Exhibit E

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 C. WILLIAMS, DISTRICT JUDGE,
Respondents,
and
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.

No. 68523

FILED

SEP 11 2015

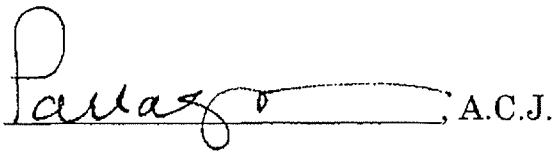
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER DIRECTING ANSWER

This original petition for a writ of mandamus or prohibition challenges a district court partial summary judgment finding petitioner MDC Restaurants, LLC liable for unpaid wages in the underlying minimum wage action. Having reviewed the petition, it appears that an answer may assist this court in resolving this matter. Therefore, real parties in interest, on behalf of respondents, shall have 30 days from the

date of this order within which to file and serve an answer, including authorities, against issuance of the requested writ. Petitioners shall have 15 days from service of the answer to file and serve any reply.

It is so ORDERED.



, A.C.J.

cc: Hon. Timothy C. Williams, District Judge
Littler Mendelson/Las Vegas
Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP/Las Vegas
Eighth District Court Clerk

Exhibit D

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,

v.

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

and

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. 68523

District Court No. A-14-701633-C

Department No. XVI

AMICI CURIAE'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

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NRAP 26.1 DISCLOSURE

Pursuant to NRAP 26.1, counsel of record for Amici Curiae certifies that the following are persons or entities described in NRAP 26.1(a) that must be disclosed.

1. Fertitta Group, Inc., a Delaware corporation, owns 100% of Landry's Inc.
2. Landry's Inc., a Delaware corporation, owns 100% of Bubba Gump Shrimp Co. Restaurants, Inc., Claim Jumper Acquisition Company, LLC, Landry's Seafood House – Nevada, Inc., Landry's Seafood House – Arlington, Inc., Bubba Gump Shrimp Co. Restaurants, Inc., Morton's of Chicago/Flamingo Road Corp. and Bertolini's of Las Vegas, Inc.

These representations are made so the judges of the Court may evaluate possible disqualification or recusal.

DATED: August 24, 2015.

JACKSON LEWIS P.C.

/s/ Elayna J. Youchah

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BRIEF OF AMICI CURIAE

I. INTEREST OF THE AMICI CURIAE

Claim Jumper Acquisition Co., LLC, Landry's Inc., Landry's Seafood House – Nevada, Inc., Landry's Seafood House – Arlington, Inc., Bubba Gump Shrimp Co. Restaurants, Inc., Morton's of Chicago/Flamingo Road Corp. and Bertolini's of Las Vegas, Inc. (collectively, "Landry's" or "Amici"), seek to participate as Amici Curiae in the Writ proceeding *MDC Restaurants, LLC v. Diaz*, Case No. 68523, District Court No. A-14-701633-C, Dept. XVI (the "Diaz Action"). Landry's submits this brief pursuant to NEV. R. APP. P. 29. Petitioners and Real Parties in Interest extended to Landry's the courtesy of their written consent to participation as Amici Curiae. *See* NEV. R. APP. P. 29(a). Landry's filed its Notice Written Consent of All Parties concurrently with this Brief.

Landry's owns and operates restaurants throughout Nevada (as well as elsewhere in the United States), is subject to the Minimum Wage Amendment (sometimes the "MWA" or "Amendment"), and is involved in three active lawsuits in Nevada where the dispute is centered on alleged violations of the MWA. There is no doubt that Landry's will face the same legal arguments advanced by the same counsel at issue in this Writ proceeding.[1] In addition, Landry's is a plaintiff in

[1] In 2014, Amici were named as defendants in two actions in the Eighth Judicial District Court: *Williams v. Claim Jumper Acquisition Co., LLC*, A-14-702048 and *Lopez v. Landry's Inc.*, A-14-706449 (the "Landry's Cases"). The

Case 2:15-cv-1160, *Landry's Inc., et al v. Sandoval, et al.*, in which plaintiffs seek declaratory and injunctive relief based on, among other things, the Employee Retirement Income Security Act's preemption of the Minimum Wage Amendment.

MDC's Writ Petition addresses the meaning of "provide" and "offering" as used in the MWA. Landry's supports Petitioner's position that "provide" cannot be reasonably interpreted to mean an employee must affirmatively *accept* the offered health benefits *and enroll* in the plan before the employer can lawfully pay the lower tier rate. Because this issue is central to the resolution of the consolidated Landry's Cases, and because Landry's has been litigating the MWA on several fronts over the past year, Amici Curiae are well-versed on the subject and able to provide the Court with additional insight based their experience.

II. INTRODUCTION

Amici support Petitioner's argument that the district court improperly found that the phrase "to provide health care" means to "enroll" in health care. As Petitioner's argue, such an interpretation is unreasonable because it ignores the

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assertions by the plaintiffs and putative classes in the Landry's Cases include alleged violation of the MWA (that plaintiffs are current or former employees who were paid $7.25 an hour, but, should have been paid $8.25 an hour because Landry's failed to provide, offer or make health benefits available as required by the Amendment). These allegations mirror the law and factual allegations in the Diaz Action. The cases against Claim Jumper and Landry's are now consolidated into one action pending in Department XX of the Eighth Judicial District Court for Clark County, Nevada. Claim Jumper Acquisition Co., LLC is also the real party in interest in a Writ proceeding pending with the Court, Docket 66629, which will resolve the MWA's applicable statute of limitations.

MWA's plain language and impermissibly renders irrelevant the critical phrase "*[o]ffering 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." Petition at 15-22. Amici also agree with Petitioner that even if "provide" means "furnish," as the district court found, furnish does not require acceptance or enrollment in the plan. *Id.* at 22-23. In this Brief, Amici raise two additional arguments for why the district court's order is contrary to law.

First, by ignoring the canon of interpretation that "the specific controls the general," the lower court failed to give effect to the MWA's plain meaning. The instant dispute implicates the Amendment's first three sentences. The first sentence reads: "Each employer shall pay a wage to each employee of not less than the hourly rates set forth in this section." Const. of Nev. Art. 15, § 16(A). The second sentence states: "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." *Id.* (The "General Sentence.") The third sentence states: "Offering health benefits within the meaning of this section shall consist of making health insurance available to the employee[.]" *Id.* (The "Definitional Sentence.")

Applying the "specific controls the general" canon to the MWA establishes that the term "provides," as it appears in the General Sentence ("if the employer

provides health benefits as described" in the MWA), is controlled by the immediately following Definitional Sentence, which plainly explains that "provide" means "*[o]ffering* health benefits" and "making health insurance available[.]" *Id.* Despite the Definitional Sentence's controlling nature, the lower court ignored the Definitional Sentence, concluding that the General Sentence unambiguously establishes that "provides" means to "enroll."

Second, Amici establish that the lower court's interpretation should be rejected because it is an unreasonable interpretation that leads to absurd results. Even assuming there is an ambiguous provision, the Court may resolve the ambiguity by rejecting an interpretation that leads to absurd results.

In sum, by concluding that the MWA unambiguously dictates that "provide" means an employee must "enroll" in an employer's plan such benefits, the lower court ignored the MWA's plain meaning, violating numerous canons of interpretation along the way. As a result, Amici Curiae urge the Court to grant the Petition and overturn the lower court's ruling.

III. THE LOWER COURT ERRED BY IGNORING THE DEFINING TERMS "OFFERING" AND "MAKE AVAILABLE" THAT CONTROL THE INTERPRETATION OF "PROVIDES."

A. Applicable Textual Interpretation Framework

The Nevada Supreme Court has repeatedly explained the proper process for textual interpretation of Nevada law. The interpretive process must "begin with

the text," itself. *Strickland v. Waymire*, 126 Nev. Adv. Op. 25, 235 P.3d 605, 608 (2010). At this stage, words are given their "normal and ordinary" meaning. *Id.*; *McKay v. Board of Supervisors of Carson City*, 102 Nev. 644, 648, 730 P.2d 438, 441 (1986). Terms should not be considered in isolation, but must be interpreted within the proper "context" of the provision as a whole. *Strickland*, 730 P.2d at 609 ("[it] is a mistake to divorce the debate over the meaning of words from their context"); *Orr Ditch and Water Co. v. Justice Court*, 64 Nev. 138, 146, 178 P.2d 558, 562 (1947) ("the meaning of particular terms in a statute may be ascertained by reference to words associated with them in the statute").

Where "a constitutional provision's language is clear on its face," the analysis is over and the Court will not look to other considerations. *Strickland*, 730 P.2d at 609. Only if the text is subject to two or more *reasonable* interpretations will it be deemed ambiguous and appropriate to look to other considerations. *Id*; *State Indus. Ins. System v. Woodall*, 106 Nev. 653, 657, 799 P.2d 552, 554 (1990) ("[s]ince these two statutes . . . are not ambiguous . . . the district court's statutory interpretation was not warranted"). Parties, however, cannot manufacture an ambiguity by concocting an unreasonable interpretation or an interpretation that leads to absurd results. *J.E. Dunn Northwest, Inc. v. Corus Construction Venture, LLC*, 127 Nev. Adv. Rep. 5, 249 P.3d 501, 505-06 (2011) (it is impermissible to "resort to ingenuity to create ambiguity").

If there are competing *reasonable* interpretations, the Court's analysis may go beyond the provision's text to aid in resolution. *Strickland*, 235 P.3d at 605-06. Avoiding interpretations that lead to absurd results, as unreasonable interpretations tend to do, is a fundamental tool in resolving ambiguous provisions. *J.E. Dunn*, 249 P.3d at 506 (rejecting interpretation that would also lead to "an absurd reading of the statute, [and] . . . yield unreasonable or absurd results"); *Secretary of State v. Burk*, 124 Nev. 579, 590, 188 P.3d 1112, 1120 (2008); (interpretations should be "in line with what reason . . . would indicate the legislature intended" and avoid "unreasonable interpretations" that yield "absurd results").

B. The Amendment's Construction Confirms That "Provides" Cannot Mean "Enroll," As The Lower Court Determined

1. The Text's Specific Terms Control Its General Terms

It is a well-settled rule of statutory construction that a "specific provision controls over the general provision." *Western Realty v. City of Reno*, 63 Nev. 330, 337, 172 P.2d 158, 161 (1946). "Under this rule, general terms in a statute may be regarded as limited by subsequent more specific terms." *Orr*, 64 Nev. at 146, 178 P.2d at 562; *Western Realty*, 63 Nev. at 337, 172 P.2d at 161 (the "specific provision controls" a general term, while the general term "embraces" the specific term); *Lader v. Warden*, 121 Nev. 682, 687, 120 P.3d 1164, 1167 (2005). In other words, "[g]eneral and specific words in a statute which are associated together, and which are capable of an analogous meaning, take color from each other, so that ***the***

general words are restricted to a sense analogous to the less general" and specific terms. *Orr*, 64 Nev. at 146, 178 P.2d at 562 (emphasis added).

The closely related "doctrine of construction . . . '*noscitur a sociis*,'" dictates that "the meaning of particular terms in a statute may be ascertained by reference to words associated with them in the statute." *Id.* ("The rule of [the specific controlling the general] has been declared to be a specific application of the broader maxim of '*noscitur a sociis*'"); *see Strickland*, 235 P.3d at 607-09. Thus, "[w]here two or more words of analogous meaning are employed together in a statute, they are understood to be used in their cognate sense, to express the same relations and give color and expression to each other." *Orr*, 64 Nev. at 146, 178 P.2d at 562. As a consequence, a term's contextual "meaning and application must be accepted as proper and controlling" when the term's "use or connection in the statute" is more definite than the term's meaning in isolation. *Id.*

In *Orr*, the Court interpreted the term "excavation" as it appeared in a statute that included the following general purpose: "An Act to secure persons and animals from danger arising from mining and other excavations." *Id.* at 144, 178 P.2d at 561. The act required landowners to construct "good and substantial fences, or other safeguards" if the land contained "any shaft, excavation, or hole, whether used for mining or otherwise[.]" *Id.* The plaintiff contended that the defendant's irrigation canals were "excavations" requiring fencing under the act.

Id. The lower court agreed. Defendant filed a writ petition, in response. *Id.*

On appeal, the Supreme Court looked to the text and identified the "limitation of general words by specific terms" and that "the meaning of a word may be known from accompanying words." *Id.* at 146, 178 P.2d at 561-62. The Court considered various definitions of "excavation" and employed more specific statutory terms to determine whether the proper definition could include a "ditch." *Id.* at 151, 178 P.2d at 565. Importantly, the Court emphasized that "excavation" did not appear in isolation. Rather, the terms appeared with more specific terms that contextualized and limited "excavation's" possible meaning. *Id.*

The Court explained, "if the word 'excavation' be construed to include 'ditch,' either the word 'around' in the phrase 'around such works or shafts' would have to be disregarded, or action, so unnecessary as to border on the absurd or the ridiculous, taken, and the ditch fenced 'around' or encircled." *Id.* In addition, the Court "observed that the statute employs the words, 'danger . . . from falling into such . . . excavations,' and says nothing as to any concurring cause such as water or drowning therefrom." *Id.* at 145-46, 178 P.2d at 562. These "omissions" supported the "contention in favor of the application of the rule of *ejusdem generis* [the specific controls the general]. *Id.* (emphasis in opinion).

Strickland further exemplifies the impact of context and how more definite terms control less-definite, but analogous, terms. Here, the Nevada Supreme Court

interpreted a "recall by special election" provision in Article 2, Section 9 of the Constitution. 235 P.3d at 607-09. The specific issue was whether signatures on a recall petition had to come from registered voters or from "voters who in fact—'actually'—voted." *Id.* The district court, ignoring the interpretive principles described above, ultimately agreed with plaintiffs ruling that the registered voter need not have "actually voted." *Id.* On appeal, the Court examined "the text of Article 2, Section 9," which provides that a recall petition must be signed by "not less than twenty-five percent of the number [of registered voters] who actually voted in the state or in the county [that the officer] represents, at the election in which [the officer] was elected." *Id.* at 607 (modifications in opinion). The Court explained "[i]t is a mistake to divorce the debate over the meaning of words from their context." *Id.* at 608-09. The Court then analyzed the general term "voter" by considering the meaning of the terms "number" and "actually" holding that the word "actually" means "an existing fact; really." *Id.* "Actually," in the context of Article 2, Section 9, "vivified" and clarified that the "*voters who*" qualified to sign the petition were those who "actually" voted. *Id.* at 610. Thus, the phrase "registered voters who actually voted in the . . . the election in which [the officer] was elected," the term "actually" modified "registered voter" by limiting the qualifying "registered voter" to one that "really" or "actually" voted. *Id.*

The two well-established principles discussed above—"the specific controls the general" and "the meaning of a word may be known from accompanying words"—play a critical role in resolving the question presented in this case.

2. The MWA's Specific Terms Control And Clarify What The MWA Requires When It Uses The Term "Provides"

This dispute is based on the interpretation of the MWA's General and Definitional Sentences. The General Sentence states: "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." Const. of Nev. Art. 15, § 16(A). The Definitional Sentence, which immediately follows the General Sentence, states: "*Offering* health benefits within the meaning of this section shall consist of *making health insurance available* to the employee[.]" *Id.* (emphasis added).

Resolving the instant issue turns on the meaning of the General Sentence's phrase, "if the employer *provides* health benefits *as described herein*" and its relation to the Definitional Sentence's phrase, "[o]ffering health benefits within the meaning of this section shall consist of making health insurance available to the employee[.]" *Id.* The lower court erred because its interpretation only considered the General Sentence's phrase containing "provides," ignoring the Definitional Sentence's subsequent and more specific terms "offering" and "make health insurance available." *See* Appendix at 262. According to the lower court, an

employer does not "provide health benefits" unless "an employee actually enroll[s] in health insurance that is offered by the employer." *Id.* This interpretation flaunts every "plain language" interpretive principle employed by the Court.

Moreover, applying its own interpretative methodology, the lower court implicitly found that the use of the word "provides" in the General Sentence has several potential definitions, such as "furnish" or "supply," that do not require a corresponding acceptance. The lower court then ignored the Amendment's express Definitional Sentence ("offering" and "make available") inserting the terms "actually provide" and "actually enroll in health insurance[.]" Appendix at 262.

Because "a statute may be regarded as limited by subsequent more specific terms" the possible definitions of "provides," as it appears in the MWA, must be limited to those definitions consistent with the MWA's more specific terms, "offering" and "make available." The *Orr* decision provides the relevant framework for analyzing this issue. Again, *Orr* considered whether the term "excavation" could include irrigation ditches. 64 Nev. at 146, 178 P.2d at 562. Because subsequent and more specific terms such as "mining" and "shafts" were used in connection with "excavation," the Court eliminated the potential definition of excavation that would include irrigation canals. *Id.* at 152, 178 P.2d at 567.

Here, the MWA's term "provides" does not appear in isolation; rather, "provides" must be considered within the context of the more specific definitional

terms "offering" and "making available," both of which eliminate the definition the lower court used. These specific words describe and define what "provides" means under the MWA. *See Orr,* 64 Nev. at 146, 178 P.2d at 562. Indeed, the General Sentence's phrase "provides health benefits *as described herein*" expressly signals that the following sentence will define for the reader what "provides" means. *Id.*

More important, however, is that the lower court defined "provide" as "to *actually* provide," which it further reasoned, necessarily required acceptance or that "an employee actually enroll." Appendix at 262. This definition completely ignores that to "offer" or and "make available," words used to explain "provides," are inconsistent with requiring acceptance or enrollment.

In sum, a definition of "provides" that translates to acceptance or "enrollment" violates the interpretive principle that the specific controls the general. The MWA's Definitional Sentence is more specific than, and restricts, the General Sentence to an interpretation analogous to "offering." The lower court wrongly ignored the Definitional Sentence, which led to an unreasonable interpretation. This unreasonable interpretation should, therefore, be rejected.

C. The Lower Court's Interpretation Leads To Absurd Results

A second clear principle applicable to the instant dispute is that courts will reject "an absurd reading of [a] statute [and] avoid[s] interpretations that yield

unreasonable or absurd results. *J.E. Dunn*, 249 P.3d at 505; *Burk*, 124 Nev. at 590, 188 P.3d at 1120 ("when a constitutional provision's language is clear on its face, we will not go beyond that language . . . or create an ambiguity where none exists"). An interpretation that adds or omits language should be rejected in the face of a reasonable, plain-language interpretation. *Id.*; *Gallagher v. City of Las Vegas*, 114 Nev. 595, 599, 959 P.2d 519, 521 (1998) (rejecting addition of language that would require a "causal connection").

Here, the lower court interpretation of the MWA leads to grammatical inconsistencies and should be rejected. *J.E. Dunn*, 249 P.3d at 505 (the "statutory construction is grammatically incorrect"). Critically, the lower court inexplicably equates the term "provides" with "actually enrolls," thereby omitting the MWA's entire Definitional Sentence. Appendix at 262. This is plainly unreasonable if the Amendment's terms are given effect and not "turned into mere surplusage." *Albios v. Horizon Comm'ty, Inc.*, 122 Nev. 409, 418, 132 P.3d 1022, 1028 (2006)). Indeed, the lower court's interpretation leaves the Definitional Sentence with "no job at all, which [the Court's] rules do not allow." *Strickland*, 235 P.3d at 610.[2]

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[2] The lower court's interpretation is also unreasonable because it fails to attribute meaning to the MWA's analogous terms "provide," "offer" and "make available." Const. of Nev. Art. 15, § 16(A). By finding that an employer can only "provide" insurance if the employee "actually enrolls," the lower court equated the term "provides" with the employee's act of "accepting" or "actually enrolling in" a plan. But construing "provides" to mean the employee affirmatively "enrolls,"

Moreover, if a statute is ambiguous, the Court can resolve the ambiguity by rejecting interpretations that lead to absurd results. *J.E. Dunn*, 249 P.3d at 505 ("unreasonable or absurd results" should be avoided). A statute is ambiguous, however, only if there are more than one reasonable interpretations of the text. *Strickland*, 235 P.3d at 605-06. To the extent the lower court's interpretation can be considered reasonable, which it cannot, the district court still erred because its interpretation leads to absurd results.

The lower court's interpretation of the MWA, requiring an employee to actually enroll in order for an employer to lawfully pay the employee the lower tier minimum wage, leads to the following absurd results: (a) suppose an employee's held beliefs include rejection of healthcare and therefore the employee declines insurance. The employer would still be required to pay the higher tier minimum wage despite the employee's conscious decision not to participate in health care and the employer's deliberate effort to "offer" and "make available" health insurance; or (b) suppose an employee under the age of 26 is insured through parents as required by the Affordable Care Act[3], and declines the employer's "offer" of insurance because the employee is fully insured and pays nothing in premiums. Under the lower court's interpretation of the MWA, the employer is

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violates the interpretive canon that analogous terms be controlled by the more specific term's meaning. *Orr*, 64 Nev. at 146, 178 P.2d at 562.

[3] YOUNG ADULTS AND THE AFFORDABLE CARE ACT, Dept. of Labor ("dependent coverage must be available until a child reaches the age of 26"), *available at http://www.dol.gov/ebsa/faqs/faq-dependentcoverage.html*.

still required to pay the employee the upper tier minimum wage rate. In contrast the employee over the age of 26, who is no longer insurable by parents under the ACA, accept the offer of insurance from the employer, gets paid the lower tier rate, ***and*** contributes up to 10% of the employees relevant income to premiums. This leads to the unintended and absurd consequence that a 25-year-old would be insured with no premium deduction, but paid $8.25 an hour, while a 26-year-old, who obtained insurance through the employer, would receive $7.25 less the insurance premium of up to, approximately, $.75. The 26-year-old, with employer insurance, would make $1.75 less an hour than the 25-year-old. This absurd result cannot be justified by the MWA's language, but necessarily follows from the lower court's unreasonable interpretation. This result is unsupported as a matter of law.

III. CONCLUSION

Amici Curiae respectfully urge the Court to grant MDC's petition and direct the lower court to enter an order that an employer may lawfully pay the lower tier rate by offering or making health insurance available as stated in the MWA.

DATED: August 24, 2015.

JACKSON LEWIS P.C.

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CERTIFICATE OF COMPLIANCE

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

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

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

[ ] Proportionately spaced, has a typeface of 14 points or more, and contains _____ words; or

[ ] Monospaced, has 10.5 or fewer characters per inch, and contains _____ words or ___ lines of text; or

[**XX**] Does not exceed 15 pages.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix

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

Dated: August 24, 2015.

JACKSON LEWIS P.C.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Jackson Lewis P.C. and that on this 24th day of August 2015, I caused to be served a true and correct copy of the above and foregoing **AMICI CURIAE'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OR PROHIBITION** via the Court's Case Management and Electronic Case Filing (CM/ECF) system and U.S. Mail, postage prepaid, properly addressed to the following:

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Exhibit C

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

vs.

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

vs.

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

Case No.

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

District Court Dept. No. XVI

PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

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NRAP 26.1 DISCLOSURE

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

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

Dated: July 30, 2015

Respectfully submitted,

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I. RELIEF SOUGHT.

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

II. ISSUES PRESENTED.

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

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

III. FACTS NECESSARY TO UNDERSTAND THE ISSUES PRESENTED.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Standard For Writ Of Mandamus Or Prohibition.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

available.

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

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

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

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

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

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

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

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

> Offering health benefits within the meaning of this section shall consist of making health insurance available to the employee for the employee and the employee's dependents at a total cost to the employee for premiums of not more than 10 percent of the employee's gross taxable income from the employer.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. CONCLUSION

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

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

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

Respectfully submitted,

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DECLARATION OF THE PARTY BENEFICIALLY INTERESTED

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CERTIFICATE OF COMPLIANCE

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

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

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

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

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

☒ Does not exceed 30 pages.

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

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

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

Dated: July 30, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

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

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

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Respondents

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

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

/s/ Erin J. Melwak

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Exhibit B

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

No. 68845

ERIN HANKS, et al.;

Plaintiffs,

vs.

BRIAD RESTAURANT GROUP, LLC., a New Jersey limited liability company; and DOES 1 through 100, inclusive,

Defendant.

Case No. 2:14-cv-00786-GMN-PAL

PROPOSED ORDER FOR CERTIFICATION OF QUESTION OF LAW TO THE NEVADA SUPREME COURT

On September 8, 2015 Plaintiffs filed their motion for Partial Summary Judgment as to Liability asserting that they are "entitled to partial summary judgment on their first claim for relief, because Defendant could only pay the lower-tier wage if it *actually provided* (or supplied or furnished) a qualifying health plan, which they did not, but must have paid the upper-tier wage to him if they did not *actually provide* (or supply or furnish) such benefits, for any reason." *See Diaz v. MDC Restaurants, LLC*, A-14-701633-C, Eighth Judicial Dist., Dept. XVI (July 17, 2015); *Hancock v. The State of Nevada*, 14 OC 00080 1B, First Judicial Dist., Dept. II (Aug. 14, 2015).

It is Defendant's position that if an employer provides health insurance to its employees, it may pay those employees the lower-tier minimum wage and that the plain and ordinary meaning of the word "provide" is "to make available." Therefore, Defendant contends that if an employer makes health insurance available to its employees, it may pay the lower tier minimum wage. *See* NAC § 608.102 ("To qualify to pay an employee the [lower-tier] minimum wage...[t]he employer must offer a health insurance plan...[and] [t]he health insurance plan must be made available to the employee and any dependents of the employee.") (emphasis added); see also NAC §§ 608.100, 106–08.

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This Court has previously reviewed and decided this issue in a virtually identical motion in *Tyus v. Cedar Enterprises, et. al*, Case No. 2:14-cv-00729-GMN-VCF (Doc. No. 71). In that matter, the Court denied plaintiffs' motion without prejudice with permission to renew the motion within thirty days of the resolution of the following question which the Court certified to the Nevada Supreme Court:

> *Whether an employee must actually enroll in health benefits offered by an employer before the employer may pay that employee at the lower-tier wage under the Minimum Wage Amendment, Nev. Const. art. XV, § 16.*

Additionally, the Court denied all other pending motions in that matter without prejudice with permission to re-file upon resolution of the Certified Question to the Nevada Supreme Court.

In the instant matter, the parties jointly request that the Court take similar action with respect to Plaintiffs' Partial Summary Judgment as to Liability in this case and certify the above question to the Nevada Supreme Court.

The Minimum Wage Amendment provides in pertinent part as follows:

> 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.

Nev. Const. art. XV, § 16. Because Plaintiffs' claims depend on whether Defendant's offer of health benefits was sufficient to pay the lower-tier wage, a dispositive question exists as to the interpretation of "provide" in the context of the Minimum Wage Amendment. The parties agree that the sole dispositive issue before the Court is the interpretation of "provide" in the context of the Minimum Wage Amendment.

Plaintiffs argue that "provide" within the context of the Minimum Wage Amendment means to actually provide or furnish qualifying health benefits to employees. However, Defendants contend that "provide" means to offer or make qualifying health benefits available to employees.

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Pursuant to Rule 5 of the Nevada Rules of Appellate Procedure ("Rule 5"), a United States District Court may certify a question of law to the Nevada Supreme Court "upon the court's own motion." Nev. R. App. P. 5(a)-(b). Under Rule 5, the Nevada Supreme Court has the power to answer such a question that "may be determinative of the cause then pending in the certifying court and . . . it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court of this state." Nev. R. App. P. 5(a). In this case, the Court is sitting in diversity jurisdiction; thus Nevada substantive law controls. Moreover, the parties fail to cite and the Court has not found any controlling decisions from the Nevada Supreme Court that interprets "provide" in the context of the Minimum Wage Amendment. Accordingly, under Rule 5, answering this certified question is within the power of the Nevada Supreme Court.

Rule 5 also provides that a certification order must specifically address each of six requirements:

(1) The questions of law to be answered;

(2) A statement of all facts relevant to the questions certified;

(3) The nature of the controversy in which the questions arose;

(4) A designation of the party or parties who will be the appellant(s) and the party or parties who will be the respondent(s) in the Supreme Court;

(5) The names and addresses of counsel for the appellant and respondent; and

(6) Any other matters that the certifying court deems relevant to a determination of the questions certified.

Nev. R. App. P. 5(c). The relevant facts are set forth above. Thus, the Court addresses only the remaining five requirements below.

The parties disagree as to whether "provide" in the context of the Minimum Wage Amendment means that an employer's offer of health benefits is sufficient to pay the lower wage rate under the Minimum Wage Amendment. In support of his argument, Plaintiff has brought to the Court's attention two recent state district court decisions in support of his position. *See Diaz v. MDC Restaurants, LLC*, A-14-701633-C, Eighth Judicial Dist., Dept. XVI (July 17, 2015); *Hancock v. The State of Nevada*, 14 OC 00080 1B, First Judicial Dist., Dept. II (Aug. 14, 2015). On the other hand, Defendants cite various regulations enacted by the Labor Commissioner to support their

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position, which clarify and implement the Minimum Wage Amendment. *See* NAC § 608.102 ("To qualify to pay an employee the [lower-tier] minimum wage...[t]he employer must offer a health insurance plan...[and] [t]he health insurance plan must be made available to the employee and any dependents of the employee.") (emphasis added); see also NAC §§ 608.100, 106–08.

Accordingly,

IT IS ORDERED that the following question of law is **CERTIFIED** to the Nevada Supreme Court pursuant to Rule 5 of the Nevada Rules of Appellate Procedure:

> *Whether an employee must actually enroll in health benefits offered by an employer before the employer may pay that employee at the lower-tier wage under the Minimum Wage Amendment, Nev. Const. art. XV, § 16.*

See Nev. R. App. P. 5(c)(1). The nature of the controversy and a statement of facts are discussed above. See Nev. R. App. P. 5(c)(2)–(3). Because Plaintiff Hanks is the movant, Hanks is designated as the Appellant, and Defendants are designated as the Respondents. *See* Nev. R. App. P. 5(c)(4). The names and addresses of counsel are as follows:

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See Nev. R. App. P. 5(c)(5). Further elaboration upon the certified question is included in this Order.

IT IS FURTHER ORDERED that the Clerk of the Court shall forward a copy of this Order to the Clerk of the Nevada Supreme Court under the official seal of the United States District Court

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for the District of Nevada. See Nev. R. App. P. 5(d).

Dated: September 15, 2015

Gloria M. Navarro, Chief Judge
United States District Court

Respectfully submitted,

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Order Plus Utilities

2:14-cv-00786-GMN-PAL Hanks, et al. v. Briad Restaurant Group, LLC

United States District Court

District of Nevada

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Case Name: Hanks, et al. v. Briad Restaurant Group, LLC

Case Number: 2:14-cv-00786-GMN-PAL

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Docket Text:

ORDER that the following question of law is CERTIFIED to the Nevada Supreme Court pursuant to Rule 5 of the Nevada Rules of Appellate Procedure: *Whether an employee must actually enroll in health benefits offered by an employer before the employer may pay that employee at the lower-tier wage under the Minimum Wage Amendment, Nev. Const. art. XV, § 16.* Signed by Chief Judge Gloria M. Navarro on 9/15/15. (Copies have been distributed pursuant to the NEF: Clerk of the Nevada Supreme Court - MMM)

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Supreme Court of Nevada

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Notice is given of the following activity:

Date and Time of Notice: Sep 21 2015 04:44 p.m.

Case Title:	HANKS VS. BRIAD RESTAURANT GROUP, LLC (NRAP 5)
Docket Number:	68845
Case Category:	Original Proceeding
Document Category:	Filed Certifying Question to Nevada Supreme Court. Received from U.S. District Court for the District of Nevada and the Honorable Gloria M. Navarro, U.S. District Court Judge.
Submitted by:	Issued by Court
Official File Stamp:	Sep 21 2015 03:27 p.m.
Filing Status:	**Accepted and Filed**
Docket Text:	Filed Certifying Question to Nevada Supreme Court. Received from U.S. District Court for the District of Nevada and the Honorable Gloria M. Navarro, U.S.

District Court Judge.

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Roger Grandgenett

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Rick Roskelley
Daniel Bravo

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Exhibit A

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

LATONYA TYUS, an individual; DAVID HUNSICKER, an individual; LINDA DAVIS, an individual; TERRON SHARP, an individual; COLLINS KWAYISI, an individual; LEE JONES, an individual; RAISSA BURTON, an individual; JERMEY MCKINNEY, an individual; and FLORENCE EDJEOU, an individual, all on behalf of themselves and all similarly situated individuals,

Plaintiffs,

vs.

WENDY'S OF LAS VEGAS, INC., an Ohio corporation; CEDAR ENTERPRISES, INC., an Ohio Corporation; and DOES 1 through 100, inclusive,

Defendants.

Case No.: 2:14-cv-00729-GMN-VCF

ORDER

Pending before the Court is the Motion for Partial Judgment on the Pleadings (ECF No. 43) filed by Defendants Wendy's of Las Vegas, Inc. and Cedar Enterprises, Inc. (collectively, "Defendants"). Plaintiffs Raissa Burton, Linda Davis, Florence Edjeou, David Hunsicker, Lee Jones, Kwayisi, Jeremy McKinney, Terron Sharp, and Latonya Tyus (collectively, "Plaintiffs") filed a Response (ECF No. 45), and Defendants filed a Reply (ECF No. 47).

Also pending before the Court is the Motion for Partial Summary Judgment (ECF No. 48) filed by Plaintiff Collins Kwayisi ("Kwayisi"). Defendants filed a Response (ECF No. 53), and Kwayisi filed a Reply (ECF No. 22). For the reasons discussed below, the Court **GRANTS** Defendants' Motion for Partial Judgment on the Pleadings and **DENIES** Kwayisi's Motion for Partial Summary Judgment.

I. BACKGROUND

This case arises out of alleged violations of Nevada's Minimum Wage Amendment, Nev. Const. art. XV, § 16. Plaintiffs are employees at various locations throughout Clark County, Nevada of the fast food restaurant chain, Wendy's. (Am. Compl. ¶ 1, ECF No. 3). Plaintiffs allege that this action "is a result of [Defendants'] failure to pay Plaintiffs and other similarly-situated employees who are members of the Class the lawful minimum wage, because [Defendants] improperly claim, or have claimed, the right to compensate employees below the upper-tier hourly minimum wage level under Nev. Const. art. XV, § 16." (*Id.* ¶ 2).

Specifically, Plaintiff Kwayisi alleges that he worked at a Wendy's restaurant owned and operated by Defendants and earned an hourly wage below the upper-tier hourly minimum wage under the Minimum Wage Amendment. (*Id.* ¶ 45). Moreover, Defendants offered Kwayisi a health insurance plan through Aetna Inc., but Kwayisi declined the insurance coverage. (*Id.* ¶ 46).

Plaintiffs filed the instant action in this Court on May 9, 2014. (*See* Compl., ECF No. 1). Shortly thereafter, on May 20, 2014, Plaintiffs filed an Amended Complaint. (*See* Am. Compl.). Subsequently, Defendants filed a Motion to Dismiss, seeking dismissal of Plaintiffs' Amended Complaint. (Mot. to Dismiss, ECF No. 11). The Court dismissed Plaintiffs' Second, Third, and Fourth claims for relief with prejudice, and denied Defendant's Motion as to Plaintiffs' First claim for relief. (Feb. 4, 2015 Order, ECF No. 40).

II. LEGAL STANDARD

A. Motion for Judgment on the Pleadings

Federal Rule of Civil Procedure 12(c) provides that "[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." "Judgment on the pleadings is properly granted when, accepting all factual allegations in the complaint as true, there is no issue of material fact in dispute, and the moving party is entitled

to judgment as a matter of law." *Chavez v. United States*, 683 F.3d 1102, 1108 (9th Cir. 2012). Accordingly, "[a]nalysis under Rule 12(c) is substantially identical to analysis under Rule 12(b)(6) because, under both rules, a court must determine whether the facts alleged in the complaint, taken as true, entitle the plaintiff to a legal remedy." *Id.*

In order to survive a motion to dismiss under Rule 12(b)(6), a complaint must allege "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

B. Motion for Summary Judgment

The Federal Rules of Civil Procedure provide for summary adjudication when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Material facts are those that may affect the outcome of the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *See id.* "Summary judgment is inappropriate if reasonable jurors, drawing all inferences in favor of the nonmoving party, could return a verdict in the nonmoving party's favor." *Diaz v. Eagle Produce Ltd. P'ship*, 521 F.3d 1201, 1207 (9th Cir. 2008) (citing *United States v. Shumway*, 199 F.3d 1093, 1103–04 (9th Cir. 1999)). A principal purpose of summary judgment is "to isolate and dispose of factually unsupported claims." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

In determining summary judgment, a court applies a burden-shifting analysis. "When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went

uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case." *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted). In contrast, when the nonmoving party bears the burden of proving the claim or defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate an essential element of the nonmoving party's case; or (2) by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element essential to that party's case on which that party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–24. If the moving party fails to meet its initial burden, summary judgment must be denied and the court need not consider the nonmoving party's evidence. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159–60 (1970).

If the moving party satisfies its initial burden, the burden then shifts to the opposing party to establish that a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 631 (9th Cir. 1987). In other words, the nonmoving party cannot avoid summary judgment by relying solely on conclusory allegations that are unsupported by factual data. *See Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go beyond the assertions and allegations of the pleadings and set forth specific facts by producing competent evidence that shows a genuine issue for trial. *See Celotex Corp.*, 477 U.S. at 324.

At summary judgment, a court's function is not to weigh the evidence and determine the truth but to determine whether there is a genuine issue for trial. *See Anderson*, 477 U.S. at 249. The evidence of the nonmovant is "to be believed, and all justifiable inferences are to be drawn

in his favor." *Id.* at 255. But if the evidence of the nonmoving party is merely colorable or is not significantly probative, summary judgment may be granted. *See id.* at 249–50.

III. DISCUSSION

A. Motion for Partial Judgment on the Pleadings

Plaintiffs' sole surviving claim is for unpaid minimum wages under the Minimum Wage Amendment. (*See* Feb. 4, 2015 Order, ECF No. 40) (dismissing all claims except for violations of the Minimum Wage Amendment). Defendants urge the Court to find that Nevada courts would adopt one or both of the rationales articulated by the California Court of Appeals in *Brewer v. Premier Golf Properties* for finding that punitive damages are unavailable to plaintiffs claiming violations of minimum wage laws. 86 Cal. Rptr. 3d 225 (Cal. Ct. App. 2008).[1] In *Brewer*, the court first held that the California Labor Code's minimum wage requirements are new rights created by statute that did not exist under common law; therefore, under the "new right-exclusive remedy" rule, claims premised on violations of the statutory rights are limited to only those remedies expressly provided under the statute—which did not include punitive damages. *See id.* at 232–34. The court went on to find that notwithstanding the "new right-exclusive remedy" rule, punitive damages would still be unavailable to the plaintiff "because punitive damages are ordinarily limited to actions 'for the breach of an obligation not arising from contract,' and [plaintiff]'s claims for unpaid wages and unprovided meal/rest breaks arise from rights based on her employment contract." *Id.* at 235 (citing Cal. Civ. Code § 3294).

The Court finds that both of the rationales for denying punitive damages in *Brewer* are equally applicable to claims arising under Nevada's Minimum Wage Amendment. Like California, Nevada courts have long subscribed to the rule that "[w]here a statute gives a new

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[1] "Where Nevada law is lacking, its courts have looked to the law of other jurisdictions, particularly California, for guidance." *Eichacker v. Paul Revere Life Ins. Co.*, 354 F.3d 1142, 1145 (9th Cir. 2004).

right and prescribes a particular remedy, such remedy must be strictly pursued, and is exclusive of any other." *State v. Yellow Jacket Silver Min. Co.*, 14 Nev. 220, 225 (1879); *see also Builders Ass'n of N. Nevada v. City of Reno*, 776 P.2d 1234, 1235 (Nev. 1989) ("If a statute expressly provides a remedy, courts should be cautious in reading other remedies into the statute."). The right to receive a minimum wage arises from legislative mandate and did not exist under common law. *See Brewer*, 86 Cal. Rptr. 3d at 232 ("Labor Code statutes regulating pay stubs (§ 226) and minimum wages (§ 1197.1) create new rights and obligations not previously existing in the common law."); *cf. MGM Grand Hotel-Reno, Inc. v. Insley*, 728 P.2d 821, 824 (Nev. 1986) (noting that the "obligation to pay compensation benefits and the right to receive them exists as a matter of statute independent of any right established by contract," and that such liability is "created" by statute). Accordingly, the remedies available for violating minimum wage laws are limited to those expressly provided by statute and constitutional amendment.

The Minimum Wage Amendment states: "An employee claiming violation of this section . . . 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." Nev. Const. art. XV, § 16(B).[2] However, there is no provision for punitive damages or any other type of damages aimed at punishing an employer for noncompliance. *See Siggelkow v. Phoenix Ins. Co.*, 846 P.2d 303, 304–05 (Nev. 1993) ("Punitive damages are not awarded as a matter of right to an injured litigant, but are awarded in addition to compensatory damages as a means of punishing the tortfeasor and deterring the tortfeasor and others from engaging in similar conduct."). Instead, the Minimum Wage

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[2] In addition to the compensatory damages, the Minimum Wage Amendment also provides: "An employee who prevails in any action to enforce this section shall be awarded his or her reasonable attorney's fees and costs." Nev. Const. art. XV, § 16(B).

Amendment's language explicitly provides only for damages "appropriate to remedy any violation." Nev. Const. art. XV, § 16(B). Therefore, because damages for violations of the Minimum Wage Amendment are limited to those expressly provided by the amendment and there is no provision in the amendment for punitive damages, Plaintiffs cannot recover punitive damages for their claims.[3]

Additionally, even if the "new right-exclusive remedy" rule did not apply, punitive damages would still be unavailable for Plaintiffs' claims. Nevada law permits the awarding of punitive damages for tort claims where the defendant "has been guilty of oppression, fraud or malice," *see* Nev. Rev. Stat. § 42.005, or where such damages are explicitly provided by statute. *See, e.g.*, Nev. Rev. Stat. § 42.010 ("In an action for the breach of an obligation, where the defendant caused an injury by the operation of a motor vehicle . . . after willfully consuming or using alcohol or another substance, knowing that the defendant would thereafter operate the motor vehicle, the plaintiff, in addition to the compensatory damages, may recover damages for the sake of example and by way of punishing the defendant."). However, "the award of punitive damages cannot be based upon a cause of action sounding solely in contract." *Ins. Co. of the W. v. Gibson Tile Co.*, 134 P.3d 698, 703 (Nev. 2006); *see also* Nev. Rev. Stat. § 42.005 ("[I]n an action for the breach of an obligation *not arising from contract*, . . . the plaintiff . . . may recover damages for the sake of example and by way of punishing the defendant.") (emphasis added).

Though Plaintiffs' minimum wage claims arise from Defendants' alleged failure to pay a

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[3] The Court notes, however, that under the old statutory minimum wage scheme, "the Labor Commissioner may impose against [an employer] an administrative penalty of not more than $5,000 for each violation." Nev. Rev. Stat. § 608.290.2. Accordingly, because there is no provision of the Minimum Wage Amendment addressing the application of penalties or fines for violations, the Labor Commissioner may impose an administrative penalty of up to $5,000 for violators of the Minimum Wage Amendment. The ability of the Labor Commissioner to impose such a penalty alleviates Plaintiffs' concern that punitive damages are necessary for minimum wage claims in order to discourage employers from willfully violating the Minimum Wage Amendment. (*See* Resp. to Mot. for Judgment n.2, ECF No. 45).

statutory obligation, "when a statute imposes additional obligations on an underlying contractual relationship, a breach of the statutory obligation is a breach of contract that will not support tort damages beyond those contained in the statute." *See Brewer*, 86 Cal. Rptr. 3d at 235; *see also Camino Properties, LLC v. Ins. Co. of the W.*, No. 2:13-CV-02262-APG, 2015 WL 2225945, at *3 (D. Nev. May 12, 2015) ("ICW cannot be right that liabilities arising from a contract, where the contract is required by statute, is a 'liability by statute.' . . . Even though insurance contracts exist because a statute requires drivers to buy them, claims for breaches of the insurance policy are governed by the six-year limitations period for contracts."); *cf. Descutner v. Newmont USA Ltd.*, No. 3:12-CV-00371-RCJ, 2012 WL 5387703, at *2 (D. Nev. Nov. 1, 2012) (stating that the Nevada statute concerning overtime wages, section 608.140, "does not imply a private right of action to sue under the labor code, but only to sue in contract"). Therefore, because claims for violations of the Minimum Wage Amendment arise from an underlying contractual employer-employee relationship, such claims do not entitle a plaintiff to punitive damages. Accordingly, Plaintiffs cannot seek punitive damages based solely on a claim for violations of the Minimum Wage Amendment, and their claims for punitive damages are dismissed.

B. Kwayisi's Motion of Partial Summary Judgment (ECF No. 48)

Kwayisi asserts that he "is entitled to partial summary judgment on his first claim for relief, because Defendants could *only* pay the lower-tier wage if they *actually provided* (or supplied or furnished) a qualifying health plan, which they did not, but must have paid the upper-tier wage to him if they *did not actually provide* (or supply or furnish) such benefits, for any reason." (Mot. Partial Summ. J. 6:12–15, ECF No. 48). Moreover, Kwayisi argues that "Defendants will claim that all they had to do was 'offer' health insurance benefits to gain the privilege of underpaying its minimum wage employees," however, "[s]uch conduct is not, in any way, authorized by the Minimum Wage Amendment." (*Id.* 6:15–18).

The Minimum Wage Amendment provides in pertinent part as follows:

> 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.

Nev. Const. art. XV, § 16. Because Plaintiffs' claims depend on whether Defendants' offer of health benefits was sufficient to pay the lower-tier wage, a dispositive question exists as to the interpretation of "provide" in the context of the Minimum Wage Amendment. The parties agree that the sole dispositive issue before the Court is the interpretation of "provide" in the context of the Minimum Wage Amendment. (*See* Response 4:19–20, ECF No. 53; Reply 2:7–8, ECF No. 55). Kwayisi argues that "provide" within the context of the Minimum Wage Amendment means to actually provide or furnish qualifying health benefits to employees. (Reply 2:13–14). However, Defendants contend that "provide" means to offer or make qualifying health benefits available to employees. (Response 3:5–6).

Pursuant to Rule 5 of the Nevada Rules of Appellate Procedure ("Rule 5"), a United States District Court may certify a question of law to the Nevada Supreme Court "upon the court's own motion." Nev. R. App. P. 5(a)-(b). Under Rule 5, the Nevada Supreme Court has the power to answer such a question that "may be determinative of the cause then pending in the certifying court and . . . it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court of this state." Nev. R. App. P. 5(a). In this case, the Court is sitting in diversity jurisdiction; thus Nevada substantive law controls. Moreover, the parties fail to cite and the Court has not found any controlling decisions from the Nevada Supreme

Court that interprets "provide" in the context of the Minimum Wage Amendment. Accordingly, under Rule 5, answering this certified question is within the power of the Nevada Supreme Court.

Rule 5 also provides that a certification order must specifically address each of six requirements:

> (1) The questions of law to be answered;
> (2) A statement of all facts relevant to the questions certified;
> (3) The nature of the controversy in which the questions arose;
> (4) A designation of the party or parties who will be the appellant(s) and the party or parties who will be the respondent(s) in the Supreme Court;
> (5) The names and addresses of counsel for the appellant and respondent; and
> (6) Any other matters that the certifying court deems relevant to a determination of the questions certified.

Nev. R. App. P. 5(c). The relevant facts are set forth in Section I, above. Thus, the Court addresses only the remaining five requirements below.

1. Nature of the Controversy

The parties disagree as to whether "provide" in the context of the Minimum Wage Amendment means that an employer's offer of health benefits is sufficient to pay the lower wage rate under the Minimum Wage Amendment. In support of his argument, Plaintiff has brought to the Court's attention two recent state district court decisions in support of his position. *See Diaz v. MDC Restaurants, LLC*, A-14-701633-C, Eighth Judicial Dist., Dept. XVI (July 17, 2015); *Hancock v. The State of Nevada*, 14 OC 00080 1B, First Judicial Dist., Dept. II (Aug. 14, 2015). On the other hand, Defendants cite various regulations enacted by the Labor Commissioner to support their position, which clarify and implement the Minimum Wage Amendment. *See* NAC § 608.102 ("To qualify to pay an employee the [lower-tier] minimum wage…[t]he employer *must offer* a health insurance plan…[and] [t]he health insurance plan *must be made available* to the employee and any dependents of the employee.") (emphasis added); *see also* NAC §§ 608.100, 106–08.

2. Question of Law

Accordingly, the Court certifies the following question of law:

Whether an employee must actually enroll in health benefits offered by an employer before the employer may pay that employee at the lower-tier wage under the Minimum Wage Amendment, Nev. Const. art. XV, § 16.

IV. CONCLUSION

IT IS HEREBY ORDERED that Defendants' Motion for Partial Judgment on the Pleadings (ECF No. 43) is **GRANTED**. Plaintiffs' punitive damages requests are dismissed with prejudice.

IT IS FURTHER ORDERED that Plaintiff Collins Kwayisi's Motion for Partial Summary Judgment (ECF No. 48) is **DENIED without prejudice**, with permission to renew the motion within thirty (30) days of the resolution of the Court's Certified Question to the Nevada Supreme Court.

IT IS FURTHER ORDERED that the following question of law is **CERTIFIED to the Nevada Supreme Court** pursuant to Rule 5 of the Nevada Rules of Appellate Procedure:

Whether an employee must actually enroll in health benefits offered by an employer before the employer may pay that employee at the lower-tier wage under the Minimum Wage Amendment, Nev. Const. art. XV, § 16.

See Nev. R. App. P. 5(c)(1). The nature of the controversy and a statement of facts are discussed above. *See* Nev. R. App. P. 5(c)(2)–(3). Because Plaintiff Kwayisi is the movant, Kwayisi is designated as the Appellant, and Defendants are designated as the Respondents. *See* Nev. R. App. P. 5(c)(4). The names and addresses of counsel are as follows:

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See Nev. R. App. P. 5(c)(5). Further elaboration upon the certified question is included in this Order.

IT IS FURTHER ORDERED that the Clerk of the Court shall forward a copy of this Order to the Clerk of the Nevada Supreme Court under the official seal of the United States District Court for the District of Nevada. *See* Nev. R. App. P. 5(d).

IT IS FURTHER ORDERED that all other pending motions are **DENIED without prejudice**, with permission to re-file upon resolution of the Court's Certified Question to the Nevada Supreme Court.

DATED this 21st day of August, 2015.

Gloria M. Navarro, Chief Judge
United States District Judge

Melwak, Erin J.

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United States District Court

District of Nevada

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Case Name: Tyus et al v. Wendy's of Las Vegas, Inc. et al
Case Number: 2:14-cv-00729-GMN-VCF
Filer:
Document Number: 71

Docket Text:
ORDER Granting Defendants' [43] Motion for Partial Judgment on the Pleadings. Plaintiff Collins Kwayisi's [48] Motion for Partial Summary Judgment is DENIED without prejudice, with permission to renew the motion within 30 days of the resolution of the Court's Certified Question to the Nevada Supreme Court. All other pending motions are DENIED without prejudice, with permission to re-file upon resolution of the Court's Certified Question to the Nevada Supreme Court. Signed by Chief Judge Gloria M. Navarro on 8/21/2015. (Copies have been distributed pursuant to the NEF - certified copy mailed to the Clerk of the Nevada Supreme Court, Carson City - SLD)

2:14-cv-00729-GMN-VCF Notice has been electronically mailed to:

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c16a3b68840e10c73ed4a274fbf8ee8de6cbf3658987f4be8afc33f594662]]

IN THE SUPREME COURT OF THE STATE OF NEVADA

State of Nevada, ex rel. Office of the Labor Commissioner; and Shannon Chambers in her official capacity as Labor Commissioner of Nevada,

Appellants,

vs.

CODY C. HANCOCK,

Respondent,

Supreme Court Case No. 68770

First Judicial District Court
Case No. 14 OC 00080 1B

Dept. No. II

RESPONDENTS-IN-CONSOLIDATION AND PETITIONERS-IN-CONSOLIDATION'S MOTION TO CONSOLIDATE

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and Attorneys for Petitioners-In-Consolidation
MDC RESTAURANTS, LLC; LAGUNA RESTAURANTS, LLC; and INKA, LLC

NRAP 26.1 DISCLOSURE

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

1. Briad Restaurant Group, LLC is a privately-held company and no publicly traded company owns 10% or more of Briad Restaurant Group, LLC's stock.
2. Cedar Enterprises Inc. is a privately-held domestic corporation and no publicly traded company owns 10% or more of Cedar Enterprises Inc.'s stock.
3. Wendy's of Las Vegas, Inc. is a privately-held foreign corporation and no publicly traded company owns 10% or more of Wendy's of Las Vegas, Inc.'s stock.
4. MDC Restaurants, LLC, is a privately-held company and no publically traded company owns 10% or more of MDC Restaurants, LLC's stock.
5. Laguna Restaurants, LLC, is a privately-held company and no publically traded company owns 10% or more of Laguna Restaurants, LLC's stock.

///

///

6. Inka, LLC, is a privately-held company and no publically traded company owns 10% or more of Inka, LLC's stock.

Dated: October 8, 2015

Respectfully submitted,

RICK D. ROSKELLEY, ESQ.
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Attorneys for Respondents-in-Consolidation and Petitioners-in-Consolidation

I. GROUNDS FOR MOTION AND RELIEF SOUGHT

Pursuant to Nevada Rule of Appellate Procedure 3(b), Respondents-in-Consolidation Briad Restaurant Group, LLC; Cedar Enterprises, Inc.; and Wendy's of Las Vegas, Inc. (collectively "Respondents-in-Consolidation") and Petitioners-in-Consolidation MDC Restaurants, LLC; Laguna Restaurants, LLC; and Inka, LLC (collectively "Petitioners-in-Consolidation"), by and through their attorneys, Littler Mendelson, P.C., hereby respectfully move this Court to consolidate their pending Nevada Rule of Appellate Procedure 5 ("NRAP 5") certified questions in *Kwayisi v. Wendy's of Las Vegas et al.*, Nevada Supreme Court case no. 68754 ("*Kwayisi*") and *Hanks v. Briad Restaurant Group, LLC*, Nevada Supreme Court case no. 68845 ("*Hanks*") and their pending Petition for Writ of Mandamus or Prohibition in *MDC Restaurants, LLC et al. v. The Eighth Judicial District Court of the State of Nevada et al. (Diaz)*, Nevada Supreme Court case no. 68523 ("*Diaz*") with this matter, *State of Nevada, ex rel. Office of the Labor Commissioner et al. v. Hancock.* The *Kwayisi* and *Hanks* certified questions and the *Diaz* Petition all involve the same issue pending before this Court in *State of Nevada, ex rel. Office of the Labor Commissioner et al. v. Hancock* ("*Hancock*") regarding the meaning of the word "provide" in the Minimum Wage Amendment, Nevada Constitution, Article 15, Section 16 ("MWA").

Appellants State of Nevada, ex rel. Office of the Labor Commissioner and Shannon Chambers in her official capacity as Labor Commissioner of Nevada (collectively "Appellants") and Respondent Cody C. Hancock ("Respondent") have yet to file their opening and answering briefs. Thus, neither Appellants nor Respondent would be prejudiced by Respondents-in-Consolidation and Petitioners-in-Consolidation's joinder to this appeal. Further, the arguments regarding the meaning of "provide" were extensively briefed and argued in the *Kwayisi*, *Hanks*, and *Diaz* matter. As such, this Court would gain a more complete picture of the legal arguments concerning why the meaning of "provide" under the MWA must mean to offer rather than to enroll. Given that the *Hancock* parties have moved for an expedited review, it appears that this Court may review the issue in this matter before it reviews the same issue in *Kwayisi*, *Hanks* or *Diaz*. Therefore, pursuant to the joinder rule and in the interests of judicial economy, this Court should consolidate that Respondents-in-Consolidation's NRAP 5 certified questions in *Kwayisi* and *Hanks* and the Petitioners-in-Consolidation's Petition for Writ in *Diaz* with this appeal.

II. FACTS AND PROCEDURAL HISTORY

A. Respondents-In-Consolidation's Procedural Posture In *Kwayisi* And *Hanks*.

Respondents-in-Consolidation currently have two separate cases, *Kwayisi* and *Hanks*, in the United States District Court against the same counsel for

Respondent in this matter, Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP. The NRAP 5 certified questions in both *Kwayisi* and *Hanks* themselves are intertwined with the decisions in *Diaz* and *Hancock.*

On August 21, 2015, the Federal district court in the underlying matter to *Kwayisi, Tyus et al. v. Wendy's of Las Vegas, Inc. et al.*, United States District Court case number 2:14-cv-00729-GMN-VCF, certified a question of law regarding the meaning of "provide" under the MWA to the Nevada Supreme Court through court order pursuant to Nevada Rule of Appellate Procedure 5. **Order [Doc. No. 71] attached to the Declaration of Montgomery Y. Paek as Exhibit A.** The Federal district court in *Kwayisi* issued its NRAP 5 certified question after reviewing the State district court's holding in the *Diaz* matter and the State district court's holding in this matter, *Hancock.* ***Id.*** Thus, the genesis of the NRAP 5 question in *Kwayisi* directly arose from the same issues in this appeal as well as the Petitioners-in-Consolidation's matter in *Diaz*.

In its Order, the Federal district court in *Kwayisi* described the arguments regarding the meaning of "provide" as follows:

> The parties disagree as to whether "provide" in the context of the Minimum Wage Amendment means that an employer's offer of health benefits is sufficient to pay the lower wage rate under the Minimum Wage Amendment. In support of his argument, Plaintiff has brought to the Court's attention two recent state district court decisions in support of his position. *See Diaz v. MDC Restaurants, LLC*, A-14-701633-C, Eighth Judicial Dist., Dept. XVI (July 17, 2015); *Hancock v. The State of Nevada*, 14 OC 00080 YB, First

> Judicial Dist., Dept. II (Aug. 14, 2015). On the other hand, Defendants cite various regulations enacted by the Labor Commissioner to support their position, which clarify and implement the Minimum Wage Amendment. See NAC § 608.102 ("To qualify to pay an employee the [lower-tier] minimum wage . . . [t]he employer *must offer* a health insurance plan . . . [and] [t]he health insurance plan *must be made available* to the employee and any dependents of the employee.") (emphasis added); see also NAC § 608.100, 106—08.

***See* Exhibit A, Order [Doc. No. 71] at 10:14-25.** Thus, pursuant to Nevada Rule of Appellate Procedure 5(c)(1), the Federal district court, *sua sponte*, certified the following question to the Nevada Supreme Court based on the holdings in *Diaz* and *Hancock*:

> **IT IS FURTHER ORDERED** that the following question of law is **CERTIFIED to the Nevada Supreme Court** pursuant to Rule 5 of the Nevada Rules of Appellate Procedure:
>
> > *Whether an employee must actually enroll in health benefits offered by an employer before the employer may pay that employee at the lower-tier wage under the Minimum Wage Amendment, Nev. Const. art. XV, § 16.*

***See* Exhibit A, Order [Doc. No. 71] at 11:1-22.** (Emphasis in original). In doing so, the Federal district court in *Kwayisi* also denied without prejudice the pending Motion for Class Certification and all other motions filed in the matter to be "re-file[d] upon resolution of the Court's Certified Question to the Nevada Supreme Court." ***Id.* at 12:14-16.**

Similarly, on September 21, 2015, the Federal district court in the underlying matter to *Hanks*, *Hanks et al. v. Briad Restaurant Group, LLC*, United States District Court case number 2:14-cv-00786-GMN-PAL, certified a question of law regarding the meaning of "provide" under the MWA to the Nevada Supreme Court through court order pursuant to Nevada Rule of Appellate Procedure 5. **[Executed] Proposed Order for Certification of Question of Law to the Nevada Supreme Court [Doc. No. 119] attached to the Declaration of Montgomery Y. Paek as Exhibit B.** As with *Kwayisi*, the Federal district court in *Hanks* issued its NRAP 5 certified question by specifically referencing the same above arguments in *Diaz* and *Hancock*. ***Id.* at 1:14-20; 3:22-4:4.** Thus, the *Hanks* court certified the same question in *Kwayisi* of:

> *Whether an employee must actually enroll in health benefits offered by an employer before the employer may pay that employee at the lower-tier wage under the Minimum Wage Amendment, Nev. Const. art. XV, § 16.*

***Id.* at 1:14-20; 3:22-4:4.** (Emphasis in original). Accordingly, both *Kwayisi* and *Hanks* involve the same exact certified question that is also the basis for appeal in this matter.

B. Petitioners-In-Consolidation's Procedural Posture In *Diaz*.

Petitioners-in-Consolidation also have another case, *Diaz*, in the Eighth Judicial District Court against the same counsel for Respondent in this matter, Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP. As with the NRAP 5 certified

questions in *Kwayisi* and *Hanks*, the *Diaz* matter shares the same question that is on appeal in this matter.

On July 31, 2015, Petitioners-in-Consolidation filed a Petition for Writ of Mandamus or Prohibition before this Court in the *Diaz* matter. **Petition for Writ of Mandamus or Prohibition ("Petition") attached to the Declaration of Montgomery Y. Paek as Exhibit C.** In *Diaz*, a State district court held that under the MWA, "for an employer to 'provide' health benefits, an employee must actually enroll in health insurance that is offered by the employer." ***Id.* at pp. 8-9.** In the *Diaz* Petition, Petitioners-in-Consolidation's stated the following issue presented:

> *In order to pay the lower-tier minimum wage rate under the MWA whether, as an important issue of law requiring clarification, "provid[ing]" and "offering" health benefits means "making health insurance available", rather than employees enrolling in health insurance.*

***Id.* at pp. 1-2.** (Emphasis added). Thus, as with the *Kwayisi* and *Hanks*, Petitioners-in-Consolidation's question before this Court in *Diaz* is whether "provide" under the MWA means an employer must offer health insurance to its employees in order to pay the lower-tier minimum wage rate as opposed to having employees actually enroll in health insurance.

On August 24, 2015, Amici Curiae Claim Jumper Acquisition Co., LLC; Landry's Inc.; Landry's Seafood House – Nevada, Inc.; Landry's Seafood House –

Arlington, Inc.; Bubba Gump Shrimp Co. Restaurants, Inc.; Morton's of Chicago/Flamingo Road Corp.; and Bertolini's of Las Vegas, Inc. (collectively, "Amici Curiae") filed its Brief in Support of Petitioners-in-Consolidation's Petition for Writ of Mandamus or Prohibition. **Brief in Support of Petition for Writ of Mandamus or Prohibition attached to the Declaration of Montgomery Y. Paek as Exhibit D.**

On September 11, 2015, this Court issued an Order Directing Answer in *Diaz*. **Order Directing Answer attached to the Declaration of Montgomery Y. Paek as Exhibit E.** As such, it appears that this Court will further consider the *Diaz* matter and its arguments as to the meaning of "provide" under the MWA. Accordingly, like with *Kwayisi* and *Hanks*, this Court should consolidate *Diaz* with *Hancock*.

III. LEGAL ARGUMENT

A. Legal Standard For Consolidation.

Under the Nevada Rules of Appellate Procedure, when the parties have filed separate timely notices of appeal, the appeals may be joined or consolidated by the Supreme Court upon its own motion or upon motion of a party. NRAP 3(b)(2). Where appellants raise identical issues on appeal, the Court may consolidate those appeals for purposes of disposition. *Ewell v. State*, 105 Nev. 897, 898 at fn. L (1989) *citing* NRAP 3(b).

In this matter, *Hancock*, the Court has before it a Joint Motion to Expedite Appeal and for Alternative Briefing Schedule. **Joint Motion to Expedite Appeal and for Alternative Briefing Schedule ("Joint Motion") on file herein and incorporated by this reference.** In this Joint Motion, the parties have asked for an alternative briefing schedule for expedited review. ***Id.*** To date, there has not been a ruling on this Joint Motion. However, should the Court expedite *Hancock*, the Court should also consolidate it with *Kwayisi*, *Hanks* and *Diaz* as these matters are all in their initial briefing stages before this Court. As noted above, the question regarding the meaning of "provide" under the MWA in this matter is the same question in *Kwayisi*, *Hanks* and *Diaz*. Further, these cases are already intertwined as the NRAP 5 certified questions in *Kwayisi* and *Hanks* specifically reference the decisions in *Diaz* and *Hancock*. As the briefing on these cases would be for the same issue, it would promote judicial economy to have all of these matters consolidated with any expedited review in *Hancock*. Accordingly, this Court should grant Respondents-in-Consolidation and Petitioners-in-Consolidation's Motion to Consolidate.

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IV. CONCLUSION

For all of the reasons stated above, this Court should grant Respondents-in-Consolidation and Petitioners-in-Consolidation's Motion to Consolidate.

October 8, 2015

Respectfully submitted,

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DECLARATION OF MONTGOMERY Y. PAEK, ESQ. IN SUPPORT OF RESPONDENTS-IN-CONSOLIDATION AND PETITIONERS-IN-CONSOLIDATION'S MOTION TO CONSOLIDATE

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

1. I am an attorney admitted to practice law in the State of Nevada. I am an Associate Attorney at the law firm of Littler Mendelson, one of the attorneys for Respondents-in-Consolidation Briad Restaurant Group, LLC; Cedar Enterprises, Inc.; and Wendy's of Las Vegas, Inc. (hereinafter collectively "Respondents-in-Consolidation") and Petitioners-in-Consolidation MDC Restaurants, LLC; Laguna Restaurants, LLC; and Inka, LLC (hereinafter collectively "Petitioners-in-Consolidation").

2. Unless otherwise stated, this declaration is based on my personal knowledge. I make this declaration in support of Respondents-in-Consolidation and Petitioners-in-Consolidation's Motion to Consolidate.

3. I have reviewed Order [Doc. No. 71], a true and correct copy of which has been attached hereto as **Exhibit A.**

4. I have reviewed [Executed] Proposed Order for Certification of Question of Law to the Nevada Supreme Court [Doc. No. 119], a true and correct copy of which has been attached hereto as **Exhibit B.**

5. I have reviewed Petition for Writ of Mandamus or Prohibition, a true and

correct copy of which has been attached hereto as **Exhibit C**.

6. I have reviewed Brief in Support of Petition for Writ of Mandamus or Prohibition, a true and correct copy of which has been attached hereto as **Exhibit D**.

7. I have reviewed Order Directing Answer, a true and correct copy of which have been attached hereto as **Exhibit E**.

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

Executed in Las Vegas, Nevada, on October 8, 2015.

MONTGOMERY Y. PAEK, ESQ.

CERTIFICATE OF SERVICE

I am a resident of the State of Nevada, over the age of eighteen years, and not a party to the within action. My business address is 3960 Howard Hughes Parkway, Suite 300, Las Vegas, Nevada, 89169. On October 8, 2015, I served the within document:

RESPONDENTS-IN-CONSOLIDATION AND PETITIONERS-IN-CONSOLIDATION'S MOTION TO CONSOLIDATE

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

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

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

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 8, 2015, at Las Vegas, Nevada.

/s/ Erin J. Melwak