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8 **UNITED STATES DISTRICT COURT**
9 **DISTRICT OF NEVADA**

10 NEVADA RESTAURANT ASSOCIATION,)
11 a Nevada non-profit corporation; RETAIL)**CASE NO. 3:08-cv-00118-BES-VPC**
12 ASSOCIATION OF NEVADA, a Nevada)
13 non-profit corporation; WYNN LAS VEGAS,) **CROSS-COMPLAINANTS’**
14 LLC, a Nevada limited liability company;) **SUPPLEMENTAL BRIEF IN OPPOSITION**
15 NEVADA MOTOR TRANSPORT) **TO MOTION TO REMAND**
16 ASSOCIATION, INC., a Nevada non-profit)
17 corporation; and NEVADA MANUFACTURERS)
18 ASSOCIATION, INC., a Nevada non-profit)
19 corporation; and NEVADA TAVERN OWNER’S)
20 ASSOCIATION, a Nevada trade association,)
21)
22 **Plaintiff,**)
23)
24 **CULINARY WORKERS UNION,**)
25 **LOCAL 226**)
26)
27 **Plaintiff-in-Intervention**)
28)
29)
30 **vs.**)
31)
32)
33 **PEST COMMITTEE,** a Nevada Ballot Advocacy)
34 **Group; TONY BADILLO,** an individual; JACK)
35 **LIPSMAN,** an individual; AL MAURICE, an)
36 **individual; ROSS MILLER,** in his official capacity)
37 **as Secretary of State for the State of Nevada; and**)
38 **DOES I through X, inclusive,**)
39)
40 **Defendants.**)

1 _____)
 2)
 3 PEST COMMITTEE, a Nevada Ballot Advocacy)
 4 Group; TONY BADILLO, an individual; JACK)
 5 LIPSMAN, an individual; AL MAURICE, an)
 6 individual,)
 7)
 8 Cross-complainants,)
 9 vs.)
 10)
 11 ROSS MILLER, in his official capacity)
 12 as Secretary of State for the State of Nevada.)
 13)
 14 Cross-defendant.)
 15 _____)

11 **MEMORANDUM OF POINTS AND AUTHORITIES**

12 **Preliminary Statement**

13
 14 This case started when the Nevada Restaurant Association and Wynn Resorts used the
 15 provisions of Nevada Revised Statutes (NRS) 295.009 and 295.061 as a procedural vehicle to
 16 challenge the PEST initiative sponsored by the Defendants. PEST stands for “Prevent
 17 Employers from Seizing Tips.” Although the plaintiffs relied upon a state statute to bring this
 18 challenge, they also alleged federal constitutional violations and claimed that the proposed
 19 initiative was unconstitutional on its face. For reasons only known to the plaintiffs, although the
 20 plaintiffs filed this action “arising under” the Constitution of the United States, plaintiffs
 21 willingly chose not to avail themselves of their right to invoke federal jurisdiction.
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23
 24 The PEST Defendants, however, relied in good faith upon the applicable federal statutes to
 25 remove this case to Federal Court, since plaintiffs had alleged a claim with a federal question.
 26 The PEST Defendants also filed an “independent cross claim” alleging federal constitutional
 27 violations against the Secretary of State, one of the other Defendants. The PEST Defendants
 28 specifically alleged that the state statutes, that is NRS 295.009 and 295.061, which the plaintiffs

1 were using to bring this lawsuit, violated the First Amendment to the U.S. Constitution. The
2 PEST Defendants in their cross claim alleged that NRS 295.009 violated the First Amendment in
3 that it was unconstitutionally vague and acted as a prior restraint against Free Speech. Lastly,
4 and most importantly, the PEST Defendants also claim that sponsoring and proposing an
5 initiative petition is “core political speech,” and as such, any government regulation impacting
6 core political speech is subject to strict scrutiny.
7

8 The PEST Defendants have prepared a detailed Motion for Preliminary Injunction and
9 Motion for Partial Summary Judgment as to Count 1 of the Cross Complaint, but up until now
10 have waited for the resolution of the Motion to Remand. Alternatively, the PEST Defendants are
11 prepared, if necessary, to re-file their Cross Complaint in Federal Court as a Direct Complaint
12 against the Secretary of State and raise the same constitutional violations. Should this occur, the
13 plaintiffs, who are the real parties in interest, would not be a party to this action, and would be in
14 the position of being required to file a motion to intervene, or asking for permission to file
15 amicus briefs to support the constitutionality of NRS 295.009 and NRS 295.061. Should this
16 occur, there would be a separate case taking place in state court, and another one taking place in
17 federal court. For the sake of judicial economy, this would not be the preferred approach.
18 Furthermore, the plaintiffs would try to use *res judicata* against the PEST Defendants in federal
19 court, despite the fact, that the issues the PEST Defendants raise are capable of repetition with
20 every initiative petition filed.
21

22 After filing the Cross Complaint, the Secretary of State filed a Motion to Remand this case,
23 because the PEST Defendants had not obtained his permission to remove the case to federal
24 court. The day after the Secretary of State filed their Motion to Remand, the remaining plaintiffs
25 joined in the Motion to Remand and made the same arguments as the Secretary of State. This
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1 Court has raised the question whether it can accept jurisdiction in a removal context by the PEST
2 defendants, when the basis for federal jurisdiction is a pre-election challenge to a ballot question
3 where the plaintiffs claim that the proposed initiative is unconstitutional on its face.
4

5 The PEST Defendants respectfully submit that the question raised by this Honorable Court
6 and the cases mentioned in the May 30, 2008 minute order hold that state courts or federal
7 courts, should **not decline to accept jurisdiction** in these cases. These cases merely hold that
8 **courts should decline to grant the relief requested** by plaintiffs and not remove ballot questions
9 prior to an election. To grant the relief requested puts the Court in a position of issuing an
10 advisory opinion. In other words, the courts have subject matter jurisdiction to hear the cases,
11 but they should decline to exercise their power to remove the ballot question. The PEST
12 Defendants believe this Honorable Court has Federal Question Jurisdiction over Count Four of
13 plaintiffs' complaint and that the PEST Defendants properly removed it to federal court. The
14 PEST Defendants believe that *Herbst* and the other cases cited hold that this Court should
15 decline to remove the PEST initiative as violating the Equal Protection Clause of the Fourteenth
16 Amendment to the U.S. Constitution as a matter of "ripeness."
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19 To grant the Motion to Remand would allow the plaintiffs to raise a federal question
20 invoking the federal constitution in state court and argue why the initiative should be removed
21 prior to the election, but deny the Defendants the same protection of those federal laws, which
22 specifically gives them the right to remove and raise their defenses in federal court on federal
23 question matters. The plaintiffs, who were masters of their own complaint, pled the federal
24 count. Whether those federal issues have merit or not is another questions. To remand this case
25 to state court would be to deny the PEST Defendants the Equal Protection of the laws as
26 guaranteed to them by the Fourteenth Amendment of the U.S. Constitution. To remand this case
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1 to state court would also deny the PEST Defendants procedural Due Process of law as
2 guaranteed to them under the Fifth and Fourteenth Amendment to the U.S. Constitution.

3
4 **I.**

5 ***HERBST GAMING STANDS FOR THE PROPOSITION THE COURTS SHOULD NOT***
6 ***ISSUE ADVISORY OPINIONS IN PRE-ELECTION CHALLENGES TO BALLOT***
7 ***QUESTIONS ALLEGING THAT THE PROPOSED LAW IS UNCONSTITUTIONAL,***
8 ***BUT DOES NOT STAND FOR THEIR LACK OF SUBJECT MATTER JURISDICTION.***

9 Of the challenges to the twelve (12) initiatives filed with the Secretary of State this year, only
10 in this case, did the plaintiffs allege a Federal Claim.¹ Specifically, the plaintiffs allege as
11 follows in Count 4 at paragraph 52 of their complaint: “*The Initiative, on its face, violates the*
12 *United States Constitution and the Nevada Constitution.*” If this were not a pre-election
13 challenge, there would be no doubt under the general guidelines bestowing jurisdiction on the
14 federal courts when a cause of action is filed and a violation of a federal constitutional right is
15 alleged, federal court jurisdiction is to be invoked. 28 USC §§ 1331 provides in relevant part:

16
17 Section 1331. Federal question.

18 “The district courts shall have original jurisdiction of all civil actions arising under
19 the Constitution, laws, or treaties of the United States.”

20 However, in the cases cited by the Court, we shall show why they are all distinguishable and do
21 not suggest that this Court should refuse to exercise jurisdiction in this case.

22 In *Herbst Gaming, Inc. v. Heller*, 122 Nev. 877, 141 P. 3d 1224 (2006), the Nevada
23 Supreme Court considered a pre-election challenge to remove a proposed initiative petition off
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¹ Two years ago, when Question 2 was challenged, the plaintiffs challenged the Nevada Property
27 Owners Bill of Rights as violating the single subject rule of NRS 295.009, but also alleged that it
28 was a violation of the Fourteenth Amendment. Those plaintiffs were represented by the same
law firm as the plaintiffs in this case. No other plaintiffs in the last two election cycles have
alleged that a proposed initiative is unconstitutional on its face.

1 the ballot. The Court noted that there are three types of pre-election challenges and relied upon a
2 Washington Supreme Court decision in stating the standard. The Washington Supreme Court in
3 *Coppernoll v. Reed*, 155 Wash. 2d 290, 119 P. 2d 3d, 318, 321 (2005) noted that the three areas
4 of pre-election challenges were: (1) the procedural requirements for placing a measure on the
5 ballot are not met; (2) the subject matter is not appropriate for direct legislation under
6 constitutional or statutory limits on the initiative power; and (3) the measure, if passed, would
7 violate substantive federal or state constitutional provisions. *Herbst Gaming, Inc.*, 141 P. 3d at
8 1228.²

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10
11 The Nevada Supreme Court stated that challenges alleging procedural defects are
12 virtually always ripe for pre-election review. The Court then stated that there is a second
13 category of challenges where the Court will generally accept jurisdiction in a pre-election
14 challenge. When the subject of a proposed initiative attempts to pass laws that specify
15 administrative details rather than legislation, or that there is a specific restriction allowing
16 jurisdiction such as the single subject law, or that the proposed initiative includes a spending
17 appropriation without providing for the necessary tax, then the Court can accept jurisdiction and
18 hear the pre-election challenge. *Herbst Gaming, Inc.*, 141 P. 3d at 1228.

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20
21 The Nevada Supreme Court then noted that pre-election challenges alleging violations of
22 the state or federal constitution in a majority of the jurisdictions are generally not permitted.
23 *Herbst Gaming, Inc.*, 141 P. 3d at 1229. The holding of the Nevada Court was not that it did not
24 have subject matter jurisdiction to hear the case, but that it was not going to exercise its
25 jurisdiction to “remove” an initiative petition for constitutional violations that will occur in the
26 future should the voters approve the initiative. In many ways, the Nevada Court’s concern was
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² The Herbst Court also recognized that the Secretary of State was a “nominal”

1 not with subject matter jurisdiction to hear the case, but with “ripeness” and whether it was too
2 soon for the Court to issue what in essence would amount to an “advisory opinion.”

3
4 The PEST Defendants agree with the reasoning of the *Herbst* Court that the Courts,
5 Federal or State, should not grant the injunction the Plaintiffs are seeking and remove the PEST
6 Initiative prior to the election, just because they allege that it might violate the Fourteenth
7 Amendment to the U.S. Constitution. The PEST Defendants do not believe that *Herbst* prohibits
8 the plaintiffs from having their day in this Court and making these arguments. Dismissal on the
9 merits such as a FRCP 12 (b) motion or motion for summary judgment are different than a
10 remand claiming that there is no jurisdiction.
11

12 The PEST Defendants disagree with the Plaintiffs that their initiative violates the single
13 subject rule, and they also disagree that their Description of Effect is false and misleading. The
14 Defendants acknowledge that NRS 295.061 allows Plaintiffs to bring their pre-election challenge
15 to Court and try to convince the Nevada state judges that their claims have merit, but disagree
16 that a pre-election challenge does not give subject matter jurisdiction to this Court. Secondly, for
17 this Court to reject subject matter jurisdiction and remand to state court knowing they have
18 jurisdiction under the second prong of *Herbst* which allows pre-election challenges for
19 procedural/substantive issues as opposed to substantive/constitutional issues would be making
20 a decision contrary to the well-pleaded complaint rule. *Herbst*, 141 P.3d at 1229
21

22
23 The plaintiffs can assert state jurisdiction under NRS 295.009 and NRS 295.061 and
24 allege violations under those statutes, and throw in violations of federal law, knowing that the
25 Federal Courts will be reluctant to hear a matter primarily based upon state law violations. If the
26 plaintiffs had not wanted to create the right for defendants to remove their case to federal court,
27 since they controlled their own destiny, they should not have alleged any violations of federal
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1 law. To allow Plaintiffs to assert violations of federal law, and to prevent the PEST Defendants
2 from having a Federal Court hear the matter is to deny the PEST Defendants their right to defend
3 themselves in a federal forum, which Congress mandated for these types of situations.
4

5 **II.**

6 **COURTS CAN EXERCISE JURISDICTION AND REMOVE AN INITIATIVE** 7 **PRIOR TO AN ELECTION IF IT IS PLAIN ON ITS FACE THAT IT VIOLATES** 8 **THE STATE OR FEDERAL CONSTITUTION.**

9 In some jurisdictions, when a proposed initiative petition would clearly violate the U.S.
10 or State Constitution, and it is plainly evident on the face of the initiative, courts will intervene
11 prior to an election and remove an initiative prior to an election. In this case, plaintiffs allege in
12 Count IV, that if passed, PEST is unconstitutional on its face.
13

14 In *Montana Citizens for the Preservation of Citizens' Rights v. Waltermire*, 224 Mont.
15 273, 729 P.2d 1283 (Mont. 1986), the Montana Supreme Court stated that when a proposed
16 initiative on its face is unconstitutional, then the courts should intervene and remove the
17 proposed initiative. After, analyzing the proposed initiative, the Court decided that although it
18 might be unconstitutional as applied, it was not unconstitutional on its face.
19

20 The other two other cases cited in the Minute Order, *Ranjel v. City of Lansing*, 417 F. 2d
21 321 (C.A. Mich. 1969) and *City of Rocky Ford v. Brown*, 133 Colo. 262, 293 P. 2d 974 (1956)
22 raise the same concern. Both of these cases involved a federal constitutional challenge to
23 remove a ballot initiative prior to a vote at the general election. Both courts held that to issue the
24 injunctions and remove the ballot questions would be the same as issuing an advisory opinion
25 prior to election on the constitutionality of the ballot question. The irony of the Court's question
26 is that the PEST Defendants are being handcuffed, because the Courts recognize that when
27 Plaintiffs bring pre-election challenges and allege federal constitutional violations, the Courts,
28

1 including the Federal Courts have subject matter jurisdiction to hear those matters. However, if
2 that same case is removed to federal court, the Defendants are not allowed to be heard on
3 plaintiff's federal claims. However, a crucial factual difference between the three cases cited by
4 the Court and this case is that in this case, there was a Cross Claim filed against one of the
5 Defendants and the Cross Claim clearly has an independent basis for federal jurisdiction.
6

7 III.

8 **EVEN IF THIS COURT DETERMINES THAT IT DOES NOT HAVE FEDERAL** 9 **JURISDICTION OVER PLAINTIFF'S CLAIM, THE COURT CAN MAINTAIN** 10 **JURISDICTION IF THERE IS A COUNTERCLAIM OR CROSS CLAIM THAT** 11 **CREATES AN INDEPENDENT BASIS FOR JURISDICTION.**

12 In Manufacturer's Casualty Insurance Co v. Arapahoe Drilling Co., 267 F. 2d 5 (10th Cir.
13 1957), the Court of Appeals stated: "It is apparent in those exceptional cases where a
14 counterclaim may survive the jurisdictional failure of a complaint that at least three premises
15 must exist. Jurisdiction must exist within the scope of the allegations of the counterclaim; the
16 claim made in the counterclaim must be independent of that made in the main case; and lastly,
17 affirmative relief must be sought." Id. at 8. (Emphasis added).
18

19 As explained in Wright & Miller, Federal Practice and Procedure, sec. 1414 at page 113,114:

20 "This result seems proper since the court's ancillary jurisdiction over the counterclaim arises
21 out of its jurisdiction over the principal claim; therefore, once the court determines that there is
22 no federal jurisdiction over the plaintiff's claim, there is nothing to support ancillary jurisdiction
23 over the counterclaim. Of course, if the counterclaim does present an independent basis of
24 federal jurisdiction, the court may adjudicate it as if it were an original claim despite the
25 dismissal of plaintiff's claim. Indeed, the original plaintiff might then reassert his dismissed
26 claim as a compulsory counterclaim since it in effect will be a counterclaim and be under the
27 court's ancillary jurisdiction." (Emphasis added).
28

The same reasoning applies under FRCP 13(g) with respect to Cross Claims. Wright &
Miller, Federal Practice and Procedure, sec. 1433 at page 258 in discussing Rule 13 explains that
the dismissal of the original suit for lack of subject matter jurisdiction will require the court to

1 dismiss the cross-claim, unless that claim is supported by an independent basis of federal
2 jurisdiction. In *Elliott v. Federal Home Loan Bank Bd.* 233 F. Supp. 578, 588, (D.C. Cal. 1964),
3 the court there held that a cross-claim will vest jurisdiction in the court if there are independent
4 grounds for jurisdiction over the cross-claim, regardless of the lack of jurisdiction in the original
5 action. The Elliot Court relied on the established rule in the 9th Circuit in *Pioche Mines Consol.,*
6 *Inc. v. Fidelity-Philadelphia Trust Co.* 206 F. 2d 336 (9th Cir. 1953). In *Pioche*, the 9th Circuit
7 stated the rule for these situations. The Court said:
8

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10 “Fidelity argues that the dismissal of its complaint renders mandatory a dismissal of the
11 counterclaim also. We think not. Compulsory counterclaims are required to be dismissed only
12 when the complaint is dismissed for want of jurisdiction, which was not the case here. The
13 counterclaim persists where it is supported by an independent ground of federal jurisdiction.”
14 *Pioche*, 206 F. 2d at 336.

15
16 When sued by the plaintiffs for violating the single subject rule, as part of their independent
17 defense, the PEST Defendants in good faith raised the issue about the abuse of NRS 295.009 and
18 boldly asserted that groups were out of control in raising these initiative petition challenges.
19 Prior to the cross complaint that was filed by the PEST Defendants, every single initiative
20 petition challenged in the Nevada state courts were found to be in violation of NRS 295.009,
21 except for the initiative filed by Sharron Angle, which was challenged as having a misleading
22 description of effect. Amazingly, since the filing of the Cross Complaint, not one petition was
23 found to be in violation of the single subject rule of NRS 295.009.

24
25 The Cross Complaint creates an independent basis for this Court to maintain jurisdiction,
26 even if this Court believes that it should not exercise jurisdiction based upon the alleged Equal
27 Protection argument raised by plaintiffs in their complaint. 28 USC 1441 (f) states:

28 (f) The court to which a civil action is removed under this section
is not precluded from hearing and determining any claim in such civil
action because the State court from which such civil action is removed
did not have jurisdiction over that claim. (Emphasis added).

1 28 USC 1441 (f) has also resolved the traditional problem that federal courts encountered
2 when it was thought that a federal court's jurisdiction was derivative of the state courts subject
3 matter jurisdiction. 28 USC 1441 (f) provides that removal jurisdiction is not defeated by the
4 fact that the state court lacked subject matter jurisdiction over the claim.
5

6 Defendants are challenging the constitutionality of NRS 295.009 and NRS 295.061,
7 therefore, it makes more sense to have it heard here and now. The PEST Defendants could have
8 this matter heard in front of another federal court by filing a direct federal claim, if this Court is
9 of the opinion that the federal question jurisdiction raised by the plaintiffs in their well-pleaded
10 complaint is hanging from a weak branch. However, for the sake of judicial economy, the PEST
11 Defendants urge this court to deny the motion to remand and allow them to file their Motion for
12 Preliminary Injunction and/or Motion for Partial Summary Judgment as to Count 1 of the Cross-
13 Complaint.
14

15 Furthermore, although this is a case involving a federal question, just as Congress created
16 diversity jurisdiction for the perceived biases against out of state defendants, the PEST
17 Defendants have more confidence in the federal courts where the judges are not dependant on
18 financial contributions for their elections. The plaintiffs, the intervener, and the amici are the
19 most powerful financial and political interests in Nevada. The PEST Defendants realize that this
20 is not a separate basis for the exercise of federal jurisdiction. However, since the Nevada
21 Supreme Court has already ruled that NRS 295.009 was constitutionally enacted and does not
22 violate the First Amendment, it would be pointless to try to ask the State Supreme Court to
23 overrule themselves just two years after *Nevadans for the Protection of Property Rights v.*
24 *Heller, 122 Nev. 894, 141 P. 3d 1235 (2006).*
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1 For the foregoing reasons, the PEST Defendants urge this Court to deny the Motion to
2 Remand and permit them to file the other Motions they have pending.

3 DATED this 5th day of June 2008.
4

5 Respectfully submitted by:
6

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1 **CERTIFICATE OF SERVICE**

2 I certify that I am an Attorney licensed to practice law in Las Vegas, Nevada and that on the 5th
3 day of June, 2008, I served the foregoing Supplemental Brief in Opposition to the Motion to
4 Remand on behalf of Defendants PEST Committee, Tony Badillo, Jack Lipsman, and Al
5 Maurice by attaching the foregoing document through electronic mail at the email addresses that
6 were provided to me by them and listed below.

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21 This is to certify a copy of the foregoing documents were served upon all counsel of record by
22 means of the Court's electronic filing system on June 5, 2008 and through my personal email
23 account from evelyn@kermittwaters.com and kermittwaters@yahoo.com.

23 */s/ Kermitt L. Waters*
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