

Irshad Ahmed's Declared Tips September 16, 2012 – December 22, 2012	
	261.93
	304.16
	312.14
	205.40
	264.72
	199.53
	186.37
TOTAL:	\$1,734.25

Irshad Ahmed's 2012 Declared Tips	
TOTAL:	\$6,126.69

Irshad Ahmed's Declared Tips December 23, 2012 – June 28, 2013	
TOTAL:	\$3,742.88

EXHIBIT 9-3

EXHIBIT 9-3

DATE: 4-00
VOUCHER # 2603

LAST NAME: AHMED

FIRST NAME: ZRS HAD
CAB NO. 116

MEDALLION # 51

METER # 31466

MO. DAY YR. 10/10/12

T.A. # 104573

RADIO CALLS

RECORD ALL DIGITS

3X1.8 SHIFT

GAS \$

25.32

GALES

6.802

TRIPS	NO. PSGRS	TIME START	FROM	DESTINATION	TOTAL FARE INCL EXTRAS	DIFF	START	STOP	OMIT 10THS ODOMETER	TOTAL MILES	PAID MILES	TRIPS	TOTAL MONEY	EXTRA MONEY	BOOK	AMOUNT	CHECK-IN	AMOUNT
1	1.00	4	450	Down town	Air port	40	20	106133	106133	5611	90102	97448	96835.93	14480.39	Total Money	339.8	Gross Book	339.8
2	2.00	4	645	Down town	Air port	42	30	106011	55993	90032	97434	96506.13	14414.99	Extra Money	5.4	Cash Turn In	331.2	
3	TAX 3.00	3	815	A.P	Flange & Double	23	30	102	102	101	14	399.8	5.4	NOT ON METER	GROSS BOOK	339.8	NET BOOK	3158
4	4.00	4	850	Paris	LUCC	11	20											
5	TAX 5.00	2	925	A.P	Circus Circus	26	50											
6	6.00	3	950	Encor	M. Bayco	17	70											
7	7.00	4	1015	4 Seasons	Bally Hairs	5	90											
8	8.00	4	1028	Bally Hairs	Encor	17	30											
9	9.00	4	1102	Encor	Air port	31	10											
10	TAX 10.00	3	1125	A.P	Wynn	20	10											
11	11.00	2	1140	Wynn	ATM & Downtown	26	30											
12	12.00	2	1210	Downtown	N.Y. N.Y.	27	10											
13	13.00	4	1248	N.Y. N.Y.	A.P	13	30											
14	14.00	3	118	M.G.M.	pre-out let N	26	30											
15	15.00																	
16	16.00																	
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31	31.00																	
32	32.00																	
33	33.00																	
34	34.00																	

THIS AMOUNT

TURN IN

\$331.2

ie \$331.00

\$331.2

ie \$331.00

TOTAL PSGRS.

~~HA~~ 104573

Feb-116

15-200

W.A.M.-ATTNED, E.

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WRD
10-10-98

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THE UNIVERSITY OF CHICAGO

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9/63928

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000200

VOUCHERS

LAST NAME

FIRST NAME

CAB NO.

MEDALLION #

METER #

MO. DAY YR.

T.A. #

Ahmedy

Ahmedy

IRS HAD

116

46

31466

02/03/13

104573

RADIO CALLS

RECORD ALL DIGITS

SHIFT

GAS \$

GALS

13.36

4.163

TRIPS	NO. PSGRS	TIME START	FROM	DESTINATION	TOTAL FARE INCL EXTRAS	DIFF	START	STOP	OMIT 10THS ODOMETER	1. TOTAL MILES	2. PAID MILES	3. TRIPS	4. TOTAL MONEY	5. EXTRA MONEY	BOOK	AMOUNT	CHECK-IN	AMOUNT
1.00	4	601	Down Town	T ₁ & T ₃	40 10													
TAX 2.00	4	750	26	A P	M.G.M.	10 20												
TAX 3.00	4	859	26	A P	H.C. Vardham	17 20												
TAX 4.00	3	956	26	A P	Henderson	26 10												
TAX 5.00	4	1058	26	A P	Palm place (LHS)	26 50												
TAX 6.00	2	1156	26	A P	ATM - & Klegun	20 10												
TAX 7.00	3	1238	26	A P	Weyland Street	11 20												
TAX 8.00	2	1262	26	A P	Ph	13 20												
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34.00																		

TURN IN THIS AMOUNT

EXHIBIT 9-4

EXHIBIT 9-4

ATTACHMENT C

TIPPED EMPLOYEE PARTICIPATION AGREEMENT

I am an employee of Western Cab Company and
wish to participate in my employer's tip reporting program.

In accordance with a Tip Rate Determination Agreement (TRDA) between my employer and the Internal Revenue Service (IRS), I agree to report my tips to my employer, as required by law, at or above the tip rate established by my employer and approved by the IRS for my Occupational Category.

I also acknowledge that, to continue participation in my employer's tip reporting program, I must file all federal tax returns required by law and pay all federal taxes for which I am liable.

I understand that this Agreement and the Agreement between my employer and the IRS apply only to tips I receive from passengers in the course of my employment with **Western Cab Company**. I understand that referral fees and similar payments which I may receive from businesses or other entities for referring patrons or facilitating the delivery of patrons to those businesses or entities, were not taken into account in establishing the tip rate approved by the IRS. Such fees and payments which I receive are includable in my income and must be reported on my Individual Income Tax Return as required by law whether or not the source of that income provides me any documentation.

EMPLOYEE

Name (printed): IRSHAD M. AHMED,

Signature: Irshad M. Ahmed

Home address: 2251, S. FORT APACHE RD. #1096 LV-NV 89117

REDACTED

Social Security Number: _____

DATE: _____

000204

Attachment B
Page 1 of 1

EXHIBIT 9-5

EXHIBIT 9-5

RECEIVED

OCT 19 2012

OFFICE OF THE LABOR COMMISSIONER

675 FAIRVIEW DRIVE, SUITE 226
CARSON CITY, NV 89701
(775) 687-4850

555 EAST WASHINGTON AVENUE, # 4100
LAS VEGAS, NEVADA 89101
(702) 486-2650

Rev. by Inv. Assign

CLAIM FOR WAGES Keith

NEVADA LABOR COMMISSIONER EMPLOYEE INFORMATION (Include copy of Photo Identification)	EMPLOYER INFORMATION
1. Name: <u>Laksiri P. Perera</u> First M.I. Last	9. Business name <u>Western cab company</u>
2. Address: <u>6500 Pearcecrest Rd.</u> Number <u>Las Vegas NV 89108</u> City State Zip	10. Name of Employer <u>Helen</u>
3. Home Phone: <u>(702) 454-7588</u>	11. Business address <u>801 South Main St.</u> <u>Las Vegas NV 89101</u> City State Zip
Other Phone: ()	12. Mailing address (if different):
4. Email address: <u>ushaniperera@yahoo.com</u>	13. Telephone: <u>(702) 382-7100</u>
5. Will you provide a financial statement if requested? ☒ Yes ☐ No	Fax: ()
6. Do you agree to be present at any pre-hearing conferences or administrative hearings scheduled, if necessary, to present information related to your wage claim? ☒ Yes ☐ No	14. County where you worked: <u>Clark</u>
7. Were you offered Health Insurance? ☒ Yes ☐ No	15. Type of work performed: <u>driver</u>
8. Does this claim include NSF checks? ☐ Yes ☒ No	16. Type of Business: <u>Taxi</u>

JOB INFORMATION

1. Base Pay Rate: Comm Date Hired: 01/2010 Last day worked: 10/15/2012 Reason for leaving: ☒ Discharged/laid off ☐ Quit ☐ Still Employed

2. Employment Agreement ☒ Oral Agreement ☐ Written Agreement: Please attach a copy

3. Basis of pay ☐ Piece work ☐ Salary ☐ Commissions Method of payment ☒ Check ☐ Cash If paid in cash, did you sign a receipt for payment? ☐ Yes ☐ No

WAGES CLAIMED

4. Reason(s) for wage claim: different pay period

5. Evidence submitted to support wage claim (attach copies):

☐ Nonpayment of regular wages	☐ Bad check(s)	☐ Pay stubs	☐ Company documents
☐ Nonpayment of overtime	☒ Unauthorized deductions	☐ Time records	☐ Witnesses (attach list)
☐ Nonpayment of commissions	☐ Other	☐ Agreement/contract	☐ Other
☐ Nonpayment of prevailing wage		☐ Tax records (i.e. FORM W-2)	

6. Did you ask for your wages? ☒ Yes ☐ No If so, from whom: Helen Date: January 2012 ☒ Oral ☐ Written demand

7. Dates unpaid/underpaid From 01/10/10 To 10/15/12 (Show dates worked from Attachment 1(A,B,C or D))

Total amount earned from Attachment 1(A,B,C or D)	<u>55,560.00</u>	\$ <u>55,560.00</u>
Total amount paid	<u>48,534.12</u>	\$ <u>48,534.12</u>
Subtotal (subtract line 24 from line 23)	<u>7,025.88</u>	\$ <u>7,025.88</u>
Total unauthorized deduction(s) (attach copy of paycheck stubs or other evidence of deduction)	<u>0</u>	\$ <u>0</u>
Total bank/overdraft fees (Attach original check, if available, and bank statement showing fees)	<u>0</u>	\$ <u>0</u>
Total amount claimed (add lines 25, 26 and 27)	<u>7,025.88</u>	\$ <u>7,025.88</u>

SUMMARY OF TIME WORKED

Week	3/15/11	3/16/11	3/17/11	3/18/11	3/19/11	3/20/11	Total Hours
Day	Sun	Mon	Tue	Wed	Thu	Fri	
Date	3/15	3/16	3/17	3/18	3/19	3/20	06
Regular Hours	12.00	12.00	12.00	12.00	12.00	12.00	72
Overtime Hours	-	-	-	-	-	-	-
Total Hours	12.00	12.00	12.00	12.00	12.00	12.00	72

Hourly pay rate \$ 8.25 X Total Regular Hours 72 = Earned \$ 594

Overtime pay rate \$ _____ X Total Overtime Hours _____ = Earned \$ _____
Total \$ 594

Gross \$ 1218.86
Net Pay 1081.07

Work Week	From: 3/12/11 To: 3/17/11							
Day	Sun	Mon	Tue	Wed	Thu	Fri	Sat	Total Hours
Date	3/12	3/13	3/14	3/15	3/16	3/17	3/18	06
Regular Hours	12.00	12.00	12.00	12.00	X	12.00	12.00	72
Overtime Hours								
Total Hours	12.00	12.00	12.00	12.00		12.00	12.00	72

Hourly pay rate \$ 8.25 X Total Regular Hours 72 = Earned \$ 594

Overtime pay rate \$ _____ X Total Overtime Hours _____ = Earned \$ _____
Total \$ 594

Week of Month	From: 3/18/11 To: 3/24/11							
Day	Sun	Mon	Tue	Wed	Thu	Fri	Sat	Total Hours
Date	3/18	3/19	3/20	3/21	X	3/22	3/24	06
Regular Hours	12	12	12	12	X	12	12	72
Overtime Hours								
Total Hours	12	12	12	12		12	12	72

Hourly pay rate \$ 8.25 X Total Regular Hours 72 = Earned \$ 594

Overtime pay rate \$ _____ X Total Overtime Hours _____ = Earned \$ _____
Total \$ 594

Start Benefit

Week Number	From 3/25/11 To 3/31/11								
Day	Sun	Mon	Tue	Wed	Thu	Fri	Sat	Total Hours	
Date	3/25	3/26	3/27	3/28	X	3/30	3/31	06	
Regular Hours	12.00	12.00	12.00	12.00	X	12.00	12.00	72	
Overtime Hours									
Total Hours	12.00	12.00	12.00	12.00		12.00	12.00	72	

Hourly pay rate \$ 7.25 X Total Regular Hours 72 = Earned \$ 522

Overtime pay rate \$ _____ X Total Overtime Hours _____ = Earned \$ _____
Total \$ 522

Employer Name Westren Cab com Employee Name Lakshmi Perera

ATTACHMENT 1(A)
SUMMARY OF TIME WORKED

Work Week From: 9/14/12 To: 9/20/12

Day	Sun	Mon	Tue	Wed	Thu	Fri	Sat	Total Hours
Date	9/14	9/15	9/16	9/17	X	9/19	9/20	06
Regular Hours	12	12	12	12		12	12	72
Overtime Hours								
Total Hours	12	12	12	12		12	12	72

Hourly pay rate \$ 7.25 X Total Regular Hours 72 = Earned \$ 522

Overtime pay rate \$ _____ X Total Overtime Hours _____ = Earned \$ _____

Total \$ 522

Work Week From: 9/24/12 To: 9/27/12

Day	Sun	Mon	Tue	Wed	Thu	Fri	Sat	Total Hours
Date	9/24	9/25	9/26	9/27	X	9/28	9/29	06
Regular Hours	12	12	12	12		12	12	72
Overtime Hours								
Total Hours	12	12	12	12		12	12	72

Hourly pay rate \$ 7.25 X Total Regular Hours 72 = Earned \$ 522

Overtime pay rate \$ _____ X Total Overtime Hours _____ = Earned \$ _____

Total \$ 522

Work Week From: 9/28/12 To: 10/4/12

Day	Sun	Mon	Tue	Wed	Thu	Fri	Sat	Total Hours
Date	9/28	9/29	9/30	10/1	X	10/2	10/3	06
Regular Hours	12	12	12	12		12	12	72
Overtime Hours								
Total Hours	12	12	12	12		12	12	72

Hourly pay rate \$ 7.25 X Total Regular Hours 72 = Earned \$ 522

Overtime pay rate \$ _____ X Total Overtime Hours _____ = Earned \$ _____

Total \$ 522

Work Week From: 10/5/12 To: 10/11/12

Day	Sun	Mon	Tue	Wed	Thu	Fri	Sat	Total Hours
Date	10/5	10/6	10/7	10/8	X	10/10	10/11	06
Regular Hours	12	12	12	12		12	12	72
Overtime Hours								
Total Hours	12	12	12	12		12	12	72

Hourly pay rate \$ 7.25 X Total Regular Hours 72 = Earned \$ 522

Overtime pay rate \$ _____ X Total Overtime Hours _____ = Earned \$ _____

Total \$ 522

Employer Name Westren Cal. Co. Employee Name Carlosi perez

EXHIBIT 9-6

EXHIBIT 9-6

Laksiri Perera's Declared Tips	
09/18/2011 – 10/01/2011	237.66
10/02/2011 – 10/15/2011	212.60
10/30/2011 – 11/12/2011	276.65
11/13/2011 – 11/26/2011	202.09
11/27/2011 – 12/10/2011	184.38
12/11/2011 – 12/24/2011	161.64
12/25/2011 – 01/07/2012	157.63
01/08/2012 – 01/21/2012	278.98
01/22/2012 – 02/04/2012	238.80
02/05/2012 – 02/18/2012	179.31
02/19/2012 – 03/03/2012	230.43
03/04/2012 – 03/17/2012	234.24
03/18/2012 – 03/31/2012	189.71
04/01/2012 – 04/14/2012	200.27
04/15/2012 – 04/28/2012	222.75
04/29/2012 – 05/12/2012	218.68
05/13/2012 – 05/26/2012	230.81
05/27/2012 – 06/09/2012	170.49
06/10/2012 – 06/23/2012	223.33
06/24/2012 – 07/07/2012	194.09
07/08/2012 – 07/21/2012	165.70
07/22/2012 – 08/04/2012	172.52
08/05/2012 – 08/18/2012	164.54
08/19/2012 – 09/01/2012	208.30
09/02/2012 – 09/15/2012	201.27
09/16/2012 – 09/29/2012	206.91
09/30/2012 – 10/13/2012	203.36
10/14/2012 – 10/15/2012	33.70
TOTAL:	\$5,600.84

2011 - \$5,498.54

2012 - \$4,325.82

EXHIBIT 9-7

EXHIBIT 9-7

EMPLOYEE RIGHTS UNDER THE FAIR LABOR STANDARDS ACT

THE UNITED STATES DEPARTMENT OF LABOR

WAGE AND HOUR DIVISION

FEDERAL MINIMUM WAGE

\$7.25

PER HOUR

Effective 12/1/2009, the minimum wage for most workers is \$7.25 per hour.

CHILD LABOR
Children under 18 years of age are subject to special rules regarding hours and types of work. For more information, refer to the Department of Labor's Child Labor poster.

Hours 14 and 15 hours of work outside school hours in a non-manufacturing, non-mining, non-hazardous job under the following conditions:

- No more than 3 hours on a school day or 18 hours in a school week.
- 8 hours on a non-school day or 40 hours in a non-school week.

Also, workers may not begin before 7 a.m. or end after 7 p.m., except from June 1 through Labor Day, when evening hours are extended to 9 p.m. Different rules apply to agricultural employment.

THE CREW
Employers of "crew employees" must pay a minimum wage of at least \$2.13 per hour if they claim a tip credit against their minimum wage obligation. If an employer has contracted with the employer's crew, wage of at least \$2.13 per hour do not equal the minimum hourly wage. The employer must make up the difference between the crew's wages and the minimum wage.

EMPLOYMENT
The Department of Labor may recover back wages either administratively or through court action, for the employees that have been underpaid in violation of the law. Violations may result in civil or criminal action. Employers may be assessed civil money penalties of up to \$1,100 for each violation or repeated violation of the minimum wage or overtime pay provisions of the law and up to \$11,000 for each employee who is the subject of a violation of the Act's child labor provisions. In addition, a civil money penalty of up to \$50,000 may be assessed for each child labor violation that causes the death or serious injury of any minor employee, and such assessments may be doubled up to \$100,000 when the violations are determined to be willful or repeated. The law also provides for criminal penalties against employers who fail to comply with the Act.

- Certain organizations and activities are exempt from the minimum wage and/or overtime pay provisions.
- Special provisions apply to workers in American Samoa and the Commonwealth of the Northern Mariana Islands.
- Certain states may have greater employee protections; employers must comply with both.
- The law requires employers to display this poster where employees can readily see it.
- Employees have 3 years of time to sue for unpaid wages during their first 90 consecutive calendar days of employment with an employer.
- Federal law also provides criminal penalties against employers who violate the law.

Information issued by the Department of Labor

EXHIBIT 10

EXHIBIT 10

LEON GREENBERG
Attorney at Law
2965 South Jones Boulevard • Suite E-4
Las Vegas, Nevada 89146
(702) 383-6085

Fax: (702) 385-1827

Leon Greenberg
Member Nevada, California
New York, Pennsylvania and New Jersey Bars
Admitted to the United States District Court of Colorado
Dana Sniegocki
Member Nevada and California Bars

September 16, 2014

Elias Gil
3106 Harbor Heights Drive
Las Vegas, NV 89117

Re: CLAIM AGAINST WESTERN CAB
FOR UNPAID MINIMUM WAGES

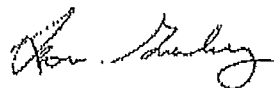
Dear Elias Gil:

I understand that you may have worked as a taxi driver for Western Cab. I believe Western Cab may have violated Nevada's Minimum Wage laws and may owe you and many other taxi drivers unpaid minimum wages. I believe many of the taxi drivers for Western Cab were earning, from the fares collected by customers, less than the \$7.25 or \$8.25 an hour currently required by Nevada's Minimum Wage law. While drivers may have also collected a substantial amount of tips from customers, those tips are **not** counted for purposes of Nevada's Minimum Wage law. For example, a taxi driver's share of the meter (customer fares collected) for an 11 hour work day must currently equal at least \$79.75 or \$90.75 under Nevada's Minimum Wage law, depending upon whether proper medical insurance was provided by Western Cab. So if you are working a full 12 hour shift, and earning less than \$80 or \$90 a day **without** including your tips, you may have a claim for unpaid minimum wages.

I would appreciate a chance to speak with you about any experience you had working as a taxi driver for Western Cab. Please call me confidentially and without obligation or charge.

I can be reached at the above number or toll free at 1-800-257-4841. Please call me anytime. I enclose some business cards.

Very truly yours,



Leon Greenberg

NOTICE: THIS IS AN
ADVERTISEMENT



LAWYER'S BIOGRAPHICAL DATA FORM AS
REQUIRED BY THE NEVADA RULES OF PROFESSIONAL CONDUCT

1. Full Name and Business Address of Leon Greenberg:

Leon Marc Greenberg
2965 South Jones Boulevard
Las Vegas, Nevada 89146

2. Leon Greenberg was initially admitted to practice law in New York on February 3, 1993.

3. Subsequent to his initial admission to practice law Leon Greenberg was admitted to practice law in the following States on the following dates:

New Jersey: April 15, 1993;
Nevada: October 11, 2002;
California: August 11, 2003;
Pennsylvania: September 29, 2003.

4. Leon Greenberg is a *magna cum laude* graduate of New York Law School and graduated from that school with a Juris Doctor degree in 1992.

NOTICE: THIS IS AN
ADVERTISEMENT

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Pennsylvania Bars
Admitted to the United States District Court of Colorado

Free Telephone Consultation
(702) 383-6085
(800) 257-4841

LEON GREENBERG
ATTORNEY AT LAW



Leon Greenberg
Attorney At Law
2965 S. Jones Blvd., Suite B-4
Las Vegas, Nevada 89146

leongreenberg@overtimelaw.com
Website: minimumwagelaw.com
Fax: (702) 385-1827

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Las Vegas, Nevada 89146

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Website: minimumwagelaw.com
Fax: (702) 385-1827

EXHIBIT 11

EXHIBIT 11

TRIP SHEET

Your Vegas Transportation Guide Since 1984

Volume 30 • Number 08 • August 2014

MAGAZINE



Chippendales®

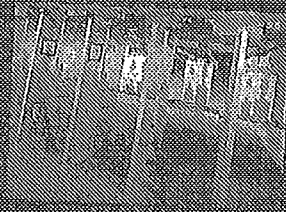
rio

THE RANGE 702

NEVADA'S LARGEST INDOOR SHOOTING FACILITY

TAXI FRIENDLY
CASH PAID OUT DAILY
On Machine Gun Packages

THE HIGHEST PAY-PER-PERSON
OF ANY
GUN
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4699 DEAN MARTIN DRIVE

WWW.THERANGE702.COM



WINNER!
Best Male Strip Show



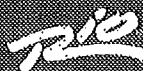
WINNER!
Top 10 Shows in Las Vegas

RECEIVE 2
FREE TICKETS!



Chippendales

To redeem this ticket offer,
call the



box office at 702-777-2782
and mention "TRANSPORTATION
PROVIDER PROMOTION"

*No tipping

*Men are welcome

*All tickets include VIP
admission to the
Voodoo Lounge
atop the Rio.

#CHIPPENDALES

*Must have Transportation ID at time of pick up *Offer valid through 12/31/14
*Subject to availability

LIQUOR • BEER WINE • CIGARS

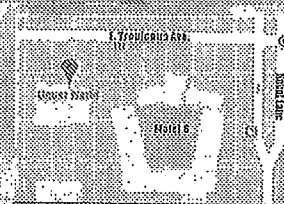
Largest Selection on the Strip - Guaranteed!!!



DRIVERS NO PUNCH
CARDS
WE PAY CASH\$\$

**FREE
ICE &
DRINKS**

**Open
24 HOURS**



1 Block East of Tropicana Casino Next to Motel 6

169 E. Tropicana **702-262-9100**

Letter to the Editor

We've received a few "Letters to the Editor" from drivers. English doesn't appear to be the first language of one writer; we've tried to fix it so we can all better understand the questions & statements. We encourage your response.

Hello Trip Sheet,

Just wanted to publicize that Battlefield Vegas is not paying drivers for delivering customers who pay for packages unless the customer says the driver recommended the place. A Western driver and I brought 7 people, who paid a total of \$1400+ for shooting packages. After we waited 15 minutes, the girl at the counter told us that because one of the men had been there before we weren't eligible for anything under store policy.

Battlefield Vegas is NOT cab friendly. Thanks for mentioning this if you can. Love the magazine, keep up the good work.

MK - YCS Driver

PS-I sent an email to Battlefield Vegas, and a manager responded with dramatic stories about racist drivers, screaming for money, berating staff, etc. He did, also, affirm the new policy.

(Editor's note: We were recently told they were not paying for cab or limos customers at all)

Hi Trip Sheet,

Green door, Stoney's, and Share nightclub did past promotions for taxi drivers, but no more.

So, drivers don't waste your time and energy with them, move to another place.

After advertisers stop their promotions, post it in Trip Sheet so we know they aren't paying.

Thanks, Name Withheld

(Editor's Note: When an advertiser stops their promotion in Trip Sheet, we don't know if (1) they are not interested in the drivers customer's or (2) If they are just financially,

continued on page 17

VEGAS WEDDINGS
Wed Forever

VEGAS REVIEW JOURNAL
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August 2014

Trip Sheet Magazine

15

Prostitution Is Big Business In Las Vegas

Continued from page 23

servers, and security officers and at least five non-employees provided drugs and prostitutes and set up an area for sexual activity to take place over a two-month period.

Six employees involved in the complaint have been fired, according to MGM Resorts International, owner of Mandalay Bay. Mandalay Bay has agreed to pay an additional \$17,000 to cover the costs of the undercover investigation by gaming agents and Metro Police.

LAS VEGAS-Las Vegas Review Journal-July 2013, authorities arrested 41 prostitutes and one pimp in Las Vegas as part of a nationwide crackdown on child prostitution-and only found one child prostitute. According to the article, there were approximately 150, 200 child prostitutes arrested every year in Las Vegas. Authorities have been aware of this problem for a while.

There is always a concern about AIDS and it's growing threat among call girls. In 2003 a prostitute was arrested seven times after it was known she had the virus and was continuing to practice her service.

It's very hard to control the activities of others. A company can go to great lengths to make sure their environment is safe and legal for their patrons, and employees. If someone is determined to engage in illegal activities a business, such as Mandalay Bay, can't be in all places at all times to make sure they are off the hook. However, if the perpetrator is the owner of the business, the law will go after them to the fullest extent of the law when ever possible.

August 2014

Trip Sheet Magazine

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EXHIBIT 12

EXHIBIT 12



JIM GIBBONS
Governor

MENDY ELLIOTT
Director

MICHAEL TANGHEK
Labor Commissioner

STATE OF NEVADA
Department of Business & Industry
OFFICE OF THE LABOR COMMISSIONER
675 Fairview Drive Suite 226
Carson City, Nevada 89701
Telephone (775) 687-4850 Fax (775) 687-6409

STATE OF NEVADA
MINIMUM WAGE
2010 ANNUAL BULLETIN
APRIL 1, 2010

PURSUANT TO ARTICLE 15, SECTION 16(A) OF THE CONSTITUTION OF THE STATE OF NEVADA, THE GOVERNOR HEREBY ANNOUNCES THAT THE FOLLOWING MINIMUM WAGE RATES SHALL APPLY TO ALL EMPLOYEES IN THE STATE OF NEVADA UNLESS OTHERWISE EXEMPTED. THESE RATES SHALL BECOME EFFECTIVE ON JULY 1, 2010.

FOR EMPLOYEES TO WHOM QUALIFYING HEALTH BENEFITS HAVE BEEN
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675 Fairview Drive, Suite 226
Carson City, Nevada 89701
(775) 687-4850

or

555 East Washington, Suite 4100
Las Vegas, Nevada 89101
(702) 486-2650

EXHIBIT 13

EXHIBIT 13



STATE OF NEVADA
OFFICE OF THE ATTORNEY GENERAL

100 North Carson Street
Carson City, Nevada 89701-4717

CATHERINE CORTEZ MASTO
Attorney General

RANDAL R. MUNN
Assistant Attorney General

March 23, 2007

OPINION NO. 2007-01

MINIMUM WAGES; EMPLOYERS;
INITIATIVE: Any increase in the federal minimum wage must take effect on the date established in the law. If either tier of the current Nevada minimum wage is less than the increased federal wage, that tier of the Nevada minimum wage must be raised to the federal level on the effective date established by federal law. A review of the two tiers of the Nevada minimum wage must be conducted annually, and communicated to the public with a bulletin published by April 1st of each year. During the review, a comparison must be made between the amount of increases, expressed as percentages, in the federal minimum wage over \$5.15 per hour and the cumulative increase in the CPI from December 31, 2004. Any adjustment to the two tier minimum wage becomes effective July 1st of the same year.

Michael Tanchek, Labor Commissioner
Office of the Labor Commissioner
675 Fairview Drive, # 226
Carson City, Nevada 89701

Dear Commissioner Tanchek:

You have requested an Attorney General Opinion on the recent constitutional amendment to Nev. Const. art. 15, § 16 (Amendment) affecting minimum wage, and you have posed six questions.

GENERAL BACKGROUND INFORMATION

The Amendment was first approved by the voters, through the initiative process, in the 2004 general election and was approved by the voters again in the 2006 general election. The Amendment states, in relevant 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...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.

The Amendment provides that either the Governor or an 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." The Labor Commissioner would likely be the "designated agency" as he is mandated to "enforce all labor laws of the State of Nevada...[t]he enforcement of which is not specifically and exclusively vested in any other officer, board or commission." NRS 607.160.

QUESTION ONE

Because the adjustments in the minimum wage rates are generally applicable to all employers in Nevada, do the rulemaking procedures of NRS chapter 233B, the Nevada Administrative Procedure Act, need to be followed in order to make the adjustments?

ANALYSIS

NRS chapter 233B is Nevada's Administrative Procedure Act (APA) and contains the requirements for the adoption of regulations. More specifically, NRS 233B.038 defines a regulation in pertinent part as follows:

1. "Regulation" means:

Michael Tanchek, Labor Commissioner
March 23, 2007
Page 3

(a) An agency rule, standard, directive or statement of general applicability which effectuates or interprets law or policy, or describes the organization, procedure or practice requirements of any agency;

Pursuant to NRS 233B.039, the Governor is exempt from APA rulemaking requirements. If he should take on this annual adjustment responsibility, he would not be constrained by the procedural requirements of the APA.

If the Labor Commissioner or other State agency was delegated the duty to annually review and publish the minimum wage, this review and publication of a potential increase could be accomplished without having to comply with the APA rulemaking procedures. The formula for establishing the minimum wage is contained within the Amendment and all that remains is the review and application of the formula on an annual basis to determine the appropriate minimum wage rate.

In *Morgan v. Committee on Benefits*, 111 Nev. 597, 894 P.2d 378 (1995), the Court reviewed whether the State Committee on Benefits actions in adjusting rates and coverage was "rulemaking" subject to the APA. The Court stated:

Where there is an express grant of authority there is likewise a clear and express grant of power to do all that is reasonably necessary to execute the power or perform duties specifically conferred by the enabling statute. This authority need not always be exercised through a process of formal rule making.

Id. at 605, 894 P.2d at 384-85.

The issue in *Morgan* was an increase in the premium rates charged state employees for benefit coverage. The Court concluded that setting rates within the statutory confines set out by the legislature does not constitute rulemaking and was not subject to the procedural requirements of the APA.

The Court compared the situation in *Morgan* with that found in *Public Service Comm'n v. Southwest Gas Corp.*, 99 Nev. 268, 662 P.2d 624 (1983). *Public Service Comm'n* involved a change to the utility's "rate design" which had been noticed as a rate change. The Court noted that while a simple rate change did not need to comply with the APA, any changes to the utility's "rate design" (forms of rate structure based on type of customer) by the Public Service Commission should, however, comply with APA rulemaking requirements. *Id.* at 383, 894 P.2d at 383.

Here, the "design" for the annual review and publication is found within the Amendment. The annual calculations to determine the appropriate adjustment are an implementation of that design, the application of a mathematical formula, with no discretion allowed to the office or agency.

CONCLUSION TO QUESTION ONE

Neither the Governor nor an agency charged with the duty to review and publish the adjustments required by the Amendment are required to follow the rulemaking procedures of the APA.

QUESTION TWO

If increases are made in the federal minimum wage, when do those increases become effective?

ANALYSIS

Section 6(a)(1) of the Federal Labor Standards Act of 1938 (29 U.S.C. 206(a)(1)) contains the federal minimum wage. The current federal minimum wage is \$ 5.15. This minimum wage rate became effective on September 1, 1997. This effective date is contained in the text of 29 U.S.C. 206(a)(1).

Pursuant to 29 § USCA 202(b), Congress may elect to exercise its power to "regulate commerce among the several States . . . to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power." Those conditions include "the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers" 29 § USCA 202(a).

Congress is currently considering a bill (H.R.2) to amend 29 U.S.C. 206(a)(1) and raise the federal minimum wage. The portion of H.R. 2 (2007) relevant to this discussion is set out below:

Sec.101 – Minimum Wage

(a) In General – Section 6(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(a)(1)) is amended to read as follows:

(1) except as otherwise provided in this section, not less than –

(A) \$ 5.85 an hour, beginning on the 60th day after the date of the enactment of the Fair Minimum Wage Act of 2007;

(B) \$ 6.55 an hour, beginning 12 months after that 60th day; and

(C) \$ 7.25 an hour beginning 24 months after that 60th day.

(b) Effective Date – The amendment made by subsection (a) shall take effect 60 days after the date of enactment of this Act.

Michael Tanchek, Labor Commissioner
March 23, 2007
Page 5

Under H.R. 2, the effective date(s) of the federal minimum wage increase(s) are set out in the amendment. If H.R. 2 fails, any bill which amends 29 U.S.C. 206(a)(1) will need to set out the effective date of the federal minimum wage increase.

CONCLUSION TO QUESTION TWO

The bill amending Section 6(a)(1) of the Federal Labor Standards Act of 1938 (29 U.S.C. 206(a)(1)), thereby raising the federal minimum wage, will contain the effective date(s) of the increase(s).

QUESTION THREE

Using the current rates of \$5.15 per hour and \$6.15 per hour, how would the cost of living adjustment be calculated, what would the rates be, and when would they become effective under the following scenarios:

Scenario 1: The federal minimum wage is not increased before April 1, 2007.

Scenario 2: The federal minimum wage is increased before April 1, 2007.

Scenario 3: The federal minimum wage is increased after April 1, 2007, but prior to July 1, 2007.

Scenario 4: The federal minimum wage is increased after July 1, 2007, but prior to April 1, 2008.

ANALYSIS OF QUESTION THREE

The Amendment provides two methods for adjusting Nevada's minimum wage and requires the use of the method resulting in the greater increase. A discussion of these methods as well as the impact of a federal minimum wage increase is necessary prior to answering the questions posed.

Any increase in the federal minimum wage must take effect on the date established in the law. See *Dail v. Arab*, 391 F.Supp.2d 1142 (M.D.Fla. 2005) (citing *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 706, 65 S.Ct. 895 (1945)) (Federal Labor Standards Act's provisions are mandatory.) If the current Nevada minimum wage is less than the federal wage, the Nevada wage must be raised to the federal level on the date specified in the federal law.

For example, if on March 29, 2007, the federal minimum wage was raised to \$5.85, the lower tier Nevada minimum wage would become \$5.85, on that day. The Amendment does not contemplate a review of the minimum wage more than once per year. It specifically calls for a publication on April 1 of each year with an effective date of July 1. Because there is no review before April 1, the upper tier would remain at \$6.15 because it is higher than the federal minimum wage. Any potential increase to the upper tier would be accomplished through the annual review conducted the following April 1 with the effective date of any increase being the following July 1.

The Amendment delineates that the minimum wage rate "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." (emphasis added.) While the Nevada Supreme Court has found that the term "or" can mean either "and" or "or," see *Desert Irrigation, Ltd. v. State*, 113 Nev. 1049, 944 P.2d 835 (1997), we conclude in this case that the rules of statutory construction dictate otherwise.

"[I]t is well settled in Nevada that words in a statute should be given their plain meaning unless this violates the spirit of the act." *Del Papa v. Bd. of Regents*, 114 Nev. 388, 956 P.2d 770, 774 (1998) (quoting *McKay v. Bd. of Supervisors*, 102 Nev. 644, 648, 730 P.2d 438, 441 (1986)). Further, it is presumed that definitions of words with well-defined common law meanings are given effect, unless it is clear that another meaning was intended. *Moser v. State*, 91 Nev. 809, 812, 544 P.2d 424, 426 (1975) (citing *Sheriff v. Smith*, 91 Nev. 729, 542 P.2d 440 (1975)). Further, the Court in *Nevadans for Nevada v. Beers*, 142 P.3d 339, 347 (2006), stated that, unless "ambiguous, the language of a constitution provision is applied in accordance with its plain meaning."

The word "or" is commonly defined as an "alternative," meaning "either" or to give a choice between or among different things. See *Webster's II New Riverside University Dictionary*, 826 (1984); *Black's Law Dictionary*, 1095 (5th ed. 1979). Following the rules of statutory construction, the presumption here is that the word "or" is given its ordinary meaning.

The Nevada Supreme Court has held that use of the term "or" between phrases indicates an alternative and suggests that the phrases have different meanings. See *Orr Ditch Co. v. Justice Court*, 64 Nev. 138, 152, 178 P.2d 558, 565 (1947); *Rogers v. State*, 105 Nev. 230, 232, 773 P.2d 1226, 1227 (1989). In fact, in *Anderson v. State*, 109 Nev. 1129, 1134, 865 P.2d 318, 321 (1993), which discusses the use of the word "or" to separate alternative elements of a crime, the court specifically noted that the legislature's use of "the disjunctive 'or,' and not the conjunctive 'and,'" required one occurrence or the other but not necessarily both.

The Amendment offers no indication that "or" is to be read as anything but disjunctive. Accordingly, the "or" at issue in the Amendment reveals an intentional separation of two distinct methods of adjusting the Nevada minimum wage. Further, no increase in the federal minimum wage is necessary to trigger a review or adjustment based on the cost of living. The disjunctive "or" requires one occurrence or the other but not necessarily both. See *Anderson*, *supra*.

The first method contained in the Amendment is the adjustment of Nevada's rate by the same increase as that imposed by the federal law. For instance, using the same wage rate increase as above, if the federal minimum wage rate is increased to \$5.85, a raise of seventy (70) cents over the prior minimum wage of \$ 5.15, the potential adjustment to Nevada's minimum wage would likewise be a raise of seventy (70) cents.

Michael Tanchek, Labor Commissioner
March 23, 2007
Page 7

The second method sets out an adjustment based on the "cumulative increase in the cost of living." The amendment then defines the calculation of the cost of living increase as "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."

The CPI for December 31, 2004, is to be used as the base rate. The "cumulative" increase refers to the requirement that the year 2004 be used as a base with the addition of the increases to the CPI that may occur in subsequent years. *Black's Law Dictionary*, 343 (5th ed. 1979), defines "cumulative" as follows: "Additional; heaping up; increasing; forming an aggregate. The word signifies that two things are to be added together, instead of one being a repetition or in substitution of the other." Thus, the "cumulative increase in the cost of living" would be the adding together of the CPI increases from 2004 forward to form an aggregate increase in the CPI between the current year and 2004. See *Del Papa, supra*.

The Amendment does not contain the word "annual" or other language which mandates an increase on a yearly basis. The Amendment calls for a comparison to be done. In interpreting a constitutional provision, the Nevada Supreme Court has stated that it is "not free to presume that the framers of the [initiative] and those who enacted it meant anything other than exactly what they said." See *Nevada Mining Ass'n v. Erdoes*, 117 Nev. 531, 26 P.3d 753, 759 (2001).

Other states in addressing this same issue have drafted their minimum wage increase provisions differently, clearly delineating that an increase will be on an annual basis tied to the cost of living. For example, Arizona's minimum wage law found at Ariz.Rev.Stat. Ann sec. 36-363 (effective January 1, 2007) states in pertinent part:

The minimum wage shall be increased on January 1, 2008 and on January 1 of successive years by the increase in the cost of living. The increase in the cost of living shall be measured by the percentage increase as of August of the immediately preceding year over the level as of August of the previous year of the consumer price index (all urban consumers, U.S. city average for all items) or its successor index as published by the U.S. department of labor or its successor agency, with the amount of the minimum wage increase rounded to the nearest multiple of five cents.

Likewise, Missouri has recently implemented a new minimum wage law which calls for an annual increase or decrease. Mo. Ann. Stat. sec. 290.502 (effective January 1, 2007) in pertinent part:

The minimum wage shall be increased or decreased on January 1, 2008, and on January 1 of successive years, by the increase or decrease in the cost of living. On September 30,

2007, and on each September 30 of each successive year, the director shall measure the increase or decrease in the cost of living by the percentage increase or decrease as of the preceding July of the immediately preceding year of the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W) or successor index as published by the U.S. Department of Labor or its successor agency, with the amount of the minimum wage increase or decrease rounded to the nearest five cents.

In our case, the plain meaning and utilization of the word "cumulative" is to refer to the requirement that during the annual review, the percentage increase is not calculated on a year by year basis, but rather that the increase in the minimum wage be compared to the cumulative increase in the CPI. Therefore, the annual review would not be reviewing the increase of CPI from year to year but rather the total increase from 2004 forward compared to the total increase in the federal minimum wage.

The Amendment calls for the comparison of the amount of a federal increase to the change in the CPI. As the federal increase is expressed in monetary terms and the change in CPI is expressed in points, a direct comparison cannot be made between monetary amounts and CPI points. Therefore, in order to do a comparison, the amounts must be converted to a similar basis, i.e. percentage change.

Using our earlier example of a seventy cent increase in the federal minimum wage on March 29, 2007, the change from \$5.15 to \$5.85 would be a 13.6 % increase in the federal minimum wage.

The Consumer Price Index (All Urban Consumers, U.S. City Average), is calculated using 1982 as a base year, with the amount assigned to it of 100. The CPI identifies the increase in the cost of living using that baseline as the starting point. Pursuant to the Bureau of Labor Statistics, as of December 31, 2004, the CPI was 190.3. See <http://data/bls.gov>. The CPI as of December 31, 2006, was 201.8, i.e., an increase of 11.5 points over December 31, 2004. <http://data/bls.gov>. This 11.5 point increase from 2004 represents a 6% increase.

At the first April 1 review after the implementation of the federal increase – the seventy cents would presumably be added to the Nevada minimum wage because the 13.6% increase in the federal minimum is larger than the 6% increase in the CPI. In subsequent years, unless there was an additional increase in the federal minimum wage, there would not be an increase to the minimum wage until the CPI increase from base year 2004 to that reviewing year was greater than the percentage change in the increase to the federal minimum wage.¹

¹ This opinion centers on the legal issues surrounding the interpretation of the Amendment. Due to the potential for sequential increases to the Federal Minimum Wage and changes to the percentage calculations, the Attorney General would defer to the specialized knowledge of the Labor Commissioner and/or any economists or accountants he may employ to assist him, for the actual formulas and calculations to be employed in adjusting the Nevada minimum wage.

We now apply these principles to the four scenarios posed.

Scenario 1: The federal minimum wage is not increased before April 1, 2007.

Under Scenario 1, if the federal minimum wage did not increase by April 1, 2007, a comparison of the 0% change to the federal minimum wage would be compared to the 6% change in the CPI to determine any adjustment, up to a maximum 3%, with the adjusted Nevada minimum wage rate effective July 1, 2007.

Scenario 2: The federal minimum wage is increased before April 1, 2007.

If either tier of the current Nevada minimum wage is less than the increased federal wage, that tier of the Nevada minimum wage must be raised to the federal level on the effective date established by federal law. For purposes of the April 1, 2007 review, the percentage of the federal minimum wage increase would be compared to the CPI percentage increase, to determine any adjustment to the two tiers of the Nevada minimum wage that would become effective on July 1, 2007.

Scenario 3: The federal minimum wage is increased after April 1, 2007, but prior to July 1, 2007; and

Scenario 4: The federal minimum wage is increased after July 1, 2007, but prior to April 1, 2008.

If either tier of the current Nevada minimum wage is less than the increased federal wage, that tier of the Nevada minimum wage must be raised to the federal level on the effective date established by federal law. For purposes of the April 1, 2008 review, the percentage of the federal minimum wage increase would be compared to the CPI percentage increase, to determine any adjustment to the two tiers of the Nevada minimum wage that would become effective on July 1, 2008.

CONCLUSION TO QUESTION THREE

Any increase in the federal minimum wage must take effect on the date established in the law. If either tier of the current Nevada minimum wage is less than the increased federal wage, that tier of the Nevada minimum wage must be raised to the federal level on the effective date established by federal law. A review of the two tiers of the Nevada minimum wage must be conducted annually, and communicated to the public with a bulletin published by April 1st of each year. During the review, a comparison must be made between the amount of increases, expressed as percentages, in the federal minimum wage over \$5.15 per hour and the cumulative increase in the CPI from December 31, 2004. Any adjustment to the two tier minimum wage becomes effective July 1st of the same year.

QUESTION FOUR

How would the answers in scenarios 2, 3, and 4 posed in Question 3 change if the amount of any raise in the federal minimum wage rate is less than the cost of living increase to be announced on April 1, 2007?

Michael Tanchek, Labor Commissioner
March 23, 2007
Page 10

QUESTION FIVE

How would the answers in scenarios 2, 3, and 4 posed in Question 3 change if the amount of any raise in the federal minimum wage rate is greater than the cost of living increase to be announced on April 1, 2007?

CONCLUSION TO QUESTIONS FOUR AND FIVE

The Amendment requires that the annual method resulting in the greater percentage increase in the minimum wage be utilized.

QUESTION SIX

What is the effect of the phrase "cumulative increase in the cost of living" on the minimum wage rate in subsequent years and how does that affect the annual calculation?

CONCLUSION TO QUESTION SIX

Please see our response to question three.

Sincere regards,

CATHERINE CORTEZ MASTO
Attorney General

By: _____
JAMES T. SPENCER
Chief Deputy Attorney General

JTS:efb

IN THE SUPREME COURT OF THE STATE OF NEVADA

WESTERN CAB COMPANY,

Petitioner,

vs.

EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF
NEVADA, in and for the COUNTY
OF CLARK; and THE HONORABLE
LINDA MARIE BELL, District Judge,

Respondents,

and

LAKSIRI PERERA, Individually and
on behalf of others similarly situated,

Real Party in Interest.

Case No.: _____

District Court Case No. A-14-707425-C

**PETITIONER'S APPENDIX IN SUPPORT OF PETITION FOR WRIT OF
MANDAMUS OR PROHIBITION**

VOLUME 3 OF 7

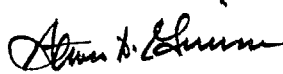
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Email: mlk@hmlawlv.com

*Attorneys for Petitioner
Western Cab Company*

<u>APPENDIX #</u>	<u>DOCUMENT DESCRIPTION</u>	<u>PAGES</u>
8	Western Cab's 2/10/15 Reply to Plaintiff's Response and Supplement to His Response to Defendant's Motion to Dismiss and Opposition to Plaintiff's Counter-Motion to Amend Complaint and Conduct Discovery under NRCP Rule 56(f).....	159-237

APPENDIX 8

APPENDIX 8


CLERK OF THE COURT

RPLY
MALANI L. KOTCHKA
Nevada Bar No. 283
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*Attorneys for Defendant
Western Cab Company*

**DISTRICT COURT
CLARK COUNTY, NEVADA**

LAKSIRI PERERA,

Plaintiff,

v.

WESTERN CAB COMPANY,

Defendant.

Case No.: A-14-707425-C

Dept.: XIV

**REPLY TO PLAINTIFF'S
RESPONSE AND SUPPLEMENT TO
HIS RESPONSE TO DEFENDANT'S
MOTION TO DISMISS**

**AND
OPPOSITION TO PLAINTIFF'S
COUNTER-MOTION TO AMEND
COMPLAINT AND CONDUCT
DISCOVERY UNDER NRCP RULE
56(f)**

Date of Hearing: 02/18/15
Time of Hearing: 9:30 a.m.

MEMORANDUM OF POINTS & AUTHORITIES

I. Introduction

Perera's Response to Western Cab's Motion to Dismiss was due January 26, 2015 and he filed a Response on that date. Then, he filed a Supplement on January 27 at 6:24 p.m. The Supplement should be stricken as untimely.

Moreover, Perera's counsel should be chastised for asserting, "Defendant's counsel has not responded to an email inquiry about whether they will consent to any supplementation of the plaintiff's original response and counter-motion which was filed on January 26, 2015." Plaintiff's

1 Supplement, p. 2. Western Cab's counsel never received an e-mail asking for consent to any
2 supplementation of the plaintiff's original response and counter-motion and Perera's counsel has not
3 attached such an e-mail to his Supplement. The Court's rules do not authorize a Supplement.
4 Therefore, Perera's Supplement should be stricken.

5
6 **II. Prospective Application of *Thomas***

7 Perera's counsel Greenberg specifically argued before the Nevada Supreme Court in
8 *Thomas*, "Despite the speciousness of any claim that the Court's opinion of June 26, 2014 only has
9 prospective application, it seems virtually certain that respondents in this case, and one or more
10 defendants in the other taxi driver minimum wage cases, will insist on litigating that issue." Exhibit
11 1, p. 2. The Supreme Court refused to change its decision, implying that the case would have only
12 prospective application.

13 **III. Authority of Labor Commissioner**

14 In Exhibit F to Perera's Response, Perera offers an Attorney General Opinion, No. 2005-04.
15 This Opinion states:

16 The minimum wage changes proposed by Question No. 6,
17 though materially different in wage outcome, applicability and civil
18 court remedy, essentially create a new method of calculating the
19 wage rate and **do not attempt to alter the underlying current**
20 **statutory basis for administrative enforcement of the new wage**
21 **by the Labor Commissioner.** By providing for a higher minimum
22 wage and a more extensive civil court remedy, the people intended to
strengthen an employee's ability to assert his right to the minimum
wage. The current administrative enforcement jurisdiction of the
Labor Commissioner is well-suited to serve this general purpose, and
it merely strengthens what the proposed amendment seeks to
guarantee [sic].

23 Exhibit F, AA19 (emphasis added). The Opinion concluded, "On the other hand, the more likely
24 and appropriate conclusion is that the proposed amendment would modify these enforcement
25 statutes to allow for the Labor Commissioner's enforcement of the new minimum wage law."
26 Exhibit F, AA19. Clearly, the Labor Commissioner is "the State agency designated by the
27 Governor" as referenced in the Minimum Wage Amendment.
28

1 Rather than file a permissive civil court action, Perera filed a claim with the Labor
2 Commissioner alleging he had not been paid minimum wage by Western Cab. Initially Perera
3 sought \$8.25 an hour and then beginning on March 25, 2011, he sought \$7.25 an hour. Exhibit 9-5.
4 On November 13, 2012, the Labor Commissioner said he had been provided copies of payroll
5 records and "with these evidentiary documents, it appears that you have been paid correctly."
6 Exhibit 5-3. The Labor Commissioner told Perera that if he disagreed, to respond in writing not
7 later than November 23, 2012 and provide evidentiary documents to substantiate why he disagreed.
8 Perera failed to respond and his claim was closed. Exhibit 5-3. Western Cab is entitled to rely on
9 the Labor Commissioner's decision because that was the remedy chosen by Perera.
10

11 Moreover, until the *Thomas* decision and despite the Attorney General's Opinion, the
12 Nevada Labor Commissioner believed that the Minimum Wage Amendment did not trump the
13 minimum wage exceptions in NRS 608.250(2). In NAC 608.115(2), the Labor Commissioner
14 describes how an employer shall pay for time worked. The regulation specifically states, "This
15 subsection does not apply to an employee who is exempt from the minimum wage requirement
16 pursuant to NRS 608.250." Since Western Cab complied with the Labor Commissioner's
17 interpretation of the law, taxicab companies should not have to pay Nevada's minimum wage to the
18 drivers until *Thomas* was decided.
19
20

21 IV. Statute of Limitations

22 In Judge Tao's decision in a non-taxidriver case on the statute of limitations to be applied to
23 a minimum wage claim in Nevada (Exhibit 4), he states:

24 Thus, the legal standard that the Plaintiffs allege was violated is the
25 wage rate established by the Labor Commissioner, not Article XV
26 section 16 itself. Although that wage rate is established pursuant to
27 the methodology articulated in the Minimum Wage Amendment, the
28 Minimum Wage Amendment does not itself define what that exact
rate is at any given moment in time. Therefore, any claim that an
employee has been illegally paid less than the effective minimum
wage rate actually alleges a violation of wage rates established by

1 state regulation rather than alleging a direct violation of Article XV,
2 Section 16 of the Nevada Constitution. Consequently, although
3 styled as a "Constitutional tort," the Plaintiffs' claim actually appears
4 to be one alleging a violation arising under NRS 608.260."

5 Exhibit 4, p. 9.

6 Judge Ellsworth agrees with Judge Tao.¹ On December 5, 2014, Judge Ellsworth, in *Golden*
7 v. *Sun Cab Inc.*, entered a tentative ruling and held:

8 This is a class action lawsuit brought by cab drivers of Deft. for
9 failure to pay the minimum wage. The matter has been stayed for a
10 lengthy period of time pending the Supreme Court's decision on the
11 question of whether the exception for taxicab drivers to the minimum
12 wage requirement, which is contained in NRS 608.250(2), applies to
13 deprive taxicab drivers of the minimum wage in the face of Article
14 15, Section 16 of the Nevada Constitution which was an amendment
15 to the constitution by way of initiative petition and ratification. The
16 Supreme Court has now decided that matter in *Thomas v. Yellow*
17 *Cab Corp.*, 130 Nev. Adv. Op. 52 (June 26, 2014) and held that the
18 Constitutional Amendment does indeed supplant the exceptions
19 listed in NRS 608.250(2). This leaves Deft. with two further
20 arguments: (1) that the two year limit on filing an action under NRS
21 608.260 to recover the difference between the wage paid and the
22 amount of the minimum wage bars the first claim for relief by Deft.
23 *Golden* (and all others so similarly situated) who was not employed
24 within two years of the filing of the suit; and (2) that Pltfs third claim
25 for waiting-time penalties under NRS 608.040 must be dismissed
26 because Pltfs did not bring a cause of action for Attorney's fees
27 under NRS 608.140, or because this section does not apply where an
28 employee is paid upon separation, but subsequently disputes the
amount paid. The Statute of Limitations Argument: Article 15,
Section 16(B) provides in relevant part: 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. 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. NRS 608.260 provides
in pertinent part: If any employer pays any employee a less amount

¹ This lawsuit was originally filed in Department V before Judge Ellsworth. On December 8, 2014, Western Cab filed its Motion to Dismiss First Amended Complaint. On December 10, 2014, Greenberg filed a Peremptory Challenge of Judge Ellsworth.

1 than the minimum wage prescribed by a regulation of the Labor
2 Commissioner pursuant to the provisions of NRS 608.250, the
3 employee may, at any time within 2 years, bring a civil action to
4 recover the difference between the amount paid to the employee and
5 the amount of the minimum wage.

6 Exhibit 8, pp. 1-2.

7 Perera's counsel Greenberg made the same arguments in opposition to the two-year statute
8 of limitations which he makes here. Exhibit 8, p. 2. Judge Ellsworth found: "Article 15, Section 16
9 contemplates a civil action, but does not prescribe a limitation on the action, and so a statutory
10 limitation period must apply. The anti-contractual waiver provision does not amount to an
11 exception to NRS 11.010." Exhibit 8, p. 2. She said, "The Nevada Supreme Court has determined
12 that the term action as used in NRS 11.190 refers to the nature or subject matter of the claim and not
13 to what the pleader says it is, and it is the nature or subject matter of the claim that will determine
14 what limitation period applies." Exhibit 8, p. 3. Judge Ellsworth concluded:

15 Here, it is clear that the purpose of the first cause of action is to
16 collect the difference between the wages paid and the minimum
17 wage required, assuming that the former was less than the latter. The
18 Constitutional provision does not set forth a limitation period and the
19 two year period set in NRS 608.250 is not irreconcilable with the
20 Constitutional provision. *Thomas v. Nevada Yellow Cab Corp.*,
21 *Supra*, did not implicitly repeal the entire statutory framework of
22 NRS Chapter 608 concerning minimum wage (i.e NRS 608.250
23 through 608.290) [sic]. Since the nature of the action here is the
24 same as the nature of the action described in NRS 608.260, the two
25 year limitation period should apply.

26 Exhibit 8, p. 3.

27 In *McDonagh v. Harrah's Las Vegas, Inc.*, 2014 WL 2742874, at *4 (D. Nev., June 17,
28 2014), Judge Mahan held:

29 While article 15, section 16 of the Nevada constitution does
30 create a new two-tiered minimum wage in the state, this section is
31 silent on whether it changes the two-year statute of limitations in the
32 Nevada Revised Statutes. Therefore the court finds that the
33 constitutional provision was not intended to change this two-year
34 statute of limitations.

35 Accordingly, plaintiffs are only entitled to a two-year statute
36 of limitations for the fourth cause of action, failure to pay minimum

1 wage in violation of the Nevada constitution.
2 This Court should follow these prior decisions and find that if Thomas does not apply prospectively,
3 a two-year statute of limitations applies to Perera's lawsuit.

4 NRS 608.115 requires an employer to maintain records of wages for a two-year period
5 following the entry of information in the record. If Perera's suggested four-year statute of
6 limitations is applied, it would conflict with NRS 608.115. Nevada employers are not required to
7 maintain records of wages after two years. NRS 608.115 comports with a two-year statute of
8 limitations.

9
10 The Minimum Wage Amendment does not contain a statute of limitations which conflicts
11 with the two-year period in NRS 608.260. A two-year statute of limitations should be applied to
12 minimum wage claims.

13
14 **V. Greenberg's Solicitation and Perera's Gross Taxable Income**

15 Prior to filing the original complaint in this case on September 23, 2014, Perera's
16 attorney Leon Greenberg solicited the drivers of Western Cab. Exhibit 10 is one such written
17 solicitation. It is dated September 16, 2014, and it states:

18 I believe many of the taxi drivers for Western Cab were earning, from
19 the fares collected by customers, less than the \$7.25 or \$8.25 an hour
20 currently required by Nevada's Minimum Wage law. While drivers
21 may have also collected a substantial amount of tips from customers,
22 those tips are **not** counted for purposes of Nevada's Minimum Wage
23 Law. For example, a taxi driver's share of the meter (customer fares
24 collected) for an 11 hour work day must currently equal at least \$79.75
25 or \$90.75 under Nevada's Minimum Wage law, depending upon
26 whether proper medical insurance was provided by Western Cab. So
27 if you are working a full 12 hour shift, and earning less than \$80 or
28 \$90 a day **without** including your tips, you may have a claim for
unpaid minimum wages.

25 Exhibit 10. Perera made \$80 or \$90 a day without including his tips. See Exhibit 5-1.
26 Moreover, he often made more than \$80 to \$90 a day. See Exhibit 5-1 where he made \$122.60
27 on September 23, 2012, \$125.35 on September 24, 2012, \$121.30 on September 25, 2012,

1 \$97.35 on October 3, 2012, \$98.45 on October 5, 2012, \$103.20 on October 6, 2012, \$105.60 on
2 October 7, 2012, \$99.65 on October 9, 2012, \$107.55 on October 10, 2012, and \$108.95 on
3 October 14, 2012. If Perera's wages of \$1,857.40 are divided by 20 days, Perera made an
4 average of \$92.87 a day. According to Greenberg's solicitation letter, Perera has been paid the
5 minimum wage.
6

7 While Perera accuses Western Cab of some horrendous perfidy in regard to the higher
8 minimum wage for those who are not provided with qualified health benefits, Western Cab relied
9 on Perera's Labor Commissioner claim to determine which hourly pay rate he was seeking. Up
10 until March 24, 2011, which is outside the statute of limitations, Perera was seeking \$8.25 an
11 hour. But from March 25, 2011 until he quit, he was seeking \$7.25 an hour. Exhibit 9-5.
12 Western Cab simply relied on Perera's Labor Commissioner claim to determine the minimum
13 wage he was seeking.
14

15 Nevada's Minimum Wage Amendment provides as follows:

16 Each employer shall pay a wage to each employee of not less than the
17 hourly rates set forth in this section. The rate shall be five dollars and
18 fifteen cents (\$5.15) per hour worked, if the employer provides health
19 benefits as described herein, or six dollars and fifteen cents (\$6.15) per
20 hour if the employer does not provide such benefits. Offering health
21 benefits within the meaning of this section shall consist of making
22 health insurance available to the employee for the employee and the
23 employee's dependents at a total cost to the employee for premiums of
24 not more than 10 percent of the employee's gross taxable income from
25 the employer.

26 NAC 608.104 is the Labor Commissioner's regulation on determining whether the employee's
27 share of the premium of the qualified health insurance exceeds 10 percent of his gross taxable
28 income. NAC 608.104(2) specifically states:

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

34 Thus, Perera's gross taxable income must include his tips, bonuses or "other compensation as

1 required for purposes of federal individual income tax.” Gross income for federal individual
2 income tax “means all income from whatever source derived, including (but not limited to) the
3 following items: (1) Compensation for services, including fees, commissions, fringe benefits,
4 and similar items. . . .” 26 U.S.C. § 61(a)(1). Thus, all of Perera’s declared and undeclared tips
5 must be included in his gross taxable income. See Exhibit 9-6. His fringe benefits such as his
6 health insurance premium which Western Cab paid must be included in his gross taxable income.
7 Fees and free tickets paid to taxi drivers for delivering passengers to certain vendors must also be
8 included in Perera’s gross taxable income. Exhibit 11. Since Perera’s wage claim filed with the
9 Labor Commissioner sought only \$7.25 an hour after March 24, 2011, he presumably knew that
10 the premium for dependent health insurance was less than 10% of his gross taxable income.²

11 12 VI. Perera’s Motion To Amend Complaint

13 In his Supplement, Perera has requested to amend his complaint and add Irshad Ahmed as a
14 class representative. Irshad Ahmed is not similarly situated to Perera and has no minimum wage
15 claim even if the higher rate of \$8.25 an hour is used. Exhibit 9. A comparison of Perera’s and
16 Ahmed’s wages (Exhibits 5 and 9) shows that Ahmed made much more in wages than Perera.
17 Ahmed and Perera worked at different time periods. Ahmed made more in declared tips than
18 Perera. Ahmed did not elect to be covered by the health insurance. Neither Perera nor Ahmed can
19 show that they were not paid the minimum wage required by Nevada’s Constitution “for many or
20 most of the days that they worked in that their hourly compensation, when calculated pursuant to the
21 requirements of said Nevada Constitutional Provision, did not equal at least the minimum hourly
22 wage provided for therein.” Supplement, Exhibit “B”, p. 2.
23
24
25

26
27 ² In his statute of limitations argument, Perera claims he is seeking recovery under the
28 Minimum Wage Amendment. Response, pp. 9-10. If the Labor Commissioner’s rate-setting is
ignored as urged by Perera, he would only be entitled to \$6.15 an hour if no health benefits were
provided. Perera certainly made over \$6.15 an hour. Exhibit 5.

1 The only notice requirement in the Minimum Wage Amendment is a requirement to
2 "provide written notification of the rate adjustments to each of its employees." There has been no
3 rate adjustment since 2010 which is outside the statute of limitations. See Exhibit 12.

4 While tips cannot be considered for the determination of the minimum wage in Nevada, tips
5 can be used to pay for fuel. In regard to the payment for the driver's fuel, Western Cab followed the
6 directions of the U.S. Department of Labor. The Department of Labor expressly told Western Cab
7 that the cost of fuel could not be considered in the calculation of minimum wage. Exhibit 9. See
8 Exhibit "E", pp. 5-6, to Response. There is no requirement to pay for fuel in the Minimum Wage
9 Amendment.
10

11 Neither Ahmed nor Perera were owed unpaid wages by Western Cab when they were
12 separated from employment. Perera and Ahmed have not shown that they were similarly situated or
13 that they have a cause of action and, therefore, Perera's motion to amend the complaint should be
14 denied.
15

16 VII. The Class Representative and Class Treatment

17 Individual determinations of each taxicab driver's hourly wages would have to be made.
18 Such individualized determinations do not qualify under NRCP 23 for class treatment. Both
19 Perera's and Ahmed's failure to have a minimum wage claim against Western Cab means neither
20 can serve as a class representative. Greenberg has been soliciting drivers from Western Cab since
21 September 16, 2014. Exhibit 10. The fact that only two individuals, who do **not** have a minimum
22 wage claim, have responded to Greenberg's solicitation means there is no class that has a minimum
23 wage claim against Western Cab. Suffering a violation of the same provision of law is not suffering
24 the same injury. *Wal-Mart Stores, Inc. v. Dukes*, ____ U.S. ____, 131 S. Ct. 2541 (2011). The U.S.
25 Supreme Court held in *Dukes*, "Quite obviously, the mere claim by employees of the same
26 company that they have suffered a Title VII injury, or even a disparate impact Title VII injury, gives
27
28

1 no cause to believe that all their claims can productively be litigated at once.” *Id.* at 2551.

2 Perera cannot get over this hurdle. His attempt to add Ahmed as a class representative when
3 his income varied a great deal from Perera’s means that they did not suffer the same injury.
4 Dissimilarities within the proposed class would have the potential to impede the generation of
5 common answers. Here, Perera’s and Ahmed’s claims cannot be resolved with generalized proof as
6 required by the Nevada Supreme Court in *Shuette v. Beazor Homes Holdings Corp.*, 121 Nev. 837,
7 124 P.3d 530 (2005). Each driver’s time and wage records will have to be examined to determine if
8 there is a minimum wage violation. This case should not proceed as a class action because it does
9 not meet the criteria of NRCP 23.
10

11 **VIII. No Equitable Tolling**

12 Perera urges equitable tolling because he claims Western Cab violated the Minimum Wage
13 Amendment by not notifying him in writing of his right to the minimum wage required by the
14 Minimum Wage Amendment. However, Perera misconstrues the requirement of the Minimum
15 Wage Amendment. The only notice requirement is, “an employer shall provide written notification
16 of the rate adjustments to each of its employees and make the necessary payroll adjustments by July
17 1 following the publication of the bulletin.” The last time there was a rate adjustment was 2010,
18 long outside the statute of limitations. Exhibits 12 and 13.
19

20 Moreover, the federal minimum wage rate has been \$7.25 since 2009. Western Cab has
21 posted the federal law requirement for 16 years. *See* Exhibits 9 and 9-7.
22

23 Federal courts generally deny motions for equitable tolling of federal minimum wage
24 lawsuits if there has been no undue delay by the court. *See Davis v. Westgate Planet Hollywood*,
25 2009 WL 102735, at *14 (D. Nev., Jan. 12, 2009); *Lewis v. Nevada Property I, LLC*, 2013 WL
26 237098 at *14 (D. Nev., Jan. 22, 2013); *Phelps v. MC Communications, Inc.*, 2011 WL 3298414, at
27 *8 (D. Nev. Aug. 1, 2011); *Williams v. Trendwest Resorts, Inc.*, 2006 WL 3690686, at *8 (D. Nev.
28

1 Dec. 7, 2006). Here, Western Cab has done nothing to prevent its drivers from filing claims and
2 there are no extraordinary circumstances beyond Perera's control making it impossible to file his
3 claims on time. Indeed, Perera filed a claim with the Labor Commissioner on time.

4 Greenberg has been soliciting Western Cab's drivers since September 16, 2014. After
5 Western Cab promptly filed its Motion to Dismiss Perera's First Amended Complaint, Greenberg
6 sought more time within which to file his response. Thus, if there has been any delay, it was caused
7 by Perera's counsel. The statute of limitations should not be tolled.
8

9 **IX. Motion to Conduct Discovery**

10 Greenberg seeks to conduct discovery of "documents on the health insurance benefits
11 provided to the plaintiff." As part of its Motion to Dismiss, Western Cab furnished Greenberg with
12 the hours worked by Perera detailed in his own handwriting and the wages paid to him. Western
13 Cab has not disputed that Perera had to personally pay for his gasoline in 2012 and has explained
14 the reason why it changed its policy in regard to the gasoline. Exhibit 9.
15

16 Perera has documents on his health insurance benefits and Perera is the person who made
17 the wage claim to the Labor Commissioner stating that he was not seeking the higher minimum
18 wage after March 25, 2011. Perera has not shown any entitlement to discovery regarding all of
19 Western Cab's taxi drivers. Greenberg obviously has the names and addresses of the other taxi
20 drivers because he has been sending out solicitation letters. Exhibit 10. He obviously does not need
21 that discovery and if no class is certified, he would not be entitled to such discovery.
22

23 In *Picus v. Wal-Mart Stores, Inc.*, 256 F.R.D. 651, 655, 660 (D. Nev. 2009), Judge Pro
24 found that it was a waste of the parties' resources and judicial resources to conduct discovery on
25 class certification where individual issues predominated and the class could not be certified as a
26 matter of law. In *Vinoli v. Countrywide Home Loans, Inc.*, 246 F.R.D. 637, 639 (S.D. Cal. 2007),
27 the district court held that a defense-driven determination of class certification was appropriate
28

1 when waiting for discovery will only cause needless delay and expense. The district court found no
2 common policy that would diminish the need for individual inquiry and denied class certification.
3 *Id.* at 41-42.

4 In *Ovieda v. Sodexo Operations*, 2012 WL 1627237, at *4 (C.D. Cal. May 7, 2012), the
5 court found that the plaintiff had alleged that her claims were typical of the class because the
6 defendants subjected all of their hourly employees to the identical violations of the California Labor
7 Code and California Business and Professions Code. The court held that the plaintiff had alleged no
8 facts to demonstrate or even suggest that any member of the putative class had similar work
9 experiences. The court found that the plaintiff had failed to allege causes of action such that
10 common questions of fact or law could provide class-wide answers and would be susceptible to
11 class-wide proof. The court concluded, "In sum, Plaintiff's class allegations and PAGA claims
12 must be dismissed because she has alleged absolutely no facts to show that her work experience is
13 similar to that of any member of the putative class." If Perera cannot show that this case should be
14 certified as a class action pursuant to NRCP 23, he is not entitled to discovery regarding class
15 allegations. *Mantolete v. Bolger*, 767 F.2d 1416 (9th Cir. 1985). Perera bears the burden of showing
16 that the class action requirements of NRCP 23 are satisfied before he is entitled to discovery
17 regarding a purported "class."
18
19

20
21 **X. Conclusion**

22 Although Perera and Ahmed allege in paragraph 8 of their proposed Second Amended
23 Complaint that a "single set of facts will establish the right of each member of the class to recover,"
24 they do not allege a single set of facts. As Exhibits 5 and 9 show, they each worked for Western
25 Cab during different periods of time, worked different hours and earned different amounts of wages.
26 Perera's and Ahmed's counter-motion to amend the complaint and conduct discovery under NRCP
27 Rule 56(f) should be denied.
28

1 Perera and Ahmed are not similarly situated. Perera filed a claim with the Labor
2 Commissioner seeking to recover \$8.25 until March 24, 2011, and then seeking to recover \$7.25 an
3 hour. Exhibit 9-5. The Labor Commissioner investigated Perera's complaint and concluded that
4 based on his payroll records, "[I]t appears that you have been paid correctly." Exhibit 5-3. Perera
5 has no claim for a minimum wage violation.
6

7 Moreover, in determining the amount of Perera's and Ahmed's gross taxable income, both
8 their declared and undeclared tips, fees from vendors and fringe benefits must be included. As
9 Exhibit 11 shows, \$50 referral fees to a wedding chapel, a "FULL PAYOUT for all Cabs & Limos"
10 to Showgirls, and a "TAXI FRIENDLY CASH PAID OUT DAILY" to The Range are common.
11 Neither Ahmed nor Perera offer any proof of their gross taxable income and thus neither can show
12 any entitlement to \$8.25 an hour.
13

14 The Department of Labor told Western Cab that payment for fuel could not be considered in
15 the minimum wage calculation. Only amounts on a paycheck could be considered. Therefore,
16 Western Cab increased the amount it paid its drivers and required them to purchase their own fuel.
17 While tips cannot be considered in determining whether an employer has met the minimum wage
18 requirement of the Minimum Wage Amendment, declared and undeclared tips can certainly be used
19 to pay for gasoline.
20

21 Perera and Ahmed offer no evidence that Western Cab knew of the Attorney General
22 Opinion No. 2005-04. Moreover, Opinion No. 2005-04 affirms the Labor Commissioner's
23 enforcement of Nevada's minimum wage law. As part of the Labor Commissioner's enforcement
24 of the minimum wage law, the Labor Commissioner still enforced the exemptions in NRS 608.250.
25 NAC 608.115(2).
26

27 Pursuant to the Minimum Wage Amendment, the Nevada Labor Commissioner sets the
28 minimum wage. Exhibit 13. Perera and Ahmed seek to recover the difference between the amount

1 paid to them and the amount of the minimum wage. Therefore, a two-year statute of limitations
2 applies to their claims. NRS 608.260.

3 The last time the Labor Commissioner adjusted the minimum wage was in 2010. Exhibit
4 12. The duty to notify its employees of this adjustment therefore occurred at that time which is
5 outside the statute of limitations.
6

7 The *Thomas* decision did not change the requirements of NRCP 23 regarding class
8 certification. Because neither Perera nor Ahmed is owed any minimum wage, neither can serve as a
9 class representative. Since Perera and Ahmed cannot meet the standards of NRCP 23, class
10 certification should be denied and no discovery should be allowed under NRCP Rule 56(f). All of
11 Western Cab's drivers were employed for different periods of time, worked different hours and
12 earned a different hourly wage. The individual members are not similar to each other. Moreover,
13 they will all have a different gross income. For Perera and Ahmed to claim that they did not receive
14 minimum wage is a travesty of justice. Therefore, Western Cab respectfully requests that this Court
15 grant its motion to dismiss the first amended complaint and deny Perera's and Ahmed's
16 counter motion to amend the complaint and conduct discovery under NRCP Rule 56(f).
17
18

19 HEJMANOWSKI & McCREA LLC
20

21
22 By: /s/ Malani L. Kotchka
23 Malani L. Kotchka
24 Nevada Bar No. 283
25 520 South Fourth Street, Suite 320
26 Las Vegas, NV 89101

27 *Attorneys for Defendant*
28

1 CERTIFICATE OF SERVICE

2 Pursuant to Administrative Order 14-2, the undersigned hereby certifies that a true and
3 correct copy of **REPLY TO PLAINTIFF'S RESPONSE AND SUPPLEMENT TO HIS**
4 **RESPONSE TO DEFENDANT'S MOTION TO DISMISS AND OPPOSITION TO**
5 **PLAINTIFF'S COUNTER-MOTION TO AMEND COMPLAINT AND CONDUCT**
6 **DISCOVERY UNDER NRCP RULE 56(f)** was electronically served via the Eighth Judicial
7 District Court's ECF System on this 10th day of February, 2015, to the following:
8

9
10 Leon Greenberg, Esq.
11 2965 S. Jones Blvd.
12 Suite E4
13 Las Vegas, NV 89146

14 *Attorney for Plaintiff*

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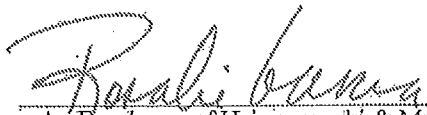

An Employee of Hejmanowski & McCrea LLC

EXHIBIT 8

EXHIBIT 8

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REGISTER OF ACTIONS

CASE No. A-13-678109-C

Neal Golden, Plaintiff(s) vs. Sun Cab Inc, Defendant(s)

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Case Type: Other Civil Filing
 Subtype: Other Civil Matters
 Date Filed: 03/11/2013
 Location: Department 5
 Cross-Reference Case Number: A678109

PARTY INFORMATION

Defendant	Sun Cab Inc <i>Doing Business As</i> Neills Cab Co	Lead Attorneys Rick D. Roskelley <i>Retained</i> 7028628800(W)
Plaintiff	Golden, Neal	Leon Greenberg <i>Retained</i> 7023836085(W)
Plaintiff	Hassan, Abalkarim	Leon Greenberg <i>Retained</i> 7023836085(W)

EVENTS & ORDERS OF THE COURT

12/05/2014 | All Pending Motions (9:00 AM) (Judicial Officer Ellsworth, Carolyn)
 All Pending Motions: 12/5/14

Minutes

12/05/2014 9:00 AM

- DEFT'S MOTION FOR PARTIAL SUMMARY JUDGMENT & MOTION TO DISMISS... PLTF'S OPPOSITION AND COUNTERMOTION FOR DISCOVERY AS PER NRCP RULE 56(f)... PLTF'S COMPLAINT UNDER NRCP RULE 12 Prior to hearing, counsel provided with tentative ruling as follows: This is a class action lawsuit brought by cabdrivers of Deft. for failure to pay the minimum wage. The matter had been stayed for a lengthy period of time pending the Supreme Court's decision on the question of whether the exception for taxicab drivers to the minimum wage requirement, which is contained in NRS 608.250(2), applies to deprive taxicab drivers of the minimum wage in the face of Article 15, Section 16 of the Nevada Constitution which was an amendment to the constitution by way of Initiative petition and ratification. The Supreme Court has now decided that matter in *Thomas v. Yellow Cab Corp.*, 130 Nev. Adv. Op. 52 (June 26, 2014) and held that the Constitutional Amendment does indeed supplant the exceptions listed in NRS 608.250(2). This leaves Deft. with two further arguments: (1) that the two year limit on filing an action under NRS 608.260 to recover the difference between the wage paid and the amount of the minimum wage bars the first claim for relief by Deft. Golden (and all others so similarly situated) who was not employed within two years of the filing of the suit; and (2) that Pltf's third claim for waiting-time penalties under NRS 608.040 must be dismissed because Pltf's did not bring a cause of action for Attorneys fees under NRS 608.140, or because the section does not apply where an employee is paid upon separation, but subsequently disputes the amount paid. The Statute of Limitations Argument: Article 15, Section 16(B) provides in relevant part: 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. 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. NRS 608.260 provides in pertinent part: If any employer pays any employee a less amount than the minimum wage prescribed by regulation of the Labor Commissioner pursuant to the provisions of NRS 608.250, the 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 amount of the minimum wage. A contract between the employer and the employee or any acceptance of a lesser wage by the employee is not a bar to the action. (emphasis added) Thus, the Constitutional Amendment is more expansive than NRS 608.260. While NRS 608.260 provides for a limited remedy of recovery of the difference in the wage paid, the Constitution provides for all remedies available in law or in equity appropriate to remedy any violation, including, but not limited to, recovery of back pay, damages and injunctive relief. Additionally, the minimum wage is no longer prescribed by regulation of the Labor Commissioner, but rather by the very terms of the Nevada Constitution which prescribe how the wage shall be determined. Previously, under NRS 608.250, the Labor Commissioner was presumably free to decline a match of the federal minimum wage if she determined that those increases are contrary to the public interest. In opposition to Defendant's statute of limitations argument, Plaintiff argues that there is no statute of limitations for an action to enforce the Constitutional Provision because no limitation is set forth in the section and subsection B prohibits a waiver of the minimum wage requirement by an individual employee, so that should be interpreted to be a bar to any limitation. Alternatively, Plaintiff argues that applying a statute of limitations would be inequitable; that Defendant should be equitably estopped from invoking the statute of limitations because they failed to advise Plaintiff of their minimum wage rights as required by the Nevada Constitution, or that the statute should be equitably tolled until the date of the decision in *Thomas v. Yellow Cab*, *Supra*. Finally, Plaintiff argues that if there is a limitation on the time to bring an action under the Constitutional amendment, it is either a 6, 4 or 3 year limitation period. The Court finds Plaintiff's first argument (i.e. that there is no period of limitations for an action claiming a violation of Article 15, Section 16) and second argument (i.e. that the provision within subsection B of Section 16 prohibiting a waiver of the minimum wage requirements by agreement between an individual employee and an employer amount to a prohibition against any period of limitation) unpersuasive. NRS 11.010 provides that civil actions can only be commenced within the periods prescribed in this chapter, after the cause of action shall have accrued, except where a different limitation is prescribed by statute. Article 15, Section 16 contemplates a civil action, but does not prescribe a limitation on the action, and so a statutory limitation period must apply. The anti-contractual waiver provision does not amount to an exception to NRS 11.010. A statute of limitations applies to all civil actions, legal and equitable, and if the cause of action is not particularly specified elsewhere in a statute, it is included in the catchall statute, NRS 11.220 providing for a 4 year period. Defendant argues that a two year period has been prescribed by NRS 608.260 and cites to two federal cases for the proposition that the two year statute of limitations in NRS 608.260 was not implicitly repealed by Nevada's Constitutional amendment. Specifically, Defendant cites to *Rivera v. Peri & Sons Farms, Inc.*, 735 F.3d 892 (9th Cir. 2013) and *McDonagh v. Harrah's Las Vegas, Inc.* 2014 WL 2742874, 2014 U.S. Dist. LEXIS 82290 (D. Nev. June 17, 2014). Actually, *River v. Peri & Sons* did not so hold. Instead, the court held that because the appellant farmworkers failed to raise the argument in the lower court it was deemed waived. While the court in *McDonagh v. Harrah*, *Supra*, did make a finding that the constitutional provision was not intended to change this two-year statute of limitations, it did so without any analysis beyond noting that the provision was silent on whether it changed the two-year statute. Plaintiff has also argued that other limitation periods

should apply NRS 11.190(1)(b) because compensation was paid pursuant to a written agreement; NRS 11.190(2)(c) because if there was not a written agreement, there was an unwritten contract; and NRS 11.220 because there is no other period provided; NRS 11.190(3)(a) because it is an action for a liability created by statute; or NRS 11.190(3)(c) because it is an action for the taking of personal property. The Nevada Supreme Court has determined that the term action as used in NRS 11.190 refers to the nature or subject matter of the claim and not to what the pleader says it is, and it is the nature or subject matter of the claim that will determine what limitation period applies. *Hartford Insurance Group v. Statewide Appliances, Inc.*, 87 Nev. 195, 484 P.2d 569 (1971). In the *Hartford Insurance* case, the insurance company, as the subrogee of its insured, filed an action for breach of express and implied warranties which were extended by the Deft. upon the sale of a water heater which subsequently exploded causing damage to the insured's home. The insurance carrier argued that NRS 11.190(2)(c) applied [an action upon a contract, obligation or liability not founded upon an instrument in writing]. The court, focusing on the nature of the action found that NRS 11.190(3)(c) [an action for injuring personal property] applied because the Plif. sought recovery for injuries to personal property which NRS 11.190(3)(c) specifically governs. In *Blotzke v. Christmas Tree, Inc.* 88 Nev. 449, 499 P.2d 647 (1972), Plif. sued his employers for personal injuries alleging that they had not provided a safe place to work. The court's focus was the Plif's attempt to assert a contract claim with a longer statute of limitations. The court, finding that the action sounded in tort rather than contract, applied the shorter limitation period which barred the claim. *State Farm v. Wharton*, 88 Nev. 183, 495 P.2d 359 (1972) involved an automobile accident and State Farm sued as subrogee of its insured, thereby stepping into the shoes of its insured. The carrier insisted that since it paid the insured under its insurance contract, a 6 year statute of limitations should apply. Again, the nature of the action was for personal injuries presumably caused by the wrongful act or neglect of the adverse, so that the 6 year limitation period would not apply. Thus, the Court is to look to the real purpose of the cause of action in determining the applicable provision of the limitation statute. Here, it is clear that the purpose of the first cause of action is to collect the difference between the wages paid and the minimum wage required, assuming that the former was less than the latter. The Constitutional provision does not set forth a limitation period and the two year period set in NRS 608.250 is not irreconcilable with the Constitutional provision. *Thomas v. Nevada Yellow Cab Corp.*, *Supra*, did not implicitly repeal the entire statutory framework of NRS Chapter 608 concerning minimum wage (i.e. NRS 608.250 through 608.290). Since the nature of the action here is the same as the nature of the action described in NRS 608.250, the two year limitation period should apply. Tolling of the period: Plif's argue that even if the two year limitation period applies, it should be tolled because Deft. failed to advise Plif's of their minimum wage rights. Specifically, Plif's cite to Article 15, Section (16)(A) which requires an employer to provide written notification of rate adjustments to each of its employees. Firstly, this provision does not require an employer to notify employees of their right to a minimum wage. Thus, Plif's may not rest on this argument alone to toll the statute, but it may be a factor when considering whether the doctrine of equitable tolling should be applied to the 2 year limitation period found in Nevada's wage and hour statutes. Equitable tolling is defined as [t]he doctrine that the statute of limitations will not bar a claim if the Plif., despite diligent efforts, did not discover the injury until after the limitations period had expired *City of North Las Vegas v. State Local Government Employee-Management Relations Bd.*, 127 Nev. Adv. Op. 57, 261 P.3d 1071 (2011) quoting *Black's Law Dictionary* 618 (9th ed. 2009). The doctrine has been adopted in Nevada in discrimination claims addressed to the Nevada Equal Rights Commission under Chapter 613 because procedural technicalities that would bar claims of discrimination will be looked upon with disfavor. *Copeland v. Desert Inn Hotel*,

99 Nev. 823, 826, 673 P.2d 490, 492 (1983). Nonetheless, even in the situations where equitable tolling may be considered, certain factors should be analyzed when determining whether the doctrine will apply. Among these are the claimant's diligence, knowledge of the relevant facts, reliance on misleading authoritative agency statements and/or misleading employer conduct, and any prejudice to the employer. *Id.* Nevada has also applied equitable tolling to time limits for filing claims for the refund of tax overpayments. See *State Dept. of Taxation v. Masco Bulder Cabinet Group*, 127 Nev. Adv. Op. 67, 265 P.3d 666 (2011), but emphasized that even when the claim's untimeliness is due to a procedural technicality, application of the doctrine is appropriate only when the danger of prejudice to the Deft. is absent and the interests of justice so require. *Id.* quoting *Selno v. Employers Ins. Co of Nevada*, 121 Nev. 146, 152, 111 P.3d 1107, 1112 (2005). Masco told the Tax Department's auditor that it was requesting a refund, stated its basis for said request, and this was communicated by the auditor in writing to his supervisors in the Tax Department. The only flaw was that Masco had not sent its own refund request letter to the Tax Department. The court in applying the doctrine of equitable tolling, considered this a mere procedural technicality. Similarly, in *Copeland v. Desert Inn Hotel*, *Supra*, the claimant did not file a Charge of Discrimination with NERC although she did go to the Commission offices and tell the relevant facts to a NERC representative who promised to get back to her. The Copeland court found these facts, asserted in a declaration by the Pltf., were sufficient to preclude summary judgment in light of the doctrine. Here, Pltf. Golden has submitted a declaration stating that in August of 2010, he filed a written claim with the Labor Commissioner asserting that he had not been paid the minimum wage. It appears that thereafter, he never followed up on his claim, but that is not entirely clear from the declaration. He does admit that the Labor Commissioner never advised him that he did not have a valid claim for violation of the minimum wage provision. Clearly, the Labor Commissioner was aware of the Constitutional Amendment. See NAC 608.100 added to NAC by the Labor Commissioner by R055-07 in 2007. The civil action herein was filed on March 11, 2013-- 32 months later, but there is no explanation as to why it was not filed earlier or how and when Golden apparently became aware of his right to file a civil action. Golden's affidavit does demonstrate that he was aware of his right to a minimum wage that was apparently the basis of his complaint to the Labor Commissioner. Because Golden has acknowledged in his declaration that he knew of the of his minimum wage rights, the Nevada cases involving tolling under the delayed discovery rule are inapposite. Pltf. s have requested that they be permitted to conduct discovery on issues concerning the factors bearing upon equitable tolling and have submitted a declaration of counsel. The Court would like Pltf. s counsel to elaborate further in oral argument as to what he believes may be revealed in discovery that would support an equitable tolling argument. The Equitable Estoppel argument: Pltf. s argue that Deft. s should be equitably estopped from asserting a statute of limitations but provide no clear analysis of why equitable estoppel should apply. Equitable estoppel works to prevent someone from asserting legal rights that in equity and good conscience should not be available due to that person's conduct. The four elements of equitable estoppel are: (1) the party to be estopped must be apprised of the true facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting estoppel has the right to believe it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; (4) he must have relied to his detriment on the conduct of the party to be estopped. In re Harrison Living Trust, 121 Nev. 217, 223, 112 P.3d 1058, 1062 (2005). The Pltf. s have made no arguments that demonstrate equitable estoppel applies here. Counsel may wish to address this in oral argument. The Third Cause of Action pursuant to NRS 608.040: Pltf. s third cause of action claims that they are entitled to the statutory penalty for a late payment of wages owed an employee at the time the employee resigns or quits his employment. NRS

608.040 which provides: If an employer fails to pay: (a) Within 3 days after the wages or compensation of a discharged employee becomes due; or (b) On the day the wages or compensation is due to an employee who resigns or quits, the wages or compensation of the employee continues at the same rate from the day the employee resigned, quit or was discharged until paid or for 30 days, whichever is less. NRS 608.180 charges the Labor Commissioner with enforcement of NRS 608.005 through 608.195. Deft s argue that Plf s have no private right of action to collect the penalty provided for under the statute. Whether a private cause of action can be implied is a question of legislative intent. *Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 958, 194 P.3d 86, 100 (2008) Baldonado addressed NRS 608.160 and held that the statute contained no express provision for a private action and that there was no evidence that the legislature intended to create one where there is an adequate administrative process in place via the Labor Commissioner. Like NRS 608.160, NRS 608.040 does not contain an express provision for private action. Plf s argue that NRS 608.140 allows for assessment of attorney fees in a private cause of action so that this is an indication that the legislature intended to a private cause of action for the collection of the penalties provided for in NRS 608.040. While NRS 608.140 does indeed provide for the recovery of attorney s fees in a suit for wages under a contract of employment (i.e. according to the terms of his or her employment) it does so in connection with a common law cause of action for the recovery of wages (i.e. Breach of contract). NRS 608.160 merely creates an exception from the American Rule, and allows for an award of attorney s fees by a court in a common law action for breach of contract involving wages in an employment contract. NRS 608.040 is not similar to 608.140 in this way. There is no indication that the legislature intended to create a private right of action for the collection of the late payment penalties which is all Plf. seek in their third claim for relief. (The Court was unable to read the federal unpublished opinions which were cited but not attached as exhibits, because only LEXIS cites were provided and the Court only has access to Westlaw. Therefore, the arguments regarding the necessity of pleading a cause of action under NRS 608.140 in order to obtain the penalties under 608.040 are unclear to the Court.) Thus, Deft s Motion for judgment on the pleading as to that claim should be GRANTED. Arguments by counsel. Colloquy between Court and counsel regarding equitably tolling. Further arguments by Mr. Greenberg. COURT advised is will allow Discovery on the issue of statute of limitations should be equitably tolled. Mr. Paek objected as he believes there will be prejudice to his client as they don't have records. Further arguments by counsel. COURT stated findings and ORDERED, Discovery is opened for the limited purpose regarding statute of limitations being equitably tolled. Further arguments by counsel. Court advised counsel used Lexis Nexus while sitting their positions, but Court only has access to Westlaw. Court directed counsel to submit courtesy copies of the Federal cases so Court can look at legislative intent, and will take this issue, for 3rd claim of relief under advisement. COURT ORDERED, Motion for Partial Summary Judgment is DENIED WITHOUT PREJUDICE and counsel can renew motion at the close of discovery, and countermotion is GRANTED as to equitable tolling.

[Parties Present](#)
[Return to Register of Actions](#)

EXHIBIT 9

EXHIBIT 9

AFFIDAVIT OF MARTHA SARVER

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

Martha Sarver, being duly sworn upon her oath, deposes and says that:

1. I am the General Manager for Western Cab Company ("Western Cab") and have held this position since 2006.

2. Attached hereto as Exhibit 9-1 are my computations of the hours Irshad Ahmed worked based on payroll records and some trip sheets from September 23, 2012 through June 28, 2013, when he last worked based on the non-tipped wages he received. I calculated Ahmed's hourly wage based on Section 30b02 of the Field Operations Handbook of the United States Department of Labor. Ahmed's total earnings for the applicable payroll periods divided by his compensable hours equal or exceed the higher of the two state minimum wages of \$8.25 an hour.

3. Attached hereto as Exhibit 9-2 is a list of Irshad Ahmed's declared tips.

4. Attached hereto as Exhibit 9-3 are two trip sheets of Irshad Ahmed. Many times Ahmed did not work 12 hours a shift. He often worked between 8 and 10 hours a shift. From December 16, 2012 through December 27, 2012, Ahmed was scheduled for and worked 8 or less hours in a day.

5. Attached hereto as Exhibit 9-4 is the Tipped Employee Participation Agreement of Irshad M. Ahmed in which he said, "I understand that referral fees and similar payments which I may receive from businesses or other entities for referring patrons or facilitating the delivery of patrons to those businesses or entities, were not taken into account in establishing the tip rate approved by the IRS. Such fees and payments which I receive are includable in my income and must be reported on my individual Income Tax Return as required by law whether or

not the source of that income provides me any documentation," Laksiri Perera signed an identical Agreement.

6. Irshad Ahmed became eligible for group health insurance on March 1, 2013 but did not enroll.

7. Attached as Exhibit 9-5 are excerpts from Laksiri Perera's Labor Commissioner claim for wages in which he sought \$8.25 an hour to March 24, 2011, and \$7.25 an hour from March 25, 2011 to October 11, 2012. The Labor Commissioner said that Perera had "been paid correctly."

8. Attached as Exhibit 9-6 are Laksiri Perera's declared tips for the applicable time periods.

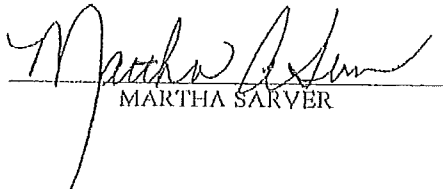
9. On August 29, 2012, I attended a meeting with Ms. Salazar and her supervisor at the U.S. Department of Labor. Western Cab had been audited by the U.S. Department of Labor for minimum wage compliance pursuant to federal law. The Department of Labor said that Western Cab's payment of gasoline for the drivers could not be considered in determining whether the company complied with federal minimum wage requirements. Ms. Salazar said that only the amounts shown on a payroll check could be considered for minimum wage compliance. As a result, Western Cab decided in February 2012 that the drivers would pay for their own gasoline. However, Western Cab then decreased the trip charge and increased the drivers' commissions on their trips to compensate them for their direct purchase of their own gasoline. In doing so, Western Cab was complying with the directions of the U.S. Department of Labor.

10. For the past 16 years, Western Cab has posted the federal minimum wage notice regarding minimum wage and the tip credit allowed by federal law. A true and accurate copy of a portion of that posted notice is attached as Exhibit 9-7.

11. In August 2012 the U.S. Department of Labor again contacted Western Cab. The Department asked to review all the drivers' trip sheets to determine if Western Cab was in compliance with federal minimum wage requirements. Western Cab made available 44 boxes of trip sheets. The U.S. Department of Labor must have determined that Western Cab was in compliance with federal minimum wage requirements because it has not pursued Western Cab any further in regard to federal minimum wage compliance. The last contact Western Cab had with the U.S. Department of Labor was October 17, 2013.

12. Federal law allows an employer to consider tips when determining whether the drivers are paid minimum wage. The minimum wage under federal law is the same as under state law except for the health insurance requirement and is \$7.25 an hour. Western Cab's drivers retain all of their tips and no tip pool arrangement applies.

13. Until the *Thomas* decision in the summer of 2014, Western Cab believed it was complying with state law because of the minimum wage exemption for taxicab drivers. As soon as the *Thomas* decision came down, Western Cab has excluded the tips when determining whether it has met the minimum wage requirement in the State of Nevada.


MARTHA SARVER

SUBSCRIBED and SWORN to before
me this 11 day of February, 2015
by Martha Sarver.

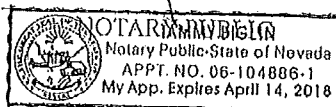


EXHIBIT 9-1

EXHIBIT 9-1

IRSHAD AHMED
2012

Date	Hours	Wages	Sept. 23 - 29, 2012 Hourly Wage
09/23/12	12	160.20	
09/25/12	12	129.45	
09/26/12	12	165.45	
09/27/12	12	157.05	
09/28/12	12	123.95	
09/29/12	12	158.85	
TOTALS:	72	\$ 894.95	\$12.43

Date	Hours	Wages	Sept. 30 - Oct. 6, 2012 Hourly Wage
09/30/12	12	158.45	
10/02/12	12	102.05	
10/03/12	12	128.90	
10/04/12	12	142.00	
10/05/12	12	140.15	
10/06/12	12	117.65	
TOTALS:	72	\$ 789.20	\$10.96

Date	Hours	Wages	Oct. 7 - 12, 2012 Hourly Wage
10/07/12	12	161.90	
10/09/12	12	123.40	
10/10/12	10	157.90	
10/11/12	12	110.90	
10/12/12	12	141.10	
10/13/12	12	128.40	
TOTALS:	70	\$ 823.60	\$11.77

Date	Hours	Wages	Oct. 14 - 20, 2012 Hourly Wage
10/14/12	12	170.15	
10/16/12	12	110.80	
10/17/12	12	128.55	
10/18/12	12	171.25	
10/19/12	12	138.15	
10/20/12	12	160.00	

TOTALS:	72	\$ 878.90	\$12.21
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Date	Hours	Wages	Oct. 21 - 27, 2012 Hourly Wage
10/21/12	12	181.25	
10/23/12	12	121.95	
10/24/12	12	102.35	
10/25/12	12	148.65	
10/26/12	12	105.25	
10/27/12	12	122.00	
TOTALS:	72	\$ 781.45	\$10.85

Date	Hours	Wages	Oct. 28 - Nov. 2, 2012 Hourly Wage
10/28/12	12	147.05	
10/30/12	12	137.50	
10/31/12	3	41.85	
11/01/12	12	211.40	
11/02/12	12	150.50	
TOTALS:	51	\$ 688.30	\$13.50

Date	Hours	Wages	Nov. 4 - 10, 2012 Hourly Wage
11/04/12	12	150.95	
11/19/12	12	120.15	
11/10/12	12	131.70	
TOTALS:	36	\$ 402.80	\$11.19

Date	Hours	Wages	Nov. 11 - 17, 2012 Hourly Wage
11/11/12	12	188.55	
11/13/12	12	121.60	
11/14/12	12	107.90	
11/15/12	12	135.10	
11/16/12	12	100.75	
11/17/12	12	91.65	
TOTALS:	72	\$ 745.55	\$10.35

Date	Hours	Wages	Nov. 18 - 24, 2012 Hourly Wage
11/18/12	12	130.65	
11/20/12	12	125.80	
11/21/12	12	85.60	
11/22/12	12	77.15	
11/23/12	12	100.00	
11/24/12	12	147.85	
TOTALS:	72	\$ 667.05	\$9.26

Date	Hours	Wages	Nov. 25 - Dec. 1, 2012 Hourly Wage
11/25/12	8	93.90	
11/27/12	7	80.95	
11/28/12	4	51.40	
11/29/12	8	103.60	
12/01/12	12	118.95	
TOTALS:	39	\$ 448.80	\$11.51

Date	Hours	Wages	Dec. 2 - 8, 2012 Hourly Wage
12/02/12	12	140.90	
12/04/12	8	79.80	
12/05/12	8	65.70	
12/06/12	12	114.00	
12/07/12	12	105.35	
12/08/12	12	106.50	
TOTALS:	64	\$ 612.25	\$9.57

Date	Hours	Wages	Dec. 9 - 15, 2012 Hourly Wage
12/09/12	12	142.65	
12/12/12	8	115.40	
12/13/12	12	106.00	
12/14/12	9	82.25	
12/15/12	12	108.90	
TOTALS:	53	\$ 555.20	\$10.48

Date	Hours	Wages	Dec. 16 - 22, 2012 Hourly Wage
12/16/12	8	134.35	
12/18/12	8	74.15	
12/19/12	8	64.30	
12/20/12	8	56.55	
12/21/12	8	47.30	
12/22/12	8	61.55	
TOTALS:	48	\$ 438.20	\$9.13

Date	Hours	Wages	Dec. 23 - 29, 2012 Hourly Wage
12/23/12	8	64.75	
12/25/12	8	73.25	
12/26/12	8	109.30	
12/27/12	8	67.50	
12/28/12	12	110.75	
12/29/12	12	89.75	
TOTALS:	56	\$ 515.30	\$9.20

2013

Date	Hours	Wages	Dec. 30, 2012 – Jan. 5, 2013 Hourly Wage
12/30/12	12	100.50	
01/01/13	12	183.35	
01/02/13	12	125.35	
01/03/13	12	50.05	
01/04/13	12	87.40	
01/05/13	12	109.85	
TOTALS:	72	\$ 656.50	\$9.12

Date	Hours	Wages	Jan. 6 - 12, 2013 Hourly Wage
01/06/13	12	141.50	
01/08/13	12	160.15	
01/09/13	12	167.95	
01/10/13	12	184.50	
01/11/13	12	177.45	
01/12/13	12	119.55	
TOTALS:	72	\$ 951.10	\$13.21

Date	Hours	Wages	Jan. 13 - 19, 2013 Hourly Wage
01/13/13	12	137.75	
01/15/13	12	113.80	
01/16/13	12	123.45	
01/17/13	12	149.85	
01/18/13	12	152.60	
01/19/13	12	162.10	
TOTALS:	72	\$ 839.55	\$11.66

Date	Hours	Wages	Jan. 20 - 26, 2013 Hourly Wage
01/20/13	12	150.70	
01/22/13	12	102.40	
01/23/13	12	101.05	
01/24/13	12	114.95	
01/25/13	12	108.55	
01/26/13	12	85.90	
TOTALS:	72	\$ 663.55	\$9.22

Date	Hours	Wages	Jan. 27 – Feb. 02, 2013 Hourly Wage
01/27/13	12	161.15	
01/29/13	12	108.45	
01/30/13	12	160.45	
01/31/13	12	111.45	
02/01/13	12	96.90	
02/02/13	12	100.45	
TOTALS:	72	\$ 738.85	\$10.26

Date	Hours	Wages	Feb. 3 - 9, 2013 Hourly Wage
02/03/13	8	78.50	
02/05/13	12	103.80	
02/06/13	12	127.95	
02/07/13	12	125.60	
02/08/13	12	148.15	
02/09/13	12	116.65	
TOTALS:	68	\$ 700.65	\$10.30

Date	Hours	Wages	Feb. 10 - 16, 2013 Hourly Wage
02/10/13	12	154.50	
02/12/13	12	99.50	
02/13/13	12	93.25	
02/14/13	12	150.80	
02/15/13	12	63.10	
02/16/13	12	109.10	
TOTALS:	72	\$ 670.25	\$9.31

Date	Hours	Wages	Feb. 17 - 23, 2013 Hourly Wage
02/17/13	12	153.45	
02/19/13	12	126.15	
02/20/13	12	127.30	
02/21/13	12	164.50	
02/22/13	12	119.70	
02/23/13	12	109.20	
TOTALS:	72	\$ 800.30	\$11.12

Date	Hours	Wages	Feb. 24 – March 2, 2013 Hourly Wage
02/24/13	12	138.75	
02/26/13	12	97.00	
02/27/13	12	110.70	
02/28/13	12	130.50	
03/01/13	12	157.40	
03/02/13	12	129.25	
TOTALS:	72	\$ 763.60	\$10.61

Date	Hours	Wages	March 3 - 9, 2013 Hourly Wage
03/03/13	12	150.90	
03/05/13	12	108.75	
03/06/13	12	101.55	
03/07/13	12	140.95	
03/08/13	12	112.65	
03/09/13	12	97.00	
TOTALS:	72	\$ 711.80	\$9.89

Date	Hours	Wages	March 10 - 16, 2013 Hourly Wage
03/10/13	12	135.80	
03/12/13	12	119.15	
03/13/13	12	105.95	
03/14/13	12	126.10	
03/15/13	12	118.25	
03/16/13	12	136.05	
TOTALS:	72	\$ 741.30	\$10.30

Date	Hours	Wages	March 17 - 23, 2013 Hourly Wage
03/17/13	12	180.60	
03/19/13	12	115.45	
03/20/13	12	181.85	
03/21/13	12	240.70	
03/22/13	12	139.60	
03/23/13	12	125.80	
TOTALS:	72	\$ 984.00	\$13.67

Date	Hours	Wages	March 24, 2013 Hourly Wage
03/24/13	12	208.26	
TOTALS:	12	\$ 208.26	\$17.36

Date	Hours	Wages	April 4 - 6, 2013 Hourly Wage
04/04/13	12	97.00	
04/15/13	12	144.35	
04/06/13	12	174.20	
TOTALS:	36	\$ 415.55	\$11.54

Date	Hours	Wages	April 7 - 13, 2013 Hourly Wage
04/07/13	12	201.80	
04/09/13	12	127.65	
04/10/13	12	123.20	
04/11/13	12	160.50	
04/12/13	12	170.50	
04/13/13	12	147.35	
TOTALS:	72	\$ 931.00	\$12.93

Date	Hours	Wages	April 14 - 20, 2013 Hourly Wage
04/14/13	12	200.85	
04/16/13	12	125.80	
04/17/13	12	87.35	
04/18/13	12	129.10	
04/19/13	12	102.15	
04/20/13	12	133.36	
TOTALS:	72	\$ 778.61	\$10.81

Date	Hours	Wages	April 21 - 27, 2013 Hourly Wage
04/21/13	12	192.55	
04/23/13	12	123.95	
04/24/13	12	127.70	
04/25/13	12	136.60	
04/26/13	12	158.65	
04/27/13	12	156.35	
TOTALS:	72	\$ 895.80	\$12.44

Date	Hours	Wages	April 28 - May 4, 2013 Hourly Wage
04/28/13	12	151.95	
04/30/13	12	122.20	
05/01/13	12	109.90	
05/02/13	12	156.85	
05/03/13	12	162.20	
05/04/13	12	129.45	
TOTALS:	72	\$ 832.55	\$11.56

Date	Hours	Wages	May 5 - 11, 2013 Hourly Wage
05/05/13	12	199.15	
05/07/13	12	133.50	
05/08/13	12	124.35	
05/09/13	12	119.75	
05/10/13	12	139.15	
05/11/13	12	113.60	
TOTALS:	72	\$ 829.50	\$11.52

Date	Hours	Wages	May 12 - 18, 2013 Hourly Wage
05/12/13	12	154.85	
05/14/13	12	120.90	
05/15/13	12	102.05	
05/16/13	12	171.05	
05/17/13	12	144.00	
05/18/13	12	112.50	
TOTALS:	72	\$ 805.35	\$11.19

Date	Hours	Wages	May 19 - 25, 2013 Hourly Wage
05/19/13	12	228.10	
05/21/13	12	151.20	
05/22/13	12	154.95	
05/23/13	12	135.85	
05/24/13	12	101.80	
05/25/13	12	155.25	
TOTALS:	72	\$ 927.15	\$12.88

Date	Hours	Wages	May 26 - June 1, 2013 Hourly Wage
05/26/13	12	206.85	
05/28/13	12	137.15	
05/29/13	12	118.10	
05/30/13	12	141.90	
05/31/13	12	148.55	
06/01/13	12	119.50	
TOTALS:	72	\$ 872.05	\$12.11

Date	Hours	Wages	June 2 - 8, 2013 Hourly Wage
06/02/13	12	165.25	
06/04/13	12	113.40	
06/05/13	12	77.10	
06/06/13	12	114.20	
06/07/13	12	119.60	
06/08/13	12	141.65	
TOTALS:	72	\$ 731.20	\$10.16

Date	Hours	Wages	June 9 - 15, 2013 Hourly Wage
06/09/13	12	170.30	
06/12/13	12	136.30	
06/13/13	12	122.85	
06/14/13	12	121.55	
06/15/13	12	103.75	
TOTALS:	60	\$ 654.75	\$10.91

Date	Hours	Wages	June 16 - 22, 2013 Hourly Wage
06/16/13	12	137.30	
06/18/13	12	72.90	
06/19/13	12	115.60	
06/22/13	12	143.60	
TOTALS:	48	\$ 469.40	\$9.78

Date	Hours	Wages	June 23 - 28, 2013 Hourly Wage
06/23/13	12	194.10	
06/25/13	12	165.90	
06/26/13	12	155.30	
06/27/13	12	132.40	
06/28/13	12	116.65	
TOTALS:	60	\$ 764.35	\$12.74

EXHIBIT 9-2

EXHIBIT 9-2

1 6. Throughout the entirety of my 12 hour shift, I was never allowed to be "off
2 duty" and was instead required to work a continuous shift. By that I mean, I remained
3 "on call" throughout the entirety of my shift and remained eligible to pick up a fare
4 should one be assigned to me. The only regular break time I had throughout my 12
5 hour shift was two 10 minute breaks per day during which I would leave my cab to use
6 the restroom at a store or gas station and pick up fast food or food from a convenience
7 store. I always ate my food in my cab while waiting for a fare, and I did not turn off
8 my radio (which dispatch used to get a hold of taxicab drivers) at any time. There
9 were many occasions during which I was sitting in my cab eating my food when I was
10 required to stop eating and pick up a fare that was assigned to me by dispatch.

11 7. Prior to January 2012, the gasoline used to operate all of defendant's taxicabs
12 was provided by defendant. Drivers were not required to pay for gasoline. Beginning
13 in January 2012, defendant changed its policy and mandated that taxicab drivers
14 purchase and pay for gasoline at outside gas stations. Since defendant started
15 mandating drivers to pay for their own gasoline, I recorded the cost of such gasoline
16 on the trip sheets that I was required to fill out and utilize daily. Those trip sheets
17 contain an accurate statement of the total cost of gasoline I was required to pay out of
18 my own pocket each shift I drove since January 2012. In the event that myself or
19 another driver did not bring the taxicab back to defendant's facility with a full tank of
20 gas, the drivers were required to pay defendant to fill up the gas tank on the
21 defendant's property. I recall one occasion during which my cab broke down during
22 my shift. It was towed back to defendant's property. Because the cab had to be towed,
23 I could not fill up the gas tank prior to the cab returning to defendant's property. The
24 next day when I reported for my shift, I was approached by one of defendant's
25 supervisors, Tammy, who told me I owed defendant \$22.00 for 6 gallons of gasoline
26 which had to be put into my cab upon its return to defendant's property from the prior
27 shift. I paid that \$22.00 to Tammy, and requested a receipt from her. She gave me a
28 post-it note, which is included as Exhibit "A" hereto, which confirmed my payment to

1 her for the gasoline used to fill up the gasoline tank of my broken down cab.

2

3 I have read the foregoing and affirm under penalty of perjury that the same is
4 true and correct.

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Laksiri Perera

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12/16/14
Date

EXHIBIT "A"

6.991
2200

EXHIBIT "C"

WESTERN CAB
COBRA RATES

EMPLOYEE PREMIUM

Employee Cost per Month Single Coverage:
\$283.00

If Dependents were covered on your plan when you were employed at Western Cab, your monthly premium is:
\$791.05

(ARRA)

If you choose to elect COBRA coverage after reviewing this information, please return the completed forms including the HPN Enrollment Form along with your check for the appropriate months to:

Chuck Glampa
Network Insurance Services, Inc.
PO Box 20066
Las Vegas, NV 89112

Please make your check payable to Western Cab and mail all future monthly COBRA payments to Western Cab; attn: Martha

TERMINATION DATE 10/16/12

EFFECTIVE DATE OF COBRA COVERAGE 11/1/12

FORMER EMPLOYEE NAME: Laksari Perera

EXHIBIT "D"



JIM GIBBONS
Governor

MENDY ELLIOTT
Director

MICHAEL TANCHEK
Labor Commissioner

STATE OF NEVADA
Department of Business & Industry
OFFICE OF THE LABOR COMMISSIONER

675 Fairview Drive Suite 226
Carson City, Nevada 89701
Telephone (775) 687-4850 Fax (775) 687-6409

STATE OF NEVADA
MINIMUM WAGE
2007 ANNUAL BULLETIN
APRIL 1, 2007

PURSUANT TO ARTICLE 15, SECTION 16(A) OF THE CONSTITUTION OF THE STATE OF NEVADA, THE GOVERNOR HEREBY ANNOUNCES THAT THE FOLLOWING MINIMUM WAGE RATES SHALL APPLY TO ALL EMPLOYEES IN THE STATE OF NEVADA UNLESS OTHERWISE EXEMPTED. THESE RATES SHALL BECOME EFFECTIVE ON JULY 1, 2007.

FOR EMPLOYEES TO WHOM QUALIFYING HEALTH BENEFITS HAVE BEEN
MADE AVAILABLE BY THE EMPLOYER:

NO LESS THAN \$5.30 PER HOUR

FOR ALL OTHER EMPLOYEES:

NO LESS THAN \$6.33 PER HOUR

Copies of this bulletin may obtained on the internet at
([http://www.laborcommissioner.com/docs/4-1-07%20ANNUAL%
20BULLETIN%20for%20site.doc](http://www.laborcommissioner.com/docs/4-1-07%20ANNUAL%20BULLETIN%20for%20site.doc))

Copies may also be obtained from the Labor Commissioner's Offices at

675 Fairview Drive, Suite 226
Carson City, Nevada 89701
(775) 687-4850

or

555 East Washington, Suite 4100
Las Vegas, Nevada 89101
(702) 486-2650

EXHIBIT "E"

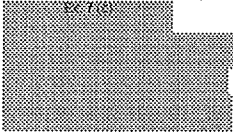
Western Cab Company Case ID: 1574184

Case File #: 1574184

Western Cab Company
801 S. Main Street
Las Vegas, NV 89101
Tel#: (702) 382-7100

EIN#: 20-8981212

Representative:
Moran Law Firm, LLC
John T. Moran, Jr., Attorney at Law



FLSA Narrative Report

COVERAGE

Nature of Business & Section 3(d) employer: The subject of this investigation is a cab company. The company has been in business since the 1950's. Mr. Tobman (now deceased) purchased the company in 1967. The company became incorporated in the State of Nevada in September 1950 as Western Cab.



The corporate officers are: Helen Tobman Martin, Director; Marylin Tobman Moran, Director; Janie Tobman Moore, President; and Jean Tobman, Secretary & Treasurer.
Mrs. Jean Tobman is retired and mother of Helen, Marylin and Jean.

The General Manager Martha Sarver and Director Helen Tobman Martin handle all the day to day operations of the business; they hire and fire the staff; therefore they're both the 3(d) Employer (see Exhibit Tab C-1).

Individual Coverage: The cab drivers do have individual coverage since they receive credit card payments from the customers.

203(s)(A)(1)ii: The subject company does meet ADV with gross revenues of [REDACTED] in 2008, [REDACTED] in 2009, and [REDACTED] YTD thru September 2010 (see Exhibit Tab C-1c).

[REDACTED]

Period of Investigation: January 1, 2009 thru September 30, 2010

MODO Office: LVDO is MODO office.

EXEMPTIONS

213(a)(1) applicable to:

(1) Helen Tobman Martin, Director

541.100 Exemption

Manages business, hires & fires staff, and does the employee scheduling

(2) Martha Sarver, General Manager

541.100 Exemption

Manages business, hires & fires staff, and does the business accounting

(3) Marilyn Tobman Moran, Director

541.100 Exemption

Helps manage the business, has authority to hire & fire staff, and assist both Martha & Helen.

213(a)(1) not applicable to:

the office staff only work 40 hours per week, no overtime.

Per Martha Sarver and Helen Tobman

213(b)(1) applicable to: All mechanics servicing the taxicabs are exempt from overtime provisions. The mechanics duties affect the safety of operations of motor vehicles in transportation on public highways.

213(b)(17) applicable to: Taxicab drivers are exempt from overtime provisions.

No other exemptions were applicable.

STATUS OF COMPLIANCE

Prior History: No prior history was found in Whisard under Western Cab Company.

FMLA violations were found and lost wages of \$459.48 were computed and

paid by Western Cab.

There were two other cases found from more than 10 years ago:

- 1) FMLA case #1249824 from 9/26/02 thru 11/7/02 with no monetary findings;
- 2) FLSA case #1046854 from 7/1/98 thru 7/1/00 with Western Limousine Service with 39 EE's due \$24,603.54.

EX-7(b)
employer was not paying the required minimum wage rate for all hours worked. Taxicab drivers are paid a commission and employer was not verifying the commission earned by drivers when divided by the number of hours worked in the week was atleast the minimum wage rate or higher.

Section 206: The review of the company's payroll records confirmed employer was not paying minimum wage rate for all hours worked. When adding all earning, commission and tips, and dividing by the hours worked the drivers were making less than the minimum wage rate. EX-7(b)

EX-7(b) (see exhibit D-1).

Computations: All earnings (commissions & tips) were divided by the average number of hours worked (60 per week), and if the rate was below the minimum wage rate, the difference was computed as back wages due employees. However, credit was given for bonuses employees received at the end of the year. All employees received bonuses according to the employment period with company. The first year of employment employees received \$50, second \$100, third \$300 and up to a max of \$500.

Note that the bonuses were also pro-rated to only count the portion due for the number of weeks back wages were computed. Example: employee receives \$500 bonus for the year and there were 10 weeks back wages were computed; therefore 500 would be divided by 26 EX-4 and then multiplied by 10 (number of weeks) and that's the portion of the bonus subtracted from the back wages computed to give employer credit for the bonus.

Section 207: No violations of overtime were found due cab drivers since they are exempt from overtime provisions. EX-7(b)

Section 211: Record keeping violations were found since employer failed to keep and maintain accurate

record of the employees work hours. Almost all cab drivers work a 12 hour shift, 5 days per week for a total of 60 hours per week, [REDACTED] b7(c)

Section 212: No record of child labor violations were found, employer stated during initial conference that they did not hire minors under the age of 18. Minors cannot operate a taxicab, and the insurance will not insure a taxicab driven by a minor.

Civil Money Penalty Assessments: No CMPs recommended, as prior cases found occurred 10 years ago. Employer has agreed to comply and pay back wages.

DISPOSITION

A final conference was held on Nov. 15, 2011 with Owners, Helen Tobman Martin and Marylin Tobman Moran; General Manager Martha Sarver, Attorney John T. Moran, WHI [REDACTED] b7(c), and WHI [REDACTED] b7(c). The conference was held at employers' establishment.

When employer was asked why minimum wage violations occurred, their response was they were not checking the employees were making atleast the minimum wage rate by dividing their weekly earnings by the hours worked. Since my initial conference appointment they have started checking for minimum wage.

I discussed the sections of Fair Labor Standards Act that were reviewed in the course of the investigation: Sections 206, 207, 211, 212 & 213). I explained in full details each section of the FLSA reviewed.

I also explained in full detail the minimum wage violations found under sections 206, and record keeping violations found under Section 211. I then asked how they would come into compliance and correct the problems that lead up to the violations to avoid future violations. The employers Martha Sarver and Helen Tobman explained they have added an area in the trip sheets the drivers fill out daily where they must document the hours worked in the day, from start to end of shift. They are also verifying drivers' are documenting the work hours that they don't forget to complete this new setion of the trip sheet. They are also closely tracking the work hours, adding them up weekly, and making sure the driver has earned minimum wage rate or higher.

They are also implementing a program to monitor closely the non-productive drivers for potential lay-off if

they do not make minimum wage or higher. They are also working on implementing a change for the drivers to pay for a percentage of the gas, but have not yet decided what percent the drivers will pay. All these changes they stated will help eliminate potential future violations.

Once compliance was discussed and agreed upon, I let them know the amount of the back wages found due for the number of employees. The back wages found were \$402,897.55 for 391 employees. Attorney John Moran asked if they could have a few days to look over the Summary of Unpaid Wages, and discuss how back wages would be paid and from where. I agreed and we planned to meet back on Wednesday, November 30, 2011 at 9:00am to sign WH-56 Summary of Unpaid Wages.

On December 1, 2011 I received a call from General Manager Martha Sarver explaining to me that the "wages" I had counted from the payroll records did not include the tips. I explained that the payroll records has the commission earned and the tips right below and underneath both is a total column for both and that is the amount that was counted as the employees' total wages. She pointed out to me that the two columns were not added to reflect the total underneath them. So I pulled up one of the payroll to verify and indeed she was correct. The total amount was the same as the commission amount therefore not adding in the tips the employee had declared. I explained to her I would need a week or two to add up the payroll records and make the necessary changes on the back wage computations. I also explained that although some employees may drop off the back wages computed, others may be added that had not been on the summary of unpaid wages before. She stated she understood. After I the added the payroll records and made the changes to the back wage computations, the results were: \$285,229.89 due 431 employees. On Tuesday, December 13, 2011 I dropped off the new computations sheets and Summary of Unpaid Wages (WH-56) to Martha Sarver, General Manager at employers' establishment. She explained the owners Helen Tobman and Marylin Tobman as well as Attorney John Moran were all on vacation and would not return until after Christmas. I told her I needed to have the Summary of Unpaid Wages back and signed before the end of the year. She agreed to have it to me by Wednesday, December 28th.

On December 28th the Summary of Unpaid Wages (WH-56) was delivered to the office by courier. The owner Helen Tobman has agreed to pay the back wages to employees by Jan. 31, 21012, see signed Summary of Unpaid Wages in case file. The Receipt of Unpaid Wages (WH-58) for all 431 employees were printed and delivered to employers' establishment on Dec. 29th to be included in the envelope with checks.

Western Cab Company Case ID: 1574184

No further action is necessary.

Recommendation: It is recommended that this case be closed administratively upon receipt of back wages paid to employees.

[REDACTED] b7 (D)

Publications: The employer was provided with an FS#44 and Handy Reference Guide to the FLSA included with the appointment letter. At initial conference, Owner, Helen Tobman Martin was provided with the following publications: 1261 & 1312.

[REDACTED] b7 (D) _____ **Date:** _____
Wage Hour Investigator

[REDACTED] b7 (D)

EXHIBIT "F"



3 of 10 DOCUMENTS

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF NEVADA

OPINION No. 2005-04

2005 Nev. AG LEXIS 4

March 2, 2005

SYLLABUS:

[*1]

BALLOTS; LABOR COMMISSIONER; WAGES; Notwithstanding the conclusion that the proposed amendment would effect an implied repeal of the provisions for calculation of the minimum wage and minimum wage entitlement found in *NRS 608.250*, the statutory exclusions from overtime compensation and the provisions of *NRS 608.250* relied upon in *NRS 608.018*, would stand as enacted for purposes of the overtime compensation law.

REQUESTBY:

Michael Tanchek, Nevada Labor Commissioner
Office of the Labor Commissioner
Department of Business and Industry
675 Fairview Drive, Suite 226
Carson City, Nevada 89701

OPINIONBY:

BRIAN SANDOVAL, Attorney General; PATRICIA PALM GASPARINO, Deputy Attorney General, Civil Division

OPINION:

As the Nevada Labor Commissioner, you are requesting an opinion regarding the potential effect of the amendment to the Nevada Constitution as proposed by the initiative placing Question No. 6, "Raise the Minimum Wage for Working Nevadans Act," on the 2004 General Election Ballot. Your questions concern the consequences of such an amendment upon Nevada's existing statutory framework for minimum [*2] wage and overtime compensation benefits. Notwithstanding the recent introduction of Assembly Bill 87 in the current session of the Nevada Legislature, the issues and conclusions of this opinion should be shared with appropriate legislative committees for consideration of prudent anticipatory statutory amendments to current laws that will be impacted by any passage of Question No. 6 amending the Nevada Constitution.

GENERAL BACKGROUND INFORMATION

AA 14

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Currently under *NRS 608.250*, certain employees in private employment are entitled to minimum wages at a rate to be established by the Nevada Labor Commissioner in accordance with federal law. Nevada's overtime compensation statute, *NRS 608.018*, incorporates select provisions of the minimum wage law at *NRS 608.250* to delineate which employees are excluded from entitlement to statutory overtime compensation. Complimenting these Nevada laws, the Fair Labor Standards Act of 1938, as amended (FLSA), at 29 U.S.C.A. § 201 *et seq.*, sets forth the minimum wage and overtime compensation benefits [*3] required by federal law. n1 Under the FLSA, the general minimum wage rate is set at \$ 5.15 per hour. 29 U.S.C.A. § 206(a)(1) (1998). In accordance therewith, the Nevada Labor Commissioner has also set Nevada's general minimum wage rate at \$ 5.15 per hour. *NAC 608.110(1)*.

n1 Although states remain free to enact their own laws governing minimum wages and overtime benefits, compliance with state legislation will not excuse noncompliance with the FLSA. 29 U.S.C.A. § 218(a) (1998); *Alaska Int'l Indus., Inc. v. Musarra*, 602 P.2d 1240, 1246 (Alaska 1979).

Ballot Question No. 6, which is aimed at raising Nevada's minimum wage rate, stemmed from an initiative petition. See Nev. Const. art. 19, § 2 (reserving to the people the power to propose, by initiative petition, amendments to the constitution, and to enact or reject them at the polls); *Garvin v. Ninth Judicial Dist. Court ex rel. County of Douglas*, 118 Nev. 749, 751, 59 P.3d 1180, 1181 (2002) [*4] (discussing the initiative power). The initiative proposes to amend Article 15 of the Nevada Constitution to add the following section addressing minimum wages:

*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 [*5] 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 [*6] 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 [*7] 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 of not longer than ninety (90) days. "Employer" means any individual, proprietorship, partnership, joint venture, corporation, limited liability company, trust, association, or other entity that may employ individuals or enter into contracts of employment.*

D. If any provision of this section is declared illegal, invalid or inoperative, in whole or in part, by the final decision of any court of competent jurisdiction, the remaining provisions and all portions not declared illegal, invalid or inoperative shall remain in full force or effect, and no such determination shall invalidate the remaining sections or portions of the sections of this section.

Compilation of Ballot Questions 2004, Question No. 6, § 3.

A majority of Nevada voters voting on Question No. 6 in the 2004 general election approved the proposed constitutional amendment. However, before the proposed amendment can become effective, the Secretary of State must resubmit the question for its approval by the voters in the 2006 general election. [*8] If a majority of the 2006 general election voters also approve the proposed amendment, it will become part of the Nevada Constitution upon certification of the election results. Nev. Const. art. 19 § 2(4); NRS 295.035.

QUESTION ONE

Would the provisions of NRS 608.250 through NRS 608.290 be voided by the successful passage of the proposed amendment?

ANALYSIS

Neither the arguments for or against the initiative's passage nor the text of the proposed constitutional amendment refer directly to the existing minimum wage statutes. See Compilation of Ballot Questions 2004, Question No. 6. Even so, the primary focus of the initiative is on raising the current Nevada minimum wage of \$ 5.15 per hour, which wage is established pursuant to the statutory scheme. Thus it unmistakably appears that the voters intended for the proposed amendment to transform the existing statutory framework for minimum wages. The extent of the transformation that would actually be affected depends upon the extent of conflict between the proposed amendment and the existing statutes.

A constitutional [*9] amendment, ratified subsequent to the enactment of a statute, is controlling on any point covered in the amendment. *State ex rel. Nevada Orphan Asylum v. Hallock*, 16 Nev. 373, 378 (1882). Further, ratification of a constitutional amendment will render void any existing law that is in conflict with the amendment. Op. Nev. Att'y Gen. 08 (May 19, 1908); see also 16 AM. JUR. 2d *Constitutional Law* § 68 (1979) (if there is a conflict between a statute and a subsequently adopted constitutional provision, the statute must give way). We now consider the relevant statutory provisions in turn.

NRS 608.250

Responsibility for Wage Calculation

NRS 608.250 governs the minimum wage for private employment and provides as follows:

1. Except as otherwise provided in this section, the Labor Commissioner shall, in accordance with federal law, establish by regulation the minimum wage which may be paid to employees in private employment within the State. The Labor Commissioner shall prescribe increases in the minimum wage in accordance with those prescribed by [*10] federal law, unless he determines that those increases are contrary to the public interest.
2. The provisions of subsection 1 do not apply to:
 - (a) Casual babysitters,
 - (b) Domestic service employees who reside in the household where they work.
 - (c) Outside salespersons whose earnings are based on commissions.
 - (d) Employees engaged in an agricultural pursuit for an employer who did not use more than 500 man-days of agricultural labor in any calendar quarter of the preceding calendar year.
 - (e) Taxicab and limousine drivers.
 - (f) Severely handicapped persons whose disabilities have diminished their productive capacity in a specific job and who are specified in certificates issued by the Rehabilitation Division of the Department of Employment, Training and Rehabilitation.
3. It is unlawful for any person to employ, cause to be employed or permit to be employed, or to contract with, cause to be contracted with or permit to be contracted with, any person for a wage less than that established by the Labor Commissioner pursuant to the provisions of this section.

This statute's provisions for calculation of the minimum wage and the responsibility therefor are completely covered by and conflict [*11] with the corresponding provisions of the proposed amendment. First, like *NRS 608.250*, the proposed amendment provides a comprehensive minimum wage calculation method which is applicable to private employment. *See* Proposed Amendment, § 16(A),(C) (setting forth a minimum wage calculation applicable to "any . . . entity that may employ individuals or enter into contracts of employment").

Second, obvious conflict is revealed when comparing the competing methods of wage calculation. Specifically, *NRS 608.250(1)* requires that the Labor Commissioner, "in accordance with federal law, establish . . . the minimum wage" and "prescribe increases in the minimum wage in accordance with those prescribed by federal law, unless he determines that those increases are contrary to the public interest." By the terms of these provisions, the minimum wage rate cannot be higher than the federal minimum wage rate (which is currently \$ 5.15 per hour). However, the proposed amendment sets the minimum wage rate at either \$ 5.15 or \$ 6.15 per hour, depending upon whether an employer provides sufficient health benefits. The proposed [*12] amendment also vests the Governor or a state agency designated by him with the responsibility of publishing adjustments to the minimum wage and requires those adjustments to be based upon increases in the federal minimum wage or increases in the Consumer Price Index not to exceed 3% per year, whichever is greater. *See* Proposed Amendment, § 16(A).

Based on this overlapping and contradictory coverage, the existing statutory provisions would not survive the proposed amendment. Instead, the proposed amendment would supplant and repeal by implication the provisions of *NRS 608.250* for wage calculation and the responsibility therefor.

Exclusions Based on Employee Type

Also apparent from a comparison of the proposed amendment and statute is the disagreement on the issue of which

employees are entitled to minimum wages. *NRS 608.250(2)* sets forth various exclusions from the statutory minimum wage entitlement for certain types of employees, *i.e.*, casual babysitters, domestic service employees who reside in the household where they work, etc. However, *NRS 608.250* [*13] does not provide any exclusion which is based on an employee's age, n2 the nonprofit status of an employer, or training periods of employment. In contrast, the proposed amendment does not exclude from its minimum wage coverage the types of employees listed at *NRS 608.250(2)*, except to the extent that those types of employees may also be "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." Proposed Amendment, § 16(C) (defining "employee" for coverage purposes to exclude certain employees under age eighteen).

n2 Previously, *NRS 608.250* expressly allowed for a minimum wage for minors that was eighty-five percent of the minimum wage for adults; however, the pertinent statutory language was deleted in 2001 when the statute was amended to allow the Labor Commissioner to establish prevailing wages in accordance with federal law. See 2001 Nev. Stat., ch. 90, § 9, at 564-65. Cf. *NAC 608.110(2)* (setting forth a lesser minimum wage for employees under age eighteen).

[*14]

The effect of the proposed amendment on the *NRS 608.250* exclusions is controlled by two presumptions. First, the voters should be presumed to know the state of the law in existence related to the subject upon which they vote. Op. Nev. Att'y Gen. 153 (December 21, 1934). Second, it is ordinarily presumed that "where a statute is amended, provisions of the former statute omitted from the amended statute are repealed." *McKay v. Board of Supervisors*, 102 Nev. 644, 650, 730 P.2d 438, 442 (1986). In keeping with these presumptions, the people, by acting to amend the minimum wage coverage and failing to include the statutory exclusions in the proposed amendment, are presumed to have intended the repeal of the existing exclusions so that the new minimum wage would be paid to all who meet its definition of "employee." Accordingly, the proposed amendment would effect an implied repeal of the exclusions from minimum wage coverage at *NRS 608.250(2)*.

NRS 608.260

Civil Court Remedies for Evasion of Minimum Wage Laws

Each competing minimum wage scheme provides a complete [*15] civil court remedy for evasion of its requirements. See *NRS 608.260* (stating, in part, "The 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 amount of the minimum wage."); compare Proposed Amendment, § 16(B) (an employee may bring an action against his employer in the courts of this state and shall be entitled to all appropriate remedies available under the law or in equity, including back pay, damages, reinstatement or injunctive relief, and if prevailing, shall be entitled to reasonable attorney's fees and costs). As the proposed amendment has completely covered the topic of a civil court remedy, providing for even greater relief, its remedy would supplant and repeal by implication the existing civil remedy provision at *NRS 608.260*.

NRS 608.270(1) and *NRS 608.290(2)*

Administrative Enforcement of Minimum Wage Laws

NRS 608.270(1)(a) states that the "Labor Commissioner shall . . . administer and enforce the provisions of *NRS 608.250* [*16] ." In addition, *NRS 608.290(2)* provides with regard to violations of *NRS 608.250* that "in addition to any other remedy or penalty, the Labor Commissioner may impose against the person an administrative penalty of not more than \$ 5,000 for each such violation." The presumptive partial repeal of *NRS 608.250* notwithstanding, legal authority suggests that the proposed amendment would serve to modify these statutes as necessary to effectuate their continued use in enforcing the new minimum wage law.

The proposed amendment is silent with respect to the administrative enforcement authority of the Labor Commissioner and his imposition of administrative sanctions. Where, as here, "express terms of repeal are not used, the presumption is always against an intention to repeal an earlier statute, unless there is such inconsistency or repugnancy [between the laws] as to preclude the presumption, or the [new law] revises the whole subject-matter of the former. [Citations omitted.]" *Ronnow v. City of Las Vegas*, 57 Nev. 332, 365, 65 P.2d 133, 145 (1937). [*17] [Text altered.] The statutes in question here are consistent with the basic provisions of the proposed amendment.

The minimum wage changes proposed by Question No. 6, though materially different in wage outcome, applicability and civil court remedy, essentially create a new method of calculating the wage rate and do not attempt to alter the underlying current statutory basis for administrative enforcement of the new wage by the Labor Commissioner. By providing for a higher minimum wage and a more extensive civil court remedy, the people intended to strengthen an employee's ability to assert his right to the minimum wage. The current administrative enforcement jurisdiction of the Labor Commissioner is well-suited to serve this general purpose, and it merely strengthens what the proposed amendment seeks to guaranty. See *Washington v. State*, 117 Nev. 735, 739, 30 P.3d 1134, 1136 (2001) (statutes must be interpreted consistently with their general purposes); see also *Rogers v. Heller*, 117 Nev. 169, 176 n.17, 18 P.3d 1034, 1038 n.17 (2001) (recognizing that rules of statutory construction apply [*18] to constitutional provisions).

The current minimum wage statutes evidence the Legislature's clear intent that the Labor Commissioner should enforce Nevada's minimum wage law and impose administrative sanctions for violations thereof. Additionally, *NRS 607.160(1)(a)(2)* provides that "the Labor Commissioner . . . shall enforce *all labor laws* of the State of Nevada . . . the enforcement of which is not specifically and exclusively vested in any other officer, board or commission." [Emphasis added.] *NRS 607.160(3)* -- (6) contemplate the Labor Commissioner will impose administrative penalties and pursue administrative and civil actions for violation of Nevada's labor laws. Further, *NRS 607.170(1)* allows the Labor Commissioner to prosecute claims and commence actions to collect wages for any person who is unable to afford counsel.

The intent behind the administrative enforcement provisions at *NRS 608.270(1)(a)* and *NRS 608.290(2)*, i.e., that the Labor Commissioner shall enforce the state's [*19] minimum wage law, is likely to prevail despite the specific references to *NRS 608.250* in *NRS 608.270(1)(a)* and *NRS 608.290*. *McKay*, 102 Nev. at 650, 730 P.2d at 443 (the intent behind a law will prevail over the literal sense of the words used in the law). However, given the specific references to *NRS 608.250* in *NRS 608.270(1)(a)* and *NRS 608.290*, it is conceivable that a court of law could find the Legislature intended the existing enforcement statutes apply only to the minimum wage as calculated under *NRS 608.250*, and not recognize the amendment to the Nevada Constitution as merely augmenting the statutes establishing the Labor Commissioner's pre-amendment administrative enforcement authority. If so, the intent behind existing statutes would be upset by allowing them to stand as enforcement tools for the new law, and the statutes should be treated as repealed. [*20] See *City and County of San Francisco v. County of San Mateo*, 896 P.2d 181, 195 (Cal. 1995) (Mosk, J., concurring) (existing statutes must be treated as repealed if the intent behind them would be thwarted by allowing them to stand in the face of a constitutional amendment). On the other hand, the more likely and appropriate conclusion is that the proposed amendment would modify these enforcement statutes to allow for the Labor Commissioner's enforcement of the new minimum wage law. Cf. *Perry v. Consolidated Special Tax Sch. Dist. No. 4*, 103 So. 639, 642 (Fla. 1925) (recognizing that previous statutory provisions, as modified by constitutional amendment, are sufficient to effectuate new constitutional provisions so that new provisions may be enforced even though they are not contained in or contemplated by present statutes).

NRS 608.270(1)(a), (2), NRS 608.280, and NRS 608.290(1)

Criminal Enforcement of Minimum Wage Laws

NRS 608.270(1)(a) and (2) establish that the district attorneys will prosecute [*21] violations of *NRS 608.250* and, for the willful failure to do so, will be subject to a misdemeanor conviction and removal from office. In addition, *NRS 608.280* requires the Attorney General to prosecute willful violations of *NRS 608.270*. Finally, *NRS 608.290(1)* also

makes the violation "of *NRS 608.250* or any regulation adopted pursuant thereto" a misdemeanor. For the same reasons given in the preceding section of this opinion (addressing the proposed amendment's effect upon the Labor Commissioner's administrative enforcement authority), it is also likely that a court would find that the proposed amendment only modifies, rather than repeals, the existing criminal enforcement statutes. In short, by enacting these criminal statutes the Legislature plainly intended that criminal sanctions would be used as a tool to enforce the state minimum wage law. Although, as with the provisions discussed in the preceding section, it is possible that a court could determine that the Legislature's intent [*22] is ambiguous with respect to application of the criminal enforcement statutes to the new minimum wage law. After considering this risk, the reasonable and fair conclusion is that the legislative intent behind the existing provisions is consistent with using these provisions to enforce the new minimum wage law. The criminal enforcement statutes are also consistent with the proposed amendment's apparent purpose of strengthening an employee's ability to collect minimum wages. The people, by presumption, were aware of the law's provisions when voting in favor of the proposed amendment. *See* Op. Nev. Att'y Gen. 153 (December 21, 1934). As both the initiative and the proposed amendment are silent as to repeal of the criminal enforcement provisions, these provisions are likely to survive as modified to effectuate their continued use as an enforcement tool for the new minimum wage law. *See Ronnow v. City of Las Vegas*, 57 Nev. at 332, 365, 65 P.2d 133, 145 (1937).

CONCLUSION TO QUESTION ONE

If the proposed constitutional amendment is approved at the 2006 general election as established by certified election results, it would supplant and [*23] repeal by implication the wage calculation and coverage provisions of *NRS 608.250* and the civil remedy of *NRS 608.260*. *NRS 608.270(1)* and *NRS 608.290(2)* would likely be found to have been modified as necessary to effectuate the Labor Commissioner's enforcement of the new minimum wage. The criminal enforcement provisions of *NRS 608.270(1)(b)* and (2), *NRS 608.280*, and *NRS 608.290(1)* also would likewise be found to be modified to allow for their continued use in enforcing the new minimum wage law.

QUESTION TWO

Would the passage of the proposed amendment require the payment of the minimum wage to those types of employees currently excluded under *NRS 608.250(2)*?

ANALYSIS

As discussed in response to Question One above, the proposed amendment does not contain any of the exceptions to coverage currently set forth at *NRS 608.250(2)* [*24]. The only exception under the proposed amendment is for employees who are "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." Proposed Amendment, § 16(C) (defining "employee" for coverage purposes to exclude certain employees under age eighteen). In light of this, the exclusions under *NRS 608.250* are repugnant to the proposed amendment, the plain wording of which requires payment of the minimum wage regardless of whether an employee is currently excluded under *NRS 608.250(2)*. Consequently, the proposed amendment would effect an implied repeal of the exclusions set forth at *NRS 608.250* from minimum wage coverage.

CONCLUSION TO QUESTION TWO

The proposed amendment would require payment of the new minimum wage to employees who are currently excluded under *NRS 608.250(2)* from entitlement to minimum wages, unless those employees fall outside the amendment's definition of a protected "employee."

QUESTION [*25] THREE

Does the language of Section 16(B) of the proposed amendment specifically and exclusively vest the enforcement of the minimum wage provisions with the courts, so as to preempt the enforcement jurisdiction of the Labor

Commissioner?

ANALYSIS

Your question alludes to the language of *NRS 607.160(1)(a)(2)*, which states, "The Labor Commissioner . . . shall enforce all labor laws of the State of Nevada . . . the enforcement of which is not specifically and exclusively vested in any other officer, board or commission." As discussed in response to Question One above, the provisions of *NRS 607.160* and *NRS 607.170*, as well as the provisions under *NRS 608.270(1)(a)* and *NRS 608.290(2)*, demonstrate the Legislature's intent that the Labor Commissioner enforce Nevada's minimum wage law, even as amended or supplanted by the instant initiative. Therefore, the proposed amendment would likely only modify the existing statutes as needed for such enforcement. The proposed amendment's civil remedy [*26] at section 16(B) would supplant the existing statutory civil remedy at *NRS 608.260*, but this would have no additional affect on the existing statutes providing for the Labor Commissioner's enforcement jurisdiction in other areas.

Moreover, section 16(B) of the proposed amendment provides, in relevant part, that an employee "may bring an action against his or her employer in the courts of this State to enforce the provisions of this section." [Emphasis added.] The use of the word "may" in this context indicates that the remedy is intended to be permissive and it does not indicate exclusivity of the remedy. *D'Angelo v. Gardner*, 107 Nev. 704, 721 n.11, 819 P.2d 206, 217 n.11 (1991); *Ewing v. Fahey*, 86 Nev. 604, 608, 472 P.2d 347, 350 (1970). Indeed, the analogous provision currently set forth in *NRS 608.260* states that an "employee may . . . bring a civil action," and this remedy coexists with other statutes providing for enforcement by the Labor Commissioner. Thus the proposed amendment's civil remedy at section [*27] 16(B) does not specifically and exclusively vest authority elsewhere or divest the Labor Commissioner of all of his jurisdiction.

CONCLUSION TO QUESTION THREE

Section 16(B) of the proposed amendment does not interfere with all of the enforcement jurisdiction of the Labor Commissioner. It is likely that authority not specifically in contradiction to the amendment would survive a legal challenge.

QUESTION FOUR

Would preemption of *NRS 608.250* have any effect on the statutory exclusions from entitlement to overtime compensation set forth in *NRS 608.018*?

ANALYSIS

The overtime compensation statute, *NRS 608.018*, should not be affected by the proposed amendment, even though it partially relies on *NRS 608.250*.

NRS 608.018 provides, in relevant part:

1. Except as otherwise provided in this section, an employer shall pay one and one-half times an employee's regular wage rate whenever an employee works:

- (a) More than 40 hours in any scheduled week of work; or
- (b) More than 8 hours in [*28] any workday unless by mutual agreement the employee works a scheduled 10 hours per day for 4 calendar days within any scheduled week of work.

2. The provisions of subsection 1 do not apply to:

- (a) Employees who are not covered by the minimum wage provisions of *NRS 608.250*;

(b) Employees who receive compensation for employment at a rate not less than one and one-half times the minimum rate prescribed pursuant to *NRS 608.250*;

....

(d) Salesmen earning commissions in a retail business if their regular rate is more than one and one-half times the minimum wage, and more than one-half their compensation comes from commissions;

....

(k) Drivers of taxicabs or limousines;

(l) Agricultural employees; . . . n3

n3 The provisions of *NRS 608.018* do not refer to, rely on, or parallel the provisions of *NRS 608.250* and would not be affected by the repeal of the *NRS 608.250* scheme for minimum wage. Furthermore, it should be noted that *NRS 608.180* -- *608.195* provide for civil and criminal enforcement and remedies for violations of *NRS 608.018*. This enforcement scheme is unrelated to the topic of minimum wage and would likewise remain unaffected by the proposed amendment.

[*29]

As set forth above, *NRS 608.018(2)(a)* incorporates by reference the standard for minimum wage entitlement in *NRS 608.250*. By this, *NRS 608.018(2)(a)* excludes from entitlement to statutory overtime compensation those employees who are also not entitled to minimum wages. *NRS 608.250(2)* sets forth a list of employees who are not entitled to minimum wages, including casual babysitters, taxicab and limousine drivers, and certain domestic service employees, outside salespersons, employees engaged in agriculture and severely handicapped persons. *NRS 608.250(2)(a)* -- (f).

The exclusions at *NRS 608.250(2)(d)* (for employees "engaged in agricultural pursuit for an employer who did not use more than 500 man-days of agricultural labor") and in *NRS 608.250(2)(e)* (for "taxicab and limousine drivers") are also subsumed in other corresponding statutory exclusions from overtime compensation. In particular, *NRS 608.018(k)* [*30] and (l) set forth exclusions which are at least as broad as those at *NRS 608.250(2)(d)* and (e) and which do not depend on or refer to *NRS 608.250*. Accordingly, any question as to the continuing validity of *NRS 608.250(2)* cannot affect the lack of entitlement to statutory overtime compensation for taxicab and limousine drivers or for agricultural employees.

On the whole, the exclusions from statutory overtime coverage, as incorporated from *NRS 608.250(2)*, are complimentary to the exclusions under the FLSA's overtime compensation provisions. n4 Hence, it is apparent that the Legislature intended to enact state overtime compensation law that was generally consistent with federal law on the same topic and to exclude from statutory overtime compensation the types of employees identified at *NRS 608.250(2)*. This intent should be respected regardless of changes in the law on the distinct subject matter of minimum wages.

n4 See, e.g., 29 U.S.C.A. § 213(a)(1) (1998) (addressing outside salespersons); 29 U.S.C.A. § 213(a)(6) (1998) (addressing employees employed in agriculture); 29 U.S.C.A. §§ 213(a)(7), 214(c) (1998) (addressing handicapped workers); 29 U.S.C.A. § 213(a)(15) (1998) (addressing casual babysitters and those engaged in domestic service).

[*31]

Moreover, *NRS 608.018(2)(a)* does not depend on the aspects of *NRS 608.250* that offend the proposed amendment, *i.e.*, the provisions for minimum wage calculation and entitlement. Because the subject of the proposed amendment is the minimum wage and not entitlement to overtime compensation, *NRS 608.018(2)(a)* does not conflict with the organic provisions of the proposed amendment. Therefore, *NRS 608.018(2)(a)*, which incorporates the identification of types of employees found in *NRS 608.250(2)*, would survive the limited repeal of *NRS 608.250(2)* specific to its exclusion from minimum wage coverage for the same types of employees.

In contrast, the exclusions from statutory overtime entitlement set forth at *NRS 608.018(2)(b)* and (d) rely on the calculation of the minimum wage under *NRS 608.250*. Subsection (2)(b) expressly does so, excluding from overtime compensation "employees [*32] who receive compensation for employment at a rate not less than one and one-half times the minimum rate prescribed pursuant to *NRS 608.250*." [Emphasis added.] Subsection 2(d) excludes "salesmen earning commissions in a retail business if their regular rate is more than one and one-half times the minimum wage, and more than one-half their compensation comes from commissions." [Emphasis added.]

The apparent intent behind *NRS 608.018(2)(b)* and (d) was to exclude from overtime compensation employees and certain salesmen who earned as a regular rate at least one and one-half times the minimum rate set by the Labor Commissioner -- a rate that is limited by the rate provided by federal law. *See NRS 608.250(1)*. In enacting *NRS 608.018(2)(b)* and (d), the Legislature could not have anticipated that overtime compensation would be required even though an employee earned more than one and one-half times the rate under federal law and *NRS 608.250*. Incorporation of the wage calculation at [*33] *NRS 608.250* into *NRS 608.018* reflects the Legislature's determination as to the proper balance of state interests. Amending or supplanting *NRS 608.018(2)(b)* or (d) with the higher minimum wage rate of the proposed amendment would prove more costly for employers and would frustrate the apparent intent of the Legislature to tie this variable in the overtime calculation to the federal minimum wage. n5 For this reason, and even more so because the proposed amendment is not concerned with overtime compensation, it would not effect a repeal or modification of these overtime compensation exclusions linked to *NRS 608.250*.

n5 For example, the current minimum wage rate is \$ 5.15 per hour. This rate multiplied by one and one-half equals \$ 7.73 per hour. Thus under *NRS 608.018(2)(b)* and (d), statutory overtime compensation is required until an employee or salesman with sufficient commissions earns at least \$ 7.73 per hour. Under the proposed amendment, assuming no adequate insurance is provided, the minimum wage would be initially set at \$ 6.15 per hour. This rate multiplied by one and one-half equals \$ 9.23 per hour. If the calculation from the proposed amendment were incorporated into *NRS 608.018(2)(b)* and (d), then an employee would be entitled to statutory overtime compensation until he earned \$ 9.23 per hour.

[*34]

The rule that all statutes in force and not inconsistent with the new constitutional provisions shall continue until amended or repealed by the Legislature seems particularly apt here. *See 16 AM. JUR. 2d Constitutional Law* § 67. Under this rule, the minimum wage calculation provisions of *NRS 608.250*, as incorporated into *NRS 608.018(2)(b)* and (d), should continue for the purpose of requiring the Labor Commissioner to establish a wage rate to be used in determining entitlement to statutory overtime compensation under *NRS 608.018(2)(b)* and (d).

CONCLUSION TO QUESTION FOUR

Notwithstanding the conclusion that the proposed amendment would effect an implied repeal of the provisions for calculation of the minimum wage and minimum wage entitlement found in *NRS 608.250*, the statutory exclusions from overtime compensation and the provisions of *NRS 608.250* relied upon in *NRS 608.018*, would [*35] stand as enacted for purposes of the overtime compensation law.

Legal Topics:

For related research and practice materials, see the following legal topics:

Administrative LawAgency RulemakingRule Application & InterpretationGeneral

OverviewGovernmentsLegislationExpirations, Repeals & SuspensionsGovernmentsLegislationInitiative & Referendum

EXHIBIT "G"

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DISTRICT COURT
CLARK COUNTY, NEVADA

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LAKSIRI PERERA, Individually and on)
behalf of others similarly situated,)

Plaintiff,)

vs.)

WESTERN CAB COMPANY,)

Defendant.)

Case No.: A-14-707425-C

Dept.: V

**PROPOSED SECOND
AMENDED
COMPLAINT**

**ARBITRATION EXEMPTION
CLAIMED BECAUSE THIS IS
A CLASS ACTION CASE**

LAKSIRI PERERA, individually and on behalf of others similarly situated, by
and through his attorney, Leon Greenberg Professional Corporation, as and for a
Second Amended Complaint against the defendant, states and alleges, as follows:

JURISDICTION, PARTIES AND PRELIMINARY STATEMENT

1. The plaintiff, LAKSIRI PERERA, (the "individual plaintiff" or the "named
plaintiff") is a resident of Clark County in the State of Nevada and is a former
employee of the defendant.

2. The defendant, WESTERN CAB COMPANY, (hereinafter referred to as
"Western Cab" or "defendant") is a corporation existing and established pursuant to

1 the laws of the State of Nevada with its principal place of business in the County of
2 Clark, State of Nevada and conducts business in Nevada.

3 **CLASS ACTION ALLEGATIONS**

4 3. The plaintiff brings this action as a class action pursuant to Nev. R. Civ.
5 P. §23 on behalf of himself and a class of all similarly situated persons employed by
6 the defendant in the State of Nevada.

7 4. The class of similarly situated persons consists of all persons employed
8 by defendant in the State of Nevada during the applicable statute of limitations periods
9 prior to the filing of this Complaint continuing until date of judgment, such persons
10 being employed as taxi cab drivers (hereinafter referred to as "cab drivers" or
11 "drivers") such employment involving the driving of taxi cabs for the defendant in the
12 State of Nevada.

13 5. The common circumstance of the cab drivers giving rise to this suit is that
14 while they were employed by defendant they were not paid the minimum wage
15 required by Nevada's Constitution, Article 15, Section 16 for many or most of the days
16 that they worked in that their hourly compensation, when calculated pursuant to the
17 requirements of said Nevada Constitutional Provision, did not equal at least the
18 minimum hourly wage provided for therein.

19 6. The named plaintiff is informed and believes, and based thereon alleges
20 that there are at least 100 putative class action members. The actual number of class
21 members is readily ascertainable by a review of the defendant's records through
22 appropriate discovery.

23 7. There is a well-defined community of interest in the questions of law and
24 fact affecting the class as a whole.

25 8. Proof of a common or single set of facts will establish the right of each
26 member of the class to recover. These common questions of law and fact predominate
27 over questions that affect only individual class members. The individual plaintiff's
28 claims are typical of those of the class.

1 9. A class action is superior to other available methods for the fair and
2 efficient adjudication of the controversy. Due to the typicality of the class members'
3 claims, the interests of judicial economy will be best served by adjudication of this
4 lawsuit as a class action. This type of case is uniquely well-suited for class treatment
5 since the employer's practices were uniform and the burden is on the employer to
6 establish that its method for compensating the class members complies with the
7 requirements of Nevada law.

8 10. The individual plaintiff will fairly and adequately represent the interests
9 of the class and has no interests that conflict with or are antagonistic to the interests of
10 the class and has retained to represent him competent counsel experienced in the
11 prosecution of class action cases and will thus be able to appropriately prosecute this
12 case on behalf of the class.

13 11. The individual plaintiff and his counsel are aware of their fiduciary
14 responsibilities to the members of the proposed class and are determined to diligently
15 discharge those duties by vigorously seeking the maximum possible recovery for all
16 members of the proposed class.

17 12. There is no plain, speedy, or adequate remedy other than by maintenance
18 of this class action. The prosecution of individual remedies by members of the class
19 will tend to establish inconsistent standards of conduct for the defendant and result in
20 the impairment of class members' rights and the disposition of their interests through
21 actions to which they were not parties. In addition, the class members' individual
22 claims are small in amount and they have no substantial ability to vindicate their
23 rights, and secure the assistance of competent counsel to do so, except by the
24 prosecution of a class action case.

25 **AS AND FOR A FIRST CLAIM FOR RELIEF ON BEHALF OF THE NAMED**
26 **PLAINTIFF AND ALL PERSONS SIMILARLY SITUATED PURSUANT TO**
 NEVADA'S CONSTITUTION

27 13. The named plaintiff repeats all of the allegations previously made and
28 brings this First Claim for Relief pursuant to Article 15, Section 16, of the Nevada

1 Constitution.

2 14. Pursuant to Article 15, Section 16, of the Nevada Constitution the named
3 plaintiff and the class members were entitled to an hourly minimum wage for every
4 hour that they worked for defendant and the named plaintiff and the class members
5 were often not paid such required minimum wages.

6 15. The defendant's violation of Article 15, Section 16, of the Nevada
7 Constitution involved malicious and/or fraudulent and/or oppressive conduct by the
8 defendant sufficient to warrant an award of punitive damages for the following,
9 amongst other reasons:

10 (a) Defendant despite having, and being aware of, an express obligation
11 under Article 15, Section 16, of the Nevada Constitution, such obligation
12 commencing no later than July 1, 2007, to advise the plaintiff and the
13 class members, in writing, of their entitlement to the minimum hourly
14 wage specified in such constitutional provision, failed to provide such
15 written advisement;

16
17 (b) Defendant was aware that the highest law enforcement officer of the
18 State of Nevada, the Nevada Attorney General, had issued a public
19 opinion in 2005 that Article 15, Section 16, of the Nevada Constitution,
20 upon its effective date, would require defendant and other employers of
21 taxi cab drivers to compensate such employees with the minimum hourly
22 wage specified in such constitutional provision. Defendant consciously
23 elected to ignore that opinion and not pay the minimum wage required by
24 Article 15, Section 16, of the Nevada Constitution to its taxi driver
25 employees in the hope that it would be successful, if legal action was
26 brought against it, in avoiding paying some or all of such minimum
27 wages;

28

1 (c) Defendant, to the extent it believed it had a colorable basis to
2 legitimately contest the applicability of Article 15, Section 16, of the
3 Nevada Constitution to its taxi driver employees, made no effort to seek
4 any judicial declaration of its obligation, or lack of obligation, under such
5 constitutional provision and to pay into an escrow fund any amounts it
6 disputed were so owed under that constitutional provision until such a
7 final judicial determination was made.

8 16. Defendant also engaged in the following malicious, illegal and bad faith
9 conduct which was intended to conceal its violations Article 15, Section 16, of the
10 Nevada Constitution and caused additional injury to the plaintiffs for which they seek
11 redress:

12 In or about January of 2012 defendant started requiring the plaintiff and
13 the class members to pay from such plaintiff and class members' own,
14 personal funds, 100% of the cost of the fuel consumed in the operation of
15 the taxicabs they drove for the defendant. That fuel was essential for the
16 operation of defendant's taxi cab business and plaintiffs could not work
17 for defendants unless they agreed to pay for that fuel from their personal
18 funds. By requiring the plaintiff and the class members to personally pay
19 for the cost of such fuel the defendant was reducing the wages it actually
20 paid the plaintiff and the class members to an amount below the minimum
21 hourly wage required by Article 15, Section 16, of the Nevada
22 Constitution. That was because after deducting from the "on the payroll
23 records" wages paid by the defendant to the plaintiff and the class
24 members the cost of the taxi cab fuel they were forced by the defendant to
25 pay, the resulting "true" wage paid to such persons by the defendant was
26 below the minimum hourly wage required by Article 15, Section 16, of
27 the Nevada Constitution. Defendant willfully and maliciously engaged in
28 this conduct to make it appear to any otherwise uninformed person who

1 was examining its payroll records that it was paying the minimum wage
2 required by Article 15, Section 16, of the Nevada Constitution when it
3 was not. Defendant instituted this policy specifically to deceive certain
4 government agencies, including but not necessarily limited to, the United
5 States Department of Labor which had previously found the defendant in
6 violation of the minimum wage law enforced by such agency. Such
7 conduct by the defendant also resulted in the defendant issuing knowingly
8 false and inaccurate statements of the plaintiff's and the class members'
9 income to the United States Internal Revenue Service and the Social
10 Security Administration, such statements inflating and exaggerating the
11 actual income earned by such persons and resulting in them being
12 required to pay additional taxes that they did not actually owe.

13 17. Defendant engaged in the acts and/or omissions detailed in paragraphs 15
14 and 16 in an intentional scheme to maliciously, oppressively and fraudulently deprive
15 its taxi driver employees of the hourly minimum wages that were guaranteed to those
16 employees by Article 15, Section 16, of the Nevada Constitution. Defendant so acted
17 in the hope that by the passage of time whatever rights such taxi driver employees had
18 to such minimum hourly wages owed to them by the defendant would expire, in whole
19 or in part, by operation of law. Defendant so acted consciously, willfully, and
20 intentionally to deprive such taxi driver employees of any knowledge that they might
21 be entitled to such minimum hourly wages, despite the defendant's obligation under
22 Article 15, Section 16, of the Nevada Constitution to advise such taxi driver
23 employees of their right to those minimum hourly wages. Defendant's malicious,
24 oppressive and fraudulent conduct is also demonstrated by its failure to make any
25 allowance to pay such minimum hourly wages if they were found to be due, such as
26 through an escrow account, while seeking any judicial determination of its obligation
27 to make those payments.

28 18. The named plaintiff seeks all relief available to him and the alleged class

1 under Nevada's Constitution, Article 15, Section 16 including appropriate injunctive
2 and equitable relief to make the defendant cease its violations of Nevada's
3 Constitution and a suitable award of punitive damages.

4 19. The named plaintiff on behalf of himself and the proposed plaintiff class
5 members, seeks, on this First Claim for Relief, a judgment against the defendant for
6 minimum wages owed since November 28, 2006 and continuing into the future, such
7 sums to be determined based upon an accounting of the hours worked by, and wages
8 actually paid to, the plaintiff and the class members along with an award of damages
9 for the increased, and false, tax liability the defendant has caused the plaintiff and the
10 class members to sustain, a suitable injunction and other equitable relief barring the
11 defendant from continuing to violate Nevada's Constitution and requiring the
12 defendant to remedy at its expense the injury to the class members it has caused by
13 falsely reporting to the United States Internal Revenue Service and the Social Security
14 Administration the income of the class members, a suitable award of punitive
15 damages, and an award of attorneys' fees, interest and costs, as provided for by
16 Nevada's Constitution and other applicable laws.

17 **AS AND FOR A SECOND CLAIM FOR RELIEF PURSUANT TO NEVADA**
18 **REVISED STATUTES § 608.040 ON BEHALF OF THE NAMED PLAINTIFF**
AND THE PUTATIVE CLASS

19 20. Plaintiff repeats and reiterates each and every allegation previously made
20 herein.

21 21. The named plaintiff brings this Second Claim for Relief against the
22 defendant pursuant to Nevada Revised Statutes § 608.040 on behalf of himself and the
23 alleged class of all similarly situated employees of the defendant.

24 22. The named plaintiff has been separated from his employment with the
25 defendant and at the time of such separation was owed unpaid wages by the defendant.

26 23. The defendant has failed and refused to pay the named plaintiff and
27 numerous members of the putative plaintiff class who are the defendant's former
28 employees their earned but unpaid wages, such conduct by such defendant constituting

1 a violation of Nevada Revised Statutes § 608.020, or § 608.030 and giving such
2 named plaintiff and similarly situated members of the putative class of plaintiffs a
3 claim against the defendant for a continuation after the termination of their
4 employment with the defendant of the normal daily wages defendant would pay them,
5 until such earned but unpaid wages are actually paid or for 30 days, whichever is less,
6 pursuant to Nevada Revised Statutes § 608.040.

7 24. As a result of the foregoing, the named plaintiff seeks on behalf of himself
8 and the similarly situated putative plaintiff class members a judgment against the
9 defendant for the wages owed to him and such class members as prescribed by Nevada
10 Revised Statutes § 608.040, to wit, for a sum equal to up to thirty days wages, along
11 with interest, costs and attorneys' fees.

12 WHEREFORE, plaintiff demands the relief on each cause of action as alleged
13 aforesaid.

14
15 Plaintiff demands a trial by jury on all issues so triable.

16
17 Dated this 26th day of January, 2015.

18
19 Leon Greenberg Professional Corporation

20
21 By: /s/ Leon Greenberg

22 LEON GREENBERG, Esq.
23 Nevada Bar No.: 8094
24 2965 South Jones Blvd- Suite E4
25 Las Vegas, Nevada 89146
26 Tel (702) 383-6085
27 Fax (702) 385-1827

28 Attorney for Plaintiff

EXHIBIT "H"

date	hours	Defendant's Payroll Wages	Gas cost from trip sheet	True wage	True Hourly Wage for Week
9/23/2012	12	122.6	28.36	94.15	
9/24/2012	12	125.35	28.45	96.41	
9/25/2012	12	121.3	28.94	96.52	
9/26/2012	11	88.6	24.78	65.76	
9/28/2012	12	89.4	22.84	60.69	
9/29/2012	12	84.25	28.71	84.25	
				497.78	7.010985915

IN THE SUPREME COURT OF THE STATE OF NEVADA

WESTERN CAB COMPANY,

Petitioner,

vs.

EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF
NEVADA, in and for the COUNTY
OF CLARK; and THE HONORABLE
LINDA MARIE BELL, District Judge,

Respondents,

and

LAKSIRI PERERA, Individually and
on behalf of others similarly situated,

Real Party in Interest.

Case No.: _____

District Court Case No. A-14-707425-C

**PETITIONER'S APPENDIX IN SUPPORT OF PETITION FOR WRIT OF
MANDAMUS OR PROHIBITION**

VOLUME 2 OF 7

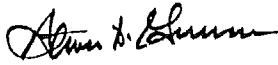
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*Attorneys for Petitioner
Western Cab Company*

<u>APPENDIX #</u>	<u>DOCUMENT DESCRIPTION</u>	<u>PAGES</u>
7	Perera's 1/26/15 Response to Defendant's Motion to Dismiss and Countermotion to Amend the Complaint and Conduct Discovery under NRCP Rule 56(f).....	82-158

APPENDIX 7

APPENDIX 7



CLERK OF THE COURT

1 **OPPC**

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11 Attorneys for Plaintiff

12 **DISTRICT COURT**
13 **CLARK COUNTY, NEVADA**

14 LAKSIRI PERERA, Individually and on)
15 behalf of others similarly situated,)

16 Plaintiff,

17 vs.

18 WESTERN CAB COMPANY,

19 Defendant.

Case No.: A-14-707425-C

Dept.: XIV

PLAINTIFF'S RESPONSE TO
DEFENDANT'S MOTION TO
DISMISS AND COUNTER-
MOTION TO AMEND THE
COMPLAINT AND CONDUCT
DISCOVERY UNDER NRCP
RULE 56(f).

20 Plaintiff, by and through their attorney, Leon Greenberg Professional
21 Corporation, submits this memorandum of points and authorities in response to
22 defendant's motion to dismiss and in support of plaintiff's counter-motion to amend
23 the complaint and to conduct discovery under NRCP Rule 56(f).

24 **MEMORANDUM OF POINTS AND AUTHORITIES**

25 **SUMMARY OF RESPONSE**

26 Defendant's motion must be denied for the following reasons:

27 • The Supreme Court's decision in *Thomas v. Nevada Yellow Cab* is not
28 limited to "future conduct" taking place after its publication on June 26, 2014. Such
a "future conduct only" ruling is contrary to fundamental judicial principles and if
the Supreme Court was to take such a revolutionary approach to the law it would
expressly state so and not make such a remarkable holding in the *sub silentio* fashion
that defendant claims. As discussed, *infra*, defendant's argument on this point,

1 based upon such Opinion's partial use of the "active" voice and present tense verb
2 form instead of an exclusively "passive" voice and past tense verb form, is contrary
3 to basic principles of law and is not even logically consistent.

4 • The applicable statute of limitations for a claim arising under Nevada's
5 Constitution is four years, not two years. The decision in *Williams v. Claim Jumper*
6 *Acquisition* ignores the constitutional nature of a claim under Article 15, Section 16,
7 of the Nevada Constitution and improperly converts such claim into a statutory
8 claim under NRS 608.250. Defendant also fails to advise the Court that the Nevada
9 Supreme Court has directed the defendant in *Williams* to answer a writ petition
10 seeking to overturn such decision. Ex. "A." It should be presumed that the Nevada
11 Supreme Court must have substantial concerns over the correctness of the *Williams*
12 decision to take the extraordinary step of directing an answer to that writ petition.

13 • Defendant's assertion that the named plaintiff Laksiri Perera does not
14 possess a claim under Article 15, Section 16, of the Nevada Constitution is false.
15 Defendant misleads the Court by claiming that such plaintiff received "qualifying
16 health insurance" and was only entitled to a \$7.25 an hour wage. Defendant did not
17 provide qualifying health insurance to the named plaintiff, as such insurance must
18 meet certain family member coverage requirements, the defendant's insurance did
19 not meet those requirements (a fact defendant intentionally ignores in their moving
20 papers). Accordingly, the named plaintiff was entitled to a minimum hourly wage of
21 \$8.25 an hour and defendant's own accounting demonstrates he was not paid that
22 wage. In addition, as documented in the declaration of Laksiri Perera, the
23 defendant's payroll records are fraudulent, in that the defendant required him to pay,
24 from his own funds, for the gas consumed by defendant's taxi cab, which
25 significantly reduced the wages defendant paid to him below the amounts shown on
26 those records. Ex. "B."

27 • No determination of whether to deny, or grant, class certification,
28 whether for injunctive or equitable relief (a NRCP Rule 23(b)(1) or (b)(2) class) or

1 for damages (a NRCP Rule 23(b)(3) class) can be made without an appropriate
2 record on the circumstances of the class. There is zero information before the Court
3 at this time on whether the class members possess any common circumstances that
4 sufficiently predominate to warrant such certification. As discussed, *infra*,
5 defendant's own payroll records demonstrate that the named plaintiff is owed unpaid
6 minimum wages. If those payroll records show similar minimum wage payment
7 deficiencies for a large number of defendant's other taxi drivers not only would a
8 class certification on such claims be proper, such claims would be subject to
9 summary judgment against defendant.

10 SUMMARY OF COUNTER-MOTION

11 Plaintiff's counter-motion seeks:

12 • To file and serve a Second Amended Complaint incorporating a new
13 paragraph 16 seeking additional relief for the damage cause by the defendant forcing
14 the plaintiff and their other taxi drivers to pay for taxi cab fuel from their own funds.
15 Such requirement resulted in them being paid less than the minimum hourly wage
16 required by Article 15, Section 16, of the Nevada Constitution and an increased, and
17 false, tax liability for such persons based upon defendant's false reporting of their
18 income.

19 • To conduct discovery under NRCP Rule 56(f) on whether the statute
20 of limitations applicable to the claims made in this case should be equitably tolled,
21 as defendant intends its motion to be for partial summary judgment in respect to the
22 statute of limitations that such applies in this case. Such tolling should be imposed
23 upon defendants because they violated their obligation, under Article 15, Section 16,
24 of the Nevada Constitution, to notify the plaintiff and the class members in writing
25 of their rights to the minimum wages required to be paid to them under that
26 constitutional provision.

27 • To conduct discovery under NRCP Rule 56(f) on whether class
28 certification under NRCP Rule 23 is appropriate in this case and to corroborate the

1 plaintiff's individual claim, as defendants are requesting a ruling denying any such
2 class certification prior to the assembly, through appropriate discovery, of any record
3 for the Court's consideration that bears upon those issues.

4 ARGUMENT

5 I. SUMMARY JUDGMENT CANNOT BE GRANTED AGAINST 6 THE NAMED PLAINTIFF WHO IS ESTABLISHED, BY 7 DEFENDANT'S OWN ACCOUNTING, TO POSSESS A VALID 8 MINIMUM WAGE CLAIM

9 Defendants assert that the only possible period for which the named plaintiff
10 can make a minimum wage claim is from September 23, 2012 to October 15, 2012.
11 As discussed, *infra*, that is incorrect. But even if defendant was correct on that
12 point, the defendant's own accounting, which is in their moving papers, actually
13 demonstrates that for such time period the named plaintiff has a minimum wage
14 claim and would be entitled to summary judgment, in part, on that claim. In
15 addition, plaintiff's declaration, Ex. "B," also explains defendant's payroll records
16 are false and overstate his earnings, so he is actually owed an additional amount in
17 unpaid minimum wages beyond what those records, on their face, indicate.

18 A. Defendant's accounting in their moving papers uses 19 the wrong minimum hourly wage rate as defendants did 20 not provide "qualifying" health insurance to the named 21 plaintiff and he was entitled to an \$8.25 an hour, not \$7.25 22 an hour, minimum wage.

23 Defendant states in its moving papers that the named plaintiff received
24 health insurance since February 1, 2011 and that the cost of that insurance was fully
25 paid for by the defendant. Moving papers p. 8, l. 9-11. It also states that as a result
26 it was allowed to pay the \$7.25 per hour minimum wage rate that is due employees
27 who receive "qualifying health benefits." Defendant is well aware that the insurance
28 they provided to the named plaintiff was not "qualifying health benefits" insurance
and it is unfortunate they burden the Court with such a misrepresentation.

While defendant in its moving papers can ignore what the Nevada
Constitution requires in the form of "qualifying health benefits" insurance this Court

1 cannot do so. The Nevada Constitution states:

2 Offering health benefits within the meaning of this section shall consist of
3 making health insurance available to the employee for the employee *and the*
4 *employee's dependents at a total cost to the employee for premiums of not*
5 *more than 10 percent of the employee's gross taxable income from the*
6 *employer.* Nevada Constitution, Article 15, Section 16, Subpart A
7 (emphasis provided).

8 It is not enough for the defendant to have paid for insurance, or made it available to
9 the named plaintiff for a cost not in excess of 10% of the wages defendant paid him,
10 that insurance **must have also covered his dependents.** Defendant makes no
11 mention of this requirement in its moving papers, and willfully ignore it, because it
12 did not grant such coverage to the named plaintiff's dependents and, as it well
13 knows, was required to compensate him at \$8.25, and not \$7.25, an hour.

14 As the plaintiff explains in his declaration, Ex. "B" ¶ 4, he spoke with
15 "Martha" the defendant's general manager about securing health insurance for his
16 wife and children. He was advised that such insurance was only available to him if
17 he personally paid a premium of \$460.00 a month, an amount far in excess of 10%
18 of his monthly wages. The plaintiff's assertions on this point are corroborated by
19 the COBRA statement he was provided when his employment terminated, Ex. "C,"
20 indicating it would cost the plaintiff approximately \$500.00 a month more to
21 continue his insurance coverage on a family, and not individual, basis.

22 Defendant's representation on this issue is absolutely false. The Court is
23 urged to admonish defendant and its counsel for their duplicity on this issue. The
24 declaration of Martha Sarver, the general manager of defendant who furnishes the
25 Ex. "5" declaration in defendant's moving papers discussing the plaintiff's health
26 insurance, never mentions the dependent coverage limitations of that insurance.
27 Obviously she was aware of the same, as she explained them to the plaintiff. It is
28 also inconceivable that defendant's counsel was not aware of this issue, did not
inquire with defendant about it, and did not willfully conceal this highly relevant
fact. The Court's job is difficult enough, it should not be burdened with the

1 intentional and willful concealment and misrepresentations of fact that defendant has
2 placed upon it in their moving papers.

3 **B. Defendant's accounting indicates that the plaintiff has**
4 **a minimum wage claim for \$44.63 for a 21 day work period.**

5 Defendant's accounting of the named plaintiff's hours worked and wages
6 paid indicates that for the 20 day period of September 30, 2012 through October 20,
7 2012, the plaintiff was paid less than \$8.25 an hour and is owed \$44.63 in unpaid
8 minimum wages for that time period. *See*, Ex. 5-1 of the moving papers.

9 **C. Plaintiff is also owed a significant amount of unpaid**
10 **minimum wages beyond that demonstrated by defendant's**
11 **accounting.**

12 As the named plaintiff explains in his declaration, defendant forced him to
13 pay, from his own funds, for all of the gasoline consumed by the taxi he drove for
14 the defendant. Ex. "B" ¶ 7. It is fundamental that an employer cannot comply with
15 Nevada's minimum wage requirements by paying an employee \$8.25 an hour and
16 then simultaneously requiring the employee to pay other charges as a condition of
17 their employment, be it 50 cents an hour, a \$20.00 per shift gasoline charge, or
18 anything else, that acts to reduce the employee's actual earnings below that \$8.25 an
19 hour minimum. *See*, 29 C.F.R. § 531.35 explaining that the minimum wage
20 requirements of the Federal Fair Labor Standards require the payment "free and
21 clear" to the employee of at least the federal hourly minimum wage. The employer
22 violates the minimum wage requirement if he forces an employee to purchase
23 something required for the performance of "the employer's particular work" which
24 purchase reduces the employee's true earnings below the minimum hourly rate. *Id.*
25 By way of example, for the one week period of September 23, 2012 to September
26 29, 2012, during which defendant claims the named plaintiff was paid \$8.89 per
27 hour, he was actually, after accounting for the fuel costs defendant made him pay,
28 paid \$7.01 per hour, as per the "gasoline" charges documented on his trip sheets
which are at Ex 5-1 of the moving papers. *See* Ex. "H," reconciliation.

1 **II. THE STATUTE OF LIMITATIONS APPLICABLE TO A**
2 **CLAIM ARISING UNDER NEVADA'S CONSTITUTION IS**
3 **AT LEAST FOUR YEARS AND ALSO VERY LIKELY**
4 **SUBJECT TO EQUITABLE TOLLING IN THIS CASE**

5 **A. Nevada, as does every other jurisdiction, applies its "catch all"**
6 **statute of limitations, which is four years, to a constitutional**
7 **claim that does not fall under a longer limitations period.**

8 In the event no specific statute of limitations is otherwise provided for a
9 particular claim, Nevada provides for a four year statute of limitations. *See*, NRS
10 11.220. Neither Nevada's Statutes nor its Constitution set forth any expressly
11 specified statute of limitations for civil claims arising under Nevada's Constitution.
12 The Nevada Supreme Court has conclusively determined such time limit for at least
13 one form of constitutionally based civil claim. In *White Pine Lumber Co. v. City of*
14 *Reno*, 801 P.2d 1370, 1371-72 (Nev. Sup. Ct. 1990) , the Court held that, by default,
15 a claim under the Nevada Constitution against a municipality for inverse
16 condemnation would have, absent other considerations, been subject to the four year
17 "catch all" statute of limitations provided for in NRS 11.220. It found other
18 considerations compelled it to apply the 15 year statute of limitations for inverse
19 condemnation, as constitutional claims against governmental actors should not be
20 subject to a statute of limitations shorter than that applicable to private parties (the
21 adverse possession limitations period of NRS 40.090) who commit the same
22 conduct. 801 P.2d at 1371. In the earlier case of *Alper v. Clark County*, 571 P.2d
23 810, 813 (1977), the Nevada Supreme Court recited, without dispute, the logic of
24 applying the four year NRS 11.220 statute of limitations to claims generally arising
25 under Nevada's Constitution, although it decided *Alper* on other grounds.

26 Every analogous case that plaintiffs' counsel has located has adopted a
27 jurisdiction's "catch-all" statute of limitations for constitutional claims when the
28 jurisdiction has not otherwise expressly provided a statute of limitations for such
29 claims. *See, Ho v. University of Texas*, 984 S.W.2d 672, 687 (Tex. Court of App.
30 1998) (Applying Texas "catch all" statute of limitations to claim originating directly

1 from state constitution when no other statute of limitations was expressly
2 applicable); *Linder v. Kindig*, 285 Neb. 386, 393 (Neb. Sup. Ct. 2013) (Applying
3 Nebraska “catch all” statute of limitations); *Pauk v. Board of Trustees of City*
4 *University of New York*, 1983, 119 Misc.2d 663, affirmed as modified on other
5 grounds 111 A.D.2d 17, affirmed 68 N.Y.2d 702 (N.Y. Ct. Appeals 1986) (Applying
6 New York “catch all” statute of limitations) and *Marshall v. Kleppe*, 637 F.2d 1217,
7 1223-24 (9th Cir. 1980) (Applying California’s four year “catch all” statute of
8 limitations to a constitutional claim and not California’s general three year “action
9 pursuant to a statute” statute of limitations period)¹.

10 **B. The *Williams* decision ignores the Nevada Constitution’s**
11 **language, the language of NRS 608.260, and contravenes**
the opinion of the Nevada Supreme Court in *Thomas*

12 **1. The holding in *Williams* is illogical and erroneous.**

13 In *Thomas v. Nevada Yellow Cab*, 327 P.3d 518, 522 (Nev. Sup. Ct. 2014)
14 the Nevada Supreme Court, in rejecting claims that taxi cab drivers were exempt
15 from Nevada’s constitutionally proscribed minimum wage by virtue of NRS
16 608.250(2)(e), held that:

17 In this case, the principle of constitutional supremacy prevents the
18 Nevada Legislature from creating exceptions to the rights and
privileges protected by Nevada's Constitution.

19 As *Thomas* held, whatever exception was created by Nevada’s Legislature in NRS
20 608.250 to Nevada’s statutorily imposed minimum wage could not limit the “rights
21 and privileges protected by Nevada’s Constitution.”

22 *Williams* ignores *Thomas* by extending the two year statute of limitations of
23 NRS 608.260, which by its express language only applies to claims arising under

24
25 ¹ *Marshall* dealt with a federal constitutional claim. Its continuing applicability
26 to federal constitutional claims, at least for cases brought in the federal courts, is
27 questionable in light of *Wilson v. Garcia*, 471 U.S. 261 (1985) and subsequent
28 decisions applying *Wilson*, a 42 U.S.C. § 1983 case, to direct claims under the United
States Constitution. Such subsequent precedents are irrelevant to the analysis in
Marshall in respect to claims arising under a state constitution.

1 NRS 608.250, to claims arising under Nevada's Constitution. The relevant language
2 from NRS 608.260 states it is applicable only:

3 If any employer pays any employee a lesser amount than the
4 minimum wage prescribed by regulation of the Labor Commissioner
 pursuant to the provisions of NRS 608.250..., (emphasis added).

5 The two year statute of limitations period of NRS 608.260 applies to claims that an
6 employee has been paid (1) Less than the amount of "minimum wage prescribed by
7 regulation of the Labor Commissioner" and (2) which amount has been so
8 prescribed in a regulation issued by "pursuant to the provisions of NRS 608.250."

9 *Williams* arrives at this result by holding that a *legislative* structure, NRS
10 608.260, converts, and limits, a claim under Nevada's Constitution in a claim under
11 NRS 608.250, with all of the attendant limitations the legislature has placed on such
12 claims, in direct contravention of *Thomas*:

13 Accordingly, a claim alleging that an employee has been illegally paid
14 less than the effective minimum wage rate is a claim that alleges a
15 violation of the rates established by the Labor Commissioner, not a
16 claim that alleges a violation of the rates set forth in the Minimum
17 Wage Amendment. Thus, the Plaintiffs' claim in this case, although
 styled as a violation of Article IV, Section 16, actually appears to
 allege a violation arising under NRS 608.260. Such a claim is
 governed by the two-year statutory period set forth in NRS 608.260.
 Williams, p. 10., ¶ 15.

18 This holding rests upon two clearly erroneous findings: (1) That a claim for
19 unpaid minimum wages under Nevada's Constitution "alleges a violation of the rates
20 established by the Labor Commissioner" and (2) That such a claim for a "violation
21 of the rates established by the Labor Commissioner" is within the purview of NRS
22 608.260.

23 The two year statute of limitations imposed by NRS 608.260 only applies to
24 wage rates set by the Labor Commissioner "**pursuant to the provisions of NRS**
25 **608.250.**" The wage rate (the Nevada Constitutional minimum hourly wage amount)
26 that *Williams* found was "established by the Labor Commissioner" was not so

27
28

1 “established” pursuant to NRS 608.250.² Indeed, as the *Williams* decision
2 acknowledges, the “wage rates” it finds were “established” by the Nevada Labor
3 Commissioner were so established “pursuant” to the express dictates of Nevada’s
4 Constitution and not NRS 608.250.³

5 The deviations from sound logic taken by *Williams* are manifest, as it makes
6 clear in paragraphs ¶ 11-12:

7 On its face, the Minimum Wage Amendment does not merely establish a
8 straightforward uniform minimum wage rate to be paid to every employee in
9 Nevada at all times. Rather, the Minimum Wage Amendment sets a specific
10 floor and then expressly requires the Governor (through the state Labor
11 Commissioner) to adjust the rate periodically as follows:

12 These rates of wages shall be adjusted by the amount of increases in
13 the federal minimum wage over \$5.15 per hour, or, if greater, by the
14 cumulative increase in the cost of living. The cost of living increase
15 shall be measured by the percentage increase as of December 31 in
16 any year over the level as of December 31, 2004 of the Consumer
17 Price Index (All Urban Consumers, U.S. City Average) as published
18 by the Bureau of Labor Statistics, U.S. Department of Labor or the
19 successor index or federal agency. No CPI adjustment for any
20 one-year period may be greater than 3%. The Governor or the State
21 agency designated by the Governor shall publish a bulletin by April 1
22 of each year announcing the adjusted rates, which shall take effect the
23 following July 1.

24
25 ² NRS 608.250(1) states: “Except as otherwise provided in this section, the
26 Labor Commissioner shall, in accordance with federal law, establish by regulation the
27 minimum wage which may be paid to employees in private employment within the
28 State. The Labor Commissioner shall prescribe increases in the minimum wage in
accordance with those prescribed by federal law, unless the Labor Commissioner
determines that those increases are contrary to the public interest.” It directs the Labor
Commissioner to make minimum wage determinations “in accordance with federal
law.” It does not authorize the Labor Commissioner to make minimum wage
determinations on any other basis, much less based upon Nevada’s Constitution.

29 ³ See, ¶ 12 of *Williams*, l. 11-15: “In other words, the ‘cause-in-fact’ of any such
30 claim [for minimum wages imposed by Nevada’s Constitution] is not that the
31 employee has not been paid the particular dollar amount set forth in the Minimum
32 Wage Amendment, but that he has not been paid the wage rate set forth in the periodic
33 bulletins issued by the Labor Commissioner pursuant to the Minimum Wage
34 Amendment.” (Emphasis provided).

1 Thus, the effective minimum wage rate in Nevada is not merely what is
2 stated in Article XV section 16, but rather is expressly defined as a wage rate
3 set by the Labor Commissioner based partially upon data from the U.S.
4 Department of Labor.

5 The foregoing section of *Williams* contains two remarkable, and completely
6 erroneous, conclusions that have no support in the excerpted text of Nevada's
7 Constitution: (1) That the Nevada's Constitution "requires the Governor (through the
8 state Labor Commissioner)" to "adjust" the minimum wage rate and (2) that the
9 minimum hourly wage required by the Nevada Constitution "is expressly defined as
10 a wage rate set by the Labor Commissioner."

11 Nowhere does the Nevada Constitution mention the Labor Commissioner.
12 *Williams* offers no explanation of how the minimum wage required by the Nevada
13 Constitution can be "expressly defined" as one "set" by a person (the Labor
14 Commissioner) who is never mentioned in the Constitution. Nor does the Nevada
15 Constitution direct that the Governor or the Labor Commissioner "adjust" the
16 minimum wage rate. It commands the Governor or "the State agency designated by
17 the Governor" to "publish a bulletin by April 1 of each year announcing the
18 adjusted rates."

19 The "adjusted rates" that the Governor or their designee must "publish" and
20 "announce" are specified in the Constitution. They are not "defined" or "set" by the
21 Governor, the Labor Commissioner, or any state official. *Williams'* finding that the
22 Nevada Constitution does not "establish a straightforward uniform minimum wage
23 rate" but "sets a specific floor and then expressly requires the Governor (through the
24 state Labor Commissioner) to adjust the rate periodically" is without any basis
25 whatsoever. Such holding ignores the Nevada Constitution's language and reads
26 into the Nevada Constitution non-existent text and completely absent meanings.

27 The hourly minimum wage rate established by the Nevada Constitution is,
28 contrary to *Williams* finding, completely "straightforward." It is an exact wage rate
created by referencing the Consumer Price Index and a maximum yearly increase of

1 3% and that automatically becomes effective on July 1st of every year as a matter of
2 law without any action by any state official. The Governor (either personally or
3 through his designee) is charged with the non-discretionary duty of “publishing” that
4 rate and has no control over that rate and wholly lacks any ability to “set” or change
5 that rate. If the Governor neglected his Constitutional obligation to publish such rate
6 it would still be the supreme law of Nevada and easily ascertainable by any
7 interested party or Court.

8 *Williams*’s holding is logically impossible. It determines that the minimum
9 wage “rate” set by the Labor Commissioner is “pursuant to the Minimum Wage
10 Amendment” which means it cannot be a rate set “pursuant to NRS 608.250” and
11 within the scope of NRS 608.260. Yet it inexplicably also holds that such “rate” is,
12 contrary to its own finding about its origins, within the scope of NRS 608.260.
13 *Williams* makes no attempt to reconcile these incompatible findings and such
14 findings are irreconcilable.

15 **2. *Williams* leads to the absurd result of an employee**
16 **having a longer statute of limitations to prosecute a**
17 **minimum wage retaliation or discrimination claim than**
to collect on a claim for unpaid minimum wages.

18 Nevada’s Constitution, Article 15, Section 16 (B) also provides that “[a]n
19 employer shall not discharge, reduce the compensation of or otherwise discriminate
20 against any employee for using any civil remedies to enforce this section or
21 otherwise asserting his or her rights under this section.” Such a discrimination
22 claim, under *Williams*, would have nothing to do with a “rate” of wages set by the
23 Labor Commissioner and could not be subject to NRS 608.260 and would flow
24 solely from the Nevada Constitution’s anti-discrimination protections. Such a direct
25 constitutional claim would have to be subject to Nevada’s “catch all” four year
26 statute of limitations, NRS 11.220. This would mean an employee would have a
27 longer period of time to claim they were discriminated against for seeking to collect
28 minimum wages than to actually collect those minimum wages, an absurd result that

1 makes no sense.

2 **3. *Williams* erroneously cites to federal cases**
3 **that do not actually support its conclusion.**

4 *Williams*, without discussing those decisions, erroneously observes that
5 “[t]wo federal courts have concluded that the two-year limitations period of NRS
6 608.260 applies to claims alleging a violation of the Minimum Wage Amendment,”
7 citing *Rivera v. Peri & Sons*, 735 F.3d 892 (9th Cir. 2013) and *McDonough v.*
8 *Harrah’s Las Vegas*, 2014 WL 2742874 (D. Nev. June 17, 2014). *Rivera* made no
9 such holding and refused to reach the issue of whether the two year statute of
10 limitations of 608.260 applied to such claims because plaintiffs had waived such
11 argument.⁴ Nor did *McDonagh* consider whether the four year “catch all” statute of
12 limitations of NRS 11.220 applies a Nevada Constitutional minimum wage claim.
13 Rather, without discussion, it rejected the argument that the six year written contract
14 statute of limitations of NRS 11.190(1)(b) applied to such claims and, without
15 considering the relevancy of the constitutional nature of those claims, found the two
16 year statute of limitations of NRS 608.260 to control.⁵

17
18
19
20
21 ⁴ 735 F.3d 902:

22 “Peri & Sons clearly argued to the district court that the two-year statute of
23 limitations applies to the farmworkers’ state constitutional claims. Instead of arguing in
24 favor of a four-year statute of limitations, the farmworkers merely contended that the
25 issue should not be resolved on a motion to dismiss, a contention we have already
26 rejected. The farmworkers’ failure to raise the argument below constitutes a waiver.”

27 ⁵ “While article 15, section 16 of the Nevada constitution does create a new
28 two-tiered minimum wage in the state, the section is silent on whether it changes the
two-year statute of limitations in the Nevada Revised Statutes. Therefore the court
finds that the constitutional provision was not intended to change this two-year statute
of limitations.” *McDonough*, 2014 WL 2742874, p. 4.

1 **4. The Nevada Supreme Court's decision to**
2 **direct an answer to the *Williams* mandamus**
3 **petition indicates that *Williams* cannot be**
 be viewed as good law.

4 The Nevada Supreme Court took the highly unusual step in *Williams* of
5 directing an answer to the plaintiff's writ petition. Ex. "A." Such action by the
6 Supreme Court must, at a minimum, cast doubt on the correctness of the decision in
7 *Williams* and requires this Court to be sure it independently scrutinizes the statute of
8 limitations issue.

9 **C. The statute of limitations in this case should be tolled.**

10 In addition to setting forth a very broad minimum wage requirement,
11 Nevada's Constitution also provides for a yearly adjustment to that minimum wage
12 via a bulletin to be published by April 1st of every year and further states:

13 An employer shall provide written notification of the rate adjustments
14 to each of its employees and make the necessary payroll adjustments
 by July 1 following the publication of the bulletin. Art. 15, Sec. 16
 (A).

15 Defendants never provided any such written notification of any rate
16 adjustment to the named plaintiff. See, Ex. "B", ¶ 3. The first such bulletin was
17 issued by the Nevada Labor Commissioner on April 1, 2007, effectuating an
18 increase of the Nevada Constitution's minimum hourly wage from \$5.15 or \$6.15 an
19 hour to \$5.30 or \$6.33 per hour depending on whether health benefits were provided.
20 Ex. "D."

21 Defendant's duty to the plaintiffs under Nevada's Constitution was twofold:
22 To both pay the minimum hourly wage specified by the Constitution *and* provide
23 "each" of its employees "written notification" of the yearly change in that minimum
24 hourly wage. Defendant's violation of its written notification obligation should be
25 subject to the most severe, and adverse to the defendant, consequences, in light of
26 the fact such obligation was constitutionally commanded. Obviously if defendant
27 had complied with that obligation, and so notified all of its employees, this lawsuit
28 would very likely have been initiated years earlier. Accordingly, such violation,

1 either by itself or when considered in conjunction with defendant's knowing
2 violation, as documented *infra*, of Nevada's Constitutional requirement to pay a
3 minimum hourly wage, should toll the statute of limitations in this case from July 1,
4 2007, the date it was first compelled to give such notice, until such time as it actually
5 gives that notice.

6 The Nevada Supreme Court has long recognized that, in appropriate cases,
7 an equitable toll of the statute of limitations should be imposed. In *Copeland v.*
8 *Desert Inn Hotel*, 673 P.2d 490 (Nev. Sup. Ct. 1998) the Supreme Court, after
9 cautioning that its discussion of the factors to be considered in connection with a
10 request for equitable tolling not be interpreted as "limiting or restricting the
11 application of the doctrine of equitable tolling," went on to list a number of factors
12 that were properly to be considered. 673 P.2d at 492. Significantly, *Copeland* was
13 also an employee rights claim involving a plaintiff asserting they were discriminated
14 against in violation of NRS 613.330(1), which prohibits employers from discharging
15 physically handicapped employees. 673 P.2d at 491. Among the enumerated, but
16 not exhaustive, factors *Copeland* found were properly considered when determining
17 if an equitable toll of a statute of limitations should be imposed included "any
18 deception or false assurances on the part of the employer against whom the claim is
19 made."

20 In this case the defendant affirmatively deceived the named plaintiff and the
21 class members by failing to provide them with written notification no later than July
22 1, 2007, of the minimum hourly wage rates imposed by Nevada's Constitution.
23 Such "non-advisement" violation by an employer has been found to create an
24 equitable statute of limitations toll in other employee rights cases. *See, Bonham v.*
25 *Dresser Industries, Inc.*, 569 F.2d 187, 193 (3rd Cir. 1977) (Holding, and finding
26 support for the conclusion in other authorities, that employer who fails to post
27 statutorily required notice in workplace of employee rights under Age
28 Discrimination in Employment Act, is subject to equitable statute of limitations toll,

1 at least until such time as the employee acquires actual knowledge of their legal
2 rights); *Kamens v. Summit Stainless, Inc.*, 586 F. Supp. 324, 328 (E.D.Pa 1984)
3 (Citing *Bonham* and recognizing such “notice violation” provides a basis to impose
4 equitable estoppel on the statute of limitations of a Fair Labor Standards Act
5 (“FLSA”) claim, such act also being the federal minimum wage statute); *Henchy v.*
6 *City of Absecon*, 148 F. Supp. 2d 435, 439 (Dist. N.J. 2001)(Citing *Kamens* and
7 reaching same conclusion on availability of equitable tolling of statute of limitations
8 as a result of “notice” violations by an employer) and numerous other cases reaching
9 the same conclusion.⁶

10 It should also be presumed that defendant violated Nevada’s Constitution
11 with full knowledge it was doing so. Prior to the enactment of Article 15, Section
12 16 then Attorney General, and current Governor, Brian Sandoval, issued a public

13
14 ⁶ In response to this line of authority defendant seems certain to cite other
15 authorities, which do exist, taking a much narrower view than *Bonham*, *Kamens*,
16 *Henchy* and similar cases of when an employer’s “notice violation” can result in a
17 statute of limitations toll. Presumably defendant, citing such other authorities, will
18 assert that the named plaintiff’s prior Nevada Labor Commissioner claim defeats any
19 rationale for such a toll since the named plaintiff had manifested some suspicion that
20 he had some sort of wage claim. Yet in other cases where an employee had
21 documented suspicions that their employer had violated their legal rights, and had even
22 gone to consult an attorney, an equitable statute of limitations toll was not completely
23 foreclosed. See, *Meyer v. Riegel Products Corp.* 720 F.2d 303, 308-09 (3rd Cir. 1983)
24 (So holding and discussing cases viewed as supporting that holding). Defendant will
25 likely further try to distinguish *Meyer* and similar cases as involving affirmative,
26 active, misrepresentations by an employer, rather than the sort of “notice violation” at
27 issue in this case. It is submitted such distinction is meaningless as all of the
28 authorities on this issue dealt with mere statutory “notice” directives. The specific
constitutional notice directive in this case is of such weight it should displace all of the
other considerations that defendants will raise and command a statute of limitations toll
as a matter of course for its violation. Or at least that should occur in a case such as
this involving a large commercial business that was clearly aware of the Nevada
Constitution’s requirements.

1 opinion stating that such Constitutional Amendment would abolish the pre-existing
2 minimum wage exemptions for taxi drivers set forth in NRS 608.250. Ex. "F."
3 Given this background, defendant should be deemed to have acted with full
4 knowledge of its obligation to pay minimum wages under Nevada's Constitution and
5 to have acted to intentionally violate that obligation.

6
7 **III. NO BASIS EXISTS TO GRANT DEFENDANT'S MOTION**
8 **TO DENY ANY CLASS CERTIFICATION IN THIS CASE**

9 Defendant seeks to have this Court issue an Order barring any class
10 certification of this case. It alleges such an Order would be proper for two reasons.
11 The first is that the named plaintiff, Laksiri Perera, allegedly has no actionable
12 minimum wage claim and summary judgment should be granted against him,
13 meaning, according to the defendant, that there is no current plaintiff with a claim
14 "typical" of the alleged class. The second is that this case is inherently unsuitable
15 for class certification of any kind as a matter of law given the nature of the claims
16 being made, both by the named plaintiff and on behalf of the putative class. Both of
17 these claims by defendant are specious and based upon incorrect, and demonstrably
18 false, assertions of law and fact.

19 **A. Summary judgment cannot be granted against the named**
20 **plaintiff Laksiri Perera and as a result he personally**
21 **possesses a claim that is common to the alleged class.**

22 As discussed, the named plaintiff Laksiri Perera not only personally
23 possesses a claim for unpaid minimum wages, that claim is not even controverted by
24 defendant, whose own records establish that claim. And even if the Court were to
25 ignore the "qualified health benefits" issue, which it cannot do, the named plaintiff
26 would still present a claim, based upon the disputed requirement that he pay for
27 defendant's taxi fuel costs (assuming defendant wishes to dispute such assertion),
28 which pushed his hourly level of compensation below \$8.25 an hour as well.
Defendant's assertion that Laksiri Perera cannot be an adequate class representative,

1 because he possesses no viable Nevada Constitutional minimum wage claim, is
2 baseless.

3 **B. Defendant's claim that this Court can conclude, on this**
4 **record, that no common questions of law or fact**
5 **predominate over individual questions is baseless.**

6 None of the three authorities cited by defendant, *Wal-Mart Stores v. Dukes*,
7 131 S.Ct. 2541 (2011), *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 937,
8 948 (9th Cir. 2009) or *Shuette v. Beazer Homes Holdings Corp.*, 124 P.3d 530 (Sup.
9 Ct. Nev. 2005) support defendant's claim that this Court even can, on the current
10 record, properly issue an order barring any class certification of this case. Such
11 decisions simply confirm longstanding, and bedrock, principles of class action law
12 that in no way implicate the availability, or lack of availability, of class certification
13 in this case.

14 **1. The authorities relied upon by defendant involved**
15 **commonality findings made upon a full record and**
16 **after discovery, no such record exists in this case and**
17 **no discovery has been conducted.**

18 *Wal-Mart*, *Vinole* and *Shuette* all involved appellate court reviews of the
19 granting, or denial, of class certification, such reviews being conducted upon the
20 extensive factual record developed in the trial court through discovery (and in
21 *Shuette* after a trial on the merits). Defendant would have this Court simply apply
22 the *results* of those decisions, all denying class certification, in this case without any
23 actual factual *record* before it. Nowhere does defendant explain how the facts in
24 this case are similar to those in *Wal-Mart*, *Vinole* and *Shuette*. Defendant fails to do
25 so because it is well aware this case shares no factual similarities whatsoever with
26 such cases. Instead, defendant just insists that the Court accept its contention that it
27 is factually impossible for a class of taxicab drivers with a common claim,
28 appropriately subject to class certification, to exist in this case:

Furthermore, he [named plaintiff Laksiri Perera] cannot show the

1 existence of a class of taxicab drivers at Western Cab who have not
2 been paid the minimum wage. Western Cab's taxicab drivers work
3 different hours and earn different amounts of wages. None earn the
4 same hourly wage. Exhibit 5. Therefore, Perera cannot show that he
5 would be an adequate class representative. Moving brief, p. 10, l. 11-
6 16.

7 Pursuant to NRCP 23(b), Perera must show that common questions
8 of law or fact predominate over individual questions. Perera cannot
9 satisfy the commonality issue. Each of the taxicab drivers were
10 employed for different periods of time, worked different hours and
11 earned a different hourly wage. Moving brief, p. 11, l. 4-8.

12 While the Exhibit 5 declaration of defendant's general manager asserts all of
13 defendant's taxi cab drivers earn different hourly wages, owing to the variations in
14 the commissions they are paid, no explanation is offered by defendant as to the
15 significance of that fact. That is because such fact, by itself, has no significance
16 whatsoever.

17 The circumstances relevant to class certification in this case, succinctly
18 stated are:

- 19 • Numerosity: Does there exist a sufficiently large group of
20 defendant's employees who appear they may have claims for
21 minimum wages under Nevada's Constitution? If the answer is yes,
22 the next inquiry is:
- 23 • Commonality: Do the reasons for those numerous claims appear to
24 involve common issues among the alleged class members? If the
25 answer is yes, the next, and highly related inquiry, is:
- 26 • Predominance: Do those common issues among the class members
27 predominate over individual questions that would have to be resolved,
28 individually, for each member of the alleged class, thus rendering a
class proceeding the "superior" means of adjudicating such claims?

There is no basis for this Court, without any record before it, to grant
defendant's motion. That defendant's taxi drivers may have been paid different
hourly rates is irrelevant if a sufficiently numerous number of those drivers were

1 paid less than the hourly minimum wage. That such drivers' who are owed unpaid
2 minimum wages may have been paid different hourly rates, and worked different
3 hours for different chronological periods, only bears upon the *measure of their*
4 *damages* and cannot defeat class certification for liability purposes. "Our court long
5 ago observed that 'the amount of damages is invariably an individual question and
6 does not defeat class action treatment.'" *Yokoyama v. Midland National Life*
7 *Insurance Co.*, 594 F. 3d 1087, 1089 (9th Cir. 2010) citing *Blackie v. Barrack*, 524
8 F.2d 891, 905 (9th Cir. 1975); *See, also, Mattson v. Montana Power Co.*, 291 P.3d
9 1209, 1221 (Sup. Ct. Mont. 2012), citing *Yokoyama* and stating "[I]t has been
10 commonly recognized that the necessity for calculation of damages on an individual
11 basis should not preclude class determination when the common issues which
12 determine liability predominate.' " citing and quoting *McDonald v. Washington*, 261
13 Mont. 862 P.2d 1150, 1157 (1993)(Sup. Ct. Mont. 1993) citing and quoting
14 *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 456 (3d Cir.1977).

15 There is no record before this Court upon which it can make an informed
16 decision on the numerosity, commonality or predominance standards. At this stage
17 of these proceedings, prior to discovery, a motion to dismiss a class action claim is
18 almost always denied as a matter of course until discovery is conducted. *See, In re*
19 *Wal-Mart Stores, Inc., Wage and Hour Litigation*, 505 F.Supp.2d 609, 615 (N.D.
20 Cal. 2007) (Observing that while it is possible to dismiss a class claim at the
21 pleading stage, prior to discovery, and "...while there is little authority on this issue
22 within the Ninth Circuit, decisions from courts in other jurisdictions have made clear
23 that "dismissal of class allegations at the pleading stage should be done rarely and
24 that the better course is to deny such a motion because 'the shape and form of a class
25 action evolves only through the process of discovery.'" citing and quoting various
26 decisions). The only potentially proper basis upon which to grant such a motion is
27 the very rigorous Rule 12(b)(6) motion to dismiss standard, based upon the
28 deficiencies in the *complaint itself*, e.g., the complaint's allegations, assumed to be

1 true, would not allow a class to be certified. *See, Picus v. Wal-Mart Stores, Inc.*, 256
2 F.R.D. 651, 655 (D. Nev. 2009) citing *Blihovde v. St. Croix County, Wis.*, 219
3 F.R.D. 607, 614 (W.D.Wis.2003). *Picus* ultimately granted a Rule 12(b)(6) motion
4 to deny class certification because for liability to be found in favor of any individual
5 class member under the complaint's allegations would require proof of reliance upon
6 defendant's "Made in the USA" label in respect each such person's decision to
7 purchase the product at issue. 256 F.R.D. at 659. This need to individually
8 determine the reliance of each class member, to find liability, rendered class
9 certification clearly not a "superior" means of adjudication. *Id.*

10 Defendant simply insists, without explanation, that the existence of separate
11 pay rates, hours, and chronological work histories, precludes class certification. It
12 points to no actual deficiencies with the complaint's allegations, much less does it
13 establish as a matter of law, as in *Picus*, how those allegations would, even if true,
14 make this case unsuitable for class certification. It fails to make that showing
15 because it cannot and this Court needs to allow for discovery to be conducted so it
16 can appropriately determine whether class certification, should, or should not, be
17 granted, and the extent of any such class certification.

18 **2. The limited information available to the Court indicates**
19 **that there is an overwhelming probability that it would**
be an abuse of discretion to deny class certification.

20 As discussed, it is not appropriate for the Court to ponder the merits of class
21 certification at this time, such an examination must await discovery and an
22 appropriate record. But if was to review the limited record before it, it would have
23 to conclude that it is overwhelmingly likely such class certification, as requested by
24 the plaintiff, could not be denied.

25 The claims in this case are all of a strict liability nature. If defendant did not
26 pay the minimum wages to any particular taxi driver employee it owes those
27 minimum wages, as established by the Supreme Court in *Thomas*. No proof of state
28 of mind, due care, negligence, or any similar elements are involved in this case. To

1 the extent the records of defendant exist for all class members, as they have
2 produced for the named plaintiff in their motion, those records will establish both
3 defendant's liability to any particular class member and that class member's
4 damages. Most significantly, a prior investigation by the United States Department
5 of Labor determined in December of 2011 that the defendant owed 431 taxi driver
6 employees over \$285,000 in unpaid minimum wages under the federal Fair Labor
7 Standards Act (the "FLSA"). Ex. "E." The amount owed to those drivers under the
8 FLSA is *less* than that owed under the Nevada Constitution because the FLSA
9 provides for a lower (\$7.25 an hour) minimum wage for all workers and also allows
10 for the payment of a reduced minimum wage, as low as \$2.31 an hour, for
11 employees who receive tips. Accordingly, the findings of the United States
12 Department of Labor virtually ensure that a class claim under Nevada's Constitution
13 must be certified in this case.

14 **C. Class certification for injunctive relief is sought and is**
15 **appropriately granted even if a damages class is not**
16 **appropriately certified.**

17 The Court is also advised to take note that plaintiff seeks both class wide
18 damages and declaratory and injunctive relief. Part of that injunctive relief would be
19 to require defendant to comply with the Nevada Constitution and correct the false
20 income information it has filed with the Internal Revenue Service overstating the
21 class members' income, as discussed, *infra*. If for some reason the Court were to
22 find that a class is not properly certified on damages issues, it would still be
23 appropriate to certify a class for declaratory and injunctive relief, *e.g.*, to determine
24 that defendant, by forcing its taxi drivers to pay for defendant's taxis's fuel, is liable
25 to those drivers for the amount, if any and as may be determined in separate,
26 individual, proceedings, that their pay was reduced below the minimum hourly
27 wage.
28

1 IV. DEFENDANT’S CLAIM THAT THE *THOMAS* DECISION
2 HAS NO BEARING ON CONDUCT TAKING PLACE PRIOR
3 TO ITS PUBLICATION ON JUNE 26, 2014 IS FRIVOLOUS

4 Defendant misrepresents the bedrock principles of law under which this
5 Court operates and argues for a wholly frivolous, and absurd, “future conduct only”
6 application of the *Thomas* decision.

7 A. Defendant proceeds from the wholly specious claim that
8 *Thomas* announced a “new constitutional principle.”

9 “The general rule that judicial decisions are given retroactive effect is basic
10 in our legal tradition.” *See, Newman v. Emerson Radio Corp.*, 48 Cal. 3d 973, 978
11 (Cal. Sup. Ct. 1989), citing *Linkletter v. Walker*, 381 U.S. 618, 622 (1965) (“At
12 common law there was no authority for the proposition that judicial decisions made
13 law only for the future”, citing 1 Blackstone, Commentaries 69 (15th ed. 1809)).

14 Defendant seeks to apply a grossly corrupted version of the “prospective
15 application” of certain decisions, such as in *Linkletter*, involving new *judicially*
16 *created rights* or that *overrule prior judicial precedents*. In *Linkletter*, the United
17 States Supreme Court declined to grant retroactive force to its decision in *Mapp v.*
18 *Ohio*, 367 U.S. 643 (1961), which overruled prior Supreme Court precedents on the
19 application of the Fourth Amendment’s exclusionary rule to state criminal
20 prosecutions. 381 U.S. at 637-38. Such a retroactive application would have
21 invalidated countless convictions that were completely valid under prior United
22 States Supreme Court precedents and created an untenable situation.

23 The legal duty at issue here did not involve, as in *Linkletter* and all of the
24 “future conduct only” decisions that defendant relies upon, a new and otherwise
25 unknowable “constitutional principle” *e.g.*, new “judicially created” law that
26 overturns prior precedents or announces new, and previously unknown and
27 unknowable, legal rights. Defendant was well aware of the duty imposed upon it
28 and all other employers under the express language of Article 15, Section 16, of the
Nevada Constitution. The Nevada Attorney General’s opinion, 05-04 Op. Atty Gen.

1 (2005), issued before November 28, 2006, put the defendant on notice of that duty,
2 which was confirmed in *Thomas*. Nor does, or can, defendant argue such
3 constitutional amendment's language, read in isolation, fails to confer the rights
4 claimed by the plaintiff. Rather it decided to rely upon *another law*, the previously
5 enacted statute NRS 608.250, which it believed trumped the rights claimed by the
6 plaintiff under the constitutional amendment.

7 Defendant could have sought a class action declaratory ruling of its
8 responsibilities, and paid into escrow, under judicial supervision, all minimum wage
9 amounts it disputed. Instead it declined to do so and elected to take its chances that
10 its "coordinated" reading of the Nevada Constitution and NRS 608.250 was correct.
11 It suffers no prejudice from the result in *Thomas*, it is merely being forced to pay the
12 liability it was well aware of and chose to ignore.

13 **B. Defendant cites irrelevant cases on whether to impose a new**
14 **statute to events occurring prior to its effective date, a**
"retroactive application of law" issue not presented by this case.

15 Defendant misleads the court by citing cases dealing with "retroactive
16 application of law" situations involving conduct taking place prior to the effective
17 date of a statute. *See, County of Clark v. Roosevelt Title Insurance*, 396 P.2d 844,
18 846 (Nev. Sup. Ct. 1964) (Statute could not revive right to redeem land taken by
19 county for tax lien when that right had expired *prior* to the statute's enactment) and
20 *Pressler v. City of Reno*, 50 P.3d 1096, 1099 (Nev. Sup. Ct. 2002) (Statute changing
21 municipal employee's status to "at will" cannot be applied to conduct taking place
22 prior to its effective date). This principal of law, which is completely irrelevant to
23 this case, is summed up in *Pub. Emps.' Benefits Program v. Las Vegas Metro.*
24 *Police Dep't (PEBP)*, 179 P.3d 542, 553–54 (Nev. Sup. Ct. 2008): "A statute has
25 retroactive effect when it takes away or impairs vested rights acquired under existing
26 laws, or creates a new obligation, imposes a new duty, or attaches a new disability,
27 *in respect to transactions or considerations already past.*"

28 No "retroactive application of law" issue is presented in this case.

1 Amendments to Nevada's Constitution become "effective upon the canvass of the
2 votes by the supreme court." *Tovinen v. Rollins*, 560 P.2d 915, 916-917 (Nev. Sup.
3 Ct. 1977). Article 15, Section 16, of the Nevada Constitution, creating new
4 minimum wage rights for Nevada's employees, was enacted by the voters in the
5 2006 general election and became effective on November 28, 2006. *See*, N.R.S. §
6 293.395(2). This case only concerns conduct taking place *after* November 28, 2006.

7 **C. The Nevada Supreme Court does not announce "future conduct**
8 **only" rulings in the *sub silentio* fashion alleged by defendant.**

9 The idea *Thomas* only applies to future conduct, because it speaks in certain
10 places in the present tense and active voice verbs "supercedes" and "supplants" and
11 not the past tense and passive voice verb forms of "superceded" and "supplanted" is
12 absurd. Defendant cites no other opinion, in the entire universe of common law
13 jurisprudence, where such an outcome has been divined from a judicial opinion that
14 is otherwise completely silent on its "future conduct only" ruling.

15 Such argument by defendant is not only absurd in respect to the law, it is not
16 logically consistent, either in respect to the internal language of the *Thomas* opinion
17 or the style, grammar, and holdings of the Nevada Supreme Court's other decisions.
18 *Thomas*, 327 P.3d at 521, when explaining its reasoning, states that a "...statute *is*
19 *deemed to have been impliedly repealed* by the [constitutiona] amendment"
20 (emphasis provided), the sort of past tense, passive voice, language that defendant
21 insists would have a current, and not just "future conduct only" effect.

22 The interchangeable use of passive/active voice past/present tense verb
23 forms in *Thomas* ignored by defendants appears repeatedly in the Nevada Supreme
24 Court's Opinions. The present and past tense of "supercedes" and "superceded"
25 appears in *State v. Connery*, 661 P.2d 1298, 1301 (Nev. Sup. Ct. 1983) ("...we hold
26 that NRAP 4(b) supersedes NRS 177.066...") with the Nevada Supreme Court using
27 the present tense and the West reporter in the headnotes and summary using the past
28 tense. *Connery*, despite its use of the present tense "supercedes," did not make a

1 “future conduct only” ruling but applied its supersession finding to the procedural
2 rule presented and to the controversy before it, and by doing so denied defendant the
3 relief it sought. *See, also, Jacobson v. Estate of Clayton*, 119 P.3d 132, 134 (Nev.
4 Sup. Ct. 2005) using “supercedes” and “superceded,” present and past tenses, active
5 and passive verb styles, interchangeably and applying its supersession finding to the
6 controversy before it and not just to future cases (Stating in first paragraph “We
7 conclude that *Bodine* is **superseded** by the Legislature’s 1971 amendment of NRS
8 140.040...” and in last paragraph under the “Conclusion” heading “The current
9 language of NRS 140.040(3) **supersedes** this court’s decision in *Bodine*...). *See,*
10 *also, Goldman v. Clark*, 1 Nev. 607, 611 (1866) (Holding that if Nevada’s
11 Constitution, “by its own terms exempts a homestead from forced sale” it would
12 “**supercede**” contrary provisions of prior statute “[b]ut if the Constitution did not
13 take effect in regard to homesteads, until the legislature passed the required law, then
14 the old act was not **superseded** until the new one went into effect.”)

15 It is also preposterous to hold that the Nevada Supreme Court’s post Opinion
16 order in *Thomas*, rejecting plaintiffs’ pre-emptive motion to change the Opinion’s
17 verbs to their past tense forms was affirming, again *sub silentio*, such “future conduct
18 only” holding claimed by the defendant. Just like the Opinion itself, such order
19 makes no mention of such a “future conduct only” holding. Rather, the Supreme
20 Court was refusing to dignify the absurd arguments now being raised by defendant
21 in this Court with even an acknowledgment that they deserved a response. It was
22 confident it could stand by its stylistic choices of language and that this Court was
23 competent enough to know that if the Supreme Court was making such a remarkable,
24 and previously unheard of, “future conduct only” ruling, the Opinion would so state
25 expressly and unmistakably.

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28

1 C. **Even if this case was of the type where a “future conduct only”**
2 **application of the Nevada Supreme Court’s Opinion could**
3 **potentially be proper, the relevant circumstances do not justify**
4 **such a “future conduct only” application.**

5 While, as discussed in *Sierra Club v. San Joaquin Local Agency* 21 Cal 4th
6 489, 509-10 (Cal. Sup. Ct. 1999), citing and quoting *Newman*, there are “narrow
7 exceptions” to the common law rule forbidding “future conduct only” rulings, such
8 as was done in *Linkletter*, they require the demonstration that “considerations of
9 fairness and public policy [that] are so compelling in a particular case that, on
10 balance, they outweigh the considerations that underlie the basic rule.” No basis
11 exists to hold that such exceptional circumstances are present in this case. *See, Isbell*
12 *v. County of Sonoma*, 21 Cal.3d 61, 74-75 (Cal. Sup. Ct. 1978) (Finding that
13 Fourteenth Amendment’s due process protections rendered California’s statutory
14 confession of judgment procedures void given limited application; in light of the
15 massive number of judgments entered under those procedures, most or almost all of
16 which presumably did involve legitimate debts such judgments would not be vacated
17 en *mass*; but judgment debtors could seek hearings to void those judgments at which
18 the creditor would have the burden of showing compliance with the new rule of law
19 announced). The sort of “future conduct only” ruling defendants urge this Court to
20 apply to *Thomas* goes far beyond the very narrow, and exceptionally justified,
21 temporal limitations applied in *Isbell* and similar cases.

22 Nevada’s very limited use of “future conduct only” rulings, as in *Isbell* and
23 similar cases, is well illustrated by *Hansen v. Harrah’s*, 675 P.2d 394 (Nev. Sup. Ct.
24 1984). *Hansen* created, through judicial recognition of Nevada’s public policy, a
25 tort cause of action for the retaliatory discharge of an employee who files a worker’s
26 compensation claim. No such cause of action was authorized in the text of any
27 Nevada statute, the creation of such a cause of action was an exception to Nevada’s
28 well established “employment at will” law, and the creation by judicial recognition
 of such a cause of action had been rejected by some other state courts. 675 P.2d at

1 396. Nonetheless, even though the employer defendants in *Hansen* had no express
2 advance notice that such a cause of action existed as an exception to the
3 “employment at will” law of Nevada, the Nevada Supreme Court exposed the
4 defendant/employers in that case to a *current* liability for compensatory damages.
5 *Hansen* both created a new cause of action and allowed liability for that newly
6 recognized caused of action to be imposed on the defendants’ *prior* conduct, it did
7 not merely determine the defendants’ future legal obligations. The only branch of its
8 holding that was limited to “future conduct only” was for punitive damages. It did
9 so because the purpose of punitive damages is to punish and deter reprehensible
10 conduct that violates the law, a purpose that would not be advance in *Hansen* since
11 the defendants had no way to know their conduct was illegal. 675 P.2d at 397.

12 Unlike the defendants in *Hansen*, defendant in this case had every reason to
13 believe their conduct was in violation of the plain language of Article 15, Section 16,
14 of Nevada’s Constitution, as ultimately found by the Supreme Court in *Thomas*.
15 Such a conclusion by defendant was absolutely required by any isolated reading of
16 such constitutional provision and in 2005 the Nevada Attorney General publicly
17 opined that such conclusion was correct. Defendant’s assertion that the Nevada
18 Labor Commissioner somehow approved of its conduct is untrue and irrelevant
19 (indeed, that office would rely upon the Nevada Attorney General for a legal advice
20 and was the one that requested the 2005 AG Opinion). If a party, as in *Hansen*, can
21 be liable for damages as a result of their conduct occurring *prior* to the Nevada
22 Supreme Court’s creation of a new cause action, one not set forth expressly in any
23 written law, defendant in this case must be liable for their conduct occurring prior to
24 June 26, 2014, which conduct was indisputably in violation of any “isolated” reading
25 of Article 15, Section 16, of Nevada’s Constitution.⁷

27 ⁷ Plaintiffs do not concede that, as in *Hansen*, defendants should be excused
28 from liability for punitive damages in this case. That issue should be addressed by the

1 **IN SUPPORT OF THE COUNTER MOTION**

2 **I. THE COUNTER MOTION TO AMEND THE**
3 **COMPLAINT SHOULD BE GRANTED**

4 At Ex. "G" is a proposed second amended complaint. The purpose of this
5 amended pleading is to seek relief in respect to defendant's policy of requiring class
6 members to pay for defendant's taxi cabs' fuel and by doing so reduce their
7 compensation below the hourly minimum wage. This is alleged in a new paragraph
8 16 and new injunctive relief request, in the form of a correct IRS income statements
9 prepared by the defendant, is sought. Such amendment should be granted at this
10 pre-answer stage of this litigation, as per NRCP Rule 15.

11 **II. THE COUNTER MOTION FOR DISCOVERY UNDER**
12 **NRCP RULE 56(F) SHOULD BE GRANTED**

13 **A. Defendant alleges the named plaintiff has no actual claim and**
14 **no common circumstances exist meriting class certification,**
15 **plaintiff should be allowed to conduct discovery on those issues.**

16 As already discussed, it is fundamental that the plaintiff should be granted
17 leave to conduct discovery on the class issue and on the nature of his individual
18 claim. Plaintiff's request for formal leave to conduct such discovery under FRCP
19 Rule 56(f) in response to defendant's summary judgment motion should be granted.
20 Such discovery would seek information such as but not limited to full payroll and
21 time worked records, employee health insurance benefit qualification policies,
22 names and addresses of class members/witnesses and deposition testimony from
23 defendant on their relevant practices and policies.

24 **B. Discovery should be allowed on the**
25 **statute of limitations tolling issue.**

26 As discussed, *supra*, if the Court is unable to grant the plaintiffs' request for
27 an equitable toll of the statute of limitations upon the current record it needs, under
28 *Copeland*, to conduct an evidentiary hearing on such request. Plaintiff has been
afforded no opportunity to conduct discovery in this case on that issue or any other

Court at a future date if the parties are unable to resolve this litigation cooperatively.

1 issue. Accordingly, under such circumstances, plaintiffs need an opportunity to
2 conduct discovery relevant to the equitable tolling issue. Such discovery would
3 include ascertaining the extent of defendant's knowledge of its obligations under the
4 Nevada Constitution and why it failed to comply with those obligations and notify
5 the named plaintiff and the class members of their minimum wage rights, as required
6 by the Nevada Constitution.

7 **CONCLUSION**

8 Wherefore, for all the foregoing reasons, the defendant's motion should be
9 denied in its entirety and plaintiff's counter-motion granted in its entirety.

10 Dated: January 26, 2015

11 Respectfully submitted,

12 /s/ Leon Greenberg
13 Leon Greenberg, Esq. (Bar # 8094)
14 A Professional Corporation
15 2965 S. Jones Blvd., Suite E-3
16 Las Vegas, Nevada 89146
17 (702) 383-6085
18 Attorney for Plaintiffs
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

The undersigned certifies that on January 26, 2015, she served the within:

**Plaintiff's Response to Defendant's
Motion to Dismiss and Counter-motion to
Amend the Complaint and Conduct
Discovery under NRCP Rule 56(f).**

by court electronic service:

TO:
Malani Kotchka
HEJMANOWSKI & MCCREA LLC
520 S. 4th St., Suite 320
Las Vegas, NV 89101

/s/ Dana Sniegocki
Dana Sniegocki

EXHIBIT "A"

IN THE SUPREME COURT OF THE STATE OF NEVADA

LISA WILLIAMS, AN INDIVIDUAL;
AMBER KLINE, AN INDIVIDUAL;
LAWRENCE PARSONS, AN
INDIVIDUAL; HANNAH SAFFORD, AN
INDIVIDUAL; AND DYLAN LEACH,
AN INDIVIDUAL, ALL ON BEHALF OF
THEMSELVES AND ALL SIMILARLY-
SITUATED INDIVIDUALS,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK; AND THE HONORABLE
JEROME T. TAO, DISTRICT JUDGE,

Respondents,

and

CLAIM JUMPER ACQUISITION
COMPANY, LLC, A NEVADA LIMITED
LIABILITY COMPANY,
Real Party in Interest.

No. 66629

FILED

NOV 10 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *R. Malone*
DEPUTY CLERK

ORDER DIRECTING ANSWER

This original petition for a writ of mandamus or prohibition challenges a district court order that establishes the relevant limitations period in a labor law matter.

Having reviewed the petition, it appears that an answer may assist this court in resolving this matter. Therefore, real party in interest, on behalf of respondents, shall have 30 days from the date of this order within which to file and serve an answer, including authorities, against issuance of the requested writ. That answer should address the adequacy of the available legal remedies, the relevancy of the question raised to other pending cases and the interest of judicial economy, the advisory

EXHIBIT "B"

1 **DECL**

2 LEON GREENBERG, ESQ., NSB 8094
3 DANA SNIEGOCKI, ESQ., NSB 11715
Leon Greenberg Professional Corporation
2965 South Jones Blvd- Suite E4
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6 Attorneys for Plaintiff
7
8

9 **DISTRICT COURT**
10 **CLARK COUNTY, NEVADA**

11 LAKSIRI PERERA, Individually and on)
behalf of others similarly situated,)

12 Plaintiff,

13 vs.

14 WESTERN CAB COMPANY,

15 Defendant.
16

Case No.: A-14-707425-C

Dept.: V

**DECLARATION OF LAKSIRI
PERERA**

17
18
19 Laksiri Perera hereby affirms and declares under penalty of perjury the
20 following:

21 1. I am the named plaintiff in this lawsuit seeking unpaid minimum wages from
22 the defendant.

23 2. I was employed by defendant, Western Cab Company, as a taxi cab driver
24 from January 2010 until October 2012.

25 3. Taxicab drivers did not receive an "hourly wage" from defendant at any time
26 during the years I was employed. My method of compensation as a taxicab driver for
27 defendant consisted of a 50% "split" of the fares I collected each day. Often, that 50%
28 commission split would result in my receiving less than the required minimum wage of

1 \$8.25 per hour for each hour I worked. During my entire period of employment,
2 defendant never furnished me with any written document stating I was entitled to any
3 Nevada mandated minimum hourly wage for my work for defendant. Nor did
4 defendant ever orally advise me that I was entitled to any Nevada mandated minimum
5 hourly wage.

6 4. Defendant offered its taxicab driver employees health benefits, but such
7 health benefits were not "qualified" health benefits under the Nevada Constitution.
8 Defendant required drivers to wait a minimum of one year after they became employed
9 to become eligible to receive health insurance benefits. After one year, defendant
10 would provide such health insurance benefits for free to its taxi drivers. However,
11 defendant did not extend such free coverage to the family members of its taxi drivers.
12 I know this is true because after I became eligible for health insurance coverage after
13 one year of employment, I inquired with defendant's general manager, Martha, about
14 obtaining coverage for myself and my wife and children. Martha told me that while
15 the health coverage for myself was free, if I wanted to also include my wife and two
16 children in my plan, I would have to pay \$460.00 per month. Because I could not
17 afford such a great expense each month, I was forced to forego obtaining health
18 insurance coverage for my family.

19 5. Myself and all of defendant's taxicab drivers were required to work a 12
20 shift. I typically worked six (6) days per week every week. Although each shift was
21 scheduled for 12 hours, often my shifts exceeded 12 hours in length. This was because
22 at the end of the shift when drivers were required to report back to defendant's
23 premises, it could often take 15 minutes or more to return our taxicabs, as defendant's
24 procedure required the drivers to line their cabs up inside defendant's yard, and a
25 mechanic would check each individual taxicab to see whether our gasoline tanks were
26 full. If a taxicab was found to not have a full tank of gasoline, the mechanic would fill
27 the tank to capacity using defendant's gasoline. At that point, the next taxicab in line
28 would be checked by the mechanic.

IN THE SUPREME COURT OF THE STATE OF NEVADA

WESTERN CAB COMPANY,

Petitioner,

vs.

EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF
NEVADA, in and for the COUNTY
OF CLARK; and THE HONORABLE
LINDA MARIE BELL, District Judge,

Respondents,

and

LAKSIRI PERERA, Individually and
on behalf of others similarly situated,

Real Party in Interest.

Electronically Filed
Sep 11 2015 08:43 a.m.
Case No.: _____ Tracie K. Lindeman
Clerk of Supreme Court
District Court Case No. A-14-707425-C

**PETITIONER'S APPENDIX IN SUPPORT OF PETITION FOR WRIT OF
MANDAMUS OR PROHIBITION**

VOLUME 1 OF 7

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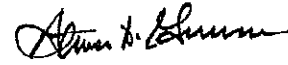
*Attorneys for Petitioner
Western Cab Company*

<u>APPENDIX #</u>	<u>DOCUMENT DESCRIPTION</u>	<u>PAGES</u>
1	Eighth Judicial District Court's 6/16/15 Decision and Order	1-14
2	Eighth Judicial District Court's 8/27/15 Minute Order and 8/27/15 Recorder's Transcript of All Pending Motions	15-44
3	Perera's 9/23/14 Complaint	45-51
4	Perera's 10/20/14 First Amended Complaint.....	52-58
5	Perera's 6/16/15 Second Amended Complaint	59-66
6	Western Cab's 12/8/14 Motion to Dismiss	67-81

APPENDIX 1

APPENDIX 1

1 ORDR



2 EIGHTH JUDICIAL DISTRICT COURT CLERK OF THE COURT

3 CLARK COUNTY, NEVADA

4
5 LAKSIRI PERERA, individually and on behalf of
6 others similarly situated,

7 Plaintiff,

Case No. A-14-707425-C
Dept No. VII

8 vs.

9 WESTERN CAB COMPANY,

10 Defendant.

11
12 DECISION AND ORDER

13 This case is an individual and proposed class action brought by a taxicab driver
14 against his former employer-taxi company to recover unpaid hourly minimum wage. On
15 December 8, 2014, Defendant Western Cab Company filed a Motion to Dismiss Plaintiff
16 Laksiri Perera's First Amended Complaint for failure to state a claim upon which relief can
17 be granted. Western Cab argues that dismissal is appropriate because Thomas v. Nevada
18 Yellow Cab Corporation applies prospectively only. 130 Nev. Adv. Op. 52, 327 P.3d 518,
19 519-21 (2014), reh'g denied (Sept. 24, 2014). Mr. Perera's claims involve the time after
20 passage of the Minimum Wage Amendment but prior to Thomas. Western Cab also argues
21 that, under a two-year statute of limitations, Mr. Perera was always paid minimum wage.
22 In the alternative, Western Cab moves to preemptively decertify the class and obtain
23 summary judgment in its favor.

24 Mr. Perera filed an Opposition and Countermotion on January 26, 2015. Mr.
25 Perera's Countermotion moves to amend his Complaint, adding an additional ground for
26 relief. Mr. Perera also seeks leave to conduct Nevada Rule of Civil Procedure 56(f)

LINDA MARIE BELL
DISTRICT JUDGE
DEPARTMENT VII

1 discovery regarding the appropriateness of class certification and tolling of the statute of
2 limitations. Western Cab filed a Reply and Opposition on February 10, 2015.

3 The Court heard these motions on March 12, 2015. The Court finds taxicab drivers'
4 right to bring an action to enforce the provisions of the Minimum Wage Amendment arose
5 on November 28, 2006, when the Amendment was ratified; claims for violations of the
6 provisions of the Amendment must be brought within four years of the cause of action
7 having accrued; genuine issues of material fact regarding Mr. Perera's wages and wage rate
8 preclude summary judgment of this case; and preemptive decertification of the class would
9 be premature because discovery has not commenced. The Court therefore denies
10 Defendant Western Cab Company's Motion to Dismiss First Amended Complaint in its
11 entirety, and grants Plaintiff Laksiri Perera's Countermotion only as to his request for leave
12 to amend his complaint to add a claim related to cab drivers being required to pay for fuel
13 costs.

14 I. Discussion

15 A. Defendant's Motion to Dismiss

16 Nevada Rule of Civil Procedure 12(b)(5) authorizes dismissal of a claim if it fails to
17 state a claim upon which relief can be granted. When considering an NRCP 12(b)(5)
18 motion, a court must accept the allegations of the complaint as true, and draw all inferences
19 in favor of the non-moving party. Buzz Stew, LLC v. City of N. Las Vegas, 124 Nev. 224,
20 228, 181 P.3d 670, 672 (2008). "Dismissal is proper where the allegations are insufficient
21 to establish the elements of a claim for relief." Hampe v. Foote, 118 Nev. 405, 408, 47 P.3d
22 438, 439 (2002). "When the defense of the statute of limitations appears from the
23 complaint itself, a motion to dismiss is proper." Kellar v. Snowden, 87 Nev. 488, 491, 489
24 P.2d 90, 92 (1971).

25 The primary question presented is whether the Nevada Supreme Court's decision in
26 Thomas v. Nevada Yellow Cab Corporation applies the full force and effect of Article 15,
27 Section 16 of the Nevada Constitution (the Minimum Wage Amendment) from the date of
28 the Amendment's enactment or from the date of the Court's decision. Thomas held that the

1 Minimum Wage Amendment "revised Nevada's then-statutory minimum wage scheme"
2 and repealed the statutory minimum wage exemptions enumerated in NRS 608.250(2),
3 including the exemption for taxicab drivers. Thomas, 130 Nev. Adv. Op. 52, 327 P.3d at
4 519-21; see also NRS 608.250(2)(b). In reaching this question, the Court examines the
5 relationship between statutory minimum wage and constitutional minimum wage, the
6 effect of Thomas, and the claims limitation period applicable to this case.

7 **1. Minimum Wage in Nevada**

8 Prior to enactment of the Minimum Wage Amendment, minimum wage in Nevada
9 was purely a creature of statutory authority and administrative regulation; born from
10 Chapter 608 of the Nevada Revised Statutes, minimum wage was set and regulated within
11 the Nevada Administrative Code. See NRS §§ 608.250-.290; see also Nev. Admin. Code §§
12 608.050-.160. Chapter 608 vested the power to establish the minimum wage in the Labor
13 Commissioner, who was required to prescribe the minimum wage by administrative
14 regulation. See NRS 680.250(1).

15 Chapter 608 did not offer all employees the right to receive minimum wage.
16 Specifically, NRS 608.250(2) denied the protections of minimum wage regulations to
17 certain kinds of employees. Those employees not entitled to minimum wage under Chapter
18 608 included (a) "casual babysitters;" (b) "domestic service employees who reside in the
19 household where they work;" (c) "outside salespersons whose earnings are based on
20 commissions;" (d) some agricultural workers; (e) "taxicab and limousine drivers;" and (f)
21 certain "persons with severe disabilities [that] have diminished their productive capacity."
22 NRS 608.250(2)(a)-(f).

23 The Minimum Wage Amendment was proposed by initiative petition, approved and
24 ratified by the people, and became effective on November 28, 2006. The Amendment
25 provided a new formula for setting minimum wage and extended minimum wage
26 protections to nearly all employees in the State. "The Minimum Wage Amendment
27 expressly and broadly defines employee, exempting only certain groups." Thomas, 130
28 Nev. Adv. Op. 52, 327 P.3d at 521. The only employees exempted by the Minimum Wage

1 Amendment are employees who are "under eighteen (18) years of age, employed by a
2 nonprofit organization for after school or summer employment or as a trainee for a period
3 not longer than ninety (90) days." Nev. Const. art. 15, § 16(C).

4 On June 26, 2014, the Nevada Supreme Court held that the Minimum Wage
5 Amendment "supersedes and supplants" Chapter 608's exceptions. Thomas, 130 Nev. Adv.
6 Op. 52, 327 P.3d at 522. The Court reasoned that, because the "expression of one thing is
7 the exclusion of another . . . the text [of the Amendment] necessarily implies that all
8 employees not exempted by the Amendment, including taxicab drivers, must be paid the
9 minimum wage set out in the Amendment." Id., 130 Nev. Adv. Op. 52, 327 P.3d at 521. The
10 Court ultimately held that "the legislative exception for taxicab drivers established by NRS
11 608.250(2)(e) . . . is impliedly repealed by the constitutional amendment." Id.

12 **2. Application of Thomas**

13 After Thomas, the question becomes when the cause of action for violations of the
14 Minimum Wage Amendment came into existence for taxicab drivers. If the enactment of
15 the Minimum Wage Amendment alone gave birth to the cause of action, the cause of action
16 has been available since the Amendment's effective date of November 28, 2006. On the
17 other hand, if Thomas created a new, otherwise unrecognized constitutional rule, Mr.
18 Perera's claims did not become available until June 26, 2014.

19 The inquiry begins with whether Thomas announced a new rule or merely clarified
20 the law. See Mitchell v. State, 122 Nev. 1269, 1276, 149 P.3d 33, 37-38 (2006) (vacating
21 habeas corpus petitioner's attempted murder conviction in light of the Court's decision
22 clarifying the mens rea required for aiding and abetting attempted murder).

23 There is no bright-line rule for determining whether a rule is new, but
24 there are basic guidelines to follow . . . "When a decision merely
25 interprets and clarifies an existing rule . . . and does not announce an
26 altogether new rule of law, the court's interpretation is merely a
27 restatement of existing law." Similarly, a decision is not new if "it has
28 simply applied a well-established constitutional principle to govern a
case which is closely analogous to those which have been previously
considered in the prior case law." . . . However, a rule is new, for
example, when the decision announcing it overrules precedent, "or

1 disapprove[s] a practice this Court had arguably sanctioned in prior
2 cases, or overturn[s] a longstanding practice that lower courts had
uniformly approved."

3 Id., 122 Nev. at 1276, 149 P.3d at 37-38 (quoting Colwell v. State, 118 Nev. 807, 819-20, 59
4 P.3d 463, 472 (2002)); Cf. Bridgewater v. Warden, Nevada State Prison, 109 Nev. 1159,
5 1161, 865 P.2d 1166, 1167 (1993) (holding that Court's recent decision created a new
6 "unforeseeable definition" of deadly weapon which was not of "constitutional moment," so
7 the new definition did not apply retroactively).

8 Thomas did not espouse a new constitutional principle; it squared the readily
9 apparent definition of "employee" contained in the Minimum Wage Amendment with the
10 exemption contained in NRS 608.250(2). In clarifying the Minimum Wage Amendment,
11 Thomas simply applied a well-established constitutional principle. "The principle of
12 constitutional supremacy prevents the Nevada Legislature from creating exceptions to the
13 rights and privileges protected by Nevada's Constitution." Thomas, 130 Nev. Adv. Op. 52,
14 327 P.3d at 522. "Statutes are construed to accord with constitutions, not vice versa." Id.,
15 130 Nev. Adv. Op. 52, 327 P.3d at 521 (citing Foley v. Kennedy, 110 Nev. 1295, 1300, 885
16 P.2d 583, 586 (1994)). The Nevada Supreme Court determined the broad definition of
17 employee in the Minimum Wage Amendment augmented the statutory definition: "The
18 Amendment's broad definition of employee and very specific exemptions necessarily and
19 directly conflict with the legislative exception for taxicab drivers established by NRS
20 608.250(2)(e)." Thomas, 130 Nev. Adv. Op. 52, 327 P.3d at 521. Moreover, Thomas did
21 not overrule precedent or overturn a longstanding practice that lower courts had uniformly
22 approved. Thomas merely interpreted and clarified existing law.

23 Western Cab argues that the Nevada Supreme Court intended to limit Thomas based
24 upon the Court's use of present tense language instead of, presumably, using strictly past
25 tense language. But this Court is not persuaded that the Nevada Supreme Court was
26 seeking to limit the application of Thomas by its use of present-tense language. In fact, in
27 the first sentence of the Thomas decision, the Nevada Supreme Court described "Article 15,
28 Section 16 of the Nevada Constitution, [as] a constitutional amendment that revised

1 Nevada's then-statutory minimum wage scheme." Thomas, 130 Nev. Adv. Op. 52, 327 P.3d
2 at 519 (emphasis added). The Nevada Supreme Court's use of the word "revised" in the first
3 sentence of Thomas suggests the Court had no intention of limiting the decision.

4 Furthermore, the Ninth Circuit Court of Appeals has rejected the argument that
5 Thomas applies only retroactively. See Greene v. Executive Coach & Carriage, 591 F. App'x
6 550 (9th Cir. 2015); see also CTA9 Rule 36-3 (unpublished decisions of the Ninth Circuit
7 are not precedent, but may be cited). In Executive Coach & Carriage, the Ninth Circuit held
8 "[t]he district court erred in dismissing Greene's claim under the Nevada Minimum Wage
9 Amendment . . . [b]ecause the repeal of § 608.250(2) occurred in 2006 when the
10 amendment was ratified." Executive Coach & Carriage, 591 F. App'x 550.

11 The Minimum Wage Amendment announced a new, straightforward constitutional
12 right. Thomas simply clarified that nothing in Chapter 608 diminished that right. The
13 Minimum Wage Amendment became law on November 28, 2006, and required nothing
14 more to establish the rights contained within it. Therefore, taxicab drivers' right to bring an
15 action to enforce the provisions of the Minimum Wage Amendment arose on November 28,
16 2006.

17 3. Statute of Limitations

18 The next issue the Court must address is the applicable statute of limitations. Mr.
19 Perera argues the four-year "catch all" statute of limitations of NRS 11.220 applies; Western
20 Cab argues the two-year statute of limitations of Chapter 608 applies. The Minimum Wage
21 Amendment provided taxicab drivers the constitutional right to receive minimum wage, a
22 right previously denied under the Chapter 608 statutory framework. "Our constitution can
23 be amended only after a long time and much labor. When an amendment is made it is
24 reasonable to conclude that, in the minds of the people, there is good reason for the change;
25 that it is wise to avoid a possible recurrence of evils borne in the past, or the happening of
26 those which threaten them in the future, or, it may be, both." State v. Hallock, 16 Nev. 373,
27 379 (1882). Therefore, when a taxicab driver brings a minimum wage claim, the taxicab
28

1 driver brings that claim under the provisions of the Minimum Wage Amendment, not
2 Chapter 608.

3 The Minimum Wage Amendment expressly provides a private right of action for an
4 employee claiming violation of the Minimum Wage Amendment. Specifically, the
5 Minimum Wage Amendment provides:

6 An employee claiming violation of this section may bring an action
7 against his or her employer in the courts of this State to enforce the
8 provisions of this section and shall be entitled to all remedies available
9 under the law or in equity appropriate to remedy any violation of this
10 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.

11 Nev. Const. art. 15, § 16(B) (emphasis added).

12 On the contrary, Chapter 608 provides a private right of action only for an employee
13 claiming violation of regulations promulgated under NRS 608.250:

14 If any employer pays any employee a lesser amount than the minimum
15 wage prescribed by regulation of the Labor Commissioner pursuant to
16 the provisions of NRS 608.250, the 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 amount of the minimum wage.

17 NRS 608.260 (emphasis added).

18 The distinction between minimum wage prescribed by regulation of the Labor
19 Commissioner pursuant to the provisions of NRS 608.250 and minimum wage established
20 by the Minimum Wage Amendment is the method by which the minimum wage is
21 established: Chapter 608 grants the Labor Commissioner authority to set and discretion to
22 raise the minimum wage through administrative regulation; while the Minimum Wage
23 Amendment establishes a two-tiered minimum wage floor that is automatically adjusted
24 upward without administrative discretion. See NRS 680.250(1); but cf. Nev. Const. art. 15,
25 § 16(A).

26 Under Chapter 608's statutory framework, "the Labor Commissioner shall prescribe
27 increases in the minimum wage in accordance with those prescribed by federal law, unless
28

1 the Labor Commissioner determines that those increases are contrary to the public
2 interest." NRS 608.250(1). Chapter 608 affords the Labor Commissioner discretion to
3 refuse minimum wage increases prescribed by federal law if the Labor Commissioner
4 determines such minimum wage increases are "contrary to the public interest." Id.

5 In contrast, under the Minimum Wage Amendment's formula, the minimum wage
6 floor is to be adjusted upward by "the amount of increases in the federal minimum wage
7 over \$5.15 per hour, or, if greater, by the cumulative increase in the cost of living." Nev.
8 Const. art. 15, § 16(A). Any cost of living increase is "measured by the [annual] percentage
9 increase . . . of the Consumer Price Index . . . as published by the Bureau of Labor Statistics,
10 U.S. Department of Labor or the successor index or federal agency." The only involvement
11 the State's executive branch has in establishing the minimum wage set by the Minimum
12 Wage Amendment is that "[t]he Governor or the State agency designated by the Governor
13 shall publish a bulletin . . . each year announcing the adjusted rates." Id.

14 The Minimum Wage Amendment and Chapter 608 prescribe different methods for
15 establishing the minimum wage, and so too, for privately enforcing the minimum wage.
16 Thus, an action brought to enforce an employee's right to minimum wage established by the
17 Minimum Wage Amendment is wholly different than an action brought to recover
18 minimum wage as prescribed by regulation of the Labor Commissioner pursuant to the
19 provisions of NRS 608.250. This is not a new notion; in fact, the Attorney General of
20 Nevada issued an official opinion declaring as much before the Minimum Wage
21 Amendment had been ratified. Then Attorney General Brian Sandoval opined:

22 Each competing minimum wage scheme provides a complete civil
23 court remedy for evasion of its requirements . . . As the proposed
24 amendment has completely covered the topic of a civil court remedy,
providing for even greater relief, its remedy would supplant and repeal
by implication the existing civil remedy provision at NRS 608.260.

25 2005 Nev. Op. Att'y Gen. No. 04 (Mar. 2, 2005); see also Blackjack Bonding v. City of Las
26 Vegas Municipal Court, 116 Nev. 1213, 1218, 14 P.3d 1275, 1279 (2000) ("Opinions of the
27 Attorney General are not binding legal authority or precedent").
28

1 Here, Mr. Perera was expressly prohibited from receiving minimum wage under the
2 provisions of NRS 608.250, therefore Mr. Perera was also expressly prohibited from
3 exercising the private right of action made available in NRS 608.260. So too is Mr. Perera
4 prohibited from exercise an implied private right of action under NRS 608.260. Even in
5 light of the repeal of the NRS 680.250 exceptions, an implied private right of action is not
6 available to taxicab drivers under NRS 608.260 because the legislature did not intend to
7 extend a private right of action to individuals who were expressly excluded from the
8 protections of the statute. See Allstate Ins. Co. v. Thorpe, 123 Nev. 565, 571, 170 P.3d 989,
9 993 (2007) ("We look to legislative intent when the statute does not expressly create a
10 cause of action"). Moreover, the Labor Commissioner's statutory authority to establish
11 regulations related to the enforcement of the minimum wage does not create a private right
12 of action for taxicab drivers. Though the intent displayed in regulations may determine
13 whether the regulation is privately enforceable, the language of a regulation cannot conjure
14 up a private right of action that has not been authorized by the legislature. See Alexander v.
15 Sandoval, 532 U.S. 275, 291, 121 S. Ct. 1511, 1522, 149 L. Ed. 2d 517 (2001) ("Agencies may
16 play the sorcerer's apprentice but not the sorcerer himself"). Therefore, Mr. Perera does
17 not have a private right of action under the provisions of Chapter 608.

18 The Minimum Wage Amendment provides the exclusive private right of action for
19 taxicab drivers to enforce Nevada's minimum wage law. Accordingly, the limitation on a
20 taxicab driver's right to enforce the minimum wage law is defined by the limitations on the
21 Minimum Wage Amendment itself. Although the Minimum Wage Amendment does not
22 provide a claims limitation period for an employee claiming violation of the Amendment,
23 Nevada Revised Statute section 11.220 provides that "[a]n action for relief, not hereinbefore
24 provided for, must be commenced within 4 years after the cause of action shall have
25 accrued." NRS 11.220. So without specific statutory prescription stating otherwise, claims
26 for violations of the provisions of the Minimum Wage Amendment must be brought within
27 four years of the cause of action having accrued. Therefore, Mr. Perera's action to enforce
28

1 Nevada minimum wage law pursuant to the Minimum Wage Amendment is subject to the
2 four-year claims limitation period provided under NRS 11.220.

3 **B. Defendant's Alternative Motion for Summary Judgment and to**
4 **Preemptively Decertify the Class**

5 Western Cab moves for summary judgment in its favor premised on its argument
6 that Mr. Perera was always paid over \$7.25 per hour worked, the wage rate for employees
7 receiving qualifying health insurance at the time. Western Cab further argues that Mr.
8 Perera is not a proper class representative because Mr. Perera has no individual claim and
9 issues of commonality exist.

10 **1. Plaintiff's Claims**

11 Summary judgment is appropriate "if the pleadings, depositions, answers to
12 interrogatories, and admissions on file, together with the affidavits, if any, show that there
13 is no genuine issue as to any material fact and that the moving party is entitled to a
14 judgment as a matter of law." NRCP 56(c). An issue is "genuine" if sufficient evidence
15 exists such that a reasonable fact finder could find for the non-moving party. Wood v.
16 Safeway, Inc., 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005). The underlying substantive
17 law of the cause of action controls which factual disputes are material. Id.

18 The Minimum Wage Amendment established minimum wage as a two-tiered floor;
19 employees with access to certain health insurance benefits are entitled to a lower minimum
20 wage than employees without access to such benefits. Nev. Const. art. 15, § 16(A). Only
21 certain health insurance benefits qualify under the Amendment: "health insurance [made]
22 available . . . for the employee and the employee's dependents at a total cost . . . for
23 premiums of not more than 10 percent of the employee's gross taxable income from the
24 employer." Id. During the time period covered by Mr. Perera's claims, the minimum wage
25 floor was seven dollars and twenty-five cents (\$7.25) per hour worked if the employer made
26 qualified health insurance available; otherwise, the minimum wage floor was eight dollars
27 and twenty-five cents (\$8.25) per hour worked. Regardless of the minimum wage tier,
28

1 "[t]ips or gratuities received by employees shall not be credited as being any part of or
2 offset against the wage rates required by this section." Id.

3 Here, summary judgment is inappropriate in light of the genuine issues of material
4 fact that exist. A genuine issue of material fact exists as to whether Western Cab provided
5 Mr. Perera and his dependents access to health insurance at a total cost for premiums of
6 not more than ten percent of the Mr. Perera's gross taxable income. If not, Mr. Perera
7 would have a right to the higher tier of minimum wage. Additionally, a genuine issue of
8 material fact exists as to whether Mr. Perera's earnings were overstated due to his tips or
9 expenses being accounted for incorrectly. Therefore, summary judgment shall not be
10 granted at this time, and so, Mr. Perera's individual claims survive.

11 **2. Class Certification**

12 Seeing as summary judgment is not appropriate and Mr. Perera's claims survive,
13 Western Cab has a remaining argument for preemptive decertification of the class.
14 Western Cab argues the Court should preemptively decertify the class because this case is
15 unsuitable for class certification based upon issues of commonality that exist between Mr.
16 Perera, the class representative, and other prospective members of the class.

17 Nevada Rule of Civil Procedure 23(c)(1) provides that "[a]s soon as practicable after
18 the commencement of an action brought as a class action, the court shall determine by
19 order whether it is to be so maintained."

20 [C]lass allegations may be stricken at the pleading stage, [but] the
21 granting of motions to dismiss class allegations before discovery has
22 commenced is rare. Indeed, while there is little authority on this issue
23 within the Ninth Circuit, decisions from courts in other jurisdictions
24 have made clear that "dismissal of class allegations at the pleading
stage should be done rarely and that the better course is to deny such a
motion because 'the shape and form of a class action evolves only
through the process of discovery.' "

25 In re Wal-Mart Stores, Inc. Wage & Hour Litig., 505 F. Supp. 2d 609, 615 (N.D. Cal. 2007)
26 (quoting Myers v. MedQuist, Inc., No. 05-4608, 2006 WL 3751210, *4 (D.N.J.2006) (also
27 citing Abdallah v. Coca-Cola Co., No. Civ.A. 1:98CV3679-RW, 1999 WL 527835
28 (N.D.Ga.1999) (dismissal of class allegations prior to discovery is premature); 7AA Charles

1 Alan Wright, Arthur R. Miller & Mary K. Kane, Federal Practice and Procedure Civil §
2 1785.3 (3d 2005) (the practice employed in the overwhelming majority of class actions is to
3 resolve class certification only after an appropriate period of discovery)).

4 Here, where discovery has not commenced, preemptive decertification of the class
5 would be premature. Decertification of the class should be left for the Court to consider
6 after discovery has sufficiently commenced. Therefore, Defendant Western Cab Company's
7 Motion to decertify the class is denied without prejudice.

8 **C. Plaintiff's Countermotions for Leave to Amend Complaint and Conduct**
9 **Discovery**

10 Mr. Perera seeks leave to file a Second Amended Complaint. Mr. Perera also seeks
11 leave to conduct discovery under Nevada Rule of Civil Procedure 56(f) regarding class
12 certification and tolling of the statute of limitations.

13 **1. Leave to Amend Complaint**

14 Leave to amend shall be freely given when justice so requires. NRCP 15(a). Mr.
15 Perera seeks to add a ground for relief alleging that Western Cab required Mr. Perera to pay
16 for fuel costs, causing Mr. Perera's hourly wage to drop below the minimum wage. Finding
17 no grounds to justify denial, Mr. Perera shall be freely granted leave to amend his
18 Complaint. Therefore, Mr. Perera's Countermotion is granted as to his request for leave to
19 amend his Complaint.

20 **2. Leave to Conduct NRCP 56(f) Discovery**

21 Mr. Perera further seeks to conduct discovery pursuant to NRCP 56(f). Specifically,
22 Mr. Perera seeks to conduct discovery relevant to the Western Cabs summary judgment
23 motion regarding certification of the class and whether the two-year statute of limitations
24 that Western Cab argued for should be equitably tolled.

25 Nevada Rule of Civil Procedure 56(f) provides,

26 Should it appear from the affidavits of a party opposing the motion [for summary
27 judgment] that the party cannot for reasons stated present by affidavit facts essential
28 to justify the party's opposition, the court may refuse the application for judgment or
may order a continuance to permit affidavits to be obtained or depositions to be
taken or discovery to be had or may make such other order as is just.

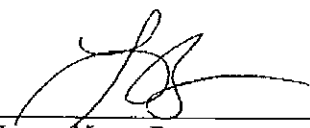
LINDA MARIE BELL
DISTRICT JUDGE
DEPARTMENT VII

1 NRCP 56(f). In light of the Court's denial of Western Cab's motion for summary judgment,
2 Mr. Perera's request to conduct NRCP 56(f) discovery is moot. Therefore, Mr. Perera's
3 Countermotion is denied.

4 **Conclusion**

5 The Court finds the Nevada Supreme Court's decision in Thomas v. Nevada Yellow
6 Cab Corp., 130 Nev. Adv. Op. 52, 327 P.3d 518, 519-21 (2014), reh'g denied (Sept. 24, 2014),
7 did not introduce a new rule of law and the Minimum Wage Amendment to the Nevada
8 Constitution became effective November 28, 2006. The Court further finds that Mr. Perera
9 brings his claims under the provisions of the Minimum Wage Amendment and, as such,
10 Mr. Perera's claims are subject to the four-year statute of limitations period provided in
11 Nevada Revised Statute section 11.220. At this point, genuine issues of fact exist regarding
12 the presence of a legitimate class. Consequently, decertification of the class prior to
13 discovery would be premature. Mr. Perera's request for NRCP 56(f) discovery is therefore
14 moot. The Court grants Mr. Perera leave to amend his Complaint. Therefore, Defendant
15 Western Cab Company's Motion to Dismiss First Amended Complaint is denied in its
16 entirety, and Plaintiff Laksiri Perera's Countermotion is granted only as to his request for
17 leave to amend his complaint.

18
19 DATED this 15th day of June, 2015.

20
21 
22 _____

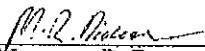
23 LINDA MARIE BELL
24 DISTRICT COURT JUDGE
25
26
27
28

LINDA MARIE BELL
DISTRICT JUDGE
DEPARTMENT VII

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 15th of June, 2015, he caused to be served the foregoing Decision and Order by faxing, mailing, or electronically serving a copy to counsel as listed below:

Name	Party	Phone	Service Method
Leon Greenberg, Esq. Dana Sniegocki, Esq.	Attorneys for Plaintiff Laksiri Perera		E-Service -or- leongreenberg@overtimelaw.com dana@overtimelaw.com
Malani Kotchka, Esq. John Moran, Jr., Esq.	Attorneys for Defendant Western Cab Co.		E-Service -or- mlk@hmlawlv.com


MICHAEL R. DICKERSON
LAW CLERK, DEPARTMENT VII

AFFIRMATION

Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Decision and Order filed in District Court case number A707425 DOES NOT contain the social security number of any person.

/s/ Linda Marie Bell Date 6/15/2015
District Court Judge

APPENDIX 2

APPENDIX 2

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REGISTER OF ACTIONS

CASE NO. A-14-707425-C

Laksiri Perera, Plaintiff(s) vs. Western Cab Company, Defendant §
 (s) §
 §
 §
 §
 §

Case Type: Other Civil Matters
 Date Filed: 09/23/2014
 Location: Department 7
 Cross-Reference Case Number: A707425

PARTY INFORMATION

Defendant	Western Cab Company	Lead Attorneys Malani L. Kotchka <i>Retained</i> 702-834-8777(W)
Plaintiff	Ahmed, Irshad	Leon Greenberg <i>Retained</i> 7023836085(W)
Plaintiff	Perera, Laksiri	Dana Sniegocki <i>Retained</i> 702-383-6085(W)

EVENTS & ORDERS OF THE COURT

08/27/2015 All Pending Motions (9:00 AM) (Judicial Officer Bell, Linda Marie)

Minutes

08/27/2015 9:00 AM

- Defendant's Motion for Reconsideration of Portion of this Court's June 16, 2015 Decision and Order... Defendant's Motion to Dismiss Second Amended Complaint... Court advised there is no basis for reconsideration; although other Judges have looked at this issue differently, it's not a basis for reconsideration and ORDERED, Motion DENIED. Arguments by Ms. Kotchka advising the second amended complaint did not comply with the 6/15/15 Decision and Order; noncompliance with the Court's order. Arguments in opposition by Ms. Sniegocki. Upon Court's inquiry, Ms. Sniegocki advised the complaint that was filed was pursuant to the Court's order. There seems to be an error on behalf of the Plaintiff's as the wrong as proposed complaints were prepared, but the wrong ones were filed. Plaintiffs agree to withdraw and have answered the arguments. Court advised until the complaint is withdrawn, parties are obligated to respond to it. Further arguments by Counsel. COURT ORDERED, this matter CONTINUED for Defendants to have time to respond to the Countermotion to Amend in the meantime a decision will be made on the 608.040. Court will prepare the Order.
 CONTINUED TO 10/8/15 9:00 AM

[Parties Present](#)

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Location : District Court Civil/Criminal [Help](#)

REGISTER OF ACTIONS

CASE NO. A-14-707425-C

Laksiri Perera, Plaintiff(s) vs. Western Cab Company, Defendant
 (s)
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Plaintiff	Perera, Laksiri	Dana Sniegocki <i>Retained</i> 702-383-6085(W)

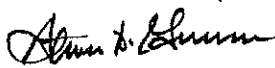
EVENTS & ORDERS OF THE COURT

08/27/2015 All Pending Motions (9:00 AM) (Judicial Officer Bell, Linda Marie)

Parties Present
 08/27/2015 9:00 AM
 Defendant
 Kotchka, Malani L. - Attorney
 Defendant
 Moran, Jr., John T. - Attorney
 Plaintiff
 Sniegocki, Dana - Attorney
 Plaintiff
 Sniegocki, Dana - Attorney

[Minutes](#)

[Return to Register of Actions](#)


CLERK OF THE COURT

1 RTRAN

2 DISTRICT COURT
3 CLARK COUNTY, NEVADA

4
5 LAKSIRI PERERA,

6 Plaintiff,

7 vs.

8 WESTERN CAB COMPANY,

9 Defendant.
10
11
12

CASE NO: A14-707425-C

DEPT. VII

13 BEFORE THE HONORABLE LINDA M. BELL, DISTRICT COURT JUDGE
14 THURSDAY, AUGUST 27, 2015

15 **RECORDER'S TRANSCRIPT OF**
16 **ALL PENDING MOTIONS**

17 APPEARANCES:
18

19 For the Plaintiff:

DANA SNIEGOCKI, ESQ.

20
21 For the Defendant:

MALANI L. KOTCHKA
JOHN MORAN, JR.

22
23
24
25 RECORDED BY: RENEE VINCENT, COURT RECORDER

1 Thursday, August 27, 2015 9:18 a.m.

2
3 THE COURT: Page 7, Perera versus Western Cab. This is a motion for
4 reconsideration and a countermotion to amend and for sanctions. All right.

5 MS. SNIEGOCKI: And, right, and then there's a separate --

6 THE COURT: Motion.

7 MS. SNIEGOCKI: -- Defense motion to dismiss the second amended
8 complaint.

9 THE COURT: Yes, there is.

10 MS. SNIEGOCKI: This is a lengthy one.

11 THE COURT: Okay.

12 MS. SNIEGOCKI: Good morning. Dana Sniegocki for the Plaintiff.

13 MS. KOTCHKA: Malani Kotchka for the Defendant Western Cab, and
14 with me I have --

15 MR. MORAN: Good morning, Your Honor. John Moran, Jr., appearing
16 with the owners of Western Cab, my wife and her two sisters. And it's a
17 pleasure to be in front of you, and I thank you.

18 THE COURT: Thank you. I'm going to start first with the motion to
19 reconsider because I don't really need argument on that. I'm going to deny
20 that. There isn't any basis for reconsideration.

21 I'm aware that other judges have looked at this issue differently.
22 They've also had some different facts in front of them. I don't think that that
23 is a basis for reconsideration, and we'll figure out what -- what the Nevada
24 Supreme Court decide, I guess, who came down on -- correctly on this one, so
25 that will be denied. Let's go ahead and go to the motion to dismiss then.

1 MS. KOTCHKA: Okay, Your Honor. We have several -- several things
2 are involved with the motion to dismiss. The first thing is that the second
3 amended complaint when it was filed, it did not comply with this Court's
4 June 16th, 2015, decision and order.

5 You held in that order, Your Honor, that Perera could amend his
6 complaint only as to his request for leave to amend --

7 THE COURT: Right.

8 MS. KOTCHKA: -- to add a claim related to cab drivers being required
9 to pay for fuel costs. Perera ignored the order and filed a second amended
10 complaint and added Irshad Ahmad as a named plaintiff.

11 THE COURT: Right.

12 MS. KOTCHKA: In addition, despite the Court's ruling on the four-year
13 statute of limitations, Perera in his second amended complaint sought a
14 judgment against the Defendant for minimum wages owed since November
15 28th, 2006, and that should be amended to since September 23rd, 2010. So
16 for those reasons the second amended complaint should be dismissed because
17 of non-compliance with the Court's order.

18 THE COURT: Right. Those are the easy ones. Let's get to the
19 complicated thing.

20 MS. KOTCHKA: Yes. Okay. Now for the more complicated things.
21 Okay. The first -- the first ground concerns the NRS 608.040 claim, and that
22 particular claim provides for a 30-day penalty if an employee isn't paid when
23 they quit or when they're terminated. This statute does not apply to the
24 Minimum Wage Amendment or the minimum wage at all. According to this
25 statute, NRS 608.012, Perera was paid the wages Western Cab agreed to pay

1 him, computed in proportion to time and the commissions owed to him at the
2 time that he quit. Therefore, under the terms of this statute, we complied.

3 THE COURT: So as I understand their argument, though, what they're
4 saying is, because he wasn't paid the minimum wage, that the check that he
5 got at the termination of his employment was not the full amount owed.

6 MS. KOTCHKA: That's his argument, but what we're saying, Your
7 Honor, is under the terms of 040, you have to look at the definition of wages
8 under 012. If you look at that definition, it does not refer to minimum wage.
9 It refers to the agreed-upon amount of wages paid in proportion to time and
10 the commissions owed. And because it doesn't have a definition that includes
11 minimum wage for saying on its face, it's not applicable.

12 But also, before an employee can file a claim for unpaid wages,
13 the employee has to make a good faith attempt to collect any wages due from
14 the employer at the normal place and in the normal method the payment is
15 made to employees of the employer pursuant to NAC 608.155(1), and we're
16 saying prayer never made such a good faith attempt.

17 But most critically, Your Honor, you lack subject matter
18 jurisdiction over the 040 claim because 608.180 provides that the labor
19 commissioner shall cause the provisions of NRS 608.005 to 608.195 inclusive
20 to be enforced. Therefore, the enforcement of NRS 608.040 is within the
21 jurisdiction of the labor commissioner and not this Court.

22 THE COURT: Not entirely, though, right? Because there's definitely
23 some indication from the Nevada Supreme Court that 608.140, there's some
24 enforceable private right of action, right?

25 MS. KOTCHKA: There -- there --

1 THE COURT: I mean, not -- I understand this is a different statute, this
2 is a different circumstance, but that isn't true all the time.

3 MS. KOTCHKA: Well, the Nevada Supreme Court has never hit the
4 issue head on. What it did was drop a footnote in the *Baldonado* case and
5 indicated that 140 indicates that there must be a private action because it
6 allows for the recovery of attorney's fees --

7 THE COURT: Right.

8 MS. KOTCHKA: -- if a demand is made five days before the wages are
9 due. However, that statute was enacted in 1925 before the other statutes
10 such as 608.040 were enacted by the legislature, and the legislature expressly
11 said this is within the purview, the 608.040 penalty, the 30-day penalty, is
12 within the enforcement mechanism of the labor commissioner.

13 Back in 1990 -- or 2009 -- I'm sorry -- we have furnished you
14 with the legislative history on SB 189, which would have provided a private
15 cause of action for any of those sections enforced by the labor commissioner.
16 It was considered by the Nevada Legislature, and it was rejected. So,
17 therefore, the legislature by not enacting it affirmed its prior interpretation of
18 608.040 and the other statutes within the enforcement of the labor
19 commissioner by saying first people have to go to the labor commissioner, give
20 them a chance to see if there's any merit to the claim and to see if they'll
21 jurisdiction over it. And that was not done in this case.

22 You will recall that Perera himself filed the claim with the labor
23 commissioner for minimum wage, but he never filed a 608.040 claim, and he
24 is outside the 24 months within the labor commissioner's jurisdiction.

25 So the federal court case as we have referred you to have done

1 a lengthy, lengthy analysis of 608.140 and recovery of the penalty under
2 608.040. They're all set out in our brief, and they come to the --

3 THE COURT: So some of this was actually my case, not Judge
4 Walsh's, so --

5 MS. KOTCHKA: Oh, was it really?

6 THE COURT: -- I'm very familiar with that case.

7 MS. KOTCHKA: Okay. Well, that case, too, is unreported, I mean,
8 and is not supposed to be --

9 THE COURT: Right.

10 MS. KOTCHKA: -- precedential, so --

11 THE COURT: It's not precedential, but I just wanted someone to know
12 that it's actually my case, so I'm grateful --

13 MS. KOTCHKA: It's reported as Judge Walsh.

14 THE COURT: No, it was mine.

15 MS. KOTCHKA: Okay. Well, anyway, the federal cases, you know,
16 go through the analysis, the lengthy history of 140 and say that that entire
17 cause of action is really contract based. It's based on trying to recover
18 attorney's fees -- or based on recovering wages that just have not been paid.
19 608.040 is a penalty statute. It says you haven't paid everything, wages and
20 compensation, then you do this 30-day penalty.

21 THE COURT: Right.

22 MS. KOTCHKA: Of course, we contend that we did pay that and that
23 minimum wage isn't included in that statute at all.

24 THE COURT: I think the footnote where they suggested that the court
25 could ignore that analysis, so it was just intended to be humorous, so --

1 MS. KOTCHKA: Okay.

2 THE COURT: Somewhat.

3 MS. KOTCHKA: Would you like to take this issue by issue and have
4 her respond to that --

5 THE COURT: No.

6 MS. KOTCHKA: -- or do you want me just to go on to the others?

7 THE COURT: Just keep going.

8 MS. KOTCHKA: Okay. The next issue, Your Honor, is the punitive
9 damages. Perera seeks punitive damages, but does not allege any cause of
10 action which does not arise from contract; therefore --

11 THE COURT: Actually, we have the next issue being the federal
12 preemption.

13 MS. KOTCHKA: Okay. Then we'll go to the federal preemption.

14 THE COURT: All right.

15 MS. KOTCHKA: All right. The term health benefits is not defined
16 under the constitutional amendment, that they are now a component of the
17 calculation of minimum wage in Nevada. The Minimum Wage Amendment
18 conflicts with ERISA and the Affordable Care Act --

19 THE COURT: All right. So my note here was be careful what you ask
20 for on this one. So if -- let's say -- because I don't think anything about the
21 Minimum Wage Amendment requires an employer to have health benefits. I
22 don't think it's -- sets out how they have to run their health benefits or
23 anything like that.

24 But if you assume that ERISA or ACA are implied here, isn't the
25 thing that would happen would be simply to strike the benefit given the

1 employer in the Minimum Wage Amendment to strike that language altogether
2 because the statute could otherwise stand?

3 MS. KOTCHKA: Okay. So you're asking me if you could just strike
4 the first tier, the 7.25 plus health benefits?

5 THE COURT: Wouldn't that be -- wouldn't that be what would be
6 natural consequence of your argument?

7 MS. KOTCHKA: No.

8 THE COURT: No.

9 MS. KOTCHKA: And the reason I say that is because they're
10 inextricably tied together. When the ballot issue went to voters, it went as a
11 joint -- as a joint issue. You get 7.25 if you provide health benefits. You can
12 pay 8.25 if you don't provide health benefits. They're actually in the same
13 sentence as the Minimum Wage Amendment, and there's no way to sever one
14 part of it without the other part of it and still meet the voters' intent in the
15 Minimum Wage Amendment.

16 THE COURT: Well, their intent was to give employers some credit for
17 providing health insurance to their employees, but if the employers are saying
18 we think there's a problem with giving us credit under federal law because it
19 says health benefits, then isn't the answer to that to just say the minimum
20 wage is 8.25?

21 MS. KOTCHKA: I don't --

22 THE COURT: I don't -- I don't know why you couldn't just strike that.

23 MS. KOTCHKA: Well, because the Nevada Supreme Court's decision
24 in *Sierra Pacific Power Company v. State* located at 338 Pacific 3rd 1244
25 where the Nevada Supreme Court concluded that the offending matter had to

1 be stricken in its entirety and could not be remedied by severance.

2 Because the Court has to consider the effect of severance on the
3 purpose of a vaguely inactive statute, the Minimum Wage Amendment is
4 meaningless without the distinction of two rates of minimum wage. The
5 distinction of wage rates based on an undefined provision of health benefits or
6 health insurance is obviously central to the amendment. So that's why we
7 believe that it cannot be severed in the manner that you're suggesting.

8 THE COURT: I just -- I guess I'm a little confused by that argument, I
9 think, from an employer because I think that definitely could backfire if the -- if
10 I or the Supreme Court did not see it that way. I mean, you understand the
11 result of that is that provision of the statute would be stricken, and the
12 employers would be stuck paying everybody the 8.25 regardless of health
13 benefits provided.

14 MS. KOTCHKA: I understand that that could be a result, but I'm
15 saying that I don't think it's the result here because I think the two rates are
16 inextricably tied together, and that's what was put before the voters.

17 (Defense counsel confer)

18 MS. KOTCHKA: Yes, and we would still have -- I mean, we would still
19 have federal minimum wage because we have the federal law that is relied
20 upon by the labor commissioner.

21 THE COURT: Well, and we have state law for minimum wage as well,
22 right?

23 MS. KOTCHKA: Yes.

24 THE COURT: I mean, it's not --

25 MS. KOTCHKA: Which is the federal law.

1 THE COURT: There wouldn't be any minimum wage if the statute was
2 stricken -- or if the constitutional amendment was stricken entirely, but I think
3 you could -- if there's a problem with federal preemption, I think that the
4 solution to that is just to strike that portion of the amendment.

5 MS. KOTCHKA: Should I address the federal preemption or --

6 THE COURT: Sure.

7 MS. KOTCHKA: Okay. ERISA's objective is to maintain a uniform
8 regulatory scheme over employer sponsored pension and health benefit plans;
9 thus ERISA expressly preempts any and all state laws that relate to any
10 employee benefit plan, and that's found in 29 USC 1144(a). The United
11 States Supreme Court has determined this language to preempt state laws that
12 have a connection with or a reference to employee benefit plans, and *Travelers*
13 and *Dillingham* rely on the same analysis.

14 The Minimum Wage Amendment requires employers to have
15 health plans if the employer wants to pay the lower minimum wage, and the
16 labor commissioner's regulations dictate some specific benefits that must be
17 provided. NAC 608.1 --

18 THE COURT: Right. So is the problem there then the amendment or
19 the NAC really?

20 MS. KOTCHKA: Well, the problem is both. The problem with the
21 amendment itself, it's said it's vague. It uses health benefits twice, and then
22 it talks about a health insurance premium, and it doesn't tell you what has to
23 be covered within those health benefits or the health insurance premium.

24 The labor commissioner tried to fix it to some extent by enacting
25 this regulation, this 608.102, but in the very definitions it uses, it refers to

1 ERISA plans. It refers to Taft-Hartley trusts, which are ERISA plans, it
2 expressly names ERISA in it, and then it provides for a few substantive things.
3 For example, they provide that you don't have to provide the -- or offer the
4 health insurance until the employee's been employed for six months. We
5 pointed out under the Affordable Care Act, you can only do 90 days. So
6 you've got a conflict between a federal law specifically to address health
7 benefits and then the state law -- or state regulation which says you can wait
8 for six months.

9 THE COURT: Well, but a state can always provide its -- I mean, they're
10 not talking about the employer having to provide healthcare, and they're
11 providing a broader time that's more favorable to the employer than the ACA.
12 I mean, I don't see how that -- I don't see how that works the employer or
13 how -- I mean, if the employer has to do it in 90 days under ACA, then they're
14 in compliance with the NAC that gives them six months. I mean, it's just -- it's
15 more flexible.

16 MS. KOTCHKA: Yes, but it's a direct conflict that an employer could
17 not rely on state law and do the six months. If the employer did, they'd be in
18 violation of the ACA which requires the 90 days. And that's the whole thing
19 about ERISA and the ACA. They have taken over, really, the regulation of
20 healthcare and health benefits in the United States.

21 ERISA's a very broad preemptive statute that says that when
22 you try -- when the legislature or the constitution or, you know, any sort of
23 regulatory body in a state imposes a requirement that refers to or has a
24 connection with the way ERISA plans are governed, that that entire law is
25 preempted.

1 THE COURT: But this isn't really governing the ERISA plan. This is
2 saying under what circumstances an employer will get a benefit of a reduction
3 in minimum wage. So if they offer certain benefits, then they get the dollar an
4 hour credit, right?

5 MS. KOTCHKA: Right.

6 THE COURT: So --

7 MS. KOTCHKA: So what are the health benefits that an employer is
8 supposed to offer? How do we figure out what it is?

9 THE COURT: Right. So that's why the NAC, but that doesn't --

10 MS. KOTCHKA: But the NAC doesn't even tell us what subjects we
11 have to have. Do you have to offer well baby care? Do you have to offer
12 physician visits, you know, just as a physical checkup? Do you only have to
13 offer health benefits for actual injuries or illnesses? I mean, there is -- that is
14 not present in the Minimum Wage Amendment. That's not present in the
15 regulations.

16 I don't know how an employer decides -- assuming they want to
17 get the lower wage and they offer some form of health benefits, I mean, does
18 any kind of health benefit entitle them to the lower minimum wage?

19 THE COURT: As long as they --

20 MS. KOTCHKA: What?

21 THE COURT: -- comply with the NAC regulations, I think it would. It
22 seems it would, right?

23 MS. KOTCHKA: So any level would be okay.

24 THE COURT: Anything that complies with the NAC requirements, I
25 think so.

1 MS. KOTCHKA: But the NAC requirements expressly refer to ERISA
2 and the Taft-Hartley trusts. So if you have an ERISA plan of any kind, then
3 you provided the health benefits? I mean --

4 THE COURT: It seems like that would be beneficial to the employer.

5 MS. KOTCHKA: It would be beneficial to the employer if they could
6 offer a very low level of health benefits and then get the additional dollar per
7 hour on minimum wage.

8 [Defense Counsel confer]

9 MS. KOTCHKA: Okay. So I'd like to bring Your Honor's attention to
10 the concern, *Home Care Providers, Inc. v. Cuomo case.*, 979 Fed Sub 2d 288,
11 in the context of a wage parody statute, with a referral to Taft-Hartley trusts.
12 The New York federal court held that it was preempted and then our own
13 Nevada Supreme Court in *Cervantes v. the Health Plan of Nevada*, 263 P.3d
14 261 in 2012.

15 The Nevada Supreme Court concluded that a plaintiff's claim for
16 negligence against a managed care organization under a state statute was
17 preempted by ERISA because a reference to prohibition reach laws that they
18 have an impermissible connection within the ERISA plan, even if the
19 challenged law does not itself reference ERISA or an ERISA plan as where
20 statutes mandate employee benefit structures.

21 And, certainly, the regulations in this case mandate an employee
22 benefits structure because they specifically refer to health insurance, which is
23 different than a self-insured plan. They reference ERISA. They reference
24 Taft-Hartley.

25 (Defense counsel confer)

1 MS. KOTCHKA: Yes, and we've cited cases in our brief for the Court
2 to review, including the Ninth Circuit where they also found some ERISA
3 preemption. And now are we ready for the punitive damages?

4 THE COURT: I think you have a due process argument, too.

5 MS. KOTCHKA: Huh?

6 THE COURT: Due process?

7 MS. KOTCHKA: Yes. Well, the due process argument is -- is obvious,
8 I guess. It's -- the due process argument is that nobody knows what health
9 benefits means, and nobody knows what health insurance premium means in
10 the sense that you don't know what kind of health insurance you have to -- an
11 employer has to get, and this can provide for arbitrary enforcement when an
12 employer doesn't know exactly what it's supposed to have.

13 And the enforcement that would be affected here would be the
14 enforcement by the courts because the Minimum Wage Amendment gives
15 employees the right to file civil actions in the courts of the State of Nevada.
16 And different -- I mean --

17 THE COURT: I was a little curious why you cited to criminal cases
18 because, obviously, that's a really different analysis.

19 MS. KOTCHKA: Well, it -- the police are the enforcement mechanism
20 in criminal cases, but courts are the enforcement mechanism under the
21 Minimum Wage Amendment. And our point is, that whenever you have
22 something that's so open ended that you just can't understand, it doesn't give
23 you fair notice of what you're supposed to do, it leaves a way for arbitrary and
24 discriminatory enforcement. Different departments of this court. Justice
25 courts could differ from -- you know, those departments could differ from

1 different departments of this court, and an employer doesn't have fair notice
2 of what kind of health benefits it's supposed to provide to get that -- that
3 minimum wage.

4 And that is the fundamental essence of due process, due process
5 under both the State Constitution and the Federal Constitution. We're
6 supposed to have notice of what kind of conduct we need to enter into in
7 order to get the lower rate for the minimum wage, and it simply doesn't give
8 us that.

9 THE COURT: Okay.

10 MS. KOTCHKA: Okay. Now --

11 THE COURT: Now punitive damages.

12 MS. KOTCHKA: Huh?

13 THE COURT: Punitive damages.

14 MS. KOTCHKA: Punitive damages. Okay. Perera seeks punitive
15 damages, but he does not allege any cause of action which does not arise
16 from a contract; therefore, pursuant to NRS 42.005, he has no punitive
17 damages claim.

18 THE COURT: What about his argument that this is a constitutional
19 claim, not a contract claim?

20 MS. KOTCHKA: Okay. If it's -- he uses the words constitutional tort,
21 and our response to that is that a constitutional tort is against a government
22 for a state actor, someone acting under color of state law. Constitutional tort
23 is not used against private employers, and so his constitutional tort analysis
24 simply doesn't stand up. And the --

25 THE COURT: Let me ask you a question. How do you have a due

1 process issue if there's no state action? Aren't those arguments a little bit
2 inconsistent to you're saying we have state actions sufficient to bring a due
3 process claim, but there's not really state action if they want to call it a
4 constitutional tort?

5 MS. KOTCHKA: No, and I'll explain why, Your Honor. The state action
6 in the due process claim are the courts. The courts are a branch of the
7 government, and if courts do not enforce a statute or constitutional
8 amendment in the same way, apply the law in the same way, that's what
9 leads to the due process violation in the administration of the Minimum Wage
10 Amendment.

11 He's not saying that, I'm entitled to punitive damages because
12 of anything the court does or because of any other branch of the government
13 does something. He's saying, I'm entitled to punitive damages because you,
14 employer, didn't follow the Minimum Wage Amendment; didn't pay me the
15 correct amount of minimum wage. And our point is, that is not -- it involves
16 no governmental action, it's a private employer, and the Doctrine of
17 Constitutional Torts simply doesn't apply. He's trying to use cases that were
18 decided under one theory and apply them to private employers, and he doesn't
19 have that.

20 And the reason we say that even though he says it's a
21 constitutional amendment issue, the basic relationship between an employer
22 and an employee is contractual. You agree to hire someone. They work for
23 you. You then pay a wage. And so because the amendment itself is based
24 on the contractual relationship between the employer and the employee, the
25 42.005 simply wouldn't be applicable.

1 And we've given you the *Hanks* decision by Judge Navarro
2 where she went through this kind of analysis as recently as the end of July
3 2015. Several other state courts -- I believe Judge Herndon is one that comes
4 to mind -- also has addressed this issue recently and held that punitive
5 damages are not available, the violation or an alleged violation of the Minimum
6 Wage Amendment.

7 (Defense counsel confer)

8 MS. KOTCHKA: And the last thing I wanted to bring to Your Honor's
9 attention is that we have a countermotion to set Perera's countermotion to
10 amend his complaint for sanctions to a date after September 3rd when our
11 opposition is due. I tried to handle this outside of the Court just by putting
12 that one motion --

13 THE COURT: I'm not inclined -- I'm not going to impose sanctions, so I
14 think there's really no --

15 MS. KOTCHKA: Well, it also includes the opposition to the motion to
16 amend. He filed a motion to amend and put it on -- I mean, it was on this
17 calendar --

18 THE COURT: Right.

19 MS. KOTCHKA: -- and we didn't have time to file our opposition. We
20 get a certain amount of time, and our opposition isn't due till September 3rd.

21 THE COURT: Right. All right.

22 MS. KOTCHKA: And so I just wanted to ask Your Honor for the
23 opportunity to be able to file our opposition, and then if you want to have oral
24 argument on their motion to amend set that for a date after September 3rd.

25 THE COURT: All right. I was hoping we could deal with it all today, if

1 that's possible. I was, frankly, a little bit confused about what is going on
2 with the complaint then, but that's really a question for you, so --

3 MS. KOTCHKA: Okay.

4 THE COURT: So let me see if I feel like I need anything after I've had a
5 chance to talk to Plaintiff's counsel --

6 MS. KOTCHKA: Thank you.

7 THE COURT: -- and then I'll let you know. But I'll tell you right now,
8 there's really no need to respond to the motion for sanctions because I'm not
9 going to impose sanctions.

10 MS. KOTCHKA: Okay.

11 THE COURT: All right.

12 MS. SNIEGOCKI: Good morning, Your Honor. As Your Honor is
13 aware, everything is pretty fully briefed. I'd ask if -- I mean, if you had any
14 specific questions that you want me to discuss --

15 THE COURT: I do have a specific question. Why did you file a
16 complaint if you needed really mean to file a complaint? I am incredibly
17 confused by that argument.

18 MS. SNIEGOCKI: Okay. How I'll explain is that, the complaint that
19 was filed was, from our point of view, pursuant to Your Honor's order. We
20 were given, you know, right to file an amended complaint.

21 THE COURT: Right.

22 MS. SNIEGOCKI: If you can recall, and perhaps you don't, there was
23 some supplemental briefing back in the first round of the motion to dismiss.

24 THE COURT: Uh-huh.

25 MS. SNIEGOCKI: Apparently, Your Honor, I guess, struck the

1 supplemental briefs, including our addition of Plaintiff. So when we filed the
2 amended complaint that we were granted leave to do, it included -- and
3 Defendant's counsel is right -- and we agreed to wholly withdraw that -- that
4 complaint. It included additional plaintiffs that apparently we do not have
5 leave to file. So there is an agreement that the Plaintiff has withdrawn.

6 THE COURT: I mean, I think the order was pretty clear.

7 MS. SNIEGOCKI: I believe it was honestly just a mistake on the part
8 of our office because --

9 THE COURT: All right.

10 MS. SNIEGOCKI: -- we had prepared -- prior to this we had prepared a
11 proposed complaint, and the wrong one was just filed. I think that's how it
12 went, honestly. So we've agreed to withdraw it. We don't agree that there is
13 this, you know sort of second amended complaint even technically in front of
14 the Court at this point because we've agreed to withdraw. We've answered,
15 obviously, the argument as to why it should be dismissed.

16 THE COURT: So you haven't withdrawn it. There was no --

17 MS. SNIEGOCKI: Well, we tried to -- to sort of work out with
18 Defendant's counsel. You know, we said it seemed withdrawn. You know,
19 you're not required to respond to it. Just please file an answer to the first
20 amended complaint that's properly before the Court, and I think that --

21 THE COURT: Well, except until you formally withdraw the complaint
22 from the Court's record, that's the complaint they're obligated to respond to.
23 They can't -- that doesn't make any sense to me. I understand what you're
24 saying, but until you take some action to formally -- I mean, you could've sent
25 a stipulation and order over to withdraw the second amended complaint, I

1 would have signed it, you would've had it back in a couple of days, and that
2 would've taken care of that, but they can't --

3 I mean, that -- while there is a second amended complaint filed
4 on the record, that first amended complaint doesn't really exist anymore. I
5 mean, it's not -- they can't respond to that. That would be inappropriate.

6 MS. SNIEGOCKI: I'm -- to be honest with you, I know that Ms.
7 Kotchka's communications were with Mr. Greenberg, who's the other attorney
8 representing. I -- I don't want to represent that I know entirely what their
9 discussions were about, but I believe it was something along the lines that,
10 we'll agree that it's withdrawn. Will you at least file an answer to the first
11 amended complaint? And the response we were given was, we won't file an
12 answer to any first amended complaint. We're only filing a motion to dismiss
13 the second amended complaint.

14 THE COURT: Well, I mean, it doesn't -- because -- that doesn't really
15 make sense either to make them answer a first amended complaint. The
16 Court's already ordered a second amended complaint to be filed. Why would
17 they do that?

18 MS. SNIEGOCKI: Because it was -- it was the improper form. So the
19 second amended complaint that Your Honor allowed was never the one that
20 was actually ever filed. I think that -- that was sort of where we got
21 confused, is that --

22 THE COURT: Okay. Well, I mean, that doesn't really make any sense
23 either because they can't -- I mean, why would they waste their time and their
24 clients' money to file an answer to something that the Court had already
25 ordered, wasn't going to be the operative pleading in the case? There was

1 supposed to be a second amended complaint, and your client had a certain
2 amount of time to get that filed, and then they needed to answer that
3 complaint. I mean, I don't know that that's a reasonable request.

4 MS. SNIEGOCKI: No. I believe that the first amended complaint that
5 is on file is in accordance with the Court's order, so I -- I think, and my
6 understanding is is that one is --

7 MR. MORAN: No, it's not. No, it isn't.

8 THE COURT: I don't think so. Anyway, I'm just letting you know
9 where I am with it. I think that, you know, they're -- which is why I said I am
10 not going to impose sanctions because I think their motion under the
11 circumstances was a reasonable motion because they're entitled to have the
12 operative pleading be the thing that they answer, and clearly what was filed in
13 the second amended complaint is -- is not what was contemplated by the
14 Court. So let's just -- let's -- and as I understand it from the countermotion to
15 amend, I mean, it really doesn't change anything anyway, right?

16 MS. SNIEGOCKI: We're just -- right. We're seeking to add --

17 MS. KOTCHKA: They're supposed to have --

18 THE COURT: They're seeking to add additional Plaintiffs.

19 MS. KOTCHKA: Right.

20 THE COURT: And I suppose that's something that we need to talk
21 about. It wasn't really addressed other than it wasn't in the Court's order, so I
22 don't know what -- I don't even know what the basis of that is, so I can't
23 make them. But then -- and the issue with the statute of limitations, those are
24 the easy issues, right? But the claim under 601.040, that is not something
25 that's going to change, right? That is a claim that you still attempt to pursue?

1 MS. SNIEGOCKI: Correct. That claim over me.

2 THE COURT: I got that.

3 MS. SNIEGOCKI: Okay. Well, you know, we heard the argument from
4 Defendant's counsel regarding this sort of last paycheck theory, and it sounds
5 like to me what they're saying is, look, the employer can agree with the
6 employee to pay him one cent an hour, right, in violation of the law -- the
7 minimum law. Their agreement is he pays them one penny an hour. The last
8 paycheck comes, the guy works one hour, gives him a check for a penny.
9 Does that mean then that he's paid him all his wages that he's owed? And
10 the position here is no. I mean, unless what they're arguing is that minimum
11 wage is not really a wage --

12 THE COURT: Why wasn't that claim raised in front of the labor
13 commissioner?

14 MS. SNIEGOCKI: By our client?

15 THE COURT: Right.

16 MS. SNIEGOCKI: Well, he -- when he went to the labor commissioner,
17 he was unrepresented. He went, I think, immediately after he left the
18 Defendant's employ. I don't know why he raised something or did not raise
19 something in front of the labor commissioner.

20 THE COURT: Do you think it needs to be raised in front of the labor
21 commissioner?

22 MS. SNIEGOCKI: No, I do not believe that there is a requirement that
23 he, you know, exhaust an administration remedy. Prior to that -- and Your
24 Honor did point out a decision of *Baldonado* which references this 608.14.
25 And what it says here is that there's -- there's a -- we'll allow this claim for

1 attorney's fees for a claim that is otherwise brought to the Court. So how
2 can -- how can 608.140 provide for an additional benefit to the employee for
3 the attorney's fees if the original claim for the unpaid wage or the unpaid
4 penalty, which is specifically referenced in *Baldonado*, is not allowed in the
5 first place? I mean, that's what the issue is.

6 And we've given you copies of -- I believe it's Judge Cory and
7 Barker's order of this Court, and I understand Your Honor's position on the
8 other judges of this court and how that could affect Your Honor's position,
9 but I think it's pretty well laid out in --

10 THE COURT: Well, I'm not saying, you know, I don't consider it. In
11 fact, I've had conversations with Judge Kischner about this issue. I mean,
12 we're, you know, permitted under the ethical rules to discuss things as long as
13 it doesn't interfere with our independent ability to decide. We can talk to
14 other judges, and I've had more than one conversation with her about this.
15 We just -- you know, I think reasonable minds differ. People see things
16 differently.

17 So it's not that I don't consider or respect the decisions of my
18 colleagues. It's just -- if I have a difference of opinion, I have, you know, an
19 obligation to decide the cases independently as well, so --

20 MS. SNIEGOCKI: Sure. Yeah, I --

21 THE COURT: It means I just want to -- I didn't mean to suggest that I
22 don't care what my colleagues say. I just -- I don't think that that's a basis to
23 reconsider. That's -- that's all I meant by that.

24 MS. SNIEGOCKI: Understood. So, again, I mean, I think it's pretty
25 well pointed out in our brief, Your Honor. It begins on page ten. We talk

1 about this manifests -- you know, it's illogical here. If you can allow the same
2 plaintiff to ask for attorney's fees and have this private right of action, how
3 can he ask for attorney's fee if he doesn't necessarily already possess the
4 right to bring the claim before the Court? I mean, it just doesn't make sense,
5 and that's essentially what we're resting on here.

6 THE COURT: This is what I'd like to do. I'd like to set -- when is the
7 countermotion to amend set? The 29th of September? The 28th?

8 MS. KOTCHKA: We get to file our opposition September 3rd.

9 THE COURT: Oh, it's set today but --

10 MS. KOTCHKA: So it's not set, the countermotion isn't set except for
11 today, but we haven't had a chance to file our opposition and complete the
12 briefing schedule.

13 THE COURT: What I'd like to do is just set this towards the end of
14 September, give you the opportunity to respond to the countermotion to
15 amend. In the meantime, I'll make a decision on the 608.040 issue, and then I
16 think with the countermotion to amend, then we can figure out how to go
17 forward from there because it's a little bit of a -- things have gotten a little bit
18 tangled up here.

19 MS. KOTCHKA: Okay.

20 THE COURT: So I'd like to try to get everything back on track. I can
21 get you that decision before, so you can proceed with the 608.040 claim, and
22 then we can figure out about the additional two plaintiffs and any other issue
23 that is raised with the countermotion to amend. All right? So they need the
24 opportunity to respond to that, and then we can sort it all out then.

25 MS. KOTCHKA: Okay.

1 MS. SNIEGOCKI: Okay. Well, I'm just a bit confused because the
2 second amended complaint that we're seeking to file, I mean, would also
3 include the first claim for relief and then the wage, which -- I mean, maybe I'm
4 confused. Is -- are you going to be issuing a ruling on that today or in
5 conjunction with the 608.040 ruling?

6 THE COURT: I'm going to rule on the issues that were raised in the
7 motion to dismiss because I think that they will impact whatever complaint
8 that you file.

9 MS. SNIEGOCKI: Sure.

10 THE COURT: So we may as well just deal with them now. With
11 respect to adding plaintiffs or anything else, I need to look at that and see
12 what the basis is. They need the opportunity to respond to that. So what I'd
13 like to do is just make a ruling on the motion to dismiss on the issues -- I
14 mean, primarily, it's the 608.040 claim and that, all right, and then we'll deal
15 with the countermotion to amend, and then that way you'll know what to
16 include in the third -- the third amended complaint to keep things straight.

17 But then you can file a third amended complaint that complies
18 with all of the Court orders up till then, and then we should be back on track.
19 I think that will just make things easier than withdrawing something and -- but
20 we're just going to move forward, and then you can file a third amended
21 complaint after they have an opportunity to respond with respect to any
22 additional claims.

23 MS. SNIEGOCKI: Okay. Just one thing I do want to point out as it
24 relates to the countermotion to amend the complaint. We don't -- I mean,
25 there's no issue with them even wanting additional time to respond to the

1 countermotion. You know, if they want till October, it doesn't matter.

2 One request made is that this be decided whether or not
3 Plaintiffs have leave to file this next, I guess, third at this point amended
4 complaint. Something -- that would be set on the chambers calendar, and I
5 don't know, are you -- because there is no hearing set for -- it was filed as a
6 countermotion, which means technically it all gets heard today.

7 THE COURT: Right, but I'm setting it for --

8 MS. SNIEGOCKI: So we're going to set it up. That's fine.

9 THE COURT: I'm going to set it out --

10 MS. SNIEGOCKI: For a hearing.

11 THE COURT: If I don't feel like I need to hear from you, I'll tell you not
12 to come, but I -- this is -- this is complicated, and it's gotten procedurally -- I
13 mean, the legal issues are complicated here, and it's gotten procedurally just a
14 hair complicated. I think I would prefer to meet with you again. Not with the
15 intention of wasting anybody's time, but just to make sure that we're all on
16 the same page because I think it will help the case go forward more smoothly.
17 And that way if anybody has any questions, we can sort it all out at that time.
18 All right?

19 MS. SNIEGOCKI: Okay.

20 THE COURT: So I'm going to set it for the -- the 29th, right?
21 Actually, let's put it on the -- I'm going to put it on October 1st. Our Thursday
22 calendars are usually just a little bit -- not today, but normally our Thursday's
23 calendar are real small.

24 MS. KOTCHKA: October 1st at 9?

25 THE COURT: October 1st at 9:00. And then that way we can just

1 have one additional conversation about what the third amended complaint is
2 going to look like, and, hopefully, that will avoid any additional motion to
3 dismiss, and then they'll file an answer, and we'll just get on with everything.
4 All right? I try to make things straight out.

5 MS. KOTCHKA: Okay. Oh, Your Honor, could --

6 THE COURT: Is that a bad date?

7 MS. KOTCHKA: Is that a bad date?

8 MR. MORAN: That's a bad date. Can I have the --

9 THE COURT: We can put it another --

10 MS. KOTCHKA: Can we do it the following week, October the 8th?

11 THE COURT: October 6th? The 8th? That's fine.

12 THE CLERK: The 8th?

13 MS. KOTCHKA: October 8th.

14 MR. MORAN: Perfect.

15 MS. KOTCHKA: Perfect. Thank you. And one other issue before we
16 leave, Your Honor, and that is on the motion for reconsideration. I know you
17 denied it --

18 THE COURT: I'll take care of the order when I do the other order.

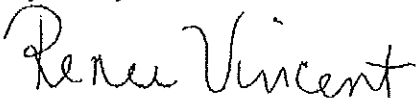
19 MS. KOTCHKA: Okay. But I just wanted to say that in addition to the
20 decisions by the other courts, we also raised the issue of the records, the
21 retention --

22 THE COURT: Which obviously it could've been raised in the motion in
23 the first place, so --

24 MS. KOTCHKA: Well, it was cited. It was cited in our brief. We
25 did --

1 THE COURT: Okay. So --
2 MS. KOTCHKA: -- raise it, but the Court didn't address it, so --
3 THE COURT: All right. But it was --
4 MS. KOTCHKA: So I just wanted to point out that that was one of the
5 bases.
6 THE COURT: It wouldn't have made a difference -- if we would've had
7 a long conversation about it, it would not have made a difference, but thank
8 you.
9 MS. KOTCHKA: All right. Okay.
10 THE COURT: So all right.
11 MS. SNIEGOCKI: So then is there no further argument that you --
12 THE COURT: Nothing now.
13 MS. SNIEGOCKI: Perfect.
14 THE COURT: We'll talk again. Thank you.
15 MS. SNIEGOCKI: Thank you.

16 [Proceedings concluded at 10:03 a.m.]
17
18 ATTEST: I do hereby certify that I have truly and correctly transcribed the
19 audio-visual recording of the proceeding in the above entitled case to the
20 best of my ability.

21 
22 Renee Vincent, Court Recorder/Transcriber
23 District Court 7, 702-671-4339
24
25

APPENDIX 3

APPENDIX 3

DISTRICT COURT CIVIL COVER SHEET

Clark

County, Nevada

Case No. **A-14-707425-C** Dept V

(Assigned by Clerk's Office)

I. Party Information (provide both home and mailing addresses if different)

Plaintiff(s) (name/address/phone): Laksiri Perera 6500 Pearcrest Road Las Vegas, NV 89108	Defendant(s) (name/address/phone): Western Cab Company 630 S. Fourth Street Las Vegas, NV 89101
Attorney (name/address/phone): Leon Greenberg, Esq. Dana Sniegocki, Esq. 2985 S. Jones Blvd., Suite E-3 Las Vegas, NV 89146 702-383-6085	Attorney (name/address/phone): Unknown

II. Nature of Controversy (please select the one most applicable filing type below)

Civil Case Filing Types

Real Property ☐ Landlord/Tenant ☐ Unlawful Detainer ☐ Other Landlord/Tenant ☐ Title to Property ☐ Judicial Foreclosure ☐ Other Title to Property ☐ Other Real Property ☐ Condemnation/Eminent Domain ☐ Other Real Property	Negligence ☐ Auto ☐ Premises Liability ☐ Other Negligence Malpractice ☐ Medical/Dental ☐ Legal ☐ Accounting ☐ Other Malpractice	Torts Other Torts ☐ Product Liability ☐ Intentional Misconduct ☐ Employment Tort ☐ Insurance Tort ☐ Other Tort
Probate <i>(select case type and estate value)</i> ☐ Summary Administration ☐ General Administration ☐ Special Administration ☐ Set Aside ☐ Trust/Conservatorship ☐ Other Probate Estate Value ☐ Over \$200,000 ☐ Between \$100,000 and \$200,000 ☐ Under \$100,000 or Unknown ☐ Under \$2,500	Construction Defect & Contract Construction Defect ☐ Chapter 40 ☐ Other Construction Defect Contract Case ☐ Uniform Commercial Code ☐ Building and Construction ☐ Insurance Carrier ☐ Commercial Instrument ☐ Collection of Accounts ☐ Employment Contract ☐ Other Contract	Judicial Review/Appeal Judicial Review ☐ Foreclosure Mediation Case ☐ Petition to Seal Records ☐ Mental Competency ☐ Nevada State Agency Appeal ☐ Department of Motor Vehicle ☐ Worker's Compensation ☐ Other Nevada State Agency Appeal Other ☐ Appeal from Lower Court ☐ Other Judicial Review/Appeal
Civil Writ ☐ Writ of Habeas Corpus ☐ Writ of Mandamus ☐ Writ of Quo Warrant ☐ Writ of Prohibition ☐ Other Civil Writ	Other Civil Filing ☐ Other Civil Filing ☐ Compromise of Minor's Claim ☐ Foreign Judgment ☒ Other Civil Matters	

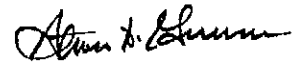
Business Court filings should be filed using the Business Court civil coversheet.

9-23-2014

Date

Signature of Initiating party or representative

See other side for family-related case filings.



CLERK OF THE COURT

COMP

LEON GREENBERG, ESQ., NSB 8094
DANA SNIEGOCKI, ESQ., NSB 11715
Leon Greenberg Professional Corporation
2965 South Jones Blvd- Suite E4
Las Vegas, Nevada 89146
Tel (702) 383-6085
Fax (702) 385-1827
leongreenberg@overtimelaw.com
dana@overtimelaw.com

Attorneys for Plaintiff

**DISTRICT COURT
CLARK COUNTY, NEVADA**

LAKSIRI PERERA, Individually and on)
behalf of others similarly situated,)

Plaintiff,)

vs.)

WESTERN CAB COMPANY,)

Defendant.)

Case No.: A-14-707425-C

Dept.: V

COMPLAINT

**ARBITRATION EXEMPTION
CLAIMED BECAUSE THIS IS
A CLASS ACTION CASE**

LAKSIRI PERERA, individually and on behalf of others similarly situated, by
and through his attorney, Leon Greenberg Professional Corporation, as and for a
Complaint against the defendant, states and alleges, as follows:

JURISDICTION, PARTIES AND PRELIMINARY STATEMENT

1. The plaintiff, LAKSIRI PERERA, (the "individual plaintiff" or the "named
plaintiff") is a resident of Clark County in the State of Nevada and is a former
employee of the defendant.

2. The defendant, WESTERN CAB COMPANY, (hereinafter referred to as
"Western Cab" or "defendant") is a corporation existing and established pursuant to
the laws of the State of Nevada with its principal place of business in the County of

1 Clark, State of Nevada and conducts business in Nevada.

2 **CLASS ACTION ALLEGATIONS**

3 3. The plaintiff brings this action as a class action pursuant to Nev. R. Civ.
4 P. §23 on behalf of himself and a class of all similarly situated persons employed by
5 the defendant in the State of Nevada.

6 4. The class of similarly situated persons consists of all persons employed
7 by defendant in the State of Nevada during the applicable statute of limitations periods
8 prior to the filing of this Complaint continuing until date of judgment, such persons
9 being employed as taxi cab drivers (hereinafter referred to as "cab drivers" or
10 "drivers") such employment involving the driving of taxi cabs for the defendant in the
11 State of Nevada.

12 5. The common circumstance of the cab drivers giving rise to this suit is that
13 while they were employed by defendant they were not paid the minimum wage
14 required by Nevada's Constitution, Article 15, Section 16 for many or most of the days
15 that they worked in that their hourly compensation, when calculated pursuant to the
16 requirements of said Nevada Constitutional Provision, did not equal at least the
17 minimum hourly wage provided for therein.

18 6. The named plaintiff is informed and believes, and based thereon alleges
19 that there are at least 100 putative class action members. The actual number of class
20 members is readily ascertainable by a review of the defendant's records through
21 appropriate discovery.

22 7. There is a well-defined community of interest in the questions of law and
23 fact affecting the class as a whole.

24 8. Proof of a common or single set of facts will establish the right of each
25 member of the class to recover. These common questions of law and fact predominate
26 over questions that affect only individual class members. The individual plaintiff's
27 claims are typical of those of the class.

28 9. A class action is superior to other available methods for the fair and

1 efficient adjudication of the controversy. Due to the typicality of the class members'
2 claims, the interests of judicial economy will be best served by adjudication of this
3 lawsuit as a class action. This type of case is uniquely well-suited for class treatment
4 since the employer's practices were uniform and the burden is on the employer to
5 establish that its method for compensating the class members complies with the
6 requirements of Nevada law.

7 10. The individual plaintiff will fairly and adequately represent the interests
8 of the class and has no interests that conflict with or are antagonistic to the interests of
9 the class and has retained to represent him competent counsel experienced in the
10 prosecution of class action cases and will thus be able to appropriately prosecute this
11 case on behalf of the class.

12 11. The individual plaintiff and his counsel are aware of their fiduciary
13 responsibilities to the members of the proposed class and are determined to diligently
14 discharge those duties by vigorously seeking the maximum possible recovery for all
15 members of the proposed class.

16 12. There is no plain, speedy, or adequate remedy other than by maintenance
17 of this class action. The prosecution of individual remedies by members of the class
18 will tend to establish inconsistent standards of conduct for the defendant and result in
19 the impairment of class members' rights and the disposition of their interests through
20 actions to which they were not parties. In addition, the class members' individual
21 claims are small in amount and they have no substantial ability to vindicate their
22 rights, and secure the assistance of competent counsel to do so, except by the
23 prosecution of a class action case.

24 **AS AND FOR A FIRST CLAIM FOR RELIEF ON BEHALF OF THE NAMED**
25 **PLAINTIFF AND ALL PERSONS SIMILARLY SITUATED PURSUANT TO**
NEVADA'S CONSTITUTION

26 13. The named plaintiff repeats all of the allegations previously made and
27 brings this First Claim for Relief pursuant to Article 15, Section 16, of the Nevada
28 Constitution.

14. Pursuant to Article 15, Section 16, of the Nevada Constitution the named plaintiff and the class members were entitled to an hourly minimum wage for every hour that they worked and the named plaintiff and the class members were often not paid such required minimum wages.

15. The named plaintiff seeks all relief available to him and the alleged class under Nevada's Constitution, Article 15, Section 16 including appropriate injunctive and equitable relief to make the defendant cease its violations of Nevada's Constitution and a suitable award of punitive damages.

16. The named plaintiff on behalf of himself and the proposed plaintiff class members, seeks, on this First Claim for Relief, a judgment against the defendant for minimum wages, such sums to be determined based upon an accounting of the hours worked by, and wages actually paid to, the plaintiff and the class members, a suitable injunction and other equitable relief barring the defendant from continuing to violate Nevada's Constitution, a suitable award of punitive damages, and an award of attorneys' fees, interest and costs, as provided for by Nevada's Constitution and other applicable laws.

**AS AND FOR A SECOND CLAIM FOR RELIEF PURSUANT TO NEVADA
REVISED STATUTES § 608.040 ON BEHALF OF THE NAMED PLAINTIFF
AND THE PUTATIVE CLASS**

17. Plaintiff repeats and reiterates each and every allegation previously made herein.

18. The named plaintiff brings this Second Claim for Relief against the defendant pursuant to Nevada Revised Statutes § 608.040 on behalf of himself and the alleged class of all similarly situated employees of the defendant.

19. The named plaintiff has been separated from his employment with the defendant and at the time of such separation was owed unpaid wages by the defendant.

20. The defendant has failed and refused to pay the named plaintiff and numerous members of the putative plaintiff class who are the defendant's former employees their earned but unpaid wages, such conduct by such defendant constituting

1 a violation of Nevada Revised Statutes § 608.020, or § 608.030 and giving such
2 named plaintiff and similarly situated members of the putative class of plaintiffs a
3 claim against the defendant for a continuation after the termination of their
4 employment with the defendant of the normal daily wages defendant would pay them,
5 until such earned but unpaid wages are actually paid or for 30 days, whichever is less,
6 pursuant to Nevada Revised Statutes § 608.040.

7 21. As a result of the foregoing, the named plaintiff seeks on behalf of himself
8 and the similarly situated putative plaintiff class members a judgment against the
9 defendant for the wages owed to him and such class members as prescribed by Nevada
10 Revised Statutes § 608.040, to wit, for a sum equal to up to thirty days wages, along
11 with interest, costs and attorneys' fees.

12 WHEREFORE, plaintiff demands the relief on each cause of action as alleged
13 aforesaid.

14 Plaintiff demands a trial by jury on all issues so triable.

15

16 Dated this 23rd day of September, 2014.

17

18 Leon Greenberg Professional Corporation

19

20 By: /s/ Leon Greenberg

21 LEON GREENBERG, Esq.
22 Nevada Bar No.: 8094
23 2965 South Jones Blvd- Suite E4
24 Las Vegas, Nevada 89146
25 Tel (702) 383-6085
26 Fax (702) 385-1827

27 Attorney for Plaintiff

28

1 IAFD

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5
6 Laksiri Perera

7 Plaintiff(s),

8 -vs-

9 Western Cab Company

10 Defendant(s).

A-14-707425-C

CASE NO. _____

DEPT. NO. V

11
12
13 INITIAL APPEARANCE FEE DISCLOSURE (NRS CHAPTER 19)

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

16
17 New Complaint Fee

18 ☐ \$1530 ☐ \$520 ☐ \$299 ☒ \$270.00

1st Appearance Fee

☐ \$1483.00 ☐ \$473.00 ☐ \$223.00

19 Name: Laksiri Perera

20 ☐ \$30

21 ☐ \$30

22 ☐ \$30

23 ☐ \$30

24 ☐ Total of Continuation Sheet Attached

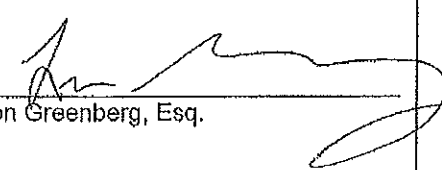
☐ \$ _____

25 TOTAL REMITTED: (Required)

Total Paid

\$ 270.00

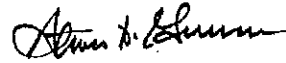
26 DATED this 23rd day of September, 2014.

27
28 
Leon Greenberg, Esq.

Initial Appearance Fee Disclosure/9/23/2014

APPENDIX 4

APPENDIX 4



CLERK OF THE COURT

1 **ACOM**

2 **LEON GREENBERG, ESQ., NSB 8094**
3 **DANA SNIEGOCKI, ESQ., NSB 11715**
4 **Leon Greenberg Professional Corporation**
5 **2965 South Jones Blvd- Suite E4**
6 **Las Vegas, Nevada 89146**
7 **Tel (702) 383-6085**
8 **Fax (702) 385-1827**
9 **leongreenberg@overtimelaw.com**
10 **dana@overtimelaw.com**

11 **Attorneys for Plaintiff**

12 **DISTRICT COURT**
13 **CLARK COUNTY, NEVADA**

14 **LAKSIRI PERERA, Individually and on)**
15 **behalf of others similarly situated,)**

16 **Plaintiff,**

17 **vs.**

18 **WESTERN CAB COMPANY,**

19 **Defendant.**

20 **Case No.: A-14-707425-C**

21 **Dept.: V**

22 **FIRST AMENDED**
23 **COMPLAINT**

24 **ARBITRATION EXEMPTION**
25 **CLAIMED BECAUSE THIS IS**
26 **A CLASS ACTION CASE**

27 **LAKSIRI PERERA, individually and on behalf of others similarly situated, by**
28 **and through his attorney, Leon Greenberg Professional Corporation, as and for a First**
29 **Amended Complaint against the defendant, states and alleges, as follows:**

30 **JURISDICTION, PARTIES AND PRELIMINARY STATEMENT**

31 **1. The plaintiff, LAKSIRI PERERA, (the "individual plaintiff" or the "named**
32 **plaintiff") is a resident of Clark County in the State of Nevada and is a former**
33 **employee of the defendant.**

34 **2. The defendant, WESTERN CAB COMPANY, (hereinafter referred to as**
35 **"Western Cab" or "defendant") is a corporation existing and established pursuant to**

1 the laws of the State of Nevada with its principal place of business in the County of
2 Clark, State of Nevada and conducts business in Nevada.

3 **CLASS ACTION ALLEGATIONS**

4 3. The plaintiff brings this action as a class action pursuant to Nev. R. Civ.
5 P. §23 on behalf of himself and a class of all similarly situated persons employed by
6 the defendant in the State of Nevada.

7 4. The class of similarly situated persons consists of all persons employed
8 by defendant in the State of Nevada during the applicable statute of limitations periods
9 prior to the filing of this Complaint continuing until date of judgment, such persons
10 being employed as taxi cab drivers (hereinafter referred to as "cab drivers" or
11 "drivers") such employment involving the driving of taxi cabs for the defendant in the
12 State of Nevada.

13 5. The common circumstance of the cab drivers giving rise to this suit is that
14 while they were employed by defendant they were not paid the minimum wage
15 required by Nevada's Constitution, Article 15, Section 16 for many or most of the days
16 that they worked in that their hourly compensation, when calculated pursuant to the
17 requirements of said Nevada Constitutional Provision, did not equal at least the
18 minimum hourly wage provided for therein.

19 6. The named plaintiff is informed and believes, and based thereon alleges
20 that there are at least 100 putative class action members. The actual number of class
21 members is readily ascertainable by a review of the defendant's records through
22 appropriate discovery.

23 7. There is a well-defined community of interest in the questions of law and
24 fact affecting the class as a whole.

25 8. Proof of a common or single set of facts will establish the right of each
26 member of the class to recover. These common questions of law and fact predominate
27 over questions that affect only individual class members. The individual plaintiff's
28 claims are typical of those of the class.

1 9. A class action is superior to other available methods for the fair and
2 efficient adjudication of the controversy. Due to the typicality of the class members'
3 claims, the interests of judicial economy will be best served by adjudication of this
4 lawsuit as a class action. This type of case is uniquely well-suited for class treatment
5 since the employer's practices were uniform and the burden is on the employer to
6 establish that its method for compensating the class members complies with the
7 requirements of Nevada law.

8 10. The individual plaintiff will fairly and adequately represent the interests
9 of the class and has no interests that conflict with or are antagonistic to the interests of
10 the class and has retained to represent him competent counsel experienced in the
11 prosecution of class action cases and will thus be able to appropriately prosecute this
12 case on behalf of the class.

13 11. The individual plaintiff and his counsel are aware of their fiduciary
14 responsibilities to the members of the proposed class and are determined to diligently
15 discharge those duties by vigorously seeking the maximum possible recovery for all
16 members of the proposed class.

17 12. There is no plain, speedy, or adequate remedy other than by maintenance
18 of this class action. The prosecution of individual remedies by members of the class
19 will tend to establish inconsistent standards of conduct for the defendant and result in
20 the impairment of class members' rights and the disposition of their interests through
21 actions to which they were not parties. In addition, the class members' individual
22 claims are small in amount and they have no substantial ability to vindicate their
23 rights, and secure the assistance of competent counsel to do so, except by the
24 prosecution of a class action case.

25 **AS AND FOR A FIRST CLAIM FOR RELIEF ON BEHALF OF THE NAMED**
26 **PLAINTIFF AND ALL PERSONS SIMILARLY SITUATED PURSUANT TO**
 NEVADA'S CONSTITUTION

27 13. The named plaintiff repeats all of the allegations previously made and
28 brings this First Claim for Relief pursuant to Article 15, Section 16, of the Nevada

1 Constitution.

2 14. Pursuant to Article 15, Section 16, of the Nevada Constitution the named
3 plaintiff and the class members were entitled to an hourly minimum wage for every
4 hour that they worked for defendant and the named plaintiff and the class members
5 were often not paid such required minimum wages.

6 15. The defendant's violation of Article 15, Section 16, of the Nevada
7 Constitution involved malicious and/or fraudulent and/or oppressive conduct by the
8 defendant sufficient to warrant an award of punitive damages for the following,
9 amongst other reasons:

10 (a) Defendant despite having, and being aware of, an express obligation
11 under Article 15, Section 16, of the Nevada Constitution, such obligation
12 commencing no later than July 1, 2007, to advise the plaintiff and the
13 class members, in writing, of their entitlement to the minimum hourly
14 wage specified in such constitutional provision, failed to provide such
15 written advisement;

16
17 (b) Defendant was aware that the highest law enforcement officer of the
18 State of Nevada, the Nevada Attorney General, had issued a public
19 opinion in 2005 that Article 15, Section 16, of the Nevada Constitution,
20 upon its effective date, would require defendant and other employers of
21 taxi cab drivers to compensate such employees with the minimum hourly
22 wage specified in such constitutional provision. Defendant consciously
23 elected to ignore that opinion and not pay the minimum wage required by
24 Article 15, Section 16, of the Nevada Constitution to its taxi driver
25 employees in the hope that it would be successful, if legal action was
26 brought against it, in avoiding paying some or all of such minimum
27 wages;

28

1 (c) Defendant, to the extent it believed it had a colorable basis to
2 legitimately contest the applicability of Article 15, Section 16, of the
3 Nevada Constitution to its taxi driver employees, made no effort to seek
4 any judicial declaration of its obligation, or lack of obligation, under such
5 constitutional provision and to pay into an escrow fund any amounts it
6 disputed were so owed under that constitutional provision until such a
7 final judicial determination was made.

8 16. Defendant engaged in the acts and/or omissions detailed in paragraph 15
9 in an intentional scheme to maliciously, oppressively and fraudulently deprive its taxi
10 driver employees of the hourly minimum wages that were guaranteed to those
11 employees by Article 15, Section 16, of the Nevada Constitution. Defendant so acted
12 in the hope that by the passage of time whatever rights such taxi driver employees had
13 to such minimum hourly wages owed to them by the defendant would expire, in whole
14 or in part, by operation of law. Defendant so acted consciously, willfully, and
15 intentionally to deprive such taxi driver employees of any knowledge that they might
16 be entitled to such minimum hourly wages, despite the defendant's obligation under
17 Article 15, Section 16, of the Nevada Constitution to advise such taxi driver
18 employees of their right to those minimum hourly wages. Defendant's malicious,
19 oppressive and fraudulent conduct is also demonstrated by its failure to make any
20 allowance to pay such minimum hourly wages if they were found to be due, such as
21 through an escrow account, while seeking any judicial determination of its obligation
22 to make those payments.

23 17. The named plaintiff seeks all relief available to him and the alleged class
24 under Nevada's Constitution, Article 15, Section 16 including appropriate injunctive
25 and equitable relief to make the defendant cease its violations of Nevada's
26 Constitution and a suitable award of punitive damages.

27 18. The named plaintiff on behalf of himself and the proposed plaintiff class
28 members, seeks, on this First Claim for Relief, a judgment against the defendant for

1 minimum wages owed since November 28, 2006 and continuing into the future, such
2 sums to be determined based upon an accounting of the hours worked by, and wages
3 actually paid to, the plaintiff and the class members, a suitable injunction and other
4 equitable relief barring the defendant from continuing to violate Nevada's
5 Constitution, a suitable award of punitive damages, and an award of attorneys' fees,
6 interest and costs, as provided for by Nevada's Constitution and other applicable laws.

7 **AS AND FOR A SECOND CLAIM FOR RELIEF PURSUANT TO NEVADA**
8 **REVISED STATUTES § 608.040 ON BEHALF OF THE NAMED PLAINTIFF**
AND THE PUTATIVE CLASS

9 19. Plaintiff repeats and reiterates each and every allegation previously made
10 herein.

11 20. The named plaintiff brings this Second Claim for Relief against the
12 defendant pursuant to Nevada Revised Statutes § 608.040 on behalf of himself and the
13 alleged class of all similarly situated employees of the defendant.

14 21. The named plaintiff has been separated from his employment with the
15 defendant and at the time of such separation was owed unpaid wages by the defendant.

16 22. The defendant has failed and refused to pay the named plaintiff and
17 numerous members of the putative plaintiff class who are the defendant's former
18 employees their earned but unpaid wages, such conduct by such defendant constituting
19 a violation of Nevada Revised Statutes § 608.020, or § 608.030 and giving such
20 named plaintiff and similarly situated members of the putative class of plaintiffs a
21 claim against the defendant for a continuation after the termination of their
22 employment with the defendant of the normal daily wages defendant would pay them,
23 until such earned but unpaid wages are actually paid or for 30 days, whichever is less,
24 pursuant to Nevada Revised Statutes § 608.040.

25 23. As a result of the foregoing, the named plaintiff seeks on behalf of himself
26 and the similarly situated putative plaintiff class members a judgment against the
27 defendant for the wages owed to him and such class members as prescribed by Nevada
28 Revised Statutes § 608.040, to wit, for a sum equal to up to thirty days wages, along

1 with interest, costs and attorneys' fees.

2 WHEREFORE, plaintiff demands the relief on each cause of action as alleged
3 aforesaid.

4
5 Plaintiff demands a trial by jury on all issues so triable.

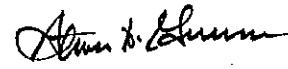
6
7 Dated this 20th day of October, 2014.

8
9 Leon Greenberg Professional Corporation

10
11 By: /s/ Leon Greenberg
12 LEON GREENBERG, Esq.
13 Nevada Bar No.: 8094
14 2965 South Jones Blvd- Suite E4
15 Las Vegas, Nevada 89146
16 Tel (702) 383-6085
17 Fax (702) 385-1827
18 Attorney for Plaintiff
19
20
21
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23
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25
26
27
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APPENDIX 5

APPENDIX 5



CLERK OF THE COURT

1 **ACOM**
2 LEON GREENBERG, ESQ., NSB 8094
3 DANA SNIEGOCKI, ESQ., NSB 11715
4 Leon Greenberg Professional Corporation
5 2965 South Jones Blvd- Suite E4
6 Las Vegas, Nevada 89146
7 Tel (702) 383-6085
8 Fax (702) 385-1827
9 leongreenberg@overtimelaw.com
10 dana@overtimelaw.com

Attorneys for Plaintiff

11 **DISTRICT COURT**
12 **CLARK COUNTY, NEVADA**

13 LAKSIRI PERERA and IRSHAD
14 AHMED, Individually and on behalf of
15 others similarly situated,

Plaintiffs,

vs.

WESTERN CAB COMPANY,

Defendant.

Case No.: A-14-707425-C

Dept.: V

**SECOND AMENDED
COMPLAINT**

**ARBITRATION EXEMPTION
CLAIMED BECAUSE THIS IS
A CLASS ACTION CASE**

16
17
18
19 LAKSIRI PERERA and IRSHAD AHMED, individually and on behalf of others
20 similarly situated, by and through their attorney, Leon Greenberg Professional
21 Corporation, as and for a Second Amended Complaint against the defendant, state and
22 allege, as follows:

23 **JURISDICTION, PARTIES AND PRELIMINARY STATEMENT**

24 1. The plaintiff, LAKSIRI PERERA, is a resident of Clark County in the State
25 of Nevada and is a former employee of the defendant. The plaintiff, IRSHAD
26 AHMED, (collectively the "individual plaintiffs" or the "named plaintiffs") is a
27 resident of Clark County in the State of Nevada and is a former employee of the
28 defendant.

1 2. The defendant, WESTERN CAB COMPANY, (hereinafter referred to as
2 "Western Cab" or "defendant") is a corporation existing and established pursuant to
3 the laws of the State of Nevada with its principal place of business in the County of
4 Clark, State of Nevada and conducts business in Nevada.

5 **CLASS ACTION ALLEGATIONS**

6 3. The plaintiffs bring this action as a class action pursuant to Nev. R. Civ.
7 P. §23 on behalf of themselves and a class of all similarly situated persons employed
8 by the defendant in the State of Nevada.

9 4. The class of similarly situated persons consists of all persons employed
10 by defendant in the State of Nevada during the applicable statute of limitations periods
11 prior to the filing of this Complaint continuing until date of judgment, such persons
12 being employed as taxi cab drivers (hereinafter referred to as "cab drivers" or
13 "drivers") such employment involving the driving of taxi cabs for the defendant in the
14 State of Nevada.

15 5. The common circumstance of the cab drivers giving rise to this suit is that
16 while they were employed by defendant they were not paid the minimum wage
17 required by Nevada's Constitution, Article 15, Section 16 for many or most of the days
18 that they worked in that their hourly compensation, when calculated pursuant to the
19 requirements of said Nevada Constitutional Provision, did not equal at least the
20 minimum hourly wage provided for therein.

21 6. The named plaintiffs are informed and believe, and based thereon allege
22 that there are at least 100 putative class action members. The actual number of class
23 members is readily ascertainable by a review of the defendant's records through
24 appropriate discovery.

25 7. There is a well-defined community of interest in the questions of law and
26 fact affecting the class as a whole.

27 8. Proof of a common or single set of facts will establish the right of each
28 member of the class to recover. These common questions of law and fact predominate

1 over questions that affect only individual class members. The individual plaintiff's
2 claims are typical of those of the class.

3 9. A class action is superior to other available methods for the fair and
4 efficient adjudication of the controversy. Due to the typicality of the class members'
5 claims, the interests of judicial economy will be best served by adjudication of this
6 lawsuit as a class action. This type of case is uniquely well-suited for class treatment
7 since the employer's practices were uniform and the burden is on the employer to
8 establish that its method for compensating the class members complies with the
9 requirements of Nevada law.

10 10. The individual plaintiffs will fairly and adequately represent the interests
11 of the class and have no interests that conflict with or are antagonistic to the interests
12 of the class and have retained to represent them competent counsel experienced in the
13 prosecution of class action cases and will thus be able to appropriately prosecute this
14 case on behalf of the class.

15 11. The individual plaintiffs and their counsel are aware of their fiduciary
16 responsibilities to the members of the proposed class and are determined to diligently
17 discharge those duties by vigorously seeking the maximum possible recovery for all
18 members of the proposed class.

19 12. There is no plain, speedy, or adequate remedy other than by maintenance
20 of this class action. The prosecution of individual remedies by members of the class
21 will tend to establish inconsistent standards of conduct for the defendant and result in
22 the impairment of class members' rights and the disposition of their interests through
23 actions to which they were not parties. In addition, the class members' individual
24 claims are small in amount and they have no substantial ability to vindicate their
25 rights, and secure the assistance of competent counsel to do so, except by the
26 prosecution of a class action case.

27

28

1 **AS AND FOR A FIRST CLAIM FOR RELIEF ON BEHALF OF THE NAMED**
2 **PLAINTIFF AND ALL PERSONS SIMILARLY SITUATED PURSUANT TO**
3 **NEVADA'S CONSTITUTION**

4 13. The named plaintiffs repeat all of the allegations previously made and
5 bring this First Claim for Relief pursuant to Article 15, Section 16, of the Nevada
6 Constitution.

7 14. Pursuant to Article 15, Section 16, of the Nevada Constitution the named
8 plaintiffs and the class members were entitled to an hourly minimum wage for every
9 hour that they worked for defendant and the named plaintiffs and the class members
10 were often not paid such required minimum wages.

11 15. The defendant's violation of Article 15, Section 16, of the Nevada
12 Constitution involved malicious and/or fraudulent and/or oppressive conduct by the
13 defendant sufficient to warrant an award of punitive damages for the following,
14 amongst other reasons:

15 (a) Defendant despite having, and being aware of, an express obligation
16 under Article 15, Section 16, of the Nevada Constitution, such obligation
17 commencing no later than July 1, 2007, to advise the plaintiff and the
18 class members, in writing, of their entitlement to the minimum hourly
19 wage specified in such constitutional provision, failed to provide such
20 written advisement;

21 (b) Defendant was aware that the highest law enforcement officer of the
22 State of Nevada, the Nevada Attorney General, had issued a public
23 opinion in 2005 that Article 15, Section 16, of the Nevada Constitution,
24 upon its effective date, would require defendant and other employers of
25 taxi cab drivers to compensate such employees with the minimum hourly
26 wage specified in such constitutional provision. Defendant consciously
27 elected to ignore that opinion and not pay the minimum wage required by
28 Article 15, Section 16, of the Nevada Constitution to its taxi driver

1 employees in the hope that it would be successful, if legal action was
2 brought against it, in avoiding paying some or all of such minimum
3 wages;

4
5 (c) Defendant, to the extent it believed it had a colorable basis to
6 legitimately contest the applicability of Article 15, Section 16, of the
7 Nevada Constitution to its taxi driver employees, made no effort to seek
8 any judicial declaration of its obligation, or lack of obligation, under such
9 constitutional provision and to pay into an escrow fund any amounts it
10 disputed were so owed under that constitutional provision until such a
11 final judicial determination was made.

12 16. Defendant also engaged in the following malicious, illegal and bad faith
13 conduct which was intended to conceal its violations Article 15, Section 16, of the
14 Nevada Constitution and caused additional injury to the plaintiffs for which they seek
15 redress:

16 In or about January of 2012, defendant started requiring the plaintiffs and
17 the class members to pay from such plaintiffs' and class members' own,
18 personal funds, 100% of the cost of the fuel consumed in the operation of
19 the taxicabs they drove for the defendant. That fuel was essential for the
20 operation of defendant's taxi cab business and plaintiffs could not work
21 for defendants unless they agreed to pay for that fuel from their personal
22 funds. By requiring the plaintiff and the class members to personally pay
23 for the cost of such fuel the defendant was reducing the wages it actually
24 paid the plaintiff and the class members to an amount below the minimum
25 hourly wage required by Article 15, Section 16, of the Nevada
26 Constitution. That was because after deducting from the "on the payroll
27 records" wages paid by the defendant to the plaintiffs and the class
28 members the cost of the taxi cab fuel they were forced by the defendant to

1 pay, the resulting "true" wage paid to such persons by the defendant was
2 below the minimum hourly wage required by Article 15, Section 16, of
3 the Nevada Constitution. Defendant willfully and maliciously engaged in
4 this conduct to make it appear to any otherwise uninformed person who
5 was examining its payroll records that it was paying the minimum wage
6 required by Article 15, Section 16, of the Nevada Constitution when it
7 was not. Defendant instituted this policy specifically to deceive certain
8 government agencies, including but not necessarily limited to, the United
9 States Department of Labor which had previously found the defendant in
10 violation of the minimum wage law enforced by such agency. Such
11 conduct by the defendant also resulted in the defendant issuing knowingly
12 false and inaccurate statements of the plaintiff's and the class members'
13 income to the United States Internal Revenue Service and the Social
14 Security Administration, such statements inflating and exaggerating the
15 actual income earned by such persons and resulting in them being
16 required to pay additional taxes that they did not actually owe.

17 17. Defendant engaged in the acts and/or omissions detailed in paragraphs 15
18 and 16 in an intentional scheme to maliciously, oppressively and fraudulently deprive
19 its taxi driver employees of the hourly minimum wages that were guaranteed to those
20 employees by Article 15, Section 16, of the Nevada Constitution. Defendant so acted
21 in the hope that by the passage of time whatever rights such taxi driver employees had
22 to such minimum hourly wages owed to them by the defendant would expire, in whole
23 or in part, by operation of law. Defendant so acted consciously, willfully, and
24 intentionally to deprive such taxi driver employees of any knowledge that they might
25 be entitled to such minimum hourly wages, despite the defendant's obligation under
26 Article 15, Section 16, of the Nevada Constitution to advise such taxi driver
27 employees of their right to those minimum hourly wages. Defendant's malicious,
28 oppressive and fraudulent conduct is also demonstrated by its failure to make any

1 allowance to pay such minimum hourly wages if they were found to be due, such as
2 through an escrow account, while seeking any judicial determination of its obligation
3 to make those payments.

4 18. The named plaintiffs seek all relief available to them and the alleged class
5 under Nevada's Constitution, Article 15, Section 16 including appropriate injunctive
6 and equitable relief to make the defendant cease its violations of Nevada's
7 Constitution and a suitable award of punitive damages.

8 19. The named plaintiffs on behalf of themselves and the proposed plaintiff
9 class members, seek, on this First Claim for Relief, a judgment against the defendant
10 for minimum wages owed since November 28, 2006 and continuing into the future,
11 such sums to be determined based upon an accounting of the hours worked by, and
12 wages actually paid to, the plaintiff and the class members along with an award of
13 damages for the increased, and false, tax liability the defendant has caused the
14 plaintiffs and the class members to sustain, a suitable injunction and other equitable
15 relief barring the defendant from continuing to violate Nevada's Constitution and
16 requiring the defendant to remedy at its expense the injury to the class members it has
17 caused by falsely reporting to the United States Internal Revenue Service and the
18 Social Security Administration the income of the class members, a suitable award of
19 punitive damages, and an award of attorneys' fees, interest and costs, as provided for
20 by Nevada's Constitution and other applicable laws.

21 **AS AND FOR A SECOND CLAIM FOR RELIEF PURSUANT TO NEVADA**
22 **REVISED STATUTES § 608.040 ON BEHALF OF THE NAMED PLAINTIFF**
AND THE PUTATIVE CLASS

23 20. Plaintiffs repeat and reiterate each and every allegation previously made
24 herein.

25 21. The named plaintiffs bring this Second Claim for Relief against the
26 defendant pursuant to Nevada Revised Statutes § 608.040 on behalf of themselves and
27 the alleged class of all similarly situated employees of the defendant.

28 22. The named plaintiffs have been separated from their employment with the

1 defendant and at the time of such separation were owed unpaid wages by the
2 defendant.

3 23. The defendant has failed and refused to pay the named plaintiffs and
4 numerous members of the putative plaintiff class who are the defendant's former
5 employees their earned but unpaid wages, such conduct by such defendant constituting
6 a violation of Nevada Revised Statutes § 608.020, or § 608.030 and giving such
7 named plaintiffs and similarly situated members of the putative class of plaintiffs a
8 claim against the defendant for a continuation after the termination of their
9 employment with the defendant of the normal daily wages defendant would pay them,
10 until such earned but unpaid wages are actually paid or for 30 days, whichever is less,
11 pursuant to Nevada Revised Statutes § 608.040.

12 24. As a result of the foregoing, the named plaintiffs seek, on behalf of
13 themselves and the similarly situated putative plaintiff class members, a judgment
14 against the defendant for the wages owed to them and such class members as
15 prescribed by Nevada Revised Statutes § 608.040, to wit, for a sum equal to up to
16 thirty days wages, along with interest, costs and attorneys' fees.

17 WHEREFORE, plaintiffs demand the relief on each cause of action as alleged
18 aforesaid.

19 Plaintiffs demand a trial by jury on all issues so triable.

20
21 Dated this 16th day of June, 2015.

22 Leon Greenberg Professional Corporation

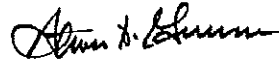
23 By: /s/ Leon Greenberg

24 LEON GREENBERG, Esq.
25 Nevada Bar No.: 8094
26 2965 South Jones Blvd- Suite E4
27 Las Vegas, Nevada 89146
28 Tel (702) 383-6085
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Attorney for Plaintiff

APPENDIX 6

APPENDIX 6



CLERK OF THE COURT

1 MDSM
2 Malani L. Kotchka
3 Nevada Bar No. 0283
4 LIONEL SAWYER & COLLINS
5 300 South Fourth Street
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7 Las Vegas, Nevada 89101
8 (702) 383-8888 (Telephone)
9 (702) 383-8845 (Fax)

10 Attorneys for Defendant

11 DISTRICT COURT
12 CLARK COUNTY, NEVADA

13 LAKSIRI PERERA, Individually and on
14 behalf of others similarly situated,

15 Plaintiff,

16 v.

17 WESTERN CAB COMPANY,

18 Defendants.

Case No.: A-14-707425-C

Dept. No.: V

DEFENDANT'S MOTION TO DISMISS
FIRST AMENDED COMPLAINT

Date of Hearing:

Time of Hearing:

19 Pursuant to NRCP 12(b)(5), 23 and 56(b), defendant Western Cab Company ("Western
20 Cab") moves this Court to dismiss plaintiff Laksiri Perera's ("Perera's") First Amended
21 Complaint for failure to state a claim upon which relief can be granted, for decertification of the

22 ///

23 ///

24 ///

1 class and for summary judgment as a matter of law. This motion is based upon the First
2 Amended Complaint and all exhibits attached hereto and incorporated herein.

3 Respectfully submitted,

4
5 LIONEL SAWYER & COLLINS

6
7 By: /s/ Malani L. Kotchka

8 Malani L. Kotchka
9 Nevada Bar No. 0283
10 300 South Fourth Street
11 Suite 1700
12 Las Vegas, Nevada 89101

13 Attorneys for Defendant

14 **NOTICE OF HEARING**

15 TO: Plaintiff Laksiri Perera, and his attorney of record, Leon Greenberg.

16 PLEASE TAKE NOTICE that the hearing on **DEFENDANT'S MOTION TO**
17 **DISMISS FIRST AMENDED COMPLAINT** will be brought before Department V of the
18 Eighth Judicial District Court of the State of Nevada in and for the County of Clark, on the
19 **16** day of **JANUARY**, 2015, at **9: 00AM** a.m./p.m.

20 Respectfully submitted,

21 LIONEL SAWYER & COLLINS

22
23 By: /s/ Malani L. Kotchka

24 Malani L. Kotchka
25 Nevada Bar No. 0283
26 300 South Fourth Street
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Attorneys for Defendant

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MEMORANDUM OF POINTS AND AUTHORITIES

I. First Amended Complaint

Western Cab's taxicab drivers' tip income has traditionally been far beyond minimum wage. Perera alleges that he is bringing this action as a class action pursuant to NRCP 23. First Amended Complaint, ¶3. He purports to represent the taxicab drivers of Western Cab who were allegedly not paid the minimum wage. First Amended Complaint, ¶¶ 4, 5. He alleges that a single set of facts will establish the right of each member of the class to recover. First Amended Complaint, ¶ 8 (emphasis added). He alleges that he, the individual plaintiff, has no interests which conflict with the interest of the class. First Amended Complaint, ¶ 10. Finally, Perera seeks a judgment for unpaid minimum wages and a 30-day penalty for those unpaid minimum wages at the time of his separation from employment. First Amended Complaint, ¶¶ 18, 22.

II. The Thomas v. Yellow Cab Decision

On June 26, 2014, the Nevada Supreme Court held in *Thomas v. Nevada Yellow Cab Corp.*, 130 Nev. Adv. Op. 52, 327 P.3d 518 (2014), that the minimum wage statutory exception for taxicab drivers provided in NRS 608.250(2) was repealed by the Minimum Wage Amendment set forth in Article 15, Section 16 of the Nevada Constitution. The Court concluded, "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)." 327 P.3d at 522.

III. Prospective Application of Thomas

Leon Greenberg, appellants' counsel in *Thomas*, is also Perera's counsel. On October 14, 2014, Greenberg, on behalf of Thomas, filed the Appellants' Motion to Correct Opinion of June 26, 2014 and Stay Remittitur ("Motion"), requesting the Court to "remov[c] any present tense

1 language that can be interpreted as directing such Opinion is only to be applied prospectively."

2 Exhibit 1, p. 1. He argued:

3 The relief requested is sought to conserve judicial resources
4 and promptly secure for the appellants, and many thousands of
5 other employees in the Nevada taxicab industry, the relief afforded
6 to them by the Court's Opinion of June 26, 2014. Appellants'
7 counsel is aware of **six other pending litigations** involving taxi
8 driver plaintiffs seeking minimum hourly wages, including one
9 currently on appeal to this Court, *Gilmore v. Desert Cab, Inc.*, No.
10 62905. See, Ex. "A" ¶ 1. This case, the *Gilmore* appeal, and all of
11 those other cases, involve the identical issue resolved by this
12 appeal, the entitlement of taxi drivers to the minimum hourly wage
13 specified by Nevada's Constitution.

14 Exhibit 1, p. 2 (emphasis added). This case is one of the six cases Greenberg names in his
15 Declaration. Exhibit 1, Exhibit "A", p. 1. Greenberg argued, "Despite the speciousness of any
16 claim that the Court's Opinion of June 26, 2014 only has prospective application, it seems
17 virtually certain that respondents in this case, and one or more defendants in the other taxi driver
18 minimum wage cases, will insist on litigating that issue." Exhibit 1, p. 2.

19 Greenberg further argued:

20 Respondents' opposition confirms that upon remittitur
21 respondents will claim that this Court's Opinion of June 26, 2014
22 only governs respondents' conduct *after* that date Yet, unless
23 addressed by a correction of the Court's Opinion, respondents will
24 press such argument upon the district court and back upon this
25 Court in a subsequent appeal. This Court, in the interests of
26 judicial efficiency, should put an end to such dilatory litigation
27 tactics by respondents by granting appellants' motion.

28 Exhibit 2, p. 1. On October 27, 2014, the Nevada Supreme Court denied Greenberg's Motion
and said:

 This court issued an opinion in this matter on June 26,
2014. Appellants have filed a motion to correct the opinion by
changing three words from present tense to past tense, and also
request that this court stay issuance of the remittitur, which was
due to issue October 20, 2014. Respondents have filed an
opposition to the motion, and appellants have filed a reply. No
good cause appearing, *we deny the motion to the extent it requests
changes to the wording of the opinion; the opinion shall stand as
issued*

1 Exhibit 3 (emphasis added).

2 The Nevada Labor Commissioner "primarily handles wage and hour matters in private
3 employment and on public works projects." Exhibit 7, p. 2. Until the *Thomas* decision, the
4 Nevada Labor Commissioner, who is charged with resolving wage disputes (Exhibit 7), believed
5 that the Minimum Wage Amendment did not trump the minimum wage exemptions in NRS
6 608.250(2). In NAC 608.115(2), the Labor Commissioner describes how an employer shall pay
7 for time worked. However, the regulation specifically states, "This subsection does not apply to
8 an employee who is exempt from the minimum wage requirement pursuant to NRS 608.250."
9 Since the agency charged with enforcing Nevada's statutes on wages and hours did not believe
10 the Minimum Wage Amendment trumped the exemption, taxicab companies should not have to
11 pay Nevada's minimum wage to the drivers until *Thomas* was decided. See Exhibit 7.

12 Unless there is a clear intent to apply the law retroactively, the law operates
13 prospectively. In *Cnty. of Clark v. Roosevelt Title Ins. Co.*, 80 Nev. 530, 535, 396 P.2d 844, 846
14 (1964), the Nevada Supreme Court said:

15 nor can it be seriously questioned that, if given such
16 retroactive effect it would create not only in this respondent but in
17 all persons in the past history of the state whose rights to redeem
18 land had vanished with the expiration of the period of the period of
19 redemption, new rights of redemption. Nor is it possible to point
20 out in the 1957 amendment any language that conclusively
21 negatives the rule and presumption that statutes are to be construed
22 as prospective only. Certainly nothing in the 1957 amendment
23 contains any express words or any clear, distinct, necessary, plain
24 or unmistakable implication that a retroactive effect was intended.
25 Both from the point of view of disturbing the County's vested right
26 in the land and from the point of view, on the other hand of
27 reviving the respondent's vanished right of redemption, we are
28 compelled to hold that the statute had no such retroactive effect.

29 In *Pressler v. City of Reno*, 118 Nev. 506, 50 P.3d 1096, 1099 (2002), the Nevada Supreme
30 Court held that a city charter amendment which provided that city employees were at-will

1 employees did not apply retroactively to a department head who previously had a
2 constitutionally protected property interest to be terminated only for cause. The Court held that
3 the Legislature intended that the city charter amendment have only prospective effect. *Id.* By
4 denying Greenberg's request in *Thomas* to change the prospective language of the Court's
5 Opinion, the Nevada Supreme Court has made it clear that its interpretation of the Minimum
6 Wage Amendment has only prospective application. Until the interpretation, the Labor
7 Commissioner and all employers in Nevada believed the exemptions in NRS 608.250 were still
8 applicable.

10 The *Thomas* decision is a new constitutional principle. It is an interpretation of a Nevada
11 constitutional amendment and an existing Nevada statute. In *Gosa v. Mayden*, 413 U.S. 665
12 (1973), the United States Supreme Court held:

14 That recognition and effect are given to a theretofore unrecognized
15 and uneffectuated constitutional principle does not, of course,
16 automatically mandate retroactivity. In *Williams v. United States*,
17 401 U.S. 646, 651, 91 S. Ct. 1148, 1151, 28 L. Ed. 2d 388 (1971),
18 Mr. Justice White made it clear, citing *Linkletter v. Walker*, 381
19 U.S. 618, 85 S. Ct. 1731, 14 L. Ed. 2d 601 (1965), that the Court
20 has "firmly rejected the idea that all new interpretations of the
21 Constitution must be considered always to have been the law and
22 the prior constructions to the contrary must always be ignored."

19 *Id.* at 675. Here, since the agency charged with administering Nevada's wage and hour laws
20 believed the statutory exemptions still applied despite the Constitutional Amendment, the
21 *Thomas* decision should be applied prospectively.

23 In *Gosa*, the Court determined that it would not give retroactive application to a new
24 constitutional principal that military tribunals generally are not to try servicemen for offenses
25 which are not service connected. The Court concluded the reliance factor favored prospectivity.
26 *Id.* at 682.

27 In *Vartelas v. Holder*, 132 S. Ct. 1479, 1486-87 (2012), the United States Supreme Court
28

1 held that the retrospective application of the law would collide with the presumption against
2 retroactivity, where such application would take away or impair vested rights acquired under
3 existing laws, would create a new obligation, impose a new duty, or attach a new disability, in
4 respect to transactions or considerations already past. The Nevada Supreme Court's *Thomas*
5 decision created a new obligation and imposed a new duty on taxicab companies to pay the state
6 minimum wage. If the decision is applied retroactively, it will create a new obligation in respect
7 to transactions already past. Therefore, this Court should interpret the *Thomas* decision to
8 operate prospectively only.
9

10 In *Colwell v. State*, 118 Nev. 807, 59 P.3d 463, 473 (2002), the Nevada Supreme Court
11 held that the new constitutional rule of criminal procedure announced by the United States
12 Supreme Court in *Ring* operated prospectively only. Similarly, the constitutional interpretation
13 set forth in *Thomas* should operate prospectively only.
14

15 IV. Statute of Limitations

16 Perera first filed his complaint in this case on September 23, 2014. The Minimum Wage
17 Amendment does not contain a statute of limitations. However, NRS 608.260 provides, "If any
18 employer pays an employee a lesser amount than the minimum wage prescribed by regulation of
19 the Labor Commissioner pursuant to the provisions of NRS 608.250, the employee may, at any
20 time within 2 years, bring a civil action to recover the difference between the amount paid to the
21 employee and the amount of the minimum wage." Thus, a two-year statute of limitations applies
22 to Perera's claim.
23

24 In *Williams v. Claim Jumper Acquisition Co.*, Exhibit 4, Judge Tao held that when a
25 plaintiff makes a claim for unpaid minimum wage, NRS 608.260 provides a two-year statute of
26 limitations. Exhibit 4. Judge Tao said, "Thus, the legal standard that the plaintiff alleged was
27 violated is a wage rate established by the Labor Commissioner, not Article XV Section 16 itself."
28

1 Exhibit 4, p. 9. If a two-year statute of limitations is applied to Perera's minimum wage claim,
2 he can seek unpaid minimum wages only from September 23, 2012 until he quit on October 16,
3 2012. Exhibit 5.

4
5 **V. Perera's Hourly Wage Rate**

6 In 2012 the minimum wage for Nevada employees to whom qualifying health benefits
7 had been made available by the employer was \$7.25 per hour. Exhibit 6. According to Perera's
8 trip sheets which reflect the hours he worked and the non-tipped wages he received on a work
9 week basis, Perera was always paid more than minimum wage. Exhibit 5. Perera started
10 receiving health insurance from Western Cab on February 1, 2011. Western Cab paid the entire
11 premium for Perera's coverage. Exhibit 5. Therefore, the minimum wage due him was \$7.25 an
12 hour. From September 23, 2012 through October 15, 2012, Perera was always paid a minimum
13 hourly wage (which did not include tips) of amounts exceeding \$7.25 an hour, the applicable
14 minimum wage for this time period. Exhibits 5 and 6. Therefore, he fails to state a claim upon
15 which relief can be granted.
16

17 Moreover, Perera filed a claim for wages with the Nevada Labor Commissioner. On
18 November 13, 2012, the Labor Commissioner said, "it appears that you have been paid
19 correctly." Exhibit 5. Perera's wage claim with the Labor Commissioner was closed on
20 November 23, 2012. Exhibit 5.
21

22 **VI. The Class Representative**

23 NRCP 23(c)(1) provides, "As soon as practicable after the commencement of an action
24 brought as a class action, the court shall determine by order whether it is to be so maintained."
25 NRCP 23 substantially mimics FRCP 23. Therefore, federal court interpretations of FRCP 23
26 are relevant to this Court's interpretation of NRCP 23. *Executive Management Ltd. v. Ticor Title*
27 *Ins.*, 118 Nev. 46, 53, 38 P.3d 872, 876-77 (2002).
28

1 In *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 937, 948 (9th Cir. 2009), the
2 Ninth Circuit Court of Appeals held that the class action rule of FRCP 23 did not preclude the
3 defendant from bringing a preemptive motion to deny certification before the plaintiffs had filed
4 a motion for class certification. In *Vinole* the plaintiffs sought to represent a proposed class of
5 current and former Countrywide employees who were employed as External Home Loan
6 Consultants. They alleged that Countrywide misclassified the home loan consultants as exempt
7 outside sales employees and as a result, Countrywide impermissibly failed to pay premium
8 overtime and other wages. *Id.* at 937. The Ninth Circuit found that the district court had not
9 abused its discretion by denying certification under FRCP 23 because individualized
10 determinations of each employee's work had to be made. *Id.* at 947-48. Here, individual
11 determinations of each taxicab driver's hourly wages would have to be made. Exhibit 5.

12
13 The adequacy of the class representative inquiry under NRCP 23(a)(4) serves to uncover
14 conflicts of interest between named parties and the class they seek to represent. *Amchem*
15 *Products, Inc. v. Windsor*, 521 U.S. 591, 625 (1997). The *Windsor* court held, "[a] class
16 representative must be part of the class and 'possess the same interest and suffer the same injury'
17 as the class members." *Id.* at 625-26. Here, if Perera does not have a minimum wage claim
18 against Western Cab, he cannot be a class representative.

19
20 In *General Telephone Company of the Southwest v. Falcon*, 457 U.S. 147, 156 (1982),
21 the United States Supreme Court held that a class representative must be part of the class and
22 possess the same interest and suffer the same injury as the class members. The court said:

23
24 Conceptually, there is a wide gap between (a) an individual's claim
25 that he has been denied a promotion on discriminatory grounds,
26 and his otherwise unsupported allegation that the company has a
27 policy of discrimination, and (b) the existence of a class of persons
28 to have suffered the same injury as that individual, such that the
individual's claim and the class claims will share common
questions of law or fact and that the individual's claim will be
typical of the class claims. For respondent to bridge that gap, he

1 must prove much more than the validity of his own claim. Even
2 though evidence that he was passed over for a promotion when
3 several less deserving whites were advanced may support the
4 conclusion that respondent was denied the promotion because of
5 his national origin, such evidence would not necessarily justify the
6 additional inferences (1) that this discriminatory treatment is
7 typical of petitioner's promotion practices, (2) that petitioner's
8 promotion practices are motivated by a policy of ethnic
9 discrimination that pervades petitioner's Irving division, or (3) that
10 this policy of ethnic discrimination is reflected in petitioner's other
11 employment practices, such as hiring, in the same way it is
12 manifested in the promotion practices. These additional inferences
13 demonstrate the tenuous character of any presumption that the
14 class claims are "fairly encompassed" within respondent's claim.

15 *Id.* at 157-58. Here, Perera cannot show that he has a minimum wage claim for the time period
16 covered by the applicable statute of limitations. Furthermore, he cannot show the existence of a
17 class of taxicab drivers at Western Cab who have not been paid the minimum wage. Western
18 Cab's taxicab drivers work different hours and earn different amounts of wages. None earn the
19 same hourly wage. Exhibit 5. Therefore, Perera cannot show that he would be an adequate class
20 representative.

21 In *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 124 P.3d 530 (2005), three
22 homeowners individually and as proposed class representatives filed a complaint against Beazer
23 Homes alleging constructional defects to their homes. 124 P.3d at 534. Although the trial court
24 certified the case as a class action, the Nevada Supreme Court reversed. The Court held, "Class
25 action suits are designed to allow representatives of a numerous class of similarly situated people
26 to sue on behalf of that class in order to obtain a judgment that will bind all." *Id.* at 537. The
27 Court addressed the adequacy of the representative issue. Relying on the United States Supreme
28 Court's *Windsor* decision, the Nevada Supreme Court held that class members must possess the
same interest and suffer the same injury as other class members. *Id.* at 539. As a practical
matter, single-family residence constructional defect cases will rarely be appropriate for class
action treatment, said the Court. *Id.* at 542. Since Perera cannot show that he has a minimum

1 wage claim for the time period covered by the applicable statute of limitations, he cannot be an
2 adequate class representative.

3 **VII. No Common Answers**

4 Pursuant to NRCP 23(b), Perera must show that common questions of law or fact
5 predominate over individual questions. Perera cannot satisfy the commonality issue. Each of the
6 taxicab drivers were employed for different periods of time, worked different hours and earned a
7 different hourly wage.
8

9 In *Wal-Mart Stores, Inc. v. Dukes*, ____ U.S. ____, 131 S.Ct. 2541 (2011), three female
10 employees filed a class action Title VII lawsuit against Wal-Mart on behalf of themselves and
11 about 1.5 million other female employees alleging that Wal-Mart's local managers exercised
12 their discretion over pay and promotions disproportionately in favor of male employees. 131 S.
13 Ct. at 2547. The Supreme Court found that the crux of the case was commonality. *Id.* at 2550.
14 The Court said:
15

16 Commonality requires the plaintiff to demonstrate that the class
17 members "have suffered the same injury," This does not
18 mean merely that they have all suffered a violation of the same
19 provision of law. . . . Quite obviously, the mere claim by
20 employees of the same company that they have suffered a Title VII
21 injury, or even a disparate-impact Title VII injury, gives no cause
22 to believe that all their claims can productively be litigated at once
23 That common contention, moreover, must be of such a nature
24 that it is capable of classwide resolution -- which means that
25 determination of its truth or falsity will resolve an issue that is
26 central to the validity of each one of the claims in one stroke.

27 *Id.* at 2551 (emphasis added). As the Court pointed out in its earlier *Falcon* decision:

28 "What matters to class certification . . . is not the raising of
common 'questions' -- even in droves -- but, rather the capacity of a
classwide proceeding to generate common *answers* apt to drive the
resolution of the litigation. Dissimilarities within the proposed
class are what have the potential to impede the generation of
common answers." Nagareda, *supra*, at 132.

1 *Id.* at 2551 n. 5.

2 The Court found that the plaintiffs could not establish commonality:

3 Because respondents provide no convincing proof of a
4 companywide discriminatory pay and promotion policy, we have
5 concluded that they have not established the existence of any
6 common question.

7 In sum, we agree with Chief Judge Kozinski that the
8 members of the class:

9 "held a multitude of different jobs, at different levels of Wal-Mart's
10 hierarchy, for variable lengths of time, in 3,400 stores, sprinkled
11 across 50 states, with a kaleidoscope of supervisors (male and
12 female), subject to a variety of regional policies that all differed
13 Some thrived while others did poorly. They have little in
14 common but their sex and this lawsuit," 603 F.3d, at 652
15 (dissenting opinion).

16 *Id.* at 2556-57.

17 The *Dukes* court also held that at a minimum, claims for individualized relief like the
18 backpay at issue in that case did not satisfy FRCP 23(b)(2). *Id.* at 2557. The court concluded,
19 "Similarly, it does not authorize class certification when each class member would be entitled to
20 an individualized award of monetary damages." *Id.* Here, any taxicab driver who was not paid
21 minimum wage during a payroll period would be entitled to an individualized award of monetary
22 damages. This case cannot be maintained as a class action for the recovery of minimum wage.
23 The *Dukes* court found that Trial by Formula was not authorized by FRCP 23. The Court
24 concluded that a class cannot be certified on the premise that Wal-Mart will not be entitled to
25 litigate statutory defenses to individual claims. *Id.* at 2561.

26 The Nevada Supreme Court agrees. The inquiry of predominance is more demanding
27 than the commonality inquiry and requires that "[t]he importance of common questions must
28 predominate over the importance of questions peculiar to individual class members." *See*
Shuette, 121 Nev. at 851, 124 P.3d 530, 540. Plaintiffs, a group of homeowners, filed a class

1 action against a home builder alleging that foundations and concrete slabs in plaintiffs'
2 development were damaged by expansive soils. 121 Nev. at 843, 124 P.3d 530, 535. The home
3 builder objected to class action certification arguing, in part, that the additional, unrelated
4 constructional defects were not common or typical to all residents. *Id.* The district court
5 certified the class and the jury found in favor of the plaintiffs. *Id.*, at 845, 124 P.3d 530, 536.
6

7 On appeal, the Nevada Supreme Court found that class action certification was not
8 appropriate. In so finding, the Court focused partly on the predominance prong of NRCP
9 23(b)(3):

10 The homeowners' claims fail to satisfy the predominance prong of
11 NRCP 23(b)(3) because the individual questions of cause and
12 effect are more important than any common questions of exposure,
13 and they cannot be resolved with generalized proof. As the United
14 States Supreme Court has explained, a shared experience alone
15 does not justify a class action. Instead, it must be adequately
16 demonstrated that this exposure was similar, and caused similar
17 effects, within the class.

18 With regard to the alleged constructional defects for which the
19 class was certified, the homeowners asserted that all of the houses
20 suffered from exposure to improper design and soil preparation in
21 light of the nature of the soils on which they were built. But they
22 admit that the houses were constructed in different phases, under
23 different plans, and with at least two separate slab designs, and
24 they did not show that each of the houses suffered from the same
25 design or constructional flaw or were affected by the expanding
26 soils in the same way. Further, the record contains evidence
27 indicating that the houses' underlying soils required different levels
28 or types of preparation.

29 *Id.* at 545.

30 According to the Nevada Supreme Court:

31common questions predominate over individual questions if
32 they significantly and directly impact each class member's effort to
33 establish liability and entitlement to relief, and their resolution can
34 be achieved through generalized proof.

35 124 P.3d at 540. The *Shuette* Court reversed the district court's judgment in favor of the

1 plaintiffs and held that class action certification was not warranted. 124 P.3d at 545. Western
2 Cab requests that this Court deny certification of the class because there is no common question
3 or common answer involved in this case.

4
5 **VIII. Conclusion**

6 Western Cab requests that this Court apply the *Thomas v. Nevada Yellow Cab*
7 *Corporation* decision prospectively from June 26, 2014, the date it was decided by the Nevada
8 Supreme Court. If this Court applies the decision prospectively, then Perera fails to state a claim
9 upon which relief can be granted. Perera last worked for Western Cab on October 15, 2012.

10 Alternatively, if this Court decides to apply the *Thomas* decision retroactively, then
11 Western Cab requests that the Court hold that a two-year statute of limitations applies to Perera's
12 minimum wage claim. NRS 608.260. Since Perera was always paid minimum wage from
13 September 23, 2012 through October 15, 2012, the last day he worked for Western Cab, Perera
14 fails to state a claim upon which relief can be granted.

15 Western Cab also requests that this Court deny class certification or decertify the class.
16 First, Perera cannot be a class representative since he does not have a minimum wage claim
17 against Western Cab. Second, Perera cannot show that any common questions of law or fact
18 predominate over individual questions. All of Western Cab's drivers were employed for
19 different periods of time, worked different hours and earned a different hourly wage. Therefore,
20 this Court should deny certification of or decertify the class. Perera has failed to state a claim
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upon which relief can be granted and Western Cab is entitled to summary judgment as a matter of law.

Respectfully submitted,
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