Exhibit S

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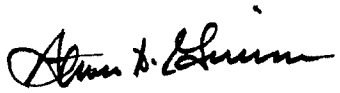

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IN THE DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF CLARK

PAULETTE DIAZ, an individual; and LAWANDA GAIL WILBANKS, an individual; SHANNON OLSZYNSKI, and individual; CHARITY FITZLAFF, an individual, on behalf of themselves and all similarly-situated individuals, Plaintiffs, vs. MDC RESTAURANTS, LLC, a Nevada limited liability company; LAGUNA RESTAURANTS, LLC, a Nevada limited liability company; INKA, LLC, a Nevada limited liability company and DOES 1 through 100, Inclusive, Defendants.	Case No. A701633 Dept. No. XVI **DEFENDANTS' OPPOSITION TO MOTION FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY AS TO PLAINTIFF PAULETTE DIAZ'S FIRST CLAIM FOR RELIEF** Hearing Date: June 16, 2015 Hearing Time: 9:00 a.m.

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

MEMORANDUM OF POINTS & AUTHORITIES

I. INTRODUCTION

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

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

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

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

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

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

II. STANDARD OF REVIEW

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

III. ADDITIONAL UNDISPUTED FACTS

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

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

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

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

IV. ARGUMENT

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. Indeed, the parties agree that this is inherent in the plain language of the MWA. ***See* Diaz Motion, at 7:5-6**. The disagreement therefore, rests solely on what is meant by the word "provide." According to Plaintiff, provide in this context means that an employer must not only provide benefits by making them available to its employees but the employees must also actually enroll in the employer-based insurance plans. In other words, Plaintiff claims that benefits are not provided unless forced on employees.

Such an interpretation of the word provide is ludicrous for three key 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.

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

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

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 it discuss or even mention any action that must be taken by employees. *See id.* Thus, Plaintiff's assertion that the MWA states that

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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. ***See* Diaz Motion, at 4:3-5.**

Indeed, the MWA directs only that employers must offer insurance and Plaintiff's argument that employees must enroll in insurance fails for three reasons: (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) Plaintiff's unreasonably restricted definition of the word "provide" renders the language of the MWA nugatory; and (3) Plaintiff's purported authority for his position is inapposite to the instant matter.

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

When the words of a statute have a definite and ordinary meaning, the 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). Here, the plain language of the MWA 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. The plain and ordinary meaning of the word "provide" is "to make available." *See i.e. <http://www.merriam-webster.com/dictionary/provide>*. Therefore, if an employer makes health insurance available to its employees, it may pay the lower tier minimum wage.

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

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that this Court adopt a nonsensical definition of the word "provide." Specifically, Plaintiff asserts that the word "provide" means that there must be some form of acceptance or assertion of control or possession by the person to whom a service or item is being provided. ***See* Diaz Motion, at 4:3-5.** Thus, according to Plaintiff, a service or item has not been provided unless the person for whom the service or item is intended actually uses or takes that service or item. **Id.** This is completely contrary to every definition of the word "provide," including the definitions used by the sources Plaintiff cites. Specifically, Plaintiff directs the Court to the online Merriam-Webster Dictionary's Thesaurus definition for the word provide. **Diaz Motion, at 7:26.** However, even that definition explains that there is 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>. 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.

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

> **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>

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

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

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

> **pro·vide**
> *verb*
> 1. make available for use; supply.
> . . .
> 2. make adequate preparation for (a possible event).

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

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

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

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

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

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. Here, Plaintiff has requested that this Court adopt a definition of the word "provide" that is so restrictive that whether an employer offers insurance to its employees would have no bearing whatsoever on whether that employer is permitted to pay the lower-tier minimum wage. This is in complete contrast to the actual language of the MWA. Indeed, directly after setting forth that employers must provide insurance, the MWA goes on to explain exactly what providing health insurance means. Specifically, it 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.

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

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

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.

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

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

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

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

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

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

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

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

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

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

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is likely because 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). 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). It says absolutely nothing about requiring an employee to enroll in insurance. Rather, the directive is clear: employers must offer insurance in order to pay the lower-tier minimum wage.

NAC 608.102 also makes clear that the Labor Commissioner understood that the definition of the word "provide" is "to make available." 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. The Court must give deference to this interpretation as long as it is "based on a permissible construction of the statute." *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842-843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). In other words, the agency interpretation is upheld unless it is arbitrary or capricious. *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). Here, as discussed above, interpreting the word "provide" to mean "to make available" is consistent with every definition of the word. Therefore, there is no argument that the Labor Commissioner's interpretation of the MWA is or was arbitrary or capricious.

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

Another regulation that sets forth the requirements of the MWA is NAC 608.106 which

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before there was any clarification by the Labor Commissioner via the regulations and lack any indication of actual research into the MWA whatsoever. **See id.**

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further elaborates that the MWA is designed to incentivize offering insurance. Specifically, it 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). It does not state that the employee will be paid the upper-tier wage if they decline insurance. Instead, it contemplates an offer of insurance, which employees are free to decline.

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

> 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). Accordingly, since at least 2007, the express mandate to employers is that offering health insurance to their minimum wage employees qualifies them to pay below the upper-tier minimum wage.

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

C. 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

Plaintiff's Motion urges the Court to ignore the above discussed regulations. As a result, if the Court were to take this approach, it would have to address the nine-years in which employers in Nevada have relied on those regulations. The 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). Thus, in the event the Court agrees with Plaintiff's argument, the

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constitutional concerns would be substantial. Specifically, 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). 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). 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).

Here, 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. Therefore, the Court should select the construction that renders constitutional analysis unnecessary. However, in the event the Court does not and agrees with Plaintiff, Plaintiff's Motion must still be denied because the voiding of the Labor Commissioner's regulations would have to be applied prospectively – not retroactively.

V. CONCLUSION

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

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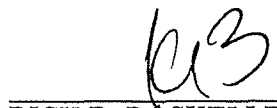
Dated: May 22, 2015

Respectfully submitted,



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PROOF OF SERVICE

I am a resident of the State of Nevada, over the age of eighteen years, and not a party to the within action. My business address is 3960 Howard Hughes Parkway, Suite 300, Las Vegas, Nevada 89169. On May 22, 2015, I served the within document:

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

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

Don Springmeyer, Esq.
Bradley Schrager, Esq.
Daniel Bravo, Esq.
Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP
3556 East Russell Road, Second Floor
Las Vegas, Nevada 89120

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

Debra Perkins

Firmwide:133575283.1 081404.1002

LITTLER MENDELSON, P.C.
ATTORNEYS AT LAW
3960 Howard Hughes Parkway
Suite 300
Las Vegas NV 89169-5937
702 862 8800

Exhibit R

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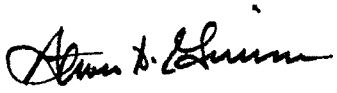

CLERK OF THE COURT

MOT
DON SPRINGMEYER, ESQ.
Nevada State Bar No. 1021
BRADLEY SCHRAGER, ESQ.
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EIGHTH JUDICIAL DISTRICT COURT

IN AND FOR CLARK COUNTY, STATE OF NEVADA

PAULETTE DIAZ, an individual; LAWANDA GAIL WILBANKS, an individual; SHANNON OLSZYNSKI, an individual; and CHARITY FITZLEFF, an individual, on behalf of themselves and all similarly-situated individuals, Plaintiffs, vs. MDC RESTAURANTS, LLC, a Nevada limited liability company; LAGUNA RESTAURANTS, LLC, a Nevada limited liability company; INKA, LLC, a Nevada limited liability company, and DOES 1 through 100, Inclusive, Defendants.	Case No.: A701633 Dept. No.: XVI **MOTION FOR APPROVAL OF CLASS ACTION NOTICE TO THE NON-ENROLLMENT CLASS, CLASS NOTICE PLAN, AND RELATED RELIEF** Hearing Date: Hearing Time:

COME NOW Plaintiffs, by and through her attorneys of record, and hereby move this Court for an Order: 1) approving Plaintiffs' proposed Class Action Notice to the Non-Enrollment Class ("Notice") here attached as **Exhibit 1**; 2) approving Plaintiffs' proposed Notice plan and requiring Defendants to provide the requested information regarding all Class members; and 3) requiring Defendants to bear the costs of sending the Class Notice. This motion is based on the memorandum of points and authorities below, all papers and exhibits on file herein, and any oral argument this

Court sees fit to allow at hearing on this matter.

DATED this 13th day of November, 2015.

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

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

NOTICE OF MOTION

TO: ALL PARTIES AND THEIR COUNSEL OF RECORD:

Please take notice that the undersigned will bring this **MOTION FOR APPROVAL OF CLASS ACTION NOTICE TO THE NON-ENROLLMENT CLASS, CLASS NOTICE PLAN, AND RELATED RELIEF** on for hearing before this Court at the Eighth Judicial District Court, 200 Lewis Avenue, Las Vegas, NV 89155, on 12/15/15 at 9:00 a.m./p.m. in Dept. XVI or as soon thereafter as counsel can be heard.

DATED this 13th day of November, 2015.

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

By: */s/ Bradley Schrager*
DON SPRINGMEYER, ESQ.
Nevada State Bar No. 1021
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DANIEL BRAVO, ESQ.
Nevada State Bar No. 13078
3556 E. Russell Road, Second Floor
Las Vegas, Nevada 89120
Attorneys for Plaintiffs

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On October 13, 2015, this Court certified the following Class:

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

See October 13, 2015 Order; October 19, 2015 Notice of Entry of Order.

Pursuant to Rule 23 of the Nevada Rules of Civil Procedure, the Court "shall direct to the members of the class the best notice practicable under the circumstances." N.R.C.P. 23(c)(2). Here, the proposed Notice to be sent to each member of the Class is sufficient to inform Class members about, inter alia: (i) the Class definition; (ii) the nature of the action; (iii) Class members' right to be excluded and the procedures for doing so; (iv) Class Counsel's information; and (v) how to obtain additional information. *See* **Exhibit 1**. The Notice provides Class members with necessary and sufficient information to make informed decisions about whether to participate in this litigation and, thus, the Notice satisfies due process. As set forth below, Plaintiffs propose the use of a third-party administrator to mail the Notice to Class members. Plaintiffs respectfully request that Defendants be ordered to provide the necessary information of all Class members to facilitate effective notice, and that the costs of mailing the Notice be assigned to Defendants.

II. PLAINTIFFS' PROPOSED NOTICE COMPORTS WITH N.R.C.P. 23

Class notification is a straightforward communication that is limited to the parameters of Rule 23(c)(2), which states:

> In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through the member's counsel.

N.R.C.P. 23(c)(2).

The mandatory class notice provisions under Rule 23(c) relating to Rule 23(b)(3) classes are designed to ensure due process protections for an absent class whose rights will be affected by

litigation, even if they are only passive participants in the action. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-77, 94 S. Ct. 2140, 2150-52 (1974).

Here, the proposed Notice complies with N.R.C.P. 23(c)(2) requirements that the members of the Class be given the best "practicable notice[.]" *See* N.R.C.P. 23(c)(2). The Notice explains the nature of the action, defines the Class, and sets forth the description of Plaintiffs' class allegations and claims in the case. *See* **Exhibit 1**. In plain language, it contains an explanation of the Class member's rights and options, including that a Class member may enter an appearance through counsel; that the Court will exclude any class member who requests exclusion; the procedures for requesting exclusion; and the binding effect of a judgment on Class members under N.R.C.P. 23. *See* **Exhibit 1**.

III. PLAINTIFFS' PROPOSED NOTICE PLAN

This Court may direct appropriate notice to the class. *See* N.R.C.P. 23(c)(2); *see also Sosna v. Iowa*, 419 U.S. 393, 415, 95 S. Ct. 553, 565 (1975). Plaintiffs propose the best notification to the Class would be as follows: a single mailing to each Class member. "When the names and addresses of most class members are known, notice by mail usually is preferred." *Manual for Complex Litigation Class* § 21.311 (citing *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 356 n. 22 (1978)). Plaintiffs propose that a third-party administrator mail the Notice to all members of the Class via direct mailing, using U.S. Mail, postage prepaid, at the addresses provided by Defendants. Plaintiffs also propose an opt-out response date of thirty (30) days from the date of mailing of the Notice.

Plaintiffs request that this Court order Defendants to produce a list of all Class members, identifying each person by full name, dates of employment, location of employment, and providing all address information known to Defendants.

Class counsel propose that the parties meet and confer to discuss the schedule for provision of the necessary information and for the sending out of the proposed Notice, as well as technical matters such as the selection of a third-party administrator. Class counsel suggests these issues also be discussed with the Court at time of hearing on this Motion, but that the Court consider dates by which it will order such information to be produced by Defendant.

IV. DEFENDANTS SHOULD PAY THE COSTS OF THE CLASS NOTICE

The United States Supreme Court in *Eisen* established the general rule that the plaintiffs should bear the costs relating to the sending of the notice to the class. *See Eisen*, 417 U.S. at 178-79, 94 S. Ct. at 2153. District courts do, however, have discretion to shift costs of notice to defendants in certain circumstances. *Hunt v. Imperial Merchant Servs., Inc.*, 560 F.3d 1137, 1143 (9th Cir. 2009). For instance, courts may order a class action defendant to pay the cost of class notification when there has been a preliminary showing of the defendant's liability. That applies here *a fortiori* and justifies requiring the Defendants to bear the cost of sending the proposed Notice. *See Hunt*, 560 F.3d at 1143 ("interim litigation costs, including class notice costs, may be shifted to defendant after plaintiff's showing of some success on the merits, whether by preliminary injunction, partial summary judgment, or other procedure."); *Sobel v. Hertz Corp.*, 2013 WL 5202027, at *5 (D. Nev. Sept. 13, 2013) ("And, indeed, the weight of authority appears to endorse the shifting of costs to the defendant when its liability is clearly within sight."); *Sullivan v. Kelly Servs., Inc.*, 2011 WL 31534 (N.D. Cal. Jan. 5, 2011); *Bickel v. Whitley Cnty. Sheriff*, 2010 WL 5564634, at *3 (N.D. Ind. Dec. 27, 2010); *Fournigault v. Independence One Mortgage Corp.*, 242 F.R.D. 486, 490 (N.D. Ill. 2007).

Here, the Court has granted partial summary judgment on liability as to Plaintiff Paulette Diaz's first claim for relief. In its July 1, 2015 minute order granting Plaintiff Paulette Diaz's motion, this Court found that, under the Minimum Wage Amendment, "[a]n 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" and that "[m]erely offering health insurance coverage is insufficient." S*ee* July 1, 2015 Minute Order; July 17, 2015 Notice of Entry of Order. On November 2, 2015, Plaintiffs Lawanda Gail Wilbanks and Shannon Olszynski filed a similar motion for summary judgment on behalf of themselves and the certified Class incorporating the arguments made in briefing and argument supporting the Court's July 17, 2015 Order. As discussed in the November 2, 2015 motion, Defendants were not eligible to pay Plaintiffs or the Class members below $8.25 an hour at any time since July 1, 2010; thus, Defendants are liable to Plaintiffs and Class members for wages unlawfully withheld from them, as well as damages and

attorneys' fees. *See* November 2, 2015, Motion for Summary Judgment on file herein. Plaintiffs expect that the Court will grant the motion and, as such, will justify requiring the Defendants to bear the cost of sending the proposed Notice.

V. CONCLUSION

Based on the reasons set forth, Plaintiffs respectfully request that this Court issue an Order: 1) approving Plaintiffs' proposed Class Action Notice to the Non-Enrollment Class; 2) approving Plaintiffs' proposed Notice plan and requiring Defendants to produce the requested information regarding all Class members; and 3) requiring Defendants to bear the costs of sending the Class Notice.

DATED this 13th day of November, 2015.

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

By: */s/ Bradley Schrager*

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

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of November, 2015, a true and correct copy of this **MOTION FOR APPROVAL OF CLASS ACTION NOTICE TO THE NON-ENROLLMENT CLASS, CLASS NOTICE PLAN, AND RELATED RELIEF** was served by electronically filing with the Clerk of the Court using the Wiznet Electronic Service system and serving all parties with an email-address on record, pursuant to Administrative Order 14-2 and Rule 9 of the N.E.F.C.R.

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

Exhibit 1

Exhibit 1

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

PAULETTE DIAZ, LAWANDA GAIL WILBANKS, SHANNON OLSZYNSKI, and CHARITY FITZLEFF, Plaintiffs, vs. MDC RESTAURANTS, LLC; LAGUNA RESTAURANTS, LLC; INKA, LLC; and DOES 1 through 100, Inclusive, Defendants.	Case No.: A-14-701633-C Dept. No.: XVI

NOTICE OF CLASS ACTION
Please Read Carefully
(A court of law authorized this Notice. It is not from a lawyer. You are not being sued.)

TO: ALL CURRENT AND FORMER NEVADA EMPLOYEES OF DEFENDANTS PAID LESS THAN $8.25 PER HOUR AT ANY TIME SINCE JULY 1, 2010, WHO DID NOT ENROLL IN DEFENDANTS' HEALTH INSURANCE PLAN.

An action has been filed against MDC Restaurants, LLC, Laguna Restaurants, LLC, and Inka, LLC ("Defendants"), owners and operators of Denny's and CoCo's restaurants in Nevada. The lawsuit, entitled *Diaz, et al. v. MDC Restaurants, LLC, et al.*, Case No. A-14-701633-C, is pending in the Eighth Judicial District Court, in Clark County, Nevada. The Court has allowed this case to go forward as a class action on behalf of "All current and former Nevada employees of Defendants paid less than $8.25 per hour at any time since July 1, 2010, who did not enroll in Defendants' health insurance plan."

Defendants have denied any liability, and the Court has not decided whether Defendants have done anything wrong. There is no money available now, and there is no guarantee that there will be. However, your legal rights are affected and you have a choice to make now:

YOUR LEGAL RIGHTS AND OPTIONS IN THIS LAWSUIT	
DO NOTHING	**Stay in this lawsuit. Await the outcome. Give up certain rights.** By doing nothing, you preserve the possibility of obtaining money or benefits that may result from a trial or a settlement. However, you give up the right to sue Defendants separately for the same or similar legal claims that have been made in this lawsuit.
ASK TO BE EXCLUDED	**Get out of this lawsuit. Get no benefits from it. Keep your rights.** You may also ask to be excluded from this lawsuit. In which case, if there is a trial or settlement in favor of the plaintiffs, you will not receive a benefit. If you ask to be excluded and money or benefits are later awarded, you will not share in those. On the other hand, if you ask to be excluded, you preserve your right to sue Defendants separately for the same or similar legal claims that are made in this lawsuit.

I. INTRODUCTION

A class action lawsuit is currently pending against MDC Restaurants, LLC, Laguna Restaurants, LLC, and Inka, LLC ("Defendants") based on Defendant's alleged violation of Nevada's minimum wage laws. The purpose of this Notice is to inform you that the Court has permitted, or "certified," a class action lawsuit that may affect you. You have legal rights and options that you may exercise before the Court holds a trial. The trial is to decide whether the claims being made against Defendants, on your behalf, are true. Judge Timothy

C. Williams of the Eighth Judicial District Court, Clark County, Nevada, is presiding over this class action. The lawsuit is known as *Diaz, et al. v. MDC Restaurants, LLC, et al.*, Case No. A-14-701633-C.

II. WHAT THE LAWSUIT IS ABOUT

This lawsuit concerns whether the Defendant restaurant companies, who own and operate Denny's and CoCo's Restaurants in Nevada, paid their hourly employees the proper minimum wage, pursuant to article XV, section 16 of the Nevada Constitution (the "Minimum Wage Amendment"). Plaintiffs allege that Defendants failed to pay them and other hourly employees a minimum wage of $8.25 per hour, contrary to Nevada's Minimum Wage Amendment, because Defendants did not provide Plaintiffs and other hourly employees with qualified health insurance benefits, and instead paid less per hour than was required. The Plaintiffs in this lawsuit are seeking unpaid wages, damages, interest, and attorneys' fees and costs. Defendants have denied any liability.

III. WHAT IS A CLASS ACTION AND WHO IS INVOLVED

A class action lawsuit is a lawsuit where one or more persons sue on behalf of themselves and others who have similar claims. This lawsuit is a class action filed by Plaintiff Paulette Diaz and others, on behalf of employees of Defendants who were paid less than $8.25 per hour but who were not provided qualified health insurance benefits permitting Defendants to pay less than that amount.

On October 13, 2015, the Court decided that this lawsuit may be maintained as a class action with respect to claims asserted on behalf of a Class defined as: All current and former Nevada employees of Defendants paid less than $8.25 per hour at any time since July 1, 2010, who did not enroll in Defendants' health insurance plan.

IV. YOUR RIGHTS AND OPTIONS

You do not have to do anything now if you want to keep the possibility of getting monetary recovery or benefits from this lawsuit. By doing nothing, you remain part of the Class. If you remain a Class member, and the Plaintiffs obtain money or benefits either as a result of the trial or as part of a settlement, you will be notified about how to apply for your applicable share (or how to ask to be excluded from any settlement). Keep in mind that if you do nothing now, regardless of whether the Plaintiffs win or lose at trial, you will not be able to sue, or continue to sue, Defendants as part of any other lawsuit concerning the same legal claims that are the subject of this lawsuit. This means that if you do nothing, you will be part of the present class action seeking unpaid wages, damages, and attorneys' fees and costs against Defendants. You will also be legally bound by all of the Orders the Court issues and judgments the Court makes in this action. Plaintiffs and their attorneys will act as your representatives and counsel, respectively, in this lawsuit. You may also choose to enter an appearance through your own attorney if you desire.

If you exclude yourself from the Class, which means to remove yourself from or "opt out" of the Class, you will not receive any monetary recovery or benefits from this lawsuit even if the Plaintiffs obtain money or benefits as a result of the trial or from any potential or possible settlement between Defendants and Plaintiffs. However, you will retain the right to sue Defendants in your own capacity concerning the issues in this lawsuit. If you exclude yourself, you will not be legally bound by the Court's judgments in this class action case. If you do wish to exclude yourself from the Class so you can initiate your own lawsuit against Defendants, you should talk to your own attorney soon, because your claims may be subject to an ongoing statute of limitations.

To ask to be excluded, you must complete and sign the enclosed "Request To Be Excluded From Class Action Lawsuit" that states that you want to be excluded from *Diaz, et al. v. MDC Restaurants, LLC, et al.*, Case No. A-14-701633-C, and return it in one of the following three ways NO LATER THAN [DATE TO BE INSERTED – 30 DAYS AFTER MAILING DATE]: [TPA ADDRESS, FAX, E-MAIL TO BE INSERTED]. By making this election to be excluded, (a) you will not share in any recovery that might be paid to Class members as a result of trial or settlement of this lawsuit; (b) you will not be bound by any decision in this lawsuit favorable to Defendants; and (c) you may present any claims you have against Defendants by filing your own lawsuit.

If you want to remain a member of the Class, you should NOT complete and sign the "Request To Be

Excluded From Class Action Lawsuit" and are not required to do anything at this time. By remaining a Class member, any claims against Defendants for monetary relief arising from Defendants' alleged conduct by the Plaintiffs will be determined in this case and cannot be presented in any other lawsuit.

V. THE ATTORNEYS REPRESENTING YOU

The Court has determined that the law firm of Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP ("Class Counsel") shall represent the Class based on Class Counsel's qualifications and experience. If Plaintiffs and the Class are successful in this lawsuit, Class Counsel may ask the Court for fees and expenses. You will not have to pay these fees and expenses. If the Court grants Class Counsels' request, the fees and expenses would be either deducted from any money obtained for the Class or paid separately by Defendants. As a member of the Class, you will not be required to pay any costs in the event that the class action is unsuccessful.

VI. OBTAINING MORE INFORMATION

Further information about this notice and answers to questions concerning this lawsuit may be obtained by writing, telephoning, or e-mailing Class Counsel at the telephone number, address, and e-mail below.

Wolf Rifkin Shapiro Schulman & Rabkin, LLP
3556 East Russell Road, 2nd Floor
Las Vegas, Nevada 89120
Phone: TBD
Email: TBD

You may, of course, seek the advice and guidance of your own attorney if you desire.

DO NOT CONTACT THE COURT, THE COURT'S CLERK, OR THE JUDGE.
THEY ARE NOT PERMITTED TO ADDRESS YOUR INQUIRIES OR QUESTIONS.

Dated: MAILING DATE TO BE INSERTED
Enclosure: Exclusion Request

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

PAULETTE DIAZ, LAWANDA GAIL WILBANKS, SHANNON OLSZYNSKI, and CHARITY FITZLEFF, Plaintiffs, vs. MDC RESTAURANTS, LLC; LAGUNA RESTAURANTS, LLC; INKA, LLC; and DOES 1 through 100, Inclusive, Defendants.	Case No.: A-14-701633-C Dept. No.: XVI

REQUEST TO BE EXCLUDED FROM CLASS ACTION LAWSUIT

The undersigned has read the Notice of Class Action, dated [MAILING DATE TO BE INSERTED], and does NOT wish to remain a member of the Class certified in the case of *Diaz, et al. v. MDC Restaurants, LLC, et al.*, Case No. A-14-701633-C, as defined therein.

Date: _____

Signature: _____

Typed or printed name: _____

If you want to exclude yourself from the Class, you must complete and return this form by mail, fax, or e-mail before [DATE TO BE INSERTED – 30 DAYS AFTER MAILING DATE] to:

TPA ADDRESS, FAX, E-MAIL TO BE INSERTED.

Exhibit Q

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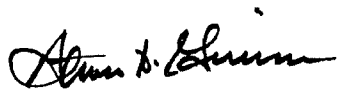

CLERK OF THE COURT

RPLY
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Attorneys for Defendants

DISTRICT COURT

CLARK COUNTY, NEVADA

PAULETTE DIAZ, an individual; and LAWANDA GAIL WILBANKS, an individual; SHANNON OLSZYNSKI, and individual; CHARITY FITZLAFF, an individual, on behalf of themselves and all similarly-situated individuals, Plaintiffs, vs. MDC RESTAURANTS, LLC, a Nevada limited liability company; LAGUNA RESTAURANTS, LLC, a Nevada limited liability company; INKA, LLC, a Nevada limited liability company and DOES 1 through 100, Inclusive, Defendants.	**Case No. A-14-701633-C** **Dept. No. XVI** **DEFENDANTS' REPLY IN SUPPORT OF COUNTERMOTION TO STRIKE UNDISCLOSED PURPORTED EXPERT AND FOR SANCTIONS** **AND** **DEFENDANTS' THIRD SUPPLEMENT TO DEFENDANTS' CONTINUED MOTION TO STAY PROCEEDINGS ON APPLICATION FOR ORDER SHORTENING TIME AND REQUEST FOR JUDICIAL NOTICE** **Hearing Date: September 25, 2015** **Hearing Time: 9:30 a.m.**

Defendants MDC RESTAURANTS, LLC; LAGUNA RESTAURANTS, LLC; and INKA, LLC (hereinafter "Defendants"), by and through their counsel of record, hereby bring their Reply in Support of Countermotion to Strike Undisclosed Expert and for Sanctions against Plaintiffs PAULETTE DIAZ, LAWANDA GAIL WILBANKS, SHANNON OLSZYNSKI, and CHARITY FITZLAFF's (hereinafter "Plaintiffs") and Third Supplement to Defendants' Continued Motion to Stay Proceedings on Application for Order Shortening Time and Request for Judicial Notice. This

Reply and Supplement are based on the Memorandum of Points and Authorities below, all papers and files on file herein and any oral argument permitted.

MEMORANDUM OF POINTS AND AUTHORITIES

I. REPLY IN SUPPORT OF COUNTERMOTION TO STRIKE UNDISCLOSED PURPORTED EXPERT AND FOR SANCTIONS.

A. Facts And Argument.

Before this Court is a litany of motions regarding proper class action procedure. Throughout their briefing, however, Plaintiffs gloss over that the reasons for all of these new issues are completely due to Plaintiffs' failure to move for a proper class definition in the first place. Plaintiffs' failure to present a proper class definition, itself arose from Plaintiffs' failure to prove the allegations they made in their Amended Class Action Complaint. These allegations were inherently flawed because they were contingent on either (1) Plaintiffs never being offered a health insurance plan or (2) Plaintiffs being offered a health insurance plan that did not comply with NAC 608.102's requirement to "cover those categories of health care expenses that are generally deductible by an employee on his/her individual federal income tax return pursuant to 26 U.S.C. § 213." **Amended Class Action Complaint ("Complaint") on file herein and incorporated by this reference at ¶¶ 25, 28, 31, and 34.** This NAC 608.102 regulation, that is integral to the Complaint, comes from the same Nevada Labor Commissioner's regulations in NAC 608 that Plaintiffs convinced this Court to ignore and invalidate for the purposes of the word "provide" meaning to enroll instead of offer.

In fact, Plaintiffs' Complaint never refers to any "traditional major medical plan." ***See* Complaint.** Nowhere in their Complaint, do Plaintiffs state that any medical plans must comply with requirements under NRS 608.1555-608.1576, NRS 689A, NRS 689B or COBRA like Matthew T. Milone does. ***Id.*** Instead, Plaintiffs' Complaint defined a "truly comprehensive" plan as one that "cover[s] 'those categories of health care expenses that are generally deductible . . . pursuant to 26 U.S.C. § 213'" as stated in NAC 608.102. ***Id.* at ¶8 citing N.A.C. 608.102(1)(a).** Thus, Plaintiffs' reliance on Milone's opinions are completely contradictory to what Plaintiffs' have pled. ***Id.*** Discovery has always been premised on Plaintiffs' Complaint allegations and discovery closed with no pleading being amended as to Plaintiffs' new argument that the MWA's term "health insurance"

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has such requirements. Accordingly, Plaintiffs ask this Court to certify a class action that is contradictory to their Complaint and all the class discovery that was conducted on those allegations.

When Plaintiffs brought their Motion for Class Certification on June 8, 2015 with the class definition of "[a]ll current and former employees . . . compensated at less than the upper-tier hourly minimum wage [$8.25]", this Court could have simply ruled that Plaintiffs failed to properly ascertain putative class members because the class definition even included plaintiffs who were actually enrolled in health insurance. Thus, the Court could have denied the Motion for Class Certification right then and there and the case would have proceeded to trial on the individual named plaintiffs and their original allegations that they were never offered health insurance. Instead, the Court allowed Plaintiffs to scrap their class definition and re-write new class definitions to cure Plaintiffs' failures to prove their Complaint claims in discovery. These rewritten class definitions themselves now require additional briefing and the proffering of supplemental evidence <u>that was never produced in discovery</u>. Accordingly, Defendants have already been severely prejudiced by the allowance of Plaintiffs' continued tweaking and re-working of their legal theories through new motions and evidence all of which should have been brought by the original Phase I motion deadline of July 28, 2015.

In support of Plaintiffs' failure to properly abide by discovery, Plaintiffs blatantly misrepresent what both this and other courts have said about their attempt to proffer an initial expert outside of discovery and after the applicable motion deadline. First, Plaintiffs' cut-and-paste of this Court's transcript makes it look like this Court completely heard the issue and agreed that the discovery rules no longer applied. **Plaintiffs' 1) Reply in Support of Motion for Partial Summary Judgment on Liability Regarding Defendants' Health Benefit Plans; 2) Response to Defendants' Supplement to Their Continued Motion to Stay Proceedings; and 3) Response to Countermotion to Strike and for Sanctions ("Plaintiffs' Reply") on file herein and incorporated by this reference at 6:3-16.** To be clear, even though this Court agreed to allow Plaintiffs to recharacterize Defendants' proposed supplemental briefing on health insurance into a post-Phase I deadline motion for partial summary judgment, this Court specifically said that it had <u>not</u> made any decision as to allowing an expert:

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> MR. SCHRAGER: And we will attach to that for your Honor's consideration an expert declaration.
>
> THE COURT: And what we'll do is this: I'm not going to make any decision as far as that is concerned, but I'm going to agree to the scheduling. Brief it, argue it. I'll deal with it.

Reporter's Transcript of Motions from August 13, 2015 at 62:5-10. (Emphasis added). Second, in the three other cases cited by Plaintiffs in Plaintiffs Reply – *Tyus et al. v. Wendy's of Las Vegas et al.*, D. Nev. Case No. 14-729; *Hanks et al. v. Briad Restaurant Group*, D. Nev Case No. 14-786; and *Leoni v. Terrible Herbst, Inc.*, Eighth Judicial District Case No. A-14-704428-C – no other court has ruled that Milone was an admissible expert or that Plaintiffs were allowed to ignore the initial expert deadline. Indeed a reading of Milone's expert "Declaration"[1] shows that he has never been qualified as an expert, ever provided expert testimony, or ever provided a written report. In fact, the only other instances in which he has provided three expert "Declarations" are in those three above cases in which he has never been qualified as an expert. To this end, Milone states:

> I have provided Declarations in the cases of *Leoni v. Terrible Herbst, Inc.*, EJDC Case No. A-14-704428-C, *Hanks v. Briad Restaurant Group, LLC*, USDC Case No. 2:14-cv-00786 and *Tyus v. Wendy's of Las Vegas, Inc.*, USDC Case No. 2:14-cv-00729 in 2015. I have not provided any other expert testimony or reports in the past five (5) years.

Plaintiffs' Reply at Exhibit 2 at ¶43. (Emphasis added). Thus, Milone is breaking into the business on all four cases simultaneously (the above three and this one), through a shell game of four cases all brought by the same Plaintiffs' counsel. Milone, however, has a long ways to go in expert work as he has missed the initial expert disclosure deadline in all four cases, not submitted a proper written report in all four cases and has based his qualifications on allusions to the other three cases in which he has never been qualified as an expert. Due to the deficient manner in which Plaintiffs proffered Milone, Milone likewise has never dealt with a rebuttal expert or been deposed as an

[1] Plaintiffs have cited no authority to supplant Nevada Rule of Civil Procedure's requirements that Plaintiffs identify a witness under Rule 16.1 or 26(a); disclose an expert at the time ordered under Rule 16.1(a)(2)(C); provide a written report under Rule 16.1(a)(2)(B); and present a qualified expert under Rule 16.1(a)(2)(B).

expert in any of the four total cases in his curriculum vitae of expert work.

If Milone really could be brought as a Phase 2 expert, why did Plaintiffs simply not do an initial expert disclosure and report for Phase 2? The reason is twofold. First, Plaintiffs use of Milone only came in all four cases after they realized that their class definition for "all . . . employees" under $8.25 was untenable in all four cases. Thus, Plaintiffs had to re-create a class definition that avoided their problems with the statute of limitations, offering of health insurance and health insurance qualifications. This led to Plaintiffs' use of Milone to carve out some argument that avoided the issue of offering insurance by just focusing on a new theory that the term "health insurance" should have some meaning beyond what is stated in the MWA and NAC 608.102.

Second, with Phase 1 discovery already closed in all four cases, Plaintiffs knew that they could not insert Milone as an untimely expert – even though his opinions went straight to a class definition for class certification purposes – which is clearly the province of Phase 1. Additionally, a Phase 2 designation was a problem because Phase 2 is a contingent discovery phase. In other words, there is no such thing as Phase 2 discovery if the class is not certified as it is contingent on class certification. That is why parties cannot conduct any Phase 2 discovery in Phase 1 because Phase 2 discovery does not even start until a class is certified. Phased discovery is not some rolling discovery standard in which all discovery is allowed. If that were the case, every single class action plaintiffs' counsel in the world would start off Phase 1 discovery by asking for all the names and addresses of all plaintiffs before a case was even certified as that is allowed in Phase 2. That would render bifurcated or phased discovery completely meaningless. That has never been the case and Plaintiffs can cite no rule or case law for that proposition. Thus, Plaintiffs' solution was to create an expert "Declaration" that would subvert the rules and gloss over the flagrant ignorance of completed discovery. Accordingly, Plaintiffs' arguments for an expert "Declaration" is not supported in law or logic and says volumes about what Plaintiffs think this Court will indulge.

II. DEFENDANTS' THIRD SUPPLEMENT TO DEFENDANTS' CONTINUED MOTION TO STAY PROCEEDINGS ON APPLICATION FOR ORDER SHORTENING TIME AND REQUEST FOR JUDICIAL NOTICE.

A. Facts And Argument.

"There is no guarantee that the [Nevada Supreme] Court will even entertain the writ-in fact,

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as a matter for which Defendants have a plain, speedy, and adequate remedy in the ordinary course of law-an appeal." **Opposition to Motion to Stay at 3:10-11 on file herein and incorporated by this reference.** Those were the words with which Plaintiffs opposed Defendants' Motion to Stay. *Id.* In Plaintiffs' Reply, Plaintiffs have supplemented their previous prejudice argument of "just get on with it" with one additional new sentence: "Defendants continue, at this very moment, to pay employees unlawfully below $8.25 an hour, and they continue to do so on the basis of what the Court now knows, definitively, is an egregiously bad health benefits plan that does not even pay for stitches." **Plaintiffs' Reply at 2:7-10.** That is the entirety of Plaintiffs' prejudice argument before the Court.

This is not an injunctive relief case and there is no argument that Plaintiffs are seeking anything beyond money damages. The argument that any alleged damages continue to accrue would prevent all stays in all cases except those for equitable relief. The Court is well aware that that is not the case. The prejudice to Defendants, of the case moving forward with an incorrect class definition based on terms that are already pending before the Nevada Supreme Court far outweighs such a non-argument. Thus, as now evidenced in multiple briefings before this Court, Plaintiffs cannot cite any prejudice to them regarding a stay of this matter.

The Defendants have previously provided this Court with the **(1)** Notice Scheduling Oral Argument in *Williams et al. v. Eighth Judicial District Court et al. (Claim Jumper Acquisition Co., LLC)*, Nevada Supreme Court case number 66629, regarding the MWA's statute of limitations in which Defendants moved to consolidate *Diaz et al. v. Eighth Judicial District Court et al. (MDC Restaurants, LLC et al.)*, Nevada Supreme Court case number 67631 (hereinafter "*Diaz I*"), regarding this Court's holding regarding the statute of limitations under the MWA; **(2)** 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.'s Brief in Support of Petition for Writ of Mandamus or Prohibition in *Diaz et al. v. Eighth Judicial District Court et al. (MDC Restaurants, LLC et al.)*, Nevada Supreme Court case number 68523 (hereinafter "*Diaz II*"), regarding this Court's holding regarding the meaning of "provide" under the MWA; **(3)** Order in

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Tyus et al. v. Wendy's of Las Vegas, Inc. et al., United States District Court case number 2:14-cv-00729-GMN-VCF, certifying a question of law based on this Court's *Diaz II* order on the meaning of "provide" under the MWA; and (4) Order Directing Answer on in *Diaz II* regarding this Court's holding regarding the meaning of "provide."

In addition to these four appellate-related filings, another recent Order has come down from the Nevada Supreme Court. In *Diaz I* regarding the statute of limitations, Defendants had moved to participate in oral argument upon consolidation of the Petitions. However, Plaintiffs vigorously opposed Defendants' motion and were granted their wish. Instead, the Nevada Supreme Court ordered that Plaintiffs provide an independent Answer to Defendants' Petition so that the Court could "resolv[e] the petition" in *Diaz I*. **Order Directing Answer attached hereto as Exhibit A.** Of note is the fact that with the October 6, 2015 hearing date looming, the Nevada Supreme Court ordered Plaintiffs to provide an answer within an expedited "15 days" rather than the "30 days" that was previously allowed to Answer the petitions in *Claim Jumper* and *Diaz II*.

In addition to the reasons already stated in Defendants' Motion to Stay and Supplement to continued Motion to Stay, this Court now has even more reason to stay all pending motions. Plaintiffs' statement of "no guarantee that the [Nevada Supreme] Court will even entertain the writ" has now been eviscerated in both *Diaz I* and *Diaz II* as the Nevada Supreme Court has required Answers in both. Along with the prejudice argument above, this Court has ample reason to stay all pending motions until the Nevada Supreme Court decides this Court's rulings in *Diaz I* and *Diaz II*. Further, it appears that the Nevada Supreme Court, in exercising their discretion to hear or not hear petitions for writ, does not agree that Defendants are simply "writ-happy" as the Nevada Supreme Court has now made clear that both of these Petitions for Writ involving the MWA will be "entertain[ed]" and warrant review and resolution.

Accordingly, Defendants respectfully request that this Court take judicial notice of this latest development in consideration of Defendants' Motion to Stay.

///

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///

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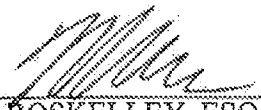
III. CONCLUSION

For all the reasons stated above, this Court should stay all pending motions. Alternatively, Plaintiffs Motion for Partial Summary Judgment should be denied, Plaintiffs' expert stricken and Defendants should be awarded sanctions.

Dated: September 23, 2015

Respectfully submitted,



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MONTGOMERY Y. PAEK, ESQ.
KATHRYN B. BLAKEY, ESQ.
LITTLER MENDELSON, P.C.
Attorneys for Defendants

DECLARATION OF MONTGOMERY Y. PAEK

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 at the law firm of Littler Mendelson and one of the attorneys for Defendants MDC Restaurants, LLC; Laguna Restaurants, LLC and Inka, LLC (hereinafter "Defendants"). Unless otherwise stated, this declaration is based on my personal knowledge. I make this declaration in support of Defendants' Third Supplement to Defendants' continued Motion to Stay Proceedings on Application for Order Shortening Time and Request for Judicial Notice.

2. I have reviewed the Order Directing Answer in *MDC Restaurants, LLC et al. v. The Eighth Judicial District Court et al.* Nevada Supreme Court case number 67631, a true and correct copy of which has been attached as **Exhibit A**.

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

Dated: September 23, 2015

MONTGOMERY Y. PAEK, ESQ.

PROOF OF SERVICE

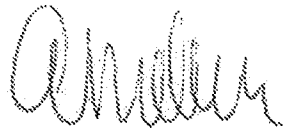
I am a resident of the State of Nevada, over the age of eighteen years, and not a party to the within action. My business address is 3960 Howard Hughes Parkway, Suite 300, Las Vegas, Nevada 89169. On September 23, 2015, I served the within document:

DEFENDANTS' REPLY IN SUPPORT OF COUNTERMOTION TO STRIKE UNDISCLOSED PURPORTED EXPERT AND FOR SANCTIONS
AND
DEFENDANTS' THIRD SUPPLEMENT TO DEFENDANTS' CONTINUED MOTION TO STAY PROCEEDINGS ON APPLICATION FOR ORDER SHORTENING TIME AND REQUEST FOR JUDICIAL NOTICE

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

Don Springmeyer, Esq.
Bradley Schrager, Esq.
Daniel Bravo, Esq.
Royi Moas, Esq.
Jordan Butler, Esq.
Daniel Hill, Esq.
Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP
3556 East Russell Road, Second Floor
Las Vegas, Nevada 89120

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 23, 2015, at Las Vegas, Nevada.



Erin Melwak

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LITTLER MENDELSON, P.C.
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Exhibit P

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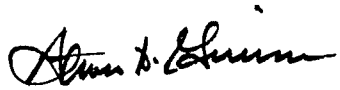

CLERK OF THE COURT

SUPP
RICK D. ROSKELLEY, ESQ., Bar # 3192
ROGER L. GRANDGENETT II, ESQ., Bar # 6323
MONTGOMERY Y. PAEK, ESQ., Bar # 10176
KATHRYN B. BLAKEY, ESQ., Bar # 12701
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Telephone: 702.862.8800
Fax No.: 702.862.8811
Attorneys for Defendants

DISTRICT COURT

CLARK COUNTY, NEVADA

PAULETTE DIAZ, an individual; and LAWANDA GAIL WILBANKS, an individual; SHANNON OLSZYNSKI, and individual; CHARITY FITZLAFF, an individual, on behalf of themselves and all similarly-situated individuals, Plaintiffs, vs. MDC RESTAURANTS, LLC, a Nevada limited liability company; LAGUNA RESTAURANTS, LLC, a Nevada limited liability company; INKA, LLC, a Nevada limited liability company and DOES 1 through 100, Inclusive, Defendants.	**Case No. A-14-701633-C** **Dept. No. XVI** **DEFENDANTS' SECOND SUPPLEMENT TO DEFENDANTS' CONTINUED MOTION TO STAY PROCEEDINGS ON APPLICATION FOR ORDER SHORTENING TIME AND REQUEST FOR JUDICIAL NOTICE** **Hearing Date: September 25, 2015** **Hearing Time: 9:30 a.m.**

Defendants MDC RESTAURANTS, LLC; LAGUNA RESTAURANTS, LLC; and INKA, LLC (hereinafter "Defendants") hereby provide their Second Supplement to Defendants' continued Motion to Stay Proceedings on Application for Order Shortening Time and Request for Judicial Notice. This Second Supplement and Request is based on the Memorandum of Points and Authorities below, all papers and files on file herein and any oral argument permitted.

MEMORANDUM OF POINTS AND AUTHORITIES

This Court has made it clear that it is important to have a record of the issues of first impression that are before it concerning the Minimum Wage Amendment, Nevada Constitution, Article XV, Section 16 (the "MWA"). **Reporter's Transcript of Motions dated August 13, 2015 at 27:9-11 and 51:5-6 on file herein and incorporated by this reference.** In accordance with this

Court's efforts to maintain a complete record and the standard cited in Defendants' Request for Judicial Notice on file herein, Defendants submit this Second Supplement and Request for the Court's consideration in considering the continued Motion to Stay.

Through their last briefing of June 16, 2015, Plaintiffs have submitted a do-over of their class definition. Abandoning their original singular class definition which was for all employees paid less than $8.25 and hour, Plaintiffs have moved to certify two alternative class definitions:

> All current and former Nevada employees of Defendants paid less than $8.25 per hour at any time since July 1, 2010, and who were not provided qualifying health insurance pursuant to Nev. Const. Article XV, Section 16 and applicable Nevada statutory and regulatory provisions.

and

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

Supplemental Brief in Support of Plaintiffs' Motion for Class Certification Pursuant to N.R.C.P. 23 at 2:5-8 and 3:17-18. Both definitions identify employees who were "not provided" or "did not enroll" in health insurance or health benefits plans. Thus, this Court's order that provide means to enroll is integral to identifying class members for both definitions. This Court's order on "provide" is currently pending before the Nevada Supreme Court as case no. 68523.

On September 11, 2015, the Nevada Supreme Court issued an Order Directing Answer on Defendants' Petition for Writ of Mandamus or Prohibition on this Court's decision on "provide." **Order Directing Answer attached hereto as Exhibit A.** Thus, in addition to the reasons already stated in Defendants' Supplement to continued Motion to Stay, this Court now has even more reason to stay all pending motions. **Defendants' Motion to Stay Proceedings on Application for Order Shortening Time ("Motion to Stay") on file herein and incorporated by this reference.** In their Opposition to Defendants' Motion to Stay, Plaintiffs premised their opposition on: "[t]here is no guarantee that the [Nevada Supreme] Court will even entertain the writ-in fact, as a matter for which Defendants have a plain, speedy, and adequate remedy in the ordinary course of law-an appeal." **Opposition to Motion to Stay at 3:10-11 on file herein and incorporated by this reference.** It is clear now that this is not the case and that the Nevada Supreme Court fully intends to "resolv[e] this

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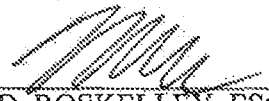
matter" on Defendants' Petition. ***See* Exhibit A, Order Directing Answer.** Accordingly, Defendants respectfully request that this Court take judicial notice of this latest development in consideration of Defendants' Motion to Stay.

Dated: September 18, 2015

Respectfully submitted,



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ROGER L. GRANDGENETT II, ESQ.
MONTGOMERY Y. PAEK, ESQ.
KATHRYN B. BLAKEY, ESQ.
LITTLER MENDELSON, P.C.
Attorneys for Defendants

DECLARATION OF MONTGOMERY Y. PAEK

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 at the law firm of Littler Mendelson and one of the attorneys for Defendants MDC Restaurants, LLC; Laguna Restaurants, LLC and Inka, LLC (hereinafter "Defendants"). Unless otherwise stated, this declaration is based on my personal knowledge. I make this declaration in support of Defendants' Second Supplement to Defendants' continued Motion to Stay Proceedings on Application for Order Shortening Time and Request for Judicial Notice.

2. I have reviewed the Order Directing Answer in *MDC Restaurants, LLC et al. v. The Eighth Judicial District Court et al.* Nevada Supreme Court case number 68523, a true and correct copy of which has been attached as **Exhibit A.**

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

Dated: September 18, 2015

MONTGOMERY Y. PAEK, ESQ.

LITTLER MENDELSON, P.C.

PROOF OF SERVICE

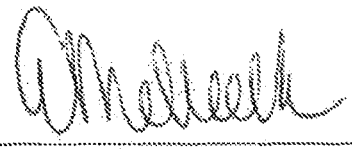
I am a resident of the State of Nevada, over the age of eighteen years, and not a party to the within action. My business address is 3960 Howard Hughes Parkway, Suite 300, Las Vegas, Nevada 89169. On September 18, 2015, I served the within document:

DEFENDANTS' SECOND SUPPLEMENT TO DEFENDANTS' CONTINUED MOTION TO STAY PROCEEDINGS ON APPLICATION FOR ORDER SHORTENING TIME AND REQUEST FOR JUDICIAL NOTICE

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

Don Springmeyer, Esq.
Bradley Schrager, Esq.
Daniel Bravo, Esq.
Royi Moas, Esq.
Jordan Butler, Esq.
Daniel Hill, Esq.
Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP
3556 East Russell Road, Second Floor
Las Vegas, Nevada 89120

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 18, 2015, at Las Vegas, Nevada.



Erin Melwak

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Exhibit O

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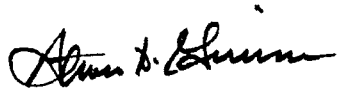

CLERK OF THE COURT

OPPS
RICK D. ROSKELLEY, ESQ., Bar # 3192
ROGER L. GRANDGENETT II, ESQ., Bar # 6323
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Attorneys for Defendants

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

Defendants.

Case No. A-14-701633-C

Dept. No. XVI

SUPPLEMENT TO DEFENDANTS' CONTINUED MOTION TO STAY PROCEEDINGS ON APPLICATION FOR ORDER SHORTENING TIME

AND

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY REGARDING DEFENDANTS' HEALTH BENEFIT PLANS

AND

DEFENDANTS' COUNTERMOTION TO STRIKE UNDISCLOSED PURPORTED EXPERT AND FOR SANCTIONS

Hearing Date: September 25, 2015

Hearing Time: 9:30 a.m.

Defendants MDC RESTAURANTS, LLC; LAGUNA RESTAURANTS, LLC; and INKA, LLC (hereinafter "Defendants"), by and through their counsel of record, hereby supplement their continued Motion to Stay Proceedings on Application for Order Shortening Time. The continued Motion to Stay is a threshold issue and should be considered before moving forward with all other pending motions in this matter.

Alternatively, should this Court deny that stay, Defendants hereby oppose Plaintiffs PAULETTE DIAZ, LAWANDA GAIL WILBANKS, SHANNON OLSZYNSKI, and CHARITY FITZLAFF's (hereinafter "Plaintiffs") Motion for Partial Summary Judgment on Liability Regarding Defendants' Health Benefits Plans and bring their Countermotion to Strike Undisclosed Purported Expert and for Sanctions. This Supplement, Opposition and Countermotion is based on the Memorandum of Points and Authorities below, all papers and files on file herein and any oral argument permitted.

MEMORANDUM OF POINTS AND AUTHORITIES

I. SUPPLEMENT TO DEFENDANTS' CONTINUED MOTION TO STAY PROCEEDINGS ON APPLICATION FOR ORDER SHORTENING TIME.

A. Facts In Support Of Supplement To Motion To Stay.

As a preliminary and threshold matter, this Court should stay the continued class certification hearing for the reasons set forth in Defendants' Motion to Stay Proceedings on Application for Order Shortening Time filed on July 30, 2015. **Defendants' Motion to Stay Proceedings on Application for Order Shortening Time attached hereto as Exhibit A.** In addition to the unsettled question of law on the meaning of "provide" under the Minimum Wage Amendment in Nevada Constitution, Article XV, Section 16 (hereinafter the "MWA"), recent filings in this and other matters provide even more reason that the Nevada Supreme Court should clarify the pending questions of law before this Court moves forward with class certification based on Plaintiffs' interpretations of the MWA.

As this Court has repeatedly noted, the interpretations of the MWA are matters of first impression. As Defendants have noted, the lack of prejudice in waiting for the Nevada Supreme Court's guidance far outweigh Plaintiffs' legally unsupported demands to just "get on with the case." **Reporter's Transcript of Motion to Stay from August 11, 2015 on file herein and incorporated**

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by this reference at 19:9-14 and Plaintiffs Opposition to Defendants' Motion to Stay Proceedings on file herein and incorporated by this reference at 3:14-17. Throughout the extensive briefing in this matter, the issue before this Court has remained constant – can a class definition be written that properly ascertains the potential class plaintiffs in this case? Both Plaintiffs' revised class and subclass definitions hinge on three separate issues of MWA interpretation: (1) the statute of limitations, (2) the meaning of "provide", and (3) the meaning of "health insurance." **Plaintiffs' Supplemental Brief in Support of Plaintiffs' Motion for Class Certification Pursuant to N.R.C.P. 23 on file herein and incorporated by this reference at 2:6-8 and 3:18-19.** Two of these questions of law are already pending before the Nevada Supreme Court - the MWA's statute of limitations and the meaning of "provide." **Petition for Writ of Mandamus or Prohibition or, in the Alternative, Motion to Consolidate (MWA's statute of limitations) attached hereto as Exhibit B *and* Petition for Writ of Mandamus or Prohibition (MWA's meaning of "provide") attached hereto as Exhibit C.** Now Plaintiffs add a third issue – the MWA's meaning of "health insurance" – that even Plaintiffs must concede will be brought before the Nevada Supreme Court regardless of whose definition prevails at any district court level. Additionally, since the filing of these Petitions for Writ, several new developments give this Court even more compelling reasons to stay the pending continued class certification hearing.

First, on July 30, 2015, the Nevada Supreme Court sent notice that the MWA's statute of limitations is set to be argued before it in *Williams et al. v. Eighth Judicial District Court et al. (Claim Jumper Acquisition Co., LLC)*, Nevada Supreme Court case number 66629, on October 6, 2015. **Notice Scheduling Oral Argument attached hereto as Exhibit D.** Defendants in this matter have moved to consolidate their Petition for Writ in this matter with the Petition for Writ in *Williams*. ***See* Exhibit B, Petition for Writ.** Thus, there is no question that the Nevada Supreme Court will now resolve the MWA's statute of limitations even though that issue was brought before it through a discretionary Petition for Writ.

Second, on August 24, 2015, Defendants' Petition for Writ of this Court's order on the meaning of "provide" has now been joined by Amici Curiae for Claim Jumper Acquisition Co., LLC; Landry's Inc.; Landry's Seafood House – Nevada, Inc.; Landry's Seafood House – Arlington,

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Inc.; Bubba Gump Shrimp Co. Restaurants, Inc.; Morton's of Chicago/Flamingo Road Corp.; and Bertolini's of Las Vegas, Inc. **Amici Curiae's Brief in Support of Petition for Writ of Mandamus or Prohibition attached hereto as Exhibit E.** Thus, this Court's holding regarding the meaning of "provide" now has ramifications beyond just the confines of this case. Amici Curiae's briefing reinforces that the meaning of "provide" under the MWA prevents any class definition that would properly ascertain class members with standing should this Court's interpretation be incorrect.

Third, on August 21, 2015, after reviewing the ruling made by this Court along with another case challenging the Nevada Labor Commissioner's authority to promulgate regulations under the MWA, the Federal district court in *Tyus et al. v. Wendy's of Las Vegas, Inc. et al.*, United States District Court case number 2:14-cv-00729-GMN-VCF, has 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. **Defendants' Request for Judicial Notice at Exhibit 1 attached hereto as Exhibit F.** In its Order, the court described the arguments regarding the meaning of "provide" in this matter:

> 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 F, Request for Judicial Notice at Exhibit 1 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 this Court's language:

> 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:

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> *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.*

(Emphasis in original). ***See* Exhibit F, Request for Judicial Notice at Exhibit 1 at 11:1-22.** In doing so, the Federal district court 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.**

B. Argument In Support Of Supplement To Motion To Stay.

Plaintiffs agree that the Nevada Supreme Court has cited analogous federal law when making determinations for certification under Nevada Rule of Civil Procedure 23. *Beazer Homes Holding Corp. v. Eighth Judicial Dist. Court of Nev.*, 128 Nev. Adv. Rep. 66, 291 P.3d 128, 136 n. 4 (2012) citing generally *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. —, 131 S. Ct. 2541, 2558, 180 L. Ed. 2d 374 (2011); *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 847-851 (2005) (citing Rule 23 case law from the Second, Third, Fifth, Sixth, Seventh and Eleventh Circuits). Under federal law, Plaintiffs themselves have argued that courts may "take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to the matters at issue." *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992); ***see also* Exhibit F, Request for Judicial Notice at Exhibit 2 at 3:3-7.** Thus, as Plaintiffs did with *Hancock*, Defendants believe that "the attached ruling [in *Tyus*] will assist the Court when considering the pending Motion in this action." ***See* Exhibit F, Request for Judicial Notice at Exhibit 2 at 2:1-2.**

In this matter, this Court should stay the continued Motion for Class Certification pending the Nevada Supreme Court's decision on (1) the statute of limitations and (2) the meaning of "provide" and (3) certify the question of what "health insurance" means under the MWA pursuant to Nevada Rule of Appellate Procedure 5. Indeed, this would be the most efficient way to ensure that the Court moves forward on a class definition that does not include plaintiffs who should never have been in the class in the first place. Further, this Court's ruling on "provide," which is integral to both Plaintiffs' class and subclass definitions, has now been independently certified by a district court *sua*

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sponte to the Nevada Supreme Court and all motions in that matter, including for class certification, have been stayed pending that decision. ***See* Exhibit F, Request for Judicial Notice at Exhibit 1.** With the Nevada Supreme Court directly asked by a Federal district court to answer this question and no prejudice or reason that has ever been cited by Plaintiffs regarding rejecting a stay other than "let's get on with it", there is no reason why this Court should continue to broadly placate Plaintiffs' unsupported demands for a quickie class certification that could be based on three erroneous interpretation of law. Accordingly, this Court should stay any further proceeding of the Motion for Class Certification on Plaintiffs' ever-evolving class-definition pending a decision on definitional terms under the MWA that all parties agree is integral to ascertain a class.

II. DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY REGARDING DEFENDANTS' HEALTH BENEFIT PLANS.

A. Plaintiffs' Motion For Partial Summary Judgment Is Improper And Should Be Stricken.

As another preliminary matter, Plaintiffs' flagrant disregard for civil procedure in regards to class certification in Phase I and initial expert disclosures are more reason than ever for this Court to step back and sort through the implications of simply moving forward with everything Plaintiffs' desire. Although the Court allowed Plaintiffs' counsel to recharacterize Defendants' Countermotion for Supplemental Briefing on Qualifying Health Insurance into a Motion for Partial Summary Judgment, there is no justification (or briefed authority) to allow Plaintiffs' to bring such a Motion when the final date to bring motions related to Phase I class certification discovery was July 28, 2015. **Scheduling Order attached hereto as Exhibit G; Notice of Entry of Stipulation and Order for Extension of Time to Complete Discovery ("Order for Extension of Discovery") filed on December 31, 2014 attached hereto as Exhibit H.** Therefore, pursuant to Nevada Rule of Civil Procedure 16.1(c)(8), Plaintiffs' Motion for Partial Summary Judgment should be stricken as non-compliant with the discovery rules and this Court's scheduling orders.

The analysis is straightforward. If Plaintiffs' Motion was truly a Phase II motion, then Plaintiffs should have no problems withdrawing this Motion for Partial Summary Judgment until Phase II commences. Plaintiffs will not do so, however, because Plaintiffs know that the definition

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of "health insurance" is now integral to the latest rendition of their class/subclass definitions which they themselves have kept changing. As such, Plaintiffs' Motion is either (1) entirely untimely under Phase I and subject to striking or (2) timely under Phase II and subject to be held in abeyance and not considered for the purposes of class certification. As the Court can see, Plaintiffs' Motion is actually improper under either scenario and this Court should not allow Plaintiffs to create their own rules when Plaintiffs had extensive extensions under Phase I to properly bring whatever motions they deemed necessary. Plaintiffs have not even cited any justification for their improper motion and move forward as if the rules do not apply to them.

In addition to the untimeliness or impropriety of the Motion, Plaintiffs have made a mockery of the discovery rules and deadlines. There is no question that Phase I discovery had an (1) initial expert deadline and a (2) discovery close deadline. ***See* Exhibit G, Scheduling Order; *see also* Exhibit H, Order for Extension of Discovery.** In fact, Phase II discovery does not even commence unless class certification is granted. ***Id.*** As with Plaintiffs' untimely and improper dispositive motion, any allowance of an undisclosed expert whose report has been converted into a declaration in support of a motion is not allowed by the Nevada Rules of Civil Procedure nor this Court's discovery orders. Further, the use of an expert to opine as to a question of law is clearly the province of the Court and now this Court risks taking an improper advisory opinion from Matthew T. Milone, an individual who has never even been certified as an expert before this or any court.

How can Plaintiffs come before this Court and be allowed to vitiate both Phase I motion deadlines and initial expert report disclosure requirements? Should this Court allow such flagrant violation of the rules, it will have modified the rules of civil procedure as follows:

> (1) Should Plaintiffs fail to make their initial expert disclosures, such disclosure shall be unnecessary and any initial expert's report can be converted into a declaration and submitted to the Court via Motion.
>
> (2) Should Plaintiffs fail to file motions by any designated deadlines, the parties can convert any supplemental briefing into a dispositive motion.

See applicable rules at Nev. R. Civ. P. 16.1(a)(2) and Nev. R. Civ. P. 16.1(c)(8). Clearly, this cannot be the case and Plaintiffs should abide by the same Nevada Rules of Civil Procedure and court orders that Defendants have been subject to.

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B. Facts In Support Of Opposition To Motion For Partial Summary Judgment.

Should the Court find grounds to overlook each reason for stay or striking the Plaintiffs' Motion for Partial Summary Judgment, then this Court should deny Plaintiffs' Motion for Partial Summary Judgment as Plaintiffs' conclusions about "health insurance" under the MWA are unsupported by the language of the MWA and the regulations in NAC 608. Pursuant to the MWA and the supporting regulations, qualifying health insurance must: (1) cover those categories of health care expenses that are generally deductible by an employee on his individual federal income tax return pursuant to 26 U.S.C. §213 if such expenses had been borne directly be the employee; (2) be made available to the employee and any dependents of the employee; (3) not have a waiting period that exceeds more than 6 months; and (4) cost the employee no more than 10% of the employee's gross taxable income attributable to the employer. Nev. Const. art. XV § 16; NAC 608.102. These four requirements are the <u>only</u> requirements for what constitutes qualifying health insurance under the MWA. The health insurance plans offered to Plaintiffs satisfy all four.

Plaintiff attempts to dispute this fact by setting forth page after page of a repetitive, vague, and totally unfounded assertion that that Defendant's health insurance plans are not "health insurance," based on a random compilation of laws and opinions which have no relevance to this case whatsoever. **Plaintiffs' Motion for Partial Summary Judgment on Liability Regarding Defendants' Health Benefits Plans (hereinafter "MPSJ") on file herein and incorporated by this reference.** Indeed, the allegation that Defendant's plans are not actually "health insurance" is completely absent from Plaintiffs' Amended Class Action Complaint (hereinafter "Complaint"). More egregiously, it completely contradicts the Complaint. In their Complaint, Plaintiffs alleged that the health insurance plan was not in compliance with the MWA or NAC 608.102 for exactly <u>two</u> reasons: (1) it allegedly did not cover those categories of health care expenses that are generally deductible by an employee on his individual federal income tax return pursuant to 26 U.S.C. §213 if such expenses had been borne directly be the employee; (2) it cost the employee more than 10% of the employee's gross taxable income attributable to the employer. **Amended Class Action Complaint on file herein and incorporated by this reference at ¶¶ 8, 9.** Plaintiffs have brought summary judgment only on the first issue of whether or not Defendants' plans meet the definition of

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"health insurance." The Plaintiffs' Complaint makes no allegations whatsoever that the company health insurance plan was not actually "health insurance." Moreover, it makes no reference whatsoever to any of the federal or state laws Plaintiff is now asserting are case-determinative.

However, Plaintiffs' case fails under this new argument as well. The federal laws Plaintiffs rely upon have no bearing whatsoever on the Nevada Constitution and the state laws they reference were preempted by ERISA decades ago. As such, the real gravamen of Plaintiffs' argument is that qualified health insurance should be more than what is set forth in the MWA – essentially asking the Court to legislate from the bench – and that employers should have guessed how much insurance coverage Plaintiffs' counsel envisioned is appropriate. **Plaintiffs' MPSJ.** Indeed, this entire case boils down to Plaintiffs' counsel's own personal belief system that "qualified health insurance" means more than the health insurance plans Defendants offered – regardless of what plans were actually offered.[1] Plaintiffs' own personal belief system of course is not a sufficient basis for summary judgment.

Defendants' dispute Plaintiffs' characterizations that Defendants' health insurance plans were not "health insurance" under the MWA and NAC 608. Further, Plaintiffs have included an untimely declaration from a purported expert that, for the reasons discussed in Defendant's Motion to Strike, filed concurrently herein, must be stricken and in no way establishes any issue of material fact. The evidence of this case shows that the generalities alleged by Plaintiffs will not justify their claims. Therefore, summary judgment must be denied as a matter of law.

C. Arguments In Support Of Opposition To Motion For Partial Summary Judgment.

The parties do not dispute the standard of review for summary judgment and agree that the question before the Court is a question of law. Defendants do dispute several of Plaintiffs' undisputed facts. Defendants dispute that Plaintiffs Diaz, Wilbanks, Olszynski and Fitzlaff were paid at a rate of $7.25 for the employment dates cited. As pointed out in Defendants' Opposition to

[1] Indeed, Plaintiffs even concede in their motion that the Nevada Division of Insurance considers the plans offered by Defendants to be health insurance and it sets guidelines for those policies which Defendants follow. **Plaintiffs' MPSJ at 11:15-12:1.**

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Motion for Class Certification, the four named Plaintiffs had varying rates of pay throughout their employment with Diaz making $8.25 an hour, to $10.00 an hour, to $11.00 an hour and $7.25 an hour; Wilbanks recalling either $7.25 or $7.45 an hour; Olszynski making $7.25 an hour and then $5.13 an hour in a Colorado location; and Fitzlaff making $7.25 an hour. **Opposition to Motion for Class Certification Pursuant to Nevada Rule of Civil Procedure 23 on file herein and incorporated by this reference at 14:17-22.** Further, Defendants dispute that they simply "offered Plaintiffs" the referenced health plans as Plaintiff Fitzlaff actually enrolled in health insurance. ***Id.* at 13:19-14:3.** Subject to these corrected facts, Defendants do agree that the question of what "health insurance" means under the MWA is a question of law for this Court.

As to this question of law, Defendants' health insurance plans satisfy each and every requirement of qualified health insurance under the MWA and corresponding Nevada Labor Commissioner regulations. Plaintiffs have not set forth a single credible argument to the contrary. Accordingly, the Court should rule against Plaintiffs for four reasons: (1) Defendants' health insurance plans are compliant with the MWA; (2) Defendants' health insurance plans do not violate any operative state law; (3) Limited Benefit Plans and Fixed-Indemnity Plans both satisfy the definition of health insurance under the MWA; and (4) Plaintiffs' discussions on "Social Expectations" and a "Wage and Benefit History" are nothing more that Plaintiffs' counsels' bogus conjecture not supported by legislative history.

1. Defendants' health insurance plans are compliant with the MWA.

The MWA sets forth a two tiered minimum wage rate based upon whether an employer offers health insurance to its employees. Specifically, the MWA provides that an employer may pay the lower tier minimum wage rate to its employee if the employer offers that employee "health insurance." Nev. Const. art. XV § 16. The MWA does not elaborate on the definition of "health insurance," but it does state that, "[o]ffering health benefits ... 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." *Id.* Additionally, employees are defined to include full and part-time employees. *Id.* Thus, under the plain language of the MWA, the only requirement for "health

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insurance" is that it not exceed 10 percent of an employee's gross taxable income. There is no language in the MWA stating that "health insurance" must provide "comprehensive coverage" or be a "traditional major medical plan." Plaintiffs cannot cite a single authority that shows that the plain language of the MWA called for any requirements beyond the term "health insurance."

After the passage of the MWA, the Nevada Labor Commissioner established a series of regulations related to the MWA under the Nevada Administrative Code (NAC) which employers paying the lower tier minimum wage are required to follow. In regard to what "qualif[ies]" as "health insurance," NAC 608.102 provides that the "health insurance" must: (1) cover those categories of health care expenses that are generally deductible by an employee on his individual federal income tax return pursuant to 26 U.S.C. §213 if such expenses had been borne directly be the employee; (2) be made available to the employee and any dependents of the employee; (3) not have a waiting period that exceeds more than 6 months; and (4) cost of the employee no more than 10% of the employee's gross taxable income attributable to the employer. NAC 608.102. Thus, it is the Nevada Labor Commissioner's regulations that are the only other authority which interpreted what was meant by "health insurance."

Defendants' health insurance plans satisfy every requisite of "health insurance" as defined by the MWA and supporting regulations. Specifically, the plans: (1) cover those categories of health care expenses that are generally deductible by an employee on his individual federal income tax return pursuant to 26 U.S.C. §213 if such expenses had been borne directly be the employee; (2) are available to employees and any dependents of employees; (3) have a waiting period that does not exceed more than 6 months; and (4) cost the employee no more than 10% of the employee's gross taxable income attributable to the employer. MWA and NAC 608. In their Motion for Partial Summary Judgment, Plaintiffs do not dispute or bring any arguments regarding points (2) through (4) and Plaintiffs concede that the Defendants' health insurance plans comply with the MWA's requirement that health insurance is available to employees and dependents, NAC 608's requirement that the health insurance waiting period is less than 6 months and the MWA's requirement that the health insurance offered cost no more than 10% of the employee's gross taxable income. Instead, the Plaintiffs dispute whether or not Defendants' health insurance was "health insurance" under the

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MWA which goes directly to point (1) on what the plans covered.

In regard to health insurance coverage, Plaintiffs attempt to confuse the issue by presenting a disorganized narrative that ultimately requests for the Court to expand the definition of "health insurance" to encompass requirements that quite plainly do not exist. Indeed, the entire basis of Plaintiffs' argument is that the Court should create its own definition of health insurance based on a compilation of random opinion-pieces that purportedly support Plaintiff's counsel's personal opinion on health insurance plans generally. **Plaintiffs' MPSJ.** Of course, articles about the Affordable Care Act and insurance laws in Connecticut are of no actual assistance in determining whether Defendant's health insurance plans are qualified health insurance as defined by the MWA. ***Id.* at 10-11.** Moreover, tossing out a series of elementary insults about Defendant's health insurance plans (i.e. "very bad health care products" and "junk benefits") is inane and in no way changes the very clear definition of health insurance under the MWA. Defendants' plans cover those categories of health care expenses that are generally deductible by an employee on his or her individual federal income tax return pursuant to 26 U.S.C. § 213. Accordingly, Defendants' plans are health insurance for the purposes of the MWA and therefore, Plaintiffs' Motion for Partial Summary Judgment must be denied.

a. Defendants' health insurance plans covered those categories of health care expenses that are generally deductible by an employee on his individual Federal Income Tax return pursuant to 26 U.S.C. §213.

Beyond the term "health insurance" in the MWA, the only other authority defining what health insurance means under the MWA is the Nevada Labor Commissioner's regulations. Those regulations, in turn, cite health care expenses that are generally deductible pursuant to 26 U.S.C. § 213. 26 U.S.C. §213 sets forth two categories of health care that are generally deductible: (1) medical care; and (2) medicine or drugs that are a prescribed drug or insulin. 26 U.S.C. §213(a)-(b). A "prescribed drug" is defined as "a drug or biological which requires a prescription of a physician for its use by an individual." 26 U.S.C. §213(d)(3). The term "medical care" is defined as amounts paid:

> (A) for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body,

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> (B) for transportation primarily for and essential to medical care referred to in subparagraph (A),
>
> (C) for qualified long-term care services (as defined in section 7702B (c)), **or**
>
> (D) for insurance (including amounts paid as premiums under part B of title XVIII of the Social Security Act, relating to supplementary medical insurance for the aged) covering medical care referred to in subparagraphs (A) and (B) or for any qualified long-term care insurance contract (as defined in section 7702B (b)).

26 U.S.C. §213(d)(1). (Emphasis added). Additionally, amounts paid for certain lodging away from home can also be treated as paid for medical care if:

> (A) the medical care referred to in paragraph (1)(A) is provided by a physician in a licensed hospital (or in a medical care facility which is related to, or the equivalent of, a licensed hospital), and
>
> (B) there is no significant element of personal pleasure, recreation, or vacation in the travel away from home.

26 U.S.C. §213(d)(2). However, the amount paid for the above defined lodging cannot exceed $50 for each night for each individual. *Id.* The statute also makes clear that "medical care" does not include cosmetic surgery. 26 U.S.C. §213(d)(9).

These definitions are further clarified by Treasury Regulation § 1.213(e) which sets forth specific examples of appropriate lodging expenses and "medical care." 26 CFR 1.213-1. For example, the regulation states:

> Amounts paid for operations or treatments affecting any portion of the body, including obstetrical expenses and expenses of therapy or X-ray treatments, are deemed to be for the purpose of affecting any structure or function of the body and are therefore paid for medical care. Amounts expended for illegal operations or treatments are not deductible. Deductions for expenditures for medical care allowable under section 213 will be confined strictly to expenses incurred primarily for the prevention or alleviation of a physical or mental defect or illness. Thus, payments for the following are payments for medical care: hospital services, nursing services (including nurses' board where paid by the taxpayer), medical, laboratory, surgical, dental and o'her diagnostic and healing services, X-rays, medicine and drugs (as defined in subparagraph (2) of this paragraph, subject to the 1-percent limitation in paragraph (b) of this section), artificial teeth or limbs, and ambulance hire. However, an expenditure which is merely beneficial to the general health of an individual, such as an expenditure for a vacation, is not an expenditure for medical care.

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Id. (Emphasis added). Therefore, because hospital services, nursing services, medical, laboratory, surgical, dental and other diagnostic services, X-rays, medicine and drugs, artificial teeth or limbs, and ambulance hire are all examples of "medical care," they qualify as health care expenses that are general deductible by an individual on his or her individual federal income tax return pursuant to 26 U.S.C. §213 and the federal regulations relating thereto. *See id.* Moreover, it follows that if a health insurance plan covers hospital services, nursing services, medical, laboratory, surgical, dental or other diagnostic services, X-rays, medicine or drugs, artificial teeth or limbs, or ambulance hire, then it covers categories of health care expenses that are generally deductible by an employee on his individual federal income tax return pursuant to 26 U.S.C. § 213 and the federal regulations relating thereto.

Here, the health insurance plans offered to Plaintiffs covered categories of health care expenses defined as "medical care" under 26 U.S.C. §213. Additionally, the plans covered most if not all of the examples of "medical care" listed in 26 CFR 1.213-1. In their Motion, Plaintiffs have cited four plans at issue: the 2010-2012 Starbridge Limited-Benefit Health Plan (the "2010-2012 Plan", the 2013 Starbridge Limited-Benefit Health Plan (the "2013 Plan"), the 2014 TransChoice hospital indemnity insurance (the "2014 Plan") and the 2015 Key Benefits Administrators Minimum Value Plan (the "2015 Plan"). **Plaintiffs' MPSJ at Exhibits 8, 9, 10 and 11.**

The 2010-2012 Plan covered doctor office visits, outpatient care, non-emergency care in emergency room, inpatient care, accidental injuries, diagnostic tests, radiation and chemotherapy treatment, anesthesia, prosthetic devices, casts, splints, crutches, oxygen, ambulance services, and postpartum care among other health expenses. **Plaintiffs' MPSJ at Exhibit 8.**

The 2013 Plan covered doctor office visits, outpatient care, non-emergency care in emergency room, inpatient care, accidental injuries, diagnostic tests, radiation and chemotherapy treatment, anesthesia, prosthetic devices, casts, splints, crutches, oxygen, ambulance services, and postpartum care among other health expenses. **Plaintiffs' MPSJ at Exhibit 9.**

The 2014 Plan covered hospital confinement, doctor office visits, outpatient care, x-rays, diagnostic tests, surgery, anesthesia, accidental injuries, prescription drugs, exams, inpatient mental and nervous disorder treatment, inpatient drug and alcohol addiction treatment, and ambulance

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services among other health expenses. **Plaintiffs' MPSJ at Exhibit 10.**

The 2015 Plan covered doctor office visits, preventative care, x-rays and lab work, emergency room, prescription drugs, specialist visits, CT/PET scans and MRIs, preventative services, and chronic disease management including services for asthma, congestive heart failure, diabetes, epilepsy, hypertension, multiple sclerosis, Parkinson's Disease, pre-diabetes, and sleep apnea among other health expenses. **Plaintiffs' MPSJ at Exhibit 11.**

26 U.S.C. §213 sets forth two categories of health care that are generally deductible: (1) medical care; and (2) medicine or drugs that are a prescribed drug or insulin. Moreover, Treasury Regulation § 1.213(e) sets forth specific examples of "medical care" expenses that can be deducted. Defendants' health insurance plans cover these categories of health care expenses and, therefore, satisfy this requirement of qualified health insurance. All of the expenses covered by the plans offered from 2010 to 2015 clearly fall under the plain meaning of "medical care." 26 U.S.C. §213; 26 CFR 1.213-1. Thus, the health insurance plans covered health care expenses "generally deductible" by an employee on his individual federal income tax return pursuant to 26 U.S.C. § 213.

In an effort to rebut this inevitable conclusion, Plaintiffs assert that Defendants' plans were required to cover "the range" of health care expense that individuals "could" deduct on their federal tax returns, including those listed in I.R.S. Publication No. 502 for Tax Year 2013. **Plaintiffs' MPSJ at 26:1-8.** Plaintiffs assert that NAC 608.102, by stating "*those* categories of health care expenses" and specifically the word "those" does not mean "some" or "few" healthcare expenses must be covered, must mean *all* and *every* healthcare expense must be covered because "Defendant does not get to select" which categories are covered. ***Id.* at 26:3-8.** To get to this argument, Plaintiffs dispute the plain meaning of 26 U.S.C. § 213. Specifically, Plaintiffs assert that "medical care" is not a "category" and therefore the Court should look to publications like I.R.S. Publication No. 502 for Tax Year 2013 (the "IRS Publication") instead, which sets forth the dozens of "categories" of health care expenses that are deductible. ***Id.* at 25:17-22.** Relying on that list, Plaintiffs assert that Defendants' health insurance plans were required to cover "the range of categories of health care expense that individuals could deduct on their federal tax returns." ***Id.* at 26:1-3.**

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As an initial matter, there is no basis whatsoever for the Court to look past 26 U.S.C. § 213 and its supporting regulations. NAC 608.102 sets forth that 26 U.S.C. § 213 defines the categories of health expenses that are deductible. As such, it lists the categories of healthcare expenses described above. Plaintiffs provide no authority for the notion that an IRS Publication is controlling. Thus, their reliance on it is unabashedly arbitrary.

Next, simply reading the IRS Publication exemplifies just how absurd of an argument Plaintiff has set forth. ***See* I.R.S. Publication No. 502 for Tax Year 2013, attached as Exhibit 24 to Plaintiffs' MPSJ.** First, under the caption "What Are Medical Expenses?" the IRS Publication sets forth the exact same description of health care expenses as 26 U.S.C. §213 and Treasury Regulation § 1.213. ***Id.* at 2**. Next, under the captions "What Medical Expenses Are Includible?" it lists a series of examples, not "categories," of medical expenses that are deductible. ***Id.* at 5-15**. The IRS Publication even states that it "does not include all possible medical expenses" that can be deducted. ***Id.*** Therefore, by its own terms, the IRS Publication does not list the alleged "range of categories" Plaintiff asserts must be covered. In fact, it's hard to imagine that any such insurance exists. For example, the IRS Publication lists Insurance Premiums, Medicare A, Medicare B, Medicare D, Prepaid Insurance Premiums, Unused Sick Leave Used to Pay Premiums, and Qualified Long-Term Care Insurance Contracts as examples of a health care expense that can be deducted. ***Id.*** Therefore, under Plaintiffs' theory, Defendants were supposed to provide health insurance that covered all these things. This makes no sense. Other items listed in the IRS Publication are: Christian Science practitioner, lead-based paint removal costs, legal fees, televisions, trips, tuition, and medical conferences. It would require a substantial amount of musing to assume that by using the word "those," the MWA intended to have such services covered by qualified health insurance. It is clear that this portion of Plaintiffs' argument is a non-starter.

Plaintiff tries to hide from this obvious concession by citing extensively to the opinion of their purported "expert," Matthew T. Milone, who is not an authority on the issue and really does nothing more than regurgitate Plaintiff's counsel's arguments. Moreover, Mr. Milone is a former co-worker of Plaintiffs' counsel, Bradley Schrager, Esq., and his "opinions" are just as useless as those of opposing counsel. As set forth in Defendants' Countermotion to Strike filed concurrently

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herein, to the extent Plaintiffs have relied on Milone's arguments, their opposition must be discredited.

Qualified health insurance must cover those categories of health care expenses that are generally deductible by an employee on his individual federal income tax return pursuant to 26 U.S.C. § 213. Defendant's plans satisfy this requirement. Plaintiffs' assertion that the health care plans offered do not cover "all of the categories of health care expenses that are generally deductible" is not the standard. Nowhere in NAC 608.102, nor 26 U.S.C. § 213, is there a requirement for "all" health care expenses to be covered. Accordingly, Plaintiffs' summary judgment must be denied as a matter of law.

2. Defendants' health insurance plans do not violate any operative state law.

Relying heavily on their purported "expert," Plaintiffs asserts that Defendants' health insurance is "not really health insurance at all under state law." **Plaintiffs' MPSJ at 18:16-21:25.** The state laws that Plaintiffs and their "expert" rely upon, however, are preempted by the Employee Retirement Income Security Act of 1974 ("ERISA") and/or completely irrelevant to the MWA. *See* 29 U.S.C. § 1144(a). Accordingly, they have no relevance to this discussion. Indeed, it is hard to imagine that Plaintiff's "expert" is an expert at all if he blatantly overlooked the most fundamental issue regarding state laws relating to health benefits. ***See* Countermotion to Strike filed concurrently herein**. Finally, the Nevada Commissioner of Insurance has expressly approved for distribution in Nevada the insurance plans offered by Defendants.

a. NRS 608.1555, NRS 608.156, and NRS 608.157 are all preempted by ERISA.

"Congress enacted ERISA to 'protect ... the interests of participants in employee benefit plans and their beneficiaries,' by setting out substantive regulatory requirements for employee benefit plans, and to 'provide for appropriate remedies, sanctions, and ready access to federal courts.'" *Insco v. Aetna Health & Life Ins. Co.*, 673 F.Supp.2d 1180, 1185 (2009) (*quoting Aetna Health Inc. v. Davila*, 542 U.S. 200, 208, 124 S.Ct. 2488, 159 L.Ed.2d 312 (2004)). As part of the enactment, ERISA has "expansive preemption provisions that are intended to ensure that employee

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benefit plan regulation is 'exclusively a federal concern.'" *Id.* (*quoting Aetna Health*, 542 U.S. at 208, 124 S.Ct. 2488). "[The United States] Supreme Court has repeatedly held that the question of whether federal law preempts state law is one of congressional intent, and that Congress' purpose is the 'ultimate touchstone.'" *Brandner v. UNUM Life Ins. Co. of America*, 152 F.Supp.2d 1219, 1223 (D. Nev. 2001).

ERISA section 514(a) expressly "preempts all state laws that 'relate to' any employee benefit plan"; however, laws regulating insurance, banking, or securities are exempt. 29 U.S.C. § 1144(a); *Munda v. Summerlin Life & Health Ins. Co.*, 127 Nev. Adv. Op. 83, 267 P.3d 771, 774 (2011) (*citing Cervantes v. Health Plan of Nevada*, 127 Nev. ——, ——, 263 P.3d 261, (2011)). A law "relates to" a covered employee benefit plan if it has a "reference to" or "connection with" it. *California Div. of Labor Standards Enforcement v. Dillingham Constr. N.A. Inc.*, 519 U.S. 316, 324, 117 S.Ct. 832, 136 L.Ed.2d 791 (1997).

Here, Plaintiffs assert that NRS 608.1555 sets forth mandatory requirements for what must be included in health insurance. That statute states:

> Benefits for health care: Provision in same manner as policy of insurance. Any employer who provides benefits for health care to his or her employees shall provide the same benefits and pay providers of health care in the same manner as a policy of insurance pursuant to chapters 689A and 689B of NRS.

Thus, it is directly referencing an employee benefit plan. It is hard to imagine a more clear-cut example of a statute that is preempted by ERISA.

Next, Plaintiffs cite NRS 608.156 – NRS 608.157. **Plaintiff's MPSJ at 19-20 and at Exhibit 1.** These statutes are also preempted by ERISA. Indeed, the Nevada Attorney General expressly found as much in Attorney General, Opinion No. 84-17. **Attorney General, Opinion No. 84-17 attached hereto as Exhibit I.** Similarly, the Ninth Circuit has examined a similar statute to NRS 608.156 and its requirement that "[i]f an employer provides health benefits for his or her employees, the employer shall provide benefits for the expenses for the treatment of abuse of alcohol and drugs." In *Golden Gate Rest. Ass'n v. City & County of San Francisco*, the Ninth Circuit held:

> Consistent with these later-decided cases, in *Standard Oil Co. v. Agsalud*, 633 F.2d 760, 763 (9th Cir. 1980), *aff'd mem.*, 454 U.S. 801, 102 S. Ct. 79, 70 L. Ed. 2d 75 (1981), we struck down a Hawaii statute

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> that "require[d] employers in that state to provide their employees with a comprehensive prepaid health care plan." As the district court noted, the statute required that plan benefits include "a combination of features," and specifically "require[d] that the plans cover diagnosis and treatment of alcohol and drug abuse." *Standard Oil Co. v. Agsalud*, 442 F. Supp. 695, 696, 704 (N.D. Cal. 1977). The statute also imposed "certain reporting requirements which differ[ed] from those of ERISA." *Id.* at 696. In affirming the district court's opinion holding the Hawaii statute preempted under ERISA, we emphasized that the statute "directly and expressly regulate[d] employers and *the type of benefits they provide* employees," and that it therefore "related to" ERISA plans under § 514(a). *Agsalud*, 633 F.2d at 766 (emphasis added). That is, the Hawaii statute was preempted because it required employers to have health plans, and it dictated the specific benefits employers were to provide through those plans. Id. The statute thereby impeded ERISA's goal of ensuring that "plans and plan sponsors would be subject to a uniform body of benefits law." *Ingersoll-Rand Co.*, 498 U.S. at 142.

Golden Gate Rest. Ass'n v. City & County of San Francisco, 546 F.3d 639, 655 (9th Cir. 2008). In this matter, NRS 608.156 has the same requirement as in *Golden Gate* that health benefits cover "treatment" of "alcohol and drugs." Thus Plaintiffs' reliance on these statutes is a total misnomer as they are no longer valid.

b. NRS 681A.030 is not relevant to the MWA.

Plaintiffs assert that the definition of health insurance set forth in NRS 681A.030 is the controlling definition of "health insurance" under Nevada law. **Plaintiffs' MPSJ at 21:10-19.** In light of the fact that this entire lawsuit is about whether Defendants' health insurance plans satisfied the definition of qualified health insurance as defined by the MWA, it is hard to see how Plaintiffs can candidly make this argument. The MWA sets forth its own distinct definition for health insurance. NRS 681A.030 cannot conflict with that. *See Thomas v. Nevada Yellow Cab Corp.*, 130 Nev. Adv. Op. 52, 327 P.3d 518, 520 (2014). Thus, when determining whether insurance is "health insurance" as defined by the MWA, the definition of "health insurance" set forth in NRS 681A.030 is completely irrelevant.

Moreover, even if NRS 681A.030 were to apply, Defendants' plans satisfy its definition. NRS 681A.030 states:

> **"Health insurance" defined**. "Health insurance" is insurance of human beings against bodily injury, disablement or death by accident or accidental means, or the expense thereof, or against disablement or

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> expense resulting from sickness, and every insurance appertaining thereto, together with provisions operating to safeguard contracts of health insurance against lapse in the event of strike or layoff due to labor disputes.

As explained above, Defendants' health insurance plans are quite plainly this sort of insurance.

c. Nevada Commissioner of Insurance approves of Defendants' plans for distribution.

Finally, as the exhibits attached to Plaintiffs' Motion for Partial Summary Judgment sets forth, the plans offered by Defendants which are Limited Benefit Plans and Fixed-Indemnity Plans are expressly permitted forms of health insurance that the Nevada Commissioner of Insurance has approved for distribution in Nevada. ***See* Nevada Division of Insurance Bulletin, attached to Plaintiffs' MPSJ as Exhibit 20.** Indeed, the Commissioner sets our clear requirements for such plans, which Defendants' plans follow such as the example of Defendants' 2014 Plan. ***Id.*** Accordingly, Defendants' Plans comply with the Nevada Commissioner of Insurance's directives relating to its plans and, accordingly, Defendants were permitted to offer these commissioner-approved health insurance plans.

3. Limited benefit plans and fixed-indemnity plans both satisfy the definition of qualified health insurance under the MWA.

Plaintiffs spend a large portion of their Motion for Partial Summary Judgment discussing limited benefit plans and fixed-indemnity plans. **Plaintiffs' MPSJ at 9:11-18:15.** Plaintiffs do not, however, explain why such plans do not satisfy the MWA. Rather, Plaintiffs repeat *ad-nauseam* that limited benefit plans and fixed-indemnity plans are not "comprehensive coverage" or "traditional major medical insurance." ***Id.*** This is completely irrelevant to the current question before the Court. Neither the MWA nor its supporting regulations make any reference whatsoever to "comprehensive" or "major medical insurance." Rather, the MWA states that health insurance should be made available to employees. As discussed above, Defendants' plans do just that. Moreover, the "authority" Plaintiffs rely upon is a memorandum on the Affordable Care Act (the "ACA"). ***Id.* at 11.** The ACA was enacted six years after the MWA. Thus, it and any discussion regarding its provisions, has no relevance to what constitutes "health insurance" under the Nevada Constitution

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for purposes of paying the lower-tier minimum wage.[2]

Next, the MWA quite plainly contemplates a lower-level of insurance. It specifically states that it cannot cost more than 10% of a minimum wage employee's gross taxable income. Accordingly, Limited Benefit Plans and Fixed-Indemnity Plans make sense in light of this mandate. Further, as stated above, both Limited Benefit Plans and Fixed-Indemnity Plans are expressly permitted forms of health insurance that the Nevada Commissioner of Insurance has approved for distribution in Nevada. ***See* Nevada Division of Insurance Bulletins, attached to Plaintiffs' MPSJ as Exhibit 20.**

The MWA sets forth clear and defined requirements for qualified health insurance. The plans provided by Defendants satisfy those requirements. Plaintiffs' diatribe on limited benefit plans and fixed-indemnity plans does not change those requirements.

4. Plaintiffs' discussions on "Social Expectations" and "Wage and Benefits History" are nothing more than Plaintiffs' counsel's bogus conjecture.

As mentioned earlier, Plaintiffs have wasted the vast majority of her MPSJ on disorganized narratives that are not based in either law or fact. None of these rants should be given any credence. For example, Plaintiffs have spent approximately four pages on a section entitled "Wage and Benefits History" wherein Plaintiffs continue on about how Defendants' Plans are not "major medical insurance" or "comprehensive" health insurance. **Plaintiffs' MPSJ at 8:9-23**. As explained above, this is not the directive of the MWA. Defendants were instructed by the MWA to offer insurance that covers deductible healthcare expenses and that is precisely what they have done. Plaintiffs' diatribe that they should have been offered more is not based in any applicable law or regulation whatsoever.

Next, Plaintiffs ends their motion with a page discussing what Plaintiffs "believe" Nevada voters envisioned when they voted for the MWA. **Id. at 27.** Plaintiffs' belief system is not a basis

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[2] Plaintiffs keenly note that Defendants will argue that the ACA has nothing to do with this action. **Plaintiffs' MPSJ at 22:3-8.** Plaintiffs do not, however, set forth any credible argument to the contrary. ***Id.*** Instead, Plaintiffs spends a page discussing how employees are required to have insurance under the ACA. ***Id.* at 22**. This of course in no way changes an employer's obligations under the MWA – a statute enacted 6 years before the ACA.

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for granting relief. Moreover, it is totally irrelevant and is of no assistance in resolving the question before the Court. Accordingly, these arguments in Plaintiffs' Motion for Partial Summary Judgment Opposition are Plaintiffs' bogus conjecture and should be discarded entirely.

III. DEFENDANTS' COUNTERMOTION TO STRIKE UNDISCLOSED PURPORTED EXPERT AND FOR SANCTIONS.

A. Facts For Countermotion To Strike Undisclosed Purported Expert And For Sanctions.

In their Motion for Partial Summary Judgment, Plaintiffs have attempted to disclose a purported expert through a report-less declaration far after the expiration of the expert disclosure deadline. Such a disclosure is extremely prejudicial to Defendants and does not comport with the Rules of Civil Procedure nor the scheduling orders issued by this Court. Further, Plaintiffs' purported expert has improperly opined on legal conclusions that are the exclusive province of this Court. It is clear that Plaintiffs' attempt to proffer a purported expert's opinions at the eleventh hour is willful and has forced Defendant to bring this Countermotion to address Plaintiffs' malfeasance.

Plaintiffs filed their Class Action Complaint on May 30, 2014. **Class Action Complaint on file herein and incorporated by this reference.** On June 5, 2014, Plaintiffs filed an Amended Class Action Complaint. **Amended Class Action Complaint on file herein and incorporated by this reference.** On October 10, 2014, the Discovery Commissioner approved the Scheduling Order in which the parties agreed to an expert disclosure deadline of November 25, 2014 and a discovery cut-off date of February 23, 2015. ***See* Exhibit G, Scheduling Order.** On October 2, 2014, the Court approved the parties' stipulation to extend that discovery plan. ***See* Exhibit H, Order for Extension of Discovery.** In that Order for Extension of Discovery, the parties agreed to extend the deadline to disclose experts to April 28, 2015 and to extend the deadline to disclose rebuttal experts from to May 28, 2015. ***Id.*** Discovery cutoff was extended to June 29, 2015 and the last day to file Phase I class certification motions was extended until July 28, 2015. ***Id.***

On April 28, 2015, the deadline to disclose experts expired and Plaintiffs designated no experts and Plaintiffs did not produce any expert reports. Thus, Defendants had no need to designate any rebuttal experts on the rebuttal expert deadline of May 28, 2015. On June 29, 2015, discovery closed and no experts were designated by either party pursuant to the Nevada Rules of Civil

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Procedure or the Order for Extension of Discovery. Throughout this discovery period, however, from May 30, 2014 through June 29, 2015, Plaintiffs asserted and reaffirmed throughout all four of their discovery disclosure statements that "Plaintiffs also reserve the right to call additional expert witnesses." **Plaintiffs' Initial Disclosure and Production of Documents and Witnesses Pursuant to N.R.C.P. 16.1 served on September 8, 2014 attached hereto as Exhibit J at 3:13-14 (document disclosures omitted); Plaintiffs' Supplemental Disclosure and Production of Documents and Witnesses Pursuant to N.R.C.P. 16.1 served on February 23, 2015 attached hereto as Exhibit K at 3:8-9 (document disclosures omitted); Plaintiffs' Second Supplemental Disclosure and Production of Documents and Witnesses Pursuant to N.R.C.P. 16.1 served on May 20, 2015 attached hereto as Exhibit L at 3:15-16 (document disclosures omitted); and Plaintiffs' Third Supplemental Disclosure and Production of Documents and Witnesses Pursuant to N.R.C.P. 16.1 served on June 3, 2015 attached hereto as Exhibit M at 3:15-16 (document disclosures omitted).** Despite these assertions, Plaintiffs designated no expert witnesses.

Prior to discovery closing on June 29, 2015, Plaintiffs brought their Motion for Class Certification on June 8, 2015 and Defendant brought its Motion to Disqualify Named Plaintiffs as Class Representatives and Dismiss Class Action Claims on June 25, 2015, before the June 29, 2015 Phase I motion deadline.

On August 25, 2015, Plaintiffs, for the first time, proffered a Declaration of Matthew T. Milone as an Exhibit 2 to Plaintiffs' Motion for Partial Summary Judgment. **Plaintiffs' MPSJ at Exhibit 2 ("Milone Decl.").** In this Declaration, attorney Matthew T. Milone declared that he had "been retained by Plaintiffs' counsel as an expert witness in the matter of *Diaz, et. al. v. MDC Restaurants, LLC, et. al.*" **Milone Decl. at 1:23-25.** Further, Plaintiffs extensively relied on the opinions in Milone's Declaration in support of their arguments in summary judgment. **Plaintiffs' MPSJ at 12:13-18:15; 19:11-21:25; and 26:1-27:1.** Thus, Plaintiffs improperly backdoored an undisclosed and unqualified expert well nearly four months after the expiration of already extended deadlines to designate experts and more than two months after the extended discovery cutoff.

In support of this "retention," Plaintiffs present Milone's curriculum vitae attached to

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Milone's Declaration and his rates for "testimony" and "all other work." **Milone Decl. at 11:10 and Attachment 1.** Plaintiffs present no expert written report from Milone. Further, Plaintiffs present no list of cases in which Milone has testified as an expert or been qualified as an expert. Instead, Plaintiffs cite the same "Declaration" that the uncertified expert Milone has provided to Plaintiffs' counsel in three parallel cases. ***Id.* at 11:11-14.** Thus, Plaintiffs have proffered a Declaration to deliver improper opinions from an undesignated and unqualified expert witness. **Milone Decl.** Accordingly, this Court should strike the designation of Milone as an expert, strike the Declaration of Milone from the litigation and sanction Plaintiffs for their willful gamesmanship that has prejudiced Defendant and vexatiously exacerbated the litigation.

B. Argument For Countermotion To Strike Undisclosed Purported Expert And For Sanctions.

1. This Court should strike Plaintiffs' purported expert's declaration because it is untimely and deficient.

Nevada Rule of Civil Procedure 26 requires parties to "a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under NRS 50.275, 50.285 and 50.305." Nev. R. Civ. P. 16.1(a)(2)(A). For an expert "retained or specifically employed to provide expert testimony," the party must provide a disclosure that is accompanied by a "written report" which contains: (1) a complete statement of all opinions to be expressed and the basis and reasons therefor; (2) the data or other information considered by the witness in forming the opinions; (3) any exhibits to be used as a summary of or support for the opinions; (4) the qualifications of the witness, including a list of all publications authored by the witness within the preceding 10 years; (5) the compensation to be paid for the study and testimony; and (6) a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years. Nev. R. Civ. P. 16.1(a)(2)(B).

The Nevada Supreme Court has upheld that an untimely-designated expert should not be allowed to testify. *Hansen v. Universal Health Servs., Inc.*, 115 Nev. 24, 974 P.2d 1158, 1160-1161 (1999). In Hansen, the Nevada Supreme Court upheld such a ruling where a plaintiff submitted a second designation of experts six months after the deadline set by the district court. *Id.* The only exception to this Rule recognized by the Nevada Supreme Court is that of a treating physician for

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"opinions [that] were formed during the course of treatment." *FCH1, LLC v. Rodriguez*, 335 P.3d 183, 189 (2014) citing *Goodman v. Staples the Office Superstore, L.L.C.*, 644 F.3d 817, 826 (9th Cir. 2011); *see Rock Bay, L.L.C. v. Eighth Judicial Dist. Court*, 129 Nev. ___, n.3, 298 P.3d 441, 445 n.3 (2013) (noting that when an NRCP is modeled after its federal counterpart, "cases interpreting the federal rule are strongly persuasive"). In these "strongly persuasive" federal cases, courts in this district have noted that the reason for requiring expert reports is "the elimination of unfair surprise to the opposing party and the conservation of resources." *Elgas v. Colorado Belle Corp.*, 179 F.R.D. 296, 299 (D. Nev. 1998) (citations omitted). Further, the "test of a report is whether it was sufficiently complete, detailed and in compliance with the Rules so that surprise is eliminated, unnecessary depositions are avoided, and costs are reduced." *Id.* Additionally, the analogous Rule 26(a)(2)(B) appears "to require exact compliance in all particulars with the disclosures" requirement. *Id.* citing *Sullivan v. Glock, Inc.*, 175 F.R.D. 497, 503 (D. Md. 1997) (citation omitted) (declaring "a literal reading of Rules 37(a)(3) and 37(c)(1) would result in the application of the automatic exclusion of an expert's trial testimony if there was not complete compliance with the requirements of Rule 26(a)(2)(B), unless the court finds that there was substantial justification for the failure to make complete disclosure or that failure to disclose is harmless").

In *Goodman v. Staples the Office Superstore, LLC* cited by the Nevada Supreme Court in *FCH1*, the Ninth Circuit found that "Rule 26 [the federal counterpart to Nevada Rule of Civil Procedure 16.1] requires the parties to disclose the identities of each expert and, for retained experts, requires that the disclosure includes the experts' written reports." *Goodman v. Staples the Office Superstore, LLC*, 644 F.3d 817, 827 (9th Cir. 2011). Further, the parties must "make these expert disclosures at the times and in the sequence that the court orders." *Id.*; Fed. R. Civ. P. 26(a)(2)(D). In *Goodman*, the plaintiffs disclosed two experts a week after the expert disclosure deadline and failed to provide expert reports until four-and-a-half months after the deadline. *Id.* at 826-827. On appeal, the Ninth Circuit upheld the district court's preclusion of the two "improperly disclosed experts" and found that the failure to disclose experts in a timely manner was neither substantially justified nor harmless. *Id.* at 827. Similarly, Rule 37 allows this Court to prohibit a disobedient party who fails to identify a witness as required by Rule 16.1 from introducing designated matters in

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evidence. Nev. R. Civ. P. 37(c)(1) and Nev. R. Civ. P. 37(b)(2)(B).

Similarly, federal courts have held that expert disclosures made one day after the rebuttal expert disclosure deadline should be struck. *Belch v. Las Vegas Metro. Police Dep't*, 2012 U.S. Dist. LEXIS 33111, 6-8 (D. Nev. Mar. 13, 2012). In *Belch*, plaintiff did not timely disclose his expert by the expert disclosure deadline. *Id.* at 6-7. Additionally, plaintiff's initial expert designation did not fulfill the requirements of Rule 26(a)(2)(B). *Id.* at 7. The Court found that the defendants suffered prejudice as a result of plaintiff's late disclosures. *Id.* citing *Wong v. Regents of University of California*, 410 F.3d 1052, 1061-1062 (9th Cir. 2005)(holding that "[d]isruption to the schedule of the court and other parties [by late disclosures of expert witnesses] is not harmless," and such late disclosures warrant excluding expert witnesses). Thus, absent any showing of "substantial justification," the court found the striking plaintiff's expert's report and precluding plaintiff from utilizing his expert's opinion was warranted. *Id.* citing Fed. R. Civ. P. 37(c)(1).

Here, like in *Hansen*, *Goodman* and *Belch*, Plaintiffs failed to timely disclose its expert by April 28, 2015 as required by this Court's Order and Rule 16.1. ***See* Exhibit H, Order for Extension of Discovery.** Throughout discovery, Plaintiffs affirmed in writing on four separate occasions that they were fully aware of their right to "call additional expert witnesses." **Plaintiffs' Initial Disclosure and Production of Documents and Witnesses Pursuant to N.R.C.P. 16.1 served on September 8, 2014 attached hereto as Exhibit J at 3:13-14 (document disclosures omitted); Plaintiffs' Supplemental Disclosure and Production of Documents and Witnesses Pursuant to N.R.C.P. 16.1 served on February 23, 2015 attached hereto as Exhibit K at 3:8-9 (document disclosures omitted); Plaintiffs' Second Supplemental Disclosure and Production of Documents and Witnesses Pursuant to N.R.C.P. 16.1 served on May 20, 2015 attached hereto as Exhibit L at 3:15-16 (document disclosures omitted); and Plaintiffs' Third Supplemental Disclosure and Production of Documents and Witnesses Pursuant to N.R.C.P. 16.1 served on June 3, 2015 attached hereto as Exhibit M at 3:15-16 (document disclosures omitted).** Despite having fifteen months from the filing of their Complaint, Plaintiffs chose not to designate any experts by the expert disclosure deadline. Due to Plaintiffs' failure to designate any experts, Defendants had no cause to retain rebuttal experts on May 28, 2015 and no reason to conduct any

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additional discovery regarding expert opinions.

After the close of discovery on June 29, 2015, Defendants relied on the known universe of produced documents and deposition testimony to narrow the issues to be disposed of by motion practice. Similarly, on June 25, 2015, Defendants relied on this known universe of discovery in opposing Plaintiffs' Motion for Class Certification filed on June 8, 2015 which is now pending before this Court. Thus, Defendants have spent great time and expense throughout discovery and motion practice in developing strategies and arguments that did not involve any expert witness testimony. To now let Plaintiffs review Defendants' briefing in opposition to certification and other motions and then cite to an undisclosed expert in support of summary judgment is highly prejudicial to Defendants' strategy and litigation efforts. Such an untimely and non-compliant expert disclosure is contrary to the entire purpose of having expert disclosure deadlines, expert written reports, certification and dispositive motion deadlines and scheduling order. Further, Plaintiffs have prevented Defendants from having any opportunity to rebut Milone or depose him as to his opinions. Thus, Plaintiffs; untimely designation effectively abolishes all of the rules concerning disclosure of expert testimony under Rules 16.1 and 26.

In addition to being grossly untimely, Plaintiffs' designation of Milone as an expert fails to comply with the substantive requirements of Rules 16.1 and 26. Plaintiffs have not provided any expert's "written report" pursuant to Rule 16.1(a) or 26(b) or a "list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition" pursuant to Rule 16.1(a)(2)(B). In fact, Plaintiffs' expert "Declaration" is not even complete as Milone states "the opinions expressed in this Declaration are my preliminary opinions and are subject to the opinions in my final report." **Milone Decl. at 11:15-16.** Milone provides no further elucidation as to when this "final report" will be forthcoming or how it will supplement or supersede his Declaration. This deficient and incomplete Declaration also violates the requirements that an expert's written report contain a (1) "complete statement of all opinions to be expressed and the basis and reasons therefor"; (2) "the data or other information considered by the witness in forming the opinions;" and "any exhibits to be used as a summary of or support for the opinions." Nev. R. Civ. P. 16.1(a)(2)(B). (Emphasis added). Accordingly, Plaintiffs' Declaration from Milone should

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be struck as Plaintiffs have completely failed to comply with the requirements imposed by Nevada Rules of Civil Procedure 16.1 and 26 and the expert disclosure date of the Court's Order for Extension of Discovery.

2. This Court should strike Plaintiffs' purported expert because he is untimely, improperly designated and unqualified.

Rule 37(c)(1) provides:

> A party that without substantial justification fails to disclose information required by Rule 16.1, 16.2, or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed..

Nev. R. Civ. P. 37(c)(1). In *Goodman*, the Ninth Circuit held that the analogous Rule 37 "gives teeth" to disclosure requirements by "forbidding the use at trial of any information that is not properly disclosed." *Goodman* at 827 citing *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d at 1106 (citing Fed. R. Civ. P. 37(c)(1)). Rule 37(c)(1) is a "self-executing," "automatic" sanction designed to provide a strong inducement for disclosure. *Id.* (quoting Fed. R. Civ. P. 37 advisory committee's note (1993)). Thus, the only exceptions to Rule 37(c)(1)'s exclusion sanction apply if the failure to disclose is substantially justified or harmless. *Goodman* at 827 citing Fed. R. Civ. P. 37(c)(1).

Further, in *Belch*, the district court held that an appropriate sanction under Rule 37(c)(1) for an expert designation that does not comply with Rule 26(a)(2)(B) is to preclude a plaintiff from using an expert's opinion. *Belch* at 8. This includes precluding a plaintiff from utilizing the opinion of an expert "to supply evidence on a motion, at a hearing, or at a trial." *Belch* at 8 citing Fed. R. Civ. P. 37(c)(1).

In this matter, Plaintiffs' untimely and improper designation of purported expert Milone is subject to Rule 37's automatic exclusion sanction as Plaintiffs failed to provide information or identify a witness as required by Rule 16.1 or 26(a). As noted above, Plaintiffs' expert designation of Milone failed to comply with Rule 16.1's requirement that the expert be disclosed at the time ordered by the Court in its Order. Nev. R. Civ. P. 16.1(a)(2)(C). Further, Plaintiffs' use of a Declaration fails to comply with Rule 16.1(a)(2)(B)'s requirements for a written report that provides

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a complete statement of all opinions, the basis and reasons for those opinions, the data considered in forming those opinions and the exhibits that will be used to summarize or support those opinions. Nev. R. Civ. P. 16.1(a)(2)(B).

Additionally, Plaintiffs' purported expert Milone is not qualified to render an expert opinion because he has made no showing of a "list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition." Nev. R. Civ. P. 16.1(a)(2)(B). As such, Plaintiffs have failed to provide information or identify an expert witness as required by Rule 16.1(a) and their purported expert Milone is subject to the automatic exclusion sanction of Rule 37(c)(1). Consequently, Plaintiffs should not be allowed to use Milone to supply evidence on a motion, at a hearing or at a trial.

3. This Court should strike Plaintiffs' purported expert and declaration because the expert has opined on ultimate issues of law that are the exclusive province of the Court.

As a general rule, "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." *Nationwide Transp. Fin. v. Cass Info. Sys.*, 523 F.3d 1051, 1058 (9th Cir. 2008) citing Fed. R. Evid. 704(a). However, "[t]hat said, an expert witness cannot give an opinion as to her legal conclusion, i.e., an opinion on an ultimate issue of law. Similarly, instructing the jury as to the applicable law is the distinct and exclusive province of the court." (Emphasis added). *Id.* citing *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1016 (9th Cir. 2004) (internal citations and quotation marks omitted); *see also* Fed. R. Evid. 702 (requiring that expert opinion evidence "assist the trier of fact to understand the evidence or to determine a fact in issue").

In *Nationwide*, plaintiff Nationwide intended to introduce the expert report and testimony of Robert Zadek, an expert on the Uniform Commercial Code ("UCC") and related commercial law, to prove its legal theory that under the UCC § 9-406, defendant Cass' conduct was improper because Cass, as an agent of the shippers, stood in the shoes of the shippers and had an unconditional obligation to pay Nationwide once the shippers received a valid notice of assignment. *Nationwide* at 1056. The district court granted defendant Cass' motion to strike the portions of Zadek's report and testimony that were "inadmissible legal opinion" and sections which "cite[d] or appl[ied] the

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relevant law." (Emphasis added). *Id.* On appeal, the Ninth Circuit upheld this striking of expert and expert report finding that Zadek's legal conclusions "invaded the province of the trial judge." *Id.* at 1059.

Further, the Ninth Circuit found that Zadek's opinions on legal conclusions also "constituted erroneous statements of law" in which case "[e]xpert testimony . . . would have been not only superfluous but mischievous." *Id.* citing *United States v. Brodie*, 858 F.2d 492, 496-97 (9th Cir. 1988), overruled on other grounds by *United States v. Morales*, 108 F.3d 1031, 1033 (9th Cir. 1997). Thus, the Ninth Circuit held that the exclusion of Zadek's erroneous conclusions were harmless because Nationwide did not identify "any legal authority extending the obligations of § 9-406 to the agent of an account debtor." *Id.* at 1062-1063 and fn. 8.

Here, as this Court is aware, the parties have briefed the legal question of whether or not Defendant offered health insurance pursuant to the MWA. In response, Plaintiffs' expert Milone, through his proffered Declaration, has opined on legal conclusions that are the exclusive province of this Court. For example, Milone opines as to an ultimate question of law by stating

> It is my opinion based on what is set forth above in this affidavit and my experience with health insurance, that the 2010-12 Plan and the 2013 Plan do not cover all of the "categories of health care expenses that are generally deductible by an employee on his individual federal income tax return pursuant to 26 U .S.C. § 213 and any federal regulations relating thereto." See NAC 608.102.

Milone Decl. at 5:14-18. Further, Milone improperly opines on whether or not Defendant's plans under the MWA complies with certain laws and regulations such as NRS Chapter 608, NRS Chapter 689B, NAC Chapter 608; COBRA and 26 U.S.C. § 213. **Milone Decl. at 2:14-22; 4:18-25; 4:26-5:13; 7:10-18; 7:25-8:28; and 10:-11:9.** In this regard, Milone presents no legal authority that "health insurance" under the MWA is defined by those laws. ***Id.*** Some of these issues of law, like those concerning NAC 608.102 and 26 U.S.C. § 213, are improper for Milone to opine on as this Court should ultimately decide those issues as a matter of law. Therefore, this Court should also strike Milone and his opinions as improper opinions on legal conclusions.

4. This Court should sanction Plaintiffs because their violation was willful and prejudicial.

Under Rule 37(c)(1)(A), "in addition to" the automatic exclusion sanction, this Court may

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order payment of the reasonable expenses, including attorney's fees, caused by the failure to provide information or identify a witness under Rule 16.1. Nev. R. Civ. P. 37(c)(1). In *Belch*, the court found that the plaintiff failed to provide the court with any justification for untimely and incomplete expert disclosures. *Belch* at 7. Thus, the court found that in addition to striking a plaintiff's expert's report and precluding plaintiff from utilizing his expert's opinion, the plaintiff was required to pay the reasonable expenses, including attorney's fees, caused by the failure to comply with a court's order and the federal rules as to expert designations. *Belch* at 5.

Here, Plaintiffs have not provided any legitimate justification for their failure to make a timely designation of their purported expert. Plaintiffs gave no reason for delay in the expert's Declaration or their Motion for Partial Summary Judgment. Despite at least four opportunities to designate an expert during discovery, Plaintiffs never disclosed any experts. Only after discovery was closed did Plaintiffs provide their purported expert designation. Instead of making any actual designation of expert - in which Plaintiffs would have to concede their untimeliness - Plaintiffs have decided to slide in a Declaration as if Milone had been their designated expert all along. Thus, Plaintiffs have exhibited willful gamesmanship in trying to confuse this Court and mask their malfeasance. Plaintiffs' expert-by-ambush behavior should be sanctioned for Plaintiffs' complete disregard of civil procedure rules and the order of this Court.

This Court should sanction Plaintiffs for their untimely and improperly designated expert. Courts have held that should an award of sanctions in the form of reasonable expenses, including attorney's fees, be made under Rule 37(c), that the awarded party may submit a separate application for reasonable fees and expenses. *Daniels v. Jenson*, 2013 U.S. Dist. LEXIS 47576, 10-11 (D. Nev. Mar. 11, 2013). Accordingly, should sanctions be awarded, Defendants request leave to submit a separate application regarding their reasonable fees and expenses.

IV. CONCLUSION

For all the reasons stated above, this Court should stay all pending motions. Alternatively, Plaintiffs Motion for Partial Summary Judgment should be denied, Plaintiffs' expert stricken and Defendants should be awarded sanctions.

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Dated: September 10, 2015

Respectfully submitted,

RICK D. ROSKELLEY, ESQ.
ROGER L. GRANDGENETT II, ESQ.
MONTGOMERY Y. PAEK, ESQ.
KATHRYN B. BLAKEY, ESQ.
LITTLER MENDELSON, P.C.
Attorneys for Defendants

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PROOF OF SERVICE

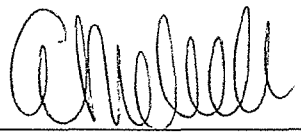
I am a resident of the State of Nevada, over the age of eighteen years, and not a party to the within action. My business address is 3960 Howard Hughes Parkway, Suite 300, Las Vegas, Nevada 89169. On September 10, 2015, I served the within document:

SUPPLEMENT TO DEFENDANTS' CONTINUED MOTION TO STAY PROCEEDINGS ON APPLICATION FOR ORDER SHORTENING TIME
AND
DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY REGARDING DEFENDANTS' HEALTH BENEFIT PLANS
AND
DEFENDANTS' COUNTERMOTION TO STRIKE UNDISCLOSED PURPORTED EXPERT AND FOR SANCTIONS

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

Don Springmeyer, Esq.
Bradley Schrager, Esq.
Daniel Bravo, Esq.
Royi Moas, Esq.
Jordan Butler, Esq.
Daniel Hill, Esq.
Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP
3556 East Russell Road, Second Floor
Las Vegas, Nevada 89120

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 10, 2015, at Las Vegas, Nevada.



Erin Melwak

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DECLARATION OF MONTGOMERY Y. PAEK, ESQ. IN SUPPORT OF
1. SUPPLEMENT TO DEFENDANTS' CONTINUED MOTION TO STAY PROCEEDINGS ON APPLICATION FOR ORDER SHORTENING TIME
AND
2. DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY REGARDING DEFENDANTS' HEALTH BENEFIT PLANS
AND
3. DEFENDANTS' COUNTERMOTION TO STRIKE UNDISCLOSED PURPORTED EXPERT AND FOR SANCTIONS

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 at the law firm of Littler Mendelson and one of the attorneys for Defendants MDC Restaurants, LLC; Laguna Restaurants, LLC and Inka, LLC (hereinafter "Defendants").

2. Unless otherwise stated, this declaration is based on my personal knowledge. I make this declaration in support of Defendants' Supplement to their Continued Motion to Stay Proceedings on Application for Order Shortening Time, Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment on Liability Regarding Defendants' Health Benefit Plans and Defendants' Countermotion to Strike Undisclosed Purported Expert and for Sanctions (hereinafter "Motion").

3. I have reviewed Defendants' Motion to Stay Proceedings on Application for Order Shortening Time, a true and correct copy of which has been attached to Defendants' Motion as **Exhibit A.**

4. I have reviewed the Petition for Writ of Mandamus or Prohibition or, in the alternative, Motion to Consolidate regarding MWA's statute of limitations, a true and correct copy of which has been attached to Defendants' Motion as **Exhibit B.**

5. I have reviewed the Petition for Writ of Mandamus or Prohibition regarding MWA's meaning of "provide", a true and correct copy of which has been attached to Defendants' Motion as **Exhibit C.**

6. I have reviewed the Notice Scheduling Oral Argument, a true and correct copy of which has been attached to Defendants' Motion as **Exhibit D.**

7. I have reviewed Amici Curiae's Brief in Support of Petition for Writ of Mandamus or Prohibition, a true and correct copy of which has been attached to Defendants' Motion as **Exhibit E**.

8. I have reviewed Defendants' Request for Judicial Notice, to be filed concurrently herewith, a true and correct copy of which has been attached to Defendants' Motion as **Exhibit F**.

9. I have reviewed the Scheduling Order, a true and correct copy of which has been attached to Defendants' Motion as **Exhibit G**.

10. I have reviewed the Notice of Entry of Stipulation and Order for Extension of Time to Complete Discovery ("Order for Extension of Discovery") filed on December 31, 2014, a true and correct copy of which has been attached to Defendants' Motion as **Exhibit H**.

11. I have reviewed the Attorney General, Opinion No. 84-17, a true and correct copy of which has been attached to Defendants' Motion as **Exhibit I**.

12. I have reviewed Plaintiffs' Initial Disclosure and Production of Documents and Witnesses Pursuant to N.R.C.P. 16.1 served on September 8, 2014, a true and correct copy of which has been attached to Defendants' Motion as **Exhibit J.**

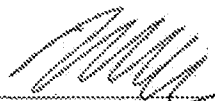
13. I have reviewed Plaintiffs' Supplemental Disclosure and Production of Documents and Witnesses Pursuant to N.R.C.P. 16.1 served on February 23, 2015, a true and correct copy of which has been attached to Defendants' Motion as **Exhibit K**.

14. I have reviewed Plaintiffs' Second Supplemental Disclosure and Production of Documents and Witnesses Pursuant to N.R.C.P. 16.1 served on May 20, 2015, a true and correct copy of which has been attached to Defendants' Motion as **Exhibit L**.

15. I have reviewed Plaintiffs' Third Supplemental Disclosure and Production of Documents and Witnesses Pursuant to N.R.C.P. 16.1 served on June 3, 2015, a true and correct copy of which has been attached to Defendants' Motion as **Exhibit M**.

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

Dated: September 10, 2015



MONTGOMERY Y. PAEK, ESQ.

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Exhibit N

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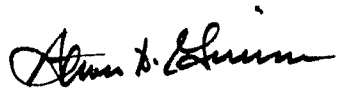

CLERK OF THE COURT

0001
RICK D. ROSKELLEY, ESQ., Bar # 3192
ROGER L. GRANDGENETT II, ESQ., Bar # 6323
MONTGOMERY Y. PAEK, ESQ., Bar # 10176
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Attorneys for Defendants
MDC Restaurants, LLC; Laguna Restaurants, LLC; and Inka, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

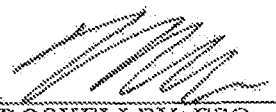
PAULETTE DIAZ, an individual; and LAWANDA GAIL WILBANKS, an individual; SHANNON OLSZYNSKI, and individual; CHARITY FITZLAFF, an individual, on behalf of themselves and all similarly-situated individuals, Plaintiffs, vs. MDC RESTAURANTS, LLC, a Nevada limited liability company; LAGUNA RESTAURANTS, LLC, a Nevada limited liability company; INKA, LLC, a Nevada limited liability company and DOES 1 through 100, Inclusive, Defendants.	Case No. A701633 Dept. No. XVI **DEFENDANTS' MOTION TO STAY PROCEEDINGS ON APPLICATION FOR ORDER SHORTENING TIME** Hearing Date: Hearing Time:

Defendants MDC RESTAURANTS, LLC; LAGUNA RESTAURANTS, LLC; and INKA, LLC (hereinafter "Defendants"), by and through their counsel of record, hereby submit their Motion to Stay Proceedings pending a determination by the Nevada Supreme Court on Defendants' Petition for Writ of Mandamus, filed on July 30, 2015, of this Court's Order which found 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." *See* **Notice Entry of Order (July 17, 2015).** This Motion is based on the attached Memorandum of Points and Authorities, all papers and files on file

herein and any oral argument permitted.

Dated: July 30, 2015

Respectfully submitted,



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Attorneys for Defendants

APPLICATION FOR ORDER SHORTENING TIME

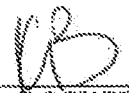
Pursuant to E.D.C.R. 2.26, Defendants' apply for an Order Shortening Time in which the Motion to Stay is to be heard. Good cause exists for shortening time because the hearing on Plaintiffs' Motion for Certification and Defendants' Motion for Disqualification is currently scheduled for August 13, 2015, and Defendants' Motion to Stay seeks to stay both of these motions pending Defendants' appeal to the Nevada Supreme Court. Neither of the motions scheduled for hearing on August 13, 2015 can be decided prior to Defendants' appeal because Defendants' appeal will directly impact any proposed class definition Plaintiffs may propose. Therefore, whether certification is proper in this case is also dependent on Defendants' appeal.

Specifically, the Order Defendants are appealing states that the language of the MWA is "unambiguous: an employer must actually provide, supply, or furnish qualifying health insurance," and "for an employer to 'provide' health benefits, an employee must actually enroll in health insurance that is offered by the employer." **Notice Entry of Order, at 2:3-11**. At the first hearing on Plaintiffs' Motion for Class Certification, the Court indicated that Plaintiffs needed to create a more focused class definition that referenced "qualified health insurance." **July 9, 2015 Hearing Transcript at 14:9-16**. Therefore, any proposed class definition would necessarily have to include individuals not enrolled in qualified health insurance. Such a definition would be overturned if Defendants prevail on their appeal. For this reason, Defendants' Motion to Stay seeks to stay the certification motions scheduled for the August 13, 2015 hearing. Accordingly, the Motion to Stay

should be heard prior to that hearing date. If the Motion to Stay is heard in the ordinary course, it will not be heard prior to Plaintiffs' Motion for Certification and Defendants' Motion for Disqualification and the Court will not be able to properly evaluate certification at the August 13, 2015 hearing. ***See*, Declaration of Montgomery Y. Paek, attached hereto.**

Dated: July 30, 2015

LITTLER MENDELSON



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MONTGOMERY Y. PAEK, ESQ.
KATHRYN B. BLAKEY, ESQ.
Attorneys for Defendants

DECLARATION OF MONTGOMERY Y. PAEK IN SUPPORT OF APPLICATION FOR ORDER SHORTENING TIME AND MOTION TO STAY

I, Montgomery Y. Paek, subject to the penalties of perjury of the State of Nevada and the laws of the United States, hereby declare that the assertions in this Declaration are true and correct and are based upon my personal knowledge.

1. I am a resident of Clark County, Nevada and an associate attorney with the law firm of Littler Mendelson, counsel of record for Defendants in the above entitled action. I am competent to testify to the facts stated herein, which are based on personal knowledge unless otherwise indicated, and if called upon to testify, I could and would testify competently to the following.

2. On July 17, 2015 this Court entered an Order which found that under Nev. Const. art. XV § 16 (the "MWA"), "for an employer to 'provide' health benefits, an employee must actually enroll in health insurance that is offered by the employer."

3. Defendants filed a Petition for Writ of that Order with the Nevada Supreme Court on July 30, 2015.

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4. Plaintiffs have proposed a class definition which includes employees "who were not provided qualifying health insurance" and a sub-class which includes employees "who did not enroll in Defendants' health benefits plan."

5. Therefore, the proposed class definitions will be directly impacted by Defendants' Petition for Writ.

6. Good cause exists to hear the Motion to Stay on shortened time because Plaintiffs' Motion for Certification and Defendants' Motion for Disqualification are currently set for hearing on August 13, 2015 and it is probable that the proposed class definitions will be addressed at that hearing. If time is not shortened, it is probable that the Motion to Stay will not be heard prior to the Court addressing certification in this case.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED this 30 day of July, 2015

MONTGOMERY Y. PAEK

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ORDER SHORTENING TIME

The Court, having considered Petitioners Application for Order Shortening Time and the Declaration of Montgomery Y. Paek in support thereof, and good cause appearing therefore that the Court should consider and decide Defendants' Motion for Stay prior to August 13, 2015.

HEREBY ORDERS that the time for hearing the Motion be shortened, and the same shall be heard on the 1st day of Sept 2015, at the hour of 9:00 a.m. or as soon thereafter as counsel can be heard.

Dated this 30th day of July, 2015.

XXX UNSIGNED XXX

DISTRICT COURT JUDGE

Submitted by:

LITTLER MENDELSON

RICK D. ROSKELLEY, ESQ.
ROGER L. GRANDGENETT II, ESQ.
MONTGOMERY Y. PAEK, ESQ.
KATHRYN B. BLAKEY, ESQ.
Attorneys for Defendants

NOTICE OF MOTION

TO: PLAINTIFFS PAULETTE DIAZ, LAWANDA GAIL WILBANKS, SHANNON OLSZYNSKI AND CHARITY FITZLAFF

YOU will please take notice that the undersigned will bring the foregoing Motion to Stay Proceedings on Application for Shortening Time for hearing before the above-entitled Court, on the 1st day of September, 2015, at the hour of 9 o'clock a.m.

Dated this 30th day of July, 2015.

LITTLER MENDELSON

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ROGER L. GRANDGENETT II, ESQ.
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MEMORANDUM OF POINTS & AUTHORITIES

I. INTRODUCTION

A stay of this case is necessary pending a final resolution of Defendants' Petition for Writ of Mandamus or Prohibition of this Court's Order which found that under Nevada Constitution's Minimum Wage Amendment, Nev. Const. art. XV § 16 (the "MWA"), "for an employer to 'provide' health benefits, an employee must actually enroll in health insurance that is offered by the employer" (**Notice Entry of Order, at 2:7-9**) because this issue directly impacts the pleadings, discovery, and certification of any potential class. Moreover, it is potentially dispositive as to three of the named Plaintiffs' cases and it has the potential to invalidate regulations which directly impact liability. Allowing this case to proceed prior to a final determination on the above issue could result in this entire case needing to be re-litigated. Staying this litigation, on the other hand, will greatly advance judicial economy. This Court has previously found that the interest of judicial economy alone is sufficient justification for staying litigation in another matter involving interpretation of the MWA. *See Dan Herring v. Boulder Cab, Inc.*, A-13-691551-C (Judge Williams), Order Granting Plaintiffs' Countermotion to Stay All Proceedings (May 15, 2014). Accordingly, Defendants hereby request that this Court stay this case in its entirety pending resolution of the issue of whether the MWA permits employers to pay below the upper tier minimum wage only to employees enrolled in the company health insurance plan or, alternatively, if it permits employers to pay below the upper tier minimum wage if they make insurance available to their employees. Defendants filed a Petition for Writ of Mandamus or Prohibition with the Nevada Supreme Court which addresses this issue on July 30, 2015.

II. BACKGROUND/PROCEDURAL HISTORY

On June 5, 2014, Plaintiffs filed the operative Complaint alleging that Defendants violated the Nevada Constitution's Minimum Wage Amendment, Nev. Const. art. XV § 16 (the "MWA"), because Defendants did not offer a health benefit plan to the named Plaintiffs and the putative class. **Amended Complaint, ¶¶ 8, 12, 25, 28, 31, 34.** Specifically, Plaintiffs alleged, "[i]n the case of the named Plaintiffs, Defendants have failed to offer any health benefit plans at all, and therefore can claim no basis for paying Plaintiffs less than $8.25 per hour at any time." **Id., at ¶12** (emphasis

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added). Moreover, every single named Plaintiff alleged that it was Defendants' failure to offer health insurance was the basis of their claims. For example, in regard to Plaintiff Diaz, the Amended Complaint states:

> 25. Ms. Diaz was never offered a company health insurance plan at all, much less a plan that would qualify Defendants for the constitutional privilege of paying less than the full hourly minimum hourly wage rate per Nev. Const. art. XV,§ 16.
>
> 26. Defendants, therefore, were unlawfully paying Ms. Diaz a sub-minimum wage for the entirety of her employment.

Id., at ¶¶25-26 (emphasis added). Accordingly, the discovery and pleadings in this case were focused on whether Plaintiffs were offered health insurance.

Almost a full year after filing the case, on April 24, 2015, Plaintiff Diaz filed a Motion for Partial Summary Judgment on Liability asserting that the basis of her claims is that "she was never enrolled in or provided qualifying health insurance benefits." **Motion for Partial Summary Judgment, at 4:7-8.** The basis of Diaz's argument was that the word "provide" as used in the MWA means acceptance of insurance or being enrolled in insurance and therefore merely being offered insurance is not sufficient under the MWA. **Id.** Defendants opposed Plaintiffs' Motion and asserted that the plain-language definition of the word "provide" is "to make available" which is synonymous with offer. **Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment, at 5:10 – 8:2.** Defendants also relied on the Nevada Labor Commissioner's regulations supporting the MWA which instruct employers to "offer" insurance. **Id., at 10:23 – 12:20.**

The Court held a hearing on Plaintiff Diaz's Motion and, on July 1, 2015, finding in favor of Plaintiffs, entered a Minute Order which stated,

> The language of the Nevada Minimum Wage Amendment 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.

July 1, 2015 Minute Order.

The Court then entered and Order which found that under the MWA "for an employer to 'provide' health benefits, an employee must actually enroll in health insurance that is offered by the

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employer." **Notice Entry of Order, at 2:7-9.** As the Court acknowledged during the hearing on this matter, its ruling also stands for the proposition that all of the Labor Commissioner's regulations relating to the MWA are invalid because they interpret the word "provide" to be synonymous with "offer" which conflicts with the Court's interpretation of the word "provide" and the MWA. **June 25, 2015 Hearing Transcript at 18:18-21; 33:18 – 42:2.** At this hearing, the Court also recognized that the questions before the Court were "clearly questions of first impressions." **Id., at 4:6-8; 41:25-42:1.**

The "provide" issue came up again on July 9, 2015 hearing on Plaintiffs' Motion for Certification. At that hearing the Court indicated that Plaintiffs needed to create a more focused class definition and, specifically one that referenced "qualified health insurance." **July 9, 2015 Hearing Transcript at 14:9-16.** The Court explained that the reference to qualified health insurance was necessary because of its prior ruling which "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." **Id., at 40:6-9.** Further, the Court noted that the ruling was one that the Nevada Supreme Court would have to deal with. **Id., at 40:24-25.** The Court then continued the hearing to August 13, 2015, and ordered supplemental briefing regarding the class definition.

On July 16, 2015, Plaintiffs filed their supplemental briefing and proposed the following class definition:

> All current and former Nevada employees of Defendants paid less than $8.25 per hour at any time since July 1, 2010, and who were not provided qualifying health insurance pursuant to Nev. Const. Article XV, Section 16 and applicable Nevada statutory and regulatory provisions.

Supplemental Brief in Support of Plaintiffs' Motion for Class Certification Pursuant to N.R.C.P. 23, at 2:6-8. Moreover, they proposed the following subclass:

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

Id., at 3:18-19.

These two definitions imply that there is a distinction between being "provided" insurance and being enrolled in insurance. Thus, the issue of whether the MWA permits employers to pay

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below the upper tier minimum wage only to employees enrolled in the company health insurance plan or, alternatively, if it permits employers to pay below the upper tier minimum wage if they make insurance available to their employees permeates the entire lawsuit. The parties cannot continue with this litigation and the Court cannot make any determination on certification until this issue is resolved. Accordingly, Defendants filed a Petition for Writ with the Nevada Supreme Court on July 30, 2015.

II. LEGAL ARGUMENT

This Court should stay the proceedings in this matter pending resolution of Defendants' appeal. Nevada Rule of Appellate Procedure 8(a) provides that a party must ordinarily move first in the district court for a stay of the order of a district court pending appeal. NRAP 8(a)(1)(A). Here, this prerequisite has been satisfied.[1]

In deciding whether to issue a stay, courts generally consider the following factors:

(1) Whether the object of the appeal will be defeated if the stay is denied;

(2) Whether the appellant will suffer irreparable or serious injury if the stay is denied;

(3) Whether the respondent will suffer irreparable or serious injury if the stay is granted; and

(4) Whether the appellant is likely to prevail on the merits in the appeal.

Mikohn Gaming Corp. v. McCrea, 120 Nev. 248, 251 (2004) (*citing Fritz Hansen A/S v. Eighth Judicial Dist. Court*, 116 Nev. 650, 657 (2000)). If one or two factors are especially strong, they may counterbalance other weaker factors. *Id.* Here, the latter three factors all weight strongly in favor of granting the stay.

A. Irreparable or Serious Harm to Defendants Will Occur if a Stay is Denied and Judicial Economy Favors the Imposition of a Stay

Judicial economy favors staying all proceedings in the district court. One important policy behind a judicial stay is to protect the appellate court's jurisdiction so that any decision it reaches is not rendered moot by subsequent trial court proceedings. *See, Elsea v. Saberi*, 4 Cal.App.4th 625,

[1] Even though Defendants hereby move for a stay of the proceedings in the district court, Defendants' may subsequently seek a stay from the Nevada Supreme Court pursuant to NRCP 62(g) and NRAP 8(a)(2)(A)(iii) if the requested stay is denied by the district court.

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629 (1992); *In re Marriage of Horowitz*, 159 Cal.App.3d 377, 381 (1984). Similarly, allowing a matter to be litigated while a related issue is pending on appeal "could create chaos with the appellate process." *City of Hanford v. Superior Court*, 208 Cal.App.3d 580, 588 (1989). This Court has previously found that the interest of judicial economy alone is sufficient justification for staying litigation. *See Dan Herring v. Boulder Cab, Inc.*, A-13-691551-C (Judge Williams), Order Granting Plaintiffs' Countermotion to Stay All Proceedings (May 15, 2014).

Here, granting a stay is in the interest of judicial economy because prior to a final determination on what exactly the MWA mandates employers to do and if the regulations are void, every aspect of this case risks being re-litigated. For example, the issue of whether the MWA permits employers to pay below the upper tier minimum wage only to employees enrolled in the company health insurance plan or, alternatively, if it permits employers to pay below the upper tier minimum wage if they make insurance available to their employees, goes the very heart of certification. If a class is certified that includes all employees who were not enrolled in qualified health insurance and then later the Nevada Supreme Court rules that enrollment is not required and that requirement is instead that insurance is made available, all the time, effort and money of certifying the class and doing discovery will be wasted. This includes all the time, effort and money that would be expended on satisfying notice requirements, communicating with class members, and engaging in liability discovery. Another concern is that individuals who are not and could not be members of the class or a subclass may be unnecessarily pulled into this litigation.

If Defendants prevail on their appeal while a stay was not granted, the district court will have needlessly and wastefully been involved in litigation that has no legal foundation and will need to be entirely re-done. Thus, judicial economy is best served by staying the instant proceedings. Moreover, when examined in the context of facing potentially conflicting rulings on the same claims and issues, the irreparable harm factor weighs in favor of a stay.

B. No Irreparable or Serious Harm to Plaintiffs Will Occur if a Stay is Granted

Plaintiffs will not suffer irreparable or serious injury if a stay is granted. To the contrary, it will be to their benefit to not have to relitigate issues or risk inconsistent outcomes which could result if the district court proceedings are not stayed. The Supreme Court has held that "a mere

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delay in pursuing discovery and litigation normally does not constitute irreparable harm." *Mikohn*, 120 Nev. at 253. Therefore, Plaintiff will not suffer irreparable or serious injury if a stay is granted.

C. Likelihood of Success on the Merits

The likelihood of success on the merits of Defendants' appeal is high. The Order granting Plaintiff Diaz's Motion for Partial Summary Judgment as to Liability overlooks the plain language of the MWA and creates an unavoidable contradiction. Specifically, the Order states that the language of the MWA is "unambiguous: an employer must actually provide, supply, or furnish qualifying health insurance," and "for an employer to 'provide' health benefits, an employee must actually enroll in health insurance that is offered by the employer." **Notice Entry of Order, at 2:3-11.** However, the term "qualified health insurance" is not in the MWA and therefore cannot be attributed to the unambiguous language of the MWA. The term "qualified health insurance" comes from NAC 608.100, which states that in order to comply with the MWA, employees must be "offered qualified health insurance." NAC 608.100(1)(a) (emphasis added). Therefore, if employees have to enroll in the qualified health insurance as the Order states then, as the Court alluded to at the hearing, NAC 608.100 is void. **June 25, 2015 Hearing Transcript at 18:18-21; 33:18 – 42:2.** As such, the term "qualified health insurance" would disappear with it. Accordingly, there is an inherent conflict with the Order's finding that employees must enroll in qualified health insurance.

Next, the words "supply" and "furnish" are not in the MWA either and, like the word "provide," they mean "to make available." <http://www.merriam-webster.com/dictionary/provide>. Thus, the ruling that the MWA requires that employees are enrolled in insurance is also not based in the language of the MWA. To the contrary, it adds to the language of the MWA and attributes a new meaning to the word provide that is contrary to every single existing definition of the word provide. ***See* Defendant's Opposition to Plaintiff Diaz's Motion.**

Looking to the Court's statements at the hearing on Plaintiff Diaz's Motion, it appears that the primary basis for the Order is that there needs to be "some meaning" to the two tier system. **June 25, 2015 Hearing Transcript at 6.** The Court indicated that if employees earning below $8.25 per hour were not enrolled in insurance, there would be no meaning to the two-tier system. **Id.** This reasoning, however, overlooks the actual structure the two-tier system and the plain language of the

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MWA: employers who have no insurance options available for their employees must pay the higher-tier minimum wage; and employers who do give their employees access to health insurance are permitted to pay the lower-tier minimum wage. Indeed, the MWA focuses exclusively on what actions employers must take in order to pay below the upper tier minimum wage. *See* Nev. Const. art XV § 16. It does not discuss or even mention any action that must be taken by employees, including enrollment. *See id.*

Accordingly, Defendants' submit that there is a strong likelihood on appeal that at least part of the Court's Order will be overturned. There is no evidence of a dilatory purpose in requesting the stay. Thus, based upon the application of the above factors, the Court should exercise its discretion to stay the proceedings in this matter pending the resolution of Defendants' appeal.

III. CONCLUSION

For the foregoing reasons, Defendants' respectfully request that this Court issue an Order granting a stay of the proceedings in this matter pending resolution of Appellants' appeal.

Dated: July 30, 2015

Respectfully submitted,

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PROOF OF SERVICE

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

DEFENDANTS' MOTION TO STAY PROCEEDINGS ON APPLICATION FOR ORDER SHORTENING TIME

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

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

Debra Perkins

Debra Perkins

Firmwide:134818389.1 081404.1002

Exhibit M

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

Electronically Filed
Mar 25 2015 09:09 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

PETITION FOR WRIT OF MANDAMUS OR PROHIBITION OR, IN THE ALTERNATIVE, MOTION TO CONSOLIDATE

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Docket 67631 Document 2015-09014

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: March 24, 2015

Respectfully submitted,

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TABLE OF CONTENTS

MEMORANDUM OF POINTS AND LEGAL AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OR PROHIBITION OR, IN THE ALTERNATIVE, MOTION TO CONSOLIDATE 1

I. RELIEF SOUGHT. 1

II. ISSUES PRESENTED 2

III. FACTS NECESSARY TO UNDERSTAND THE ISSUES PRESENTED. 2

IV. LEGAL ARGUMENT AND REASON WHY THE WRIT SHOULD ISSUE 10

A. Standard For Writ Of Mandamus Or Prohibition. 10

B. Under Thomas And Terry, This Court Should Clarify That The Statute Of Limitations For Nevada Minimum Wage Claims Under The MWA Is Two Years Because There Are No Conflicting Terms That Would Be Irreconcilably Repugnant With The MWA. 11

C. Under Thomas And Terry, This Court Should Clarify That The MWA Does Not Impliedly Repeal All Existing Statutes Regarding The Minimum Wage Under NRS 608. 19

V. Alternatively, This Petition Should Be Consolidated With The Petition In Williams. 20

VI. CONCLUSION 21

DECLARATION OF THE PARTY BENEFICIALLY INTERESTED 23

CERTIFICATE OF COMPLIANCE 26

CERTIFICATE OF SERVICE 28

TABLE OF AUTHORITIES

Page(s)

CASES

Clean Water Coal. v. The M Resort, L.L.C.,
127 Nev. Adv. Rep. 24, 255 P.3d 247 (2011) 12

Ewell v. State,
105 Nev. 897 at fn.1 (1989) 21

Falcke v. Douglas County,
116 Nev. 583 (2000) 14

Galloway v. Truesdell,
83 Nev. 13, 422 P.2d 237 (1967) 13

Hanks et al. v. Briad Restaurant Group, LLC,
2:14-cv-00786-GMN-PAL 8

Mengelkamp v. List,
88 Nev. 542, 501 P.2d 1032 (1972) 12, 13

Perry et al. v. Terrible Herbst, Inc.,
A-14-704428-C 9

Smith v. District Court,
107 Nev. 674, 818 P.2d 849 (1991) 10

State ex rel. DOT v. Public Emples. Ret. Sys. of Nev.,
120 Nev. 19, 83 P.3d 815 (2004) 10, 11

State v. Glusman,
98 Nev. 412, 651 P.2d 639 (1982) 12

Terry v. Sapphire/Sapphire Gentlemen's Club,
130 Nev. Adv. Rep. 87, 336 P.3d 951 (2014) 5, 11, 14, 15, 16, 19

Thomas v. Nevada Yellow Cab Corp.,
130 Nev. Adv. Op. 52 (2014) 3, 5, 6, 8, 11, 12, 13, 14, 15, 16, 18, 19

Thomas v. Nevada Yellow Cab Corp.,
130 Nev. Adv. Op. 52, 327 P.3d 518 (2014) 11, 12

TABLE OF AUTHORITIES
(continued)

Page(s)

Tyus et al. v. Wendy's of Las Vegas, Inc. et al.,
2:14-cv-00729-GMN-VCF 8

W. Realty Co. v. City of Reno,
63 Nev. 330, 172 P.2d 158 (1946) 12, 13

Walters v. Eighth Judicial Dist. Court,
2011 Nev. LEXIS 82, 263 P.3d 231 (2011) 10, 11

Williams et al. v. The Eighth Judicial District Court of the State of Nevada et al., Nevada Supreme Court case no. 66629 ..... 1, 2, 8, 9, 21, 22

STATUTES

NRS 11.010 20

NRS 11.220 ..... 4, 8, 11, 17, 19, 20

NRS 34.150 et seq. 1

NRS 608 ..... 5, 11, 12, 14, 15, 19

NRS 608.010 14

NRS 608.011 ..... 14, 15

NRS 608.115 9

NRS 608.250(2) 12, 13, 14, 15, 18

NRS 608.250(2)(e) 11, 13

NRS 608.260 ..... 1, 3, 5, 6, 7, 8, 11, 16, 17, 18, 19, 20, 21

NRS Chapter 11 ..... 19, 20

NRS Chapter 608 ..... 14, 15, 16, 18, 19, 20

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

N.R.A.P. 21 1

N.R.A.P. 27 1

N.R.A.P. 3(b) 1

Nev. Const. art. XV, 16 ..... 3, 6, 7, 13, 18

MEMORANDUM OF POINTS AND LEGAL AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OR PROHIBITION OR, IN THE ALTERNATIVE, MOTION TO CONSOLIDATE

I. RELIEF SOUGHT.

Pursuant to NRS 34.150 et seq., Nevada Rule of Appellate Procedure 21 and Nevada Rule of Appellate Procedure 27, 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 of Findings of Fact and Conclusions of Law entered on February 24, 2015 denying Defendants' Motion for Judgment on the Pleadings Pursuant to NRCP 12(c) with Respect to All Claims for Damages Outside the Two-Year Statute of Limitations and granting Plaintiffs' Countermotion for Summary Judgment Re Limitation of the Action and enter an order that the statute of limitations for Nevada minimum wage claims is two years under NRS 608.260.

Alternatively, pursuant to Nevada Rule of Appellate Procedure 3(b), Petitioners request that this Petition be consolidated with the pending Petition for Writ of Mandamus or, in the Alternative, for Writ of Prohibition filed on October 6, 2014 in *Williams et al. v. The Eighth Judicial District Court of the State of*

Nevada et al., Nevada Supreme Court case no. 66629 as that Petition involves the same issue that this Court should clarify what the statute of limitations is for Nevada minimum wage claims.

II. ISSUES PRESENTED.

Whether, as an important issue of law requiring clarification, the statute of limitations for Nevada minimum wage claims under the MWA is two years.

Alternatively, whether this Petition should be consolidated with the pending Petition in *Williams et al. v. The Eighth Judicial District Court of the State of Nevada et al.*, Nevada Supreme Court case no. 66629.

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 October 1, 2014, Petitioners filed a Motion for Judgment on the Pleadings Pursuant to NRCP 12(c) with Respect to All Claims for Damages Outside the Two-Year Statute of Limitations (also referred to as "Motion for Judgment on the Pleadings"). (Appendix at 43-70). In this Motion for Judgment on the Pleadings, Petitioners argued, under the guidance provided by this Court in *Thomas v. Nevada Yellow Cab Corp.*, 130 Nev. Adv. Op. 52 (2014), that a claim for Nevada minimum wage under Article XV, Section 16 of the Nevada Constitution (the "Minimum Wage Amendment" or "MWA") was to be harmonized with the two-year statute of limitations for Nevada minimum wage claims under NRS 608.260. (Appendix at 46-54).

On October 20, 2014, Plaintiffs filed an Opposition to Defendants' Motion for Judgment on the Pleadings Pursuant to NRCP 12(c) with Respect to All Claims for Damages Outside the Two-Year Statute of Limitations and Plaintiffs' Countermotion for Partial Summary Judgment (also referred to as "Countermotion for Partial Summary Judgment"). (Appendix at 71-105). In their Countermotion for Partial Summary Judgment, Plaintiffs argued that NRS 608.260 was "likely impliedly repealed in its entirety" by the passage of the MWA and defunct in light of *Thomas*. (Appendix at 72:26-73:2). Consequently, Plaintiffs asserted that a Nevada minimum wage claim now has "no limitation" or, in the alternative, a four-

year statute of limitations applies under NRS 11.220 which governs actions for relief not otherwise provided for. (Appendix at 73:4-7).

On October 22, 2014, Petitioners filed their Reply in Support of Defendant's Motion for Judgment on the Pleadings and Response to Plaintiffs' Countermotion for Partial Summary Judgment Re Limitation of the Action and Motion to Strike Plaintiffs' Countermotion for Partial Summary Judgment Re Limitation of the Action. (Appendix at 106-121). On November 7, 2014, Plaintiffs responded with their Reply in Support of Plaintiffs' Countermotion for Partial Summary Judgment Re Limitation of the Action and Plaintiffs' Opposition to Defendants' Motion to Strike Plaintiffs' Countermotion for Partial Summary Judgment Re Limitation of the Action. (Appendix at 122-128). On November 11, 2014, Petitioners responded with their Reply in Support of Defendants' Motion to Strike Plaintiffs' Countermotion for Partial Summary Judgment Re Limitation of the Action. (Appendix at 129-136). With the briefing complete, the hearing on all the pending motions for December 4, 2014.

On December 4, 2014, Respondents Honorable Timothy C. Williams and Eighth Judicial District Court held a hearing on the Petitioners' Motion for Judgment on the Pleadings, Plaintiffs' Countermotion for Partial Summary Judgment and all related filings. (Appendix at 137). At the hearing, the Petitioners provided extensive arguments as to why all Nevada minimum wage claims were

still subject to a two-year statute of limitation in the existing applicable statute of NRS 608.260. (Appendix at 138-197). When directed to the *Thomas* analysis of conflicting exemption language in the MWA and the existing minimum wage laws in NRS 608, the district court criticized this Court's standard of "harmonizing" the MWA with existing statutes and noted that its view may be different. (Appendix at 143:14-145:7 and 145:8-146:18). Petitioners argued that the district court must use the *Thomas* analysis and that a silent statute of limitations under the MWA was not the same as a conflicting statute of limitations in the MWA such as three years or some other number of years. (Appendix at 147:8-154:4). At the hearing, Petitioners also noted that in the recent Nevada Supreme Court authority in *Terry v. Sapphire/Sapphire Gentlemen's Club*, 130 Nev. Adv. Rep. 87, 336 P.3d 951 (2014), this Court affirmed that the MWA only supplanted the existing NRS 608 statutory scheme to "some extent" while affirming that the laws had to be read together. (Appendix at 178:6-179:13). At the conclusion of the hearing, the district court deferred its decision on all motions so that it could "review the briefing and read the *Thomas v. Yellow Cab* case before rendering a decision." (Appendix at 136).

On February 3, 2015, the district court issued a minute order regarding the motions that were heard on December 4, 2014. (Appendix at 137). On February 24, 2015, the Notice of Findings of Fact, Conclusions of Law, and Order was filed

incorporating the district court's Order (also referred to as "Order"). (Appendix at 138-146). In its Order, the district court made no reference to *Thomas* despite indicating that it would read that case before issuing its Order. (Appendix at 136 and 141-144). As a result, the district court did not attempt to harmonize the two-year statute of limitations under NRS 608.260 with the silent statute of limitations under the MWA. *Id.* Instead, the district court adopted its own "expansive rights" standard promulgated by Plaintiffs and specifically found:

> 1. The civil claims and remedies for violations of minimum wage laws under NRS 608.260 and article XV, section 16 of the Nevada Constitution differ significantly in both character and nature.
>
> 2. Pursuant to NRS 608.260, an employee may, at any time within 2 years, bring a civil action to recover the difference between the amount paid to the employee and the minimum wage amount. Thus, under the Nevada statutory scheme, the employee is solely limited to back pay, i.e., the difference between the amount paid and the amount of the minimum wage. See NRS 608.260.
>
> 3. In contrast, article XV, section 16(B) of the Nevada Constitution provides that "[a]n employee claiming a violation of this section may bring an action against his or her employer in the courts of this State to enforce the provisions of the section and shall be entitled to all of the remedies available under the law or in equity appropriate to remedy any violation of this section, including but not limited to back pay, damages, reinstatement or injunctive relief. An employee who prevails in any action under this section shall be awarded his or her attorney fees and costs." Nev. Const. art. XV, § 16(B).
>
> 4. The claims for relief and remedies afforded to Nevada employees under the Nevada Constitutional Amendment are expanded and not merely limited to back pay.

5. By its very nature, the Nevada Constitutional Amendment grants Nevada employees expansive rights, relief and legal remedies available in law or in equity. Id. In addition, the Nevada Constitutional Amendment expands employee rights even further, providing for an entitlement to attorney fees and costs should an employee prevail in the prosecution of his or her action. Id.

6. It is of paramount importance to distinguish the limited remedy of back pay available to Nevada employees under NRS 608.260 versus the Constitutional rights, claims, and remedies available to Nevada employees under the Nevada Constitutional Amendment, which could include, but are not limited to, back pay, damages, and injunctive relief.

7. Pursuant to the language of NRS 608.260, the two-year limitations period applies only to claims for back pay. See NRS 608.260. Consequently, this statutory limitation does not affect or apply to the constitutionally mandated claims, rights, and remedies afforded to claimants under the Constitutional Amendment.

8. It is also important to note that the Nevada Constitutional Amendment is much more expansive in the rights, claims, relief, and remedies available to claimants. As a result, it would be problematic to apply a two year statute of limitations to a claim for back pay and a different limitations period for claims for damages and/or injunctive relief not covered by the statute (NRS 608.260).

9. Clearly, the implication of the expansive Nevada Constitutional Amendment effectively supplants, supersedes, and/or repeals the two-year limitations period and the limited civil remedy provisions of NRS 608.260.

10. Lastly, with respect to the applicable statute of limitations period, this determination is based largely on the allegations and claims for relief asserted in Plaintiffs Complaint. A review of Plaintiffs' Amended Complaint clearly indicates that Plaintiffs' action is primarily based on Defendants' alleged violations of Nev. Const. art. XV, 16. Furthermore, Plaintiffs Prayer For Relief is not limited to an award of back pay; rather, Plaintiffs request

> declaratory relief, unpaid wages, damages, interest, attorneys' fees and costs, and other relief necessary and just in law and in equity.
>
> 11. Therefore, the Court finds that in this action, the most plausible applicable limitations provision shall be the four-year catch-all limitations period for civil actions pursuant to NRS 11.220.

(Emphasis added). (Appendix at 142:6-143:22). While disregarding the *Thomas* analysis of implied repeal for conflicting terms, the district court found that under its own expansive rights analysis, the MWA "supplants, supersedes, and/or repeals" NRS 608.260. (Appendix at 143:12-14). Based on this, the district court held that the "most plausible" statute of limitations for a Nevada minimum wage claim under the MWA was "the four-year catch-all limitations period for civil actions pursuant to NRS 11.220." (Appendix at 143:21-22).

On March 24, 2014, Petitioners filed a Notice to the district court regarding this Petition and Motion. (Appendix at 198-200). The applicable statute of limitations period under the MWA is an important issue of law in need of clarification. Declaration of Montgomery Y. Paek, Esq. attached hereto. Indeed, even Plaintiffs' counsel agrees that the statute of limitations under the MWA is an important issue in need of clarification as stated in *Williams et al. v. The Eighth Judicial District Court of the State of Nevada et al.*, Nevada Supreme Court case no. 66629. (Appendix at 147-177). In addition to this matter, Petitioners' counsel is also counsel of record for Defendants in the *Tyus et al. v. Wendy's of Las Vegas, Inc. et al.*, 2:14-cv-00729-GMN-VCF; *Hanks et al. v. Briad Restaurant Group,*

LLC, 2:14-cv-00786-GMN-PAL; and *Perry et al. v. Terrible Herbst, Inc.*, A-14-704428-C cases listed in the *Williams* Petition. (Appendix at 155-156). In one of these matters, the statute of limitations also became a major impediment to any possibility of settlement as the parties vehemently disagreed as to what the applicable statute of limitations was. Decl. of Montgomery Y. Paek, Esq. In order to clarify the statute of limitations under the MWA, Petitioners' counsel has also filed an amicus curiae brief on behalf of the Defendants in *Hanks* and *Wendy's of Las Vegas, Inc.* in the *Williams* matter. *Id.*

Additionally, in this matter, the parties have voluminous pending discovery that hinges in part on how long the applicable statute of limitations is for both document productions and depositions. Decl. of Montgomery Y. Paek, Esq. Due to the district court's ruling, Petitioners now face the prospect of a discovery period and damages period that is double what even the Nevada Labor Commissioner says is the appropriate period for employers to retain wage records under NRS 608.115 and NAC 608.140. Accordingly, this Court should issue a writ of mandamus or prohibition clarifying that the statute of limitations for claims under the MWA is two-years and compelling the district court to vacate its Order. Alternatively, Petitioners request that this Court consolidate this Petition with the issues raised in *Williams et al. v. The Eighth Judicial District Court of the State of Nevada et al.*, Nevada Supreme Court case no. 66629.

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

A. Standard For Writ Of Mandamus Or Prohibition.

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 will only consider writ petitions challenging a district court denial of a motion for summary judgment when no factual dispute exists and summary judgment is clearly required by a statute or an important issue of law requires clarification. *Smith* at 1345 and *Walters* at 7-8.

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 reviewed a writ of mandamus in regards to interpretation of a statute of limitations where parties have disputed when the statute of limitations began to run. *State ex rel. DOT v. Public Emples. Ret. Sys. of Nev.*, 120 Nev. 19, 21, 83 P.3d 815, 816 (2004).

Here, the district court did not find any question of fact that would prevent it from deciding the statute of limitations for a Nevada minimum wage claim under the MWA as a matter of law. The district court interpreted the language of the

MWA as granting expansive rights that required the application of a four-year statute of limitations under NRS 11.220. The district court also did not make any application of the Thomas analysis to NRS 608.260 even though that holding is this Court's guidance for interpreting whether or not the MWA repealed the existing statutory scheme for minimum wage claims under NRS 608.

This Court should interpret and clarify the applicable statute of limitations as it has done in *Walters* and *State ex rel. DOT.* Accordingly, a petition for writ of mandamus or prohibition is appropriate in a case such as this where the statute of limitations for a MWA claim is an important issue of law in need of clarification.

B. Under *Thomas* And *Terry*, This Court Should Clarify That The Statute Of Limitations For Nevada Minimum Wage Claims Under The MWA Is Two Years Because There Are No Conflicting Terms That Would Be Irreconcilably Repugnant With The MWA.

As was explained to the district court, the decisions of *Thomas v. Nevada Yellow Cab Corp.*, 130 Nev. Adv. Op. 52, 327 P.3d 518 (2014) and *Terry v. Sapphire/Sapphire Gentlemen's Club*, 130 Nev. Adv. Rep. 87, 336 P.3d 951 (2014) are directly applicable to whether or not the two-year statute of limitations applies to a minimum wage claim brought under the MWA. In *Thomas*, this Court analyzed whether MWA overrode the exception for taxicab drivers provided in Nevada's minimum wage statute, NRS 608.250(2)(e). *Thomas*, 327 P.3d at 520. In doing so, the Court laid out the test for determining how the MWA would affect

existing NRS 608 statutes.

The Court in *Thomas* held that the Nevada Constitution is the "supreme law of the state," which "control[s] over any conflicting statutory provisions." *Thomas*, 327 P.3d at 521 *citing Clean Water Coal. v. The M Resort, L.L.C.*, 127 Nev. Adv. Rep. 24, 255 P.3d 247, 253 (2011) (alteration in original). However, "if reasonably possible," statutes are to be construed "in harmony with the constitution." *Id. citing State v. Glusman*, 98 Nev. 412, 419, 651 P.2d 639, 644 (1982). The exception to harmonizing, is when a statute "is irreconcilably repugnant" to a constitutional amendment, in which case the statute is deemed to have be impliedly repealed by the amendment. *Id. citing Mengelkamp v. List*, 88 Nev. 542, 545-46, 501 P.2d 1032, 1034 (1972). Importantly, this Court stated that "[t]he presumption is against implied repeal unless the enactment conflicts with existing law to the extent that both cannot logically coexist." (Emphasis added). *Id. citing W. Realty Co. v. City of Reno*, 63 Nev. 330, 344, 172 P.2d 158, 165 (1946).

When the Court applied these standards to the exceptions listed in the MWA with the exceptions listed in NRS 608.250(2), the Court found that the canon of construction "expressio unius est exclusio alterius," the expression of one thing is the exclusion of another, must be applied when there are two conflicting definitions of "employee" each with their own defined and different exception

categories. *Id. citing Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967). Thus, under expressio unius est exclusio alterius, this Court contrasted the conflicting definitions of "employee" in the MWA and NRS 608.250(2):

> The Minimum Wage Amendment expressly and broadly defines employee, exempting only certain groups: "'employee' means any person who is employed [by an individual or entity that may employ individuals or enter into contracts of employment] but does not include an employee who is under eighteen (18) years of age, employed by a nonprofit organization for after school or summer employment or as a trainee for a period not longer than ninety (90) days." Nev. Const. art. 15, § 16(C). Following the expressio unius canon, the text necessarily implies that all employees not exempted by the Amendment, including taxicab drivers, must be paid the minimum wage set out in the Amendment. The Amendment's broad definition of employee and very specific exemptions necessarily and directly conflict with the legislative exception for taxicab drivers established by NRS 608.250(2)(e). Therefore, the two are "irreconcilably repugnant," *Mengelkamp*, 88 Nev. at 546, 501 P.2d at 1034, such that "both cannot stand," *W. Realty Co.*, 63 Nev. at 344, 172 P.2d at 165, and the statute is impliedly repealed by the constitutional amendment.
>
> * * *
>
> The text of the Minimum Wage Amendment, by enumerating specific exceptions that do not include taxicab drivers, supersedes and supplants the taxicab driver exception set out in NRS 608.250(2).

(Footnotes omitted). *Thomas* at 521-522. Thus, to impliedly repeal, supersede and supplant the exception in NRS 608.250(2), there first must be a "conflicting" statutory term that cannot be harmonized with the MWA. Then, when the conflicting term expresses something different, such as an exceptions for under eighteen (18) year employees, nonprofit organization employees or as a trainee

employees rather than exceptions for taxicab employees, is when the statute will be viewed as irreconcilably repugnant to the Nevada Constitution.

Additionally, in the case of silence in a statute, this Court has held that "'it is not the business of [the] court to fill in alleged legislative omissions based on conjecture as to what the legislature would or should have done.'" *Falcke v. Douglas County*, 116 Nev. 583, 589 (2000) (Holding that a statute which did not expressly provide for a two-thirds super-majority vote by county board of commissioners did not authorize the county planning commission to require a super-majority vote for approval of amendments). Thus, an omitted term such as in *Falcke* is not the same as a conflicting term as in *Thomas*.

In *Terry*, this Court noted the implications of its holdings in *Thomas*. The issue before the Court in Terry was whether appellants, performers at Sapphire Gentlemen's Club, were employees within the meaning of NRS 608.010, the definition of which hinges on the definition of "employer" under NRS 608.011, and thus entitled to minimum wage under NRS Chapter 608. *Terry*, 336 P.3d 951 at 953. Citing the *Thomas* analysis as a guide, the Court recognized that the text of the MWA supplanted that of that statutory minimum wage laws to "some extent" with regards to "the taxicab driver exception set out in NRS 608.250(2)." *Id.* at 955 *citing Thomas* at 522. However, the Court also recognized the continued viability of other NRS 608 minimum wage by noting that "the Department of

Labor continues to use the definition of 'employer' found in NRS 608.011, not that in the Minimum Wage Amendment. NAC 608.070." *Id.* Although the MWA had its own "definition of 'employer'" that was different than the definition of "employer" found in NRS 608.011, the MWA's definition was not instructive because it was "equally, if not more, tautological than NRS 608.011." *Id.* Thus, in *Terry*, the Court recognized that *Thomas'* repeal was limited to the conflicting "employee" exception for taxicab drivers in NRS 608.250(2) and that the MWA did not impliedly repeal all NRS Chapter 608 statutes concerning the minimum wage. Where there was no conflict, such as the "employer" definition under the MWA and NRS 608.011, the Court looked at both definitions harmoniously, rather than hold that the MWA had impliedly repealed all NRS 608 statutes concerning the minimum wage or its definitions.

In this matter, the district court made no reference to *Thomas* or *Terry* nor did it apply the principles of harmonizing NRS 608 with the MWA except where conflicting terms exist. Instead, the district court set out its own "expansive rights" analysis that did not attempt to harmonize the existing two-year statute of limitations with the complete absence of any statute of limitations in the MWA. (Appendix at 142:19-143:14).

At the hearing, Petitioners argued that *Thomas* and *Terry* were the applicable standard for determining whether or not the two-year statute of limitations under

NRS 608.260 applied to the MWA. (Appendix at 147:8-154:4 and 178:6-179:13). Under *Thomas*, Petitioners explained that where the MWA was silent, such as having no provision for the statute of limitations, then there was no conflict with the existing statute of limitations in NRS 608.260. (Appendix at 147:8-149:3). Further, Petitioners argued without two conflicting statute of limitations to compare, there could never be an application of expressio unius est exclusio alterius from *Thomas* which would exclude NRS 608.260 from applying to a minimum wage claim. (Appendix at 149:10-154:4). Under *Terry*, Petitioners argued that this Court upheld that where there is no conflicting terms, provisions under NRS Chapter 608 are not impliedly repealed by the MWA. (Appendix at 177:3-179:13). Consequently, in its minutes, the district court noted that it would "review the briefing and read the *Thomas v. Yellow Ca*b case before rendering a decision." (Appendix at 136).

In its Order, however, the district court made no attempt to apply *Thomas* to the statute of limitations. (Appendix at 142:6-143:22). Without applying *Thomas*, the district court found that the remedy provisions of the MWA of "back pay, damages, and injunctive relief" were "distinguishable" from the "limited remedy of back pay available to Nevada employees under NRS 608.260." (Appendix at 142:25-143:3). Further, the district court stated that as a result of the more expansive remedies under the MWA, it would be "problematic to apply a two year

statute of limitations to a claim for back pay and a different limitations period for claims for damages and/or injunctive relief not covered by the statute (NRS 608.260)" and that the implication was that the MWA "effectively supplants, supersedes, and/or repeals the two-year limitations period and the limited civil remedy provisions of NRS 608.260." (Appendix at 143:8-14). Consequently, the Court chose to impose the four year statute of limitations pursuant to NRS 11.220. (Appendix at 143:21-22).

In so ruling, the district court ignored Petitioners' distinction that remedy provisions were not the same as a statute of limitations provisions and therefore, not "conflicting" terms. (Appendix at 181:21-183:15). The district court cited no conflict between the terms "back pay" in the MWA and NRS 608.260. Instead, it only cited that an application of the two-year statute of limitations would be "problematic" without explanation. (Appendix at 143:8-14). At the hearing, Petitioners addressed the additional remedy provisions of the MWA and explained that the statute of limitations for non-back pay remedies would still flow from the underlying claim rather than the remedy. (Appendix at 152:7-154:4). Thus, even an injunctive relief action would be limited to two years if the underlying claim was one based in minimum wage, rather than six years for a written contract. (Appendix at 152:7-154:4). The district court did not cite any reason why a two-year statute of limitations for injunctive relief would be irreconcilably repugnant

with the remedy provisions of the MWA. Therefore, there is no reasoning as to why NRS 608.260's two-year statute of limitations cannot logically co-exist as the statute of limitations for claims under the MWA.

Even under an analysis of remedies as the district court performed, neither NRS 608.260 nor the MWA provide an exclusive or conflicting list of remedies. NRS 608.260 states that an employee may bring a "civil action to recover the difference between the amount paid to the employee and the amount of the minimum wage" but does not state that this is an exclusive remedy or that an action for injunctive relief is barred. The MWA states that an employee may bring a civil action and is entitled to "all remedies available under the law or in equity appropriate to remedy any violation of this section, but are not limited to back pay, damages, reinstatement or injunctive relief." (Emphasis added). Nev. Const. art. XV § 16(b). This is in contrast to the conflict addressed in *Thomas*, where NRS 608.250(2) and the MWA both provided for an exclusive list of exceptions under "employee" and could not be reconciled. Therefore, ignoring the fatal flaw of not citing a conflicting statute of limitation in the MWA, the district court's reliance on distinguishing remedies does not meet the *Thomas* test.

The district court's Order is contrary to the case law in *Thomas* which has directly addressed the MWA's compatibility with the existing minimum wage provisions in NRS Chapter 608. At the very least, the district court was required to

determine whether or not the two-year statute of limitations in NRS 608.260 conflicted with any term in the MWA. Recognizing that under that analysis, there was no conflict, the district court adopted a different standard and found that under the expansive rights of the MWA, that NRS 608.260 was impliedly repealed. This finding is the opposite of the presumption that was enunciated in *Thomas* in favor of harmonizing NRS Chapter 608 with the MWA. Therefore, the district court's order with regards to the statute of limitations should be vacated for the two-year statute of limitations.

C. Under *Thomas* And *Terry*, This Court Should Clarify That The MWA Does Not Impliedly Repeal All Existing Statutes Regarding The Minimum Wage Under NRS 608.

In its Order, the district court applied the four-year statute of limitation in NRS 11.220 to minimum wage claims under the MWA. (Appendix at 143:21-22). The district court found that "the implication of the expansive Nevada Constitutional Amendment effectively supplants, supersedes, and/or repeals the two-year limitations period and the limited civil remedy provisions of NRS 608.260." (Appendix at 143:12-14). Thus, to create an applicable statute of limitations where the MWA was silent, the district court then reached to NRS Chapter 11 as the closest applicable statute in light of its view that the MWA repeal all statute of limitations under NRS 608.260.

NRS 11.220 provides "Action for relief not otherwise provided for. An

action for relief, not hereinbefore provided for, must be commenced within 4 years after the cause of action shall have accrued." At the hearing, Petitioners argued that Plaintiffs' reliance on NRS 11.220 was misplaced because the general provisions of NRS Chapter 11 indicate that NRS Chapter 11 provisions do not apply "where a different limitation is prescribed by statute." NRS 11.010. (Appendix at 162:7-19). Therefore, the different limitation prescribed by NRS 608.260 controls. (Appendix at 162:13-19).

The district court's application of a statute of limitation from the general Limitation of Actions in NRS Chapter 11 over a statute of limitation from the Compensation, Wages and Hours in NRS Chapter 608 shows that without clarification, district courts may continue to believe that minimum wage provisions under NRS Chapter 608 are repealed by the MWA. Therefore, this Court should clarify that NRS Chapter 608 remains applicable to minimum wage claims under the MWA to the extent that there are no conflicting terms and provisions can be read in harmony.

V. ALTERNATIVELY, THIS PETITION SHOULD BE CONSOLIDATED WITH THE PETITION IN *WILLIAMS*.

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.1 (1989) *citing* NRAP 3(b).

In this matter, the clarification of the applicable statute of limitations under the MWA has been brought before this Court in the *Williams* Petition. Therefore, for the purposes of judicial economy, this Court may consolidate this Petition with *Williams et al. v. The Eighth Judicial District Court of the State of Nevada et al.*, Nevada Supreme Court case no. 66629.

VI. CONCLUSION

Nevada's constitutional, statutory, and case law is clear: minimum wage violation claims are subject to a two-year statute of limitations. The passage of the MWA did not change that. NRS 608.260 clearly provides for a two-year statute of limitations for minimum wage causes of action that can be read in harmony with the MWA. Accordingly, Petitioners respectfully submit that this Court grant its Petition for Mandamus or Prohibition and compel the district court to apply a two-year statute of limitations.

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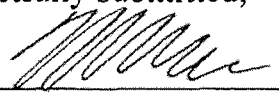
Alternatively, this Petition and the points and authorities herein should be consolidated with the pending case in *Williams et al. v. The Eighth Judicial District Court of the State of Nevada et al.*, Nevada Supreme Court case no. 66629.

Dated: March 24, 2015

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, or in the alternative, Motion to Clarify ("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 applicable statute of limitations period 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 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 listed in the *Williams et al. v. The Eighth Judicial District Court of the State of Nevada et al.* Petition. In one of these matters, the statute of limitations also became a major impediment to any possibility of settlement as the parties vehemently disagreed as to what the applicable statute of limitations was.

7. In order to clarify the statute of limitations under the MWA, my firm has filed an amicus curiae brief on behalf of the Defendants in *Hanks* and *Wendy's of Las Vegas, Inc.* in the *Williams* matter.

8. Additionally, in this matter, the parties have voluminous pending discovery that hinges in part on how long the applicable statute of limitations is for both document productions and depositions. Due to the district court's ruling, Petitioners now face the prospect of a discovery period and damages period that is double what even the Nevada Labor Commissioner says is the appropriate period for employers to retain wage records under NRS 608.115 and NAC 608.140.

9. Accordingly, I believe this Court should issue a writ of mandamus or prohibition clarifying that the statute of limitations for claims under the MWA is two-years and compelling the district court to vacate its Order. Alternatively, I would request that this Court consolidate this Petition with the issues raised in *Williams et al. v. The Eighth Judicial District Court of the State of Nevada et al.*, Nevada Supreme Court case no. 66629.

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

Executed in Las Vegas, Nevada, on March 24, 2015.

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: March 24, 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 March 24, 2015, I served the within document:

PETITION FOR WRIT OF MANDAMUS OR PROHIBITION OR, IN THE ALTERNATIVE, 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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Bradley Schrager, Esq.
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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 March 24, 2015, at Las Vegas, Nevada.

/s/ Erin J. Melwak

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Exhibit L

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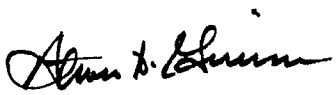

CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

PAULETTE DIAZ, an individual; and LAWANDA GAIL WILBANKS, an individual; SHANNON OLSZYNSKI, and individual; CHARITY FITZLAFF, an individual, on behalf of themselves and all similarly-situated individuals, Plaintiffs, vs. MDC RESTAURANTS, LLC, a Nevada limited liability company; LAGUNA RESTAURANTS, LLC, a Nevada limited liability company; INKA, LLC, a Nevada limited liability company and DOES 1 through 100, Inclusive, Defendants.	Case No. A701633 Dept. No. XVI **DEFENDANTS' OPPOSITION TO PLAINTIFFS' SUPPLEMENTAL BRIEF IN SUPPORT OF THEIR MOTION FOR CLASS CERTIFICATION PURSUANT TO N.R.C.P. 23** **AND** **COUNTERMOTION FOR TEMPORARY STAY OF HEARING ON CLASS CERTIFICATION FOR BRIEFING OF "QUALIFYING HEALTH INSURANCE"** **Hearing Date: August 13, 2015** **Hearing Time: 9:00 a.m.**

Defendants MDC RESTAURANTS, LLC; LAGUNA RESTAURANTS, LLC; and INKA, LLC (hereinafter "Defendants"), by and through their counsel of record, hereby oppose Plaintiffs PAULETTE DIAZ, LAWANDA GAIL WILBANKS, SHANNON OLSZYNSKI, and CHARITY FITZLAFF's (hereinafter "Plaintiffs") Supplemental Brief in Support of their Motion for Class Certification Pursuant to N.R.C.P. 23 and files their Countermotion for Temporary Stay of Hearing

on Class Certification for Briefing of "Qualifying Health Insurance." This Opposition and Countermotion is based on the Memorandum of Points and Authorities below, all papers and files on file herein and any oral argument permitted.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

As a preliminary matter, this Court should stay the continued hearing on Plaintiff's Motion for Class Certification Pursuant to N.R.C.P. 23 for the reasons set forth in Defendants' Motion to Stay Proceedings on Application for Order Shortening Time filed on July 30, 2015. **Defendants' Motion to Stay Proceedings on Application for Order Shortening Time on file herein and incorporated by this reference.**

Alternatively, should that stay not be granted, this Court should stay the continued hearing on class certification for the reasons as stated below in the Countermotion for Temporary Stay of Hearing on Class Certification for Briefing of "Qualifying Health Insurance." In their Supplemental Brief, Plaintiffs are now proffering newly proposed class and subclass definitions that are based on an unsettled question of law as to what "qualifying health insurance" means and a confusion of this Court's order on "provide." This new unsettled question regarding "qualifying health insurance" is in addition to the already pending Petitions for Writ of the meaning of "provide" and the statute of limitations period under the MWA to the Nevada Supreme Court. If anything, the complexities of these multiple unsettled questions of law under the MWA show a stay is paramount to prevent further waste of judicial resources and needless litigation.

Should this Court not grant any stay, then Plaintiffs Supplemental Brief and Motion for Class Certification must be denied. In addition to the arguments provided below, Defendants hereby incorporate in full all of their arguments made previously in their June 25, 2015 Opposition to Class Certification and at the July 9, 2015 hearing. **Defendants' Opposition to Plaintiff's Motion for Class Certification Pursuant to N.R.C.P. 23 and Countermotion to Continue Hearing on Order Shortening Time ("Opposition to Class Certification") on file herein and incorporated by this reference;** ***see also*** **Reporter's Transcript of Plaintiffs' Motion for Class Certification Pursuant to NRCP 23 and Defendant's Opposition of Plaintiff's Motion for Class Certification Pursuant**

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to NRCP 23 and Countermotion to Continue Hearing on Order Shortening Time July 9, 2015 ("July 9, 2015 Hearing Transcript") on file herein and incorporated by this reference. At the July 9, 2015 hearing, this Court noted that it was concerned with making sure that potential class members could be ascertained or identified through a specific class definition. Despite this concern, Plaintiffs plowed ahead with even more expansive and unworkable class and subclass definitions that not only fail to properly identify potential class members, but also create a clearly erroneous use of the word "provide" that is not consistent with this Court's ruling. Accordingly, should the Court not stay this matter, the Court must deny Plaintiffs' Motion for Certification based on these new class and subclass definitions and Defendants' prior arguments made in opposition to certification.

II. FACTS FOR COUNTERMOTION AND OPPOSITION

At the July 9, 2015 hearing, this Court made clear that Plaintiffs' previous class definition was not "specific" enough and did not "adequately identify"[1] the class. **July 9, 2015 Hearing Transcript at 7:2-19 and 14:9-16.** As the Court noted, Plaintiffs' class definition of "All current and former employees of Defendants at all Nevada locations at any time during the applicable period of limitation who were compensated at less than the upper-tier hourly minimum wage set forth in Nev. Const. art XV, § 16" would not exclude certain individuals such as those "individuals that were paid $7.25 an hour who also had health insurance benefits." **July 9, 2015 Hearing Transcript at 10:10-19.** Plaintiffs' rebuttal was that even enrolled individuals would be included because of Plaintiffs' repetitive, authority-less argument that "you can't offer any old thing." **July 9, 2015 Hearing Transcript at 10:20-21, 12:4-5 and 12:8.** After considering this argument, the Court noted that it would ultimately have to make a "determination as a matter of law as to whether or not these plans qualify" and that the class definition should include some language that allows the Court to determine whether or not a particular plan qualifies. **July 9, Hearing Transcript at 17:2-21.** The Court also noted that a subclass would not be necessary if this qualification language was in the class definition. **July 9, Hearing Transcript at 18:7-15.** Although the Court was not instructing

[1] Although the Court used the phrases "adequacy" and "adequately identified", the identification of class members through a class definition runs to the threshold requirement of "ascertainability" and not the Rule 23(a)(4) requirement of "adequacy."

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the parties as to what that language should be, it did provide an example by stating:

> And so it's not -- you don't have -- you don't have to have discovery on what a qualified plan is in order for the class definition to make a statement that, you know what, that the class includes those that were offered a plan that did not meet the qualifications as mandated by the State of Nevada Insurance Commission. Something like that.

July 9, Hearing Transcript at 27:15-21. As such, the Court thoroughly vetted at this hearing that it would need some sort of definitional language that would allow it to make a determination of what qualified health insurance plans were.

Instead of following the Court's guidance regarding definitional language, Plaintiffs proffered the following revised class definition:

> All current and former Nevada employees of Defendants paid less than $8.25 per hour at any time since July 1, 2010, and who were not provided qualifying health insurance pursuant to Nev. Const. Article XV, Section 16 and applicable Nevada statutory and regulatory provisions.

Supplemental Brief in Support of Plaintiffs' Motion for Class Certification Pursuant to N.R.C.P. 23 at 2:5-8. In their revised class definition, Plaintiff did nothing to define what "qualifying health insurance" was or indicate what standard could be used to determine "qualifying health insurance." Further, despite this Court's indication that a subclass would not be necessary, Plaintiffs also proffered the following confusing subclass:

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

Supplemental Brief in Support of Plaintiffs' Motion for Class Certification Pursuant to N.R.C.P. 23 at 3:17-18. In their class definition, Plaintiffs identified their class members as those employees who were "not provided" qualifying health insurance. *Id.* As this Court is aware, it recently defined "provide" under the MWA as "enroll." **July 17, 2015 Notice of Entry of Order on Order Regarding Motion for Partial Summary Judgment on Liability as to Plaintiff Paulette Diaz's First Claim for Relief ("July 17, 2015 Order") on file herein and incorporated by this reference.** Thus, by stating that the <u>subclass</u> is comprised of employees who "did not enroll", Plaintiffs are actually duplicating their <u>class</u> definition of employees who "were not provided" health insurance because this Court has held that "provided" means "enrolled." **July 17, 2015 Order at**

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2:7-9. Accordingly, Plaintiffs' revised class definition and subclass definition fail to provide an ascertainable class or subclass that would be proper for certification.

III. ARGUMENT ON COUNTERMOTION FOR TEMPORARY STAY OF HEARING ON CLASS CERTIFICATION FOR BRIEFING OF "QUALIFYING HEALTH INSURANCE"

The Nevada Supreme Court has held that "[t]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Maheu v. Eighth Judicial Dist. Court*, 89 Nev. 214, 217 (1973) citing *Landis v. North American Co.*, 299 U.S. 248, 254-55 (1936). A court must determine how this can best be done by "weigh[ing] competing interests and maintain an even balance." *Id.* Similarly, the Ninth Circuit has found that courts have broad discretion to control its docket and may stay proceedings where, as here, it is necessary for the proper adjudication of complex litigation. *Mediterranean Enters., Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1465 (9th Cir. 1983) *abrogated on other grounds by Gatta v. Gatta*, 2012 N.J. Super. Unpub. LEXIS 2417 (App. Div. Oct. 26, 2012) (observing that the "trial court possesses the inherent power to control its own docket and calendar"); *see also Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936) (noting "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants"). Exercise of that discretion is justified here.

Proceeding to a class certification motion without clarification of the correct legal standard in this case will virtually guarantee an appeal. Appellate courts in other jurisdictions handling complex class actions have found that a trial court cannot certify a class without first determining the applicable law necessary to decide whether common issues of law predominate. *Washington Mutual Bank, FA v. Superior Court*, 24 Cal. 4th 906, 927 (2001). Further, a class certification order based on improper criteria or erroneous legal assumptions cannot survive legal scrutiny. *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 436 (2000); *Clothesrigger, Inc. v. GTE Corp.*, 191 Cal. App. 3d 605, 612 (1987).

In *Washington Mutual*, the trial court certified a class action without first deciding what law applied to the class members' claims. The Court of Appeal denied the defendant's writ petition, but

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the California Supreme Court reversed, holding that "the decision in this case to order certification of a nationwide class was premised on the faulty legal assumption that choice of law issues need not be resolved as part of the certification process." *Washington Mutual*, 24 Cal. 4th at 927. The Supreme Court further held that "a trial court cannot reach an informed decision on predominance and manageability" without first "determining the applicable law or delving into manageability issues." *Id.*

In this matter, the Court has already indicated that it must make a determination as a matter of law as to "whether or not these plans qualify." **July 9, Hearing Transcript at 17:2-21.** Plaintiffs' attempt to craft a new class definition and subclass definition shows that the issue of "qualifying health insurance" requires additional briefing before this Court to further define that term. In order to prevent further confusion on the issue and to prevent unnecessary litigation, this Court should stay its certification hearing until the term "qualifying health insurance" is clarified as a matter of law. Plaintiffs have presented no reason as to why a temporary stay of the certification hearing would be prejudicial to them. On the other hand, having this Court rule on what "qualifying health insurance" is as a matter of law would promote judicial economy and assist the parties in determining whether an ascertainable class can be defined or not. Accordingly, the certification hearing should be stayed for clarification of what the meaning of "qualifying health insurance."

IV. OPPOSITION TO PLAINTIFFS' SUPPLEMENTAL BRIEF IN SUPPORT OF THEIR MOTION FOR CLASS CERTIFICATION PURSUANT TO N.R.C.P. 23

A. Plaintiffs' Revised Class Definition And Subclass Definition Cannot Be Certified Because The Class And Subclass Are Not Ascertainable.

Should this Court not stay this matter, then the Court should deny Plaintiffs' Motion for Class Certification and the Supplemental Brief in support of that Motion. As noted in Defendants' incorporated Opposition to Class Certification, ascertainability is a threshold matter in which "the court begins with the proposed definition of the class . . . [because] [a]bsent a cognizable class, determining whether Plaintiffs or the putative class satisfy the other Rule 23(a) and (b) requirements is unnecessary." *Robinson v. Gillespie*, 219 F.R.D. 179, 183-184 (D. Kan. 2003). Then, the court must determine whether it is "administratively feasible" to ascertain whether an individual is a

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member of a proposed class. *Ratnayake v. Farmers Ins. Exch.*, 2015 WL 875432, *4 (D. Nev. Feb. 27, 2015). Thus, courts will look to the class definition to determine whether a class is "ascertainable and clearly identifiable" and that properly excludes class members who lack standing to recover on the claims alleged. *Konik v. Time Warner Cable*, 2010 U.S. Dist. LEXIS 136923, 32-33 (C.D. Cal. Nov. 24, 2010) citing *Mazur v. eBay Inc.*, 257 F.R.D. 563, 566 (N.D. Cal. 2009) (Patel, J.) (citing *Lamumba Corp. v. City of Oakland*, 2007 U.S. Dist. LEXIS 81688, 2007 WL 3245282 (N.D. Cal. 2007); *Konik* at 33-35; *see also, McDonald v. Corr. Corp. of Am.*, 2010 U.S. Dist. LEXIS 122674, 7-8 (D. Ariz. Nov. 4, 2010). ***See also* Opposition to Class Certification at 7:7-8:14.**

As another threshold issue, "[s]tanding is a jurisdictional element that must be satisfied prior to class certification." *Lee v. State of Oregon*, 107 F.3d 1382, 1390 (9th Cir. 1997) (emphasis added); *see also Henry v. Circus Circus Casinos, Inc.*, 223 F.R.D. 541, 543 (D. Nev. 2004) (same). A litigant who fails to establish standing may not "seek relief on behalf of himself or any other member of the class." *Id.* 895 F.2d at 1250 (quoting *O'Shea v. Littleton*, 414 U.S. at 494).

Here, Plaintiffs' revised class definition does not allow this Court to ascertain nor clearly identify potential class members with standing. Plaintiffs have failed to include language or a standard by which this Court can determine what "qualifying health insurance" is or determine whether a group of employees under each health insurance plan belongs in the class. Instead, Plaintiffs have simply used the term "qualifying health insurance" as-is under the unsupported presumption that none of the Defendants' health insurance plans were "qualifying." Therefore, Plaintiffs' proposed class definition fails to properly include a means to identify what class members should be included or excluded based on the health plans at issue.

Additionally, Plaintiffs' subclass definition further confuses identification of class members as it appears duplicative of the class definition. The Court has recently clarified that under the MWA, "provide" means "enroll." **July 17, 2015 Order at 2:7-9.** Plaintiffs seem to imply that the class definition of "not provided" employees is different than its subclass definition of "not enroll" employees by also referring to the latter subclass by the even more confusing moniker of a "Non-Acceptance Class." Plaintiffs' continues to insist on using vague terms that can be interpreted in

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different ways.

As the two definitions stand now, there is no meaningful distinction between the two. Accordingly, this Court should deny the certification of the Class and Subclass proposed by Plaintiffs.

B. Plaintiffs' Revised Class Definition And Subclass Definition Cannot Be Certified Because They Do Not Cure The Failure To Meet The Rule 23(a) Certification Requirements.

In their Supplemental Brief, Plaintiffs then tout their vague and confusing "Non-Acceptance Class or Subclass" as the new cure-all to all of their Rule 23(a) requirements. Plaintiffs' subclass of non-enrolled employees does nothing to cure Plaintiffs' failure to meet their burden in showing commonality, typicality, predominance, superiority and adequacy in addition to the failure to meet the ascertainability threshold explained above.

Under commonality, Plaintiffs' revised class and subclass definitions do not change the fact that enrollment or declination in health insurance and determination of qualified health insurance is a highly individualized inquiry as shown by Plaintiffs' own deposition testimony. **Opposition to Class Certification at 14:4-16:5.** Similarly, Plaintiffs have failed to show typicality because of these individualized differences in Plaintiffs' claims and resultant defenses. **Opposition to Class Certification at 17:7-20.** Plaintiffs also fail to show predominance and superiority because of the individualized inquiries needed and the failure to show that these claims would best be resolved through class treatment. **Opposition to Class Certification at 18:10-21:4.** Under adequacy, Plaintiffs' deposition testimony exemplified Plaintiffs' inadequacy to act as class representatives by having no familiarity with the class claims, having an incorrect belief of claims or having knowledge of claims derived almost exclusively from counsel. **Opposition to Class Certification at 22:5-25:22.**

Plaintiffs' revised class and subclass definitions do nothing to cure these deficiencies in which this Court must conduct a "rigorous" analysis. *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2551; *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982). Accordingly, Plaintiffs' Motion should be denied as they cannot meet the requirements for certification.

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IV. CONCLUSION

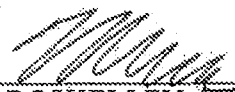
For all the reasons set forth above, this Court should stay all proceedings based on Defendants' Motion to Stay Proceedings on Application for Order Shortening Time.

Alternatively, this Court should grant Defendants' Countermotion to Stay Hearing on Class Certification for Briefing of "Qualifying Health Insurance."

Further, should this matter not be stayed, then the Court should deny Plaintiffs' Supplemental Brief in Support of their Motion for Class Certification Pursuant to N.R.C.P. 23 and the Plaintiffs underlying Motion for Class Certification Pursuant to N.R.C.P. 23.

Dated: July 31, 2015

Respectfully submitted,



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PROOF OF SERVICE

I am a resident of the State of Nevada, over the age of eighteen years, and not a party to the within action. My business address is 3960 Howard Hughes Parkway, Suite 300, Las Vegas, Nevada 89169. On July 21, 2015, I served the within document:

DEFENDANTS' OPPOSITION TO PLAINTIFFS' SUPPLEMENTAL BRIEF IN SUPPORT OF THEIR MOTION FOR CLASS CERTIFICATION PURSUANT TO N.R.C.P. 23

AND

COUNTERMOTION FOR TEMPORARY STAY OF HEARING ON CLASS CERTIFICATION FOR BRIEFING OF "QUALIFYING HEALTH INSURANCE"

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

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Bradley Schrager, Esq.
Daniel Bravo, Esq.
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I declare under penalty of perjury that the foregoing is true and correct. Executed on July 21, 2015, at Las Vegas, Nevada.

Erin Melwak

Firmwide:134921761.1 081404.1002

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Exhibit K

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EIGHTH JUDICIAL DISTRICT COURT

IN AND FOR CLARK COUNTY, STATE OF NEVADA

PAULETTE DIAZ; LAWANDA GAIL WILBANKS; SHANNON OLSZYNSKI; and CHARITY FITZLAFF, all on behalf of themselves and all similarly-situated individuals, Plaintiffs, vs. MDC RESTAURANTS, LLC; LAGUNA RESTAURANTS, LLC; INKA, LLC; and DOES 1 through 100, Inclusive, Defendants.	Case No.: A701633 Dept. No.: XVI **SUPPLEMENTAL BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION PURSUANT TO N.R.C.P. 23** Hearing Date: August 13, 2015 Hearing Time: 9:00 a.m.

COME NOW Plaintiffs, by and through their attorneys of record, and here supplement their motion for an order certifying this action as a class action pursuant to N.R.C.P. 23. The supplemental brief is based on the Memorandum of Points and Authorities below, the papers and exhibits on file, the Declaration of Bradley S. Schrager, Esq. (**Exhibit 1**) and any oral argument this Court sees fit to allow at hearing on this matter.

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MEMORANDUM OF POINTS AND AUTHORITIES

To avoid repetitive briefing, Plaintiffs incorporate the arguments and evidence submitted in support of their original Motion for Class Certification, with the addition of the following:

I. REVISED CLASS DEFINITION

Plaintiffs propose to represent the following Class:

> **All current and former Nevada employees of Defendants paid less than $8.25 per hour at any time since July 1, 2010, and who were not provided qualifying health insurance pursuant to Nev. Const. Article XV, Section 16 and applicable Nevada statutory and regulatory provisions.**

Plaintiffs submit that the revised definition captures and describes the target Class with greater precision and specificity than the original definition, as it zeroes in upon those who were paid below the upper-tier minimum wage under the Minimum Wage Amendment—unlawfully, due to not having been provided qualifying health insurance under any and all legal provisions governing same.

Plaintiffs have included the date of July 1, 2010, because that was the date upon which the upper-tier wage increased to $8.25 per hour in Nevada, the level at which it has remained ever since. *See* **Exhibit 2**, an accurate copy of the Nevada Labor Commissioner's Minimum Wage 2010 Annual Bulletin (April 1, 2010). Previous to that date, the upper-tier wage had been $7.55 per hour. In discovery and at hearings, Defendants stated that they had been paying employees at the $7.55 hourly rate, but did not increase wages to $8.25 per hour after July 1, 2010, deciding instead to attempt to qualify to pay at least the lower-tier rate by offering health benefits as mandated by the Amendment. *See* **Exhibits 3** and **4**, accurate copies of Defendant MDC's and INKA's respective responses to Plaintiffs' Interrogatory No. 1 ("... all [Defendant] employees were paid at least $7.55 per hour prior to July 2010."); **Exhibit 5**, an accurate copy of Defendant Laguna's response to Plaintiffs' Interrogatory No. 1 ("... all Laguna employees were paid at least $7.55 per hour prior to January 2010."); **Exhibit 6**, an accurate copy of pertinent portions of the January 28, 2015 Discovery Commissioner Hearing Transcript at 8:11-15 ("... all employees were paid 7.55, which met the upper tier minimum wage up to July of 2010 ..."). Plaintiffs' investigation has borne out this course of Defendants' conduct, and therefore Plaintiffs accept Defendants' representation in

this respect.

This case, as the Court knows, will come down to the ultimate question of whether Defendants did, in fact, qualify to pay less than $8.25. Because July 1, 2010 is less than four years before the filing of the complaint in this action (May 30, 2014), all claims in this action fall within this Court's previous determination of the appropriate statute of limitations in this matter, and tolling or other mechanisms that may extend that period are unlikely to apply.

All aspects of Plaintiffs' original motion regarding the necessary elements of N.R.C.P. 23 continue to apply to the revised Class definition above, and they are incorporated fully herein.

II. PROPOSED N.R.C.P. 23(C)(4) CLASS OR SUBCLASS

Plaintiffs further propose the certification of a second Class (the "Non-Acceptance Class") or Subclass, pursuant to N.R.C.P. 23(c)(4)(A) and (B). Under the rule, in the Court's discretion, "[w]hen appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly." N.R.C.P. 23(c)(4).

Here, Plaintiffs propose either a secondary Non-Acceptance Class under N.R.C.P. 23(c)(4)(A), or in the alternative a Subclass under 23(c)(4)(B) that is a divisible portion of the entire, revised Class. The Non-Acceptance Class or Subclass is defined as follows:

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

As Defendants' counsel noted at the July 9, 2015 hearing, the Court's ruling that merely offering health insurance is insufficient to meet the requirements of the Minimum Wage Amendment for paying employees below $8.25 per hour means this case now features an added layer. The revised Class definition, *supra* at 2, targets all those who were underpaid the lawful minimum wage, whether they accepted Defendants' health benefits plans or not, because Plaintiffs contend that none of those plans constituted "qualifying health insurance." The Non-Acceptance Class or Subclass, however, targets those within the revised Class who <u>did not accept</u> Defendants' health benefits at any time, and therefore were unquestionably not paid lawfully if they received less than $8.25 per hour at any time since July 1, 2010.

The Non-Acceptance Class or Subclass represents a very large proportion of the revised Class. Documents and admissions obtained in discovery indicate that of the approximately 2,545 members of the proposed revised Class of underpaid employees, at least **79.4%**, or **2,022**, of those employees did not accept Defendants' health benefits at any time. *See* **Exhibit 7** and **8**, accurate copies of pertinent excerpts of Defendants' Fifth and Seventh Supplemental Disclosure Statements.[1] All 2,545 underpaid employees will be members of the overall Class; roughly 2,022 of those also will be members of the Non-Acceptance Class or Subclass. This would leave approximately 523 Class members still within only the revised Class definition. This group includes Plaintiff Fitzlaff, the only named Plaintiff who did accept Defendants' health benefits plan for at least a portion of her employment, while declining it for other periods during which she was paid less than $8.25 an hour.

Certification of the Non-Acceptance Class or Subclass is appropriate given the particular posture of the action, and is in keeping with the Court's determination of the legal issues thus far. Plaintiffs Diaz, Wilbanks, and Olszynski seek appointment by the Court as representatives of the Non-Acceptance Class or Subclass.

Certification of the 23(c)(4) Non-Acceptance Class or Subclass also has the virtue of ensuring that any potential appellate review of the provide-versus-offer issue will not disturb the conduct of this class action as to the ultimate question of whether Defendants qualified to pay <u>any employee</u> less than $8.25 per hour, while still providing an efficient resolution avenue for the vast

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[1] In Defendants' Seventh Supplemental Disclosure Statement (**Exhibit 8**), Defendants stated that, from July 1, 2010 through December 31, 2013, a total of <u>413 employees</u> were enrolled in their benefits plan. *See* **Exhibit 8** at MDC001014.

In Defendants' Fifth Supplemental Disclosure Statement (**Exhibit 7**), Defendants identify that, in December 2014, a total of 74 MDC employees and 7 INKA employees were enrolled in Defendants' benefits plan—a total of <u>81 employees</u>. *See* **Exhibit 7** at MDC001004. As of March 2015, Defendants identified a total of 25 MDC employees and 4 INKA employees that were enrolled in Defendants' health benefits plan—a total of <u>29 employees</u>. *See* **Exhibit 7** at MDC001005.

Thus, at most, and assuming that none of those identified enrollees is counted more than once in Defendants' calculations, <u>523 employees</u> were enrolled in Defendants' benefits plan during the Class and Subclass periods, through March of 2015.

majority of Class members who did not accept Defendants' benefits plans. Additionally, and also arguing for the establishment of the Non-Acceptance Class or Subclass, in the unlikely event that the Court determines Defendants' health benefits plans meet legal requirements for Defendants to pay employees at the lower-tier wage rate, the existence of the Non-Acceptance Class or Subclass will ensure that those employees who did not accept those benefits may still proceed with their claims.

A. Rule 23(a) Requirements

The proposed Non-Acceptance Class or Subclass and its representatives also meet all necessary elements of N.R.C.P. 23(a) for certification.

1. Numerosity

Asked to state the number of employees enrolled in their successive benefits plans over the time covered by this action, Defendants responded with lists of enrolled employees totaling 523 over the Class period. *See* **Exhibits 7, 8**; *supra* note 1. Given that Defendants identified 2,545 total employees paid less than $8.25 per hour since July 1, 2010, that equates to least 2,022 such employees who did not accept Defendants' health benefits plans. *Id.* The Non-Acceptance Class or Subclass, therefore, represents 79.5% of the whole revised Class, and easily satisfies the numerosity requirement for certification. *See* Pls. Mot. for Class Certification at 6-8 (discussing standards for numerosity); Pls. Reply in Support of Mot. for Class Certification at 7-8 (same).

2. Commonality

Much as the revised Class coheres around the common question of whether Defendants' health benefits plans qualified them to pay employees below the upper-tier minimum wage at all, under any circumstances, the Non-Acceptance Class or Subclass coheres around the single common question of whether, by not accepting and receiving Defendants' health benefits, these class members are entitled to, and Defendants are liable to them for, back pay and damages on that basis alone. *See* Pls. Mot. for Class Certification at 8-11 (discussing standards for commonality); Pls. Reply in Support of Mot. for Class Certification at 5-7 (same). In a single stroke, the answer to that question can be achieved for each and every member of the Non-Acceptance Class or Subclass, just as it was for Plaintiff Diaz in the Court's ruling on her Motion for Partial Summary

Judgment on that question.

3. Typicality

Plaintiffs Diaz, Wilbanks, and Olszynski are typical of the proposed Non-Acceptance Class or Subclass, as Defendants admit these Plaintiffs were all paid less than $8.25 per hour, and each alleges that she did not accept Defendants' health benefits plans. *See* Defs. Ans. to Amend. Compl. ¶¶ 14-17, 24, 27, 30, 33; Pls. Mot. for Class Certification at 11; Pls. Mot. for Class Certification, Ex. 1 (Diaz Decl. ¶¶ 6, 8), Ex. 2 (Olszynski Dec. ¶¶ 6, 7), Ex. 3 (Wilbanks Decl. ¶¶ 7, 9). The claims of the Non-Acceptance Class or Subclass representatives, therefore, arise from the same facts, events, and conduct that give rise to the claims of the its other members, and are based on the same legal theories as the other members' claims. *See* Pls. Mot. for Class Certification at 11-12 (discussing standards for typicality); Pls. Reply in Support of Mot. for Class Certification at 7 (same). Typicality is satisfied.

4. Adequacy

Plaintiffs Diaz, Wilbanks, and Olszynski are factually within the definition of the Non-Acceptance Class or Subclass, as demonstrated above. Further, there are no conflicts among themselves, the members of the proposed Non-Acceptance Class or Subclass, or their counsel. Each has already demonstrated a willingness to pursue her claims on behalf of the Class, and similarly to the proposed Non-Acceptance Class or Subclass. *See* Pls. Mot. for Class Certification, Exs. 1-4. Nothing more is required of them to meet the adequacy requirements of Rule 23(a). *See* Pls. Mot. for Class Certification at 12-13 (discussing standards for adequacy); Pls. Reply in Support of Mot. for Class Certification at 8-11 (same); *see generally* Pls. Opp. to Defs. Mot. to Disqualify.

B. Rule 23(b)(3) Requirements

The proposed Non-Acceptance Class or Subclass and its representatives also meet all necessary elements of N.R.C.P. 23(b)(3) for certification.

1. Predominance

Predominance is satisfied by the Non-Acceptance Class or Subclass, because when considering only the question of Defendants' liability based upon Non-Acceptance Class or Subclass members' declination of health benefits, its members "are sufficiently cohesive to warrant

adjudication by representation" and "the relationship between the common and individual issues" inherent in the Non-Acceptance Class or Subclass definition clearly argues that resolving Defendants' liability to this group in a common fashion overwhelms any individual issues that might be suggested. *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1019 (9th Cir. 2011). Because the Court has already answered the question of whether merely offering health insurance is sufficient to pay employees less than $8.25 per hour, the common question dominates and will determine the outcome of the Non-Acceptance Class's or Subclass's claims in this action. The predominance factor, per Rule 23(b)(3), is satisfied. *See* Pls. Mot. for Class Certification at 13-14 (discussing standards for predominance); Pls. Reply in Support of Mot. for Class Certification at 11-12 (same).

2. Superiority

As with the revised, entire Class, which numbers more than 2,500 employees of Defendants, the Non-Acceptance Class or Subclass, numbering at least 2,022 employees, presents a straightforward argument for superiority. *See* Pls. Mot. for Class Certification at 14-15 (discussing standards for superiority); Pls. Reply in Support of Mot. for Class Certification at 12-13 (same). The small size of individual claims effectively precludes individual action. *Local Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152 (9th Cir. 2001). Also, as with the revised Class, for minimum wage employees it is economically infeasible for proposed Non-Acceptance Class or Subclass members to prosecute individual actions of their own given the relatively small amount of damages at stake for each individual, and the alternative of the group "filing hundreds of individual lawsuits that could involve duplicating discovery and costs that exceed the extent of the proposed class members' individual injuries." *Wolin v. Jaguar Land Rover North America, LLC*, 617 F.3d 1168, 1176 (9th Cir. 2010). The superiority of the class action mechanism for resolving the claims of the Non-Acceptance Class or Subclass is manifest.

III. CONCLUSION

Based upon the foregoing, the requirements of Rules 23(a) and 23(b)(3) are satisfied for both the proposed Class and the proposed Non-Acceptance Class or Subclass. Plaintiffs request that the Court grant their Motion for Class Certification, certify the case as a class action using the

revised definition proposed herein, and establish the 23(c)(4) Non-Acceptance Class or Subclass as described herein. Plaintiffs request that all named Plaintiffs be appointed to serve as representatives of that Class, and that Ms. Diaz, Ms. Wilbanks, and Ms. Olszynski be appointed as representatives of the Non-Acceptance Class or Subclass, with their attorneys and firm designated as counsel for all.

DATED this 16th day of July, 2015.

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

By: */s/ Bradley Schrager*

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of July, 2015, a true and correct copy of **SUPPLEMENTAL BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION PURSUANT TO N.R.C.P. 23** was served by electronically filing with the Clerk of the Court using the Wiznet Electronic Service system and serving all parties with an email-address on record, pursuant to Administrative Order 14-2 and Rule 9 of the N.E.F.C.R.

By: */s/ Dannielle Fresquez*
Dannielle Fresquez, an Employee of
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Exhibit J

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6 DISTRICT COURT

7 CLARK COUNTY, NEVADA

8 * * * * *

9 PAULETTE DIAZ,)
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10 Plaintiff,)
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11 vs.)
)
12 MDC RESTAURANTS LLC,)
)
13 Defendant.)
_____)

14

15 REPORTER'S TRANSCRIPT
OF
PLAINTIFFS' MOTION FOR CLASS CERTIFICATION PURSUANT TO
16 NRCP 23; AND DEFENDANTS' OPPOSITION TO PLAINTIFFS'
MOTION FOR CLASS CERTIFICATION PURSUANT TO NRCP 23 AND
17 COUNTERMOTION TO CONTINUE HEARING ON ORDER SHORTENING
TIME

18

19 BEFORE THE HONORABLE JUDGE TIMOTHY C. WILLIAMS

20 DISTRICT COURT JUDGE

21

22 DATED THURSDAY, JULY 9, 2015

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24

25 REPORTED BY: PEGGY ISOM, RMR, NV CCR #541

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1 **LAS VEGAS, NEVADA; THURSDAY, JULY 9, 2015**
2 **9:36 A.M.**
3 **P R O C E E D I N G S**
4 *** * * * * * ***
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6 THE COURT: Diaz v MDC.
7 MR. PAEK: Good morning. Montgomery Paek of
8 Littler Mendelson for the defendant.
9 MR. BLAKEY: Kathryn Blakey, Littler Mendelson
09:36:31 10 on behalf of the defendants.
11 MR. SCHRAGER: Good morning, your Honor.
12 Bradley Schrager for plaintiffs.
13 MR. SPRINGMEYER: Don Springmeyer for
14 plaintiff. Good morning.
09:36:39 15 MR. BRAVO: Daniel Bravo for plaintiffs. Good
16 morning.
17 THE COURT: All right. Good morning to
18 everyone. And this is plaintiffs' motion for class
19 certification pursuant to Rule 23.
09:36:51 20 MR. SCHRAGER: Thank you, your Honor.
21 THE COURT: Is that correct, sir?
22 MR. SCHRAGER: Yes, your Honor. By way of
23 introduction we find this to be among the range of
24 possible class certification decisions that would come
09:37:06 25 before you a fairly straightforward one, and we tried

09:37:08 1 to demonstrate that in our pleadings that from A to B
2 is a fairly short trip.
3 So your Honor is familiar with the basic
4 allegations in the complaint. We've been here before
09:37:19 5 in front of you for a number of hearings. It has to do
6 with the payment of the minimum wage under the minimum
7 wage amendment.
8 Now we've asked for certification of a class
9 action of all current and former employees of
09:37:33 10 defendants and at all Nevada locations at any time
11 during the applicable period of limitation who were
12 compensated at less than the upper tier hourly minimum
13 wage set forth in the minimum wage amendment.
14 Now reading that now that sort of perfectly
09:37:49 15 captures in a lawyerly way exactly who we're trying to
16 focus the class upon. All those people that defendants
17 paid less than 8.25 going back four years from the,
18 from the filing of the complaint. I certainly, you
19 know, reading that now in thinking about a potential
09:38:05 20 notice to the class understand that there's maybe a
21 more simple way to put that as far as due process
22 concerns so that individuals will know very easily
23 whether they're in or out of the class and whether they
24 wish to opt out of the class and exercise those rights.
09:38:21 25 So we certainly wouldn't be opposed to putting

09:38:23 1 in the actual amount, for example, so that someone can
2 look at it and say, hey, I wasn't paid 8.25. I must be
3 part of that. I think now that we have a statute of
4 limitations determination, it's -- we wouldn't object
09:38:36 5 to putting in the actual date --
6 THE COURT: I'm not really as concerned. I
7 mean, as far as statute of limitations are concerned, I
8 mean, there's a tolling provision when you file a class
9 action. I get that --
09:38:46 10 MR. SCHRAGER: Okay.
11 THE COURT: -- as far as putative class
12 members are concerned and its impact on the -- the
13 impact on the statute of limitations.
14 Here's my real concern, and it was addressed
09:38:56 15 by the defense in this matter:
16 One of the primary focuses I have to really
17 look at when it comes to class action litigation, and I
18 think it's really often overlooked, and it's probably
19 one of the most important components that is the class
09:39:14 20 definition, you know. And so the defense is taking a
21 position, they're saying, Look, Judge, No. 1 -- and, I
22 guess, this is going to their adequacy argument based
23 upon another motion that's currently pending.
24 One of the things I -- that always served me
09:39:31 25 very well when it comes to class action cases from a

09:39:34 1 decision-making standpoint is this, and understand I
2 think I've only had two successful class action
3 certification in construction defect litigation which
4 is extremely difficult to do.
09:39:45 5 MR. SCHRAGER: Yes. It's a slightly different
6 situation.
7 THE COURT: It's a much more difficult
8 burden --
9 MR. SCHRAGER: Right.
09:39:52 10 THE COURT: -- because of Chapter 40 and
11 specifically what Chapter 40 relates to and the lack of
12 generalized proof and the like because of the, you
13 know, they're single family homes and homes are unique
14 and so on and so, so it's very tough to class certify
09:40:10 15 those.
16 MR. SCHRAGER: Yeah.
17 THE COURT: However, I've done two, and they
18 both withstood scrutiny of our Nevada Supreme Court.
19 But one of them that settled. I can kind of
09:40:20 20 talk about it in certain respects. One of the big
21 concerns I had in the beginning was class definition.
22 I made them go back and work on it. Lo and behold,
23 they tweaked it some, and ultimately I certified it,
24 but when it certified, it withstood scrutiny of the
09:40:37 25 Nevada Supreme Court. Does everybody understand that?

09:40:38 1 Because they sent it back to me and the case resolved.
2 So when I look at this definition, I think we
3 have to be really more specific. So like I said
4 before, the class members know specifically in looking
09:40:50 5 at this whether they meet the requirement or not.
6 Secondly, and this is the challenge it appears
7 to be from the defense, they're saying Look,
8 apparently -- and understand I have not delved into
9 this at all from a decision-make standpoint, but it's
09:41:07 10 their position, Look, I think this is probably the
11 bottom line, there's -- the current class member
12 doesn't meet the adequacy requirement. That's
13 basically what it is. You know.
14 And so I'm looking at it. And before we go
09:41:19 15 down this road, I think the most important component --
16 because I look at commonality, typicality, and all
17 those different components and in general terms I don't
18 see much of a problem. However, I do see a problem
19 with the class definition.
09:41:41 20 MR. SCHRAGER: Okay. Well, let me sort of
21 describe sort of how and why we're focusing on the
22 people described in our class definition, and then we
23 can talk about what, you know, in what ways we may
24 improve for the benefit of certification.
09:41:57 25 THE COURT: Because what I do, I just tell you

09:41:58 1 this. I don't necessarily get involved in crafting the
2 class definition.
3 MR. SHRAGER: Sure.
4 THE COURT: I just, you know, if you propose
09:42:04 5 one, and you want to amend it and be more specific, I
6 review it and say this is fine.
7 MR. SHRAGER: Right.
8 THE COURT: So I don't really get involved in
9 that.
09:42:13 10 MR. SHRAGER: Right.
11 THE COURT: If you understand what I'm trying
12 to say.
13 MR. SCHRAGER: Absolutely. Absolutely.
14 THE COURT: Because I don't -- because you
09:42:15 15 know what I think, everybody forgets when it comes to
16 class action litigation. Once I certify the class, the
17 role of the trial judge changes. Everyone forgets
18 that. It does. So it's still adversarial, but I have
19 to make sure that the class is being adequately
09:42:32 20 represented.
21 MR. SCHRAGER: Yeah.
22 THE COURT: Right.
23 MR. SCHRAGER: Absolutely.
24 THE COURT: When I approve it -- when we have
09:42:36 25 a pre -- I don't know if this case will ever settle,

09:42:40 1 but even going through that process we have the first
2 level of the -- where we approve the preliminarily
3 approval of the settlement. We have a big hearing.
4 Everybody comes in. Homeowners can come in and those
09:42:54 5 types of things. Maybe it gets tweaked. Then we have
6 the final approval hearing sometime later after the opt
7 out notices and all those things are submitted.
8 And so the trial judge takes a different role.
9 MR. SCHRAGER: Yeah.
09:43:03 10 THE COURT: Just --
11 MR. SCHRAGER: And, frankly, even if we were
12 to stipulate or to come up with a settlement class,
13 your Honor would still have to make the same --
14 THE COURT: Absolutely.
09:43:14 15 MR. SCHRAGER: -- requisite findings. And
16 they would have to withstand scrutiny and all those
17 things.
18 THE COURT: Yeah. In Re Kitec has been going
19 on for nine years. It's still ongoing.
09:43:21 20 MR. SCHRAGER: Well, we crafted the class
21 definition going after this particular circle.
22 THE COURT: Right.
23 MR. SCHRAGER: All those that were paid under
24 8.25 since four years prior to the filing of the
09:43:33 25 complaint which has been, what, May 30, 2010. The

09:43:36 1 reason we did that is that the only reason, the only
2 way that defendants could pay anyone less than 8.25
3 during that period, is if they provided qualifying
4 health benefits. That's indisputable. So that anyone
09:43:51 5 paid less than an upper tier necessarily would be part
6 of the class seeking to determine whether or not they
7 were provided qualifying benefits.
8 That's just sort of the basic gravamen of the
9 entire class.
09:44:07 10 THE COURT: But what about members -- what
11 about -- are there individuals that were paid 7.25 an
12 hour who also had health insurance benefits?
13 MR. SCHRAGER: Yes. Yes, there were.
14 THE COURT: So they wouldn't be part of the
09:44:18 15 class.
16 MR. SCHRAGER: They would, your Honor. Here's
17 the reason for that.
18 THE COURT: Why would they be part of the
19 class?
09:44:22 20 MR. SHRAGER: Because you can't just provide
21 any old thing and call it insurance. The thing you are
22 offering, whether you accepted it, whether you
23 enrolled, whether you declined it, whether you rejected
24 it, whether you were offered, whether you were
09:44:33 25 provided, the thing itself has to meet a certain

09:44:36 1 standard.

2 Our allegations, and what we'll be showing to

3 this Court, is that the thing that was offered,

4 provided, accepted, rejected, enrolled in, not enrolled

09:44:44 5 in was junk. It doesn't meet any standard of what

6 health insurance is under the administrative

7 regulations, under state law for insurance, under

8 federal law. There is -- what we're saying basically

9 is the thing you're offering can in no circumstances

09:45:00 10 qualify you to pay less than 8.25. So that the entire

11 class which sort of they've -- they've told us that

12 they've paid 2500 people in those four and a half years

13 less than 8.25.

14 The gravamen of the complaint is you had no

09:45:15 15 right to pay them less than 8.25 under any

16 circumstances whether they took it or they didn't take

17 it, whether you didn't offer it to them and just paid

18 them 7.25, or whether you said -- you sat down with

19 them and went over it for three hours and talked about

09:45:28 20 it, if the thing itself doesn't qualify, you can't pay

21 less than 8.25. There are standards to the insurance.

22 Right. It has to be health insurance which means it

23 has to meet group health insurance statutes in this

24 state.

09:45:43 25 All right. There are administrative

09:45:44 1 regulations saying what group health insurance has to
2 do. If you don't do those things, then, your Honor,
3 the loophole that is opened is akin to something we
4 talked about a couple weeks ago. You can offer me any
09:45:56 5 old thing. You call it health benefits. And if I take
6 it, you get to pay me 7.25. That's not how the
7 constitution operates.
8 You can't offer any old thing. That's the
9 entire question facing the class. We're not even
09:46:14 10 interesting at the moment, we're concerned about the
11 10 percent rule. There are two ways in which health
12 insurance has to qualify in order to pay someone less
13 than 8.25 currently in the state. It has to meet the
14 standards for health insurance, and it has to cost the
09:46:27 15 employee less than 10 percent of their take home pay,
16 of their wage from the employer.
17 We're not really even contesting the
18 10 percent rule. The problem with their health
19 insurance is it's not health insurance.
09:46:39 20 And so that no matter whether someone accepted
21 it or didn't, the thing they had to be offered had to
22 qualify under applicable law, and theirs doesn't.
23 That's our allegation.
24 THE COURT: Okay. How does that fit in the
09:46:52 25 class definition?

09:46:54 1 MR. SHRAGER: Well, you know, this class
2 definition points to anybody paid less than 8.25,
3 right.
4 Defendants only offered one plan at any one
09:47:05 5 time. None of their plans qualify. Therefore, every
6 single person who was offered or provided health
7 insurance and paid 7.25 has a claim against defendants.
8 I mean, I don't know how to be -- you know, how -- at
9 the risk of repeating myself, you can't simply offer
09:47:27 10 junk. And so --
11 THE COURT: I mean, I understand that. But
12 I'm sitting here. I mean, I understand that we have as
13 it relates to insurance and how it's regulated by the
14 states and how there's specific requirements for a plan
09:47:42 15 to even qualify as insurance. I get that.
16 MR. SCHRAGER: Sure.
17 THE COURT: But I'm looking at it from this
18 perspective: What does that -- what impact does that
19 have on the class definition? Because in this case,
09:47:54 20 for example, I mean, you're telling me that there's
21 2500 potential -- the class could be as high as or as
22 large as 2500 members, right.
23 MR. SCHRAGER: Correct.
24 THE COURT: I get that. I mean, numerosity
09:48:06 25 under federal law 40 or more.

09:48:08 1 MR. SCHRAGER: Right.
2 THE COURT: I mean, so what I'm trying to say
3 is this: I understand the application of Rule 23(a)
4 and (b). I get that. To me it appears that the real
09:48:17 5 issue as far as this request is concerned, because I
6 can say right now, 2500 meets the numerosity
7 requirement.
8 MR. SCHRAGER: Sure.
9 THE COURT: You know, so, but I'm focusing on
09:48:28 10 this class definition. Shouldn't there be something in
11 here regarding qualified insurance plans? Or, I mean,
12 I don't know. I'm just thinking of potential issues
13 here from a class definition standpoint because that's
14 my big concern. Because if we have a class, I want to
09:48:45 15 make sure the class is adequately identified. That's
16 the real issue for me.
17 MR. SCHRAGER: Yeah.
18 THE COURT: And then, if we have a class
19 that's very clear, then I don't have to worry about
09:48:57 20 Supreme Court scrutiny because I feel fairly
21 comfortable or confident because there will be a writ
22 that the writ will withstand the challenge.
23 MR. SCHRAGER: Sure. Well, let me approach
24 that this way. The way in which it's written
09:49:12 25 identifies every person who would have a claim because

09:49:14 1 they were paid less than 8.25, right. It may not do so
2 perfectly artfully, but it does do that.
3 Anyone paid less than 8.25 must have been
4 provided health insurance. We claim in the complaint
09:49:28 5 they weren't provided qualifying health insurance.
6 Those are the allegations of the complaint that, you
7 know, much like a motion to dismiss at this particular
8 stage your Honor accepts more or less as true.
9 If your Honor is saying there are more artful
09:49:41 10 and more specific ways to say that, we can do that.
11 But the circle we've drawn necessarily includes
12 everyone they've underpaid and everyone who would have
13 the exact same claim as the named plaintiffs. That's
14 what covers typicality, for example. That's what
09:50:00 15 covers commonality. At one stroke the question of does
16 your health insurance qualify as insurance to pay
17 anyone less than 8.25 answers everybody's claim, all
18 four of the named plaintiffs and all 2500 of the
19 putative class members.
09:50:18 20 So is there a way to write the class
21 definition to discuss qualifying health insurance? We
22 certainly can do that. I don't know that it's
23 necessary given the fact that it's inherent in the
24 actual definition.
09:50:34 25 Now there are also ways --

09:50:35 1 THE COURT: But don't -- but one thing -- I
2 mean, how much discovery has been done on this specific
3 issue to date?
4 MR. SCHRAGER: The specific issue of being...
09:50:43 5 THE COURT: Qualified health insurance.
6 MR. SCHRAGER: We have all the plans. We've
7 analyzed them. You know, at this point we've been
8 doing class discovery. We have admissions from them
9 that they at least offered year by year, the same plan
09:50:57 10 to everybody in the class.
11 There was no one who would be in the class who
12 was offered something different. They were all offered
13 the same thing. All right. If I paid you -- or if
14 they paid you less than 8.25, they offered you plan X.
09:51:09 15 If plan X fails, they owe you a dollar an hour. So we
16 have --
17 THE COURT: But don't we -- but we don't know
18 for sure, do we, whether there are some employees that
19 were paid less than the 8.25 who were given a
09:51:27 20 "qualified plan". We don't know that with absolute
21 certainty, do we?
22 MR. SCHRAGER: There are no -- the way to
23 frame that is there are no employees who were paid less
24 than 8.25 who were offered some other plan than the
09:51:42 25 plans they've given us, and the plans they've given us

09:51:44 1 do not qualify.
2 THE COURT: Well, see, I mean, here's the
3 thing, and this is kind of how I'm looking at it.
4 That's why I'm wondering whether or not there should be
09:51:55 5 some language regarding a qualified insurance plan in
6 the class definition because, I mean, ultimately, I'm
7 going to have to make, I would think, a determination
8 as a matter of law as to whether or not these plans
9 qualify.
09:52:07 10 MR. SCHRAGER: Absolutely.
11 MR. SPRINGMEYER: Right.
12 THE COURT: So it seems to me then if that's a
13 condition to being a class member, that has to be in
14 the class definition some way some how. Because
09:52:20 15 regardless of -- say hypothetically, there's six plans
16 that were given over a certain time period or offered,
17 right. And I've reviewed all six plans, and say
18 potentially, I might decide five don't qualify, one
19 does. So if we have qualifications regarding the
09:52:39 20 insurance in the class definition, it wouldn't have to
21 be changed as far as who --
22 MR. SCHRAGER: Understood.
23 THE COURT: You see what I'm saying?
24 MR. SCHRAGER: I do. I do. And you know, one
09:52:49 25 of the things we could talk about here is that under

09:52:55 1 Rule 23(c)(4) the Court has the authority, either on
2 motion of the parties or sua sponte, to create
3 subclasses.
4 THE COURT: Yeah, I've done that.
09:53:05 5 MR. SCHRAGER: That may, in fact, speak to
6 some of the issues you're talking about. In fact --
7 THE COURT: But, see, what I'm saying is this:
8 I don't even know -- I mean, when I look at it from
9 this perspective I don't know if a subclass is
09:53:15 10 absolutely necessary in this regard: If we have the
11 qualification language in the class definition it
12 doesn't matter whether you have plan type A, plan type
13 B, plan type C, if the Court makes a decision as a
14 matter of law the plan does qualify then you're part of
09:53:33 15 the class.
16 MR. SCHRAGER: Yeah.
17 THE COURT: Right.
18 MR. SHRAGER: No. I think that's right. I
19 think that's right.
09:53:37 20 THE COURT: Am I -- I even think the defense
21 even agrees with that. Because what you don't want to
22 do is if this case goes up, I think -- I can tell you
23 this, every time I look at a motion for class
24 certification, the first thing I look at is class
09:53:51 25 definition and how specifically and narrowly drawn.

09:53:54 1 Because that gives -- I think the more specific the
2 class definition is I think the better it is because
3 there's no ambiguity there. There really isn't.
4 MR. SCHRAGER: No. I think that's well taken,
09:54:06 5 your Honor.
6 THE COURT: Yeah.
7 MR. SCHRAGER: Now, would you like to at this
8 point go through the other factors? Or...
9 THE COURT: Yeah, we can.
09:54:12 10 MR. SCHRAGER: Okay.
11 THE COURT: Numerosity.
12 MR. SCHRAGER: Well, we talked about that.
13 Commonality I think inheres in what we're talking about
14 even if the class definition at the moment doesn't meet
09:54:23 15 your Honor's peculiar satisfaction is that there's
16 still going to be one question: Could you pay anyone
17 less than 8.25, right. That's -- all we need, frankly,
18 is one question that is common to the class. There's
19 the question.
09:54:37 20 You paid all these people less than 8.25.
21 Could you do it? Were you qualified to do so. So I
22 think we've met -- that is answered in one stroke, and
23 I think it easily meets the commonality requirement.
24 As far as typicality goes, plaintiffs' claims
09:54:54 25 need only be reasonably coextensive with those of the

09:54:57 1 class. In fact they were identical in this instance
2 with those of the class. You can pluck any one of
3 those 2500 people who were paid less than 8.25, put
4 them in the named plaintiffs' position, and the
09:55:08 5 question would be exact -- the claim would be exactly
6 the same. You didn't have the right to pay me less
7 than 8.25 per hour.
8 So let's talk about adequacy because your
9 Honor raised that earlier. They have -- you know, they
09:55:21 10 have filed, you know, not only in their opposition did
11 they speak at length regarding adequacy, they filed a
12 250-page extrapolation of that particular argument that
13 your Honor will review later this month.
14 I mean, as I understand it, adequacy is a very
09:55:38 15 simple analysis.
16 THE COURT: It is.
17 MR. SCHRAGER: Right. Is there a conflict
18 between the named plaintiff and the class members? Is
19 there a conflict between the named plaintiff and his or
09:55:47 20 her attorneys?
21 THE COURT: And if there is that can be --
22 MR. SCHRAGER: Dealt with.
23 THE COURT: Yeah -- dealt with and remedied.
24 MR. SCHRAGER: Yeah.
09:55:52 25 THE COURT: I mean, that's not a real big --

09:55:55 1 MR. SCHRAGER: Right.
2 THE COURT: -- issue. I mean, it's not
3 uncommon in class action lawsuits from time to time to
4 substitute in a new class representative.
09:56:06 5 MR. SCHRAGER: Sure.
6 THE COURT: That's not --
7 MR. SCHRAGER: Yeah.
8 THE COURT: Yeah.
9 MR. SHRAGER: If it even becomes necessary.
09:56:11 10 THE COURT: If it becomes necessary, it
11 happens.
12 MR. SCHRAGER: I mean, these plaintiffs have
13 shown their willingness to exercise their duties on
14 behalf of the class. They have answered discovery
09:56:18 15 timely. They didn't have to get dragged in front of
16 the discovery commissioner on motions to compel. They
17 sat for depositions. They've been in contact with
18 their counsel. And, I mean, they are -- they have met
19 what the rule requires absolutely.
09:56:31 20 So I think that the four aspects of 23(a) are
21 met here. Of course, under 23(b)(3) we have to move on
22 to predominance and superiority. Now predominance, is
23 does -- does the common question that plaintiffs and
24 your Honor identify, does it basically swallow the
09:56:56 25 whole? Is it the question? Does it drown out all

09:56:59 1 those individualized inquiries that could possibly
2 theoretically be made?
3 Once again, I will go back to what we said
4 under commonality which is the predominant question is
09:57:09 5 could you pay me less than 8.25? There are no other
6 functional questions that need be answered with one
7 stroke to answer the entirety of the suit. So I think
8 that the predominance factor is met.
9 As far as superiority, I can go back to we can
09:57:27 10 pluck any one of the 2500, put them in the named
11 plaintiffs' situation, and have the same case.
12 THE COURT: I mean --
13 MR. SCHRAGER: We have 2500 times.
14 THE COURT: I mean, from a superiority
09:57:38 15 standpoint, assuming I determine there's a common
16 questions of law or fact, there's adequacy and
17 typicality of the claims and the like, clearly handling
18 a case like this in a class action manner would be
19 superior to 2500 joinder claims filed in district court
09:57:55 20 in the state of Nevada.
21 MR. SCHRAGER: That seems clear, your Honor.
22 THE COURT: Yeah, I understand.
23 MR. SCHRAGER: So I -- apart from the class
24 definition issue, it seems to me that the elements of
09:58:04 25 Rule 23 have been satisfied by plaintiffs.

09:58:07 1 I do want to talk for one second about the
2 impact of your Honor's ruling of last week regarding
3 provide versus offer because it's something you raised
4 earlier on and it's something we've been thinking about
09:58:20 5 as well.
6 Now when we had to move for class
7 certification because our deadline has arrived, we had
8 not yet received the benefit of your Honor's thinking
9 regarding the provide versus offer issue. Now we do.
09:58:31 10 We know that unambiguously the requirement is to
11 provide not merely to offer.
12 To us, that now argues for the potentiality of
13 a subclass creation because in documents given to us by
14 the defendants, out of the 2500 more than 80 percent of
09:58:52 15 them were merely offered, not provided. So it seems to
16 us that a subclass of the 2500 whole that would take in
17 that 80 percent that were not provided health insurance
18 at all, according to your Honor's ruling last week, is
19 not just legitimate, it's actually necessary for the
09:59:15 20 efficient and quick resolution of the actions.
21 So, you know, your Honor has the ability to do
22 that sua sponte. We are happy to brief it, especially
23 as part of a -- if your Honor should order this -- a
24 renewed motion for class certification. We would -- we
09:59:30 25 would include that because we now have the benefits of

09:59:33 1 your Honor's ruling, and we would be asking for a
2 subclass of the whole.
3 The 2500 would still be the whole. The
4 80 percent of that which we'll identify for the Court
09:59:43 5 would be a subclass who, frankly based on your Honor's
6 ruling of last week, are more or less assumed to be
7 entitled to recompense.
8 So, I mean, if your Honor has any questions
9 about that, we can do that any way your Honor would
10:00:02 10 like. We are happy to do that as part of a motion
11 later on or for the court to consider it on its own.
12 THE COURT: I understand, sir.
13 MR. SCHRAGER: Okay. Thank you.
14 MR. PAEK: Good morning, your Honor.
10:00:17 15 THE COURT: Good morning, sir.
16 MR. PAEK: As a preliminary matter, what
17 counsel just said about moving for certification is not
18 entirely accurate. Certification deadline in this case
19 actually has not even passed yet. It's July 28th
10:00:31 20 according to the last extended discovery order we
21 stipulated to.
22 So there was no pressure or anything like, of
23 that sort for them to move for a certification at the
24 stage they did other than their own strategical
10:00:45 25 decision to do that.

10:00:46 1 As the Court has already hit on under the US
2 Supreme Court case of ***WalMart versus Dukes***, the Court
3 must conduct a rigorous analysis as to these factors
4 for certification and make sure that all of them have
10:01:03 5 been met.
6 And it's plaintiffs' motion, so it's their
7 burden to show by a preponderance of the evidence that
8 all those factors have been met. And plaintiff can't
9 do that under any of these factors. And what the Court
10:01:17 10 has already hit on, the first key issue I'll address is
11 the adequacy because the court already noted that to
12 begin with. But as the Court noted, there is a
13 plaintiff -- of the four named plaintiffs, there is a
14 plaintiff Charity Fitzlaff who actually enrolled in the
10:01:37 15 health insurance that was offered by defendants.
16 Just through that act alone, that takes her
17 out of the class definition that has been proposed by
18 plaintiffs which is for all employees who were paid
19 under 8.25. Now the arguments that plaintiffs' counsel
10:01:54 20 has just made about qualified health insurance and that
21 all the plans didn't qualify, well, that hasn't been
22 briefed in front of this Court, your Honor. It has
23 been briefed in other cases that involve the minimum
24 wage action, but this Court has not issued a ruling on
10:02:11 25 that as a matter of law. And that is a threshold issue

10:02:13 1 here. So it would make sense that that issue needs to
2 be decided first as to whether or not -- as to what
3 qualified health insurance is under the minimum wage
4 amendment so that we can determine who is or is not in
10:02:25 5 that class.
6 So as far as defendants go, we agree that the
7 definition as it is stands right now can't even beat
8 that one requirement and fails because of that one
9 named plaintiff that's already in that class.
10:02:43 10 THE COURT: Well, I don't know the one named
11 claimant will cause the failure of all -- I should say
12 the one named class representative, just because one
13 class representative fails doesn't mean the class fails
14 as a whole. And I don't think there's any case law
10:03:01 15 that stands for that. What you do is you peel them
16 off.
17 MR. PAEK: I understand that, your Honor.
18 There's been -- no, there's been no discovery done as
19 to -- there's been no offering in their motion as to
10:03:11 20 the numbers of enrolled parties versus non-enrolled
21 parties. If that's what's -- if that's what we're
22 going to do, then there still has to be a determination
23 to what qualified health insurance is for them to
24 argue, well, none of our plans qualify. That hasn't
10:03:28 25 been determined.

10:03:30 1 THE COURT: But, sir, I'm not disagreeing with
2 you on that. Here's the thing when it comes to -- and
3 class action is different from other forms of
4 litigation. You can start out with your initial
10:03:38 5 complaint, and you can have a very much carefully
6 crafted class definition, right. And the class
7 definition is really straight to the point, it's
8 narrowly construed and so on.
9 And you know what, discovery can determine
10:03:56 10 whether 5,000 people meet that class or 500,000 people
11 meet that class based upon what is ferreted out during
12 discovery. All the plaintiff has to establish is
13 essentially this: That the numerosity standard is met
14 when it comes to the number of class members. That's
10:04:13 15 all. And so it's not -- you don't have -- you don't
16 have to have discovery on what a qualified plan is in
17 order for the class definition to make a statement
18 that, you know what, that the class includes those that
19 were offered a plan that did not meet the
10:04:32 20 qualifications as mandated by the State of Nevada
21 Insurance Commission. Something like that. I'm just
22 making it up, you know, as I go along. But if that's
23 in there, then you go through discovery.
24 I might make a decision where three meet the
10:04:44 25 requirement, two don't. Then that will knock the class

10:04:46 1 down, hypothetically, from 2500 to 1700 depending on
2 how the numbers play. So what I'm saying is: You
3 don't do -- the class definition does not impact what
4 my ultimate findings of fact and conclusions of law
10:05:03 5 will be based upon the definition of a qualified plan.
6 I could make a determination that all five are
7 qualified, right. If there's five plans, and then
8 there's no class. I don't know. You know.
9 MR. PAEK: And --
10:05:16 10 THE COURT: Where the class is not -- you
11 know, so that to me is not necessarily critical at this
12 level because it's been asserting there's 2500 class
13 members out there.
14 So what I want to do is this, I mean, because
10:05:28 15 understand, the Court is given fairly broad discretion
16 if the facts and circumstances change after class
17 definition -- I mean, after class certification is
18 granted, the Court can do things, motions can be
19 brought, "de-certify, Judge". It happens from time to
10:05:44 20 time.
21 So I'm just telling you -- because what you
22 want to do is this: You want to get the class
23 certificate -- the class certification issues out of
24 the way so discovery can continue. You don't want to
10:05:56 25 do all the discovery and then have the class certified

10:05:59 1 at the end. That's just not how it's done. It's done
2 early on in the litigation. I just want to tell you
3 that. And so you've challenged the class definition.
4 I understand that, and I see there's some issues there.
10:06:15 5 MR. PAEK: Thank you, your Honor.
6 THE COURT: I do.
7 MR. PAEK: And on that point, we understand
8 the Court's position.
9 THE COURT: I don't have a position. I never
10:06:23 10 have a position.
11 MR. PAEK: We understand.
12 THE COURT: Lawyers say that. I never have a
13 position. I just point issues out, right. That's all
14 I'm doing. I never have a position. I'm not an
10:06:32 15 advocate. Trust me. I just see issues that jump out
16 at me.
17 MR. PAEK: Well, your Honor, this issue of
18 qualified health insurance, it hasn't been briefed
19 before the Court. It was brought up for the first time
10:06:44 20 in their reply and not in their underlying motion, the
21 theory that none of the plans were in compliance.
22 THE COURT: I'm not making a decision on that
23 today.
24 MR. PAEK: So --
10:06:53 25 THE COURT: So you feel very comfortable about

10:06:55 1 that.

2 MR. PAEK: Well, without that component, your

3 Honor, their class definition doesn't work. And I

4 would like to go since counsel did go through the other

10:07:03 5 factors.

6 THE COURT: Yeah, go ahead.

7 MR. PAEK: I would like to go through the

8 other factors as well.

9 As stated in our briefs ascertainability is a

10:07:12 10 threshold issue before weighing the Rule 23

11 requirements. And the problem here goes back to the

12 fact that plaintiffs' class definition right now as it

13 stands is too speculative because it would include

14 unharmed persons.

10:07:25 15 A class definition that includes all persons

16 paid under 8.25 does not take into account the

17 employer's right to properly pay persons the lower tier

18 rate under the minimum wage amendment or the MWA should

19 qualified health insurance have been enrolled in by

10:07:43 20 some of the plaintiffs as we have in our case.

21 In relation to what counsel touched on about

22 the recent ruling in provide versus offer, that order

23 just came out less than a week ago, and we're still

24 digesting that. In fact, we are setting up a call

10:08:00 25 later today regarding the order in that with counsel.

10:08:04 1 But we understand that this Court found that provide
2 does not mean offer, that it means an employee must
3 enroll or accept the health insurance and, you know,
4 that position was, of course, articulated by plaintiff
10:08:21 5 in their underlying motion in that case.
6 But that being said, it comes back to the
7 second component which they brought up in their reply
8 that what is qualified health insurance under the
9 minimum wage claim. What is under the supporting labor
10:08:39 10 commission regulations under NAC608? Those issues have
11 to be built in because it's not really a defense
12 portion of the MWA. What it really is, is it's part of
13 their claim because you can pay a lower tier under the
14 MWA if you have qualified health insurance. That's
10:08:57 15 what the minimum wage amendment says. So it doesn't
16 even get to the individualized defenses stage.
17 THE COURT: Well, here's my question for you:
18 I mean, who would determine whether or not health
19 insurance is qualified? Would it be based upon
10:09:09 20 insurance regulations? You know, I mean, I don't know
21 if the Department of Labor --
22 MR. PAEK: We --
23 THE COURT: -- would make that ultimate
24 determination because they're not -- I would think from
10:09:18 25 a delegation of authority as to what qualifies as

10:09:23 1 insurance in the state of Nevada, that would come under
2 the insurance commissioner.
3 MR. PAEK: Well --
4 THE COURT: And the insurance commission
10:09:30 5 regulation. I would think. I'm not saying -- I'm not
6 accepting that 100 percent but common sense dictates
7 that. That's where it comes from. Because whether
8 it's auto insurance, health insurance, property and
9 casualty insurance, and all the insurances typically
10:09:43 10 that comes under the penumbra of the insurance
11 commissioner, right, and their regulations. And they
12 regulate that in their statutes out there for health
13 insurance, right.
14 MR. PAEK: And we haven't fully delved into
10:09:55 15 that issue, your Honor.
16 THE COURT: That's what my gut tells me.
17 MR. PAEK: And --
18 THE COURT: I just want to tell you that.
19 MR. PAEK: And I understand what you're
10:10:01 20 saying. It's something that would have to be briefed I
21 would say.
22 THE COURT: Yeah.
23 MR. PAEK: It would have to be briefed, and we
24 would have to look at our respective positions as to
10:10:10 25 whether or not, for example, the insurance commissioner

10:10:13 1 or the labor commissioner as to whether or not those
2 regulations have any impact as to how that should be
3 interpreted.
4 THE COURT: Right. But I don't think the
10:10:22 5 labor commissioner has been delegated any sort of
6 statutory grant of authority from the Nevada
7 legislature and the government, and the governor, the
8 executive branches, I guess the entire legislative
9 process, the powers to determine qualifications of
10:10:39 10 insurance.
11 MR. PAEK: Well --
12 THE COURT: I would be shocked if that is the
13 case.
14 MR. PAEK: It is --
10:10:44 15 THE COURT: However, my mind is open, but I
16 would be surprised.
17 MR. PAEK: Well, this is where we get into an
18 interesting area which we have not briefed before this
19 Court but the minimum wage amendment has a portion
10:10:57 20 which has the appointee of the governor publish the
21 bulletins which adjust the rates, and that's been
22 delegated to the labor commissioner of Nevada. And
23 because of that the Labor Commissioner of Nevada has
24 promulgated regulations under NAC608 regarding how the
10:11:16 25 minimum wage amendment is supposed to function as far

10:11:18 1 as the offers of insurance go, as far as keeping track
2 of declination forms, for example. And as to this
3 issue, it also goes into the definition of what
4 qualifying health insurance is under the minimum wage
10:11:33 5 amendment.
6 Actually ironically, the term that they use
7 qualifying health insurance doesn't come from the
8 minimum wage amendment. It actually comes from the
9 labor commissioner's regulations under NAC608. And
10:11:46 10 under those regulations there is a set of standards
11 that health insurance qualifies if it meets certain
12 requirements such as being complying with the IRC,
13 internal Revenue Code or the Taft-Hartley Act for
14 example.
10:12:06 15 And like I said, your Honor, I mean, I'm sure
16 that issue is going to be briefed before this Court.
17 THE COURT: It will.
18 MR. PAEK: And it's a threshold issue.
19 As far as commonality goes, your Honor --
10:12:18 20 THE COURT: Common questions of law or fact.
21 MR. PAEK: Yes. Even without -- even with
22 what plaintiffs' counsel is saying about the provide
23 means enroll definition, as pointed out in our briefs,
24 there are problems here because the plaintiffs have
10:12:32 25 individualized facts which are very important that go

10:12:36 1 to their individualized -- that goes to defendants'
2 individualized defenses regarding those plaintiffs.
3 As pointed out in our briefs, all the
4 plaintiffs had differing hours, differing pay rates.
10:12:50 5 Some plaintiffs, two of them, reported all their tips
6 but one plaintiff Olszynski, she only reported
7 20 percent. Another plaintiff Wilbanks reported none.
8 And the reason why this is important, your Honor, is
9 that the amount of tips also range from as low as $252
10:13:09 10 a week to $500 a week.
11 THE COURT: Why does that matter?
12 MR. PAEK: Under the labor commissioner's
13 regulations of NAC608.104 that sets out what a
14 qualifying plan is under the minimum wage. And under
10:13:21 15 that regulation it allows tips to be included to
16 determine the 10 percent, whether you meet the
17 10 percent threshold of gross income as to a qualifying
18 plan. So that's why that matters, your Honor.
19 It matters because it's -- on one hand, it's
10:13:35 20 can we get at accurate gauge of who qualifies -- who
21 had enough -- whose plan was low enough to meet the
22 qualifying income and --
23 THE COURT: See, but I -- and maybe I'm wrong
24 on this, but I would think a qualified plan, insurance
10:13:52 25 plan would be real insurance coverage. Am I missing

10:13:55 1 something?

2 MR. PAEK: But there's no -- your Honor,

3 that's no what the minimum wage amendment says.

4 THE COURT: I understand.

10:14:00 5 MR. PAEK: The minimum wage amendment just

6 says health. And, your Honor, what the plans that were

7 offered were health insurance plans. There's no --

8 there's no statement that it does not comply. And we

9 haven't briefed this issue, your Honor. This goes back

10:14:10 10 to qualified health insurance. But as to what exactly

11 health insurance is under the minimum wage amendment --

12 THE COURT: I'll give you an example. I mean,

13 if you look at the Affordable Care Act, there was a lot

14 of insurance being offered that wasn't real insurance.

10:14:24 15 MR. PAEK: But, your Honor --

16 THE COURT: Right. And so what happened was

17 as a result of the Affordable Care Act, the government

18 said, Look, those types of "plans" can no longer be

19 offered because they're not really insurance. And so,

10:14:37 20 I guess, at the end of the day what I'm going to have

21 to look at, and this is all questions I'll have to

22 answer, I'm just telling everybody this whether the

23 types of plans offered meet the statutory definition of

24 health insurance on some level. That's what I'm going

10:14:52 25 to have to decide.

10:14:53 1 MR. PAEK: And the Affordable Care Act, your
2 Honor, is a separate issue from the minimum wage
3 amendment.
4 THE COURT: I just use that as an example,
10:15:00 5 sir. That's all. I just -- that's my analogy. But I
6 think at the end of the day I'm going to have to decide
7 because there's -- I mean, historically, there's been a
8 lot of plans that have been offered, it's not going to
9 have an impact on any ultimate decision, but that were
10:15:15 10 purported to be insurance plans which aren't.
11 You know, and I don't know what the plans are
12 in this case. And I'll look at them. And I'll have to
13 make a determination as to whether they meet the
14 definition of insurance in the state of Nevada. I
10:15:26 15 don't know. I'm going to give you a chance to brief
16 that. That's what I'm thinking about.
17 I'm just going to tee it up and tell you what
18 I'm thinking about.
19 MR. PAEK: And we're fine with briefing that
10:15:33 20 issues, your Honor.
21 THE COURT: Yeah.
22 MR. PAEK: I mean, and that is an important
23 issue. We wholeheartedly agree --
24 THE COURT: Right.
10:15:39 25 MR. PAEK: -- that that's an issue that needs

10:15:40 1 to come before this Court.
2 THE COURT: And it's not before me now. I'm
3 not going to decide it right now.
4 MR. PAEK: And it's not, your Honor.
10:15:49 5 So getting back to the commonality aspect of
6 this, even under provide means enrolled definition,
7 there are individual inquiries as to whether it is
8 plausible or impossible to defendants to actually
9 enroll some of these plaintiffs into their plans.
10:16:10 10 Because as we found out in depositions, many of these
11 plaintiffs made independent choices to enroll for their
12 own personal reasons that range from having existing
13 health coverage such as with plaintiffs Diaz and
14 Wilbanks, or a better choice through Medicaid as with
10:16:28 15 plaintiff Olszynski. And then there's even an --
16 THE COURT: But even under those circumstances
17 then, I mean, it's my -- and my ruling would stand for
18 the proposition that, okay, if they weren't enrolled,
19 then they should have been paid 8.25 a hour.
10:16:43 20 MR. PAEK: Well, your Honor, I mean, that gets
21 to the issue of whether or not we could enroll them.
22 And, for example, there is -- there is a plaintiff.
23 There's a plaintiff Fitzlaff who alleges in her
24 deposition contrary to the company's policy that she
10:16:56 25 was dissuaded from enrolling by a manager.

10:16:59 1 THE COURT: That's a problem.
2 MR. PAEK: We'd have to look at that too.
3 That's a -- I mean, that could go to: Was that manager
4 acting in their course and scope. Was that what the
10:17:06 5 policy was? I mean, that creates all sorts of issues
6 just on that one issue alone.
7 THE COURT: But, see, if I follow that
8 argument, sir, and trust me, there would never be a
9 class certification. I mean, if you look at the cases
10:17:18 10 involving torts, I mean, every one of those cases, the
11 asbestos cases some people, I mean, all -- they have
12 cancer. They have so many different damages. And that
13 in and of itself was not sufficient to preclude class
14 certification.
10:17:34 15 You look at the In Re Kitec case I certified
16 that's still ongoing for nine years that we're in the
17 claims administration process right now that involved
18 27,000 homes in Clark County.
19 Every home had a different square footage.
10:17:48 20 There were different numbers of fittings that were in
21 all the different homes. And we had subclasses. There
22 were actually maybe 20 different plumbing companies
23 involved.
24 And so from a commonality standpoint, there
10:18:03 25 were still common questions of law or fact. And you

10:18:07 1 don't have to be identical when it comes to proof as
2 far as that is concerned. So the fact that there might
3 be a component where its alleged that one of the
4 employees dissuaded one of the class reps from getting
10:18:23 5 health insurance or whatever, okay, that, be that as it
6 may, my ruling stands for the proposition one of two
7 things happens: If you enroll them in insurance, then
8 you can pay 7.25 an hour. If you don't enroll them in
9 insurance, they get paid 8.25 an hour. And that's the
10:18:46 10 whole -- at the end of the day, regardless of all the
11 different reasons, based upon my decision, enrolled
12 means enrolled. You know, not -- you know, I mean,
13 provide means provide, you know. That's what it stands
14 for.
10:19:00 15 And so that's how -- that's how I look at this
16 case. You know, there could be a lot of different
17 reasons out there factually, but at the end of the day
18 there's a constitutional mandate as it relates to the
19 minimum wage. Either you provide them health
10:19:14 20 insurance. They need to pay them 7.25 an hour. If for
21 whatever reason you don't provide them health
22 insurance, they get pay 8.25 an hour. There could be a
23 lot of different reasons why, but that's the case.
24 That's how I look at that based upon my ruling. And I
10:19:29 25 realize the Supreme Court will have to deal with that.

10:19:30 1 But that's kind of how I see it. And so I'm not as
2 concerned about the commonality issues. I do
3 understand your concern as to adequacy. I get that.
4 And we'll talk about that. And you have the floor on
10:19:40 5 that.
6 MR. PAEK: Yeah. Yes, your Honor. And I
7 understand what you're saying about commonality.
8 THE COURT: Because that's broad.
9 MR. PAEK: That goes to typicality also. And
10:19:56 10 I would just point out that even as to typicality, the
11 same, and all these -- obviously, as the Court has
12 already pointed out, all of these requirements sort of
13 flow into each other, but the plaintiff Fitzlaff's
14 enrollment in insurance, the same problem that we have
10:20:11 15 with the class definition is the same problem we have
16 with typicality in that, you know, she doesn't have a
17 claim that's typical of the other class members. Or
18 she's not even in the class for that matter.
19 As far as the adequacy goes, your Honor, this
10:20:33 20 is a threshold issue. And this has been more
21 thoroughly briefed in the motion for disqualification
22 that will be heard by this Court at the certification
23 deadline -- the current certification deadline of
24 June 28 -- or July 28. But I can briefly go through
10:20:54 25 and summarize how that affects the adequacy here. And

10:20:59 1 we've already kind of touched upon it, but Fitzlaff is
2 the one who actually enrolled in the insurance.
3 But other than that, that's also -- there's
4 also some problems here under the Ceegan case that
10:21:13 5 we've cited for class plaintiffs who have no
6 credibility. Or and also the Robinson case which goes
7 to the knowledge of their claims or position adverse to
8 the putative class.
9 And just briefly, your Honor, you know,
10:21:30 10 plaintiffs in their reply at page 11 footnote three,
11 they have -- what they've done is even during the same
12 day as the first depositions went off on May 19th. And
13 that same day plaintiffs had, unbeknownst to us, also
14 filled out declarations which now plaintiffs proffer in
10:21:53 15 support of their motion for certification. But in that
16 briefing, in that footnote plaintiffs argue that the
17 plaintiffs in the class know that 8.25 is the upper
18 tier, that they had an understanding that wages were
19 tied to purported offers of insurance, and that they
10:22:15 20 uniformly found the insurance offer wanting as to the
21 healthcare. And that is absolutely not what panned out
22 at the depositions, your Honor.
23 For example, with plaintiff Diaz, as cited to
24 in the depo transcript in our brief, she had no
10:22:34 25 understanding of what qualifying health insurance was.

10:22:36 1 And she in fact --

2 THE COURT: But tell me this, though --

3 MR. PAEK: She --

4 THE COURT: -- how many members of the general

10:22:42 5 public know what uninsured motorists coverage is.

6 MR. PAEK: And I understand the --

7 THE COURT: So what I'm trying to say is this:

8 Specifically as it relates to their individualized

9 specific knowledge as to insurance and what insurance

10:22:56 10 is, the general public has no clue.

11 MR. PAEK: Well, that --

12 THE COURT: They don't. And I don't expect a

13 minimum wage type employee to have an understanding as

14 to what is health insurance. I mean, most people don't

10:23:11 15 realize that now we don't have preexisting conditions

16 which is a huge issue. And they want to get rid of the

17 Affordable Care Act. And you got -- you have

18 essentially no longer preexisting conditions, you know.

19 And so people don't know and understand insurance.

10:23:31 20 They just don't. They just assume that it's there when

21 they need it. And sometimes they go to get it, and

22 they file their claims, and they find out they don't

23 have necessarily what they anticipated they thought

24 they had. And that's what happens.

10:23:43 25 MR. PAEK: Well --

10:23:44 1 THE COURT: So I'm not concerned about what
2 they knew. I'm concerned about whether or not the
3 plans were qualified or not.
4 MR. PAEK: Well, what I was getting at, your
10:23:52 5 Honor, is with --
6 THE COURT: Because isn't --
7 MR. PAEK: That --
8 THE COURT: Go ahead. Go ahead.
9 MR. PAEK: That that lack of understanding is
10:23:56 10 also coupled with just an incorrect understanding. For
11 example, plaintiff -- so plaintiff Diaz's failure to
12 understand what qualifying health insurance combined
13 with thinking that her claims are for off-the-clock
14 work which aren't even pled factually or legally in the
10:24:14 15 case.
16 THE COURT: Okay. But she doesn't get that.
17 I mean, really.
18 MR. PAEK: I mean, that's -- that's -- she's
19 contradicting what her own claims are in her complaint
10:24:23 20 is what she's doing. This is where it gets
21 highlighted, your Honor, because plaintiff Wilbanks,
22 what -- why that is important, plaintiff Wilbanks when
23 she was being deposed, she thought she was being
24 deposed for a different case that she's in with
10:24:38 25 plaintiff's counsel which is the Watson case, which is

10:24:40 1 Watson versus Mancha. And she testified as to
2 off-the-clock work in this case. And that's where the
3 problem arises is it has no bearing. Off-the-clock
4 work has no bearing in a minimum wage case and vice
10:24:54 5 versa. So she can't be a plaintiff or a class
6 representative in this case when she really thinks
7 she's in the Watson case, and that's all she's
8 testifying to in the deposition. That creates a
9 problem.
10:25:05 10 THE COURT: Here's my question.
11 MR. PAEK: That's --
12 THE COURT: Why can't she be the class
13 representative if factually she meets the class
14 definition requirement?
10:25:09 15 MR. PAEK: Because she doesn't have an
16 understanding of what she's there for. She brought
17 claims based off of -- they pled facts in their
18 complaint based off of her knowledge. When we asked
19 her on her basic knowledge as to that, as to what her
10:25:22 20 claims were, she couldn't articulate anything except
21 for claims from another case. And that's a problem.
22 Then she should be a class representative in that case,
23 not in this case.
24 THE COURT: So are there any -- are there any
10:25:36 25 factual issues as to whether or not she meets the class

10:25:40 1 definition if one is formulated in this case that she
2 was not provided health insurance and paid 7.25 a hour?
3 MR. PAEK: Well, as we've -- as we've said,
4 the class definition as it stands right now includes
10:26:00 5 other unharmed persons, so it doesn't work on its face.
6 THE COURT: Because at the end of the day --
7 MR. PAEK: I mean, that's --
8 THE COURT: -- you have to understand --
9 MR. PAEK: Here's the class definition.
10:26:10 10 THE COURT: I'll tell you this, sir. I took
11 thousands of depositions, and you can control how the
12 deposition goes by the questions you ask. And so I'm
13 wondering were there specific questions asked of her:
14 Ma'am, how much were I paid? 7.25 a hour,
10:26:24 15 right. And yes.
16 Were you given health insurance?
17 That's the question.
18 MR. PAEK: Well, that's actually that -- the
19 offer of health insurance, your Honor --
10:26:34 20 THE COURT: Well, were you provided health
21 insurance.
22 MR. PAEK: Well, that's -- and, your Honor,
23 these briefings were based off of the issue of offer,
24 so now that it's --
10:26:43 25 THE COURT: So, factually, it would seem like

10:26:45 1 to me that would be the line of questioning that you
2 would need to find out if she met the class definition
3 or somewhere in the parameters of the class definition.
4 MR. PAEK: Because their proposed complaint,
10:26:57 5 your Honor, their initial complaint before the ruling
6 on provide means enroll was based off of offering of
7 health insurance is what -- they used offering as a
8 synonym of provide in their complaint.
9 THE COURT: But you're telling me that those
10:27:08 10 specific -- because if I was taking the deposition
11 knowing the direction the case is going, I could think
12 of questions I would ask to try to cover everything
13 regarding, okay, how much were you being paid? Were
14 you offered health insurance? Were you provided health
10:27:21 15 insurance? And the like. I mean, it's -- that's
16 pretty straightforward stuff.
17 I mean, technically, you look at her
18 deposition. I would think it wouldn't take more than a
19 half an hour as to the facts of this case.
10:27:33 20 MR. PAEK: Well, your Honor, the problem is in
21 this case is that their legal theories and their
22 definitions have become a moving target because what
23 started off in their complaint as one legal theory of
24 why we're liable which was because we didn't offer
10:27:50 25 health insurance has morphed into we're liable because

10:27:53 1 we didn't enroll people in health insurance. And that
2 was a big change. And there's been changes all along
3 with their other briefings, and what they're bringing
4 up now with qualified health insurance. That's another
10:28:06 5 issue. But --
6 THE COURT: Well, I think that probably became
7 an issue as a result of discovery in this case.
8 Because I would think that the question would be this:
9 What insurance was offered?
10:28:16 10 And then they looked at the policies and they
11 said Look, well, we don't think this is health
12 insurance that meets the requirements of health
13 insurance as it relates to the state of Nevada.
14 Now, that's -- I don't know anything about
10:28:26 15 what happened in discovery, but I was involved in a lot
16 of discovery, and I would anticipate that's what
17 happened.
18 Is that what happened?
19 MR. SPRINGMEYER: Yes, your Honor.
10:28:33 20 MR. SCHRAGER: Well --
21 MR. SPRINGMEYER: Plus, it's in the complaint.
22 MR. SCHRAGER: I mean --
23 MR. SPRINGMEYER: They did provide --
24 MR. SCHRAGER: I will read you from the
10:28:40 25 complaint momentarily.

10:28:41 1 THE COURT: All right.
2 MR. SCHRAGER: It won't matter, your Honor.
3 MR. PAEK: Your Honor, the distinction that
4 they're making that has come about in their motion
10:28:48 5 practice after the fact is different than what -- how
6 they initially plead the complaint. Because in their
7 complaint they didn't say it didn't matter because no
8 one -- because all that matters was whether or not you
9 enrolled people. That is no where in the complaint. I
10:29:01 10 mean.
11 THE COURT: I understand.
12 MR. SCHRAGER: You can go ahead.
13 MR. PAEK: And it's anonymous with offer and
14 provide, Bradley, isn't it, throughout your complaint.
10:29:07 15 So getting back to the other plaintiffs, your
16 Honor. For example, and this goes to the core of the
17 minimum wage amendment. Olszynski, plaintiff
18 Olszynski, she had no understanding of the two-tier
19 minimum wage. And here's the problem with that
10:29:26 20 understanding, your Honor. She thought that the only
21 minimum wage rate out there was 8.25 an hour.
22 In fact, she said that at no time can an
23 employer pay less than 8.25 an hour. So she actually
24 testified contradictory to what her own claims are,
10:29:40 25 that there's a two-tier minimum wage system that you

10:29:44 1 have to pay 8.25 if you're not offering health
2 insurance and 7.25 if you are offering health
3 insurance.
4 In fact, she even testified --
10:29:55 5 THE COURT: So how --
6 MR. PAEK: In fact, she even testified --
7 THE COURT: How is that a defense, though? I
8 mean, really. Just because, you know, hypothetically
9 you have a malpractice plaintiff doesn't understand
10:30:06 10 what the standard of care might be for an orthopedic
11 spine surgeon. That doesn't mean their claim is not
12 viable if they have an expert that will opine on the
13 standard of care.
14 MR. PAEK: Well, she also testified that she
10:30:16 15 was being offered legitimate health insurance. So how
16 is it that she couldn't be paid the lower tier rate if
17 she, in her own words, the health insurance was
18 legitimate.
19 And we've already hit on plaintiff Fitzlaff
10:30:32 20 who already enrolled in the health insurance which, you
21 know, contradicts even their position now would the
22 provide means offer.
23 So that being said, your Honor, I mean,
24 adequacy is a big problem. The class definition is a
10:30:49 25 big problem. Under its rigorous -- under the rigorous

10:30:53 1 standard and the analysis of each one of those factors,
2 they don't meet it. And the declarations that they've
3 proffered in here, they don't stand for what they say
4 they stand for. They're the definitions is what these
10:31:09 5 plaintiffs actually testified to as to their knowledge
6 and their understanding.
7 THE COURT: I understand, sir.
8 MR. PAEK: And, you know, I'll be happy to
9 address any points that the Court would like me to
10:31:21 10 address beyond that or anything else that plaintiffs
11 might bring up.
12 THE COURT: Thank you, sir.
13 Counsel.
14 MR. SCHRAGER: I will be exceptionally brief,
10:31:29 15 and just hit a few things. Number one, I did want to
16 read from the amended complaint filed June 5, 2014,
17 which is now 13 months ago.
18 Defendants -- this is the first claim for
19 relief. Defendants paid and have paid plaintiffs and
10:31:42 20 members of the class at a reduced minimum wage level
21 pursuant to the Nevada constitution without providing
22 qualified health insurance benefits as required by that
23 provision. Can't be any clearer than that. Pled
24 exactly what we meant.
10:31:57 25 Pardon me.

10:31:59 1 Now, as to Ms. Fitzlaff --
2 THE COURT: Maybe that should be kind of
3 inserted into the class definition at some point.
4 MR. SCHRAGER: No, you're absolutely --
10:32:06 5 THE COURT: I mean, really. That's the whole
6 case --
7 MR. SCHRAGER: I will get to that momentarily.
8 THE COURT: -- right.
9 MR. SCHRAGER: I will get to that momentarily.
10:32:12 10 As far as, you know, your Honor's general understanding
11 as to what this case is going to come down to I think
12 is exactly right.
13 As far as the issue of what constitutes or
14 whether their plans constituted qualified health
10:32:24 15 insurance is not a threshold issue. That's the
16 ultimate issue. We're just completing the class
17 certification phase, the merits and liability phase --
18 THE COURT: I understand.
19 MR. SCHRAGER: -- will proceed. So it's not
10:32:33 20 something, as I think your Court understands, it's not
21 something you have to decide now. It's something that
22 will decide the case.
23 As far as plaintiff Fitzlaff. The fact that
24 she enrolled at periods of time over the last five
10:32:44 25 years, there were periods of time in which she was not

10:32:47 1 covered by insurance and was still paid 7.25.
2 So enrollment for periods of time does not
3 disqualify her as a representative of those who weren't
4 because there was plenty of time in which she was not.
10:33:00 5 Let's see. I mean, it seems to me, we can
6 sort of cut through this and move on with our lives
7 because we're going to be back at the end of this month
8 on this disqualification motion. It seems to me that
9 the most logical and useful thing to do at the moment
10:33:15 10 is to deny the motion without prejudice. We will renew
11 or class certification motion to probably better, you
12 know, or supplemental briefing on the class definition.
13 We will discuss with you in the wake of last week's
14 order regarding the provide versus offer. We will
10:33:39 15 propose our subclass idea. We can flesh that out
16 better.
17 Defendants can make whatever arguments they
18 want. And we will come back and we will have this out
19 then. Sort of having it out now in this manner does
10:33:50 20 not really seem to be the best use of everyone's time.
21 THE COURT: All right.
22 Anything else?
23 MR. PAEK: Just to address really quickly,
24 your Honor, just for the record what they're pointing
10:33:55 25 out in their complaint. Throughout the complaint, for

10:33:58 1 example on page 3 line 1: Providing, offering, and
2 maintaining health insurance. Provide and offer at
3 that time in their complaint was used synonymously.
4 And if you look specifically on page 6 paragraphs 25,
10:34:09 5 26. As part of their individualized claim they write:
6 Ms. Diaz was never offered a company health plan at all
7 much less a plan that would qualify. So that right --
8 and there -- and the next paragraph, paragraph 26:
9 Defendants, therefore, were unlawfully paying Ms. Diaz.
10:34:26 10 So what they started out with within their complaint,
11 your Honor, was contingent on whether or not health
12 plans were offered, not whether or not people were
13 enrolled. Now its changed into that. But that's not
14 what was reflected in their complaint or what was
10:34:39 15 reflected at the time of the deposition.
16 As to, I mean, it's within the Court's
17 discretion as to -- I mean, if plaintiffs want to
18 propose denying the motion without prejudice at this
19 time, we'll leave that up -- I mean, that's within the
10:35:04 20 Court's discretion as to how the Court would like to
21 handle that. We've already addressed the issue with
22 the class definition as they exist. Those issues are
23 still there. I don't think they can move forward with
24 certification at this time. So as we pointed out to
10:35:18 25 the Court, we are still currently ahead of the

10:35:21 1 certification deadline which is July 28. So which will
2 also be the same date as the hearing on our motion to
3 disqualify.
4 And unless the Court has any other questions,
10:35:37 5 I'll rest there.
6 THE COURT: All right. This is what I'm --
7 Mr. Springmeyer, sir.
8 MR. SPRINGMEYER: Could I propose, your Honor,
9 that we have this hearing continued over on to the 28th
10:35:48 10 when the other one is set. That --
11 THE COURT: I was actually thinking about
12 that, Mr. Springmeyer. What I'm actually thinking
13 about doing, since there will have to be
14 supplementation, moving the deadline and also the
10:36:00 15 hearing date from the 28th to August 6 which gives
16 everybody more time.
17 MR. SPRINGMEYER: Right. And then we could do
18 supplemental briefing on the class definition --
19 THE COURT: Exactly.
10:36:10 20 MR. SCHRAGER: -- on the subclass idea.
21 MR. PAEK: Your Honor, we are --
22 MR. SPRINGMEYER: They can oppose, and then we
23 can reply.
24 THE COURT: Right.
10:36:14 25 MR. SPRINGMEYER: And it can be heard in a

10:36:16 1 timely fashion.
2 THE COURT: Right.
3 MR. PAEK: We are living in a different world
4 with the order of --
10:36:19 5 THE COURT: Absolutely.
6 MR. PAEK: -- last week.
7 THE COURT: Yeah.
8 MR. PAEK: So things have changed, and --
9 MR. SCHRAGER: Makes sense.
10:36:23 10 THE COURT: That's why I said, you know, I
11 looked at the 28th, and that's probably still not
12 enough time but the 6th gives us an entire month.
13 MR. SPRINGMEYER: Yes, your Honor --
14 MR. SCHRAGER: Yes.
10:36:32 15 THE COURT: -- for all practical purposes.
16 And so what we'll do is this, which I think is probably
17 the prudent way to handle it: We're going to continue
18 this motion to August 6. We're going to move the
19 defendant's motion to disqualify named plaintiffs as
10:36:47 20 class representatives and dismiss class action claims
21 to August 6. And also we're going to move the
22 stipulated deadline to August 6. And so that makes it
23 all -- so I can take care of it all at the same time.
24 One thing I can just tell you this: I think
10:37:02 25 there has to be some issue regarding something to deal

10:37:07 1 with time and also qualified health insurance in the
2 definition. I just want to tell you that. That's kind
3 of how I see that.
4 MR. SPRINGMEYER: We got that, your Honor.
10:37:14 5 Thank you.
6 THE COURT: Yeah. And anyway, that's what
7 we'll do. And I'm going to hear all arguments on the
8 merits as it relates to the individual class
9 representatives and what potential defects they might
10:37:24 10 have. And then I'm going to listen to the motion to
11 dismiss. We still have the certification motion
12 pending. I'll bundle it all up, and I'll make a
13 decision on August 6.
14 MR. SPRINGMEYER: Your Honor, could we set
10:37:33 15 deadlines for the supplemental briefing?
16 THE COURT: Yes, you can. And bottom line is
17 if you want to stipulate, that's fine with me.
18 MR. SPRINGMEYER: Well, I think we should be
19 able to do that.
10:37:42 20 THE COURT: You can do it right now. What do
21 you want. So we can put it on the record. Make it
22 easy for you.
23 MR. SPRINGMEYER: Sure.
24 MR. SCHRAGER: Sure.
10:37:49 25 MR. SPRINGMEYER: 10 days for us. 10 days for

10:37:50 1 them. 5 days for reply.
2 THE COURT: So 10 days for -- where does that
3 take --
4 MR. SCHRAGER: That will take us roughly
10:37:59 5 Monday the 20th given the fact that the 19th is a
6 Sunday.
7 THE COURT: Is that fine? So that's what it
8 will be. Prepare an order for me.
9 MR. SPRINGMEYER: Yes, your Honor.
10:38:10 10 THE COURT: Then the hearing will be August 6.
11 MR. PAEK: I think we'll need more time for
12 the hearing, your Honor.
13 THE COURT: You need more time for the
14 hearing?
10:38:21 15 MR. SCHRAGER: Well, if they're going to have
16 an extra 10 days that will take us to the end of the
17 month, which will be the -- I mean, we give them to the
18 31st. The hearing would just be less that a week
19 later, so that the reply would be rather stunted.
10:38:34 20 THE COURT: You want August 10th or August 13?
21 It's up to you.
22 MR. SCHRAGER: Either of those.
23 MR. PAEK: I prefer August 13.
24 THE COURT: That's whatever you need.
10:38:42 25 MR. SHRAGER: That's fine.

10:38:43 1 THE COURT: That's what we'll do.
2 MR. SPRINGMEYER: Okay.
3 MR. SCHRAGER: So the 20th, the 31st. And
4 let's say the 7th for the briefing, supplemental
10:38:55 5 briefing schedule.
6 MR. PAEK: Well, that gives us less than 10
7 days actually, judicial days.
8 MR. SPRINGMEYER: All right.
9 MR. PAEK: Could we have until the 3rd?
10:39:04 10 MR. SPRINGMEYER: How about if we cut ours
11 back to the proceeding Friday. We don't need 10 days
12 to do this.
13 THE COURT: Okay.
14 THE COURT CLERK: Can you repeat those days
10:39:11 15 then now?
16 MR. SCHRAGER: That doesn't seem right. So
17 that is the 7th.
18 So Monday the 20th for supplemental brief.
19 When did you want?
10:39:19 20 MR. PAEK: August 3.
21 MR. SPRINGMEYER: Friday.
22 MR. SCHRAGER: I'm sorry. Okay, Friday the
23 17th. Friday the 17th for the supplemental brief.
24 The 31st still good for you?
10:39:29 25 MR. PAEK: That works.

10:39:29 1 MR. SCHRAGER: Okay. 31st for their
2 opposition or response. And Friday the 7th for the
3 reply, your Honor.
4 THE COURT: All right. That's what it will
10:39:40 5 be.
6 MR. SPRINGMEYER: Okay.
7 MR. SCHRAGER: Thank you, your Honor.
8 THE COURT: And the hearing date will be?
9 THE COURT CLERK: You want the hearing...
10:39:43 10 MR. SPRINGMEYER: The 13.
11 THE COURT CLERK: 13th then?
12 MR. SCHRAGER: Yes.
13 MR. SPRINGMEYER: Yes.
14 THE COURT: August 13. Is that it?
10:39:51 15 MR. SCHRAGER: Yes. That's it.
16 MR. SPRINGMEYER: Yes. Thank you, your Honor.
17 MR. PAEK: Thank you, your Honor.
18 THE COURT: Okay. Enjoy your week.
19
20
21 **(THE PROCEEDINGS WERE CONCLUDED.)**
22
23
24 * * * * * * * *
25

1 REPORTER'S CERTIFICATE

2 STATE OF NEVADA)
:SS
3 COUNTY OF CLARK)

4 I, PEGGY ISOM, CERTIFIED SHORTHAND REPORTER DO
5 HEREBY CERTIFY THAT I TOOK DOWN IN STENOTYPE ALL OF THE
6 PROCEEDINGS HAD IN THE BEFORE-ENTITLED MATTER AT THE
7 TIME AND PLACE INDICATED, AND THAT THEREAFTER SAID
8 STENOTYPE NOTES WERE TRANSCRIBED INTO TYPEWRITING AT
9 AND UNDER MY DIRECTION AND SUPERVISION AND THE
10 FOREGOING TRANSCRIPT CONSTITUTES A FULL, TRUE AND
11 ACCURATE RECORD TO THE BEST OF MY ABILITY OF THE
12 PROCEEDINGS HAD.

13 IN WITNESS WHEREOF, I HAVE HEREUNTO SUBSCRIBED
14 MY NAME IN MY OFFICE IN THE COUNTY OF CLARK, STATE OF
15 NEVADA.

16

17 /s/ Peggy Isom
PEGGY ISOM, RMR, CCR 541

18

19

20

21

22

23

24

25

Exhibit I

1 CASE NO. A701633

2 DOCKET U

3 DEPT. 16

4

5

6 DISTRICT COURT

7 CLARK COUNTY, NEVADA

8 * * * * *

9 PAULETTE DIAZ,)
)
10 Plaintiff,)
)
11 vs.)
)
12 MDC RESTAURANTS LLC,)
)
13 Defendant.)
_____)

14

15 REPORTER'S TRANSCRIPT
OF
MOTIONS

16

17 BEFORE THE HONORABLE JUDGE TIMOTHY C. WILLIAMS

18 DISTRICT COURT JUDGE

19

20 DATED THURSDAY, JUNE 25, 2015

21

22

23

24 REPORTED BY: PEGGY ISOM, RMR, NV CCR #541

25

09:31:10 1 employees who are being paid 7.25 but don't have the
2 insurance, right?
3 Well, I know --
4 THE COURT: Here -- and, well, here's the next
09:31:18 5 question I have then: If that was okay, why would they
6 have two tiers?
7 MR. SCHRAGER: That's exactly right. The
8 second tier --
9 THE COURT: Do you understand what I'm saying?
09:31:27 10 It's like, okay. Why would you have two tiers if there
11 wasn't some meaning to the lower tier, i.e., hourly
12 wages plus health insurance? If you understand? You
13 see where I'm kind of going?
14 MR. SCHRAGER: I do. I do. And that's --
09:31:44 15 THE COURT: Because if that was the case, then
16 it would be okay -- there would be one minimum wage and
17 everyone has to be offered health insurance
18 potentially.
19 MR. SCHRAGER: Yes. I think the point that
09:31:54 20 your Honor is making is that the lower tier has to have
21 substance. There has to be something in exchange for
22 losing that dollar.
23 THE COURT: Right.
24 MR. SCHRAGER: Right. Okay. I mean, I can --
09:32:02 25 I can go through the layers. You sort of skipped to

09:44:22 1 in Carson City, so we know a little bit about how these
2 regulations came to be and what they're supposed to
3 mean. And it's interesting to watch the developments
4 back in '06 and '07 when the amendment was enacted --
09:44:34 5 THE COURT: Sir, I can tell you this, that if
6 the regulation is contrary to the -- to the grant of
7 authority or the Constitution, it's problematic.
8 MR. SCHRAGER: Okay.
9 THE COURT: I get that.
09:44:44 10 MR. SCHRAGER: I can submit on that then if
11 you like, your Honor.
12 THE COURT: I mean, I understand that.
13 MR. SCHRAGER: Sure.
14 THE COURT: I mean, this is an administrative
09:44:50 15 agency, and whatever authority it has is granted to it
16 from the law.
17 MR. SCHRAGER: Yeah.
18 THE COURT: And it can't -- whatever --
19 whatever regulations it puts into place can't be
09:44:59 20 contrary to the Constitution or the statutory scheme.
21 That's pretty much easy stuff there.
22 MR. SCHRAGER: I'll submit on that, your
23 Honor.
24 Thank you.
09:45:06 25 THE COURT: Sir.

09:45:10 1 MR. PAEK: I think your Honor has already
2 touched on some of the problems with plaintiff's
3 arguments. As your Honor said, you have to look at the
4 overall constitutional scheme. And your Honor posed a
09:45:23 5 question that plaintiffs can't really answer is, Well,
6 under the way the scheme is written, how does the 8.25
7 upper rate work then if it works the way you're saying?
8 How would an employer be able to comply with that? And
9 why doesn't the constitutional amendment, the minimum
09:45:38 10 wage amendment, just write something to the effect of
11 all employees get 8.25?
12 THE COURT: No, no. That's not what I said.
13 What I said was this: If you take a look at the way, I
14 guess, you're requesting me to interpret the
09:45:51 15 constitutional amendment, why is it -- why would there
16 be two tiers? Because if I interpreted it that way,
17 all the -- all that would be required is this: Pay a
18 minimum wage of 7.25. However, you must offer health
19 insurance. So, in essence, why would there be a second
09:46:10 20 tier? What's the incentive? What's the motivation?
21 Why was that even placed there?
22 And, I guess, furthermore, upon what
23 circumstances would someone ever get paid the 8.25 per
24 hour.
09:46:22 25 MR. PAEK: Yes.

09:46:23 1 THE COURT: The mandate.

2 MR. PAEK: And I think what is being sort of

3 glossed over here is that second sentence in the

4 minimum wage amendment, your Honor. I mean, really

09:46:34 5 we're talking about two sentences in the minimum wage

6 amendment, the second sentence and the third sentence.

7 And in the dictionary battles we've had in our

8 briefing, your Honor, what we've submitted to the Court

9 is that an offer means simply to make available. And

09:46:48 10 that is exactly in line with that second sentence. It

11 says "offering health benefits within the meaning of

12 this section shall consistent of, quote, making health

13 insurance available." That's what that means.

14 What they want is that first sentence to be

09:47:08 15 read in a vacuum. And that can't be done, your Honor.

16 It has to be read together. If we want to read that

17 first sentence about "provide" without that second

18 sentence about "offering," then we wouldn't even be

19 here. The defendants could argue, "Well, in that first

09:47:21 20 sentence, it clearly says that the upper tier rate is

21 6.15 an hour. And we know from discovery that all the

22 defendants paid above $7 an hour, so there is no

23 liability."

24 That's, of course, not the case, your Honor.

09:47:34 25 THE COURT: I understand that, but no one has

09:47:35 1 answered me this question: Why is the upper tier rate
2 in the constitutional amendment if it wasn't meant to
3 have some force and effect? Because if I -- if you're
4 telling me, "All it has to do is be an offer," then
09:47:47 5 under what circumstances would an employer be forced to
6 pay 8.25 a hour?
7 MR. PAEK: When they -- the -- the upper tier
8 rate, your Honor?
9 THE COURT: Upper tier right.
09:47:57 10 MR. PAEK: The upper tier --
11 THE COURT: Because if I follow -- I'm
12 listening to your logic. If all it is is an offer
13 then, I guess, it would be this simple: You pay the
14 lower tier rate and all you have to do is offer health
09:48:08 15 insurance. And then if they reject it or whatever, I
16 guess, the factual scenario would be, there would never
17 be an 8.25 a hour upper tier rate.
18 MR. PAEK: Because some of the employers
19 doesn't offer health insurance, your Honor. Some
09:48:22 20 employers have an entirely -- very minimal part-time
21 hourly work force, and they just don't offer health
22 insurance in any form. And that's where it is. I
23 mean --
24 THE COURT: So they're treated differently,
09:48:32 25 the smaller guy than the bigger guy under the

10:01:01 1 Again, your Honor, it's been nine years. Nine
2 years that they've -- that they've thought if we offer
3 health insurance, we get to pay the lower tier. And
4 that's it in a nutshell, your Honor.
10:01:13 5 THE COURT: I understand. I do.
6 MR. PAEK: And I'll be happy to address any
7 questions your Honor has or any points that you'd like
8 me to bring up, counterpoints to what plaintiffs have
9 argued here today as well.
10:01:24 10 THE COURT: I understand.
11 Sir.
12 MR. SCHRAGER: Your Honor, I don't know how
13 much more I could add. I think that the discussion has
14 been frank and your Honor's questions have been on
10:01:32 15 point. Basic question, what is the mandate of the
16 Constitution? What do you have to do? You have to
17 provide --
18 THE COURT: What do I do with the -- and I
19 don't recall in great detail this. But it appears to
10:01:45 20 me that the regulations -- normally when I look at the
21 impact of a statute or constitutional amendment that
22 specifically deals with the substantive right, they
23 are, you know -- I don't really have to conduct a
24 prospective versus retroactive application because, you
10:02:11 25 know, we're talking about a substantive right. And

10:02:13 1 sometimes I do have to go into the procedural versus
2 substantive right analysis. I look at this, the
3 amendment was nine years ago. So a substantive right
4 was created with the employees potentially.
10:02:24 5 Now, the next question is this. And this is
6 where it gets a little murky. What do you do when
7 there's been regulations promulgated and say
8 hypothetically we -- and this is just for sake of
9 argument. This doesn't mean this is how I'm going to
10:02:38 10 rule. I just want to tell you that.
11 What do you do if the -- if potentially --
12 because I know the regulations are being attacked, I
13 guess, in Carson City.
14 Is that correct?
10:02:45 15 MR. SCHRAGER: Correct.
16 THE COURT: Now, what happens under those
17 circumstances? Because that's that different analysis.
18 Because normally I wouldn't be concerned about it if it
19 was a substantive right. Whenever the law goes into
10:02:57 20 effect, that's -- it moves forward from that standpoint
21 on. But what do you do when you have regulations that
22 are -- that murky it up? And you can respond to that.
23 MR. SCHRAGER: Yeah. I will -- I will -- I
24 think -- it's instructed for me to get very briefly --
10:03:11 25 THE COURT: Very fascinating issue.

10:03:13 1 MR. SCHRAGER: Absolutely.

2 But the story of the development of the

3 regulations. The minimum wage amendment came into

4 effect late November 2006.

10:03:22 5 THE COURT: Right.

6 MR. SCHRAGER: It had already passed the one

7 in 2004 by a very wide margin. It was quite clear that

8 it was going to pass again and become law in November

9 of 2006. There were attorney general's opinions issue.

10:03:33 10 There were questions from the labor commissioner.

11 There was preparation for this.

12 Immediately after the amendment was enacted,

13 the labor commissioner at the time enacted emergency

14 regulations because there wasn't time to go through the

10:03:46 15 whole process of public comment and all the things you

16 have to do to enact a rule. What the emergency

17 regulation said and sort of first blush of we have to

18 give people guidance what to do under this said

19 "provide." There was no mention of offering. Provide

10:04:02 20 health insurance. And if you go through all the labor

21 alerts the law firms put out and all the things they

22 say to tell people what to do, it's "Bud, you better go

23 get insurance for these people or you got to pay them

24 8.25, or until you figure out what to do with it. You

10:04:17 25 give them 8.25."

10:04:18 1 THE COURT: I understand.
2 MR. SCHRAGER: Right?
3 Over the process of the next year -- and I can
4 only call it subject to lobbying because minimum wage
10:04:25 5 workers don't have lobbyists, your Honor. The
6 temporary regulations morphed into more employer
7 friendly -- the permanent regulations are the ones
8 before you. They've never been amended. They say,
9 "Yeah. All you got to do is offer." That's the story
10:04:38 10 of how we got here. Right?
11 The labor commissioner is not a lawmaker. And
12 the one case that I -- that I remember that sort of
13 touches on this point, if you remember back in 2008,
14 the Las Vegas Convention and Visitors Authority was
10:04:48 15 trying to put a measure on the ballot. And they went
16 to the Secretary of State to get all their materials,
17 and you have the petition, the data, all those things.
18 The Secretary of State said, "There you go. Off you
19 go. Go get your signatures." Comes back. It's
10:05:04 20 challenged because the form didn't fit the statute. It
21 didn't have all the language you needed under the
22 statute.
23 THE COURT: I understand.
24 MR. SCHRAGER: What the Supreme Court said
10:05:14 25 was, "You don't get to rely on that. Your first duty

10:05:17 1 is the law. You come before me. You don't get to
2 rely -- the Secretary of State is not the lawmaker.
3 Now, if you came to the Secretary of State on an
4 administrative complaint, maybe it will go one way.
10:05:28 5 We're here to enforce the law. And you have that
6 responsibility. So the fact that you relied on that
7 isn't going to do you any good" and all those
8 signatures were thrown out.
9 Here we're not even talking about the statute.
10:05:38 10 We're talking about the Constitution.
11 THE COURT: I understand.
12 MR. SCHRAGER: Right?
13 The first duty not only of any employer, but
14 of the Court, is to enforce the words that are on that
10:05:46 15 page. Given also the fact that there is, you know,
16 this sort of murky development over time where the end
17 product is particularly employer friendly as opposed to
18 the language of the actual Constitution, I don't think
19 we are talking about much deference. I mean, I think
10:06:01 20 the only question you're talking about now is
21 prospective versus retroactive.
22 THE COURT: Exactly.
23 MR. SCHRAGER: Okay. In this context of this
24 particular case, there are many reasons why defendants
10:06:10 25 are liable to these employees. The first one is the

10:06:13 1 thing they offered wasn't even insurance. It doesn't
2 meet any basic standards under law to be offered.
3 Right?
4 It doesn't matter if anybody accepted it, if
10:06:22 5 anybody declined it. It wasn't offered, it doesn't
6 matter. The thing itself is inadequate under law.
7 That will exist after your ruling no matter what it is.
8 If your ruling is, prospectively, pay
9 everybody 8.25, I'll live with that. That's a good
10:06:39 10 day's work, because we've done that and we still have
11 the underlying claim, which is it doesn't matter
12 whether you offered or provided this junk insurance to
13 everybody for the past four years, you're still liable
14 to them.
10:06:52 15 So frankly in a practical sense, it doesn't
16 really matter to me. In a legal sense, I think there
17 is something in complying first with the Constitution
18 that is your responsibility. If you're going to take
19 advantage of the privilege under the Constitution there
10:07:06 20 is something to that that should interest your Honor.
21 That's my answer.
22 THE COURT: I understand.
23 Sir, you get to comment on this.
24 MR. PAEK: Yes.
10:07:14 25 And I think -- I think, your Honor, what we're

10:07:17 1 missing here is that the Constitution said "offering"
2 means "make available." And after that whether or not
3 there was as back-and-forth, that's how all laws are
4 made. Whether -- I mean, but at the end of the day
10:07:31 5 there's nothing in the labor commissioner of regulation
6 that it's out of place with the Constitution, your
7 Honor. It expands on top of what the offer is. And it
8 just repeats it. It just repeats it throughout the
9 regulation, that offering means makes available.
10:07:46 10 That's directly from the minimum wage amendment.
11 I believe there's one, two, three, four -- at
12 least four different areas in the NAC regulation which
13 just talks about offer or makes available, and that is
14 taken directly from the minimum wage amendment. So I
10:08:06 15 guess I'm a little lost on what counsel's point is,
16 other than maybe employers should have ignored the
17 labor commissioner's regulation, should have ignored
18 the language of the Constitution, and should have
19 somehow read in more to, well, this can't be -- this
10:08:22 20 can't be what it is. I mean, that's -- that's
21 plaintiff's counsel's theory of the case that came
22 about after they discovered one of their plaintiffs was
23 never -- was indeed offered insurance when she claimed
24 she wasn't. And now they've developed this theory
10:08:37 25 further. And that's fine.

10:08:38 1 But that -- that doesn't -- if you go back to
2 when the employers first saw this law pass and first
3 relied on those regulations, that does nothing for
4 those employers. How are they supposed to know? And
10:08:49 5 that's the question they can't answer.
6 Because they're -- because until this lawsuit
7 happened, and until -- this is the first time these
8 theories have been thrown out there, your Honor, is
9 through our moving papers and our briefing. This was
10:09:02 10 never in front of the labor commissioner's regulations
11 or how "provide" can't mean "to make available." It's
12 got to be something more than that. Where is that
13 cited, your Honor? There's nothing in their moving
14 papers that cites that from any source, including all
10:09:17 15 the extrinsic sources that they cited.
16 So that's the problem we have herein. We
17 can't get around the plain language of the minimum wage
18 amendment. They can't get around that third sentence
19 in the minimum wage amendment. And they can't get
10:09:30 20 around the regulations that have been promulgated, and
21 they have no contrary authority, your Honor. So that's
22 where we're at.
23 And that's the issue before this Court as to
24 whether or not all these employers should be punished
10:09:41 25 for -- for complying with what they thought was correct

10:09:45 1 at the time.

2 THE COURT: I -- I just want to make sure. I

3 mean, my ultimate decision will not -- I'm not looking

4 upon it as to whether the employers are going to be

10:09:54 5 punished or not. It's going to focus solely on the

6 application of the constitutional amendment. And I'm

7 going to take a look at the regulations.

8 And as far as the application of regulations

9 or not, understand, whatever grant of authority the

10:10:16 10 labor commission has, it's limited to the

11 constitutional amendment. That's basically what it

12 comes down to. So I'm going to make a decision based

13 upon that.

14 The thrust of my question was this -- before

10:10:28 15 that, was, What about retroactive versus prospective

16 application? Because you brought up a somewhat

17 important point. What happens under this scenario

18 where you have employers in the state of Nevada that

19 have relied upon the regulations of the labor

10:10:44 20 commissioner. And that's what I was thinking about.

21 And counsel even said, "Well, if it was

22 prospective, he can live with that," you know. Because

23 I was concerned about what about the retroactive

24 application.

10:10:55 25 This is a complex issue, sir. It's one of

10:10:57 1 first impression. I'm going to sit down and really
2 think about it.
3 MR. PAEK: Understood, your Honor.
4 THE COURT: Yeah. Last word. Anything you
10:11:02 5 want to add?
6 MR. SCHRAGER: No, your Honor. I mean, there
7 are -- you know, there are factual assertions here that
8 obviously we don't agree with. I don't think they've
9 been part of your Honor's considerations, so we'll
10:11:12 10 submit on that.
11 THE COURT: All right. Is there anything
12 pressing that I need to know about as far as this case
13 is concerned right now, from a time constant?
14 MR. SCHRAGER: We have -- we filed a motion
10:11:20 15 for class certification last month. I believe the
16 opposition is due today even.
17 MR. PAEK: Yes. That will be filed today.
18 THE COURT: Okay. So there's nothing pending?
19 MR. SCHRAGER: July 9th, two weeks from now
10:11:30 20 we'll be back before you.
21 THE COURT: All right. I understand. I'll
22 try to get something done before the 9th.
23 MR. PAEK: Thank you, your Honor.
24 MR. SCHRAGER: Thank you, your Honor.
10:11:36 25 THE COURT: Have a nice day, everyone.

10:11:43 1 REPORTER'S CERTIFICATE

2 STATE OF NEVADA)
:SS
3 COUNTY OF CLARK)

4 I, PEGGY ISOM, CERTIFIED SHORTHAND REPORTER DO
10:11:43 5 HEREBY CERTIFY THAT I TOOK DOWN IN STENOTYPE ALL OF THE
6 PROCEEDINGS HAD IN THE BEFORE-ENTITLED MATTER AT THE
7 TIME AND PLACE INDICATED, AND THAT THEREAFTER SAID
8 STENOTYPE NOTES WERE TRANSCRIBED INTO TYPEWRITING AT
9 AND UNDER MY DIRECTION AND SUPERVISION AND THE
10:11:43 10 FOREGOING TRANSCRIPT CONSTITUTES A FULL, TRUE AND
11 ACCURATE RECORD TO THE BEST OF MY ABILITY OF THE
12 PROCEEDINGS HAD.

13 IN WITNESS WHEREOF, I HAVE HEREUNTO SUBSCRIBED
14 MY NAME IN MY OFFICE IN THE COUNTY OF CLARK, STATE OF
10:11:43 15 NEVADA.

16

17 /s/ Peggy Isom
PEGGY ISOM, RMR, CCR 541

18

19

20

21

22

23

24

25

Exhibit H

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EIGHTH JUDICIAL DISTRICT COURT

IN AND FOR CLARK COUNTY, STATE OF NEVADA

PAULETTE DIAZ, an individual; and LAWANDA GAIL WILBANKS, an individual; SHANNON OLSZYNSKI, an individual; CHARITY FITZLAFF, an individual, on behalf of themselves and all similarly-situated individuals, Plaintiffs, vs. MDC RESTAURANTS, LLC, a Nevada limited liability company; LAGUNA RESTAURANTS, LLC, a Nevada limited liability company; INKA, LLC, a Nevada limited liability company, and DOES 1 through 100, Inclusive, Defendants.	**Case No:** **A-14-701633-C** **Dept. No.:** **XVI** **NOTICE OF ENTRY OF ORDER**

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NOTICE OF ENTRY OF ORDER

NOTICE IS HEREBY GIVEN that an ORDER REGARDING MOTION FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY AS TO PLAINTIFF PAULETTE DIAZ'S FIRST CLAIM FOR RELIEF was entered in the above-captioned matter on the 17th day of July, 2015. A copy of the ORDER is attached hereto.

DATED this 17th day of July, 2015.

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

By: */s/ Bradley Schrager*
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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of July, 2015, a true and correct copy of **NOTICE OF ENTRY OF ORDER** was served by electronically filing with the Clerk of the Court using the Wiznet Electronic Service system and serving all parties with an email-address on record, pursuant to Administrative Order 14-2 and Rule 9 of the N.E.F.C.R.

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

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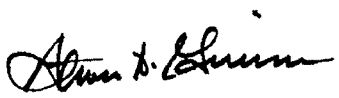

CLERK OF THE COURT

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EIGHTH JUDICIAL DISTRICT COURT

IN AND FOR CLARK COUNTY, STATE OF NEVADA

PAULETTE DIAZ; LAWANDA GAIL WILBANKS; SHANNON OLSZYNSKI; and CHARITY FITZLAFF, all on behalf of themselves and all similarly-situated individuals, Plaintiffs, vs. MDC RESTAURANTS, LLC; LAGUNA RESTAURANTS, LLC; INKA, LLC; and DOES 1 through 100, Inclusive, Defendants.	Case No.: A-14-701633-C Dept. No.: XVI **ORDER REGARDING MOTION FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY AS TO PLAINTIFF PAULETTE DIAZ'S FIRST CLAIM FOR RELIEF** Hearing Date: June 25, 2015 Hearing Time: 9:00 a.m.

On April 24, 2015, Plaintiff Paulette Diaz filed her Motion for Partial Summary Judgment on Liability as to her First Claim for Relief. On May 22, 2015, Defendants filed their Opposition to Plaintiffs' Motion. On June 5, 2015, Plaintiffs filed their Reply in Support of their Motion. On June 25, 2015, the Court held a hearing on Plaintiffs' Motion, Bradley S. Schrager, Esq., Jordan J. Butler, Esq., and Daniel Bravo, Esq. appearing for Plaintiffs, and Montgomery Y. Paek, Esq. and Kathryn B. Blakey, Esq. appearing for Defendants.

After review and consideration of the record, the points and authorities on file herein, and oral argument of counsel, the Court finds the following facts and states the following conclusions

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of law.[1]

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.

IT IS SO ORDERED this 15th day of July, 2015.

DISTRICT COURT JUDGE

Submitted by:

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Bradley Schrager, Esq.

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

Approved as to form and content by:

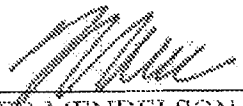

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Exhibit G

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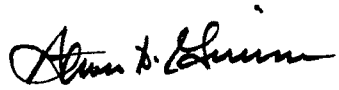

CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

PAULETTE DIAZ, an individual; and LAWANDA GAIL WILBANKS, an individual; SHANNON OLSZYNSKI, and individual; CHARITY FITZLAFF, an individual, on behalf of themselves and all similarly-situated individuals, Plaintiffs, vs. MDC RESTAURANTS, LLC, a Nevada limited liability company; LAGUNA RESTAURANTS, LLC, a Nevada limited liability company; INKA, LLC, a Nevada limited liability company and DOES 1 through 100, Inclusive, Defendants.	Case No. A701633 Dept. No. XVI **DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION PURSUANT TO N.R.C.P. 23** **AND** **COUNTERMOTION TO CONTINUE HEARING ON ORDER SHORTENING TIME** Hearing Date: July 9, 2015 Hearing Time: 9:00 a.m.

Defendants MDC RESTAURANTS, LLC; LAGUNA RESTAURANTS, LLC; and INKA, LLC (hereinafter "Defendants"), by and through their counsel of record, hereby oppose Plaintiffs PAULETTE DIAZ, LAWANDA GAIL WILBANKS, SHANNON OLSZYNSKI, and CHARITY FITZLAFF's (hereinafter "Plaintiffs") Motion for Class Certification Pursuant to Nevada Rule of Civil Procedure 23 and files their Countermotion to Continue Hearing on Order Shortening Time pending the resolution of the Motion to Disqualify Named Plaintiffs as Class Representatives and Dismiss Class Action Claims, which is being filed concurrently with this Opposition and

Countermotion. This Opposition and Countermotion is based on the Memorandum of Points and Authorities below, all papers and files on file herein and any oral argument permitted.

I. INTRODUCTION

Since the filing of Plaintiffs' Amended Class Action Complaint for claims under the Nevada Minimum Wage Amendment ("MWA") (also referred to as Article XV, Section 16 of the Nevada Constitution), Plaintiffs have chosen to focus on their fabricated interpretation of how the MWA functions rather than directly addressing the applicable law or facts. As a consequence, Plaintiffs' Motion for Class Certification does not come close to meeting the rigorous analysis required by Rule 23. Nev. R. Civ. P. 23. Instead, Plaintiffs' Motion for Class Certification is premised on an entirely flawed reading of what common questions are required by the MWA. Further, Plaintiffs have completely glazed over the applicable facts by eschewing their own deposition testimony in favor of declarations to minimize the many differences in answers between even the named Plaintiffs that go straight to individualized claims and defenses. Thus, after voluminous written discovery responses and the depositions of all of the named Plaintiffs and Defendants' representatives, Plaintiffs have only highlighted the reasons why a Rule 23 class is unworkable for claims under the MWA.

Plaintiffs' Motion for Class Certification is completely premised on the ubiquitous error cited in the United States Supreme Court case of *Wal-Mart v. Dukes*. In *Wal-Mart*, the Court noted that commonality is "easy to misread" because "any competently crafted complaint literally raises common 'questions.'" *Wal-Mart Stores, Inc. v. Dukes et al.*, 564 U.S. —, 131 S. Ct. 2541, 2550-2551, 180 L. Ed. 2d 374 (2011). Instead of just "common questions", however, Plaintiffs have the burden to show that a classwide proceeding has the capacity to "generate common <u>answers</u> apt to drive the resolution of the litigation" and "resolve an issue that is central to the validity of each one of the claims in one stroke." (Emphasis in original). *Wal-Mart Store, Inc.*, 131 S. Ct. 2541 at 2551. With deposition testimony failing to yield answers that could resolve central issues in one stroke as required by *Wal-Mart*, Plaintiffs' only refuge is to re-emphasize their question of "whether Defendant was eligible to pay Plaintiffs and proposed class members below the upper-tier minimum hourly rate." In this matter, Plaintiffs have now conducted extensive discovery into their posed question and it has now become clear that Plaintiffs cannot meet the Rule 23 requirements of

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ascertainability, commonality, typicality, predominance, superiority, numerosity and adequacy.

As explained below, Plaintiffs do not meet the threshold issue of ascertainability because Plaintiffs' class definition is imprecise and overbroad in that it simply includes any employee paid below the upper-tier minimum wage of $8.25 an hour. As liability under the MWA is contingent on whether or not an employer offers health insurance, such a class definition concerning rate of pay does nothing to define the class or exclude employees who would not be class members. Further, Plaintiffs fail to show commonality under Rule 23 because their flawed contentions based on an incorrect definition of "provid[ing]" health insurance would not generate answers apt to resolve the litigation and Plaintiffs' own deposition testimony highlights that enrollment or declination in health insurance and determination of qualified health insurance is a highly individualized inquiry. Similarly, Plaintiffs have failed to show typicality because their claims are again based on an incorrect definition of "provid[ed]" health insurance under the MWA and even amongst the named Plaintiffs there are individualized differences in their claims and resultant defenses. Plaintiffs also fail to show predominance and superiority because of the individualized inquiries needed and the failure to show that these claims would best be resolved through class treatment. Further, Plaintiffs cannot meet the numerosity requirement because the Defendants had a policy to offer all employees health insurance and no employee has denied being offered health insurance. Finally, Plaintiffs' deposition testimony brought focus to a Rule 23 requirement that is often overlooked - adequacy. Throughout their depositions, the named Plaintiffs exemplified their inadequacy to act as class representatives by having no familiarity with the class claims, having an incorrect belief of claims or having knowledge of claims derived almost exclusively from counsel. Accordingly, Plaintiffs' Motion should be denied as they cannot meet the requirements for certification.

II. FACTS

The named Plaintiffs are four[1] individuals who allege that they have worked at a Denny's or Coco's restaurant in Clark County, Nevada. Plaintiffs filed their Class Action Complaint on May 30, 2014 and filed their Amended Class Action Complaint on June 5, 2014. In their Amended Class

[1]The four named Plaintiffs in the Amended Class Action Complaint are (1) Paulette Diaz, (2) Lawanda Gail Wilbanks, (3) Shannon Olszynski and (4) Charity Fitzlaff.

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Action Complaint, Plaintiffs, on behalf of a putative Rule 23 class, brought two claims for relief for (1) Violation of Nev. Const. art. XV, § 16 Failure to Pay Lawful Minimum Wage and (2) Violation of Nev. Const. art. XV, § 16 and N.A.C. § 608.102 Failure to Pay Lawful Minimum Wage, both of which arise out of alleged violations of the Nevada minimum wage. As the second claim for relief is nothing more than a duplicative claim for violation of the MWA that merely adds reference to a Nevada Labor Commissioner's regulation on minimum wage, the only claim before this Court for certification arises entirely out of Plaintiffs' claim for unpaid wages under the MWA.

In their Motion for Class Certification, Plaintiffs propose that their alleged "class" be comprised of "All current and former employees of Defendants at all Nevada locations at any time during the applicable period of limitation who were compensated at less than the upper-tier hourly minimum wage set forth in Nev. Const. art XV, § 16." **Plaintiff's Motion for Class Certification Pursuant to N.R.C.P. 23 (hereinafter "Plfs.' Mot.") attached hereto as Exhibit A at 3:2-4.** Plaintiffs' proposed "class" of "employees . . . compensated at less than the upper-tier hourly minimum wage" is not correctly based in the Plaintiffs' claims for relief under the MWA or any question of law or fact pertinent to that claim for relief. Plaintiffs' class is for all employees paid below the upper-tier minimum wage or below $8.25 an hour. This class definition does not take into account the language of the MWA that makes payment of $8.25 an hour or higher expressly contingent on whether or not an employee was offered health insurance. Instead, it creates a class on one component, the rate of pay, without taking into account the express defense to the claim that an $8.25 an hour rate of pay was incorrect. This would be the equivalent of creating a "class" of all employees who were paid bi-weekly or a "class" of all employees who wore a uniform. In other words, there is a group of employees, but the group parameters are not linked to any issue to be resolved for liability. Accordingly, the "class" of all employees "compensated at less than the upper-tier hourly minimum wage" has no meaning within the context of the lawsuit.

Plaintiffs' class definition completely ignores the MWA's provision to pay the lower-tier $7.25 through an offer of health insurance. Whether or not the health insurance plans offered were applicable for purposes of the MWA revolves around whether or not the cost of the premiums were not more than 10% of an employee's gross taxable income and what a "qualified" health insurance

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plan is under the Nevada Labor Commissioner's regulations. In their Motion for Class Certification, however, Plaintiffs' class definition does not go to any of these issues and is again a common question without an answer apt to drive the resolution of the litigation.

III. LEGAL ARGUMENT

A. Legal Standard For Class Certification.

Plaintiffs agree that the Nevada Supreme Court has cited the "analogous federal rule" of Federal Rule of Civil Procedure 23 and its related case law when making determinations for certification under Nevada Rule of Civil Procedure 23. *Beazer Homes Holding Corp. v. Eighth Judicial Dist. Court of Nev.*, 128 Nev. Adv. Rep. 66, 291 P.3d 128, 136 n. 4 (2012) citing generally *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. —, 131 S. Ct. 2541, 2558, 180 L. Ed. 2d 374 (2011); *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 847-851 (2005) (citing Rule 23 case law from the Second, Third, Fifth, Sixth, Seventh and Eleventh Circuits). Similarly, this Court may evaluate certification under Nevada Rule of Civil Procedure 23 with analogous federal law.

As with certification under federal law, departure from the normal course of individual litigation must be justified through an affirmative demonstration of compliance with the prerequisites of Rule 23. The burden of making the affirmative demonstration is to be borne by Plaintiffs and is subject to rigorous scrutiny by the Court. More specifically, the United States Supreme Court has explained, "[t]he class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart Stores, Inc. v. Dukes et al.*, 564 U.S. —, 131 S. Ct. 2541, 2550, 180 L. Ed. 2d 374 (2011) (citing *Califano v. Yamasaki*, 442 U.S. 682, 700-701, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979)). A departure from the usual rule of litigation must be justified and cannot merely be assumed. *Id.* Indeed, the Rule "does not set forth a mere pleading standard" and the Court may not simply rely upon Plaintiffs' representations in determining whether a class action can be maintained. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432, 185 L. Ed. 2d 515 (2013). Instead, the party seeking certification must affirmatively prove each of the Rule's requirements and the Court must conduct a "rigorous analysis," in order to satisfy itself that those requirements have each been met. *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2551; *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982). As set forth in the text of the rule, Rule 23(a)

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requires that the party seeking certification demonstrate that:

> "(1) the class is so numerous that joinder of all members is impracticable,
>
> "(2) there are questions of law or fact common to the class,
>
> "(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and
>
> "(4) the representative parties will fairly and adequately protect the interests of the class"

Nev. R. Civ. P. 23(a). (Paragraph breaks added). Rule 23 also requires that the proposed class satisfy at least one of the three requirements listed in Rule 23(b). Nev. R. Civ. P. 23(b). Here, Plaintiffs rely on Rule 23(b)(3), which states that a class may be maintained where "questions of law or fact common to the members of the class predominate over any questions affecting only individual members" and a class action would be "superior to other available methods for the fair and efficient adjudication of the controversy." Nev. R. Civ. P. 23(b)(3); *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2549 n.2.

As indicated above, although Defendant may bear certain burdens of proof at trial, Plaintiffs must prove each requirement of Rule 23 certification by a preponderance of the evidence. *See Messner v. NorthShore Univ. HealthSystem*, 669 F.3d 802, 811 (7th Cir. 2012); *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 513 (7th Cir. 2006); *Novak v. Boeing Co.*, No. SACV 09-01011-CJC, 2011 U.S. Dist. LEXIS 146676, *9 (C.D. Cal. Dec. 19, 2011). In further explanation of Plaintiffs' burden when attempting to establish Rule 23's requirements the Supreme Court explained, "[a] party . . . must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2551 (emphasis in original). A "court may not simply assume the truth of the matters as asserted by the plaintiff. If there are material factual disputes, the court must 'receive evidence . . . and resolve the disputes before deciding whether to certify the class.'" *Messner*, 669 F.3d at 811 (citations omitted).

In their Motion for Class Certification, Plaintiffs do not reach the Rule 23 requirements because Plaintiffs have failed to define an ascertainable class by not basing their class definition on anything beyond the upper tier $8.25 an hour rate. In addition to failing to meet ascertainability,

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Plaintiffs fail to meet the commonality, typicality, numerosity and adequacy requirements as required by Rule 23(a). Further, the nature of claims under the MWA show that class litigation is not superior to individual litigation and that Plaintiffs have not met the predominance requirement as required by Rule 23(b)(3).

B. Plaintiffs Have Failed To Meet The Ascertainability Requirement In Their Class Definition.

As a threshold matter, the Court need not review Rule 23's numerosity, commonality, typicality, adequacy, superiority and predominance requirements because Plaintiffs have failed to propose an ascertainable class. Ascertainability must be determined "[b]efore weighing the enumerated [Rule 23] class certification factors." (Emphasis added). *Ratnayake v. Farmers Ins. Exch.*, 2015 WL 875432, *4 (D. Nev. Feb. 27, 2015). Indeed, "[i]n determining whether to certify a class, the court begins with the proposed definition of the class . . . [because] [a]bsent a cognizable class, determining whether Plaintiffs or the putative class satisfy the other Rule 23(a) and (b) requirements is unnecessary." *Robinson v. Gillespie*, 219 F.R.D. 179, 183-184 (D. Kan. 2003). Accordingly, should this Court find no ascertainable class, there is no need to conduct a further analysis of other class certification requirements.

Under ascertainability, the Court must determine whether it is "administratively feasible" to ascertain whether an individual is a member of a proposed class. *Ratnayake* at *4. Further, if a Court must make "detailed fact determinations to determine whether someone is a member of the class" then "a class may not be ascertainable." *Id.* Thus, courts will look to the class definition to determine whether a class is "ascertainable and clearly identifiable." *Konik v. Time Warner Cable*, 2010 U.S. Dist. LEXIS 136923, 32-33 (C.D. Cal. Nov. 24, 2010) citing *Mazur v. eBay Inc.*, 257 F.R.D. 563, 566 (N.D. Cal. 2009) (Patel, J.) (citing *Lamumba Corp. v. City of Oakland*, 2007 U.S. Dist. LEXIS 81688, 2007 WL 3245282 (N.D. Cal. 2007).

Many courts have found that a proposed class is not ascertainable where it includes all users or all employees, regardless of the injuries suffered, because such an overbroad class can encompass a significant number of class members who lack standing to recover on the claims alleged. *See, e.g., Konik* at *33-35; *see also, McDonald v. Corr. Corp. of Am.*, 2010 U.S. Dist. LEXIS 122674, 7-8 (D.

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Ariz. Nov. 4, 2010). In *Konik*, plaintiffs' proposed class definition stated "[a]ll California residential and business persons who were customers of Adelphia Cable Television and who were switched over to Time Warner after Time Warner's purchase of Adelphia Cable Television consummated in or about August, 2006." Under this class definition, the court held that this class was not ascertainable because "Plaintiff offers no way of determining what members of the class actually suffered service interruptions" and that since "the class as currently defined would include these non-harmed [people], this portion of the class definition is both imprecise and overbroad." *Konik* at *33. In *McDonald*, plaintiff's proposed class for certification included "[a]ll individuals employed by Corrections Corporation of America at any time since July 1, 2007, who have been or may be subjected to termination, discipline, or reprimand, resulting from CCA's failure to comply with the ADA." *McDonald* at 6-7. The court found that plaintiff's proposed class definition was "imprecise, overbroad and unascertainable" and that the proposed class definition did not specify "whether class members include all CCA employees, or only those employees similarly situated to McDonald in terms of position . . . and facility." *McDonald* at 7-8.

Here, like in *Konik* and *McDonald*, Plaintiffs have proposed a class definition that is imprecise and overbroad. As stated above, Plaintiffs propose the class definition of "[a]ll current and former employees of Defendants at all Nevada locations at any time during the applicable period of limitation who were compensated at less than the upper-tier hourly minimum wage set forth in Nev. Const. art XV, § 16." **Plfs.' Mot., Exhibit A at 3:2-4.** Plaintiffs only use the compensation rate of "less than the upper-tier hourly minimum wage" of $8.25 an hour as a class definition. This class definition is imprecise because liability under the MWA does not arise from just paying less than $8.25 an hour to an employee. More accurately, a violation under the MWA occurs only when an employee is paid less than $8.25 an hour is not "offered" health insurance benefits. Nev. Const. Art. XV, § 16(A). Thus, liability is contingent on whether or not the employer "provides health benefits as described herein" which the MWA "describe[s]" as "[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 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, §

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16(A). The class definition is also overbroad because simply defining a class of employees who made less than $8.25 an hour would include non-class members such as those employees who were properly exempt from the upper tier minimum wage because they were "offer[ed] health benefits" when Defendant "ma[de] health insurance available to the employee." *Id.*

The Plaintiffs have failed to define their class precisely or narrowly. In fact, the definition is not properly linked to any issue that would incur liability under the MWA. Accordingly, this Court should deny Plaintiffs' Motion for Class Certification as a threshold issue.

C. Plaintiffs Have Failed To Meet The Commonality Requirement.

1. Plaintiffs common contentions fail because they do not resolve any issue central to liability under the MWA.

Rule 23(a)'s prerequisite of commonality requires Plaintiffs to demonstrate that there are "questions of law or fact common to the class." Nev. R. Civ. P. 23(a)(2). However, not just any common question will do. As put by the Ninth Circuit, "it is insufficient to merely allege any common question." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011). The Supreme Court explained that the key inquiry is not whether the plaintiffs have raised common questions, "even in droves," but rather, whether class treatment will "generate common answers apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2551. (Emphasis in original). Also, the common contentions must "resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* Again, those seeking to meet this prerequisite "must affirmatively demonstrate [their] compliance" and "prove that there are in fact . . . common questions of law or fact . . . ." *Id.* at 2551-2552. (Emphasis in original).

As the Supreme Court explained in *Wal-Mart Stores, Inc.*, "[a]ny competently crafted class complaint literally raises common questions." *Id.* at 2551. This case is no exception as Plaintiffs have proposed a class definition of all employees who were compensated "less than the upper-tier hourly minimum wage set forth in Nev. Const. art XV, § 16". **Plfs.' Mot., Exhibit A at 3:2-4.** A class of employees paid less than $8.25 an hour does not provide any answers that would resolve the litigation. Instead, it avoids the central issue of whether or not there would be liability under the MWA for an employer who offered health insurance plans to its employees.

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Additionally, Plaintiffs pose additional "common questions" in their Motion for Class Certification that are based on a flawed reading of the MWA by stating:

> The questions concerning Plaintiffs and the proposed Class are straightforward. Did Defendants pay Class members below the upper-tier hourly wage? If so, they had to meet the constitutional mandate regarding provision of benefits. If they did not qualify to pay a lower wage—either by offering a health insurance benefits plan that did not meet coverage requirements, by offering a plan where employee premium costs exceeded legal limits, or by not offering a qualifying plan at all—then Defendants are liable to Plaintiffs and the Class for back pay, damages, and other associated relief.

Plfs.' Mot., Exhibit A at 1:11-17. Plaintiffs' first common question is the same as the class definition above as it asks "[d]id Defendants pay Class members below the upper-tier hourly wage?" and does nothing to link the upper-tier rate to liability under the MWA. The second common question posed sets out the qualification to pay the lower-tier rate in three instances that are not based in the language of the MWA. The first qualification is "offering a health insurance benefits plan that did not meet coverage requirements." This qualification is based in Plaintiffs' own fabricated criteria as Plaintiffs can cite no MWA or NAC 608 language that would give rise to "coverage requirements" that Plaintiffs claim were not met. The second qualification is not supported in fact as Plaintiffs have not cited any evidence of an example offer in which "employee premium costs exceeded legal limits." Finally, the third qualification of "not offering a qualifying plan at all" is also not supported by evidence and a red herring. As will be explained below, there is testimonial and written evidence that all four named Plaintiffs were offered health insurance by the Defendants as two of the named Plaintiffs admit to being offered health insurance (with one Plaintiff actually enrolling in the health insurance) and the other two named Plaintiffs used a sudden lack of memory to avoid answering whether or not they were offered health insurance despite contrary written evidence that they were offered health insurance.

The facts regarding Plaintiffs' underlying class claim requires clarification as Plaintiffs are attempting to certify a class on misstated law. In their Motion for Class Certification, Plaintiffs acknowledge that their claim is for an alleged violation of the MWA. **Plfs.' Mot., Exhibit A at 1:3-20.** Instead of citing the actual language of the MWA, however, Plaintiffs base their certification arguments on an incorrect interpretation of the language of the MWA. Specifically, Plaintiffs

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misrepresent that Defendants had to "provide" qualifying health insurance instead of just "offer[ing]" qualifying health insurance. **Plfs.' Mot., Exhibit A at 10:14-17;** ***see also*** **2:6-15.** The language of the MWA does contain the term "provide such benefits" but then immediately clarifies that provide means "offering health benefits" by "making health insurance available to the employee." (Emphasis added). Nev. Const. Art. XV, § 16(A). Thus, the relevant portion of Section A of the MWA states:

> 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.

(Emphasis added). Nev. Const. Art. XV, § 16(A). Contrary to the MWA's plain language, Plaintiffs would request that this Court adopt a nonsensical definition of the work "provide" by asserting that there must be some form of acceptance of assertion of control or possession by the person to whom a service or item is provided. **Defendants' Opposition to Motion for Partial Summary Judgment on Liability as to Plaintiff Paulette Diaz's First Claim for Relief (hereinafter "Dfts.' Opp. to MPSJ") attached as Exhibit B at 5:28-6:5.** As more fully explained in Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment, however, the plain meaning of "provide" is "to make available for use." ***See*** **Dfts.' Opp. to MPSJ, Exhibit B at 6:5-8:2.** Further, such an interpretation that "provide" requires acceptance or possession would render the language of the MWA nugatory and is not supported by other authority. ***See*** **Dfts.' Opp. to MPSJ, Exhibit B at 8:2-13:20.**

Additionally, the Nevada Labor Commissioner has promulgated numerous regulations that further expand on what constitutes "offered qualified health insurance." ***See also*** **Dfts.' Opp. to MPSJ, Exhibit B at 10:23-12:20.** In these Nevada Labor Commissioner regulations codified in Chapter 608 of the Nevada Administrative Code that correspond to Chapter 608 of the minimum wage laws in the Nevada Revised Statutes, the lower tier and upper tier minimum wage specifically

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hinge on whether an employee is "offered" or "not offered" qualified health insurance. The regulation provides that the "minimum wage for an employee . . . (a) If an employee is offered qualified health insurance, is $5.15 per hour; or (b) If an employee is not offered qualified health insurance, is $6.15 per hour." (Emphasis added). NAC 608.100(1) and (2). In the section addressing an employer's "qualification to pay lower rate to employee offered health insurance", again, the Nevada Labor Commissioner's regulations clearly require the "offer" of health insurance - not "provision" of health insurance - by stating that the employer "must offer a health insurance plan which:. . . " NAC 608.102.

Further, the Nevada Labor Commissioner's regulations make further distinctions between the "offer" of health insurance and actual enrollment in a health insurance plan. NAC 608.108. Under NAC 608.108, the regulations distinguish between the offer of health insurance from a separate and disjunctive situation for when a plan "becomes effective." *Id.* Thus, NAC 608.108 adds further guidance on the clear distinctions between offered health insurance and enrollment in health insurance.

Additionally, in converse to enrollment, NAC 608.106 provides guidance as to declination of an offered plan. Under NAC 608.106, an employer must maintain documentation of an employee who "declines coverage under a health insurance plan." This regulation highlights the reality that employers cannot force employees to enroll in health insurance plans. Thus, an employer can be in compliance with the MWA by keeping a record of declined coverage. There would be no logical reason for a regulation concerning the declination of coverage if an employer was required to enroll employees rather than simply offer health insurance to employees.

As with the plain language of the MWA, the Labor Commissioner's regulations all contradict Plaintiffs' arguments that the only requirement under the MWA is that employees must actually enroll in health insurance benefits to employees to qualify for the lower-tier minimum wage rate, rather than "offer" health insurance benefits. In fact, all of the regulatory language supports Defendants having a complete defense by simply "offering" health insurance benefits that qualify under the regulations. The issue of offering health insurance is also more thoroughly briefed before this Court in Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment. *See* **Dfts.'**

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Opp. to MPSJ, Exhibit B.

The MWA's "offer" requirement also reflects the reality of how employees enroll or decline in health insurance plans on a case-by-case and individual basis. As was borne out in the depositions, although an employer can offer a health insurance plan, it cannot force an employee to accept that health insurance plan as there are a variety of reasons why an employee may not require health insurance - including an individual's pre-existing health insurance coverage from other sources as with Plaintiff Diaz or the individual's refusal to have any deductions of any sort from their pay. Thus, recognizing the realities of how these health plans are accepted or declined for a variety of personal reasons, the Nevada Legislature and the Nevada Labor Commissioner expressly structured the lower-tier minimum wage to be contingent on the more straightforward "offer" of health insurance when drafting the laws and regulations concerning the Nevada minimum wage.

Plaintiffs' statements that the MWA requires a "provi[sion]" of insurance and nothing else is unsupported by the explicit "offer" language contained in both the MWA and NAC 608. Thus, Plaintiffs' certification issues are also irreparably misstated. The issues for certification, therefore, must involve whether or not Defendants "offer[ed"] qualified health insurance as it goes to both Plaintiffs' claims and Defendants' defenses under the MWA. In their Motion for Class Certification, however, Plaintiffs have glossed over the "offer" requirement of the MWA by concocting their own "provide" definition that is contradicted by the offer language in the MWA. **Plfs.' Mot., Exhibit A at 10:14-21.** In doing so, Plaintiffs also proffer newly crafted declarations focusing on their own definition of "provide" rather than citing the relevant deposition testimony that established that two of the four named Plaintiffs, Olszynski and Fitzlaff, admitted to being "offered" health insurance (with Fitzlaff actually enrolling in health insurance) while the other two named Plaintiffs, Diaz and Wilbanks, were not able to "recall" being offered health insurance despite Diaz having executed a written declination form and Wilbanks previously admitting to being offered health insurance in a written Request for Admission response. **Plfs.' Mot. at 3:21-24; *but see* excerpts from Paulette Diaz Deposition ("Diaz Depo.") attached hereto as Exhibit C at 113:23-116:3; Lawanda Wilbanks Deposition ("Wilbanks Depo.") attached hereto as Exhibit D at 91:16-93:6; Shannon Olszynski Deposition ("Olszynski Depo.") attached hereto as Exhibit E at 91:22-93:21; and**

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Charity Fitzlaff Deposition ("Fitzlaff Depo.") attached hereto as Exhibit F at 47:4-13. Thus, there is testimonial or written evidence that all four named Plaintiffs were, in fact, offered health insurance by the Defendants.

2. Plaintiffs common contentions fail because the inquiry into liability under the MWA is far too individualized.

Even if the MWA or Labor Commissioner's regulations under NAC 608 required that employees be actually enrolled in health insurance for an employer to pay the lower tier wage- which they do not - the resultant inquiry would be so individualized that there could be no class treatment for such claims. For health insurance to be provided, the employer would first have to offer a health plan that qualifies. To qualify, a health plan would have to not exceed 10% of each Plaintiffs' gross taxable income. Nev. Const. Art. XV, § 16(A). "Gross taxable income . . . includes, without limitation, tips, bonuses or other compensation." NAC 608.104(2). (Emphasis added). Here, the four named Plaintiffs all had varying hours ranging from 8 to 40 hours a week: Diaz worked 40 hours, 30 hours or 30-35 hours a week; Wilbanks worked 40 or 8 hours a week; Olszynski worked 35-40 hours a week; and Fitzlaff worked 35 plus hours a week. **Diaz Depo., Exhibit C at 144:12-148:13; Wilbanks Depo., Exhibit D at 69:8-70:16; Olszynski Depo., Exhibit E at 110:13-15; and Fitzlaff Depo., Exhibit F at 64:12-16.** The four named Plaintiffs also had varying rates of pay: Diaz made $8.25 an hour, to $10.00 an hour, to $11.00 an hour and $7.25 an hour; Wilbanks recalled making either $7.25 or $7.45 an hour; Olszynski made $7.25 an hour and then $5.13 an hour in a Colorado location; and Fitzlaff made $7.25 an hour. **Diaz Depo., Exhibit C at 84:20-85:4; Wilbanks Depo., Exhibit D at 63:1-13; Olszynski Depo., Exhibit E at 107:9-14 and 76:1-11; and Fitzlaff Depo., Exhibit F at 64:22-65:12.** Importantly, the named Plaintiffs also differed in how they reported the tips portion of their gross taxable income: Diaz and Fitzlaff testified to reporting all tips they received; Olszynski never reported more than 20% of what she received in tips; and Wilbanks did not report any of her tips. **Diaz Depo., Exhibit C at 162:18-163:13; Wilbanks Depo., Exhibit D at 79:7-20; Olszynski Depo., Exhibit E at 116:4-118:17; and Fitzlaff Depo., Exhibit F at 65:14-66:4.** Additionally, the Plaintiffs differed in the amount of tips they averaged a week: Diaz averaged "at most" $252 a week in tips; Olszynski averaged $500 a

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week in tips; and Fitzlaff averaged $300 to $400 a week in tips. **Diaz Depo., Exhibit C at 165:17-166:5; Olszynski Depo., Exhibit E at 116:4-118:17; and Fitzlaff Depo., Exhibit F at 68:13-21.** Thus, to determine whether each plan met the 10% test, each individual plaintiff would have to have hours, rate of pay and tips examined on a yearly or weekly basis against the costs of the plans. Further, there would have to be some other means of accurately gauging gross taxable income for some Plaintiffs, such as Wilbanks and Olszynski, who did not accurately or lawfully report their tips. Plaintiffs have presented no evidence that this issue could be resolved in one stroke or that the plans failed to meet the 10% gross income requirement.

Further, even if this individualized inquiry was performed for each Plaintiff, then each Plaintiffs' declination would have to be examined as some Plaintiffs declined insurance from a personal choice that would give rise to an estoppel argument that it was impossible to "provide" certain Plaintiffs with health insurance. For example, Diaz testified that she already had health insurance coverage through her Native-American clinic as a member of the Oglala Sioux tribe. **Diaz Depo., Exhibit C at 62:17-64:10.** Wilbanks, on the other hand, testified that her "main concern" was for her daughter's health insurance coverage but that her daughter was already "covered through her dad's insurance." **Wilbanks Depo., Exhibit D at 65:3-66:20.** Olszynski had enrolled in Medicaid because she believed Medicaid was a "better choice." **Olszynski Depo., Exhibit E at 112:11-114:19.** Alternatively, Fitzlaff alleges that the manager told her to initially "deny the insurance" and that health insurance would be handled after opening. **Fitzlaff Depo., Exhibit F at 40:17-41:4 and 47:4-13.** Despite this allegation of being told to decline health insurance, Fitzlaff testified that she actually enrolled in the health insurance that was offered. **Fitzlaff Depo., Exhibit F at 47:4-13.** Thus, an individualized inquiry is needed as to each Plaintiff's reasons for declining insurance. This is especially true in cases where Plaintiffs allege that managers were affirmatively dissuading employees from accepting insurance which may give rise to separate defenses that those particular managers were not acting within the course and scope of their duties for Defendants by expressly contradicting the Defendants' offer policies.

The most fundamental and searching questions, those apt to drive this litigation in terms of Plaintiffs' claims and Defendants' defenses, simply do not lend themselves to class-wide resolution.

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To make the matter even easier for the Court, Plaintiffs have offered no common answers or evidence to affirmatively show that the commonality requirement might be met in this case. The rigorous analysis required by the Court here must fall on nothing more than the gossamer strands of conjecture which simply do not bear the weight of the inquiry. Accordingly, Plaintiffs' Motion requesting Rule 23 certification fails.

D. Plaintiffs Have Failed To Meet The Typicality Requirement.

Rule 23's typicality requirement serves the important function of protecting absent class members from the *res judicata* effect of a class action brought by representatives who may have unique claims, defenses, or interests not shared by the members of the proposed class. Eloquently put by the Sixth Circuit, "the premise of the typicality requirement is simply stated: as goes the claim of the named plaintiff, so go the claims of the class." *Sprague v. General Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998). Accordingly, even if the concepts underlying typicality is to be given a permissive interpretation it is absolutely critical that the Court nevertheless engage in the rigorous analysis called for by the Supreme Court to ensure that absentee class members are protected.

While typicality and commonality are each distinct requirements, the nature of the analysis each requires tends to engender a certain amount of overlap. As explained by the United States Supreme Court:

> Both [typicality and commonality] serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. Those requirements therefore also tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest.

Wal-Mart Stores, Inc., 131 S. Ct. at 2551 n.5 (citing *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157-158, n 13, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)).

In an attempt to meet their burden here, Plaintiffs assert the conclusion that "[h]ere, all Plaintiffs were paid below the upper-tier minimum wage" and that Plaintiffs "allege that they were not provided with qualifying health benefits." **Plfs.' Mot., Exhibit A at 11:24-28.** Thus, Plaintiffs'

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typicality requirement suffers the same fatal flaw as in their ascertainability and commonality requirements. Plaintiffs have premised the typicality of their claims on being paid below the upper-tier minimum wage without being "provided" qualifying health benefits. As stated above, Plaintiffs' argument regarding "provided" benefits is not supported by the language of the MWA or NAC 608. Further, Plaintiffs' reference to "qualifying health benefits" does not provide any definitions but Plaintiffs have failed to show that any individual named Plaintiffs did not have "qualified" health insurance benefits as defined in NAC 608. Additionally, as shown above, the differences in Plaintiffs' hours, pay, tips and reasons for declination give rise to an individualized inquiry as to whether the 10% threshold of gross income was met, whether health insurance could actually be provided and whether certain managers were properly following policies. Therefore, like with ascertainability and commonality, Plaintiffs' typicality argument is not linked to any question of law or fact that would give rise to liability under the MWA.

Plaintiffs simply have not shown that their claims are typical of the class they seek to represent. The possibility that some class member may have his or her claim adjudicated without proper representation absolutely undermines and contradicts a finding of typicality. While the typicality requirement does not require Plaintiffs to demonstrate exact factual similarity amongst a class, Plaintiffs are, nevertheless, required to prove that their claims and interests are sufficiently typical of the proposed class members that representative litigation will be economical and that absent class members will be adequately represented. *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2551 n.5. Plaintiffs have failed to meet this burden and so class certification would be improper.

E. Plaintiffs Cannot Satisfy The Predominance And Superiority Requirements Of Rule 23(b)(3).

As indicated above, to certify a class action pursuant to Rule23(b)(3) the court, through a rigorous analysis, must find that Plaintiffs have affirmatively shown that (1) questions of law or fact common to the members of the class predominate over any questions affecting only individual members (a requirement often referred to as "predominance"); and (2) that a class action is superior to other available methods for the fair and efficient adjudication of the controversy, (a requirement commonly referred to as "superiority"). Nev. R. Civ. P. 23(b)(3); *See Comcast, Corp.*, 133 S. Ct. at

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1432. As explained by one district court, the "predominance" and "superiority" "prongs of Rule 23 work together to ensure that certifying a class 'would achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.'" *Ginsburg v. Comcast Cable Comm. Mgmt. LLC*, 2013 U.S. Dist. LEXIS 55149, at *15, 20 Wage & Hour Cas. 2d (BNA) 1068 (W.D. Wash. Apr. 17, 2013) (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)). As with other Rule 23 requirements, compliance with the standards of Rule 23(b) must be affirmatively demonstrated by evidentiary proof. *Comcast, Corp.*, 133 S. Ct. at 1432.

1. Plaintiffs cannot meet the demanding predominance requirement.

Even if Plaintiffs had established commonality here, which they have not done, "[c]ommonality alone is not sufficient" to satisfy Rule 23(b)(3) which requires a showing that questions of law or fact common to class members predominate over any questions affecting only individual members. *Brown v. Fed. Express Corp.*, 249 F.R.D. 580, 583 (C.D. Cal. 2008). The predominance inquiry is "far more demanding" than the commonality requirement of Rule 23(a) and imposes on the court the "duty to take a 'close look' at whether common questions predominate over individual ones." *Comcast, Corp.*, 133 S. Ct. at 1432; *Amchem Prods. V. Windsor*, 521 U.S. 591, 623 (1997); *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001). In taking its "close look" at the demanding requirement of predominance, the Court "must first examine the substantive issues raised by Plaintiff[] and second inquire into the proof relevant to each issue." *Jimenez v. Domino's Pizza, Inc.*, 238 F.R.D. 241, 251-52 (C.D. Cal. 2006) (citing *Simer v. Rios*, 661 F.2d 655, 672 (7th Cir. 1981)) (denying certification, *inter alia*, because of the "individual, fact-specific analysis" required as to each putative class member). "In determining whether common issues predominate in accordance with Rule 23(b)(3) . . . differences among class members' claims are crucial." *Ginsburg*, 2013 U.S. Dist. LEXIS 55149 at *15.

Plaintiffs cannot establish predominance in this matter because individual inquiries will necessarily abound. As shown in the named Plaintiffs' depositions, the proof necessary to address the issues involved in Plaintiffs' claims will require a case-by-case analysis of myriad individualized

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factual issues. Plaintiffs attempt to meet their Rule 23(b)(3) burden by explaining that, the questions of employee pay levels and "Defendant's eligibility to pay at reduced hourly minimum wage rates . . . essentially describe the entirety of the suit." **Plfs.' Mot., Exhibit A at 14:7-11.** As before, Plaintiffs proceed then to speculate that the inquiry required here will center on Plaintiffs' flawed legal position of whether or not Defendants "provid[ed]" health insurance benefits plans. ***Id.* at 14:11-14.** Beyond this unsupported legal premise, the depositions thus far have shown that even under a "provided" theory, the inquiry as to the claims and defenses for each named Plaintiffs are far too individualized.

As explained above, the inquiry in this case will focus to a great extent on whether or not particular health benefits were offered or made available to each particular employee 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, pursuant to the Nevada Constitution, Article XV, Section 16(A). As explained in Defendants' Opposition to Motion for Partial Summary Judgment, Plaintiffs have rested all of their arguments on a flawed reading that the MWA requires an absolute providing of health insurance that is beyond an offer. Further, even under this flawed reading, Plaintiffs have failed to state or show questions of law or fact common to class members that predominate over any questions affecting only individual members. Accordingly, Plaintiffs have failed to meet the predominance requirement of Rule 23(b)(3).

2. Plaintiffs cannot meet Rule 23(b)(3)'s superiority requirement.

Under Rule 23(b)(3)'s superiority requirement, Plaintiffs must establish that deviation from the normal course of litigation to a class action is the "superior" method of adjudicating and resolving their claims. *See, e.g., Valentino v. Carter-Wallace, Inc.*, 97 F3d 1227, 1235 (9th Cir. 1996); *Jimenez*, 238 F.R.D. at 253. As part of this inquiry, the Court "must . . . consider trial management concerns." *Weigele v. Fedex Ground Package Sys.*, 267 F.R.D. 614, 624 (S.D. Cal. 2010); *see also Maddock v. KB Homes, Inc.*, 248 F.R.D. 229, 240 (C.D. Cal. 2007) ("The [superiority] requirement requires consideration of the difficulties likely to be encountered in the management of this litigation as a class action, including, especially, whether and how the case may be tried."). Again, this requirement is tied to the serious concerns regarding commonality and

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predominance as, given the individual questions to be answered in this litigation, it is likely that "trial administration would be overwhelming" if a class action were certified. *Id; see also Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1192 (9th Cir. 2001) ("If each class member has to litigate numerous and substantial separate issues to establish his or her right to recover individually, a class action is not 'superior.'"); *Jimenez*, 238 F.R.D. at 253 (finding no superiority where "trial of [the] case as a class action would be unmanageable because of the individualized inquiries required").

Peripherally addressing what would certainly be the unmanageable individual inquiries class litigation would present in this case, Plaintiffs speculate that the "advanced network computer . . . systems" they believe Defendant has will allow "Class, wage, benefits and damages issues" to be "resolved with relative ease." **Plfs.' Mot., Exhibit A at 15:23-26.** However, apart from being absolutely unclear as to what issues Plaintiffs are referring, what, exactly, they believe these "advanced" systems will be able to do, and to what the supposed "ease" would be relative to, the conjecture is far from an affirmative demonstration that class adjudication could be efficiently managed in this case.

Indeed, Plaintiffs have not affirmatively shown that a class action would be the superior option in this matter, nor have they suggested any actual method for dealing with the individual issues that will necessarily arise, choosing instead to merely ignore them. As explained above, if interest in this case is minimal, the vastly superior option for continued litigation, and achieving each of the efficiencies referenced by Plaintiffs, would be further use of the joinder mechanism. In fact, Plaintiffs have already shown the efficacy of this option, adding two additional interested parties after the initial complaint was filed. Joinder would avoid the difficulties of representative litigation while still allowing all interested parties to have their claims heard in a single case and have their costs shared.

Even if there were some benefit to representative litigation, which Plaintiffs have failed to affirmatively demonstrate, that minimal benefit would nevertheless fail to justify certification of a class action in this case. As explained by another district court, while there may always be some benefit to allowing similar, yet nevertheless individual, claims to be heard in a single case, "because

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of the individualized issues on which class members' claims would ultimately depend, a class action would prove unmanageable" in these circumstances. *Ginsburg*, 2013 U.S. Dist. LEXIS 55149 at *26. In a situation like this, especially where "Plaintiffs have proposed no method to efficiently manage resolution of the individual questions," class action certification is not appropriate. *See id.*

F. Plaintiffs Have Failed To Meet The Numerosity Requirement.

Under Rule 23(a)(1), Plaintiffs must show that "the class is so numerous that joinder of all members is impracticable." Nev. R. Civ. P. 23(a)(1). There is no bright line rule regarding a particular number of class members that inherently suggests impracticability of joinder. *Twegbe v. Pharmaca Integrative Pharm., Inc.*, 2013 U.S. Dist. LEXIS 100067 (N.D. Cal. July 17, 2013). Courts canvassing precedent have concluded that the numerosity requirement is usually satisfied where the class comprises 40 or more members, and generally not satisfied when the class comprises 21 or fewer members. *Twegbe* at *6 citing, 242 F.R.D. 544, 549 (N.D. Cal. 2007).

In this matter, numerosity may not be met if Defendants have a complete defense to the claims under the MWA through its offering of health insurance. As stated, the parties dispute whether or not liability under the MWA attaches when an employer offers its employee a health insurance plan. Should Defendants prevail on this issue, Defendants would only remain liable for any Plaintiffs who were not offered health insurance. At deposition, Defendants confirmed that all of their employees were offered health insurance benefits during the applicable period. **Excerpts from Terry DiGiamarino Deposition attached hereto as Exhibit G at 42:18-21, 44:4-9.** Of the four named Plaintiffs, Olszynski and Fitzlaff admitted to being "offered" health insurance; Diaz executed a written declination form; and Wilbanks admitted to being offered health insurance in a written discovery response. **Diaz Depo., Exhibit C at 113:23-116:3; Wilbanks Depo., Exhibit D at 91:16-93:6; Olszynski Depo., Exhibit E at 91:22-93:21; and Fitzlaff Depo., Exhibit F at 47:4-13.** None of the named Plaintiffs disputed Defendants' known policy on offering health insurance and only two named Plaintiffs, Diaz and Wilbanks, could not "recall" being offered health insurance despite previous writings showing otherwise. *Id.* Thus, if an offer of health insurance allows an employer to pay the lower tier minimum wage, then Plaintiffs have no evidence of class members beyond two Plaintiffs who cannot "recall" what everyone else was offered.

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Under Rule 23's numerosity requirement, courts have held that 40 or more members usually satisfy this requirement. Clearly, two potential Plaintiffs do not meet this requirement. Therefore, Plaintiffs have not met their burden to show that the proposed class meets the numerosity requirement.

G. Plaintiffs Have Failed To Meet The Adequacy Requirement.

Under Rule 23(a)(4), the "representative parties" must "fairly and adequately protect the interests of the class." Nev. R. Civ. P. 23(a)(4). When it is determined that a class representative will be unable to fairly and adequately protect the interests of the class, courts will disqualify them as representatives and not allow them to proceed in representing the class. *See i.e. In Re: Storage Technology Corp. Secs. Litigation*, 113 F.R.D. 113 (D. Colo. 1986). Courts have determined that an individual is an inadequate representative when: (1) the named representative displays a lack of credibility regarding the allegations being made; or (2) a lack of knowledge or understanding concerning what the suit is about. *See e.g., Robinson v. Gillispie*, 219 F.R.D. 179, 186 (D. Kan. 2003).

With respect to a class representative's credibility and honesty, a named plaintiff with credibility and honesty problems that relate to issues directly relevant to the litigation or who have confirmed examples of dishonesty, such as a criminal conviction for fraud, are inadequate representatives. *Keegan v. Am. Honda Motor Co.*, 2012 WL 2250040 at *14 (C.D. Cal. June 12, 2012).

Next, in regards to knowledge about the lawsuit, the class representative must have a sufficient level of knowledge regarding the litigation and claims asserted to provide the appropriate "check on the otherwise unfettered discretion of counsel in prosecuting the suit." *Welling v. Alexy*, 155 F.R.D. 654, 659 (N.D. Cal. 1994). In considering the involvement and knowledge of a prospective class representative, "the court must feel <u>certain</u> that the class representative will discharge his fiduciary obligations by fairly and adequately protecting the interests of the class." *Koenig* at 333-34. (Emphasis added).

In this matter, all of the named Plaintiffs should be disqualified as class representatives. Specifically, every named Plaintiffs has either: (1) demonstrated severe credibility and/or honesty

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issues that are directly related to the claims that they are pursuing on behalf of a putative class; (2) demonstrated that they are totally unfamiliar with the claims they assert they are bringing on behalf of a putative class as a purported class representative; and/or (3) taken a position adverse to the punitive class. These arguments are summarized below and more fully briefed in Defendants' Motion to Disqualify Named Plaintiffs filed concurrently herewith and incorporated herein. **Defendants' Motion to Disqualify Named Plaintiffs as Class Representatives and Dismiss Class Action Claims ("Mtn. to Disqualify") on file herein and incorporated by this reference.**

1. Paulette Diaz is an inadequate class representative.

Plaintiff Diaz is an inadequate class representative for three reasons: (1) she has lied under oath about the facts relating to her allegations on at least two occasions, thus completely undermining her credibility; (2) she does not understand the nature of her claims or her role as class representative; and (3) she has actively taken a position adverse to the putative class.

At her deposition, Diaz provided misrepresented facts and provided contradictory evidence as to whether or not she was offered health insurance by Defendants. **Mtn. to Disqualify at 7:21-9:13.** Further, Diaz misrepresented her rate of pay in relation to the tiers of pay under the MWA. ***Id.* at 9:14-10:4.** Thus, Diaz was not truthful or credible as to the facts involved in this litigation.

As to her requisite knowledge of her claims as a class representative, Diaz had an incorrect understanding of what qualifying health insurance was, what her dependents were, what violations under the MWA she was alleging, what the minimum wage rate was during her employment, what her role was as class representative, what other named Plaintiffs were in the lawsuit, and an incorrect assertion that this lawsuit involved off-the-clock claims. **Mtn. to Disqualify at 10:5-12:9.** Finally, Diaz's individual legal assertions in her recently filed Motion for Partial Summary Judgment are in contradiction to the claims filed by the putative class. ***Id.* at 12:10-13:8.** Accordingly, Diaz fails to meet the adequacy requirement as a class representative under Rule 23(a)(4).

2. Lawanda Gail Wilbanks is an inadequate class representative.

Wilbanks is not an adequate representative because she has no knowledge about the lawsuit whatsoever. Indeed, Wilbanks testified that she believes that she is in an entirely separate case.

At her deposition, Wilbanks testified that she believes that the lawsuit was led by her former

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supervisor, Paul Watson, and that the basis of the action was alleged off-the-clock work. **Mtn. to Disqualify at 13:9-14:12.** In actuality, Paul Watson is a former supervisor at one of Defendants' restaurants who has filed an entirely separate Class Action Complaint in Department 6 of the Eighth Judicial District entitled *Paul Watson v. Mancha Development Company, et al.* under case number A-12-655630-C involving overtime and off-the-clock claims. ***Id.* at 13:11-13 at fn. 1.** As to claims in this lawsuit, Wilbanks had no understanding of health insurance or its relevance to the Nevada minimum wage. ***Id.* at 14:13-20.** Accordingly, Wilbanks fails to meet the adequacy requirement as a class representative under Rule 23(a)(4).

3. Shannon Olszynski is an inadequate class representative.

Plaintiff Olszynski is an inadequate class representative for two reasons: (1) she actively misrepresented her actual gross taxable income, which is directly relevant to this case, thus completely undermining her credibility; and (2) she has no knowledge about the basic elements of this case, specifically the minimum wage and Nevada's two-tiered minimum wage system.

At her deposition, Olszynski admitted that she failed to disclose a substantial portion of her gross taxable income by unlawfully failing to report any tips in excess of 20% of sales. **Mtn. to Disqualify at 14:26-16:8.** Thus, pursuant to the regulations which include tips for the purpose of calculating gross taxable income for the MWA, Olszynski cannot possibly provide credible or accurate evidence of her gross taxable income. ***Id.***

Further, Olszynski had no understanding that there was a two-tiered minimum wage rate in Nevada. **Mtn. to Disqualify at 16:10-17.** Instead, Olszynski asserted that there was only one minimum wage rate of $8.25 in Nevada and that $7.25 was never the minimum wage rate in Nevada. ***Id.* at 16:18-17:5.** As to health insurance under the MWA, Olszynski believed that the plan offered to Defendants was a "legitimate plan" in direct contravention of the allegations of a deficient plan as has been asserted in Plaintiffs' Complaint. ***Id.* at 17:6-20.** Accordingly, Olszynski fails to meet the adequacy requirement as a class representative under Rule 23(a)(4).

4. Charity Fitzlaff is an inadequate class representative.

Plaintiff Fitzlaff is an inadequate class representative for two reasons: (1) she has lied under oath about the facts relating to her allegations; and (2) she does not understand the nature of her

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claims or her role as class representative.

In her Complaint, Fitzlaff alleged that she "was offered a purported health insurance plan" and "Defendants, therefore, unlawfully paid [her] a sub-minimum wage for the entirety of her employment." **Mtn. to Disqualify at 18:3-5.** At deposition and in her declaration, however, Fitzlaff asserted that she was told that she had to decline insurance and that she had to "fight" the company to receive health insurance. ***Id.* at 18:5-17.** Similarly, Fitzlaff was contradictory in her testimony regarding whether or not her insurance application was submitted. ***Id.* at 18:18-19:10.** Also, Fitzlaff changed her testimony mid-deposition regarding her rate of pay, revealing that she was actually paid well above the upper-tier minimum wage rate when she became a supervisor and was paid $10.00 an hour. ***Id.* at 19:11-20:10.**

In addition to these credibility issues, Fitzlaff also had a lack of understanding of her claims or a conflicting claim with the class. As stated, Fitzlaff's current co-Plaintiff Diaz has recently filed a motion with the Court asserting that the MWA permits employers to pay the lower-tier minimum wage only to employees enrolled in a company health insurance plan. **Mtn. to Disqualify at 20:11-16.** This, of course, directly conflicts with Fitzlaff's allegations that the reason she was owed the upper-tier minimum wage was because she was not offered a compliant health insurance plan. ***Id.* at 20:17-19.** Thus, if Fitzlaff intends to represent the class on this "must be enrolled" theory, then she had an affirmative duty to plead in the Complaint that she had actually enrolled in the insurance. ***Id.* at 20:19-20.** Instead, Fitzlaff either has a lack of familiarity with her claims or, alternatively, a conflicting stance on the nature of her claims that contradicts the position of other class representatives. Accordingly, Fitzlaff fails to meet the adequacy requirement as a class representative under Rule 23(a)(4).

IV. CONCLUSION

For all the reasons set forth above, this Court should deny Plaintiffs' Motion for Class Certification.

COUNTERMOTION TO CONTINUE HEARING ON ORDER SHORTENING TIME

I. FACTS AND ARGUMENT

Under EDCR 2.22(d), the Court may continue a hearing on a motion "upon a showing by

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motion supported by affidavit or oral testimony that such continuance is in good faith, reasonably necessary and is not sought merely for delay." Pursuant to EDCR 2.22(D), Defendants request a continuance of the hearing on Plaintiffs' Motion for Class Certification Pursuant to N.R.C.P. 23 for the following reasons. Pursuant to EDCR 2.26, Defendants bring this Countermotion on Order Shortening Time because the hearing date that is requested to be continued is set to take place within nine judicial days of the filing of this Countermotion and the Defendants wish to provide the parties adequate notice of any continued hearing date. **Declaration of Montgomery Paek, Esq. ("Paek Decl.") attached hereto.**

The hearing on Plaintiffs' Motion for Class Certification Pursuant to N.R.C.P. 23 has been set for July 9, 2015 at 9:00 a.m. **Paek Decl.** Defendants' Motion to Disqualify Named Plaintiffs as Class Representatives and Dismiss Class Action Claims was filed on June 25, 2015 and it is anticipated that the hearing on this Motion will be set for some date after July 9, 2015. **Paek Decl.** Thus, the current hearing setting on Plaintiff's Motion for Class Certification Pursuant to N.R.C.P. 23 does not allow enough time for this Court to consider and rule on Defendants' Motion to Disqualify Named Plaintiffs as Class Representatives and Dismiss Class Action Claims. **Paek Decl.**

Defendants' Motion to Disqualify Named Plaintiffs as Class Representatives and Dismiss Class Action Claims is a threshold issue to certification as the disqualification of the Named Plaintiffs in this matter would render Plaintiffs' Motion for Class Certification Pursuant to N.R.C.P. 23 moot. **Paek Decl.** Should this Court grant Defendants' Motion to Disqualify Named Plaintiffs as Class Representatives and Dismiss Class Action Claims, Plaintiffs will no longer have any class representatives with which to move for certification. **Paek Decl.**

There would be no prejudice to the Plaintiffs to continue the hearing until a ruling on Defendants' Motion to Disqualify Named Plaintiffs as Class Representatives and Dismiss Class Action Claims as Plaintiffs moved for certification prior to the July 28, 2015 deadline and there are no remaining deadlines that would be prejudiced by continuing the hearing on certification. **Paek Decl.** Further, the disposition of the disqualification issue *before* certification will assist this Court in its case management as the Court will not have to expend judicial resources on a certification determination should the named Plaintiffs be disqualified to act as class representatives. **Paek Decl.**

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Based on the above, Defendants respectfully requests that the hearing on Plaintiffs' Motion for Class Certification Pursuant to N.R.C.P. 23 be moved from July 9, 2015 to a date convenient to the Court that is after the Court issues a ruling on Defendants' Motion to Disqualify Named Plaintiffs as Class Representatives.

Dated: June 25, 2015

Respectfully submitted,

RICK D. ROSKELLEY, ESQ.
ROGER L. GRANDGENETT II, ESQ.
MONTGOMERY Y. PAEK, ESQ.
KATHRYN B. BLAKEY, ESQ.
LITTLER MENDELSON, P.C.
Attorneys for Defendants

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ORDER SHORTENING TIME
AND
NOTICE OF COUNTERMOTION

Defendants having filed a request to shorten time as to Plaintiff's Emergency Motion to Continue Hearing on Motion for Preliminary Injunction on Order Shortening Time, and good cause appearing therefore,

IT IS ORDERED that the time to hear the foregoing Countermotion to Continue Hearing on Plaintiffs' Motion for Class Certification Pursuant to N.R.C.P. 23 on Order Shortening Time is hereby shortened; and

IT IS FURTHER ORDERED that said Countermotion to Continue Hearing on Plaintiffs' Motion for Class Certification Pursuant to N.R.C.P. 23 on Order Shortening Time shall be heard, (if necessary), on the _____ day of _____, 2015 at _____:_____ ____.m. before the Honorable Timothy C. Williams.

IT IS SO ORDERED this _____ day of _____, 2015.

_____
DISTRICT COURT JUDGE

Respectfully Submitted by:

RICK D. ROSKELLEY, ESQ.
ROGER L. GRANDGENETT II, ESQ.
MONTGOMERY Y. PAEK, ESQ.
KATHRYN B. BLAKEY, ESQ.
LITTLER MENDELSON, P.C.
Attorneys for Defendants

DECLARATION OF MONTGOMERY Y. PAEK, ESQ.

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

I, Montgomery Y. Paek, Esq., declare under penalty of perjury that the following is true and correct.

1. I am an attorney licensed to practice law within the State of Nevada with the law firm of Littler Mendelson, P.C. This firm represents Defendants MDC RESTAURANTS, LLC;

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LAGUNA RESTAURANTS, LLC; and INKA, LLC ("Defendants") in the above-referenced matter. I have personal knowledge of the matters stated herein and can testify of the same if called upon to do so.

2. Defendants are filing a Countermotion to Continue Hearing on Plaintiffs' Motion for Class Certification Pursuant to N.R.C.P. 23 on Order Shortening Time in this action. Pursuant to EDCR 2.26, Defendants bring this Countermotion on Order Shortening Time because the hearing date to be continued is set to take place within nine judicial days of the filing of this Countermotion and the Defendants wish to provide the parties adequate notice of any continued hearing date.

3. The hearing on Plaintiffs' Motion for Class Certification Pursuant to N.R.C.P. 23 has been set for July 9, 2015 at 9:00 a.m. Paek Decl. Defendants' Motion to Disqualify Named Plaintiffs as Class Representatives and Dismiss Class Action Claims was filed on June 25, 2015 and it is anticipated that the hearing on this Motion will be set for some date after July 9, 2015. Thus, the current hearing setting on Plaintiff's Motion for Class Certification Pursuant to N.R.C.P. 23 does not allow enough time for this Court to consider and rule on Defendants' Motion to Disqualify Named Plaintiffs as Class Representatives and Dismiss Class Action Claims.

4. Defendants' Motion to Disqualify Named Plaintiffs as Class Representatives and Dismiss Class Action Claims is a threshold issue to certification as the disqualification of the Named Plaintiffs in this matter would render Plaintiffs' Motion for Class Certification Pursuant to N.R.C.P. 23 moot. Should this Court grant Defendants' Motion to Disqualify Named Plaintiffs as Class Representatives and Dismiss Class Action Claims, Plaintiffs will no longer have any class representatives with which to move for certification.

5. There would be no prejudice to the Plaintiffs to continue the hearing until a ruling on Defendants' Motion to Disqualify Named Plaintiffs as Class Representatives and Dismiss Class Action Claims as Plaintiffs moved for certification prior to the July 28, 2015 deadline and there are no remaining deadlines that would be prejudiced by continuing the hearing on certification. Further, the disposition of the disqualification issue before certification will assist this Court in its case management as the Court will not have to expend judicial resources on a certification determination should the named Plaintiffs be disqualified to act as class representatives.

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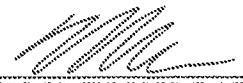
I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and I am competent to testify to the facts contained in this Declaration if called as a witness.

Executed this 25 day of June, 2015, in Las Vegas, Nevada.



MONTGOMERY Y. PAEK, ESQ.

ORDER ON COUNTERMOTION TO CONTINUE HEARING ON ORDER SHORTENING TIME

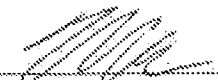
IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendants' Countermotion to Continue Hearing on Order Shortening Time is GRANTED.

IT IS FURTHER ORDERED that the Plaintiffs' Motion for Class Certification Pursuant to N.R.C.P. 23 currently set for 9:00 a.m. on July 9, 2015 be continued to __:__ __.m. on _____, 2015.

DATED this 25 day of June, 2015.

_____
DISTRICT COURT JUDGE

Respectfully Submitted by:



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PROOF OF SERVICE

I am a resident of the State of Nevada, over the age of eighteen years, and not a party to the within action. My business address is 3960 Howard Hughes Parkway, Suite 300, Las Vegas, Nevada 89169. On June 25, 2015, I served the within document:

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION PURSUANT TO N.R.C.P. 23

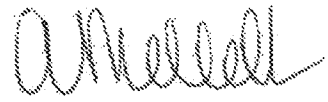
AND

COUNTERMOTION TO STAY HEARING ON ORDER SHORTENING TIME

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

Don Springmeyer, Esq.
Bradley Schrager, Esq.
Daniel Bravo, Esq.
Royi Moas, Esq.
Jordan Butler, Esq.
Daniel Hill, Esq.
Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP
3556 East Russell Road, Second Floor
Las Vegas, Nevada 89120

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 25, 2015, at Las Vegas, Nevada.



Erin Melwak

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Exhibit F

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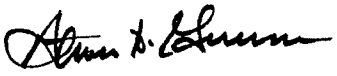

CLERK OF THE COURT

MCC
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EIGHTH JUDICIAL DISTRICT COURT

IN AND FOR CLARK COUNTY, STATE OF NEVADA

PAULETTE DIAZ; LAWANDA GAIL WILBANKS; SHANNON OLSZYNSKI; and CHARITY FITZLAFF, all on behalf of themselves and all similarly-situated individuals, Plaintiffs, vs. MDC RESTAURANTS, LLC; LAGUNA RESTAURANTS, LLC; INKA, LLC; and DOES 1 through 100, Inclusive, Defendants.	Case No.: A701633 Dept. No.: XVI **PLAINTIFFS' MOTION FOR CLASS CERTIFICATION PURSUANT TO N.R.C.P. 23** Hearing Date: 7/9/15 Hearing Time: 9:00am

COME NOW Plaintiffs, by and through her attorneys of record, and hereby move for an order certifying this action as a class action pursuant to N.R.C.P. 23. The motion is based on the Memorandum of Points and Authorities below, the papers and exhibits on file, the declarations of Plaintiffs Paulette Diaz (**Exhibit 1**), Shannon Olszynski (**Exhibit 2**), Lawanda Wilbanks (**Exhibit 3**), and Charity Fitzlaff (**Exhibit 4**), and attorneys Bradley Schrager, Esq. (**Exhibit 5**) and Don Springmeyer, Esq. (**Exhibit 6**), and any oral argument this Court sees fit to allow at hearing on this matter.

NOTICE OF MOTION

TO: ALL PARTIES AND THEIR COUNSEL OF RECORD:

Please take notice that the undersigned will bring **PLAINTIFFS' MOTION FOR CLASS CERTIFICATION PURSUANT TO N.R.C.P. 23** on for hearing before this Court at the Eighth Judicial District Court, 200 Lewis Avenue, Las Vegas, Nevada 89155, on 7/9/15 at 9:00 a.m./~~p.m.~~ in Dept. XVI or as soon thereafter as counsel can be heard.

DATED this 8th day of June, 2015.

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

By: */s/ Bradley Schrager*

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TABLE OF CONTENTS

Page

MEMORANDUM OF POINTS AND AUTHORITIES 1

I. INTRODUCTION 1

III. FACTUAL BACKGROUND 3

A. Plaintiffs 3

B. Defendants 4

II. PROCEDURAL BACKGROUND 4

III. ARGUMENT 5

A. Class Certification Is Appropriate Under N.R.C.P. 23(a) 6

1. The Proposed Class Satisfies the Numerosity Requirement of Rule 23(a)(1) 6

2. The Proposed Class Satisfies the Commonality Requirement of Rule 23(a)(2) 8

3. The Proposed Class Representatives Satisfy the Typicality Requirement of Rule 23(a)(3) 11

4. The Proposed Class Representatives Satisfy the Adequacy Requirement of Rule 23(a)(4) 12

B. Class Certification Is Appropriate Under N.R.C.P. 23(b)(3) 13

1. Common Questions of Law and Fact Predominate 13

2. A Class Action is Superior to Other Methods of Adjudication 14

C. Undersigned Counsel Are Appropriate Class Counsel 15

IV. CONCLUSION 16

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Abdullah v. U.S. Sec. Associates, Inc.,
731 F.3d 952 (9th Cir. 2013) 6

Alpern v. UtiliCorp United, Inc.,
84 F.3d 1525 (8th Cir. 1996) 11

Amchem Products, Inc. v. Windsor,
521 U.S. 591, 117 S. Ct. 2231 (1997) 6, 12, 14

American Pipe and Constr. Co. v. Utah,
414 U.S. 538, 94 S. Ct. 756 (1974) 5

California Rural Legal Assistance v. Legal Services Corp.,
917 F.2d 1171 (9th Cir. 1990) 11

Esplin v. Hirschi,
402 F.2d 94 (10th Cir. 1968) 5

General Tel. Co. of the Northwest, Inc. v. Equal Employment Opportunity Comm'n,
446 U.S. 318, 100 S. Ct. 1698 (1980) 7

Hanlon v. Chrysler Corp.,
150 F.3d 1011 (9th Cir. 1998) 9, 11, 12, 14

Hester v. Vision Airlines, Inc.,
2014 WL 1366550 (D. Nev. Apr. 7, 2014) 8

In re Cathode Ray Tube (CRT) Antitrust Litig.,
2008 WL 2024957 (N.D. Cal. May 9, 2008) 16

In re Syncor Erisa Litig.,
227 F.R.D. 338 (C.D. Cal. 2005) 5

Joseph v. Gen. Motors Corp.,
109 F.R.D. 635 (D. Colo. 1986) 5

Kristensen v. Credit Payment Services,
12 F. Supp. 3d 1292 (D. Nev. 2014) 11

Lerwill v. Inflight Motion Pictures, Inc.,
582 F.2d 507 (9th Cir. 1978) 12

Local Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.,
244 F.3d 1152 (9th Cir. 2001) 15

Mazza v. AM. Honda Motor Co.,
254 F.R.D. 610 (C.D. Cal. 2008) 7

Rainero v. Archon Corp.,
2011 WL 167278 (D. Nev. Jan. 19, 2011) 8

Rannis v. Recchia,
380 F. Appx. 646 (9th Cir. 2010) 8

Rodriguez v. Hayes,
591 F.3d 1105 (9th Cir. 2009) 11

Rosario v. Livaditis,
963 F.2d 1013 (7th Cir. 1992) 11

Santoro v. Aargon Agency, Inc.,
252 F.R.D. 675 (D. Nev. 2008) 13

Sobel v. Hertz Corp.,
291 F.R.D. 525 (D. Nev. 2013) 7, 15

Staton v. Boeing Co.,
327 F.3d 938 (9th Cir. 2003) 6

Stearns v. Ticketmaster Corp.,
655 F.3d 1013 (9th Cir. 2011) 13

Wal-Mart Stores, Inc. v. Dukes,
131 S. Ct. 2541 (2011) 8, 9, 10

Wolin v. Jaguar Land Rover North America, LLC,
617 F.3d 1168 (9th Cir. 2010) 15

STATE CASES

Beazer Homes Holding Corp. v. Dist. Ct.,
128 Nev. Adv. Op. 66, 291 P.3d 128 (2012) 5

Cummings v. Charter Hosp. of Las Vegas, Inc.,
111 Nev. 639, 896 P.2d 1137 (1995) 7

Deal v. 999 Lakeshore Ass'n,
94 Nev. 301, 579 P.2d 775 (1978) 5

Meyer v. Eighth Judicial Dist. Court,
110 Nev. 1357, 885 P.2d 622 (1994) 6

Picardi v. Eighth Judicial Dist. Court of State, ex rel. County of Clark,
127 Nev. Adv. Op. 9, 251 P.3d 723 (2011) 5

Shuette v. Beazer Homes Holdings Corp.,
121 Nev. 837, 124 P.3d 530 (2005) ..... passim

OTHER AUTHORITIES

Nev. Const. art. XV, § 16 1

Newberg on Class Actions (4th ed. 2002) 12

RULES

F.R.C.P. 23 5

N.R.C.P. 23 ..... passim

REGULATIONS

N.A.C. 608.102 1

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Since the passage by Nevada voters of Question 6 in November of 2006, workers in this State have been subject to a two-tiered minimum hourly wage requirement. Nev. Const. art. XV, § 16 (the "Minimum Wage Amendment" or the "Amendment"). Employers must pay their employees at the upper-tier hourly level, but may qualify for the privilege of paying between the lower and upper-tier if they provide comprehensive, low-cost health insurance benefits to their workers. Currently, the wage-tiers are $7.25 and $8.25 per hour.[1] Defendants here did not provide Plaintiffs or members of the putative Class with qualifying health insurance benefits, yet paid those employees below the mandated upper-tier minimum hourly wage.

The questions concerning Plaintiffs and the proposed Class are straightforward. Did Defendants pay Class members below the upper-tier hourly wage? If so, they had to meet the constitutional mandate regarding provision of benefits. If they did not qualify to pay a lower wage—either by offering a health insurance benefits plan that did not meet coverage requirements, by offering a plan where employee premium costs exceeded legal limits, or by not offering a qualifying plan at all—then Defendants are liable to Plaintiffs and the Class for back pay, damages, and other associated relief. All employees paid below the upper-tier minimum hourly wage are necessarily similarly situated because Defendants would have had to arrange for health insurance benefits coverage common to all Plaintiffs and Class members in order to pay any of them less than $8.25 per hour. *See* N.A.C. 608.102(2)(a).

The proposed Class definition encompasses all of Defendants' employees paid below the upper-tier minimum hourly wage level pursuant to the Minimum Wage Amendment during the

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[1] Since November 28, 2006, the Minimum Wage Amendment has been subject to an indexing mechanism, and the state minimum wage rate has interacted with the federal minimum wage rate over the last nine years. *See* Nev. Const. art. XV, § 16(A). On July 1, 2010, the upper-tier rate for employees who are not provided qualifying health insurance benefits was raised to $8.25 per hour, and the lower-tier rate for employees who are provided qualifying health insurance benefits was raised to $7.25 per hour. *See* Nevada Minimum Wage Announcement, Office of the Nevada Labor Commissioner, 2010-2015. The upper-tier and lower-tier rates have remained unchanged since that time. *Id.*

appropriate limitations period. Defendants procure, and procured, health insurance benefit plans they purported to offer to all of their minimum wage employees. The plans Defendants purportedly offered to Plaintiffs were the same plans Defendants claimed to have made available to every hourly employee paid below the upper-tier minimum hourly wage. The Class mechanism, therefore, is perfectly suited to this action because the same question can be answered on a class-wide basis: whether Defendants claimed provision of health insurance supports Defendants eligibility to pay below the upper-tier minimum wage rate. Put simply: If Defendants claimed the privilege to pay <u>any employee</u> less than the upper-tier minimum wage, it has to be for the same reasons as for all others—that they claimed to have provided qualifying health insurance benefits to all of them.

The allegations in the Amended Complaint are clear: Each of the Plaintiffs alleges that she was paid below the upper-tier minimum wage by Defendants, and that they each have not been provided qualifying health insurance benefit plans by Defendants. The proposed Class is comprised of those employees of Defendants who are similarly-situated: like Plaintiffs, paid below the upper-tier minimum hourly wage level and not provided with qualifying health insurance plan benefits.

The proposed Class is numerous, counting in the thousands, which Defendants have confirmed in discovery responses, disclosures, and deposition testimony. The questions of law and fact regarding Defendants' eligibility to pay below the upper-tier hourly wage are clearly common to all employees paid below that level. Plaintiffs, as current and former employees of Defendants paid at the lower hourly minimum wage and alleging they were not provided or offered qualifying benefits plans, are typical of the Class they seek to represent, and suffered the same injuries as the Class due to Defendants' conduct in underpaying on the basis of non-qualifying health insurance benefit plans. Plaintiffs are adequate representatives of the Class, as no conflicts among them arise from their common effort to recover years of lost wages as well as appropriate damages. Further, the common questions among Plaintiffs and all Class members predominate entirely, and a class action is superior to any other method of adjudicating the claims made herein. Class certification, therefore, is appropriate and necessary to redress the injuries alleged in the Amended Complaint.

II. THE PROPOSED CLASS

Plaintiffs move for certification of the following proposed Class:

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

The proposed Class is easily ascertainable, identifiable, and manageable from employment records necessarily kept by Defendants, and encompasses the community of interest sought to be protected by the passage by Nevada voters of the Minimum Wage Amendment. The named Plaintiffs seek appointment as representatives of the Class.

This motion is made on the grounds that the proposed Class is sufficiently numerous such that joinder is impracticable; there are questions of law and fact common to the Class; the respective named Plaintiffs' claims are typical of the Class' claims; and the respective named Plaintiffs will adequately represent the Class. *See* N.R.C.P. 23(a). Certification of the Class is appropriate under N.R.C.P. 23(b)(3) because common questions predominate over any questions affecting only individual Class members, and class resolution is superior to other available methods for the fair and efficient adjudication of the controversy. *See id.*

III. FACTUAL BACKGROUND

A. Plaintiffs

Plaintiffs are all current or former employees of Defendants in Nevada at Denny's or Coco's restaurants (the "Restaurants"). *See* Amend. Compl. ¶¶ 14-17, 24, 27, 30, 33. All of them were paid by Defendants below the upper-tier minimum hourly rate set pursuant to the Minimum Wage Amendment. *See id.* All of them allege that Defendant have not provided them with qualifying health insurance plan benefits such that wage payments below the upper-tier level are permissible. *See id.* ¶¶ 25, 28, 31, 34; *see also* Diaz Decl. ¶¶ 7-8 (**Ex. 1**); Olszynski Decl. ¶ 7 (**Ex. 2**); Wilbanks Decl. ¶¶ 8-9 (**Ex. 3**); Fitzlaff Decl. ¶ 7 (**Ex. 4**).

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B. Defendants

Defendant MDC Restaurants, LLC owns and operates approximately twenty-two (22) Denny's restaurants (the "MDC Restaurants") in Nevada at which Plaintiffs Diaz and Wilbanks and Class members work or did work.[2] *See* Defs.' Ans. ¶¶ 14-15. Defendant INKA, LLC owns and operates approximately four (4) Denny's restaurants (the "INKA Restaurants") in Nevada at which Plaintiffs Olszynski and Fitzlaff and Class members work or did work.[3] *See id.* ¶¶ 16-17. Defendant Laguna Restaurants, LLC owns and operates approximately two (2) Denny's or other-branded restaurants (the "Laguna Restaurants") in Nevada at which Class members work or did work.[4] Defendants, through Mancha Development Co., create and impose uniform wage and benefit policies and practices at all the Restaurants, and maintain centralized human resource functions to implement those policies and practices at the Restaurants, and contract and arrange for the same health insurance benefits policies that each Defendant claims as the basis for paying Plaintiffs and Class members less than the upper-tier hourly minimum wage rate. *See* Amend. Compl. ¶¶ 36-38.

II. PROCEDURAL BACKGROUND

Plaintiffs filed their initial Complaint on May 30, 2014, and the Amended Complaint on June 5, 2014. *See* Pls.' Compl.; Pls.' Amend. Compl. Defendants answered the Amended Complaint on July 22, 2014. *See* Defs.' Ans. A number of motions for partial summary judgment or judgment on the pleadings on discrete issues have also been filed by the parties, including: Defendants' Motion for Judgment on the Pleadings with Respect to All Claim for Damages Outside

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[2] Asked in Class Interrogatory No. 9 to list its Denny's or Coco's restaurant locations in Nevada, Defendant MDC provided a list of twenty-two (22) separate stores in operation during the appropriate limitations period. *See* document produced as MDC000158, offered in response to propounded interrogatories, an accurate copy of which is attached as **Exhibit 7**.

[3] Asked in Class Interrogatory No. 9 to list its Denny's or Coco's restaurant locations in Nevada, Defendant INKA provided a list of four (4) separate stores in operation during the appropriate limitations period. *See* Defendant INKA's Response to Class Interrogatory No. 9, an accurate copy of which is attached as **Exhibit 8**.

[4] Asked in Class Interrogatory No. 39 to list its Denny's or Coco's restaurant locations in Nevada, Defendant Laguna provided a list of two (2) separate stores in operation during the appropriate limitations period. *See* Defendant Laguna's Response to Third Set of Interrogatories, an accurate copy of which is attached as **Exhibit 9**.

the Two-Year Statute of Limitations; Plaintiffs' Countermotion for Partial Summary Judgment Regarding Limitation of the Action; and Plaintiff Diaz's Motion For Partial Summary Judgment on Liability to Plaintiff Diaz's First Claim for Relief.

III. ARGUMENT

The language of Rule 23 of the Nevada Rules of Civil Procedure is similar to its federal counterpart. *Compare* N.R.C.P. 23 *with* F.R.C.P. 23. Nevada courts therefore routinely look to federal case law for guidance on class certification issues. See *Beazer Homes Holding Corp. v. Dist. Ct.*, 128 Nev. Adv. Op. 66, 291 P.3d 128, 135 n. 4 (2012) (citing approvingly federal precedent on Rule 23); *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 847, 124 P.3d 530, 537-38 (2005) (citing approvingly "analogous" Sixth Circuit analysis of F.R.C.P. 23).

"[T]he determination to use the class action is a discretionary function wherein the district court must pragmatically determine whether it is better to proceed as a single action, or many individual actions in order to redress a single fundamental wrong." *Deal v. 999 Lakeshore Ass'n*, 94 Nev. 301, 306, 579 P.2d 775, 778-79 (1978). Class actions serve three essential purposes: (1) to facilitate judicial economy by the avoidance of multiple suits on the same subject matter; (2) to provide a feasible means for asserting the rights of those who would have no realistic day in court if a class action were not available; and (3) to deter inconsistent results, assuring a uniform, singular determination of rights and liabilities. *American Pipe and Constr. Co. v. Utah*, 414 U.S. 538, 550, 94 S. Ct. 756, 764-65 (1974); *In re Syncor Erisa Litig.*, 227 F.R.D. 338, 343 (C.D. Cal. 2005).

N.R.C.P. 23 should be given a liberal rather than a restrictive interpretation. "[I]f there is to be an error made, let it be in favor and not against the maintenance of the class action." *Esplin v. Hirschi*, 402 F.2d 94, 99 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969); *see also Joseph v. Gen. Motors Corp.*, 109 F.R.D. 635, 638 (D. Colo. 1986) (noting that any doubts should be resolved in favor of class certification). Most importantly, Nevada has a strong public policy in favor of class actions in order to provide multiple plaintiffs who individually may have a valid but small claim, an adequate remedy at law. *Picardi v. Eighth Judicial Dist. Court of State, ex rel. County of Clark*, 127 Nev. Adv. Op. 9, 251 P.3d 723, 727 (2011).

Here, certification is appropriate under Rule 23(b)(3) because "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *See* N.R.C.P. 23(b)(3). In determining whether class certification is appropriate, the Court need not—and, where possible, should not—reach resolution of the substantive merits of the claims. The trial court "should generally accept the allegations of the complaint as true; an extensive evidentiary showing is not required." *Meyer v. Eighth Judicial Dist. Court*, 110 Nev. 1357, 1363-64, 885 P.2d 622, 626 (1994). Rule 23(b)(3) requires only "a showing that questions common to the class predominate, not that those questions will be answered, on the merits, in favor of the class." *Abdullah v. U.S. Sec. Associates, Inc.*, 731 F.3d 952, 964 (9th Cir. 2013) (internal quotations and citations omitted). Applying these principles, class certification is appropriate in this action.

A. Class Certification Is Appropriate Under N.R.C.P. 23(a)

Under N.R.C.P. 23(a), plaintiffs seeking to certify a case as a class action must establish four prerequisites. *See Shuette*, 121 Nev. at 846; *Staton v. Boeing Co.*, 327 F.3d 938, 953 (9th Cir. 2003); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 117 S. Ct. 2231 (1997). First, the *numerosity* prerequisite requires that the members of a proposed class be so numerous that separate joinder of each member is impracticable. N.R.C.P. 23(a)(1). Second, the *commonality* prerequisite requires questions of law or fact common to each member of the class. N.R.C.P. 23(a)(2). Third, *typicality* demands a showing that the representative parties' claims or defenses are typical of the class's claims or defenses. N.R.C.P. 23(a)(3). Finally, under the *adequacy* prerequisite, the parties must be able to fairly and adequately protect and represent each class member's interests. N.R.C.P. 23(a)(4).

Plaintiffs address each requirement of N.R.C.P. 23(a) in turn below, and demonstrate that all four are met in this instance.

1. The Proposed Class Satisfies the Numerosity Requirement of Rule 23(a)(1)

It must be shown that the putative class has so many members that joinder of all members is

impracticable. The United States Supreme Court has cautioned that "[t]he numerosity requirement requires examination of the specific facts of each case and imposes no absolute limitations." *General Tel. Co. of the Northwest, Inc. v. Equal Employment Opportunity Comm'n*, 446 U.S. 318, 330, 100 S. Ct. 1698 (1980). Although courts agree that numerosity mandates no minimum number of individual members, a putative class of forty or more generally will be found to satisfy this requirement. *See Shuette*, 121 Nev. at 847 (holding that numerosity is generally satisfied when there are at least 40 or more class members); *Mazza v. AM. Honda Motor Co.*, 254 F.R.D. 610, 617 (C.D. Cal. 2008) ("As a general rule, classes of forty or more are considered sufficiently numerous."). Plaintiffs need not state exact figures of total potential Class members; instead, they can satisfy the numerosity requirement by providing reasonable estimates. *See Sobel v. Hertz Corp.*, 291 F.R.D. 525, 541 (D. Nev. 2013). Plaintiffs need only demonstrate that the Class "is so large that proceedings as a class action is the only manageable method of resolving the controversy." *Cummings v. Charter Hosp. of Las Vegas, Inc.*, 111 Nev. 639, 643-44, 896 P.2d 1137, 1140 (1995).

Here, Defendants have stated in depositions and in discovery responses that, apart from the named Plaintiffs whom have alleged payments at less than the upper-tier minimum wage under the Nevada Constitution, Defendant MDC paid **2,100** employees below the upper-tier during the period between July 1, 2010 and March 26, 2015. *See* Defendant MDC's Supplemental Response to Class Interrogatory No. 5, an accurate copy of which is attached as **Exhibit 10**. Defendant INKA, responding to the same query, enumerated **426** employees that it paid less than $8.25 during that same period. *See* Defendant INKA's Supplemental Response to Class Interrogatory No. 5, an accurate copy of which is attached as **Exhibit 11**. Defendant Laguna, also responding, stated that it paid less than $8.25 to **19** employees between May 30, 2012 and January 20, 2015. *See* **Ex. 9** (Defendant Laguna's Response to Class Interrogatory No. 38).[5] Laguna refused to provide information on the number of employees paid at that level between 2010 and 2012, during peak

[5] Each set of interrogatory responses by each Defendant was verified by Ms. Terry DiGiamarino, the current Payroll Manager for Mancha Development Co., Defendants' parent corporation.

months of its operations, and so the number of Laguna employees expected to be contained in the Class is significantly higher than 19. Furthermore, in documents produced in response to the Discovery Commissioner's Report and Recommendation on Plaintiffs' Motion to Compel, Defendants indicated—without specifically identifying members of the putative Class and in the form demonstrated here by document MDC000843 and MDC000917, accurate copies of which are attached as **Exhibit 12**—a total of **2,526** employees of Defendants were paid less than $8.25 between May of 2010 and March of 2015.

Plaintiffs have developed sufficient evidence, therefore, to establish the necessary numbers of putative Class members. *See e.g., Rannis v. Recchia*, 380 F. Appx. 646, 651 (9th Cir. 2010) (approving district court's finding that class of 20 satisfied numerosity requirement). The precise number of Class members will be calculable from a further review of Defendants' personnel, payroll, and benefits records, but the Class size is large enough to make joinder of all members impracticable. *See Rainero v. Archon Corp.*, 2011 WL 167278 at *2 (D. Nev. Jan. 19, 2011) ("Joinder of over 500 putative plaintiffs is impracticable.").

2. The Proposed Class Satisfies the Commonality Requirement of Rule 23(a)(2)

Under the commonality requirement, class action certification is proper when there are questions of law or fact common to the class. See *Shuette*, 121 Nev. at 848. "Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury, and the plaintiff's common contention must be of such a nature that it is capable of class-wide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Hester v. Vision Airlines, Inc.*, 2014 WL 1366550 (D. Nev. Apr. 7, 2014) (approving class settlement agreement; citing *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011)). Commonality assesses "the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2551.

As the Ninth Circuit stated, "Rule 23(a)(2) has been construed permissively, and all questions of fact and law need not be common to satisfy the rule." *Hanlon v. Chrysler Corp.*, 150

F.3d 1011, 1019 (9th Cir. 1998). "The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Id.* This prerequisite may be satisfied by a single common question of law or fact. *See Shuette*, 121 Nev. at 848; *see also Wal-Mart Stores, Inc.*, 131 S. Ct. at 2556.

Here, the major common questions are simple, and are of both fact and law. First, Plaintiffs and proposed Class members share the common question of whether they were paid less than the upper-tier minimum hourly wage, a clear mutual question of fact which Defendants' discovery responses and deposition testimony answer in the affirmative. *See* **Exs. 9-11** (where Defendants enumerate totals figures of employees paid less than $8.25 per hour since 2010); *see also* Defs.' Ans. ¶¶ 11, 14, 15, 16, 17, 24, 27, 30, 33 (where Defendants "admit that some employees are paid an hourly rate less than $8.25 per hour[,]" and where Defendants admit they paid each named Plaintiff below $8.25 per hour).

Second, given that Defendants procure and offer only a single series of successive, annual plans to Plaintiffs and members of the putative Class as the basis for paying them below the upper-tier minimum wage, the commonality requirement is satisfied. Both Defendant INKA and Defendant MDC responded to interrogatories regarding provision of human resources and benefits services by stating that "[a]s part of its administrative services, Mancha Development Company provides plans to Defendant (INKA, or MDC) which then offers the selected plan to its hourly employees." *See* Defendant INKA's Response to Interrogatory No. 19 and Defendant MDC's Response to Interrogatory No. 19, accurate copies of which are here attached as **Exhibit 13** and **14**, respectively.

Defendants all offered the following benefits plans, in annual succession, in their attempt to justify paying Plaintiffs and the Class less than $8.25, pursuant to the Minimum Wage Amendment:

2010 – 2012: Starbridge Limited-Benefit Sickness and Accident Plan, an accurate copy of which is attached as **Exhibit 15** (produced by Defendants as MDC000087-000096).

2013: Starbridge Limited-Benefit Sickness and Accident Plan, an accurate copy of which is attached as **Exhibit 16** (MDC000097-000120).

2014: Transamerica TransChoice Advance Hospital Indemnity Insurance Plan, an accurate copy of which is attached as **Exhibit 17** (MDC000129-000132).

2015: Key Benefit Minimum Value Plan (MVP Plan), an accurate copy of which is attached as **Exhibit 18** (MDC000770-000777).

Furthermore, Ms. DiGiamarino testified thusly at her recent deposition, regarding these successive plans:

> Q. Presently, every hourly employee in Nevada is offered the same MVP plan?
> A. Every employee that's offered insurance is offered the same plan, yes.
>
> . . .
>
> Q. Prior to the MVP Plan, was the Transamerica or TransChoice Plan provided to all Nevada hourly employees?
> A. Yes.
> Q. Prior to TransAmerica/TransChoice plan, was the Starbridge offered to all hourly employees?
> A. Yes.

See Transcr. Depo. Terry DiGiamarino at 42:18-21, 44:4-9 (Mar. 12, 2015). The pertinent excerpts of Ms. DiGiamarino's deposition testimony are here attached as **Exhibit 19**. The shared nature of the question regarding whether Defendants paid these employees lawfully, after purporting to offer—not provide, but merely to offer—all their hourly crew members the plans in question here, is manifest.

There are other common questions, certainly: Did Defendants' health insurance benefit plans, if they were provided by Defendants to Plaintiffs and members of the proposed Class, meet legal requirement as comprehensive, low-cost insurance permitting payment below the upper-tier wage rate? Did Defendants appropriately and lawfully calculate the premium costs to Plaintiffs and members of the proposed Class in offering or providing health insurance benefit plans? The answers to these questions will determine "the validity of [this claim] in one stroke." *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2551. The simple, overarching legal question, however, is whether Defendants were eligible to pay Plaintiffs and proposed Class members below the upper-tier minimum wage rate. They paid all these employees less than the upper-tier wage, and they offered all of them the same benefits plans. The contentions by Plaintiffs are common to the proposed Class and are capable of class-wide determination and resolution, and because the Class members'

claims arise from Defendants' standard and uniform practices, the commonality requirement of N.R.C.P. 23(a)(2) is satisfied.

3. The Proposed Class Representatives Satisfy the Typicality Requirement of Rule 23(a)(3)

Typicality demands that the claims or defenses of the representative parties be typical of those of the class. *See Shuette*, 121 Nev. at 848. Generally, typicality exists where the claims of the named plaintiffs arise from the same event that gives rise to the claims of the other class members, and the named plaintiffs' claims are based on the same legal theories as the other class members' claims. *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992); *see also Alpern v. UtiliCorp United, Inc.*, 84 F.3d 1525, 1540 (8th Cir. 1996) ("Factual variations in the individual claims will not normally preclude class certification if the claim arises from the same event or course of conduct as the class claims, and gives rise to the same legal or remedial theory.").

Typicality "is satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *Rodriguez v. Hayes*, 591 F.3d 1105, 1124 (9th Cir. 2009) (internal quotations and citation omitted). "Under the [Rule 23]'s permissive standards, representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1020; *see also Kristensen v. Credit Payment Services*, 12 F. Supp. 3d 1292, 1305 (D. Nev. 2014). The typicality prerequisite concentrates on the defendants' actions, not on the plaintiffs' conduct. *See Rosario*, 963 F.2d at 1018. If the class representatives and members of the class "share a common issue of law or fact" and "are sufficiently parallel to insure a vigorous and full presentation of all claims for relief" then the typicality requirement is satisfied. *California Rural Legal Assistance v. Legal Services Corp.*, 917 F.2d 1171, 1175 (9th Cir. 1990).

Here, all Plaintiffs were paid below the upper-tier minimum wage. *See* Amend. Compl. ¶¶ 14-17, 24, 27, 30, 33; *see also* Diaz Decl. ¶ 6 (**Ex. 1**); Olszynski Decl. ¶ 6 (**Ex. 2**); Wilbanks Decl. ¶ 7 (**Ex. 3**); Fitzlaff Decl. ¶ 6 (**Ex. 4**); Defs.' Ans. ¶¶ 14, 15, 16, 17, 24, 27, 30, 33. Plaintiffs allege that they were not provided with qualifying health benefits, per the Minimum Wage Amendment, that would permit Defendants to pay below the upper-tier wage. *See* Amend. Compl.

¶¶ 25, 28, 31, 34; *see also* Diaz Decl. ¶¶ 7-8 (**Ex. 1**); Olszynski Decl. ¶ 7 (**Ex. 2**); Wilbanks Decl. ¶¶ 8-9 (**Ex. 3**); Fitzlaff Decl. ¶ 7 (**Ex. 4**). Defendants, for their part, admit that they paid a sizable number of their employees below the upper-tier wage, and did so on the basis of having offered the health benefits plans in question, for every year noted herein during the Class period. *See* **Exs. 9-11**.

Plaintiffs' claims, therefore, are typical of those of the proposed Class, and the relief sought is typical of the relief which would be sought by each member of the Class in separate actions—back pay for underpayment of the minimum wage, and damages associated with the constitutional violations of Defendants. Plaintiffs and all other proposed Class members sustained similar losses of back pay, and for the very same reasons: Defendants' unlawful minimum wage underpayments and failure to provide qualifying health benefits. Plaintiffs' and the Class' injuries and damages are all a direct and proximate result of Defendants' unlawful conduct, policies, and practices. Defendants' failure to provide qualifying health benefits affected Plaintiffs and all Class members similarly, and Defendants benefited from their conduct in the same way—unlawful retention of up to a dollar an hour for every hour worked—relative to every member of the putative Class, including Plaintiffs. Plaintiffs are thus typical of the putative Class they seek to represent.

4. The Proposed Class Representatives Satisfy the Adequacy Requirement of Rule 23(a)(4)

A class action may proceed when it is shown that plaintiffs can fairly and adequately protect the interest of the class. *See* N.R.C.P. 23(a)(4). This inquiry "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem*, 521 U.S. at 625. Resolution of two questions determines legal adequacy: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Hanlon*, 150 F.3d at 1020; *see also Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978).

Adequate representation is usually presumed in the absence of contrary evidence. *Newberg on Class Actions* § 7:24 (4th ed. 2002). Additionally, "precise alignment of the representative's interest in the case with those of putative class members is not required; what matters is sufficient

co-extensiveness of interests and the representative's abilit[y] to pursue the class claims vigorously and represent the interests of the absentee class members." *Santoro v. Aargon Agency, Inc.*, 252 F.R.D. 675, 683 (D. Nev. 2008) (internal quotations omitted).

Plaintiffs here are adequate representatives of the proposed Class, because Plaintiffs are members of the proposed Class they seek to represent and their interests do not conflict with the interests of the other members of the proposed Class that Plaintiffs seek to represent. Plaintiffs will vigorously prosecute this case on behalf of the entire Class. Plaintiffs have retained counsel that is competent and experienced in complex class action litigation, and Plaintiffs intend to prosecute this action vigorously. *See* Wolf, Rifkin, Shapiro, Schulman & Rabkin LLP Firm Resume, here attached as **Exhibit 20**. The interests of members of the proposed Class will be fairly and adequately protected by Plaintiffs and their counsel. Neither Plaintiffs nor their counsel have any interests that are contrary to, or in any way conflict with, the interests of the proposed Class.

B. Class Certification Is Appropriate Under N.R.C.P. 23(b)(3)

In addition to meeting the requirements of N.R.C.P. 23(a), parties seeking to certify a class action also must meet one of the conditions set forth in N.R.C.P. 23(b): (1) that separate litigation by individuals in the class would create a risk that the opposing party would be held to inconsistent standards of conduct or that nonparty members' interests might be unfairly impacted by the other members' individual litigation; (2) that the party opposing the class has acted or refused to act against the class in a manner making appropriate class-wide injunctive or declaratory relief; or (3) that common questions of law or fact predominate over individual questions, and a class action is superior to other methods of adjudication. *See* N.R.C.P. 23(b); *Shuette*, 121 Nev. at 850. Plaintiffs here concentrate upon N.R.C.P. 23(b)(3), which itself has two prongs: *predominance* and *superiority*. *See* N.R.C.P. 23(b)(3). Plaintiffs take these requirements in turn below, and demonstrate fulfillment of their prerequisites.

1. Common Questions of Law and Fact Predominate

Predominance "asks whether proposed classes are sufficiently cohesive to warrant adjudication by representation ... [and focuses] on the relationship between the common and individual issues." *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1019 (9th Cir. 2011); *see also*

Amchem, 521 U.S. at 623. In contrast to Rule 23(a)(2)'s commonality analysis, Rule 23(b)(3) tests the interplay between the common and individual issues and determines their relative importance within the action. "When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." *Hanlon*, 150 F.3d at 1022.

Here, the legal and factual issues common to the Plaintiffs and the Class dominate the litigation and will determine its outcome. In fact, the major common questions utterly control this action. The questions of employee pay levels, Defendants' eligibility to pay at reduced hourly minimum wage rates, and the recompense Defendants must make to Plaintiffs and the Class through back pay and a damages award essentially describe the entirety of the suit. If Defendants are liable to any one Plaintiff or member of the Class because they did not qualify to pay below the upper-tier minimum wage, they are liable to all Plaintiffs and members of the Class to whom a sub-minimum wage was paid and to whom Defendants purported to provide that health benefit plan. Defendants do not purchase, maintain, or offer individualized insurance benefit plans for each individual employee; they contract with an insurer for a single plan annually that they offer to hourly Nevada employees, and have done so for the entirety of the period covered by this lawsuit. *See* **Exs. 15-18** (the summaries of Defendants' annual Plans from 2010 through 2015). Either those plans were compliant with Nevada constitution, or they were not. Defendants were either eligible to pay below the upper-tier minimum wage, or they were not. The answer will be the same for any employee covered by the Class definition. All of these question are common to the whole Class and, therefore, the predominance requirement of N.R.C.P. 23(b)(3) is met.

2. A Class Action is Superior to Other Methods of Adjudication

The second requirement of N.R.C.P. Rule 23(b) is a determination whether a class action is the superior method for adjudicating the claims. In evaluating superiority, Rule 23(b) directs the court to consider (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating

the litigation of the claims in the particular forum; and (D) the likely difficulties in managing the class action. *See Shuette*, 121 Nev. at 852; *Sobel*, 291 F.R.D. at 544. The Ninth Circuit, for its part, has held that superiority is established where the small size of individual claims effectively precludes individual action. *Local Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152 (9th Cir. 2001).

Here, a class action is superior to other available methods for the fair and efficient adjudication of the controversy, because, *inter alia*, as minimum wage employees it is economically infeasible for proposed Class members to prosecute individual actions of their own given the relatively small amount of damages at stake for each individual. Plaintiffs seek the difference in wages actually paid by Defendants and the wages as ought to have been paid pursuant to the Minimum Wage Amendment, as well as appropriate damages available under law. *See* Pls.' Amend. Compl.

The class action mechanism is particularly appropriate where, as here, the alternative is class members "filing hundreds of individual lawsuits that could involve duplicating discovery and costs that exceed the extent of the proposed class members' individual injuries." *Wolin v. Jaguar Land Rover North America, LLC*, 617 F.3d 1168, 1176 (9th Cir. 2010). In this instance, the number of individual actions would be in the thousands. The cost to the court system and the public for the adjudication of individual litigation and claims would be substantially more than if the claims were to be treated as a class action. Furthermore, prosecution of separate actions by individual Class members would create the real but unnecessary risk of inconsistent and/or varying adjudications with respect to the individual Class members, establishing incompatible standards of conduct for Defendants and resulting in the impairment of Class members' rights and the disposition of their interests through actions to which they were not parties. Plaintiffs and their counsel know of no unusual difficulties in the case, and Defendants have advanced network computer, payroll, and benefit systems that will allow the Class, wage, benefits, and damages issues in the case to be resolved with relative ease.

C. Undersigned Counsel Are Appropriate Class Counsel

Plaintiffs request appointment of undersigned counsel as class counsel. A court may

consider "any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 2008 WL 2024957 at *1 (N.D. Cal. May 9, 2008). As is demonstrated in the declaration of Don Springmeyer, Esq. (**Ex. 6**), and the firm resume of Wolf, Rifkin, Shapiro, Schulman & Rabkin LLP (**Ex. 20**), and as evidenced by the present motion and supporting papers, proposed class counsel have thoroughly investigated the claims in this action; have extensive experience handling class actions, and deep knowledge of the applicable law; and, have adequate resources to litigate this action.

IV. CONCLUSION

Based upon the foregoing, the requirements of Rules 23(a) and 23(b)(3) are satisfied. Plaintiffs request that the Court grant their Motion for Class Certification and certify the case as a class action; with Plaintiffs to serve as representatives of that Class; and, designate their attorneys and firm as class counsel.

DATED this 8th day of June, 2015.

WOLF, RIFKIN, SHAPIRO,
SCHULMAN & RABKIN, LLP

By: */s/ Bradley Schrager*

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of June, 2015, a true and correct copy of **PLAINTIFFS' MOTION FOR CLASS CERTIFICATION PURSUANT TO N.R.C.P. 23** was served by electronically filing with the Clerk of the Court using the Wiznet Electronic Service system and serving all parties with an email-address on record, pursuant to Administrative Order 14-2 and Rule 9 of the N.E.F.C.R.

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

Exhibit E

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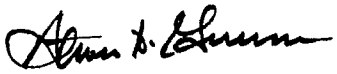

CLERK OF THE COURT

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EIGHTH JUDICIAL DISTRICT COURT

IN AND FOR CLARK COUNTY, STATE OF NEVADA

PAULETTE DIAZ, an individual; and LAWANDA GAIL WILBANKS, an individual; SHANNON OLSZYNSKI, an individual; CHARITY FITZLAFF, an individual, on behalf of themselves and all similarly-situated individuals, Plaintiffs, vs. MDC RESTAURANTS, LLC, a Nevada limited liability company; LAGUNA RESTAURANTS, LLC, a Nevada limited liability company; INKA, LLC, a Nevada limited liability company and DOES 1 through 100, Inclusive, Defendants.	**Case No:** **A701633** **Dept. No.:** **XV** **AMENDED CLASS ACTION COMPLAINT**

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

INTRODUCTION

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

RESTAURANTS, LLC; and INKA, LLC ("MDC," "Laguna," "Inka," and, collectively, "Defendants"), owners and operators of Denny's and CoCo's restaurants (the "Restaurants") in Nevada.

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

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

4. The 2006 amendment guaranteed to each Nevada employee, with very few exceptions, a particular hourly wage: "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."

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

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

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

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

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

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

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

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

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

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

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

PARTIES

A. Plaintiffs

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

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

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

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

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

B. Defendants

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

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

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

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

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

JURISDICTION AND VENUE

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

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

GENERAL ALLEGATIONS

A. Plaintiffs' Allegations

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

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

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

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

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

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

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

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

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

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

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

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

B. Defendants' Control of the Restaurants

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

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

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

C. Defendants' Unlawful Minimum Wage Practices

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

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

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

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

implementing same.

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

CLASS ACTION ALLEGATIONS

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

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

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

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

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

i. Whether Defendants paid Class members the required minimum wage pursuant to the Nevada Constitution;

ii. Whether, when paying minimum wage employees the reduced minimum wage level pursuant to Nev. Const. art. XV, § 16, Defendants provided qualifying health insurance benefit plans, with appropriate coverage and at appropriate premium cost, to the members of the Class;

iii. The applicable statute of limitations, if any, for Plaintiffs' and Class members' claims;

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

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

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

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

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

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

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

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

FIRST CLAIM FOR RELIEF

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

Failure to Pay Lawful Minimum Wage

(On Behalf of Plaintiffs and the Class against Defendants)

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

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

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

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

SECOND CLAIM FOR RELIEF

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

Failure to Pay Lawful Minimum Wage

(On Behalf of Plaintiffs and the Class against Defendants)

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

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

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

PRAYER FOR RELIEF

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

A. Certifying this matter as a class action pursuant to N.R.C.P. 23, designating Plaintiffs as Class representatives, and appointing the undersigned as Class counsel;

B. Declaring the practices here complained of as unlawful under appropriate law;

C. Granting judgment to Plaintiffs and the members of the Class on their claims of unpaid wages as secured by law, as well as damages, interest, attorneys' fees and costs as applicable and appropriate;

D. Granting punitive and exemplary damages against the Defendants pursuant to law; and

E. Ordering such other relief as the Court may deem necessary and just.

JURY TRIAL DEMAND

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

DATED this 5th day of June, 2014.

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

By: /s/ Don Springmeyer, Esq.

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EXHIBIT “1”

EXHIBIT “1”

Nev. Const. Art 15, Sec. 16. **Payment of minimum compensation to employees.**

A. Each employer shall pay a wage to each employee of not less than the hourly rates set forth in this section. The rate shall be five dollars and fifteen cents ($5.15) per hour worked, if the employer provides health benefits as described herein, or six dollars and fifteen cents ($6.15) per hour if the employer does not provide such benefits. Offering health benefits within the meaning of this section shall consist of making health insurance available to the employee for the employee and the employee's dependents at a total cost to the employee for premiums of not more than 10 percent of the employee's gross taxable income from the employer. These rates of wages shall be adjusted by the amount of increases in the federal minimum wage over $5.15 per hour, or, if greater, by the cumulative increase in the cost of living. The cost of living increase shall be measured by the percentage increase as of December 31 in any year over the level as of December 31, 2004 of the Consumer Price Index (All Urban Consumers, U.S. City Average) as published by the Bureau of Labor Statistics, U.S. Department of Labor or the successor index or federal agency. No CPI adjustment for any one-year period may be greater than 3%. The Governor or the State agency designated by the Governor shall publish a bulletin by April 1 of each year announcing the adjusted rates, which shall take effect the following July 1. Such bulletin will be made available to all employers and to any other person who has filed with the Governor or the designated agency a request to receive such notice but lack of notice shall not excuse noncompliance with this section. An employer shall provide written notification of the rate adjustments to each of its employees and make the necessary payroll adjustments by July 1 following the publication of the bulletin. Tips or gratuities received by employees shall not be credited as being any part of or offset against the wage rates required by this section.

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

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

D. If any provision of this section is declared illegal, invalid or inoperative, in whole or in part, by the final decision of any court of competent jurisdiction, the

Exhibit D

REC'D & FILED
2015 OCT 12 AM 10: 01
SUSAN MERRIWETHER
CLERK
BY G. WINDER
DEPUTY

IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR CARSON CITY

CODY C. HANCOCK, an individual, Plaintiff, vs. THE STATE OF NEVADA *ex rel.* THE OFFICE OF THE LABOR COMMISSIONER; THE OFFICE OF THE LABOR COMMISSIONER; and SHANNON CHAMBERS, Nevada Labor Commissioner in her official capacity, Defendants.	Case No.: 14 OC 00080 1B Dept. No.: 2 **ORDER GRANTING DEFENDANTS' MOTION TO STAY ORDER PENDING APPEAL**

Defendants State of Nevada *ex rel.* the Office of the Labor Commissioner, the Office of the Labor Commissioner and Shannon Chambers in her official capacity as the Labor Commissioner of Nevada (collectively referred to as "Labor Commissioner)" have moved this Court to stay enforcement of its order pending appeal. Plaintiff has opposed the motion.

"In deciding whether to issue a stay, [a district] court generally considers the following factors: (1) Whether the object of the appeal or writ petition will be defeated if the stay is denied; (2) Whether appellant/petitioner will suffer irreparable or serious injury if the stay is denied; (3) Whether respondent/real party in interest will suffer irreparable or serious injury if the stay is granted; and (4) Whether appellant/petitioner is likely to prevail on the merits in the appeal or writ petition." *Hansen v. Eighth Judicial Dist. Court ex rel. Cnty. of Clark*, 116 Nev.

650, 657, 6 P.3d 982, 986 (2000). Under the factor considering a likelihood of success on the merits, a stay may be warranted if there is "...a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting the stay." *Id.*. at 659, 6 P.3d at 987. No one factor is dispositive when it comes to granting a stay, however "...if one or two factors are especially strong, they may counterbalance other weak factors." *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 251, 89 P.3d 36, 38 (2004).

The Court has weighed these factors and finds that the requested stay is appropriate in this case. The Court's order affects how the Labor Commissioner approaches the minimum wage calculation in her enforcement proceedings. These enforcement proceedings are actions taken in the public interest and will necessarily concern persons who are not parties to this matter. These proceedings should be allowed to continue unimpeded until the Nevada Supreme Court has given finality to the issues raised in this case. This implicates the first two factors of under *Hansen*, as weighing in favor of staying the order pending appeal. Conversely there is no indication that Plaintiff will suffer an irreparable injury if a stay is granted.

The Court recognizes that a serious legal question is involved in this case as it involves the interpretation of a constitutional provision with ramifications affecting persons throughout the State. While the final interpretation of the amendment is a judicial question, the constitutional interpretation of the legislative and executive departments is entitled to some weight in the analysis. *e.g. State v. Glenn*, 18 Nev. 34, 44, 1 P. 186, 190-191 (1883). Further, as the Court's order will affect non-parties pursuing wage claims through the Labor Commissioner's administrative process, the equities weigh in favor of staying the order while the appeal remains pending.

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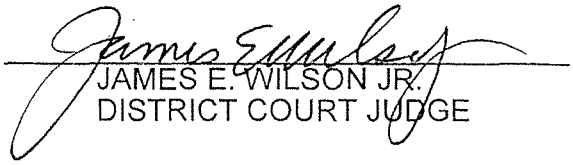
Based upon the foregoing, and good cause appearing therefore:

IT IS HEREBY ORDERED that Defendants' motion to stay the order pending appeal is Granted.

October 9, 2015



JAMES E. WILSON JR.
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

The undersigned, an employee of the First Judicial District Court, hereby certifies that on the 12 day of October, 2015, I mailed a true and correct copy of the foregoing Order to:

Scott Davis, DAG
555 E. Washington Ave, Ste 3900
Las Vegas, NV 89101

Don Springmeyer, Esq.
3556 E. Russell Road, 2nd Floor
Las Vegas, NV 89120

Gina Winder
Judicial Assistant

Exhibit C

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Attorneys for Defendant
BRIAD RESTAURANT GROUP, L.L.C.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ERIN HANKS, et al., Plaintiffs, vs. BRIAD RESTAURANT GROUP, L.L.C., Defendant.	Case No. 2:14-cv-0786-GMN-PAL **JOINT STIPULATION AND ORDER FOR TEMPORARY STAY OF PROCEEDINGS** **FIRST REQUEST**

Plaintiffs ERIN HANKS, et al. ("Plaintiffs") and Defendant BRIAD RESTAURANT GROUP, L.L.C. ("Defendant"), by and through their respective counsel of record, hereby stipulate to and request that the Court grant a temporary stay in the above-referenced matter now pending before this Court as Case No. 2:14-cv-0786-GMN-PAL (the "Litigation"), pending the resolution of the Court's Certified Question to the Nevada Supreme Court regarding 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, as requested by the parties in a concurrently-filed joint motion.

The parties request a temporary stay in this matter to avoid unnecessarily incurring the significant costs and fees associated with approaching briefing deadlines including but not limited to, costs and fees associated with responding and replying to all filed motions with the exception of Plaintiff's Motion for Certification (Doc. 101) and Defendant's Motion to Compel Arbitration (Doc.

104) which can be decided irrespective of any ruling by the Nevada Supreme Court on the meaning of the word "provide" as used in the Minimum Wage Amendment. The parties further agree that staying these deadlines is preferable to dismissing the aforementioned motions without prejudice to avoid the costs and fees associated with refilling such motions. Therefore, the parties request:

- The Court enter a temporary stay on briefing of all filed motions with the exception of Plaintiff's Motion for Certification (Doc. 101) and Defendant's Motion to Compel Arbitration (Doc. 104) pending the resolution of the Court's Certified Question to the Nevada Supreme Court listed above.
- The Court extend the deadline for the filing of Plaintiffs' renewed motion for class certification until after the resolution of the Court's Certified Question to the Nevada Supreme Court listed above.

IT IS SO STIPULATED.

September 8, 2015

/s/ Don Springmeyer, Esq.
DON SPRINGMEYER, ESQ.
BRADLEY SCHRAGER, ESQ.
DANIEL BRAVO, ESQ.
WOLF, RIFKIN, SHAPIRO,
SCHULMAN & RABKIN, LLP

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KATHRYN B. BLAKEY, ESQ.
LITTLER MENDELSON, P.C.

Attorneys for Defendant
BRIAD RESTAURANT GROUP, L.L.C.

ORDER

IT IS SO ORDERED.

Plaintiffs shall have 30 days after the resolution of the Court's Certified Question to file their renewed motion for class certification.

In addition to the Motion for Certification (ECF No. 101) and Motion to Compel (ECF No. 104), the Motion to Amend (ECF No. 94) is also <u>not</u> stayed.

Gloria M. Navarro, Chief Judge
United States District Court
September 15, 2015

From:	cmecf@nvd.uscourts.gov
To:	cmecfhelpdesk@nvd.uscourts.gov
Subject:	Activity in Case 2:14-cv-00786-GMN-PAL Hanks, et al. v. Briad Restaurant Group, LLC Order on Stipulation
Date:	Tuesday, September 15, 2015 2:25:41 PM

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.
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United States District Court

District of Nevada

Notice of Electronic Filing

The following transaction was entered on 9/15/2015 at 2:24 PM PDT and filed on 9/15/2015
Case Name: Hanks, et al. v. Briad Restaurant Group, LLC
Case Number: 2:14-cv-00786-GMN-PAL
Filer:
Document Number: 118

Docket Text:
ORDER ON STIPULATION Granting [117] STIPULATION for Temporary Stay of Proceedings.

Plaintiffs shall have 30 days after the resolution of the Court's Certified Question to file their renewed motion for class certification.

In addition to the Motion for Certification (ECF No. [101]) and Motion to Compel (ECFNo. [104]), the Motion to Amend (ECF No. [94]) is also not stayed.

Signed by Chief Judge Gloria M. Navarro on 9/15/15.

(Copies have been distributed pursuant to the NEF - MMM)

2:14-cv-00786-GMN-PAL Notice has been electronically mailed to:

Don Springmeyer (Terminated) dspringmeyer@wrslawyers.com, cmixson@wrslawyers.com, crehfeld@wrslawyers.com, nvaldez@wrslawyers.com

Rick D Roskelley rroskelley@littler.com, mrodriguez@littler.com

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Kathryn Blakey kblakey@littler.com, dperkins@littler.com

Daniel Bravo (Terminated) dbravo@wrslawyers.com

2:14-cv-00786-GMN-PAL Notice has been delivered by other means to:

Robert Baker
5412 Danville Lane
Las Vegas, NV 89119

The following document(s) are associated with this transaction:

Document description: Main Document
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Exhibit B

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:

Counsel for Plaintiff

Bradley Scott Schrager, Daniel Bravo, and Don Springmeyer
Wold, Rifkin, Shapiro, Schulman & Rabkin, LLP
3556 E. Russell Road, 2nd Floor
Las Vegas, NV 89120

Counsel for Defendants

Kathryn Blakey, Rick D. Roskelley, and Roger L. Grandgenett
Littler Mendelson, PC
3960 Howard Hughes Parkway, Suite 300
Las Vegas, NV 89169

Montgomery Y. Paek
Jackson Lewis P.C.
3800 Howard Hughes Parkway, Suite 600
Las Vegas, NV 89169

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.

From:	cmecf@nvd.uscourts.gov
Sent:	Monday, August 24, 2015 2:46 PM
To:	cmecfhelpdesk@nvd.uscourts.gov
Subject:	Activity in Case 2:14-cv-00729-GMN-VCF Tyus et al v. Wendy's of Las Vegas, Inc. et al Order on Motion for Judgment

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.
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United States District Court

District of Nevada

Notice of Electronic Filing

The following transaction was entered on 8/24/2015 at 2:45 PM PDT and filed on 8/21/2015
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:

Don Springmeyer (Terminated) dspringmeyer@wrslawyers.com, cmixson@wrslawyers.com, crehfeld@wrslawyers.com, nvaldez@wrslawyers.com

Rick D Roskelley rroskelley@littler.com, mrodriguez@littler.com

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Bradley Scott Schrager (Terminated) bschrager@wrslawyers.com, ODavidoff@wrslawyers.com, crehfeld@wrslawyers.com, dfresquez@wrslawyers.com, lrillera@wrslawyers.com

Kathryn Blakey kblakey@littler.com, dperkins@littler.com

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2:14-cv-00729-GMN-VCF Notice has been delivered by other means to:

Linda Davis
1251 S. Cimarron, #53
Las Vegas, NV 89117

Terron Sharp
5474 Winning Spirit Lane
Las Vegas, NV 89113

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:n/a
Electronic document Stamp:
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c16a3b68840e10c73ed4a274fbf8ee8de6cbf3658987f4be8afc33f594662]]

Exhibit A

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10/19/2015 09:29:15 AM

CLERK OF THE COURT

NOE
DON SPRINGMEYER, ESQ.
Nevada State Bar No. 1021
BRADLEY SCHRAGER, ESQ.
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Attorneys for Plaintiffs

EIGHTH JUDICIAL DISTRICT COURT

IN AND FOR CLARK COUNTY, STATE OF NEVADA

PAULETTE DIAZ; LAWANDA GAIL WILBANKS; SHANNON OLSZYNSKI; and CHARITY FITZLAFF, all on behalf of themselves and all similarly-situated individuals, Plaintiffs, vs. MDC RESTAURANTS, LLC; LAGUNA RESTAURANTS, LLC; INKA, LLC; and DOES 1 through 100, Inclusive, Defendants.	Case No.: A-14-701633-C Dept. No.: XVI **NOTICE OF ENTRY OF ORDER GRANTING CLASS CERTIFICATION, DESIGNATING CLASS REPRESENTATIVES, AND DESIGNATING CLASS COUNSEL** Hearing Date: September 25, 2015 Hearing Time: 9:30 a.m.

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

DATED this 17th day of October, 2015.

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

By: */s/ Bradley Schrager*

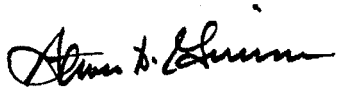
DON SPRINGMEYER, ESQ.
Nevada State Bar No. 1021
BRADLEY SCHRAGER, ESQ.
Nevada State Bar No. 10217
DANIEL BRAVO, ESQ.
Nevada State Bar No. 13078
3556 E. Russell Road, Second Floor
Las Vegas, Nevada 89120
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of October, 2015, a true and correct copy of **NOTICE OF ENTRY OF ORDER GRANTING CLASS CERTIFICATION, DESIGNATING CLASS REPRESENTATIVES,, AND DESIGNATING CLASS COUNSEL** was served by electronically filing with the Clerk of the Court using the Wiznet Electronic Service system and serving all parties with an email-address on record, pursuant to Administrative Order 14-2 and Rule 9 of the N.E.F.C.R.

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

Electronically Filed
10/16/2015 02:58:55 PM



CLERK OF THE COURT

ORDR

DISTRICT COURT
CLARK COUNTY, NEVADA

PAULETTE DIAZ; LAWANDA GAIL WILBANKS; SHANNON OLSZYNSKI; and CHARITY FITZLAFF, all on behalf of themselves and all similarly-situated individuals, Plaintiffs, vs. MDC RESTAURANTS, LLC; LAGUNA RESTAURANTS, LLC; INKA, LLC; and DOES 1 through 100, Inclusive, Defendants.	Case No.: A-14-701633-C Dept. No.: XVI **ORDER GRANTING CLASS CERTIFICATION, DESIGNATING CLASS REPRESENTATIVES, AND DESIGNATING CLASS COUNSEL** Hearing Date: September 25, 2015 Hearing Time: 9:30 a.m.

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

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

TIMOTHY C. WILLIAMS
DISTRICT JUDGE

DEPARTMENT SIXTEEN
LAS VEGAS NV 89155

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

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

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

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

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

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

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

TIMOTHY C. WILLIAMS
DISTRICT JUDGE

DEPARTMENT SIXTEEN
LAS VEGAS NV 89155

requirement of Rule 23(a)(1).

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

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

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

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

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

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

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

TIMOTHY C. WILLIAMS
DISTRICT JUDGE

DEPARTMENT SIXTEEN
LAS VEGAS NV 89155

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

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

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

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

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

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

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

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

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

. . .

TIMOTHY C. WILLIAMS
DISTRICT JUDGE

DEPARTMENT SIXTEEN
LAS VEGAS NV 89155

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

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

TIMOTHY C. WILLIAMS
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

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

Littler Mendelson

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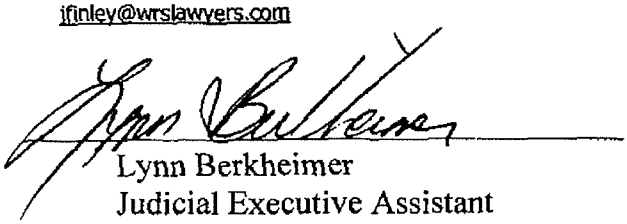

Lynn Berkheimer
Judicial Executive Assistant

TIMOTHY C. WILLIAMS
DISTRICT JUDGE

DEPARTMENT SIXTEEN
LAS VEGAS NV 89155

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. 68523

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

District Court Dept. No. XVI

Electronically Filed
Nov 19 2015 04:32 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

PETITIONERS' MOTION TO STAY

RICK D. ROSKELLEY, ESQ., Bar # 3192
ROGER GRANDGENETT, ESQ., Bar #6323
MONTGOMERY Y. PAEK, ESQ., Bar #10176
KATHRYN B. BLAKEY, ESQ., Bar # 12701
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Attorneys for Petitioners MDC RESTAURANTS, LLC; LAGUNA RESTAURANTS, LLC; and INKA, LLC

Docket 68523 Document 2015-35470

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.

This NRAP 26.1 Disclosure is made in support of Petitioners MDC Restaurants, LLC; Laguna Restaurants, LLC; and Inka, LLC (collectively "Petitioners") Motion to Stay the district court case with Real Parties in Interest Paulette Diaz, Lawanda Gail Wilbanks, Shannon Olzynski and Charity Fitzlaff (collectively "Real Parties in Interest").

Dated: November 19, 2015

Respectfully submitted,

/s/ Montgomery Y. Paek, Esq.

RICK D. ROSKELLEY, ESQ.
ROGER L. GRANDGENETT II, ESQ.
MONTGOMERY Y. PAEK, ESQ.
KATHRYN B. BLAKEY, ESQ.
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I. GROUNDS FOR MOTION AND RELIEF SOUGHT

Pursuant to NRAP 8, Petitioners move to stay all proceedings in the district court and the district court's Order entered on October 19, 2015 pending the resolution of Petitioners' Petition for Writ of Prohibition or Mandamus, in *MDC Restaurants, LLC et al. v. The Eighth Judicial District Court of the State of Nevada et al. ("Diaz")*, NV. S. Ct. no. 68754, regarding the meaning of the word "provide" under the Nevada Constitution, Art. XV, § 16 ("MWA"). **Order at Declaration of Montgomery Y. Paek ("Decl.") as Exhibit A.** The district court has certified a class definition on its erroneous interpretation that the meaning of "provide" means an employee must chose to "enroll" in health insurance rather than the common sense meaning that an employer must "offer" health insurance. ***Id.*** As this same issue is pending before this Court, a stay is warranted to prevent the serious harm that would arise from an incorrect class notice and related classwide discovery.

By basing class certification on a flawed legal definition of "provide", the district court has engaged the powerful machinery of a class action for thousands of absent plaintiffs who may never have had standing as class members in the first place. Thus, if the district court's interpretation of "provide" is overturned, the district court will have allowed Real Parties in Interest to notice the wrong class in a court-sanctioned solicitation of thousands of people who never had any claim and allowed classwide discovery on the wrong class. The harm is irreparable as there

is no corrective procedure to cure this disruption and confusion to absent class plaintiffs who are also Petitioners' employees or former employees. Further, should the district court's ruling be overturned, all matters related to the flawed class definition would have to be re-litigated or redone. Accordingly, this Court should issue a stay for judicial economy and the avoidance of serious harm.

In addition to certifying the incorrect class, the meaning of "provide" is dispositive as to three of the named Real Parties in Interest and the district court's ruling effectively invalidated the Labor Commissioner's long-established regulations that set forth "provide" means "offer." In contrast, Real Parties in Interest have never articulated any harm beyond "let's get on with it" and the accrual of money damages. Moreover, all of the other three matters in which a court has considered the meaning of "provide" under the MWA, have been stayed pending a resolution by this Court. As with those cases, Petitioners' matter should also be stayed pending a resolution of "provide."[1]

II. FACTS AND PROCEDURAL HISTORY

On June 5, 2014, Real Parties in Interest filed their operative Amended Class Action Complaint. **Amended Class Action Complaint at Decl. as Exhibit E.** On

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[1] *Kwayisi v. Wendy's of Las Vegas et al.*, NV. S. Ct. no. 68754 ("*Kwayisi*"); *Hanks v. Briad Restaurant Group, LLC*, NV. S. Ct. no. 68845 ("*Hanks*"); and *State of Nevada, ex rel. Office of the Labor Commissioner et al. v. Hancock*, NV. S. Ct. no. 68770 ("*Hancock*"). ***Kwayisi* Order [Doc. No. 71]; *Hanks* Order [Doc. No. 118]; and *Hancock* Order at Decl. as Exhibits B, C, and D.**

June 8, 2015, Real Parties in Interest brought their Motion for Class Certification with a class definition of "All. . . employees. . . compensated at less than the upper-tier hourly minimum wage set forth in Nev. Const. art XV, § 16." **Plaintiff's Motion for Class Certification at Decl. as Exhibit F.** In their Opposition, Petitioners argued that a class of "all. . . employees" did nothing to ascertain a class of potential plaintiffs as the class definition did not take into account the language of the MWA that makes liability for the upper tier $8.25 rate contingent on failing to offer or provide health insurance. **Defendants' Opposition to Motion for Class Certification at 4:8-3 and 7:7-9:7 at Decl. as Exhibit G.** On July 1, 2015, however, the district court issued a minute order that "provide" did not have its common sense meaning of "offer" or make available and instead meant that employees had to actually "enroll" in health insurance. **July 17, 2015 Notice of Entry of Order at Decl. as Exhibit H.** Thus, the district court's ruling effectively invalidated the Labor Commissioner's regulations relating to the MWA which interpreted the word "provide" to be synonymous with "offer." **June 25, 2015 Hearing Transcript at 18:18 – 21 and 33:18 - 42:2 at Decl. as Exhibit I.**

At the July 9, 2015 hearing on class certification, the district court could have denied the flawed class definition of "all. . . employees" and the case would have proceeded to trial on the individual named plaintiffs' claims. Instead, the district court allowed Real Parties in Interest to scrap their flawed class definition

and re-write new class definitions to cure their failures in discovery to prove no "offer" was made. **July 9, 2015 Hearing Transcript at Decl. as Exhibit J.**

On July 16, 2015, Real Parties in Interest submitted this do-over of their class definition. Abandoning their original singular class definition of all employees, Real Parties in Interest moved to certify a class and subclass that in reality were the same or alternative classes depending on Real Parties in Interest's view of "provide" and "enroll." These class definitions were for "[a]ll. . . employees. . . not provided qualifying health insurance" and "[a]ll. . . employees. . . who did not enroll in Defendants' health benefits plans." **Plaintiff's Supplemental Brief at 2:5-8 and 3:17-18 at Decl. as Exhibit K.** Thus, Real Parties in Interest either created confusing class definitions with no distinction because the district court held that "not provided" meant "not enrolled" *or* they created two alternative classes which, of course, would be contrary to ascertaining an identifiable class. **Defendants' Opposition to Supplemental Brief at Decl. as Exhibit L.** Nevertheless, the district court saw fit to certify a "not enrolled" class based on its flawed interpretation of "provide." ***See* Exhibit A, Order.**

On July 30, 2015[2], Petitioners submitted a Petition for Writ of Mandamus or Prohibition before this Court in *Diaz* regarding the district court's holding that "provide" meant "enroll." **Petition for Writ of Mandamus or Prohibition**

[2] Although submitted on July 30, 2015, the stamped filing date was July 31, 2015.

("Petition") at 8-9 at Decl. as Exhibit M. That same day, on July 30, 2015, Petitioners also filed their Motion to Stay Proceedings before the district court. **Defendants' Motion to Stay Proceedings ("Motion to Stay") at Decl. as Exhibit N.** As explained in that Motion, Real Parties in Interest's Complaint was premised on the allegation that the MWA was violated because Petitioners did not "offer[]" health benefit plans to the named plaintiffs and the putative class. ***Id.* at 6:22-28**. Even the individual named plaintiffs' claims turned on being "offered" or "never offered" health insurance. ***Id.* at 7:1-9**. As such, all discovery and litigation was focused on whether Real Parties in Interest were offered health insurance. ***Id.*** Further, Petitioners noted to the district court in the Motion to Stay that both class definitions hinged on three separate issues of MWA interpretation: (1) the statute of limitations, (2) the meaning of "provide", and (3) the meaning of "health insurance" and that two of these questions of law - the statute of limitations and "provide" - were already pending before this Court. **Defendants' Supplement to Continued Motion to Stay at 1:24-2:17 at Decl. as Exhibit O.** Petitioners also notified the district court of this Court's requests for answers on the Petitions further evincing that the meaning of "provide" was likely to be clarified by this Court. **Defendants' Second Supplement to Continued Motion to Stay at Decl. as Exhibit P.** Despite these compelling reasons, the district court denied a stay even though Real Parties in Interest cited nothing more than "just get on with it"

and the accrual of possible money damages. ***Id.*; *See* Exhibit A, Order; Defendants' Third Supplement to Continued Motion to Stay at Decl. as Exhibit Q.** As a result, Real Parties in Interest have moved for class notice to be sent to the flawed "non-enrollment class." **Motion for Approval of Class Action Notice at Decl. as Exhibit R.**

III. LEGAL ARGUMENT

This Court should stay all proceedings in the district court pending a resolution of Defendants' Petition in *Diaz*. As required by Rule 8, Petitioners have already moved for stay in the district court which was denied. NRAP 8(a)(1)(A); ***See* Exhibit N, Motion to Stay.** This Court has held that it will consider the following factors in deciding whether to issue a stay: (1) Whether the object of the appeal will be defeated if the stay is denied; (2) Whether the appellant will suffer irreparable or serious injury if the stay is denied; (3) Whether the respondent will suffer irreparable or serious injury if the stay is granted; and (4) Whether the appellant is likely to prevail on the merits in the appeal. *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 251 (2004) (*citing Fritz Hansen A/S v. Eighth Judicial Dist. Court*, 116 Nev. 650, 657 (2000)). If one or two factors are especially strong, they may counterbalance other weaker factors. *Id.* Here, the factors all weigh strongly in favor of granting the stay.

A. The Object of the Petition Will Be Defeated Without A Stay.

As stated, the Petition concerns the meaning of the word "provide" under the MWA and goes to the core of whether or not the Petitioners' are liable to employees who were offered health insurance, but chose not to enroll. In class actions, the notice to the class puts absent putative plaintiffs on notice of their claim in the litigation. Such notice should not go to employees who may have no claim as such a notice would act as a court-sanctioned solicitation for Real Parties in Interests' law firm. A subsequent notice would not cure the disruption to the Petitioners' workforce caused by such a direct mailer to putative class members informing them to contact a law firm about harms that never occurred. By then, absent class members may have already contacted the law firm when they had no standing for any claim to begin with. Thus, the purpose of a correct class definition would be defeated without a stay.

B. A Stay Supports Judicial Economy And Avoids Serious Harm.

Judicial economy favors staying all proceedings in the district court. One important policy behind a judicial stay is to protect the appellate court's jurisdiction so that any decision it reaches is not rendered moot by subsequent trial court proceedings. *See, Elsea v. Saberi*, 4 Cal.App.4th 625, 629 (1992); *In re Marriage of Horowitz*, 159 Cal.App.3d 377, 381 (1984). Similarly, allowing a matter to be litigated while a related issue is pending on appeal "could create chaos with the appellate process." *City of Hanford v. Superior Court*, 208 Cal.App.3d

580, 588 (1989). Here, judicial economy warrants a stay because it avoids the possibility of re-litigation and the danger of incorrect classwide notice and discovery. As stated, the issue of whether the MWA permits employers to pay below the upper tier minimum wage only to employees "offered" health insurance defines liability. If this Court rules that "provide" means "offer", all the time, effort and money for a classwide notice, classwide discovery and related motion practice will be wrong, require re-litigation, and cause serious harm by disrupting Petitioners' workforce with an incorrect class action notice.

C. A Stay Does Not Cause Serious Harm To Real Parties In Interest.

Contrarily, Real Parties in Interest suffer no irreparable or serious harm from a stay and will not have to re-litigate issues. This Court has held that "a mere delay in pursuing discovery and litigation normally does not constitute irreparable harm." *Mikohn*, 120 Nev. at 253. In their opposition to stay in the district court, Real Parties in Interest cited no prejudice other than the accrual of potential money damages. This is not serious harm as Real Parties in Interest can be made whole by the payment of money damages should they prevail.

D. Likelihood Of Success On The Merits.

The likelihood of success on the merits of Petitioners' Petition is high. The district court's ruling on "provide" overlooks the plain language of the MWA and creates an unavoidable contradiction. Specifically, the Order states that the

language of the MWA is "unambiguous: an employer must actually provide, supply, or furnish qualifying health insurance," and "for an employer to 'provide' health benefits, an employee must actually enroll in health insurance that is offered by the employer." ***See* Exhibit H, Order.** However, the term "qualified health insurance" is not in the MWA and therefore cannot be attributed to the unambiguous language of the MWA. The term "qualified health insurance" comes from NAC 608.100, which states that in order to comply with the MWA, employees must be "offered qualified health insurance." NAC 608.100(1)(a) (emphasis added). Therefore, if employees have to enroll in the qualified health insurance as the Order states then, as the Court alluded to at the hearing, NAC 608.100 is void. ***See* Exhibit I, Transcript at 18:18-21; 33:18 – 42:2**. As such, the term "qualified health insurance" would disappear with it. Accordingly, there is an inherent conflict with the district court's ruling.

Next, the words "supply" and "furnish" are not in the MWA either and, like the word "provide," they mean "to make available." <http://www.merriam-webster.com/dictionary/provide>. Thus, the ruling that the MWA requires employees to enroll in insurance is also not based in the language of the MWA. To the contrary, it adds to the language of the MWA and attributes new meaning to the word provide that is contrary to every single existing definition of the word. **Defendants' Opposition to Plaintiff Diaz's Motion for Summary Judgment at**

Decl. as Exhibit S. At hearing, it appeared that the primary basis for the district court's ruling was that there needs to be "some meaning" to the two tier system. ***See*** **Exhibit I, Transcript at 6**. The district court indicated that if employees earning below $8.25 per hour were not enrolled in insurance, there would be no meaning to the two-tier system. ***Id***. This reasoning, however, overlooks the actual structure the two-tier system and the plain language of the MWA: employers who have no insurance options available for their employees must pay the higher-tier minimum wage; and employers who do give their employees access to health insurance are permitted to pay the lower-tier minimum wage. Indeed, the MWA focuses exclusively on what actions employers must take in order to pay below the upper tier minimum wage and does not discuss or even mention any action that must be taken by employees, including enrollment.

IV. CONCLUSION

For all of the reasons stated above, this Court should grant a stay.

November _____, 2015

Respectfully submitted,

_____

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MDC RESTAURANTS, LLC; LAGUNA RESTAURANTS, LLC; and INKA, LLC

DECLARATION OF MONTGOMERY Y. PAEK, ESQ. IN SUPPORT OF PETITIONERS' MOTION TO STAY

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 (hereinafter collectively "Petitioners").

2. Unless otherwise stated, this declaration is based on my personal knowledge. I make this declaration in support of Petitioners' Motion to Stay.

3. I have reviewed Order Granting Class Certification, Designating Class Representatives, and Designating Class Counsel, a true and correct copy of which has been attached hereto as **Exhibit A**.

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

5. I have reviewed *Hanks* Order [Doc. No. 118], a true and correct copy of which has been attached hereto as **Exhibit C**.

6. I have reviewed *Hancock* Order, a true and correct copy of which has been attached hereto as **Exhibit D**.

7. I have reviewed Amended Class Action Complaint, a true and correct copy of which has been attached hereto as **Exhibit E**.

8. I have reviewed Plaintiff's Motion for Class Certification without exhibits, a true and correct copy of which has been attached hereto as **Exhibit F**.

9. I have reviewed Defendants' Opposition to Motion for Class Certification without exhibits, a true and correct copy of which has been attached hereto as **Exhibit G**.

10. I have reviewed July 17, 2015 Notice of Entry of Order, a true and correct copy of which has been attached hereto as **Exhibit H**.

11. I have reviewed June 25, 2015 Hearing Transcript, a true and correct copy of which has been attached hereto as **Exhibit I**.

12. I have reviewed July 9, 2015 Hearing Transcript, a true and correct copy of which has been attached hereto as **Exhibit J**.

13. I have reviewed Plaintiff's Supplemental Brief without exhibits, a true and correct copy of which has been attached hereto as **Exhibit K**.

14. I have reviewed Defendants' Opposition to Supplemental Brief without exhibits, a true and correct copy of which has been attached hereto as **Exhibit L**.

15. I have reviewed Petition for Writ of Mandamus or Prohibition, a true and correct copy of which has been attached hereto as **Exhibit M**.

16. I have reviewed Defendants' Motion to Stay Proceedings without exhibits, a true and correct copy of which has been attached hereto as **Exhibit N**.

17. I have reviewed Defendants' Supplement to Continued Motion to Stay

without exhibits, a true and correct copy of which has been attached hereto as **Exhibit O**.

18. I have reviewed Defendants' Second Supplement to Continued Motion to Stay without exhibits, a true and correct copy of which has been attached hereto as **Exhibit P**.

19. I have reviewed Defendants' Third Supplement to Continued Motion to Stay without exhibits, a true and correct copy of which has been attached hereto as **Exhibit Q**.

20. I have reviewed Motion for Approval of Class Action Notice, a true and correct copy of which has been attached hereto as **Exhibit R**.

21. I have reviewed Defendants' Opposition to Plaintiff Diaz's Motion for Summary Judgment without exhibits, a true and correct copy of which have been attached hereto as **Exhibit S**.

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

Executed in Las Vegas, Nevada, on November _____, 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 November 19, 2015, I served the within document:

PETITIONERS' MOTION TO STAY

☒ 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 November 19, 2015, at Las Vegas, Nevada.

/s/ Erin J. Melwak

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