**IN THE SUPREME COURT OF THE STATE OF NEVADA**

MDC RESTAURANTS, LLC, a Nevada limited liability company; LAGUNA RESTAURANTS, LLC, a Nevada limited liability company; INKA, LLC, a Nevada limited liability company,
Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA in and for the County of Clark and THE HONORABLE TIMOTHY C. WILLIAMS, District Court Judge,
Respondents,

vs.

PAULETTE DIAZ, an individual; LAWANDA GAIL WILBANKS, an individual; SHANNON OLSZYNSKI, an individual; and CHARITY FITZLAFF, an individual, on behalf of themselves and all similarly-situated individuals,
Real Parties in Interest.

**Case No.**

District Court Case No. A-14-701633-C

District Court Dept. No. XVI



**PETITION FOR WRIT OF MANDAMUS OR PROHIBITION**

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## NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. MDC Restaurants, LLC, is a privately-held company and no publically traded company owns 10% or more of MDC Restaurants, LLC's stock.
2. Laguna Restaurants, LLC, is a privately-held company and no publically traded company owns 10% or more of Laguna Restaurants, LLC's stock.
3. Inka, LLC, is a privately-held company and no publically traded company owns 10% or more of Inka, LLC's stock.

Dated: July 30, 2015

Respectfully submitted,

/s/ Montgomery Y. Paek, Esq.

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## MEMORANDUM OF POINTS AND LEGAL AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

## I. RELIEF SOUGHT.

Pursuant to NRS 34.150 *et seq*., NRS 34.320 *et seq*. and Nevada Rule of Appellate Procedure 21, Petitioners MDC Restaurants, LLC; Laguna Restaurants, LLC; and Inka, LLC (collectively "Petitioners"), by and through their counsel, Littler Mendelson, P.C., hereby petition this Court for the issuance of a writ of mandamus or, in the alternative, writ of prohibition for clarification of law. Petitioners request that this Court compel the Honorable Timothy C. Williams of the Eighth Judicial District Court of the State of Nevada to vacate his Order Regarding Motion for Partial Summary Judgment on Liability as to Plaintiff Paulette Diaz's First Claim for Relief entered on July 17, 2015 granting Plaintiff Paulette Diaz's Motion for Partial Summary Judgment on Liability as to her First Claim for Relief and enter an order that under the Minimum Wage Amendment, Nev. Const. Art. XV, § 16 ("MWA"), for an employer to "provide" health benefits, an employer need only offer or make available health benefits to an employee, rather than actually enroll that employee into a health plan, in order to pay the lower-tier minimum wage rate.

## II. ISSUES PRESENTED.

In order to pay the lower-tier minimum wage rate under the MWA whether, as an important issue of law requiring clarification, "provid[ing]" and "offering"

health benefits means "making health insurance available", rather than employees enrolling in health insurance.

## III. FACTS NECESSARY TO UNDERSTAND THE ISSUES PRESENTED.

In the underlying district court case, the named Plaintiffs and Real Parties in Interest Paulette Diaz, Lawanda Gail Wilbanks, Shannon Olzynski and Charity Fitzlaff (collectively "Plaintiffs") are four individuals who allege that they have worked at restaurants operated by Petitioners in Clark County, Nevada. (Appendix at 1-31). These Plaintiffs filed their Complaint against Petitioners on May 30, 2014 and filed their Amended Class Action Complaint on June 5, 2014. *Id*. On July 22, 2014, Petitioners filed their Answer to the Amended Class Action Complaint. (Appendix at 32-42).

On April 24, 2015, individual Plaintiff Paulette Diaz ("Plaintiff") filed a Motion for Partial Summary Judgment on Liability as to Plaintiff Paulette Diaz's First Claim for Relief (also referred to as "Motion for Partial Summary Judgment"). (Appendix 43-149). In this Motion for Partial Summary Judgment, Plaintiff argued, that despite the MWA's use of the term "offer[]", that "'provide' does not mean 'offer'" and instead, that "provide" means that an employee must enroll in a health insurance plan (Appendix at 51:9 and 45:6-7). Thus, Plaintiff argued that under the MWA, "provide" is in actuality a synonym of "enroll" in that the MWA allows an employee to choose their own tier of pay. (Appendix at 46).

Specifically, Plaintiff asserted "[h]ere, Ms. Diaz was not allowed her constitutionally-protected choice; she was never enrolled in or provided qualifying health insurance benefits, but was paid at the lower-tier wage rate by MDC." (Appendix at 46:7-9).

On May 22, 2015, Petitioners filed Defendants' Opposition to Motion for Partial Summary Judgment on Liability as to Plaintiff Paulette Diaz's First Claim for Relief. (Appendix at 150-167). In this Opposition, Petitioners argued that (1) the MWA directs employers to offer insurance and it does not require employees to enroll in insurance; (2) the regulations implementing the MWA specifically state on numerous occasions that employers need only offer qualifying health insurance benefits in order to pay the lower-tier minimum wage; and (3) the retroactive effect of a ruling requiring employees to be enrolled in insurance prior to being paid the lower-tier minimum wage would be a violation of due process. (Appendix at 153:13-18). In their plain meaning analysis of the word "provide", Petitioners noted that Plaintiff, in crafting her own interpretation of "provide", had completely omitted parts of the definition of the word upon which she relied. (Appendix at 154:10-157:2). Petitioners also noted that the Plaintiff's interpretation completely ignored the third sentence of the MWA which states "[o]ffering health benefits within the meaning of this section shall consist of making health insurance available to the employee. . ." (Appendix at 157:3-158:16). Additionally,

Petitioners noted that Plaintiff misconstrued her cited authority while failing to address the Labor Commissioner's regulations interpreting the MWA or the due process ramifications of any new interpretation of "provide" under the MWA. (Appendix at 158:17-162:25).

On June 5, 2015, Plaintiff filed her Reply to Defendants' Opposition to Motion for Partial Summary Judgment on Liability as to Plaintiff Paulette Diaz's First Claim for Relief. (Appendix at 168-207). In her Reply, Plaintiff did not address that her interpretation of "provide" is not supported by the plain language meaning or the express language of the MWA and instead shifted her unsupported arguments to additional arguments of the Plaintiff's interpretation of the policy behind the MWA. (Appendix at 173:5-24).

On June 25, 2015, Respondents Honorable Timothy C. Williams and Eighth Judicial District Court held a hearing on Plaintiff's Motion for Partial Summary Judgment on Liability as to Plaintiff Paulette Diaz's First Claim for Relief. (Appendix at 208 and 209-261). Upon commencement of the hearing, the district court pronounced that the issues before it were "clearly questions of first impressions." (Appendix at 212:1-8). As Plaintiff had brought the Motion before the district court, Plaintiff began her arguments with her position regarding the plain meaning of "provide" under the MWA when the district court interrupted with "why does that matter" and instead proffered its own question of the purpose

behind the upper-tier rate under the MWA. (Appendix at 212:9-214:23). Even Plaintiff's counsel acknowledged that the district court had "skipped to the last layer" without doing the requisite analysis. (Appendix at 214:24-215:2). The district court then cited the *King vs. Burwell*, 576 U.S. ___ (2015), ruling that had been in the news that morning and the Affordable Care Act ("ACA"), neither of which were at issue in the briefs and neither of which were relevant to the MWA. (Appendix at 215:3-216:3). The district court did seem to recognize, however, that it should only go beyond the meaning of the word "provide" if there was ambiguity when it stated "[w]ell, I mean, ultimately I have to decide whether "provide" is ambiguous or not." (Appendix at 217:18-19). The district court expressed confusion as to what scenario the upper-tier rate would apply if employers had to offer health insurance, rather than employees enrolling in health insurance, to which Plaintiff's counsel explained "[s]ome employers do not bother to offer or provide health insurance at all" to which the district court responded "I understand." (Appendix at 223:5-9). Plaintiff and district court then had another discourse on the ACA and the quality of coverage offered even though the applicability of the ACA was not argued in the briefs as it had been passed after the MWA. (Appendix at 223:10-225:20). Although Plaintiff had the burden as the moving party, the district court did not question Plaintiff as to the misstatements and omissions from her definition cites, the flaws in her reading of the plain

language of the MWA and the regulations promulgated by the Nevada Labor Commissioner that were based on employers offering health insurance. (Appendix at 211:6-226:24).

Petitioners then presented their arguments in opposition and noted that the district court only had to examine two sentences in the MWA, the second and third sentences. (Appendix at 228:2-6). Petitioners argued that Plaintiff had not addressed the plain language of the third sentence of the MWA which stated "offering health benefits within the meaning of this section shall consist of making health insurance available. . ." (Appendix at 228:7-24). Again, the district court redirected Petitioners to its own view of who would pay an upper-tier rate under an offer, and not enrollment, of health insurance to which Petitioners explained, as Plaintiff's counsel had, that it would apply to employers who do not offer health insurance such as those with a minimal part-time hourly work force. (Appendix at 229:11-23). The district court then presented its own, not briefed, hypotheticals of small businesses being able to offer health insurance, law firm insurance, landscaping companies and convenience stores, Petitioners' counsel's health insurance, and the ACA hypothetically being in effect when the MWA was passed. (Appendix at 229:24-236:2). Petitioners responded that the lack of legislative history prevented any such analysis of the district court's hypotheticals and that the district court was left with the plain language of the MWA and the Labor

Commissioner's regulations interpreting compliance with the MWA. (Appendix at 230:23-231:4 and 236:3-237:3).

Petitioners also cited that in addition to several Labor Commissioner's regulations that turned on the "offer" of insurance, that NAC 608.106 also specifically called for employers to keep declinations of insurance which would have no meaning if enrollment was always required. (Appendix at 236:24-237:7). Petitioners also explained that Plaintiff's argument regarding enrollment being necessary only came about after discovery showed the Plaintiff had declined offered health insurance. (Appendix at 237:21-238:19). Further, Petitioners pointed out that Plaintiff was arguing that the district court should ignore the Labor Commissioner's regulations even though one of those regulations, NAC 608.102, was pled as part of Plaintiff's second cause of action in her Complaint. (Appendix at 238:20-239:12). As for policy considerations, Petitioners pointed out that there were due process issues in interpreting the MWA differently than the Labor Commissioner upon whose regulations employers had relied upon for nine years. (Appendix at 239:16-241:4). At the close of arguments, the district court stated that its decision would "focus solely on the application of the constitutional amendment. And I'm going to take a look at the regulations." (Appendix at 249:2-7).

On July 1, 2015, the district court issued a minute order regarding the hearing held on June 25, 2015. (Appendix at 262). On July 17, 2015, the Notice of Order Regarding Motion for Partial Summary Judgment on Liability as to Plaintiff Paulette Diaz's First Claim for Relief was filed incorporating the district court's Order (also referred to as "Order"). (Appendix at 263-269). In its Order, the district court made no reference either applying or dismissing the Labor Commissioner's regulations despite indicating that it would look at those regulations before issuing its Order. (Appendix at 249:2-7). Further, the district court did not find any ambiguity in the MWA. (Appendix at 262). Instead, the district court found that the language of the MWA as to "provide" was unambiguously synonymous with the words found in Plaintiff's brief of "supply" or "furnish" even though those words are not in the text of the MWA. (Appendix at 262). Thus, the district court made the following Findings of Fact and Conclusions of Law:

> 1. The language of the Minimum Wage Amendment, Nev. Const. art. XV, § 16, is unambiguous: An employer must actually provide, supply, or furnish qualifying health insurance to an employee as a precondition to paying that employee the lower-tier hourly minimum wage in the sum of $7.25 per hour. Merely offering health insurance coverage is insufficient.
>
> 2. This Court finds under the Minimum Wage Amendment, Nev. Const. art. XV, § 16, that for an employer to "provide" health benefits, an employee must

> actually enroll in health insurance that is offered by the employer.
>
> IT IS THEREFORE ORDERED that Plaintiff Paulette Diaz's Motion for Partial Summary Judgment on Liability as to her First Claim for Relief is GRANTED.

(Emphasis added). (Appendix at 267:3-11). In addition to finding that "provide" was synonymous with "supply" or "furnish", the district court also found that "offering health insurance coverage is insufficient" despite the MWA's third sentence stating "[o]ffering health benefits within the meaning of this section shall consist of making health insurance available to the employee. . . " (Emphasis added). (Appendix at 267:6). Further, the district court found that for an "employer to 'provide' health benefits" it was actually the "employee" who "must actually enroll in health insurance." (Appendix at 267:7-9).

After this hearing, on July 9, 2015, the parties were again before the district court on Plaintiff's Motion for Class Certification Pursuant to NRCP 23. (Appendix at 270-342). Plaintiff acknowledged that the district court's July 1, 2015 minute order regarding whether an offer or enrollment was required to pay the lower tier rate directly related to the parties' arguments as to the commonality and typicality requirements for class certification. (Appendix at 288:12-289:7). Thus, at the July 9, 2015 hearing, the district court provided this further elucidation as to its ruling on what "provide" means and what this Court would have to deal with:

> my ruling stands for the proposition one of two things happens: If you enroll them in insurance, then you can pay 7.25 an hour. If you don't enroll them in insurance, they get paid 8.25 an hour. And that's the whole -- at the end of the day, regardless of all the different reasons, based upon my decision, enrolled means enrolled. You know, not -- you know, I mean, provide means provide, you know. That's what it stands for.
>
> And so that's how -- that's how I look at this case. You know, there could be a lot of different reasons out there factually, but at the end of the day there's a constitutional mandate as it relates to the minimum wage. Either you provide them health insurance. They need to pay them 7.25 an hour. If for whatever reason you don't provide them health insurance, they get pay 8.25 an hour. There could be a lot of different reasons why, but that's the case. That's how I look at that based upon my ruling. And I realize the Supreme Court will have to deal with that.

(Appendix at 309:6-25). Thus, the district court emphasized that the MWA language of "provide" required employees to "enroll" in insurance despite the lack of any such language in the MWA and the contradictory regulation that required that records of declinations be kept by employers. (Appendix at 309:6-25).

On July 29, 2014, Petitioners filed a Notice to the district court regarding this Petition. (Appendix at 343-345). The meaning of "provide" under the MWA is an important issue of law in need of clarification. **Declaration of Montgomery Y. Paek, Esq. ("Paek Decl.") attached hereto.** Indeed, even the district court noted that this Court would need to review its Order on the meaning of "provide"

under the MWA and that the issues were a matter of "first impression." (Appendix at 309:24-25, 212:6-8 and 249:25-250:2).

In addition to this matter, Petitioners' counsel are the counsel of record for Defendants in the cases of *Tyus et al. v. Wendy's of Las Vegas, Inc. et al.*, United States District Court case number 2:14-cv-00729-GMN-VCF; *Hanks et al. v. Briad Restaurant Group, LLC*, United States District Court case number 2:14-cv-00786-GMN-PAL; and *Perry et al. v. Terrible Herbst, Inc.*, Eighth Judicial District Court case number A-14-701633-C against the same listed Plaintiff's counsel for MWA violations. In one of these matters, the meaning of "provide" and "offer" under the MWA became a major impediment to any possibility of settlement as the parties vehemently disagreed on the correct meaning of "provide" and "offer."

Additionally, in this matter, Plaintiff has a pending continued Motion for Class Certification Pursuant to NRCP 23 that hinges on the definition of the meaning of "provide" under the MWA. (Appendix at 346-501; see also 355:14-17 and 347:6-15). In their Opposition to this Motion for Class Certification, Petitioners noted that the flawed reading of "provide" under the MWA was directly relevant to Plaintiff's burden under the class certification requirements of ascertainability, commonality, typicality, superiority, numerosity and adequacy. (Appendix at 502-769; see also 509:15-510:4, 511:1-515:3, 517:26-518:20, 519:26-520:18, 522:13-523:4, 524:13-16, 525:22-25, 526:2-22). Indeed, in her

Supplemental Brief in Support of Plaintiffs' Motion for Class Certification Pursuant to N.R.C.P. 23, Plaintiff bases her new certification arguments on the creation of a "Non-Acceptance Class or Subclass" to represent the employees "who did not enroll in Defendants' health benefit plans." (Appendix at 770-819; see also 772:17-19). Throughout her Supplemental Brief, Plaintiff also highlights that the new "Non-Acceptance Class or Subclass" of non-enrolled employees is an essential component of her numerosity, commonality, typicality, adequacy, predominance and superiority requirements. (Appendix at 774:10-776:24). As such, Petitioners face the prospect of certification based on an incorrect issue of law. **Paek Decl.** With Plaintiffs alleging that there are a potential 2,545 employees in their proposed putative class and subclass, Petitioners would be highly prejudiced by the undue burden of litigating over thousands of employees who may be wrongfully included as class or subclass members. ***Id.*** Accordingly, this Court should issue a writ of mandamus or prohibition clarifying that under the MWA, an employer must "offer" or "mak[e] available" health insurance to its employees in order to pay the lower-tier minimum wage rate and not that employees are required to actually "enroll" in health insurance. ***Id.***

## IV. LEGAL ARGUMENT AND REASON WHY THE WRIT SHOULD ISSUE.

### A. Standard For Writ Of Mandamus Or Prohibition.

Under NRS 34.150 *et seq.*, NRS 34.320 *et seq.* and Nevada Rule of Appellate Procedure 21, a writ of mandamus or prohibition may be issued by this Court to compel or prohibit an act by the district court. Both a writ of mandamus and writ of prohibition are extraordinary remedies within the Court's discretion. *Smith v. District Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). Neither writ will issue when a petitioner has a plain, speedy and adequate remedy in the ordinary course of law. *Walters v. Eighth Judicial Dist. Court*, 2011 Nev. LEXIS 82, 7, 263 P.3d 231, 233-234 (2011).

The Court reviews a petition for writ of mandamus or prohibition when statutory interpretation or application is at issue. *Walters* at 8-10. This Court has also held that it will exercise its discretion to review matters under mandamus where the "issue of law is a matter of first impression and may be dispositive of the case." *Otak Nev., LLC v. Eighth Judicial Dist. Court of Nev.*, 312 P.3d 491, 496 (2013).

Here, the district court did not find any question of fact that would prevent it from deciding the meaning of "provide" and "offer" under the MWA as a matter of first impression. The district court found that the language of the MWA was "unambiguous" and stated that the word "provide" was synonymous with the words "supply" or "furnish" which are found nowhere in the MWA. (Appendix at 267:3-4). The district court also held that such "supply[ing]" or "furnish[ing]" was

a "precondition to paying that employee the lower-tier minimum wage in the sum of $7.25 per hour" even though that requirement is also found nowhere in the MWA. (Appendix at 267:3-6). Further, the district court held that "[m]erely offering health insurance coverage is insufficient" in direct contradiction of the third sentence of the MWA that states "[o]ffering health benefits within the meaning of this section shall consist of making health insurance available to the employee. . . " (Appendix at 267:6).

Additionally, the district court created a completely new and distinct requirement that is contrary to the plain language of the MWA and the interpretive guidance provided by the Labor Commissioner by stating "[t]his Court finds under the Minimum Wage Amendment, Nev. Const. art. XV, § 16, that for an employer to 'provide' health benefits, an employee must actually enroll in health insurance that is offered by the employer." (Appendix at 267:7-9).

The district court's interpretation of the word "provide" is incorrect for three key reasons: (1) the MWA directs employers to offer insurance and it does not require employees to enroll in insurance in order to pay the lower-tier minimum wage rate; (2) the regulations implementing the MWA specifically state that employers need only "offer" qualifying health insurance benefits in order to pay the lower-tier minimum wage; and (3) the retroactive effect of a ruling requiring employees to be enrolled in insurance prior to being paid the lower-tier minimum

wage would be a violation of due process. This Court should interpret and clarify the meaning of the words "provide" and "offer" under the MWA as it has done in *Walters* and *Otak*. Accordingly, a petition for writ of mandamus or prohibition is appropriate in a case such as this where interpretation of "provide" and "offer" under the MWA is an important issue of law in need of clarification.

### B. This Court Should Clarify That The MWA Directs Employers To "Offer" Health Insurance To Employees In Order To Pay The Lower-Tier Minimum Wage And Does Not Require Employees To "Enroll" In Health Insurance.

The MWA sets forth a very clear directive for Nevada employers paying minimum wage: if they provide health insurance to their employees, they may pay the lower-tier minimum wage. Nev. Const. Art. XV, § 16. The disagreement between the parties rested solely on what was meant by the word "provide."

The district court held that "provide" means that an employer must not only provide benefits by making them available to its employees but also that the employees must also actually "enroll" in the employer-based insurance plans. (Appendix at 267:7-9). In other words, the district court has held that benefits are not "provide[d]" unless forced on employees through "enroll[ment]."

The district court's holding regarding the plain meaning of "provide" and "offer" is incorrect for three reasons: (1) the MWA directs employers to offer insurance and it does not require employees to enroll in insurance; (2) the regulations implementing the MWA specifically state that employers need only

offer qualifying health insurance benefits in order to pay the lower-tier minimum wage; and (3) the retroactive effect of a ruling requiring employees to be enrolled in insurance prior to being paid the lower-tier minimum wage would be a violation of due process.

Absent in the district court's order is that the MWA focuses on what actions employers must take in order to pay below the upper tier minimum wage. *See* Nev. Const. Art. XV, § 16. Specifically, it directs employers to offer health insurance benefits to their employees. *Id*. At no point does the MWA discuss or even mention any action that must be taken by employees. *See id*. Thus, the district court's order that the MWA means that employees must enroll in the health insurance plan provided to them by their employers in order to be paid below the upper tier minimum wage is completely erroneous and contrary to the clear directive of the MWA. Indeed, the MWA directs only that employers must offer insurance and the district court's Order requiring that employees are enrolled in health insurance fails because (1) the plain language of the MWA permits payment of the lower-tier minimum wage where the employer offers health benefits to its employees; (2) such an unreasonable definition of the word "provide" renders the language of the MWA nugatory; and (3) the purported authority for "provide" meaning "furnish" is inapposite to the instant matter.

### 1. Under The MWA, "Provide" Means An Employer Must "Offer" Health Insurance And Not That An Employee Must "Enroll" In Health Insurance Because The Plain Language Of The MWA Permits Payment Of The Lower-Tier Minimum Wage Where The Employer Offers Health Benefits To Its Employees.

As was argued to the district court, this Court has held that when the words of a statute have a definite and ordinary meaning, a court should not look beyond "the plain language of the statute, unless it is clear that this meaning was not intended." *Harris Associates v. Clark Cnty. Sch. Dist*., 119 Nev. 638, 641-42, 81 P.3d 532, 534 (2003) (*citing State v. Quinn*, 117 Nev. 709, 713, 30 P.3d 1117, 1120 (2001)); *see also Glover v. Concerned Citizens for Fuji Park*, 118 Nev. 488 (2002) (stating that "[i]t is well established that when the language of a statute is unambiguous, a court should give that language its ordinary meaning"), *overruled in part by Garvin v. Dist. Ct*., 118 Nev. 749 (2002).

Under the MWA, the plain language of the first two sentences is clear:

> 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.

Nev. Const. Art. XV, § 16. Thus, if an employer provides health insurance to its employees, it may pay those employees the lower-tier minimum wage. As briefed by Petitioners, the plain and ordinary meaning of the word "provide" is "to make

available." *See i.e.* <*http://www.merriam-webster.com/dictionary/provide*>. (Appendix at 154:24-27). Thus, if an employer makes health insurance available to its employees, it may pay the lower tier minimum wage.

At the hearing, Petitioners argued that under the MWA, an employer had to "offer" or "make available" health insurance. (Appendix at 228:2-23). In their Opposition in support of these arguments, Petitioners pointed out that Plaintiff's interpretation of "provide" was based on an online Merriam-Webster Dictionary's Thesaurus definition for the word "provide." (Appendix at 155:1-9). As to this erroneous definition of "provide", Petitioners showed that even Plaintiff's cited definition explained that there was no need for actual acceptance or use:

> **PROVIDE**
> to put (something) into the possession of someone for use or consumption <this luxury hotel provides all the comforts of home to well-heeled vacationers>

<http://www.merriam-webster.com/thesaurus/provide>. (Appendix at 155:8-13). Thus, Petitioners expanded on the above definition with the following example:

> As the example sets forth, providing is the same as making available for use. If a "well-heeled vacationer" doesn't use or keep the towels, it doesn't mean the "comforts of home" weren't provided. Rather, if the towels were available for use, they were provided – plain and simple. Whether the guest actually uses the towels is irrelevant to the inquiry. For example, if person A invites person B over for dinner and then prepares and offers person B dinner, person A has provided person B dinner regardless of whether person B eats the food provided. What matters is that dinner was made

available.

(Appendix at 155:13-19). Additionally, Petitioners noted that in Plaintiff's moving papers, Plaintiff completely omitted the actual dictionary definition of the online Merriam-Webster Dictionary which defined "provide" as:

> **Provide:**
> : to make (something) available : to supply (something that is wanted or needed)
> : to give something wanted or needed to (someone or something) : to supply (someone or something) with something
> . . .
> : to supply or make available (something wanted or needed) <provided new uniforms for the band>; *also* : afford <curtains provide privacy>
> : to make something available to <provide the children with free balloons>

<http://www.merriam-webster.com/dictionary/provide> (emphasis added). (Appendix at 155:20-156:1). Thus, Petitioners noted that Plaintiff ignored her own source's very first definition in which the word "provide" is "to make available." *Id*. (Appendix at 156:1-5). In contrast to this misrepresented definition, Petitioners also provided several other definitions to support that the plain meaning of "provide" is to "make available." (Appendix at 156:6-157:2).

Despite these clear definitional examples that "provide" means to "make available", the district court found that "provide" means that "an employee must actually enroll in health insurance that is offered by the employer." (Appendix 267:7-9). This "enroll[ment]" is not stated in the MWA nor is it supported by the

various definitions of "provide" proffered to the district court. Accordingly, the district court should be compelled to enter an Order that under the MWA, "provide" means to "offer" or "make available" and prohibited from enforcing its Order that "provide" means "an employee must actually enroll" in health insurance.

### 2. Under The MWA, "Provide" Means An Employer Must "Offer" Health Insurance And Not That An Employee Must "Enroll" In Health Insurance Because A Requirement Of Enrollment Would Render The Language Of The MWA Nugatory.

This Court has held that whenever possible, statutes are construed "such that no part of the statute is rendered nugatory or turned to mere surplusage" or to "produce absurd or unreasonable results." *Albios v. Horizon Communities, Inc*., 122 Nev. 409, 418, 132 P.3d 1022, 1028 (2006); *Harris*, 119 Nev. at 642, 81 P.3d at 534.

In this matter, the district court's definition that "provide" means "enroll" is so restrictive that an employer's offer of health insurance to its employees would have no bearing whatsoever on whether that employer is permitted to pay the lower-tier minimum wage. As argued by Petitioners at the hearing, this is in complete contrast to the actual third sentence of the MWA which states:

> 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.

Nev. Const. Art. XV, § 16. (Appendix at 228:2-23). Thus, Petitioners argued that the MWA did not set forth a separate and distinct act by the employer and instead used the terms “provide” and “offer” synonymously. *Id*; (Appendix at 157:18-21). To assert otherwise is nonsensical because if “provide” and “offer” meant entirely separate things, then the third sentence was essentially meaningless and would be rendered nugatory. (Appendix at 157:19-158:2). The second sentence of the MWA states "if the employer provides health benefits as described herein" while the above third sentence states "Offering health benefits within the meaning of this section shall consist of making health insurance available to the employee" (Emphasis added). Nev. Const. Art. XV, § 16. There is no other sentence in the MWA that refers to the providing or offering of health benefits, so those two sentences must be referring to each other regarding what "provides health benefits" and "offering health benefits" mean. (Appendix at 232:11-233:23 and 236:3-23). Thus, the drafters of the MWA, aware that employers cannot forcibly enroll their employees in insurance, indicated that the relevant act for compliance with the MWA was an employer's "offer" of health insurance and not the employee's acceptance or "enrollment" in the health insurance. (Appendix at 157:21-24). In support of this, Petitioners noted the following public policy argument regarding the potential discrimination that would arise from an enrollment scheme:

> Moreover, looking to the subject matter of the MWA – minimum wage and insurance – it is clear making insurance available to minimum wage employees was the goal. It was not to allow minimum wage employees to select their own rate of pay. Such a result would be completely contrary to the concepts of both minimum wage and insurance. Enrolling in insurance is a voluntary process. Minimum wage employees are free to choose, just as anyone else would be, which insurance they would like to select, if any. Employers cannot require their employees to enroll in insurance. Thus, if the MWA intended to mandate that employees be enrolled in a company health insurance in order to be paid the lower-tier wage, it would be inherently discriminatory towards employees without other sources of insurance. For example, any employee who over the age of 26 and therefore cannot be covered by their parents insurance – at no cost to themselves – would invariably earn less than their younger counterparts. Similarly, an un-married employee who could not be on a spouse's insurance would also earn less. The result would be absurd.

(Appendix at 158:3-14). Accordingly, the plain language of the third sentence of the MWA regarding "offering insurance" must mean that employers may pay the lower-tier minimum wage by offering employees health insurance.

### 3. Under The MWA, "Provide" Means An Employer Must "Offer" Health Insurance And Not That An Employee Must "Enroll" In Health Insurance Because The Purported Authority For "Provide" Meaning "Furnish" Is Inapposite.

In its Order, the district court also found that under the MWA, "[t]he language. . . is unambiguous. . . an employer must actually provide, supply, or furnish qualifying health care." (Appendix at 267:3-6). Nowhere in the MWA, is

there any language regarding "supply[ing]" or "furnish[ing]" health care. Nev. Const. Art. XV, § 16. Instead, this "unambiguous" language about "supply" or "furnish" arises from Plaintiff's moving papers. (Appendix at 48:12-18). In her Motion for Partial Summary Judgment, Plaintiff attempted to skew the clear definition of "provide" by arguing that "furnish" was synonymous with "provide" under a criminal case wherein a prisoner was charged with furnishing a controlled substance to himself. (Appendix at 50:16-25). In that Motion, Plaintiff asserted that this Court stated that furnishing "calls for delivery by one person to another person." *Id.* However, Plaintiff omitted that the cited sentence goes on to say "you can't deliver to yourself." (Appendix at 158:17-159:2) citing *State v. Powe, No. 55909*, 2010 WL 3462763, at *1 (Nev. July 19, 2010). Thus, the Court was in no way indicating that the words "provide" or "furnish" mean there must be some acceptance or use or ongoing possession by the person for whom an item or service is intended. *Id*. Rather, the point of the statement was that a person cannot transfer something to themselves. *See id*. Further, Petitioners distinguished the Plaintiff's other cited authority as inapplicable through flawed interpretation. (Appendix at 159:3-22).

Here, the district court's only authority for the MWA requiring an employer to "provide, supply, or furnish qualifying health care" could have only come from Plaintiff's "authority." As shown, the authority for Plaintiff's interpretation of

"provide" meaning to "supply" or "furnish" was misapplied and misstated. (Appendix at158:3-159:22). Further, the district court found "unambiguous" language based on language not found in the MWA. Accordingly, the plain language of the MWA regarding "provide" does not mean that an employer must "supply" or "furnish" health insurance through affirmative employee enrollment of that health insurance.

### C. This Court Should Clarify That The MWA Only Requires An "Offer" Of Health Insurance To Employees And Not "Enrollment" Because It Is Consistent With The Labor Commissioner's Regulations Implementing The MWA.

Under the Nevada Labor Commissioner's regulations implementing the MWA under NAC 608, the regulations make it abundantly clear that employers who "offer" insurance to their employees qualify to pay the lower-tier minimum wage. Specifically, NAC 608.102 states: "To qualify to pay an employee the minimum wage set forth in paragraph (a) of subsection 1 of NAC 608.100 . . . [t]he employer must offer a health insurance plan." NAC 608.102(1) (emphasis added). (Appendix at 159:23-160:5). The regulation goes on to state that, "[t]he health insurance plan must be made available to the employee and any dependents of the employee." NAC 608.102(2) (emphasis added). (Appendix at 160:5-6). The regulations in NAC 608, like the MWA, state absolutely nothing about requiring an employee to enroll in insurance. (Appendix at 160:6-7). NAC 608.102 makes clear that the Labor Commissioner understood that the definition of the word

"provide" was "to make available." (Appendix at 160:9-10). Moreover, the Labor Commissioner interpreted the MWA as a whole to require employers to offer insurance to their employees – not to require employees to enroll in insurance. (Appendix at 160:10-12).

In their Opposition before the district court, Petitioners argued that the district court must give deference to this interpretation as long as it is "based on a permissible construction of the statute" and that the agency interpretation is upheld unless it is arbitrary or capricious. *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842-843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984); *see also Deukmejian v. United States Postal Service*, 734 F.2d 460 (9th Cir.1984); *Lane v. U.S. Postal Serv.*, 964 F. Supp. 1435, 1437 (D. Nev. 1996). (Appendix at 160:9-17). As "provide" meaning "to make available" was consistent with every definition of the word, there was no argument that the Labor Commissioner's interpretation of the MWA is or was arbitrary or capricious. (Appendix at 160:17-19).

Further, Petitioners noted that NAC 608.102 is also due deference because it explains what sort of coverage must be included in the offered health insurance plan. (Appendix at 160:20-25). In fact the terms "qualification to pay lower rate" and "qualified health insurance" are found nowhere in the language of the MWA and are instead found in the Labor Commissioner's regulations. NAC 608.100,

NAC 608.102 and NAC 608.104. Thus, the district court's Order finding that an employer must "furnish qualifying health insurance" actually uses the Labor Commissioner's definition of health insurance while simultaneously refusing to apply the regulation's definition of "offer as "make available. (Appendix at 267:7-9). In addition to the regulations noted above, Petitioners also noted that NAC 608.106 sets forth that employees are free to decline the offered insurance:

> If an employee declines coverage under a health insurance plan that meets the requirements of NAC 608.102 and which is offered by the employer the employer must maintain documentation that the employee has declined coverage.

NAC 608.102 (emphasis added). (Appendix at 160:26-161:8). Petitioners also cited NAC 608.108 as yet another regulation that explains that it is the offer of insurance that is relevant:

> If an employer does not offer a health insurance plan, or the health insurance plan is not available or is not provided within 6 months of employment, the employee must be paid at least the minimum wage set forth in paragraph (b) of subsection 1 of NAC 608.100 . . .

NAC 608.108 (emphasis added). (Appendix at 161:9-17).

At the hearing, Petitioners emphasized that the "offer" and "make available" language found in NAC 608.100 and 608.102 mirrored that language in the MWA. (Appendix at 236:3-23). As to NAC 608.106, Petitioners noted that the regulations on declination of insurance also supported the MWA requiring an offer of health

insurance rather than enrollment. (Appendix at 236:24-237:20). Further, Petitioners noted that Plaintiff was arguing for the ignorance of the Labor Commissioner's regulation even though a violation of NAC 608.102 was expressly included as an element of their second cause of action in their Complaint. (Appendix at 237:21-239:12).

After Petitioners' additional arguments regarding the applicability of the Labor Commissioner's regulations, the district court stated that it would "look at the regulations" and that "as far as the application of regulations or not, understand, whatever grant of authority the labor commission has, it's limited to the constitutional amendment." (Appendix at 246:24-249:13). However, in its Order, the district court makes no finding regarding the applicability of the Labor Commissioner's regulations. Instead, the district court reads in a "qualifying health insurance" term into the MWA without addressing the Labor Commissioner regulations that define "qualified health insurance." Accordingly, the Court should clarify that under the MWA, "provide" means "offer" and not "enroll" as the Labor Commissioner's regulations also support that interpretation and there is no contrary authority to those regulations.

### D. This Court Should Clarify That The MWA Only Requires An "Offer" Of Health Insurance To Employees And Not "Enrollment" Because The Retroactive Effect Of A Ruling Requiring Employees To Be Enrolled Would Violate Due Process.

The United States Supreme Court has held that “a court is to apply the law in

effect at the time it renders its decision" in the absence of manifest injustice or evidence of legislative intent to the contrary. *Bradley v. School Board*, 416 U.S. 696, 711, 94 S.Ct. 2006, 2016, 40 L.Ed.2d 476 (1974). (Appendix at 161:21-28). When interpreting a statute, courts have long applied the "cardinal principle" that a fair construction which permits the court to avoid constitutional questions will be adopted. *United States v. Security Industrial Bank*, 459 U.S. 70, 78, 103 S.Ct. 407, 412, 74 L.Ed.2d 235 (1982) (*quoting Lorillard v. Pons*, 434 U.S. 575, 577, 98 S.Ct. 866, 868, 55 L.Ed.2d 40 (1978)); *Lowe v. S.E.C.*, 472 U.S. 181, ——, 105 S.Ct. 2557, 2562, 85 L.Ed.2d —— (1985). (Appendix at 161:28-162:6). Where a statute may be construed to have either retrospective or prospective effect, a court will choose to apply the statute prospectively if constitutional problems can thereby be avoided. *In re Ashe*, 712 F.2d 864, 865–66 (3d Cir.1983), cert. denied, 465 U.S. 1024, 104 S.Ct. 1279, 79 L.Ed.2d 683 (1984); *Roth v. Pritikin*, 710 F.2d 934, 939–40 (2d Cir.), cert. denied, 464 U.S. 961, 104 S.Ct. 394, 78 L.Ed.2d 377 (1983). (Appendix at 162:6-10). Resolution of the constitutional issue need not be certain; there need only be a "substantial doubt," *Security Industrial Bank*, 459 U.S. at 78, 103 S.Ct. at 412, or an indication that the constitutional question is "non-frivolous." *Ashe*, 712 F.2d at 865. *Accord Roth*, 710 F.2d at 939 ("[e]ven the spectre of a constitutional issue" is sufficient to construe the statute to provide for only prospective relief). (Appendix at 162:10-14).

At the hearing, Petitioners argued that a retroactive application of an "enrolled" requirement under the MWA would violate the employers' due process rights as employers had been relying on the plain language of the MWA and the Labor Commissioner's regulations for the past nine years. (Appendix at 239:16-241:5). Thus, as stated in Petitioners' Opposition, retroactive application of Plaintiff's "must be enrolled" argument could raise constitutional questions concerning both the Ex Post Facto Clause, U.S. Const., art. I, § 9, cl. 3, and the Due Process Clause of the Fifth Amendment. (Appendix at 162:15-20). The district court did seem to recognize this issue and noted that even Plaintiff's counsel agreed with a prospective application only. (Appendix at 249:14-250:2).

In its Order, however, the district court made no finding as to whether or not an enrollment requirement under the MWA would violate due process. (Appendix at 267). Contrary to what it stated at the hearing, the district court also did not make any finding as to retroactive or prospective application. (Appendix at 267). Accordingly, this Court should clarify that the MWA does not have an enrollment requirement as it would violate the due process rights of employers who have relied on the plain language of the MWA and the regulations promulgated by the Labor Commissioner.

## V. CONCLUSION

The plain language of the MWA is clear; to "provide" health benefits an

employer must "offer" health benefits by "making health insurance available to the employee." The MWA does not require an employee to "enroll" in that health insurance as that would render the MWA's own language nugatory. Further, "provide" does not mean an employer must "supply" or "furnish qualifying health insurance."

Additionally, the regulations in NAC 608 make clear that an employer "provides" health insurance by "offering" or "making available" health insurance to employees. In conjunction with these regulations, any enrollment requirement under the MWA would violate due process. Accordingly, Petitioners respectfully submit that this Court grant their Petition for Mandamus or Prohibition and compel the district court to order that "provide" under the MWA means to "offer" or "make available" and not to enroll.

Respectfully submitted,

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**DECLARATION OF THE PARTY BENEFICIALLY INTERESTED**

STATE OF NEVADA )
) ss:
COUNTY OF CLARK )

I, Montgomery Y. Paek, under penalty of perjury under the laws of the United States of America and the State of Nevada, declare and state as follows:

1. I am an attorney admitted to practice law in the State of Nevada. I am an Associate Attorney at the law firm of Littler Mendelson, one of the attorneys for Petitioners MDC Restaurants, LLC; Laguna Restaurants, LLC; and Inka, LLC ("Petitioners").

2. Unless otherwise stated, this declaration is based on my personal knowledge.

3. Pursuant to NRS 15.010 and NRS 34.030, I make this Declaration in support of Petitioners' Petition for Writ of Mandamus or Prohibition ("Petition").

4. I have reviewed the Petition and its attachments and state that the contents are true of my own knowledge, except as to the matters which are therein stated upon information and belief, and as to those matters that I believe them to be true.

5. I believe that the meaning of "provide" and "offer" under the MWA is an important issue of law in need of clarification.

6. In addition to this matter, I am counsel of record for the defendants in the *Tyus et al. v. Wendy's of Las Vegas, Inc. et al*.; *Hanks et al. v. Briad Restaurant Group, LLC*; and *Perry et al. v. Terrible Herbst, Inc*. cases. In one of these matters, the meaning of "provide" and "offer" under the MWA became a major impediment to any possibility of settlement as the parties vehemently disagreed as to what the meaning of "provide" and "offer" were.

7. The meaning of "provide" under the MWA is an important issue of law in need of clarification. Indeed, even the district court noted that this Court would need to review its Order on the meaning of "provide" under the MWA and that the issues were a matter of "first impression."

8. Additionally, in this matter, Plaintiff has a pending continued Motion for Class Certification Pursuant to NRCP 23 that hinges on the definition of the meaning of "provide" under the MWA. In their Opposition to this Motion for Class Certification, Petitioners noted that the flawed reading of "provide" under the MWA was directly relevant to Plaintiff's burden under the class certification requirements of ascertainability, commonality, typicality, superiority, numerosity and adequacy. Indeed, in

her Supplemental Brief in Support of Plaintiffs' Motion for Class Certification Pursuant to N.R.C.P. 23, Plaintiff bases her new certification arguments on the creation of a "Non-Acceptance Class or Subclass" to represent the employees "who did not enroll in Defendants' health benefit plans." Throughout her Supplemental Brief, Plaintiff also highlights that the new "Non-Acceptance Class or Subclass" of non-enrolled employees is an essential component of her numerosity, commonality, typicality, adequacy, predominance and superiority requirements. As such, Petitioners face the prospect of certification based on an incorrect issue of law. With Plaintiff alleging that there are a potential 2,545 employees in their proposed putative class and subclass, Petitioners would be highly prejudiced by the undue burden of litigating over thousands of employees who may be wrongfully included as class or subclass members. Accordingly, this Court should issue a writ of mandamus or prohibition clarifying that under the MWA, an employer must "offer" health insurance to its employees and not that employees are required to actually "enroll" in health insurance.

9. Accordingly, I believe this Court should issue a writ of mandamus or prohibition clarifying that the meaning of "provide" under the MWA is to "offer" or "make available" health insurance that is already

specified in the MWA and not that employees must "enroll" in health insurance.

10. I declare under penalty of perjury that the foregoing statements are true and correct.

Executed in Las Vegas, Nevada, on July 30, 2015.

/s/ Montgomery Y. Paek, Esq.
MONTGOMERY Y. PAEK, ESQ.

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

☒ This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point font size and Times New Roman.

I further certify that this brief complies with the page or type volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

☐ Proportionately spaced, has a typeface of 14 points or more, and contains _____ words:

☐ Monospaced, has 10.5 or fewer characters per inch, and contains ___words or ___lines of text; or

☒ Does not exceed 30 pages.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief

regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: July 30, 2015

Respectfully submitted,

/s/ Montgomery Y. Paek

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## CERTIFICATE OF SERVICE

I am a resident of the State of Nevada, over the age of eighteen years, and not a party to the within action. My business address is 3960 Howard Hughes Parkway, Suite 300, Las Vegas, Nevada, 89169. On July 30, 2015, I served the within document:

**PETITION FOR WRIT OF MANDAMUS OR PROHIBITION**

☒ By **CM/ECF Filing** – Pursuant to N.E.F.R. the above-referenced document was electronically filed and served upon the parties listed below through the Court's Case Management and Electronic Case Filing (CM/ECF) system.

☒ By **United States Mail** – a true copy of the document listed above for collection and mailing following the firm's ordinary business practice in a sealed envelope with postage thereon fully prepaid for deposit in the United States mail at Las Vegas, Nevada addressed as set forth below.

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I am readily familiar with the firm's practice of collection and processing correspondence for mailing and for shipping via overnight delivery service. Under that practice it would be deposited with the U.S. Postal Service or if an overnight delivery service shipment, deposited in an overnight delivery service pick-up box or office on the same day with postage or fees thereon fully prepaid in the ordinary course of business.

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 30, 2015, at Las Vegas, Nevada.

/s/ Erin J. Melwak

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