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IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CARSON CITY

HELLEN QUAN LOPEZ, individually
and on behalf of her minor child, C.Q.;
MICHELLE GORELOW, individually
and on behalf of her minor children,
A.G. and H.G.; ELECTRA
SKRYZDLEWSKI, individually and on
behalf of her minor child, L.M.;
JENNIFER CARR, individually and on
behalf of her minor children, W.C.,
A.C., and E.C.; LINDA JOHNSON,
individually and on behalf of her minor
child, K.J.; SARAH and BRIAN
SOLOMON, individually and on behalf
of their minor children, D.S. and K.S.,

Plaintiffs,

vs.

DAN SCHWARTZ, IN HIS OFFICIAL
CAPACITY AS TREASURER OF THE
STATE OF NEVADA,

Defendant.

CASE NO: 15 OC 00207 1B
DEPT.: 2

ORDER GRANTING MOTION FOR
PRELIMINARY INJUNCTION

PROCEDURAL BACKGROUND

Before the Court is Plaintiffs' Motion for a Preliminary Injunction. Plaintiffs are parents whose children attend Nevada public schools. Plaintiff Parents seek an injunction to stop the State Treasurer from implementing Senate Bill 302 ("SB 302") which authorizes educational savings accounts. Plaintiff Parents alleged SB 302 violates certain sections of Article 11 of the Nevada Constitution. State Treasurer Dan Schwartz

1 opposed the motion. The court authorized the filing of several amicus briefs, and denied
2 a motion to intervene. The court held a hearing on the motion.

4 ISSUES AND CONCLUSIONS

5 As a preliminary matter, the court emphasizes that the issues before it do not
6 include the educational or public policy merits of the education savings account
7 provisions of SB 302. The educational and public policy issues were debated and voted
8 upon by the legislature and approved by the governor. Courts have no super-veto power,
9 based upon public policy grounds, over legislative enactments. Therefore, this court
10 cannot consider whether the SB 302 provisions for education savings accounts are wise,
11 workable, or worthwhile.

12 Plaintiff Parents argued SB 302 violates the Nevada Constitution in three ways:

13 First, it violates Article 11, Section 3 and Sections 6.1 and 6.2 because those
14 sections prohibit the transfer of funds appropriated for the operation of the
15 public schools to any other use.

16 Second, it violates Article 11, Section 6.2 because it removes from the
17 public school system a portion of the funds the Legislature has "deemed
18 sufficient" to maintain and operate the public schools.

19 Third, it violates Article 11, Section 2 because it creates a non-uniform
20 system of schools, and uses public funds to create the non-uniform system of
21 schools.

22 Having examined the submissions the parties and the amicus briefs, and having
23 heard oral argument by the parties, this court concludes Plaintiff Parents have failed to
24 carry their burden of proof that SB 302 violates Article 11, Sections 2 or 3 of the Nevada
25 Constitution, but that Plaintiff Parents have carried their burden of proof that SB 302
26 violates Article 11, Sections 6.1 and 6.2, and that irreparable harm will result if an
27 injunction is not entered. Therefore an injunction will issue to enjoin Treasurer
28 Schwartz from implementing SB 302.

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3 **FINDINGS OF FACT**

4 **Public School Funding**

5 The Nevada Constitution requires the legislature to support and maintain public
6 schools by direct legislative appropriation from the general fund, and to provide the
7 money the legislature deems to be sufficient, when combined with the local money, to
8 fund the public schools for the next biennium. To fulfill its constitutional obligation to
9 fund education, the legislature created the Nevada Plan, statutes which establish the
10 process by which the legislature determines the biennial funding for education. Under
11 the Nevada Plan the legislature establishes basic support guarantees for all school
12 districts.

13 The basic support guarantee is the amount of money each school district is
14 guaranteed to fund its operations. The amount for each school district is determined by
15 the number of pupils in that school district. After the legislature determines how much
16 money each local school district can contribute, the legislature makes up the difference
17 between the district's contribution and the amount of the basic support guarantee.

18 Under NRS 387.1233(3), the so-called "hold harmless" provision, a school district
19 must be funded based on the prior year's enrollment figure if the school district
20 experiences a reduction in enrollment of five percent or more.

21 Funds appropriated by the legislature from the general fund sufficient to satisfy
22 each district's basic support guarantee are deposited into the State Distributive School
23 Account ("DSA"), which is an account within the state general fund.

24 The DSA, in addition to receiving such appropriations from the general fund, also
25 receives money from other sources, including the Permanent School Fund ("PSF"). The
26 legislature created the PSF to implement Article 11, Section 3 of the Nevada
27 Constitution, which provides that specified property, including lands granted by
28 Congress to Nevada for educational purposes and the proceeds derived from these
sources, are pledged for educational purposes and the money therefrom must not be

1 transferred to other funds for other uses. Section 3 money is kept in the PSF, and
2 interest on Section 3 money is transferred to the DSA.

3 The interest on the PSF constitutes a small portion of the funds in the DSA. In
4 2014, of the \$1.4 billion in the DSA that came from the State Government, \$1.1 billion,
5 or 78 percent, came from the general fund, and \$1.6 million, or 0.14%, came from the
6 PSF.¹

7 In June 2015, the legislature enacted Senate Bill 515 (“SB 515”) to ensure
8 sufficient funding for K-12 public education for the 2015-2017 biennium. The legislature
9 established an estimated weighted average basic support guarantee of \$5,710 per pupil
10 for FY 2015-16 and \$5,774 per pupil for FY 2016-17.² The legislature appropriated \$1.1
11 billion from the general fund for the DSA for FY 2015-16 and more than \$933 million for
12 FY 2016-17, for a total of more than \$2 billion for the biennium.

14 **Senate Bill 302**

15 As part of the education reform measures enacted in 2015, the legislature passed
16 and the governor signed SB 302 which authorized the State Treasurer to use public
17 school funds to create private accounts called education saving accounts (“ESAs”). The
18 money in these accounts may only be used to pay for non-public education expenses,
19 including but not limited to private school tuition, tutoring, home-based education
20 curricula, and transportation.

21 Under SB 302 the State Treasurer may enter into written agreements with a
22 parent of a school aged child who has been enrolled in a Nevada public school for not
23 less than 100 consecutive school days. If a written agreement is entered into, the parent
24 must establish an ESA on behalf of the child, and the treasurer must deposit the grant
25 money into the ESA. For a child with a disability, or a child who lives in a low income

27 ¹See [http://www.doe.nv.gov/uploadedFiles/ndedoenvgov/content/Legislative/
28 DSA-SummaryForBiennium.pdf](http://www.doe.nv.gov/uploadedFiles/ndedoenvgov/content/Legislative/DSA-SummaryForBiennium.pdf).

²Id. Section 7.

1 household, the amount of the grant is 100% of the statewide average basic support per
2 pupil; for all other children the amount of the grant is 90% of the statewide average
3 basic support per pupil. For the 2015-16 school year the grant amounts will be \$5,710
4 per disabled or low income pupil, and \$5,139 for all other pupils. Funds deposited into
5 ESAs are subtracted from the legislative appropriation to fund the school district in
6 which the child who is receiving the ESA grant resides.

7 Under SB 302 general fund money appropriated to fund the operation of the
8 public schools will be used to fund education savings accounts.

9 SB 302 does not limit the number of ESAs that can be established, cap the
10 amount of public school funding that can be transferred to ESAs, or impose any
11 household income limitations on eligibility.

12 PRINCIPLES OF LAW

13 **Judicial Deference**

14 Judicial deference to duly enacted legislation is derived from three “first
15 principles” of state constitutional jurisprudence.³

16 First, all political power originates with the people.⁴

17 Second, unlike the Constitution of the United States which granted specific
18 powers to the federal government and retained all other powers in the people, the
19 Nevada Constitution granted all of the people’s political power to the government of
20 Nevada except as limited in the Nevada Constitution.⁵ The Nevada government consists
21 of three branches, the legislative, executive, and judicial. The public officials the people
22 elect to the constitutional offices in each branch exercise all of the people’s political
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25 ³*Gibson v. Mason*, 5 Nev. 283, 291-99, 1869 Nev. LEXIS 46 (1869); *King v.*
26 *Board of Regents*, 65 Nev. 533, 200 P.2d 221 (1948). See *Bush v. Holmes*, 919
27 So.2d 392, 414 (FL 2006) Bell, J. Dissent.

28 ⁴*Gibson* at 291.

⁵*Id.*

1 power except for those powers expressly denied by the Nevada Constitution.⁶ Each
2 branch is endowed with and confined to the execution of powers peculiar to itself, and
3 each branch is supreme within its respective sphere.⁷ Thus, the legislature is supreme in
4 its field of making the law so long as it does not contravene some express or necessarily
5 implied limitation appearing in the constitution itself.⁸ The people's grant of powers
6 upon the legislature was general in terms with specified restrictions.⁹ The legislature has
7 general legislative or policy-making power over such issues as the education of Nevada's
8 children except as those powers are specifically limited by an express or necessarily
9 implied provision in the Nevada Constitution or the U.S. Constitution.¹⁰

10 Third, because general legislative or policy-making power is vested in the
11 legislature, the power of judicial review over legislative enactments is strictly limited.
12 "Statutes are presumed to be valid, and the challenger bears the burden of showing that
13 a statute is unconstitutional."¹¹ "When making a facial challenge to a statute, the
14 challenger generally bears the burden of demonstrating that there is no set of
15 circumstances under which the statute would be valid."¹² "In case of doubt, every
16 possible presumption will be made in favor of the constitutionality of a statute, and
17 courts will interfere only when the Constitution is clearly violated."¹³ "Further, the

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19 ⁶*Id.* at 291-92.

20 ⁷*Id.* at 292.

21 ⁸*Gibson* at 292; *King* at 542.

22 ⁹*Gibson* at 292.

23 ¹⁰*King* at 542.

24 ¹¹*Busefink v. State*, 128 Nev. A.O. 49, 286 P.3d 599, 602,(2012), citing *Flamingo*
25 *Paradise Gaming v. Att'y General*, 125 Nev. 502, 509, 217 P.3d 546, 551 (2009)
(quoting *Silvar v. Dist. Ct.*, 122 Nev. 289, 292, 129 P.3d 682, 684 (2006)).

26 ¹²*Deja Vu Showgirls of Las Vegas, LLC v. Nev. Dep't of Taxation*, 130 Nev. A.O.
27 73, 334 P.3d 392, 398 (2014).

28 ¹³*List v. Whisler*, 99 Nev. 133, 137-138, 660 P.2d 104, 106 (1983), citing *City of*
Reno v. County of Washoe, 94 Nev. 327, 333-334, 580 P.2d 460 (1978);

1 presumption of constitutional validity places upon those attacking a statute the burden
2 of making a clear showing that the statute is unconstitutional.”¹⁴ The Nevada Supreme
3 Court has “concede[d] the elasticity of the [Nevada] constitution, as a living thing, to be
4 interpreted in the light of new and changing conditions,” and that the Supreme Court
5 “may not condemn legislation simply because the object or purpose is new (no matter
6 how astonishing or revolutionary) so long as a constitutional limitation is not
7 violated...”¹⁵

8
9 **Preliminary Injunction**

10 A preliminary injunction may issue “upon a showing that the party seeking it
11 enjoys a reasonable probability of success on the merits and that the defendant’s
12 conduct, if allowed to continue, will result in irreparable harm for which compensatory
13 damage is an inadequate remedy.”

14
15 **ANALYSIS**

16 Plaintiff Parents have made a facial challenge to SB 302. Using the above
17 principles of law the court must decide whether Plaintiff Parents have made a clear
18 showing that SB 302 violates one or more specified sections of Article 11 of the Nevada
19 Constitution, and that the plaintiffs will suffer irreparable harm.

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25 *Mengelkamp v. List*, 88 Nev. 542, 545, 501 P.2d 1032 (1972); *State of Nevada v. Irwin*, 5 Nev. 111 (1869).

26 ¹⁴*List v. Whisler* at 138, citing *Ottenheimer v. Real Estate Division*, 97 Nev. 314,
27 315-316, 629 P.2d 1203 (1981); *Damus v. County of Clark*, 93 Nev. 512, 516, 569
28 P.2d 933 (1977); *Koscot Interplanetary, Inc. v. Draney*, 90 Nev. 450, 456, 530
P.2d 108 (1974).

¹⁵*King* at 543.

1 **Reasonable Probability of Success on the Merits**

2
3 *Plaintiff Parents have not clearly shown that SB 302 violates Article 11, Section 3.*

4
5 Plaintiff Parents pointed out that Article 11, Section 3 provides that funds from
6 sources specified in Section 3 are “pledged for educational purposes and the money
7 therefrom must not be transferred to other funds for other uses.” They cited *State ex rel.*
8 *Keith v. Westerfield*¹⁶ for the proposition that funds appropriated for the public schools
9 under Article 11 can only be used for the support of the public schools and no portion of
10 those funds can be used for non-public school expenditures “without disregarding the
11 mandates of the constitution.”¹⁷ Plaintiff Parents argued that because SB 302, Section
12 16.1 directs the State Treasurer to transfer into ESAs the basic support guarantee per-
13 pupil funding appropriated by the legislature for the operation of the school district in
14 which the ESA-eligible child resides, SB 302, Section 16.1 violates Article 11, Section 3.

15 The Treasurer countered that SB 302 does not mandate the use of Section 3
16 money for the ESA program, and the Distributive School Account has sufficient money
17 to fund the ESA program without using Section 3 money. The Treasurer argued that
18 based upon these facts the Plaintiff Parents have not met their burden of proof.

19 The court concludes the Treasurer’s argument is correct. Because SB 302 does
20 not require the use of Section 3 money for the ESA program, the ESA program can be
21 funded without Section 3 money, and therefore Plaintiff Parents have not met their
22 burden of clearly proving that there is no set of circumstances under which the statute
23 would be valid, and therefore Plaintiff Parents have failed to show a reasonable
24 likelihood of success on the merits on the Article 11, Section 3 issue.

25 The Treasurer also argued that the ESA program was created for and serves
26 educational purposes. The court concludes this argument lacks merit because the

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28 ¹⁶23 Nev. 468 (1897).

¹⁷Id. at 121.

1 Nevada Supreme Court held in *State ex rel. Keith v. Westerfield* that the legislature is
2 prohibited from using Article 11 Section 3 funds for any purpose except that immediately
3 connected with the public school system.

4 The court concludes the other arguments made by the Treasure on the Article 11,
5 Section 3 issue also lack merit.

6
7 *Plaintiff Parents have clearly shown that SB 302 violates Article 11, Sections 6.1 and*
8 *6.2.*

9 Plaintiff Parents argued SB 302, Section 16(1) violates Article 11, Sections 6.1 and
10 6.2 because general funds appropriated to fund the operation of the public schools must
11 only be used to fund the operation of the public schools, but under SB 302 some amount
12 of general funds appropriated to fund the operation of the public schools will be diverted
13 to fund education saving accounts.

14 Under SB 302 general fund money appropriated to fund the operation of the
15 public schools will be used to fund education savings accounts. The legislature
16 recognized that general fund money appropriated to fund the operation of public schools
17 would be used to fund education savings accounts. This is evidenced by the legislature's
18 amendment of NRS 387.045 which provides:

- 19 1. No portion of the public school funds or of the money specially
20 appropriated for the purpose of public schools shall be devoted to any
other object or purpose.
- 21 2. No portion of the public school funds shall in any way be segregated,
22 divided or set apart for the use or benefit of any sectarian or secular society
or association.

23 The legislature amended that statute to make an exception so funds appropriated for
24 public schools can be used to pay the education savings account grants established by SB
25 302.

26 Sections 6.1 and 6.2 require the legislature to support public schools by direct
27 legislative appropriation from the general fund before any other appropriation is
28 enacted. Those sections do not expressly say that the general funds appropriated to fund

1 the operation of the public schools must only be used to fund the operation of the public
2 schools. Sections 6.1 and 6.2 do however necessarily imply that the legislature must use
3 the general funds appropriated to fund the operation of the public schools only to fund
4 the operation of the public schools.

5 Sections 6.1 and 6.2 mandate that the legislature make appropriations to fund the
6 operation of the public schools. An “appropriation” is “the act of appropriating to ... a
7 particular use;” or “something that has been appropriated; *specif*: a sum of money set
8 aside or allotted by official or formal action for a specific use (as from public revenue by
9 a legislative body that stipulates the amount, manner, and purpose of items of
10 expenditure)....”¹⁸ To “appropriate” means “to set apart for or assign to a particular
11 purpose or use in exclusion of all others.”¹⁹ Therefore, Sections 6.1 and 6.2 require the
12 legislature to set apart or assign money to be used to fund the operation of the public
13 schools, to the exclusion of all other purposes. Because some amount of general funds
14 appropriated to fund the operation of the public schools will be diverted to fund
15 education saving accounts under SB 302, that statute violates Sections 6.1 and 6.2 of
16 Article 11.

17 Plaintiff Parents have met their burden of clearly proving that there is no set of
18 circumstances under which the statute would be valid, and therefore Plaintiff Parents
19 have shown a reasonable likelihood of success on the merits on the Article 11, Sections
20 6.1 and 6.2 issue.

21
22 *Plaintiff Parents have clearly shown that SB 302 violates Article 11, Section 6.2.*

23 Plaintiff Parents argued SB 302 violates Article 11, Section 6.2 because: “The
24 direct legislative appropriation can only be used ‘to fund the operation of the public
25

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28 ¹⁸Webster’s Third New International Dictionary 106 (2002).

¹⁹Id.

1 schools..., ”²⁰ but SB 302 diverts funds from the DSA thereby reducing the amount
2 deemed sufficient by the legislature to fund public education.²¹

3 The Treasurer argued the legislature complied with Section 6.2 when it passed SB
4 515 which guarantees a minimum fixed amount of funding through the hold harmless
5 guarantee and a minimum per-pupil amount of funding with no upper limit, i.e., the
6 per-pupil basic support guarantee. The Treasurer pointed out that the legislature passed
7 SB 515 just three days after it passed SB 302, and that “when the legislature enacts a
8 statute, [the Nevada Supreme Court] presumes that it does so ‘with full knowledge of
9 existing statutes relating to the same subject.’”²²

10 The court concludes Plaintiff Parents’ argument is correct. Under Sections 6.1
11 and 6.2 the legislature must appropriate from the general fund an amount for the
12 operation of the public schools. The legislature appears to have appropriated money
13 from the general fund into one account to fund the operation of the public schools and
14 to fund ESAs. Because Section 6.2 requires the legislature to appropriate money to fund
15 the operation of the public schools, it is necessarily implied that the money appropriated
16 to fund the operation of the public schools will be used to fund the operation of the
17 public schools and not for other purposes. SB 302’s diversion of funds from the Section
18 6 direct legislative appropriation from the general fund to fund the operation of the
19 public schools reduces the amount deemed sufficient by the legislature to fund public
20 education and therefore violates Article 11, Section 6.2.

21 Plaintiff Parents have met their burden of clearly proving that there is no set of
22 circumstances under which SB 302 would be valid, and therefore Plaintiff Parents have
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24 ²⁰Pls.’ Mot. For Prelim. Inj. p. 11.

25 ²¹Pls.’ Reply on Its Mot. For Prelim. Inj. p. 1.

26 ²²*Division of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 295, 995 P.2d
27 482, 486 (2000) citing *City of Boulder v. General Sales Drivers*, 101 Nev. 117,
28 118-19, 694 P.2d 498, 500 (1985).

1 shown a reasonable likelihood of success on the merits on the Article 11, Sections 6.2
2 issue.

3
4 *SB 302 does not create a non-uniform system of schools, or use public funds to create a*
5 *system of education other than the type mandated in Article 11 Section 2.*

6 Article 11 Section 2 requires the legislature establish and maintain a “uniform
7 system of common schools.” Plaintiff Parents argued the Legislature has enacted an
8 extensive framework of requirements to ensure the public schools are open to all
9 children and meet performance and accountability standards. They argued SB 302
10 allows public school funds to pay for private schools and other entities that are not
11 subject to the requirements applied to public schools, are unregulated, and not uniform.
12 For example, they argue, the private schools, online programs and parents receiving
13 public school funds under SB 302 do not have to use the state adopted curriculum
14 taught in public schools; meet public school teaching requirements; comply with other
15 educational standards and accountability requirements established for public schools;
16 and they do not have to accept all students so they may discriminate based on a
17 student’s religion or lack thereof, academic achievement, English language learner
18 status, disability, homelessness or transiency, gender, gender identity and sexual
19 orientation.

20 Plaintiffs also alleged that in mandating the establishment of a public school
21 system, the Nevada Constitution has, in the same breath, forbidden the Legislature from
22 establishing a separate, publicly-funded alternative to Nevada’s uniform system of
23 public schools. They cited *State v. Javier C.*²³ for the proposition that “Nevada follows
24 the maxim ‘*expressio unius est exclusio alterius*,’ the expression of one thing is the
25 exclusion of another”; and *King v. Bd. of Regents of Univ. of Nev.*²⁴ for the proposition
26 that “[t]his rule applies as forcibly to the construction of written Constitutions as other

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28 ²³128 Nev. A.O. 50, 289 P.3d 1194, 1197 (2012).

²⁴65 Nev. 533, 556, 200 P.2d 221 (1948).

1 instruments.” Plaintiff Parents argued that under this principle, the legislature may not
2 enact statutes that achieve constitutional goals by means different from those explicitly
3 provided for in the Constitution. The Nevada Supreme Court held that “[e]very positive
4 direction” in the Nevada Constitution “contains an implication against anything
5 contrary to it which would frustrate or disappoint the purpose of that provision.”²⁵

6 Plaintiff Parents have failed to show that the ESA program is contrary to or would
7 frustrate or disappoint the Article 11, Section 2 mandate that the legislature provide a
8 uniform system of common schools. SB 302 does not do away with public schools.
9 Therefore the *expressio unius est exclusio alterius* maxim does not prohibit the
10 legislature from providing students with options not available in the public schools.

11 Article 11, Section 1 requires the legislature to encourage by all suitable means the
12 promotion of intellectual, literary, scientific, mining, mechanical, agricultural, and
13 moral improvements. Plaintiff Parents’ argument would limit the legislature and stunt
14 the “encourage by all suitable means” provision of section 2.

15 The court concludes that Plaintiff Parents have failed to show that Article 11,
16 Section 2 prohibits the legislature from enacting SB 302. Therefore, Plaintiff Parents
17 have failed to show a likelihood of success on the merits on this issue.

19 **Irreparable Harm**

20 Plaintiff Parents argued the irreparable injury element for a preliminary
21 injunction is met because SB 302 violates the Nevada Constitution, and cited several
22 cases in support of their argument.²⁶

23 The Treasurer argued the court must weigh the potential hardship to the relative
24 parties and others, and the public interest, and cited cases in support of this proposition.

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26 ²⁵*Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967) (citation
omitted).

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28 ²⁶*City of Sparks v. Sparks Mun. Court*, 129 Nev. A.O. 38, 302 P.3d 1118, 1124
(2013); *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997); *Eaves*
v. *Bd. Of Clark Cnty Comm’rs*, 96 Nev. 921, 924-25, 620 P.2d 1248 (1980).

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3 **ORDER**


4 **IT IS ORDERED:**

5 Plaintiff Parents' Motion for Preliminary Injunction is granted.

6 State Treasurer Dan Schwartz will be preliminarily enjoined from implementing
7 the provisions of SB 302.

8 The parties confer and by January 18, 2016 arrange with the court's judicial
9 assistant to set a hearing on the issue of security and to set the trial on the merits. The
10 parties may appear by telephone if no evidence will be offered at the hearing on the issue
11 of security.

12 January 11, 2016.

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15 James E. Wilson Jr.
16 District Judge
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CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of the First Judicial District Court, and I certify that on January 11, 2016, I deposited for mailing at Carson City, Nevada, and emailed, a true and correct copy of the foregoing Order and addressed to the following:

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