

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

PETITIONERS' APPENDIX

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PROOF 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:

PETITIONERS APPENDIX

☒ Via **Electronic Service** - pursuant to N.E.F.C.R Administrative Order: 14-2.

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Honorable Timothy C. Williams
Eighth Judicial District Court, Dept. 16
200 Lewis Avenue
Las Vegas, NV 89155
Respondents

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
Erin J. Melwak

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 known 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 from \$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.

EXHIBIT “6”

3 Guide to Employment Law and Regulation § 49:7

Guide to Employment Law and Regulations

Database updated March 2015

Part VIII. STATE LABOR LAWS

Chapter 49. Nevada

Summary

§ 49:7. Minimum wage law

Minimum wage. Effective November 28, 2006, the state constitution was amended to create a two-tiered minimum wage, \$5.15 per hour with health benefits or \$6.15 per hour without.⁵⁰ The labor commissioner has the authority to adjust the minimum wage:¹ effective July 1, 2008, minimum wage was set at \$5.85 per hour with health benefits and \$6.85 per hour without, and effective July 1, 2009, minimum wage was set at \$6.55 per hour with health benefits and \$7.55 per hour without, and effective July 1, 2010, minimum wage will be \$7.25 per hour with health benefits and \$8.25 per hour without.¹⁻⁵⁰

Exceptions. Casual babysitters, domestics residing in the household where they work, commissioned outside salespersons, agricultural employees of employers who have not used more than 500 man-days of agricultural labor in any quarter of the preceding calendar year, and taxi and limousine drivers are exempt from minimum wage coverage. The minimum wage requirement does not apply to severely handicapped persons whose disabilities have diminished their productive capacities in a specific job and who have been issued special certificates by the rehabilitation division of the Department of Employment, Training and Rehabilitation.²

Tip and meal credits. Tips cannot be confiscated by an employer or credited as wages in determining compliance with the law.³ Part of the wages or compensation may consist of a meal if mutually agreed upon by employee and employer in the contract of employment. The maximum value for meals cannot be computed at more than \$1.50 per day, and in no case may the maximum value of specific meals be computed or valued at more than: 35¢ for breakfast; 45¢ for lunch; and 70¢ for dinner. The meals must actually be consumed for an employer to take the credit.⁴

Uniforms. Uniforms or accessories distinctive in style, color or material must be furnished without cost. If a special cleaning process is required, and the uniforms or accessories cannot easily be laundered by an employee, the employer must clean them without cost to the employee.⁵

Overtime. Time and one-half an employee's regular wage rate must be paid whenever an employee works more than 40 hours in any scheduled week of work, or more than eight hours in any scheduled workday *unless* by mutual agreement, the employee works a scheduled 10-hour day for four days within any scheduled week of work.⁶

Exceptions. Employees not covered by the above minimum wage provisions; employees paid not less than one and one-half the above minimum wage rates; outside buyers; retail commission salespersons if their regular rate is more than one and one-half the minimum wage, and more than one-half their pay comes from commissions; bona fide executives, administrators and professionals; employees covered by collective bargaining agreements that otherwise provide for overtime; drivers, drivers' helpers, loaders and mechanics under the Motor Carrier Act of 1935; railroad employees; air carrier employees; drivers or drivers' helpers making local deliveries who are paid on a trip-rate basis or other delivery payment plan; taxi and limousine drivers; agricultural employees; employees of businesses with a gross sales volume of less than \$250,000; and any salesman or mechanic primarily engaged in selling or servicing cars, trucks or farm equipment.⁷

Posting. Every employer must post on the premises where any person is employed a printed abstract of the law furnished by the Labor Commissioner.⁸

Enforcement. Any employee paid less than the minimum wage may sue the employer within two years for difference between wages paid and the minimum wage. No contract to accept a lesser wage or any acceptance of a lesser wage by the employee will bar such action.⁹

Equal pay law. No employee can be paid a wage less than that paid an employee of the opposite sex in the same establishment for equal work requiring equal skill, effort and responsibility and which is performed under similar working conditions.¹⁰

Exceptions. This provision does not apply where wages are paid pursuant to a seniority system; merit system; compensation system under which wages are determined by the quality or quantity of production; or, a wage differential based on factors other than sex. An employer who violates the provision may not reduce the wages of any employee in order to comply with it.¹¹

Penalties. Violations of any of the payment of wages and benefits laws of the Nev. Rev. Stat. §§ 608.005 to 608.190 are misdemeanors.¹²

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Footnotes

.50 Nev. Const. Article 13, § 16.

1 Nev. Rev. Stat. § 608.250.

1.50 <http://www.laborcommissioner.com/>

2 Nev. Rev. Stat. § 608.250.

3 Nev. Rev. Stat. § 608.160.

4 Nev. Rev. Stat. § 608.155.

5 Nev. Rev. Stat. § 608.165.

6 Nev. Rev. Stat. § 608.018.1.

7 Nev. Rev. Stat. § 608.018.2.

8 Nev. Rev. Stat. § 608.080.

9 Nev. Rev. Stat. § 608.260.

10 Nev. Rev. Stat. § 608.017.1.

11 Nev. Rev. Stat. § 608.017.2.

12 Nev. Rev. Stat. § 608.195.

End of Document

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EXHIBIT “7”



Fact Sheet

MINIMUM WAGE IN NEVADA

PREPARED BY KRISTIN ROSSITER
RESEARCH DIVISION
LEGISLATIVE COUNSEL BUREAU

MARCH 2015

ESTABLISHMENT AND AUTHORITY

The *Nevada Constitution* establishes a minimum wage for the State of Nevada in Article 15, Section 16(A). The provisions require the minimum wage to be adjusted yearly based on the Consumer Price Index (CPI). *Nevada Revised Statutes* (NRS) 608.250 establishes the Office of Labor Commissioner as the agency designated by the Governor to make the minimum wage calculation each year and publish the bulletin announcing the rates.

The federal Fair Labor Standards Act (FLSA) requires employers to pay nonexempt employees at least a minimum wage for all hours they work. The FLSA establishes a minimum wage, overtime pay, recordkeeping, and child labor standards affecting full-time and part-time workers in the private sector and in federal, state, and local governments. At the time the FLSA was enacted in 1938, the minimum wage was set at \$0.25 per hour. The FLSA does not supersede any state or local laws that are more favorable to employees. Therefore, if a state has a minimum wage that is higher than the federal minimum, employers are obligated to pay the higher rate to employees working in that state.

CURRENT MINIMUM WAGE

The federal minimum wage is currently \$7.25 and was put into effect in 2009. The federal minimum wage does not increase automatically. Congress must pass a bill, which the President signs into law, in order for the minimum wage to go up. Effective July 1, 2014, Nevada's minimum wage for employees who received qualified health benefits from their employers is \$7.25 per hour, and the minimum wage for employees who do not receive health benefits is \$8.25 per hour.

BACKGROUND AND HISTORY

Nevada enacted a statewide minimum wage law in 1937, a year before the federal minimum wage was set. The 1937 legislation regulated the wage, hours, and working conditions only of females employed in private industry. In 1965, the law was amended to add males and minors in private employment to the minimum wage provisions. In 1989, Nevada's minimum wage law was amended to require the Labor Commissioner to prescribe increases in the minimum wage in accordance with those prescribed by federal law.

An amendment to the *Nevada Constitution* to raise the minimum wage paid to employees in Nevada was approved by Nevada voters in 2004 and was reaffirmed in 2006. The 2006 voter approved

Minimum Wage Amendment to the *Nevada Constitution* requires the minimum wage to be recalculated each year. The rates are adjusted annually by comparing the amount of increases in the federal minimum wage or, if greater, by the cumulative increase in the cost of living. Any increases take effect on July 1 of each year.

MINIMUM WAGE AMENDMENT TO THE *NEVADA CONSTITUTION*

Ballot Question Results		
Year	Yes Votes	No Votes
2004	545,490	252,162
2006	393,367	186,033

PROCESS FOR AMENDMENT

Because provisions governing the minimum wage rate are included in the *Nevada Constitution*, any changes to the minimum wage provisions require a constitutional amendment. There are two ways to amend the *Nevada Constitution*. One way is through the citizen initiative process. Citizen initiatives for constitutional amendments must be approved in identical form in two consecutive general elections. This is the process that enacted the current minimum wage requirements in the *Nevada Constitution*. The second way to amend the *Constitution* is through the legislative process. The Senate or Assembly may propose a constitutional amendment, which must pass in identical form with a majority of members of both houses in two consecutive biennial sessions. After that, the proposal must pass a popular vote during the next general election.

COMPARISON WITH OTHER STATES

The following table provides a comparison of Nevada's current minimum wages with those of other western states. Across the nation, nine states had increased their minimum wage rates on January 1, 2015, because of indexed increases in their state laws.

Comparison of Minimum Wages Across Select Western States						
	2009	2010	2011	2012	2013	2014
California	\$8.00	\$8.00	\$8.00	\$8.00	\$8.00	\$9.00
Idaho	\$6.25	\$7.25	\$7.25	\$7.25	\$7.25	\$7.25
Nevada (No Insurance)	\$6.25	\$7.55	\$8.25	\$8.25	\$8.25	\$8.25
Nevada (Health Insurance)	\$6.55	\$6.55	\$7.25	\$7.25	\$7.25	\$7.25
Oregon	\$8.40	\$8.40	\$8.50	\$8.80	\$8.95	\$9.10
Utah	\$6.55	\$7.25	\$7.25	\$7.25	\$7.25	\$7.25
Washington	\$8.55	\$8.55	\$8.67	\$9.04	\$9.19	\$9.32

Resources for Additional Information

Detailed information on the minimum wage: <http://www.dol.gov/dol/topic/wages/minimumwage.htm>

For a history of the increases in minimum wage by year since 1938: <http://www.dol.gov/whd/minwage/chart.pdf>

EXHIBIT “8”

Growing Business In Nevada

www.nv.gov/bid

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NEVADA'S MINIMUM WAGE AND DAILY OVERTIME RATES REMAIN UNCHANGED FOR 2015

Carson City, NV - March 31, 2015

The Office of the Labor Commissioner today released the annual bulletins for Nevada's minimum wage and daily overtime requirements that will take effect July 1, 2015. The 2006 Minimum Wage Amendment to the Nevada Constitution requires the minimum wage to be recalculated and adjusted each year based on increases in the federal minimum wage, or, if greater, by the cumulative increase in the cost of living.

Contact:

Teri Williams
Public Information Officer
(702) 486-0407
twilliams@business.nv.gov

The rates will remain unchanged from the previous year. The minimum wage for employees who receive qualified health benefits from their employers will remain at \$7.25 per hour; the minimum wage for employees who do not receive health benefits will remain at \$8.25 per hour.

The rate for daily overtime will also remain the same. Employees who receive qualified health benefits from their employer and earn less than \$10.875 per hour, and employees earning less than \$12.375 per hour who do not receive qualified health benefits must be paid overtime whenever they work more than 8 hours in a 24-hour period. Nevada is one of a few states with a daily overtime requirement in addition to the requirement to pay overtime for more than 40 hours in a workweek. Employees that are exempt from overtime under Nevada state law are not subject to these requirements.

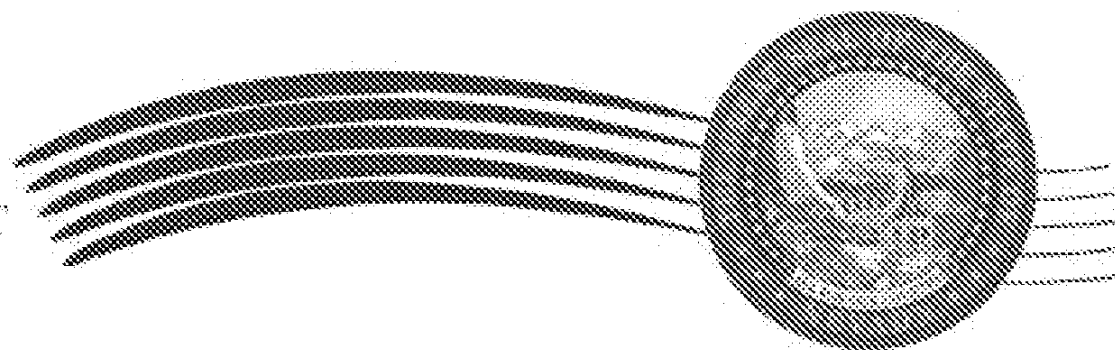
Additional information regarding the minimum wage and daily overtime rates is available from the Office of the Labor Commissioner at: (702) 486-2650 in Las Vegas or (775) 687-4850 in Carson City. The Annual Bulletins containing the rates are available online from the Office of the Labor Commissioner's website at www.laborcommissioner.com or in hard copy form by request to the Office of the Labor Commissioner.

About the Office of the Labor Commissioner

The Office of the Labor Commissioner is a division of the Department of Business and Industry. The Labor Commissioner strives to ensure that all workers are treated fairly under the law by investigating complaints of non-payment of wages, State minimum wage, overtime, and prevailing wage disputes. The office also monitors youth employment standards, including work hours and safe, non-hazardous working conditions.

###

EXHIBIT “9”



LABOR AND EMPLOYMENT

INTRODUCTION

The employment of workers is a cornerstone of any economy and a fundamental subject of governmental oversight. The State of Nevada has a long history of involvement in employment issues. The first miners' unions in the western United States formed on the Comstock in the early 1800s. Chapter 613 ("Employment Practices") of *Nevada Revised Statutes* (NRS) dates to 1911. In 1915, Nevada's Legislature created the Office of Labor Commissioner, giving the Commissioner primary responsibility to enforce the State's labor laws, particularly those related to wages and hours.

At the national level, the Wagner Act of 1935, also known as the National Labor Relations Act, provided federal support for unionization and collective bargaining. In 1947, the Taft-Hartley Act shifted federal policy toward a more neutral position on unionization. The Landrum-Griffin Act of 1959, known as the Labor-Management Reporting and Disclosure Act, created a bill of rights for union members.

The following sections of this report outline some important aspects of labor and employment policy in Nevada, including the concepts of at-will employment, the minimum wage, the right to work, unemployment insurance, workers' compensation, and other subjects.

AT-WILL EMPLOYMENT

At-will employment is a legal doctrine that defines an employment relationship in which either the employer or employee may break off the relationship with no liability, provided that the employee has no contract for a definite term or that the employer has not recognized a labor union. Nevada is an at-will employment state.

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Business and Labor

In most states, including Nevada, an employer may not fire an employee if the firing would violate the state's public policies (against discrimination, for example) or a state or federal statute. Also, an employee with an implied contract may not be fired without liability on the part of the employer. Eleven states, again including Nevada, also recognize a breach of an implied covenant of good faith and fair dealing as an exception to at-will employment.

In 1989, in the case of *Vancheri v. GNLV Corporation* (105 Nev. 417, 777 P.2d 366 [1989]), the Supreme Court of Nevada considered at-will employment, saying, "Employment 'at-will' is a contractual relationship and thus governed by contract law. An employer can dismiss an at-will employee with or without cause, so long as the dismissal does not offend a public policy of this state."

Similarly, in the 1990 case of *American Bank Stationery v. Farmer* (106 Nev. 698, 799 P.2d 1100 [1990]), the Court said, "All employees in Nevada are presumed to be at-will employees. An employee may rebut this presumption by proving by a preponderance of the evidence that there was an expressed or implied contract between his employer and himself that his employer would fire him only for cause."

EMPLOYMENT OF MINORS

In the early 1900s, the numbers of child laborers in the U.S. peaked. Minors worked in agriculture, industry, as newsboys and messengers, and in other jobs. In 1938, the U.S. government regulated for the first time minimum ages of employment and hours of work for children, in the Fair Labor Standards Act.

Nevada restricts the employment of minors under the age of 16 and between the ages of 16 and 18. No person under 16 years of age may be legally employed to work in any capacity in connection with:

- The preparation of compounds using dangerous or poisonous acids;
- The manufacture of colors, paints, or white lead;
- Dipping, drying, or packing matches;
- The manufacture of goods for immoral purposes;
- A coal breaker, glass furnace, mine, ore reduction works, quarry, or smelter;
- A cigar factory, tobacco warehouse, or other factory where tobacco is prepared;
- A laundry;
- A brewery, distillery, or other establishment where malt or alcoholic liquors are bottled, manufactured, or packed;

- The outside erection or repair of electric wires;
- Running or managing elevators, hoists, or lifts or oiling dangerous or hazardous machinery in motion;
- Gate tending, track repairing, or switch tending;
- Acting as a brakeman, conductor, engineer, fireman, or motorman on any railroad; or
- Establishments where explosives are manufactured or stored.

The Labor Commissioner may also declare other employment to be dangerous or injurious to the health or morals of persons under 16 years of age, thus prohibiting the employment of children in those lines of work as well. No person under the age of 16 may work more than 48 hours a week or 8 hours a day, with certain exceptions, and no person under the age of 14 may be employed without written permission from a district court judge or other person authorized by a judge.

Except for employment as a performer in a motion picture, no person may employ any child under the age of 14 during the hours when school is in session, unless the child has been excused by the school district or the order of the juvenile court.

For persons between the ages of 16 and 18, Nevada has fewer restrictions. They may not work in bars or casinos or in occupations dangerous to health. In incorporated cities and towns, no person under the age of 18 may be employed to deliver goods or messages before 5 a.m. or after 10 p.m. on any day.

In 2003, Nevada amended its laws to provide for judicial approval of a contract involving a minor rendering artistic, athletic, creative, or intellectual property services. If the court grants its approval, it must immediately appoint a special guardian to receive and hold a specific percentage of the minor's earnings. When the contract is terminated, the earnings must be transferred to the minor, if emancipated, or to the minor's guardian.

MINIMUM WAGE

Both federal laws and the laws of the State of Nevada require an employer to pay a minimum wage. The current federal minimum wage, pursuant to the Fair Labor Standards Act (FLSA), is \$7.25 per hour, effective July 24, 2009. The FLSA does not supersede any state or local law that is more favorable to employees. Therefore, in a state with a higher minimum wage, the employer must pay the higher rate.

In 2004 and 2006, Nevada's voters approved an amendment to the *Nevada Constitution* (Article 15, Section 16) adding a new section regarding minimum wages. An employer must pay a certain wage to any employee for whom the employer provides health care benefits or a higher wage to any employee

who does not receive health care benefits. The minimum wage is adjusted annually to the level of the federal minimum wage or by the cumulative increase in the cost-of-living index, whichever results in the higher amount. The adjustment, if any, is announced on April 1 by the Office of Labor Commissioner and is effective on July 1. Effective July 1, 2013, the State minimum wage is \$7.25 per hour for employees who receive health care benefits and \$8.25 for employees who do not receive health care benefits. "Health benefits" mean a health insurance plan that is available to the employee and the employee's dependents at a total cost to the employee of not more than 10 percent of his or her gross taxable income from that employer.

An employee under the age of 18 who is employed by a nonprofit corporation for after-school or summer employment, or as a trainee, for not more than 90 days is exempt from Nevada's minimum wage rules. And in 2007, the Legislature clarified the relationship between clients and providers of rehabilitation services and training programs for handicapped persons. Such a relationship is not considered employment for purposes related to the minimum wage.

OCCUPATIONAL HEALTH AND SAFETY

To prevent work-related illnesses, injuries, and occupational fatalities, federal and State laws set standards and establish enforcement programs for workplace health and safety. These laws address such subjects as asbestos exposure, blood-borne pathogens, exposure to other chemicals, guards on moving parts, hazard communication, and work in confined spaces.

The federal Occupational Safety and Health Act of 1970 created the Occupational Safety and Health Administration (OSHA) and the National Institute for Occupational Safety and Health (NIOSH), a research agency. The law authorizes states to develop approved health and safety plans, if they cover public employees and provide protection equivalent to federal regulations. Nevada's laws are found in Chapter 618 ("Occupational Safety and Health") of NRS.

In response to a number of serious worker safety issues—including 12 fatalities in southern Nevada in 2008—the Legislature passed two measures in 2009 to promote safety on construction sites and to assist families affected by fatal construction accidents.

Assembly Bill 148 (Chapter 432, *Statutes of Nevada 2009*) required construction workers and their supervisors to take construction safety courses and obtain completion cards, or be subject to suspension or termination by their employers. A nonsupervisory construction worker must complete an approved 10-hour course in construction industry safety and health hazard recognition and prevention, known as an "OSHA-10 course." A supervisory construction worker must complete a similar 30-hour course, known as an "OSHA-30 course." The employee must present a completion card within 15 days of his or her employment date. If the employee does not present the card, the employer must suspend or terminate the employee.

Through December 31, 2010, a construction worker had the option of completing an alternative course offered by the employer. The employer's safety committee must approve the alternative course and it must meet or exceed federal guidelines. However, an employee who satisfied the requirements

of A.B. 148 by completing an alternative course must nevertheless complete an OSHA-10 or OSHA-30 course, as applicable, not later than January 1, 2011. The bill does not apply to workers performing maintenance on property for which a certificate of occupancy has been issued, or to Nevada's Department of Transportation and its employees in the performance of their duties.

Senate Bill 288 (Chapter 216, *Statutes of Nevada*) of the 2009 Session addressed workplace fatalities and workers' families. It required the Division of Industrial Relations (DIR) of Nevada's Department of Business and Industry (DBI), after investigating a fatal accident, to offer to discuss any citation it issues with the employee's immediate family. The measure also required the Division to provide the family's contact information to the Occupational Safety and Health Review Board, in the event that the employer contests any citation or fine related to the accident.

RIGHT TO WORK

Nevada is a right-to-work state. Right-to-work laws prohibit agreements between labor unions and employers making membership in a union, or payment of union dues, a condition of employment. Fewer than half of the 50 states have such laws.

The federal Taft-Hartley Act authorizes individual states to adopt an "open shop" rule, under which an employee cannot be compelled to join a union or pay the equivalent of dues to a union, nor can the employee be fired if he or she joins the union. In other words, the employee has the right to work.

Nevada's right-to-work law is found in NRS 613.230 through NRS 613.300. The law was enacted by an initiative of the people and became effective in 1953. In the 1950s, voters defeated three initiatives aimed at repealing the law, and a fourth initiative failed for lack of a sufficient number of signatures. Since 1959, the Legislature has considered and rejected at least ten measures to amend or repeal the law, and in 1994, an initiative to repeal the law did not gain enough signatures to be placed on the ballot.

UNEMPLOYMENT INSURANCE

The federal Social Security Act of 1935 created the unemployment insurance (UI) system, which provides workers with partial replacement of wages lost as a result of involuntary unemployment. The UI system helps to dampen economic fluctuations by replacing a portion of workers' wages during troughs in the business cycle, drawing on reserves built up during more favorable periods.

The UI system is a shared federal-state program financed jointly by federal and state payroll taxes. The Federal Unemployment Tax Act (FUTA) authorizes a tax to cover the costs of administering UI programs and a portion of the costs of extended UI benefits. The U.S. Department of Labor administers the federal components of the system.

Nevada's Legislature enacted the Unemployment Compensation Law in 1937, declaring, "Economic insecurity due to unemployment is a serious menace to the health, welfare, and morals of the people of this state." The Employment Security Division (ESD), DBI, administers the system in Nevada.

To qualify for benefits, a person must be fully or partially unemployed, must have earned enough wages to qualify, and must be unemployed through no fault of his or her own. A claimant must be able to work, available for work, and actively seeking work. The amount of benefits depends on the wages the worker earned during a base period, usually defined as the first four of the last five completed calendar quarters preceding the claim. The maximum benefit is set at 50 percent of the statewide annual average weekly wage, and it is based on past earnings, up to a maximum of \$407 per week. The duration of benefits is generally limited to 26 weeks unless extended by law.

An employer who pays wages of \$225 or more during any calendar quarter for services performed in Nevada must register with the ESD and pay quarterly unemployment taxes. (Employees do not pay UI taxes.) The tax rate for new employers is 2.95 percent of a worker's taxable wages, plus 0.05 percent for the Career Enhancement Program, a training program to foster job creation and provide more skilled workers. After being in the system for a minimum of 14 quarters, an employer receives an experience rating, which is a function of the excess of taxes paid over benefits charged to the employer's account. The employer's tax rate is then based on that rating, varying from 0.25 percent to 5.4 percent of taxable wages. In 2014, an individual's taxable wages are capped at \$27,400.

During the economic downturn in 2008 and 2009, both in Nevada and the nation as a whole, contributions from employers were not sufficient to cover the cost of providing benefits to the unemployed. As a result, in October 2009 the State began borrowing from the U.S. Department of the Treasury to continue payment of unemployment insurance benefits. As of June 2013, the outstanding balance on this loan was \$560 million. To repay the principal, employers have been paying additional charges as required by the FUTA. The State General Fund has funded the interest on the loan.

To help limit the impact on the State General Fund, the Nevada Legislature enacted A.B. 482 (Chapter 367, *Statutes of Nevada 2013*), which levies a temporary assessment on employers to pay the interest on the loan. The ESD sent out a press release in June 2013 with details about the assessment, which will occur annually as long as it is necessary. According to the ESD, the average employer will pay approximately \$25 per employee in temporary assessments.

To reduce the cost of this debt over the long term, the Legislature also approved S.B. 515 (Chapter 450, *Statutes of Nevada 2013*), which enables the ESD to issue bonds to finance the outstanding loan principal and interest. If bonds are sold, the temporary assessment imposed under A.B. 482 and the FUTA charges would be discontinued, and employers would instead pay special bond contributions to repay the bonds. This would result in lower costs for most employers.

WORKERS' COMPENSATION (INDUSTRIAL INSURANCE)

The concept of compensating workers for on-the-job injuries is an ancient one, dating to ancient Arab, Chinese, Greek, and Roman law. The Code of Hammurabi, 1750 B.C., provided rewards for specific injuries (Guyton, G.P., 1999, "A Brief History of Workers' Compensation," in *The Iowa Orthopaedic Journal* 1999, 19: 106-110). In the U.S., Wisconsin passed the first comprehensive industrial insurance law in 1911. Nevada passed its Industrial Insurance Act in 1913. The purpose of these laws revolves around economic efficiency and social justice.

The workers' compensation system is a no-fault insurance system. Employers either purchase insurance or set up self-insurance accounts. Injured workers receive compensation to replace wages ("indemnity payments") and to cover medical and rehabilitation costs. Second-injury funds, which cover benefits when a second injury proves incapacitating, are important in maintaining the employability of partially impaired workers. In exchange for covering all work-related injuries and occupational diseases, regardless of fault, employers are protected by the exclusive remedy provision, under which an injured worker cannot sue an employer in tort, even if the employer was in fact responsible.

Nevada authorized self-insurance for qualified employers in 1979. Prior to that time, the Nevada Industrial Commission (NIC) was the only provider of workers' compensation insurance in Nevada. In 1981, the Legislature enacted laws replacing the NIC with the State Industrial Insurance System (SIIS), which began operation as a State-run insurance carrier in July 1982. At the same time, the DIR became the primary regulator of the State's workers' compensation program.

Prior to the 1993 Session, the Legislature learned that SIIS was insolvent, with an unfunded \$2.2 billion liability. To address this problem, the Legislature enacted a comprehensive reform measure and adopted cost-savings provisions, including implementation of a managed care program, imposition of employer deductibles, and aggressive pursuit of fraud. The measure also reduced injured workers' benefits by limiting stress as a compensable injury, limiting eligibility and compensation amounts for rehabilitation, and making other changes.

In 1995, the Legislature prohibited civil lawsuits against an insurer or third-party administrator (TPA) who in bad faith violates the workers' compensation laws. Rather than allowing bad-faith lawsuits, the Legislature created a benefit penalty to be paid directly to an injured worker, and authorized the Commissioner of Insurance to withdraw the self-insurance certificate of an employer for violations of laws intended to protect injured workers from unreasonable acts.

In 1999, the Legislature authorized privatization of SIIS, and in January 2000, SIIS became a private domestic mutual insurance company doing business as Employers Insurance Company of Nevada. Then, in 2007, the company converted to a publicly traded stock company and operates in Nevada under the name "Employers."

Business and Labor

The Commissioner of Insurance reviews and approves premium rates and must certify self-insured employers and associations that meet statutory requirements. The Commissioner also regulates managed care organizations and TPAs of self-insured programs.

The Office of the Nevada Attorney for Injured Workers, a State agency, represents claimants free of charge at appeals before the Hearings Division of Nevada's Department of Administration. In selected cases, the office also represents claimants in the district courts and the Supreme Court of Nevada.

Benefits under Nevada's workers' compensation system fall into three general categories: indemnity payments, medical benefits, and rehabilitation expenses.

Indemnity payments replace a portion of lost wages in temporary or permanent cases of partial or total disability. *Nevada Revised Statutes* establishes eligibility requirements and the amount and duration of benefits.

For permanent and temporary total disability (PTD and TTD), the benefit is generally two-thirds of the person's wages at the time of his or her injury, not to exceed 150 percent of the average weekly wage, for the duration of the disability.

For permanent and temporary partial disability (PPD and TPD), the primary factor in determining the indemnity benefit amount is the extent of the injury. How this determination is made has been a major issue in workers' compensation laws nationwide. Pursuant to S.B. 195 (Chapter 500, *Statutes of Nevada*) of the 2009 Session, the DIR must adopt regulations providing that the American Medical Association's *Guides to the Evaluation of Permanent Impairment, Fifth Edition*, must be applied to all PPD examinations.

When an injured worker is permanently and totally disabled (PTD) from an occupational injury or disease and can no longer work, he or she receives cash payments, based on wages at the time of the injury, for life (as long as the disability continues to exist). This benefit recognizes not only the inability to earn income, but also the inability to contribute to a pension fund or accumulate savings for retirement.

When a worker is killed as the result of an accident in the course and scope of employment, Nevada law provides burial benefits and benefits to surviving spouses and dependents. Until 2007, the surviving spouse of the deceased worker received monthly compensation payments until death or remarriage. Senate Bill 3 (Chapter 214, *Statutes of Nevada*) of the 2007 Session removed the so-called "remarriage penalty" for a surviving spouse of a firefighter or police officer who remarries on or after October 1, 2007, and S.B. 363 (Chapter 503, *Statutes of Nevada*) of the 2009 Session removed the "remarriage penalty" for any surviving spouse who remarries on or after the same date.

The insurer pays medical benefits for all medically necessary procedures and devices related to the injured worker's claim, with no deductible or copayment. A health care provider may not seek payment from the injured worker for any portion of the medical costs.

The insurer also pays *rehabilitation expenses* when the nature of the injury prevents the injured worker from returning to pre-injury employment. Rehabilitation plans may include educational or vocational training, compensation payments (known as rehabilitation maintenance), or a lump sum payment in lieu of rehabilitation.

ADDITIONAL REFERENCES

Employment Security Division website: <http://detr.state.nv.us/esd.htm>.

Division of Industrial Relations website: <http://dirweb.state.nv.us/>.

Office of Labor Commissioner website: <http://www.laborcommissioner.com/>.

Office of the Nevada Attorney for Injured Workers website: <http://naiw.nv.gov/>.

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EXHIBIT “10”

12 No. 11 Nev. Emp. L. Letter 6

Nevada Employment Law Letter

August 2007

Minimum Wage

MONEY, MONEY, MONEY: MINIMUM WAGE INCREASE DATES

Von S. Heinz

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In our July 2007 newsletter, Suzanne Martin told you about the recent increase in the minimum wage (see "Up, up, and away! Nevada's minimum wage to increase at least once this year," page 4). We received lots of questions about compliance, so here's more information to help you on this crucial issue.

Mark these dates on your calendar now

For those of you who are governed by your desk timer and keep important dates marked on the calendar months, even years ahead, here are not-to-be-missed dates to place in ink on your calendars now:

July 1, 2007 (Nevada). By the time you read this article, you already should have implemented the increase in Nevada's minimum wage, which was announced earlier by Labor Commissioner Mike Tanchek. Our state's minimum wage increased effective July 1, for a cost-of-living adjustment to \$5.30 per hour (with qualified health plan) and \$6.33 per hour (without qualified health plan). We know, you just raised your company's minimum wage six months ago and now you had to do it again on July 1. And there's still one more increase to mark on the calendar in July!

July 24, 2007 (federal). So you just made all those payroll adjustments for the increase in the minimum wage commanded by the state. Now, effective July 24, the first federal minimum wage increase took place, raising the federal minimum wage to \$5.85 per hour. If at that time you were paying only the Nevada lower minimum wage of \$5.30 per hour, you had to increase that wage to the new federal minimum wage of \$5.85 per hour. Even though Nevada's lower minimum wage will officially remain at \$5.30 per hour, Silver State employers still are required to comply with the federal rate. Nevada's higher minimum wage will continue to be \$6.33 per hour.

July 1, 2008 (Nevada). Next summer, another round of minimum wage increases go into effect. On July 1, 2008, both Nevada minimum wages will increase by 70 cents per hour (the difference between the old and new federal minimum wage). The lower Nevada wage will rise to \$6 per hour (with a qualified health plan) and \$7.03 per hour (without a qualified health plan).

July 24, 2008 (federal). Just as with the two increases that took place in July 2007, mark your calendar for another state increase. On July 24, 2008, the second increase in the federal minimum wage will go into effect, bringing it to \$6.55 per hour. On that date, if you pay your employees the lower Nevada minimum wage, you'll need to increase that pay scale to the higher federal minimum wage of \$6.55 per hour. The higher Nevada minimum wage will continue to be \$7.03 per hour.

July 1, 2009 (Nevada). By now, you've got the system mastered. Effective July 1, 2009, the state minimum wages will increase to \$6.70 per hour (with a qualified health plan) and \$7.73 per hour (without a qualified health plan).

July 24, 2009 (federal). And when three weeks have passed from the July 1, 2009, date for increasing minimum wages to comply with state law, the final step of the federal minimum wage increases will take effect on July 24. On that date, if you pay

your employees the lower Nevada minimum wage, you'll need to increase that pay scale to the higher federal minimum wage of \$7.25 per hour. The higher Nevada minimum wage will continue to be \$7.73.

July 1, 2010 (Nevada). But you're not done yet. Even though the final increase in the federal minimum wage went into effect nearly one year earlier, the Nevada minimum wage has yet another adjustment to go. Silver State minimum wages will be adjusted on July 1, 2010, to reflect the final federal minimum wage increase. That will cause the lower Nevada wage to rise to \$7.40 per hour (with a qualified health plan) and \$8.43 per hour (without a qualified health plan).

And the story keeps rolling along

The yearly increases in our state's minimum wages won't stop in 2010, when the last of the increases in the federal minimum wage have been put in place. Nevada will continue to assess annual adjustments to the minimum wage, with any adjustment taking effect on July 1 of that year. The adjustments to the Nevada minimum wages will likely cause our state's minimum wages to go up every year. Unless Congress acts in the meantime -- and keep in mind how many years it took to gather enough votes to support the most recent increase in the federal minimum wage -- the only difference is that when July rolls around, you won't need to mark both July 1 and July 24 on the calendar for special attention in payroll.

And if charts are your thing

Some of us keep important dates on multiple calendars and still have a difficult time grasping upcoming deadlines. The Las Vegas Chamber of Commerce has put together a chart that clearly expresses all upcoming deadlines for minimum wage adjustments. It can be found at www.lvchamber.com. Even better, you can download the chart and print it poster-size to adorn your office wall or reduce it to wallet-size so you'll never be without the very handy resource.

Keep the calendar handy!

As Suzanne's article last month wisely counseled, there are many repercussions associated with the minimum wage, including how overtime pay is calculated. Refer to her article frequently to be sure that your employees are compensated according to law.

EXHIBIT “11”

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Question 6 passes! New Nevada Minimum Wage Takes Effect November 28, 2006

November 21, 2006



With a majority of voters voting yes on Question 6 last election day, the Constitution of the State of Nevada has been amended to include a new minimum wage standard. Beginning on November 28, 2006, employers in Nevada will be required to pay a minimum wage of either \$5.15 or \$6.15 per hour depending on whether health insurance benefits are provided to employees. But the new amendment will have a greater impact on Nevada wage and hour law than simply raising the minimum wage – it will also lead to changes in administration and enforcement.

New Requirements

Do You Provide Health Benefits?

On November 28, all Nevada employers who do not provide "health benefits" for their employees will be required to pay each employee at least \$6.15 per hour. An employer provides "health benefits" if it provides family health insurance coverage at a cost to an employee of no more than 10% of the employee's gross taxable income received from the employer. Those employees receiving health insurance benefits according to this standard can still be paid at a rate of \$5.15 per hour.

What happens if an employer does provide "health benefits" as defined above, but will not allow an employee to participate in a company insurance plan until the completion of his or her probationary period? The new constitutional amendment provides that an employer must make health insurance available to the employee and his or her dependents. During a probationary period, health benefits are not typically "available" to the employee, even if participation will commence at the conclusion of the probationary period. Therefore, Nevada employers should pay probationary employees the higher minimum wage of \$6.15 per hour. Once an employee completes the probationary period, and the employer makes health benefits available to the employee, the employer is free to reduce the hourly minimum wage to \$5.15 per hour.

Employers in the hospitality industry should note that the Nevada Labor Commissioner has taken the position that an employee's gross taxable income "received from the employer" does not include any gratuities, because gratuities are not "received" from the employer. Therefore, a calculation of whether an employee's cost of insurance meets the 10% threshold should include only base wages an employee receives through payroll. Nevada's new minimum wage does not change the prohibition on Nevada employers taking a tip credit against minimum wage. Additionally, the Nevada Labor Commissioner is currently advising that the calculation of the 10% of the employee's gross taxable income must be done on a per pay period basis.

Here is an example of how the new law will work for tipped employees. –

Bill works at the Moonglow Restaurant 6 hours a day, 5 days a week for \$5.15 per hour plus tips. Moonglow has a bi-weekly pay period, and Bill earns a gross wage of \$309.00 per pay period, not including tips. For Bill to continue to be compensated at a rate of \$5.15 per hour, Moonglow must provide insurance that will not cost Bill more than \$30.90 per pay period (10% of \$309.00) for both Bill and his dependents.

The result is the same whether or not Bill actually elects to accept the insurance coverage for himself or his dependents. Note that in any pay period where Bill works less than the regularly scheduled number of hours, Moonglow needs to recalculate whether the cost for available family coverage exceeds 10% of Bill's gross

income in that pay period. If the cost of available insurance exceeds the 10% cap, Bill is entitled to the higher \$6.15 minimum wage for that pay period.

So far, the Nevada Labor Commissioner has not issued guidance as to what types or levels of health insurance coverage will be necessary for an employer to avail itself of the lower, \$5.15 minimum wage rate.

Employee Defined

What may have been missed by many voters is that the new amendment provides a new definition of "employee" for purposes of entitlement to minimum wage. Prior to Question 6's passage, the statutory definition of a covered "employee" specifically exempted certain job classifications from minimum wage requirements, including: casual babysitters; live-in, domestic service employees; outside salespersons earning commissions; certain agricultural workers; taxi and limousine drivers; and severely handicapped workers. Now, under the newly-ratified amendment, an "employee" is any person employed by an "employer." Only one exemption from minimum wage requirements is identified in the amendment, that being any individual "under eighteen 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."

Because Question 6 has become part of the Nevada Constitution, it effectively repeals the previous statutory definition of employee for purposes of minimum wage payment. Likewise, all the exemptions from minimum wage payment provided under Nevada statutory law no longer exist.

Nevada's Minimum Wage Tied To Federal Minimum Wage or CPI

In general, Nevada's minimum wage is now tied to increases in the federal minimum wage, which currently is \$5.15 per hour. For example, a dollar increase in the federal minimum wage will also mean an increase in Nevada's minimum wage to either \$6.15 or \$7.15 per hour. In addition, Nevada's minimum wage will also be permanently tied to increases in the cost of living index. If the cumulative increase in the cost of living for a given year is greater than any increase in the federal minimum wage, Nevada's minimum wage will increase by the percentage of the cumulative increase in the cost of living. The cost of living increase will be measured by the percentage increase as of December 31 of any year over the level of the consumer price index (CPI) of December 31, 2004. The Bureau of Labor Statistics, U.S. Department of Labor, currently publishes the CPI. A cost of living adjustment in Nevada's minimum wage cannot exceed 3% over the previous year's minimum wage.

Nevada employers will not need to worry about complicated calculations over the percentage increase in the cost of living from one year to the next. Nevada's Governor, or an agency designated by the Governor, is obligated under the new amendment to publish the adjusted rate by April 1 each year. The adjusted rate will then take effect the following July 1. In order to receive the adjusted rate bulletin, you must file a request with the Governor, or the agency designated by the Governor.

Union Employees

The minimum wage provisions now part of the Nevada Constitution may not be waived by an individual employee. However, the new provisions may be waived in a bona fide collective bargaining agreement (CBA). The waiver in the CBA must be explicitly set forth in the CBA in "clear and unambiguous terms." Any unilateral implementation of the terms and conditions of employment by either party to a CBA is not a waiver of any of the provisions of the new amendment.

Remedies

Currently, the Nevada minimum wage statute permits an employee to recover owed-wages by either filing a claim with the Nevada Labor Commission or by filing a lawsuit. Under the new amendment, an employee may directly file suit against his or her employer. The remedies available to an employee who brings a lawsuit under Nevada's Constitution include back pay, damages, reinstatement, and injunctive relief. Additionally, employees prevailing on minimum wage claims will be entitled to their attorney's fees. Employers will not be able to recover attorney's fees even if they present a successful defense to an employee's claim. Finally, under the new amendment, employers are prohibited from discharging, reducing the compensation of, or otherwise discriminating against employees for using civil remedies to enforce their rights to minimum wages.

More disconcerting for Nevada employers is the potential scope of backpay that may now be awarded to an employee who successfully brings a claim under the new amendment. Nevada statutory law previously dictated that any claim would apply only to the two years of employment preceding the date of the employee's claim. The new amendment

provides no discernible statute of limitations, and a claim could cover a period of employment far greater than two years.

Labor Commissioner's Enforcement Capabilities

The Nevada Labor Commissioner currently enforces minimum wage laws, which state that the "Labor Commissioner shall enforce the provisions of the law and may impose, in addition to other remedies or penalties, an administrative penalty of no more than \$5,000 for each violation. With the Constitution's repeal of this law, there is a question as to whether the Labor Commissioner retains the power to levy civil penalties with respect to an employer's failure to pay an appropriate minimum wage. In any event, any alteration in the Labor Commissioner's enforcement authority will apply to minimum wage violations only. The Labor Commissioner is still empowered to enforce the state's general labor laws under other sections of Nevada statutory law, including enforcement of overtime requirements.

Overtime Considerations

Prior to November 28, if an employee earned less than one-and-a-half times the current minimum wage (i.e., \$7.73 per hour), Nevada law required that the employee receive an overtime premium for any hours worked beyond the normal eight-hour day. The effect the new minimum wage mandates will have on this daily overtime requirement remains unclear.

The Nevada Labor Commissioner has taken the position that the dual-rate minimum wage established by the new amendment also creates a dual standard under Nevada's daily overtime requirement. In other words, if you offer adequate health benefits to your employees, then employees will be entitled to daily overtime premiums if they earn less than \$7.73 per hour. But if the \$6.15 minimum wage applies to particular employees, (because their health insurance costs them more than 10% of their gross income), then those employees earning less than \$9.23 will be entitled to daily overtime premiums. In essence, the Labor Commissioner's opinion may lead to an expansion of the number of Nevada employees receiving daily, rather than weekly, overtime pay.

The Nevada Attorney General previously issued a formal opinion stating that the new amendment does not affect Nevada's daily overtime requirements, and that employees are only entitled to daily overtime if they earn less than \$7.73 per hour. But until the Labor Commissioner's and the Attorney General's opinions are reconciled, our advice is to pay your employees according to the Labor Commissioner's position, given that it is the broader of the two.

Likewise, Nevada's daily overtime requirements do not apply to any employee working an agreed-upon four, ten hour day work week. In such cases, Nevada employers should continue to pay that employee 40 hours at his or her regular rate of pay.

Actions You Should Take

Nevada employers should take the following steps immediately:

Identify which employees are currently being paid wages of less than \$6.15 per hour. Don't forget piece rate employees – they are also covered by the minimum wage provisions.

Identify any employees that were exempt from minimum wage requirements but will now be covered as of November 28. Again, these include:

Casual babysitters

Domestic service employees residing in the household where they work

Outside salespersons paid by commission

Agricultural employees

Taxi-cab and limousine drivers

Severely handicapped individuals working under government issued certificates

Supervisory, administrative or professional employees you have considered exempt from overtime but whose hourly rate (derived by dividing the weekly salary by the number of hours actually worked in a workweek) is less than \$6.15

Identify part time employees who are being paid less than \$6.15 per hour. Consider offering health insurance or modifying health insurance premiums for those employees in order to avoid paying the higher minimum wage.

Analyze to whom, when, and at what cost health insurance is being offered at your company. Consider offering low-cost health insurance for employees and their dependents as a way to avoid the higher minimum wage.

Identify which employees will become eligible for daily overtime. Consider formalizing voluntary arrangements for 4/10 schedules.

Begin compliance with the new minimum wage obligations on November 28. Note: The Labor Commissioner has informally taken the enforcement position that employers who cannot implement the changes by November 28 will not be penalized provided that they come into compliance as quickly as possible and make retroactive payments to employees for the period they were not in compliance.

This Labor Alert is intended to provide a brief overview of the significant portions of this new law. It is not intended to serve as, nor should it be construed as, advice for any particular legal situation. If you would like more information, contact any attorney in our Las Vegas office at 702.252.3131.

EXHIBIT “12”

TAXTOPICS

A Publication of the Nevada Taxpayers Association serving the citizens of Nevada since 1922

ISSUE 2-04

OCTOBER 2004

THE BALLOT QUESTIONS - STATE AND LOCAL

In addition to electing candidates for federal, state and local offices, voters will be asked to vote on state and local ballot questions. Because of Legislative changes in 2003 which require sample ballots to contain pro and con arguments and rebuttals, this year's sample ballots will be the longest that Nevada voters have seen - - - at least 25 pages in most counties. And, this is the first November general election sample ballot that Clark and Washoe Counties will print in Spanish.

This is also the first time that a general election ballot will contain six statewide questions that are based on initiative petitions. Of the six petition questions appearing on the ballot, Question 3 is the only one which proposes a statutory change. The remaining petition questions (2-6) propose to amend the Nevada Constitution and, if passed by the voters, will again appear on the 2006 November general election ballot. Additionally, one local question in Churchill County is on the ballot because of a petition.

The statewide questions begin on page 2 and the local questions, which are identified by county, begin on page 5 with the "All Counties" NACO question. The questions as they will appear on the ballots are shown in *italics*. Sample ballots will be sent to all Nevada voters prior to the start of early voting on October 16th. They will provide the questions as they appear on the ballot as well as an explanation, the arguments for and against a question, and any pertinent fiscal information.

Any "POSITION" which follows a statewide ballot question is based on a survey conducted of NTA's Board of Directors.

NOTE: At least 60% of the Board must respond and of those responses, a minimum of 55% of the replies must agree for a position to be taken on a question. If there is no position shown, the ballot question is not within NTA's purview.

**DON'T
FORGET
TO
VOTE!**

NTA POSITIONS AT A GLANCE

QUESTION NO. 1-	Fund Education First NO CONSENSUS
QUESTION NO. 2-	Fund Education to the National Average OPPOSE
QUESTION NO. 3-	Medical Malpractice Reform Not in our Purview
QUESTION NO. 4-	Roll Back Insurance Rates Not in our Purview
QUESTION NO. 5-	Stop Frivolous Lawsuits Not in our Purview
QUESTION NO. 6-	Raise the Minimum Wage Not in our Purview
QUESTION NO. 7-	Change Obsolete Constitutional Provisions Not in our Purview
QUESTION NO. 8-	Exemptions to Sales and Use Tax Act OPPOSE
NACO QUESTION -	No Unfunded Mandates and No Reduction in Local Revenue OPPOSE

COMMENTARY

A Constitution is a policy document that establishes the framework under which laws are created. Unfortunately, on this general election ballot some of the petition questions to amend the Nevada Constitution are not policy statements. These petition questions contain as much or more detail than some of the Nevada Revised Statutes. While the subjects contained in the questions may appeal to the general public, the changes proposed may prove in fact to be unworkable and not stand the test of time. In these instances, the Constitution will have to be amended which means that for five years we will have to live with unintended consequences. (Under the provisions governing amendments to Nevada's Constitution, it takes five years to make necessary changes.)

The Association supports the petition process ---- it is a valuable tool when used properly. The unbridled use of petitions to put questions on the ballot, particularly in the area of taxes and spending, however, will put us on the same course as California ---- and the phenomenon known as "ballot box budgeting." Do we really want to become "California East", whereby Legislators hands are tied in setting priorities and spending decisions are dictated by emotions played upon by special interest groups?

PLEASE NOTE: The statement on petitions adopted by the Association's board of directors can be viewed at: www.nevadataxpayers.org under "What's New".

STATEWIDE QUESTIONS

QUESTION NO. 1

Shall the Nevada Constitution be amended to require the Nevada Legislature to fund the operation of the public schools for kindergarten through grade 12 before funding any other part of the state budget for the next biennium?

REFERENCE: Initiative Petition to amend the Constitution.

PROPOSERS: Education First - a.k.a. Jim Gibbons Initiative.

EXPLANATION: This amendment would provide that during a regular session of the Legislature, before any appropriation is enacted to fund a portion of the state budget, the Legislature must appropriate sufficient funds for the operation of Nevada's public schools for kindergarten through grade 12 for the next biennium, and that any appropriation in violation of this requirement is void. The appropriation requirement also applies to certain special sessions of the Legislature.

FISCAL IMPACT: None.

POSITION: NO CONSENSUS

QUESTION NO. 2

Shall the Nevada Constitution be amended to require that the annual per-pupil expenditure for Nevada's public elementary and secondary schools equals or exceeds the national average?

REFERENCE: Initiative Petition to amend the Constitution

PROPOSERS: Nevadans for National Average (Teachers Union)

EXPLANATION: The proposed amendment, if passed, would create four new sections in Section 2 of Article 11 of the Nevada Constitution. The amendment would require the Legislature, commencing July 1, 2012, to ensure that in each fiscal year the annual per pupil expenditure for public elementary and secondary schools equals or exceeds the national average.

ADDITIONAL INFORMATION: This initiative does not allow the billions of dollars being spent on school construction and bond debt service to be included in the "annual per-pupil expenditure" calculations. The result would be an annual expenditure far above the national average. Proponents have stated this requirement can be funded by "shifting" revenue; that is highly unlikely. The amount of money required to implement this proposal makes that almost impossible and would most assuredly result in substantial tax increases.

FISCAL IMPACT: Well over \$1.3 billion for the biennium, which was the appropriation based on implementation in FY 2004 (From SB 2 of the 2003 regular session)

POSITION: **OPPOSE.** The amount of "per-pupil spending" has not been shown to correlate to improvement for students. Additionally, there is no indication as to how the additional money will be spent, nor any indication of the increased performance that can be expected. National measures of educational progress have shown states with the highest amount of per-pupil spending may have inferior results when compared to states with low per-pupil spending. Educational spending formulas do not belong in the Constitution. The Legislature should have the flexibility to determine Nevada's spending priorities when the need arises.

QUESTION NO. 3

Shall Title 1 of the Nevada Revised Statutes governing attorneys, and Title 3 of the Nevada Revised Statutes governing actions for medical or dental malpractice and damage awards, be amended to limit attorney fees and damages which a plaintiff may recover in an action regarding professional negligence?

REFERENCE: Initiative petition to change statute.

PROPOSERS: Keep Our Doctors in Nevada - a.k.a. KODIN (Doctors)

EXPLANATION: This proposal limits attorney's fees in actions against providers of health care based upon professional negligence. Professional negligence means a negligent act, or omission to act, by a provider of health care that is the proximate cause of a personal injury or wrongful death. The proposal also would limit non-economic damages to \$350,000 (damages to compensate for pain, suffering, inconvenience, physical impairment, and disfigurement). Further, joint and several liability of a provider of health care based upon professional negligence would be repealed. This means that a health care provider would only be liable to a plaintiff for that portion of a damage award which represents the percentage of negligence attributable to that particular health care provider, and not liable for the percentage of negligence attributable to another health care provider. The proposal also revises the statute of limitations for the filing of an action from 2 years to 1 year when the person discovers, or through the use of reasonable diligence should have discovered the injury. The proposal also would allow a defendant to introduce into evidence benefits payable to the plaintiff, including those as a result of the injury or death, and makes changes to how damages are paid, including future damages. These damages include future medical treatment, care, loss of future earnings, loss of bodily function, or future pain and suffering, and periodic payments.

ADDITIONAL INFORMATION: This is the only petition question to propose a statutory change. It was circulated and qualified in 2002. It was delivered to the 2003 Legislature and, because no action was taken by the Legislature, it appears on this general election ballot.

FISCAL IMPACT: Cannot be determined.

QUESTION NO. 4

Shall the Nevada Constitution be amended to add provisions governing insurance rates and practices in Nevada?

continued top of next column

Question 4 continued

REFERENCE: Initiative Petition to amend the Constitution

PROPOSERS: People for a Better Nevada (Trial Lawyers)

EXPLANATION: The proposed amendment would create a new Article in the Nevada Constitution. The amendment requires that: premiums charged for casualty insurance be rolled back to the amount charged on December 1, 2005, and reduced an additional 20%; insurers justify future rate increases to ensure rates are maintained at fair levels; insurers be subject to all laws applicable generally to other Nevada businesses, including consumer protection and antitrust; motor vehicle insurers provide a 20% good driver discount; any statute in effect on December 1, 2006 which limits compensation provided by juries to victims of medical negligence by certain health care providers are void unless insurance companies lower malpractice premiums as a result of such limitations; the Governor appoint an Insurance Commissioner for oversight and regulation of the industry; and one or more persons be appointed to represent the interests of the Nevada public related to insurance.

ADDITIONAL INFORMATION: This ballot question and ballot question No. 5, if passed, would negate various provisions of ballot question No. 3. Both question No. 4 and question No. 5 have more detail than some statutes. The Constitution should be a policy document.

FISCAL IMPACT: Insurance premiums could be reduced by 20% beginning December 1, 2006. If premiums are actually reduced, revenue from the State Insurance Premium Tax would be reduced by about \$40 million in the first full fiscal year. The new requirements would add State personnel to the Division of Insurance funded through fees on insurers which could be passed on to consumers.

QUESTION NO. 5

Shall the Nevada Constitution be amended to penalize lawyers willfully involved in vexatious and frivolous litigation, and to prohibit certain changes to limits on recovery of monetary damages?

REFERENCE: Initiative Petition to amend the Constitution.

PROPOSERS: People for a Better Nevada (Trial Lawyers)

EXPLANATION: The proposed amendment would create a new section of the Nevada Constitution. The amendment provides that a lawyer willfully involved in vexatious and

continued on page 4

Question 5 continued from page 3

frivolous litigation is personally responsible for attorney's fees, court costs, and expenses of an aggrieved party, in addition to any other sanction that may be imposed. "Vexatious and frivolous" means filing or defending a lawsuit solely to harass the opposing party or to seek economic gain unrelated to the merits of the lawsuit. This amendment would also void any limits on monetary damages set by the Legislature between January 1, 2004 and December 1, 2006. It would allow the Legislature to increase limits in the future or repeal laws which limited damages. All other changes would be deemed void.

ADDITIONAL INFORMATION: This amendment would void the provision in Question No. 3 that decreases the dollar amount of non-economic damages persons may recover.

QUESTION NO. 6

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

REFERENCE: Initiative Petition to amend the Constitution.

PROPOSER: AFL/CIO.

EXPLANATION: The proposed amendment would create a new section in Article 15 on 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%. It also provides that a union may agree to a wage paid that is less than minimum when negotiating its contract.

FISCAL IMPACT: The impact to business cannot be determined at this time.

QUESTION NO. 7

Shall the Nevada Constitution be amended to change the provision that prohibits an "idiot or insane person" from voting to refer instead to "a person who has been adjudicated mentally incompetent, unless restored to legal capacity" and to repeal a provision relating to the election of United States Senators by the Legislature that was made obsolete by the adoption of the 17th Amendment to the United States Constitution?

REFERENCE: AJR No. 3 of the 71st (2001) Session

EXPLANATION: [1] Currently, the Constitution provides that no "idiot or insane person" shall be entitled to vote in Nevada. The proposed amendment would change this language to provide that no person "who has been adjudicated mentally incompetent, unless restored to legal capacity" shall be entitled to vote in Nevada. [2] The language of the Constitution regarding the election of United States Senators by the legislature is obsolete.

QUESTION NO. 8

Shall the Sales and Use Tax Act of 1955 be amended to revise the exemption from the tax for the sale or use of used vehicles; to provide exemptions from the tax for the sale or use of prescription ophthalmic and ocular devices and appliances, farm machinery and other agricultural equipment, works of fine art for public display, and professional racing vehicles and parts; and to revise the exemption from the tax on the sale or use of aircraft and parts of aircraft used by commercial air carriers?

REFERENCE: AB 514 of the 72nd Session.

EXPLANATION: This proposed amendment to the Sales and Use Tax Act of 1955 is required for the State to participate as a governing member of the Streamlined Sales Tax Implementing Committee. The above exemptions apply to all but the State's 2% portion of the sales and use tax. If approved by the voters, the exemptions will be extended to the State's 2% portion of the tax. If the voters do not approve the exemptions, they will be removed from the statutes that govern the local portion of the sales and use tax.

ADDITIONAL INFORMATION: The State's 2% portion of the sales and use tax was approved by the voters in 1956 as a referendum question. Because of this, any proposed change to the State's portion of the tax must be approved by the voters. (What the voters approve by referendum only the voters can change.)

FISCAL IMPACT: If the voters approve this question, the impact will be a nearly \$8.5 million decrease in State revenue. If the voters disapprove this question, local governments will likely receive an increase of more than \$22.1 million.

POSITION: OPPOSE. The Association has consistently opposed the use of exemptions when there is not a justifiable economic or social purpose for the exemption. Unfortunately, the 2003 Legislature chose to have only one question incorporating all of the exemptions instead of a different question for each exemption. Because of this, the merits, or lack thereof, of each exemption listed cannot be individually evaluated.

LOCAL BALLOT QUESTIONS

In addition to the statewide questions, voters in 16 of the 17 counties will be asked to vote on local ballot questions. In four of these counties, only the "NACO" question will appear on the ballot. The local questions begin on page 6. They have been taken from information provided to NTA by the various County Clerks and Registrars of Voters. The wording of the questions taken from resolutions may have minor changes which will be reflected in the sample ballots sent to the voters. Financial information, where provided, has been taken from the information received and is not based on calculations done by NTA. The Association's Board of Directors took a position only on the "NACO" (Nevada Association of Counties) question.

Types of Local Ballot Questions

ADVISORY - No legal requirement is placed on the elected officials or any other official to enact the provisions of an advisory ballot question, including the imposition of a tax, if the question is approved.

APPROVAL OF DEBT - These questions ask for the approval to finance debt by issuing general obligation bonds in which case a property tax rate will be identified. The debt may also be financed through the issuance of revenue bonds which will be repaid from a revenue source other than property tax – generally sales tax.

For any question seeking approval to issue general obligation bonds, the sample ballot will contain the purpose of the issue, a disclosure of the property tax rate anticipated and the dollar amount of interest, and an explanation of how the operating and maintenance costs of the facility will be paid.

The actual tax rate necessary to pay the bonds may be higher or lower than the estimate depending on: the interest rates at the time the bonds are sold; maturity schedule and term of bonds as actually issued; and actual assessed value of property in the district at the time bonds are sold.

TAX OVERRIDE - Allows a property tax rate to be set for operational expenses, such as additional public safety personnel. Tax overrides may not be levied for longer than 30 years and may be discontinued sooner by the governing body that has imposed the override.

PAY AS YOU GO - Used generally by school districts to provide for a property tax rate to fund the building refurbishing of school facilities as funds are accrued. The rate cannot be imposed for longer than 20 years.

TAX ROLLOVER - A mechanism to allow school districts to ask voters to approve a continuation of the existing debt rate to build facilities. Until 2008, which is when the current provision expires, a school district which has received voter approval for the "rollover" may issue debt against any property tax rate which becomes available because of prior debt being retired.

ALL COUNTIES

(Ed. Note: The following question is not a State-wide ballot question. However, it will be on 16 of the 17 counties' ballots. It will not appear on the Douglas County ballot. Each of the counties has assigned their own number to this ballot question. For ease in identification, it is referred to here as "NACO". It will also be identified as "NACO" under each county's list of ballot questions with the actual ballot question number cross-referenced.)

QUESTION NO. NACO (NEVADA ASSOCIATION OF COUNTIES) ADVISORY QUESTION CONCERNING MANDATES AND LOSS OF REVENUE.

Shall the Nevada Constitution be amended to add the following provisions?

1. *The Nevada Legislature shall not, directly or indirectly, enact laws or authorize the adoption of regulations, requiring the counties and cities of the State to provide new services, expand existing services or conduct new or additional governmental functions without appropriating or designating state funding sources to support said new services, expansion of existing services and new or additional governmental functions.*

2. *The Nevada Legislature shall not enact legislation that would effectively reduce, eliminate or divert to the State revenue or revenue sources previously authorized to support county and city governmental services and functions.*

EXPLANATION: The first part of the question deals with unfunded mandates and is in response to the fact that the legislature has consistently ignored a statutory provision prohibiting unfunded mandates. The second part of the question is in response to bills introduced in both the 2001 and 2003 regular Legislative session for the State to take "excess" revenue received by the counties and cities from the motor vehicle privilege tax (2001) and property tax (2003). It is expected that if the voters approve this question, the Legislature will be asked to introduce a Resolution to amend the Constitution.

Continued on page 6

Question No. NACO continued

POSITION: **OPPOSE.** The Association supported the original ballot question of 1992 which statutorily prohibited the use of unfunded mandates. However, the effect of Section 2 in this question would be to limit the Legislature's ability to change local government funding mechanisms in the future (as was done in 1981 when property tax was capped and the emphasis was placed on sales tax) and that is the primary reason for the opposition to this question.

CARSON CITY

QUESTION NO. CCI - ADVISORY - SALES TAX TO SUPPORT STORM WATER SYSTEM

Shall the Carson City Board of Supervisors be authorized to ask the Nevada State Legislature to amend Nevada state law to allow Carson City to impose up to 1/8th of a percent sales tax to support storm water operation and maintenance?

ADDITIONAL INFORMATION: The storm water program is anticipated to cost \$1.2 million per year when fully operational. Start-up program already funded through user charges of \$20.40 per residence per year (\$600,000 annually). Increase in sales tax rate expected to generate \$1 million per year and cost consumers \$6.25 per \$5,000 of taxable spending. Sales tax would remain in effect for the life of the program.

QUESTION NO. CC2 - ADVISORY - NACO (See question and explanation on page 5.)

NTA POSITION: **OPPOSE** (see page 6)

CHURCHILL COUNTY

QUESTION NO. 1 - ADVISORY - NACO (See question and explanation on page 5.)

NTA POSITION: **OPPOSE** (See page 6 for explanation.)

QUESTION NO. 2 - PROPERTY TAX FOR SENIOR CENTER

Shall the Board of County Commissioners of Churchill County be authorized to levy an additional property tax rate to assist in the continued funding of the necessary facilities and services for the Churchill County Senior Center in an amount of \$0.03 per \$100 of assessed

continued top of next column

Churchill County Questions continued

valuation for a period of four years beginning July 1, 2005, and ending June 30, 2009? The cost for the owner of a new \$100,000 home is estimated to be \$10.50 per year.

ADDITIONAL INFORMATION: The additional tax rate of \$0.03 per \$100 of assessed valuation is estimated to generate \$132,446 per year.

QUESTION NO. 3 - BAN PROSTITUTION - PETITION

Shall Chapter 5.2 of the Churchill County Code be repealed in order to end legalized prostitution in Churchill County?

ADDITIONAL INFORMATION: Currently, there are no brothels licensed or operating in Churchill County. This question was placed on the ballot by a referendum petition which was circulated and qualified to abolish the licensing and regulation of prostitution in Churchill County, Nevada.

CLARK COUNTY

QUESTION NO. 9 - ADVISORY - PUBLIC SAFETY

This question is advisory only. Do you support an increase in the sales and use tax in Clark County of up to 1/2 of 1% for the purpose of hiring and equipping more police officers to protect the citizens of Clark County?

ADDITIONAL INFORMATION: With authorization from the Legislature, the proposal is to increase the tax rate by 1/2 of 1% beginning July 1, 2005 and increasing it to 1% beginning July 1, 2009. This question was proposed by Metro. However, as the sales tax cannot be identified for distribution within Metro's boundaries, the sales tax is proposed to be levied County-wide with all police departments within the County receiving a share of the sales tax.

FISCAL NOTE: The average cost to the taxpayer would be \$12.50 per year, based on \$5,000 annual expenditure at the 1/2% additional rate and \$25 per year, based on the \$5,000 annual expenditure at the 1% additional rate.

QUESTION NO. 10 - ADVISORY - NACO (See question and explanation on page 5.)

NTA POSITION: **OPPOSE** (See explanation on page 6)

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BOULDER CITY

BOULDER CITY QUESTION NO. 1 - ADVISORY - LAND SALES

Shall 45 ± acres of City-owned land located on the northeasterly perimeter of the Boulder Creek Golf Course be sold by the City of Boulder City for residential development for the exclusive purpose of generating funds to retire a portion of the capital obligations incurred during construction of the Boulder Creek Golf Course?

TOWN OF SEARCHLIGHT

SEARCHLIGHT E-911 ADVISORY QUESTION

Shall the annual property tax rate be increased by \$0.005 per \$100 of assessed valuation to fund the capital, operation and maintenance costs of an E-911 Emergency Telephone Number System to provide a single number and call identification system for police, fire, and paramedic services in the Searchlight area? This question is purely advisory in nature and does not place any legal requirement on the governing body or any office of the political subdivision or the Nevada Legislature.

TOWN OF BUNKERVILLE

BUNKERVILLE E-911 ADVISORY QUESTION

Shall the annual property tax rate be increased by \$0.005 per \$100 of assessed valuation to fund the capital, operation and maintenance costs of an E-911 Emergency Telephone Number System to provide a single number and call identification system for police, fire, and paramedic services in the Bunkerville area? This question is purely advisory in nature and does not place any legal requirement on the governing body or any office of the political subdivision or the Nevada Legislature.

DOUGLAS COUNTY

There are no local questions on the Douglas County Ballot.

An advisory question to increase the Utility Franchise Fee for bonds for the construction of public buildings and operations and maintenance appeared on the **Primary Election Ballot**. This question was defeated with 6,767 opposed and 3,615 in favor.

ELKO COUNTY

QUESTION NO. 1 - ADVISORY - NACO (See question and explanation on page 5.)

NTA POSITION: OPPOSE (See page 6 for explanation)

QUESTION NO. 2 - LIBRARY PROPERTY TAX OVERRIDE

Shall the Board of County Commissioners of Elko County, Nevada, on behalf of continuing support of the Elko County Library, enact all ordinances and take all actions, including exceeding any applicable limitation upon ad valorem taxes, to levy an additional property tax rate for materials, equipment and improved technology for the Elko County Library of 5 cents per \$100 of assessed valuation for a period of 30 years commencing July 1, 2005? The cost of the 5 cent property tax levy for the owner of a new \$100,000 home is estimated to be \$17.50 per year.

PLEASE NOTE: This ballot question has not been worded to conform with statutory or regulatory language. The question contains the phrase "including exceeding any applicable limitation", without any explanation as to whether that refers to the 106% revenue cap or the property tax rate cap of \$3.64 per \$100 of assessed valuation, or both. If this language does refer to the rate cap, the Legislature would have to enact the necessary statutory change. And, in that instance, the question should then have been "advisory".

QUESTION NO. 3 - ADVISORY - MOTOR VEHICLE FUEL TAX

Should the Board of Elko County Commissioners act to increase the County optional motor vehicle gas tax levied pursuant to NRS 373.030(1)(B) from the current 4 cents per gallon to the statutory maximum of 9 cents per gallon?

QUESTION NO. 4 - SALES TAX FOR PUBLIC ROADS

Should the Board of County Commissioners enact a one half cent sales tax pursuant to NRS Chapter 337A.020 for the construction, maintenance and repair of public roads?

ESMERALDA COUNTY

QUESTION NO. 1 - ADVISORY - NACO (See question and explanation on page 5.)

NTA POSITION: OPPOSE (See page 6 for the explanation.)

EUREKA COUNTY

QUESTION NO. 1 - ADVISORY - NACO (See question and explanation on page 5.)

NTA POSITION: OPPOSE (See page 6 for explanation.)

QUESTION NO. 2 - SCHOOL BOND - PROPERTY TAX LEVY

Shall the Board of Trustees of the Eureka County School District, Nevada, be authorized to issue up to \$6,000,000 of general obligation bonds, in one series or more, in the maximum aggregate principal amount of \$6,000,000 for the purpose of acquiring, constructing, improving and equipping school facilities within the District? The Bonds are expected to require a property tax levy for 10 years. The Bonds are estimated to result in an increase in the property taxes that the owner of a new \$100,000 home (with an assessed value of \$35,000) will pay, which will average \$56.88 per year.

HUMBOLDT COUNTY

QUESTION NO. 9 - ADVISORY - NACO (See question and explanation on page 5.)

NTA POSITION: OPPOSE (See page 6 for explanation.)

QUESTION NO. 10 - ADVISORY - PROPERTY TAX INCREASE FOR SENIOR CENTER

This is an advisory measure only. Do you support an additional property tax in Humboldt County for the operation of the senior citizens center in the amount of \$0.015 per \$100 assessed valuation?

FISCAL NOTE: The property tax levy of \$0.015 per \$100 assessed valuation would result in the property taxes that the owner of a new \$100,000 home will pay of \$5.25 per year.

LANDER COUNTY

QUESTION NO. 1 - ADVISORY - NACO (See question and explanation on page 5.)

NTA POSITION: OPPOSE (See page 6 for explanation.)

QUESTION NO. 2 - ADVISORY - COMBINE OFFICES OF THE CLERK - RECORDER

Should the offices of the Lander County Recorder and the Lander County Clerk be combined?

QUESTION NO. 3 - ADVISORY - INCREASE NUMBER OF COMMISSIONERS TO FIVE

Should the Lander County Board of Commissioners be increased to five members?

LINCOLN COUNTY

QUESTION NO. 1 - ADVISORY - NACO (See question and explanation on page 5.)

NTA POSITION: OPPOSE (see page 6)

LYON COUNTY

QUESTION NO. 9 - ADVISORY - NACO (See question and explanation on page 5.)

NTA POSITION: OPPOSE (See page 6 for explanation.)

QUESTION NO. 10 - ADVISORY - NEW CONSTRUCTION TAX

Shall the Board of County Commissioners impose a tax on new construction of not more than six hundred and fifty dollars (\$650) on each new single family residence and not more than sixty-five cents per square foot (\$0.65) on other new construction, with the proceeds of the tax to be used for road projects (including construction and maintenance), road bonds or both projects and bonds?

FISCAL NOTE: This tax is on new construction. The tax will be imposed for the foreseeable future. The county, in connection with the levy of this tax, does not intend to sell revenue bonds which are backed by the full faith and credit of the assessed value of the county. The county may sell bonds and pay the bonds with the proceeds of this tax. (Revenue bonds.)

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QUESTION NO. 11 - SCHOOL DISTRICT BOND ROLLOVER

Shall Lyon County School District be authorized to issue up to \$22,000,000 of general obligation bonds for the purpose of acquiring, constructing, improving and equipping school facilities? The Bonds are expected to require a property tax levy for 22 years. Due to the retirement of outstanding bonds and projected assessed value growth, passage of this question is not expected to result in an increase in the existing property tax rate levied to pay the District's bonds.

FISCAL NOTE: The maximum principal amount of the Bonds is \$22,000,000. Maximum maturity is 30 years, but the Board anticipates maturity within 22 years. Anticipated interest is 6.10%, with interest cost at \$17,535,500. Actual interest rate may be higher or lower depending on interest rates at the times the Bonds are sold. The average property tax rate required would be 13.03 cents per \$100 of assessed valuation, or \$45.59 per year for the owner of a new \$100,000 home.

MOUNDHOUSE AND DAYTON VOTERS ONLY

QUESTION NO. 12 - MOUND HOUSE AND DAYTON BECOME UNINCORPORATED TOWN

Shall the Board of County Commissioners form an unincorporated town including the areas of Mound House and Dayton for the purposes of providing services, which may include parks, recreation, swimming pools, and acquisition, maintenance and improvement of town property? A "yes" vote carries with it the assent to be taxed for services. Imposition of any such tax would require the approvals of the Town Board and the Nevada Department of Taxation.

FERNLEY SWIMMING POOL DISTRICT

QUESTION NO. 13 - ADVISORY - FERNLEY SWIMMING POOL DISTRICT

Should the Lyon County Board of Commissioners initiate action to dissolve the Fernley Swimming Pool District if requested to do so by the City of Fernley Council?

FISCAL NOTE: There would be no net increase or decrease in tax to City residents as any tax increase by the City would be offset by the tax decrease by the County District.

NORTH LYON COUNTY FIRE DISTRICT

QUESTION NO. 14 - ADVISORY - DISSOLVE FIRE DISTRICT

Should the Lyon County Board of Commissioners initiate action to dissolve the North Lyon County Fire Protection District if requested to do so by the City of Fernley Council?

FISCAL NOTE: There would be no net increase or decrease in the tax to City residents as any tax increase by the City would be offset by the tax decrease by the County District.

CITY OF FERNLEY

QUESTION NO. 15 - PROPERTY TAX FOR SWIMMING POOL

If the Fernley Swimming Pool District is dissolved and no longer levies a tax and if the City of Fernley agrees to provide pool and recreational services that were formerly provided by the District, shall the City be authorized to levy a property tax rate for the pool and recreational activities in the amount of up to \$0.20 per \$100.00 assessed valuation for a period of up to (30) years? The estimated cost will remain the same, which is up to \$70.00 per year for the owner of a new \$100,000.00 home.

QUESTION NO. 16 - PROPERTY TAX FOR FIRE DISTRICT

If the North Lyon County Fire Protection District is dissolved and no longer levies a tax and if the City of Fernley agrees to provide fire protection services that were formerly provided by the District, shall the City be authorized to levy a property tax rate for those services in the amount of up to \$0.05 per \$100.00 assessed valuation for a period of up to (30) years? The estimated cost will remain the same, which is up to \$17.50 per year for the owner of a new \$100,000.00 home.

MINERAL COUNTY

QUESTION NO. 1 - ADVISORY - NACO (See question and explanation on page 5.)

NTA POSITION: **OPPOSE** (See page 6 for explanation.)

NYE COUNTY

QUESTION NO. 1 - ADVISORY - NACO (See question and explanation on page 5.)

NTA POSITION: **OPPOSE** (See page 6 for explanation.)

TOWN OF PAHRUMP

QUESTION NO. 2 - LIBRARY PROPERTY TAX OVERRIDE

Shall the Board of Trustees of Pahrump Library District be authorized to establish an additional property tax rate for the purpose of operating, maintaining, equipping, and improving library facilities at a rate of 5 cents per \$100 of assessed valuation for a period of up to 30 years? The cost for the owner of a new \$100,000 home is estimated to be \$17.50 per year.

ADDITIONAL INFORMATION: Approval will not result in an increase in the district's current tax rate, but would allow the District to levy the additional tax within the District's current voter-approved debt levy of 10.46 cents. It would allow the rate to extend beyond the expiration date of June 30, 2008.

QUESTION NO. 3 - ADVISORY - PAHRUMP ZONING ORDINANCE

Do you favor a comprehensive zoning ordinance within the Pahrump Regional Planning District?

QUESTION NO. 4 - CREATION OF REGIONAL TRANSPORTATION DISTRICT AND DEVELOPER TAX

Should the Nye County Board of County Commissioners, pursuant to NRS 278.710 and NRS 244A.252, create a Pahrump Regional Transportation District within the boundaries of the Pahrump Regional Planning District and impose a one-time tax within the Pahrump Regional Transportation District at a rate not to exceed \$650.00 for each new single-family dwelling unit, including newly developed lots for mobile and manufactured homes, and for each new dwelling unit in a multi-family building; and at a rate not to exceed \$0.65 (65 cents) per square foot of new commercial, industrial, and other new development excluding accessory buildings; with incremental tax increases as provided for in the Nevada Revised Statutes; with the tax to be used exclusively within the Pahrump Regional Transportation District for overpass projects, street projects and underpass projects?

ADDITIONAL INFORMATION: The tax is estimated to generate approximately \$800,000 in the first year.

PERSHING COUNTY

QUESTION NO. 9 - ADVISORY - NACO (See question and explanation on page 5.)

NTA POSITION: **OPPOSE** (See page 6 for explanation.)

QUESTION NO. 10 - INCREASE NUMBER OF COUNTY COMMISSIONERS

Shall the Board of County Commissioners be increased to five members?

ADDITIONAL INFORMATION: The two new commission members would be elected at the General Election November 7, 2006.

FISCAL NOTE: At 2003-04 rates, the cost for salaries and benefits would be \$52,840 annually, plus costs for travel, training, supplies and additional support staff.

STOREY COUNTY

QUESTION NO. 1 - ADVISORY - NACO (See question and explanation on page 5.)

NTA POSITION: **OPPOSE** (See page 6 for explanation.)

WASHOE COUNTY

BALLOT QUESTION NO. WC-1 - ADVISORY - PROPERTY TAX CONTINUANCE FOR VECTOR BORNE DISEASES

This question is advisory only: Do you support the continuation of an existing property tax in Washoe County for use by the Washoe County District Health Department's Vector Borne Diseases Program in case of an emergency in the amount of \$0.005 per \$100 assessed valuation?

FISCAL NOTE: The current property tax rate of \$0.005 per \$100 assessed valuation would continue to cost the owner of a new \$100,000 home \$17.50 per year. If the tax continues to be levied, Washoe County may sell bonds payable from the tax that are backed by the full faith and credit of the assessed value of the County.

Continued on page 11

**DON'T FORGET ELECTION DAY IS
NOVEMBER 2**

BALLOT QUESTION NO. WC-2 - ADVISORY - SALES TAX FOR NATURAL RESOURCES

This question is advisory only: Do you support an increase in the sales and use tax in Washoe County of up to 1/8 of 1% for the purpose of acquiring, improving, restoring and maintaining open space, trails, regional parks, natural resources, and historic and cultural facilities?

EXPLANATION: Chapter 376A of NRS allows the imposition of a sales and use tax of up to 1/4 of 1% for certain open space related purposes. If this question passes, Washoe County will ask the State Legislature to amend Chapter 376A to include all the items listed in the question.

FISCAL NOTE: The sales and use tax increase of 1/8 of 1% would last for up to 30 years. The average annual cost is expected to be \$12.50 per year for typical payer of sales and use tax in the County based on average annual expenditures of \$10,000. Following the levy of the tax, additional expenses are expected to be incurred to pay for the operation and maintenance of the facilities acquired, which may be paid from the tax or existing County resources.

BALLOT QUESTION NO. WC-3 - ADVISORY - NACO (See question and explanation on page 5.)

NTA POSITION: **OPPOSE** (See page 6 for explanation.)

BALLOT QUESTION NO. R-1 - CONTINUE PROPERTY TAX LEVY FOR STREETS

Shall the City Council of the City of Reno be authorized to continue to levy the current property tax rate for the purpose of acquiring, constructing, reconstructing, improving, and maintaining City streets in the amount of up to 22.98 cents per \$100 of assessed valuation for a period of up to 30 years? The cost for the owner of a new \$100,000 home will not increase, but would continue in the estimated amount of up to \$80.43 per year.

EXPLANATION: If approved this will permit the City of Reno to continue the current property tax levy for up to 30 more years.

WHITE PINE COUNTY

QUESTION NO. 1 - ADVISORY - NACO (See question and explanation on page 5.)

NTA POSITION: **OPPOSE** (See page 6 for explanation.)

2004 GENERAL ELECTION DATES OF IMPORT	
OCTOBER 3 to OCTOBER 12	Voters may register, update registration or change party affiliation for the general election IN PERSON only at the County Registrar of Voters or County Clerks' Offices.
OCTOBER 16	EARLY VOTING STARTS Contact the County Registrar of Voters or County Clerks' Offices for information on location and times.
OCTOBER 26	Written requests for mail ballots must be received by the election department.
OCTOBER 29	LAST DAY FOR EARLY VOTING
NOVEMBER 2	GENERAL ELECTION Polls open from 7:00 a.m. to 7:00 p.m.
DON'T FORGET TO VOTE!	

BE AN INFORMED VOTER

Read your sample ballot to better understand the questions you will be voting on.

REMEMBER

The only way you can record your opinion is by voting. Don't let this very important election be decided without registering your opinion.

YOUR VOTE DOES COUNT!

Don't forget to cast your vote on November 2, 2004.

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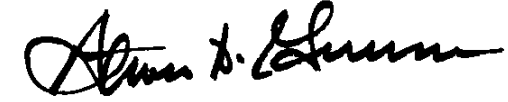
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IN THE DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF CLARK

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

Plaintiffs,

vs.

MDC RESTAURANTS, LLC, a Nevada
limited liability company; LAGUNA
RESTAURANTS, LLC, a Nevada limited
liability company; INKA, LLC, a Nevada
limited liability company and DOES 1
through 100, Inclusive,

Defendants.

Case No. A701633

Dept. No. XVI

**DEFENDANTS' OPPOSITION TO
MOTION FOR PARTIAL SUMMARY
JUDGMENT ON LIABILITY AS TO
PLAINTIFF PAULETTE DIAZ'S FIRST
CLAIM FOR RELIEF**

Hearing Date: June 16, 2015

Hearing Time: 9:00 a.m.

Defendants, by and through their counsel of record, hereby oppose the Motion for Partial Summary Judgment on Liability as to Plaintiff Paulette Diaz's First Claim for Relief and submits its Countermotion for Partial Summary Judgment on Liability for an Order finding that employers who offer their employees qualified health insurance are permitted under the MWA to pay those employees below the upper tier minimum wage. This Opposition is based on the attached Memorandum of Points and Authorities, all papers and files on file herein and any oral argument permitted.

1 **MEMORANDUM OF POINTS & AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Daiz's Motion seeking a partial summary judgment turns on the definition of a
4 single word: provide. In order to prevail on his Motion, Plaintiff Diaz must convince this Court that
5 unless she actually personally enrolled in the health plan admittedly made available to her by her
6 employer, Defendant did not "provide" health benefits as that term is used in Nev. Const. art XV §
7 16 (Nevada Constitution's Minimum Wage Amendment or "MWA").¹ **See, Diaz Motion, at 3:6-7.**
8 There is, however, one problem with this argument. It is flat out wrong.

9 Even a cursory review of his Points and Authorities reveals that Plaintiff has engaged in
10 extensive verbal gyrations and resorted to blatant omissions to arrive at the tortured definition she
11 proffers to support her unwonted position. Indeed, Plaintiff intentionally ignored numerous terms
12 and synonyms to the contrary in order to argue that "provide" as used in the MWA requires that she
13 actually enroll in health benefits. Citing but one example, the online Merriam-Webster Dictionary
14 cited by Plaintiff prominently contains among its first definitions of the term "provide" "to make
15 (something) available." Moreover, Plaintiff doubles down on his deliberately obfuscated definition
16 by failing to quote the sentence following language of the MWA on which he relies: a sentence
17 which unmistakably clarifies that the terms provide and offer were intended by the drafters of the
18 MWA to be synonymous. "Offering health benefits within the meaning of this section shall consist
19 of making health insurance available to the employee for the employee and the employee's
20 dependents...." Nev. Const. art XV § 16.

21 The putrescence of Plaintiff's argument is further highlighted by the fact that she completely
22 fails to discuss the regulations implementing the MWA. The regulations specifically state that
23 qualification to pay the lower tier minimum wage is predicated on making health insurance
24 "available to the employee and any dependents of the employee," not on actual enrollment by the
25 employee. NAC 608.102(2). Finally, by taking the position he has in this case, Plaintiff is in
26 essence asking this Court to vitiate duly enacted regulations on which Defendant WOLV, and
27

28 ¹ Although Plaintiff Diaz has filed this lawsuit against all three Defendants, Defendant MDC Restaurants is the only Defendant to have employed Diaz during the relevant statute of limitations.

1 practically every other employer in Nevada, has reasonably relied. The retroactive effect of such a
2 ruling would be a classic blunder and clear violation of WOLV's and other Nevada employers' due
3 process.

4 Accordingly, there is but one clear meaning of the word provide in the MWA. Indeed, the
5 unambiguous language of the MWA, the implementing regulations and even the various dictionaries
6 Plaintiff cites confirm that health benefits are provided within the meaning of the Nevada
7 Constitution when an employer offers or makes "health insurance available" to its employees.

8 **II. STANDARD OF REVIEW**

9 The Nevada Supreme Court has long held that entry of summary judgment is proper when
10 there are no issues of fact in dispute and that the moving party is entitled to an expedited judgment
11 as a matter of law. *Riley v. OPP IX, L.P.*, 112 Nev. 826, 830, 919 P.2d 1071, 1074 (1996). A
12 genuine issue of material fact is such that a reasonable jury could return a verdict for the non-moving
13 party. *Id.* (Citing *Valley Bank v. Marble*, 105 Nev. 366, 367, 775 P.2d 1278, 1279 (1989)).
14 Moreover, the Nevada Supreme Court has adopted the same summary judgment principles espoused
15 by the United States Supreme Court in *Celotex Corp v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548
16 (1986). *Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005). In *Wood*, the
17 Nevada Supreme Court held that NRCP 56 mandates the entry of summary judgment against a party
18 who fails to make a showing sufficient to establish the existence of an element essential to that
19 party's case, and on which that party will bear the burden of proof at trial. *Wood* at 731. One of the
20 principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported
21 claims. *Id.* at 324. Here, Plaintiff cannot prove any of the required elements to sustain her Motion
22 and thus her Motion should be denied in its entirety.

23 **III. ADDITIONAL UNDISPUTED FACTS**

24 Defendants concur that the facts 1-5 in Plaintiff's Section III Undisputed Facts are correct,
25 with the exception that Defendants contend that Plaintiff's employer did provide qualifying health
26 insurance benefits for all its hourly employees, including Plaintiff. In addition, Defendants proffer
27 the following undisputed facts which are material to a resolution of the instant Motion:

28 1. Plaintiff Diaz was offered insurance at her time of hire. ***See Plaintiff Diaz Insurance***

3.

1 **Enrollment Form, produced as bates no. MDC000002, attached hereto as Exhibit 1.**

2 2. Plaintiff Diaz declined the health insurance offered to her. **See Plaintiff Diaz Insurance**
3 **Enrollment Form, produced as bates no. MDC000002, attached hereto as Exhibit 1.**

4 **IV. ARGUMENT**

5 The MWA sets forth a very clear directive for Nevada employers paying minimum wage: if
6 they provide health insurance to their employees, they may pay the lower-tier minimum wage. Nev.
7 Const. art XV § 16. Indeed, the parties agree that this is inherent in the plain language of the MWA.
8 **See Diaz Motion, at 7:5-6.** The disagreement therefore, rests solely on what is meant by the word
9 “provide.” According to Plaintiff, provide in this context means that an employer must not only
10 provide benefits by making them available to its employees but the employees must also actually
11 enroll in the employer-based insurance plans. In other words, Plaintiff claims that benefits are not
12 provided unless forced on employees.

13 Such an interpretation of the word provide is ludicrous for three key reasons: (1) the MWA
14 directs employers to offer insurance and it does not require employees to enroll in insurance; (2) the
15 regulations implementing the MWA specifically state that employers need only offer qualifying
16 health insurance benefits in order to pay the lower-tier minimum wage; and (3) the retroactive effect
17 of a ruling requiring employees to be enrolled in insurance prior to being paid the lower-tier
18 minimum wage would be a violation of due process.

19 The fact that Plaintiff chose not to enroll in the health insurance provided to her is irrelevant.
20 Accordingly, Defendants respectfully request that the Court deny Plaintiff’s Motion in its entirety
21 and enter an order to the effect that employers who offer their employees qualified health insurance
22 are compliant with the MWA.

23 **A. The Nevada Constitution Directs Employers to Offer Insurance to Employees In**
24 **Order to Pay the Lower-Tier Minimum Wage**

25 The MWA focuses on what actions employers must take in order to pay below the upper tier
26 minimum wage. *See Nev. Const. art XV § 16.* Specifically, it directs employers to offer health
27 insurance benefits to their employees. *Id.* At no point does it discuss or even mention any action
28 that must be taken by employees. *See id.* Thus, Plaintiff’s assertion that the MWA states that

1 employees must enroll in the health insurance plan provided to them by their employers in order to
2 be paid below the upper tier minimum wage is completely erroneous and contrary to the clear
3 directive of the MWA. **See Diaz Motion, at 4:3-5.**

4 Indeed, the MWA directs only that employers must offer insurance and Plaintiff's argument
5 that employees must enroll in insurance fails for three reasons: (1) the plain language of the MWA
6 permits payment of the lower-tier minimum wage where the employer offers health benefits to its
7 employees; (2) Plaintiff's unreasonably restricted definition of the word "provide" renders the
8 language of the MWA nugatory; and (3) Plaintiff's purported authority for his position is inapposite
9 to the instant matter.

10 1. The Plain Language of the MWA Permits Payment of the Lower-Tier Minimum
11 Wage Where the Employer Offers Health Benefits to its Employees

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

20 Each employer shall pay a wage to each employee of not less than the
21 hourly rates set forth in this section. The rate shall be five dollars and
22 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.

23 Nev. Const. art. XV § 16. Thus, if an employer provides health insurance to its employees, it may
24 pay those employees the lower-tier minimum wage. The plain and ordinary meaning of the word
25 "provide" is "to make available." *See i.e.* <<http://www.merriam-webster.com/dictionary/provide>>.
26 Therefore, if an employer makes health insurance available to its employees, it may pay the lower
27 tier minimum wage.

28 In an attempt to contort the very straight-forward directive of the MWA, Plaintiff requests

1 that this Court adopt a nonsensical definition of the word “provide.” Specifically, Plaintiff asserts
2 that the word “provide” means that there must be some form of acceptance or assertion of control or
3 possession by the person to whom a service or item is being provided. **See Diaz Motion, at 4:3-5.**
4 Thus, according to Plaintiff, a service or item has not been provided unless the person for whom the
5 service or item is intended actually uses or takes that service or item. **Id.** This is completely contrary
6 to every definition of the word “provide,” including the definitions used by the sources Plaintiff
7 cites. Specifically, Plaintiff directs the Court to the online Merriam-Webster Dictionary’s Thesaurus
8 definition for the word provide. **Diaz Motion, at 7:26.** However, even that definition explains that
9 there is no need for actual acceptance or use:

10 **PROVIDE**

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

13 <<http://www.merriam-webster.com/thesaurus/provide>> As the example sets forth, providing
14 is the same as making available for use. If a “well-heeled vacationer” doesn’t use or keep the towels,
15 it doesn’t mean the “comforts of home” weren’t provided. Rather, if the towels were available for
16 use, they were provided – plain and simple. Whether the guest actually uses the towels is irrelevant
17 to the inquiry. For example, if person A invites person B over for dinner and then prepares and
18 offers person B dinner, person A has provided person B dinner regardless of whether person B eats
19 the food provided. What matters is that dinner was made available.

20 Next, Plaintiff completely omits the actual dictionary definition of the online Merriam-
21 Webster Dictionary. **Diaz Motion, at 7:26.** The online Merriam-Webster Dictionary defines
22 “provide” as follows:

23 **Provide:**

24 : to make (something) available : to supply (something that is wanted
or needed)

25 : to give something wanted or needed to (someone or something) : to
supply (someone or something) with something

26 : . . .

27 : to supply or make available (something wanted or needed) <provided
new uniforms for the band>; *also* : afford <curtains provide privacy>

28 : to make something available to <provide the children with free
balloons>

1 <<http://www.merriam-webster.com/dictionary/provide>> (emphasis added). Thus, according to
2 Plaintiff's own source and which he outlandishly ignores in his Motion, the very first definition of
3 the word "provide" is "to make available." *Id.* Nowhere in this definition is there a requirement that
4 the person being provided an item or service must actually use or accept that item or service in order
5 for it to be considered "provided."

6 This is also true in the definition given by Black's Law Dictionary: "An act of furnishing or
7 supplying a person with a product." <<http://thelawdictionary.org/provide/>> (Black's Law Dictionary
8 Online). Thus, according to Black's, if a person furnishes or supplies a product, they have made it
9 available. There is no requirement that the supplied or furnished product is accepted or used or taken
10 into possession by the offeree.

11 Another source, and one which arguably offers the most "ordinary and everyday meaning" of
12 the word "provide," is Google. Indeed, there is no other definition of "provide" that is more
13 "accessible, ordinary, or everyday" in today's world than that given by a simple internet search.
14 Accordingly, a Google search of "provide definition" gives the following result:

15 **pro·vide**

16 *verb*

17 1. make available for use; supply.

18 2. make adequate preparation for (a possible event).

19 If a Nevada voter or minimum wage worker were curious about the definition of the word
20 provide, this is more than likely the definition they would locate first. Thus, it would be clear that
21 this definition, like all the others, in no way requires acceptance or use by the person to whom a
22 service or item is being provided.

23 To further display this point, yet another source that defines "provide" is Roget's II: The
24 New Thesaurus. *Roget's II: The New Thesaurus. 3rd ed. Boston: Houghton Mifflin, 1995.* Therein,
25 "provide" is defined as "[t]o make (something) readily available." *Id.*, at 647, 701. Thus every
26 single definition of the word "provide" is the same. It means to make available for use. There is no
27 ambiguity and there is no requirement of actual acceptance or use.

28 The definition of the word "provide" is "to make available for use." Accordingly, as

1 explained above, the plain language of the MWA is clear: if an employer makes insurance available
2 to its employees, it may pay those employees the lower-tier minimum wage. It is that simple.

3 2. Plaintiff's Unreasonably Restricted Definition of the Word "Provide" Renders the
4 Language of the MWA Nugatory

5 Whenever possible, statutes are construed "such that no part of the statute is rendered
6 nugatory or turned to mere surplusage" or to "produce absurd or unreasonable results." *Albios v.*
7 *Horizon Communities, Inc.*, 122 Nev. 409, 418, 132 P.3d 1022, 1028 (2006); *Harris*, 119 Nev. at
8 642, 81 P.3d at 534. Here, Plaintiff has requested that this Court adopt a definition of the word
9 "provide" that is so restrictive that whether an employer offers insurance to its employees would
10 have no bearing whatsoever on whether that employer is permitted to pay the lower-tier minimum
11 wage. This is in complete contrast to the actual language of the MWA. Indeed, directly after setting
12 forth that employers must provide insurance, the MWA goes on to explain exactly what providing
13 health insurance means. Specifically, it states:

14 Offering health benefits within the meaning of this section shall
15 consist of making health insurance available to the employee for the
16 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.

17 It is not setting forth a separate and distinct act by the employer. It is clarifying what sort of
18 insurance should be provided by the employer. Thus, the MWA uses the terms "provide" and
19 "offer" synonymously. To assert otherwise is nonsensical. If "offer" and "provide" mean entirely
20 separate things, as Plaintiff suggests, then the second sentence is essentially meaningless and would
21 be rendered nugatory. This of course is not the case. The drafters, aware that employers cannot
22 forcibly enroll their employees in insurance, indicated that the relevant act for compliance with the
23 MWA is the employer's offer of insurance – not an employee's acceptance. Thus, Plaintiff's
24 contention that "[t]he term '[o]ffering' is not concerned with whether an employer qualifies for
25 paying the lower tier wage addressed in the prior sentence," is blatantly inaccurate. **Diaz Motion, at**
26 **10:11-13.** The word "offering" is clearly used in conjunction with the type of insurance that must be
27 made available in order for employers to qualify to pay below the upper-tier minimum wage. Thus
28

1 the use of the word “offering” is relevant and it is directly addressing whether an employer qualifies
2 to pay the lower-tier minimum wage.

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

15 Accordingly, the MWA discusses “offering insurance” because that is its mandate to
16 employers paying the lower-tier minimum wage – they must offer employees health insurance.

17 3. Plaintiff’s Purported Authority For His Position is Inapposite to The Instant Matter

18 Most likely aware that his argument requires the Court to ignore the plain language of the
19 MWA and the obvious directives therein, Plaintiff makes tenuous arguments based on inapposite
20 authority that does not actually support his position. For example, in an effort to skew the clear
21 definition of the word “provide,” Plaintiff makes a tenuous argument regarding the word “furnish.”
22 **Diaz Motion, at 8:16-25.** Specifically, he notes that “furnish” is synonymous with “provide” and
23 then cites to a criminal case wherein a prisoner was charged with furnishing a controlled substance
24 to himself. **Id.** Plaintiff notes that the Nevada Supreme Court stated that furnishing “calls for
25 delivery by one person to another person.” **Id.** However, what Plaintiff leaves out is that the
26 sentence goes on to say “you can’t deliver to yourself.” *State v. Powe, No. 55909, 2010 WL*
27 *3462763, at *1 (Nev. July 19, 2010).* Thus, the Nevada Supreme Court was in no way indicating
28 that the words “provide” or “furnish” mean there must be some acceptance or use or ongoing

1 possession by the person for whom an item or service is intended. Rather, the point of the statement
2 was that a person cannot transfer something to themselves. *See id.*

3 Next, Plaintiff relies upon an Internal Revenue Service (“IRS”) interpretation from 1976 of
4 Treasury Regulation § 601.201(o)(3) which stands for the exact opposite of Plaintiff’s position.
5 **Diaz Motion, at 8 fn. 4.** Specifically, at issue was whether applicants must be given copies of all
6 comments on an application or allowed to inspect and copy materials on request. *Id.* The IRS
7 determined that the applicant must be given copies, “not merely given the opportunity to obtain
8 them” and, therefore, “rather than adopting a strained reading of the word ‘provide,’ the regulation
9 should be amended.” *Id.* Thus, the IRS was stating that as written the regulation was indicating an
10 “opportunity to obtain” may be implied by the use of the word “provide.”

11 Plaintiff further relies on a case which makes a distinction between the use of the terms “state
12 office” and “local governing body” in an effort to show that the MWA intended two entirely
13 different meanings by using the words “provide” and “offer.” **Diaz Motion; at 11:19-24.** At issue
14 in that case was the drafter’s intent in Nev. Const. art. XV § 3 by using different terms in addressing
15 how term limits apply in state and local elections. *Lorton v. Jones*, 130 Nev. Adv. Op. 8, 322 P.3d
16 1051, 1056 (2014), *reh’g denied* (Mar. 5, 2014). This is in no way analogous to the matter at hand.
17 “Provide” and “offer” are not materially different terms. As discussed above, provide means to
18 make available. By the very nature of the subject matter of the MWA, naturally an offer must occur.
19 The two terms go hand in hand.

20 Finally, Plaintiff refers to the “findings and purposes” of the MWA. **Diaz Motion, at 14:7-**
21 **26.** As evident from Plaintiff’s motion, the “findings and purposes” make no reference whatsoever
22 to the alleged requirement that an employee must enroll in insurance. *Id.*

23 **B. The Regulations Implementing the MWA Specifically State That Employers Need**
24 **Only Offer Qualifying Health Insurance In Order to Pay the Lower-Tier Minimum**
25 **Wage**

26 In what can only be described as a blatant attempt to mislead the Court, Plaintiff quite
27 egregiously failed to make any reference whatsoever to the regulations that support the MWA.² This

28 ² Instead, Plaintiff cites to a series of articles and press releases which were likely copied and pasted from one another
and are of no controlling precedent whatsoever. **Diaz Motion, at 16-17.** Indeed, many of the citations were published

1 is likely because the regulations make it abundantly clear that employers who “offer” insurance to
2 their employees qualify to pay the lower-tier minimum wage. Specifically, NAC 608.102 states:
3 “To qualify to pay an employee the minimum wage set forth in paragraph (a) of subsection 1 of
4 NAC 608.100 . . . [t]he employer must offer a health insurance plan.” NAC 608.102(1) (emphasis
5 added). The regulation goes on to state that, “[t]he health insurance plan must be made available to
6 the employee and any dependents of the employee.” NAC 608.102(2) (emphasis added). It says
7 absolutely nothing about requiring an employee to enroll in insurance. Rather, the directive is clear:
8 employers must offer insurance in order to pay the lower-tier minimum wage.

9 NAC 608.102 also makes clear that the Labor Commissioner understood that the definition
10 of the word “provide” is “to make available.” Moreover, the Labor Commissioner interpreted the
11 MWA as a whole to require employers to offer insurance to their employees – not to require
12 employees to enroll in insurance. The Court must give deference to this interpretation as long as it is
13 “based on a permissible construction of the statute.” *Chevron v. Natural Resources Defense*
14 *Council*, 467 U.S. 837, 842-843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). In other words, the agency
15 interpretation is upheld unless it is arbitrary or capricious. *Deukmejian v. United States Postal*
16 *Service*, 734 F.2d 460 (9th Cir.1984); *Lane v. U.S. Postal Serv.*, 964 F. Supp. 1435, 1437 (D. Nev.
17 1996). Here, as discussed above, interpreting the word “provide” to mean “to make available” is
18 consistent with every definition of the word. Therefore, there is no argument that the Labor
19 Commissioner’s interpretation of the MWA is or was arbitrary or capricious.

20 Next, NAC 608.102 is also due deference because it explains what sort of coverage must be
21 included in the offered health insurance plan. Therefore, if the Court were to ignore NAC 608.102 or
22 determine it is somehow inapplicable or void, there would be no guidance whatsoever on what sort
23 of coverage must be included in the offered insurance. The result would be truly absurd. NAC
24 608.102 has been in place since 2007 and its directives have been essential in the interpretation of
25 the MWA.

26 Another regulation that sets forth the requirements of the MWA is NAC 608.106 which
27
28 before there was any clarification by the Labor Commissioner via the regulations and lack any indication of actual
research into the MWA whatsoever. See *id.*

1 further elaborates that the MWA is designed to incentivize offering insurance. Specifically, it sets
2 forth that employees are free to decline the offered insurance:

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

6 NAC 608.102 (emphasis added). It does not state that the employee will be paid the upper-tier wage
7 if they decline insurance. Instead, it contemplates an offer of insurance, which employees are free to
8 decline.

9 Finally, NAC 608.108 is yet another regulation that explains that it is the offer of insurance
10 that is relevant. NAC 608.108 clearly sets forth that the requirements for payment of the upper-tier
11 minimum wage are as follows:

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

15 NAC 608.108 (emphasis added). Accordingly, since at least 2007, the express mandate to employers
16 is that offering health insurance to their minimum wage employees qualifies them to pay below the
17 upper-tier minimum wage.

18 The regulations, like the MWA, are clear: employers must offer health insurance to pay
19 below the upper-tier minimum wage. Actual coverage which would occur in the event an employee
20 selects the insurance has no bearing on the rate of pay.

21 **C. The Retroactive Effect of A Ruling Requiring Employees to be Enrolled in**
22 **Insurance Prior to Being Paid the Lower-Tier Minimum Wage Would be a**
Violation of Due Process

23 Plaintiff's Motion urges the Court to ignore the above discussed regulations. As a result, if
24 the Court were to take this approach, it would have to address the nine-years in which employers in
25 Nevada have relied on those regulations. The Supreme Court has held that "a court is to apply the
26 law in effect at the time it renders its decision" in the absence of manifest injustice or evidence of
27 legislative intent to the contrary. *Bradley v. School Board*, 416 U.S. 696, 711, 94 S.Ct. 2006, 2016,
28 40 L.Ed.2d 476 (1974). Thus, in the event the Court agrees with Plaintiff's argument, the

1 constitutional concerns would be substantial. Specifically, when interpreting a statute, courts have
2 long applied the “cardinal principle” that a fair construction which permits the court to avoid
3 constitutional questions will be adopted. *United States v. Security Industrial Bank*, 459 U.S. 70, 78,
4 103 S.Ct. 407, 412, 74 L.Ed.2d 235 (1982) (quoting *Lorillard v. Pons*, 434 U.S. 575, 577, 98 S.Ct.
5 866, 868, 55 L.Ed.2d 40 (1978)); *Lowe v. S.E.C.*, 472 U.S. 181, —, 105 S.Ct. 2557, 2562, 85
6 L.Ed.2d — (1985). Where a statute may be construed to have either retrospective or prospective
7 effect, a court will choose to apply the statute prospectively if constitutional problems can thereby be
8 avoided. *In re Ashe*, 712 F.2d 864, 865–66 (3d Cir.1983), cert. denied, 465 U.S. 1024, 104 S.Ct.
9 1279, 79 L.Ed.2d 683 (1984); *Roth v. Pritikin*, 710 F.2d 934, 939–40 (2d Cir.), cert. denied, 464 U.S.
10 961, 104 S.Ct. 394, 78 L.Ed.2d 377 (1983). Resolution of the constitutional issue need not be
11 certain; there need only be a “substantial doubt,” *Security Industrial Bank*, 459 U.S. at 78, 103 S.Ct.
12 at 412, or an indication that the constitutional question is “non-frivolous.” *Ashe*, 712 F.2d at 865.
13 Accord *Roth*, 710 F.2d at 939 (“[e]ven the spectre of a constitutional issue” is sufficient to construe
14 the statute to provide for only prospective relief).

15 Here, retroactive application of Plaintiff’s “must be enrolled” argument could raise
16 constitutional questions concerning both the Ex Post Facto Clause, U.S. Const., art. I, § 9, cl. 3, and
17 the Due Process Clause of the Fifth Amendment. Therefore, the Court should select the construction
18 that renders constitutional analysis unnecessary. However, in the event the Court does not and
19 agrees with Plaintiff, Plaintiff’s Motion must still be denied because the voiding of the Labor
20 Commissioner’s regulations would have to be applied prospectively – not retroactively.

21 **V. CONCLUSION**

22 For the forgoing reasons, Defendants respectfully request that the Court deny Plaintiff Diaz’s
23 Motion in its entirety and enter an order finding that employers who offer their employees qualified
24 health insurance are permitted under the MWA to pay those employees below the upper tier
25 minimum wage.

26 ///

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28 ///

1 Dated: May 22, 2015

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Respectfully submitted,



RICK D. ROSKELLEY, ESQ.
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PROOF 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 May 22, 2015, I served the within document:

DEFENDANTS' OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY AS TO PLAINTIFF PAULETTE DIAZ'S FIRST CLAIM FOR RELIEF

☒ Via **Electronic Service** - pursuant to N.E.F.C.R Administrative Order: 14-2.

Don Springmeyer, Esq.
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3556 East Russell Road, Second Floor
Las Vegas, Nevada 89120

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 22, 2015, at Las Vegas, Nevada.



Debra Perkins

Firmwide:133575283.1 081404.1002

EXHIBIT 1



Enrollment Application
Effective Date: _____

PERSONAL INFORMATION				
Last Name	First Name	M.I.	Date of Birth	Social Security Number
Diaz	Paula He	@	07-07-64	Redacted
Address		City	State	Zip Code
7405 Burnham Ave		#2007 Las Vegas	NV	89123
Date of Hire	Home Phone		Email Address	
1/23	702-742-4208			
<input type="checkbox"/> Male <input checked="" type="checkbox"/> Female <input checked="" type="checkbox"/> Single <input type="checkbox"/> Married				
Enrollment Reason: <input type="checkbox"/> Open Enrollment <input type="checkbox"/> Loss of Coverage <input type="checkbox"/> New Hire <input type="checkbox"/> Change				
Are you, your spouse or any of your dependents covered by other group health benefits? <input type="checkbox"/> Yes <input type="checkbox"/> No				
If yes, write the name of other plan here: _____ Contract #: _____				
MEDICAL ELECTIONS - RATES ARE PER PAY				
Select One:	<input type="checkbox"/> Enroll <input checked="" type="checkbox"/> Decline			
	Starbridge Level 1	Starbridge Level 2		
Employee	<input type="checkbox"/> \$17.45	<input type="checkbox"/> \$43.47		
EE + Spouse	<input type="checkbox"/> \$55.49	<input type="checkbox"/> \$119.34		
EE + Child(ren)	<input type="checkbox"/> \$55.49	<input type="checkbox"/> \$119.34		
EE + Family	<input type="checkbox"/> \$88.32	<input type="checkbox"/> \$184.78		
Family Members (last name, first name, middle initial)				
Spouse/DP	Gender	Birth Date	Social Security#	Add / Delete
1	M / F	/ /		A / D
2	M / F	/ /		A / D
3	M / F	/ /		A / D
4	M / F	/ /		A / D

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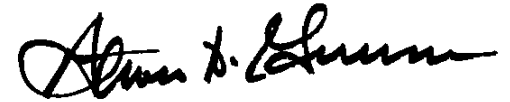
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EIGHTH JUDICIAL DISTRICT COURT

IN AND FOR CLARK COUNTY, STATE OF NEVADA

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

Plaintiffs,

vs.

MDC RESTAURANTS, LLC, a Nevada
limited liability company; LAGUNA
RESTAURANTS, LLC, a Nevada limited
liability company; INKA, LLC, a Nevada
limited liability company, and DOES 1
through 100, Inclusive,

Defendants.

Case No.: A701633
Dept. No.: XVI

**PLAINTIFF'S REPLY TO
DEFENDANTS' OPPOSITION TO
PLAINTIFF'S MOTION FOR PARTIAL
SUMMARY JUDGMENT ON LIABILITY
AS TO PLAINTIFF PAULETTE DIAZ'S
FIRST CLAIM FOR RELIEF**

Hearing Date: June 16, 2015
Hearing Time: 9:00 AM

Plaintiff Paulette Diaz ("Plaintiff"), by and through her attorneys of record, hereby submits her Reply to Defendants' Opposition (the "Opposition") to Plaintiff's Motion for Partial Summary Judgment on Liability as to Plaintiff's First Claim For Relief (the "Motion"). This Reply is based on the Memorandum of Points and Authorities below, and all papers exhibits on file in this case including the declaration of Bradley Schrager, attached as **Exhibit 1**, along with any oral argument at hearing on this matter.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Defendants do not dispute any material fact necessary to decide Plaintiff's Motion in their
4 Opposition.¹ Rather, they misunderstand and misstate the purpose of article XV, section 16(A) of
5 the Nevada Constitution (the "Minimum Wage Amendment," or the "Amendment"), and thus
6 misinterpret the term "provide" in the sentence establishing the two-tiered wage requirements of
7 the Amendment. The sole dispositive issue before the Court remains a simple legal one: the proper
8 interpretation of "provide" in the context of the Minimum Wage Amendment.

9 The express purpose and intent of the Minimum Wage Amendment was to increase the
10 minimum wage for Nevada hourly employees above the federal minimum threshold; thus the
11 measure was titled "RAISE THE MINIMUM WAGE FOR WORKING NEVADANS." It was not,
12 as Defendants suggest in their Opposition, merely to make insurance available to hourly
13 employees. *See* Opposition at 4-5. Therefore, to "provide" insurance as a precondition to paying
14 the lower-tier minimum wage must mean actually to provide or furnish such insurance. Any other
15 interpretation of the term "provide" within the context of the Amendment thwarts the spirit and
16 purpose of the Amendment, and diminishes its benefits and protections to the employees it was
17 intended to secure.

18 Defendants argue that "provide" means something less than actually furnishing, that
19 Nevada employers can pay the lower-tier minimum wage merely by "offering" or "making
20 available" health insurance to their employees—wholly without regard to the quality of the
21 insurance offered, the manner in which such plan is presented to the employees by the employer
22 (i.e., whether the employees are tacitly, or even actively, encouraged to reject it), or the various

23
24 ¹ Defendants do include two additional purportedly "undisputed facts" without evidentiary
25 support: (1) that Plaintiff was offered some unspecified form of insurance at her time of hire, and
26 (2) that she declined the insurance. These additional "facts", while not conceded by Plaintiff, have
27 no bearing on Plaintiffs' Motion in any case. The crux of the Motion is that, regardless of whether a
28 health plan is *offered* by an employer, an employer must pay the upper-tier minimum wage (\$8.25)
unless it actually provides or furnishes health insurance to its employee.

1 reasons an employee might decline the insurance. In effect, they ask the Court to construe the
2 Amendment in a manner that creates a loophole for employers, allowing them to avoid a minimum
3 wage increase *and* not provide health insurance to minimum wage workers.

4 Defendants' loophole construction flouts the plain language and express purpose of the
5 Amendment; in fact, it renders the Amendment largely impotent. In positing it, Defendants make
6 three unsound arguments: (1) that, under a plain language analysis, there can be no distinction
7 between "providing" a health plan and "offering" a health plan; (2) that the implementing
8 regulations, specifically NRS 608.100 and 608.102 (the "Regulations"), can somehow dictate or
9 determine a proper construction of a *constitutional amendment* enacted by overwhelming vote of
10 the people; and (3) that federal cases concerning retroactivity of newly enacted legislation
11 somehow protect Defendants from liability to Plaintiff for wages Defendants unlawfully withheld
12 from her under the clear language and purpose of the Minimum Wage Amendment. As
13 demonstrated below, none of these arguments have merit.

14 First, Defendants' position that the two terms "provide" and "offer" were meant by the
15 drafters of the Amendment to be synonymous flies in the face of clearly articulated Nevada
16 authority to the contrary. Defendants ignore or distort the Nevada Supreme Court's
17 pronouncements on the meaning of "provide", which it equates with "furnish"—that the terms must
18 mean something more than to offer or to make available and connote a transfer of possession.
19 Defendants cite no cases for their position that "provide" and "offer" are "synonymous," but rather
20 simply list competing sources that parse the term "provide," such as Google, which include among
21 the several definitions "to make available", but, strikingly, never merely "to offer." Context matters
22 here, and thus Plaintiff stands by her position that, under the plain language of the Minimum Wage
23 Amendment, "provide" means actually to furnish or supply qualifying health insurance, not merely
24 to offer it or make it available. Plaintiff's Motion is due to be granted under a plain language
25 analysis alone.

26 Nevertheless, should the Court decide that Defendants' contrary interpretation of "provide"
27 in the Amendment is reasonable enough to create an ambiguity, then the Court may look to its
28 history, public policy, and reason as addressed in Plaintiff's Motion, and apply longstanding rules

1 of statutory construction to determine what the drafters and voters intended. The consideration of
2 these factors and produce the same result as a plain language analysis: “provide” must mean
3 actually to provide or furnish, nothing less. And, while Defendants make much ado about the
4 seemingly conflicting interpretation of “provide” in the Regulations, it is black letter law that a
5 constitutional (or statutory) provision cannot be construed in light of administrative regulations, but
6 rather administrative regulations are scrutinized in light of and so as to comport with the
7 constitutional or statutory provisions to which they relate. Defendants’ argument gets it backwards,
8 and violates longstanding rules of statutory construction.

9 In a similar vein, Defendants’ contention that the Regulations must be given *Chevron*-type
10 deference also gets it backwards. In addition to violating rules of statutory construction, the “tail
11 wagging the dog” proposition that an agency regulation can substantively alter or modify a
12 constitutional provision runs aground on well-established principles of separation of powers, the
13 limits of regulatory authority and constitutional supremacy. Although great deference is given a
14 board or commission’s interpretation of a statute or constitutional provision, it is only granted *if the*
15 *interpretation is consistent with the terms and purpose of such statute or provision*. Even a
16 reasonable agency interpretation of an ambiguous statute or constitutional provision may be
17 stricken by a court if it determines that the interpretation conflicts with legislative or voter and
18 drafter intent.

19 Boards and commissions, such as the Office of the Labor Commissioner, are creatures of
20 statute and have only such authority as has expressly been granted by the Legislature, or is
21 incidental for the purposes of carrying out such express powers. The Labor Commissioner has no
22 power to create law, or to adopt regulations which conflict with or to diminish rights preserved by a
23 Nevada constitutional provision. The Regulations, if interpreted as Defendants suggest, would
24 diminish vested rights of all Nevada hourly wage earners to an increased minimum wage, and in
25 effect would rewrite the Minimum Wage Amendment to contain a pro-employer loophole that the
26 drafters and voters certainly never intended. Thus, even if constitutional provisions could be
27 scrutinized or construed under agency regulations—which they cannot—the interpretation of the
28 Regulations touted by Defendants which effectively rewrites the Minimum Wage Amendment

1 would be an invalid, *ultra vires* act by the Labor Commissioner, grossly exceeding his regulatory
2 authority and violating the principle of constitutional supremacy. The Regulations cannot
3 determine the critical meaning of “provide” in the Minimum Wage Act—such determination is for
4 the Court.

5 Finally, in apparent anticipation that the Court will agree with the Plaintiff that the only
6 reasonable construction of “provide” means actually to furnish or supply, Defendants end their
7 Opposition by hedging with federal cases regarding retroactive application of legislation they
8 believe may somehow insulate them from liability for wages improperly withheld from Plaintiff,
9 citing also “the Ex Post Facto Clause, U.S. Const., art. I, § 9, cl. 3, and the Due Process Clause of
10 the Fifth Amendment.” *See* Opposition at 13. In fact, Defendants encourage the Court to avoid the
11 whole issue by adopting their “loophole” construction of “provide.” But this hodgepodge of
12 constitutional arguments is nothing but a basket of red herrings, and none of the cases or arguments
13 are compelling, or even applicable to the legal issues presented here.

14 The bottom line is this: Nevada voters overwhelmingly adopted the Minimum Wage
15 Amendment *to increase the minimum wage for Nevada hourly laborers in order to help lift them*
16 *out of poverty*. Under the only plausible construction of the two-tiered wage structure of the
17 Amendment, Nevada employers may comply with this purpose and mandate in one of two ways:
18 (1) by paying employees the upper-tier hourly wage outright, or (2) by providing—actually
19 providing—quality and affordable health insurance plans to employees, the actual precondition of
20 which is the *only* justification for, paying the lower-tier minimum wage. Defendants’ construction,
21 on the other hand, perverts the essential purpose of the Amendment, by providing employers a
22 giant loophole through which employers could both pay the lower minimum wage *and* fail to
23 provide qualifying health insurance. Interpreting “provide” to mean merely “offer” leaves too much
24 room for employer misbehavior and defeats the purpose of the Amendment.

25 Instead, “provide” must mean that an employer must actually furnish or supply qualifying
26 health insurance in order to pay the lower-tier wage, as this is the only reasonable construction of
27 the Amendment. It is undisputed that Defendants have not actually provided a qualifying health
28 plan to Plaintiff, but nevertheless unlawfully paid her the lower-tier wage. Thus, the Plaintiff is

1 entitled to partial summary judgment in her favor on the issue of liability.

2 **II. ARGUMENT**

3 **A. Plain Language**

4 **1. The ordinary meaning of “provide” is “furnish” or “supply”**

5 Defendants argue that the plain meaning of “provide” in the Minimum Wage Amendment is
6 indistinguishable from the meaning of the terms “offer” or “make available.” They contend that for
7 the Court to adopt a meaning consistent with the authorities cited by Plaintiff in her Motion—
8 including the Nevada Supreme Court’s own articulation of the term “furnish” as interchangeable
9 with “provide” in *State v. Powe*, No. 55909, 2010 WL 3462763 (Nev. July 19, 2010)—would be
10 “nonsensical” and “absurd.” *See* Opposition at 8-9. Plaintiff respectfully disagrees and stands by
11 the authorities previously cited for the proposition that the plain and ordinary meaning of “provide”
12 in the context of the Minimum Wage Amendment must mean something more than merely to offer,
13 suggest or merely make available. “Provide” connotes a transfer of possession, and means the
14 actual provision of health insurance to an employee as a precondition to an employer’s paying the
15 lower-tier minimum wage.

16 Defendants’ interpretation of “provide” as merely to “offer” would set up an incentive for
17 unscrupulous Nevada employers to avoid paying increased minimum wages simply by waiving
18 sham insurance plans in front of new hires in such a way that discourages their acceptance of it.
19 This cannot have been the drafters and voters intention when they chose the word “provide.” While
20 the parties could continue to parse the term “provide” ad nauseam, the only reasonable construction
21 of the everyday meaning of the word “provide”, the only one that maintains the drafters’ and
22 voters’ crystalline intent that a meaningful increase in the minimum wage would be afforded to *all*
23 Nevada hourly wage earners, and the only one consistent with the Nevada Supreme Court’s only
24 discussion of the term, is that it means actually to provide or furnish.

25 In addition to the authorities cited in Plaintiff’s Motion for this position, other jurisdictions
26 construe “provide” to mean actual provision as well. *See Herd v. Am. Sec. Ins. Co.*, 501 F. Supp. 2d
27 1240 (W.D. Mo. 2007) (finding the plain meaning of “provide” requiring mortgagors to provide
28 proof of insurance to a mortgagee to be unambiguous and to mean the actual provision of such

1 proof of insurance, not merely the mortgagor’s obtaining insurance, such that proof would be
2 technically available to the mortgagee); *State, ex rel., Stephan v. Bd. of Educ. of Unified Sch. Dist.*
3 *428, Barton Cnty., Kan.*, 231 Kan. 579, 647 P.2d 329 (1982) (interpreting the statutory requirement
4 of a school district to “provide or furnish transportation” for students to mean *actually furnishing*
5 bus transportation or reimbursing persons who furnish transportation in privately owned vehicles
6 their transportation costs (or a combination of both), not merely to make transportation available);
7 *Tippett v. Daly*, 10 A.3d 1123, 1127 (D.C. 2010) (looking to dictionary definitions of “provide”
8 since it was not defined in the statute being construed, and determining that a tenant must *actually*
9 *provide* or *deliver* a statement of interest to the landlord within the meaning of the statute, rather
10 than merely make it available, or put it in the mail because “[p]rovide means to supply for use and
11 is synonymous with furnish.”) (internal quotations and citations omitted). Actual provision of
12 health insurance as a precondition to paying the lower-tier wage is the only reasonable and non-
13 absurd interpretation of “provide” in the context of the Amendment.

14 **2. Different terms used within the same statute create presumption that**
15 **they denote different ideas.**

16 Defendants’ argument equates “provide” with “offering” in the separate and distinct
17 sentences of the Amendment, despite the fact that the drafters carefully chose these two different
18 words and placed them in two different sentences—“provide,” in describing the command of a
19 mandatory two-tiered minimum wage increase; and “offering,” in a further sentence describing
20 what type of insurance may be offered in complying with that command. A drafter’s choice of
21 different and distinct terms in different places or sentences carries with it a presumption that the
22 different terms denote different ideas. *Lorton v. Jones*, 130 Nev. Adv. Op. 8, 322 P.3d 1051, 1056
23 (2014). Defendants argue unpersuasively that *Lorton* is inapposite but, to the contrary, *Lorton* is
24 directly on point. It articulates the well-established rule that a drafter’s use of one word over
25 another is a decision “imbued with legal significance and should not be presumed to be random or
26 devoid of meaning.” *S.E.C. v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003) (embracing the “well-
27 established canon of statutory interpretation” that the use of different words or terms within the
28 same statute demonstrates the intention by the legislature to convey different meanings for those

1 words, and a “decision to use one word over another... is material”); *see also Alberto-Gonzalez v.*
2 *I.N.S.*, 215 F.3d 906, 909-10 (9th Cir. 2000) (use of different language in a statute creates a
3 *presumption* that the drafter intended the terms to have different meanings); *Legacy Emanuel Hosp.*
4 *& Health Ctr. v. Shalala*, 97 F.3d 1264 (9th Cir. 1996) (construing different terms in adjacent
5 provisions to connote different meanings). Therefore, Defendants’ argument that “provide” and
6 “offering” are synonymous in the Amendment runs aground on this well established canon of
7 statutory interpretation. The use of such different terms in such close proximity in the Amendment
8 creates a presumption that they must convey different ideas and that such was intended by the
9 drafters. If the drafters of the Minimum Wage Amendment had wanted to convey the idea that
10 merely offering health insurance entitled an employer to pay the lower-tier wage and avoid a
11 minimum wage increase, they easily could have used the term “offer” or “make available” in the
12 sentence containing the two-tiered wage structure. They did not; they used “provide.”

13 **B. Statutory Construction Of Ambiguous Provisions Or Terms**

14 **1. General rules of statutory construction**

15 If the Court accepts any portion of Defendants’ argument, at best they have pointed up an
16 ambiguity in the Amendment (the meaning of “provide”). Any such ambiguity easily can be
17 remedied by the application of the following well established Nevada rules of statutory
18 construction.²

19 When a statute is ambiguous, meaning it is “capable of being understood in two or more
20 senses by reasonably informed persons,” courts may look to reason and public policy to determine
21 what the Legislature, or in this case, the drafters and the public, intended. *Pub. Employees’ Benefits*
22 *Program v. Las Vegas Metro. Police Dep’t*, 124 Nev. 138, 147-48, 179 P.3d 542, 548 (2008). The
23 meaning of terms may be ascertained by examining the background and spirit in which the law was
24

25 ² The rules of statutory construction apply with full rigor to the interpretation of a constitutional
26 provision; thus, references to statutory and constitutional construction are used interchangeably
27 herein. *See Landreth v. Malik*, 127 Nev. Adv. Op. 16, 251 P.3d 163, 166 (2011) (“Constitutional
28 interpretation utilizes the same rules and procedures as statutory interpretation.”).

1 enacted, “and the entire subject matter and policy guides our interpretation.” *Id.* A statute or
2 constitutional provision must be construed holistically, giving meaning to each word, sentence and
3 phrase used, so that none is rendered nugatory, or so as to produce unreasonable or absurd results.
4 *Id.*

5 Whatever meaning ultimately is attributed to an ambiguous word or phrase may not violate
6 the spirit of the provision. *Miller v. Burk*, 124 Nev. 579, 591, 188 P.3d 1112, 1120 (2008); *see also*
7 *City of Sparks v. Sparks Mun. Court*, 129 Nev. Adv. Op. 38, 302 P.3d 1118, 1126 (2013). Stated
8 another way, if following a statute’s plain meaning results in a meaning that runs counter to the
9 “spirit” of the statute, a court may look outside the statute’s language. *See MGM Mirage v. Nevada*
10 *Ins. Guar. Ass’n*, 125 Nev. 223, 229, 209 P.3d 766, 769 (2009) (observing that Nevada courts
11 adhere to the rule of construction that the intent of a statute will prevail over the literal sense of its
12 words). Regulations are construed to conform to statutes and constitutional provisions, not vice
13 versa. *See, e.g., Roberts v. State*, 104 Nev. 33, 37, 752 P.2d 221, 223 (1988).

14 And finally, in determining drafter and voter intent behind an ambiguous constitutional
15 provision, the expressly-stated purpose of the provision must be considered. *Hotel Employees &*
16 *Rest. Employees Int’l Union, AFL-CIO v. State ex rel. Nevada Gaming Control Bd.*, 103 Nev. 588,
17 591, 747 P.2d 878, 880 (1987). Indeed, the whole goal of statutory interpretation is to determine
18 the public understanding of a legal text leading up to and in the period after its enactment or
19 ratification. *Pohlabel v. State*, 128 Nev. Adv. Op. 1, 268 P.3d 1264, 1269 (2012). Here, the stated
20 purpose, history, policy, and public understanding of the text leading up to its enactment all make
21 plain that the Amendment was intended would effectively raise the minimum wage for all
22 Nevadans. *See* Pl.’s Motion at 11-15. Even the title of the measure, which must be considered, was
23 “RAISE THE MINIMUM WAGE FOR WORKING NEVADANS.” *Id.* at 14. Defendants’
24 interpretation would diminish if not destroy the constitutional guaranties to Nevada hourly
25 employees of an increased minimum wage and render the Minimum Wage Amendment virtually
26 meaningless.

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1 **2. Specific rule of construction with regard to remedial provisions such as**
2 **the Minimum Wage Amendment**

3 Another cardinal principle of construction applies here, and in fact is dispositive: where a
4 statute or constitutional provision is remedial in nature, such as the Minimum Wage Amendment, it
5 must be liberally construed to effect the intended benefit and in favor of the intended beneficiaries.
6 *See Washoe Med. Ctr., Inc. v. Reliance Ins. Co.*, 112 Nev. 494, 497, 915 P.2d 288, 289 (1996)
7 (remedial statutes must be liberally construed in favor of those whom they are intended to benefit);
8 *Colello*, 100 Nev. at 347, 683 P.2d at 17 (“[s]tatutes with a protective purpose should be liberally
9 construed in order to effectuate the benefits intended to be obtained”).

10 *Int’l Game Tech., Inc. v. Second Judicial Dist. Court ex rel. Cnty. of Washoe*, 124 Nev. 193,
11 179 P.3d 556 (2008), is instructive. There, a former employee brought an action against his
12 employer under Nevada’s False Claims Act (“FCA”), and the employer unsuccessfully moved to
13 dismiss the complaint for the employee’s failure to allege that the employer pressured him into
14 participating in the reported activity. *Id.* The employer filed a writ of mandamus with the Nevada
15 Supreme Court, asking it to compel the district court to dismiss the whistleblower complaint
16 against it under NRS 357.250(2)(b), which required employees to assert and prove that the
17 employer had pressured an employee to engage in fraudulent activity in order to recover. *Id.* In
18 denying relief to the employer, the Supreme Court addressed the proper construction of an
19 ambiguous remedial statute, stating:

20 Resolving ambiguity in NRS 357.250 as [the employer] suggests so that it applies
21 only to employers that have harassed, threatened, or coerced employees into
22 fraudulent activity would require us to disregard several key tenets of statutory
23 construction. Under those tenets, an ambiguous statute *must be interpreted in*
24 *accordance with what reason and public policy indicate the Legislature intended.* The public policy behind the legislation may be discerned from the entire act, and a
statute’s provisions should be read as a whole, so that no part is rendered inoperative
and, when possible, any conflict is harmonized. Finally, *remedial statutes, like NRS*
357.250, should be liberally construed to effectuate the intended benefit.

25 *Id.* at 200-01, 179 P.3d at 560-61. (footnotes omitted; emphasis supplied).

26 Following those tenets, the Nevada Supreme Court rejected the employer’s self-serving
27 construction of NRS 357.250 as applying only to employers that have harassed, threatened, or
28 coerced employees into fraudulent activities. *Int’l Game Tech., Inc.*, 124 Nev. at 202, 179 P.3d at

1 562. Instead, noting that NRS 357.250 was enacted for the benefit of employees, not employers, to
2 protect them when they act lawfully under the FCA, the Supreme Court determined that the more
3 reasonable construction of the statute was that *if* an employee engaged in fraudulent activity, then
4 that employee could only recover under the statute if he had been harassed, threatened, or coerced
5 into the fraudulent activity by the employer in the first instance. *Id.* at 201, 179 P.3d at 561. In so
6 doing, the Supreme Court noted that effectuating the legislative policy behind the statute to protect
7 employees was the most important consideration in the proper construction of that remedial statute.
8 *Id.*

9 The Minimum Wage Amendment is unarguably a remedial statute, and the Nevada
10 Supreme Court has expressly stated as much. *Terry v. Sapphire Gentlemen's Club*, 130 Nev. Adv.
11 Op. 87, 336 P.3d 951, 954 (2014) (discussing the Amendment and NRS Chapter 608: "Particularly
12 *where, as here, remedial statutes are in play ...*") (emphasis supplied). It cannot be disputed that
13 the Amendment was drafted to safeguard the health and welfare of people earning their livings by
14 their own endeavors, and to increase the minimum wages provided to such hourly employees to
15 help lift them out of poverty. Thus, the only correct construction of the Amendment is one that
16 effectuates and secures these intended benefits to minimum wage employees like Plaintiff.

17 C. Regulatory Overreach And Constitutional Supremacy

18 1. The Regulations and the limits of regulatory authority

19 Defendants' argument that the Regulations must be given deference under *Chevron v.*
20 *Natural Resources Defense Council*, 467 U.S. 837 (1984), is a manipulation of the *Chevron*
21 doctrine. See Opposition at 11-12. Defendants attempt to transform the straightforward and clear
22 mandates of the Minimum Wage Amendment into something ambiguous so as to argue that the
23 Labor Commissioner's "interpretation" of the constitutional provision must be considered, or even
24 given deference. This would be an improper transfer of lawmaking power to an administrative
25 agency, because the Regulations, if read as softening the clear boundaries of the two-tiered wage
26 structure of the Amendment, would in effect be a modification of or redrafting of that constitutional
27 provision by and administrative agency. In fact, the most basic principle of *Chevron* is that an
28 agency's freedom to interpret a statute is controlled and limited by that statute's (or constitutional

1 provision's) language and structure. *Chevron*, 467 U.S. at 842-43 ("If the intent of Congress is
2 clear, that is the end of the matter; for the court, as well as the agency, must give effect to the
3 unambiguously expressed intent of Congress."). Only if Congress (or the drafters of a
4 constitutional amendment) explicitly left a gap for the Labor Commissioner to fill would *Chevron*
5 deference apply to that agency's interpretation, and then only if it is a "permissible" construction of
6 the constitutional provision. *Id.* at 842. In the end, the Judiciary, not administrative agencies, is the
7 final authority on issues of statutory construction in any case, and must reject any administrative
8 construction that is contrary to the intent of the legislature, or in this case the drafters of and voters
9 for, a statute or constitutional provision.

10 Here, no gap was left by the drafters of the Minimum Wage Amendment with regard to
11 what "provide" means, and Defendants' construction is not a "permissible" one, because it directly
12 conflicts with the plain language (or the only reasonable interpretation of) the Amendment. Thus,
13 the Regulations at issue simply do not qualify for the application of the *Chevron* doctrine. *Chevron*
14 may not be used to enable an agency to bootstrap power in order to diminish employee rights and
15 benefits provided by a constitutional amendment, as the Regulations appear to do here. The Labor
16 Commissioner has no such jurisdiction.

17 More importantly, the construction of the Nevada Minimum Wage Amendment is a
18 function of state, not federal, law, and Nevada law does not include an analogous *Chevron*-type
19 precedent. Instead, the Nevada Supreme Court makes clear that deference to an agency's regulatory
20 interpretation of a statute or provision it is charged with enforcing is only given if the regulation
21 does not conflict with the statute or constitution. *State, Div. of Ins. v. State Farm Mut. Auto. Ins.*
22 *Co.*, 116 Nev. 290, 995 P.2d 482 (2000).

23 In *State Farm*, an automobile insurer filed a motion for summary judgment on its
24 declaratory judgment action challenging the validity of a Nevada Division of Insurance ("DOI")
25 regulation defining "chargeable accidents" for purposes of cancelling coverage for accidents in
26 which the insured is more than 50% at fault, claiming that the regulation modified or conflicted
27 with existing Nevada comparative negligence statutes. *Id.* at 291, 995 P.2d at 484. The trial court
28 found that the regulation failed to aid in the administration of the relevant statutes and granted the

1 insurer summary judgment, declaring the regulation invalid and prohibiting its enforcement. *Id.*

2 On appeal by the DOI, the Nevada Supreme Court declared that:

3 [A] court will not hesitate to declare a regulation invalid when the regulation
4 violates the constitution, conflicts with existing statutory provisions or exceeds the
statutory authority of the agency or is otherwise arbitrary and capricious.

5 Finally, even a reasonable agency interpretation of an ambiguous statute may be
6 stricken by a court when a court determines that the agency interpretation conflicts
with legislative intent.

7 *Id.* at 293, 995 P.2d at 485.

8 The Supreme Court looked to the legislative intent of the relevant statutes, which was to
9 protect insureds from insurers' re-rating premiums only where the insureds were not legally
10 responsible for the accident. *Id.* at 295, 995 P.2d at 486. Because the regulation prohibited insurers
11 from re-rating even where the insured was legally liable for an accident under the statutory scheme,
12 the regulation conflicted with the statutes at issue and was declared invalid. *Id.* ("Therefore, we
13 conclude that the [DOI] exceeded its authority under NRS 679.130 by promulgating NAC
14 690B.230(2)."). *See also Thomas v. Nevada Yellow Cab Corp.*, 130 Nev. Adv. Op. 52, 327 P.3d
15 518 (2014), *reh'g denied* (Sept. 24, 2014) (statutes [and thus even more so, regulations] are
16 construed to accord with constitutions, not vice versa); *Pub. Agency Comp. Trust (PACT) v. Blake*,
17 127 Nev. Adv. Op. 77, 265 P.3d 694 (2011) (invalidating an administrative regulation that directly
18 conflicted with the governing statute; because of the conflict "no deference to the agency's
19 interpretation is due, and we conclude that [the regulation] is invalid") (emphasis added).

20 The Labor Commissioner is not given free reign to adopt regulations fundamentally at odds
21 with the Minimum Wage Amendment. Neither can the Labor Commissioner, under the guise of
22 interpreting the Amendment, circumscribe the protections and benefits afforded Nevada workers by
23 interpreting "provide" in such a way that scuttles the very purpose of the Amendment.

24 **2. Defendants' construction of "provide" offends the principle of**
25 **constitutional supremacy**

26 The basic principle of state and federal constitutional systems is that all political power is
27 inherent in the people, and that this inherent power is exercised by the people under a constitution
28 adopted by them. The principle of constitutional supremacy involves the doctrine of separation of

1 powers, and provides that a constitutional amendment is the supreme law of the land and
2 controlling over conflicting statutes or regulations addressing the same issue.³ A constitution may
3 not be construed according to statutes or regulations; statutes or regulations instead must be
4 construed consistent with a constitution. *Foley v. Kennedy*, 110 Nev. 1295, 1301, 885 P.2d 583,
5 586 (1994) (constitutional supremacy prevents Nevada legislature—and even more so Nevada
6 agencies or regulators—from “creating exceptions to the rights and privileges protected by
7 Nevada’s constitution”).

8 Instructive on this point is *Foley v. Kennedy*, *supra*. In that case, the Nevada Supreme Court
9 construed article II, section 9, of the Nevada Constitution concerning recall of public officers and
10 NRS 306.015, which specifies the procedure for initiating and carrying out a recall petition. *Foley*,
11 110 Nev. at 1299, 885 P.2d at 585. The Supreme Court rejected a citizens group’s construction of
12 NRS 306.015 as referring to an election *preceding* the filing of the notice required by that statute to
13 be the relevant “election” for determining the required number of signatures under article II, section
14 9. *Id.* It found that the group’s construction offended the principle of constitutional supremacy:

15 Citizens’ reasoning is contrary to general rules of statutory and constitutional
16 construction, placing, as it does, greater interpretive effect upon one section of a
17 statute than upon the plain terms of the constitution. The constitution may not be
18 construed according to a statute enacted pursuant thereto; rather, statutes must be
19 construed consistent with the constitution and, where necessary, in a manner
20 supportive of their constitutionality ... [A]n adoption of the Citizens’ position would
require the untenable ruling that constitutional provisions are to be interpreted so as
to be in harmony with the statutes enacted pursuant thereto; or that the constitution
is presumed to be legal and will be upheld unless in conflict with the provisions of a
statute. This is contrary to the clear rules of statutory and constitutional construction.

21 *Id.* at 1300-01, 885 P.2d at 586.

22 Also instructive is *Thomas*, *supra*, where the Nevada Supreme Court emphasized that:

23 It is fundamental to our federal, constitutional system of government that a state
24 legislature has not the power to enact any law conflicting with the federal
25 constitution, the laws of congress, or the constitution of its particular State. The
Nevada Constitution is the supreme law of the state, which controls over any

26 ³ See *Thomas*, *supra*, 327 P.3d at 521 (“later statutes inconsistent with the Constitution [cannot]
27 furnish a construction that the Constitution does not warrant”) (citations omitted).

1 conflicting statutory provisions.

2
3
4 An alternative construction that would attempt to make the Minimum Wage
5 Amendment compatible with NRS 608.250, despite the plain language of the
6 Amendment, would run afoul of the principle of constitutional supremacy. A
constitutional amendment, adopted subsequent to the enactment of the statute relied
on by counsel for petitioner, is controlling over the statute that addresses the same
issue. Statutes are construed to accord with constitutions, not vice versa.

7 *Thomas*, 327 P.3d at 520-21 (internal citations, quotations and brackets omitted).

8 Constitutional supremacy applies with even greater vigor to regulations promulgated by an
9 administrative agency. There are definite limits to regulatory authority. The Commissioner is
10 simply charged with enforcing, not altering, the labor laws of this state, and may only adopt
11 regulations which enable her to carry out such enforcement, not that change the existing laws. *See*
12 NRS 607.160. Moreover, for a regulator to construe statutes or constitutional provisions in a
13 manner which changes and circumscribes, if not eviscerates, the benefits afforded the intended
14 beneficiaries of those statutes or provisions, is wholly ultra vires.

15 **D. Defendants' Alternative Constitutional Arguments**

16 Apparently anticipating that the Court will agree with Plaintiff's position, the Defendants
17 offer a final round of argument amounting to a scattershot collection of constitutional principles,
18 including rules regarding the enactment of retroactive legislation, ex post fact laws, and the due
19 process clause. *See* Opposition at 13. None of these principles apply here, and none of the
20 authorities cited by Defendants in purported support of this argument have any application to the
21 simple legal question before the Court of what "provide" means within the context of the Minimum
22 Wage Amendment.

23 For instance, Defendants cite *Bradley v. Sch. Bd. of City of Richmond*, 416 U.S. 696, 711
24 (1974), for the principle that "a court is to apply the law in effect at the time it renders its decision."
25 The principle is not in dispute or at issue here, where (1) the Minimum Wage Amendment *is* the
26 vey law that is in effect at present; and (2) the issue is not whether some intervening or
27 subsequently enacted statute should control, but the proper construction of the existing Minimum
28 Wage Amendment. *Bradley* is simply inapposite. It involved protracted litigation over

1 desegregation in Virginia. The issue before the United States Supreme Court in *Bradley* was
2 whether section 718 of the Education Amendments of 1972, which granted federal courts authority
3 to award attorneys' fees to prevailing parties, was applicable to legal work performed by attorneys
4 before the provision was enacted, but where the propriety of their award was still pending
5 resolution on appeal after the prevailing party provision became law. *Bradley*, 416 U.S. at 697. The
6 Supreme Court held that section 718 could be quasi-retroactively applied in such a situation,
7 because it would not work a manifest injustice or impinge upon any vested right of a party, and
8 there was no statutory directive or legislative history to the contrary. *Id.* It also reasoned that the
9 application of section 718 did not alter the defendant school board's constitutional responsibility
10 for providing students with a nondiscriminatory education, and there was no real change in the
11 substantive obligation of the parties because the defendant school board had "engaged in a
12 conscious course of conduct with the knowledge that, under different theories discussed by the
13 District Court and the Court of Appeals, the Board could have been required to pay attorneys'
14 fees." *Id.* at 721. Thus, *Bradley* provides no support to Defendants' argument.

15 Defendants also encourage the Court, rather heavy-handed, to avoid various and sundry
16 future constitutional objections by the Defendants by adopting their unreasonable and untenable
17 construction of "provide" in the Minimum Wage Amendment. Not only is Defendants' reasoning
18 circular and flawed, it also evinces a fundamental misunderstanding of the principle articulated in
19 *United States v. Sec. Indus. Bank*, 459 U.S. 70 (1982), cited by Defendants in support of this
20 suggestion. *Security Industrial Bank* involved a series of bankruptcy cases in which individual
21 debtors in bankruptcy proceedings claimed certain exemptions to avoid liens pursuant to the
22 retroactive application of a provision of the Bankruptcy Reform Act of 1978, 11 U.S.C. § 522(f)(2)
23 (the "lien avoidance provision")—in each case, the creditors had loaned the money to the debtors
24 and perfected their liens before the lien avoidance statute was enacted. *Id.* at 71. The Court of
25 Appeals held that the lien avoidance provision was intended to apply retroactively, but that such
26 application violated the Fifth Amendment and thus declared the lien avoidance statute
27 unconstitutional and invalid. *Id.* at 72. The Supreme Court affirmed the decision, but only as to
28 outcome, not as to reasoning. *Id.* at 82. Specifically, because there is a presumption that statutes

1 operate only prospectively, retrospective application was not a clearly manifest intention by
2 Congress in the lien avoidance provision, and because retroactive application would result in a
3 complete destruction of a property right of the creditor, the Supreme Court held that the lien
4 avoidance provision could not be applied retroactively based on those principles. It avoided basing
5 its decision on reasoning that could implicate the Fifth Amendment's prohibition against taking
6 private property without compensation, i.e., it avoided holding that the lien statute could be
7 retroactively applied, but reached the same result as that of the Court of Appeals. *Id.* at 83.

8 The Supreme Court was able to avoid constitutional questions in *Bradley* only because *it*
9 *was possible to decide it correctly on independent, i.e., non-constitutional grounds.* Contrary to the
10 implication in Defendants' Opposition, the case does not stand for the proposition that a court can
11 decide a case *wrongly* in order to avoid a constitutional issue. *Security Industrial Bank* has no
12 application here, where the Court is presented with a straightforward and unavoidable
13 *constitutional* question about the proper construction and application of a *constitutional* provision
14 governing a fundamental right to a living wage for Nevada minimum wage earners.

15 The other cases cited by Defendants for their retroactive application argument are neither
16 controlling nor applicable. Both involved the retroactive application *of newly enacted or*
17 *interceding statutes*, which is not the case here. *See In re Ashe*, 712 F.2d 864 (3d Cir. 1983)
18 (prohibiting the retroactive application of the same bankruptcy lien avoidance provision addressed
19 in *Security Industrial Bank*); *Roth v. Pritikin*, 710 F.2d 934 (2d Cir. 1983) (prohibiting the
20 retroactive application of the 1978 Copyright Act to work-for-hire agreements executed prior to the
21 Act's enactment). Similarly, Defendants' additional reference to the "Ex Post Facto Clause of the
22 U.S. Const., Art. I, § 9, cl. 3" is unavailing because that clause describes limitations on *Congress'*
23 power, not the initiative and referendum power of the citizens of Nevada.⁴ *See* Opposition at 13.

24

25 ⁴ Even if Defendants' citation to section 9 was merely a scrivener's error, and they meant to refer
26 to art. I, section 10, which prohibits *states* from passing ex post facto laws, section 10's prohibition
27 cannot save their fatally flawed argument either, because the clause prohibits the retroactive
28 application of *criminal or penal* statutes, not remedial provisions such as the Minimum Wage

(footnote continued on next page)

1 While Defendants’ constitutional arguments have no merit, they do highlight an important
2 additional consideration with regard to the invalidity of the Regulations. As discussed above, if
3 “offer” in the Regulations means merely to make insurance available, not to provide it, as
4 Defendants contend, then by circumscribing the benefits to employees expressly intended by the
5 Minimum Wage Amendment, the Regulations impermissibly impair vested rights and attach new
6 disabilities to the rights of hourly wage earners, in violation of article 1, section 15 of the Nevada
7 Constitution, which prohibits ex-post facto laws and impairment of contracts. *See, e.g.*, 16B Am.
8 Jur. 2d Constitutional Law § 741 (“A state constitutional proscription against retroactive legislation
9 prohibits the impairment of vested rights, the creation of new obligations or duties, or the
10 attachment of new disabilities with respect to past transactions.”); *Reimers v. State, ex rel. Dep’t of*
11 *Corr.*, 2011 OK CIV APP 83, ¶ 31, 257 P.3d 416, 421 (2011) (“Remedial or procedural statutes [or
12 regulations] may operate to retrospectively only where they do not create, enlarge, diminish or
13 destroy vested rights. A substantive change that alters the rights or obligations of a party cannot be
14 viewed as solely a remedial or procedural change and cannot be retrospectively applied.”). Thus,
15 Defendants’ reference to the prohibition against ex post facto laws, though not applicable to the
16 Minimum Wage Amendment, may actually point up an additional reason that for the Court not to
17 rely upon the Regulations.

18 **E. An Overall Perspective**

19 Let us put some of the puzzle pieces together, for clarity. Very simply, is not the easiest and
20 most natural manner of reading the text and policy of the Minimum Wage Amendment to conclude
21 that it embodied a bargaining between employer and employee? Employers would make the
22 economic choice of whether to take on the potential costs of providing health insurance to
23 minimum wage employees, figuring the lower wage rate paid out and the participation rates of their
24 workforce. Employees would choose between receiving the full minimum wage rate, or a reduced

25
26 Amendment. *See Collins v. Youngblood*, 497 U.S. 37, 43 (1990) (observing that the ex post facto
27 clauses of article I are aimed at laws that “retroactively alter the definition of crimes or increase the
28 punishment for criminal acts”).

1 wage—up to a dollar less, currently a 12.2% decrease—coupled with low-cost health insurance.
2 That is the meaning, purpose, and policy of the Amendment. Defendants’ position, however,
3 destroys that bargain, and ensures that the employer takes the benefit of paying a lower wage to
4 their least-paid workers, while the employees are guaranteed precisely nothing. All employers have
5 to do, Defendants claim, is “offer” benefits, apparently of almost any type, variety, or quality, and
6 cut their wage bill at the employees’ expense.

7 So what did Defendants here “offer?” Garbage benefits, truly junk insurance that is nearly
8 worthless to anyone facing anything more than the most minor health needs. The 2015 benefits
9 plan “offered” by Defendants, for example, is so egregiously bad as a health insurance product that
10 it does not even cover surgery or any other inpatient services—zero, nothing, no coverage
11 whatsoever. *See* Defendants’ 2015 MVP [Employee] Benefit Guide [produced by Defendants as
12 MDC000770-000777] at MDC000772-000773, here attached as **Exhibit 2**. Forget about
13 chemotherapy, or a prosthesis—again, not a penny of coverage. *Id.* Even emergency room services
14 are not covered in the event the insured is admitted to the hospital. *Id.* The 2014 plan had no out-of-
15 pocket maximums, provided no insurance for prescription drugs, and gave sick employees \$100 per
16 day of hospital confinement with a 31-day limitation. *See* Defendants’ 2014 TransChoice Advance
17 Plan and Policy Info [produced by Defendants as MDC000129-000130], here attached as
18 **Exhibit 3**. For perspective, in 2013, the Henry J. Kaiser Family Foundation determined the average
19 cost of one day in a Nevada hospital was **\$1,913**. *See* [http://kff.org/other/state-indicator/expenses-](http://kff.org/other/state-indicator/expenses-per-inpatient-day/)
20 [per-inpatient-day/](http://kff.org/other/state-indicator/expenses-per-inpatient-day/) (last accessed Jun. 5, 2015).

21 The overwhelming majority of Defendants’ hourly workers reject and decline these awful
22 “benefits,” something Defendants both know and freely discuss among themselves. In an email
23 dated September 6, 2014, well after the filing of this lawsuit, Ms. Colleen Fulton, identified by
24 Defendants as Mancha Development Co.’s Training Manager, in a discussion of why \$7.55 was too
25 much to be paying employees who could be making \$7.25 instead, stated the following:

26 We must offer insurance to every employee on their hire date to be able to pay this
27 sub minimum wage. (8.25 is the minimum wage in Nevada) they do not have to
28 accept this insurance but we have to offer it ... **Most employees decline it, they can
do better in the state of Nevada insurance marketplace.**

1 See Email from Colleen Fulton to Joe Soraci, *Hourly Pay Rates* (Sept. 6, 2014, 2:11 p.m.)
2 [produced by Defendants as MDC000653], here attached as **Exhibit 4** (emphasis added;
3 parenthetical in original). Apart from being quite accurate, Ms. Fulton engages in breathtaking
4 understatement, as any benefits plan sold on the Nevada insurance marketplace is subject to
5 minimum essential value and coverage standards that Defendants flaunt with their own “offering.”
6 In fact, any employee who enrolls in Defendants’ current plan would still need to go purchase real
7 health insurance on the state exchange, or pay the I.R.S. tax penalty for not having real health
8 insurance, because none of Defendants’ plans in any year have met the minimum standards for
9 coverage mandated by the Affordable Care Act.

10 This is what has become of the bargain of the Minimum Wage Amendment in Defendants’
11 hands. Defendants get to cut their wage bill, while employees rightly decline garbage policies and
12 have to pay to purchase real insurance anyway, only with less money in their pockets to do so.

13 Additionally, from a regulatory standpoint, the Amendment was never intended to lead to
14 the morass of interpretive squabbles Defendants urge on this Court. Which is more direct and
15 implementable: arguing over whether Defendants’ junk plans qualify to pay less than \$8.25, or the
16 simple act of determining who is enrolled in such plans and who is not, as the basis for deciding
17 who is eligible to pay or be paid less than the upper-tier minimum wage. And let us recall, that is
18 what we are talking about: the privilege of paying minimum wage workers even less. Plaintiff here
19 expects to have received something for her bargain of losing a dollar for every hour she worked,
20 and she did not.

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1 **III. CONCLUSION**

2 Defendants violated the clear command of the Minimum Wage Amendment by paying
3 Plaintiff the lower-tier wage without actually providing her qualifying health insurance. Therefore,
4 Plaintiff is entitled to partial summary judgment in her favor on the issue of liability as a matter of
5 law.

6

7 DATED this 5th day of June, 2015.

8

**WOLF, RIFKIN, SHAPIRO,
SCHULMAN & RABKIN, LLP**

9

By: /s/ Bradley Schrager

10

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Nevada State Bar No. 13078
3556 E. Russell Road, Second Floor
Las Vegas, Nevada 89120
Attorneys for Plaintiffs

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of June, 2015, a true and correct copy of **PLAINTIFF’S REPLY TO DEFENDANTS’ OPPOSITION TO PLAINTIFF’S MOTION FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY AS TO PLAINTIFF PAULETTE DIAZ’S FIRST CLAIM FOR RELIEF** was served by electronically filing with the Clerk of the Court using the Wiznet Electronic Service system and serving all parties with an email-address on record, pursuant to Administrative Order 14-2 and Rule 9 of the N.E.F.C.R.

By: /s/ Dannielle Fresquez
Dannielle Fresquez, an Employee of
WOLF, RIFKIN, SHAPIRO, SCHULMAN &
RABKIN, LLP

Exhibit 1

Exhibit 1

1 DON SPRINGMEYER, ESQ.
Nevada State Bar No. 1021
2 BRADLEY SCHRAGER, ESQ.
Nevada State Bar No. 10217
3 DANIEL BRAVO, ESQ.
Nevada State Bar No. 13078
4 WOLF, RIFKIN, SHAPIRO,
SCHULMAN & RABKIN, LLP
5 3556 E. Russell Road, 2nd Floor
Las Vegas, Nevada 89120-2234
6 Telephone: (702) 341-5200/Fax: (702) 341-5300
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7 Email: bschrager@wrslawyers.com
Email: dbravo@wrslawyers.com
8 Attorneys for Plaintiffs

9
10 EIGHTH JUDICIAL DISTRICT COURT

11 IN AND FOR CLARK COUNTY, STATE OF NEVADA

12 PAULETTE DIAZ; LAWANDA GAIL
WILBANKS; SHANNON OLSZYNSKI;
13 and CHARITY FITZLAFF, all on behalf of
themselves and all similarly-situated
14 individuals,

15 Plaintiffs,

16 vs.

17 MDC RESTAURANTS, LLC; LAGUNA
RESTAURANTS, LLC; INKA, LLC; and
18 DOES 1 through 100, inclusive,

19 Defendants.

Case No.: A701633
Dept. No.: XVI

DECLARATION OF BRADLEY
SCHRAGER, ESQ. IN SUPPORT OF
PLAINTIFF'S REPLY TO
DEFENDANTS' OPPOSITION TO
PLAINTIFF'S MOTION FOR PARTIAL
SUMMARY JUDGMENT ON LIABILITY
AS TO PLAINTIFF PAULETTE DIAZ'S
FIRST CLAIM FOR RELIEF

20
21 DECLARATION OF BRADLEY SCHRAGER, ESQ.

22 I, Bradley Schrager, Esq., under penalty of perjury, declare as follows:

23 1. I am an attorney with the law firm Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP,
24 duly admitted to practice law in the state of Nevada, and counsel for Plaintiffs in the above-
25 captioned action. I make this declaration of personal, firsthand knowledge and, if called and sworn
26 as a witness, I could and would testify competently thereto. I have personal knowledge of the facts
27 stated herein and submit this Declaration in support of Plaintiff's Reply To Defendants' Opposition
28 To Plaintiff's Motion For Partial Summary Judgment On Liability As To Plaintiff Paulette Diaz's

1 First Claim For Relief

2 2. Attached, as Exhibit 2, is a true and accurate copy of Defendants' 2015 MVP
3 [Employee] Benefit Guide, which Defendants produced as MDC000770-000777.

4 3. Attached, as Exhibit 3, is a true and accurate copy of Defendants' 2014
5 TransChoice Advance Plan and Policy Info, which Defendants produced as MDC000129-000130.

6 4. Attached, as Exhibit 4, is a true and accurate copy of an email from Colleen Fulton
7 to Joe Soraci, titled *Hourly Pay Rates* and dated Sept. 6, 2014, 2:11 p.m., which Defendants
8 produced as MDC000653.

9 Under penalties of perjury under the laws of the United States of America and the State of
10 Nevada, I declare that the foregoing is true and correct to my own knowledge, except as to those
11 matters stated on information and belief, and that as to such matters I believe to be true.

12
13 DATED this 5th day of June, 2015.

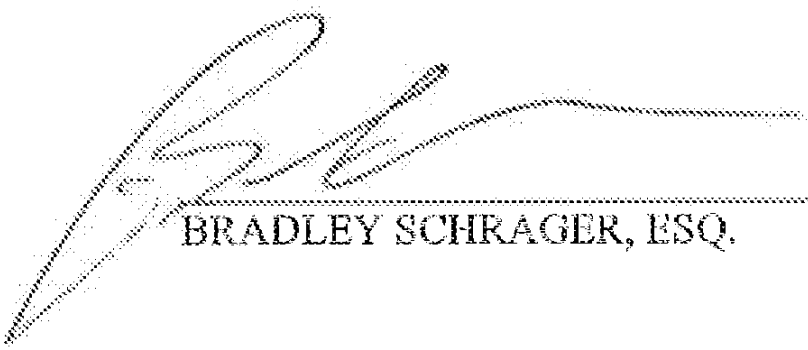
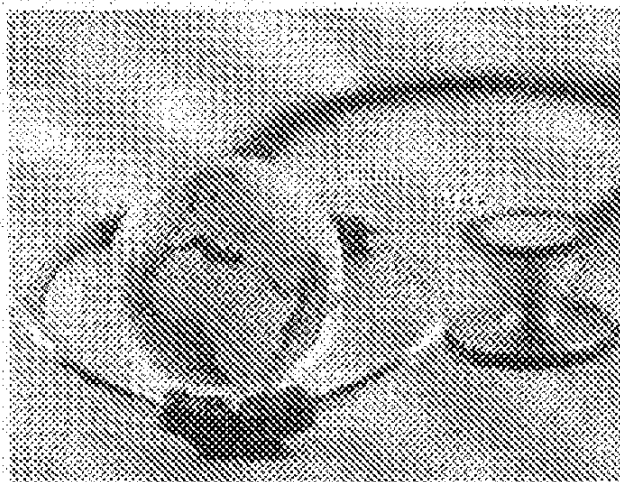
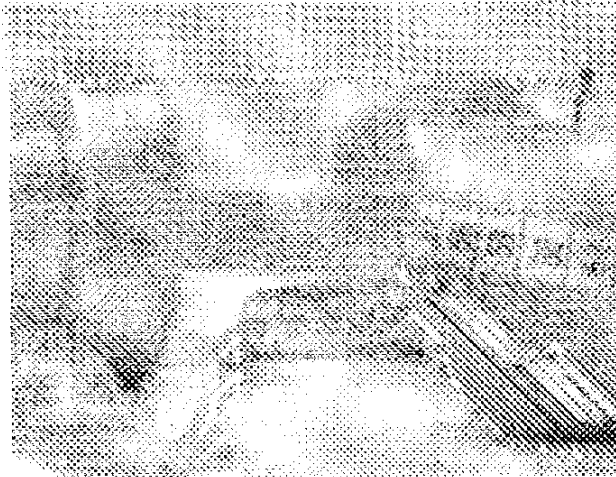
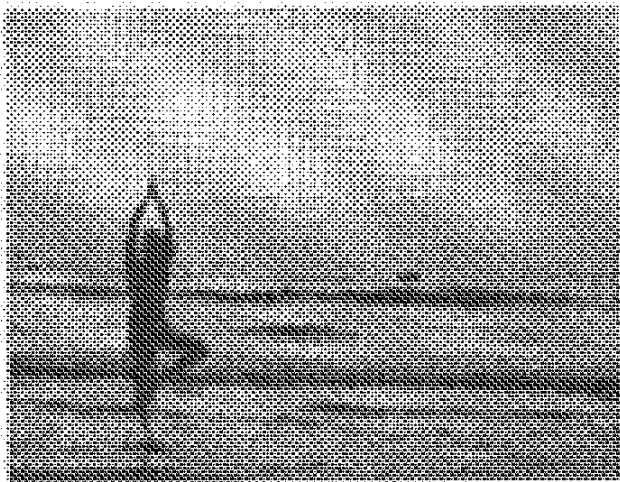
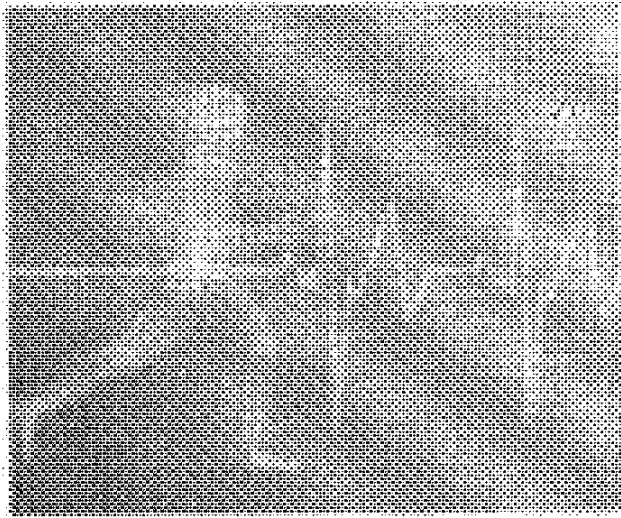
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BRADLEY SCHRAGER, ESQ.

Exhibit 2

Exhibit 2

Mancha Companies



2015 Employee Benefit Guide

January 1, 2015 – December 31, 2015

NDC000770

CONTACT INFORMATION

Refer to this list when you need to contact one of your benefit vendors.
For general information contact Human Resources.

CUSTOMER SERVICE: KEY BENEFITS ADMINISTRATION

Member Services: (877) 851-0906

Hours: 8:00 am to 7:00 pm (EST)

PROVIDER NETWORK: MULTIPLAN

Member Services: (888) 342-7427

On-Line Services: www.multiplan.com

This guide is intended as only a summary of the benefit plans offered as of January 1, 2015, and is not meant to be a complete plan document.

Complete description of plan specifications, coverage, limitations and exclusions are provided in the appropriate summary plan description and/or plan document.

All plans are subject to policy provisions and limitations and may be amended, modified or terminated at any time with or without notice. Applicable federal, state and local laws govern all plans.

Participation in the employee benefit programs is in no way to be considered a contract of employment, implied or otherwise.

In case of discrepancy between the 2015 Benefit Guide and the actual plan documents, the actual plan documents will prevail.

MDC000771

— MVP Plan —

Full-time employees of Mancha Companies have the option to enroll in the ACA Minimum Value Plan.

Benefits	In-Network	Non-Network
Deductible	None	\$500 Individual \$1,000 Family
Maximum Out-of-Pocket	\$1,850 Individual \$12,700 Family	None
Office Visit Copay (Primary / Specialist)	\$15 / \$25 Copay	40% After Deductible
Preventative Care	No Charge	40% After Deductible
Basic X-Ray/Lab Work	\$50 Copay	40% After Deductible
Complex X-Ray/Lab Work	\$400 Copay	40% After Deductible
Emergency Room	\$400 Copay	\$400 Copay
Prescription Deductible	None	Plan Deductible
Prescription Copay (Generic / Brand / Non-Formulary)	\$15 / \$25 / \$75	40% After Deductible

Plan Exclusions:

- 1) Hospital inpatient services are not covered by the plan. This means any inpatient service billed by the hospital.
- 2) Outpatient Surgery Physician/Surgical and Ambulatory Surgical Center services are not covered.
- 3) Specialty drugs are not covered.
- 4) Mental/Behavioral Health and Substance Abuse Disorder Outpatient Services are not covered with the exception of services covered under the MEC benefits.
- 5) Rehabilitative Speech, Rehabilitative Occupational and Rehabilitative Physical Therapy services are not covered.
- 6) Skilled Nursing Facility services are not covered.

MDC000772

FREQUENTLY ASKED QUESTIONS:

What is covered in an emergency room visit?

Includes all services done in emergency room. Emergency room services will not be covered if admitted to hospital (stay over 24 hours). Emergency Room services are covered at the same rate for in and out of network providers.

Are services rendered in an urgent care facility covered?

Urgent Care is covered the same as the physician visit benefit. The exam and lab/x-ray benefit will be a separate copay as listed in the schedule of benefits. All surgeries including stitches, setting of broken bones, etc. are not covered.

Are maternity services covered? Pre-Post Natal Care? Ultrasound? Delivery?

Services for pregnancy and pre-natal care are covered. The pregnancy services listed under preventive care will be covered at the preventive benefit. Preventive care for maternity would include (but not limited to) pre-natal care, breastfeeding support and supplies, folic acid supplements and gestational diabetes screening. Ultrasounds and non-routine pregnancy services will be covered the same as any other illness. Delivery and inpatient charges including nursery are not covered.

Are mental health and substance abuse services covered?

Mental health and substance abuse services are not covered under the plan unless listed in the preventive care schedule (example, screenings for depression over age 12 are covered but treatment for depression is not covered).

Are contraceptives covered?

Approved contraceptives would be covered in-network at 100% at the pharmacy, as they are considered part of the preventive/wellness benefit.

Is surgery covered?

Surgery, whether inpatient, outpatient or in the office, is not covered under the plan unless it is listed under the preventive/wellness benefit, such as a routine colonoscopy. This includes stitches, removal of moles, setting of bones, etc.

How are MRI, CAT/CT, PET scans covered?

MRI, CAT/CT and PET scans are covered with a \$400 copay and then at 100% per service. If rendered in an emergency room (ER) these would be covered under the ER copay and benefit. The \$400 copay will cover the physician and facility charge when rendered on an outpatient basis in a hospital, independent clinic or office setting. The inpatient facility charge of an MRI, CT, PET scans is not covered.

What is covered when I go to the doctor's office?

If it is an illness or injury visit, the exam would be covered under the physician benefit after a copay. There is a difference between Primary Care Physician or Specialist exam copays (see summary below or plan document). Lab and x-ray's done in the office, again for illness or injury, are a separate benefit and copay for each service line billed. Wellness exams are covered under the preventive care/wellness benefit at 100% in network. Some lab and x-rays related to wellness may also be considered under this benefit. Surgery will not be covered.

FREQUENTLY ASKED QUESTIONS:

Is durable medical equipment and prosthetics covered?

All medical supplies, durable medical equipment and prosthetics are not covered under the plan.

Are biotech/specialty medication covered?

All biotech and specialty medications through either the pharmacy or other setting/place are not covered under the plan. This includes specialty medications given through infusion.

Are ambulance services covered?

Ambulance services are not covered. This includes ground, air, sea, etc.

Is chiropractic care covered?

Chiropractic care is not covered. This includes exam and all services rendered by a chiropractic provider.

Is infusion therapy, chemotherapy, or radiation covered?

Infusion, chemotherapy and radiation are not covered.

What preventive/routine services are covered?

Preventive care/wellness services will be covered in-network at 100% based on the 63 CMS mandated preventive care listing. Please see the plan document for the complete listing.

Are domestic partners covered?

Yes as long as the requirements stated in the plan document are met.

What is the benefit period?

The benefit period runs from January to December.

Are injections or shots covered?

Injections, whether inpatient, outpatient or in the office, are not covered under the plan unless it is listed under the preventive/wellness benefit, such as a routine immunization. This includes antibiotics, steroids, allergy injections, etc.

How is a healthcare provider defined?

Healthcare providers are defined as physicians or licensed healthcare professionals that are acting within the scope of their license. This includes physician assistants, nurse practitioners, licensed clinical social workers, etc.

How is the allowed amount for out of network claims determined?

The 90th percentile of usual and customary will be used.

Are inpatient services covered?

Inpatient facility services are not covered. Physician visits performed while inpatient will be covered under the physician benefit with the copay stated in the schedule of benefits.

Deductible

Type	Network	Non-Network	Limitations
Individual	\$0 -- No deductible	\$500	Not applicable

Coinurance

	100%	40%	Not applicable
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Out-of-Pocket Maximums

Individual Maximum	\$1,850 per covered person, per plan year	No maximum	Copays apply to out-of-pocket. When the out-of-pocket per plan year has been reached, no additional copays will be applied. In-network out-of-pocket separate from non-network out-of-pocket.
Family Maximum	\$12,700 Per covered family, per plan year	No maximum	

Hospital Services

All Inpatient Hospital Services	Not Covered	Not Covered	Includes all services billed by any facility when admitted (stay over 24 hours)
Miscellaneous Charges	Not Covered	Not Covered	Includes inpatient and outpatient miscellaneous services, including but not limited to chemotherapy and infusion.
Outpatient Surgery	Not Covered	Not Covered	Not applicable
Emergency Room (ER)	\$400 copay, then paid at 100%	\$400 copay, then paid at 100%	Copays apply to the network out-of-pocket maximum. Includes all services done in ER. ER services will not be covered if admitted to hospital. One copay for physician and facility per ER visit.
Lab & X-ray: outpatient facility	\$50 copay, then paid at 100%	40% after deductible	Copay will apply per service line billed. Copay applies to the out-of-pocket maximum. Does not include inpatient facility charges. Does not include CT/PET Scan and MRIs.

Physician Services

Primary Care Physician (PCP)	\$15 copay, then paid at 100%	40% after deductible	Allowed with copay only for visit for illness or injury. Visit will be allowed for any place of service or location. This benefit does not include services other than visit/exam. Copay applies to the out-of-pocket maximum.
Specialist	\$25 copay, then paid at 100%	40% after deductible	Allowed with copay only for visit for illness or injury. Visit will be allowed for any place of service or location. This benefit does not include services other than visit/exam. Copay applies to the out-of-pocket maximum.
Surgery -- in office, outpatient facility, inpatient facility	Not Covered	Not Covered	Not applicable
Medical equipment & supplies	Not Covered	Not Covered	Includes durable medical equipment, prosthetics and general supplies.
Lab & X-ray: in office & non-office outpatient facility	\$50 copay, then paid at 100%	40% after deductible	Copay will apply per service line billed. Copay applies to the out-of-pocket maximum. Does not include inpatient facility charges. Does not include CT/PET Scan and MRIs.
Imaging: CT/PET scan and MRIs	\$400 copay, then paid at 100%	40% after deductible	Copay will apply per service line billed. Copay applies to the out-of-pocket maximum. Does not include inpatient facility charges.
Emergency Room (ER) physician visit	\$400 copay, then paid at 100%	\$400 copay, then paid at 100%	Copays apply to the network out-of-pocket maximum. One copay for physician and facility per ER visit.
Preventive/Wellness	100%	40% after deductible	Limited only to CMS mandated preventive services -- See separate plan document for complete listing.

Unless covered under Preventive/Wellness or CDM benefit excludes (but not limited to) services for: maternity care, medical or allergy injections, mental health, substance abuse, durable medical equipment, prosthetics, home health care, hospice, TMS, specialty/biotech medications, physical therapy, occupational therapy, speech therapy, chiropractic care, infusion therapy, radiation and chemotherapy. See exclusions for complete list.

MDC000775

Prescription Drugs – copays apply toward the medical out-of-pocket

Service	Benefit	Limitations
Generic Drugs	\$15 copay per prescription or refill	Limited to a 34-day supply
Preferred Drugs	\$25 copay per prescription or refill	Limited to a 34-day supply
Non-Preferred Drugs	\$75 copay per prescription or refill	Limited to a 34-day supply
Mail-In Generic Drugs	\$27.50 copay per prescription or refill	Limited to a 90-day supply
Mail-In Preferred Drugs	\$62.50 copay per prescription or refill	Limited to a 90-day supply
Mail-In Non-Preferred Drugs	\$187.50 copay per prescription or refill	Limited to a 90-day supply
Biotech/Specialty Drugs	Not Covered	Not Covered

Chronic Disease Management (CDM) Benefits

The listed chronic diseases below shall have the listed services (service details listed in full plan document) rendered by a network provider payable at 100% and not subject to the copay. Non-network services shall be payable according to the standard plan benefits. Once the service maximum benefit has been met, eligible charges shall be payable according to the standard plan benefits.

The provider must provide the appropriate billing including diagnosis code and procedure/CPT code for the Chronic Disease Management benefit to apply. If a covered person has more than one CDM diagnosis, the primary diagnosis billed will determine the benefit payable.

*The services listed below are the standard laboratory and diagnostic procedure for each disease.

Asthma	2 Office exams per plan year *Spirometry
Atherosclerosis (Peripheral Vascular Disease)	1 Office exam per plan year *Lipid panel
Atrial Fibrillation	1 Office exam per plan year *EKG *Prothrombin times
Chronic Obstructive Pulmonary Disease	2 Office exam per plan year *Spirometry
Chronic Renal Insufficiency	2 Office exam per plan year *Creatinine *Completed blood count (CBC) *Electrolytes *Urine protein *Serum calcium *Serum phosphorus *Lipid panel
Congestive Heart Failure	2 Office exams per plan year *BUN *Creatinine *Potassium
Coronary Artery Disease	1 Office exam per plan year *Lipid panel *EKG *Cholesterol
Diabetes	2 Office exams per plan year *Glycohemoglobins *Microalbumin *Lipid panel
Epilepsy	1 Office exam per plan year
Human Immunodeficiency Virus Infection	1 Office exams per plan year *T-Cell/CD-4 counts *HIV quantifications *Pap smear (women only) *PPD *Complete blood count (CBC)
Hyperlipidemia	1 Office exam per plan year *Lipid panel *Cholesterol

Hypertension	2 Office exams per plan year
Hyperthyroidism	1 Office exam per plan year *Thyroid stimulating hormone (TSH) *Thyroxine (T4)
Hypothyroidism	1 Office exam per plan year *Thyroid stimulating hormone (TSH) *Thyroxine (T4)
Metabolic Syndrome	1 Office exam per plan year *Lipid panel *Glucose FBS or Hemoglobin A1c (HgbA1c)
Multiple Sclerosis	2 Office exams per plan year
Parkinson's Disease	2 Office exams per plan year
Pre-diabetes	1 Office exam per plan year *Lipid panel *Glucose FBS or Hemoglobin A1c (HgbA1c)
Polymyalgia Rheumatica	2 Office exams per plan year *Erythrocyte sedimentation rate (ESR) or C-reactive protein (CRP) *Complete blood count (CBC)
Pulmonary Hypertension (unrelated to COPD)	2 Office exams per plan year
COPD with Pulmonary Hypertension/COR Pulmonale	2 Office exams per plan year *Spirometry *12 months of supplemental O2 Tx
Rheumatoid Arthritis	1 Office exams per plan year *Complete blood count (CBC)
Sleep Apnea	1 Office exam per plan year
Chronic Venous Thrombotic Disease	2 Office exams per plan year
Ulcerative Colitis (Inflammatory Bowel Disease)	1 Office exam per plan year *Complete blood count *LFT

MDC000776



Minimum Value Plan (MVP) Enrollment Form

1. Enrollee Information

Group Name:		Employee's Original Start Date:	
Last Name:		Date you became a Full time Employee:	
First Name:		Date of Birth (DOB):	
Sex: <input type="checkbox"/> M <input type="checkbox"/> F	SS #:	No. Hours Work/per week:	
Home Phone #:		Work Phone #:	
Street Address:		City:	State: Zip:
Please check one of the following: <input type="checkbox"/> New employee OR <input type="checkbox"/> Current employee newly eligible for benefits OR <input type="checkbox"/> New Group Enrollment			
Plan Selection:			
Beneficiary of Life Insurance	Full name, address and phone number:		Relationship:

2. Dependent Information

I would like to be covered under this plan along with the following dependents:					
<input type="checkbox"/> Spouse <input type="checkbox"/> Domestic Partner	Last Name:	First:	SS#:	DOB:	<input type="checkbox"/> Male <input type="checkbox"/> Female
	Last Name:	First:	SS#:	DOB:	<input type="checkbox"/> Male <input type="checkbox"/> Female
<input type="checkbox"/> Child <input type="checkbox"/> Disabled ¹ <input type="checkbox"/> Court Ordered ²					
	Last Name:	First:	SS#:	DOB:	<input type="checkbox"/> Male <input type="checkbox"/> Female
<input type="checkbox"/> Child <input type="checkbox"/> Disabled ¹ <input type="checkbox"/> Court Ordered ²					
	Last Name:	First:	SS#:	DOB:	<input type="checkbox"/> Male <input type="checkbox"/> Female
<input type="checkbox"/> Child <input type="checkbox"/> Disabled ¹ <input type="checkbox"/> Court Ordered ²					
	Last Name:	First:	SS#:	DOB:	<input type="checkbox"/> Male <input type="checkbox"/> Female
<input type="checkbox"/> Child <input type="checkbox"/> Disabled ¹ <input type="checkbox"/> Court Ordered ²					
	Last Name:	First:	SS#:	DOB:	<input type="checkbox"/> Male <input type="checkbox"/> Female
<input type="checkbox"/> Child <input type="checkbox"/> Disabled ¹ <input type="checkbox"/> Court Ordered ²					
	Last Name:	First:	SS#:	DOB:	<input type="checkbox"/> Male <input type="checkbox"/> Female
<input type="checkbox"/> Child <input type="checkbox"/> Disabled ¹ <input type="checkbox"/> Court Ordered ²					

¹For disabled dependents; SUBMIT appropriate documentation as proof of disabled status with this enrollment form.

²If a court decree requires you to cover your dependent under this plan, SUBMIT that portion of the court decree with this enrollment form.

I hereby apply for participation in my Minimum Value Benefit Plan for myself and/or my dependents listed above and agree to abide by the terms, provisions and limitations as outlined by the Plan Sponsor in the issuance of the Summary Plan Description. I declare all statements contained in this entire form are true and correct and that no material information has been withheld or omitted. I agree that no benefits will be effective until the date specified by Key Benefit Administrators. I agree a photographic copy of this authorization shall be as valid as the original and that said authorization shall be valid for the maximum length of time permitted by law. I understand that I have the right to receive a copy of this authorization upon request. I authorize my employer to deduct from earnings the contributions (if any) required toward the benefits.

☐ I am waiving/declining coverage for myself and all dependents

Employee (print name): _____ Employee Signature: _____ Date: _____

Revised 7-15-14
MDC000777

Exhibit 3

Exhibit 3

TransChoice® Advance hospital indemnity insurance

		\$ 100 31 Days per con- finement	\$ 300 31 Days per con- finement	\$ 500 31 Days per con- finement
Daily In-Hospital Indemnity Benefit	Pays benefits per day of hospital confinement, up to the annual maximum.			
Outpatient Physician Office Visit Indemnity Benefit	Pays each day a covered person receives outpatient treatment in a phys- ician's office or at an urgent care facility as the result of a covered accident or sickness, up to the annual maximum days listed.	\$ 50 6 Days	\$ 70 6 Days	\$ 70 6 Days
Outpatient Diagnostic Laboratory Test Indemnity Benefit	Pays each day a covered person undergoes an outpatient lab test performed for the purpose of diagnosis for a covered accident or sickness, up to the annual maximum days listed. Does not include tests covered under any other rider.	\$ 10 2 Days	\$ 15 4 Days	\$ 15 4 Days
Outpatient Select Diagnostic Test Indemnity Benefit	Pays each day a covered person undergoes an outpatient X-ray, ultrasound, EEG or sleep study performed for the purpose of diagnosis for a covered ac- cident or sickness, up to the annual maximum days listed.	\$ 50 1 Day	\$ 75 2 Days	\$ 75 2 Days
Outpatient Advanced Studies Diagnostic Test Indemnity Benefit	Pays each day a covered person undergoes an outpatient CT scan, MRI, myelogram, PET, angiogram, arteriogram or thallium stress test performed for the purpose of diagnosis for a covered accident or sickness, up to the annual maximum days listed.	\$ 200 1 Day	\$ 300 2 Days	\$ 300 2 Days
Hospital Confinement Indemnity Benefit	Pays each day over 23 hours a covered person is confined to a hospital (not emergency room, outpatient stay or stay in an observation unit) as the result of a covered accident or sickness, maximum of 1 day per confinement, up to the annual maximum days listed.	\$ 500 2 Days	\$ 1,000 2 Days	\$ 1,000 2 Days
Surgical and Anesthesia Indemnity Benefit	Pays each day a covered person under- goes surgery. The percentage listed is also paid if anesthesia is administered.	Inpatient surgery	\$ 500	\$ 1,000
		Outpatient surgery	\$ 250	\$ 500
		Outpatient minor surgery	\$ 50	\$ 100
		Anesthesia percentage	20%	20%
Off-the-Job Accidental Injury Indemnity Benefit	Pays each day a covered person requires x-rays or receives treatment by a physician within 60 hours of a covered accident.	No Coverage	No Coverage	\$ 700
Prescription Drug Indemnity Benefit	Pays each day a covered person fills a prescription as the result of a covered accident or sickness.	Generic prescription	\$ 10	\$ 15
		Name brand prescription	\$ 20	\$ 30
		Annual maximum	12 Days per Year	12 Days per Year
Critical Illness Indemnity Benefit	Pays once when diagnosed with invasive cancer, heart attack, stroke, end- stage renal failure or major organ failure. A subsequent benefit is payable if diagnosed more than 60 days later with a different critical illness. <i>Dependent percentage</i>	No Coverage	No Coverage	\$3,000 60%
Wellness Indemnity Benefit	Pays each day a covered person undergoes a physical exam or stress test or specific health screening tests as defined in the policy, up to the annual maximum days listed. Includes four days for children 0-12 mos. and two days for children 12- 24 mos for well baby exams.	\$100 1 Day	\$100 1 Day	\$100 1 Day
Inpatient Mental and Nervous Disorder Indemnity Benefit	Pays each day a covered person is confined on an inpatient basis to a hospital or mental health facility as the result of a mental or nervous disorder. Annual maximum of 31 Days, lifetime maximum 60 Days.	\$ 100	\$ 100	\$ 100

THIS IS NOT MAJOR MEDICAL INSURANCE AND IS NOT A SUBSTITUTE FOR MAJOR MEDICAL INSURANCE.
IT DOES NOT QUALIFY AS MINIMUM ESSENTIAL HEALTH COVERAGE UNDER THE FEDERAL AFFORDABLE CARE ACT.

This is a brief summary of TransChoice® Advance Hospital Indemnity Insurance underwritten by Transamerica Life Insurance Company, Cedar Rapids, Iowa.
Policy Form Series CPCH100 and CCCH100. Forms and form numbers may vary. Coverage may not be available in all jurisdictions.
Limitations and exclusions apply. Refer to the policy, certificate and riders for complete details.

Issue Date: 1/1/2010 Term: 1000 Cancellation: Vol 14.00.00 SIC: 5812 Pay type: Voluntary Mail-Bill: No

MDC000129

Inpatient Drug and Alcohol Addiction Indemnity Benefit	Pays each day a covered person is confined on an inpatient basis to a hospital or residential treatment facility as the result of drug or alcohol addiction. Annual maximum of 31 Days, lifetime maximum 40 Days.	\$ 100	\$ 100	\$ 100
Ambulance Indemnity Benefit	Pays each day a covered person receives licensed ambulance transportation within 96 hours of a covered accident or onset of sickness. Air ambulance pays three times the amount.	No Coverage	\$ 200	\$ 350
Health Insurance Options				
Group Term Life Policy with Accidental Death and Dismemberment Rider	Employee	\$ 10,000	\$ 10,000	\$ 10,000
	Spouse	\$ 5,000	\$ 5,000	\$ 5,000
	Child(ren) (Accidental Death and Dismemberment Rider not available to dependent children)	\$ 2,500	\$ 2,500	\$ 2,500
Health Insurance Options				
Prescription Drug Discount Card offered by ProCare	By presenting the prescription drug discount card to one of the participating providers, an insured can receive a savings of at least 14% on retail pharmacy prices for brand-name drugs and up to 60% for generic drugs.	Included	Included	Included
Telemedicine Option	Around the clock telephone, video or e-mail access to a board-certified physician.	No Coverage	Healthiestyou	Healthiestyou
Employee Discount Card offered by New Benefits, Ltd.	Provides access to a discount vision plan, nurses' hotline, counselling services and discounts for hearing aids.	Included	Included	Included
PPO Network offered by WebMD	Employee and covered dependents will receive contracted savings from the normal fees charged by network physicians, hospitals and outpatient X-ray and laboratory providers.	No Coverage	Included	Included

Employee Plan Categories	Employee	Employee + Spouse	Employee + Children	Family
Plan I	19.09	48.74	39.62	62.32
Plan II	41.63	93.43	75.30	115.51
Plan III	51.16	114.90	96.70	142.43

Non-Insurance Benefits

Telemedicine

Healthiestyou provides insureds with telemedicine access to consult with a doctor by telephone, video chat or secure e-mail 24/7/365.

Prescription Drug Discount Card (provided by ProCare)

By presenting the prescription drug discount card to one of the participating providers, an insured can receive a savings of at least 14% on retail pharmacy prices for brand-name drugs and up to 60% for generic drugs. The insured will continue to receive the savings even after his or her TransChoice Advance benefit has been used for the year.

Employee Discount Card (provided by New Benefits Ltd.)

The employee discount card offers access to a discount vision plan, a nurses' hotline, counselling services and benefits for hearing aids. This is not an insurance plan.

The discount vision plan's coast-to-coast network allows the employee to receive savings of 20-60% on eyeglasses, contact lenses and frames from more than 12,000 participating retail optical locations. Providers include independent practitioners, regional chains, department store opticals and the largest chains in the United States, like LensCrafters®, Pearle Vision®, Sears® Optical and JCPenney® Optical.*

A nurses' hotline allows telephone access to experienced, registered nurses 24 hours a day, 7 days a week, 365 days a year. These nurses are an immediate, reliable and caring source of health information, education and support. Services provided by this plan include:

- general information on all types of health concerns,
- information based on physician-approved guidelines,

Exhibit 4

Exhibit 4

Message

From: Colleen Fulton [Cfulton@manchastores.com]
Sent: 9/6/2014 2:11:40 PM
To: Joe Soraci [jsoraci@manchedev.com]
CC: Denny's 8659 [8659@manchastores.com]
Subject: Hourly Pay Rates

Joe I did forget to mention to you when I was reviewing the employee schedule at unit 8659 I noticed the servers pay rates were not what I am used to seeing. All servers are in at \$7.55 per hour. I asked BJ why that is and she said that is what they were when she came to the unit and thought that is what it is supposed to be. I let her know that is not correct. Wage for tipped employees is \$7.25 per hour. 4 years ago minimum wage was different, if servers worked a certain number of hours they were to be paid \$7.55 and above that number of hours it was \$7.25. That law is no longer valid, MDC HR, Blanca told us to leave rates as they are but hire in at \$7.25 per hour. We have been hiring in at \$7.55 at 8659. I don't know if we can lower the people we already have in at 7.55, I doubt it, if you are interested in doing this I would consult Yvette Galimore. There was another job code that seemed off to me, I believe it was server assistant, could be host though, it was a bit high. To me this is \$353 a month, \$4236 a year we are over paying.

BJ and I talked about correct starting salaries for each job code. Servers \$7.25, tipped server assistants \$7.25, non tipped server assistants \$8.00, hosts - depending on experience, \$7.25 to \$8.00. Cooks depending in experience \$9 to \$12 per hour, there will be talented cooks we need to pay more to, this is what causes our cooks line to be clean, meeting speed of service goals, pass every inspection with few criticals for the year. Any cook hired in more than \$12 needs to discuss with ADO. We must offer insurance to every employee on their hire date to be able to pay this sub minimum wage. (\$8.25 is minimum wage in Nevada) they do not have to accept this insurance but we have to offer it. This insurance would not take effect if they choose to accept it until they have been with us 60 days. Most employees decline it, they can do better in the state of Nevada insurance marketplace.

I just need to make you aware Joe when I see things that need correcting.

Thanks,

Colleen

MDC000653

From: no-reply@tylerhost.net
To: [Perkins, Debra A.](#)
Subject: Service Notification of Filing Case(Paulette Diaz, Plaintiff(s)vs. MDC Restaurants LLC, Defendant(s)) Document Code:(RPLY) Filing Type:(EFS) Repository ID(7048406)
Date: Friday, June 05, 2015 4:12:13 PM

This is a service filing for Case No. A-14-701633-C, Paulette Diaz, Plaintiff(s)vs. MDC Restaurants LLC, Defendant(s)

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Submitted: 06/05/2015 02:02:34 PM

Case title: Paulette Diaz, Plaintiff(s)vs. MDC Restaurants LLC, Defendant(s)
Document title: Plaintiff's Reply to Defendants' Opposition to Plaintiff's Motion for Partial Summary Judgment on Liability as to Plaintiff Paulette Diaz's First Claim for Relief
Document code: RPLY Filing Type: EFS
Repository ID: 7048406
Number of pages: 39
Filed By: Wolf, Rifkin, Shapiro, Schulman & Rabkin,LLP

To download the document, click on the following link shown below or copy and paste it into your browser's address bar.

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Service List Recipients:

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Debra Perkins
Erin Melwak
Katy Blakey, Esq.
Maribel Rodriguez
Montgomery Paek
Rick Roskelley, Esq.

Little Mendelson, P.C.
Roger Grandgenett, Esq.

Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP
Bradley S. Schrager, Esq.
Christie Rehfeld
Daniel Bravo
Dannielle Fresquez
Don Springmeyer
E. Noemy Valdez
Justin Jones, Esq.
Lorraine Rillera

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D1F1E68FB39A3BBB386382D50AEE0C1C3A1279DB1101D78C815E1AD1F300CB7B0C7C04C5E5F66034451EC1DC3765ED4E186C37DAC60C1FD9

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Location : District Court Civil/Criminal Help

REGISTER OF ACTIONS

CASE NO. A-14-701633-C

**Paulette Diaz, Plaintiff(s) vs. MDC Restaurants LLC,
Defendant(s)**

§
§
§
§
§
§

Case Type: **Other Civil Filing**
Subtype: **Other Civil Matters**
Date Filed: **05/30/2014**
Location: **Department 16**
Cross-Reference Case Number: **A701633**

PARTY INFORMATION

Defendant	Inka LLC	Lead Attorneys Rick D. Roskelley <i>Retained</i> 7028628800(W)
Defendant	Laguna Restaurants LLC	Rick D. Roskelley <i>Retained</i> 7028628800(W)
Defendant	MDC Restaurants LLC	Rick D. Roskelley <i>Retained</i> 7028628800(W)
Plaintiff	Diaz, Paulette	Don Springmeyer <i>Retained</i> 702-341-5200(W)
Plaintiff	Fitzlaff, Charity	Don Springmeyer <i>Retained</i> 702-341-5200(W)
Plaintiff	Olszynski, Shannon	Don Springmeyer <i>Retained</i> 702-341-5200(W)
Plaintiff	Wilbanks, Lawanda Gail	Don Springmeyer <i>Retained</i> 702-341-5200(W)

EVENTS & ORDERS OF THE COURT

06/25/2015 **Motion for Summary Judgment** (9:00 AM) (Judicial Officer Williams, Timothy C.)
Motion for Partial Summary Judgment on Liability as to Plaintiff Paulette Diaz's First Claim for Relief

Minutes

05/26/2015 9:00 AM

06/16/2015 9:00 AM

06/25/2015 9:00 AM

- Mr. Schrager argued regarding the health insurance requirement determining the two tiers of minimum wage. He further argued the plain or ordinary meaning of "provide" was to administer, bestow, give over, sustain or yield and that to provide does not mean to offer. Mr. Paek argued one must look at the overall scheme and noted the amendment doesn't just say all employees get \$8.25. Mr. Paek stated to offer means to make available and if the

<https://www.clarkcountycourts.us/Anonymous/CaseDetail.aspx?CaseID=11411300&HearingID=187578976&SingleViewMode=Minutes>

Parties Present
Return to Register of Actions

VOLUME 1

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

PETITIONERS' APPENDIX

RICK D. ROSKELLEY, ESQ., Nevada Bar # 3192
ROGER L. GRANDGENETT II, ESQ., Nevada Bar # 6323
MONTGOMERY Y. PAEK, ESQ., Nevada Bar #10176
KATHRYN B. BLAKEY, ESQ., Nevada Bar # 12701
LITTLER MENDELSON, P.C.
3960 Howard Hughes Parkway, Suite 300
Las Vegas, NV 89169-5937
Telephone: 702.862.8800
Fax No.: 702.862.8811
Attorneys for Petitioners

INDEX OF APPENDIX

Name of Document	Appendix	Page Number
May 20, 2014 Class Action Complaint and June 5, 2014 Amended Class Action Complaint on June 5, 2014	Vol. 1	001-031
July 22, 2014 Answer to the Amended Class Action Complaint	Vol. 1	032-042
April 24, 2015 Plaintiff's Motion for Partial Summary Judgment on Liability as to Plaintiff Paulette Diaz's First Claim for Relief	Vol. 1	043-149
May 22, 2015 Defendants' Opposition to Motion for Partial Summary Judgment on Liability as to Plaintiff Paulette Diaz's First Claim for Relief	Vol. 1	150-167
June 5, 2015 Plaintiff's Reply to Defendants' Opposition to Motion for Partial Summary Judgment on Liability as to Plaintiff Paulette Diaz's First Claim for Relief	Vol. 1	168-207
June 25, 2015 minutes of hearing	Vol. 1	208
June 25, 2015 hearing transcript	Vol. 2	209-261
July 1, 2015, minute order regarding the hearing held on June 25, 2015	Vol. 2	262
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	Vol. 2	263-269
July 9, 2015, hearing transcript on Plaintiff's Motion for Class Certification Pursuant to NRCP 23	Vol. 2	270-342
July 30, 2014, Notice of Petition for Writ of Mandamus or Prohibition	Vol. 2	343-345
June 8, 2015 Plaintiff's Motion for Class Certification Pursuant to NRCP 23	Vol. 3	346-501
June 25, 2015 Defendants' Opposition to this Motion for Class Certification	Vol. 4	502-769

July 16, 2015 Supplemental Brief in Support of Plaintiffs' Motion for Class Certification Pursuant to N.R.C.P. 23	Vol. 5	770-819
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PROOF 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:

PETITIONERS APPENDIX

☒ Via **Electronic Service** - pursuant to N.E.F.C.R Administrative Order: 14-2.

Don Springmeyer, Esq.
Bradley Schrager, Esq.
Daniel Bravo, Esq.
Wolf, Rifkin, Shapiro, Schulman &
Rabkin, LLP
3556 E. Russell Road, 2nd Floor
Las Vegas, NV 89120-2234
Attorneys for Real Party in Interest

Honorable Timothy C. Williams
Eighth Judicial District Court, Dept. 16
200 Lewis Avenue
Las Vegas, NV 89155
Respondents

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
Erin J. Melwak

CIVIL COVER SHEET A-14-701633-C

Clark County, Nevada

XV

Case No. _____

(Assigned by Clerk's Office)

I. Party Information

Plaintiff(s) (name/address/phone): PAULETTE DIAZ, an individual; and LAWANDA GAIL WILBANKS, an individual, on behalf of themselves and all similarly-situated individuals

Attorney (name/address/phone): Don Springmeyer, Esq., Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP, 3556 E. Russell Rd, 2nd Floor, Las Vegas, NV, 89120, (702) 341-5200

Defendant(s) (name/address/phone): MDC RESTAURANTS, LLC, a Nevada limited liability company; LAGUNA RESTAURANTS, LLC, a Nevada limited liability company; INKA, LLC, a Nevada limited liability company and DOES 1 through 100, Inclusive

Attorney (name/address/phone):

II. Nature of Controversy (Please check applicable bold category and applicable subcategory, if appropriate)☐ **Arbitration Requested****Civil Cases**

Real Property	Torts	
<input type="checkbox"/> Landlord/Tenant <input type="checkbox"/> Unlawful Detainer <input type="checkbox"/> Title to Property <input type="checkbox"/> Foreclosure <input type="checkbox"/> Liens <input type="checkbox"/> Quiet Title <input type="checkbox"/> Specific Performance <input type="checkbox"/> Condemnation/Eminent Domain <input type="checkbox"/> Other Real Property <input type="checkbox"/> Partition <input type="checkbox"/> Planning/Zoning	<input type="checkbox"/> Negligence <input type="checkbox"/> Negligence – Auto <input type="checkbox"/> Negligence – Medical/Dental <input type="checkbox"/> Negligence – Premises Liability (Slip/Fall) <input type="checkbox"/> Negligence – Other	<input type="checkbox"/> Product Liability <input type="checkbox"/> Product Liability/Motor Vehicle <input type="checkbox"/> Other Torts/Product Liability <input type="checkbox"/> Intentional Misconduct <input type="checkbox"/> Torts/Defamation (Libel/Slander) <input type="checkbox"/> Interfere with Contract Rights <input type="checkbox"/> Employment Torts (Wrongful termination) <input type="checkbox"/> Other Torts <input type="checkbox"/> Anti-trust <input type="checkbox"/> Fraud/Misrepresentation <input type="checkbox"/> Insurance <input type="checkbox"/> Legal Tort <input type="checkbox"/> Unfair Competition
Probate	Other Civil Filing Types	
Estimated Estate Value: _____ <input type="checkbox"/> Summary Administration <input type="checkbox"/> General Administration <input type="checkbox"/> Special Administration <input type="checkbox"/> Set Aside Estates <input type="checkbox"/> Trust/Conservatorships <input type="checkbox"/> Individual Trustee <input type="checkbox"/> Corporate Trustee <input type="checkbox"/> Other Probate	<input type="checkbox"/> Construction Defect <input type="checkbox"/> Chapter 40 <input type="checkbox"/> General <input type="checkbox"/> Breach of Contract <input type="checkbox"/> Building & Construction <input type="checkbox"/> Insurance Carrier <input type="checkbox"/> Commercial Instrument <input type="checkbox"/> Other Contracts/Acct/Judgment <input type="checkbox"/> Collection of Actions <input type="checkbox"/> Employment Contract <input type="checkbox"/> Guarantee <input type="checkbox"/> Sale Contract <input type="checkbox"/> Uniform Commercial Code <input type="checkbox"/> Civil Petition for Judicial Review <input type="checkbox"/> Foreclosure Mediation <input type="checkbox"/> Other Administrative Law <input type="checkbox"/> Department of Motor Vehicles <input type="checkbox"/> Worker's Compensation Appeal	<input type="checkbox"/> Appeal from Lower Court (also check applicable civil case box) <input type="checkbox"/> Transfer from Justice Court <input type="checkbox"/> Justice Court Civil Appeal <input type="checkbox"/> Civil Writ <input type="checkbox"/> Other Special Proceeding <input checked="" type="checkbox"/> Other Civil Filing <input type="checkbox"/> Compromise of Minor's Claim <input type="checkbox"/> Conversion of Property <input type="checkbox"/> Damage to Property <input type="checkbox"/> Employment Security <input type="checkbox"/> Enforcement of Judgment <input type="checkbox"/> Foreign Judgment – Civil <input type="checkbox"/> Other Personal Property <input type="checkbox"/> Recovery of Property <input type="checkbox"/> Stockholder Suit <input checked="" type="checkbox"/> Other Civil Matters

III. Business Court Requested (Please check applicable category; for Clark or Washoe Counties only.)

- | | | |
|---|--|---|
| <input type="checkbox"/> NRS Chapters 78-88 | <input type="checkbox"/> Investments (NRS 104 Art. 8) | <input type="checkbox"/> Enhanced Case Mgmt/Business |
| <input type="checkbox"/> Commodities (NRS 90) | <input type="checkbox"/> Deceptive Trade Practices (NRS 598) | <input type="checkbox"/> Other Business Court Matters |
| <input type="checkbox"/> Securities (NRS 90) | <input type="checkbox"/> Trademarks (NRS 600A) | |

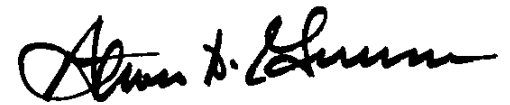
May 30, 2014

/s/ Don Springmeyer

Date

Signature of initiating party or representative

See other side for family-related case filings.



CLERK OF THE COURT

COMJD
DON SPRINGMEYER, ESQ.
Nevada State Bar No. 1021
BRADLEY SCHRAGER, ESQ.
Nevada State Bar No. 10217
DANIEL BRAVO, ESQ.
Nevada State Bar No. 13078
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Attorneys for Plaintiffs

EIGHTH JUDICIAL DISTRICT COURT

IN AND FOR CLARK COUNTY, STATE OF NEVADA

PAULETTE DIAZ, an individual; and
LAWANDA GAIL WILBANKS, an
individual, on behalf of themselves and all
similarly-situated individuals,

Plaintiffs,

vs.

MDC RESTAURANTS, LLC, a Nevada
limited liability company; LAGUNA
RESTAURANTS, LLC, a Nevada limited
liability company; INKA, LLC, a Nevada
limited liability company and DOES 1
through 100, Inclusive,

Defendants.

Case No: A-14-701633-C

Dept. No.: XV

CLASS ACTION COMPLAINT

The above-referenced Plaintiffs (herein "Plaintiffs") through undersigned counsel, on
behalf of themselves and all persons similarly situated, complain and allege as follows:

INTRODUCTION

1. This lawsuit is an individual and class action brought by Plaintiffs, on behalf of
themselves and all similarly-situated employees of MDC RESTAURANTS, LLC; LAGUNA
RESTAURANTS, LLC; and INKA, LLC ("MDC," "Laguna," "Inka," and, collectively,

1 “Defendants”), owners and operators of Denny’s and CoCo’s restaurants (the “Restaurants”) in
2 Nevada.

3 2. This lawsuit is a result of the Defendants’ failure to pay Plaintiffs and other
4 similarly-situated employees who are members of the Class the lawful minimum wage, because
5 the Defendants have improperly claimed eligibility to compensate employees at a reduced
6 minimum wage rate under Nev. Const. art. XV, § 16.

7 3. At the 2006 General Election, Nevada voters approved, for the second time, a
8 constitutional amendment regarding the minimum wage to be paid to all Nevada employees.¹ The
9 amendment became effective in November, 2006, and was codified as new Article XV, § 16 of the
10 Nevada Constitution.

11 4. The 2006 amendment guaranteed to each Nevada employee, with very few
12 exceptions, a particular hourly wage: “Each employer shall pay a wage to each employee of not
13 less than the hourly rates set forth in this section. The rate shall be five dollars and fifteen cents
14 (\$5.15) per hour worked, if the employer provides health benefits as described herein, or six
15 dollars and fifteen cents (\$6.15) per hour if the employer does not provide such benefits.”

16 5. The amendment contained an index/increase mechanism, such that since 2010 the
17 Nevada minimum wage level is \$7.25 per hour if the employer provides qualifying health benefits,
18 or \$8.25 per hour if the employer does not provide such qualifying health benefits. Employers,
19 like Defendants, who claim eligibility to pay the reduced wage rate, therefore, can pay employees
20 up to 12.2% less than workers paid at the \$8.25 level.

21 6. The public policy underlying the minimum wage amendment was to benefit
22 Nevada’s minimum wage employees, and to incentivize employers to provide low-cost,
23 comprehensive health insurance benefits to the state’s lowest-paid workers.

24 7. The opportunity to compensate employees at a level beneath the standard minimum
25 wage rate is a privilege offered to employers by the voters of Nevada. Employers must qualify for
26 that privilege by providing, offering, and maintaining health insurance plans for their employees

27
28 ¹ See Exhibit 1 here attached, a true and correct copy of the text of Nev. Const. art. XV, § 16.

1 that meet very specific regulatory standards.

2 8. In order to qualify to pay employees at a reduced minimum wage rate, the health
3 insurance benefits plan provided, offered, and/or maintained must be truly comprehensive in its
4 coverage, and cover “those categories of health care expenses that are generally deductible by an
5 employee on his/her individual federal income tax return pursuant to 26 U.S.C. § 213 and any
6 federal regulations relating thereto, if such expenses had been borne directly by the employee.”
7 N.A.C. 608.102(1)(a).

8 9. Furthermore, the cost of health insurance benefit premiums for the employee, and
9 all his or her dependents, may not exceed “10 percent of the employee’s gross taxable income
10 from the employer.” Nev. Const. art. XV, § 16.

11 10. Failure to meet the specific requirements that establish a qualified health insurance
12 benefits plan means that the employer forfeits the right to pay employees at anything less than the
13 full minimum wage rate under Nev. Const. art. XV, § 16, currently \$8.25 per hour.

14 11. Defendants here pay Plaintiffs and members of the Class at an hourly rate below
15 \$8.25 per hour.

16 12. Defendants do not provide, offer, and/or maintain qualifying health insurance plan
17 benefits for the benefit of Plaintiffs and members of the Class. In the case of named Plaintiffs,
18 Defendants have failed to offer any health benefit plans at all, and therefore can claim no basis for
19 paying Plaintiffs less than \$8.25 per hour at any time.

20 13. Defendants are not, and have not been, eligible to pay Plaintiffs and members of
21 the Class at the reduced minimum wage rate. They have forfeited the privilege extended to it
22 under Article XV, § 16. Instead, they now owe back pay and damages to all employees they have
23 unlawfully underpaid since passage of the minimum wage amendment in 2006.

24 **PARTIES**

25 **A. Plaintiffs**

26 14. Plaintiff Paulette Diaz is a resident of Oregon, and worked as a server at numerous
27 Denny’s and CoCo’s restaurants owned and operated by Defendants in Clark County, Nevada
28 between April 2010 and September 2013. Her wage was \$7.25 per hour. She has two dependents.

1 15. Plaintiff Lawanda Gail Wilbanks is a resident of Nevada, and worked as a server at
2 a Denny's restaurant owned and operated by Defendants in Clark County, Nevada between June
3 2011 and January 2013. Her wage was \$7.25 per hour. She has one dependent.

4 **B. Defendants**

5 16. Plaintiffs are informed and believe and thereon allege that at all times material
6 hereto Defendant MDC RESTAURANTS, LLC, was and is a Nevada limited liability company,
7 and it and any subsidiaries or affiliated companies were and are engaged in the ownership and
8 operation of franchise and non-franchise restaurants located in Clark County and throughout
9 Nevada. Upon information and belief, this Defendant owns and operates approximately thirteen
10 Denny's restaurants in Clark County and elsewhere in Nevada, employed Plaintiffs and/or
11 employed and employs Class members, and is conducting business in good standing in the State of
12 Nevada. Its sole listed officer is manager Vince Eupierre.

13 17. Plaintiffs are informed and believe and thereon allege that at all times material
14 hereto Defendant LAGUNA RESTAURANTS, LLC, was and is a Nevada limited liability
15 company, and it and any subsidiaries or affiliated companies were and are engaged in the
16 ownership and operation of franchise and non-franchise restaurants located in Clark County and
17 throughout Nevada. Upon information and belief, this Defendant owns and operates
18 approximately four Denny's and CoCo's restaurants in Clark County and elsewhere in Nevada,
19 employed Plaintiffs and/or employed and employs Class members, and is conducting business in
20 good standing in the State of Nevada. Its sole listed officer is manager Vince Eupierre.

21 18. Plaintiffs are informed and believe and thereon allege that at all times material
22 hereto Defendant INKA, LLC, was and is a Nevada limited liability company, and it and any
23 subsidiaries or affiliated companies were and are engaged in the ownership and operation of
24 franchise and non-franchise restaurants located in Clark County and throughout Nevada. Upon
25 information and belief, this Defendant owns and operates approximately three Denny's restaurants
26 in Clark County and elsewhere in Nevada, employed Plaintiffs and/or employed and employs
27 Class members, and is conducting business in good standing in the State of Nevada. Its two listed
28 officers are managers Vince Eupierre and Joseph Soraci.

1 19. Plaintiffs sue fictitious Defendants DOES 1 through 100, inclusive, as Plaintiffs do
2 not know their true names and/or capacities, and upon ascertainment, will amend the Complaint
3 with their true names and capacities. Plaintiffs are informed and believe and on that basis allege
4 that each of said fictitiously named Defendants is responsible in some manner for the occurrences
5 herein alleged, and that Plaintiffs' damages were proximately caused by their conduct mentioned
6 herein, each of the Defendants, including DOES 1 through 100, was an agent, joint-venturer,
7 representative, alter ego, and/or employee of the other defendants, and was acting both
8 individually and in the course and scope of said relationship at the time of the events herein
9 alleged, and all aided and abetted the wrongful acts of the others.

JURISDICTION AND VENUE

11 20. This Court has subject matter jurisdiction over this action pursuant to Nev. Const,
12 art. XV, § 16(B).

21. Venue is proper because acts giving rise to the claims of the Plaintiffs herein occurred within this judicial district, and all Defendants regularly conduct business in and have engaged and continue to engage in the wrongful conduct alleged herein—and, thus, are subject to personal jurisdiction—in this judicial district.

GENERAL ALLEGATIONS

18 | **A. Plaintiffs' Allegations**

22. Plaintiff Diaz worked as a server at Denny's and CoCo's restaurants owned and operated by Defendants in Clark County, Nevada, where she earned \$7.25 per hour, below the constitutional minimum wage under Nev. Const. art XV, § 16 of \$8.25 per hour.

23. Ms. Diaz was never offered a company health insurance plan at all, much less a plan that would qualify Defendants for the constitutional privilege of paying less than the full hourly minimum hourly wage rate per Nev. Const. art. XV, § 16.

25 24. Defendants, therefore, were unlawfully paying Ms. Diaz a sub-minimum wage for
26 the entirety of her employment.

27 25. Plaintiff Wilbanks worked as a server at a Denny's restaurant owned and operated
28 by Defendants in Clark County, Nevada, where she earned \$7.25 per hour, below the

1 constitutional minimum wage under Nev. Const. art XV, § 16 of \$8.25 per hour.

2 26. Ms. Wilbanks was never offered a company health insurance plan at all, much less
3 a plan that would qualify Defendants for the constitutional privilege of paying less than the full
4 hourly minimum hourly wage rate per Nev. Const. art. XV, § 16.

5 27. Defendants, therefore, were unlawfully paying Ms. Wilbanks a sub-minimum wage
6 for the entirety of her employment

7 **B. Defendants' Control of the Restaurants**

8 28. Defendants maintain control, oversight, and direction over the operation of the
9 Restaurants, including their employment and/or labor practices.

10 29. Defendants (i) create uniform wage and benefit policies and practices for use at the
11 Restaurants, (ii) impose uniform wage and benefit policies and practices at the Restaurants, and
12 (iii) maintain centralized human resource functions which implement wage and benefit policies
13 and practices at the Restaurants.

14 30. Defendants have common ownership and management and, upon information and
15 belief, formulate and execute uniform human resource and benefit policies affecting Plaintiffs and
16 members of the Class.

17 **C. Defendants' Unlawful Minimum Wage Practices**

18 31. Defendants paid Plaintiffs and members of the Class for many years at a reduced
19 minimum wage rate pursuant to Nev. Const. art. XV, § 16.

20 32. Defendants do not provide, offer, and/or maintain health insurance plan benefits
21 that meet necessary requirements in order to qualify to pay Plaintiffs and members of the Class at
22 the reduced minimum wage level.

23 33. Defendants, therefore, have been unlawfully paying all Class members a sub-
24 minimum wage during employment at the Restaurants.

25 34. Defendants are aware of, and perpetuate, this ongoing violation of Nevada's
26 constitutional provision regarding minimum wage, and associated regulatory provisions
27 implementing same.

28 35. As a result, pursuant to Nev. Const. art. XV, § 16, Plaintiffs and the members of the

1 Class are owed back pay and damages for every hour worked during the applicable period.

2 **CLASS ACTION ALLEGATIONS**

3 36. Plaintiffs re-allege and incorporate herein by this reference all the paragraphs above
4 in this Complaint as though fully set forth herein.

5 37. Plaintiffs bring this action pursuant to N.R.C.P. 23 on behalf of themselves and all
6 others similarly situated, as representative members of the following proposed Class:

7 **All current and former employees of Defendants at all**
8 **Restaurant locations at any time during the applicable statutes**
9 **of limitation who were compensated at less than the upper-tier**
10 **hourly minimum wage set forth in Nev. Const. art XV, § 16.**

11 38. Numerosity: The members of the proposed Class are so numerous that individual
12 joinder of all members is impracticable under the circumstances of this case, and the disposition of
13 their claims as a Class will benefit the parties and the Court. The precise number of members
14 should be readily available from a review of Defendants' personnel, payroll, and benefits records,
15 and upon information and belief numbers in the thousands.

16 39. Commonality/Predominance: Common questions of law or fact are shared by the
17 members of the proposed Class. This action is suitable for class treatment because these common
18 questions of fact and law predominate over any questions affecting individual members. These
19 common legal and factual questions, include, but are not limited to, the following:

- 20 i. Whether Defendants paid Class members the required minimum wage
21 pursuant to the Nevada Constitution;
- 22 ii. Whether, when paying minimum wage employees the reduced minimum
23 wage level pursuant to Nev. Const. art. XV, § 16, Defendants provided
24 qualifying health insurance benefit plans, with appropriate coverage and at
25 appropriate premium cost, to the members of the Class;
- 26 iii. The applicable statute of limitations, if any, for Plaintiffs' and Class
27 members' claims;
- 28 iv. Whether Defendants are liable for pre-judgment interest; and
- v. Whether Defendants are liable for attorneys' fees and costs.

1 40. Typicality: Plaintiffs' claims are typical of those of the proposed Class, and the
2 relief sought is typical of the relief which would be sought by each member of the Class in
3 separate actions. Plaintiffs and all other proposed Class members sustained similar losses, injuries,
4 and damages as a direct and proximate result of Defendants' same unlawful policies and/or
5 practices. Plaintiffs' claims arise from Defendants' same unlawful policies, practices, and/or
6 course of conduct as all other proposed Class members' claims in that Plaintiffs were denied
7 lawful wages for hours worked, and Plaintiffs' legal theories are based on the same legal theories
8 as all other proposed Class members. Defendants' compensation and benefit policies and practices
9 affected all Class members similarly, and Defendants benefited from the same type of unfair
10 and/or wrongful acts done to each Class member.

11 41. Adequacy: Plaintiffs are adequate representatives of the proposed Class because
12 Plaintiffs are members of the proposed Class they seek to represent and their interests do not
13 conflict with the interests of the other members of the proposed Class that Plaintiffs seek to
14 represent. Plaintiffs have retained counsel that is competent and experienced in complex class
15 action litigation, and Plaintiffs intend to prosecute this action vigorously. The interests of members
16 of the proposed Class will be fairly and adequately protected by Plaintiffs and their counsel.
17 Neither Plaintiffs nor their counsel have interests that are contrary to, or conflicting with, the
18 interests of the proposed Class.

19 42. Superiority: A class action is superior to other available methods for the fair and
20 efficient adjudication of the controversy, because, inter alia, as minimum wage employees it is
21 economically infeasible for proposed Class members to prosecute individual actions of their own
22 given the relatively small amount of damages at stake for each individual. Important public
23 interests will be served by addressing the matter as a class action. The cost to the court system and
24 the public for the adjudication of individual litigation and claims would be substantial and
25 substantially more than if the claims are treated as a class action. Prosecution of separate actions
26 by individual Class members would create a risk of inconsistent and/or varying adjudications with
27 respect to the individual members of the Class, establishing incompatible standards of conduct for
28 Defendants and resulting in the impairment of Class members' rights and the disposition of their

1 interests through actions to which they were not parties. The issues in this action can be decided
2 by means of common, class-wide proof. In addition, if appropriate, the Court can and is
3 empowered to, fashion methods to efficiently manage this action as a class action.

4 43. The case will be manageable as a class action. Plaintiffs and their counsel know of
5 no unusual difficulties in the case, and Defendants have advanced networked computer, payroll,
6 and benefit systems that will allow the class, wage, benefits, and damages issues in the case to be
7 resolved with relative ease.

8 44. Because the elements of Rule 23(b)(3), or in the alternative Rule 23(c)(4), are
9 satisfied in the case, class certification is appropriate.

10 **FIRST CLAIM FOR RELIEF**

11 **Violation of Nev. Const. art. XV, § 16**

12 **Failure to Pay Lawful Minimum Wage**

13 **(On Behalf of Plaintiffs and the Class against Defendants)**

14 45. All preceding paragraphs in this Complaint are re-alleged and incorporated by
15 reference as though fully set forth herein.

16 46. As described and alleged herein, Defendants pay, and have paid, Plaintiffs and
17 members of the Class at a reduced minimum wage level pursuant to Nev. Const. art XV, § 16
18 without providing qualifying health insurance benefits as required by that provision.

19 47. Defendants are not, and/or were not, eligible to pay Plaintiffs and members of the
20 Class at a reduced minimum wage during any period where qualifying benefits were not provided
21 by Defendants.

22 48. Pursuant to Nev. Const. art XV, § 16, Defendants are liable to Plaintiffs and
23 members of the Class for their unpaid wages for any period during which Defendants were
24 ineligible to compensate Plaintiffs and members of the Class at a reduced minimum wage; an
25 award of damages; costs of the action; reasonable attorneys' fees; and any other relief deemed
26 appropriate by this Court.

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PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, on behalf of themselves and all other similarly-situated members of the Class, request that this Court enter an Order:

- A. Certifying this matter as a class action pursuant to N.R.C.P. 23, designating Plaintiffs as Class representatives, and appointing the undersigned as Class counsel;
 - B. Declaring the practices here complained of as unlawful under appropriate law;
 - C. Granting judgment to Plaintiffs and the members of the Class on their claims of unpaid wages as secured by law, as well as damages, interest, attorneys’ fees and costs as applicable and appropriate;
 - D. Granting punitive and exemplary damages against the Defendants pursuant to law;
- and
- E. Ordering such other relief as the Court may deem necessary and just.

JURY TRIAL DEMAND

Pursuant to Rule 38(b) of the Nevada Rules of Civil Procedure, Plaintiffs demand a trial by jury on all issues so triable.

DATED this 30th day of May, 2014.

**WOLF, RIFKIN, SHAPIRO,
SCHULMAN & RABKIN, LLP**

By: /s/ Don Springmeyer, Esq.
DON SPRINGMEYER, ESQ.
Nevada State Bar No. 1021
BRADLEY SCHRAGER, ESQ.
Nevada State Bar No. 10217
DANIEL BRAVO, ESQ.
Nevada State Bar No. 13078
3556 E. Russell Road, Second Floor
Las Vegas, Nevada 89120
Attorneys for Plaintiffs

EXHIBIT “1”

EXHIBIT “1”

Nev. Const. Art 15, 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

1 **IAFD**
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2 Nevada State Bar No. 1021
BRADLEY SCHRAGER, ESQ.
3 Nevada State Bar No. 10217
DANIEL BRAVO, ESQ.
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8 Email: dbravo@wrslawyers.com
Attorneys for Plaintiffs

10 **EIGHTH JUDICIAL DISTRICT COURT**
11 **IN AND FOR CLARK COUNTY, STATE OF NEVADA**

12 PAULETTE DIAZ, an individual; and
13 LAWANDA GAIL WILBANKS, an
individual, on behalf of themselves and all
14 similarly-situated individuals,

15 Plaintiffs,

16 vs.

17 MDC RESTAURANTS, LLC, a Nevada
limited liability company; LAGUNA
18 RESTAURANTS, LLC, a Nevada limited
liability company; INKA, LLC, a Nevada
19 limited liability company and DOES 1
20 through 100, Inclusive,

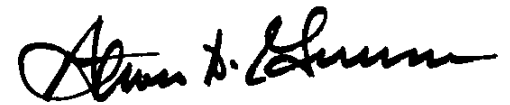
21 Defendants.

Case No: A-14-701633-C
Dept. No.: XV

**INITIAL APPEARANCE
FEE DISCLOSURE
(NRS CHAPTER 19)**

22 Pursuant to NRS Chapter 19, as amended by Senate Bill 106, filing fees are submitted for
23 parties appearing in the above entitled action as indicated below:

- 24 1. Plaintiff, PAULETTE DIAZ; \$270.00
25 ///
26 ///
27 ///
28 ///



CLERK OF THE COURT

1 **ACOM**
2 DON SPRINGMEYER, ESQ.
3 Nevada State Bar No. 1021
4 BRADLEY SCHRAGER, ESQ.
5 Nevada State Bar No. 10217
6 DANIEL BRAVO, ESQ.
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14 Email: bschrager@wrslawyers.com
15 Email: dbravo@wrslawyers.com
16 Attorneys for Plaintiffs

10 **EIGHTH JUDICIAL DISTRICT COURT**

11 **IN AND FOR CLARK COUNTY, STATE OF NEVADA**

12 PAULETTE DIAZ, an individual; and
13 LAWANDA GAIL WILBANKS, an
14 individual; SHANNON OLSZYNSKI, an
15 individual; CHARITY FITZLAFF, an
16 individual, on behalf of themselves and all
17 similarly-situated individuals,

16 Plaintiffs,

17 vs.

18 MDC RESTAURANTS, LLC, a Nevada
19 limited liability company; LAGUNA
20 RESTAURANTS, LLC, a Nevada limited
21 liability company; INKA, LLC, a Nevada
22 limited liability company and DOES 1
23 through 100, Inclusive,

22 Defendants.

Case No: A701633

Dept. No.: XV

**AMENDED CLASS ACTION
COMPLAINT**

24 The above-referenced Plaintiffs (herein "Plaintiffs") through undersigned counsel, on
25 behalf of themselves and all persons similarly situated, complain and allege as follows:

26 **INTRODUCTION**

27 1. This lawsuit is an individual and class action brought by Plaintiffs, on behalf of
28 themselves and all similarly-situated employees of MDC RESTAURANTS, LLC; LAGUNA

1 RESTAURANTS, LLC; and INKA, LLC (“MDC,” “Laguna,” “Inka,” and, collectively,
2 “Defendants”), owners and operators of Denny’s and CoCo’s restaurants (the “Restaurants”) in
3 Nevada.

4 2. This lawsuit is a result of the Defendants’ failure to pay Plaintiffs and other
5 similarly-situated employees who are members of the Class the lawful minimum wage, because
6 the Defendants have improperly claimed eligibility to compensate employees at a reduced
7 minimum wage rate under Nev. Const. art. XV, § 16.

8 3. At the 2006 General Election, Nevada voters approved, for the second time, a
9 constitutional amendment regarding the minimum wage to be paid to all Nevada employees.¹ The
10 amendment became effective in November, 2006, and was codified as new Article XV, § 16 of the
11 Nevada Constitution.

12 4. The 2006 amendment guaranteed to each Nevada employee, with very few
13 exceptions, a particular hourly wage: “Each employer shall pay a wage to each employee of not
14 less than the hourly rates set forth in this section. The rate shall be five dollars and fifteen cents
15 (\$5.15) per hour worked, if the employer provides health benefits as described herein, or six
16 dollars and fifteen cents (\$6.15) per hour if the employer does not provide such benefits.”

17 5. The amendment contained an index/increase mechanism, such that since 2010 the
18 Nevada minimum wage level is \$7.25 per hour if the employer provides qualifying health benefits,
19 or \$8.25 per hour if the employer does not provide such qualifying health benefits. Employers,
20 like Defendants, who claim eligibility to pay the reduced wage rate, therefore, can pay employees
21 up to 12.2% less than workers paid at the \$8.25 level.

22 6. The public policy underlying the minimum wage amendment was to benefit
23 Nevada’s minimum wage employees, and to incentivize employers to provide low-cost,
24 comprehensive health insurance benefits to the state’s lowest-paid workers.

25 7. The opportunity to compensate employees at a level beneath the standard minimum
26 wage rate is a privilege offered to employers by the voters of Nevada. Employers must qualify for

27
28 ¹ See Exhibit 1 here attached, a true and correct copy of the text of Nev. Const. art. XV, § 16.

1 that privilege by providing, offering, and maintaining health insurance plans for their employees
2 that meet very specific regulatory standards.

3 8. In order to qualify to pay employees at a reduced minimum wage rate, the health
4 insurance benefits plan provided, offered, and/or maintained must be truly comprehensive in its
5 coverage, and cover “those categories of health care expenses that are generally deductible by an
6 employee on his/her individual federal income tax return pursuant to 26 U.S.C. § 213 and any
7 federal regulations relating thereto, if such expenses had been borne directly by the employee.”
8 N.A.C. 608.102(1)(a).

9 9. Furthermore, the cost of health insurance benefit premiums for the employee, and
10 all his or her dependents, may not exceed “10 percent of the employee’s gross taxable income
11 from the employer.” Nev. Const. art. XV, § 16.

12 10. Failure to meet the specific requirements that establish a qualified health insurance
13 benefits plan means that the employer forfeits the right to pay employees at anything less than the
14 full minimum wage rate under Nev. Const. art. XV, § 16, currently \$8.25 per hour.

15 11. Defendants here pay Plaintiffs and members of the Class at an hourly rate below
16 \$8.25 per hour.

17 12. Defendants do not provide, offer, and/or maintain qualifying health insurance plan
18 benefits for the benefit of Plaintiffs and members of the Class. In the case of named Plaintiffs,
19 Defendants have failed to offer any health benefit plans at all, and therefore can claim no basis for
20 paying Plaintiffs less than \$8.25 per hour at any time.

21 13. Defendants are not, and have not been, eligible to pay Plaintiffs and members of
22 the Class at the reduced minimum wage rate. They have forfeited the privilege extended to it
23 under Article XV, § 16. Instead, they now owe back pay and damages to all employees they have
24 unlawfully underpaid since passage of the minimum wage amendment in 2006.

25 **PARTIES**

26 **A. Plaintiffs**

27 14. Plaintiff Paulette Diaz is a resident of Oregon, and worked as a server at numerous
28 Denny’s and CoCo’s restaurants owned and operated by Defendants in Clark County, Nevada

1 between April 2010 and September 2013. Her wage was \$7.25 per hour. She has two dependents.

2 15. Plaintiff Lawanda Gail Wilbanks is a resident of Nevada, and worked as a server at
3 a Denny's restaurant owned and operated by Defendants in Clark County, Nevada between June
4 2011 and January 2013. Her wage was \$7.25 per hour. She has one dependent.

5 16. Plaintiff Shannon Olszynski is a resident of Nevada, and works as a server at a
6 Denny's restaurant owned and operated by Defendants in Elko County, Nevada beginning in May
7 of 2014 to the present. Her wage is \$7.25 per hour.

8 17. Plaintiff Charity Fitzlaff is a resident of Nevada, and worked as a server at a
9 Denny's restaurant owned and operated by Defendants in Elko County, Nevada between June
10 2012 and October 2013. Her wage was \$7.25 per hour. She has three dependents.

11 **B. Defendants**

12 18. Plaintiffs are informed and believe and thereon allege that at all times material
13 hereto Defendant MDC RESTAURANTS, LLC, was and is a Nevada limited liability company,
14 and it and any subsidiaries or affiliated companies were and are engaged in the ownership and
15 operation of franchise and non-franchise restaurants located in Clark County and throughout
16 Nevada. Upon information and belief, this Defendant owns and operates approximately thirteen
17 Denny's restaurants in Clark County and elsewhere in Nevada, employed Plaintiffs and/or
18 employed and employs Class members, and is conducting business in good standing in the State of
19 Nevada. Its sole listed officer is manager Vince Eupierre.

20 19. Plaintiffs are informed and believe and thereon allege that at all times material
21 hereto Defendant LAGUNA RESTAURANTS, LLC, was and is a Nevada limited liability
22 company, and it and any subsidiaries or affiliated companies were and are engaged in the
23 ownership and operation of franchise and non-franchise restaurants located in Clark County and
24 throughout Nevada. Upon information and belief, this Defendant owns and operates
25 approximately four Denny's and CoCo's restaurants in Clark County and elsewhere in Nevada,
26 employed Plaintiffs and/or employed and employs Class members, and is conducting business in
27 good standing in the State of Nevada. Its sole listed officer is manager Vince Eupierre.

28 20. Plaintiffs are informed and believe and thereon allege that at all times material

1 hereto Defendant INKA, LLC, was and is a Nevada limited liability company, and it and any
2 subsidiaries or affiliated companies were and are engaged in the ownership and operation of
3 franchise and non-franchise restaurants located in Clark County and throughout Nevada. Upon
4 information and belief, this Defendant owns and operates approximately three Denny's restaurants
5 in Clark County and elsewhere in Nevada, employed Plaintiffs and/or employed and employs
6 Class members, and is conducting business in good standing in the State of Nevada. Its two listed
7 officers are managers Vince Eupierre and Joseph Soraci.

8 21. Plaintiffs sue fictitious Defendants DOES 1 through 100, inclusive, as Plaintiffs do
9 not know their true names and/or capacities, and upon ascertainment, will amend the Complaint
10 with their true names and capacities. Plaintiffs are informed and believe and on that basis allege
11 that each of said fictitiously named Defendants is responsible in some manner for the occurrences
12 herein alleged, and that Plaintiffs' damages were proximately caused by their conduct mentioned
13 herein, each of the Defendants, including DOES 1 through 100, was an agent, joint-venturer,
14 representative, alter ego, and/or employee of the other defendants, and was acting both
15 individually and in the course and scope of said relationship at the time of the events herein
16 alleged, and all aided and abetted the wrongful acts of the others.

17 **JURISDICTION AND VENUE**

18 22. This Court has subject matter jurisdiction over this action pursuant to Nev. Const,
19 art. XV, § 16(B).

20 23. Venue is proper because acts giving rise to the claims of the Plaintiffs herein
21 occurred within this judicial district, and all Defendants regularly conduct business in and have
22 engaged and continue to engage in the wrongful conduct alleged herein—and, thus, are subject to
23 personal jurisdiction—in this judicial district.

24 **GENERAL ALLEGATIONS**

25 **A. Plaintiffs' Allegations**

26 24. Plaintiff Diaz worked as a server at Denny's and CoCo's restaurants owned and
27 operated by Defendants in Clark County, Nevada, where she earned \$7.25 per hour, below the
28 constitutional minimum wage under Nev. Const. art XV, § 16 of \$8.25 per hour.

1 25. Ms. Diaz was never offered a company health insurance plan at all, much less a
2 plan that would qualify Defendants for the constitutional privilege of paying less than the full
3 hourly minimum hourly wage rate per Nev. Const. art. XV, § 16.

4 26. Defendants, therefore, were unlawfully paying Ms. Diaz a sub-minimum wage for
5 the entirety of her employment.

6 27. Plaintiff Wilbanks worked as a server at a Denny's restaurant owned and operated
7 by Defendants in Clark County, Nevada, where she earned \$7.25 per hour, below the
8 constitutional minimum wage under Nev. Const. art XV, § 16 of \$8.25 per hour.

9 28. Ms. Wilbanks was never offered a company health insurance plan at all, much less
10 a plan that would qualify Defendants for the constitutional privilege of paying less than the full
11 hourly minimum hourly wage rate per Nev. Const. art. XV, § 16.

12 29. Defendants, therefore, were unlawfully paying Ms. Wilbanks a sub-minimum wage
13 for the entirety of her employment.

14 30. Plaintiff Olszynski works as a server at a Denny's restaurant owned and operated
15 by Defendants in Elko County, Nevada, where she earns \$7.25 per hour, below the constitutional
16 minimum wage under Nev. Const. art XV, § 16 of \$8.25 per hour.

17 31. Ms. Olszynski was offered a purported company health insurance plan (the "Plan").
18 The Plan offered to Ms. Olszynski (which, upon information and belief, is the plan offered by
19 Defendants to employees in their Nevada locations) is not, and was not, in compliance with Nev.
20 Const. art XV, § 16 or N.A.C. 608.102, as it did not cover those categories of health care expenses
21 that are generally deductible by an employee on his/her individual federal income tax return
22 pursuant to 26 U.S.C. § 213 and any federal regulations relating thereto, if such expenses had been
23 borne directly by the employee.

24 32. Defendants, therefore, have been unlawfully paying Ms. Olszynski a sub-minimum
25 wage for the entirety of her employment.

26 33. Plaintiff Fitzlaff worked as a server at a Denny's restaurant owned and operated by
27 Defendants in Elko County, Nevada, where she earned \$7.25 per hour, below the constitutional
28 minimum wage under Nev. Const. art XV, § 16 of \$8.25 per hour.

1 34. Ms. Fitzlaff was offered a purported company health insurance plan, he Plan. The
2 Plan offered to Ms. Fitzlaff is not, and was not, in compliance with Nev. Const. art XV, § 16 or
3 N.A.C. 608.102, as it did not cover those categories of health care expenses that are generally
4 deductible by an employee on his/her individual federal income tax return pursuant to 26 U.S.C. §
5 213 and any federal regulations relating thereto, if such expenses had been borne directly by the
6 employee.

7 35. Defendants, therefore, unlawfully paid Ms. Fitzlaff a sub-minimum wage for the
8 entirety of her employment.

9 **B. Defendants' Control of the Restaurants**

10 36. Defendants maintain control, oversight, and direction over the operation of the
11 Restaurants, including their employment and/or labor practices.

12 37. Defendants (i) create uniform wage and benefit policies and practices for use at the
13 Restaurants, (ii) impose uniform wage and benefit policies and practices at the Restaurants, and
14 (iii) maintain centralized human resource functions which implement wage and benefit policies
15 and practices at the Restaurants.

16 38. Defendants have common ownership and management and, upon information and
17 belief, formulate and execute uniform human resource and benefit policies affecting Plaintiffs and
18 members of the Class.

19 **C. Defendants' Unlawful Minimum Wage Practices**

20 39. Defendants paid Plaintiffs and members of the Class for many years at a reduced
21 minimum wage rate pursuant to Nev. Const. art. XV, § 16.

22 40. Defendants do not provide, offer, and/or maintain health insurance plan benefits
23 that meet necessary requirements in order to qualify to pay Plaintiffs and members of the Class at
24 the reduced minimum wage level.

25 41. Defendants, therefore, have been unlawfully paying all Class members a sub-
26 minimum wage during employment at the Restaurants.

27 42. Defendants are aware of, and perpetuate, this ongoing violation of Nevada's
28 constitutional provision regarding minimum wage, and associated regulatory provisions

1 implementing same.

2 43. As a result, pursuant to Nev. Const. art. XV, § 16, Plaintiffs and the members of the
3 Class are owed back pay and damages for every hour worked during the applicable period.

4 **CLASS ACTION ALLEGATIONS**

5 44. Plaintiffs re-allege and incorporate herein by this reference all the paragraphs above
6 in this Complaint as though fully set forth herein.

7 45. Plaintiffs bring this action pursuant to N.R.C.P. 23 on behalf of themselves and all
8 others similarly situated, as representative members of the following proposed Class:

9 **All current and former employees of Defendants at all Nevada**
10 **Restaurant locations at any time during the applicable statutes**
11 **of limitation who were compensated at less than the upper-tier**
12 **hourly minimum wage set forth in Nev. Const. art XV, § 16.**

13 46. Numerosity: The members of the proposed Class are so numerous that individual
14 joinder of all members is impracticable under the circumstances of this case, and the disposition of
15 their claims as a Class will benefit the parties and the Court. The precise number of members
16 should be readily available from a review of Defendants' personnel, payroll, and benefits records,
17 and upon information and belief numbers in the thousands.

18 47. Commonality/Predominance: Common questions of law or fact are shared by the
19 members of the proposed Class. This action is suitable for class treatment because these common
20 questions of fact and law predominate over any questions affecting individual members. These
21 common legal and factual questions, include, but are not limited to, the following:

- 22 i. Whether Defendants paid Class members the required minimum wage
23 pursuant to the Nevada Constitution;
- 24 ii. Whether, when paying minimum wage employees the reduced minimum
25 wage level pursuant to Nev. Const. art. XV, § 16, Defendants provided
26 qualifying health insurance benefit plans, with appropriate coverage and at
27 appropriate premium cost, to the members of the Class;
- 28 iii. The applicable statute of limitations, if any, for Plaintiffs' and Class
members' claims;

1 iv. Whether Defendants are liable for pre-judgment interest; and

2 v. Whether Defendants are liable for attorneys' fees and costs.

3 48. Typicality: Plaintiffs' claims are typical of those of the proposed Class, and the
4 relief sought is typical of the relief which would be sought by each member of the Class in
5 separate actions. Plaintiffs and all other proposed Class members sustained similar losses, injuries,
6 and damages as a direct and proximate result of Defendants' same unlawful policies and/or
7 practices. Plaintiffs' claims arise from Defendants' same unlawful policies, practices, and/or
8 course of conduct as all other proposed Class members' claims in that Plaintiffs were denied
9 lawful wages for hours worked, and Plaintiffs' legal theories are based on the same legal theories
10 as all other proposed Class members. Defendants' compensation and benefit policies and practices
11 affected all Class members similarly, and Defendants benefited from the same type of unfair
12 and/or wrongful acts done to each Class member.

13 49. Adequacy: Plaintiffs are adequate representatives of the proposed Class because
14 Plaintiffs are members of the proposed Class they seek to represent and their interests do not
15 conflict with the interests of the other members of the proposed Class that Plaintiffs seek to
16 represent. Plaintiffs have retained counsel that is competent and experienced in complex class
17 action litigation, and Plaintiffs intend to prosecute this action vigorously. The interests of members
18 of the proposed Class will be fairly and adequately protected by Plaintiffs and their counsel.
19 Neither Plaintiffs nor their counsel have interests that are contrary to, or conflicting with, the
20 interests of the proposed Class.

21 50. Superiority: A class action is superior to other available methods for the fair and
22 efficient adjudication of the controversy, because, inter alia, as minimum wage employees it is
23 economically infeasible for proposed Class members to prosecute individual actions of their own
24 given the relatively small amount of damages at stake for each individual. Important public
25 interests will be served by addressing the matter as a class action. The cost to the court system and
26 the public for the adjudication of individual litigation and claims would be substantial and
27 substantially more than if the claims are treated as a class action. Prosecution of separate actions
28 by individual Class members would create a risk of inconsistent and/or varying adjudications with

1 respect to the individual members of the Class, establishing incompatible standards of conduct for
2 Defendants and resulting in the impairment of Class members' rights and the disposition of their
3 interests through actions to which they were not parties. The issues in this action can be decided
4 by means of common, class-wide proof. In addition, if appropriate, the Court can and is
5 empowered to, fashion methods to efficiently manage this action as a class action.

6 51. The case will be manageable as a class action. Plaintiffs and their counsel know of
7 no unusual difficulties in the case, and Defendants have advanced networked computer, payroll,
8 and benefit systems that will allow the class, wage, benefits, and damages issues in the case to be
9 resolved with relative ease.

10 52. Because the elements of Rule 23(b)(3), or in the alternative Rule 23(c)(4), are
11 satisfied in the case, class certification is appropriate.

12 **FIRST CLAIM FOR RELIEF**

13 **Violation of Nev. Const. art. XV, § 16**

14 **Failure to Pay Lawful Minimum Wage**

15 **(On Behalf of Plaintiffs and the Class against Defendants)**

16 53. All preceding paragraphs in this Complaint are re-alleged and incorporated by
17 reference as though fully set forth herein.

18 54. As described and alleged herein, Defendants pay, and have paid, Plaintiffs and
19 members of the Class at a reduced minimum wage level pursuant to Nev. Const. art XV, § 16
20 without providing qualifying health insurance benefits as required by that provision.

21 55. Defendants are not, and/or were not, eligible to pay Plaintiffs and members of the
22 Class at a reduced minimum wage during any period where qualifying benefits were not provided
23 by Defendants.

24 56. Pursuant to Nev. Const. art XV, § 16, Defendants are liable to Plaintiffs and
25 members of the Class for their unpaid wages for any period during which Defendants were
26 ineligible to compensate Plaintiffs and members of the Class at a reduced minimum wage; an
27 award of damages; costs of the action; reasonable attorneys' fees; and any other relief deemed
28 appropriate by this Court.

1 **SECOND CLAIM FOR RELIEF**

2 **Violation of Nev. Const. art. XV, § 16 and N.A.C. 608.102**

3 **Failure to Pay Lawful Minimum Wage**

4 **(On Behalf of Plaintiffs and the Class against Defendants)**

5 57. All preceding paragraphs in this Complaint are re-alleged and incorporated by
6 reference as though fully set forth herein.

7 58. As described and alleged herein, the Restaurants pay, and have paid, Plaintiff and
8 members of the Class at a reduced minimum wage level pursuant to Nev. Const. art XV, § 16
9 without providing qualifying health insurance benefits as required by that provision.

10 59. Health insurance benefits provided and/or offered to Plaintiff and members of the
11 Class and their dependents did not meet coverage requirements under Nev. Const. art XV, § 16
12 and N.A.C. 608.102, and therefore the Restaurants are not, and/or were not, eligible to pay
13 Plaintiff and members of the Class at the reduced minimum wage tier during any period where
14 such qualifying benefits were not provided, offered, and/or maintained by the Restaurants.
15 Pursuant to Nev. Const. art XV, § 16, the Restaurants are liable to Plaintiff and members of the
16 Class for their unpaid wages for any period during which the Restaurants were ineligible to
17 compensate Plaintiff and members of the Class at the reduced minimum wage tier; an award of
18 damages; costs of the action; reasonable attorneys' fees; and any other relief deemed appropriate
19 by this Court.

20 **PRAYER FOR RELIEF**

21 **WHEREFORE**, Plaintiffs, on behalf of themselves and all other similarly-situated
22 members of the Class, request that this Court enter an Order:

- 23 A. Certifying this matter as a class action pursuant to N.R.C.P. 23, designating
24 Plaintiffs as Class representatives, and appointing the undersigned as Class counsel;
- 25 B. Declaring the practices here complained of as unlawful under appropriate law;
- 26 C. Granting judgment to Plaintiffs and the members of the Class on their claims of
27 unpaid wages as secured by law, as well as damages, interest, attorneys' fees and
28 costs as applicable and appropriate;

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- D. Granting punitive and exemplary damages against the Defendants pursuant to law;
and
- E. Ordering such other relief as the Court may deem necessary and just.

JURY TRIAL DEMAND

Pursuant to Rule 38(b) of the Nevada Rules of Civil Procedure, Plaintiffs demand a trial by jury on all issues so triable.

DATED this 5th day of June, 2014.

**WOLF, RIFKIN, SHAPIRO,
SCHULMAN & RABKIN, LLP**

By: /s/ Don Springmeyer, Esq.
DON SPRINGMEYER, ESQ.
Nevada State Bar No. 1021
BRADLEY SCHRAGER, ESQ.
Nevada State Bar No. 10217
DANIEL BRAVO, ESQ.
Nevada State Bar No. 13078
3556 E. Russell Road, Second Floor
Las Vegas, Nevada 89120
Attorneys for Plaintiffs

EXHIBIT “1”

EXHIBIT “1”

Nev. Const. Art 15, Sec. 16.

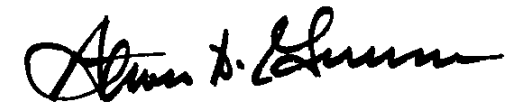
Payment of minimum compensation to employees.

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



CLERK OF THE COURT

RICK D. ROSKELLEY, ESQ., Bar # 3192
ROGER L. GRANDGENETT II, ESQ., Bar # 6323
KATIE BLAKEY, ESQ., Bar # 12701
LITTLER MENDELSON, P.C.
3960 Howard Hughes Parkway
Suite 300
Las Vegas, NV 89169-5937
Telephone: 702.862.8800
Fax No.: 702.862.8811

Attorneys for Defendants

IN THE DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK

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

Plaintiffs,

vs.

MDC RESTAURANTS, LLC, a Nevada
limited liability company; LAGUNA
RESTAURANTS, LLC, a Nevada limited
liability company; INKA, LLC, a Nevada
limited liability company and DOES 1
through 100, Inclusive,

Defendants.

Case No. A701633

**ANSWER TO AMENDED CLASS ACTION
COMPLAINT**

Defendants MDC RESTAURANTS, LLC, LAGUNA RESTAURANTS, LLC, AND INKA,
LLC (collectively "Defendants"), by and through their counsel of record Littler Mendelson, P.C.,
hereby answer Plaintiffs' Amended Class Action Complaint as follows:

INTRODUCTION

1. Answering paragraph 1 of the Amended Complaint, Defendants respond that the
allegations of this paragraph do not allege any act or omission by Defendants and do not require a
response. To the extent that a response is required, Defendants lack knowledge or information

1 sufficient to form a belief about the truth of said allegation, which statement has the effect of a
2 denial.

3 2. Defendants deny the allegations set forth in Paragraph 2 of the Amended Complaint.

4 3. Answering paragraph 3 of the Amended Complaint, Defendants respond that the
5 allegations of this paragraph do not allege any act or omission by Defendants and do not require a
6 response. To the extent that a response is required, Defendants lack knowledge or information
7 sufficient to form a belief about the truth of said allegation, which statement has the effect of a
8 denial.

9 4. Answering paragraph 4 of the Amended Complaint, Defendants respond that the
10 allegations of this paragraph do not allege any act or omission by Defendants and do not require a
11 response. To the extent that a response is required, Defendants lack knowledge or information
12 sufficient to form a belief about the truth of said allegation, which statement has the effect of a
13 denial.

14 5. Answering paragraph 5 of the Amended Complaint, Defendants respond that the
15 allegations of this paragraph do not allege any act or omission by Defendants and do not require a
16 response. To the extent that a response is required, Defendants lack knowledge or information
17 sufficient to form a belief about the truth of said allegation, which statement has the effect of a
18 denial.

19 6. Answering paragraph 6 of the Amended Complaint, Defendants respond that the
20 allegations of this paragraph do not allege any act or omission by Defendants and do not require a
21 response. To the extent that a response is required, Defendants deny the allegations set forth in
22 paragraph 6 of the Amended Complaint.

23 7. Answering paragraph 7 of the Amended Complaint, Defendants respond that the
24 allegations of this paragraph do not allege any act or omission by Defendants and do not require a
25 response. To the extent that a response is required, Defendants deny the allegations set forth in
26 paragraph 7 of the Amended Complaint.

27 8. Answering paragraph 8 of the Amended Complaint, Defendants respond that the
28 allegations of this paragraph do not allege any act or omission by Defendants and do not require a

1 response. To the extent that a response is required, Defendants deny the allegations set forth in
2 paragraph 8 of the Amended Complaint.

3 9. Answering paragraph 9 of the Amended Complaint, Defendants respond that the
4 allegations of this paragraph do not allege any act or omission by Defendants and do not require a
5 response. To the extent that a response is required, Defendants lack knowledge or information
6 sufficient to form a belief about the truth of said allegation, which statement has the effect of a
7 denial.

8 10. Answering paragraph 10 of the Amended Complaint, Defendants respond that the
9 allegations of this paragraph do not allege any act or omission by Defendants and do not require a
10 response. To the extent that a response is required, Defendants deny the allegations set forth in
11 paragraph 10 of the Amended Complaint.

12 11. Answering paragraph 11 of the Amended Complaint, Defendants admit that some
13 employees are paid an hourly rate less than \$8.25 per hour. Defendants lack knowledge or
14 information sufficient to form a belief about the truth of the remaining allegations of paragraph 11 of
15 the Amended Complaint, which has the effect of a denial.

16 12. Defendants deny the allegations set forth in paragraph 12 of the Amended Complaint.

17 13. Defendants deny the allegations set forth in paragraph 13 of the Amended Complaint.

18 **PARTIES**

19 **A. Plaintiffs**

20 14. Answering paragraph 14 of the Amended Complaint, Defendants admit that Plaintiff
21 Paulette Diaz worked at numerous Denny's restaurants owned and operated by Defendant MDC
22 Restaurants in Clark County, Nevada, between April 2010 and September 2013 and that she was
23 paid \$7.25 per hour. Defendants deny that Plaintiff Diaz worked for Defendants INKA or Laguna
24 Restaurants. Defendants lack knowledge or information sufficient to form a belief about the truth of
25 the remaining allegations of paragraph 14 of the Amended Complaint, which has the effect of a
26 denial.

27 15. Answering paragraph 15 of the Amended Complaint, Defendants admit that Plaintiff
28 Lawanda Gail Wilbanks worked at a Denny's restaurant owned and operated by Defendant MDC

1 Restaurants in Clark County, Nevada, between June 2011 and January 2013 and that she was paid
2 \$7.25 per hour. Defendants deny that Plaintiff Wilbanks worked for Defendants INKA or Laguna
3 Restaurants. Defendants lack knowledge or information sufficient to form a belief about the truth of
4 the remaining allegations of paragraph 15 of the Amended Complaint, which has the effect of a
5 denial.

6 16. Answering paragraph 16 of the Amended Complaint, Defendants admit that Plaintiff
7 Shannon Olszynski has worked at a Denny's restaurant owned and operated by Defendant INKA in
8 Elko County, Nevada, since May 2014 and that she is paid \$7.25 per hour. Defendants deny that
9 Plaintiff Olszynski worked for Defendants MDC Restaurants or Laguna Restaurants. Defendants
10 lack knowledge or information sufficient to form a belief about the truth of the remaining allegations
11 of paragraph 16 of the Amended Complaint, which has the effect of a denial.

12 17. Answering paragraph 17 of the Amended Complaint, Defendants admit that Plaintiff
13 Charity Fitzlaff worked at a Denny's restaurant owned and operated by Defendant INKA in Elko
14 County, Nevada, and that she was paid \$7.25 per hour. Defendants deny that Plaintiff Fitzlaff
15 worked for Defendants MDC Restaurants or Laguna Restaurants. Defendants deny that Plaintiff
16 Fitzlaff worked between June 2012 and October 2013. Defendants lack knowledge or information
17 sufficient to form a belief about the truth of the remaining allegations of paragraph 17 of the
18 Amended Complaint, which has the effect of a denial.

19 **B. Defendants**

20 18. Answering paragraph 18 of the Amended Complaint, Defendants deny that MDC
21 Restaurants, LLC, is engaged in the ownership and operation of non-franchise restaurants, that it
22 owns and operates approximately thirteen Denny's restaurants, that it owns and operates restaurants
23 throughout Nevada, and that it employed Plaintiffs. Defendants admit the remaining allegations in
24 paragraph 18 of the Amended Complaint.

25 19. Answering paragraph 19 of the Amended Complaint, Defendants admit that Laguna
26 Restaurants, LLC, was a Nevada limited liability company that was engaged in the ownership and
27 operation of franchise restaurants in Clark County. Defendants deny the remaining allegations in
28 paragraph 19 of the Amended Complaint.

1 20. Answering paragraph 20 of the Amended Complaint, Defendants deny that INKA,
2 LLC, is engaged in the ownership and operation of non-franchise restaurants, that it owns and
3 operates approximately three Denny's restaurants, and that it employs Plaintiffs. Defendants admit
4 the remaining allegations in paragraph 20 of the Amended Complaint.

5 21. Answering paragraph 21 of the Amended Complaint, Defendants respond that the
6 allegations of this paragraph do not allege any act or omission by Defendants and do not require a
7 response. To the extent that a response is required, Defendants deny the allegations set forth in
8 paragraph 21 of the Amended Complaint.

9 **JURISDICTION AND VENUE**

10 22. Answering paragraph 22 of the Amended Complaint, Defendants respond that the
11 allegations of this paragraph do not allege any act or omission by Defendants and do not require a
12 response. To the extent that a response is required, Defendants deny the allegations set forth in
13 paragraph 22 of the Amended Complaint.

14 23. Answering paragraph 23 of the Amended Complaint, Defendants respond that the
15 allegations of this paragraph do not allege any act or omission by Defendants and do not require a
16 response. To the extent that a response is required, Defendants deny the allegations set forth in
17 paragraph 23 of the Amended Complaint.

18 **GENERAL ALLEGATIONS**

19 24. Answering paragraph 24 of the Amended Complaint, Defendants admit that Plaintiff
20 Diaz worked at Denny's restaurants owned and operated by Defendant MDC Restaurants in Clark
21 County, Nevada, and that she was paid \$7.25 per hour. Defendants deny the remaining allegations of
22 paragraph 24 of the Amended Complaint.

23 25. Defendants deny the allegations set forth in paragraph 25 of the Amended Complaint.

24 26. Defendants deny the allegations set forth in paragraph 26 of the Amended Complaint.

25 27. Answering paragraph 27 of the Amended Complaint, Defendants admit that Plaintiff
26 Wilbanks worked at a Denny's owned and operated by Defendant MDC Restaurants in Clark
27 County, Nevada, and that she was paid \$7.25 per hour. Defendants deny the remaining allegations of
28 paragraph 27 of the Amended Complaint.

1 28. Defendants deny the allegations set forth in paragraph 28 of the Amended Complaint.

29. Defendants deny the allegations set forth in paragraph 29 of the Amended Complaint.

3 30. Answering paragraph 30 of the Amended Complaint, Defendants admit that Plaintiff
4 Olszynski works at a Denny's owned and operated by Defendant INKA in Elko County, Nevada,
5 and that she is paid \$7.25 per hour. Defendants deny the remaining allegations of paragraph 30 of
6 the Amended Complaint.

31. Answering paragraph 31 of the Amended Complaint, Defendants admit that Plaintiff Olszynski was offered the company health insurance plan. Defendants deny the remaining allegations of paragraph 31 of the Amended Complaint.

10 32. Defendants deny the allegations set forth in paragraph 32 of the Amended Complaint.

11 33. Answering paragraph 33 of the Amended Complaint, Defendants admit that Plaintiff
12 Fitzlaff worked at a Denny's owned and operated by Defendant INKA in Elko County, Nevada, and
13 that she was paid \$7.25 per hour. Defendants deny the remaining allegations of paragraph 33 of the
14 Amended Complaint.

15 34. Answering paragraph 34 of the Amended Complaint, Defendants admit that Plaintiff
16 Fitzlaff was offered the company health insurance plan. Defendants deny the remaining allegations
17 of paragraph 34 of the Amended Complaint.

18 35. Defendants deny the allegations set forth in paragraph 35 of the Amended Complaint.

19 36. Defendants deny the allegations set forth in paragraph 36 of the Amended Complaint.

20 37. Defendants deny the allegations set forth in paragraph 37 of the Amended Complaint.

21 38. Defendants deny the allegations set forth in paragraph 38 of the Amended Complaint.

22 39. Defendants deny the allegations set forth in paragraph 39 of the Amended Complaint.

23 40. Defendants deny the allegations set forth in paragraph 40 of the Amended Complaint.

24 41. Defendants deny the allegations set forth in paragraph 41 of the Amended Complaint.

25 42. Defendants deny the allegations set forth in paragraph 42 of the Amended Complaint.

26 43. Defendants deny the allegations set forth in paragraph 43 of the Amended Complaint.

27 CLASS ACTION ALLEGATIONS

28 44. Defendants repeat and re-allege by reference each and every response, denial and

admission contained in Paragraphs 1 through 43, and incorporate the same as though fully set forth herein.

45. Answering paragraph 45 of the Amended Complaint, Defendants respond that the allegations of this paragraph do not allege any act or omission by Defendants and do not require a response. To the extent that a response is required, Defendants deny the allegations set forth in paragraph 45 of the Amended Complaint.

46. Defendants deny the allegations set forth in paragraph 46 of the Amended Complaint.

47. Defendants deny the allegations set forth in paragraph 47 and all subparts thereto of the Amended Complaint.

48. Defendants deny the allegations set forth in paragraph 48 of the Amended Complaint.

49. Defendants deny the allegations set forth in paragraph 49 of the Amended Complaint.

50. Defendants deny the allegations set forth in paragraph 50 of the Amended Complaint.

51. Defendants deny the allegations set forth in paragraph 51 of the Amended Complaint.

52. Defendants deny the allegations set forth in paragraph 52 of the Amended Complaint.

FIRST CLAIM FOR RELIEF

(Violation of Nev. Const. art. XV, § 17 Failure to Pay Lawful Minimum Wage)

53. Defendants repeat and re-allege by reference each and every response, denial and admission contained in Paragraphs 1 through 52, and incorporate the same as though fully set forth herein.

54. Defendants deny the allegations set forth in paragraph 54 of the Amended Complaint.

55. Defendants deny the allegations set forth in paragraph 55 of the Amended Complaint.

56. Defendants deny the allegations set forth in paragraph 56 of the Amended Complaint.

SECOND CLAIM FOR RELIEF

(Violation of Nev. Const. art XV, § 16 and N.A.C. 608.102 Failure to Pay Lawful Minimum Wage)

57. Defendants repeat and re-allege by reference each and every response, denial and admission contained in Paragraphs 1 through 56, and incorporate the same as tough fully set forth herein.

1 58. Defendants deny the allegations set forth in paragraph 58 of the Amended Complaint.

2 59. Defendants deny the allegations set forth in paragraph 59 of the Amended Complaint.

3 **PLAINTIFFS' PRAYER FOR RELIEF**

4 Defendants are not required to respond to Plaintiffs' prayer for relief. However, to the extent
5 Plaintiffs' prayer asserts allegations, Defendants deny the allegations in Plaintiff's prayer.

6 **AFFIRMATIVE DEFENSES**

7 1. For and as a first, separate defense to the Amended Complaint, Defendants allege that
8 the Amended Complaint fails to state a claim upon which relief may be granted.

9 2. For and as a second, separate defense to the Amended Complaint, Defendants allege
10 that some or all of the claims asserted in the Amended Complaint are barred by the equitable
11 doctrines of laches, waiver, estoppel, release and/or unclean hands.

12 3. For and as a third, separate defense to the Amended Complaint, Defendants allege
13 that some or all of the claims asserted in the Amended Complaint, and each purported claim
14 contained therein, is barred by the applicable statute of limitations.

15 4. For and as a fourth, separate defense to the Amended Complaint, Defendants allege
16 that the Amended Complaint is barred to the extent Plaintiffs or any member of the alleged class
17 which Plaintiffs purports to represent, the existence of which is expressly denied, have executed a
18 compromise and release of any claims asserted in this lawsuit.

19 5. For and as a fifth, separate defense to the Amended Complaint, Defendants allege that
20 Plaintiffs' Amended Complaint and each cause of action asserted therein, are subject to the doctrine
21 of accord and satisfaction and therefore, any remedy or recovery to which Plaintiffs might have been
22 entitled must be denied or reduced accordingly.

23 6. For and as a sixth, separate defense to the Amended Complaint, Defendants allege
24 that Plaintiffs have already been fully compensated for all hours worked.

25 7. For and as a seventh, separate defense to the Amended Complaint, Defendants allege
26 that with respect to some or all of the claims brought by Plaintiffs that any act(s) and/or omissions
27 which may be found to be in violation of state law, occurred in good faith in conformity with and in
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1 reliance on a written administrative regulation, order, ruling, approval and/or interpretation Nevada
2 Labor Commission, with respect to the class of employers to which Defendants belong.

3 8. For and as a eighth, separate defense to the Amended Complaint, Defendants allege
4 that Plaintiffs have failed to timely make demand in writing for wages due and payable.

5 9. For and as a ninth, separate defense to the Amended Complaint, Defendants allege
6 that the Amended Complaint is barred to the extent that Plaintiffs lacks standing to raise some or all
7 of the claims of the alleged class of persons whom Plaintiffs purport to represent, the existence of
8 which is expressly denied.

9 10. For and as a tenth, separate defense to the Amended Complaint, Defendants allege
10 that the class of persons that Plaintiffs purport to represent, the existence of which is expressly
11 denied, is not so numerous that joinder is impracticable.

12 11. For and as an eleventh, separate defense to the Amended Complaint, Defendants
13 allege that the Amended Complaint is barred to the extent that the claims alleged by Plaintiffs are
14 neither common to nor typical of those, if any, of the alleged class of persons whom they purport to
15 represent, the existence of which is expressly denied.

16 12. For and as a twelfth, separate defense to the Amended Complaint, Defendants allege
17 that the Amended Complaint is barred to the extent that Plaintiffs are inadequate representatives of
18 the alleged class of persons whom they purport to represent, the existence of which is expressly
19 denied.

20 13. For and as a thirteenth, separate defense to the Amended Complaint, Defendants
21 allege that the types of claims alleged by Plaintiffs on behalf of themselves and the class of persons
22 whom Plaintiffs purport to represent, the existence of which is expressly denied, are matters in
23 which individual questions predominate and not appropriate for class treatment.

24 14. For and as a fourteenth, separate defense to the Amended Complaint, Defendants
25 allege that because liability may not be determined by a single jury on a class wide basis, allowing
26 this action to proceed as a collective action would violate Defendants' rights under the Seventh
27 Amendment.

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15. For and as a fifteenth, separate defense to the Amended Complaint, Defendants allege that Plaintiffs have failed to exhaust their administrative, statutory, and/or contractual remedies.

16. For and as a sixteenth, separate defense to the Amended Complaint, Defendants allege that Defendants acted in a good faith belief that they were in compliance with all applicable statutes, law, and regulations concerning payment of wages and any other compensation owed to Plaintiffs.

17. For and as a seventeenth, separate defense to the Amended Complaint, Defendants allege that at no time did Defendants pay Plaintiffs in a manner known or believed to violate any applicable minimum wage laws, nor did Defendants compensate Plaintiffs in willful disregard of any applicable minimum wage laws.

Because the Amended Complaint is couched in conclusory and vague terms, Defendants cannot fully anticipate all affirmative defenses that may be applicable to this case. Accordingly, Defendants hereby reserve the right to assert additional affirmative defenses.

WHEREFORE, Defendants pray as follows:

1. For judgment decreeing that the Plaintiffs are entitled to recover nothing by way of their Complaint and that the Complaint be dismissed with prejudice;

2. For an award of attorneys' fees and costs of suit incurred herein; and

3. For such other and further relief as the Court deems proper.

Dated: July 22, 2014

Respectfully submitted,

ROGER L. GRANDGENETT II, ESQ.
RICK D. ROSKELLEY, ESQ.
KATIE BLAKEY, ESQ.
LITTLER MENDELSON, P.C.

Attorneys for Defendants

1 **PROOF OF SERVICE**

2 I am a resident of the State of Nevada, over the age of eighteen years, and not a party to the
3 within action. My business address is 3960 Howard Hughes Parkway, Suite 300, Las Vegas, Nevada
4 89169. On July 22, 2014, I served the within document:

5 **ANSWER TO AMENDED CLASS ACTION COMPLAINT**

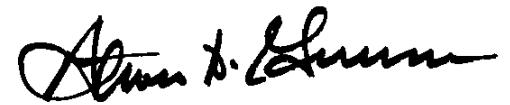
6 ☒ By **United States Mail** – a true copy of the document(s) listed above for collection and
7 mailing following the firm's ordinary business practice in a sealed envelope with postage
8 thereon fully prepaid for deposit in the United States mail at Las Vegas, Nevada addressed as
set forth below.

9 Don Springmeyer
10 Wolf Rifkin Shapiro Schulman Rabkin, LLP
11 3556 East Russell Road, Second Floor
Las Vegas, Nevada 89120

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

17 I declare under penalty of perjury that the foregoing is true and correct. Executed on July
18 22, 2014, at Las Vegas, Nevada.

19 
20 _____
21 Debra Perkins
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CLERK OF THE COURT

MPSJ
DON SPRINGMEYER, ESQ.
Nevada State Bar No. 1021
BRADLEY SCHRAGER, ESQ.
Nevada State Bar No. 10217
DANIEL BRAVO, ESQ.
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Email: dspringmeyer@wrslawyers.com
Email: bschrager@wrslawyers.com
Email: dbravo@wrslawyers.com
Attorneys for Plaintiffs

EIGHTH JUDICIAL DISTRICT COURT

IN AND FOR CLARK COUNTY, STATE OF NEVADA

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

Plaintiffs,

vs.

MDC RESTAURANTS, LLC, a Nevada
limited liability company; LAGUNA
RESTAURANTS, LLC, a Nevada limited
liability company; INKA, LLC, a Nevada
limited liability company, and DOES 1
through 100, Inclusive,

Defendants.

Case No.: A701633
Dept. No.: XVI

Hearing Date: 5 / 26 / 15
Hearing Time: 9 : 00 a m

**MOTION FOR PARTIAL SUMMARY
JUDGMENT ON LIABILITY AS TO
PLAINTIFF PAULETTE DIAZ'S FIRST
CLAIM FOR RELIEF**

COMES NOW Plaintiff Paulette Diaz ("Ms. Diaz"), by and through her attorneys of record,
and hereby moves this Court for partial summary judgment, pursuant to N.R.C.P. 56, on Defendant
MDC Restaurants, LLC's liability to her on her first claim for relief. This Motion is based on the
Memorandum of Points and Authorities below, all papers and exhibits on file herein,¹ and any oral
argument this Court sees fit to allow at hearing on this matter.

¹ See Declaration of Bradley S. Schrager, Esq., here attached as **Exhibit 1**.

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NOTICE OF MOTION

TO: ALL PARTIES AND THEIR COUNSEL OF RECORD:

Please take notice that the undersigned will bring **MOTION FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY AS TO PLAINTIFF PAULETTE DIAZ’S FIRST CLAIM FOR RELIEF** on for hearing before this Court at the Eighth Judicial District Court, 200 Lewis Avenue, Las Vegas, Nevada 89155, on 5 / 2 6 / 1 5 at 9 : 0 0 a m a.m./p.m. in Dept. XVI or as soon thereafter as counsel can be heard.

DATED this 24th day of April, 2015.

**WOLF, RIFKIN, SHAPIRO,
SCHULMAN & RABKIN, LLP**

By: /s/ Bradley Schrager
DON SPRINGMEYER, ESQ.
Nevada State Bar No. 1021
BRADLEY SCHRAGER, ESQ.
Nevada State Bar No. 10217
DANIEL BRAVO, ESQ.
Nevada State Bar No. 13078
3556 E. Russell Road, Second Floor
Las Vegas, Nevada 89120
Attorneys for Plaintiffs

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. INTRODUCTION**

3 Plaintiff Paulette Diaz worked for Defendant MDC Restaurants, LLC (“Defendant” or
4 “MDC”) between April 2010 and September 2013, at numerous Denny’s and CoCo’s restaurants
5 owned by that Defendant. She was paid at a rate of \$7.25 per hour for all or most of her
6 employment. She was never provided qualifying health insurance by Defendant—never had or was
7 enrolled by Defendant in any such health insurance plan—at any time during her employment.
8 Defendant was not eligible to pay her at the reduced minimum wage rate of \$7.25 per hour at any
9 time. Defendant was required by law, therefore, to compensate Ms. Diaz at a rate of no less than
10 \$8.25 per hour during the entirety of her employment, and is thus liable to her for the wages
11 unlawfully withheld from her.

12 Article XV, section 16(A) of the Nevada Constitution (the “Minimum Wage Amendment”
13 or the “Amendment”) is plain:

14 Each employer shall pay a wage to each employee of not less than the hourly rates
15 set forth in this section. The rate shall be five dollars and fifteen cents (\$5.15) per
16 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.²

17 Nev. Const. art. XV, sec. 16(A) (emphasis supplied). Employers must provide qualifying health
18 insurance benefits to their employees, or they must pay employees not less than the upper-tier
19 minimum wage rate for every hour worked. The Amendment also requires that if such health
20 insurance benefits are provided, the premium costs to the employee cannot exceed ten percent of
21 the employee’s gross taxable income from the employer. Id.

22 The Amendment, enacted in 2006 by overwhelming popular vote of the people, offered
23 both employers and employees straightforward economic choices: Employers had to choose
24

25 ² The Minimum Wage Amendment is subject to an indexing mechanism, such that by July 1,
26 2010, the upper-tier rate for employees who are not provided qualifying health insurance benefits
27 was raised to \$8.25 per hour. See State of Nevada, Minimum Wage, 2010 Annual Bulletin, April 1,
2010, http://www.laborcommissioner.com/min_wage_overtime/4-1-10 (accessed Apr. 17, 2015).
28 The upper-tier rate has remained at \$8.25 per hour since that time.

1 between either paying employees at the upper-tier wage rate, or providing qualifying health
2 insurance benefits at a capped cost that might entail subsidizing employee premiums if the costs of
3 the benefits exceeded ten percent of the employee's wages. Employees, on the other hand, were
4 given the choice between accepting such health insurance benefits and being paid at the lower-tier
5 rate, or eschewing such benefits and being paid at the upper-tier rate. This was, and is, the bargain
6 of the Minimum Wage Amendment.

7 Here, Ms. Diaz was not allowed her constitutionally-protected choice; she was never
8 enrolled in or provided qualifying health insurance benefits, but was paid at the lower-tier wage
9 rate by MDC. Instead, MDC devised a game it thought it could not lose—merely purporting to
10 offer substandard, junk health insurance benefits, and paying her at the lower-tier rate of \$7.25 per
11 hour whether or not she received any health benefits at all. In other words, MDC got the benefit of
12 the constitutional bargain, while Ms. Diaz got nothing but a lower hourly wage. This is in direct
13 contradiction to the plain language, intent, and public policy underlying the Minimum Wage
14 Amendment.

15 **II. STANDARD FOR PARTIAL SUMMARY JUDGMENT**

16 Summary judgment under N.R.C.P. 56(a) is “appropriate and shall be rendered forthwith
17 when the pleadings and other evidence on file demonstrate that no genuine issue as to any material
18 fact [remains] and that the moving party is entitled to a judgment as a matter of law.” *Wood v.*
19 *Safeway*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (internal quotations omitted). “While the
20 pleadings and other proof must be construed in a light most favorable to the nonmoving party, that
21 party bears the burden to do more than simply show that there is some metaphysical doubt as to the
22 operative facts in order to avoid summary judgment being entered in the moving party's favor.” *Id.*
23 at 732, 121 P.3d at 1031. The nonmoving party “must, by affidavit or otherwise, set forth specific
24 facts demonstrating the existence of a genuine issue for trial or have summary judgment entered
25 against him.” *Id.* See also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *United States*
26 *v. Arango*, 670 F.3d 988, 992 (9th Cir. 2012). Because partial summary judgment allows a court “to
27 isolate and dispose of factually unsupported claims or defenses,” the court construes the evidence
28 before it “in the light most favorable to the opposing party.” *Celotex Corp. v. Catrett*, 477 U.S. 317,

1 323-24, 106 S. Ct. 2548, 2553 (1986). N.R.C.P. 56(a) specifically permits the Court to entertain
2 issues on partial summary judgment on part of a claim or defense, and partial summary judgment
3 can be useful for courts in focusing the issues to be litigated, thus conserving judicial resources.

4 In a putative class action, courts have discretion to entertain motions regarding all or some
5 liability issues, and in exercising this discretion, courts often consider the merits of the claims and
6 any doubts as to those merits, the efficiency ruling upon such a motion may offer, and the potential
7 for prejudice to the parties or the putative class. “Under the proper circumstances—where it is more
8 practicable to do so and where the parties will not suffer significant prejudice—the district court
9 has discretion to rule on a motion for summary judgment before it decides the certification issue.”
10 Wright v. Schock, 742 F.2d 541, 543-44 (9th Cir. 1984).

11 **III. UNDISPUTED FACTS**

12 The undisputed facts are as follows:

- 13 1. The people of Nevada approved, at the general election of 2006, Question 6,
14 now codified at article XV, section 16 of the Nevada Constitution. The text
of that provision speaks for itself.
- 15 2. Ms. Diaz has filed suit per article XV, section 16 of the Nevada Constitution,
16 praying for back pay and damages according to its terms. See Pls.’ Amend.
Compl.
- 17 3. Ms. Diaz was an employee of Defendant MDC at numerous restaurants in
18 Clark County, Nevada between April 2010 and September 2013. See Pls.’
19 Amend. Compl. at ¶ 14; Defs.’ Ans. at ¶ 14; Declaration of Paulette Diaz at
¶ 3, here attached as **Exhibit 2**.
- 20 4. Defendant MDC paid Ms. Diaz at a rate of \$7.25 per hour worked between
21 April 2010 and September 2013, except for the period between November
22 2010 through March 2011 when she was paid \$10.00 as a supervisor at the
Defendant’s Primm Denny’s Restaurant location and Defendant’s Palace
Station Coco’s location. See Pls.’ Amend. Compl. at ¶¶ 14, 24; Defs.’ Ans. at
¶¶ 14, 4; **Exhibit 2** at ¶ 4.
- 23 5. Ms. Diaz never, at any time during her employment, had, enrolled in or was
24 provided with qualifying health insurance benefits from Defendant MDC.
See Pls.’ Amend. Compl. at ¶ 25; **Exhibit 2** at ¶¶ 5, 6.

25 **IV. ARGUMENT**

26 Section A of the Minimum Wage Amendment clearly and unambiguously authorizes an
27 employer to pay the lower tier minimum wage (originally \$5.15 per hour worked) only to those
28 employees to whom it “provides health insurance benefits.” Nev. Const. art. XV, § 16(A). If, on the

1 other hand, an employer “does not provide such benefits” to an employee, it must pay that
2 employee the upper tier wage (originally \$6.15 per hour worked). Id. The two-tiered wage
3 provision of the Amendment is mandatory and remedial, and creates a strong incentive to
4 employers to provide qualifying health plans or increased wages to their employees.

5 The pertinent text of the Amendment reads as follows:

6 Each employer **shall pay** a wage to each employee of not less than the hourly rates
7 set forth in this section. The rate shall be five dollars and fifteen cents (\$5.15) per
8 hour worked, **if the employer provides health benefits** as described herein, or six
9 dollars and fifteen cents (\$6.15) per hour **if the employer does not provide such**
10 **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 of not more than 10 percent of the employee’s
gross taxable income from the employer.

11 Id. (emphasis supplied).

12 As demonstrated herein, Ms. Diaz is entitled to partial summary judgment on her first claim
13 for relief, because MDC could only pay the lower-tier wage if it actually provided (or supplied or
14 furnished) a qualifying health plan, which it did not, but must have paid the upper-tier wage to her
15 if it did not actually provide (or supply or furnish) such benefits, for any reason.³ It may be that
16 Defendant will claim that all it has to do is “offer” health insurance benefits to gain the privilege of
17 underpaying its minimum wage employees—at least that is something it claimed during deposition
18 testimony. Such conduct is not, in any way, authorized by the Minimum Wage Amendment.

19 **A. The Plain Language Of The Minimum Wage Amendment**

20 The meaning and operation of the Amendment’s two-tiered wage scheme is evident,
21 unambiguous, and unavoidable: employer payment of the lower-tier hourly wage is conditioned
22

23 ³ Reasons that an employee might not be furnished a qualifying health plan by his employer, in
24 which case the employer would be required under the Amendment to pay the upper tier wage,
25 might include, but are not limited to: (1) the employee might decline coverage because it knows
26 that the insurance offered by the employee is substandard, “junk” insurance; (2) the employee
27 might not qualify under the employer’s chosen insurance provider; (3) the employee might opt to
28 self-insure or to obtain other (i.e., better) coverage; or (4) the employer may fail to offer any
insurance to the employee, or may offer it in such a way that actively discourages the employee
from accepting it.

1 upon an employer's actual provision of qualifying health insurance benefits to its employee. If, as
2 here, a provision is clear and unambiguous, courts will not look beyond the language of the
3 provision. *Miller v. Burk*, 124 Nev. 579, 590-91, 188 P.3d 1112, 1119-20 (2008). Although the
4 Amendment does not expressly define "provide," the meaning is facially evident from the text of
5 the Amendment. Thus, the Court need not be detained by rules of statutory construction, as they
6 only apply if a statute or constitutional provision is ambiguous.

7 **1. The plain, ordinary, and everyday meaning of "provide"**

8 It is well-established that, when interpreting a statute, courts first look to the plain language
9 of the statute, giving every word, phrase, and sentence its usual, natural, and ordinary import and
10 meaning, unless doing so violates the statute's spirit. See *McKay v. Bd. of Sup'rs of Carson City*,
11 102 Nev. 644, 648, 730 P.2d 438, 441 (1986). When a statute or constitutional provision is facially
12 clear, courts will not generally go beyond its plain language. *Id.* Stated another way, when a statute
13 or provision is susceptible to only one honest construction, that alone is the construction which
14 properly can be given. See *Washoe Med. Ctr., Inc. v. Reliance Ins. Co.*, 112 Nev. 494, 496, 915
15 P.2d 288, 289 (1996) (citing *Building & Constr. Trades v. Public Works*, 108 Nev. 605, 610, 836
16 P.2d 633, 636 (1992)). Plain language controls unless it would lead to absurd results. See *Harris*
17 *Associates v. Clark Cnty. Sch. Dist.*, 119 Nev. 638, 642, 81 P.3d 532, 534 (2003). The plain
18 language and intended operation of the Amendment is ascertainable from the face of the
19 Amendment. An employer must do more than merely wave a junk health plan in front of an
20 employee, who may well rightly decline it, in order to qualify for paying the employee the lower
21 wage. Any other construction would be absurd, and would turn the incentives embodied by the
22 Amendment to encourage employers to provide qualifying health plans to their employees or else
23 pay higher wages to those employees, on their heads.

24 "Provide" in the wage provision of the Amendment must be accorded its ordinary and
25 everyday meaning of actually furnishing or supplying employees with coverage. The ordinary and
26 everyday meaning of "provide" according to the online Merriam-Webster Dictionary and
27 Thesaurus is "to put (something) into the possession of someone for use or consumption," not
28 merely to offer that such transfer of possession take place, even if it does not occur. See Merriam-

1 Webster (Online) Dictionary and Thesaurus, <http://www.merriam-webster.com/thesaurus/provide>
2 (accessed Apr. 17, 2015) (parentheticals in the original). Synonyms of “provide” include “deliver”,
3 “give”, “hand”, “hand over”, and “supply”. Id. The online resource uses “provide” and “furnish” or
4 “supply” interchangeably. Id. For instance, the definition for “furnish” is (1) “to provide (someone)
5 with what is needed for a task or activity” and (2) “to put (something) into the possession of
6 someone for use or consumption.” Id. Synonyms for “furnish” include “supply,” “feed”, “give”,
7 “hand”, “hand over”, and, most notably, “provide”. Id.

8 Likewise, the definition of “supply” is (1) “to provide (someone) with what is needed for a
9 task or activity,” and (2) “to put (something) into the possession of someone for use or
10 consumption.” Id. Synonyms for “supply” include “deliver”, “feed”, “give”, “hand”, “hand over”,
11 and, again, “provide.” Id. Likewise, the first definition of “provide” according to Black’s Law
12 Dictionary (Online), <http://thelawdictionary.org/provide/> (accessed Apr. 17, 2015), is “an act of
13 furnishing or supplying a person with a product.” See also *Black’s Law Dictionary* (5th ed. 1979)
14 (defining “furnish” as interchangeable with “provide” — “To supply, provide, or equip, for
15 accomplishment of a particular purpose.”).

16 Nevada courts also have used “provide” interchangeably with the word “furnish” to connote
17 a transfer of possession from one to another, as opposed to merely suggesting or posing something.
18 See, e.g., *State v. Powe*, No. 55909, 2010 WL 3462763 at *1 (Nev. July 19, 2010). In interpreting a
19 Nevada criminal statute’s use of the word “furnish” for example, the district court found as a matter
20 of law that “furnishing” calls for actual delivery by one person to another. Id. Reviewing that
21 interpretation de novo, the Nevada Supreme Court affirmed. Id. (citing *Walker v. State*, 428 So.2d
22 139, 141 (Ala. Crim. App. 1982) (“‘[F]urnishes’ means to provide or supply and connotes a
23 transfer of possession.”)); *Bailey v. State*, 120 Nev. 406, 409, 91 P.3d 596, 598 (2004) (stating that
24 if the words of a statute have ordinary meaning, this court will not look beyond the plain language
25 of the statute unless that meaning was clearly not intended).⁴

26
27 ⁴ Similarly, the Internal Revenue Service (“IRS”) construes a Treasury Regulation that requires
28 the IRS to “provide” an applicant with a copy of all comments on an application filed under Treas.

(footnote continued on next page)

1 Thus, by looking only at the plain and unambiguous language of the Amendment’s two-
2 tiered wage provision as required, it is clear that the operative word “provide” means something
3 other than simply suggesting or “offering” any sort of health plan. Interpretation necessarily begins
4 with the assumption that the language employed by the drafters was intentional and its ordinary
5 meaning accurately expresses the drafter’s purpose. See, e.g., *Gross v. FBL Fin. Servs., Inc.*, 557
6 U.S. 167, 175, 129 S. Ct. 2343, 2350 (2009). “Provide” and the other terms of the Amendment
7 must be respected as being chosen carefully and deliberately by the drafters, and were approved
8 overwhelmingly by the people of Nevada.

9 **2. “Provide” does not mean “offer”**

10 Defendant will contend that it needed only “offer” Ms. Diaz health benefits—of any kind,
11 even a junk plan with little or no discernible value as health insurance—in order to gain the
12 constitutional privilege of paying her below the upper-tier minimum hourly wage.⁵ But employers
13

14 Reg. § 601.201(o)(3) to mean that the IRS must actually “furnish or supply” the materials to the
15 applicant, not merely make them available. See Statement of Procedural Rules of Section
16 601.201(o), GCM 36593 (I.R.S. Feb. 20, 1976). The IRS states:

17 However, allowing inspection and copying of materials or even supplying the
18 materials on request will not satisfy the requirement of Treas. Reg. §
19 601.201(o)(5)(vii), that these materials be **provided to** the applicant. We believe that,
20 pursuant to Treas. Reg. § 601.201(o)(5)(vii), the applicant must be furnished or
21 supplied with the required copies and **not merely given the opportunity to obtain**
22 **them**. If necessary, rather than adopting a strained reading of the word “provide,”
23 the Regulation should be amended.”

24 Id. (emphasis supplied).

25 ⁵ Defendant’s representatives have so indicated in their deposition testimony this far in this
26 matter:

27 A. We pay a sub-minimum wage because we offer medical insurance on the 1st day
28 of hire (7.25).

Transcr. Depo. Yvette Gallimore, former HR Director, 155:12-14 (Mar. 11, 2015). True and
accurate copies of the pertinent portions of Ms. Gallimore’s deposition transcript are here attached
as **Exhibit 3**.

Q. As far as being able to pay crew members at that wage below—you understood it
was below the upper tier rate, correct?

A. Correct.

(footnote continued on next page)

1 cannot do so, and having attempted to do so is just a manner of shortchanging workers, Ms. Diaz
2 among them. “Provide” within the context of the wage structure sentence of the Amendment has a
3 particular and ordinary meaning within that sentence—actually to supply or furnish health
4 insurance—which cannot be read out of the statute. The succeeding phrase after the constitutional
5 command to “provide” benefits, “[o]ffering health benefits ...” plainly concerns the cost of
6 insurance that shall be made available to the employees if the employer decides to offer such
7 benefits and attempt to exercise the privilege of paying at the lower-tier hourly minimum wage
8 rate. Nev. Const. art. XV, § 16(A). Specifically, under that sentence, if they are going to provide
9 benefits and pay less than the upper-tier wage, employers must “offer” health plans that cover the
10 employee and all the employee’s dependents and the premium cost does not exceed ten percent
11 (10%) of the employee’s gross taxable income from the employer. Id. The term “[o]ffering” is not
12 concerned with whether an employer qualifies for paying the lower tier wage addressed in the prior
13 sentence and is, moreover, a separate and distinct constitutional command from “providing” the

14
15 Q. What was your understanding of why Mancha Development Company could do
that?

16 A. Because we offered health insurance.

17 Q. Any other reason?

18 A. No.

19 Q. Because you offered health insurance to the crew members?

20 A. Correct.

21 Transcr. Depo. Blanca Vallejo, former HR Manager, 58:2-13 (Mar. 10, 2015). True and accurate
copies of the pertinent portions of Ms. Vallejo’s deposition transcript are here attached as
Exhibit 4.

22 Q. And your statement there, that Mancha offers medical insurance on the first day
23 of hire, and, therefore, they could pay a subminimum wage, was that your
understanding of how the law in Nevada worked?

24 A. Yes.

25 Q. Okay. That Mancha could offer any type of insurance and qualify to pay below
26 that particular minimum wage?

27 A. Yes.

28 See **Exhibit 3**, Transcr. Depo. Gallimore at 159:23-25, 160:1-6.

1 required insurance benefits.

2 By contrast with the definition of “provide”, the definition of “offer” in Merriam-Webster is
3 merely to (1) to put before another for acceptance or consideration” or (2) “to set before the mind
4 for consideration.” Merriam-Webster (Online) Dictionary and Thesaurus, [http://www.merriam-](http://www.merriam-webster.com/thesaurus/furnish)
5 [webster.com/thesaurus/furnish](http://www.merriam-webster.com/thesaurus/furnish) (accessed Apr. 17, 2015). Synonyms for “offer” include “extend”,
6 “pose”, “proffer”, and “suggest”, but notably not “provide”, “furnish”, or “supply”. Id.⁶ Thus,
7 “offer”, a much less active verb, is patently not a synonym for or interchangeable with “provide” in
8 the wage provision sentence of the Amendment.

9 In Lorton v. Jones, 130 Nev. Adv. Op. 8, 322 P.3d 1051 (2014), the Nevada Supreme Court
10 construed a Nevada constitutional provision on term limits in granting a mayoral candidate’s
11 petition for writ of mandamus, which challenged the eligibility of a former city counsel member in
12 the election. Although ultimately finding that both parties’ interpretations of the term provision
13 were plausible, and thus that article XV, section 3(2) of the Nevada Constitution was ambiguous,
14 before looking outside the plain text of the provision to policy and history, the Supreme Court first
15 looked carefully at the words expressly chosen by the drafters for a proper interpretation of the
16 provision. Id., 322 P.3d at 1056. More important, the Court found it significant that the drafters
17 chose to use different terms in addressing how term limits apply in state and local elections by
18 saying that a person may not be elected to a “state office or local governing body.” Id.

19 The Supreme Court noted that the drafters could have used “state governing body” and
20 “local governing body” to indicate the bodies as a whole, or “state office” and “local office” to
21 indicate individual positions. Id., 322 P.3d at 1057. “Instead,” the Supreme Court reasoned, the
22 drafters “chose the distinct terms ‘state office’ and ‘local governing body,’ which indicates that, at
23 the state level, the drafters intended to prevent election to a specific office, but at the local level, the
24 intent was to preclude continuing service on the governing body generally.” Id. To support its

25
26 ⁶ See also *Black’s Law Dictionary* (Online), <http://thelawdictionary.org/offer/> (accessed Apr. 17,
27 2015) (where the first definition of “offer” is “to bring to or before; to present for acceptance or
28 rejection; to hold out or proffer, to make a proposal; to exhibit something that may be taken or
received or not).

1 decision, it quoted Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal*
2 *Texts*, 170 (2012):

3 “[W]here the document has used one term in one place, and a materially different
4 term in another, **the presumption is that the different term denotes a different idea.**

5 *Id.* (emphasis supplied).

6 In the case of the Amendment, the drafters likewise chose distinct terms: “provide”, when
7 describing what actions by employers are required to qualify them to pay the lower tier wage to
8 employees, and “offering”, when separately describing the cost of health plans which may be
9 offered when providing benefits under the Amendment. As in *Lorton*, the distinction between these
10 two verbs and two sentences may not be ignored or glossed over, as the first guide to statutory
11 interpretation is the actual wording chosen by the drafters.

12 **B. Consistency With History, Policy, Intent And Purpose Of The Amendment**

13 Any actual confusion or ambiguity regarding the requirements of the Minimum Wage
14 Amendment, should it even be considered to exist, is resolved by resort to the simplest of
15 construction analyses. In such cases courts may look to the provision’s history, public policy and
16 reason to determine what the voters and drafters intended. *Miller*, 124 Nev. at 590, 188 P.3d
17 at 1120. The guiding star of statutory interpretation of a provision such as the one at issue here is
18 the drafters’ and voters’ intent as gleaned from the history, policy and purpose of the constitutional
19 provision.⁷ Courts determine the drafters’ and voters’ intent by construing the statute in a manner

21 ⁷ See *City Plan Dev., Inc. v. Office of Labor Com’r*, 121 Nev. 419, 435, 117 P.3d 182, 192 (2005)
22 (in rejecting the Labor commissioner’s interpretation of NRS 338.090, the penalty provision of the
23 wage statutes governing public works, as providing for double assessments, the court stated:
24 “When interpreting a statute, this court will look to the policy and spirit of the law and will seek to
25 avoid an interpretation that leads to an absurd result.”); *Thomas v. Nevada Yellow Cab Corp.*, 130
26 Nev. Adv. Op. 52, 327 P.3d 518, 522 (2014) (“The goal of constitutional interpretation is to
27 determine the public understanding of a legal test leading up to and in the period after its enactment
28 or ratification.”) (internal quotation marks and citation omitted); *City of Sparks v. Sparks Mun.*
Court, 129 Nev. Adv. Op. 38, 302 P.3d 1118, 1126 (2013) (“The goal of constitutional
interpretation is to determine the public understanding of a legal text leading up to and in the period
after its enactment or ratification ... In the face of this ambiguity, we look beyond the language of
the provision to determine the intent of the voters in approving the Amendment.”) (citations

(footnote continued on next page)

1 that conforms to reason and public policy. Nevada Attorney for Injured Workers v. Nevada Self-
2 *Insurers Ass’n*, 126 Nev. Adv. Op. 7, 225 P.3d 1265, 1271 (2010). The general rule is that courts
3 should use the contemporaneous construction by those charged with drafting a provision, rather
4 than a post hoc construction. 6 Treatise on Const. L. § 23.32 (cited with approval by the Nevada
5 Supreme Court in *Strickland v. Waymire*, 126 Nev. Adv. Op. 25, 235 P.3d 605, 609 (2010)).

6 As the Nevada Supreme Court explained in *Lorton*, *supra*:

7 Outside of the text, the purpose of the provision and public policy are relevant to our
8 interpretation of Article 15, Section 3(2), and these considerations further support
9 the conclusion that the limitations apply to the local governing body as a whole.
10 Article 15, Section 3(2)’s limitations provision was enacted by voters through the
11 ballot initiative process following its approval at the 1994 and 1996 elections. When
the question was presented to voters, the proponents stated that its purpose was to
‘stop career politicians’ by preventing them from holding office for an excessive
number of terms.

12 *Lorton*, 322 P.3d at 1057 (noting that the objective of limiting career politicians in order to promote
13 a government of citizen representatives has been recognized as a “legitimate state interest”).

14 Applying this critical rule of constitutional construction to the Amendment, it is clear that
15 the drafters intended to benefit and protect Nevada wage earners by requiring employers either to
16 pay the higher tier wage, or to provide employees with qualifying health plans in order to pay the
17 lower-tier wage. Nothing in the Amendment’s history indicates that the drafters or voters intended
18 the Amendment to benefit employers or to give them any loophole to pay the lower tier wage (then,
19 a mere \$5.15) per hour merely by doing anything other than providing qualifying health insurance
20 benefits to employees.

21 The actual, condensed question posed to the voters on the 2004 and 2006 General Election
22 ballots was “Shall the Nevada Constitution be amended to raise the minimum wage paid to
23 employees?” In the published arguments contained in the sample ballots at each election, the
24 proponents offered the following explanation:

25 The proposed Amendment, if passed, would create a new section to Article 15 of the

26 _____

27 omitted). If a provision is ambiguous, the drafters’ intent becomes the controlling factor in statutory
28 construction. *Harris Associates*, 119 Nev. at 642, 81 P.3d at 534.

1 Nevada Constitution. The Amendment would require employers to pay Nevada
2 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.

3 See Nevada Statewide Ballot Questions, 2004, 2006, Nevada Secretary of State, Question No. 6, a
4 true and accurate copy of which is attached hereto as **Exhibit 5**.

5 The express findings and purposes of the Amendment included the following:

- 6 1. No full-time worker should live in poverty in our state.
- 7 2. Raising the minimum wage is the best way to fight poverty. By raising the
8 minimum wage from [sic.] \$5.15 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
9 in the lives of low-income workers to move many families out of poverty.
- 10 3. For low-wage workers, a disproportionate amount of their income goes
toward cost of living expenses. Living expenses such as housing, healthcare,
11 and food have far outpaced wage levels for Nevada's working families.
- 12 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
13 work full-time.
- 14 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
15 productive members of society and the burden on Nevada taxpayers is
reduced.
- 16 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
17 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.

17 Id.

18 Two striking observations immediately arise from the stated findings and purposes of the
19 Amendment. First, without question, the Amendment's proponents placed a premium on making a
20 difference for the better in the lives of low-income wage earners in Nevada by increasing their
21 wages in an attempt to move them out of poverty and to assist with living expenses such as health
22 care. The measure was titled "RAISE THE MINIMUM WAGE FOR WORKING NEVADANS."
23 Id. The increased minimum wage provisions of the Amendment were clearly crafted to benefit
24 hourly employees in Nevada, not their employers. It cannot be seriously argued that any intent of
25 the Amendment was to leave a worker's wages at the lower tier, while stranding him or her without
26 the benefits promised by the Amendment's passage.

27 Second, and perhaps more important for present purposes, the entire idea behind the
28 Amendment was to increase the minimum wage from the then-existing federal minimum hourly

1 wage of \$5.15 per hour worked, to an “upper-tier” wage at the time of \$6.15 per hour worked. In
2 other words, the Amendment was expressly purposed to move Nevada wage earners from the lower
3 tier to the upper tier.⁸ Therefore, paying the lower-tier wage was intended to be an exception and a
4 narrow privilege, earned by employers only by providing—actually providing—qualifying health
5 insurance to an employee. To read the provision otherwise would thwart the stated purposes of the
6 Amendment and create incentives to employers merely to offer junk or sham insurance coverage
7 with the expectation (or even encouragement) that the employee will decline it, so that the
8 employer can pay the lower-tier wage without having to furnish the benefit promised by the
9 Amendment.

10 **C. Reasonable Interpretations Of The Amendment’s Requirements By Agencies**
11 **And Others Establish The Appropriate Contemporary Public Understanding**
Of Its Requirements

12 Although not controlling, the early interpretations of the operation of the two tiered wage
13 structure of the Amendment by Nevada agencies and others familiar with Nevada labor laws after
14 the Amendment’s passage may assist in a proper determination of the meaning of the wage
15 structure of the Amendment, as well as its mandatory requirements. Strickland, 235 P.3d at 609-10
16 (“The goal of constitutional interpretation is ‘to determine the public understanding of a legal text’
17 leading up to and ‘in the period after its enactment or ratification.’”); see also 6 Treatise on Const.
18 L. § 23.32 (“[T]he court may examine a variety of legal and other sources—all post-enactment—to
19 seek to determine the public understanding of a legal text in the period after its enactment or
20 ratification. That sort of inquiry is a critical tool of constitutional interpretation.”) (internal
21 quotation marks omitted).

22 Overwhelmingly, those involved in and harboring expertise in state labor laws understood,
23 and still understand today, that Section A of the Amendment requires actual provision of a
24 qualifying health plan to the employee by the employer in order for the employer to enjoy the

25 ⁸ See **Exhibit 5**, Findings and Purpose of the Amendment, #2 (“By raising the minimum wage
26 form [sic.] \$5.15 an hour to \$6.15 an hour ...”), #5 (“At \$5.15 an hour, minimum wage workers in
27 Nevada make less money than they would on welfare.”), #6 (“Raising the minimum wage from
28 \$5.15 an hour to \$6.15 an hour affirms Nevadan’s beliefs...”).

1 exception and privilege of paying the lower tier wage. For instance, then-Labor Commissioner
2 Michael Tanchek, in addressing the Nevada Senate Committee on Commerce and Labor on
3 February 8, 2007, less than three months after passage of the Amendment and regarding
4 consideration of passage Emergency Regulations necessary immediately to implement its terms,
5 explained that it established “two minimum wage rates for Nevada. Currently, they are \$5.15 and
6 \$6.15 per hour **depending on whether insurance benefits are provided.**” Nev. S. Comm. Min.,
7 Committee on Commerce and Labor, Seventy-Fourth Session (2007) (emphasis supplied).

8 Many others knowledgeable regarding Nevada labor laws, from the passage of the
9 Amendment until today, correctly understand that “provide” means actually to “furnish” or
10 “supply”, not merely to “offer”. Examples of such reasonable interpretations abounded at time of
11 enactment, and abound now, including the following:

- 12 • “**Minimum wage.** Effective November 28, 2006, the state constitution was
13 amended to create a two-tiered minimum wage, \$5.15 per hour **with health**
14 **benefits**, or \$6.15 per hour **without.**” 3 Guide to Employment Law and
Regulations § 49.7 (Mar. 2015) (emphasis supplied). A true and accurate
copy of which is attached hereto as **Exhibit 6.**
- 15 • “Effective July 1, 2014, Nevada’s minimum wage for employees **who**
16 **received** health benefits from their employers is \$7.25 per hours, and the
17 minimum wage for employees **who do not receive** health benefits is \$8.25
per hours.” Kirstin Rossiter, Legislative Counsel Bureau, Fact Sheet:
Minimum Wage in Nevada (Mar. 2015) (emphasis supplied). A true and
accurate copy of which is attached hereto as **Exhibit 7.**
- 18 • “The minimum wage for employees **who receive** qualified health benefits
19 from their employers will remain at \$7.25 per hour; the minimum wage for
employees **who do not receive** health benefits will remain at \$8.25 per hour.”
20 Press Release, State Nevada Dept. of Business and Industry (Mar. 31, 2015)
(emphasis supplied). A true and accurate copy of which is attached hereto as
21 **Exhibit 8.**
- 22 • “Effective July 1, 2013, the State minimum wage is \$7.25 per hour for
23 employees **who receive** health care benefits and \$8.25 for employees **who do**
not receive health care benefits.” Legislative Counsel Bureau, Research
24 Division, Policy and Program Report: Labor and Employment (Apr. 2014)
(mirroring the structure and operation of the Amendment, which makes the
25 same distinction between “providing” health benefits to obtain the right to
pay the lower wage, and what types of insurance may be “offered”)
(emphasis supplied). A true and accurate copy of which is attached hereto as
26 **Exhibit 9.**
- 27 • “Our state’s minimum wage increased effective July 1, for cost-of-living
28 adjustment to \$5.30 per hour (**with qualified health plan**) and \$6.33 per hour
(**without qualified health plan**) ... Next summer ... [t]he lower Nevada
wage will rise to \$6 per hour (**with a qualified health plan**) and \$7.03 per

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hour (**without a qualified health plan**).” Von S. Heinz, Money, Money, Money: Minimum Wage Increase Dates, 12 No. 11 Nev. Emp. L. Letter 6 (Aug. 2007) (parentheticals in the original; emphasis supplied). A true and accurate copy of which is attached hereto as **Exhibit 10**.

- “[E]mployers in Nevada will be required to pay a minimum wage of either \$5.15 or \$6.15 per hour **depending on whether health insurance benefits are provided to employees**... Those **employees receiving health insurance benefits** according to this standard can still be paid at a rate of \$5.15 per hour.” Fisher & Phillips, LLP, Labor Alert: Question 6 Passes! New Nevada Minimum Wage Takes Effect November 28, 2006 (Nov. 21, 2006) (emphasis supplied). A true and accurate copy of which is attached hereto as **Exhibit 11**.
- “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**.” Nevada Taxpayers Association, The Ballot Questions—State and Local (Oct. 2004) (like the text of the Amendment, no mention of lower-tier wage payments if the employer merely “offers” the benefits) (emphasis supplied). A true and accurate copy of which is attached hereto as **Exhibit 12**.

The public understanding of the requirements of the Minimum Wage Amendment, from enactment to the present day, is manifest and simple: Employees with qualifying health insurance benefits can be paid down to \$7.25 per hour; employees without must be paid at the \$8.25 rate. There are no gyrations to which Defendant can resort in order to twist the law of this state to enable it, instead, to merely “offer” benefits—which the employee never selected from any range of possible benefits plans, and which Defendant can manipulate to cost it nothing and provide next-to-no coverage to the employee—and still gain the constitutional privilege of underpaying workers. The Minimum Wage Amendment exists to benefit employees, not to enrich cynical employers.

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1 **V. CONCLUSION**

2 The language of the Nevada Minimum Wage Amendment is unambiguous: An employer
3 must actually provide, supply, or furnish qualifying health insurance to an employee as a
4 precondition to paying that employee the lower-tier hourly minimum wage. Merely “offering”
5 substandard, or even qualifying, health insurance coverage is insufficient, if it is not actually
6 provided to the employee. There is no ambiguity in the ordinary usage and meaning of the word
7 “provide.” It is undisputed that Defendant MDC did not provide Ms. Diaz with qualifying health
8 insurance benefits during her employment with it; MDC, however, claimed the right to pay her—
9 and did pay her—at the rate of \$7.25 per hour for the vast majority of her employment with it. She
10 is entitled to partial summary judgment on her first claim for relief.

11 DATED this 24th day of April, 2015.

13 **WOLF, RIFKIN, SHAPIRO,**
14 **SCHULMAN & RABKIN, LLP**

15 By: /s/ Bradley Schrager
16 DON SPRINGMEYER, ESQ.
17 Nevada State Bar No. 1021
18 BRADLEY SCHRAGER, ESQ.
19 Nevada State Bar No. 10217
20 DANIEL BRAVO, ESQ.
21 Nevada State Bar No. 13078
22 3556 E. Russell Road, Second Floor
23 Las Vegas, Nevada 89120
24 Attorneys for Plaintiffs
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28

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of April, 2015, a true and correct copy of **MOTION FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY AS TO PLAINTIFF PAULETTE DIAZ’S FIRST CLAIM FOR RELIEF** was served by electronically filing with the Clerk of the Court using the Wiznet Electronic Service system and serving all parties with an email-address on record, pursuant to Administrative Order 14-2 and Rule 9 of the N.E.F.C.R.

By: /s/ Dannielle Fresquez
Dannielle Fresquez, an Employee of
WOLF, RIFKIN, SHAPIRO, SCHULMAN &
RABKIN, LLP

EXHIBIT “1”

1 **DECL**
2 DON SPRINGMEYER, ESQ.
3 Nevada State Bar No. 1021
4 BRADLEY SCHRAGER, ESQ.
5 Nevada State Bar No. 10217
6 DANIEL BRAVO, ESQ.
7 Nevada State Bar No. 13078
8 **WOLF, RIFKIN, SHAPIRO,**
9 **SCHULMAN & RABKIN, LLP**
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15 Email: dbravo@wrslawyers.com
16 *Attorneys for Plaintiffs*

10 **EIGHTH JUDICIAL DISTRICT COURT**
11 **IN AND FOR CLARK COUNTY, STATE OF NEVADA**

12 PAULETTE DIAZ, an individual;
13 AWANDA GAIL WILBANKS, an
14 individual; SHANNON OLSZYNSKI, an
15 individual; and CHARITY FITZLAFF, an
16 individual, on behalf of themselves and all
17 similarly-situated individuals,

18 Plaintiffs,

19 vs.

20 MDC RESTAURANTS, LLC, a Nevada
21 limited liability company; LAGUNA
22 RESTAURANTS, LLC, a Nevada limited
23 liability company; INKA, LLC, a Nevada
24 limited liability company; and DOES 1
25 through 100, inclusive,

26 Defendants.

Case No: A701633

Dept. No.: XVI

**DECLARATION OF BRADLEY
SCHRAGER, ESQ. IN SUPPORT OF
PLAINTIFFS' MOTION FOR PARTIAL
SUMMARY JUDGMENT ON LIABILITY
AS TO PLAINTIFF PAULETTE DIAZ'S
FIRST CLAIM FOR RELIEF**

23 **DECLARATION OF BRADLEY SCHRAGER, ESQ.**

24 I, Bradley Schrager, Esq., under penalty of perjury, hereby declare as follows:

25 I am an attorney with the law firm Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP, duly
26 admitted to practice law in the state of Nevada, and counsel for Plaintiffs in the above-captioned action.
27 I make this Declaration in support of Plaintiffs' Motion For Partial Summary Judgment On Liability As
28 To Plaintiff Paulette Diaz's First Claim For Relief. I have personal knowledge of the facts set forth in

1 this declaration, and if called upon to testify, I could and would testify competently thereto.

2 1. Attached, as **Exhibit 2**, is a true and accurate copy of the Declaration of Paulette Diaz.

3 2. Attached, as **Exhibit 3**, are true and accurate copies of the pertinent portions of Yvette
4 Gallimore's deposition transcript.

5 3. Attached, as **Exhibit 4**, are true and accurate copies of the pertinent portions of Blanca
6 Vallejo's deposition transcript.

7 4. Attached, as **Exhibit 5**, is a true and accurate copy of Nevada Statewide Ballot
8 Questions, 2004, 2006, Nevada Secretary of State, Question No. 6.

9 5. Attached, as **Exhibit 6**, is a true and correct copy of Guide to Employment Law and
10 Regulations § 49.7.

11 6. Attached, as **Exhibit 7**, is a true and correct copy of Kirstin Rossiter, Legislative
12 Counsel Bureau, *Fact Sheet: Minimum Wage in Nevada* (Mar. 2015).

13 7. Attached, as **Exhibit 8**, is a true and correct copy of the State Nevada Dept. of Business
14 and Industry, *Press Release* (Mar. 31, 2015).

15 8. Attached, as **Exhibit 9**, is a true and correct copy of the Legislative Counsel Bureau,
16 Research Division, *Policy and Program Report: Labor and Employment* (Apr. 2014).

17 9. Attached, as **Exhibit 10**, is a true and correct copy of Von S. Heinz, *Money, Money,*
18 *Money: Minimum Wage Increase Dates*, 12 No. 11 Nev. Emp. L. Letter 6 (Aug. 2007).

19 10. Attached, as **Exhibit 11**, is a true and correct copy of Fisher & Phillips, LLP, *Labor*
20 *Alert: Question 6 Passes! New Nevada Minimum Wage Takes Effect November 28, 2006* (Nov. 21,
21 2006).

22 11. Attached, as **Exhibit 12**, is a true and correct copy of the Nevada Taxpayers
23 Association, *The Ballot Questions—State and Local* (Oct. 2004).

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26 ///

27 ///

28 ///

1 Under penalties of perjury under the laws of the United States of America and the State of
2 Nevada, I declare that the foregoing is true and correct to my own knowledge, except as to those
3 matters stated on information and belief, and that as to such matters I believe to be true.
4

5 DATED this 24th day of April, 2015.

6 By: 

7 BRADLEY SCHRAGER, ESQ.
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EXHIBIT “2”

1 DECL
2 DON SPRINGMEYER, ESQ.
3 Nevada State Bar No. 1021
4 BRADLEY SCHRAGER, ESQ.
5 Nevada State Bar No. 10217
6 DANIEL BRAVO, ESQ.
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15 Email: dbravo@wrslawyers.com
16 *Attorneys for Plaintiffs*

17
18 EIGHTH JUDICIAL DISTRICT COURT

19 IN AND FOR CLARK COUNTY, STATE OF NEVADA

20 PAULETTE DIAZ, an individual; and
21 LAWANDA GAIL WILBANKS, an
22 individual; SHANNON OLSZYNSKI, an
23 individual; CHARITY FITZLAFF, an
24 individual, on behalf of themselves and all
25 similarly-situated individuals,

26 Plaintiffs,

27 vs.

28 MDC RESTAURANTS, LLC, a Nevada
limited liability company; LAGUNA
RESTAURANTS, LLC, a Nevada limited
liability company; INKA, LLC, a Nevada
limited liability company, and DOES 1
through 100, inclusive,

Defendants.

Case No.: A701633
Dept. No.: XVI

Hearing Date:
Hearing Time:

DECLARATION OF PAULETTE DIAZ,
PURSUANT TO N.R.S. 53.045, IN
SUPPORT OF MOTION FOR PARTIAL
SUMMARY JUDGMENT ON LIABILITY
AS TO PLAINTIFF PAULETTE DIAZ'S
FIRST CLAIM FOR RELIEF

State of Oregon }
 } s.s.
County of Multnomah }

Plaintiff PAULETTE DIAZ states:

1. I am over eighteen years of age and I am a Plaintiff in the present case. I have
personal knowledge of the facts set forth herein, except as to those stated on information and belief

1 and, as to those, I am informed and believe them to be true. If called upon to testify before this
2 Court I would do so to the same effect.

3 2. I am currently a resident of the State of Oregon.

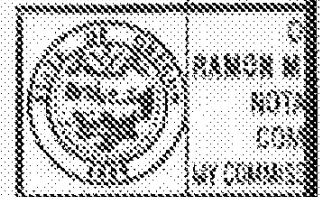
4 3. I worked for MDC Restaurants, LLC between April 2010 and September 2013, at
5 numerous Denny's and Coco's in the State of Nevada.

6 4. During that time, I was paid \$7.25 per hour except from November 2010 through
7 March 2011 when I was paid \$10.00 because I was a supervisor at the Denny's Primm location and
8 the Coco's Palace Station location.

9 5. I was never provided health insurance by Defendant MDC Restaurants, LLC, nor
10 did I receive or ever enroll in any such health insurance benefit plan.

11
12 I declare under penalty of perjury under the law of the State of Nevada that the foregoing is
13 true and correct. Executed this 3rd day of April, 2015.

14
15 
16 PAULETTE DIAZ



JURAT WITH AFFIANT STATEMENT

State of Oregon } ss.
County of Multnomah

- ☒ See Attached Document (Notary to cross out lines 1-7 below)
☐ See Statement Below (Lines 1-7 to be completed only by document signer[s], not Notary)

1 _____
2 _____
3 _____
4 _____
5 _____
6 _____
7 [Signature]

Signature of Document Signer No. 1

Signature of Document Signer No. 2 (if any)

Subscribed and sworn to (or affirmed) before me

this 24 day of April, 2015, by
Date Month Year

Paulette Diaz

Name of Signer No. 1

Name of Signer No. 2 (if any)

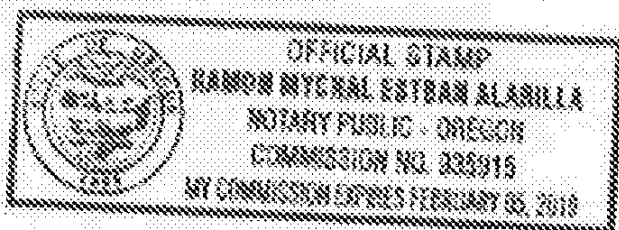
[Signature]

Signature of Notary Public

Exp 2/5/19

Any Other Required Information
(Residence, Expiration Date, etc.)

Place Notary Seal/Stamp Above



OPTIONAL

This section is required for notarizations performed in Arizona but is optional in other states. Completing this information can deter alteration of the document or fraudulent reattachment of this form to an unintended document.

Description of Attached Document

Title or Type of Document: Motion for Partial Summary Judgment

Document Date: 4/24/15 Number of Pages: 2

Signer(s) Other Than Named Above: N/A

EXHIBIT “3”

1	EIGHTH JUDICIAL DISTRICT COURT		
2	IN AND FOR CLARK COUNTY, STATE OF NEVADA		
3			
)	
4	PAULETTE DIAZ, an individual;)	
	LAWANDA GAIL WILEANKS, an)	
5	individual; SHANNON)	
	OLSZYNSKI, an individual; and)	
6	CHARITY FITZLAFF, an)	
	individual, on behalf of)	
7	themselves and all)	
	similarly-situated)	
8	individuals,)	
)	
9	Plaintiffs,)	
)	
10	vs.)	No. A-14-701633-C
)	
11	MDC RESTAURANTS, LLC, a)	
	Nevada limited liability)	
12	company; et al.,)	
)	
13	Defendants.)	
)	

14		
15		
16	DEPOSITION OF YVETTE GALIMORE	
17	Irvine, California	
18	Wednesday, March 11, 2015	
19	Volume I	
20		
21	Reported by:	
	SHARON LINDSAY-MILNIKEL	
22	CSR No. 5335	
23	Job No. 2022658	
24		
25	PAGES 1 - 205	

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EIGHTH JUDICIAL DISTRICT COURT
IN AND FOR CLARK COUNTY, STATE OF NEVADA

_____)
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,)
)
Plaintiffs,) No. A-14-701633-C
)
vs.)
)
MDC RESTAURANTS, LLC, a)
Nevada limited liability)
company; LAGUNA RESTAURANTS,)
LLC, a Nevada limited)
liability company; INKA, LLC,)
a Nevada limited liability)
company; and DOES 1 through)
100, Inclusive,)
)
Defendants,)
_____)

Deposition of YVETTE GALIMORE, Volume I, taken
on behalf of Plaintiffs, at 2050 Main Street, Suite
900, Irvine, California, beginning at 9:26 a.m. and
ending at 3:04 p.m. on Wednesday, March 11, 2015,
before SHARON LINDSAY-MILNIKEL, Certified Shorthand
Reporter No. 5335.

1 APPEARANCES:
2
3 For Plaintiffs:
4 WOLF, RIFKIN, SHAPIRO, SCHULMAN & RASKIN
5 BY: JORDAN J. BUTLER
6 BY: DANIEL BRAVO
7 Attorneys at Law
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10 (702) 341-5300
11 jb@wrslawyers.com
12 dbravo@wrslawyers.com
13
14 For Defendants:
15 LITTLER MENDELSON
16 BY: ROGER L. GRANDGENETT, II
17 Attorney at Law
18 3960 Howard Hughes Parkway, Suite 300
19 Las Vegas, Nevada 89169
20 (702) 862-8800
21 rgrandgenett@littler.com
22
23
24
25

Page 3

1 Q This is an E-mail from you dated 9-24-2014,
2 11:14 a.m., recipient is Colleen Fulton, subject is
3 wages.

4 Have you seen this E-mail before?

5 A Yes.

6 Q Did you draft this E-mail?

7 A Yes.

8 Q This is a true and accurate copy?

9 A Yes.

10 Q Go ahead and read the content of the E-mail
11 into the record, please.

12 A "We pay a sub minimum wage because we
13 offer medical insurance on the 1st
14 day of hire (7.25)" -- per hour -- "I
15 do not know about the other wage
16 amounts, but I will check with
17 Terry."

18 Q Okay. What do you recall of the context of
19 this E-mail?

20 A If I remember correctly, this was following
21 the other trail of E-mails previous to Colleen's
22 inquiry. I don't know what the date was on the other
23 one -- yes.

24 Q You seem to be answering a question in this
25 E-mail by stating, "We pay a sub minimum wage

Page 155

1 because we offer medical insurance on
2 the 1st day of hire..."

3 Was she asking why employees were paid below
4 upper-tier minimum wage?

5 A If I go back to the E-mail -- and, I'm sorry,
6 my glasses are buried at the bottom of my purse right
7 now, but if I go back to the E-mail --

8 Q Where are -- where are you?

9 A I'm at -- where was her E-mail -- Colleen
10 Fulton's E-mail.

11 Q Which one?

12 A That's what I'm going to get for you in one
13 second. I think it was number -664. It was a trail of
14 E-mails from -664 to -658.

15 Q Yeah, but your E-mail precedes these other
16 E-mails in time, correct?

17 A It does.

18 Q So you're not responding to the E-mails on
19 -664 or -658.

20 MR. GRANDGENETT: Look at the date.

21 THE WITNESS: I don't have my glasses on --

22 MR. GRANDGENETT: Take your time --

23 BY MR. BUTLER:

24 Q The date and time of your E-mail --

25 A Uh-huh, is 9-24 --

1 Q 9-24 at 11:14.

2 A Yes.

3 Q Okay. All the other E-mails that you're
4 looking at on -658 and -664 occurred after that.

5 A Yes.

6 Q Okay. So I'll ask you again what the context
7 of this E-mail was.

8 A I would have to make an assumption. I thought
9 I read where Colleen had asked a question about
10 consistency and why some employees were paid at 7.25,
11 7.55 or 8.25, and I was copied on those E-mails and I
12 was answering --

13 Q Well, we know that's not the case because your
14 E-mail is first. What you just referenced occurred
15 after your E-mail.

16 A Well, I don't know, then. I would have to go
17 and get the other E-mails.

18 Q Do you recall what Colleen's inquiry was?

19 A I thought I previously read that she was
20 inquiring why they were different rate amounts -- I'm
21 sorry -- the reason why employees were paid at
22 different rates.

23 Q But your -- even if that's the case, those
24 inquiries, again, were after your E-mail -- okay -- so
25 what prompted this E-mail?

Page 157

1 MR. GRANDGENETT: I just want to make a
2 comment that that's true with respect to the E-mails
3 that are listed here, but not with respect to any other
4 communication.

5 THE WITNESS: I can only make an assumption.

6 BY MR. BUTLER:

7 Q I don't want you to assume --

8 A I can't answer that because I don't have the
9 previous E-mails to what I said.

10 Q I'm asking because you drafted the E-mail --

11 A Yes.

12 Q -- to Colleen.

13 A Yes.

14 Q And you made this statement, so I'm asking you
15 what prompted you to provide her with this information.

16 A I can't answer that, because I don't have the
17 previous E-mail to answer. I can only make --

18 Q This doesn't --

19 A -- an assumption that I would be answering a
20 question.

21 MR. GRANDGENETT: Wait for him to talk.

22 BY MR. BUTLER:

23 Q Do you know what you meant by "I do not
24 know about the other wage amounts,
25 but I will check with Terry"?

Page 158

1 A I'm only making an assumption, that she said
2 in her previous E-mails some people were paid at 7.25,
3 7.55 and, et cetera, so that would be the other wage
4 amounts.

5 Q Okay. And what about the "sub minimum wage"
6 portion here, "we pay a sub minimum wage because
7 we offer medical insurance," was she
8 asking how is it that Mancha can get away with
9 subminimum wage?

10 A No, I think she was asking why there were
11 different wage rates and we weren't consistent.

12 Q Why do you think?

13 A Because that was in the information that she
14 found. She said some people were paid at 7.55, some
15 people were paid at 8.25, some people were paid at
16 7.25.

17 Q Okay. Well, what does that have to do as far
18 as the reason for paying a subminimum wage, the fact
19 they're differing wage amounts?

20 A I was explaining to her that in Nevada we
21 offer -- we offer the insurance and so, therefore, we
22 were paying at 7.25.

23 Q And your statement there, that Mancha offers
24 medical insurance on the first day of hire, and,
25 therefore, they could pay a subminimum wage, was that

1 your understanding of how the law in Nevada worked?

2 A Yes.

3 Q Okay. That Mancha could offer any type of
4 insurance and qualify to pay below that particular
5 minimum wage?

6 A Yes.

7 Q Even with the limited health plan?

8 A Yes.

9 Q What did you mean by medical insurance, just
10 any type of plan?

11 A Yes.

12 Q Is it your understanding that the 10 percent
13 rule that we talked about applies regardless of whether
14 the employee has dependents or a spouse or a family on
15 the plan?

16 A My understanding, it's based on their --
17 simply based upon their gross wages, that they would be
18 paying 10 percent, no more than 10 percent, I'm sorry.

19 Q The enrollment form that we looked at earlier
20 for the TransChoice plan, I didn't mark it as an
21 exhibit, the MDC -131, if you look at that.

22 Is there a space there for the employee to
23 identify whether or not they're enrolling for
24 themselves or any dependents?

25 A Yes.

Page 160

1 I, the undersigned, a Certified Shorthand
2 Reporter of the State of California, do hereby certify:

3 That the foregoing proceedings were taken
4 before me at the time and place herein set forth; that
5 any witnesses in the foregoing proceedings, prior to
6 testifying, were administered an oath; that a record of
7 the proceedings was made by me using machine shorthand
8 which was thereafter transcribed under my direction;
9 that the foregoing transcript is a true record of the
10 testimony given.

11 Further, that if the foregoing pertains to the
12 original transcript of a deposition in a Federal Case,
13 before completion of the proceedings, review of the
14 transcript () was () was not requested.

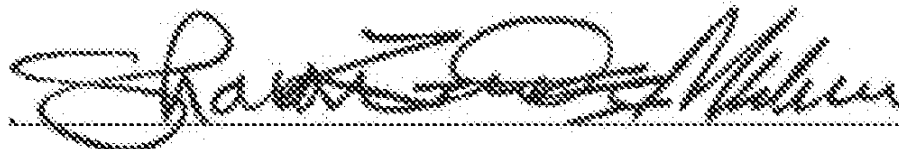
15 I further certify that I am neither
16 financially interested in the action nor a relative or
17 employee of any attorney of any party to this action.

18 IN WITNESS WHEREOF, I have this date
19 subscribed my name.

20
21 Dated: 03/23/2015

22

23



24

SHARON LINDSAY-MILNIKEL

CSR No. 5335

25

Page 205

EXHIBIT “4”

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EIGHTH JUDICIAL DISTRICT COURT
IN AND FOR CLARK COUNTY, STATE OF NEVADA

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

Plaintiffs,

vs.

No. A701633

MDC RESTAURANTS, LLC, a Nevada limited
liability company; LAGUNA RESTAURANTS,
LLC, a Nevada limited liability company,
INCA, LLC, a Nevada limited liability
company and Does 1 through 100 inclusive,

Defendants.

DEPOSITION OF BLANCA VALLEJO
Irvine, California
Tuesday, March 10, 2015
Volume I

Reported by:
ANGELA METZ
CSR No. 12454
JOB No. 2028868

PAGES 1 ~ 140

Page 1

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EIGHTH JUDICIAL DISTRICT COURT
IN AND FOR CLARK COUNTY, STATE OF NEVADA

PAULETTE DIAZ, an individual;
and LAWANDA GAIL WILBANKS, an
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LLC, a Nevada limited liability company,
INCA, LLC, a Nevada limited liability
company and Does 1 through 100 inclusive,

Defendants.

Deposition of BLANCA VALLEJO, taken
on behalf of Plaintiffs, at 2050 Main
Street, Suite 900, Irvine, California,
beginning at 9:22 a.m. and ending at 1:44
p.m. on Tuesday, March 10, 2015, before
ANGELA METZ, Certified Shorthand Reporter
No. 12454.

1 APPEARANCES:
2 For Plaintiffs:
3 WOLF, RIFKIN, SHAPIRO & SCHULMAN
4 BY: JORDAN BUTLER
5 BY: DANIEL BRAVO
6 ATTORNEYS AT LAW
7 3556 East Russell Road, 2nd Floor
8 Las Vegas, Nevada 89120
9 (702) 341-5200
10
11 For Defendants:
12
13 LITTLER MENDELSON
14 BY: ROGER L. GRANDGENETT, II
15 ATTORNEY AT LAW
16 2050 Main Street, Suite 900
17 Irvine, California 92614
18 (949) 705-3015
19 rgrandgenett@littler.com
20
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Page 3

1 A. Yes.

2 Q. As far as being able to pay crew members at that
3 wage below -- you understood it was below the upper tier
4 rate, correct?

5 A. Correct.

6 Q. What was your understanding of why Mancha
7 Development Company could do that?

8 A. Because we offered health insurance.

9 Q. Any other reason?

10 A. No.

11 Q. Because you offered health insurance to the crew
12 members?

13 A. Correct.

14 Q. Was there a discussion about, okay, we need to
15 offer health insurance to the crew members and it needs to
16 be of a certain quality or has to cover certain things or
17 just the fact that we need to offer some type of plan to
18 the employees?

19 A. I don't recall a discussion around that.

20 Q. Okay. So you don't recall a discussion regarding
21 okay, since we're going to pay below the upper tier, we're
22 going to pay \$7.25 an hour, we need to make sure that our
23 plans that we're offering have certain benefits?

24 A. Well, the plan did have already the certain
25 benefits. It was my understanding, anyway that our plan,

Page 58

1 I, the undersigned, a Certified Shorthand
2 Reporter of the State of California, do hereby certify:

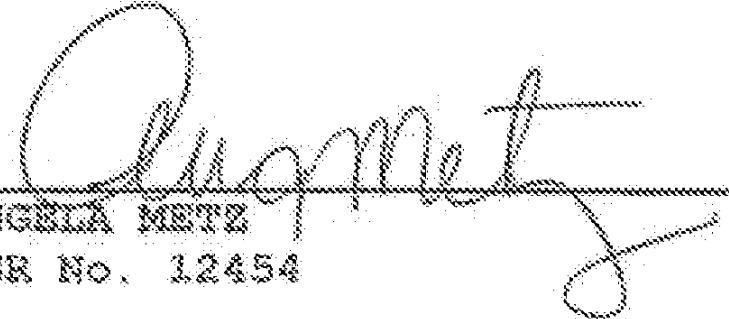
3 That the foregoing proceedings were taken before
4 me at the time and place herein set forth; that any
5 witnesses in the foregoing proceedings, prior to
6 testifying, were duly sworn; that a record of the
7 proceedings was made by me using machine shorthand which
8 was thereafter transcribed under my direction; further,
9 that the foregoing transcript is a true record of the
10 testimony given.

11 Further, that if the foregoing pertains to the
12 original transcript of a deposition in a Federal Case,
13 before completion of the proceedings, review of the
14 transcript [] was [] was not requested.

15 I further certify I am neither financially
16 interested in the action nor a relative or employee of any
17 attorney of any of this action.

18 IN WITNESS WHEREOF, I have this date subscribed
19 my name.

20
21 Dated: 4/3/2015

22
23
24 
ANGELA METZ
CSR No. 12454

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Page 140

EXHIBIT “5”

State of Nevada

**Statewide
Ballot Questions**

2004



**To Appear on the November 2, 2004
General Election Ballot**

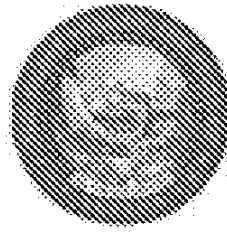
**Issued by
Dean Heller
Secretary of State**

DEAN HELLER
Secretary of State

STATE OF NEVADA

CHARLES E. MOORE
Securities Administrator

RENEE L. PARKER
*Chief Deputy Secretary
of State*



SCOTT W. ANDERSON
*Deputy Secretary
for Commercial Recordings*

PAMELA A. RUCKEL
*Deputy Secretary for
Southern Nevada*

RONDA L. MOORE
*Deputy Secretary
for Elections*

OFFICE OF THE
SECRETARY OF STATE

Dear Fellow Nevadan:

You will soon be taking advantage of one of your most important rights as an American citizen: the right to vote! As Secretary of State and the state's Chief Election Officer, I take the job of informing the public about various statewide ballot questions very seriously. An informed and knowledgeable electorate is a cornerstone to fair and just elections.

With that in mind, the Secretary of State's office has prepared this booklet detailing the statewide questions that will appear on the 2004 General Election Ballot. The booklet contains "Notes to Voters," a complete listing of the exact wording of each question, along with a summary, arguments for and against each question's passage, and, where applicable, a fiscal note. Any fiscal note included in this booklet explains only adverse impacts and does not note any possible cost savings.

I encourage you to carefully and thoughtfully review the ballot questions listed in the booklet. As a voter, your actions on these ballot questions can create new laws, amend existing laws or amend the Nevada Constitution.

On the 2004 General Election Ballot, there are eight statewide questions. Ballot Question Numbers 7 and 8 appear on the ballot through the actions of the Nevada State Legislature. Ballot Question Numbers 1 through 6 qualified for this year's ballot through the initiative petition process.

You can also view these ballot questions on the Secretary of State's web site at www.secretaryofstate.biz. If you require further assistance or information, please feel free to contact my office at 775/684-5705.

Respectfully,

A handwritten signature in cursive script, reading "Dean Heller".

DEAN HELLER
Secretary of State

LAS VEGAS OFFICE
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2004 STATEWIDE BALLOT QUESTIONS SUMMARY

Question #	Title	Originated	If passed in 2004
1	Education First	Initiative Petition	Will Go Onto The 2006 General Election Ballot
2	Improve Nevada Public School Funding to the National Average	Initiative Petition	Will Go Onto The 2006 General Election Ballot
3	Keep Our Doctors in Nevada	Initiative Petition	Becomes Law
4	The Insurance Rate Reduction and Reform Act	Initiative Petition	Will Go Onto The 2006 General Election Ballot
5	Stop Frivolous Lawsuits and Protect Your Legal Rights Act	Initiative Petition	Will Go Onto The 2006 General Election Ballot
6	Raise the Minimum Wage for Working Nevadans	Initiative Petition	Will Go Onto The 2006 General Election Ballot
7	Repeals an Obsolete Provision Concerning Those Permitted to Vote	Legislature AJR #3 of the 71 st Session	Becomes Law
8	Sales and Use Tax of 1955	Legislature AB 514 of the 72 nd Session Including Note To Voters	Becomes effective January 1, 2006

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.....☒ 545,490
No.....☐ 252,162

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 Nevada'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.

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."

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.

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.

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 [deleted material] is material being deleted.

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

Section 1. Title.

This Measure shall be known 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 from \$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.*

State of Nevada

**Statewide
Ballot Questions**

2006



**To Appear on the November 7, 2006
General Election Ballot**

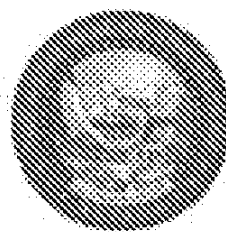
**Issued by
Dean Heller
Secretary of State**

DEAN HELLER
Secretary of State

STATE OF NEVADA

CHARLES E. MOORE
Security Administrator

KIM A. HUYS
*Chief Deputy Secretary
of State*



SCOTT W. ANDERSON
*Deputy Secretary
for Commercial Recordings*

PAMELA A. RUCKEL
*Deputy Secretary for
Southern Nevada*

OFFICE OF THE
SECRETARY OF STATE

ELLYCK C. HSU
*Deputy Secretary
for Elections*

SIACY M. WOODBURY
*Deputy Secretary
for Operations*

Dear Fellow Nevadan:

You will soon be taking advantage of one of your most important rights as an American citizen: the right to vote! As Secretary of State and the state's Chief Election Officer, I take the job of informing the public about various statewide ballot questions very seriously. An informed and knowledgeable electorate is a cornerstone to fair and just elections.

With that in mind, the Secretary of State's office has prepared this booklet detailing the statewide questions that will appear on the 2006 General Election Ballot. The booklet contains "Notes to Voters," a complete listing of the exact wording of each question, along with a summary, arguments for and against each question's passage, and, where applicable, a fiscal note. Any fiscal note included in this booklet explains only adverse impacts and does not note any possible cost savings.

I encourage you to carefully and thoughtfully review the ballot questions listed in the booklet. As a voter, your actions on these ballot questions can create new laws, amend existing laws or amend the Nevada Constitution.

On the 2006 General Election Ballot, there are ten statewide questions. Ballot Question Numbers 8, 9, 10 and 11 appear on the ballot through the actions of the Nevada State Legislature. Ballot Question Numbers 2, 4, 5, and 7 qualified for this year's ballot through the initiative petition process. Ballot Question Numbers 1 and 6 also qualified through the initiative petition process, passed at the 2004 General Election and appear for the second and last time on the 2006 General Election Ballot. Ballot Question Number 3 was removed from the Ballot by the Nevada Supreme Court.

You can also view these ballot questions on the Secretary of State's web site at www.secretaryofstate.biz. If you require further assistance or information, please feel free to contact my office at 775-684-5705.

Respectfully,

A handwritten signature in cursive script that reads "Dean Heller".

DEAN HELLER
Secretary of State

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2006
STATEWIDE BALLOT QUESTIONS
SUMMARY

Question #	Title	Originated	If passed in 2006
1	Education First	Initiative Petition	Becomes Law
2	Nevada Property Owner's Bill of Rights (PISTOL)	Initiative Petition	Will Go Onto The 2008 General Election Ballot
3	Tax and Spending Control for Nevada (TASC)	Initiative Petition	Removed by the Nevada Supreme Court
4	Responsibly Protect Nevadans from Second Hand Smoke	Initiative Petition	Becomes Law
5	Clean Indoor Air Act	Initiative Petition	Becomes Law
6	Raise the Minimum Wage for Working Nevadans	Initiative Petition	Becomes Law
7	Regulation of Marijuana	Initiative Petition	Becomes Law
8	Sales and Use Tax of 1955	Legislature AB 554 of the 73 rd Session Including Note To Voters	Becomes effective January 1, 2007

9	Board of Regents	Legislature AJR 11 of the 72 nd Session	Becomes effective January 1, 2008
10	Legislators Call Special Session	Legislature AJR 13 of the 72 nd Session	Becomes effective upon canvass
11	Legislators Paid Every Day of Session	Legislature SJR 11 of the 72 nd Session	Becomes effective upon canvass

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..... ☐

No..... ☐

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.

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
701633-C

District Court Dept. No. XVI

Electronically Filed
Case No. A-14
Jul 31 2015 10:49 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

PETITIONERS' APPENDIX

RICK D. ROSKELLEY, ESQ., Nevada Bar # 3192
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PROOF 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:

PETITIONERS APPENDIX

☒ Via **Electronic Service** - pursuant to N.E.F.C.R Administrative Order: 14-2.

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Respondents

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
Erin J. Melwak