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

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

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

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

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

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

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

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

James C. Mahan
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 “E”

EXHIBIT “E”

NEOJ
DON SPRINGMEYER, ESQ.
Nevada State Bar No. 1021
BRADLEY SCHRAGER, ESQ.
Nevada State Bar No. 10217
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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

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NOTICE OF ENTRY OF ORDER

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

DATED this 17th day of July, 2015.

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

By: */s/ Bradley Schrager*
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

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CLERK OF THE COURT

ORDR

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

IN AND FOR CLARK COUNTY, STATE OF NEVADA

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

Plaintiffs,

vs.

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

Defendants.

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

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

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

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

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

07-14-15 11:55 RCVD

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.
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DANIEL BRAVO, ESQ.
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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

IN THE SUPREME COURT OF THE STATE OF NEVADA

COLLINS KWAYISI, AN INDIVIDUAL,
Appellant,
vs.
WENDY'S OF LAS VEGAS, INC., AN OHIO CORPORATION; AND CEDAR ENTERPRISES, INC., AN OHIO CORPORATION,
Respondents.

No. 68754

FILED

OCT 09 2015

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

ORDER ACCEPTING CERTIFIED QUESTION, DIRECTING BRIEFING, AND DIRECTING SUBMISSION OF FILING FEE

This matter involves a legal question certified to this court, under NRAP 5, by the United States District Court, District of Nevada. Specifically, the District Court has certified the following question of law to this court:

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

As no clearly controlling Nevada precedent exists with respect to this important legal question and its answer may determine part of the federal case, we accept the certified question. *See* NRAP 5(a); *Volvo Cars of N. Am., Inc. v. Ricci*, 122 Nev. 746, 137 P.3d 1161 (2006).

Accordingly, appellant shall have 30 days from the date of this order to file and serve an opening brief and appendix. Respondents shall have 30 days from the date the opening brief is served to file and serve an answering brief. Appellant shall then have 20 days from the date the answering brief is served to file and serve any reply brief. The parties' briefs shall comply with NRAP 28, 28.2, 31(c), and 32. *See* NRAP 5(g)(2).

Lastly, in any proceeding under NRAP 5, fees "shall be the same as in civil appeals . . . and shall be equally divided between the parties unless otherwise ordered by the certifying court." NRAP 5(e). The District Court's order does not address the payment of this court's fees. Accordingly, appellant and respondents shall each tender to the clerk of this court, within 11 days from the date of this order, the sum of $125, representing half of the filing fee. *See* NRAP 3(e); NRAP 5(e).

It is so ORDERED.

_____, C.J.
Hardesty

_____, J.
Parraguirre

_____, J.
Douglas

_____, J.
Cherry

_____, J.
Saitta

_____, J.
Gibbons

_____, J.
Pickering

cc: Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP/Las Vegas
Littler Mendelson/Las Vegas

Supreme Court of Nevada

NOTICE OF ELECTRONIC FILING

Notice is given of the following activity:

Date and Time of Notice: Oct 09 2015 02:03 p.m.

Case Title:	KWAYISI VS. WENDY'S OF LAS VEGAS (NRAP 5)
Docket Number:	68754
Case Category:	Original Proceeding
Document Category:	Filed Order Accepting Certified Question, Directing Briefing, and Directing Submission of Filing Fee. Opening Brief and Appendix due: 30 days. Answering Brief due: 30 days from service of opening brief. Reply Brief due: 20 days from service of answering brief. Appellant and Respondent shall each tender to the clerk of this court, within 11 days from the date of this order, the sum of $125, representing half of the filing fee.
Submitted by:	Issued by Court
Official File Stamp:	Oct 09 2015 11:38 a.m.
Filing Status:	Accepted and Filed
Docket Text:	Filed Order Accepting Certified Question, Directing Briefing, and Directing Submission of Filing Fee. Opening Brief and Appendix due: 30 days. Answering Brief due: 30 days from service of opening brief. Reply Brief due: 20 days from service of answering brief. Appellant and Respondent shall each tender to the clerk of this court, within 11 days from the date of this order, the sum of $125, representing half of the filing fee.

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Kathryn Blakey
Montgomery Paek
Bradley Schrager
Don Springmeyer
Roger Grandgenett

No notice was electronically mailed to those listed below; counsel filing the document must serve a copy of the document on the following:

Rick Roskelley

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IN THE SUPREME COURT OF THE STATE OF NEVADA

ERIN HANKS,
Appellant,
vs.
BRIAD RESTAURANT GROUP, LLC, A NEW JERSEY LIMITED LIABILITY COMPANY,
Respondent.

No. 68845

FILED

OCT 0 9 2015

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

ORDER ACCEPTING CERTIFIED QUESTION, DIRECTING BRIEFING, AND DIRECTING SUBMISSION OF FILING FEE

This matter involves a legal question certified to this court, under NRAP 5, by the United States District Court, District of Nevada. Specifically, the District Court has certified the following question of law to this court:

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

As no clearly controlling Nevada precedent exists with respect to this important legal question and its answer may determine part of the federal case, we accept the certified question. *See* NRAP 5(a); *Volvo Cars of N. Am., Inc. v. Ricci*, 122 Nev. 746, 137 P.3d 1161 (2006).

Accordingly, appellant shall have 30 days from the date of this order to file and serve an opening brief and appendix. Respondent shall have 30 days from the date the opening brief is served to file and serve an answering brief. Appellant shall then have 20 days from the date the answering brief is served to file and serve any reply brief. The parties' briefs shall comply with NRAP 28, 28.2, 31(c), and 32. *See* NRAP 5(g)(2).

Lastly, in any proceeding under NRAP 5, fees "shall be the same as in civil appeals . . . and shall be equally divided between the parties unless otherwise ordered by the certifying court." NRAP 5(e). The District Court's order does not address the payment of this court's fees. Accordingly, appellant and respondent shall each tender to the clerk of this court, within 11 days from the date of this order, the sum of $125, representing half of the filing fee. *See* NRAP 3(e); NRAP 5(e).

It is so ORDERED.

_____, C.J.
Hardesty

_____, J.
Parraguirre

_____, J.
Douglas

_____, J.
Cherry

_____, J.
Saitta

_____, J.
Gibbons

_____, J.
Pickering

cc: Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP/Las Vegas
Littler Mendelson/Las Vegas

IN THE SUPREME COURT OF THE STATE OF NEVADA

MDC RESTAURANTS, LLC, A NEVADA LIMITED LIABILITY COMPANY; LAGUNA RESTAURANTS, LLC, A NEVADA LIMITED LIABILITY COMPANY; AND INKA, LLC, A NEVADA LIMITED LIABILITY COMPANY, Petitioners, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE TIMOTHY C. WILLIAMS, DISTRICT JUDGE, Respondents, and PAULETTE DIAZ, AN INDIVIDUAL; LAWANDA GAIL WILBANKS, AN INDIVIDUAL; SHANNON OLSZYNSKI, AN INDIVIDUAL; AND CHARITY FITZLAFF, AN INDIVIDUAL, ON BEHALF OF THEMSELVES AND ALL SIMILARLY-SITUATED INDIVIDUALS, Real Parties in Interest.	No. 68523
COLLINS KWAYISI, AN INDIVIDUAL, Appellant, vs. WENDY'S OF LAS VEGAS, INC., AN OHIO CORPORATION; AND CEDAR ENTERPRISES, INC., AN OHIO CORPORATION, Respondents.	No. 68754

THE STATE OF NEVADA, OFFICE OF THE LABOR COMMISSIONER; AND SHANNON CHAMBERS, NEVADA LABOR COMMISSIONER IN HER OFFICIAL CAPACITY, Appellants, vs. CODY C. HANCOCK, AN INDIVIDUAL, Respondent.	No. 68770
ERIN HANKS, Appellant, vs. BRIAD RESTAURANT GROUP, LLC, A NEW JERSEY LIMITED LIABILITY COMPANY, Respondent.	No. 68845

ORDER

Counsel for petitioners in Docket No. 68523 and respondents in Docket Nos. 68754 and 68845, Montgomery Paek, has filed motions to consolidate the four matters indicated on the caption of this order. Respondent in Docket No. 68770 has filed an opposition, and Mr. Paek has filed a reply. Having considered the parties' arguments and the documents before us, we conclude that formal consolidation is warranted, and we hereby consolidate these matters. *See* NRAP 3(b)(2).

Additionally, the parties in Docket No. 68770 have filed a joint motion to expedite resolution and for an alternative briefing schedule. Cause appearing, the motion is granted to the following extent. Appellants in Docket No. 68770 shall have 15 days from the date of this order to file and serve the opening brief and appendix. Thereafter, respondent shall have 15 days from service of the opening brief and appendix to file the answering brief and appellants shall have 10 days from service of the answering brief to file and serve a reply brief, if any.

Respondents in Docket Nos. 68754 and 68845 and petitioners in Docket No. 68523 shall have 15 days from the date of this order to file and serve a combined answering brief in Docket Nos. 68754 and 68845 and reply to answer to writ petition in Docket No. 68523 of no more than 45 pages or 21,000 words. Appellants in Docket Nos. 68754 and 68845 shall have 10 days from service of the combined answering brief and reply to writ petition to file a combined reply brief, if any, of no more than 30 pages or 14,000 words. The disposition of these consolidated matters will be expedited to the extent this court's docket will allow.

It is so ORDERED.

_____, C.J.

cc: Littler Mendelson/Las Vegas
Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP/Las Vegas
Jackson Lewis P.C.
Attorney General/Las Vegas

Supreme Court of Nevada

NOTICE OF ELECTRONIC FILING

Notice is given of the following activity:

Date and Time of Notice: Nov 13 2015 03:25 p.m.

Case Title:	MDC RESTAURANTS, LLC VS. DIST. CT. (DIAZ) C/W 68754/68770/68845
Docket Number:	68523
Case Category:	Original Proceeding
Document Category:	Filed Order. We hereby consolidate these matters. Appellants in Docket No. 68770 shall have 15 days from the date of this order to file and serve the opening brief and appendix. Thereafter, respondent shall have 15 days from service of the opening brief and appendix to file the answering brief and appellants shall have 10 days from service of the answering brief to file and serve a reply brief, if any. Respondents in Docket Nos. 68754 and 68845 and petitioners in Docket No. 68523 shall have 15 days from the date of this order to file and serve a combined answering brief in Docket Nos. 68754 and 68845 and reply to answer to writ petition in Docket No. 68523 of no more than 45 pages or 21,000 words. Appellants in Docket Nos. 68754 and 68845 shall have 10 days from service of the combined answering brief and reply to writ petition to file a combined reply brief, if any, of no more than 30 pages or 14,000 words. The disposition of these consolidated matters will be expedited to the extent this court's docket will allow. Nos. 68523/68754/68770/68845.
Submitted by:	Issued by Court
Official File Stamp:	Nov 13 2015 02:02 p.m.
Filing Status:	Accepted and Filed
Docket Text:	Filed Order. We hereby consolidate these matters. Appellants in Docket No. 68770 shall have 15 days from the date of this order to file and serve the opening brief and appendix. Thereafter, respondent shall have 15 days from service of the opening brief and appendix to file the answering brief and appellants shall have 10 days from service of the answering brief to file and serve a reply brief, if any. Respondents in Docket Nos. 68754 and 68845 and petitioners in Docket No. 68523 shall have 15 days from the date of this order to file and serve a combined answering brief in Docket Nos. 68754 and 68845 and reply to answer to writ petition in Docket No. 68523 of no more than 45 pages or 21,000 words. Appellants in Docket Nos. 68754 and 68845 shall have 10 days from service of the combined answering brief and reply to writ petition to file a combined reply brief, if any, of no more than 30 pages or 14,000 words. The disposition of these consolidated matters will be

expedited to the extent this court's docket will allow. Nos. 68523/68754/68770/68845.

The Clerk's Office has filed this document. It is now available on the Nevada Supreme Court's E-Filing website. Click here to login to eFlex and view this document.

Electronic service of this document is complete at the time of transmission of this notice. The time to respond to the document, if required, is computed from the date and time of this notice. Refer to NEFR 9(f) for further details.

Clerk's Office has electronically mailed notice to:

Roger Grandgenett
Don Springmeyer
Kathryn Blakey
Montgomery Paek
Elayna Youchah
Bradley Schrager

No notice was electronically mailed to those listed below; counsel filing the document must serve a copy of the document on the following:

Rick Roskelley
Daniel Bravo

This notice was automatically generated by the electronic filing system. If you have any questions, contact the Nevada Supreme Court Clerk's Office at 775-684-1600 or 702-486-9300.

RICK D. ROSKELLEY, ESQ., Bar # 3192
ROGER L. GRANDGENETT II, ESQ., Bar # 6323
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Telephone: 702.862.8800
Fax No.: 702.862.8811

Attorneys for Defendants

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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

Plaintiffs,

vs.

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

Defendants.

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

DEFENDANTS' OPPOSITION TO MOTION OF PLAINTIFFS FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY AS TO PLAINTIFF COLLINS KWAYISI'S FIRST CLAIM FOR RELIEF

Defendants WENDY'S OF LAS VEGAS ("WOLV") and CEDAR ENTERPRISES, INC., ("Defendants"), by and through their counsel of record, Littler Mendelson, hereby file their Opposition to Motion of Plaintiffs for Partial Summary Judgment on Liability as to Plaintiff Collins Kwayisi's First Claim for Relief.

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MEMORANDUM OF POINTS & AUTHORITIES

I. INTRODUCTION

Plaintiff Kwayisi's Motion seeking a partial summary judgment turns on the definition of a single word: provide. In order to prevail on his Motion, Plaintiff Kwayisi must convince this Court that unless he actually personally enrolled in the health plan admittedly made available to him by his employer, WOLV, WOLV did not "provide" health benefits as that term is used in Nev. Const. art XV § 16 (Nevada Constitution's Minimum Wage Amendment or "MWA"). ***See* Kwayisi Motion (ECF No. 48), at 3:8-9**. There is, however, one problem with this argument. It is flat out wrong.

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

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

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ruling would be a classic blunder and clear violation of WOLV's and other Nevada employers' due process.

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

II. STANDARD OF REVIEW

Pursuant to the Federal Rules of Civil Procedure, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

All facts and inferences drawn must be viewed in the light most favorable to the responding party when determining whether a genuine issue of material fact exists for summary judgment purposes. *Brinson v. Linda Rose Joint Venture*, 53 F.3d 1044, 1050 (9th Cir. 1995). After drawing inferences in the light most favorable to the non-moving party, summary judgment will be granted if all reasonable inferences defeat the non-moving party's claims as a matter of law. *Securities Exchange Comm'n v. Seabord Corp.*, 677 F.2d 1297, 1298 (9th Cir. 1982); *Wood v. Safeway, Inc.*, 121 P.3d 1026, 1028 (2005).

A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the differing versions of the truth. *See Seabord*, 677 F.2d at 1305-1306. The substantive law defines which facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue of material fact is more than some "metaphysical doubt" as to the material facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Only disputes over outcome determinative facts under the applicable substantive law will preclude the entry of summary judgment. *Id.* If the factual context makes the non-moving party's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986).

The party moving for summary judgment has the initial burden of showing the absence of a

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genuine issue of material fact. *Metro Indus., Inc. v. Sammi Corp.*, 82 F.3d 839, 847 (9th Cir. 1996). Once the movant's burden is met by presenting evidence which, if uncontroverted, would entitle the movant to a directed verdict at trial, the burden then shifts to the non-moving party to set forth specific facts demonstrating that there is a genuine issue for trial. *Liberty Lobby*, 477 U.S. at 250.

III. ADDITIONAL UNDISPUTED FACTS

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

1. Plaintiff Kwayisi was offered insurance at his time of hire. ***See* Plaintiffs' First Amended Class Action Complaint (ECF No. 3), at ¶ 16, 45; Answer (ECF No. 42), at ¶ 45**
2. Plaintiff Kwayisi declined WOLV's health insurance. ***See* Plaintiffs' First Amended Class Action Complaint (ECF No. 3), at ¶ 16, 45; Answer (ECF No. 42), at ¶ 45.**

IV. ARGUMENT

The MWA sets forth a very clear directive for Nevada employers paying minimum wage: if they provide health insurance to their employees, they may pay the lower-tier minimum wage. Nev. Const. art XV § 16. Indeed, the parties agree that this is inherent in the plain language of the MWA. ***See* Kwayisi Motion (ECF No. 48), at 7:5-7**. The disagreement therefore, rests solely on what is meant by the word "provide." According to Plaintiff, it means employees have to enroll in their employer-based insurance plans. According to Defendants is means employers have to make insurance available to their employees.

Ultimately, Defendants' position must prevail for three key reasons: (1) the MWA directs employers to offer insurance and it does not require employees to enroll in insurance; (2) the regulations implementing the MWA specifically state that employers need only offer qualifying health insurance benefits in order to pay the lower-tier minimum wage; and (3) the retroactive effect of a ruling requiring employees to be enrolled in insurance prior to being paid the lower-tier minimum wage would be a violation of due process.

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

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

The MWA focuses on what actions employers must take in order to pay below the upper tier minimum wage. *See* Nev. Const. art XV § 16. Specifically, it directs employers to offer health insurance benefits to their employees. *Id.* At no point does it discuss or even mention any action that must be taken by employees. *See id.* Thus, Plaintiff's assertion that the MWA states that employees must enroll in the health insurance plan provided to them by their employers in order to be paid below the upper tier minimum wage is completely erroneous and contrary to the clear directive of the MWA. ***See* Kwayisi Motion (ECF No. 48), at 3:8-9.**

Indeed, the MWA directs only that employers must offer insurance and Plaintiff's argument that employees must enroll in insurance fails for three reasons: (1) the plain language of the MWA permits payment of the lower-tier minimum wage where the employer offers health benefits to its employees; (2) Plaintiff's unreasonably restricted definition of the word "provide" renders the language of the MWA nugatory; and (3) Plaintiff's purported authority for his position is inapposite to the instant matter.

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

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

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overruled in part by Garvin v. Dist. Ct., 118 Nev. 749 (2002). Here, the plain language of the MWA is clear:

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

Nev. Const. art. XV § 16. Thus, if an employer provides health insurance to its employees, it may pay those employees the lower-tier minimum wage. The plain and ordinary meaning of the word "provide" is "to make available." *See infra*. Therefore, if an employer makes health insurance available to its employees, it may pay the lower tier minimum wage.

In an attempt to contort the very straight-forward directive of the MWA, Plaintiff requests that this Court adopt a nonsensical definition of the word "provide." Specifically, Plaintiff asserts that the word "provide" means that there must be some form of acceptance or assertion of control or possession by the person to whom a service or item is being provided. **Kwayisi Motion (ECF No. 48), at 4:3-5**. Thus, according to Plaintiff, a service or item has not been provided unless the person for whom the service or item is intended actually uses or takes that service or item. **Id**. This is completely contrary to every definition of the word "provide," including the definitions used by the sources Plaintiff cites. Specifically, Plaintiff directs the Court to the online Meriam-Webster Dictionary's Thesaurus definition for the word provide. **Kwayisi Motion (ECF No. 48), at 8:5**. However, even that definition explains that there is no need for actual acceptance or use:

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

<http://www.merriam-webster.com/thesaurus/provide>. As the example sets forth, providing is the same as making available for use. If a "well-heeled vacationer" doesn't use or keep the towels, it doesn't mean the "comforts of home" weren't provided. Rather, if the towels were available for use, they were provided – plain and simple. For example, if person A invites person B over for dinner and then prepares and offers person B dinner, person A has provided person B dinner

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regardless of whether person B eats the food provided. What matters is that dinner was made available.

Next, Plaintiff completely omits the actual dictionary definition of the online Merriam-Webster Dictionary. **Kwayisi Motion, at 8:2**. The online Merriam-Webster Dictionary defines "provide" as follows:

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

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

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

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

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

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

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

The definition of the word "provide" is "to make available for use." Accordingly, as explained above, the plain language of the MWA is clear: if an employer makes insurance available to its employees, it may pay those employees the lower-tier minimum wage. It is that simple.

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

Whenever possible, statutes are construed "such that no part of the statute is rendered nugatory or turned to mere surplusage" or to "produce absurd or unreasonable results." *Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 418, 132 P.3d 1022, 1028 (2006); *Harris*, 119 Nev. at 642, 81 P.3d at 534. Here, Plaintiff has requested that this Court adopt a definition of the word "provide" that is so restrictive that whether an employer offers insurance to its employees would have no bearing whatsoever on whether that employer is permitted to pay the lower-tier minimum wage. This is in complete contrast to the actual language of the MWA. Indeed, directly after setting forth that employers must provide insurance, the MWA goes on to explain exactly what providing health insurance means. Specifically, it states:

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

It is not setting forth a separate and distinct act by the employer. It is clarifying what sort of insurance should be provided by the employer. Thus, the MWA uses the terms "provide" and "offer"

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synonymously. To assert otherwise is nonsensical. If "offer" and "provide" mean entirely separate things, as Plaintiff suggests, then the second sentence is essentially meaningless and would be rendered nugatory. This of course is not the case. The drafters, aware that employers cannot forcibly enroll their employees in insurance, indicated that the relevant act for compliance with the MWA is the employer's offer of insurance – not an employee's acceptance. Thus, Plaintiff's contention that "[t]he term '[o]ffering' is not concerned with whether an employer qualifies for paying the lower tier wage addressed in the prior sentence," is blatantly inaccurate. **Kwayisi Motion (ECF No. 48), at 10:5-7**. The word "offering" is clearly used in conjunction with the type of insurance that must be made available in order for employers to qualify to pay below the upper-tier minimum wage. Thus the use of the word "offering" is relevant and it is directly addressing whether an employer qualifies to pay the lower-tier minimum wage.

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

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

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

Most likely aware that his argument requires the Court to ignore the plain language of the MWA and the obvious directives therein, Plaintiff makes tenuous arguments based on inapposite

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authority that does not actually support his position. For example, in an effort to skew the clear definition of the word "provide," Plaintiff makes a tenuous argument regarding the word "furnish." **Kwayisi Motion (ECF No. 48), at 8:22-28**. Specifically, he notes that "furnish" is synonymous with "provide" and then cites to a criminal case wherein a prisoner was charged with furnishing a controlled substance to himself. **Id**. Plaintiff notes that the Nevada Supreme Court stated that furnishing "calls for delivery by one person to another person." **Id**. However, what Plaintiff leaves out is that the sentence goes on to say "you can't deliver to yourself." *State v. Powe, No. 55909*, 2010 WL 3462763, at *1 (Nev. July 19, 2010). Thus, the Nevada Supreme Court was in no way indicating that the words "provide" or "furnish" mean there must be some acceptance or use or ongoing possession by the person for whom an item or service is intended. Rather, the point of the statement was that a person cannot transfer something to themselves. *See id.*

Next, Plaintiff relies upon an Internal Revenue Service ("IRS") interpretation from 1976 of Treasury Regulation § 601.201(o)(3) which stands for the exact opposite of Plaintiff's position. **Kwayisi Motion (ECF No. 48), at 8 fn. 4**. Specifically, at issue was whether applicants must be given copies of all comments on an application or allowed to inspect and copy materials on request. **Id**. The IRS determined that the applicant must be given copies, "not merely given the opportunity to obtain them" and, therefore, "rather than adopting a strained reading of the word 'provide,' the regulation should be amended." **Id.** Thus, the IRS was stating that as written the regulation was indicating an "opportunity to obtain" may be implied by the use of the word "provide."

Plaintiff further relies on a case which makes a distinction between the use of the terms "state office" and "local governing body" in an effort to show that the MWA intended two entirely different meanings by using the words "provide" and "offer." **Kwayisi Motion (ECF No. 48), at 11:1-9**. At issue in that case was the drafter's intent in Nev. Const. art. XV § 3 by using different terms in addressing how term limits apply in state and local elections. *Lorton v. Jones*, 130 Nev. Adv. Op. 8, 322 P.3d 1051, 1056 (2014), *reh'g denied* (Mar. 5, 2014). This is in no way analogous to the matter at hand. "Provide" and "offer" are not materially different terms. As discussed above, provide means to make available. By the very nature of the subject matter of the MWA, naturally an offer must occur. The two terms go hand in hand.

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Finally, Plaintiff refers to the "findings and purposes" of the MWA. **Kwayisi Motion (ECF No. 48), at 13:16-28**. As evident from Plaintiff's motion, the "findings and purposes" make no reference whatsoever to the alleged requirement that an employee must enroll in insurance. **Id**.

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

In what can only be described as a blatant attempt to mislead the Court, Plaintiff quite egregiously failed to make any reference whatsoever to the regulations that support the MWA.[1] This is likely because the regulations make it abundantly clear that employers who "offer" insurance to their employees qualify to pay the lower-tier minimum wage. Specifically, NAC 608.102 states: "To qualify to pay an employee the minimum wage set forth in paragraph (a) of subsection 1 of NAC 608.100 . . . [t]he employer must offer a health insurance plan." NAC 608.102(1) (emphasis added). The regulation goes on to state that, "[t]he health insurance plan must be made available to the employee and any dependents of the employee." NAC 608.102(2) (emphasis added). It says absolutely nothing about requiring an employee to enroll in insurance. Rather, the directive is clear: employers must offer insurance in order to pay the lower-tier minimum wage.

NAC 608.102 also makes clear that the Labor Commissioner understood that the definition of the word "provide" is "to make available." Moreover, the Labor Commissioner interpreted the MWA as a whole to require employers to offer insurance to their employees – not to require employees to enroll in insurance. The Court must give deference to this interpretation as long as it is "based on a permissible construction of the statute." *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842-843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). In other words, the agency interpretation is upheld unless it is arbitrary or capricious. *Deukmejian v. United States Postal Service*, 734 F.2d 460 (9th Cir.1984); *Lane v. U.S. Postal Serv.*, 964 F. Supp. 1435, 1437 (D. Nev. 1996). Here, as discussed above, interpreting the word "provide" to mean "to make available" is consistent with every definition of the word. Therefore, there is no argument that the Labor

[1] Instead, Plaintiff cites to a series of articles and press releases which were likely copied and pasted from one another and are of no controlling precedent whatsoever. **Kwayisi Motion (ECF No. 48), at 15-16**. Indeed, many of the citations were published before there was any clarification by the Labor Commissioner via the regulations and lack any indication of actual research into the MWA whatsoever. **See id**.

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Commissioner's interpretation of the MWA is or was arbitrary or capricious.

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

Another regulation that sets forth the requirements of the MWA is NAC 608.106 which further elaborates that the MWA is designed to incentivize offering insurance. Specifically, it sets forth that employees are free to decline the offered insurance:

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

NAC 608.102 (emphasis added). It does not state that the employee will be paid the upper-tier wage if they decline insurance. Instead, it contemplates an offer of insurance, which employees are free to decline.

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

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

NAC 608.108 (emphasis added). Accordingly, since at least 2007, the express mandate to employers is that offering health insurance to their minimum wage employees qualifies them to pay below the upper-tier minimum wage.

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

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C. The Retroactive Effect of A Ruling Requiring Employees to be Enrolled in Insurance Prior to Being Paid the Lower-Tier Minimum Wage Would be a Violation of Due Process

Plaintiff's Motion urges the Court to ignore the above discussed regulations. As a result, if the Court were to take this approach, it would have to address the nine-years in which employers in Nevada have relied on those regulations. The Supreme Court has held that "a court is to apply the law in effect at the time it renders its decision" in the absence of manifest injustice or evidence of legislative intent to the contrary. *Bradley v. School Board*, 416 U.S. 696, 711, 94 S.Ct. 2006, 2016, 40 L.Ed.2d 476 (1974). Thus, in the event the Court agrees with Plaintiff's argument, the constitutional concerns would be substantial. Specifically, when interpreting a statute, courts have long applied the " 'cardinal principle' " that a fair construction which permits the court to avoid constitutional questions will be adopted. *United States v. Security Industrial Bank*, 459 U.S. 70, 78, 103 S.Ct. 407, 412, 74 L.Ed.2d 235 (1982) (*quoting Lorillard v. Pons*, 434 U.S. 575, 577, 98 S.Ct. 866, 868, 55 L.Ed.2d 40 (1978)); *Lowe v. S.E.C.*, 472 U.S. 181, ——, 105 S.Ct. 2557, 2562, 85 L.Ed.2d —— (1985). Where a statute may be construed to have either retrospective or prospective effect, a court will choose to apply the statute prospectively if constitutional problems can thereby be avoided. *In re Ashe*, 712 F.2d 864, 865–66 (3d Cir.1983), cert. denied, 465 U.S. 1024, 104 S.Ct. 1279, 79 L.Ed.2d 683 (1984); *Roth v. Pritikin*, 710 F.2d 934, 939–40 (2d Cir.), cert. denied, 464 U.S. 961, 104 S.Ct. 394, 78 L.Ed.2d 377 (1983). Resolution of the constitutional issue need not be certain; there need only be a "substantial doubt," *Security Industrial Bank*, 459 U.S. at 78, 103 S.Ct. at 412, or an indication that the constitutional question is "non-frivolous." *Ashe*, 712 F.2d at 865. *Accord Roth*, 710 F.2d at 939 ("[e]ven the spectre of a constitutional issue" is sufficient to construe the statute to provide for only prospective relief).

Here, retroactive application of Plaintiff's "must be enrolled" argument could raise constitutional questions concerning both the Ex Post Facto Clause, U.S. Const., art. I, § 9, cl. 3, and the Due Process Clause of the Fifth Amendment. Therefore, the Court should select the construction that renders constitutional analysis unnecessary. However, in the event the Court does not and agrees with Plaintiff, Plaintiff's Motion must still be denied because the voiding of the Labor

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Commissioner's regulations would have to be applied prospectively – not retroactively.

V. CONCLUSION

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

Dated: May 18, 2015

Respectfully submitted,

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PROOF OF SERVICE

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

DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS PURSUANT TO FRCP 12(c) WITH RESPECT TO PUNITIVE DAMAGES

☒ By CM/ECF Filing – Pursuant to FRCP 5(b)(3) and LR 5-4, 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:

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

Debra Perkins

Firmwide:133345360.1 029931.1008

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United States District Court

District of Nevada

Notice of Electronic Filing

The following transaction was entered by Blakey, Kathryn on 5/18/2015 at 10:28 AM PDT and filed on 5/18/2015

Case Name:	Tyus et al v. Wendy's of Las Vegas, Inc. et al
Case Number:	2:14-cv-00729-GMN-VCF
Filer:	Cedar Enterprises, Inc. Wendy's of Las Vegas, Inc.
Document Number:	53

Docket Text:

RESPONSE to [48] Motion for Partial Summary Judgment,, filed by Defendants Cedar Enterprises, Inc., Wendy's of Las Vegas, Inc.. *Defendants' Opposition to Motion of Plaintiffs for Partial Summary Judgment on Liability as to Plaintiff Collins Kwayisi's First Claim for Relief* Replies due by 6/4/2015. (Blakey, Kathryn)

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

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d2c3d1c48038970e4c51622ada470ca07437417e56f7b441ed5757fe9ccb2]]

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ERIN HANKS, et al., all on behalf of themselves and all similarly-situated individuals,

Plaintiffs,

vs.

BRIAD RESTAURANT GROUP, LLC.; and DOES 1 through 100, Inclusive,

Defendant.

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

DECLARATION OF BRADLEY S. SCHRAGER, ESQ.

I, Bradley Schrager, Esq., under penalty of perjury, hereby declare as follows:

I am an attorney with the law firm Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP, duly admitted to practice law in the state of Nevada, and counsel for Plaintiffs in the above-captioned action. I make this Declaration in support of Plaintiffs' Motion for Partial Summary Judgment on Liability as to Plaintiff Jeffrey Andersen's First Claim for Relief. I have personal knowledge of the facts set forth in this declaration, and if called upon to testify, I could and would testify competently thereto.

1. Attached, as **Exhibit B**, is a true and accurate copy of the Declaration of Plaintiff Jeffrey Andersen.

2. Attached, as **Exhibit C**, is a true and accurate copy of Nevada Statewide Ballot

Questions, 2004, 2006, Nevada Secretary of State, Question No. 6.

3. Attached, as **Exhibit D**, is a true and accurate copy of Judge James Wilson's August 12, 2015 Decision and Order in *Hancock v. State ex rel Labor Commissioner*, First Judicial District Case No. 14 OC 00080 1B.

4. Attached, as **Exhibit E**, is a true and accurate copy of Notice of Entry of July 15, 2015 Order of Judge Timothy Williams in *Diaz et al v. MDC Restaurants, LLC et al*, Eighth Judicial District Court Case No. A701633.

5. The present motion for partial summary judgment regarding limitation of the action concerns a pure matter of law: the applicable temporal limitation on Plaintiffs' and the proposed Class's claims, if any. No facts or evidence exist that preclude the Court from rendering a determination of the appropriate period of limitation, nor are any such facts disputed or disputable.

6. The undisputed facts, such as they are, are as follows::

a. The people of Nevada approved, at the general election of 2006, Question 6, now codified at Nev. Const. art. XV, § 16. The text of that provision speaks for itself.

b. Plaintiffs—employees or former employees of Defendant—have filed suit per Nev. Const. art. XV, § 16, praying for back pay and damages according to its terms.

c. Plaintiffs' suit is styled as a class action, and they seek to represent a class comprised of similarly-situated employees and former employees of Defendant.

d. All authorities, be they constitutional or statutory provisions, necessary for this Court to resolve the present motion for partial summary judgment on the issue of the appropriate period of limitation, if any, speak for themselves as provisions of law available for interpretation and application.

e. No further facts need be developed or discovered in order for this Court to resolve the present motion.

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Under penalties of perjury under the laws of the United States of America and the State of Nevada, I declare that the foregoing is true and correct to my own knowledge, except as to those matters stated on information and belief, and that as to such matters I believe to be true.

FURTHER YOUR DECLARANT SAYETH NAUGHT

DATED this 8th day of September, 2015.

By: */s/ Bradley Schrager*
BRADLEY SCHRAGER, ESQ.

EXHIBIT “B”

EXHIBIT “B ”

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
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Email: dbravo@wrslawyers.com
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ERIN HANKS, an individual; DEATRA ENARI, an individual; JEFFREY ANDERSON, an individual; TOBY EARL, an individual; SHYHEEM SMITH, an individual; ROBERT BAKER, an individual, JAMES SKADOWSKI, an individual, and MICHELLE PICKTHALL, an individual, all on behalf of themselves and all similarly-situated individuals,

Plaintiffs,

vs.

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

Defendant.

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

DECLARATION OF JEFFREY ANDERSEN

DECLARATION OF JEFFREY ANDERSEN

I, Jeffrey Andersen, under penalty of perjury, hereby declare as follows:

1. I am over eighteen years of age and I am a Plaintiff in the present case. I have personal knowledge of the facts set forth herein, except as to those stated on information and belief and, as to those, I am informed and believe them to be true. If called upon to testify before this Court I would do so to the same effect.

2. I am currently a resident of the State of Nevada.

3. I worked for Defendant Briad Restaurant Group, LLC as an hourly, non-exempt employee at the TGI Friday's Restaurant located in the Orleans Casino, 4500 W. Tropicana Avenue, Las Vegas, Nevada 89103.

4. I worked at the TGI Friday's from July of 2009 through March of 2013.

5. I held the position of server at the TGI Friday's.

6. My hourly wage was $6.50 at the TGI Friday's until 2010, when it increased to $7.25.

7. When I began working at the TGI Friday's Restaurant, I was offered health insurance, but declined coverage because of the cost. My hourly wage was unaffected.

8. To the best of my knowledge, hourly employees, such as servers and bussers, were paid less than $8.25 per hour by Defendant Briad Restaurant Group, LLC while I was working for Defendant.

9. To the best of my knowledge, hourly employees, such as servers and bussers, were offered the same or a similar health insurance policy as I was, and were paid the same whether they accepted or declined the health insurance coverage.

10. To the best of my knowledge, my experience was similar to other TGI Friday's employees.

Under penalties of perjury under the laws of the United States of America and the State of Nevada, I declare that the foregoing is true and correct to my own knowledge, except as to those matters stated on information and belief, and that as to such matters I believe to be true.

DATED this 12 day of June, 2015.

By: _____
Jeffrey Andersen

EXHIBIT “C”

EXHIBIT “C ”

State of Nevada

Statewide Ballot Questions

2004

To Appear on the November 2, 2004
General Election Ballot

Issued by
Dean Heller
Secretary of State

DEAN HELLER
Secretary of State

RENEE L. PARKER
Chief Deputy Secretary of State

PAMELA A. RUCKEL
Deputy Secretary for Southern Nevada

STATE OF NEVADA

OFFICE OF THE
SECRETARY OF STATE

CHARLES E. MOORE
Securities Administrator

SCOTT W. ANDERSON
Deputy Secretary for Commercial Recordings

RONDA L. MOORE
Deputy Secretary for Elections

Dear Fellow Nevadan:

You will soon be taking advantage of one of your most important rights as an American citizen: the right to vote! As Secretary of State and the state's Chief Election Officer, I take the job of informing the public about various statewide ballot questions very seriously. An informed and knowledgeable electorate is a cornerstone to fair and just elections.

With that in mind, the Secretary of State's office has prepared this booklet detailing the statewide questions that will appear on the 2004 General Election Ballot. The booklet contains "Notes to Voters," a complete listing of the exact wording of each question, along with a summary, arguments for and against each question's passage, and, where applicable, a fiscal note. Any fiscal note included in this booklet explains only adverse impacts and does not note any possible cost savings.

I encourage you to carefully and thoughtfully review the ballot questions listed in the booklet. As a voter, your actions on these ballot questions can create new laws, amend existing laws or amend the Nevada Constitution.

On the 2004 General Election Ballot, there are eight statewide questions. Ballot Question Numbers 7 and 8 appear on the ballot through the actions of the Nevada State Legislature. Ballot Question Numbers 1 through 6 qualified for this year's ballot through the initiative petition process.

You can also view these ballot questions on the Secretary of State's web site at **www.secretaryofstate.biz**. If you require further assistance or information, please feel free to contact my office at 775/684-5705.

Respectfully,

DEAN HELLER
Secretary of State

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2004
STATEWIDE BALLOT QUESTIONS
SUMMARY

Question #	Title	Originated	If passed in 2004
1	Education First	Initiative Petition	Will Go Onto The 2006 General Election Ballot
2	Improve Nevada Public School Funding to the National Average	Initiative Petition	Will Go Onto The 2006 General Election Ballot
3	Keep Our Doctors in Nevada	Initiative Petition	Becomes Law
4	The Insurance Rate Reduction and Reform Act	Initiative Petition	Will Go Onto The 2006 General Election Ballot
5	Stop Frivolous Lawsuits and Protect Your Legal Rights Act	Initiative Petition	Will Go Onto The 2006 General Election Ballot
6	Raise the Minimum Wage for Working Nevadans	Initiative Petition	Will Go Onto The 2006 General Election Ballot
7	Repeals an Obsolete Provision Concerning Those Permitted to Vote	Legislature AJR #3 of the 71st Session	Becomes Law
8	Sales and Use Tax of 1955	Legislature AB 514 of the 72nd Session Including Note To Voters	Becomes effective January 1, 2006

QUESTION NO. 6
Amendment to the Nevada Constitution

CONDENSATION (ballot question)

Shall the Nevada Constitution be amended to raise the minimum wage paid to employees?

Yes. . . . . ☑ 545,490
No. . . . . ☐ 352,162

EXPLANATION (ballot question)

The proposed amendment, if passed, would create a new section to Article 15 of the Nevada Constitution. The amendment would require employers to pay Nevada employees $5.15 per hour worked if the employer provides health benefits, or $6.15 per hour worked if the employer does not provide health benefits. The rates 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 measured by the Consumer Price Index (CPI), with no CPI adjustment for any one-year period greater than 3%.

The following arguments for and against and rebuttals for Question No. 6 were prepared by a committee as required by Nevada Revised Statutes (NRS) 293.252.

ARGUMENT IN SUPPORT OF QUESTION NO. 6

All Nevadans will benefit from a long-overdue increase in the state's minimum wage through a more robust economy, a decreased taxpayer burden and stronger families.

Low-income workers who do not currently earn enough to cover the basic costs of living for their families – housing, health care, food and child care – will clearly benefit. Many low-income Nevada families live in poverty even though they have full-time jobs. A Nevada worker at the current minimum wage for 40 hours per-week — every week, all year – makes only $10,712. If the minimum wage had been increased to keep up with rising prices over the last 25 years, it would now bring in $15,431 per-year – not $10,712. At the current $5.15 an hour, many minimum wage workers in Nevada have incomes below the federal poverty line. We want to encourage people to work and be productive members of society. It's economic common sense.

Taxpayers will benefit as an increased minimum wage allows low-income working families to become more financially able to free themselves from costly taxpayer-provided services such as welfare, childcare and public health services.

Our state's economy will benefit as we develop a workforce that will earn more spendable income and put dollars directly into local stores and businesses.

Raising the minimum wage one dollar affirms Nevadan's beliefs that we value work, especially the difficult jobs performed by nursing home employees, childcare workers, and restaurant employees.

Minimum wage workers are not just teenagers working part-time to pay for movies, CDs and fast food. The vast majority of minimum wage workers in Nevada are adults (79% are 20 and older). Most work full-time. Six out of 10 minimum wage earners are women. Twenty-five percent are single mothers. And altogether they are the parents of 25,000 children. The paycheck these workers bring home accounts for about half of their families' earnings.

No matter what special interests and big corporations who oppose a fair minimum wage tell you, virtually *every* reputable economic study has found that workers don't get fired when minimum wages are passed or increased. In fact, employment increases. Eight of the eleven states that had a minimum wage above the federal level in 2003 are producing more jobs than the United States as a whole.

Raising the minimum wage makes sense for *all* of Nevada. Cast a vote for Nevada working people, Nevada taxpayers, Nevada values and a stronger Nevada economy.

REBUTTAL TO ARGUMENT IN SUPPORT OF QUESTION NO. 6

Contrary to claims by those eager to change Nevada's constitution, the most credible economic research for over 30 years has shown that minimum wage hikes hurt, rather than help, low-wage workers.

A recent example is the study, *The Effects of Minimum Wages Throughout the Wage Distribution*, by David Neumark, National Bureau of Economic Research; Mark Schweitzer, Federal Reserve Bank of Cleveland; and William Wascher, Board of Governors of the Federal Reserve - Division of Research and Statistics: "The evidence indicates that workers initially earning near the minimum wage are adversely affected by minimum wage increases.... Although wages of low-wage workers increase, their hours and employment decline, and the combined effect of these changes is a decline in earned income." *National Bureau of Economic Research, Working Paper 7519, 5/8/2000.*

The same year, Stanford University's Thomas MaCurdy & Frank McIntyre showed that the effect of a minimum wage increase is very similar to a "sales tax levied only on selective commodities" and conclude: "... three in four of the poorest workers *lose* from shouldering the costs of higher prices resulting from the wage increase. When these benefits and costs are considered, the minimum wage is *ineffective* as an anti-poverty policy."

ARGUMENT AGAINST QUESTION NO. 6

This constitutional amendment would actually *increase* poverty in Nevada, rather than fight it.

Suffering the most would be single mothers with little education, and other unskilled workers who are just entering the job market.

Today, such entry-level employees are paid not just with wages, but also the chance to learn new job skills. With those new skills—and the work habits they learn—they are able to climb the job ladder and make better lives for themselves and their families.

But if government forces entry-level wages artificially higher, fewer businesses will be able to hire these unskilled workers. That's because their *total* cost to the company—their pay, plus their training costs—will often be greater than these workers contribute to the company. So some workers will be let go, and others will never be hired.

Nevada has long been known as a state where businesses enjoy economic opportunities they cannot find elsewhere. But this constitutional amendment would end all that.

It would suddenly place Nevada at a big economic disadvantage to many other states—states without these high wage requirements. Under this amendment, wages paid in Nevada must, from now on, exceed the federal minimum wage by about $1 an hour. This would seriously damage Nevada businesses—especially small mom and pop businesses, which usually have fewer resources to work with.

This proposal also would discriminate against non-union companies—which means against the great majority of small businesses in Nevada. It would give labor union officials the power, under the law, to permit *union* companies to hire new employees at rates *below* the new minimum wage. This is unfair to both companies and union members. It is also a virtual invitation to union corruption.

The key to fighting poverty—and to achieving higher wages for *all* workers—is long-term economic growth. Artificially higher wages imposed by government will only obstruct such growth.

This proposed constitutional amendment should be rejected.

Fiscal impact: Negative.

Environmental impact: Neutral.

Public health, safety and welfare impact: Negative.

REBUTTAL TO ARGUMENT AGAINST QUESTION NO. 6

Raising the minimum wage in Nevada will decrease poverty as it increases people's participation in the State's economy. If increased wages actually made people poorer – as the special interests opposed to this amendment ridiculously claim – *nobody* in Nevada would ever ask for a raise.

Single mothers, as well as anyone else working a minimum wage job, will see an increase in their wages that will actually allow them to pay for housing, healthcare, food and childcare.

All available economic studies show that *everyone* wins when the minimum wage is increased. Low-income workers earn more, become less dependent on welfare and other public programs which eases the burden on taxpayers, and have more money to spend on local goods and services -- which strengthens the economy and generates more jobs.

There is *nothing* in the amendment to raise the minimum wage that would exempt union companies -- it's a federal minimum that all companies must follow.

Raise low-income workers' wage. Spur Nevada's economic growth. Generate more buying power to support Nevada businesses. Create jobs. Move low-wage workers away from dependence on public programs and ease taxpayers' burden.

You can achieve *all* of these goals by voting YES on the minimum wage amendment.

FISCAL NOTE

Financial Impact – Cannot be determined.

Although the proposal to amend the *Nevada Constitution* to increase the minimum wage in Nevada could result in additional costs to Nevada's businesses, the impact on a particular business would depend on the number of employees working at a wage below the new requirement, the amount by which the wages would need to be increased and any actions taken by the business to offset any increased costs associated with the increased wage requirement.

The proposal would, however, result in beneficial financial impacts for employees who receive a wage increase as a result of the proposal and who are not impacted adversely by any actions taken by the business to offset the increased costs associated with the increased wage requirement.

In addition, if the proposal results in an increase in annual wages paid by Nevada's employers, revenues received by the State from the imposition of the Modified Business Tax would also increase.

FULL TEXT OF THE MEASURE

RAISE THE MINIMUM WAGE FOR WORKING NEVADANS

Explanation – Matter in ***bolded italics*** is new; matter between brackets [deleted material] is material being deleted.

THE PEOPLE OF THE STATE OF NEVADA DO ENACT AS FOLLOWS:

Section 1. Title.

This Measure shall be know and may be cited as "**The Raise the Minimum Wage for Working Nevadans Act.**"

Section 2. Findings and Purpose

The people of the State of Nevada hereby make the following findings and declare their purpose in enacting this Act is as follows:

1. No full-time worker should live in poverty in our state.
2. Raising the minimum wage is the best way to fight poverty. By raising the minimum wage form $5.15 an hour to $6.15 an hour, a full-time worker will earn an additional $2,000 in wages. That's enough to make a big difference in the lives of low-income workers to move many families out of poverty.
3. For low –wage workers, a disproportionate amount of their income goes toward cost of living expenses. Living expenses such as housing, healthcare, and food have far outpaced wage levels for Nevada's working families.
4. In our state, 6 out of 10 minimum wage earners are women. Moreover 25 percent of all minimum wage earners are single mothers, many of whom work full-time.
5. At $5.15 an hour, minimum wage workers in Nevada make less money than they would on welfare. When people choose work over welfare, they become productive members of society and the burden on Nevada taxpayers is reduced.
6. Raising the minimum wage from $5.15 an hour to $6.15 an hour affirms Nevadan's beliefs that we value work, especially the difficult jobs performed by hotel maids, childcare workers, and nursing home employees. We need to make sure the workers who are the backbone of our economy receive fair paychecks that allow them and their families to live above the poverty line.

Section 3.

Article 15 of the Constitution of the State of Nevada is hereby amended by adding thereto a new section to read as follows:

Sec. 16. Payment of minimum compensation to employees.

A. Each employer shall pay a wage to each employee of not less than the hourly rates set forth in this section. The rate shall be five dollars and fifteen cents ($5.15) per hour worked, if the employer provides health benefits as described herein, or six dollars and fifteen cents ($6.15) per hour if the employer does not provide such benefits. Offering health benefits within the meaning of this section shall consist of making health insurance available to the employee for the employee and the employee's dependents at a total cost to the employee for premiums of not more than 10 percent of the employee's gross taxable income from the employer. These rates of wages shall be adjusted by the amount of increases in the federal minimum wage over $5.15 per hour, or, if greater, by the cumulative increase in the cost of living. The cost of living increase shall be measured by the percentage increase as of December 31 in any year over the level as of December 31, 2004 of the Consumer Price Index (All Urban Consumers, U.S. City Average) as published by the Bureau of Labor Statistics, U.S. Department of Labor or the successor index or federal agency. No CPI adjustment for any one-year period may be greater than 3%. The Governor or the State agency designated by the Governor shall publish a bulletin by April 1 of each year announcing the adjusted rates, which shall take effect the following July 1. Such bulletin will be made available to all employers and to any other person who has filed with the Governor or the designated agency a request to receive such notice but lack of notice shall not excuse noncompliance with this section. An employer shall provide written notification of the rate adjustments to each of its employees and make the necessary payroll adjustments by July 1 following the publication of the bulletin. Tips or gratuities received by employees shall not be credited as being any part of or offset against the wage rates required by this section.

B. The provisions of this section may not be waived by agreement between an individual employee and an employer. All of the provisions of this section, or any part hereof, may be waived in a bona fide collective bargaining agreement, but only if the waiver is explicitly set forth in such agreement in clear and unambiguous terms. Unilateral implementation of terms and conditions of employment by either party to a collective bargaining relationship shall not constitute, or be permitted, as a waiver of all or any part of the provisions of this section. An employer shall not discharge, reduce the compensation of or otherwise discriminate against any employee for using any civil remedies to enforce this section or otherwise asserting his or her rights under this section. An employee claiming violation of this section may bring an action against his or her employer in the courts of this State to

enforce the provisions of this section and shall be entitled to all remedies available under the law or in equity appropriate to remedy any violation of this section, including but not limited to back pay, damages, reinstatement or injunctive relief. An employee who prevails in any action to enforce this section shall be awarded his or her reasonable attorney's fees and costs.

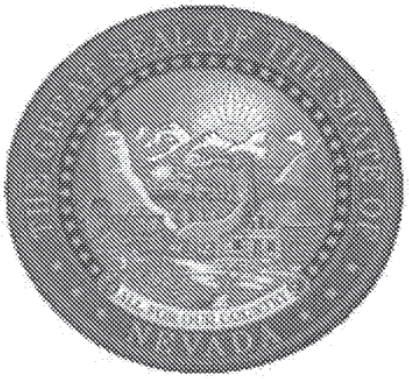
C. *As used in this section, "employee" means any person who is employed by an employer as defined herein but does not include an employee who is under eighteen (18) years of age, employed by a nonprofit organization for after school or summer employment or as a trainee for a period not longer than ninety (90) days. "Employer" means any individual, proprietorship, partnership, joint venture, corporation, limited liability company, trust, association, or other entity that may employ individuals or enter into contracts of employment.*

D. *If any provision of this section is declared illegal, invalid or inoperative, in whole or in part, by the final decision of any court of competent jurisdiction, the 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.*

State of Nevada

Statewide Ballot Questions

2006



To Appear on the November 7, 2006 General Election Ballot

Issued by
Dean Heller
Secretary of State

DEAN HELLER
Secretary of State

KIM A. BUYS
Chief Deputy Secretary of State

PAMELA A. RUCKEL
Deputy Secretary for Southern Nevada

STATE OF NEVADA

OFFICE OF THE
SECRETARY OF STATE

CHARLES E. MOORE
Securities Administrator

SCOTT W. ANDERSON
Deputy Secretary for Commercial Recordings

ELLICK C. HSU
Deputy Secretary for Elections

STACY M. WOODBURY
Deputy Secretary for Operations

Dear Fellow Nevadan:

You will soon be taking advantage of one of your most important rights as an American citizen: the right to vote! As Secretary of State and the state's Chief Election Officer, I take the job of informing the public about various statewide ballot questions very seriously. An informed and knowledgeable electorate is a cornerstone to fair and just elections

With that in mind, the Secretary of State's office has prepared this booklet detailing the statewide questions that will appear on the 2006 General Election Ballot. The booklet contains "Notes to Voters," a complete listing of the exact wording of each question, along with a summary, arguments for and against each question's passage, and, where applicable, a fiscal note. Any fiscal note included in this booklet explains only adverse impacts and does not note any possible cost savings.

I encourage you to carefully and thoughtfully review the ballot questions listed in the booklet. As a voter, your actions on these ballot questions can create new laws, amend existing laws or amend the Nevada Constitution.

On the 2006 General Election Ballot, there are ten statewide questions. Ballot Question Numbers 8, 9, 10 and 11 appear on the ballot through the actions of the Nevada State Legislature. Ballot Question Numbers 2, 4, 5, and 7 qualified for this year's ballot through the initiative petition process. Ballot Question Numbers 1 and 6 also qualified through the initiative petition process, passed at the 2004 General Election and appear for the second and last time on the 2006 General Election Ballot. Ballot Question Number 3 was removed from the Ballot by the Nevada Supreme Court.

You can also view these ballot questions on the Secretary of State's web site at **www.secretaryofstate.biz**. If you require further assistance or information, please feel free to contact my office at 775-684-5705.

Respectfully,

DEAN HELLER
Secretary of State

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2006
STATEWIDE BALLOT QUESTIONS
SUMMARY

Question #	Title	Originated	If passed in 2006
1	Education First	Initiative Petition	Becomes Law
2	Nevada Property Owner's Bill of Rights (PISTOL)	Initiative Petition	Will Go Onto The 2008 General Election Ballot
3	Tax and Spending Control for Nevada (TASC)	Initiative Petition	Removed by the Nevada Supreme Court
4	Responsibly Protect Nevadans from Second Hand Smoke	Initiative Petition	Becomes Law
5	Clean Indoor Air Act	Initiative Petition	Becomes Law
6	Raise the Minimum Wage for Working Nevadans	Initiative Petition	Becomes Law
7	Regulation of Marijuana	Initiative Petition	Becomes Law
8	Sales and Use Tax of 1955	Legislature AB 554 of the 73rd Session Including Note To Voters	Becomes effective January 1, 2007

9	Board of Regents	Legislature AJR 11 of the 72nd Session	Becomes effective January 1, 2008
10	Legislators Call Special Session	Legislature AJR 13 of the 72nd Session	Becomes effective upon canvass
11	Legislators Paid Every Day of Session	Legislature SJR 11 of the 72nd Session	Becomes effective upon canvass

QUESTION NO. 6

Amendment to the Nevada Constitution

CONDENSATION (Ballot Question)

Shall the Nevada Constitution be amended to raise the minimum wage paid to employees?

Yes.....☐
No.....☐

EXPLANATION (Ballot Question)

The proposed amendment, if passed, would create a new section to Article 15 of the Nevada Constitution. The amendment would require employers to pay Nevada employees $5.15 per hour worked if the employer provides health benefits, or $6.15 per hour worked if the employer does not provide health benefits. The rates 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 measured by the Consumer Price Index (CPI), with no CPI adjustment for any one-year period greater than 3%.

The following arguments for and against and rebuttals for Question No. 6 were prepared by a committee as required by Nevada Revised Statutes (NRS) 293.252.

ARGUMENT IN SUPPORT OF QUESTION NO. 6

All Nevadans will benefit from a long-overdue increase in the state's minimum wage through a more robust economy, a decreased taxpayer burden and stronger families.

Low-income workers who do not currently earn enough to cover the basic costs of living for their families – housing, health care, food and child care – will clearly benefit. Many low-income Nevada families live in poverty even though they have full-time jobs. A Nevada worker at the current minimum wage for 40 hours per-week — every week, all year – makes only $10,712. If the minimum wage had been increased to keep up with rising prices over the last 25 years, it would now bring in $15,431 per-year – not $10,712. At the current $5.15 an hour, many minimum wage workers in Nevada have incomes below the federal poverty line. We want to encourage people to work and be productive members of society. It's economic common sense.

Taxpayers will benefit as an increased minimum wage allows low-income working families to become more financially able to free themselves from costly taxpayer-provided services such as welfare, childcare and public health services.

Our state's economy will benefit as we develop a workforce that will earn more spendable income and put dollars directly into local stores and businesses.

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No matter what special interests and big corporations who oppose a fair minimum wage tell you, virtually *every* reputable economic study has found that workers don't get fired when minimum wages are passed or increased. In fact, employment increases. Eight of the eleven states that had a minimum wage above the federal level in 2003 are producing more jobs than the United States as a whole.

Raising the minimum wage makes sense for *all* of Nevada. Cast a vote for Nevada working people, Nevada taxpayers, Nevada values and a stronger Nevada economy.

The above argument was submitted by the Ballot Question Committee composed of citizens in favor of this question as provided for in NRS 293.252

REBUTTAL TO ARGUMENT IN SUPPORT OF QUESTION NO. 6

Contrary to claims by those eager to change Nevada's constitution, the most credible economic research for over 30 years has shown that minimum wage hikes hurt, rather than help, low-wage workers.

A recent example is the study, *The Effects of Minimum Wages Throughout the Wage Distribution*, by David Neumark, National Bureau of Economic Research; Mark Schweitzer, Federal Reserve Bank of Cleveland; and William Wascher, Board of Governors of the Federal Reserve - Division of Research and Statistics: "The evidence indicates that workers initially earning near the minimum wage are adversely affected by minimum wage increases.... Although wages of low-wage workers increase, their hours and employment decline, and the combined effect of these changes is a decline in earned income." *National Bureau of Economic Research, Working Paper 7519, 5/8/2000.*

The same year, Stanford University's Thomas MaCurdy & Frank McIntyre showed that the effect of a minimum wage increase is very similar to a "sales tax levied only on selective commodities" and conclude: "... three in four of the poorest workers *lose* from shouldering the costs of higher prices resulting from the wage increase. When these benefits and costs are considered, the minimum wage is *ineffective* as an anti-poverty policy."

The above argument was submitted by the Ballot Question Committee composed of citizens opposed to this question as provided for in NRS 293.252

ARGUMENT AGAINST QUESTION NO. 6

This constitutional amendment would actually *increase* poverty in Nevada, rather than fight it.

Suffering the most would be single mothers with little education, and other unskilled workers who are just entering the job market.

Today, such entry-level employees are paid not just with wages, but also the chance to learn new job skills. With those new skills—and the work habits they learn—they are able to climb the job ladder and make better lives for themselves and their families.

But if government forces entry-level wages artificially higher, fewer businesses will be able to hire these unskilled workers. That's because their *total* cost to the company—their pay, plus their training costs—will often be greater than these workers contribute to the company. So some workers will be let go, and others will never be hired.

Nevada has long been known as a state where businesses enjoy economic opportunities they cannot find elsewhere. But this constitutional amendment would end all that.

It would suddenly place Nevada at a big economic disadvantage to many other states—states without these high wage requirements. Under this amendment, wages paid in Nevada must, from now on, exceed the federal minimum wage by about $1 an hour. This would seriously damage Nevada businesses—especially small mom and pop businesses, which usually have fewer resources to work with.

This proposal also would discriminate against non-union companies—which means against the great majority of small businesses in Nevada. It would give labor union officials the power, under the law, to permit *union* companies to hire new employees at rates *below* the new minimum wage. This is unfair to both companies and union members. It is also a virtual invitation to union corruption.

The key to fighting poverty—and to achieving higher wages for *all* workers—is long-term economic growth. Artificially higher wages imposed by government will only obstruct such growth.

This proposed constitutional amendment should be rejected.

Fiscal impact: Negative.

Environmental impact: Neutral.

Public health, safety and welfare impact: Negative.

The above argument was submitted by the Ballot Question Committee composed of citizens opposed to this question as provided for in NRS 293.252

REBUTTAL TO ARGUMENT AGAINST QUESTION NO. 6

Raising the minimum wage in Nevada will decrease poverty as it increases people's participation in the State's economy. If increased wages actually made people poorer – as the special interests opposed to this amendment ridiculously claim – *nobody* in Nevada would ever ask for a raise.

Single mothers, as well as anyone else working a minimum wage job, will see an increase in their wages that will actually allow them to pay for housing, healthcare, food and childcare.

All available economic studies show that *everyone* wins when the minimum wage is increased. Low-income workers earn more, become less dependent on welfare and other public programs which eases the burden on taxpayers, and have more money to spend on local goods and services -- which strengthens the economy and generates more jobs.

There is *nothing* in the amendment to raise the minimum wage that would exempt union companies – it's a federal minimum that all companies must follow.

Raise low-income workers' wage. Spur Nevada's economic growth. Generate more buying power to support Nevada businesses. Create jobs. Move low-wage workers away from dependence on public programs and ease taxpayers' burden.

You can achieve *all* of these goals by voting YES on the minimum wage amendment.

The above argument was submitted by the Ballot Question Committee composed of citizens in favor of this question as provided for in NRS 293.252

FISCAL NOTE

FINANCIAL IMPACT – CANNOT BE DETERMINED

Although the proposal to amend the *Nevada Constitution* to increase the minimum wage in Nevada could result in additional costs to Nevada's businesses, the impact on a particular business would depend on the number of employees working at a wage below the new requirement, the amount by which the wages would need to be increased and any actions taken by the business to offset any increased costs associated with the increased wage requirement.

The proposal would, however, result in beneficial financial impacts for employees who receive a wage increase as a result of the proposal and who are not impacted adversely by any actions taken by the business to offset the increased costs associated with the increased wage requirement.

In addition, if the proposal results in an increase in annual wages paid by Nevada's employers, revenues received by the State from the imposition of the Modified Business Tax would also increase.

FULL TEXT OF THE MEASURE

RAISE THE MINIMUM WAGE FOR WORKING NEVADANS

EXPLANATION – Matter in *bolded italics* is new; matter between brackets [omitted material] is material to be omitted.

THE PEOPLE OF THE STATE OF NEVADA DO ENACT AS FOLLOWS:

Section 1. Title.

This Measure shall be know and may be cited as "**The Raise the Minimum Wage for Working Nevadans Act.**"

Section 2. Findings and Purpose

The people of the State of Nevada hereby make the following findings and declare their purpose in enacting this Act is as follows:

1. No full-time worker should live in poverty in our state.
2. Raising the minimum wage is the best way to fight poverty. By raising the minimum wage form $5.15 an hour to $6.15 an hour, a full-time worker will earn an additional $2,000 in wages. That's enough to make a big difference in the lives of low-income workers to move many families out of poverty.
3. For low –wage workers, a disproportionate amount of their income goes toward cost of living expenses. Living expenses such as housing, healthcare, and food have far outpaced wage levels for Nevada's working families.
4. In our state, 6 out of 10 minimum wage earners are women. Moreover 25 percent of all minimum wage earners are single mothers, many of whom work full-time.
5. At $5.15 an hour, minimum wage workers in Nevada make less money than they would on welfare. When people choose work over welfare, they become productive members of society and the burden on Nevada taxpayers is reduced.
6. Raising the minimum wage from $5.15 an hour to $6.15 an hour affirms Nevadan's beliefs that we value work, especially the difficult jobs performed by hotel maids, childcare workers, and nursing home employees. We need to make sure the workers who are the backbone of our economy receive fair paychecks that allow them and their families to live above the poverty line.

Section 3.

Article 15 of the Constitution of the State of Nevada is hereby amended by adding thereto a new section to read as follows:

Sec. 16. Payment of minimum compensation to employees.

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

benefits. Offering health benefits within the meaning of this section shall consist of making health insurance available to the employee for the employee and the employee's dependents at a total cost to the employee for premiums of not more than 10 percent of the employee's gross taxable income from the employer. These rates of wages shall be adjusted by the amount of increases in the federal minimum wage over $5.15 per hour, or, if greater, by the cumulative increase in the cost of living. The cost of living increase shall be measured by the percentage increase as of December 31 in any year over the level as of December 31, 2004 of the Consumer Price Index (All Urban Consumers, U.S. City Average) as published by the Bureau of Labor Statistics, U.S. Department of Labor or the successor index or federal agency. No CPI adjustment for any one-year period may be greater than 3%. The Governor or the State agency designated by the Governor shall publish a bulletin by April 1 of each year announcing the adjusted rates, which shall take effect the following July 1. Such bulletin will be made available to all employers and to any other person who has filed with the Governor or the designated agency a request to receive such notice but lack of notice shall not excuse noncompliance with this section. An employer shall provide written notification of the rate adjustments to each of its employees and make the necessary payroll adjustments by July 1 following the publication of the bulletin. Tips or gratuities received by employees shall not be credited as being any part of or offset against the wage rates required by this section.

B. *The provisions of this section may not be waived by agreement between an individual employee and an employer. All of the provisions of this section, or any part hereof, may be waived in a bona fide collective bargaining agreement, but only if the waiver is explicitly set forth in such agreement in clear and unambiguous terms. Unilateral implementation of terms and conditions of employment by either party to a collective bargaining relationship shall not constitute, or be permitted, as a waiver of all or any part of the provisions of this section. An employer shall not discharge, reduce the compensation of or otherwise discriminate against any employee for using any civil remedies to enforce this section or otherwise asserting his or her rights under this section. An employee claiming violation of this section may bring an action against his or her employer in the courts of this State to enforce the provisions of this section and shall be entitled to all remedies available under the law or in equity appropriate to remedy any violation of this section, including but not limited to back pay, damages, reinstatement or injunctive relief. An employee who prevails in any action to enforce this section shall be awarded his or her reasonable attorney's fees and costs.*

C. *As used in this section, "employee" means any person who is employed by an employer as defined herein but does not include an employee who is under eighteen (18) years of age, employed by a nonprofit organization for after school or summer employment or as a trainee for a period not longer than ninety (90) days. "Employer" means any individual, proprietorship, partnership, joint venture, corporation, limited liability company, trust, association, or other entity that may employ individuals or enter into contracts of employment.*

D. If any provision of this section is declared illegal, invalid or inoperative, in whole or in part, by the final decision of any court of competent jurisdiction, the 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.

EXHIBIT “D”

EXHIBIT “D”

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

Appendix Vol. 1

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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

Plaintiffs,

vs.

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

Defendants.

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

MOTION OF PLAINTIFFS FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY AS TO PLAINTIFF COLLINS KWAYISI'S FIRST CLAIM FOR RELIEF

Plaintiff Collins Kwayisi, by and through his attorneys of record, hereby files a Motion for Partial Summary Judgment as to Liability on his first claim for relief. This Motion is based on the Memorandum of Points and Authorities below, all papers and exhibits on file herein,[1] and any oral argument at hearing in this matter.

[1] *See* Declaration of Bradley S. Schrager, Esq. ("Schrager Decl."), filed concurrently herewith.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Collins Kwayisi ("Mr. Kwayisi") has worked for Defendants Wendy's of Las Vegas, Inc. and Cedar Enterprises, Inc. ("Defendants") since May 2010. He was paid at an hourly rate of $7.55 between May 2010 and May 2011; $7.60 between May 2011 and May 2012; $7.65 between May 2012 and May 2013; and $7.75 from May 2013 to the present. He has never been provided qualifying health insurance by Defendants—never had or was enrolled by Defendants in any such health insurance plan—at any time during his employment. Defendants were not eligible to pay him at a wage rate of less than $8.25 per hour at any time. Defendants were required by law to compensate Mr. Kwayisi at a rate of no less than $8.25 per hour during the entirety of his employment, and are thus liable to him for the wages unlawfully withheld from him, and all damages prayed for and flowing from Defendants' unlawful conduct.

Article XV, section 16(A) of the Nevada Constitution (the "Minimum Wage Amendment" or the "Amendment") is plain:

> 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.[2]

Nev. Const. art. XV, sec. 16(A) (emphasis supplied). Employers must provide qualifying health insurance benefits to their employees, or they must pay employees not less than the upper-tier minimum wage rate for every hour worked. The Amendment also requires that if such health insurance benefits are provided, the premium costs to the employee cannot exceed ten percent of the employee's gross taxable income from the employer. *Id*.

The Amendment, enacted in 2006 by overwhelming popular vote of the people, offered both

[2] The Minimum Wage Amendment is subject to an indexing mechanism, such that by July 1, 2010, the upper-tier rate for employees who are not provided qualifying health insurance benefits was raised to $8.25 per hour. *See* State of Nevada, Minimum Wage, 2010 Annual Bulletin, April 1, 2010, http://www.laborcommissioner.com/min_wage_overtime/4-1-10 (accessed Apr. 17, 2015). The upper-tier rate has remained at $8.25 per hour since that time.

employers and employees straightforward economic choices: Employers had to choose between either paying employees at the upper-tier wage rate, or providing qualifying health insurance benefits at a capped cost that might entail subsidizing employee premiums if the costs of the benefits exceeded ten percent of the employee's wages. Employees, on the other hand, were given the choice between accepting such health insurance benefits and being paid at the lower-tier rate, or eschewing such benefits and being paid at the upper-tier rate. This was, and is, the bargain of the Minimum Wage Amendment.

Here, Mr. Kwayisi was not allowed the benefit of his constitutionally-protected choice; he was never enrolled in or provided qualifying health insurance benefits, but was paid below the legal rate by Defendants. Instead, Defendants devised a game they thought they could not lose—merely purporting to offer substandard, junk health insurance benefits, and paying him below $8.25 per hour whether or not he received any health benefits at all. In other words, Defendants got the benefit of the constitutional bargain, while Mr. Kwayisi—like so many of his work colleagues—got an unconstitutionally-insufficient hourly wage.[3] This is in direct contradiction to the plain language,

[3] Wendy's representatives testified in their depositions that only about 10 out of their roughly 580 hourly crew member employees currently being paid less than $8.25, or **less than two percent** of those, are actually enrolled in their "offered" health benefits plan:

> Q. You said there's roughly 500 crew member employees …
>
> A. I mean, if you take 29 or 30 stores times 20 employees, what's that?
>
> Q. That's about 580.
>
> A. Okay.

Transcr. Depo. Kelly Pratt, Defendant Cedar Enterprises Inc.'s HR Manager, at 87:4-19 (Feb. 10, 2015). A true and correct copy of the pertinent portions of Ms. Pratt's deposition transcript is included as **Exhibit A** to Schrager Decl.

See also Transcr. Depo. Nancy Holliday, Defendant Cedar Enterprises Inc.'s Payroll Supervisor, at 24:13-27:22 (Feb. 12, 2015). A true and correct copy of the pertinent portions of Ms. Holliday's deposition transcript is included as **Exhibit B** to Schrager Decl. *See, e.g., id.* at 26:24- 27:2; *id.* at 27:11-22:

> Q. So 10 had to have premiums deducted?
>
> A. Correct.
>
> Q. And is that 10 number, is that fairly standard by period? Is that about what you

(*footnote continued on next page*)

intent, and public policy underlying the Minimum Wage Amendment.

II. STANDARD FOR PARTIAL SUMMARY JUDGMENT

In considering a motion for summary judgment, the court performs "the threshold inquiry of determining whether there is the need for a trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2511 (1986); *United States v. Arango*, 670 F.3d 988, 992 (9th Cir. 2012). F.R.C.P. 56(a) specifically permits the Court to entertain issues on partial summary judgment on part of a claim or defense, and partial summary judgment can be useful for courts in focusing the issues to be litigated, thus conserving judicial resources. *See* F.R.C.P 56(a); *Miller v. Wackenhut Servs., Inc.*, 808 F. Supp. 697 (W.D. Mo. 1992). Because partial summary judgment allows a court "to isolate and dispose of factually unsupported claims or defenses," the court construes the evidence before it "in the light most favorable to the opposing party." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 2553 (1986); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157, 90 S. Ct. 1598, 1608 (1970).

The allegations or denials of a pleading, however, will not defeat a well-founded motion. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 1356 (1986). That is, the opposing party cannot "rest upon the mere allegations or denials of the adverse party's pleading but must instead produce evidence that set[s] forth specific facts showing that there is

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always have to look at?

A. Yeah, that's about right. It could vary, but not by too much. It will go up and down depending on turnover.

See also Transcr. Depo. Deborah Harmon, Defendant Cedar Enterprises Inc.'s Director of HR, 58:15-62:5 (Feb. 13, 2015). A true and correct copy of the pertinent portions of Ms. Harmon's deposition transcript is included as **Exhibit C** to Schrager Decl. *See, e.g., id.* at 58:15-19; *id*. at 61:10-12:

Q. Out of the 600-or-so crew members working for Wendy's of Las Vegas, do you know how many of them have accepted and enrolled currently in the SRC plan?

A. No.

Q. I'll represent yesterday [Ms. Holliday] said it was 10.

A. Okay. Then I'll accept that.

a genuine issue for trial." *Estate of Tucker ex rel. Tucker v. Interscope Records, Inc.*, 515 F.3d 1019, 1030 (9th Cir. 2008) (internal quotations omitted). The nonmoving party "must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered against him." *Id*. *See also Anderson*, 477 U.S. at 250, 106 S. Ct. at 2511; *Arango*, 670 F.3d at 992.

In a putative class action, courts have discretion to entertain motions regarding all or some liability issues, and in exercising this discretion, courts often consider the merits of the claims and any doubts as to those merits, the efficiency ruling upon such a motion may offer, and the potential for prejudice to the parties or the putative class. "Under the proper circumstances—where it is more practicable to do so and where the parties will not suffer significant prejudice—the district court has discretion to rule on a motion for summary judgment before it decides the certification issue." *Wright v. Schock*, 742 F.2d 541, 543-44 (9th Cir. 1984).

III. UNDISPUTED FACTS

The undisputed facts are as follows:

1. The people of Nevada approved, at the general election of 2006, Question 6, now codified at article XV, section 16 of the Nevada Constitution. The text of that provision speaks for itself.

2. Mr. Kwayisi has filed suit per article XV, section 16 of the Nevada Constitution, praying for back pay and damages according to its terms. *See* Pls.' Amend. Compl [ECF Doc. 3].

3. Mr. Kwayisi has worked as an employee of Defendants at a Wendy's Restaurant location in Clark County, Nevada since May 2010. *See* ECF Doc. 3 at ¶¶ 16, 45; Defs.' Ans. [ECF Doc. 42] at ¶ 45; Declaration of Collins Kwayisi at ¶¶ 3, 4, here attached as **Exhibit 1** to this Motion.

4. Defendants paid Mr. Kwayisi at a rate of $7.55, $7.60, $7.65, and $7.75 per hour. *See* ECF Doc. 3 at ¶ 45; ECF Doc. 42 at ¶ 45; **Ex. 1** at ¶¶ 5, 6.

5. Mr. Kwayisi never, at any time during his employment, had, enrolled in or was provided with qualifying health insurance benefits from Defendants. *See* **Ex. 1** at ¶¶ 7, 8.

IV. ARGUMENT

Section A of the Minimum Wage Amendment clearly and unambiguously authorizes an employer to pay the lower-tier minimum wage (originally $5.15 per hour worked) *only* to those employees to whom it "provides health insurance benefits." Nev. Const. art. XV, § 16(A). If, on the

other hand, an employer "does not provide such benefits" to an employee, it must pay that employee the upper-tier wage (originally $6.15 per hour worked). *Id*. The two-tiered wage provision of the Amendment is mandatory and remedial, and creates a strong incentive to employers to provide qualifying health plans or increased wages to their employees.

The pertinent text of the Amendment reads as follows:

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

Id. (emphasis supplied).

As demonstrated herein, Mr. Kwayisi is entitled to partial summary judgment on his first claim for relief, because Defendants could *only* pay the lower-tier wage if they *actually provided* (or supplied or furnished) a qualifying health plan, which they did not, but must have paid the upper-tier wage to him if they *did not actually provide* (or supply or furnish) such benefits, for any reason.[4] It may be that Defendants will claim that all they had to do was "offer" health insurance benefits to gain the privilege of underpaying its minimum wage employees—at least that is something it claimed during deposition testimony. Such conduct is not, in any way, authorized by the Minimum Wage Amendment.

A. The Plain Language Of The Minimum Wage Amendment

In interpreting a Nevada statute for the first time, this Court must predict how the Nevada Supreme Court would interpret it. *Sobel v. Hertz Corp.*, 291 F.R.D. 525, 534 (D. Nev. 2013). The meaning and operation of the Amendment's two-tiered wage scheme is evident, unambiguous, and

[4] Reasons that an employee might not be furnished a qualifying health plan by his employer, in which case the employer would be required under the Amendment to pay the upper-tier wage, might include, but are not limited to: (1) the employee might decline coverage because it knows that the insurance offered by the employee is substandard, "junk" insurance; (2) the employee might not qualify under the employer's chosen insurance provider; (3) the employee might opt to self-insure or to obtain other (i.e., better) coverage; or (4) the employer may fail to offer any insurance to the employee, or may offer it in such a way that actively discourages the employee from accepting it.

unavoidable: employer payment of the lower-tier hourly wage is conditioned upon an employer's actual provision of qualifying health insurance benefits to its employee. If, as here, a provision is clear and unambiguous, Nevada courts will not look beyond the language of the provision. *Miller v. Burk*, 124 Nev. 579, 590-91, 188 P.3d 1112, 1119-20 (2008). Although the Amendment does not expressly define "provide," the meaning is facially evident from the text of the Amendment. Thus, the Court need not be detained by rules of statutory construction, as they only apply if a statute or constitutional provision is ambiguous.

1. The plain, ordinary, and everyday meaning of "provide"

It is well-established that, when interpreting a statute, courts first look to the plain language of the statute, giving every word, phrase, and sentence its usual, natural, and ordinary import and meaning, unless doing so violates the statute's spirit. *See Royal Foods Co. v. RJR Holdings, Inc.*, 252 F.3d 1102, 1106 (9th Cir. 2001); *McKay v. Bd. of Sup'rs of Carson City*, 102 Nev. 644, 648, 730 P.2d 438, 441 (1986). When a statute or constitutional provision is facially clear, courts will not generally go beyond its plain language. *McKay*, 102 Nev. at 648, 730 P.2d at 441. Stated another way, when a statute or provision is susceptible to only one honest construction, that alone is the construction which properly can be given. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S. Ct. 843, 846 (1997); *Washoe Med. Ctr., Inc. v. Reliance Ins. Co.*, 112 Nev. 494, 496, 915 P.2d 288, 289 (1996) (citing *Building & Constr. Trades v. Public Works*, 108 Nev. 605, 610, 836 P.2d 633, 636 (1992)). Plain language controls unless it would lead to absurd results. *See United States v. Romero-Bustamente*, 337 F.3d 1104, 1109 (9th Cir. 2003); *Harris Associates v. Clark Cnty. Sch. Dist.*, 119 Nev. 638, 642, 81 P.3d 532, 534 (2003).

The plain language and intended operation of the Amendment is ascertainable from the face of the Amendment. An employer must do more than merely wave a junk health plan in front of an employee, who may well rightly decline it, in order to qualify for paying the employee the lower-tier wage. Any other construction would be absurd, and would turn the incentives embodied by the Amendment to encourage employers to provide qualifying health plans to their employees or else pay higher wages to those employees, on their heads.

"Provide" in the wage provision of the Amendment must be accorded its ordinary and everyday

meaning of *actually furnishing or supplying* employees with coverage. The ordinary and everyday meaning of "provide" according to the online Merriam-Webster Dictionary and Thesaurus is "to put (something) into the possession of someone for use or consumption," not merely to offer that such transfer of possession take place, even if it does not occur. *See* Merriam-Webster (Online) Dictionary and Thesaurus, http://www.merriam-webster.com/thesaurus/provide (accessed Apr. 17, 2015) (parentheticals in the original). Synonyms of "provide" include "deliver", "give", "hand", "hand over", and "supply[.]" *Id*. The online resource uses "provide" and "furnish" or "supply" interchangeably. *Id*. For instance, the meaning for "furnish" is (1) "to provide (someone) with what is needed for a task or activity" and (2) "to put (something) into the possession of someone for use or consumption[.]" *Id*., http://www.merriam-webster.com/thesaurus/furnish (accessed Apr. 17, 2015) (parentheticals in the original). Synonyms for "furnish" include "supply", "feed", "give", "hand", "hand over", and, most notably, "provide[.]" *Id*.

Likewise, the meaning of "supply" is (1) "to provide (someone) with what is needed for a task or activity" and (2) "to put (something) into the possession of someone for use or consumption[.]" *Id*., http://www.merriam-webster.com/thesaurus/supply (accessed Apr. 17, 2015) (parentheticals in the original). Synonyms for "supply" include "deliver", "feed", "give", "hand", "hand over", and, again, "provide[.]" *Id*. Likewise, the first definition of "provide" according to Black's Law Dictionary (Online), http://thelawdictionary.org/provide/ (accessed Apr. 17, 2015), is "an act of furnishing or supplying a person with a product." *See also Black's Law Dictionary* (5th ed. 1979) (defining "furnish" as interchangeable with "provide" — "To supply, provide, or equip, for accomplishment of a particular purpose.").

Nevada courts also have used "provide" interchangeably with the word "furnish" to connote a transfer of possession from one to another, as opposed to merely suggesting or posing something. *See, e.g., State v. Powe*, No. 55909, 2010 WL 3462763 at *1 (Nev. July 19, 2010). In interpreting a Nevada criminal statute's use of the word "furnish" for example, the district court found as a matter of law that "furnishing" calls for actual delivery by one person to another. *Id*. Reviewing that interpretation de novo, the Nevada Supreme Court affirmed. *Id*. (citing *Walker v. State*, 428 So.2d 139, 141 (Ala. Crim. App. 1982) ("'[F]urnishes' means to provide or supply and connotes a transfer of possession."); *Bailey*

v. State, 120 Nev. 406, 409, 91 P.3d 596, 598 (2004) (stating that if the words of a statute have ordinary meaning, this court will not look beyond the plain language of the statute unless that meaning was clearly not intended)).[5]

Thus, by looking only at the plain and unambiguous language of the Amendment's two-tiered wage provision as required, it is clear that the operative word "provide" means something other than simply suggesting or "offering" any sort of health plan. Interpretation necessarily begins with the assumption that the language employed by the drafters was intentional and its ordinary meaning accurately expresses the drafter's purpose. *See, e.g., Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175, 129 S. Ct. 2343, 2350 (2009) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose."). "Provide" and the other terms of the Amendment must be respected as being chosen carefully and deliberately by the drafters, and were approved overwhelmingly by the people of Nevada.

2. "Provide" does not mean "offer"

Defendants will contend that they needed only "offer" Mr. Kwayisi health benefits—of any kind, even a junk plan with little or no discernible value as health insurance—in order to gain the constitutional privilege of paying him below the upper-tier minimum hourly wage.[6] But employers

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[5] Similarly, the Internal Revenue Service ("IRS") construes a Treasury Regulation that requires the IRS to "provide" an applicant with a copy of all comments on an application filed under Treas. Reg. § 601.201(o)(3) to mean that the IRS must actually "furnish or supply" the materials to the applicant, not merely make them available. *See Statement of Procedural Rules of Section 601.201(o)*, GCM 36593 (I.R.S. Feb. 20, 1976). The IRS states:

> However, allowing inspection and copying of materials or even supplying the materials on request will not satisfy the requirement of Treas. Reg. § 601.201(o)(5)(vii), that these materials be ***provided to*** the applicant. We believe that, pursuant to Treas. Reg. § 601.201(o)(5)(vii), the applicant must be furnished or supplied with the required copies and ***not merely given the opportunity to obtain them***. If necessary, rather than adopting a strained reading of the word "provide," the Regulation should be amended."

Id. (emphasis supplied).

[6] *See* **Exhibit** C to Schrager Decl., Transcr. Depo. Deborah Harmon, at 58:15-62:5, 191:14-192:4, 191:24- 192:4:

(*footnote continued on next page*)

cannot do so, and having attempted to do so is just a manner of shortchanging workers, Mr. Kwayisi among them. "Provide" within the context of the wage structure sentence of the Amendment has a particular and ordinary meaning within that sentence—actually to supply or furnish health insurance—which cannot be read out of the statute. The succeeding phrase after the constitutional command to "provide" benefits, "[o]ffering health benefits…" plainly concerns the cost of insurance that shall be made available to the employees if the employer decides to offer such benefits and attempt to exercise the privilege of paying at the lower-tier hourly minimum wage rate. Nev. Const. art. XV, § 16(A). Specifically, under that sentence, if they are going to provide benefits and pay less than the upper-tier wage, employers must "offer" health plans that cover the employee and all the employee's dependents and the premium cost does not exceed ten percent of the employee's gross taxable income from the employer. *Id*. The term "[o]ffering" is not concerned with whether an employer qualifies for paying the lower-tier wage addressed in the prior sentence and is, moreover, a separate and distinct constitutional command from "providing" the required insurance benefits.

By contrast with the definition of "provide", the meaning of "offer" in Merriam-Webster is merely to (1) "to put before another for acceptance or consideration" or (2) "to set before the mind for consideration[.]" Merriam-Webster (Online) Dictionary and Thesaurus, http://www.merriam-webster.com/thesaurus/furnish (accessed Apr. 17, 2015). Synonyms for "offer" include "extend", "pose", "proffer", and "suggest", but notably *not* "provide", "furnish", or "supply[.]" *Id*.[7] Thus, "offer", a much less active verb, is patently *not* a synonym for or interchangeable with "provide" in the wage provision sentence of the Amendment.

In *Lorton v. Jones*, 130 Nev. Adv. Op. 8, 322 P.3d 1051 (2014), the Nevada Supreme Court

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A. Yeah, we're able to offer the lower tier minimum wage.

Q. On the basis of having offered this plan?

A. Yes.

[7] *See also Black's Law Dictionary* (Online), http://thelawdictionary.org/offer/ (accessed Apr. 17, 2015) (where the first definition of "offer" is "to bring to or before; to present for acceptance or rejection; to hold out or proffer, to make a proposal; to exhibit something that may be taken or received or not).

construed a Nevada constitutional provision on term limits in granting a mayoral candidate's petition for writ of mandamus, which challenged the eligibility of a former city council member in the election. Although ultimately finding that both parties' interpretations of the term provision were plausible, and thus that article XV, section 3(2) of the Nevada Constitution was ambiguous, before looking outside the plain text of the provision to policy and history, the Supreme Court first looked carefully at *the words expressly chosen by the drafters* for a proper interpretation of the provision. *Id.*, 322 P.3d at 1056. More important, the Court found it significant that the drafters chose to use different terms in addressing how term limits apply in state and local elections by saying that a person may not be elected to a "state office or local governing body." *Id*.

The Nevada Supreme Court noted that the drafters could have used "state governing body" and "local governing body" to indicate the bodies as a whole, or "state office" and "local office" to indicate individual positions. *Id.*, 322 P.3d at 1057. "Instead," the Supreme Court reasoned, the drafters "chose the distinct terms 'state office' and 'local governing body,' which indicates that, at the state level, the drafters intended to prevent election to a specific office, but at the local level, the intent was to preclude continuing service on the governing body generally." *Id*. To support its decision, it quoted Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 170 (2012):

> "[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***.

Id. (emphasis supplied).

In the case of the Amendment, the drafters likewise chose distinct terms: "provide", when describing what actions by employers are required to qualify them to pay the lower-tier wage to employees, and "offering", when separately describing the cost of health plans which may be offered when providing benefits under the Amendment. As in *Lorton*, the distinction between these two verbs and two sentences may not be ignored or glossed over, as the first guide to statutory interpretation is the *actual wording chosen by the drafters*.

B. Consistency With History, Policy, Intent And Purpose Of The Amendment

Any actual confusion or ambiguity regarding the requirements of the Minimum Wage Amendment, should it even be considered to exist, is resolved by resort to the simplest of construction

analyses. In such cases, courts may look to the provision's history, public policy and reason to determine what the voters and drafters intended. *Sobel*, 291 F.R.D. at 534; *Miller*, 124 Nev. at 590, 188 P.3d at 1120. The guiding star of statutory interpretation of a provision such as the one at issue here is the drafters' and voters' intent as gleaned from the history, policy and purpose of the constitutional provision.[8] Courts determine the drafters' and voters' intent by construing the statute in a manner that conforms to reason and public policy. *Nevada Attorney for Injured Workers v. Nevada Self-Insurers Ass'n*, 126 Nev. Adv. Op. 7, 225 P.3d 1265, 1271 (2010). The general rule is that courts should use the contemporaneous construction by those charged with drafting a provision, rather than a *post hoc* construction. 6 Treatise on Const. L. § 23.32 (cited with approval by the Nevada Supreme Court in *Strickland v. Waymire*, 126 Nev. Adv. Op. 25, 235 P.3d 605, 609 (2010)).

As the Nevada Supreme Court explained in *Lorton, supra*:

> Outside of the text, the purpose of the provision and public policy are relevant to our interpretation of Article 15, Section 3(2), and these considerations further support the conclusion that the limitations apply to the local governing body as a whole. Article 15, Section 3(2)'s limitations provision was enacted by voters through the ballot initiative process following its approval at the 1994 and 1996 elections. When the question was presented to voters, the proponents stated that its purpose was to 'stop career politicians' by preventing them from holding office for an excessive number of terms.

Lorton, 322 P.3d at 1057 (noting that the objective of limiting career politicians in order to promote a government of citizen representatives has been recognized as a "legitimate state interest").

Applying this critical rule of constitutional construction to the Amendment, it is clear that the

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[8] *See City Plan Dev., Inc. v. Office of Labor Com'r*, 121 Nev. 419, 435, 117 P.3d 182, 192 (2005) (in rejecting the Labor commissioner's interpretation of NRS 338.090, the penalty provision of the wage statutes governing public works, as providing for double assessments, the court stated: "When interpreting a statute, this court will look to the policy and spirit of the law and will seek to avoid an interpretation that leads to an absurd result."); *Thomas v. Nevada Yellow Cab Corp.*, 130 Nev. Adv. Op. 52, 327 P.3d 518, 522 (2014) ("The goal of constitutional interpretation is to determine the public understanding of a legal test leading up to and in the period after its enactment or ratification.") (internal quotation marks and citation omitted); *City of Sparks v. Sparks Mun. Court*, 129 Nev. Adv. Op. 38, 302 P.3d 1118, 1126 (2013) ("The goal of constitutional interpretation is to determine the public understanding of a legal text leading up to and in the period after its enactment or ratification … In the face of this ambiguity, we look beyond the language of the provision to determine the intent of the voters in approving the Amendment.") (citations omitted). If a provision is ambiguous, the drafters' intent becomes the controlling factor in statutory construction. *Harris Associates*, 119 Nev. at 642, 81 P.3d at 534.

drafters intended to benefit and protect Nevada wage earners by requiring employers either to pay the upper-tier wage, or to provide employees with qualifying health plans in order to pay the lower-tier wage. Nothing in the Amendment's history indicates that the drafters or voters intended the Amendment to benefit employers or to give them any loophole to pay the lower-tier wage (then, a mere $5.15) per hour merely by doing anything other than *providing* qualifying health insurance benefits to employees.

The actual, condensed question posed to the voters on the 2004 and 2006 General Election ballots was "Shall the Nevada Constitution be amended to raise the minimum wage paid to employees?" In the published arguments contained in the sample ballots at each election, the proponents offered the following explanation:

> The proposed Amendment, if passed, would create a new section to Article 15 of the Nevada Constitution. The Amendment would require employers to pay Nevada employees $5.15 per hour worked if the employer provides health benefits, or $6.15 per hour worked if the employer does not provide health benefits.

See Nevada Statewide Ballot Questions, 2004, 2006, Nevada Secretary of State, Question No. 6, a true and accurate copy of which is included as **Exhibit D** to Schrager Decl.

The express findings and purposes of the Amendment included the following:

> 1. No full-time worker should live in poverty in our state.
> 2. Raising the minimum wage is the best way to fight poverty. By raising the minimum wage form [sic.] $5.15 to $6.15 an hour, a full-time worker will earn an additional $2,000 in wages. That's enough to make a big difference in the lives of low-income workers to move many families out of poverty.
> 3. For low-wage workers, a disproportionate amount of their income goes toward cost of living expenses. Living expenses such as housing, healthcare, and food have far outpaced wage levels for Nevada's working families.
> 4. In our state, 6 out of 10 minimum wage earners are women. Moreover 25 percent of all minimum wage earners are single mothers, many of whom work full-time.
> 5. At $5.15 an hour, minimum wage workers in Nevada make less money than they would on welfare. When people choose work over welfare, they become productive members of society and the burden on Nevada taxpayers is reduced.
> 6. Raising the minimum wage from $5.15 an hour to $6.15 an hour affirms Nevadan's beliefs that we value work, especially the difficult jobs performed by hotel maids, childcare workers, and nursing home employees. We need to make sure the workers who are the backbone of our economy receive fair paychecks that allow them and their families to live above the poverty line.

Id.

Two striking observations immediately arise from the stated findings and purposes of the

Amendment. First, without question, the Amendment's proponents placed a premium on making a difference *for the better* in the lives of low-income wage earners in Nevada *by increasing their wages* in an attempt to move them out of poverty and to assist with living expenses such as health care. The measure was titled "RAISE THE MINIMUM WAGE FOR WORKING NEVADANS." *Id.* The increased minimum wage provisions of the Amendment were clearly crafted to benefit hourly employees in Nevada, not their employers. It cannot be seriously argued that any intent of the Amendment was to leave a worker's wages at the lower-tier, while stranding him or her without the benefits promised by the Amendment's passage.

Second, and perhaps more important for present purposes, the entire idea behind the Amendment was to *increase* the minimum wage from the then-existing federal minimum hourly wage of $5.15 per hour worked, to an "upper-tier" wage at the time of $6.15 per hour worked. In other words, the Amendment was *expressly purposed to move Nevada wage earners from the lower-tier to the upper-tier.*[9] Therefore, paying the lower-tier wage was intended to be an exception and a narrow privilege, earned by employers *only* by providing—*actually providing*—qualifying health insurance to an employee. To read the provision otherwise would thwart the stated purposes of the Amendment and create incentives to employers merely to offer junk or sham insurance coverage with the expectation (or even encouragement) that the employee will decline it, so that the employer can pay the lower-tier wage without having to furnish the benefit promised by the Amendment.

C. Reasonable Interpretations Of The Amendment's Requirements By Agencies And Others Establish The Appropriate Contemporary Public Understanding Of Its Requirements

Although not controlling, the early interpretations of the operation of the two-tiered wage structure of the Amendment by Nevada agencies and others familiar with Nevada labor laws after the Amendment's passage may assist in a proper determination of the meaning of the wage structure of the Amendment, as well as its mandatory requirements. *Strickland*, 235 P.3d at 609-10 ("The goal of

[9] *See* **Exhibit D** to Schrager Decl., Findings and Purpose of the Amendment, #2 ("By raising the minimum wage form [sic.] $5.15 an hour to $6.15 an hour …"), #5 ("At $5.15 an hour, minimum wage workers in Nevada make less money than they would on welfare."), #6 ("Raising the minimum wage from $5.15 an hour to $6.15 an hour affirms Nevadan's beliefs…").

constitutional interpretation is 'to determine the public understanding of a legal text' leading up to and 'in the period after its enactment or ratification.'"); *see also* 6 Treatise on Const. L. § 23.32 ("[T]he court may examine a variety of legal and other sources—all post-enactment—to seek to determine the public understanding of a legal text in the period after its enactment or ratification. That sort of inquiry is a critical tool of constitutional interpretation.") (internal quotation marks omitted).

Overwhelmingly, those involved in and harboring expertise in state labor laws understood, and still understand today, that Section A of the Amendment requires actual provision of a qualifying health plan to the employee by the employer in order for the employer to enjoy the exception and privilege of paying the lower-tier wage. For instance, then-Labor Commissioner Michael Tanchek, in addressing the Nevada Senate Committee on Commerce and Labor on February 8, 2007, less than three months after passage of the Amendment and regarding consideration of passage Emergency Regulations necessary immediately to implement its terms, explained that it established "two minimum wage rates for Nevada. Currently, they are $5.15 and $6.15 per hour ***depending on whether insurance benefits are provided***." Nev. S. Comm. Min., Committee on Commerce and Labor, Seventy-Fourth Session (2007) (emphasis supplied).

Many others knowledgeable regarding Nevada labor laws, from the passage of the Amendment until today, correctly understand that "provide" means actually to "furnish" or "supply", not merely to "offer[.]" Examples of such reasonable interpretations abounded at time of enactment, and abound now, including the following:

- "**Minimum wage.** Effective November 28, 2006, the state constitution was amended to create a two-tiered minimum wage, $5.15 per hour ***with health benefits***, or $6.15 per hour ***without***." 3 Guide to Employment Law and Regulations § 49.7 (Mar. 2015) (emphasis supplied). A true and accurate copy of which is included as **Exhibit E** to Schrager Decl.

- "Effective July 1, 2014, Nevada's minimum wage for employees ***who received*** health benefits from their employers is $7.25 per hours, and the minimum wage for employees ***who do not receive*** health benefits is $8.25 per hours." Kirstin Rossiter, Legislative Counsel Bureau, *Fact Sheet: Minimum Wage in Nevada* (Mar. 2015) (emphasis supplied). A true and accurate copy of which is included as **Exhibit F** to Schrager Decl.

- "The minimum wage for employees ***who receive*** qualified health benefits from their employers will remain at $7.25 per hour; the minimum wage for employees ***who do not receive*** health benefits will remain at $8.25 per hour." *Press Release*, State Nevada Dept. of Business and Industry (Mar. 31, 2015)

(emphasis supplied). A true and accurate copy of which is attached hereto as **Exhibit G** to Schrager Decl.

- "Effective July 1, 2013, the State minimum wage is $7.25 per hour for employees ***who receive*** health care benefits and $8.25 for employees ***who do not receive*** health care benefits." Legislative Counsel Bureau, Research Division, *Policy and Program Report: Labor and Employment* (Apr. 2014) (mirroring the structure and operation of the Amendment, which makes the same distinction between "providing" health benefits to obtain the right to pay the lower wage, and what types of insurance may be "offered") (emphasis supplied). A true and accurate copy of which is included as **Exhibit H** to Schrager Decl.

- "Our state's minimum wage increased effective July 1, for cost-of-living adjustment to $5.30 per hour (***with qualified health plan***) and $6.33 per hour (***without qualified health plan***) … Next summer … [t]he lower Nevada wage will rise to $6 per hour (***with a qualified health plan***) and $7.03 per hour (***without a qualified health plan***)." Von S. Heinz, *Money, Money, Money: Minimum Wage Increase Dates*, 12 No. 11 Nev. Emp. L. Letter 6 (Aug. 2007) (parentheticals in the original; emphasis supplied). A true and accurate copy of which is included as **Exhibit I** to Schrager Decl.

- "[E]mployers in Nevada will be required to pay a minimum wage of either $5.15 or $6.15 per hour ***depending on whether health insurance benefits are provided to employees***… Those ***employees receiving health insurance benefits*** according to this standard can still be paid at a rate of $5.15 per hour." Fisher & Phillips, LLP*, Labor Alert: Question 6 Passes! New Nevada Minimum Wage Takes Effect November 28, 2006* (Nov. 21, 2006) (emphasis supplied). A true and accurate copy of which is included as **Exhibit J** to Schrager Decl.

- "The Amendment would require employers to pay Nevada employees $5.15 per hour worked ***if the employer provides health benefits***, or $6.15 per hour worked ***if the employer does not provide health benefits***." Nevada Taxpayers Association, *The Ballot Questions—State and Local* (Oct. 2004) (like the text of the Amendment, no mention of lower-tier wage payments if the employer merely "offers" the benefits) (emphasis supplied). A true and accurate copy of which is attached included as **Exhibit K** to Schrager Decl.

The public understanding of the requirements of the Minimum Wage Amendment, from enactment to the present day, is manifest and simple: Employees with qualifying health insurance benefits can be paid down to $7.25 per hour; employees without must be paid at the $8.25 rate. There are no gyrations to which Defendants can resort in order to twist the law of this state to enable it, instead, to merely "offer" benefits—which the employee never selected from any range of possible benefits plans, and which Defendants can manipulate to cost them nothing[10] and provide next-to-no

[10] *See* **Exhibit** C to Schrager Decl., Transcr. Depo. Deborah Harmon, at 115:7-10:

(*footnote continued on next page*)

coverage to the employee—and still gain the constitutional privilege of underpaying workers. The Minimum Wage Amendment exists to benefit employees, not to enrich cynical employers.

V. CONCLUSION

The language of the Nevada Minimum Wage Amendment is unambiguous: An employer must actually provide, supply, or furnish qualifying health insurance to an employee as a precondition to paying that employee the lower-tier hourly minimum wage. Merely "offering" substandard, or even qualifying, health insurance coverage is insufficient, if it is not actually provided to the employee. There is no ambiguity in the ordinary usage and meaning of the word "provide." It is undisputed that Defendants did not provide Mr. Kwayisi with qualifying health insurance benefits during his employment with them; Defendants, however, claimed the right to pay him—and did pay him—below the rate of $8.25 per hour. He is entitled to partial summary judgment on his first claim for relief.

DATED this 30th day of April, 2015.

WOLF, RIFKIN, SHAPIRO,
SCHULMAN & RABKIN, LLP

By: */s/ Bradley Schrager*

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

Q. Currently what does the SRC [plan] cost Wendy's or Cedar to offer to its employees? What's the cost to you?

A. Nothing. The employee pays the premium.

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of April, 2015, a true and correct copy of **MOTION OF PLAINTIFFS FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY AS TO PLAINTIFF COLLINS KWAYISI'S FIRST CLAIM FOR RELIEF** was served via the United States District Court CM/ECF system on all parties or persons requiring notice.

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

EXHIBIT “1”

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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

Plaintiffs,

vs.

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

Defendants.

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

DECLARATION COLLINS KWAYISI IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY AS TO PLAINTIFF COLLINS KWAYISI'S FIRST CLAIM FOR RELIEF

I, Collins Kwayisi, under penalty of perjury, hereby declare as follows:

1. I am over eighteen years of age and I am a Plaintiff in the present case. I have personal knowledge of the facts set forth herein, except as to those stated on information and belief and, as to those, I am informed and believe them to be true. If called upon to testify before this Court I would do so to the same effect.

2. I am currently a resident of the State of Nevada.

3. I currently work for Defendant Wendy's of Las Vegas, Inc. as an hourly, non-exempt

employee at the Wendy's Restaurant located at 3785 S. Las Vegas Blvd., Las Vegas, Nevada 89109, Store #033.

4. I have worked for Defendant Wendy's of Las Vegas, Inc. as a crew member since May 2010.

5. My hourly wage at the Wendy's Restaurant is currently $7.75 per hour.

6. Upon information and belief, my hourly wage at the Wendy's Restaurant has varied as follows:

a. Between May 2010 and May 2011, my hourly wage was $7.55;

b. Between May 2011 and May 2012, my hourly wage was $7.60;

c. Between May 2012 and May 2013, my hourly wage was $7.65; and

d. Beginning in May 2013 to the present, my hourly wage is $7.75.

7. I was never provided qualifying health insurance by Defendants.

8. I was never enrolled for health insurance by Defendants.

Under penalties of perjury under the laws of the United States of America and the State of Nevada, I declare that the foregoing is true and correct to my own knowledge, except as to those matters stated on information and belief, and that as to such matters I believe to be true.

DATED this 30 day of April, 2015.

By: _____
COLLINS KWAYISI

RICK D. ROSKELLEY, ESQ., Bar # 3192
ROGER L. GRANDGENETT II, ESQ., Bar # 6323
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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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

Plaintiffs,

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

Defendants.

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

DEFENDANTS' OPPOSITION TO MOTION OF PLAINTIFFS FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY AS TO PLAINTIFF COLLINS KWAYISI'S FIRST CLAIM FOR RELIEF

Defendants WENDY'S OF LAS VEGAS ("WOLV") and CEDAR ENTERPRISES, INC., ("Defendants"), by and through their counsel of record, Littler Mendelson, hereby file their Opposition to Motion of Plaintiffs for Partial Summary Judgment on Liability as to Plaintiff Collins Kwayisi's First Claim for Relief.

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MEMORANDUM OF POINTS & AUTHORITIES

I. INTRODUCTION

Plaintiff Kwayisi's Motion seeking a partial summary judgment turns on the definition of a single word: provide. In order to prevail on his Motion, Plaintiff Kwayisi must convince this Court that unless he actually personally enrolled in the health plan admittedly made available to him by his employer, WOLV, WOLV did not "provide" health benefits as that term is used in Nev. Const. art XV § 16 (Nevada Constitution's Minimum Wage Amendment or "MWA"). ***See* Kwayisi Motion (ECF No. 48), at 3:8-9**. There is, however, one problem with this argument. It is flat out wrong.

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

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

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ruling would be a classic blunder and clear violation of WOLV's and other Nevada employers' due process.

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

II. STANDARD OF REVIEW

Pursuant to the Federal Rules of Civil Procedure, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

All facts and inferences drawn must be viewed in the light most favorable to the responding party when determining whether a genuine issue of material fact exists for summary judgment purposes. *Brinson v. Linda Rose Joint Venture*, 53 F.3d 1044, 1050 (9th Cir. 1995). After drawing inferences in the light most favorable to the non-moving party, summary judgment will be granted if all reasonable inferences defeat the non-moving party's claims as a matter of law. *Securities Exchange Comm'n v. Seabord Corp.*, 677 F.2d 1297, 1298 (9th Cir. 1982); *Wood v. Safeway, Inc.*, 121 P.3d 1026, 1028 (2005).

A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the differing versions of the truth. *See Seabord*, 677 F.2d at 1305-1306. The substantive law defines which facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue of material fact is more than some "metaphysical doubt" as to the material facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Only disputes over outcome determinative facts under the applicable substantive law will preclude the entry of summary judgment. *Id.* If the factual context makes the non-moving party's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986).

The party moving for summary judgment has the initial burden of showing the absence of a

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genuine issue of material fact. *Metro Indus., Inc. v. Sammi Corp.*, 82 F.3d 839, 847 (9th Cir. 1996). Once the movant's burden is met by presenting evidence which, if uncontroverted, would entitle the movant to a directed verdict at trial, the burden then shifts to the non-moving party to set forth specific facts demonstrating that there is a genuine issue for trial. *Liberty Lobby*, 477 U.S. at 250.

III. ADDITIONAL UNDISPUTED FACTS

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

1. Plaintiff Kwayisi was offered insurance at his time of hire. ***See* Plaintiffs' First Amended Class Action Complaint (ECF No. 3), at ¶ 16, 45; Answer (ECF No. 42), at ¶ 45**
2. Plaintiff Kwayisi declined WOLV's health insurance. ***See* Plaintiffs' First Amended Class Action Complaint (ECF No. 3), at ¶ 16, 45; Answer (ECF No. 42), at ¶ 45.**

IV. ARGUMENT

The MWA sets forth a very clear directive for Nevada employers paying minimum wage: if they provide health insurance to their employees, they may pay the lower-tier minimum wage. Nev. Const. art XV § 16. Indeed, the parties agree that this is inherent in the plain language of the MWA. ***See* Kwayisi Motion (ECF No. 48), at 7:5-7**. The disagreement therefore, rests solely on what is meant by the word "provide." According to Plaintiff, it means employees have to enroll in their employer-based insurance plans. According to Defendants is means employers have to make insurance available to their employees.

Ultimately, Defendants' position must prevail for three key reasons: (1) the MWA directs employers to offer insurance and it does not require employees to enroll in insurance; (2) the regulations implementing the MWA specifically state that employers need only offer qualifying health insurance benefits in order to pay the lower-tier minimum wage; and (3) the retroactive effect of a ruling requiring employees to be enrolled in insurance prior to being paid the lower-tier minimum wage would be a violation of due process.

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

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

The MWA focuses on what actions employers must take in order to pay below the upper tier minimum wage. *See* Nev. Const. art XV § 16. Specifically, it directs employers to offer health insurance benefits to their employees. *Id.* At no point does it discuss or even mention any action that must be taken by employees. *See id.* Thus, Plaintiff's assertion that the MWA states that employees must enroll in the health insurance plan provided to them by their employers in order to be paid below the upper tier minimum wage is completely erroneous and contrary to the clear directive of the MWA. ***See* Kwayisi Motion (ECF No. 48), at 3:8-9.**

Indeed, the MWA directs only that employers must offer insurance and Plaintiff's argument that employees must enroll in insurance fails for three reasons: (1) the plain language of the MWA permits payment of the lower-tier minimum wage where the employer offers health benefits to its employees; (2) Plaintiff's unreasonably restricted definition of the word "provide" renders the language of the MWA nugatory; and (3) Plaintiff's purported authority for his position is inapposite to the instant matter.

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

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

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overruled in part by Garvin v. Dist. Ct., 118 Nev. 749 (2002). Here, the plain language of the MWA is clear:

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

Nev. Const. art. XV § 16. Thus, if an employer provides health insurance to its employees, it may pay those employees the lower-tier minimum wage. The plain and ordinary meaning of the word "provide" is "to make available." *See infra*. Therefore, if an employer makes health insurance available to its employees, it may pay the lower tier minimum wage.

In an attempt to contort the very straight-forward directive of the MWA, Plaintiff requests that this Court adopt a nonsensical definition of the word "provide." Specifically, Plaintiff asserts that the word "provide" means that there must be some form of acceptance or assertion of control or possession by the person to whom a service or item is being provided. **Kwayisi Motion (ECF No. 48), at 4:3-5**. Thus, according to Plaintiff, a service or item has not been provided unless the person for whom the service or item is intended actually uses or takes that service or item. **Id**. This is completely contrary to every definition of the word "provide," including the definitions used by the sources Plaintiff cites. Specifically, Plaintiff directs the Court to the online Meriam-Webster Dictionary's Thesaurus definition for the word provide. **Kwayisi Motion (ECF No. 48), at 8:5**. However, even that definition explains that there is no need for actual acceptance or use:

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

<http://www.merriam-webster.com/thesaurus/provide>. As the example sets forth, providing is the same as making available for use. If a "well-heeled vacationer" doesn't use or keep the towels, it doesn't mean the "comforts of home" weren't provided. Rather, if the towels were available for use, they were provided – plain and simple. For example, if person A invites person B over for dinner and then prepares and offers person B dinner, person A has provided person B dinner

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regardless of whether person B eats the food provided. What matters is that dinner was made available.

Next, Plaintiff completely omits the actual dictionary definition of the online Merriam-Webster Dictionary. **Kwayisi Motion, at 8:2**. The online Merriam-Webster Dictionary defines "provide" as follows:

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

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

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

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

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

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

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

The definition of the word "provide" is "to make available for use." Accordingly, as explained above, the plain language of the MWA is clear: if an employer makes insurance available to its employees, it may pay those employees the lower-tier minimum wage. It is that simple.

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

Whenever possible, statutes are construed "such that no part of the statute is rendered nugatory or turned to mere surplusage" or to "produce absurd or unreasonable results." *Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 418, 132 P.3d 1022, 1028 (2006); *Harris*, 119 Nev. at 642, 81 P.3d at 534. Here, Plaintiff has requested that this Court adopt a definition of the word "provide" that is so restrictive that whether an employer offers insurance to its employees would have no bearing whatsoever on whether that employer is permitted to pay the lower-tier minimum wage. This is in complete contrast to the actual language of the MWA. Indeed, directly after setting forth that employers must provide insurance, the MWA goes on to explain exactly what providing health insurance means. Specifically, it states:

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

It is not setting forth a separate and distinct act by the employer. It is clarifying what sort of insurance should be provided by the employer. Thus, the MWA uses the terms "provide" and "offer"

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synonymously. To assert otherwise is nonsensical. If "offer" and "provide" mean entirely separate things, as Plaintiff suggests, then the second sentence is essentially meaningless and would be rendered nugatory. This of course is not the case. The drafters, aware that employers cannot forcibly enroll their employees in insurance, indicated that the relevant act for compliance with the MWA is the employer's offer of insurance – not an employee's acceptance. Thus, Plaintiff's contention that "[t]he term '[o]ffering' is not concerned with whether an employer qualifies for paying the lower tier wage addressed in the prior sentence," is blatantly inaccurate. **Kwayisi Motion (ECF No. 48), at 10:5-7**. The word "offering" is clearly used in conjunction with the type of insurance that must be made available in order for employers to qualify to pay below the upper-tier minimum wage. Thus the use of the word "offering" is relevant and it is directly addressing whether an employer qualifies to pay the lower-tier minimum wage.

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

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

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

Most likely aware that his argument requires the Court to ignore the plain language of the MWA and the obvious directives therein, Plaintiff makes tenuous arguments based on inapposite

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authority that does not actually support his position. For example, in an effort to skew the clear definition of the word "provide," Plaintiff makes a tenuous argument regarding the word "furnish." **Kwayisi Motion (ECF No. 48), at 8:22-28**. Specifically, he notes that "furnish" is synonymous with "provide" and then cites to a criminal case wherein a prisoner was charged with furnishing a controlled substance to himself. **Id**. Plaintiff notes that the Nevada Supreme Court stated that furnishing "calls for delivery by one person to another person." **Id**. However, what Plaintiff leaves out is that the sentence goes on to say "you can't deliver to yourself." *State v. Powe, No. 55909*, 2010 WL 3462763, at *1 (Nev. July 19, 2010). Thus, the Nevada Supreme Court was in no way indicating that the words "provide" or "furnish" mean there must be some acceptance or use or ongoing possession by the person for whom an item or service is intended. Rather, the point of the statement was that a person cannot transfer something to themselves. *See id.*

Next, Plaintiff relies upon an Internal Revenue Service ("IRS") interpretation from 1976 of Treasury Regulation § 601.201(o)(3) which stands for the exact opposite of Plaintiff's position. **Kwayisi Motion (ECF No. 48), at 8 fn. 4**. Specifically, at issue was whether applicants must be given copies of all comments on an application or allowed to inspect and copy materials on request. **Id**. The IRS determined that the applicant must be given copies, "not merely given the opportunity to obtain them" and, therefore, "rather than adopting a strained reading of the word 'provide,' the regulation should be amended." **Id.** Thus, the IRS was stating that as written the regulation was indicating an "opportunity to obtain" may be implied by the use of the word "provide."

Plaintiff further relies on a case which makes a distinction between the use of the terms "state office" and "local governing body" in an effort to show that the MWA intended two entirely different meanings by using the words "provide" and "offer." **Kwayisi Motion (ECF No. 48), at 11:1-9**. At issue in that case was the drafter's intent in Nev. Const. art. XV § 3 by using different terms in addressing how term limits apply in state and local elections. *Lorton v. Jones*, 130 Nev. Adv. Op. 8, 322 P.3d 1051, 1056 (2014), *reh'g denied* (Mar. 5, 2014). This is in no way analogous to the matter at hand. "Provide" and "offer" are not materially different terms. As discussed above, provide means to make available. By the very nature of the subject matter of the MWA, naturally an offer must occur. The two terms go hand in hand.

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Finally, Plaintiff refers to the "findings and purposes" of the MWA. **Kwayisi Motion (ECF No. 48), at 13:16-28**. As evident from Plaintiff's motion, the "findings and purposes" make no reference whatsoever to the alleged requirement that an employee must enroll in insurance. **Id.**

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

In what can only be described as a blatant attempt to mislead the Court, Plaintiff quite egregiously failed to make any reference whatsoever to the regulations that support the MWA.[1] This is likely because the regulations make it abundantly clear that employers who "offer" insurance to their employees qualify to pay the lower-tier minimum wage. Specifically, NAC 608.102 states: "To qualify to pay an employee the minimum wage set forth in paragraph (a) of subsection 1 of NAC 608.100 . . . [t]he employer must offer a health insurance plan." NAC 608.102(1) (emphasis added). The regulation goes on to state that, "[t]he health insurance plan must be made available to the employee and any dependents of the employee." NAC 608.102(2) (emphasis added). It says absolutely nothing about requiring an employee to enroll in insurance. Rather, the directive is clear: employers must offer insurance in order to pay the lower-tier minimum wage.

NAC 608.102 also makes clear that the Labor Commissioner understood that the definition of the word "provide" is "to make available." Moreover, the Labor Commissioner interpreted the MWA as a whole to require employers to offer insurance to their employees – not to require employees to enroll in insurance. The Court must give deference to this interpretation as long as it is "based on a permissible construction of the statute." *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842-843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). In other words, the agency interpretation is upheld unless it is arbitrary or capricious. *Deukmejian v. United States Postal Service*, 734 F.2d 460 (9th Cir.1984); *Lane v. U.S. Postal Serv.*, 964 F. Supp. 1435, 1437 (D. Nev. 1996). Here, as discussed above, interpreting the word "provide" to mean "to make available" is consistent with every definition of the word. Therefore, there is no argument that the Labor

[1] Instead, Plaintiff cites to a series of articles and press releases which were likely copied and pasted from one another and are of no controlling precedent whatsoever. **Kwayisi Motion (ECF No. 48), at 15-16**. Indeed, many of the citations were published before there was any clarification by the Labor Commissioner via the regulations and lack any indication of actual research into the MWA whatsoever. **See id.**

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Commissioner's interpretation of the MWA is or was arbitrary or capricious.

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

Another regulation that sets forth the requirements of the MWA is NAC 608.106 which further elaborates that the MWA is designed to incentivize offering insurance. Specifically, it sets forth that employees are free to decline the offered insurance:

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

NAC 608.102 (emphasis added). It does not state that the employee will be paid the upper-tier wage if they decline insurance. Instead, it contemplates an offer of insurance, which employees are free to decline.

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

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

NAC 608.108 (emphasis added). Accordingly, since at least 2007, the express mandate to employers is that offering health insurance to their minimum wage employees qualifies them to pay below the upper-tier minimum wage.

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

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C. The Retroactive Effect of A Ruling Requiring Employees to be Enrolled in Insurance Prior to Being Paid the Lower-Tier Minimum Wage Would be a Violation of Due Process

Plaintiff's Motion urges the Court to ignore the above discussed regulations. As a result, if the Court were to take this approach, it would have to address the nine-years in which employers in Nevada have relied on those regulations. The Supreme Court has held that "a court is to apply the law in effect at the time it renders its decision" in the absence of manifest injustice or evidence of legislative intent to the contrary. *Bradley v. School Board*, 416 U.S. 696, 711, 94 S.Ct. 2006, 2016, 40 L.Ed.2d 476 (1974). Thus, in the event the Court agrees with Plaintiff's argument, the constitutional concerns would be substantial. Specifically, when interpreting a statute, courts have long applied the " 'cardinal principle' " that a fair construction which permits the court to avoid constitutional questions will be adopted. *United States v. Security Industrial Bank*, 459 U.S. 70, 78, 103 S.Ct. 407, 412, 74 L.Ed.2d 235 (1982) (*quoting Lorillard v. Pons*, 434 U.S. 575, 577, 98 S.Ct. 866, 868, 55 L.Ed.2d 40 (1978)); *Lowe v. S.E.C.*, 472 U.S. 181, ——, 105 S.Ct. 2557, 2562, 85 L.Ed.2d —— (1985). Where a statute may be construed to have either retrospective or prospective effect, a court will choose to apply the statute prospectively if constitutional problems can thereby be avoided. *In re Ashe*, 712 F.2d 864, 865–66 (3d Cir.1983), cert. denied, 465 U.S. 1024, 104 S.Ct. 1279, 79 L.Ed.2d 683 (1984); *Roth v. Pritikin*, 710 F.2d 934, 939–40 (2d Cir.), cert. denied, 464 U.S. 961, 104 S.Ct. 394, 78 L.Ed.2d 377 (1983). Resolution of the constitutional issue need not be certain; there need only be a "substantial doubt," *Security Industrial Bank*, 459 U.S. at 78, 103 S.Ct. at 412, or an indication that the constitutional question is "non-frivolous." *Ashe*, 712 F.2d at 865. *Accord Roth*, 710 F.2d at 939 ("[e]ven the spectre of a constitutional issue" is sufficient to construe the statute to provide for only prospective relief).

Here, retroactive application of Plaintiff's "must be enrolled" argument could raise constitutional questions concerning both the Ex Post Facto Clause, U.S. Const., art. I, § 9, cl. 3, and the Due Process Clause of the Fifth Amendment. Therefore, the Court should select the construction that renders constitutional analysis unnecessary. However, in the event the Court does not and agrees with Plaintiff, Plaintiff's Motion must still be denied because the voiding of the Labor

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Commissioner's regulations would have to be applied prospectively – not retroactively.

V. CONCLUSION

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

Dated: May 18, 2015

Respectfully submitted,

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PROOF OF SERVICE

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

DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS PURSUANT TO FRCP 12(c) WITH RESPECT TO PUNITIVE DAMAGES

☒ By CM/ECF Filing – Pursuant to FRCP 5(b)(3) and LR 5-4, 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:

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

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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

Plaintiffs,

vs.

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

Defendants.

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

PLAINTIFF'S REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY AS TO PLAINTIFF COLLINS KWAYISI'S FIRST CLAIM FOR RELIEF

Plaintiff Collins Kwayisi ("Plaintiff"), by and through his attorneys of record, hereby submits his Reply to Defendants Wendy's of Law Vegas, Inc. and Cedar Enterprises, Inc. (collectively, "Defendants") Opposition (the "Opposition") [ECF Doc. 53] to Plaintiff's Motion for Partial Summary Judgment on Liability as to Plaintiff's First Claim for Relief (the "Motion") [ECF Doc. 48]. This Reply is based on the Memorandum of Points and Authorities below, and all papers exhibits on file in this case, along with any oral argument at hearing on this matter.

/ / /

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendants do not dispute any material fact necessary to decide Plaintiff's Motion in their Opposition.[1] Rather, they misunderstand and misstate the purpose of article XV, section 16(A) of the Nevada Constitution (the "Minimum Wage Amendment," or the "Amendment"), and thus misinterpret the term "provide" in the sentence establishing the two-tiered wage requirements of the Amendment. The sole dispositive issue before the Court remains a simple legal one: the proper interpretation of "provide" in the context of the Minimum Wage Amendment.

The express purpose and intent of the Minimum Wage Amendment was to increase the minimum wage for Nevada hourly employees above the federal minimum threshold; thus the measure was titled "RAISE THE MINIMUM WAGE FOR WORKING NEVADANS." It was not, as Defendants suggest in their Opposition, merely to make insurance available to hourly employees. *See* Opposition at 9. Therefore, to "provide" insurance as a precondition to paying the lower-tier minimum wage must mean actually to provide or furnish such insurance. Any other interpretation of the term "provide" within the context of the Amendment thwarts the spirit and purpose of the Amendment, and diminishes its benefits and protections to the employees it was intended to secure.

Defendants argue that "provide" means something less than actually furnishing, that Nevada employers can pay the lower-tier minimum wage merely by "offering" or "making available" health insurance to their employees—wholly without regard to the quality of the insurance offered, the manner in which such plan is presented to the employees by the employer (i.e., whether the employees are tacitly, or even actively, encouraged to reject it), or the various reasons an employee might decline the insurance. In effect, they ask the Court to construe the Amendment in a manner that creates a

[1] Defendants do include two additional purportedly "undisputed facts" without evidentiary support: (1) that Plaintiff was offered some unspecified form of insurance at his initial employment, and (2) that he declined it. These additional "facts", while not conceded by Plaintiff, have no bearing on Plaintiffs' Motion in any case. The crux of the Motion is that, regardless of whether a health plan is *offered* by an employer, an employer must pay the upper-tier minimum wage ($8.25) unless it actually provides or furnishes health insurance to its employee.

loophole for employers, allowing them to avoid a minimum wage increase *and* not provide health insurance to minimum wage workers.

Defendants' loophole construction flouts the plain language and express purpose of the Amendment; in fact, it renders the Amendment largely impotent. In positing it, Defendants make three unsound arguments: (1) that, under a plain language analysis, there can be no distinction between "providing" a health plan and "offering" a health plan; (2) that the implementing regulations, specifically NRS 608.100 and 608.102 (the "Regulations"), can somehow dictate or determine a proper construction of a *constitutional amendment* enacted by overwhelming vote of the people; and (3) that federal cases concerning retroactivity of newly enacted legislation somehow protect Defendants from liability to Plaintiff for wages Defendants unlawfully withheld from him under the clear language and purpose of the Minimum Wage Amendment. As demonstrated below, none of these arguments have merit.

First, Defendants' position that the two terms "provide" and "offer" were meant by the drafters of the Amendment to be synonymous flies in the face of clearly articulated Nevada authority to the contrary. Defendants ignore or distort the Nevada Supreme Court's pronouncements on the meaning of "provide", which it equates with "furnish"—that the terms must mean something more than to offer or to make available and connote a transfer of possession. Defendants cite no cases for their position that "provide" and "offer" are "synonymous," but rather simply list competing sources that parse the term "provide," such as Google, which include among the several definitions "to make available", but, strikingly, never merely "to offer." Context matters here, and thus Plaintiff stands by his position that, under the plain language of the Minimum Wage Amendment, "provide" means actually to furnish or supply qualifying health insurance, not merely to offer it or make it available. Plaintiff's Motion is due to be granted under a plain language analysis alone.

Nevertheless, should the Court decide that Defendants' contrary interpretation of "provide" in the Amendment is reasonable enough to create an ambiguity, then the Court may look to its history, public policy, and reason as addressed in Plaintiff's Motion, and apply longstanding rules of statutory construction to determine what the drafters and voters intended. The consideration of these factors and produce the same result as a plain language analysis: "provide" must mean actually to provide or

furnish, nothing less. And, while Defendants make much ado about the seemingly conflicting interpretation of "provide" in the Regulations, it is black letter law that a constitutional (or statutory) provision cannot be construed in light of administrative regulations, but rather administrative regulations are scrutinized in light of and so as to comport with the constitutional or statutory provisions to which they relate. Defendants' argument gets it backwards, and violates longstanding rules of statutory construction.

In a similar vein, Defendants' contention that the Regulations must be given *Chevron*-type deference also gets it backwards. In addition to violating rules of statutory construction, the "tail wagging the dog" proposition that an agency regulation can substantively alter or modify a constitutional provision runs aground on well-established principles of separation of powers, the limits of regulatory authority and constitutional supremacy. Although great deference is given a board or commission's interpretation of a statute or constitutional provision, it is only granted *if the interpretation is consistent with the terms and purpose of such statute or provision*. Even a reasonable agency interpretation of an ambiguous statute or constitutional provision may be stricken by a court if it determines that the interpretation conflicts with legislative or voter and drafter intent.

Boards and commissions, such as the Office of the Labor Commissioner, are creatures of statute and have only such authority as has expressly been granted by the Legislature, or is incidental for the purposes of carrying out such express powers. The Labor Commissioner has no power to create law, or to adopt regulations which conflict with or to diminish rights preserved by a Nevada constitutional provision. The Regulations, if interpreted as Defendants suggest, would diminish vested rights of all Nevada hourly wage earners to an increased minimum wage, and in effect would rewrite the Minimum Wage Amendment to contain a pro-employer loophole that the drafters and voters certainly never intended. Thus, even if constitutional provisions could be scrutinized or construed under agency regulations—which they cannot—the interpretation of the Regulations touted by Defendants which effectively rewrites the Minimum Wage Amendment would be an invalid, *ultra vires* act by the Labor Commissioner, grossly exceeding his regulatory authority and violating the principle of constitutional supremacy. The Regulations cannot determine the critical meaning of "provide" in the Minimum Wage Act—such determination is for the Court.

Finally, in apparent anticipation that the Court will agree with the Plaintiff that the only reasonable construction of "provide" means actually to furnish or supply, Defendants end their Opposition by hedging with federal cases regarding retroactive application of legislation they believe may somehow insulate them from liability for wages improperly withheld from Plaintiff, citing also "the Ex Post Facto Clause, U.S. Const., art. I, § 9, cl. 3, and the Due Process Clause of the Fifth Amendment." *See* Opposition at 13. In fact, Defendants encourage the Court to avoid the whole issue by adopting their "loophole" construction of "provide." But this hodgepodge of constitutional arguments is nothing but a basket of red herrings, and none of the cases or arguments are compelling, or even applicable to the legal issues presented here.

The bottom line is this: Nevada voters overwhelmingly adopted the Minimum Wage Amendment *to increase the minimum wage for Nevada hourly laborers in order to help lift them out of poverty*. Under the only plausible construction of the two-tiered wage structure of the Amendment, Nevada employers may comply with this purpose and mandate in one of two ways: (1) by paying employees the upper-tier hourly wage outright, or (2) by providing—actually providing—quality and affordable health insurance plans to employees, the actual precondition of which is the *only* justification for, paying the lower-tier minimum wage. Defendants' construction, on the other hand, perverts the essential purpose of the Amendment, by providing employers a giant loophole through which employers could both pay the lower minimum wage *and* fail to provide qualifying health insurance. Interpreting "provide" to mean merely "offer" leaves to much room for employer misbehavior and defeats the purpose of the Amendment.

Instead, "provide" must mean that an employer must actually furnish or supply qualifying health insurance in order to pay the lower-tier wage, as this is the only reasonable construction of the Amendment. It is undisputed that Defendants have not actually provided a qualifying health plan to Plaintiff, but nevertheless unlawfully paid him the lower-tier wage. Thus, the Plaintiff is entitled to partial summary judgment in his favor on the issue of liability.

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II. ARGUMENT

A. Plain Language

1. The ordinary meaning of "provide" is "furnish" or "supply"

Defendants argue that the plain meaning of "provide" in the Minimum Wage Amendment is indistinguishable from the meaning of the terms "offer" or "make available." They contend that for the Court to adopt a meaning consistent with the authorities cited by Plaintiff in his Motion—including the Nevada Supreme Court's own articulation of the term "furnish" as interchangeable with "provide" in *State v. Powe*, No. 55909, 2010 WL 3462763 (Nev. July 19, 2010)—would be "nonsensical" and "absurd." *See* Opposition at 6, 9. Plaintiff respectfully disagrees and stands by the authorities previously cited for the proposition that the plain and ordinary meaning of "provide" in the context of the Minimum Wage Amendment must mean something more than merely to offer, suggest or merely make available. "Provide" connotes a transfer of possession, and means the actual provision of health insurance to an employee as a precondition to an employer's paying the lower-tier minimum wage.

Defendants' interpretation of "provide" as merely to "offer" would set up an incentive for unscrupulous Nevada employers to avoid paying increased minimum wages simply by waiving sham insurance plans in front of new hires in such a way that discourages their acceptance of it. This cannot have been the drafters and voters intention when they chose the word "provide." While the parties could continue to parse the term "provide" ad nauseam, the only reasonable construction of the everyday meaning of the word "provide", the only one that maintains the drafters' and voters' crystalline intent that a meaningful increase in the minimum wage would be afforded to *all* Nevada hourly wage earners, and the only one consistent with the Nevada Supreme Court's only discussion of the term, is that it means actually to provide or furnish.

In addition to the authorities cited in Plaintiff's Motion for this position, other jurisdictions construe "provide" to mean actual provision as well. *See Herd v. Am. Sec. Ins. Co.*, 501 F. Supp. 2d 1240 (W.D. Mo. 2007) (finding the plain meaning of "provide" requiring mortgagors to provide proof of insurance to a mortgagee to be unambiguous and to mean the actual provision of such proof of insurance, not merely the mortgagor's obtaining insurance, such that proof would be technically available to the mortgagee); *State, ex rel., Stephan v. Bd. of Educ. of Unified Sch. Dist. 428, Barton*

Cnty., Kan., 231 Kan. 579, 647 P.2d 329 (1982) (interpreting the statutory requirement of a school district to "provide or furnish transportation" for students to mean *actually furnishing* bus transportation or reimbursing persons who furnish transportation in privately owned vehicles their transportation costs (or a combination of both), not merely to make transportation available); *Tippett v. Daly*, 10 A.3d 1123, 1127 (D.C. 2010) (looking to dictionary definitions of "provide" since it was not defined in the statute being construed, and determining that a tenant must *actually provide* or *deliver* a statement of interest to the landlord within the meaning of the statute, rather than merely make it available, or put it in the mail because "[p]rovide means to supply for use and is synonymous with furnish.") (internal quotations and citations omitted). Actual provision of health insurance as a precondition to paying the lower-tier wage is the only reasonable and non-absurd interpretation of "provide" in the context of the Amendment.

2. Different terms used within the same statute create presumption that they denote different ideas.

Defendants' argument equates "provide" with "offering" in the separate and distinct sentences of the Amendment, despite the fact that the drafters carefully chose these two different words and placed them in two different sentences—"provide," in describing the command of a mandatory two-tiered minimum wage increase; and "offering," in a further sentence describing what type of insurance may be offered in complying with that command. A drafter's choice of different and distinct terms in different places or sentences carries with it a presumption that the different terms denote different ideas. *Lorton v. Jones*, 130 Nev. Adv. Op. 8, 322 P.3d 1051, 1056 (2014). Defendants argue unpersuasively that *Lorton* is inapposite but, to the contrary, *Lorton* is directly on point. It articulates the well-established rule that a drafter's use of one word over another is a decision "imbued with legal significance and should not be presumed to be random or devoid of meaning." *S.E.C. v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003) (embracing the "well-established canon of statutory interpretation" that the use of different words or terms within the same statute demonstrates the intention by the legislature to convey different meanings for those words, and a "decision to use one word over another… is material"); *see also Alberto-Gonzalez v. I.N.S.*, 215 F.3d 906, 909-10 (9th Cir. 2000) (use of different language in a statute creates a *presumption* that the drafter intended the terms to have different

meanings); *Legacy Emanuel Hosp. & Health Ctr. v. Shalala*, 97 F.3d 1264 (9th Cir. 1996) (construing different terms in adjacent provisions to connote different meanings). Therefore, Defendants' argument that "provide" and "offering" are synonymous in the Amendment runs aground on this well established canon of statutory interpretation. The use of such different terms in such close proximity in the Amendment creates a presumption that they must convey different ideas and that such was intended by the drafters. If the drafters of the Minimum Wage Amendment had wanted to convey the idea that merely offering health insurance entitled an employer to pay the lower-tier wage and avoid a minimum wage increase, they easily could have used the term "offer" or "make available" in the sentence containing the two-tiered wage structure. They did not; they used "provide."

B. Statutory Construction Of Ambiguous Provisions Or Terms

1. General rules of statutory construction

If the Court accepts any portion of Defendants' argument, at best they have pointed up an ambiguity in the Amendment (the meaning of "provide"). Any such ambiguity easily can be remedied by the application of the following well established Nevada rules of statutory construction.[2]

When a statute is ambiguous, meaning it is "capable of being understood in two or more senses by reasonably informed persons," courts may look to reason and public policy to determine what the Legislature, or in this case, the drafters and the public, intended. *Pub. Employees' Benefits Program v. Las Vegas Metro. Police Dep't*, 124 Nev. 138, 147-48, 179 P.3d 542, 548 (2008). The meaning of terms may be ascertained by examining the background and spirit in which the law was enacted, "and the entire subject matter and policy guides our interpretation." *Id*. A statute or constitutional provision must be construed holistically, giving meaning to each word, sentence and phrase used, so that none is rendered nugatory, or so as to produce unreasonable or absurd results. *Id*.

Whatever meaning ultimately is attributed to an ambiguous word or phrase may not violate the spirit of the provision. *Miller v. Burk*, 124 Nev. 579, 591, 188 P.3d 1112, 1120 (2008); *see also City of*

[2] The rules of statutory construction apply with full rigor to the interpretation of a constitutional provision; thus, references to statutory and constitutional construction are used interchangeably herein. *See Landreth v. Malik*, 127 Nev. Adv. Op. 16, 251 P.3d 163, 166 (2011) ("Constitutional interpretation utilizes the same rules and procedures as statutory interpretation.").

Sparks v. Sparks Mun. Court, 129 Nev. Adv. Op. 38, 302 P.3d 1118, 1126 (2013). Stated another way, if following a statute's plain meaning results in a meaning that runs counter to the "spirit" of the statute, a court may look outside the statute's language. *See MGM Mirage v. Nevada Ins. Guar. Ass'n*, 125 Nev. 223, 229, 209 P.3d 766, 769 (2009) (observing that Nevada courts adhere to the rule of construction that the intent of a statute will prevail over the literal sense of its words). Regulations are construed to conform to statutes and constitutional provisions, not vice versa. *See, e.g., Roberts v. State*, 104 Nev. 33, 37, 752 P.2d 221, 223 (1988).

And finally, in determining drafter and voter intent behind an ambiguous constitutional provision, the expressly-stated purpose of the provision must be considered. *Hotel Employees & Rest. Employees Int'l Union, AFL-CIO v. State ex rel. Nevada Gaming Control Bd.*, 103 Nev. 588, 591, 747 P.2d 878, 880 (1987). Indeed, the whole goal of statutory interpretation is to determine the public understanding of a legal text leading up to and in the period after its enactment or ratification. *Pohlabel v. State*, 128 Nev. Adv. Op. 1, 268 P.3d 1264, 1269 (2012). Here, the stated purpose, history, policy, and public understanding of the text leading up to its enactment all make plain that the Amendment was intended would effectively raise the minimum wage for all Nevadans. *See* Pl.'s Motion at 11-15. Even the title of the measure, which must be considered, was "RAISE THE MINIMUM WAGE FOR WORKING NEVADANS." *Id*. at 14. Defendants' interpretation would diminish if not destroy the constitutional guaranties to Nevada hourly employees of an increased minimum wage and render the Minimum Wage Amendment virtually meaningless.

2. Specific rule of construction with regard to remedial provisions such as the Minimum Wage Amendment

Another cardinal principle of construction applies here, and in fact is dispositive: where a statute or constitutional provision is remedial in nature, such as the Minimum Wage Amendment, it must be liberally construed to effect the intended benefit and in favor of the intended beneficiaries. *See Washoe Med. Ctr., Inc. v. Reliance Ins. Co.*, 112 Nev. 494, 497, 915 P.2d 288, 289 (1996) (remedial statues must be liberally construed in favor of those whom they are intended to benefit); *Colello*, 100 Nev. at 347, 683 P.2d at 17 ("[s]tatutes with a protective purpose should be liberally construed in order to effectuate the benefits intended to be obtained").

Int'l Game Tech., Inc. v. Second Judicial Dist. Court ex rel. Cnty. of Washoe, 124 Nev. 193, 179 P.3d 556 (2008), is instructive. There, a former employee brought an action against his employer under Nevada's False Claims Act ("FCA"), and the employer unsuccessfully moved to dismiss the complaint for the employee's failure to allege that the employer pressured him into participating in the reported activity. *Id*. The employer filed a writ of mandamus with the Nevada Supreme Court, asking it to compel the district court to dismiss the whistleblower complaint against it under NRS 357.250(2)(b), which required employees to assert and prove that the employer had pressured an employee to engage in fraudulent activity in order to recover. *Id*. In denying relief to the employer, the Supreme Court addressed the proper construction of an ambiguous remedial statute, stating:

> Resolving ambiguity in NRS 357.250 as [the employer] suggests so that it applies only to employers that have harassed, threatened, or coerced employees into fraudulent activity would require us to disregard several key tenets of statutory construction. Under those tenets, an ambiguous statue *must be interpreted in accordance with what reason and public policy indicate the Legislature intended*. The public policy behind the legislation may be discerned from the entire act, and a statute's provisions should be read as a whole, so that no part is rendered inoperative and, when possible, any conflict is harmonized. Finally, *remedial statutes, like NRS 357.250, should be liberally construed to effectuate the intended benefit.*

Id. at 200-01, 179 P.3d at 560-61. (footnotes omitted; emphasis supplied).

Following those tenets, the Nevada Supreme Court rejected the employer's self-serving construction of NRS 357.250 as applying only to employers that have harassed, threatened, or coerced employees into fraudulent activities. *Int'l Game Tech., Inc.*, 124 Nev. at 202, 179 P.3d at 562. Instead, noting that NRS 357.250 was enacted for the benefit of employees, not employers, to protect them when they act lawfully under the FCA, the Supreme Court determined that the more reasonable construction of the statute was that *if* an employee engaged in fraudulent activity, then that employee could only recover under the statue if he had been harassed, threatened, or coerced into the fraudulent activity by the employer in the first instance. *Id.* at 201, 179 P.3d at 561. In so doing, the Supreme Court noted that effectuating the legislative policy behind the statute to protect employees was the most important consideration in the proper construction of that remedial statute. *Id.*

The Minimum Wage Amendment is unarguably a remedial statute, and the Nevada Supreme Court has expressly stated as much. *Terry v. Sapphire Gentlemen's Club*, 130 Nev. Adv. Op. 87, 336 P.3d 951, 954 (2014) (discussing the Amendment and N.R.S. Chapter 608: "Particularly *where, as*

here, remedial statutes are in play …") (emphasis supplied). It cannot be disputed that the Amendment was drafted to safeguard the health and welfare of people earning their livings by their own endeavors, and to increase the minimum wages provided to such hourly employees to help lift them out of poverty. Thus, the only correct construction of the Amendment is one that effectuates and secures these intended benefits to minimum wage employees like Plaintiff.

C. Regulatory Overreach And Constitutional Supremacy

1. The Regulations and the limits of regulatory authority

Defendants' argument that the Regulations must be given deference under *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), is a manipulation of the *Chevron* doctrine. *See* Opposition at 11-13. Defendants attempt to transform the straightforward and clear mandates of the Minimum Wage Amendment into something ambiguous so as to argue that the Labor Commissioner's "interpretation" of the constitutional provision must be considered, or even given deference. This would be an improper transfer of lawmaking power to an administrative agency, because the Regulations, if read as softening the clear boundaries of the two-tiered wage structure of the Amendment, would in effect be a modification of or redrafting of that constitutional provision by and administrative agency. In fact, the most basic principle of *Chevron* is that an agency's freedom to interpret a statute is controlled and limited by that statute's (or constitutional provision's) language and structure. *Chevron*, 467 U.S. at 842-43 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). Only if Congress (or the drafters of a constitutional amendment) explicitly left a gap for the Labor Commissioner to fill would *Chevron* deference apply to that agency's interpretation, and then only if it is a "permissible" construction of the constitutional provision. *Id*. at 842. In the end, the Judiciary, not administrative agencies, is the final authority on issues of statutory construction in any case, and must reject any administrative construction that is contrary to the intent of the legislature, or in this case the drafters of and voters for, a statute or constitutional provision.

Here, no gap was left by the drafters of the Minimum Wage Amendment with regard to what "provide" means, and Defendants' construction is not a "permissible" one, because it directly conflicts with the plain language (or the only reasonable interpretation of) the Amendment. Thus, the

Regulations at issue simply do not qualify for the application of the *Chevron* doctrine. *Chevron* may not be used to enable an agency to bootstrap power in order to diminish employee rights and benefits provided by a constitutional amendment, as the Regulations appear to do here. The Labor Commissioner has no such jurisdiction.

More importantly, the construction of the Nevada Minimum Wage Amendment is a function of state, not federal, law, and Nevada law does not include an analogous *Chevron*-type precedent. Instead, the Nevada Supreme Court makes clear that deference to an agency's regulatory interpretation of a statute or provision it is charged with enforcing is only given if the regulation does not conflict with the statute or constitution. *State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 995 P.2d 482 (2000).

In *State Farm*, an automobile insurer filed a motion for summary judgment on its declaratory judgment action challenging the validity of a Nevada Division of Insurance ("DOI") regulation defining "chargeable accidents" for purposes of cancelling coverage for accidents in which the insured is more than 50% at fault, claiming that the regulation modified or conflicted with existing Nevada comparative negligence statutes. *Id*. at 291, 995 P.2d at 484. The trial court found that the regulation failed to aid in the administration of the relevant statutes and granted the insurer summary judgment, declaring the regulation invalid and prohibiting its enforcement. *Id*.

On appeal by the DOI, the Nevada Supreme Court declared that:

> [A] court will not hesitate to declare a regulation invalid when the regulation violates the constitution, conflicts with existing statutory provisions or exceeds the statutory authority of the agency or is otherwise arbitrary and capricious.
>
> Finally, even a reasonable agency interpretation of an ambiguous statute may be stricken by a court when a court determines that the agency interpretation conflicts with legislative intent.

Id. at 293, 995 P.2d at 485.

The Supreme Court looked to the legislative intent of the relevant statutes, which was to protect insureds from insurers' re-rating premiums only where the insureds were not legally responsible for the accident. *Id*. at 295, 995 P.2d at 486. Because the regulation prohibited insurers from re-rating even where the insured was legally liable for an accident under the statutory scheme, the regulation conflicted with the statutes at issue and was declared invalid. *Id*. ("Therefore, we conclude that the

[DOI] exceeded its authority under NRS 679.130 by promulgating NAC 690B.230(2)."). S*ee also Thomas v. Nevada Yellow Cab Corp.*, 130 Nev. Adv. Op. 52, 327 P.3d 518 (2014), *reh'g denied* (Sept. 24, 2014) (statutes [and thus even more so, regulations] are construed to accord with constitutions, not vice versa); *Pub. Agency Comp. Trust (PACT) v. Blake*, 127 Nev. Adv. Op. 77, 265 P.3d 694 (2011) (invalidating an administrative regulation that directly conflicted with the governing statute; because of the conflict "*no deference* to the agency's interpretation is due, and we conclude that [the regulation] is invalid") (emphasis added).

The Labor Commissioner is not given free reign to adopt regulations fundamentally at odds with the Minimum Wage Amendment. Neither can the Labor Commissioner, under the guise of interpreting the Amendment, circumscribe the protections and benefits afforded Nevada workers by interpreting "provide" in such a way that scuttles the very purpose of the Amendment.

2. Defendants' construction of "provide" offends the principle of constitutional supremacy

The basic principle of state and federal constitutional systems is that all political power is inherent in the people, and that this inherent power is exercised by the people under a constitution adopted by them. The principle of constitutional supremacy involves the doctrine of separation of powers, and provides that a constitutional amendment is the supreme law of the land and controlling over conflicting statutes or regulations addressing the same issue.[3] A constitution may not be construed according to statutes or regulations; statutes or regulations instead must be construed consistent with a constitution. *Foley v. Kennedy*, 110 Nev. 1295, 1301, 885 P.2d 583, 586 (1994) (constitutional supremacy prevents Nevada legislature—and even more so Nevada agencies or regulators—from "creating exceptions to the rights and privileges protected by Nevada's constitution").

Instructive on this point is *Foley v. Kennedy*, *supra*. In that case, the Nevada Supreme Court construed article II, section 9, of the Nevada Constitution concerning recall of public officers and NRS 306.015, which specifies the procedure for initiating and carrying out a recall petition. *Foley*, 110

[3] *See Thomas*, *supra*, 327 P.3d at 521 ("later statutes inconsistent with the Constitution [cannot] furnish a construction that the Constitution does not warrant") (citations omitted).

Nev. at 1299, 885 P.2d at 585. The Supreme Court rejected a citizens group's construction of NRS 306.015 as referring to an election *preceding* the filing of the notice required by that statute to be the relevant "election" for determining the required number of signatures under article II, section 9. *Id*. It found that the group's construction offended the principle of constitutional supremacy:

> Citizens' reasoning is contrary to general rules of statutory and constitutional construction, placing, as it does, greater interpretive effect upon one section of a statute than upon the plain terms of the constitution. The constitution may not be construed according to a statute enacted pursuant thereto; rather, statutes must be construed consistent with the constitution and, where necessary, in a manner supportive of their constitutionality … [A]n adoption of the Citizens' position would require the untenable ruling that constitutional provisions are to be interpreted so as to be in harmony with the statutes enacted pursuant thereto; or that the constitution is presumed to be legal and will be upheld unless in conflict with the provisions of a statute. This is contrary to the clear rules of statutory and constitutional construction.

Id. at 1300-01, 885 P.2d at 586.

Also instructive is *Thomas*, *supra*, where the Nevada Supreme Court emphasized that:

> It is fundamental to our federal, constitutional system of government that a state legislature has not the power to enact any law conflicting with the federal constitution, the laws of congress, or the constitution of its particular State. The Nevada Constitution is the supreme law of the state, which controls over any conflicting statutory provisions.
>
> . . .
>
> An alternative construction that would attempt to make the Minimum Wage Amendment compatible with NRS 608.250, despite the plain language of the Amendment, would run afoul of the principle of constitutional supremacy. A constitutional amendment, adopted subsequent to the enactment of the statute relied on by counsel for petitioner, is controlling over the statute that addresses the same issue. Statutes are construed to accord with constitutions, not vice versa.

Thomas, 327 P.3d at 520-21 (internal citations, quotations and brackets omitted).

Constitutional supremacy applies with even greater vigor to regulations promulgated by an administrative agency. There are definite limits to regulatory authority. The Commissioner is simply charged with enforcing, not altering, the labor laws of this state, and may only adopt regulations which enable her to carry out such enforcement, not that change the existing laws. *See* NRS 607.160. Moreover, for a regulator to construe statutes or constitutional provisions in a manner which changes and circumscribes, if not eviscerates, the benefits afforded the intended beneficiaries of those statutes or provisions, is wholly ultra vires.

D. Defendants' Alternative Constitutional Arguments

Apparently anticipating that the Court will agree with Plaintiff's position, the Defendants offer a final round of argument amounting to a scattershot collection of constitutional principles, including rules regarding the enactment of retroactive legislation, ex post fact laws, and the due process clause. *See* Opposition at 13-14. None of these principles apply here, and none of the authorities cited by Defendants in purported support of this argument have any application to the simple legal question before the Court of what "provide" means within the context of the Minimum Wage Amendment.

For instance, Defendants cite *Bradley v. Sch. Bd. of City of Richmond*, 416 U.S. 696, 711 (1974), for the principle that "a court is to apply the law in effect at the time it renders its decision." The principle is not in dispute or at issue here, where (1) the Minimum Wage Amendment *is* the vey law that is in effect at present; and (2) the issue is not whether some intervening or subsequently enacted statute should control, but the proper construction of the existing Minimum Wage Amendment. *Bradley* is simply inapposite. It involved protracted litigation over desegregation in Virginia. The issue before the United States Supreme Court in *Bradley* was whether section 718 of the Education Amendments of 1972, which granted federal courts authority to award attorneys' fees to prevailing parties, was applicable to legal work performed by attorneys before the provision was enacted, but where the propriety of their award was still pending resolution on appeal after the prevailing party provision became law. *Bradley*, 416 U.S. at 697. The Supreme Court held that section 718 could be quasi-retroactively applied in such a situation, because it would not work a manifest injustice or impinge upon any vested right of a party, and there was no statutory directive or legislative history to the contrary. *Id.* It also reasoned that the application of section 718 did not alter the defendant school board's constitutional responsibility for providing students with a nondiscriminatory education, and there was no real change in the substantive obligation of the parties because the defendant school board had "engaged in a conscious course of conduct with the knowledge that, under different theories discussed by the District Court and the Court of Appeals, the Board could have been required to pay attorneys' fees." *Id.* at 721. Thus, *Bradley* provides no support to Defendants' argument.

Defendants also encourage the Court, rather heavy-handed, to avoid various and sundry future constitutional objections by the Defendants by adopting their unreasonable and untenable construction

of "provide" in the Minimum Wage Amendment. Not only is Defendants' reasoning circular and flawed, it also evinces a fundamental misunderstanding of the principle articulated in *United States v. Sec. Indus. Bank*, 459 U.S. 70 (1982), cited by Defendants in support of this suggestion. *Security Industrial Bank* involved a series of bankruptcy cases in which individual debtors in bankruptcy proceedings claimed certain exemptions to avoid liens pursuant to the retroactive application of a provision of the Bankruptcy Reform Act of 1978, 11 U.S.C. § 522(f)(2) (the "lien avoidance provision")—in each case, the creditors had loaned the money to the debtors and perfected their liens before the lien avoidance statute was enacted. *Id*. at 71. The Court of Appeals held that the lien avoidance provision was intended to apply retroactively, but that such application violated the Fifth Amendment and thus declared the lien avoidance statute unconstitutional and invalid. *Id*. at 72. The Supreme Court affirmed the decision, but only as to outcome, not as to reasoning. *Id*. at 82. Specifically, because there is a presumption that statutes operate only prospectively, retrospective application was not a clearly manifest intention by Congress in the lien avoidance provision, and because retroactive application would result in a complete destruction of a property right of the creditor, the Supreme Court held that the lien avoidance provision could not be applied retroactively based on those principles. It avoided basing its decision on reasoning that could implicate the Fifth Amendment's prohibition against taking private property without compensation, i.e., it avoided holding that the lien statute could be retroactively applied, but reached the same result as that of the Court of Appeals. *Id*. at 83.

The Supreme Court was able to avoid constitutional questions in *Bradley* only because *it was possible to decide it correctly on independent, i.e., non-constitutional grounds.* Contrary to the implication in Defendants' Opposition, the case does not stand for the proposition that a court can decide a case *wrongly* in order to avoid a constitutional issue. *Security Industrial Bank* has no application here, where the Court is presented with a straightforward and unavoidable *constitutional* question about the proper construction and application of a *constitutional* provision governing a fundamental right to a living wage for Nevada minimum wage earners.

The other cases cited by Defendants for their retroactive application argument are neither controlling nor applicable. Both involved the retroactive application *of newly enacted or interceding*

statutes, which is not the case here. *See In re Ashe*, 712 F.2d 864 (3d Cir. 1983) (prohibiting the retroactive application of the same bankruptcy lien avoidance provision addressed in *Security Industrial Bank*); *Roth v. Pritikin*, 710 F.2d 934 (2d Cir. 1983) (prohibiting the retroactive application of the 1978 Copyright Act to work-for-hire agreements executed prior to the Act's enactment). Similarly, Defendants' additional reference to the "Ex Post Facto Clause of the U.S. Const., Art. I, § 9, cl. 3" is unavailing because that clause describes limitations on *Congress'* power, not the initiative and referendum power of the citizens of Nevada.[4] *See* Opposition at 13.

While Defendants' constitutional arguments have no merit, they do highlight an important additional consideration with regard to the invalidity of the Regulations. As discussed above, if "offer" in the Regulations means merely to make insurance available, not to provide it, as Defendants contend, then by circumscribing the benefits to employees expressly intended by the Minimum Wage Amendment, the Regulations impermissibly impair vested rights and attach new disabilities to the rights of hourly wage earners, in violation of article 1, section 15 of the Nevada Constitution, which prohibits ex-post facto laws and impairment of contracts. *See, e.g.,* 16B Am. Jur. 2d Constitutional Law § 741 ("A state constitutional proscription against retroactive legislation prohibits the impairment of vested rights, the creation of new obligations or duties, or the attachment of new disabilities with respect to past transactions."); *Reimers v. State, ex rel. Dep't of Corr.*, 2011 OK CIV APP 83, ¶ 31, 257 P.3d 416, 421 (2011) ("Remedial or procedural statutes [or regulations] may operate to retrospectively only where they do not create, enlarge, diminish or destroy vested rights. A substantive change that alters the rights or obligations of a party cannot be viewed as solely a remedial or procedural change and cannot be retrospectively applied."). Thus, Defendants' reference to the prohibition against ex post facto laws, though not applicable to the Minimum Wage Amendment, may actually point up an

[4] Even if Defendants' citation to section 9 was merely a scrivener's error, and they meant to refer to art. I, section 10, which prohibits *states* from passing ex post facto laws, section 10's prohibition cannot save their fatally flawed argument either, because the clause prohibits the retroactive application of *criminal or penal* statutes, not remedial provisions such as the Minimum Wage Amendment. *See Collins v. Younglood*, 497 U.S. 37, 43 (1990) (observing that the ex post facto clauses of article I are aimed at laws that "retroactively alter the definition of crimes or increase the punishment for criminal acts").

additional reason that for the Court not to rely upon the Regulations.

III. CONCLUSION

Defendants violated the clear command of the Minimum Wage Amendment by paying Plaintiff the lower-tier wage without actually providing him qualifying health insurance. Therefore, Plaintiff is entitled to partial summary judgment in his favor on the issue of liability as a matter of law.

DATED this 2nd day of June, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of June, 2015, a true and correct copy of **PLAINTIFF'S REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY AS TO PLAINTIFF COLLINS KWAYISI'S FIRST CLAIM FOR RELIEF** was served via the United States District Court CM/ECF system on all parties or persons requiring notice.

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

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ERIN HANKS, et al., all on behalf of themselves and all similarly-situated individuals,

Plaintiffs,

vs.

BRIAD RESTAURANT GROUP, LLC.; and DOES 1 through 100, Inclusive,

Defendant.

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

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY AS TO PLAINTIFF JEFFREY ANDERSEN'S FIRST CLAIM FOR RELIEF

Plaintiff Jeffrey Andersen, by and through his attorneys of record, hereby files a Motion for Partial Summary Judgment as to Liability on his first claim for relief. This Motion is based on the Memorandum of Points and Authorities below, all papers and exhibits on file herein,[1] and any oral argument at hearing in this matter.

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[1] *See* Declaration of Bradley S. Schrager, Esq. ("Schrager Decl."), here attached as **Exhibit A**.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Jeffrey Andersen ("Mr. Andersen") worked for Defendant Briad Restaurant Group, LLC ("Defendant") from July of 2009 through March of 2013. Mr. Andersen was paid at an hourly rate of $7.25 for a majority of his employment.[2] He was never provided qualifying health insurance by Defendant—never had or was enrolled by Defendant in any such health insurance plan—at any time during his employment. Defendant was not eligible to pay him at a wage rate of less than $8.25 per hour at any time. Defendant was required by law to compensate Mr. Andersen at a rate of no less than $8.25 per hour during the entirety of his employment, and is thus liable to him for the wages unlawfully withheld from him, and all damages prayed for and flowing from Defendant's unlawful conduct.

Article XV, section 16(A) of the Nevada Constitution (the "Minimum Wage Amendment" or the "Amendment") is plain:

> 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.[3]

Nev. Const. art. XV, sec. 16(A) (emphasis supplied). Employers must *provide* qualifying health insurance benefits to their employees, or they must pay employees not less than the upper-tier minimum wage rate for every hour worked. The Amendment also requires that if such health insurance benefits are provided, the premium costs to the employee cannot exceed ten percent of the employee's gross taxable income from the employer. *Id*.

The Amendment, enacted in 2006 by overwhelming popular vote of the people, offered

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[2] Mr. Andersen was paid at an hourly rate of $7.25 beginning of July of 2010; prior to that time, Mr. Andersen was paid at an hourly rate of $6.15.

[3] The Minimum Wage Amendment is subject to an indexing mechanism, such that by July 1, 2010, the upper-tier rate for employees who are not provided qualifying health insurance benefits was raised to $8.25 per hour. *See* State of Nevada, Minimum Wage, 2010 Annual Bulletin, April 1, 2010, http://www.laborcommissioner.com/min_wage_overtime/4-1-10 (accessed Apr. 17, 2015). The upper-tier rate has remained at $8.25 per hour since that time.

both employers and employees straightforward economic choices: Employers had to choose between either paying employees at the upper-tier wage rate, or providing qualifying health insurance benefits at a capped cost that might entail subsidizing employee premiums if the costs of the benefits exceeded ten percent of the employee's wages. Employees, on the other hand, were given the choice between accepting such health insurance benefits and being paid at the lower-tier rate, or eschewing such benefits and being paid at the upper-tier rate. This was, and is, the bargain of the Minimum Wage Amendment.

Here, Mr. Andersen was not allowed the benefit of his constitutionally-protected choice; he was never enrolled in or provided qualifying health insurance benefits, but was paid below the legal rate by Defendant. Instead, Defendant devised a game it thought it could not lose—merely purporting to offer substandard health insurance benefits, and paying Mr. Andersen below $8.25 per hour whether or not he received any health benefits at all. In other words, Defendant received the benefit of the constitutional bargain, while Mr. Andersen—like so many of his work colleagues—received an unconstitutionally-insufficient hourly wage. This is in direct contradiction to the plain language, intent, and public policy underlying the Minimum Wage Amendment.

II. LEGAL STANDARD

In considering a motion for summary judgment, the court performs "the threshold inquiry of determining whether there is the need for a trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2511 (1986); *United States v. Arango*, 670 F.3d 988, 992 (9th Cir. 2012). F.R.C.P. 56(a) specifically permits the Court to entertain issues on partial summary judgment on part of a claim or defense, and partial summary judgment can be useful for courts in focusing the issues to be litigated, thus conserving judicial resources. *See* F.R.C.P 56(a); *Miller v. Wackenhut Servs., Inc.*, 808 F. Supp. 697 (W.D. Mo. 1992). Because partial summary judgment allows a court "to isolate and dispose of factually unsupported claims or defenses," the court construes the evidence before it "in the light most favorable to the opposing party." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S. Ct. 2548, 2553 (1986); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157, 90 S. Ct. 1598,

1608 (1970).

The allegations or denials of a pleading, however, will not defeat a well-founded motion. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 1356 (1986). That is, the opposing party cannot "rest upon the mere allegations or denials of the adverse party's pleading but must instead produce evidence that set[s] forth specific facts showing that there is a genuine issue for trial." *Estate of Tucker ex rel. Tucker v. Interscope Records, Inc.*, 515 F.3d 1019, 1030 (9th Cir. 2008) (internal quotations omitted). The nonmoving party "must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered against him." *Id*. *See also Anderson*, 477 U.S. at 250, 106 S. Ct. at 2511; *Arango*, 670 F.3d at 992.

In a putative class action, courts have discretion to entertain motions regarding all or some liability issues, and in exercising this discretion, courts often consider the merits of the claims and any doubts as to those merits, the efficiency ruling upon such a motion may offer, and the potential for prejudice to the parties or the putative class. "Under the proper circumstances—where it is more practicable to do so and where the parties will not suffer significant prejudice—the district court has discretion to rule on a motion for summary judgment before it decides the certification issue." *Wright v. Schock*, 742 F.2d 541, 543-44 (9th Cir. 1984).

III. PROCEDURAL BACKGROUND

Plaintiffs filed their initial Complaint [ECF Doc. 1] on May 19, 2014, and the First Amended Complaint [ECF Doc. 6] on May 23, 2014. Defendant filed a motion to dismiss the amended complaint [ECF Doc. 14] on July 1, 2014, which the Court granted in part, and denied in part. *See* ECF Doc. 68. Defendant answered the First Amended Complaint on March 4, 2015. *See* ECF Doc. 72.

IV. UNDISPUTED FACTS

The undisputed facts are as follows:

1. The people of Nevada approved, at the general election of 2006, Question 6, now codified at article XV, section 16 of the Nevada Constitution. The text of that provision speaks for itself.

2. Mr. Andersen has filed suit per article XV, section 16 of the Nevada

Constitution, praying for back pay and damages according to its terms. *See* Amend. Compl [ECF Doc. 6].

3. Mr. Andersen worked as an employee of Defendant at a TGI Friday's restaurant located in Clark County, Nevada, from July of 2009 through March of 2013. *See* ECF Doc. 6 at ¶¶ 16, 36; Ans. [ECF Doc. 72] at ¶¶ 16, 36; Declaration of Jeffrey Andersen at ¶¶ 3-4, here attached as **Exhibit B**.

4. Defendant paid Mr. Andersen at a rate of $7.25 per hour for a majority of his employment. *See* ECF Doc. 6 at ¶ 16; ECF Doc. 72 at ¶ 16; **Exhibit B** at ¶ 6.

5. Mr. Andersen never, at any time during his employment, had, enrolled in or was provided with qualifying health insurance benefits from Defendant. *See* **Exhibit B** at ¶ 7.

V. ARGUMENT

Section A of the Minimum Wage Amendment clearly and unambiguously authorizes an employer to pay the lower-tier minimum wage (originally $5.15 per hour worked) *only* to those employees to whom it "provides health insurance benefits." Nev. Const. art. XV, § 16(A). If, on the other hand, an employer "does not provide such benefits" to an employee, it must pay that employee the upper-tier wage (originally $6.15 per hour worked). *Id*. The two-tiered wage provision of the Amendment is mandatory and remedial, and creates a strong incentive to employers to provide qualifying health plans or increased wages to their employees.

The pertinent text of the Amendment reads as follows:

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

Id. (emphasis supplied).

As demonstrated herein, Mr. Andersen is entitled to partial summary judgment on his first claim for relief, because Defendant could *only* pay the lower-tier wage if it *actually provided* (or supplied or furnished) a qualifying health plan to Mr. Andersen, which it did not, but must have

paid the upper-tier wage to him if they *did not actually provide* (or supply or furnish) such benefits, for any reason.[4] It may be that Defendant will claim that all it had to do was "offer" health insurance benefits to gain the privilege of underpaying its minimum wage employees. Such conduct is not, in any way, authorized by the Minimum Wage Amendment.

A. The Plain Language Of The Minimum Wage Amendment

In interpreting a Nevada statute for the first time, this Court must predict how the Nevada Supreme Court would interpret it. *Sobel v. Hertz Corp.*, 291 F.R.D. 525, 534 (D. Nev. 2013). The meaning and operation of the Amendment's two-tiered wage scheme is evident, unambiguous, and unavoidable: employer payment of the lower-tier hourly wage is conditioned upon an employer's actual provision of qualifying health insurance benefits to its employee. If, as here, a provision is clear and unambiguous, Nevada courts will not look beyond the language of the provision. *Miller v. Burk*, 124 Nev. 579, 590-91, 188 P.3d 1112, 1119-20 (2008). Although the Amendment does not expressly define "provide," the meaning is facially evident from the text of the Amendment. Thus, the Court need not be detained by rules of statutory construction, as they only apply if a statute or constitutional provision is ambiguous.

1. The plain, ordinary, and everyday meaning of "provide"

It is well-established that, when interpreting a statute, courts first look to the plain language of the statute, giving every word, phrase, and sentence its usual, natural, and ordinary import and meaning, unless doing so violates the statute's spirit. *See Royal Foods Co. v. RJR Holdings, Inc.*, 252 F.3d 1102, 1106 (9th Cir. 2001); *McKay v. Bd. of Sup'rs of Carson City*, 102 Nev. 644, 648, 730 P.2d 438, 441 (1986). When a statute or constitutional provision is facially clear, courts will not generally go beyond its plain language. *McKay*, 102 Nev. at 648, 730 P.2d at 441. Stated

[4] Reasons that an employee might not be furnished a qualifying health plan by his employer, in which case the employer would be required under the Amendment to pay the upper tier wage, might include, but are not limited to: (1) the employee might decline coverage because it knows that the insurance offered by the employee is substandard, "junk" insurance; (2) the employee might not qualify under the employer's chosen insurance provider; (3) the employee might opt to self-insure or to obtain other coverage; or (4) the employer may fail to offer any insurance to the employee; or (5) the employer may offer it in such a way that actively discourages the employee from accepting it.

another way, when a statute or provision is susceptible to only one honest construction, that alone is the construction which properly can be given. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S. Ct. 843, 846 (1997); *Washoe Med. Ctr., Inc. v. Reliance Ins. Co.*, 112 Nev. 494, 496, 915 P.2d 288, 289 (1996) (citing *Building & Constr. Trades v. Public Works*, 108 Nev. 605, 610, 836 P.2d 633, 636 (1992)). Plain language controls unless it would lead to absurd results. *See United States v. Romero-Bustamente*, 337 F.3d 1104, 1109 (9th Cir. 2003); *Harris Associates v. Clark Cnty. Sch. Dist.*, 119 Nev. 638, 642, 81 P.3d 532, 534 (2003).

The plain language and intended operation of the Amendment is ascertainable from the face of the Amendment. An employer must do more than merely wave a junk health plan in front of an employee, who may well rightly decline it, in order to qualify for paying the employee the lower-tier wage. Any other construction would be absurd, and would turn the incentives embodied by the Amendment to encourage employers to provide qualifying health plans to their employees or else pay higher wages to those employees, on their heads.

"Provide" in the wage provision of the Amendment must be accorded its ordinary and everyday meaning of *actually furnishing or supplying* employees with coverage. The ordinary and everyday meaning of "provide" according to the online Merriam-Webster Dictionary and Thesaurus is "to put (something) into the possession of someone for use or consumption," not merely to offer that such transfer of possession take place, even if it does not occur. *See* Merriam-Webster (Online) Dictionary and Thesaurus, http://www.merriam-webster.com/thesaurus/provide (accessed Apr. 17, 2015) (parentheticals in the original). Synonyms of "provide" include "deliver", "give", "hand", "hand over", and "supply[.]" *Id*. The online resource uses "provide" and "furnish" or "supply" interchangeably. *Id*. For instance, the meaning for "furnish" is (1) "to provide (someone) with what is needed for a task or activity" and (2) "to put (something) into the possession of someone for use or consumption[.]" *Id*., http://www.merriam-webster.com/thesaurus/furnish (accessed Apr. 17, 2015) (parentheticals in the original). Synonyms for "furnish" include "supply", "feed", "give", "hand", "hand over", and, most notably, "provide[.]" *Id*.

Likewise, the meaning of "supply" is (1) "to provide (someone) with what is needed for a

task or activity" and (2) "to put (something) into the possession of someone for use or consumption[.]" *Id*., http://www.merriam-webster.com/thesaurus/supply (accessed Apr. 17, 2015) (parentheticals in the original). Synonyms for "supply" include "deliver", "feed", "give", "hand", "hand over", and, again, "provide[.]" *Id*. Likewise, the first definition of "provide" according to Black's Law Dictionary (Online), http://thelawdictionary.org/provide/ (accessed Apr. 17, 2015), is "an act of furnishing or supplying a person with a product." *See also Black's Law Dictionary* (5th ed. 1979) (defining "furnish" as interchangeable with "provide" — "To supply, provide, or equip, for accomplishment of a particular purpose.").

Nevada courts also have used "provide" interchangeably with the word "furnish" to connote a transfer of possession from one to another, as opposed to merely suggesting or posing something. *See, e.g., State v. Powe*, No. 55909, 2010 WL 3462763 at *1 (Nev. July 19, 2010). In interpreting a Nevada criminal statute's use of the word "furnish" for example, the district court found as a matter of law that "furnishing" calls for actual delivery by one person to another. *Id*. Reviewing that interpretation de novo, the Nevada Supreme Court affirmed. *Id*. (citing *Walker v. State*, 428 So.2d 139, 141 (Ala. Crim. App. 1982) ("'[F]urnishes' means to provide or supply and connotes a transfer of possession."); *Bailey v. State,* 120 Nev. 406, 409, 91 P.3d 596, 598 (2004) (stating that if the words of a statute have ordinary meaning, this court will not look beyond the plain language of the statute unless that meaning was clearly not intended)).[5]

Thus, by looking only at the plain and unambiguous language of the Amendment's two-

[5] Similarly, the Internal Revenue Service ("IRS") construes a Treasury Regulation that requires the IRS to "provide" an applicant with a copy of all comments on an application filed under Treas. Reg. § 601.201(o)(3) to mean that the IRS must actually "furnish or supply" the materials to the applicant, not merely make them available. *See Statement of Procedural Rules of Section 601.201(o)*, GCM 36593 (I.R.S. Feb. 20, 1976). The IRS states:

> However, allowing inspection and copying of materials or even supplying the materials on request will not satisfy the requirement of Treas. Reg. § 601.201(o)(5)(vii), that these materials be ***provided to*** the applicant. We believe that, pursuant to Treas. Reg. § 601.201(o)(5)(vii), the applicant must be furnished or supplied with the required copies and ***not merely given the opportunity to obtain them***. If necessary, rather than adopting a strained reading of the word "provide," the Regulation should be amended."

Id. (emphasis supplied).

tiered wage provision as required, it is clear that the operative word "provide" means something other than simply suggesting or "offering" any sort of health plan. Interpretation necessarily begins with the assumption that the language employed by the drafters was intentional and its ordinary meaning accurately expresses the drafter's purpose. *See, e.g., Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175, 129 S. Ct. 2343, 2350 (2009) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose."). "Provide" and the other terms of the Amendment must be respected as being chosen carefully and deliberately by the drafters, and were approved overwhelmingly by the people of Nevada.

2. "Provide" does not mean "offer"

Defendant will contend that it needed only "offer" Mr. Andersen health benefits—of any kind, even a junk plan with little or no discernible value as health insurance—in order to gain the constitutional privilege of paying him below the upper-tier minimum hourly wage. But employers cannot do so, and having attempted to do so is just a manner of shortchanging workers, Mr. Andersen among them. "Provide" within the context of the wage structure sentence of the Amendment has a particular and ordinary meaning within that sentence—actually to supply or furnish health insurance—which cannot be read out of the statute. The succeeding phrase after the constitutional command to "provide" benefits, "[o]ffering health benefits …" plainly concerns the cost of insurance that shall be made available to the employees if the employer decides to offer such benefits and attempt to exercise the privilege of paying at the lower-tier hourly minimum wage rate. Nev. Const. art. XV, § 16(A). Specifically, under that sentence, if they are going to provide benefits and pay less than the upper-tier wage, employers must "offer" health plans that cover the employee and all the employee's dependents and the premium cost does not exceed ten percent of the employee's gross taxable income from the employer. *Id*. The term "[o]ffering" is not concerned with whether an employer qualifies for paying the lower-tier wage addressed in the prior sentence and is, moreover, a separate and distinct constitutional command from "providing" the required insurance benefits.

By contrast with the definition of "provide", the meaning of "offer" in Merriam-Webster is

merely to (1) "to put before another for acceptance or consideration" or (2) "to set before the mind for consideration[.]" Merriam-Webster (Online) Dictionary and Thesaurus, http://www.merriam-webster.com/thesaurus/furnish (accessed Apr. 17, 2015). Synonyms for "offer" include "extend", "pose", "proffer", and "suggest", but notably *not* "provide", "furnish", or "supply[.]" *Id*.[6] Thus, "offer", a much less active verb, is patently *not* a synonym for or interchangeable with "provide" in the wage provision sentence of the Amendment.

In *Lorton v. Jones*, 130 Nev. Adv. Op. 8, 322 P.3d 1051 (2014), the Nevada Supreme Court construed a Nevada constitutional provision on term limits in granting a mayoral candidate's petition for writ of mandamus, which challenged the eligibility of a former city council member in the election. Although ultimately finding that both parties' interpretations of the term provision were plausible, and thus that article XV, section 3(2) of the Nevada Constitution was ambiguous, before looking outside the plain text of the provision to policy and history, the Supreme Court first looked carefully at *the words expressly chosen by the drafters* for a proper interpretation of the provision. *Id.*, 322 P.3d at 1056. More important, the Court found it significant that the drafters chose to use different terms in addressing how term limits apply in state and local elections by saying that a person may not be elected to a "state office or local governing body." *Id*.

The Nevada Supreme Court noted that the drafters could have used "state governing body" and "local governing body" to indicate the bodies as a whole, or "state office" and "local office" to indicate individual positions. *Id.*, 322 P.3d at 1057. "Instead," the Supreme Court reasoned, the drafters "chose the distinct terms 'state office' and 'local governing body,' which indicates that, at the state level, the drafters intended to prevent election to a specific office, but at the local level, the intent was to preclude continuing service on the governing body generally." *Id*. To support its decision, it quoted Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 170 (2012):

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[6] *See also Black's Law Dictionary* (Online), http://thelawdictionary.org/offer/ (accessed Apr. 17, 2015) (where the first definition of "offer" is "to bring to or before; to present for acceptance or rejection; to hold out or proffer, to make a proposal; to exhibit something that may be taken or received or not).

> "[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***.

Id. (emphasis supplied).

In the case of the Amendment, the drafters likewise chose distinct terms: "provide", when describing what actions by employers are required to qualify them to pay the lower-tier wage to employees, and "offering", when separately describing the cost of health plans which may be offered when providing benefits under the Amendment. As in *Lorton*, the distinction between these two verbs and two sentences may not be ignored or glossed over, as the first guide to statutory interpretation is the *actual wording chosen by the drafters*.

B. Consistency With History, Policy, Intent And Purpose Of The Amendment

Any actual confusion or ambiguity regarding the requirements of the Minimum Wage Amendment, should it even be considered to exist, is resolved by resort to the simplest of construction analyses. In such cases, courts may look to the provision's history, public policy and reason to determine what the voters and drafters intended. *Sobel*, 291 F.R.D. at 534; *Miller*, 124 Nev. at 590, 188 P.3d at 1120. The guiding star of statutory interpretation of a provision such as the one at issue here is the drafters' and voters' intent as gleaned from the history, policy and purpose of the constitutional provision.[7] Courts determine the drafters' and voters' intent by construing the statute in a manner that conforms to reason and public policy. *Nevada Attorney for Injured Workers*

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[7] *See City Plan Dev., Inc. v. Office of Labor Com'r*, 121 Nev. 419, 435, 117 P.3d 182, 192 (2005) (in rejecting the Labor commissioner's interpretation of NRS 338.090, the penalty provision of the wage statutes governing public works, as providing for double assessments, the court stated: "When interpreting a statute, this court will look to the policy and spirit of the law and will seek to avoid an interpretation that leads to an absurd result."); *Thomas v. Nevada Yellow Cab Corp.*, 130 Nev. Adv. Op. 52, 327 P.3d 518, 522 (2014) ("The goal of constitutional interpretation is to determine the public understanding of a legal test leading up to and in the period after its enactment or ratification.") (internal quotation marks and citation omitted); *City of Sparks v. Sparks Mun. Court*, 129 Nev. Adv. Op. 38, 302 P.3d 1118, 1126 (2013) ("The goal of constitutional interpretation is to determine the public understanding of a legal text leading up to and in the period after its enactment or ratification … In the face of this ambiguity, we look beyond the language of the provision to determine the intent of the voters in approving the Amendment.") (citations omitted). If a provision is ambiguous, the drafters' intent becomes the controlling factor in statutory construction. *Harris Associates*, 119 Nev. at 642, 81 P.3d at 534.

v. Nevada Self-Insurers Ass'n, 126 Nev. Adv. Op. 7, 225 P.3d 1265, 1271 (2010). The general rule is that courts should use the contemporaneous construction by those charged with drafting a provision, rather than a *post hoc* construction. 6 Treatise on Const. L. § 23.32 (cited with approval by the Nevada Supreme Court in *Strickland v. Waymire*, 126 Nev. Adv. Op. 25, 235 P.3d 605, 609 (2010)).

As the Nevada Supreme Court explained in *Lorton, supra*:

> Outside of the text, the purpose of the provision and public policy are relevant to our interpretation of Article 15, Section 3(2), and these considerations further support the conclusion that the limitations apply to the local governing body as a whole. Article 15, Section 3(2)'s limitations provision was enacted by voters through the ballot initiative process following its approval at the 1994 and 1996 elections. When the question was presented to voters, the proponents stated that its purpose was to 'stop career politicians' by preventing them from holding office for an excessive number of terms.

Lorton, 322 P.3d at 1057 (noting that the objective of limiting career politicians in order to promote a government of citizen representatives has been recognized as a "legitimate state interest").

Applying this critical rule of constitutional construction to the Amendment, it is clear that the drafters intended to benefit and protect Nevada wage earners by requiring employers either to pay the upper-tier wage, or to provide employees with qualifying health plans in order to pay the lower-tier wage. Nothing in the Amendment's history indicates that the drafters or voters intended the Amendment to benefit employers or to give them any loophole to pay the lower-tier wage (then, a mere $5.15) per hour merely by doing anything other than *providing* qualifying health insurance benefits to employees.

The actual, condensed question posed to the voters on the 2004 and 2006 General Election ballots was "Shall the Nevada Constitution be amended to raise the minimum wage paid to employees?" In the published arguments contained in the sample ballots at each election, the proponents offered the following explanation:

> The proposed Amendment, if passed, would create a new section to Article 15 of the Nevada Constitution. The Amendment would require employers to pay Nevada employees $5.15 per hour worked if the employer provides health benefits, or $6.15 per hour worked if the employer does not provide health benefits.

See Nevada Statewide Ballot Questions, 2004, 2006, Nevada Secretary of State, Question No. 6, a

true and accurate copy of which is included as **Exhibit C**.

The express findings and purposes of the Amendment included the following:

> 1. No full-time worker should live in poverty in our state.
> 2. Raising the minimum wage is the best way to fight poverty. By raising the minimum wage form [sic.] $5.15 to $6.15 an hour, a full-time worker will earn an additional $2,000 in wages. That's enough to make a big difference in the lives of low-income workers to move many families out of poverty.
> 3. For low-wage workers, a disproportionate amount of their income goes toward cost of living expenses. Living expenses such as housing, healthcare, and food have far outpaced wage levels for Nevada's working families.
> 4. In our state, 6 out of 10 minimum wage earners are women. Moreover 25 percent of all minimum wage earners are single mothers, many of whom work full-time.
> 5. At $5.15 an hour, minimum wage workers in Nevada make less money than they would on welfare. When people choose work over welfare, they become productive members of society and the burden on Nevada taxpayers is reduced.
> 6. Raising the minimum wage from $5.15 an hour to $6.15 an hour affirms Nevadan's beliefs that we value work, especially the difficult jobs performed by hotel maids, childcare workers, and nursing home employees. We need to make sure the workers who are the backbone of our economy receive fair paychecks that allow them and their families to live above the poverty line.

Id.

Two striking observations immediately arise from the stated findings and purposes of the Amendment. First, without question, the Amendment's proponents placed a premium on making a difference *for the better* in the lives of low-income wage earners in Nevada *by increasing their wages* in an attempt to move them out of poverty and to assist with living expenses such as health care. The measure was titled "RAISE THE MINIMUM WAGE FOR WORKING NEVADANS." *Id.* The increased minimum wage provisions of the Amendment were clearly crafted to benefit hourly employees in Nevada, not their employers. It cannot be seriously argued that any intent of the Amendment was to leave a worker's wages at the lower-tier, while stranding him or her without the benefits promised by the Amendment's passage.

Second, and perhaps more important for present purposes, the entire idea behind the Amendment was to *increase* the minimum wage from the then-existing federal minimum hourly wage of $5.15 per hour worked, to an "upper-tier" wage at the time of $6.15 per hour worked. In

other words, the Amendment was *expressly purposed to move Nevada wage earners from the lower-tier to the upper-tier.*[8] Therefore, paying the lower-tier wage was intended to be an exception and a narrow privilege, earned by employers *only* by providing—*actually providing*—qualifying health insurance to an employee. To read the provision otherwise would thwart the stated purposes of the Amendment and create incentives to employers merely to offer junk or sham insurance coverage with the expectation (or even encouragement) that the employee will decline it, so that the employer can pay the lower-tier wage without having to furnish the benefit promised by the Amendment.

C. Recent Interpretations Of The Amendment's Requirements by Nevada District Courts

Recently, on August 12, 2015, Judge James E. Wilson of the First Judicial District Court recently found, in invalidating N.A.C. 608.100(1), 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 D** at 8, a true and accurate copy of Judge Wilson's August 12, 2015 Decision and Order in *Hancock v. State ex rel Labor Commissioner*, First Judicial District Case No. 14 OC 00080 1B. The Court 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 Court continues that "the overall definitional weight of the verb phrase 'to provide' lends credence … 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." *Id*. at 9.

Similarly, on July 15, 2015, Judge Timothy C. Williams of the Eighth Judicial District Court found that "[t]he language of the Minimum Wage Amendment … is unambiguous: An

[8] *See* **Exhibit C**, Findings and Purpose of the Amendment, #2 ("By raising the minimum wage form [sic.] $5.15 an hour to $6.15 an hour …"), #5 ("At $5.15 an hour, minimum wage workers in Nevada make less money than they would on welfare."), #6 ("Raising the minimum wage from $5.15 an hour to $6.15 an hour affirms Nevadan's beliefs …").

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. Merely offering health insurance coverage is insufficient." *See* **Exhibit E**, a true and accurate copy of Notice of Entry of July 15, 2015 Order in *Diaz et al v. MDC Restaurants, LLC et al*, Eighth Judicial District Court Case No. A701633. The Court states "that for an employer to 'provide' health benefits, an employee must actually enroll in health insurance that is offered by the employer." *Id.*

The recent court decisions demonstrate that the text and policy of the Minimum Wage Amendment envisions a bargaining between employer and employee: Employees choose between receiving the upper-tier minimum wage, or the lower-tier minimum wage coupled with low-cost health insurance. Any other construction of the Amendment creates a loophole for employers, allowing them to avoid a minimum wage increase *and* not provide health insurance to minimum wage workers; such a construction flouts the plain language and express purpose of the Amendment; in fact, it renders the Amendment largely impotent. As Judge Wilson states, "[t]he 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. *See* **Exhibit D** at 9.

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VI. CONCLUSION

The language of the Nevada Minimum Wage Amendment is unambiguous: An employer must actually provide, supply, or furnish qualifying health insurance to an employee as a precondition to paying that employee the lower-tier hourly minimum wage. Merely "offering" substandard, or even qualifying, health insurance coverage is insufficient, if it is not actually provided to the employee. There is no ambiguity in the ordinary usage and meaning of the word "provide." It is undisputed that Defendant did not provide Mr. Andersen with qualifying health insurance benefits during his employment; Defendant, however, claimed the right to pay him—and did pay him—below the rate of $8.25 per hour. He is entitled to partial summary judgment on his first claim for relief.

DATED this 8th day of September, 2015.

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

By: */s/ Bradley Schrager*

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of September, 2015, a true and correct copy of **PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY AS TO PLAINTIFF JEFFREY ANDERSEN'S FIRST CLAIM FOR RELIEF** was served via the United States District Court CM/ECF system on all parties or persons requiring notice.

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

EXHIBIT “A”

EXHIBIT “A”

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA, OFFICE OF THE LABOR COMMISSIONER; AND SHANNON CHAMBERS, NEVADA LABOR COMMISSIONER IN HER OFFICIAL CAPACITY

Appellants,

vs.

CODY C. HANCOCK, AN INDIVIDUAL,

Respondent.

Case No. 68770

Electronically Filed
Dec 14 2015 03:42 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

ERIN HANKS,

Appellant,

vs.

BRIAD RESTAURANT GROUP, LLC, A NEW JERSEY LIMITED LIABILITY COMPANY,

Respondent.

Case No. 68845

COLLINS KWAYISI, AN INDIVIDUAL,

Appellant,

vs.

WENDY'S OF LAS VEGAS, INC., AN OHIO CORPORATION; AND CEDAR ENTERPRISES, INC., AN OHIO CORPORAITON,

Respondents.

Case No. 68754

MDC RESTAURANTS, LLC, A NEVADA LIMITED LIABILITY COMPANY; LAGUNA RESTAURANTS LLC, A NEVADA LIMITED LIABLITY COMPANY; AND INKA LLC, A NEVADA LIMITED LIABILITY COMPANY,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT

Case No. 68523

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; and CHARITY FITZLAFF, AN INDIVIDUAL, ALL ON BEHALF OF THEMSELVES AND ALL SIMILARLY-SITUATED INDIVIDUALS,

Real Parties in Interest.

APPENDIX TO RESPONDENT BRIAD RESTAURANT GROUP, LLC'S ANSWERING BRIEF AND ANSWER TO WRIT OF PETITION

APPENDIX TO RESPONDENTS WENDY'S OF LAS VEGAS, INC.'S AND CEDAR ENTERPRISES, INC.'S, ANSWERING BRIEF AND ANSWER TO WRIT OF PETITION

AND

APPENDIX TO PETITIONERS MDC RESTAURANTS, LLC'S, LAGUNA RESTAURANTS LLC'S, AND INKA LLC'S, REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

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INDEX OF APPENDIX

CERTIFICATE OF SERVICE

I am a resident of the State of Nevada, over the age of eighteen years, and not a party to the within action. My business address is 3960 Howard Hughes Parkway, Suite 300, Las Vegas, Nevada, 89169. On December 14, 2015, I served the within document:

APPENDIX TO RESPONDENT BRIAD RESTAURANT GROUP, LLC'S ANSWERING BRIEF AND ANSWER TO WRIT OF PETITION

APPENDIX TO RESPONDENTS WENDY'S OF LAS VEGAS, INC.'S AND CEDAR ENTERPRISES, INC.'S, ANSWERING BRIEF AND ANSWER TO WRIT OF PETITION

AND

APPENDIX TO PETITIONERS MDC RESTAURANTS, LLC'S, LAGUNA RESTAURANTS LLC'S, AND INKA LLC'S, REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

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

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

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I declare under penalty of perjury that the foregoing is true and correct. Executed on December 14, 2015, at Las Vegas, Nevada.

/s/ Erin J. Melwak
Erin J. Melwak

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