between 1980 and 1985 include data reflective of the amount of ADIN or other indicators of oxygen damage. Defendants' Reply Brief, Ex. D.

Consideration of the evidence described above leads me to conclude that there are disputed material facts which preclude summary judgment on this issue. My conclusion that I cannot, as a matter of law, identify the date a reasonable person on the Thisses farm should have recognized the alleged fraud, differs from the conclusion of the trial court in *Van Sickle.* [3] This is because the facts which led the *Van Sickle* trial court to conclude that plaintiffs reasonably should have known about their silos' defects stand in contrast to the facts recited above.

[*12] Like the Thisses, the *Van Sickle* plaintiffs noticed a decline in milk and butterfat and reproductive problems. However, unlike the Thisses, the *Van Sickle* plaintiffs noticed a moldy smell emanating from a silo as early as 1974, and had visual confirmation that they were feeding their herd moldy feed. This was the first symptom that directly linked the herd's health and productivity problems with the Harvestore systems. The second link, also missing in the present case, is the *Van sickle* plaintiff's observation that cows fed from the Harvestore silos tended to produce stillborn calves. Though the two cases share many facts, the trial court's conclusion that the Van Sickle's should have known about the alleged fraud within two years of the purchase of their second silo relied heavily on these links. Ex. 27, *West Marion Dairy Farms v. A.O. Smith Corp.,* Slip Op. Case No. 86-CV-75448-DT (E.D. Mich. Sept. 10, 1990).

In the present matter, although there is a significant

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[2] Mr. Thiss' affidavit does not give a date for this consultation. Defendants assert that Mr. Smalligan retired in 1981, and therefore it had to be before that time. There is one reference to consultation with Mr. Smalligan in a deposition of Mr. Thiss. It occurred shortly after the Thisses bought their first silo, and it "as prompted by plaintiffs' recognition that their butterfat content had not increased as promised. Defendants' Ex. 2, p. 69.

[3] On appeal, the plaintiff is identified as Van sickle. At trial, the plaintiff was identified as West Marion Farms, which is the corporation the Van Sickle family runs. For clarity's sake, when referring to either the trial or appellate level, I will identify it as *Van Sickle.*

amount of evidence concerning the plaintiffs' notice that something was wrong, there is not sufficient evidence linking those problems with the Harvestore systems for me to rule as a matter of law that they **[*13]** should have realized the connection on a particular date. Therefore, resolution of the issue of when a reasonable person would have known of the alleged fraud in the circumstances described above will be left to the jury. Defendants' motion for summary judgment on this point will be denied.

Count III: Conspiracy to Commit Fraud

This Count of plaintiffs' complaint alleges that defendants knew that the Harvestore system was not oxygen-limiting, as advertised, and that they conspired to conceal this information and continued to make representations to customers which they knew were false.

HN2[] The statute of limitations for this claim is six years. M.C.L. § 600.5813. Defendants assert that the conspiracy cause of action accrues at the same time as the underlying tort. [4] If defendants are correct, this issue should be resolved by the jury. Plaintiffs assert that Michigan adheres to an "actual discovery" rule to measure accrual of a cause of action for conspiracy. If plaintiffs are correct, the accrual date is clearly within the limitations period.

[*14] Review of Michigan law has convinced me that Michigan courts would apply the same tolling standard to a conspiracy count as they would to the underlying overt act. Gilbert v. Grand Trunk, 95 Mich. App. 308, 290 N.W.2d 426 (1980); Roche v. Blair, 305 Mich. 608, 9 N.W.2d 861 (1943). Therefore, while I do not believe that plaintiffs' assertion of an "actual discovery" rule is correct, I also believe that defendants' assertion that the causes of action accrue at the same time is overbroad. They accrue in the same manner.

That means that plaintiffs' conspiracy to commit fraud count accrued when plaintiffs knew or should have known of the alleged conspiracy to commit fraud. There is virtually no evidence before me on this point. Therefore, at this stage of the proceedings, defendants' motion for summary judgment on Count III must be denied.

Counts IV and V: RICO

HN3[] The statute of limitations for RICO claims is four years. Agency Holding Corp. v. Malley-Duff & Assoc., Inc., 483 U.S. 143, 97 L. Ed. 2d 121, 107 S. Ct. 2759 (1987). The present complaint was filed on March 8, 1991. Therefore, if plaintiffs' RICO claims accrued earlier than March 8, 1987, **[*15]** their claim is time-barred.

In *Van Sickle,* the Sixth Circuit panel reviewed the Circuit split on when RICO causes of action accrue. The panel rejected one method, the last-predicate act rule. However, it determined that it did not need to decide between the two remaining methods, because the plaintiffs' RICO claim was time-barred by each. The first of the two is the discovery rule, which focuses on when plaintiffs knew or should have known of defendants' fraudulent scheme. The second is a "compromise rule," also referred to as the *Bivens* rule, which holds that a civil RICO action accrues as soon as the plaintiff discovers, or reasonably should have discovered, both the existence and source of the injury, and that the injury is part of a pattern. Van Sickle, 967 F.2d at 241, citing Bivens Gardens Office Bldg., Inc., v. Barnett Bank of Florida, Inc., 906 F.2d 1546, 1554-55 (11th Cir. 1990), *cert. denied, 111 S. Ct. 1695 (1991)*.

The *Van Sickle* court found that it did not have to choose between the latter two standards. Instead, it held that in the factual circumstance at bar, plaintiffs **[*16]** should have discovered the pattern of fraud at the same time they discovered the fraud. 957 F.2d at 242. However, it reached this conclusion by analyzing the more "liberal" standard, the *Bivens* rule, first. Because plaintiffs' claim was time-barred by that standard, it would also have been barred by the discovery rule. Given the similarity of the facts and the claims in these cases, and the lack of guidance on the appropriate accrual rule, I will follow the Sixth Circuit's approach in *Van Sickle,* and apply the *Bivens* rule for determining when plaintiffs' RICO claims accrued.

Similarly, I will apply the approach of the Sixth Circuit in my analysis of the facts. The *Van Sickle* panel held that the same facts that did or should have alerted the plaintiffs to the alleged injury and its source also should have alerted them that the alleged misrepresentations

[4] Although defendants asserted that their statute of limitations basis for summary judgment applied to all counts, they did not analyze the conspiracy count in their motion. Plaintiffs addressed it briefly, and then defendants made the contention above in their reply. As a result, I note for the record that this issue has not been argued very thoroughly.

were part of a pattern. It held that "as a matter of law, [plaintiff] should have determined that the representations were part of pattern at the same time it should have discovered that the silos caused the alleged problems on the dairy farm." *967 F.2d at 242*.

As **[*17]** a result, I hold that plaintiffs should have discovered the pattern the same date they should have discovered the source of their injury. As I ruled in regard to the fraud counts, the jury must decide when plaintiffs should have discovered the source of their injury. If this date is before March 8, 1987, then plaintiffs' RICO counts are time-barred. If it is not, these counts are viable.

Defendants' Substantive Attack on Count III, Conspiracy to Defraud

Defendants argue that they are entitled to summary judgment on plaintiffs' conspiracy count because defendants assert, Smith Corp. cannot conspire with its subsidiary as a matter of law. Plaintiffs argue that it can, but, as both parties concede, there is no Michigan law to instruct the Court on whether Michigan courts would allow plaintiffs to proceed on this theory. Therefore, the arguments on each side are based on law from other jurisdictions.

Defendants' motion forces me to consider a state law count with no governing law. A federal judge sitting in diversity can attempt to predict the course of state law, but there is no basis for me to predict what Michigan courts would do in this situation. I refuse both parties' **[*18]** invitation to make what is essentially a policy decision between competing doctrines.

Instead, I must turn to the Michigan Supreme Court for guidance. Pursuant to Michigan Rule of Court 7.305(B), [5] I will certify the following question to the Michigan Supreme Court by separate order; "Under Michigan law, is it possible for a corporation to commit civil conspiracy with its wholly owned subsidiary?"

[*19] My proposed certification order is attached to this opinion. I will delay sending it for ten days after the issuance of this opinion. If either party has an objection to the phrasing or content of the certification order, it should lodge it with the Court within that ten-day period.

As a result of the foregoing, defendants' motion on Count III will be denied without prejudice. If the Supreme Court accepts the certified question for review, I will reconsider the motion in light of the answer it returns. If the Supreme Court declines to answer the question, I will reconsider the motion on the briefs already submitted, and make an *"Erie* guess," *Erie R.R. Co. v. Tompkins, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938)*, as to how the state's highest court would decide the issue.

Defendants' Substantive Attacks on Counts IV & V, the RICO Counts

Defendants offer three grounds in support of their motion for summary judgment on plaintiffs' RICO counts. First, they argue that the Thisses cannot establish the requisite "investment injury" under *§ 1962(a)*. Secondly, they argue that the Thisses' *§ 1962(c)* claim is deficient because the Thisses' alleged association-in-fact enterprise **[*20]** is not distinct from the alleged persons. Thirdly, they argue that the Thisses' alleged association-in-fact enterprise is not

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[5] *HN4*[↑] Rule 7.305(B) states:

Rule 7.305 Certified Questions

(B) From Other Courts

(1) When a federal court . . . considers a question that Michigan law may resolve and that is not controlled by Michigan Supreme Court precedent, the court may on its own initiative . . . certify the question to the Michigan Supreme Court.

(2) A certificated may be prepared by stipulation or at the certifying court's direction, and must contain

(a) the case title;

(b) a factual statement; and

(c) the question to be answered.

The presiding judge must sign it, and the clerk must certify it under seal.

(3) With the certificate, the parties shall submit

(a) briefs conforming with MCR 7.306 and 7.309;

(b) a joint appendix conforming with MCR 7.307, 7.308 and 7.309; and

(c) request for oral argument, if oral argument is desired.

(4) If the Supreme Court responds to the question certified, the clerk shall send a copy to the certifying court under seal.

(5) The Supreme Court shall divide costs equally among the parties, subject to redistribution by the certifying court.

distinct from the alleged pattern of racketeering activity. I will address each argument in turn.

Investment Injury Under § 1962(a)

Count V of plaintiffs' complaint alleges that defendants participated in a pattern of racketeering activity and invested the monies generated to fund the continuing marketing and sale of Harvestore systems to farmers across the country between 1973 and 1986.

In *Craighead v. E.F. Hutton & Co., Inc., 899 F.2d 485 (6th Cir. 1990)*, the court stated,

> If plaintiffs had alleged the necessary predicate acts, their *section 1962(a)* claim would still fail because they have not alleged injuries stemming directly from the defendants' alleged use or investment of their illegally obtained income. Unlike *section 1962(c)*, subsection (a) requires such a separate and traceable injury, and plaintiffs have alleged only injuries traceable to the alleged predicate acts.

Id. at 494. Although plaintiffs are correct to point out that this passage is dicta, it is the best guidance **[*21]** the appellate court has given to date.

The harm plaintiffs claim cannot be fairly characterized as a "separate and traceable injury" which "stems directly" from defendants' alleged use or investment of illegally obtained income. The harm they claim flowed from the allegedly fraudulent representations which led them to buy the Harvestore, and the subsequent damage it allegedly caused. ***HN5***[↑] A "reinvestment" theory, without allegations of distinct harm from that reinvestment, will not support a *§ 1962(a)* count. *Berent v. Kemper Corp., 780 F. Supp. 431, 446 (E.D. Mich. 1991)*, *aff'd on other grounds, 973 F.2d 1291 (6th Cir. 1992)*; *Brittingham v. Mobil Corp., 943 F.2d 297, 305 (3d Cir. 1991)*. As a result, defendants' motion for summary judgment as to Count V will he granted.

The Distinction Between the Alleged Association-in-Fact and Alleged Persons Under § 1962(c)

In relevant part, ***HN6***[↑] *18 U.S.C. § 1962(c)* prohibits any "person . . . associated with any enterprise" from conducting or participating in the conduct of "such enterprise's affairs through a pattern **[*22]** of racketeering activity." *§ 1961(3)* defines "person" as any individual or entity capable of holding an interest in property. *§ 1961(4)* defines "enterprise" as any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact, although not a legal entity.

Plaintiffs allege that Smith Corp. (the parent corporation) and Harvestore (its subsidiary) are the RICO persons, and they allege that Smith Corp., Harvestore, and Michigan Glass comprise an association-in-fact "enterprise." ***HN7***[↑] *§ 1962(c)* prohibits "persons" from doing certain acts, and therefore, the alleged persons in a RICO claim will be the defendants. "Persons" are liable under this statute, not "enterprises," for "the RICO 'person' is the active wrongdoer, while the RICO 'enterprise' is the passive instrumentality through which the person performs the predicate acts." *Salvador v. Mazzocone, 686 F. Supp. 528, 530 (E.D. Pa. 1987)*.

Defendants argue that the RICO persons and the RICO enterprise alleged by plaintiffs are not sufficiently separate to sustain a *§ 1962(c)* claim. Defendants' position is that the alleged enterprise is nothing **[*23]** more than a combination of entities affiliated with the same corporation. Any actions taken by Harvestore, as a subsidiary of Smith Corp., and Michigan Glass, as an agent of Smith Corp., would have been on behalf of Smith Corp. Therefore, defendants assert, the "passive" association-in-fact comprised by this parent corporation, its subsidiary and its agent, is not sufficiently distinct from the "active" RICO persons.

The best guidance the Sixth Circuit has offered on the requisite degree of distinction between a RICO person and a RICO enterprise is found in *Fleischhauer v. Feltner, 879 F.2d 1290 (6th Cir. 1989)*, *cert. denied, 493 U.S. 1074, 107 L. Ed. 2d 1029, 110 S. Ct. 1122 (1990)*. In *Fleischhauer,* defendants challenged a jury verdict in favor of plaintiffs. The Sixth Circuit panel rejected defendants' attack on plaintiffs' *§ 1962(c)* claim, and held that the RICO persons were sufficiently distinct from the RICO enterprises.

> We believe the pleadings adequately state that each of the five defendants was a "person" and together they formed a racketeering "enterprise." . . . Appellant contends that the "enterprise" alleged and proven was not sufficiently **[*24]** distinct from the "person" -- in other words, because Feltner owned 100% of the corporations, they were the equivalent of his "right arm" with whom he could not "conspire." [citation's omitted] Such argument has no merit; the fact that Feltner owned 100% of the

corporations' shares does not vitiate the fact that these corporations were separate legal entities.

879 F.2d at 1297.

A case from within the district, *In* Re Tucker Freight Lines Inc., 789 F. Supp. 884, 893 (W.D. Mich. 1991), also provides some guidance. In that case, one of plaintiffs' § 1962(c) arguments was that a company named Tucker conducted the affairs of an association of itself, its owner Central, and Central's parent company, Centra. *Id. at 892*. The Court rejected this alignment. It found that Tucker did not violate subsection (c) by conducting the affairs of an association of itself and its controlling agents, because the affairs conducted were not distinct from Tucker's. In support of this proposition, the court quoted Yellow Bus Lines v. Drivers Chauffeurs & Helpers Local Union 639, 280 U.S. App. D.C. 60, 883 F.2d 132, 141 (D.C. Cir. 1989) **[*25]** for the proposition that "'an organization cannot join with its own meters to do that which it normally does and thereby form an enterprise separate and apart from itself.'" *Id. at 892*.

The difference between *Tucker* and the present case is that the enterprise alleged by plaintiffs' includes an entity distinct from the parent and subsidiary corporation. That is Glass Lined, which plaintiffs do not allege was aware that the representations that Harvestore and Smith Corp. instructed it to make were fraudulent. Plaintiffs allege that "Defendants are the perpetrators of the racketeering activity, using Michigan Glass Lined Storage and the enterprise itself as the conduit, or "passive instrument" of this activity." Smith Corp.'s Ex. 3, Plaintiffs' RICO Case Statement, Response to Question 6(f).

This distinction leads me to conclude that the law of this Circuit does not entitle defendants to summary judgment on plaintiffs'§ 1962(c) claim. *Fleischhauer* approved the use of the same entities as both persons and participants in an enterprise. I also believe it stands for the proposition that close ties don't prevent separate legal entities from forming an enterprise. However, even **[*26]** if that were the case, it appears that plaintiffs could sustain a § 1963(c) claim by alleging that Smith Corp. and Harvestore are persons associated with Glass Lined, who participated in the affairs of Glass Lined in a pattern of racketeering activity. Though plaintiffs' pleadings are fairly opaque, I believe that this assertion is clearly made in the section of their RICO Case Statement cited above.

As a result, I find that the entities plaintiffs' allege as persons and as an enterprise in fact are sufficiently distinct, and defendants ore not entitled to judgment as a matter of law on this basis.

The Distinction Between an Association-in-Fact Enterprise and the Alleged Pattern of Racketeering Activity

Defendants' last argument first asks the Court to adopt a three part test to define whether the RICO enterprise and the alleged pattern of racketeering are sufficiently separate. The Circuits which have adopted variations of this test have done so in response to the Supreme Court's statement that a RICO enterprise must be "separate and apart from the pattern of activity in which it engages." *United states* v. Turkette, 452 U.S. 576, 583, 69 L. Ed. 2d 246, 101 S. Ct. 2524 (1981). **[*27]** The Sixth Circuit has not addressed the issue. Secondly, defendants invite the Court to find that plaintiffs fail the third prong of the proposed test, and therefore their RICO claims must be dismissed.

HN8[⬆] The three requirements of a RICO enterprise defendants propose is: (1) there must be a shared purpose among the enterprise's members or participants; (2) the enterprise must be an ongoing organization with some sort of structure; (3) there must be an ascertainable structure distinct from that inherent in the pattern of racketeering activity. I decline to either adopt or reject this test in this Opinion. However, were the Court to adopt this test, I would find that plaintiffs have satisfied the all three prongs.

Defendants only allege that plaintiffs fail the third prong, so I will not address the first two. The purpose of the third prong is to prevent the bootstrapping which occurs when persons who come together to commit predicate crimes are charged with an additional RICO violation solely on the basis of that affiliation. ***HN9***[⬆] RICO is targeted at the element which makes the commission of some predicate crimes more dangerous than others, and that is the use of otherwise legitimate enterprises **[*28]** as a tool to commit predicate crimes. Use of such passive instruments makes those crimes harder to detect, and often enhances the scope and profitability of racketeering operations. As a result, Congress saw fit to penalize those who commit predicate crimes through use of an enterprise more heavily than those who simply commit predicate acts.

Therefore, in order to satisfy the third prong of the proposed test, the entity alleged as the enterprise or association-in-fact must do something other than commit predicate crimes. Put another way, I believe the

question is whether the members of the association-in-fact came together solely for the purpose of committing the predicate crimes, or if their affiliation has substantial additional purposes. The Third Circuit has explained its understanding of the requirement that the entity is separate from the pattern of racketeering activity as follows:

> HN10[] It is not necessary to show that the enterprise has some function wholly unrelated to the racketeering activity, but rather that it has an existence beyond that which is necessary merely to commit each of the acts charged as predicate racketeering offenses.

United States v. Riccobene, 709 F.2d 214 **[*29]** (3rd cir.), *cert. denied, 464 U.S. 849 (1983)*. As applied to this case, I believe the question is whether the alleged association-in-fact of Smith Corp., Harvestore and Glass Lined came together solely for the purpose of committing the alleged wire and mail fraud.

The answer is no. In addition to marketing the Harvestore System through allegedly fraudulent representations, these entities also manufacture the product. Additionally, the line may be drawn between products. The members of the association-in-fact also joined to manufacture and market other products. I am unpersuaded by the affidavit of Donald Dunaway, which asserts that all of Harvestore's products are sold as one "system." It might be reasonable to accept this argument as applied to the products which enhance and facilitate the use of the featured feed silos. However, even if this characterization were accepted with the feed containment units, I do not believe that it can be extended to the Slurrystore, which, along with all of its associated products, is used to convert manure into useable fertilizer.

In summary, were the Court to adopt the test defendants propose to insure separateness **[*30]** of the alleged RICO enterprise and the alleged pattern of racketeering, I believe plaintiffs would satisfy it. Therefore, defendants are not entitled to a judgment as a matter of law on this point.

Dated in Kalamazoo, MI:

June 29, 1993

RICHARD A. ENSLEN

United States District Judge

ORDER

In accordance with the Opinion entered on this date;

IT IS HEREBY ORDERED that defendant A.O. Smith Harvestore Products Inc.'s motion for summary judgment on statute of limitations grounds (dkt. #188), filed February 16, 1993, is **DENIED.**

IT IS FURTHER ORDERED that defendant A.O. Smith Corporation's motion for summary judgment (dkt. #186), filed February 16, 1993, is **GRANTED in part, DENIED with prejudice in part, and denied without prejudice in part.**

IT IS FURTHER ORDERED that Count V of plaintiffs' complaint is **DISMISSED.**

Dated in Kalamazoo, MI:

June 29, 1993

RICHARD A. ENSLEN

United States District Judge

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