MEADOW VALLEY CONTRACTORS

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ORDER

Presently before this Court is Defendants Terry Johnson's and GailMaxwell's Motion to Dismiss (#11) filed on January 31, 2000. PlaintiffsMeadow Valley Contractors, Inc. and Walter Construction (USA), Inc. filedan Opposition (#14) on February 9, 2000. Defendants filed a Reply (#16)and an Affdavit in Support of Motion to Dismiss (#17) on February 14,2000.

I. BACKGROUND

This is a dispute arising out of the interpretation andconstitutionality of provisions of Nevada's prevailing wage laws. TheNevada Legislature has created a regulatory scheme governing the paymentof wages to workmen employed in state public works projects. UnderNev.Rev.Stat. § 338.040, all "[w]orkmen employed by contractors orsubcontractors or by public bodies at the site of the work and necessaryin the execution of any contract for public works are deemed to beemployed on public works." Employers of such workers are subject tocertain prevailing wage requirements. Section 338.020 states, inpertinent part, that:

1. Every contract to which a public body of this state is a party, requiring the employment of skilled mechanics, skilled workmen, semiskilled mechanics, semiskilled workmen or unskilled labor in the performance of public work, must contain in express terms the hourly and daily rate of wages to be paid each of the classes of mechanics and workmen. The hourly and daily rate of wages must:

(a) Not be less than the rate of such wages then prevailing in the county in which the public work is located, which prevailing rate of wages must have been determined in the manner provided in NRS 338.030; and

3. The prevailing wage so paid to each class of mechanics or workmen must be in accordance with the jurisdictional classes recognized in the locality where the work is performed.

Nev.Rev.Stat. § 338.020(1), (3).

Co-Plaintiff Walter Construction, Ltd. ("Walter Construction") is aconstruction company doing business in the State of Nevada as a generalcontractor. Walter Construction entered into an agreement withCo-Plaintiff Meadow Valley Contractors, Inc. ("Meadow Valley") for themanufacture and installation of precast bridge segments for theInterstate 15/U.S. Highway 95 Interchange

(commonly referred to as the"Spaghetti Bowl"), a large public works project located in Las Vegas,Nevada. The precast bridge segments were constructed in a productionfacility located approximately 11 to 12 miles away from the SpaghettiBowl.

On or about December 10, 1999, Defendant Gail Maxwell, the then ActingLabor Commissioner of the State of Nevada, allegedly requested that theNevada Department of Transportation withhold approximately $249,000 fromthe final payment of Meadow Valley for its involvement in the SpaghettiBowl project. This amount allegedly represents the difference between thelawfully-required prevailing wage and the wages actually paid by WalterConstruction.

On January 7, 2000, Meadow Valley and Walter Construction (hereinafterreferred to as the "Plaintiffs") sued Terry Johnson (the current LaborCommissioner of the State of Nevada), Gail Maxwell, and Thomas E.Stephens (the Director of the NevadaDepartment of Transportation) in both their individual and officialcapacities. Stephens was dismissed as a party from this suit on January24, 2000. (Notice of Dismissal (#4)). Johnson and Maxwell (hereinafterreferred to as the "Defendants") remain. The Complaint (#1) asserts thatthe Defendants' withholding of public works funds violated Plaintiffs'procedural and substantive due process, in contradiction of the civilrights provisions of 42 U.S.C. § 1983, and the Declaratory JudgmentAct, 28 U.S.C. § 2201. Plaintiffs seek, in pertinent part, (1)injunctive relief "prohibiting Johnson, Maxwell, the Labor Commissioner,Stephens and/or NDOT [the Nevada Department of Transportation] fromenforcing or attempting to apply NRS 338 to Walter [Construction]'s workat the . . . pre-cast yard" and (2) "a declaration that the workperformed by Walter [Construction] at the . . . pre-cast yard for theSpaghetti Bowl project is not subject to the prevailing wage rates of NRS338." (Compl. ¶ 49(1)-(3)).

On January 13, 2000, this Court denied Plaintiffs' Ex Parte Motion forTemporary Restraining Order. (Order (#3)). On February 23, 2000, thisCourt denied Plaintiffs' Motion for Preliminary Injunction after hearingoral argument. (Order (#20)). Defendants, by way of their Motion toDismiss, now seek dismissal of all claims asserted against them.

II. MOTION TO DISMISS STANDARD

The issue presented by a motion to dismiss is not whether the plaintiffwill ultimately prevail, but whether she may offer evidence in support ofher claims. See Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 249 (9thCir. 1997). Thus, a district court must restrict its consideration tothose matters presented within the pleadings and presume the veracity ofall factual allegations made therein. See Usher v. City of Los Angeles,828 F.2d 556, 561 (9th Cir. 1987). Matters that lie within a party'spleadings include: (1) documents physically attached to the complaint, seeDurning v. First Boston Corp., 815 F.2d 1265, 1267 (9th Cir. 1987); (2)documents of undisputed authenticity that are merely alleged orreferenced within the complaint, see Parrino v. FHP, Inc., 146 F.3d 699,706 (9th Cir. 1998); Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir.1994); and (3) public records and other judicially noticeable evidence,see Barron v. Reich, 13 F.3d 1370, 1377 (9th Cir. 1994); MGIC Indem.Corp. v. Weisman, 803

F.2d 500, 504 (9th Cir. 1986).

III. DISCUSSION

Plaintiffs' claims for both injunctive and declaratory relief areclosely intertwined. The extent of Plaintiffs' rights and duties underNevada's prevailing wage laws will depend in large part upon theinterpretation of certain provisions within Chapter 338 of the NevadaRevised Statutes. Before adjudication of these issues, however,Defendants contend that dismissal of the entire action from federal courtis proper on the grounds of (A) immunity, (B) Younger abstention doctrineand (C) general justiciability grounds.

A. Defendants' Immunity From Suit

Defendants assert that the Eleventh Amendment and the absolute immunitydoctrine shield them from liability in suit. Plaintiffs, however,correctly point out that the posture of this action precludes theirusage.

For purposes of the Eleventh Amendment, a suit against an official inhis or her official capacity is a suit against that official's office.See Will v. Michigan Dep't of State Police, 491 U.S. 58, 71, 109 S.Ct.2304, 105 L.Ed.2d 45 (1989); Eaglesmith v. Ward, 73 F.3d 857, 860 (9thCir. 1995). States, however, are not considered to be "persons" forpurposes of 42 U.S.C. § 1983 and are therefore immune from suit. SeeDeNieva v. Reyes, 966 F.2d 480, 483 (9th Cir. 1992). Nevertheless, anexception to this rule of immunity applies to actions for injunctiverelief, see Kentucky v. Graham, 473 U.S. 159, 167 n. 14, 105 S.Ct. 3099,87 L.Ed.2d 114 (1985); Ex parte Young, 209 U.S. 123, 159-60, 28 S.Ct.441, 52 L.Ed. 714 (1908), such as the one before this Court. (Compl.¶ 49.) Accordingly, this Court will deny Defendants' requests fordismissal based upon Eleventh Amendment grounds.

Identical reasons undercut Defendants' reliance upon absolute immunitydoctrine. In certain instances, state executive branch officials areentitled to absolute immunity for acts of a quasi-judicial orquasi-prosecutorial nature. See Butz v. Economon, 438 U.S. 478, 512-13,98 S.Ct. 2894, 57 L.Ed.2d 895 (1978); Meyers v. Contra Costa County Dep'tof Social Servs., 812 F.2d 1154, 1157 (9th Cir. 1987). Like EleventhAmendment immunity, however, absolute immunity applies only to suits fordamages and will not preclude a suit for declaratory or injunctiverelief. See Fry v. Melaragno, 939 F.2d 832, 839 (9th Cir. 1991).

B. Propriety of Younger Abstention Doctrine

Defendants, however, rightly contend that this Court should abstainfrom adjudication of this case under Younger abstention doctrine. Underthis non-discretionary doctrine, see Fresh Int'l v. Agricultural LaborRelations Bd., 805 F.2d 1353, 1356 (9th Cir. 1986), federal courts mustrefrain from enjoining state administrative proceedings that are judicialin nature, see The San Remo Hotel v. City

and County of San Francisco,145 F.3d 1095, 1103 (9th Cir. 1998). Absent extraordinary circumstances,Younger abstention is required if the state proceedings (1) are ongoing,(2) implicate important state interests, and (3) provide the plaintiffwith an adequate opportunity to litigate his or her federal claims. SeeHirsh v. Justices of the Supreme Court, 67 F.3d 708, 712 (9th Cir.1995). This case fits comfortably within these three prongs.

First, there currently exists an ongoing state adjudicatoryadministrative proceeding worthy of deference. Contrary to Plaintiffs'assertions, propriety of Younger abstention is determined not by acomparison of the starting dates of the federal and state proceedings,but rather whether state proceedings have been initiated before theperformance of any "proceedings of substance on the merits" in the federalaction. See Polykoff v. Collins, 816 F.2d 1326, 1332 (9th Cir. 1987)(citations and quotation omitted). Here, the Nevada Office of the LaborCommissioner officially commenced a state action by filing anadministrative complaint against Walter Construction on February 1,2000. (Maxwell Aff.Ex. A.)[1] Pursuant to Nev.Rev.Stat. § 338.015,hearings before the Labor Commission to discuss the allegations thereinwere scheduled to be held between March 20 and March 23, 2000. (MaxwellAff.Ex. B.) In comparison, a federal action for prospective reliefadvances beyond its "embryonic stage" only upon the conduct of extensivehearings for a motion for preliminary injunction or the grant of such amotion. See Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 238, 104S.Ct. 2321, 81 L.Ed.2d 186 (1984). This Court held its preliminaryinjunction hearing on February 16, 2000, more than two weeks after thecommencement of the state action. Accordingly, this Court finds the stateproceeding to be ongoing or pending in nature.[2]

Second, state control of the distribution of public works funding andthe maintenance of a prevailing wage for workers constructing publicinfrastructure certainly seem to be matters of vital importance toNevada. While no court has directly classified such concerns for purposesof Younger, issues of similar consequence have justified abstention.See, e.g., Trainor v. Hernandez, 431 U.S. 434, 444-49, 97 S.Ct. 1911, 52L.Ed.2d 486 (1977) (enforcement of state welfare program); GettyPetroleum Corp. v. Harshbarger, 807 F. Supp. 855, 858 (D.Mass. 1992)(economic protection of franchised gasoline operators); H.P. Hood, Inc.v. Commissioner of Agric., Food, and Rural Resources, 764 F. Supp. 662,670 (D.Me. 1991) (pricing and health safety regulation of state dairyindustry).

Third, the state proceedings will provide Plaintiffs with theopportunity to raise their federal concerns. For purposes of Younger, itis enough that the federal constitutional claims "may be raised instate-court judicial review of the administrative proceeding." Ohio CivilRights Com'n v. Dayton Christian Schools, Inc., 477 U.S. 619, 629, 106S.Ct. 2718, 91 L.Ed.2d 512 (1986) (citation omitted). Here, Plaintiffsmay seek state judicial review of any decision by the LaborCommissioner, see Nev.Rev.Stat. §§ 233B.130(1), 607.215(3), whichallegedly causes constitutional injury, see Nev.Rev. Stat. § 233B.135(3).

The arguments raised in opposition by Plaintiffs fail to prevent theapplication of Younger abstention doctrine. It is true that, as Plaintiffscontend, Younger abstention is appropriate only when an injunction issought against the allegedly unconstitutional state judicial proceeding,as opposed to the

allegedly unconstitutional state act. See Jonathan Clubv. City of Los Angeles, 680 F. Supp. 1405, 1410 (C.D.Cal. 1988) (refusingabstention where injunction was sought against enforcement of ordinancerather than city's state-court proceeding). Yet reference to Plaintiffs'prayer for relief reveals a broadly-worded request that would engulf theextant administrative action before the Labor Commissioner. (Compl.¶ 49(2)). Moreover, even construing Plaintiffs' allegations in theirmost favorable light, this Court does not find the existence of the typeof "irreparable harm" meriting federal consideration of this case. SeeGrand Metropolitan PLC v. Pillsbury Co., 702 F. Supp. 236, 239 (D.Ariz.1988). This Court therefore finds dismissal of Plaintiffs' Complaint (#1)to be appropriate. See Delta Dental Plan of California, Inc. v. Mendoza,139 F.3d 1289, 1294 (9th Cir. 1998) (requiring dismissal, not stay, offederal claims abstained from under Younger).

C. Other Justiciability Issues

Even in the absence of Younger abstention doctrine, this Court wouldstill find dismissal to be proper under other general precepts ofjusticiability. In their § 1983 claim, Plaintiffs have asserted thatDefendants' conduct violated both the procedural and substantive dueprocess provisions of the Fourteenth Amendment. (Compl. ¶¶ 42-43.)Without deciding these issues, this Court further notes that exhaustionand Pullman abstention concerns would preclude the consideration of bothof these claims.

1. Exhaustion of State Procedural Due Process Remedies

The sine qua non of any § 1983 action is the deprivation of afederal right. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 150, 90S.Ct. 1598, 26 L.Ed.2d 142 (1970). "When state remedies are adequate toprotect an individual's procedural due process rights, a section 1983action alleging a violation of those rights will not stand." Brogan v.San Mateo County, 901 F.2d 762, 764 (9th Cir. 1990) (citing Wood v.Ostrander, 879 F.2d 583, 588 (9th Cir. 1989)). When construing a similarstate prevailing wage statute, the Ninth Circuit Court of Appeals heldthat the state's interest in ensuring prevailing wages was sufficient topermit the withholding of money from public works contractors withouta pre-deprivation hearing, as long as the statutory scheme provided for a"reasonably prompt" post-deprivation hearing. See G & G Fire Sprinklers,Inc. v. Bradshaw, 156 F.3d 893, 903-04 (9th Cir. 1998), judgment vacatedand remanded, ___ U.S. ___, 119 S.Ct. 1450, 143 L.Ed.2d 538 (1999),reinstated, 204 F.3d 941, 943-44 (9th Cir. 2000) (construing Californiaprevailing wage law).

Under Nevada's prevailing wage laws, the Labor Commissioner may order awithholding of public funds upon reasonable belief that a public worksemployee may have a valid and enforceable claim for the payment ofprevailing wages. See Nev.Rev.Stat. § 338.160(5). The Nevada LaborCommissioner's Practice Rules further require that:

If, from the complaint [of failure to pay a prevailing wage] or from other official records of the commissioner, it appears that the charges may be well founded, the commissioner will send written

notice to the person charged at least 14 days before the date fixed for the hearing. The notice must itemize the charges and set forth the date of the hearing.

Nev.Admin.Code ch. 607, § 607.200(3). Together, these provisionssatisfy the notice and fair hearing requirements of the Due ProcessClause. See Universal Elec., Inc. v. State ex rel. Office of LaborCom'r, 109 Nev. 127, 847 P.2d 1372, 1373 (1993). Plaintiffs, at aminimum, must request such a hearing before asserting a deprivation ofprocedural due process rights.

2. Pullman Abstention From Substantive Due Process Claim

Similarly inappropriate at this time would be an examination ofPlaintiffs' allegations that Johnson's and Maxwell's actions were both"arbitrary and capricious" and "without legal authority" (i.e., violatedsubstantive due process). (Compl. ¶ 42.) Under the Pullman abstentiondoctrine, federal court abstention is required when: (1) the complaintinvolves a sensitive area of social policy best left to the states; (2)state court clarification of state law might obviate the need forconstitutional adjudication by the federal court; and (3) there isuncertainty as to the meaning of the potentially determinative state lawat issue. See Railroad Comm'n v. Pullman Co., 312 U.S. 496, 501, 61S.Ct. 643, 85 L.Ed. 971 (1941); Burdick v. Takushi, 846 F.2d 587, 588(9th Cir. 1988).

All these factors are satisfied here. The regulation of constructionwages paid in state public works projects seems to be a matter of equalmagnitude to other areas properly abstained from under Pullman. See,e.g., Cedar Shake and Shingle Bureau v. City of Los Angeles, 997 F.2d 620,622 (9th Cir. 1993) (building fire safety codes); Mireles v. CrosbyCounty, 724 F.2d 431, 433 (5th Cir. 1984) (state welfare benefits);International Brotherhood of Elec. Workers v. Public Serv. Comm'n,614 F.2d 206, 212 (9th Cir. 1980) (public utilities rates and energyresource conservation). Moreover, it is unclear whether laborers at awork site physically removed from a public works project but whofabricate materials solely for use at such a project are subject toNev.Rev. Stat. § 338.040. State court clarification of the terms"site of the work" and "necessary in the execution of [a] contract forpublic works" might obviate the need of any substantive due processanalysis (i.e., find Johnson's and Maxwell's acts to be authorized bystatute). Accordingly, deference to state proceedings under Pullmanabstention grounds would be appropriate here as well.

IV. CONCLUSION

IT IS THEREFORE ORDERED that Defendants Terry Johnson's and GailMaxwell's Motion to Dismiss (#11) is GRANTED and that all claims assertedagainst Defendants Terry Johnson and Gail Maxwell, in both their officialand individual capacities, are DISMISSED.

1. The Administrative Complaint (Maxwell Aff. Ex. A) and theaccompanying Notice of Hearing on Administrative Complaint (MaxwellAff.Ex. B) were not attached or referenced within Plaintiffs' Complaint(#1) filed before this Court. Nevertheless, this Court may refer topublic records and other judicially noticeable documents in the context ofa motion

to dismiss. See Barron, 13 F.3d at 1377. Accordingly, this Courtwill hereby take judicial notice of the documents filed in conjunctionwith this administrative proceeding. See Dollinger v. State Ins. Fund,44 F. Supp.2d 467, 472 (N.D.N.Y. 1999).

2. The Court is aware that Plaintiffs' Ex Parte Motion for TemporaryRestraining Order (#2) was filed on January 13, 2000, and denied by thisCourt on that very same day. (Order (#3)). A denial of a request fortemporary order, however, is not a proceeding of substance on the meritsfor purposes of Younger. See Fresh Int'l, 805 F.2d at 1358 n. 5.