

IN THE SUPREME COURT OF THE STATE OF NEVADA

NBC UNIVERSAL, INC.,
Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK, AND THE HONORABLE J.
CHARLES THOMPSON, SENIOR
JUDGE,

Respondents,

and

DENNIS J. KUCINICH,
Real Party in Interest.

No. 50889

FILED

JAN 15 2008

TRACIE L LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

ORDER GRANTING PETITION
FOR WRITS OF PROHIBITION AND MANDAMUS

This original petition for writ relief challenges an order of the district court that requires petitioner NBC Universal, Inc., to allow real party in interest Dennis J. Kucinich to participate in a democratic presidential debate in Las Vegas, Nevada, on January 15, 2008. Based upon the petition and the parties' oral arguments, we have determined that writ relief is warranted.

Preliminarily, although the petition seeks relief solely in the form of prohibition, we conclude that it is more appropriately considered to be requesting both a writ of prohibition and a writ of mandamus.¹ These

¹See Budget Rent-A Car v. District Court, 108 Nev. 483, 484, 835 P.2d 17, 18 (1992) (noting that that in the interest of judicial economy, this court could construe a petition for a writ of mandamus as seeking relief in the form of prohibition); Koza v. District Court, 99 Nev. 535, 536, 665 P.2d 244, 245 (1983) (treating, in the interest of judicial economy, a petition seeking a writ of prohibition as requesting mandamus relief).

remedies are addressed to this court's sound discretion² and may be issued when no plain, speedy and adequate legal remedy exists.³ In this case, the court's order is styled a temporary restraining order, from which no appeal lies.⁴ Further, even if the order could be properly appealed under NRAP 3A(b)(2) as an order granting an injunction, the severe time constraints in operation would render an appeal an inadequate remedy.⁵ Thus, this matter is properly before us in the context of a petition for extraordinary relief.

This court may issue a writ of prohibition to arrest the proceedings of a district court exercising its judicial functions, when such proceedings are in excess of the jurisdiction of the district court.⁶ A writ of mandamus, on the other hand, is available to compel the performance of

²Smith v. District Court, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991).

³NRS 34.330; NRS 34.170.

⁴See NRAP 3A(b)(2) (providing that an appeal may be taken from an order granting or refusing to grant an injunction); Sugarman Co. v. Morse Bros., 50 Nev. 191, 198-99, 255 P. 1010, 1012 (1927) (explaining that whether a temporary restraining order is appealable depends on whether it amounts to an injunction).

⁵Garvin v. Dist. Ct., 118 Nev. 749, 766 n. 76, 59 P.3d 1180, 1192 n. 76 (2002) (noting that although petitioners could have appealed the district court's decision, and an appeal is ordinarily an adequate remedy, Guerin v. Guerin, 114 Nev. 127, 131, 953 P.2d 716, 719 (1998), significant time constraints may render an appeal inadequate).

⁶NRS 34.320.

an act that the law requires as a duty resulting from an office, trust or station,⁷ or to control an arbitrary or capricious exercise of discretion.⁸

With respect to prohibition, petitioner asserts that, in resolving the real party in interest's Federal Communications Act of 1934 (FCA)⁹ claim, the district court exceeded its jurisdiction. We agree.

The FCA's purpose is to protect the public interest.¹⁰ Under the FCA, primary and exclusive jurisdiction to vindicate this interest with respect to alleged violations of § 315(a), which pertains to equal opportunities and fairness, is vested in the Federal Communications Commission (FCC), and the courts' sole function with respect to FCA enforcement is to review final FCC orders under the federal statutory scheme.¹¹ As a result, courts have consistently held that no private right of action exists to enforce § 315(a), even when injunctive relief, in addition

⁷NRS 34.160.

⁸See Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981).

⁹47 U.S.C. §§ 151-615b (2000).

¹⁰See Sagan v. Pennsylvania Pub. Television Network, 544 A.2d 1309, 1312 (Pa. 1988); Ackerman v. Columbia Broad. System, 301 F. Supp. 628, 631 (S.D.N.Y. 1969) (citing Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969)); Gordon v. National Broad. Co., 287 F. Supp. 452, 455 (S.D.N.Y. 1968) (quoting Scripps-Howard Radio, Inc. v. F.C.C., 316 U.S. 875, 882 (1942)).

¹¹Sagan, 544 A.2d at 1313; Ackerman, 301 F. Supp. at 631; Gordon, 287 F. Supp. at 455; see also 47 U.S.C. §§ 401 and 402 (2000) (providing that federal courts have jurisdiction to review FCC orders).

to damages, is requested.¹² Here, because the district court granted the real party in interest relief for alleged § 315(a) violations even though he failed to allege that he first requested and was denied relief from the FCC, the district court exceeded its jurisdiction.

Although the petitioner also asserts that the district court lacked jurisdiction to consider the real party in interest's breach of contract claim, it bases its assertion, in part, on the lack of an enforceable contract between the petitioner and the real party in interest. Thus, we elect to treat this portion of the petition as seeking mandamus relief. We conclude that the district court manifestly abused its discretion in determining that a contract existed between the parties. Specifically, we have previously noted that an enforceable contract requires an offer and acceptance, meeting of the minds, and consideration.¹³ Here, the element of consideration is absent. Indeed, the real party in interest, in his answer to the petition, acknowledges this deficiency when he asserts that in this case "promissory estoppel replaces traditional consideration." And the real party in interest's promissory estoppel argument is unavailing because he failed to raise it in the district court as a basis for relief.¹⁴

Consequently, we conclude that a writ of prohibition is warranted with respect to the district court's purported exercise of jurisdiction over the real party in interest's FCA claim and that a writ of mandamus is warranted with respect to the district court's order granting

¹²See Sagan, 544 A.2d at 1312; Ackerman, 301 F. Supp. at 631; Gordon, 287 F. Supp. at 455.

¹³May v. Anderson, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005).

¹⁴Cf. Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 623 P.2d 981 (1981).

a temporary restraining order based on the real party in interest's breach of contract claim.¹⁵ We therefore direct the clerk of this court to issue a writ of prohibition precluding the district court from exercising jurisdiction over the real party in interest's FCA claim and a writ of mandamus compelling the district court to vacate its temporary restraining order.

It is so ORDERED

Gibbons, C.J.
Gibbons

Maupin, J.

Maupin

Parraguirre, J.

Parraguirre

Cherry, J.

Cherry

Hardesty, J.
Hardesty

Douglas, J.
Douglas

Saitta, J.
Saitta

¹⁵Here, the district court's order required the petitioner to allow the real party in interest to participate in the January 15, 2008 debate. The order further provided that, in the event that the petitioner refused to allow the real party in interest to participate, the petitioner would be enjoined from broadcasting the debate. This portion of the district court's order conditionally prohibiting the petitioner from broadcasting the debate is an unconstitutional prior restraint on the petitioner's First Amendment rights under the United States Constitution. See Alexander v. United States, 509 U.S. 544, 550 (1993) (describing injunctions that forbid speech activities as "classic examples of prior restraints"); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 556-58 (1976) (explaining that classic prior restraints have involved judge-issued injunctions against the publication of certain information); see also Erwin v. State, 111 Nev. 1535, 908 P.2d 1367 (1995) (citing Gitlow v. New York, 268 U.S. 652 (1925) (explaining that the First Amendment to the United States Constitution applies to the states through the due process clause of the Fourteenth Amendment)).

cc: Chief Judge, Eighth Judicial District
Hon. J. Charles Thompson, Senior Judge
Campbell & Williams
Delanoy Schuetze & McGaha, P.C.
Eighth District Court Clerk