IN THE SUPREME COURT OF NEVADA

CHRISTOPHER THOMAS, and CHRISTOPHER CRAIG, Individually and on behalf of others similarly situated,	Sup. Ct. No. 61681
Petitioners,	Case No.: A-12-661726-C Dept. No.: XXVIII
vs.	
NEVADA YELLOW CAB CORPORATION, NEVADA CHECKER CAB CORPORATION NEVADA STAR CAB CORPORATION	
Respondents.	

RESPONDENTS' APPENDIX

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REGISTER OF ACTIONS
CASE NO. A-12-668502-C

Barbara Gilmore, Plaintiff(s) vs. Desert Cab, Inc., Defendant(s) §§§§§§§

Case Type: **Other Civil Filing**
Subtype: **Other Civil Matters**
Date Filed: **09/17/2012**
Location: **Department 3**
Conversion Case Number: **A668502**

PARTY INFORMATION

Defendant	**Desert Cab, Inc.**	**Lead Attorneys** **Jeffrey A. Bendavid** *Retained* 7023848424(W)
Plaintiff	**Gilmore, Barbara**	**Leon M. Greenberg** *Retained* 7023836085(W)

EVENTS & ORDERS OF THE COURT

01/16/2013 **Motion to Dismiss** (9:00 AM) (Judicial Officer Herndon, Douglas W.)
Defendant, Desert Cab, Inc's Motion to Dismiss Plaintiff, Barbara Gilmore's Complaint

Minutes
01/16/2013 9:00 AM
- Leon Greenberg, Esq. present on behalf of Plaintiff Barbara Gilmore. Jeffrey Bendavid, Esq. present on behalf of Defendant Desert Cab, Inc. Argument by Mr. Bendavid and Mr. Greenberg. Statements by the Court, noting 608.250 is appropriate law and amendment does not change what 608.250 stands for. Additionally, Court stated that the same issue was raised previously in other cases. COURT ORDERED, motion GRANTED. Mr. Greenberg stated that the Yellow Cab case is on appeal and requested that Court stay this matter until a decision is made. COURT ORDERED, request DENIED

Return to Register of Actions

Lucas v. Bell Trans

United States District Court for the District of Nevada
June 23, 2009, Decided; June 24, 2009, Filed
2:08-cv-01792-RCJ-RJJ

Reporter: 2009 U.S. Dist. LEXIS 72549; 158 Lab. Cas. (CCH) P35,599; 158 Lab. Cas. (CCH) P60,831; 2009 WL 2424557

ANTHONY LUCAS, GREGORY H. CASTELLO, LILLIAN MELTON, LEAVON R. SMITH, ROBERT A. GREENE, on behalf of themselves and all others similarly situated, Plaintiffs, vs. BELL TRANS, a Nevada Corporation, Does 150, inclusive, Defendant.

Notice:

Subsequent History: Motion denied by *Lucas v. Bell Trans, 2009 U.S. Dist. LEXIS 101836 (D. Nev., Oct. 14, 2009)*

Core Terms

minimum wage, private right of action, unpaid wages, motion to dismiss, overtime compensation, unpaid, state law, drivers, preempt, district court, limousine, definition of employee, cause of action, labor law, overtime, lawsuit, tips

Counsel: [*1] For Anthony Lucas, Lisa Medford, Bradley Edwards, Merrill Clair, Donald Spearce, William Sack, Larry Dutcher, James A Biggs, Robert Greene, Leavon Smith, Lillian Melton, Gregory Castello, Plaintiffs: Mark R. Thierman, Thierman Law Firm, Reno, NV.

For Bell Trans, Defendant: Mark E Trafton, LEAD ATTORNEY, Las Vegas, NV; Norman H. Kirshman, LEAD ATTORNEY, Norman H. Kirshman PC, Las Vegas, NV.

For Bell Limo, Whittlesea-Bell Corporation, Defendants: Norman H. Kirshman, Norman H. Kirshman PC, Las Vegas, NV.

Judges: Robert C. Jones, United States District Judge.

Opinion by: Robert C. Jones

Opinion

ORDER

This lawsuit is a class and collective action for unpaid minimum wages and overtime compensation brought on behalf of all persons who worked for Defendant Bell Trans during the last three years as limousine drivers. Now before the Court is Bell Trans's Motion to Dismiss. (# 4).

The Limousine Plaintiffs have also filed a Motion for Leave to Amend Complaint (# 9) and a Motion to Strike a sur-reply filed by Bell Trans in relation to the Motion for Leave to Amend Complaint (# 18). The Court has considered the motions, briefs, pleadings, and oral argument on behalf of all parties and issues the following opinion and order.

I. [*2] FACTS

On December 18, 2008, Plaintiffs Anthony Lucas, Gregory H. Castello, Lillian Melton, Leavon R. Smith, and Robert A. Greene (collectively, "the Limousine Plaintiffs") filed the present lawsuit individually and on behalf of all persons who were employed by Bell Trans as limousine drivers within the last three years. (# 1). The Limousine Plaintiffs have pleaded claims for 1) failure to pay wages for each hour worked in violation of *NRS 608.016*; 2) failure to pay minimum wages in violation of the Fair Labor Standards Act, *29 U.S.C. § 206* and Section 16 of the Nevada Constitution; 3) failure to pay overtime compensation in violation of *NRS 608.100* and the Fair Labor Standards Act, *29 U.S.C. § 207*; 4) failure to pay wages in violation of *NRS 608.040*; and 5) unlawful wage deductions in violation of *NRS § 608.100*. Bell Trans has now filed a Motion to Dismiss pursuant to *Rule 12(b)(6) of the Federal Rules of Civil Procedure* (# 4).

II. LEGAL STANDARD

Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief" in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which **[*3]** it rests." *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957). *Federal Rule of Civil Procedure 12(b)(6)* mandates that a court dismiss a cause of action that fails to state a claim upon which relief can be granted. A motion to dismiss under *Rule 12(b)(6)* tests the complaint's sufficiency. *See North Star Int'l. v. Arizona Corp. Comm'n.*, 720 F.2d 578, 581 (9th Cir. 1983). When considering a motion to dismiss under *Rule 12(b)(6)* for failure to state a claim, dismissal is appropriate only when the complaint does not give the defendant fair notice of a legally cognizable claim and the grounds on which it rests. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1964, 167 L. Ed. 2d 929 (2007). In considering whether the complaint is sufficient to state a claim, the court will take all material allegations as true and construe them in the light most favorable to the plaintiff. *See NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). The court, however, is not required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

"Generally, a district court may not consider **[*4]** any material beyond the pleadings in ruling on a *Rule 12(b)(6)* motion . . . However, material which is properly submitted as part of the complaint may be considered on a motion to dismiss. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citations omitted). Similarly, "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a *Rule 12(b)(6)* motion to dismiss" without converting the motion to dismiss into a motion for summary judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). Moreover, under *Federal Rule of Evidence 201*, a court may take judicial notice of "matters of public record." *Mack v. South Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Otherwise, if the district court considers materials outside of the pleadings, the motion to dismiss is converted into a motion for summary judgment. *See Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir. 2001).

If the court grants a motion to dismiss a complaint, it must then decide whether to grant leave to amend. The court should "freely **[*5]** give" leave to amend when there is no "undue delay, bad faith[,] dilatory motive on the part of the movant . . . undue prejudice to the opposing party

by virtue of . . . the amendment, [or] futility of the amendment . . . ." Fed. R. Civ. P. 15(a); Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962). Generally, leave to amend is only denied when it is clear that the deficiencies of the complaint cannot be cured by amendment. See DeSoto v. Yellow Freight Sys., Inc., 957 F.2d 655, 658 (9th Cir. 1992).

III. ANALYSIS

Bell Trans argues that the Limousine Plaintiffs cannot state a claim for violation of Nevada's labor laws because there is no private right of action related thereto. Bell Trans argues that the Nevada Labor Commissioner has exclusive jurisdiction over the enforcement of Nevada's labor laws. In support of its state law claims, the Limousine Plaintiff rely upon several provisions within NRS Chapter 608 and Section 16 of the Nevada Constitution. NRS Chapter 608 governs employment compensation, wages, and hours, making employers responsible for paying employee wages.

A. *Baldonado v. Wynn Las Vegas*

Bell Trans's argument rests on the recent Nevada Supreme Court decision, Baldonado v. Wynn Las Vegas, LLC, 194 P.3d 96 (2008). **[*6]** In *Baldonado,* Daniel Baldonado and Joseph Cesarz were employed by Wynn Las Vegas as table game dealers. Id. at 98. At the beginning of their employment, Wynn had a toke pooling and distribution policy, outlining the manner in which employee tokes, or tips, would be collected, calculated, and distributed, which limited the distribution of tips among the actual dealers. *Id.* Wynn later revised the pooling and distribution policy so that the pit manager and floor supervisor positions also received a share of the daily tip pool, which ultimately resulted in a reduction of the table dealers' shares of the pool by 10 to 15 percent and a reduction in their overall salaries. Id. at 99. As a result, Baldonado and similarly situated table dealers filed a class action against Wynn, claiming that the modified toke policy reduced their compensation in violation of NRS 608.160 (making it unlawful for employers to take employee tips), NRS 608.100 (making it unlawful for employers to require employees to rebate compensation earned and paid), and NRS 613.120 (making it unlawful for managers and shift bosses to receive gratuities from employees as a condition of the employees' employment). *Id.*

The district **[*7]** court dismissed the plaintiffs' complaint on the ground that the particular Nevada statutes relied on by the plaintiffs provided no private causes of action. The Nevada Supreme Court affirmed. In its decision, the Nevada Supreme Court analyzed the existence of a private right of action under NRS 608.160, but it stated that its reasoning and decision as to NRS 608.160 applied equally to NRS 608.100 and NRS 613.120, because the latter two statutes "are included within the Labor Commissioner's authority in the same manner as, and phrased similarly to, NRS 608.160, in that all three statutes deem certain employer conduct unlawful . . . ." Id. at 100.

The Nevada Supreme Court began its analysis by observing that NRS 608.160 "does not expressly mention whether employees may privately enforce its terms." *Id.* As a result, the Court had to determine whether a private right of action could be implied in NRS 608.160. *Id.* "Whether a private cause of action can be implied is a question of legislative intent." Id. at 10x0-01. To that end, three factors guide a court's analysis in gauging the legislative intent to create an implied private of action: "(1) whether the plaintiffs are 'of the class for **[*8]** whose [e] special benefit the statute was enacted'; (2) whether the legislative history indicates any intention to create or to deny a private remedy; and (3) whether implying such a remedy is 'consistent with the underlying purposes of the legislative [sch]eme.'" Id. at 101 ((quoting Sports Form v. Leroy's Horse & Sports, 108 Nev. 37, 39, 823 P.2d 901, 902 (1992) (quoting Cort v. Ash, 422 U.S. 66,

78, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975)) (quotations omitted).

As the first two factors were not helpful, the Nevada Supreme Court based its holding on the third factor--"whether a private remedy is consistent with the legislative scheme." *Id.* at 102. The Court broke its third factor analysis into two parts.

First, it determined that "the Legislature has entrusted the labor laws' enforcement to the Labor Commissioner, unless otherwise specified." *Id.* It observed that *NRS 608.180* provides that "[t]he Labor Commissioner or his representative shall cause the provisions of *NRS 608.005 to 608.195*, inclusive, to be enforced." *Id.* If there is a violation of any of the provisions falling within *NRS 608.005 to 608.195*, then the Labor Commissioner "can direct the district attorney, the Deputy Labor **[*9]** Commissioner, the Attorney General, or special counsel to 'prosecute the action for enforcement according to law.'" *Id.* (quoting *NRS 608.180*). The Court acknowledged that as a general matter, "when an administrative official is expressly charged with enforcing a section of laws, a private cause of action generally cannot be implied." *Id.*

The second half of the Nevada Supreme Court's analysis highlighted the adequacy of an administrative remedy provided under Chapter 608. That administrative scheme allows private parties to file labor law complaints with the Labor Commissioner. The Commissioner has a duty to hear and resolve such complaints. *Id.* at 104. *NRS 607.205* and *NRS 607.207* establish the Labor Commissioner's authority to conduct hearings to resolve labor complaints. After a hearing is conducted, the Commissioner must render a written decision within thirty days, setting forth findings of fact and conclusions of law, which must be mailed to the parties. *Id.* at 103. The parties can then challenge the Labor Commissioner's decision through a district court petition for judicial review, which can ultimately be appealed to the Nevada Supreme Court. *Id.* These two factors led the Nevada **[*10]** Supreme Court to hold that "in light of the statutory scheme requiring the Labor Commissioner to enforce the labor statutes and the availability of an adequate administrative remedy for those statutes' violations, the Legislature did not intend to create a parallel private remedy for *NRS 608.160* violations." *Id.* at 102.

In *Baldonado,* the Court bolstered its decision in a footnote on another ground, which at the same time left open the possibility for some provisions within NRS 608 as creating a private right of action. It noted that two other statutes in NRS Chapter 608, not relied upon by the plaintiffs in that case, "expressly recognize a civil enforcement action to recoup unpaid wages: *NRS 608.140* (civil actions by employees to recoup unpaid wages) and *NRS 608.150* (civil actions by the district attorney to recoup unpaid wages from general contractors)." *Id.* at 104 n.33. In contrast, the provisions relied upon by the plaintiffs in *Baldonado*--*NRS 608.160*, *NRS 608.100*, and *NRS 613.120* --did not contain such express language. *Id.* Accordingly, "[t]he existence of express civil remedies within the statutory framework of a given set of laws indicates that the Legislature will expressly provide **[*11]** for private civil remedies when it intends that such remedies exist; thus, if the Legislature fails to expressly provide a private remedy, no such remedy should be implied." *Id.*

Under *Baldonado,* the Limousine Plaintiffs do not have an implied private right of action under *NRS 608.100*. The Limousine Plaintiffs attempt to escape the *Baldonado* holding by arguing that *Baldonado* only applies to tips, not wages. Clearly, that is not the case, as the Nevada Supreme Court stated that its reasoning for not recognizing an implied private right of action under *NRS 608.160* also applied to the other two statutes at issue, including *NRS 608.100*. Thus, the Court holds that there is no private right of action in *NRS 608.100*.

The existence of a private right of action to recover unpaid wages, however, can be found in

NRS 608.140, which recognizes a cause of action for wages earned and unpaid. NRS 608.140 indicates that a laborer or employee can "have cause to bring suit for wages earned and due according to the terms of his employment," and if he does, he can obtain a "decision of the court or verdict of the jury that the amount for which he has brought suit is justly due . . . ." As previously mentioned, **[*12]** in *Baldonado,* the Nevada Supreme Court recognized that NRS 608.140 contains an express civil remedy in the form of a civil action by employees to recoup unpaid wages. 194 P.3d at 104 n.33. Thus, NRS 608.140 demonstrates that there is a private right of action in NRS 608 for unpaid wages. *See* Nunez v. Sahara Nevada Corp., 677 F.Supp. 1471, 1475 n.7 (D.Nev. 1988) (stating that NRS 608.140 "specifically creates a cause of action for wages earned and unpaid and penalties and a reasonable attorney's fee."); Moen v. Las Vegas Intern. Hotel, Inc., 402 F.Supp. 157, 160-61 (D.Nev. 1975) (holding same).

Chapter 608 also contains a private right of action for unpaid wages in NRS 608.016, NRS 608.020, and NRS 608.040. "An employer shall pay to the employee wages for each hour the employee works." NRS 608.016. "Whenever an employer discharges an employee, the wages and compensation earned and unpaid at the time of such discharge shall become due and payable immediately." NRS 608.020. "If an employer fails to pay: (a) Within 3 days after the wages or compensation of a discharged employee becomes due . . . the wages or compensation of the employee continues at the same rate from the day he . . . was **[*13]** discharged until paid or for 30 days, whichever is less." NRS 608.040(1). In *Boucher v. Shaw,* three former employees of the Castaways Hotel, Casino and Bowling Center sued three of their former managers under these three statutory provisions to recover unpaid wages for themselves and for a class of Castaways employees. Boucher v. Shaw, 483 F.3d 613, 614-15 (9th Cir. 2007). The district court dismissed the plaintiffs' lawsuit, in part, because the district court held that the three managers could not qualify as "employers" under Chapter 608 of the Nevada Revised Statutes. *Id.* On appeal, the Ninth Circuit determined that the question of whether individual managers could be held liable as employers for unpaid wages under Chapter 608 of the Nevada Revised Statutes should be certified to the Nevada Supreme Court. *Id.* at 616. The Nevada Supreme Court agreed with the district court, holding that Chapter 608's definition of "employer" does not extend beyond common law employers to include individual managers. *See* Boucher v. Shaw, 196 P.3d 959, 196 P.3d 959 (2008). Neither the district court nor the Ninth Circuit nor the Nevada Supreme Court stated that the plaintiffs did not have a private **[*14]** right of action for unpaid wages under Chapter 608. All three courts assumed that such a right existed. This Court does not disagree.

In sum, there is no general private right of action for all of the provisions found in Chapter 608. This conclusion is confirmed by Baldonado. In most cases, a private party must first file a complaint with the Labor Commissioner and obtain a decision from the Commissioner before bringing any kind of lawsuit in court. Nevertheless, Chapter 608 does contemplate a private right of action for the recovery of unpaid wages that the employee has earned.

Based upon the discussion above, the Limousine Plaintiffs may sue for the recovery of unpaid wages. The Limousine Plaintiffs make this claim in their first cause of action. They allege that Bell Trans only paid them for when they were actually driving customers. (# 1, P 32). According to them, there were many other times when they should have been paid for their time but they were not. For example, they allege that they should have been paid for their attendance at a 4-day training class that they were required to attend before employment. (*Id.,* P 34). They also allege that they should have been paid for the **[*15]** fifteen minutes that they were required to be present before their actual shift began to wait in line at the dispatch office to pick up their trip sheets and keys. (*Id.,* P 35). Thus, the Limousine Plaintiffs have stated a cause of action under Nevada law for unpaid wages, consistent with NRS 608.140 and NRS 608.040. The Limousine Plaintiffs, however, cannot proceed with a private action under NRS 608.100.

B. Minimum Wages

The private right of action for unpaid wages, however, does not extend to minimum wage and overtime claims. Unearned wages is different from unpaid minium wages or overtime compensation.

1. The Nevada Wage and Hour Law

Nevada has minimum wage and overtime compensation statutes. The Nevada Wage and Hour Law ("NWHL"), like the Fair Labor Standards Act ("FLSA"), establishes minimum wages that apply to private employers within this state. *See* NRS 608.250. Under the NWHL, the Labor Commissioner is to establish by regulation the minimum wage that may be paid to employees in private employment within the State. NRS. 608.260 recognizes a private right of action by the employee against his or her employer to recover the difference between the amount paid to the employee and the **[*16]** amount of the minimum wage. The NWHL's minimum wage requirements, however, only apply to certain employees. The NWHL expressly states that it does not apply to taxicab and limousine drivers. NRS 608.250(2)(e). Under the NWHL, the Limousine Plaintiffs have no claim for violation of unpaid minimum wages under Nevada law.

2. The Amendment

In 2004, the Nevada Constitution was amended, Nev. Const. art. 15, § 16, by initiative, to increase the state minimum wage. The Amendment was approved by the voters again in the 2006 general election. The Amendment provides that state minimum wage "shall be five dollars and fifteen cents ($ 5.15) per hour worked, if the employer provides health benefits as described herein, or six dollars and fifteen cents ($ 6.15) per hour if the employer does not provide such benefits . . . ." Nev. Const. art. 15, § 16(A). The Amendment states the following:

> An employee claiming violation of this section may bring an action against his or her employer in the courts of this State to enforce the provisions of this section and shall be entitled to all remedies available under the law or in equity appropriate to remedy any violation of this section, including but not limited **[*17]** to back pay, damages, reinstatement or injunctive relief. An employee who prevails in any action to enforce this section shall be awarded his or her reasonable attorney's fees and costs.

Id. at § 16(B). As to the definition of "employee," the Amendment states the following:

> "employee" means any person who is employed by an employer as defined herein but does not include an employee who is under eighteen (18) years of age, employed by a nonprofit organization for after school or summer employment or as a trainee for a period of not longer than ninety (90) days.

Id. at § 16(C).

Thus, the Amendment does not include the excluded categories listed in NRS 608.250(2). Under the Amendment's language, as long as one is 18 years or older and does not work for the type of nonprofit organization program described above, he or she has a private right of action to collect minimum wages as provided in § 16.

In March 2005, the Nevada Attorney General issued an opinion on whether the Amendment,

which was merely proposed at that stage, would void NRS 608.250 through NRS 608.290. The relevant excerpt from his opinion on this issue stated the following:

> The effect of the proposed amendment on the NRS 608.250 **[*18]** exclusions is controlled by two presumptions. First, the voters should be presumed to know the state of the law in existence related to the subject upon which they vote. Op. Nev. Att'y Gen. 153 (December 21, 1934). Second, it is ordinarily presumed that "[w]here a statute is amended, provisions of the former statute omitted from the amended statute are repealed." McKay v. Board of Supervisors, 102 Nev. 644, 650, 730 P.2d 438, 442 (1986). In keeping with these presumptions, the people, by acting to amend the minimum wage coverage and failing to include the statutory exclusions in the proposed amendment, are presumed to have intended the repeal of the existing exclusions so that the new minimum wage would be paid to all who meet its definition of "employee." Accordingly, the proposed amendment would effect an implied repeal of the exclusions from minimum wage coverage at NRS 608.250(2).

05-04 Op. Nev. Att'y. Gen. 7 (Mar. 2, 2005).

The Nevada Attorney General's opinion does not necessarily carry weight with this Court. The Nevada Supreme Court has concluded in the past that "[o]pinions of the Attorney General are not binding legal authority or precedent." Blackjack Bonding v. City of Las Vegas Municipal Court, 116 Nev. 1213, 1218, 14 P.3d 1275, 1279 (2000). **[*19]** In *Blackjack Bonding,* the Nevada Supreme Court had to decide whether municipal courts have the power to collect fees independent of specific statutory authorization. *Id.* In support of the plaintiff's position, the plaintiff relied upon an opinion of the Nevada Attorney General that concluded that municipal courts are not empowered by the Nevada Constitution or statutory authority to collect filing fees for bail or property bonds. *Id.* The Nevada Supreme Court held to the contrary. In doing so, as a general matter, it recognized the lack of weight that the Attorney General's opinion carried with the Court, and more particularly, it determined that the Nevada Attorney General's basis for his opinion in that case was wrong. *Id.*

As to the Attorney General's opinion on the Amendment, the Attorney General's reasoning seems to be inconsistent. In the beginning of the Attorney General's analysis, the Attorney General recognized that "[a] constitutional amendment, ratified subsequent to the enactment of a statute, is controlling on any point covered in the amendment." *Id.* at 5 (citing State ex rel. Nevada Orphan Asylum v. Hallock, 16 Nev. 373, 378 (1882)). The Attorney General also stated that **[*20]** "ratification of a constitutional amendment will render void any existing law *that is in conflict* with the amendment." *Id.* (emphasis added) (citing Op. Nev. Att'y Gen. 08 (May 19, 1908); 16 AM. JUR. 2d Constitutional Law § 68 (1979)). But the Amendment did not cover any of the exceptions found in NRS 608.250; it made no mention of NRS 608.250 or its exceptions. Furthermore, the Amendment's definition of "employee" is not necessarily in conflict with NRS 608.250. The NRS 608.250 exceptions and the Amendment's definition of "employee" can happily co-exist.

The Attorney General's two presumptions are also questionable. First, to presume that the general citizenry is aware of and well-versed in all of its government's laws is highly idealistic. With the mountain of statutes and regulations that exists at the federal, state, and local government level, most citizens would need to be spending a lot of time in the library to know the terms of all the laws applicable to them. Second, the Attorney General relied upon the general principle that "[w]here a statute is amended, provisions of the former statute omitted from the amended statute are repealed." McKay v. Board of Sup'rs of Carson City, 102 Nev. 644, 650, 730 P.2d 438 (1986).

[*21] A related principle is that "[i]t is ordinarily presumed that the legislature, by deleting an express portion of a law, intended a substantial change in the law." *Id.*

The problem with the Attorney General's second presumption is that NRS 608.250 was enacted by the Nevada Legislature, but the Amendment was not. The Amendment came directly from the people of Nevada (or a majority of them) in conformity with Nevada's initiative process. *See* Nev. Const. art. 19, § 2 (reserving to the people the power to propose, by initiative petition, amendments to the constitution, and to enact or reject them at the polls); Garvin v. Ninth Judicial Dist. Court ex rel. County of Douglas, 118 Nev. 749, 751, 59 P.3d 1180, 1181 (2002) (discussing the initiative power). Thus, the applicability of these principles of statutory interpretation to the case here is much weaker than if the Nevada legislature actually amended NRS 608.250.

Additionally, the Attorney General himself stated that "the primary focus of the initiative [was] on raising the current Nevada minimum wage of $ 5.15 per hour . . . ." 05-04 Op. Nev. Att'y. Gen. 6 (Mar. 2, 2005). As a result of that focus, the presumption that the people of Nevada **[*22]** were likely aware of the various exceptions under NRS 608.250 does not seem that strong. If the people knew anything about NRS 608.250 at the time they voted on the Amendment, it was most likely the minimum wage prescribed under that state law.

The Attorney General opined that because the Amendment did not expressly incorporate the exceptions found in NRS 608.250 but instead included its two own exceptions (i.e., above 18 years old and not participating in a non-profit organization program), the Amendment impliedly repealed all of the NRS 608.250 exceptions. Under Nevada law, however, the implied repeal of a statute is "heavily disfavored." Washington v. State, 117 Nev. 735, 30 P.3d 1134, 1137 (2001). The Nevada Supreme Court has stated that it "will not consider a statute to be repealed by implication unless there is *no other* reasonable construction of the two statutes." *Id.* (emphasis added). "The fact that a statute is enacted after another statute, but is subsequently amended without mention of the first statute, may weigh against a finding of legislative intent to repeal by implication." *Id.* The Amendment made no reference to NRS 608.250. There is no indication that when Nevada **[*23]** voters went to the polls, they were informed that their vote would be repealing or amending NRS 608.250 and its multiple exceptions.

In sum, this Court cannot conclude that there is no other reasonable construction of the Amendment than that it repealed NRS 608.250. The Amendment made absolutely no reference to NRS 608.250. The focus of the Amendment was the actual minimum wage. And the Amendment's definition of "employee" is not in conflict with NRS 608.250's exceptions, which include limousine drivers. As a result, this Court holds that the Amendment did not repeal NRS 608.250 or its exceptions. Because the NWHL expressly states that it does not apply to taxicab and limousine drivers, the Limousine Plaintiffs cannot sue for a violation of unpaid minimum wages under Nevada law. NRS 608.250(2)(e).

C. Overtime Compensation

Nevada's overtime compensation statute, NRS 608.018, requires an employer to "pay 1 1/2 times an employee's regular wage rate whenever an employee who receives compensation for employment at a rate less than 1 1/2 times the minimum rate" works "[m]ore than 40 hours in any scheduled week of work" or "[m]ore than 8 hours in any workday, unless by mutual agreement the employee **[*24]** works a scheduled 10 hours per day for 4 calendar days within any scheduled week of work." The Limousine Plaintiffs cite to NRS 608.100(1) for their overtime compensation claim, but that is not the correct provision; it is NRS 608.018.

NRS 608.018 does not have a similar civil remedy provision like NRS 608.250 has with NRS

608.260. Nevertheless, this inquiry is not crucial to the Court's decision because NRS 608.018 excludes the overtime compensation requirements for "[e]mployees who are not covered by the minimum wage provisions of NRS 608.250," which includes taxicab and limousine drivers. NRS 608.018(3). In fact, in his 2005 opinion, the Attorney General concluded that although the Amendment effectuated an "implied repeal of the provisions for calculation of the minimum wage and minimum wage entitlement found in NRS 608.250, the statutory exclusions from overtime compensation and the provisions of NRS 608.250 relied upon in NRS 608.018, would stand as enacted for purposes of the overtime compensation law." 05-04 Op. Nev. Att'y. Gen. 1 (Mar. 2, 2005). For the reasons explained above in connection with Nevada minimum wages, the Court holds that the exceptions found in NRS 608.250, **[*25]** and consequently NRS 608.018, are still in force, notwithstanding the Amendment. Because the Limousine Plaintiffs fall within the express exceptions for Nevada's overtime compensation statute, they cannot bring a claim for unpaid overtime compensation under Nevada law.

D. THE FLSA

In its Motion to Dismiss, Bell Trans also claims that the Limousine Plaintiffs have no standing to bring their FLSA claim because the wage claims fall exclusively under the jurisdiction of the Labor Commissioner. Bell Trans's argument that Nevada's labor laws somehow preempt an FLSA action is groundless and entirely inconsistent with the U.S. Constitution.

Bell Trans's position flies in the face of the U.S. Constitution's Supremacy Clause. As a result of the Supremacy Clause, federal law may certainly preempt state law. Federal law preempts state law if the state law "actually conflicts" with federal law. Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 280-81, 107 S.Ct. 683, 93 L.Ed.2d 613 (1987); Davidson v. Velsicol Chemical 108 Nev. 591, 593, 834 P.2d 931, 932 (1992) ("Under the Supremacy Clause, state laws which are contrary to, or which interfere with, the laws of Congress are invalid." (citation omitted)). **[*26]** But state law cannot preempt federal law, not unless the applicable "federal act itself sanctions the application of state standards." U.S. v. Hall, 543 F.2d 1229, 1232 (9th Cir. 1976).

The FLSA sets limits on minimum wages and the number of hours an employee is permitted to work before the employer is required to pay overtime. 29 U.S.C. §§ 206-207. Under the FLSA, an employee may bring a collective action on behalf of "similarly situated" employees based on their employer's alleged violations of the FLSA. 29 U.S.C. § 216(b); Does I thru XXIII v. Advanced Textile Corp., 214 F.3d 1058, 1064 (9th Cir. 2000). The FLSA explicitly contemplates that state law will co-exist with the FLSA's standards, allowing state labor laws to establish higher standards than those established in the FLSA. The FLSA states that "[n]o provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter." 29 U.S.C. § 218(a). The Ninth Circuit has held that the FLSA only preempts state laws that are less beneficial to the employee. *See* Pac. Merch. Shipping Assoc. v. Aubry, 918 F.2d 1409, 1425 (9th Cir. 1990) **[*27]** ("There is no indication that Congress, in enacting the FLSA [ ], intended to preempt states from according more generous protection to [its] employees. [T]he purpose behind the FLSA is to establish a national floor under which wage protections cannot drop, not to establish absolute uniformity in minimum wage and overtime standards nationwide at levels established in the FLSA." (emphasis omitted)).

Lawsuits are routinely litigated that include minimum wage and overtime claims under the FLSA and the relevant state's parallel labor laws. There is no dispute--both claims can co-exist. In fact, in a recent decision, the Nevada Supreme Court reversed a state trial court's ruling that "essentially concluded that the FLSA preempted Nevada law under a conflict analysis because the

NWHL applied to the same subject." Jane Roe Dancer I-VII v. Golden Coin, Ltd., 176 P.3d 271, 274 (2008). The Nevada Supreme Court held that there is no conflict between the wage rights of plaintiffs under the NWHL and wage rights of plaintiffs under the FLSA. *Id.* As a result, the Nevada Supreme Court held that the plaintiffs' FLSA claim did not preempt their NWHL claim. *Id.*

For these reasons, this Court cannot dismiss **[*28]** the Limousine Plaintiffs' FLSA claims.

IV. MOTION FOR LEAVE TO AMEND THE COMPLAINT

The Limousine Plaintiffs have also filed a Motion for Leave to Amend Complaint. (# 9). They claim that two months after filing their Complaint, as a result of an article on the case published in the *Las Vegas Sun,* they received many phone calls informing them that Bell Trans was only one of three limousine companies owned by Whittlesea-Bell Corporation. In addition to Bell Trans, Whittlesea-Bell Corporation owns Presidential Limousine and Bell Limo.

The Limousine Plaintiffs allege that the other two companies, like Bell Trans, carried out a common policy under which they underpaid their drivers and failed to compensate them for overtime. The Limousine Plaintiffs have been contacted by multiple drivers from these other two companies, who wish to participate in the lawsuit. The Limousine Plaintiffs have received thirteen consent to sue forms from such drivers.

Under Federal Rule of Civil Procedure 15(a), "a party may amend its pleading once as a matter of course . . . before being served with a responsive pleading." Except for amendments made "of course" or pursuant to stipulation, leave of court is required **[*29]** to amend a pleading. Fed. R. Civ. P. 15(a). The rules require that leave to amend should be freely granted "when justice so requires." *Id.*

The Limousine Plaintiffs do not need to ask this Court for leave to amend the Complaint. Bell Trans has not yet filed an answer. It has merely filed a Motion to Dismiss. A motion to dismiss, however, is not a responsive pleading within the meaning of Rule 15(a). *See, e.g.,* Rhoades v. Avon Prods., Inc., 504 F.3d 1151, 1158 n. 5 (9th Cir. 2007) (quoting Miles v. Dep't of Army, 881 F.2d 777, 781 (9th Cir. 1989)). A plaintiff can respond to a motion to dismiss by filing an amended complaint. *See* Rick-Mik Enterprises, Inc. v. Equilon Enterprises LLC, 532 F.3d 963, 977 (9th Cir. 2008). Even if a court grants a motion to dismiss, a plaintiff maintains an absolute right to file an amended complaint, so long as the defendant has not yet answered. *See* Mayes v. Leipziger, 729 F.2d 605, 607 (9th Cir. 1984) ("'Neither the filing nor granting of . . . a motion [to dismiss] before answer terminates the right to amend; an order of dismissal denying leave to amend at that stage is improper[.]'") (quoting Breier v. Northern Cal. Bowling Proprietors' Ass'n, 316 F.2d 787, 789 (9th Cir. 1963)). **[*30]** Thus, the Limousine Plaintiffs still have an absolute right to amend the Complaint once as a matter of course.

For these reasons, the Court must grant the Limousine Plaintiffs' Motion for Leave to Amend Complaint.

V. MOTION TO STRIKE

Five days after the Limousine Plaintiffs filed their reply brief to their Motion for Leave to Amend, Bell Trans filed a "Supplemental Statutory Citations in Opposition to Plaintiffs' Motion for Leave to Amend Complaint." (# 17). It merely quoted NRS 608.140, which has already been discussed above in connection with the Motion to Dismiss. The Limousine Plaintiffs then filed a Motion to Strike that filing, arguing that it was a sur-reply that Bell Trans did not have permission to file. Bell Trans's supplemental brief added nothing to its other briefs. Furthermore, the

Court is not ruling in favor of Bell Trans on its arguments related to *NRS 608.140*. This Court is holding that the Limousine Plaintiffs have a private right of action for unpaid wages under NRS 608. Therefore, this Court denies the Motion to Strike.

CONCLUSION

IT IS HEREBY ORDERED that:

(1) Bell Trans's Motion to Dismiss is GRANTED as to the Limousine Plaintiffs' claims for compensation under *NRS 608.100*, **[*31]** for unpaid minimum wages under Nevada law (under either *NRS 608.250* or *Nev. Const. art. 15, § 16*), and for unpaid overtime compensation under Nevada law (# 4);

(2) Bell Trans's Motion to Dismiss is DENIED as to the Limousine Plaintiffs' claims for unpaid wages under NRS 608 (# 4);

(3) the Limousine Plaintiffs' Motion to Amend is GRANTED (# 9);

(4) the Limousine Plaintiffs' Motion to Strike is DENIED (# 18).

Dated: June 23, 2009

/s/ Robert C. Jones

Robert C. Jones

United States District Judge

QUESTION NO. 6

Amendment to the Nevada Constitution

CONDENSATION (Ballot Question)

Shall the Nevada Constitution be amended to raise the minimum wage paid to employees?

Yes.....	☑	395,367
No.....	☐	180,085

EXPLANATION (Ballot Question)

The proposed amendment, if passed, would create a new section to Article 15 of the Nevada Constitution. The amendment would require employers to pay Nevada employees $5.15 per hour worked if the employer provides health benefits, or $6.15 per hour worked if the employer does not provide health benefits. The rates shall be adjusted by the amount of increases in the federal minimum wage over $5.15 per hour, or, if greater, by the cumulative increase in the cost of living measured by the Consumer Price Index (CPI), with no CPI adjustment for any one-year period greater than 3%.

The following arguments for and against and rebuttals for Question No. 6 were prepared by a committee as required by Nevada Revised Statutes (NRS) 293.252.

ARGUMENT IN SUPPORT OF QUESTION NO. 6

All Nevadans will benefit from a long-overdue increase in the state's minimum wage through a more robust economy, a decreased taxpayer burden and stronger families.

Low-income workers who do not currently earn enough to cover the basic costs of living for their families – housing, health care, food and child care – will clearly benefit. Many low-income Nevada families live in poverty even though they have full-time jobs. A Nevada worker at the current minimum wage for 40 hours per-week — every week, all year – makes only $10,712. If the minimum wage had been increased to keep up with rising prices over the last 25 years, it would now bring in $15,431 per-year – not $10,712. At the current $5.15 an hour, many minimum wage workers in Nevada have incomes below the federal poverty line. We want to encourage people to work and be productive members of society. It's economic common sense.

Taxpayers will benefit as an increased minimum wage allows low-income working families to become more financially able to free themselves from costly taxpayer-provided services such as welfare, childcare and public health services.

Our state's economy will benefit as we develop a workforce that will earn more spendable income and put dollars directly into local stores and businesses.

Raising the minimum wage one dollar affirms Nevadan's beliefs that we value work, especially the difficult jobs performed by nursing home employees, childcare workers, and restaurant employees.

Minimum wage workers are not just teenagers working part-time to pay for movies, CDs and fast food. The vast majority of minimum wage workers in Nevada are adults (79% are 20 and older). Most work full-time. Six out of 10 minimum wage earners are women. Twenty-five percent are single mothers. And altogether they are the parents of 25,000 children. The paycheck these workers bring home accounts for about half of their families' earnings.

No matter what special interests and big corporations who oppose a fair minimum wage tell you, virtually *every* reputable economic study has found that workers don't get fired when minimum wages are passed or increased. In fact, employment increases. Eight of the eleven states that had a minimum wage above the federal level in 2003 are producing more jobs than the United States as a whole.

Raising the minimum wage makes sense for *all* of Nevada. Cast a vote for Nevada working people, Nevada taxpayers, Nevada values and a stronger Nevada economy.

The above argument was submitted by the Ballot Question Committee composed of citizens in favor of this question as provided for in NRS 293.252

REBUTTAL TO ARGUMENT IN SUPPORT OF QUESTION NO. 6

Contrary to claims by those eager to change Nevada's constitution, the most credible economic research for over 30 years has shown that minimum wage hikes hurt, rather than help, low-wage workers.

A recent example is the study, *The Effects of Minimum Wages Throughout the Wage Distribution*, by David Neumark, National Bureau of Economic Research; Mark Schweitzer, Federal Reserve Bank of Cleveland; and William Wascher, Board of Governors of the Federal Reserve - Division of Research and Statistics: "The evidence indicates that workers initially earning near the minimum wage are adversely affected by minimum wage increases.... Although wages of low-wage workers increase, their hours and employment decline, and the combined effect of these changes is a decline in earned income." *National Bureau of Economic Research, Working Paper 7519, 5/8/2000.*

The same year, Stanford University's Thomas MaCurdy & Frank McIntyre showed that the effect of a minimum wage increase is very similar to a "sales tax levied only on selective commodities" and conclude: "... three in four of the poorest workers *lose* from shouldering the costs of higher prices resulting from the wage increase. When these benefits and costs are considered, the minimum wage is *ineffective* as an anti-poverty policy."

The above argument was submitted by the Ballot Question Committee composed of citizens opposed to this question as provided for in NRS 293.252

ARGUMENT AGAINST QUESTION NO. 6

This constitutional amendment would actually *increase* poverty in Nevada, rather than fight it.

Suffering the most would be single mothers with little education, and other unskilled workers who are just entering the job market.

Today, such entry-level employees are paid not just with wages, but also the chance to learn new job skills. With those new skills—and the work habits they learn—they are able to climb the job ladder and make better lives for themselves and their families.

But if government forces entry-level wages artificially higher, fewer businesses will be able to hire these unskilled workers. That's because their *total* cost to the company—their pay, plus their training costs—will often be greater than these workers contribute to the company. So some workers will be let go, and others will never be hired.

Nevada has long been known as a state where businesses enjoy economic opportunities they cannot find elsewhere. But this constitutional amendment would end all that.

It would suddenly place Nevada at a big economic disadvantage to many other states—states without these high wage requirements. Under this amendment, wages paid in Nevada must, from now on, exceed the federal minimum wage by about $1 an hour. This would seriously damage Nevada businesses—especially small mom and pop businesses, which usually have fewer resources to work with.

This proposal also would discriminate against non-union companies—which means against the great majority of small businesses in Nevada. It would give labor union officials the power, under the law, to permit *union* companies to hire new employees at rates *below* the new minimum wage. This is unfair to both companies and union members. It is also a virtual invitation to union corruption.

The key to fighting poverty—and to achieving higher wages for *all* workers—is long-term economic growth. Artificially higher wages imposed by government will only obstruct such growth.

This proposed constitutional amendment should be rejected.

Fiscal impact: Negative.

Environmental impact: Neutral.

Public health, safety and welfare impact: Negative.

The above argument was submitted by the Ballot Question Committee composed of citizens opposed to this question as provided for in NRS 293.252

REBUTTAL TO ARGUMENT AGAINST QUESTION NO. 6

Raising the minimum wage in Nevada will decrease poverty as it increases people's participation in the State's economy. If increased wages actually made people poorer – as the special interests opposed to this amendment ridiculously claim – *nobody* in Nevada would ever ask for a raise.

Single mothers, as well as anyone else working a minimum wage job, will see an increase in their wages that will actually allow them to pay for housing, healthcare, food and childcare.

All available economic studies show that *everyone* wins when the minimum wage is increased. Low-income workers earn more, become less dependent on welfare and other public programs which eases the burden on taxpayers, and have more money to spend on local goods and services -- which strengthens the economy and generates more jobs.

There is *nothing* in the amendment to raise the minimum wage that would exempt union companies – it's a federal minimum that all companies must follow.

Raise low-income workers' wage. Spur Nevada's economic growth. Generate more buying power to support Nevada businesses. Create jobs. Move low-wage workers away from dependence on public programs and ease taxpayers' burden.

You can achieve *all* of these goals by voting YES on the minimum wage amendment.

The above argument was submitted by the Ballot Question Committee composed of citizens in favor of this question as provided for in NRS 293.252

FISCAL NOTE

FINANCIAL IMPACT – CANNOT BE DETERMINED

Although the proposal to amend the *Nevada Constitution* to increase the minimum wage in Nevada could result in additional costs to Nevada's businesses, the impact on a particular business would depend on the number of employees working at a wage below the new requirement, the amount by which the wages would need to be increased and any actions taken by the business to offset any increased costs associated with the increased wage requirement.

The proposal would, however, result in beneficial financial impacts for employees who receive a wage increase as a result of the proposal and who are not impacted adversely by any actions taken by the business to offset the increased costs associated with the increased wage requirement.

In addition, if the proposal results in an increase in annual wages paid by Nevada's employers, revenues received by the State from the imposition of the Modified Business Tax would also increase.

FULL TEXT OF THE MEASURE

RAISE THE MINIMUM WAGE FOR WORKING NEVADANS

EXPLANATION – Matter in ***bolded italics*** is new; matter between brackets [omitted material] is material to be omitted.

THE PEOPLE OF THE STATE OF NEVADA DO ENACT AS FOLLOWS:

Section 1. Title.

This Measure shall be know and may be cited as "**The Raise the Minimum Wage for Working Nevadans Act.**"

Section 2. Findings and Purpose

The people of the State of Nevada hereby make the following findings and declare their purpose in enacting this Act is as follows:

1. No full-time worker should live in poverty in our state.
2. Raising the minimum wage is the best way to fight poverty. By raising the minimum wage form $5.15 an hour to $6.15 an hour, a full-time worker will earn an additional $2,000 in wages. That's enough to make a big difference in the lives of low-income workers to move many families out of poverty.
3. For low –wage workers, a disproportionate amount of their income goes toward cost of living expenses. Living expenses such as housing, healthcare, and food have far outpaced wage levels for Nevada's working families.
4. In our state, 6 out of 10 minimum wage earners are women. Moreover 25 percent of all minimum wage earners are single mothers, many of whom work full-time.
5. At $5.15 an hour, minimum wage workers in Nevada make less money than they would on welfare. When people choose work over welfare, they become productive members of society and the burden on Nevada taxpayers is reduced.
6. Raising the minimum wage from $5.15 an hour to $6.15 an hour affirms Nevadan's beliefs that we value work, especially the difficult jobs performed by hotel maids, childcare workers, and nursing home employees. We need to make sure the workers who are the backbone of our economy receive fair paychecks that allow them and their families to live above the poverty line.

Section 3.

Article 15 of the Constitution of the State of Nevada is hereby amended by adding thereto a new section to read as follows:

Sec. 16. Payment of minimum compensation to employees.

A. Each employer shall pay a wage to each employee of not less than the hourly rates set forth in this section. The rate shall be five dollars and fifteen cents ($5.15) per hour worked, if the employer provides health benefits as described herein, or six dollars and fifteen cents ($6.15) per hour if the employer does not provide such

benefits. Offering health benefits within the meaning of this section shall consist of making health insurance available to the employee for the employee and the employee's dependents at a total cost to the employee for premiums of not more than 10 percent of the employee's gross taxable income from the employer. These rates of wages shall be adjusted by the amount of increases in the federal minimum wage over $5.15 per hour, or, if greater, by the cumulative increase in the cost of living. The cost of living increase shall be measured by the percentage increase as of December 31 in any year over the level as of December 31, 2004 of the Consumer Price Index (All Urban Consumers, U.S. City Average) as published by the Bureau of Labor Statistics, U.S. Department of Labor or the successor index or federal agency. No CPI adjustment for any one-year period may be greater than 3%. The Governor or the State agency designated by the Governor shall publish a bulletin by April 1 of each year announcing the adjusted rates, which shall take effect the following July 1. Such bulletin will be made available to all employers and to any other person who has filed with the Governor or the designated agency a request to receive such notice but lack of notice shall not excuse noncompliance with this section. An employer shall provide written notification of the rate adjustments to each of its employees and make the necessary payroll adjustments by July 1 following the publication of the bulletin. Tips or gratuities received by employees shall not be credited as being any part of or offset against the wage rates required by this section.

B. *The provisions of this section may not be waived by agreement between an individual employee and an employer. All of the provisions of this section, or any part hereof, may be waived in a bona fide collective bargaining agreement, but only if the waiver is explicitly set forth in such agreement in clear and unambiguous terms. Unilateral implementation of terms and conditions of employment by either party to a collective bargaining relationship shall not constitute, or be permitted, as a waiver of all or any part of the provisions of this section. An employer shall not discharge, reduce the compensation of or otherwise discriminate against any employee for using any civil remedies to enforce this section or otherwise asserting his or her rights under this section. An employee claiming violation of this section may bring an action against his or her employer in the courts of this State to enforce the provisions of this section and shall be entitled to all remedies available under the law or in equity appropriate to remedy any violation of this section, including but not limited to back pay, damages, reinstatement or injunctive relief. An employee who prevails in any action to enforce this section shall be awarded his or her reasonable attorney's fees and costs.*

C. *As used in this section, "employee" means any person who is employed by an employer as defined herein but does not include an employee who is under eighteen (18) years of age, employed by a nonprofit organization for after school or summer employment or as a trainee for a period not longer than ninety (90) days. "Employer" means any individual, proprietorship, partnership, joint venture, corporation, limited liability company, trust, association, or other entity that may employ individuals or enter into contracts of employment.*

D. If any provision of this section is declared illegal, invalid or inoperative, in whole or in part, by the final decision of any court of competent jurisdiction, the remaining provisions and all portions not declared illegal, invalid or inoperative shall remain in full force or effect, and no such determination shall invalidate the remaining sections or portions of the sections of this section.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ROBERT A. GREENE,

Plaintiff,

vs.

EXECUTIVE COACH & CARRIAGE,

Defendant.

2:09-cv-00466-RCJ-RJJ

ORDER

I. INTRODUCTION

Before the Court is Defendant Bentley Transportation Services' Motion to Dismiss. (#6). This case is factually similar to *Lucas v. Bell Trans*, 2:08-cv-01792-RCJ-RJJ. The Plaintiff limousine driver is suing the Defendant limousine company on behalf of himself and those similarly situated for various violations of state and federal labor law. In the present motion, Defendant moves to dismiss Plaintiff's state law claims.

The Court has considered the pleadings and arguments of both parties. IT IS HEREBY ORDERED THAT Defendant's Motion to Dismiss (#6) is GRANTED.

II. BACKGROUND

On March 10, 2009, Plaintiff Robert A. Greene filed the present lawsuit individually and on behalf of all persons who have worked for Defendant Bentley Transportation Services dba Executive Coach & Carriage ("Defendant") within the last three years. Plaintiff asserts several claims against Defendant: (1) failure to pay the minimum wage under Fair Labor Standards Act ("FLSA"); (2)

failure to pay overtime under the FLSA; (3) liquidated damages under the FLSA; (4) failure to pay for all hours worked under Nevada Revised Statute 608.016; (5) failure to pay the minimum wage under Article 15, § 16 of the Constitution of the State of Nevada; (6) failure to pay overtime under Nevada Revised Statute 608.100(1)(b); (7) waiting penalties under Nevada Revised Statute 608.040; and (8) improper wage deductions under Nevada Revised Statute 608.100.

In the present motion, Defendant contends that Plaintiff's state law claims should be dismissed. Defendant argues that the state law minimum wage and overtime claims should be dismissed because limousine drivers are excepted from Nevada's overtime and minimum wage provisions. Defendant further argues that, since Plaintiff has no cognizable claim for backpay under Nevada law, there is no basis for an award of waiting penalties and that claim must also be dismissed. Finally, Defendant asserts that Plaintiff has not stated a claim for improper wage deduction.

III. STANDARD OF REVIEW

Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief" in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of action that fails to state a claim upon which relief can be granted. A motion to dismiss under Rule 12(b)(6) tests the complaint's sufficiency. *See North Star Int'l. v. Arizona Corp. Comm'n.*, 720 F.2d 578, 581 (9th Cir. 1983). When considering a motion to dismiss under Rule 12(b)(6) for failure to state a claim, dismissal is appropriate only when the complaint does not give the defendant fair notice of a legally cognizable claim and the grounds on which it rests. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554–55 (2007). In considering whether the complaint is sufficient to state a claim, the court will take all material allegations as true and construe them in the light most favorable to the plaintiff. *See NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). The court, however, is not

required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

If the court grants a motion to dismiss a complaint, it must then decide whether to grant leave to amend. The court should "freely give" leave to amend when there is no "undue delay, bad faith[,] dilatory motive on the part of the movant . . . undue prejudice to the opposing party by virtue of . . . the amendment, [or] futility of the amendment . . . ." Fed. R. Civ. P. 15(a); *Foman v. Davis*, 371 U.S. 178, 182 (1962). Generally, leave to amend is only denied when it is clear that the deficiencies of the complaint cannot be cured by amendment. *See DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992).

IV. ANALYSIS

A. Failure to Pay for All Hours Worked and Violation of Nevada Minimum Wage Laws

In his complaint, Plaintiff claims that Defendant violated Nevada's minimum wage laws. Defendant apparently did not pay its drivers an hourly wage. Instead, drivers were compensated only with a percentage of their fares. Plaintiff alleges that, under this pay scheme, Defendant violated Nevada law by failing to pay its limousine drivers the minimum wage for each hour they worked. Plaintiff alleges several specific situations in which drivers were not paid, including: (1) a mandatory thirty-two hour training course for new drivers; (2) mandatory company meetings; (3) time required to fix and maintain Defendant's vehicles; and (4) generally any non-driving time while the drivers were engaged in work for Defendant.

In the present motion, Defendant asserts that Plaintiff's state law minimum wage claim must be dismissed because limousine drivers are specifically excluded from Nevada's minimum wage laws under Nevada Revised Statute 608.250(2)(e). Plaintiff counters that Article 15, § 16 of the Nevada Constitution, which was enacted by ballot initiative in 2006, impliedly repealed the previously existing exclusions. Because the electorate did not intend to repeal the exclusions to

Nevada's minimum wage law by enacting Article 15, § 16, those exclusions remain in force, and the Court should thus grant dismissal of Plaintiff's state law minimum wage claims.

1. The Nevada Wage and Hour Law and Nevada's Constitutional Amendment

Nevada has minimum wage and overtime compensation statutes. The Nevada Wage and Hour Law ("NWHL"), which is codified at Nevada Revised Statute 608.250, establishes minimum wages that apply to private employers within this state. Included in the NWHL is a list of occupations that are specifically excluded from its minimum wage provision. *See* Nev. Rev. Stat. 608.250(2). Among the excluded occupations are "taxicab and limousine drivers." Nev. Rev. Stat. 608.250(2)(e).

In the 2006 election cycle, the Nevada voters approved a measure, raised by initiative, entitled "Raise the Minimum Wage for Working Nevadans." The effect of the measure was to add Article 15, § 16 to the Constitution of the State of Nevada ("Minimum Wage Amendment" or "Amendment"). The Minimum Wage Amendment essentially raised the state minimum wage to $6.15 per hour unless an employer provided health insurance to its employees under certain terms, in which case the minimum wage was set at $5.15 per hour. The Amendment also provided for annual cost of living increases to the minimum wage, which were tied to the Consumer Price Index. The Minimum Wage Amendment made no mention of any of the exclusions in Nevada Revised Statute 608.250(2).

The dispute between the parties centers on the import of Section 16(c) of the Minimum Wage Amendment, which defines "employer" and "employee." Section 16(c) provides:

> As used in this section, "employee" means any person who is employed by an employer as defined herein but does not include an employee who is under eighteen (18) years of age, employed by a nonprofit organization for after school or summer employment or as a trainee for a period not longer than ninety (90) days. "Employer" means any individual, proprietorship, partnership, joint venture, corporation, limited liability company, trust, association, or other entity that may employ individuals or enter into contracts of employment.

Nev. Const. art. 15 § 16(c). Subject to these definitions, Section 16(a) of the Minimum Wage Amendment provides that "[e]ach employer shall pay a wage to each employee of not less than the hourly rates set forth in this section." Nev. Const. art. 15, § 16(a). Plaintiff's theory is that the Minimum Wage Amendment impliedly repealed the enumerated exemptions in Nevada Revised Statute 608.250(2). Plaintiff argues that since he fits the definition of "employee" under Article 15, § 16(c), he is entitled to the minimum wage. Defendant counters that the only effect of the Amendment was to raise the minimum wage, and that the NWHL exclusions are still in force.

2. The Scope of the Minimum Wage Amendment

The viability of Plaintiff's state law minimum wage claim depends upon whether the Minimum Wage Amendment and the exemptions in Nevada Revised Statute 608.250(2) conflict. It is a basic principle that, if a constitutional provision conflicts with a statute, the constitutional provision controls. *See We the People Nev. v. Miller*, 192 P.3d 1166, 1177 n.55 (Nev. 2008). If the Minimum Wage Amendment's definition section was intended to completely supplant the NWHL's list of exemptions, then those exemptions would be impliedly repealed and Plaintiff's state law minimum wage claim survives. Conversely, if the Amendment was intended only to raise the minimum wage and not disturb the exemptions, those exemptions (including the exemption for limousine drivers) still stand and Plaintiff's claim fails.

As a preliminary matter, implied repeal is disfavored under Nevada law. *Presson v. Presson*, 147 P. 1081, 1082 (Nev. 1915). Implied repeal occurs only when "there is an irreconcilable repugnancy between the two laws compelling the conclusion that the later enactment necessarily repeals the earlier." *Las Vegas v. Int'l Ass'n of Firefighters*, 543 P.2d 1345, 1346 (Nev. 1975). "Where express terms of repeal are not used, the presumption is always against an intention to [impliedly] repeal an earlier statute." *Western Realty Co. v. Reno*, 63 Nev. 330, 344 (Nev. 1946).

The scope of a constitutional provision is determined by the intent of those who enacted it. *See Guinn v. Legislature of Nev.*, 119 Nev. 460, 471 (Nev. 2003) ("In construing the Constitution,

our primary objective is to discern the intent of those who enacted the provisions at issue."). Since a ballot initiative is enacted by the voters, the crucial determination that must be made is what the voters intended when they passed the measure. *See Miller v. Burk*, 188 P.3d 1112, 1120 (Nev. 2008). When the language of constitutional provision adopted through initiative process is clear on its face, Nevada courts will not go beyond that language in determining the voters' intent. *Id.* But if the language of such a constitutional amendment is ambiguous, meaning that it is subject to two reasonable but inconsistent interpretations, the Court may turn to extrinsic evidence to determine what the voters intended. *Id.* Courts attempting to discern the voters' intent and understanding of a ballot measure may consider the ballot summaries and arguments issued to the voters, *Prof'l Eng'rs in Cal. Gov't v. Kempton*, 155 P.3d 226, 239 (Cal. 2007), as well as "public policy and reason." *Miller*, 188 P.3d at 1120.

Because the language of the Minimum Wage Amendment is subject to two reasonable but inconsistent interpretations, the Court may examine extrinsic evidence to discern the intent of the voters when they enacted it. *See Miller*, 188 P.3d at 1120. One possible interpretation of the Minimum Wage Amendment is that it was intended to create an inalienable *right* to a minimum wage for anyone defined as an employee under its terms. Under this interpretation, the exclusions in Nevada Revised Statute 206.250 would be irreconcilable with the Nevada Constitution, and would thus be impliedly repealed. However, an equally reasonable interpretation of the Minimum Wage Amendment is that the voters merely intended to bypass the legislature to raise the minimum wage and provide for mandatory annual cost-of-living increases, and that the Amendment otherwise preserved the status quo ante. Under this interpretation, there would be no conflict between the Minimum Wage Amendment and the NWHL, and the exclusions would remain in force. In order to determine which of these two reasonable interpretations the voters intended, resort to extrinsic evidence is necessary.

An examination of the available extrinsic evidence suggests that the Nevada voters did not intend to repeal the exclusions in the NWHL by enacting the Minimum Wage Amendment. Perhaps the best evidence of the voters' intent in enacting the Amendment is the wording of the ballot question and the scope of the arguments for and against the initiative.[1] *See People v. Rizo* 996 P.2d 27, 30 (Cal. 2000) (noting the particular usefulness of "the analyses and arguments contained in the official ballot pamphlet" in determining voter intent). The measure itself is entitled "Raise the Minimum Wage for Working Nevadans" (#6 Ex. 2 at 35), which seems to imply that the enactment's scope was limited to changing the amount of the minimum wage and not the occupations entitled to that minimum wage. The condensation of the ballot question, which reduces the question to a single sentence, asks: "Shall the Nevada Constitution be amended to raise the minimum wage paid to employees?" (#6 Ex. 2 at 31.) Voters reading this condensed question would have no reason to think that they were voting to repeal exemptions to the previously existing law, nor would they have any reason to consider the impact of such a change when casting their ballots. The arguments both for and against the Amendment were entirely centered upon its impact on those already receiving the minimum wage. One would expect that if one of the contemplated purposes of the enactment was to abolish the NWHL's exceptions that the arguments would include at least a passing reference to how such a change would affect the state. In sum, a Nevada voter who had cast her ballot in favor of the Amendment based on careful consideration of these materials would likely be surprised if someone told her that she had also voted to extend the minimum wage to casual babysitters, live-in domestic workers, limousine drivers, and other previously excluded occupations. *See* Nev. Rev. Stat. 608.250(2). Given the presumption against implied repeal, the extrinsic evidence available is insufficient to support the conclusion that Nevada voters intended to abolish the NWHL's exceptions

[1] Defendant has provided these materials as Exhibit 2 to its Motion to Dismiss.

by enacting Article 15, § 16. Rather, the voters intended only to change the amount of the minimum wage and provide for mandatory cost-of-living increases.

3. The State Attorney General's Opinion

Plaintiff's opposition to the dismissal of his minimum wage claim rests almost entirely on an advisory opinion issued by the Nevada Attorney General, which concluded that the Minimum Wage Amendment *did* impliedly repeal the exemptions in the NWHL. The relevant excerpt from the opinion states as follows:

> The effect of the proposed amendment on the NRS 608.250 exclusions is controlled by two presumptions. First, the voters should be presumed to know the state of the law in existence related to the subject upon which they vote. Op. Nev. Atty' Gen. 153 (December 21, 1934). Second, it is ordinarily presumed that "[w]here a statute is amended, provisions of the former statute omitted from the amended statute are repealed." *McKay v. Board of Supervisors*, 730 P.2d 437, 442 (1986). In keeping with these presumptions, the people, by acting to amend the minimum wage coverage and failing to include the statutory exclusions in the proposed amendment, are presumed to have intended the repeal of the existing exclusions so that the new minimum wage would be paid to all who met its definition of "employee." Accordingly, the proposed amendment would effect an implied repeal of the exclusions from minimum wage coverage at NRS 608.250(2).

(#8 Ex. A at 12.)

Opinions issued by the Attorney General are not binding on the Court. *Cannon v. Taylor*, 493 P.2d 1313, 1314 (Nev. 1972). The Nevada Supreme Court has issued holdings contrary to Attorney General opinions if the court had concluded that the Attorney General's opinion was poorly reasoned. *See, e.g., Miller v. Burk*, 188 P.3d 1112, 1123 n.54 (Nev. 2008) (refusing to adhere to an Attorney General opinion because it was "internally inconsistent"); *Blackjack Bonding v. City of Las Vegas Municipal Court*, 14 P.3d 1275, 1279 (Nev. 2000) (rejecting the reasoning in an Attorney General Opinion because "[the] opinion confuse[d] jurisdiction, which is subject to legislative control, with independent, inherent judicial powers, which are not subject to legislative control").

Because the Attorney General Opinion in this case is poorly reasoned, the Court should disregard it. Both of the assumptions upon which the Attorney General's analysis rests are flawed. First, the Attorney General states that "the voters should be presumed to know the state of the law in existence related to the subject upon which they vote."[2] The presumption the Attorney General makes here appears to be a modification of the well-settled presumption that *legislatures* are presumed to know the state of the law when they act. *See, e.g., Int'l Game Tech. Inc. v. Second Judicial Dist. Court of Nev.*, 127 P.3d 1088, 1103 (Nev. 2005). This presumption is eminently sensible when applied to legislators because, as professional lawmakers, they should be expected to be very familiar with the law. But the reasonableness of this presumption falls apart when it is applied to lay voters; it is not reasonable to assume that a cashier voting on a ballot initiative is intimately familiar with related provisions of the Nevada Revised Statutes. The Attorney General's second presumption, that "it is ordinarily presumed that, where a statute is amended, provisions of the former statute omitted from the amended statute are repealed," simply has no application here. The voters were not voting to amend Nevada Revised Statute 608.250; they were voting to create an entirely new section of the Nevada Constitution which could happily co-exist with the previously existing statutory exceptions. Given that these two presumptions are flawed, it does not follow that "[the voters] are presumed to have intended the repeal of all existing exclusions" by not including them in the minimum wage amendment.

4. Conclusion

Plaintiff's state law minimum wage claim should be dismissed. Plaintiff, as a limousine driver, is expressly excluded from Nevada's minimum wage law under Nevada Revised Statute 608.250(2). The Nevada electorate did not intend an implied repeal of that exemption by enacting

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[2] As Defendant points out, the authority the Attorney General cites for this proposition is another (non-binding) Attorney General opinion. There does not appear to be any mandatory authority supporting a presumption that the voters are presumed to know the state of the law in existence related to the subject upon which they vote.

the Minimum Wage Amendment. Thus, the exemption is still in force and Plaintiff's claim fails.

B. Plaintiff's State Law Overtime Claim

Defendant also contends that Plaintiff's overtime claim must also be dismissed. The statute governing Nevada's overtime law is Nevada Revised Statute 608.018. Nevada Revised Statute 608.018(3)(j) specifically states that taxicab and limousine drivers are not entitled to overtime under Nevada law. Plaintiff, apparently realizing this, claims that his state law overtime claim arises not under Nevada Revised Statute 608.018 but rather under Nevada Revised Statute 608.100. That statute provides, *inter alia*, that it is "unlawful for any employer to . . . [p]ay a lower wage, salary or compensation to an employee than the amount that employer is required to pay employee by virtue of any statute or regulation . . . ." Plaintiff claims that Defendant's failure to pay its limousine drivers overtime is a violation of the FLSA, which in turn amounts to a violation of Nevada Revised Statute 608.100. Because Nevada Revised Statute 608.100 affords Plaintiff no private cause of action, the Court should dismiss Plaintiff's state law overtime compensation claim.[3]

The Nevada Supreme Court held in *Baldonado v. Wynn Las Vegas,* 194 P.3d 96 (Nev. 2008), that Nevada Revised Statute 608.100 does not provide a private cause of action.[4] In *Baldonado*, the plaintiffs were table game dealers that worked for defendant Wynn Las Vegas. *Id.* at 98. Wynn modified its tip policy to compel the table game dealers to share a portion of their tips with pit managers and floor supervisors, which lowered the dealers' overall salaries. *Id.* at 99. The table game dealers filed a class action suit against Wynn seeking damages and injunctive relief. *Id.* Among the dealers' claims was an allegation that Wynn had violated Nevada Revised Statute

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[3] Even if Nevada Revised Statute 608.100 did provide a private cause of action, Plaintiff's position that any violation of the FLSA amounts to a violation of 608.100 would lead to an absurd result. Under Plaintiff's theory, any Nevada FLSA Plaintiff would be able to bootstrap any FLSA opt-in collective action into a Rule 23(b)(3) opt-out class action based on a violation of 608.100. It seems unlikely that the Nevada legislature intended such a result.

[4] This Court engaged in a detailed treatment of *Baldonado* in the recent case of *Lucas v. Bell Trans*, 2:08-cv-01792-RCJ-RJJ (#27 at 4–8.)

608.100. *Id.* The trial court determined that Nevada Revised Statute 608.100 did not confer a private cause of action on the dealers and dismissed that claim. *Id.* The Nevada Supreme Court affirmed.[5] *Id.* at 107. The court determined that "the Legislature has entrusted the labor laws' enforcement to the Labor Commissioner, unless otherwise specified." *Id.* at 102. The court also highlighted the adequacy of an administrative remedy provided under Chapter 608, which allows private parties to file labor law complaints with the Labor Commissioner. *Id.* at 102. The Commissioner has a duty to hear and resolve such complaints. *Id.* at 104.

In short, Nevada Revised Statute 608.100 confers no private right of action. Because Plaintiff's overtime claim is based on a violation of Nevada Revised Statute 608.100, his claim fails.

C. Plaintiff's Improper Wage Deduction Claim

Defendant has also moved to dismiss Plaintiff's claim for "improper wage deductions." Plaintiff claims in his Complaint that Defendant deducted a "leasing fee" of at least five dollars each time a limousine driver drove a vehicle for a client or customer. (#1 at 16 ¶ 64.) Plaintiff alleges that these "leasing fees" violated Nevada Revised Statute 608.100(2)'s proscription against "requir[ing] an employee to rebate, refund or return any part of the wage, salary or compensation earned by and paid to the employee."

The essence of Defendant's argument is that Plaintiff's factual allegations are insufficient to support his claim for improper wage deduction. However, the Court need not consider this argument because, as discussed above, Nevada Revised Statute 608.100 does not grant a private cause of action. Since this claim is based on an alleged violation of Nevada Revised Statute 608.100, the claim should be dismissed.

D. Plaintiff's Claim for Waiting Penalties

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[5] The Nevada Supreme Court also determined that there was no private cause of action under 608.160 (which prohibits taking employee tips), and 608.120 (which makes it unlawful for managers and shift bosses to require gratuities as a condition of employment). Neither of those statutes are at issue in the case at bar.

Finally, Defendant claims that Plaintiff's claim for waiting penalties should be dismissed. Plaintiff's Complaint included a claim for relief under Nevada Revised Statute 608.040. That statute provides:

> 1. If an employer fails to pay
>
> (a) Within 3 days after the wages or compensation of a discharged employee becomes due; or
>
> (b) On the day the wages or compensation is due to an employee who resigns or quits,
>
> the wages or compensation of the employee continues at the same rate from the day he resigned, quit or was discharged until paid or for 30 days, whichever is less.

Nev. Rev. Stat. 608.040. Plaintiff's Complaint "seek[s] waiting penalties in addition to wages due for themselves and all class members who terminated employment within the last three years." (#1 at 16 ¶ 62.

Because Plaintiff does not have any valid state law claim for minimum wage and overtime, there can be no delay damages. Under Nevada law, Plaintiff was not deprived of any wages or overtime which he had been due. Thus, there is no basis for this claim and it should be dismissed.

V. CONCLUSION

The Court has considered the pleadings and arguments of both parties. IT IS HEREBY ORDERED THAT Defendant's Motion to Dismiss (#6) is GRANTED.

DATED: November 10, 2009

ROBERT C. JONES
UNITED STATES DISTRICT JUDGE