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; and 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 WILLIAMS, District Judge,

Respondents,

and

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

Real Parties in Interest.

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Case No.: 68523

Eighth Judicial District Court
Case No.: A701633

REAL PARTIES IN INTEREST'S APPENDIX

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ALPHABETICAL INDEX TO JOINT APPENDIX

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of October, 2015, a true and correct copy of the foregoing **REAL PARTIES IN INTEREST'S APPENDIX** was served upon all counsel of record by electronically filing the document using the Nevada Supreme Court's electronic filing system.

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

PROPOSED EMERGENCY REGULATIONS OF THE
LABOR COMMISSIONER
NOVEMBER 29, 2006

EXPLANATION- Matter that is underlined is new; matter in brackets [omitted material] is material to be omitted.

AUTHORITY: §§1-13, NRS 607.160(1)(b), NRS 608.270, NRS 608.018, NRS 233B.0613.

Section 1. Chapter 608 of NAC is hereby amended by adding thereto the provisions set forth as sections 2 to 12, inclusive, of this regulation. This regulation shall expire at the end of 120 days from filing with the Secretary of State or upon the filing of a temporary or permanent regulation whichever should occur first.

Sec.2. Nevada has established a two-tiered minimum wage.

A. The first tier, lower tier, is from $5.15 to $6.14 per hour for employers who provide qualified health insurance benefits.

B. The second tier, upper tier, is $6.15 per hour for employers who do not provide qualified health benefits.

Sec.3. The minimum wage may be adjusted annually.

A. These rates will be adjusted annually to include increases in the federal minimum wage and a yearly cost of living adjustment as set forth in Article 15, Section 16 of the Constitution of Nevada.

B. The annual adjustments will be announced in April and become effective on July 1 of each year.

C. Each minimum wage tier will increase by the same dollar amount as the federal rate increase.

Sec. 4. A. The minimum wage applies to all employees in Nevada.

B. The minimum wage exemptions codified at NRS 608.250(2) conflict with Article 15, Section 16 of the Constitution of Nevada and are no longer applicable.

C. People under the age of 18, employed by a nonprofit organization for after school or summer employment or as a trainee for a period not longer than ninety (90) days are not considered employees for the purpose of compliance with the minimum wage.

D. There is no distinction between whether an employee is full-time, permanent, part-time, or temporary.

Sec. 5. In order to qualify for the lower minimum wage tier an employer must comply with all of the following:

A. Health insurance coverage must be made available to the employee and the employees dependents; and

B. The employee's share of the cost of the premium cannot exceed 10% of the employee's gross income as defined under the Internal Revenue Code for the time interval between the premium payments; and

C. The health insurance must be a policy, contract, certificate or agreement offered or issued by a carrier authorized by the Nevada Insurance Commissioner to provide, deliver, arrange for, pay for or reimburse any of the costs of health care services or, in the alternative, any federally approved self-funded plans established under the Employee Retirement Income Security Act of 1974 (ERISA), as amended, except that medical discount plans as defined by NRS 695H.050 and workers compensation insurance do not qualify as health insurance.

Sec. 6. If an employee declines coverage under a qualified health insurance plan offered by the employer, the employee may be paid in the lower minimum wage tier, however, the employer must document that the employee has declined coverage and declining coverage may not be a term or condition of employment.

Sec. 7. If an employer offers qualified health insurance, but for some reason the employee is not eligible to receive the coverage provided by the employer or there is a delay before the coverage can become effective, the employee must be paid the upper tier wage until such time as the employee becomes eligible and is offered coverage or when the insurance becomes effective.

Sec. 8. For the purposes of complying with the overtime provisions of NRS 608.018(1),

A. An employer who qualifies for the lower tier minimum wage shall pay all employees with a base hourly rate of $7.725 per hour or less overtime whenever the employee works more than eight hours in a workday.

B. An employer who is required to pay the upper tier minimum wage shall pay all employees with a base hourly rate of $9.225 per hour or less overtime whenever the employee works more than eight hours in a workday.

Chapter 608 of NAC

LCB File No. T004-07

PROPOSED TEMPORARY REGULATION OF THE LABOR COMMISSIONER

EXPLANATION- Matter that is ***italicized*** is new; matter in brackets ~~[omitted material]~~ is material to be omitted.

AUTHORITY: § § 1-10; Article 15, Section 16, the constitution of the State of Nevada, NRS 607.110, NRS 607.160.

Section 1. Chapter 608 of NAC is hereby amended by adding thereto the provisions set forth as sections 2 to 9, inclusive, of this regulation.

Sec. 2. ***Definition of minimum wage tiers.***

1. ***The lower tier is from $5.15 to $6.14 per hour for employees who offered qualified health insurance benefits.***
2. ***The upper tier is $6.15 per hour for employees who are not offered qualified health benefits.***
3. ***An employer must pay the upper tier rate unless the employee qualifies for the lower tier rate.***
4. ***These rates may change based on the annual adjustments as set forth in Article 15, Section 16 of the Constitution of Nevada.***

Sec. 3. ***Applicability of Minimum Wage.***

1. ***The minimum wage applies to all employees in Nevada.***
2. ***The only exceptions to the minimum wage are***
   (a) Persons under the age of 18; or
   (b)Persons employed by a nonprofit organization for after school or summer employment; or
   (c)Persons employed as trainees for a period not longer than ninety (90) days as interpreted by the U. S. Department of Labor pursuant to Section 6(g) of the Fair Labor Standards Act; or
   (d) Persons employed under a valid collective bargaining agreement where Article 15, Section 16 of the Nevada Constitution relating to minimum wage, tip credit or other provisions included therein have been waived in clear and unambiguous terms.
3. ***There is no distinction between full-time, permanent, part-time, probationary, or temporary employees.***

Sec. 4. ***In order to qualify for the lower minimum wage tier an employer must comply with all of the following:***

1. *Qualified health insurance coverage must be made available to the employee and the employee's dependents, if any. For the purposes of this section, qualified health insurance coverage is "available to the employee and employee's dependents" when an employer contracts for and maintains qualified health insurance for the class of employees of which the employee is a member, subject only to fulfillment of the conditions required to complete the coverage which are applicable to all similarly-situated employees within this class, unless the waiting period exceeds 120 days; and*
2. *The employee's share of the cost of the premium cannot exceed 10% of the employee's gross taxable income attributable to the employer as defined under the Internal Revenue Code;*
   (a) "Gross Taxable Income" attributable to the employer means the amount specified on the employee's W-2 issued by the employer and includes tips, bonuses or other compensation as required for purposes of federal individual income tax.
   (b) To determine whether the employee's share of the premium does not exceed 10% of the employee's gross taxable income, the employer may:
      I. For an employee for whom the employer has issued a W-2 for the immediately preceding year, divide the gross taxable income from the employer into the projected employee's share of the premiums for qualified health insurance for the current year;
      II. For an employee for which the employer has not issued a W-2 and has payroll information for the four prior quarters, divide the combined total of gross taxable income normally calculated from this payroll information from these four quarters into the projected employee's share of the premiums for qualified health insurance for these four quarters;
      III. For an employee for which there is less than an aggregate year of payroll information, the employer shall
         1) take the total payroll information available for the employee determine the combined total of gross taxable income normally calculated from this payroll information; and
         2) After dividing it by the number of weeks it represents and multiplying it by 52, divide this annualized number into the projected employee's share of the premiums for qualified health insurance for the current year;
      IV. *For a new employee or an employee who turns eighteen years of age during employment, the employer shall wait until the employee has completed two normal payroll periods and then utilize this payroll information as set forth in subsection 3 above relating to an employee for which there is less than a complete year of employment;* and
3. *Offers a health benefit plan that meets one of the following requirements:*
   (a) The plan covers only those categories of health care expenses that are generally deductible by employees on their individual federal income tax returns pursuant to the provisions of 26 U.S.C. Sec. 213 and any federal

regulations relating thereto, if those expenses had been borne directly by those employees; or

(b) Provides health benefits pursuant to a Taft-Hartley trust which:

I. Is formed pursuant to 29 U.S.C. Sec. 186(c)(5); and

II. Qualifies as an employee welfare benefit plan under the Internal Revenue Service guidelines; or

(c) Is a qualified employee welfare benefit plan pursuant to the Employee Retirement Income Security Act of 1974, 29 U.S.C. Sec. 1001 et seq.

Sec. 5. *An employer may decide to pay the maximum wage rate for minimum wage currently applicable in lieu of making any determination under this regulation that the employee may be paid the lower minimum wage rate.*

Sec. 6. *If a determination is made that the employee's share of the premium does not exceed 10% of the employee's gross taxable income from the employer, the employer may pay the employee through the end of the calendar year for which the determination has been made either:*

1. *The lowest minimum wage rate currently applicable; or*
2. *Any amount within the lower minimum wage tier currently applicable.*

Sec. 7. *If an employee declines coverage under a qualified health insurance plan offered by the employer, the employee may be paid in the lower minimum wage tier, however, the employer must document that the employee has declined coverage and the documentation must include the employee's signed wavier of coverage. Declining coverage may not be a term or condition of employment.*

Sec. 8. *If an employer offers qualified health insurance with a standard waiting period of no more than 6 months, the employee may be paid at the lower tier wage rate. If an employer does not offer a qualified health insurance plan or the health benefit plan is not available or the health benefit plan is not provided within 6 months of employment, the employee must be paid the upper tier wage rate until such time as the employee becomes eligible and is offered coverage or when the insurance becomes effective.*

Sec. 9. *For the purposes of complying with the daily overtime provisions of NRS 608.018(1), an employer shall pay overtime based on the minimum wage tier for which that employee is qualified.*

Sec. 10. NAC 608.110 is hereby repealed

~~[NAC 608.110 Minimum wage. (NRS 608.250) The minimum wage for an employee in private employment who:~~
~~1. Is 18 years of age or older is $5.15 per hour.~~
~~2. Is under 18 years of age is $4.38 per hour.]~~

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THE FIRST JUDICIAL DISTRICT COURT

IN AND FOR CARSON CITY, NEVADA

CODY C. HANCOCK, an individual and resident of Nevada,

Plaintiff,

vs.

THE STATE OF NEVADA ex rel. THE OFFICE OF THE NEVADA LABOR COMMISSIONER; THE OFFICE OF THE NEVADA LABOR COMMISSIONER; and THORAN TOWLER, Nevada Labor Commissioner, in his official capacity,

Defendants.

CASE NO: **14 OC 00080 1B**

DEPT. NO: **II**

NOTICE OF ENTRY OF ORDER

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NOTICE OF ENTRY OF ORDER

TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that a **DECISION AND ORDER, COMPRISING FINDINGS OF FACT AND CONCLUSIONS OF LAW** was filed with the First Judicial District Court on the 14th day of August, 2015, a true and correct copy of which is attached hereto as **Exhibit 1**.

Dated this 17th day of August, 2015.

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of August, 2015, a true and correct copy of the **NOTICE OF ENTRY OF ORDER** was served by depositing a true copy of the same for mailing, in the U.S. Mail, postage pre-paid, at Las Vegas, Nevada, said envelope addressed to:

Scott Davis, Esq.
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By Dannielle Fresquez
Dannielle R. Fresquez, an Employee of
WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

Exhibit 1

Exhibit 1

THE FIRST JUDICIAL DISTRICT COURT

IN AND FOR CARSON CITY, NEVADA

CODY C. HANCOCK, an individual and resident of Nevada,

Plaintiff,

vs.

THE STATE OF NEVADA ex rel. THE OFFICE OF THE NEVADA LABOR COMMISSIONER; THE OFFICE OF THE NEVADA LABOR COMMISSIONER; and SHANNON CHAMBERS, Nevada Labor Commissioner, in her official capacity,

Defendants.

CASE NO.: 14 OC 00080 1B
DEPT. NO.: II

DECISION AND ORDER, COMPRISING FINDINGS OF FACT AND CONCLUSIONS OF LAW[1]

On April 30, 2015, Plaintiff Cody C. Hancock ("Plaintiff"), pursuant to N.R.S. 233B.110, filed a complaint for declaratory relief against Defendants the State of Nevada *ex rel.* Office of the Nevada Labor Commissioner, the Office Of The Nevada Labor Commissioner, and Shannon Chambers, in her official capacity as the Nevada Labor Commissioner (collectively, "Defendants"), seeking to invalidate two administrative regulations—N.A.C. 608.100(1) and N.A.C. 608.104(2)—purporting to implement article XV, section 16 of the Nevada Constitution (the

[1] If any finding herein is in truth a conclusion of law, or if any conclusion stated is in truth a finding of fact, it shall be deemed so.

seeking to invalidate two administrative regulations—N.A.C. 608.100(1) and N.A.C. 608.104(2)—purporting to implement article XV, section 16 of the Nevada Constitution (the "Minimum Wage Amendment" or the "Amendment"). Plaintiff also sought to enjoin the Defendants from enforcing the challenged regulations.

On or about June 25, 2014, Defendants filed a motion to dismiss. After a brief stay of proceedings for the parties to consider resolution through a renewed rulemaking process, Defendants' motion to dismiss was withdrawn by stipulation of the parties, entered March 30, 2015, in which the parties also agreed to permit Plaintiff to amend the complaint, and to seek to resolve this action by respective motions for summary judgment. The parties agreed that no discovery was necessary in this case, and that the determinative issues were matters of law.

On or about June 11, 2015, Defendants filed their Motion for Summary Judgment on Plaintiff's claims for declaratory relief. On or about June 12, 2015, Plaintiff filed his Motion for Summary Judgment on Plaintiff's claims for declaratory relief. Subsequently, each party responded in opposition to the other parties' motion, and replied in support of their own. Plaintiff had previously asked the Nevada Labor Commissioner to pass upon the validity of the challenged regulations, and the Court finds that all prerequisites under N.R.S. 233B.110 have been satisfied sufficient for the Court to enter orders resolving this matter.

The Court, having considered the pleadings and being fully advised, now finds and orders as follows:

As an initial matter, summary judgment under N.R.C.P. 56(a) is "appropriate and shall be rendered forthwith when the pleadings and other evidence on file demonstrate that no genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law." *Wood v. Safeway*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (internal quotations omitted). Further, in deciding a challenge to administrative regulations pursuant to N.R.S. 233B.110, "[t]he court shall declare the [challenged] regulation invalid if it finds that it violates constitutional or statutory provisions or exceeds the statutory authority of the agency." N.R.S. 223B.110. The burden is upon Plaintiff to demonstrate that the challenged regulations violate the Minimum Wage Amendment.

The Minimum Wage Amendment was enacted by a vote of the people by ballot initiative at the 2006 General Election, and became effective on November 28, 2006. It is a remedial act, and will be liberally construed to ensure the intended benefit for the intended beneficiaries. *See, e.g., Washoe Med. Ctr., Inc. v. Reliance Ins. Co.*, 112 Nev. 494, 496, 915 P.2d 288, 289 (1996); *see also Terry v. Sapphire Gentlemen's Club*, __ Nev. __, 336 P.2d 951, 954 (2014).

Here, in order to determine whether the challenged regulations conflict with or violate the Minimum Wage Amendment, the Court will first determine the meaning of the pertinent textual portions of the Amendment. Courts review an administrative agency's interpretation of a statute of constitutional provision *de novo*, and may do so with no deference to the agency's interpretations. *United States v. State Engineer*, 117 Nev. 585, 589, 27 P.3d 51, 53 (2001) ("An administrative agency's interpretation of a regulation or statute does not control if an alternate reading is compelled by the plain language of the provision."); *Bacher v. State Engineer*, 122 Nev. 1110, 1118, 146 P.3d 793, 798 (2006) ("The district court may decide purely legal questions without deference to an agency's determination.").

The Minimum Wage Amendment raised the minimum hourly wage in Nevada, but also established a two-tier wage system by which an employer may pay employees, currently, $8.25 per hour, or pay down to $7.25 per hour if the employer provides qualifying health insurance benefits, to the employee and all of his or her dependents, at a certain capped premium cost to employee.

Section A of the Minimum Wage Amendment provides:

> 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.

Nev. Const. art. XV, § 16(A).

N.A.C. 608.104(2) states, in pertinent part:

2. As used in this section, "gross taxable income of the employee attributable to the employer" means the amount specified on the Form W-2 issued by the employer to the employee and includes, without limitation, tips, bonuses or other compensation as required for purposes of federal individual income tax.

N.A.C. 608.100(1) states, in pertinent part:

1. Except as otherwise provided in subsections 2 and 3, the minimum wage for an employee in the State of Nevada is the same whether the employee is a full-time, permanent, part-time, probationary or temporary employee, and:

(a) If an employee is offered qualified health insurance, is $5.15 per hour; or

(b) If an employee is not offered qualified health insurance, is $6.15 per hour.

N.A.C. 608.104(2) Is Invalid

Plaintiff contends that N.A.C. 608.104(2) unlawfully permits employers to figure in tips and gratuities furnished by customers and the general public when establishing the maximum allowable premium cost to the employee of qualifying health insurance. He argues that "10% of the employee's gross taxable income from the employer" can only mean compensation and wages paid by the employer to the employee, and excludes tips earned by the employee.

Defendants argue that the term "gross taxable income" directed the Labor Commissioner to interpret the entire provision as meaning all income derived from working for the employer, whether as direct wages or as tips and gratuities, because Nevada has no state income tax and state law contains no definition of "gross taxable income." Therefore, the State argues, resort to federal tax law is appropriate, and because tips and gratuities earned by the employee constitute, for him or her, gross taxable income upon which federal taxes must be paid. In that regard, Defendants contend that N.A.C. 608.104(2)'s definition of "income attributable to the employer" best

implements the language of the Amendment.

The Court finds the text of the Minimum Wage Amendment which N.A.C. 608.104(2) purports to implement—"10% of the employee's gross taxable income from the employer"—to be unambiguous. As the Court reads the plain language of the constitutional provision, it indicates that the term "10% of the employee's gross taxable income" is limited to such income that comes "from the employer," as opposed to gross taxable income that emanates from any other source, including from tips and gratuities provided by an employer's customers. "[T]he language of a statute should be given its plain meaning unless doing so violates the spirit of the act ... [thus] when a statute is clear on its face, a court may not go beyond the language of the statute in determining the legislature's intent." *University and Community College System of Nevada v. Nevadans for Sound Government,* 120 Nev. 712, 731, 100 P.3d 179, 193 (2004).

There are no particular difficulties in determining an employee's gross taxable income that comes *from the employer*, as this figure must be reported to the United States Internal Revenue Service as part of the employee's tax information, including on his or her annual W-2 form, along with the employee's income from tips and gratuities. The Court further presumes that employers are aware of, or can easily compute, how much they pay out of their business revenue to each employee, this being a major portion of the business's expenses for which records are surely maintained by the employer.

The Court does note that N.A.C. 608.104(2)'s inclusion of "bonuses or other compensation" presents no constitutional problem under the Amendment, as long as the income in question comes "from the employer."

The Court understands Defendants' interpretation of this portion of the Amendment, and in support of the administrative regulation purporting to implement and enforce it, to emphasize the phrase "gross taxable income" in isolation, at the expense of a full reading giving meaning to the qualifying term "from the employer." As Defendants note in their briefing, "[i]n expounding a constitutional provision, such constructions should be employed as will prevent any clause, sentence or word from being superfluous, void or insignificant." *Youngs v. Hall,* 9 Nev. 212 (1874). To arrive at Defendants' preferred interpretation of the Amendment, however, the Court

would have to first find the provision ambiguous, and then engage in an act of interpretation in order to agree that the phrase "gross taxable income" modifies the term "from the employer," rather than the other way around. In that formulation, "gross taxable income from the employer" is rendered as "gross taxable income earned but for employment by the employer," or, "gross taxable income earned as a result of having worked for the employer," and "from the employer" is rendered more or less insignificant to the provision. This is, indeed, what N.A.C. 608.104(2) attempts to indicate when it designates "gross taxable income attributable to the employer" as the measure of the Amendment's ten-percent employee premium cost cap calculation. The Court disagrees, and instead finds the constitutional language plain on its face.

But even if the Court were to find the pertinent portion of the Amendment to be ambiguous, its context, reason, and public policy would still support the conclusion that tips and gratuities should not be included in the calculation of allowable employee premium costs when an employer seeks to qualify to pay below the upper-tier minimum hourly wage. The drafters of the Amendment expressly excluded tips and gratuities from the calculation of the minimum hourly wage ("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."), and gave no other indication that tips and gratuities should be allowed as a form of credit against the cost of the health insurance benefits the Minimum Wage Amendment was designed to encourage employers to provide employees in exchange for the privilege of paying a lower hourly wage rate. Further, as Plaintiff points out, the effect of permitting inclusion of tips and gratuities is to increase, in some cases precipitously, the cost of health insurance benefits to employees, a result that is not supported by the policy and function of the Amendment generally.

Defendants argue that permitting tips and gratuities in the premium calculations for tipped employees eliminates an advantage for those employees that non-tipped employees do not enjoy. It is not strictly within the province of the Nevada Labor Commissioner, however, to make such policy choices in place of the Legislature, or the people acting in their legislative capacity. Her charge is to enforce and implement the labor laws of this State as written. N.R.S. 607.160(1). In any event, and apart from the Amendment's express treatment of the issue, Nevada has prohibited

administrative regulation. *See* N.R.S. 608.160.

The Court finds that N.A.C. 608.104(2), insofar as it permits employers to include tips and gratuities furnished by the customers of the employer in the calculation of income against which in measured the Minimum Wage Amendment's ten percent income cap on allowable health insurance premium costs, violates the Nevada Constitution and therefore exceeds the Nevada Labor Commissioner's authority to promulgate administrative regulations. The Court determines the regulation in question to be invalid, and will further enjoin Defendants from enforcing N.A.C. 608.104(2) for the reasons stated herein.

N.A.C. 608.100(1) Is Invalid

Plaintiff argues that, in order to qualify for the privilege of paying less than the upper-tier hourly minimum wage, an employer must actually provide qualifying health insurance, rather than merely offer it. He contends that, read as a whole and giving all parts of the Amendment meaning and function, the basic scheme of the provision is to propose for both employers and employees a set of choices, a bargain: an employer can pay down to $7.25 per hour, currently, but the employee must receive something in return, qualified health insurance. A mere offer of health insurance—which the employee has not played a role in selecting and may not meet the needs of an employee and his or her family for any number of reasons—permits the employer to receive the benefit of the Minimum Wage Amendment, but can leave the employee with less pay and no insurance provided by the employer.

In support of this interpretation, Plaintiff suggests that "provide" and "offering," as used in the Amendment, are not synonyms, but rather that the basic command of the constitutional provision (in order to pay less than the upper-tier wage level) is to *provide* health benefits, and that the succeeding sentence that begins with the term "offering" only dictates certain requirements of the benefits that must be offered as a step in their provision to employees paid at the lower wage rate.

Defendants argue that "provide" and "offering" are synonymous, and that an employer need only make available qualified health insurance in order to pay below the upper-tier wage level, whether the employee accepts the benefit or not. Defendants argue that the usage, by the

Amendment's drafters, of "offering" and "making available" in the sentence succeeding those employing "provide" modifies and defines "provide" to mean merely "offering" of health insurance.

A further argument by Defendants is that the benefit of the bargain inherent in the Amendment is the offer itself, having employer-selected health insurance made available to the employee, and that interpreting the Amendment to require that employees accept the benefit in order for an employer to pay below the upper-tier minimum wage denies the value of the Minimum Wage Amendment to the employer. They deny that "provide" is the command, or mandate, of the Minimum Wage Amendment where qualification for paying the lesser wage amount is concerned.

The Court finds that the Minimum Wage Amendment requires that employees actually receive qualified health insurance in order for the employer to pay, currently, down to $7.25 per hour to those employees. Otherwise, the purposes and benefits of the Amendment are thwarted, and employees (the obvious beneficiaries of the Amendment) who reject insurance plans offered by their employer would receive neither the low-cost health insurance envisioned by the Minimum Wage Amendment, nor the raise in wages its passaged promised, $7.25 per hour already being the federal minimum wage rate that every employer in Nevada must pay their employees anyway. The amendment language does not support this interpretation.

The Court agrees with Plaintiff's argument that "provide" and "offering" are not synonymous, and that the drafters included both terms, intentionally, to signify different concepts. "[W]here the document has used one term in one place, and a materially different term in another, the presumption is that the different term denotes a different idea." Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 170 (2012). It is also instructive that the drafters used "provide," a verb, and "offering," a gerund, ostensibly to make a distinction between their functions as parts of speech within the text of the Amendment. The Amendment easily could have stated that "[t]he rate shall be X dollars per hour worked, if the employer **offers** health benefits as described herein, or X dollars per hour if the employer does not **offer** such benefits." It did not so state. Instead, it required that the employer "provide" qualified health insurance if it wished to take advantage of the lower wage rate. The Court agrees with Plaintiff, furthermore, that

the overall definitional weight of the verb phrase "to provide" lends credence to his interpretation that it means to furnish, or to supply, rather than merely to make available, especially when the overall context and scheme of the Minimum Wage Amendment is taken into consideration.

The distinction the parties here draw between "provide" and "offering" is no small matter. Allowing employers merely to offer health insurance plans rather than provide, furnish, and supply them, alters significantly the function of this remedial constitutional provision. The fundamental operation of the Minimum Wage Amendment, fairly construed, demands that employees not be left with none of the benefits of its enactment, whether they be the higher wage rate or the promised low-cost health insurance for themselves and their families.

Because N.A.C. 608.100(1) impermissibly allows employers only to offer health insurance benefits, but does not take into account whether the employee accepts those benefits when determining how and when the employer may pay below the upper-tier minimum wage rate, it violates the Nevada Constitution and therefore exceeds the Nevada Labor Commissioner's authority to promulgate administrative regulations. The Court determines the regulation in question to be invalid, and will further enjoin Defendants from enforcing N.A.C. 608.104(2) for the reasons stated herein.

IT IS HEREBY ORDERED, therefore, and for good cause appearing, that Plaintiff's Motion for Summary Judgment is **GRANTED** and the Defendant's Motion for Summary Judgment is DENIED.

IT IS FURTHER ORDERED that N.A.C. 608.104(2) is declared invalid and of no effect, for the reasons stated herein;.

IT IS FURTHER ORDERED that N.A.C. 608.100(1) is declared invalid and of no effect, for the reasons stated herein;

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IT IS FURTHER ORDERED that Defendants are enjoined from enforcing the challenged regulations.

IT IS SO ORDERED this 12 day of August, 2015.

James Ellsworth
DISTRICT COURT JUDGE

Submitted by:

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP
DON SPRINGMEYER, ESQ.
Nevada State Bar No. 1021
BRADLEY SCHRAGER, ESQ.
Nevada State Bar No. 10217
3556 E. Russell Road, Second Floor
Las Vegas, Nevada 89120
Attorneys for Plaintiffs

/s/ Bradley S. Schrager
Bradley S. Schrager, Esq.

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ORDR

CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

MDC RESTAURANTS, LLC; LAGUNA RESTAURANTS, LLC; INKA, LLC; and DOES 1 through 100, Inclusive,

Defendants.

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

ORDER GRANTING CLASS CERTIFICATION, DESIGNATING CLASS REPRESENTATIVES, AND DESIGNATING CLASS COUNSEL

Hearing Date: September 25, 2015
Hearing Time: 9:30 a.m.

On June 8, 2015, Plaintiffs filed their Motion for Class Certification. On June 25, 2015, Defendants filed their Opposition to Plaintiffs' Motion for Class Certification. On June 30, 2015, Plaintiffs filed their Reply in Support of their Motion for Class Certification. On July 9, 2015, the Court held a hearing on Plaintiffs' Motion for Class Certification, and ordered supplemental briefing regarding Plaintiffs' Motion for Class Certification.

On July 16, 2015, Plaintiffs filed their Supplemental Brief in Support of their Motion for Class Certification. On July 31, 2015, Defendants filed their Opposition to

TIMOTHY C. WILLIAMS
DISTRICT JUDGE

DEPARTMENT SIXTEEN
LAS VEGAS NV 89155

Plaintiffs' Supplemental Brief. On August 7, 2015, Plaintiffs filed their Reply in Support of their Supplemental Brief.

On September 25, 2015, the Court held a hearing on Plaintiffs' continued Motion for Class Certification and supplemental briefing; Defendants' continued Motion to Stay Proceedings on Application for Order Shortening Time; Plaintiffs' Motion for Partial Summary Judgment on Liability Regarding Defendants' Health Benefits Plans; and Defendants' Countermotion to Strike Undisclosed Purported Expert and for Sanctions, with Bradley S. Schrager, Esq., Jordan J. Butler, Esq., and Daniel Bravo, Esq. appearing for Plaintiffs, and Montgomery Y. Paek, Esq. and Kathryn B. Blakey, Esq. appearing for Defendants.

After review and consideration of the record, the points and authorities on file herein, and oral arguments of counsel at hearing, the Court finds the following facts and states the following conclusions of law.[1]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Plaintiffs Diaz, Wilbanks, and Olszynski have proposed the following Class, pursuant to Rule 23 of the Nevada Rules of Civil Procedure:

> **All current and former Nevada employees of Defendants paid less than $8.25 per hour at any time since July 1, 2010, who did not enroll in Defendants' health insurance plan.**
>
> **(hereinafter the "Not Enrolled" Class).**

2. The Court finds that the requirements of Rule 23(a) and (b) of the Nevada Rules of Civil Procedure, as described herein, are met, and that certification of the "Not Enrolled" Class pursuant to rule is appropriate.

3. The Court finds that the proposed "Not Enrolled" Class consists of approximately 2,022 putative members, and that it therefore satisfies the numerosity

[1] If any finding herein is in truth a conclusion of law, or if any conclusion stated is in truth a finding of fact, it shall be deemed so.

TIMOTHY C. WILLIAMS
DISTRICT JUDGE

DEPARTMENT SIXTEEN
LAS VEGAS NV 89155

requirement of Rule 23(a)(1).

4. The Court finds that the commonality requirement of Rule 23(a)(2) is satisfied, as there are common questions of law or fact applicable to all members of the "Not Enrolled" Class, including, but not limited to: Whether a "Not Enrolled" Class member is or was an employee of the Defendant; Whether a "Not Enrolled" Class member is or was employed by Defendants at any time since July 1, 2010; Whether a "Not Enrolled" Class member was enrolled in Defendants' health insurance plan; and, Whether a "Not Enrolled" Class member was paid less than $8.25 an hour at any time during the stated period.

5. The Court finds that the typicality requirement of Rule 23(a)(3) is satisfied, as the claims of Plaintiffs Diaz, Wilbanks, and Olszynski are typical of the claims of the "Not Enrolled" Class, including, but not limited to the fact that Plaintiffs allege they were paid less than $8.25 an hour, and were not enrolled in Defendants' health insurance plan.

6. The Court finds that the adequacy requirement of Rule 23(a)(4) is satisfied, as Plaintiffs Diaz, Wilbanks, and Olszynski are factually within the definition of the "Not Enrolled" Class, and there are no other issues that indicate that the proposed Class representatives would be inadequate under the facts of this matter.

7. The Court finds that the law firm of Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP satisfies the adequacy requirement to serve as counsel for the "Not Enrolled" Class.

8. The Court finds that the predominance requirement of Rule 23(b)(3) is satisfied, as the common questions of law or fact identified herein predominate over any questions affecting individual members.

9. The Court finds that the superiority requirement of Rule 23(b)(3) is satisfied, as a class action would be far superior than having over 2,000 individual claims filed in and burdening the district court.

10. The Court finds that as to Defendants' Motion to Stay Proceedings on Application for Order Shortening Time, the Court denies the Motion as to the "Not Enrolled" Class.

TIMOTHY C. WILLIAMS
DISTRICT JUDGE

DEPARTMENT SIXTEEN
LAS VEGAS NV 89155

11. The Court finds that as to Plaintiffs' Motion for Partial Summary Judgment on Liability Regarding Defendants' Health Benefits Plans, the Court denies the motion without prejudice, not based upon the underlying merits of the motion, but because for the Court to even consider the motion, there should have been a Nevada Rule of Civil Procedure 16.1 initial expert disclosure as it relates to Dean Matthew T. Milone.

12. The Court finds that as to Defendants' Countermotion to Strike Undisclosed Purported Expert and for Sanctions, the Court denies the motion based upon the timing of the new issue of Liability Regarding Defendants' Health Benefits Plan, which was raised on August 13, 2015, where the Court itself recognized that expert input would be helpful to reach its decision. Defendants shall be given 45 days to designate their own expert on the issue of Liability Regarding Defendants' Health Benefits Plan.

IT IS THEREFORE ORDERED that Plaintiffs' Motion for Class Certification is **GRANTED**, and the Court certifies the "Not Enrolled" Class consisting of

> **All current and former Nevada employees of Defendants paid less than $8.25 per hour at any time since July 1, 2010, who did not enroll in Defendants' health insurance plan.**

IT IS FURTHER ORDERED that Plaintiffs Paulette Diaz, Lawanda Gail Wilbanks, and Shannon Olszynski are designated representatives of the certified "Not Enrolled" Class;

IT IS FURTHER ORDERED that the law firm of Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP is approved as Class Counsel for the "Not Enrolled" Class certified by this Order.

IT IS FURTHER ORDERED that Defendants' Motion to Stay Proceedings on Application for Order Shortening Time is **DENIED** as to the "Not Enrolled" Class.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Partial Summary Judgment on Liability Regarding Defendants' Health Benefits Plans is **DENIED without prejudice**.

IT IS FURTHER ORDERED that Defendants' Countermotion to Strike Undisclosed Purported Expert and for Sanctions is **DENIED.**

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TIMOTHY C. WILLIAMS
DISTRICT JUDGE

DEPARTMENT SIXTEEN
LAS VEGAS NV 89155

IT IS FURTHER ORDERED that Defendants shall be given 45 days to designate their own expert on the issue of Liability Regarding Defendants' Health Benefits Plan.

IT IS SO ORDERED this 13th day of October, 2015.

TIMOTHY C. WILLIAMS
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on the date filed, this document was electronically served to all registered parties for case number A701633 as follows:

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Lynn Berkheimer
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TIMOTHY C. WILLIAMS
DISTRICT JUDGE

DEPARTMENT SIXTEEN
LAS VEGAS NV 89155

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CLERK OF THE COURT

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DON SPRINGMEYER, ESQ.
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Attorneys for Plaintiffs

EIGHTH JUDICIAL DISTRICT COURT

IN AND FOR CLARK COUNTY, STATE OF NEVADA

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

Plaintiffs,

vs.

MDC RESTAURANTS, LLC; LAGUNA RESTAURANTS, LLC; INKA, LLC; and DOES 1 through 100, Inclusive,

Defendants.

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

NOTICE OF ENTRY OF ORDER GRANTING CLASS CERTIFICATION, DESIGNATING CLASS REPRESENTATIVES, AND DESIGNATING CLASS COUNSEL

Hearing Date: September 25, 2015
Hearing Time: 9:30 a.m.

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PLEASE TAKE NOTICE that the attached Order Granting Class Certification, Designating Class Representatives, and Designating Class Counsel was filed on the 16th day of October, 2015.

DATED this 17th day of October, 2015.

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

By: */s/ Bradley Schrager*

DON SPRINGMEYER, ESQ.
Nevada State Bar No. 1021
BRADLEY SCHRAGER, ESQ.
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DANIEL BRAVO, ESQ.
Nevada State Bar No. 13078
3556 E. Russell Road, Second Floor
Las Vegas, Nevada 89120
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of October, 2015, a true and correct copy of **NOTICE OF ENTRY OF ORDER GRANTING CLASS CERTIFICATION, DESIGNATING CLASS REPRESENTATIVES,, AND DESIGNATING CLASS COUNSEL** 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/ Lorrine Rillera*
Lorrine Rillera, an Employee of
WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

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ORDR

CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

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

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vs.

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DISTRICT JUDGE

DEPARTMENT SIXTEEN
LAS VEGAS NV 89155

Plaintiffs' Supplemental Brief. On August 7, 2015, Plaintiffs filed their Reply in Support of their Supplemental Brief.

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After review and consideration of the record, the points and authorities on file herein, and oral arguments of counsel at hearing, the Court finds the following facts and states the following conclusions of law.[1]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Plaintiffs Diaz, Wilbanks, and Olszynski have proposed the following Class, pursuant to Rule 23 of the Nevada Rules of Civil Procedure:

> **All current and former Nevada employees of Defendants paid less than $8.25 per hour at any time since July 1, 2010, who did not enroll in Defendants' health insurance plan.**
>
> **(hereinafter the "Not Enrolled" Class).**

2. The Court finds that the requirements of Rule 23(a) and (b) of the Nevada Rules of Civil Procedure, as described herein, are met, and that certification of the "Not Enrolled" Class pursuant to rule is appropriate.

3. The Court finds that the proposed "Not Enrolled" Class consists of approximately 2,022 putative members, and that it therefore satisfies the numerosity

[1] If any finding herein is in truth a conclusion of law, or if any conclusion stated is in truth a finding of fact, it shall be deemed so.

TIMOTHY C. WILLIAMS
DISTRICT JUDGE

DEPARTMENT SIXTEEN
LAS VEGAS NV 89155

requirement of Rule 23(a)(1).

4. The Court finds that the commonality requirement of Rule 23(a)(2) is satisfied, as there are common questions of law or fact applicable to all members of the "Not Enrolled" Class, including, but not limited to: Whether a "Not Enrolled" Class member is or was an employee of the Defendant; Whether a "Not Enrolled" Class member is or was employed by Defendants at any time since July 1, 2010; Whether a "Not Enrolled" Class member was enrolled in Defendants' health insurance plan; and, Whether a "Not Enrolled" Class member was paid less than $8.25 an hour at any time during the stated period.

5. The Court finds that the typicality requirement of Rule 23(a)(3) is satisfied, as the claims of Plaintiffs Diaz, Wilbanks, and Olszynski are typical of the claims of the "Not Enrolled" Class, including, but not limited to the fact that Plaintiffs allege they were paid less than $8.25 an hour, and were not enrolled in Defendants' health insurance plan.

6. The Court finds that the adequacy requirement of Rule 23(a)(4) is satisfied, as Plaintiffs Diaz, Wilbanks, and Olszynski are factually within the definition of the "Not Enrolled" Class, and there are no other issues that indicate that the proposed Class representatives would be inadequate under the facts of this matter.

7. The Court finds that the law firm of Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP satisfies the adequacy requirement to serve as counsel for the "Not Enrolled" Class.

8. The Court finds that the predominance requirement of Rule 23(b)(3) is satisfied, as the common questions of law or fact identified herein predominate over any questions affecting individual members.

9. The Court finds that the superiority requirement of Rule 23(b)(3) is satisfied, as a class action would be far superior than having over 2,000 individual claims filed in and burdening the district court.

10. The Court finds that as to Defendants' Motion to Stay Proceedings on Application for Order Shortening Time, the Court denies the Motion as to the "Not Enrolled" Class.

TIMOTHY C. WILLIAMS
DISTRICT JUDGE

DEPARTMENT SIXTEEN
LAS VEGAS NV 89155

11. The Court finds that as to Plaintiffs' Motion for Partial Summary Judgment on Liability Regarding Defendants' Health Benefits Plans, the Court denies the motion without prejudice, not based upon the underlying merits of the motion, but because for the Court to even consider the motion, there should have been a Nevada Rule of Civil Procedure 16.1 initial expert disclosure as it relates to Dean Matthew T. Milone.

12. The Court finds that as to Defendants' Countermotion to Strike Undisclosed Purported Expert and for Sanctions, the Court denies the motion based upon the timing of the new issue of Liability Regarding Defendants' Health Benefits Plan, which was raised on August 13, 2015, where the Court itself recognized that expert input would be helpful to reach its decision. Defendants shall be given 45 days to designate their own expert on the issue of Liability Regarding Defendants' Health Benefits Plan.

IT IS THEREFORE ORDERED that Plaintiffs' Motion for Class Certification is **GRANTED**, and the Court certifies the "Not Enrolled" Class consisting of

> **All current and former Nevada employees of Defendants paid less than $8.25 per hour at any time since July 1, 2010, who did not enroll in Defendants' health insurance plan.**

IT IS FURTHER ORDERED that Plaintiffs Paulette Diaz, Lawanda Gail Wilbanks, and Shannon Olszynski are designated representatives of the certified "Not Enrolled" Class;

IT IS FURTHER ORDERED that the law firm of Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP is approved as Class Counsel for the "Not Enrolled" Class certified by this Order.

IT IS FURTHER ORDERED that Defendants' Motion to Stay Proceedings on Application for Order Shortening Time is **DENIED** as to the "Not Enrolled" Class.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Partial Summary Judgment on Liability Regarding Defendants' Health Benefits Plans is **DENIED without prejudice**.

IT IS FURTHER ORDERED that Defendants' Countermotion to Strike Undisclosed Purported Expert and for Sanctions is **DENIED.**

. . .

TIMOTHY C. WILLIAMS
DISTRICT JUDGE

DEPARTMENT SIXTEEN
LAS VEGAS NV 89155

IT IS FURTHER ORDERED that Defendants shall be given 45 days to designate their own expert on the issue of Liability Regarding Defendants' Health Benefits Plan.

IT IS SO ORDERED this 13th day of October, 2015.

TIMOTHY C. WILLIAMS
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on the date filed, this document was electronically served to all registered parties for case number A701633 as follows:

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