Exhibit 5

Exhibit 5

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

EIGHTH JUDICIAL DISTRICT COURT

IN AND FOR CLARK COUNTY, STATE OF NEVADA

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

Plaintiffs,

vs.

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

Defendants.

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

NOTICE OF ENTRY OF ORDER

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

NOTICE OF ENTRY OF ORDER

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

DATED this 17th day of July, 2015.

WOLF, RIFKIN, SHAPIRO,
SCHULMAN & RABKIN, LLP

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

CERTIFICATE OF SERVICE

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

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

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

EIGHTH JUDICIAL DISTRICT COURT

IN AND FOR CLARK COUNTY, STATE OF NEVADA

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

Plaintiffs,

vs.

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

Defendants.

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

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

Hearing Date: June 25, 2015
Hearing Time: 9:00 a.m.

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

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

of law.[1]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

2. This Court finds under the Minimum Wage Amendment, Nev. Const. art. XV, § 16, that for an employer to "provide" health benefits, an employee must actually enroll in health insurance that is offered by the employer.

IT IS THEREFORE ORDERED that Plaintiff Paulette Diaz's Motion for Partial Summary Judgment on Liability as to her First Claim for Relief is GRANTED.

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

DISTRICT COURT JUDGE

Submitted by:

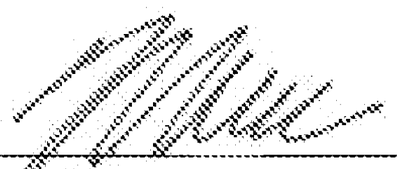
WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP
DON SPRINGMEYER, ESQ.
Nevada State Bar No. 1021
BRADLEY SCHRAGER, ESQ.
Nevada State Bar No. 10217
DANIEL BRAVO, ESQ.
Nevada State Bar No. 13078
3556 E. Russell Road, Second Floor
Las Vegas, Nevada 89120
Attorneys for Plaintiffs

Bradley Schrager, Esq.

---

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

Approved as to form and content by:



LITTLER MENDELSON, P.C.
RICK D. ROSKELLEY, ESQ.
Nevada State Bar No. 3192
ROGER GRANDGENNET, ESQ.
Nevada State Bar No. 6323
MONTGOMERY Y. PAEK, ESQ.
Nevada State Bar No. 10176
KATHRYN BLAKEY, ESQ.
Nevada State Bar No. 12701
3960 Howard Hughes Parkway, Suite 300
Las Vegas, Nevada 89169
Attorneys for Defendant

Exhibit 4

Exhibit 4

THE FIRST JUDICIAL DISTRICT COURT

IN AND FOR CARSON CITY, NEVADA

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

Plaintiff,

vs.

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

Defendants.

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

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

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

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

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

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

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

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

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

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

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

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

Section A of the Minimum Wage Amendment provides:

> A. Each employer shall pay a wage to each employee of not less than the hourly rates set forth in this section. The rate shall be five dollars and fifteen cents ($5.15) per hour worked, if the employer provides health benefits as described herein, or six dollars and fifteen cents ($6.15) per hour if the employer does not provide such benefits. Offering health benefits within the meaning of this section shall consist of making health insurance available to the employee for the employee and the employee's dependents at a total cost to the employee for premiums of not more than 10 percent of the employee's gross taxable income from the employer. These rates of wages shall be adjusted by the amount of increases in the federal minimum wage over $5.15 per hour, or, if greater, by the cumulative increase in the cost of living. The cost of living increase shall be measured by the percentage increase as of December 31 in any year over the level as of December 31, 2004 of the Consumer Price Index (All Urban Consumers, U.S. City Average) as published by the Bureau of Labor Statistics, U.S. Department of Labor or the successor index or federal agency. No CPI adjustment for any one-year period may be greater than 3%. The Governor or the State agency designated by the Governor shall publish a bulletin by April 1 of each year announcing the adjusted rates, which shall take effect the

following July 1. Such bulletin will be made available to all employers and to any other person who has filed with the Governor or the designated agency a request to receive such notice but lack of notice shall not excuse noncompliance with this section. An employer shall provide written notification of the rate adjustments to each of its employees and make the necessary payroll adjustments by July 1 following the publication of the bulletin. Tips or gratuities received by employees shall not be credited as being any part of or offset against the wage rates required by this section.

Nev. Const. art. XV, § 16(A).

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

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

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

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

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

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

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

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

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

implements the language of the Amendment.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

///

///

///

///

///

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

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

James Ellsworth
DISTRICT COURT JUDGE

Submitted by:

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

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

Exhibit 3

Exhibit 3

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

EIGHTH JUDICIAL DISTRICT COURT

IN AND FOR CLARK COUNTY, STATE OF NEVADA

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

Plaintiffs,

vs.

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

Defendants.

Case No.: A701633
Dept. No.: XVI

MOTION FOR APPROVAL OF CLASS ACTION NOTICE TO THE NON-ENROLLMENT CLASS, CLASS NOTICE PLAN, AND RELATED RELIEF

Hearing Date:
Hearing Time:

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

Court sees fit to allow at hearing on this matter.

DATED this 13th day of November, 2015.

WOLF, RIFKIN, SHAPIRO,
SCHULMAN & RABKIN, LLP

By: */s/ Bradley Schrager*

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

NOTICE OF MOTION

TO: ALL PARTIES AND THEIR COUNSEL OF RECORD:

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

DATED this 13th day of November, 2015.

WOLF, RIFKIN, SHAPIRO,
SCHULMAN & RABKIN, LLP

By: */s/ Bradley Schrager*

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

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

III. PLAINTIFFS' PROPOSED NOTICE PLAN

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

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

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

IV. DEFENDANTS SHOULD PAY THE COSTS OF THE CLASS NOTICE

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

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

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

V. CONCLUSION

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

DATED this 13th day of November, 2015.

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

By: */s/ Bradley Schrager*

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

CERTIFICATE OF SERVICE

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

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

Exhibit 1

Exhibit 1

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

PAULETTE DIAZ, LAWANDA GAIL WILBANKS, SHANNON OLSZYNSKI, and CHARITY FITZLEFF,

Plaintiffs,

vs.

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

Defendants.

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

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

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

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

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

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

I. INTRODUCTION

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

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

II. WHAT THE LAWSUIT IS ABOUT

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

III. WHAT IS A CLASS ACTION AND WHO IS INVOLVED

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

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

IV. YOUR RIGHTS AND OPTIONS

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

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

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

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

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

V. THE ATTORNEYS REPRESENTING YOU

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

VI. OBTAINING MORE INFORMATION

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

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

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

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

Dated: MAILING DATE TO BE INSERTED
Enclosure: Exclusion Request

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

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

REQUEST TO BE EXCLUDED FROM CLASS ACTION LAWSUIT

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

Date: _____

Signature: _____

Typed or printed name: _____

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

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

Exhibit 2

Exhibit 2

CASE NO. A701633

DOCKET U

DEPT. 16

DISTRICT COURT

CLARK COUNTY, NEVADA

*** * * * ***

PAULETTE DIAZ,)
)
Plaintiff,)
)
vs.)
)
MDC RESTAURANTS LLC,)
)
Defendant.)
_____)

REPORTER'S TRANSCRIPT

OF

MOTIONS

BEFORE THE HONORABLE JUDGE TIMOTHY C. WILLIAMS

DISTRICT COURT JUDGE

DATED FRIDAY, SEPTEMBER 25, 2015

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

APPEARANCES:

For the Plaintiff:

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP
BY: BRADLEY SCHRAGER, ESQ.
BY: DANIEL BRAVO, ESQ.
BY: JORDAN BUTLER, ESQ.
3556 EAST RUSSELL ROAD
LAS VEGAS, NV 89120
(702) 341-5200
(702) 341-5300 Fax
DSPRINGMEYER@WRSLAWYERS.COM

For the Defendant:

LITTLER MENDELSON
BY: MONTGOMERY Y. PAEK, ESQ.
BY: KATHRYN BLAKEY, ESQ.
3960 HOWARD HUGHES PARKWAY
SUITE 300
LAS VEGAS, NV 89169
(702) 862-8800
(702) 862-8811 (Fax)
MPAEK@LITTLER.COM

*** * * * ***

10:48:40 THE COURT: And, No. 2, you wouldn't be going anyway. I can tell you that because I'm pretty -- I'm pretty loaded in -- in the area after the first of the year. And I'm quite sure there's probably 20-plus
10:48:50 cases in front of you.

MR. SCHRAGER: The notice period alone would take up until that time.

THE COURT: Exactly.

MR. SCHRAGER: And we're nowhere close to the
10:48:56 five-year rule.

THE COURT: Yeah. You're right. So that's not -- notices.

MR. SCHRAGER: Yeah.

THE COURT: So this is really impractical.
10:49:00 We'll talk about that a little bit later.

But the way I'm looking at it is this: And I've listened to the argument of -- as it relates to the stay.

Secondly, I think we should -- we might as
10:49:16 well go ahead and tee up all issues, because at this point I don't know specifically what I'm going to do as it relates to the stay, as it deals specifically with the issue as to whether there was, quote, qualified health insurance or not. I don't know.

10:49:36 I think it's important for everyone to argue

and make their record. And I'm going to tell you this, just like, I guess, it was Judge Wilson: I can't promise you I'll issue a long 15-, 20-page written decision. Maybe I will. It's a very important issue, though. And so I think I want to bundle it all up and decide all issues at the same time.

Hypothetically, I could look at it from this perspective. I decide all issues, stay it. Or I say, no, we're going to go forward and let the Supreme Court decide whether there's a stay.

But -- so I think I have to -- I can't -- we might as well, if my decision ultimately comes down to the equivalency of a partial summary judgment motion on the issue of liability, sobeit, right? But we might as well get it all --

MR. SCHRAGER: Yeah.

THE COURT: -- going and bundle it up and put it in a posture where the reviewing court, the Supreme Court or maybe in this case it might be the Court of appeals -- I doubt it, though. They probably hear this before the Nevada Supreme Court. They wouldn't push it down, you know. And probably because of Judge Tao.

MR. PAEK: We believe so, also, your Honor, yes.

THE COURT: So let's get it all going.

health insurance plan or not?

And that's the focus of the adequacy component.

And -- and just as important, too, I don't see any other issues that would clearly indicate to me that the proposed class representatives would be inadequate under the facts of this specific case. Another component that wasn't really addressed, I think, in argument, but there is an adequacy component as it relates to the character and nature of counsel involved in this case. And, I mean, the law firm who represents the plaintiff clearly meets those requirements. I mean, it just does. And I just wanted to make sure the record is clear on that.

Predominance, again --

MR. SCHRAGER: Oh, I'm sorry, your Honor. We should go back and do typicality under 23(a).

THE COURT: Okay. I'm sorry. Okay.

MR. SCHRAGER: Pardon me.

THE COURT: Well, you know, the typicality and adequacy kind of runs hand in hand in this respect. I mean, this is factually -- this is one of the -- I really think this is probably the simplest class definition I've had to deal with. You know, because in some of the other cases, the -- when you look at common

12:43:59

REPORTER'S CERTIFICATE

STATE OF NEVADA)
:SS
COUNTY OF CLARK)

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

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

_____
PEGGY ISOM, RMR, CCR 541

Exhibit 1

Exhibit 1

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

EIGHTH JUDICIAL DISTRICT COURT

IN AND FOR CLARK COUNTY, STATE OF NEVADA

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

Plaintiffs,

vs.

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

Defendants.

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

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

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

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

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

DATED this 17th day of October, 2015.

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

By: */s/ Bradley Schrager*

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

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of October, 2015, a true and correct copy of **NOTICE OF ENTRY OF ORDER GRANTING CLASS CERTIFICATION, DESIGNATING CLASS REPRESENTATIVES,, AND DESIGNATING CLASS COUNSEL** was served by electronically filing with the Clerk of the Court using the Wiznet Electronic Service system and serving all parties with an email-address on record, pursuant to Administrative Order 14-2 and Rule 9 of the N.E.F.C.R.

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

Electronically Filed
10/16/2015 02:58:55 PM

ORDR

CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

PAULETTE DIAZ; LAWANDA GAIL WILBANKS; SHANNON OLSZYNSKI; and CHARITY FITZLAFF, all on behalf of themselves and all similarly-situated individuals, Plaintiffs, vs. MDC RESTAURANTS, LLC; LAGUNA RESTAURANTS, LLC; INKA, LLC; and DOES 1 through 100, Inclusive, Defendants.	Case No.: A-14-701633-C Dept. No.: XVI **ORDER GRANTING CLASS CERTIFICATION, DESIGNATING CLASS REPRESENTATIVES, AND DESIGNATING CLASS COUNSEL** Hearing Date: September 25, 2015 Hearing Time: 9:30 a.m.

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

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

TIMOTHY C. WILLIAMS
DISTRICT JUDGE

DEPARTMENT SIXTEEN
LAS VEGAS NV 89155

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

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

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

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

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

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

---

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

TIMOTHY C. WILLIAMS
DISTRICT JUDGE

DEPARTMENT SIXTEEN
LAS VEGAS NV 89155

requirement of Rule 23(a)(1).

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

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

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

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

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

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

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

TIMOTHY C. WILLIAMS
DISTRICT JUDGE

DEPARTMENT SIXTEEN
LAS VEGAS NV 89155

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

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

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

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

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

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

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

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

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

. . .

TIMOTHY C. WILLIAMS
DISTRICT JUDGE

DEPARTMENT SIXTEEN
LAS VEGAS NV 89155

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

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

TIMOTHY C. WILLIAMS
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

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

Littler Mendelson

Name	Email
Debra Perkins	dperkins@littler.com
Erin Melwak	emelwak@littler.com
Katy Blakey, Esq.	kblakey@littler.com
Maribel Rodriguez	mrodriguez@littler.com
Montgomery Paek	mpaek@littler.com
Rick Roskelley, Esq.	rroskelley@littler.com

Littler Mendelson, P.C.

Name	Email
Roger Grandgenett, Esq.	rgrandgenett@littler.com

Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP

Name	Email
Bradley S. Schrager, Esq.	bschrager@wrslawyers.com
Christie Rehfeld	crehfeld@wrslawyers.com
Dan Hill, Esq.	dhill@wrslawyers.com
Daniel Bravo	dbravo@wrslawyers.com
Dannielle Fresquez	dfresquez@wrslawyers.com
Don Springmeyer	dspringmeyer@wrslawyers.com
E. Noemy Valdez	nvaldez@wrslawyers.com
Justin Jones, Esq.	jjones@wrslawyers.com
Lorrine Rillera	Lrillera@wrslawyers.com

Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP.

Name	Email
Jennifer Finley	jfinley@wrslawyers.com

Lynn Berkheimer
Judicial Executive Assistant

TIMOTHY C. WILLIAMS
DISTRICT JUDGE

DEPARTMENT SIXTEEN
LAS VEGAS NV 89155

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Petitioners,

vs.

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

Respondents,

and

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

Real Parties in Interest.

Electronically Filed
Dec 01 2015 09:35 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

Case No.: 68523

Eighth Judicial District Court
Case No.: A701633

REAL PARTIES IN INTEREST'S RESPONSE TO PETITIONERS' MOTION TO STAY

DON SPRINGMEYER, ESQ., Nevada Bar No. 1021
BRADLEY SCHRAGER, ESQ., Nevada Bar No. 10217
WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP
3556 E. Russell Road, 2nd Floor
Las Vegas, Nevada 89120-2234
(702) 341-5200 / Fax: (702) 341-5300
Attorneys for Real Parties in Interest

N.R.A.P. 26.1 DISCLOSURE

Pursuant to N.R.A.P. 26.1, the undersigned counsel of record certifies that there are no persons or entities as described in N.R.A.P. 26.1(a) that must be disclosed.

Dated this 30th day of November, 2015.

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

By: */s/ Bradley Schrager, Esq.*

DON SPRINGMEYER, ESQ. (NV Bar No. 1021)
dspringmeyer@wrslawyers.com
BRADLEY SCHRAGER, ESQ. (NV Bar No. 10217)
bschrager@wrslawyers.com
3556 E. Russell Road, 2nd Floor
Las Vegas, Nevada 89120-2234
(702) 341-5200 / Fax: (702) 341-5300

Attorneys for Real Parties in Interest

Real Parties in Interest hereby oppose Petitioners' Motion to Stay. Petitioners' motion should be denied because Petitioners fail to establish that a stay is appropriate under the standards set forth in N.R.A.P. 8, and because any stay entered at this time would actually harm the efficient progress of this action.

I. INTRODUCTION

Petitioners have asked the district court to stay proceedings at least five times, and now come to this Court with the same request. The district court has been correct in denying these repeated demands, and there remains no legitimate reason to stay this action at this time. The court below's handling of the issues in this case has been procedurally careful and fair, and, as explained below, granting a stay now would actually delay and disrupt this litigation. Additionally, Petitioners do not meet the necessary elements for a stay in any event, as they continue to have the option of eventual appeal, will suffer no serious harm should the litigation continue, and they do not demonstrate a likelihood of success on the merits of their arguments.

II. PROCEDURAL HISTORY

Petitioners present a highly selective and disjointed version of the procedural history and status of this matter. Real Parties in Interest can here simplify it quite clearly.

Plaintiffs below moved for the certification of two classes, each having to do with Defendants' liability for violation of article XV, section 16 of the Nevada Constitution (the "Minimum Wage Amendment" or the "Amendment"). One class is comprised of all those of Defendants' employees who did not accept Defendants' health benefits plan but were paid less than $8.25 per hour. *See* **Exhibit 1**, a true and accurate copy of Notice of Entry of Order Granting Class Certification, Designating Class Representatives, and Designating Class Counsel. The district court, having already found that the Amendment required that

Plaintiffs and the class receive something in return for Defendants' retaining a dollar of wages for every hour worked, certified that class on October 19, 2015, calling it among "the simplest class definition" it had ever had to deal with. *See* **Exhibit 2**, a true and accurate copy of pertinent portions of the September 25, 2015 hearing transcript, at 118:23-24.

The second proposed class is based upon Defendants' health benefits plan not meeting the requirements of the Minimum Wage Amendment for paying employees below, currently, $8.25 per hour worked. In litigating that proposed class's certification, Defendants demanded—repeatedly—that the district court first rule upon the merits of their health benefits plans, prior to a certification decision. Obliging, Plaintiffs filed a motion for partial summary judgment to settle the question, and included an expert declaration in support of their claims. Defendants objected, and the district court determined that Defendants should have time to produce and disclose a rebuttal expert report, and therefore denied the motion without prejudice to re-file, while allotting 45 days for Defendants to move forward with a rebuttal expert. That period expires on December 3, 2015, and Plaintiffs expect to re-file their motion both for partial summary judgment and for certification of the benefits plan class in a timely fashion.

In other words, Defendants have argued that the basic merits—the determinative questions of their liability—must be decided prior to certification of both proposed classes in this case: whether employees must accept Defendants' benefits plan in order to be paid less than $8.25 an hour, and whether Defendants' benefits plans meet basic legal requirements to do so at all, if accepted or declined by an employee. The first of these questions has been answered by the district court: Defendants may not pay less than $8.25 to employees that did not accept health benefits. That question is on a pending writ petition to this Court. The second question—whether Defendants' plans qualified it to pay anyone less than

$8.25—is shortly going to be determined by the district court, as well as a decision on whether a class based upon that question ought to be certified in this action. Because of this, the parties have not arrived at the point in this action where a stay is necessary, prudent, or efficient. There is no sense in disrupting this ongoing process for one proposed class while a second is pending before the district court, and upon which the same pattern of writ and stay request will surely follow.

So far in this case Defendants have filed two writs, and have asked for numerous stays at both jurisdictional levels. It is likely this pattern will continue. Given the objective lack of quality of Defendants' health benefits plans, it is likely they will lose on that question and face certification of the second class as well. At that point, it is near-certain this Court will be entertaining further writ petitions and requests for stay on those questions. It is not efficient litigation conduct to call a time-out every time a defendant is unhappy with the result of motion practice at the district court level.

Real Parties in Interest, as well as the district court, are aware of the first-impression nature of these questions. Real Parties in Interest are not opposed, in principle, to an appropriate stay allowing this Court to determine, finally, the issues at hand. The question is one of timing. The district court itself recognized that it is better to have all issues of a similar nature addressed by this Court at once, rather than seeing serial writs, and attendant stay requests, which stretch this litigation far into the future. *See* **Exhibit 2** at 58:14-59:22. The best course at present is to allow the district court to manage this case appropriately, as it has done so far.

Real Parties in Interest will correct Petitioners on one important point. No one has moved the district court to send out class notice to the certified class. Instead, cognizant of the need for both classes to be addressed and motion practice to occur, Plaintiffs below have moved only for approval of a notice form for the certified class based upon Defendants' failure to provide health benefits to

underpaid employees. There has been no demand for contact information or for the opening of the opt-out period, both of which Plaintiffs expect will be achieved once the district court is satisfied it is appropriate to do so. In Plaintiffs' understanding, it is unnecessary to waste time at the present while the parties await the district court's determination on partial summary judgment and certification of the second class when the notice for the first, certified class may be readied for distribution at the appropriate time. This actually furthers the goals of efficiency in this case, which is among the reasons class actions exist generally. Should this Court, after consideration of both class certification decisions and the merits decisions Defendants demanded, determine there was error, the district may easily adapt its procedures and no class notices will have yet been sent. There is no need, however, to extend the process by months by acceding to stay requests at every step along the development of this case.

III. ARGUMENT

In deciding whether to issue a stay, the Supreme Court will generally consider the following factors: (1) whether the object of the writ petition will be defeated if the stay is denied; (2) whether petitioner will suffer irreparable or serious injury if the stay is denied; (3) whether real party in interest will suffer irreparable or serious injury if the stay is granted; and (4) whether petitioner is likely to prevail on the merits in the writ petition. *See* N.R.A.P. 8(c); *Hansen v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 116 Nev. 650, 657, 6 P.3d 982, 986 (2000) (denying the request for stay). No individual factor predominates, and whether a stay is warranted rests with the court's broad discretion. *See Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 251, 89 P.3d 36, 38 (2004).

Considering its comprehensive knowledge of the events leading up to its October 16, 2015 Order, as well as the prejudice further delay imposes upon Real Parties in Interest and the certified class, the district court rightly rejected

Petitioners' request for continued delay in the form of a stay. Real Parties in Interest ask this Court to follow suit.

A. The Object of the Writ Petition

Denying the motion to stay will not defeat the object of the writ petition. Real Parties in Interest have not moved the district court below for notice to be sent out to the certified class—Real Parties in Interest merely moved for approval of a notice form, the notice plan, and other related relief. *See* **Exhibit 3**, a true and accurate copy of Plaintiffs' Motion for Approval of Class Action Notice. Approval of the notice form by the district court is not a "court-sanctioned solicitation[;]" here it functions as efficient use of the parties' time. Denying Petitioners' motion to stay will advance the litigation along as the district court below can deal with the proposed notice and then hear arguments and rule upon the certification of the second proposed class and liability issues pertaining to whether Petitioners' benefits plans meet basic legal requirements. All of these determinations are appealable in any event, but more importantly they will be taking place while this Court is deciding the filed writ petition, should it determine writ relief is warranted. Anyway, Plaintiffs have no plans to ask the district court to order Defendants to hand over contact information or to send out the class notice for the first certified class until resolution of the certification of the second class.

B. Irreparable or Serious Injury

This Court's precedents have long recognized the prejudice inflicted by undue delays. *See Skeen v. Valley Bank of Nev.*, 89 Nev. 301, 303, 511 P.2d 1053, 1054 (1973) ("[D]iligent parties are entitled to be protected against interminable delay and uncertainty as to their legal rights."). Moreover, plaintiffs to civil suits have "an obvious interest in proceeding expeditiously," and "[t]his is particularly true in the context of complex litigation which must proceed in an efficient manner." *Aspen Fin. Servs. v. Dist. Ct.*, 128 Nev. Adv. Op. 57, 289 P.3d 201, 208-

09 (2012) (citing *Microfinancial, Inc. v. Premier Holidays Intern.*, 385 F.3d 72, 78 (1st Cir. 2004); *Digital Equipment Corp. v. Currie Enterprises*, 142 F.R.D. 8, 12 (D. Mass. 1991)). The delay resulting from a stay may also "duly frustrate a plaintiff's ability to put on an effective case" because as time elapses, "witnesses become unavailable, memories of conversations and dates fade, and documents can be lost or destroyed." *Id*. (citing *Alcala v. Texas Webb County*, 625 F. Supp. 2d 391, 405 (S.D. Tex. 2009)).

Petitioners' cited cases are not on point to the issues at hand in this litigation; they speak to the lower court's jurisdiction while an *appeal* is pending—not a writ. For instance, *Elsea v. Saberi*, 4 Cal. App. 4th 625, 5 Cal. Rptr. 2d 742 (1992), pertains to the trial court's lack of jurisdiction with vacating a default judgment in personal injury action while the appeal is pending. *Id.* at 629, 5 Cal. Rptr. 2d at 744; *accord In re Marriage of Horowitz*, 159 Cal. App. 3d 377, 381, 205 Cal. Rptr. 880 (Ct. App. 1984) ("The purpose of the rule depriving the trial court of jurisdiction pending appeal in civil actions is to protect the jurisdiction of the appellate court; the rule prevents the trial court from rendering the appeal futile by changing the judgment into something different."); *City of Hanford v. Superior Court*, 208 Cal. App. 3d 580, 588, 256 Cal. Rptr. 274 (Ct. App. 1989) (same). Here, there are no issues regarding the district court's jurisdiction as it retains jurisdiction while this Court decides to accept the pending writ.

As already discussed above, the harm Petitioners describe is imaginary. No class notice has been sent out, and no class notice will be sent out until the appropriate moment. More pointedly, even if there was a pending request to distribute class notice here, no Nevada court has ever agreed with Petitioners that the mere sending out of class notices is, in itself, serious harm requiring a stay. In fact, the opposite is true. In *Shuette*, this Court stated that it is better for the district

court to initially grant class certification, if appropriate, and "reevaluate the certification in light of any problems that appear post-discovery or later in the proceedings." *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 857-58, 124 P.3d 530, 544 (2005). In that situation—just as if a class was certified and noticed, but the plaintiff's case was subsequently lost—class members would have received notice of the action and of their rights, but would not have garnered a recovery. The notice, in those circumstances, would have "disrupted" the defendants' business to exactly the same extent as that which Petitioners complain of here. Surely Petitioners are not claiming that notice can only go out to a certified class once the case is already won or lost, in all instances. The right to be protected from the annoyance of a class-action notice is simply not a recognized basis for granting a stay in these circumstances.

Denying a stay will not cause Petitioners to suffer irreparable or serious injury, as the district court can reevaluate any certification issues later if this Court were to accept and grant the pending writ petition. However, if a stay is granted, Real Parties in Interest and the certified class suffer irreparable or serious injury as class members' addresses are lost or grow stale, and Real Parties in Interest are unable to move forward with certification of the second proposed class and liability-related issues.

C. Likelihood of Success on the Merits

Every petitioner to this Court likes their chances of success on the merits; to state otherwise would be foolish. Two district court judges, however, have ruled contrary to Petitioners' position. In fact, Judge James E. Wilson of the First Judicial District Court recently found, in invalidating N.A.C. 608.100(1), which Petitioners point to as a basis for their success on the merits, that "the Minimum Wage Amendment requires that employees actually receive qualified health insurance in order for the employer to pay, currently, down to $7.25 per hour to

those employees." *See* **Exhibit 4**, a true and accurate copy of Judge Wilson's August 12, 2015 Decision and Order. Judge Wilson states that "[o]therwise, the purposes and benefits of the Amendment are thwarted, and employees (the obvious beneficiaries of the Amendment) who reject insurance plans offered by their employer would receive neither the low-cost health insurance … nor the raise in wages[.]" *Id*. The same is true here with the district court's ruling below. "[F]or an employer to 'provide' health benefits, an employee must actually enroll in health insurance that is offered by the employer." *See* **Exhibit 5**, a true and accurate copy of Notice of Entry of July 15, 2015 Order. Petitioners' contentions regarding the likelihood of their success on the merits of their writ petition is just an obstinate re-argument of their original opposition to the motion for partial summary judgment filed with the district court below. That does not establish likelihood of success on the merits. If anything, the concurrence of a second district court judge would seem to *reduce* the likelihood of Petitioners' success.

IV. CONCLUSION

There are no grounds for this Court to stay the district court's proceedings. Petitioners have put forth no extraordinary reasons not only why their appeal rights are not sufficient to address their concerns, but why the case ought to be stayed at this time with so many important decisions, determinations, and motions already in train. The outstanding issues—the certification of the second proposed class and a decision upon Petitioners' health benefits plans—that the district court needs to address need to be resolved in a timely fashion, and a stay does nothing to advance the matters at hand. No one is sending out class notices to the certified class at this time, and the delay resulting from a stay will duly impede the parties from litigating important but as-yet unresolved issues.

/ / /

/ / /

For the reasons stated herein, therefore, Real Parties in Interest respectfully request that this Court deny Petitioners' Motion to Stay.

Dated this 30th day of November, 2015.

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

By: */s/ Bradley Schrager, Esq.*

DON SPRINGMEYER, ESQ. (NV Bar No. 1021)
dspringmeyer@wrslawyers.com
BRADLEY SCHRAGER, ESQ. (NV Bar No. 10217)
bschrager@wrslawyers.com
3556 E. Russell Road, 2nd Floor
Las Vegas, Nevada 89120-2234
(702) 341-5200 / Fax: (702) 341-5300

Attorneys for Real Parties in Interest

CERTIFICATE OF SERVICE

STATE OF NEVADA, COUNTY OF CLARK

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Clark, State of Nevada My business address is 3556 E. Russell Road, 2nd Floor, Las Vegas, Nevada 89120-2234.

On November 30, 2015, I served true copies of the following document(s) described as **REAL PARTIES IN INTEREST'S RESPONSE TO PETITIONERS' MOTION TO STAY** on the interested parties in this action as follows:

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

BY U.S. MAIL: I enclosed the document(s) listed above in a sealed envelope or package addressed to the persons at the addresses listed below and placed the envelopes for collection and mailing, following our ordinary business practices. I am readily familiar with Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

Rick D. Roskelley, Esq.
Roger Grandgenett, Esq.
Montgomery Y. Paek, Esq.
Kathryn B. Blakey, Esq.
LITTLER MENDELSON, P.C.
3960 Howard Hughes Parkway,
Suite 300
Las Vegas, NV 89169
Attorneys for Petitioners

Elayna J. Youchah, Esq.
Steven C. Anderson, Esq.
JACKSON LEWIS P.C.
3800 Howard Hughes Parkway
Suite 600
Las Vegas, NV 89169
Attorneys for Amici Curiae

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

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

Executed on November 30, 2015, at Las Vegas, Nevada.

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