

EXHIBIT "D"

Western Cab Company
Dba Western Cab Company
801 Main St.
Las Vegas, NV 89101
Tel: (702)382-7100
EIN: 20-8981212
Point of Contact: Martha Sarver

Representative:
Moran Law Firm, LLC
John T. Moran, Jr., Attorney at Law
630 S. 4th Street
Las Vegas, NV 89101
Tel#: 702-384-8424
Fax#: 702-384-6568

FAIR LABOR STANDARDS ACT NARRATIVE

COVERAGE:

Subject firm is a local taxicab company. The firm provides local transit services via taxicab to customers. The firm was incorporated in the state of Nevada in September 1950. It was purchased by the late Mr. Tobman in 1967. The company currently owns and operates around [REDACTED] taxicabs and a limo service with [REDACTED] limo drivers. The company employs approximately [REDACTED] employees, including taxicab and limo drivers, mechanics, dispatchers, and office staff.

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

Section 3(d) employers: The General Manager, Martha Sarver, and Director, Helen Tobman Martin, handle all the day to day operations of the business, including hiring and firing of all staff. Ms. Martin and Ms. Sarver are both the 3(d) employers (see Exhibits B-1-B94).

Period of investigation: This limited investigation is from 09/26/2010-12/16/2012. [REDACTED]

2010- [REDACTED]
2011- [REDACTED]
2012- [REDACTED]

(See Exhibit C-2)

EXEMPTIONS

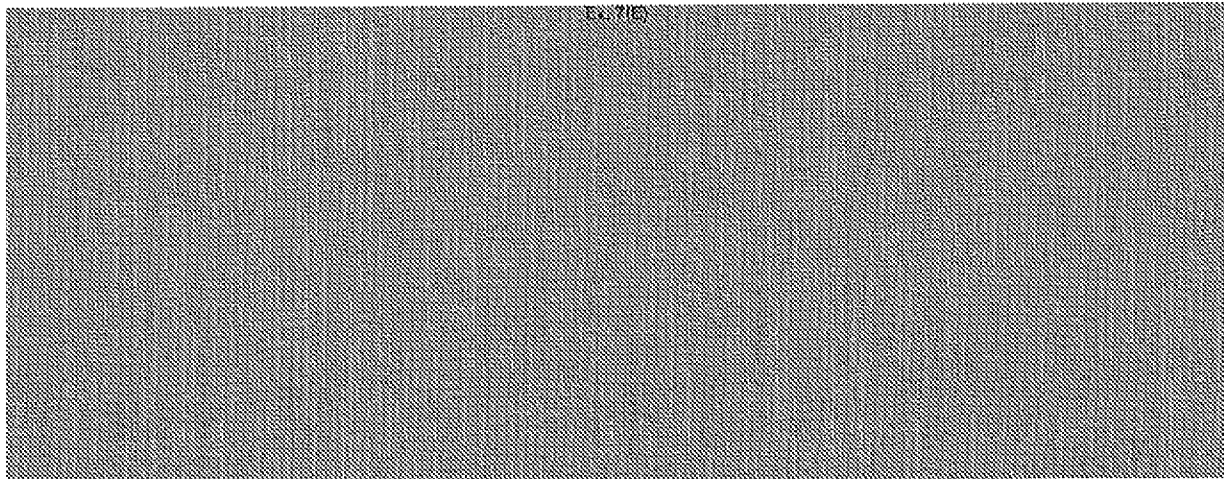
13 (b)(17) Applicable to: Taxicab drivers are exempt from overtime provisions

STATUS OF COMPLIANCE

History: 1574184. FLSA. Section 6- taxicab drivers were not being paid the minimum wage. 434 employees found to be due \$285,229.89 in back wages (Exhibit E-2).

1601867. FMLA. ER failed to offer FMLA. ER ATR and pay lost wages. Concluded 01/1/11.

MODO Instructions: Las Vegas District Office is the MODO.



Section 6: There were violations found under this section, as the firm failed to come into compliance for the period that was not included in the previous investigation, but was a time frame while WHI 241089 still actively had the previous investigation, from 10/1/10- 01/09/12 (See Exhibit E-2). Additionally, on February 5, 2012, the firm implemented a new policy requiring all drivers to pay for their own gasoline used for their taxicabs out of pocket. This change caused drivers to fall below the \$7.25 minimum wage for all hours worked (See Exhibits A-0-A154).

When computing their total wages earned, the firm counted the amount of tips reported to the IRS as wages. On March 30, 2011 the IRS entered into a "Tip Rate Determination Agreement" with the firm which subjects them to reporting a pre-determined percentage of the driver's meter as the tipped earnings for their shift (See Exhibit D-4). This agreements subjects the firm to reporting nine percent of the driver's meter from 01/01/2011-12/31/2012 for "participants" and ten percent for "non-participants" (See Exhibit D-4). The firm relied on this reporting rate to count as the employee's tips for their shift. Section 3 (m) permits an employer to take a tip credit

toward its minimum wage obligation for tipped employees equal to the difference between the required cash wage and the minimum wage. The firm failed to fulfill the tip credit requirements, thus invalidating their ability to take credit for the tips an employee receives. In referencing the tip credit requirements of Fact Sheet #15 rev. 03/2011, the firm failed to provide any of the tip credit information to the employees prior to them making use of the tip credit. The violations found under this section were found as the firm failed to have a valid tip credit agreement with the taxicab drivers. Additionally, the drivers were not guaranteed a \$2.13 cash wage and were paid solely based off commission. A total of \$877,791.84 was found in back wages due to 594 employees. The back wages resulted in an illegal gas deduction and invalid tip credit that brought the drivers below the federal minimum wage of \$7.25 per hour.

An Excel spread sheet was used to compute the minimum wage due to the employees (Exhibit A-2- A-154):

Pay Period Ending column: the bi-weekly pay period in which minimum wage violations were found (note: drivers are exempt from Section 7 of FLSA; therefore, computations remained at the biweekly pay period instead of separating shifts per work week)

TA# column: The Taxicab Authority issued employee identification number

Employee name column: the employee's name

Shifts column: the number of shifts in the biweekly pay period

Trips column: the number of recorded shifts in the biweekly pay period

Book column: the total gross amount of their book for the biweekly pay period

Tips column: the total number of tips automatically reported to the IRS per the TRDA (9% or 10%)- according to firm

Gross wages column: the total amount of gross wages received by the employee for the biweekly pay period. This amount is the final number after the trip charges (\$1.25 prior to 2/5/12, \$1.00 after 2/5/12) and commission percentage (36% of first \$100.00, then 50% of any earnings thereafter prior to 2/5/12; 50% of book after 2/5/12).

Daily gas column: the daily gas the drivers paid out of pocket and were not reimbursed (deduction). The number is the average daily cost to refuel the car spent by each driver. It is computed using Exhibit D-1. To establish the average take the total gas spent (Gas column) divided by the number of shifts column (Shifts column) to develop the daily average per each driver. For drivers where the TA# was undecipherable or the full gas amount reported appeared to be incorrect, an average of the other employee's daily gas averages was applied and used for this computation. The average was \$24.33 per shift.

Gas deduction column: the daily gas column multiplied by the shifts column

Gross after deduction column: the gas deduction column subtracted from the gross wages column. This column displays the actual gross received by the employee as they had a daily deduction when paying for their taxicab's gas from their own wages

Total hours worked column: the agreed average shift length (confirmed by ER and through interviews) of 12 hours multiplied by the number of shifts (shifts column)

Regular rate column: The "gross after deduction" column divided by the "total hours worked" column providing the hourly regular rate of pay

Minimum wage difference column: the difference between the federal \$7.25 minimum wage and the "regular rate column", thus giving the amount due that will bring the employee up to minimum wage for all the hours worked

*Please note: On 4/10/13, WHI [REDACTED] was provided information [REDACTED] the drivers switch to eight hour shifts around the holidays. A request of such information was provided to the firm and the response to the letter returned failed to include specific information that would have changed the average of 12 hours used for the computations to represent the alleged eight hour shifts during that time period. The back wage computations were not changed and remained at 12 hour shifts. (See Exhibit D-7, D-8).

Section 7: There were no violations found under this section as drivers are exempt from Section 7 overtime under Section 13 (b)(17) of the Fair Labor Standards Act.

Section 11: The firm failed to accurately enforce and maintain an accurate record of hours worked. The firm has a policy requiring drivers to clock in, but the trip sheets were not reliable as not all employees accurately use the time clock to clock in and out on the trip sheet. The trip sheet is the only location where hours worked are recorded, so their failure of records being complete caused the investigator to deem their trip sheets for the investigative period inaccurate (See Exhibits A-0, B-1-94). (See Exhibit D-6 for sample of trip sheets).

Section 12: No violations were found under this section. The firm only employs workers above the age of 18 (See Exhibits B-1-94).

DISPOSITION

A final conference was held at the firm's attorney's law office on April 25, 2013. Present at the meeting representing the firm was Attorney John Moran Jr., Marilyn Moran, Helen Tobman, Martha Sarver, Wage Hour Investigator [REDACTED] and Assistant District Director Richard Quezada (See Exhibit E-1).

The basis of Enterprise Coverage was discussed with the firm as their annual dollar volume exceeds \$500,000 annually. The firm was notified this investigation was limited to the drivers only as it appears compliance has not been achieved regarding this group of employees since the previous investigation. The investigative period was notified to be from October 1, 2010 through December 16, 2012.

The firm was notified there were no Section 12 child labor violations found as the firm does not employ any drivers under the age of 21.

The firm was notified the drivers are exempt from the Section 7 overtime requirements of the Fair Labor Standards Act in Section 13 (b)(13).

The Section 11 recordkeeping requirements were then discussed with the firm. WHI [REDACTED] notified them their records were found to be inaccurate as they were missing information

regarding the "clock in" or "clock out" time on several of the trip sheets that were reviewed. Ms. Sarver acknowledged this is a problem that they continuously face as their drivers are lazy and sometimes do not clock out. She stated the firm has attempted to work on this issue since the previous investigation and it occurs very infrequently now, around 3-4% of the time. WHI [REDACTED] expressed the importance of all trip sheets being accurate as the firm is unable to correctly determine the hours worked if they do not have the time the employee stopped work and returned to the shop. Ms. Moran stated that one can estimate by the last trip on the trip sheet the amount of time it took the driver to return to the shop after the shift. WHI [REDACTED] informed the firm that is not an accurate way to determine hours worked because they do not know the circumstances that occurred after that last trip (traffic, waiting time at a location, car problems, etc) that could cause the driver to exceed or work less than the average 12 hour shift. The firm stated they will comply in the future with such requirements, but expressed the difficulty of perfecting such recordkeeping based on the industry and type of drivers they have.

The Section 6 minimum wage violations were discussed with the firm. WHI [REDACTED] informed the firm there were two areas of concern affecting the minimum wage of the drivers: the gas deduction and the invalid tip credit. WHI [REDACTED] first discussed the deduction that arose from the firm requiring the drivers to pay out of pocket for the gas to drive the taxicabs. WHI [REDACTED] provided Fact Sheet #16 and referred to section 3(m) of the provided Fair Labor Standards Act publication. The firm has a requirement that drivers are to return their vehicles to the shop at the end of the shift with a full tank of gas. This requirement brings the drivers below minimum wage. Many of the attendees representing the firm voiced the same notion that they were informed they were allowed to do this practice from WHI [REDACTED] during the final conference of the previous case, CF#1574184. Ms. Sarver stated at the initial conference of the previous case, they were informed they would be given a \$20.00 per day gas credit toward the minimum wage since the firm paid for the gas of the drivers at the time. She stated WHI [REDACTED] then at the final conference after discussing it with her supervisor disallowed the credit as it was an employer expense. Ms. Sarver stated she asked WHI [REDACTED] how they could take credit for paying for the gas and asked if they would be allowed to have the drivers pay for their own gas. She stated WHI [REDACTED] said "if it is not on the payroll, it does not count". Mr. Moran stated the [REDACTED]

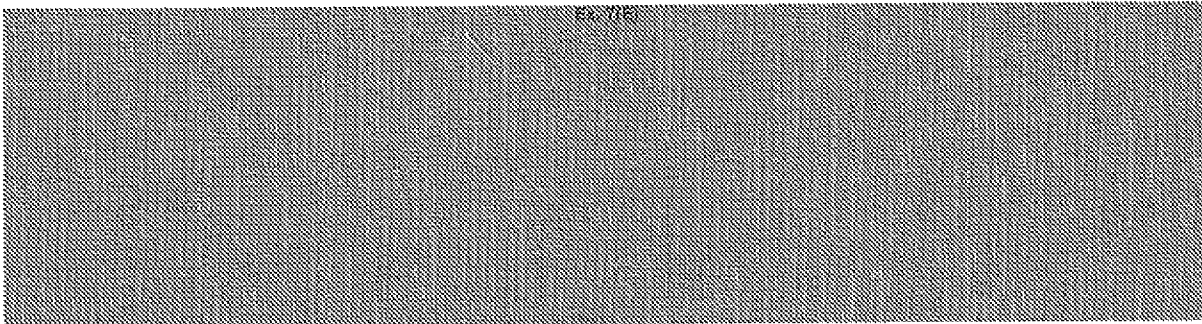
WHI [REDACTED] then discussed the requirements of taking a tip credit. WHI [REDACTED] referred Mr. Moran to Final Rule April 5, 2011 that references such enforcement. Additionally, a print out of CFR 531.59, Fact Sheet #15 and Fact Sheet #15a were provided to the firm's representatives. WHI [REDACTED] informed the attendees the firm did not notify their employees they would make use of the tip credit. Additionally, the firm does not provide a cash wage of \$2.13 to the employees as the employees work solely on commission plus tips. Such commission is based on the formula mentioned above. The firm was also notified the tips that are received by the employees are not retained by the employee as they are required to pay for their own gas out of

pocket. WHI [REDACTED] informed them [REDACTED] it was discovered many of the drivers pay for their gas with the tips they earned from that day and if they did not make enough tips, they will get money out of their personal bank account to ensure the tank is full upon returning it to the shop. Based on the above factors, WHI [REDACTED] informed the firm they could not use the tip credit provisions for the period of investigation and therefore must pay the tipped employees at least \$7.25 per hour in wages and allow the tipped employee to keep all tips received. The firm found many problems with the information provided to them. Ms. Moran stated during the previous investigation, WHI [REDACTED] actually provided them with a back wage amount of around \$900k and that amount did not give the company credit for the tips. She stated after they found many mistakes in her computations and the fact they weren't given credit for the tips, the amount went down to the final back wage amount of \$285,000. She stated WHI [REDACTED] gave a credit for the tips, so they do not understand why it is not granted so now (See Exhibit E-2). Ms. Sarver stated the firm and all other local taxicab companies entered into an agreement Tip Rate Determination Agreement with the IRS in 2007 that requires the firm to report an agreed percentage of tips to the IRS (See Exhibit D-4). Ms Sarver stated the firm has the drivers sign a document acknowledging participating in such agreement and she does not understand why that document does not count for the Department of Labor. Additionally, she stated the tip percentage of 9% or 10% is reported to the IRS and considered as wages, so she does not understand why the Department of Labor does not as well.

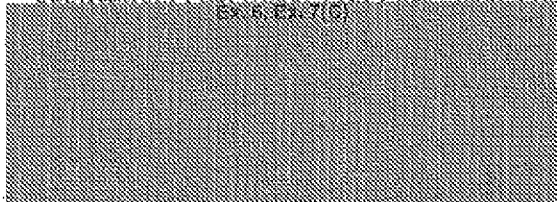
The firm mentioned several other items during the meeting that did not pertain to the current investigation, but the previous investigation. Mr. Moran stated this investigation added to their confusion as to why there was a second investigation as they were under the assumption they came into compliance under the previous investigation and were told by WHI [REDACTED] there would not be a subsequent investigation after the back wages were paid. Ms. Sarver stated during the final conference with WHI [REDACTED] they asked what they should do about individuals they felt were overpaid by the back wages as they were underperformers. She stated many of the employees were elderly and were workers they have had for years. Ms. Sarver stated they asked WHI [REDACTED] what they should do, mentioning firing the employees and she responded "if they are not performing, then you should get rid of them." Ms. Moran also inquired as to why they were not provided such publications provided at the present meeting during the previous investigation and were under the assumption this investigation was to "cover up her mistakes". Ms. Tobman mentioned she felt as though the Department was using this investigation as a test and Western Cab was the "guinea pig" for the entire Las Vegas taxicab industry. They felt as though they have been mislead and the Department is picking on them since they are the only "mom and pop" company left in the taxicab business.

When asked whether they agreed to come into compliance regarding paying the minimum wage, Mr. Moran stated the firm needed additional time to review the information provided at the meeting. He mentioned the firm may have to retain a labor attorney and planned to contact elected officials to notify them of their concern. WHI [REDACTED] and ADD Quezada agreed to allow time for the firm to review the publications and information provided at the meeting and informed the firm to notify when they were prepared to give their compliance status and their plans for coming into compliance.

The back wage amount was not disclosed at this meeting as compliance was not agreed. Possibilities of CMPs or liquidated damages were not discussed with the firm at the final conference.



Publications: Ms. Tobman and Ms. Sarver were provided the FLSA Handy Reference Guide, Fair Labor Standards Act publication, Part 785, Part 778- Overtime Bulletin, Part 541, and Fact Sheet #15 at the initial conference by WHI [REDACTED] on January 8, 2013. At the final conference, Attorney John Moran Jr., Ms. Sarver, Ms. Tobman, and Mrs. Moran were provided the FLSA publication, Fact Sheet #15, Fact Sheet #15a, Fact Sheet #16, and a copy of CFR 531.59.



Date: April 26, 2013

Wage and Hour Investigator

EXHIBIT "E"

LEON GREENBERG

Attorney at Law

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Las Vegas, Nevada 89146

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Leon Greenberg

Member Nevada, California

New York, Pennsylvania and New Jersey Bars

Admitted to the United States District Court of Colorado

Dana Sniegocki

Member Nevada and California Bars

February 26, 2016

Hermanowski & McCrea LLC
520 South Fourth Street - Suite 320
Las Vegas, Nevada 89101

Attention: Malani L. Kotchka, Esq.

VIA EMAIL AND FIRST CLASS MAIL

Re: *Petera v. Western Cab Company*

Request for voluntary agreement by your client to
refrain from having taxi driver paid expenses reduce
wage payments below the minimum wage rate.

Dear Ms. Kotchka:

This office is in receipt of the defendant's answer in this case. I thank you for the same.

As you are aware, one of the outstanding issues in this litigation is the alleged "minimum wage violation expenses" paid by the putative class of taxi driver employees of the defendant. I well understand your position that no such claims can be stated, as a matter of law, in this case. You are also aware that the Court has disagreed with that position and expressly ruled that a claim for minimum wage violations *can* be stated by such alleged circumstances.

I am writing to see whether the defendant will agree to refrain from

requiring its taxi drivers pay for expenses (which at the present time I understand are limited to gasoline for taxi cabs) to the extent such expenses reduce those taxi drivers' wage, paid by your client, below the minimum hourly wage rate specified by Nevada's Constitution. To clarify and reiterate: I am not calling upon the defendant to refrain from imposing *all* expenses it may require its taxi drivers to pay, only those expenses that would reduce their hourly wage below the minimum hourly wage rate.

In the absence of an agreement by the defendant to limit the expenses it requires its taxi drivers to pay I intend to seek appropriate injunctive relief from the Court imposing such a limitation upon the defendant. I would also seek class certification for such injunctive relief under NRCP Rule 23(b)(2). I intend to include in that request for injunctive relief the imposition of a suitable regimen to ensure defendant's compliance with that injunction, perhaps through the appointment of a special master paid for by the defendant. If I am forced to proceed in such a fashion I will also ask that the Court grant me an award of attorney's fees in connection with my work in securing such an injunction.

While defendant need not agree to my request, it seems incumbent upon me to communicate this request to defendant, and attempt to secure defendant's voluntary compliance with the same, before seeking injunctive relief from the Court. It is for that reason I now write you to set forth this request.

I trust you will review my foregoing request with your client and advise me, no later than March 8, 2016, whether your client will agree to my request. In the event your client declines to so agree I would greatly appreciate being advised of that fact. I also, of course, remain available to discuss this and would be pleased to do so.

I remain,

Very truly yours,


Leon Greenberg

EXHIBIT "F"



HEJMANOWSKI
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ATTORNEYS AT LAW

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Manager/Member
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March 8, 2016

Leon Greenberg
Greenberg, P.C.
2965 S. Jones Blvd., Suite E4
Las Vegas, NV 89146

Re: Western Cab

Dear Mr. Greenberg:

This case began on September 23, 2014, upon the filing of a purported class action complaint by a single plaintiff, Laksiri Perera, a *former* employee of Western Cab. By the December 2, 2015, Third Amended Complaint, Mr. Perera was joined by two other *former* employees of Western Cab, Irshad Ahmed and Michael Sargeant, in asserting a demand for class relief to achieve the following remedies, all according to ¶19 of that pleading:

- (1) "a judgment... for minimum wages... to be determined based upon an accounting of the hours worked by, and wages actually paid to, the plaintiff...";
- (2) "an award of damages for the increased, and false, tax liability the defendant... caused the plaintiffs and the class members to sustain...";
- (3) "a suitable injunction and other equitable relief barring [Western Cab] from continuing to violate Nevada's Constitution and requiring Western Cab to remedy, at its expense, the injury to the class members it has caused by falsely reporting to the United States Internal Revenue Service and the Social Security Administration the income of the class members;" and
- (4) "an award of attorneys' fees, interest and costs, as provided for by Nevada's Constitution and other applicable laws."

Although the fact that this case has been pending since September 2014 and that multiple cases concerning the interpretation and constitutionality of the Minimum Wage Amendment are now pending before the Nevada Supreme Court, with some hearings set for as soon as April 2016, you have now proposed by your February 26, 2016, letter that Western Cab immediately stipulate to relief that has not even been pled or demanded by your most recent filing.



Leon Greenberg
March 8, 2016
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Moreover, you do not even cite what provision(s) of the Nevada Constitution, the Nevada Revised Statutes, the Nevada Administrative Code, or any other law, regulation or case supports your new demand, which is not even part of your latest pleading, the months-old Third Amended Complaint. It is clearly unreasonable to expect a defendant to stipulate to relief not even a part of the pending pleading brought solely by *former*, not current, Western Cab employees. *Beazer Homes Holding Corp. v. District Court*, 128 Nev. Adv. Op. 66, 291 P.3d 128, 133 (2012), thus explains as to representative actions under NRCP 23:

Under Nevada law, an action must be commenced by the real party in interest -- 'one who possesses the right to enforce the claim and has a significant interest in the litigation.' *Szilagyi v. Tasta*, 99 Nev. 834, 838, 673 P.2d 495, 498 (1983); see NRCP 17(a). Due to this limitation, *a party generally has standing to assert only its own rights and cannot raise the claims of a third party not before the court. See Deal*, 94 Nev. at 304, 579 P.2d at 777; see also *Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 45 L. Ed.2d 343 (1975).... [Emphasis added.]

See also, *Id.*, at n. 4, quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. at 338 (2011), and explaining:

Under NRCP 23(b)(3), the class action plaintiff must prove 'that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is [the] superior [method of adjudicating the case].' Individualized claims for monetary relief are subject to this subsection.

Dukes itself begins with the admonition that class actions are the rare exception to the general rule that cases must be conducted on behalf of named parties and that in order to justify a departure from the general rule, "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *Id.*, 564 U.S. at 2550, citing *Califano v. Yamasaki*, 442 U.S. 682, 700-702 (1979), and *East Tex. Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395 (1977).

Dukes then notes that while Federal Rule 23(b) allows class certification in a wider set of circumstances, it nonetheless requires "greater procedural protections." *Id.* at 2558-59, explaining Rule 23(b)'s inapplicability to the circumstances raised by your letter:



Leon Greenberg
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Permitting the combination of individualized and classwide relief in a (b)(2) class is also inconsistent with the structure of Rule 23(b). Classes certified under (b)(1) and (b)(2) share the most traditional justifications for class treatment—that individual adjudications would be impossible or unworkable, as in a (b)(1) class, or that the relief sought must perforce affect the entire class at once, as in a (b)(2) class. For that reason these are also mandatory classes: The Rule provides no opportunity for (b)(1) or (b)(2) class members to opt out, and does not even oblige the District Court to afford them notice of the action. Rule 23(b)(3), by contrast, is an ‘adventurous innovation’ of the 1966 amendments, ... framed for situations “in which ‘class-action treatment is not as clearly called for’.” ... It allows class certification in a much wider set of circumstances but with greater procedural protections. Its only prerequisites are that ‘the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.’ Rule 23(b)(3). And unlike (b)(1) and (b)(2) classes, the (b)(3) class is not mandatory; class members are entitled to receive ‘the best notice that is practicable under the circumstances’ and to withdraw from the class at their option. See Rule 23(c)(2)(B).

Given that structure, we think it clear that individualized monetary claims belong in Rule 23(b)(3). The procedural protections attending the (b)(3) class—predominance, superiority, mandatory notice, and the right to opt out—are missing from (b)(2) not because the Rule considers them unnecessary, but because it considers them unnecessary *to a (b)(2) class*. When a class seeks an indivisible injunction benefitting all its members at once, there is no reason to undertake a case-specific inquiry into whether class issues predominate or whether class action is a superior method of adjudicating the dispute. Predominance and superiority are self-evident. But with respect to each class member’s individualized claim for money, that is not so—which is precisely why (b)(3) requires the judge to make findings about predominance and superiority before allowing the class. Similarly, (b)(2) does not require that class members be given notice and opt-out rights, presumably because it is thought (rightly or wrongly) that notice has no purpose when the class is mandatory, and that depriving people of their right to sue in this manner complies with the Due Process Clause. In the context of a class action predominantly for money damages we have held that absence of notice and opt-out violates due process. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985). While we have never held that to be so where



Leon Greenberg
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Page 4

the monetary claims do not predominate, the serious possibility that it may be so provides an additional reason not to read Rule 23(b)(2) to include the monetary claims here. [Emphasis supplied.]

Next, according to your letter, should Western Cab have the temerity to refuse to consent immediately (your February 26 letter demands response by March 8, the 7th working day) to such extraordinary relief which is not even part of the pleadings, you state that you will seek "appropriate injunctive relief from the Court imposing such a limitation" on Western Cab, seek class certification for such relief and request implementation of a "suitable regimen" over Western Cab's business, such as the "appointment of a special master paid for by" Western Cab. In other words, without even pleading a claim for the extraordinary class injunctive relief demanded, you propose to seek the Court's appointment of a "master" to oversee Western Cab's business based on a claim for relief you did not plead on behalf of class members you have not identified -- all of it in disregard of fundamental due process.

Your February 26 request does not comport with the most elemental requirements of due process or with NRCP 23 or 53(b). In fact, Rule 53 acknowledges the Nevada courts' use of special masters, but according to subsection (b) of the Rule, only as "the exception and not the rule," and in actions to be tried by a jury, as you demand in this case, "only when the issues are complicated..." and not to enforce some final disposition of claims never brought or litigated.

The Nevada Supreme Court is currently considering the issue "that fuel costs need not be deducted from non-tipped wages prior to determining minimum wage." Western Cab does not believe there are any expenses that would reduce its drivers' hourly wage below the minimum hourly wage rate. Western Cab does not consent to your February 26, 2016, request.

Sincerely,

Malani L. Kotchka

MLK:rg

EXHIBIT "G"

1 **DECL**
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10 dana@overtimelaw.com

11 Attorneys for Plaintiff

12
13 **DISTRICT COURT**
14
15 **CLARK COUNTY, NEVADA**

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

18 Plaintiff,

19 vs.

20 WESTERN CAB COMPANY,

21 Defendant.

Case No.: A-14-707425-C

Dept.: V

**DECLARATION OF LAKSIRI
PERERA**

22 Laksiri Perera hereby affirms and declares under penalty of perjury the
23 following:

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

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

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

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

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

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

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

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

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

2

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

5

6


Laksiri Perera

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12/16/14
Date

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EXHIBIT "A"

6921
6800/
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EXHIBIT "H"

1 **DECL**
2 LEON GREENBERG, ESQ., NSB 8094
3 DANA SNIEGOCKI, ESQ., NSB 11715
4 Leon Greenberg Professional Corporation
5 2965 South Jones Blvd- Suite E4
6 Las Vegas, Nevada 89146
7 Tel (702) 383-6085
8 Fax (702) 385-1827
9 leongreenberg@overtimelaw.com
10 dana@overtimelaw.com

11 Attorneys for Plaintiff

12
13 **DISTRICT COURT**
14
15 **CLARK COUNTY, NEVADA**

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

18 Plaintiff,

19 vs.

20 WESTERN CAB COMPANY,

21 Defendant.

Case No.: A-14-707425-C

Dept.: V

**DECLARATION OF IRSHAD
AHMED**

22 Irshad Ahmed hereby affirms and declares under penalty of perjury the
23 following:

24 1. I am a former taxicab driver for the defendant, Western Cab Company. I am
25 offering this declaration in support of the plaintiff's motion to amend the complaint to
26 add me as a named plaintiff and to explain the nature of my work for the defendant.

27 2. I was employed by Western Cab Company for more than one year, until
28 approximately July of 2013 when my employment ended.

3. Taxicab drivers did not receive an "hourly wage" from defendant at any time
during the time I was employed. My method of compensation as a taxicab driver for
defendant consisted of a 50% "split" of the fares I collected each day, minus certain

1 deductions known as "trip charges." Often, that commission split would result in my
2 receiving less than the required minimum wage of \$8.25 per hour for each hour I
3 worked. During my entire period of employment, defendant never furnished me with
4 any written document stating I was entitled to any Nevada mandated minimum hourly
5 wage for my work for defendant. Nor did defendant ever orally advise me that I was
6 entitled to any Nevada mandated minimum hourly wage.

7 4. Myself and all of defendant's taxicab drivers were required to work a 12
8 shift. During most of my employment with defendant, I was required to work (7) days
9 per week. Towards the end of my employment, I would sometimes only work (6) days
10 per week.

11 5. Throughout the entirety of my 12 hour shift, I was never allowed to be "off
12 duty" and was instead required to work a continuous shift. By that I mean, I remained
13 "on call" throughout the entirety of my shift and remained eligible to pick up a fare
14 should one be assigned to me. The only regular "break time" I had throughout my 12
15 hour shift was for a few minutes to use the restroom or to pick up fast food. I always
16 ate my food in my cab while waiting for a fare, and I did not turn off my radio (which
17 dispatch used to get a hold of taxicab drivers) at any time. There were many occasions
18 during which I was sitting in my cab eating my food when I was required to stop
19 eating and pick up a fare that was assigned to me by dispatch.

20 6. During the entire time I was employed by the defendant, defendant mandated
21 that all taxicab drivers purchase and pay for gasoline from their own personal funds
22 for use in the taxicab. At no point did Western Cab Company pay for the gasoline, or
23 reimburse taxicab drivers for the cost of gasoline. All drivers were required to return
24 the taxicabs back to defendant's yard with a full tank of gas that was purchased from
25 the taxicab drivers' own personal funds.

26 7. I understand that this case was commenced by the plaintiff as a class action
27 for the purpose of collecting unpaid minimum wages owed to all of the taxicab drivers
28 employed by the defendant who did not receive at least the constitutionally required

1 minimum wage for each hour they worked. I understand that if this case is certified as
2 a class action, and I am appointed as a representative plaintiff for the class, I will have
3 a responsibility to take action in this case that is in the best interest of all the class
4 members, meaning all of the taxicab drivers who are part of the class. I cannot act
5 only in what I believe is my best interest. I understand that responsibility and am
6 comfortable performing that duty.

7

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

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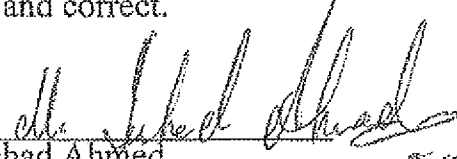
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Irshad Ahmed

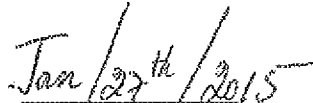

Date Jan/27th/2015

EXHIBIT "I"

1 **DECL**
2 LEON GREENBERG, ESQ., NSB 8094
3 DANA SNIEGOCKI, ESQ., NSB 11715
4 Leon Greenberg Professional Corporation
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7 Tel (702) 383-6085
8 Fax (702) 385-1827
9 leongreenberg@overtimelaw.com
10 dana@overtimelaw.com

11 Attorneys for Plaintiff

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

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

16 Plaintiff,

17 vs.

18 WESTERN CAB COMPANY,

19 Defendant.

Case No.: A-14-707425-C

Dept.: V

**DECLARATION OF
MICHAEL SARGEANT**

20 Michael Sargeant, hereby affirms and declares under penalty of perjury the
21 following:

22 1. I am a former taxicab driver for the defendant, Western Cab Company. I am
23 offering this declaration in support of the plaintiff's motion to amend the complaint to
24 add me as a named plaintiff and to explain the nature of my work for the defendant.

25 2. I was employed by Western Cab Company for approximately 3 or 4 months,
26 until approximately June 2014 when my employment ended.

27 3. Taxicab drivers did not receive an "hourly wage" from defendant at any time
28 during the time I was employed. My method of compensation as a taxicab driver for
defendant consisted of a 50% "split" of the fares I collected each day, minus certain

1 deductions known as "trip charges." Often, that commission split would result in my
2 receiving less than the required minimum wage of \$8.25 per hour for each hour I
3 worked. During my entire period of employment, defendant never furnished me with
4 any written document stating I was entitled to any Nevada mandated minimum hourly
5 wage for my work for defendant. Nor did defendant ever orally advise me that I was
6 entitled to any Nevada mandated minimum hourly wage.

7 4. Myself and all of defendant's taxicab drivers were required to work a 12
8 shift. During most of my employment with defendant, I was typically required to work
9 6 days per week all though some weeks I worked fewer days per week.

10 5. During the entire time I was employed by the defendant, defendant mandated
11 that all taxicab drivers purchase and pay for gasoline from their own personal funds
12 for use in the taxicab. At no point did Western Cab Company pay for the gasoline, or
13 reimburse taxicab drivers for the cost of gasoline. All drivers were required to return
14 the taxicabs back to defendant's yard with a full tank of gas that was purchased from
15 the taxicab drivers' own personal funds. I would estimate that during a typical shift,
16 the cost of gasoline I paid from my own personal funds was anywhere from \$28.00 to
17 \$35.00 for each shift I worked.

18 6. Throughout the entirety of my 12 hour shift, I was never allowed to be "off
19 duty" and was instead required to work a continuous shift. By that I mean, I remained
20 "on call" throughout the entirety of my shift and remained eligible to pick up a fare
21 should one be assigned to me. The only regular "break time" I had throughout my 12
22 hour shift was for a few minutes to use the restroom or to pick up fast food. I always
23 ate my food in my cab while waiting for a fare, and I did not turn off my radio (which
24 dispatch used to get a hold of taxicab drivers) at any time.

25 7. While Western Cab gave me a paystub that included a statement of the hours
26 I worked, I believe that statement of hours worked may not be accurate. I believe that
27 statement of hours worked may not include time I was working that Western Cab
28 treated as non-working break time. I also believe that Western Cab may have failed to

1 credit to me as "working time" the "show up" time I spent on same days. "Show up"
2 time would occur when I was required to "show up" to possibly work at 2:00 p.m. but
3 there was no taxi available for me to drive. I was required to wait until 4:00 p.m. and
4 then was sent away for the day without driving a taxi or earning any commissions. I
5 believe defendant Western Cab may not have recorded these 2 hour periods as
6 "working time" on my paychecks.

7 8. I understand that this case was commenced by the plaintiff as a class action
8 for the purpose of collecting unpaid minimum wages owed to all of the taxicab drivers
9 employed by the defendant who did not receive at least the constitutionally required
10 minimum wage for each hour they worked. I understand that if this case is certified as
11 a class action, and I am appointed as a representative plaintiff for the class, I will have
12 a responsibility to take action in this case that is in the best interest of all the class
13 members, meaning all of the taxicab drivers who are part of the class. I understand
14 that as a class representative I cannot act just in my own interests. I understand that
15 responsibility and am comfortable performing that duty.

16
17 I have read the foregoing and affirm under penalty of perjury that the same is
18 true and correct.

19
20 
21 Michael Sargeant

7-15-2015
Date

EXHIBIT "J"

1 **DECL**
LEON GREENBERG, ESQ., NSB 8094
2 DANA SNIEMOCKI, ESQ., NSB 11715
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Fax (702) 385-1827
5 leongreenberg@overtimeclaw.com
dana@overtimeclaw.com

6 Attorneys for Plaintiff

7 **DISTRICT COURT**
8 **CLARK COUNTY, NEVADA**
9

10 LAKSIRI PERERA, IRSHAD AHMED,)
and MICHAEL SARGEANT,)
11 Individually and on behalf of others)
similarly situated,)

12 Plaintiff,

13 vs.

14 WESTERN CAB COMPANY,

15 Defendant.
16

Case No.: A-14-707425-C

Dept.: VII

**DECLARATION OF
PLAINTIFFS' COUNSEL,
LEON GREENBERG, ESQ.**

17 Leon Greenberg, an attorney duly licensed to practice law in the State of
18 Nevada, hereby affirms, under the penalty of perjury, that:

19 1. I am one of the attorneys representing the plaintiff in this matter. I am
20 requesting that I, along with my co-counsel, Dana Sniegocki, Esq., be appointed
21 class counsel for the plaintiff class in this matter. I am familiar with the plaintiffs'
22 claims in this case, those claims involving a failure by the plaintiffs and the plaintiff
23 class members to receive the minimum wage for each hour they worked as required
24 by Article 15, Section 16 of the Nevada Constitution. I am confident that I can
25 adequately and properly represent the plaintiffs and the plaintiff class in this
26 litigation and am thus requesting appointment as plaintiffs' class counsel in this
27 case along with my co-counsel, Dana Sniegocki.

28 2. I have extensive experience in class actions and wage and hour
litigation and am qualified to be appointed class counsel in this case. I am a magna

1 cum laude graduate of New York Law School and graduated in 1992. I was first
2 admitted to practice law in 1993. I am a member of the Bars of the States of New
3 York, New Jersey, Nevada, California and Pennsylvania. I have substantial
4 experience in litigating class actions, in particular wage and hour class action
5 claims, and have been appointed class counsel in a significant number of litigations
6 in various jurisdictions. These cases include *Flores v. Vassallo*, Docket 01 Civ.
7 9225 (JSM), United States District Court, Southern District of New York; *Menjivar*
8 *v. Sharin West et al.*, Index # 101424/96, Supreme Court of the State of New York,
9 County of New York; *Rivera v. Kedmi*, Index # 14172/99, Supreme Court of the
10 State of New York, County of Kings; *Burke v. Chiusano*, Docket 01 Civ. 3509
11 (KW), United States District Court, Southern District of New York; *Kalvin v.*
12 *Santorelli*, Docket 01 Civ. 5356 (VM), United States District Court, Southern
13 District of New York. In all of the foregoing matters I was appointed sole counsel
14 for the respective plaintiff classes. All of these litigations involved unpaid wage
15 claims. I was also appointed class counsel in *Maraffa v. NCS Inc.*, Eighth Judicial
16 District Court, State of Nevada, Case No. A504053 (2005), Dept. III. I was
17 appointed sole plaintiffs' class counsel in that case for a class of plaintiffs seeking
18 damages for improper wage garnishments. I was also appointed class co-counsel in
19 the following cases: *Klemme v. Shaw*, Docket CV-S-05-1263 (PMP-LRL), United
20 States District Court, District of Nevada, in that case representing a class of persons
21 making claims for unpaid health fund benefits under ERISA; *Williams v. Trendwest*,
22 Docket CV-S-05-0605 (RCJ/LRL); *Westerfield v. Fairfield Resorts*, Docket CV-S-
23 05-1264 (JCM/PAL); *Leber v. Starpoint*, Docket CV-S-09-01101 (RLH/PAL); and
24 *Brunton v. Berkeley Group*, Docket CV-S-08-1752 (PMP/PAL), United States
25 District Court, District of Nevada, on behalf of classes of salespersons denied
26 overtime wages, minimum wages, and commissions; *Allerton v. Sprint Nextel*,
27 Docket CV-S-09-1325 (RLH/GWF), United States District Court, District of
28 Nevada, on behalf of classes of telephone call center workers denied overtime

1 wages and other wages; *Jankowski v. Castle Construction*, Docket CV-01-164,
2 United States District Court, Eastern District of New York, on behalf of a class of
3 construction workers denied overtime wages; *Levinson v. Primedia*, Docket 02 Civ.
4 2222 (DAB), United States District Court, Southern District of New York, on behalf
5 of a class of Internet website guides for unpaid commissions due under contract;
6 *Hallissey v. America Online*, Docket 99-CV-03785 (KTD), United States District
7 Court, Southern District of New York, on behalf of a class of Internet "volunteers"
8 for unpaid minimum wages; and *Elliott v. Leatherstocking Corporation*, 3:10-cv-
9 00934-MAD-DEP, Northern District of New York, on behalf of a class of
10 hospitality and banquet workers for improperly withheld "service charges" and
11 unpaid overtime wages; *Phelps v. MC Communications, Inc.*, Eighth Judicial
12 District Court, A-11-634965-C and *Kiser v. Pride Communications, Inc.*, United
13 States District Court, District of Nevada, 2:11-CV-00165 on behalf of two separate
14 classes of cable, phone, and internet installation technicians for unpaid overtime
15 wages; *Socarras v. Tormar Cleaning Services Nevada, Inc.*, Eighth Judicial District
16 Court, A-13-675189 on behalf of a class of janitorial workers for unpaid overtime
17 wages; *Girgis v. Wolfgang Puck Catering and Events LLC*, Eighth Judicial District
18 Court, A-13-674853 on behalf of a group of restaurant servers for unpaid minimum
19 wages and overtime wages; *Gemma v. Boyd Gaming Corporation*, Eighth Judicial
20 District Court, A-14-703790-C on behalf of a class of casino workers for unpaid
21 minimum wages under the Nevada Constitution; and most recently in *Thomas v.*
22 *Nevada Yellow Cab Corp. et al.*, Eighth Judicial District Court, A-12-661726 and
23 *Murray v. A Cab Taxi Service LLC*, Eighth Judicial District Court, A-12-669926 on
24 behalf of taxicab drivers asserting claims for unpaid minimum wages under
25 Nevada's Constitution.

26 3. I am also requesting that my co-counsel, Dana Sniegocki, be
27 appointed with me as co-class counsel. Dana Sniegocki is a *cum laude* graduate,
28 has been licensed to practice law for over six years, is admitted to the State Bars of

1 Nevada and California, has been an associate attorney at my office for more than
2 five years, and has experience in litigating class action cases, specifically wage and
3 hour class action litigations. To date, Dana Sniegocki has been appointed co-class
4 counsel in the following cases: *Phelps v. MC Communications, Inc.*, Eighth Judicial
5 District Court, A-11-634965-C and *Kiser v. Pride Communications, Inc.*, United
6 States District Court, District of Nevada, 2:11-CV-00165 on behalf of two separate
7 classes of cable, phone, and internet installation technicians for unpaid overtime
8 wages; *Socarras v. Tormar Cleaning Services Nevada, Inc.*, Eighth Judicial District
9 Court, A-13-675189 on behalf of a class of janitorial workers for unpaid overtime
10 wages; *Girgis v. Wolfgang Puck Catering and Events LLC*, Eighth Judicial District
11 Court, A-13-674853 on behalf of a group of restaurant servers for unpaid minimum
12 wages and overtime wages; *Gemma v. Boyd Gaming Corporation*, Eighth Judicial
13 District Court, A-14-703790-C on behalf of a class of casino workers for unpaid
14 minimum wages under the Nevada Constitution; and most recently in *Thomas v.*
15 *Nevada Yellow Cab Corp. et al.*, Eighth Judicial District Court, A-12-661726 and
16 *Murray v. A Cab Taxi Service LLC*, Eighth Judicial District Court, A-12-669926 on
17 behalf of taxicab drivers asserting claims for unpaid minimum wages under
18 Nevada's Constitution.

19 4. I am aware of my duty as counsel to adequately represent the interests
20 of the class members in this case. I believe that myself, and my co-counsel, Dana
21 Sniegocki, are competent to do so.

22
23 Affirmed this 28th day of March, 2016.

24
25 
26 Leon Greenberg
27
28

EXHIBIT "K"

Case File #: 1574184

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

EIN#: 20-8981212

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



FLSA Narrative Report

COVERAGE

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



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

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

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

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

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

MODO Office: LVDO is MODO office.

EXEMPTIONS

213(a)(1) applicable to:

(1) Helen Tobman Martin, Director

541.100 Exemption

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

(2) Martha Sarver, General Manager

541.100 Exemption

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

(3) Marilyn Tobman Moran, Director

541.100 Exemption

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

213(a)(1) not applicable to:

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

Per Martha Sarver and Helen Tobman

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

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

No other exemptions were applicable.

STATUS OF COMPLIANCE

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

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

paid by Western Cab.

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

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

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

Section 206: The review of the company's payroll records confirmed employer was not paying minimum wage rate for all hours worked. When adding all earning, commission and tips, and dividing by the hours worked the drivers were making less than the minimum wage rate. (see exhibit D-1).

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

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

Section 207: No violations of overtime were found due cab drivers since they are exempt from overtime provisions.

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

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

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

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

DISPOSITION

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

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

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

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

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

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

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

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

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

No further action is necessary.

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

[REDACTED]

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

Date: _____

[REDACTED]
Wage Hour Investigator

[REDACTED]

EXHIBIT "L"

REC'D & FILED

2015 AUG 14 PM 12: 50

SUGAN HERRINWETHER
CLERK

BY V. Alegria
DEPUTY

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

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

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.

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

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

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

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

20 As an initial matter, summary judgment under N.R.C.P. 56(a) is “appropriate and shall be
21 rendered forthwith when the pleadings and other evidence on file demonstrate that no genuine issue
22 as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of
23 law.” *Wood v. Safeway*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (internal quotations
24 omitted). Further, in deciding a challenge to administrative regulations pursuant to N.R.S.
25 233B.110, “[t]he court shall declare the [challenged] regulation invalid if it finds that it violates
26 constitutional or statutory provisions or exceeds the statutory authority of the agency.” N.R.S.
27 223B.110. The burden is upon Plaintiff to demonstrate that the challenged regulations violate the
28 Minimum Wage Amendment.

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

6 Here, in order to determine whether the challenged regulations conflict with or violate the
7 Minimum Wage Amendment, the Court will first determine the meaning of the pertinent textual
8 portions of the Amendment. Courts review an administrative agency's interpretation of a statute of
9 constitutional provision *de novo*, and may do so with no deference to the agency's interpretations.
10 *United States v. State Engineer*, 117 Nev. 585, 589, 27 P.3d 51, 53 (2001) ("An administrative
11 agency's interpretation of a regulation or statute does not control if an alternate reading is
12 compelled by the plain language of the provision."); *Bacher v. State Engineer*, 122 Nev. 1110,
13 1118, 146 P.3d 793, 798 (2006) ("The district court may decide purely legal questions without
14 deference to an agency's determination.").

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

19 Section A of the Minimum Wage Amendment provides:

20 A. Each employer shall pay a wage to each employee of not less than the hourly
21 rates set forth in this section. The rate shall be five dollars and fifteen cents (\$5.15)
22 per hour worked, if the employer provides health benefits as described herein, or six
23 dollars and fifteen cents (\$6.15) per hour if the employer does not provide such
24 benefits. Offering health benefits within the meaning of this section shall consist of
25 making health insurance available to the employee for the employee and the
26 employee's dependents at a total cost to the employee for premiums of not more
27 than 10 percent of the employee's gross taxable income from the employer. These
28 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

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

9 Nev. Const. art. XV, § 16(A).

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

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

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

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

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

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

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

24 Plaintiff contends that N.A.C. 608.104(2) unlawfully permits employers to figure in tips and
25 gratuities furnished by customers and the general public when establishing the maximum allowable
26 premium cost to the employee of qualifying health insurance. He argues that "10% of the
27 employee's gross taxable income from the employer" can only mean compensation and wages paid
28 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

1 implements the language of the Amendment.

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

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

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

22 The Court understands Defendants' interpretation of this portion of the Amendment, and in
23 support of the administrative regulation purporting to implement and enforce it, to emphasize the
24 phrase "gross taxable income" in isolation, at the expense of a full reading giving meaning to the
25 qualifying term "from the employer." As Defendants note in their briefing, "[I]n expounding a
26 constitutional provision, such constructions should be employed as will prevent any clause,
27 sentence or word from being superfluous, void or insignificant." *Youngs v. Hall*, 9 Nev. 212
28 (1874). To arrive at Defendants' preferred interpretation of the Amendment, however, the Court

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

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

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

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

2 The Court finds that N.A.C. 608.104(2), insofar as it permits employers to include tips and
3 gratuities furnished by the customers of the employer in the calculation of income against which in
4 measured the Minimum Wage Amendment's ten percent income cap on allowable health insurance
5 premium costs, violates the Nevada Constitution and therefore exceeds the Nevada Labor
6 Commissioner's authority to promulgate administrative regulations. The Court determines the
7 regulation in question to be invalid, and will further enjoin Defendants from enforcing N.A.C.
8 608.104(2) for the reasons stated herein.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

24 ///

25 ///

26 ///

27 ///

28 ///

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

3
4 IT IS SO ORDERED this 12 day of August, 2015.

5
6 James S. Schrage
7 DISTRICT COURT JUDGE

8 Submitted by:

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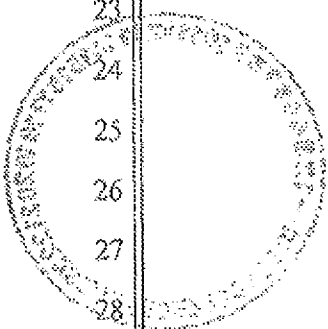


EXHIBIT "M"



JOE CASSIDY
Governor

GERY ELIOTT
Director

MICHAEL TANCHEK
Labor Commissioner

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

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**STATE OF NEVADA
MINIMUM WAGE
2007 ANNUAL BULLETIN**

APRIL 1, 2007

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

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

NO LESS THAN \$5.30 PER HOUR

FOR ALL OTHER EMPLOYEES:

NO LESS THAN \$6.33 PER HOUR

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

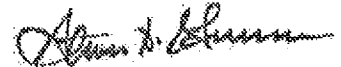
Copies may also be obtained from the Labor Commissioner's Offices at

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

or

555 East Washington, Suite 4100
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EXHIBIT "N"



CLERK OF THE COURT

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Attorneys for Plaintiffs

DISTRICT COURT
CLARK COUNTY, STATE OF NEVADA

10 CHRISTOPHER THOMAS, and
11 CHRISTOPHER CRAIG, Individually
12 and on behalf of others similarly
13 situated,

Plaintiffs,

vs.

14 NEVADA YELLOW CAB
15 CORPORATION, NEVADA
16 CHECKER CAB CORPORATION, and
17 NEVADA STAR CAB
18 CORPORATION,

Defendants.

Case No.: A-12-661726-C

Dept.: XXVIII

Order Granting Plaintiffs' Motion
to Certify Class Action Pursuant
to NRCP 23(b)(3)

19
20 Plaintiffs filed their Motion to Certify Class Action Pursuant to NRCP 23(b)(3)
21 on June 10, 2015. Defendants' Response in Opposition to plaintiffs' motion was filed
22 on June 26, 2015. Plaintiffs thereafter filed their Reply to defendants' Response in
23 Opposition to plaintiffs' motion on July 7, 2015. This matter, having come before the
24 Court for hearing on July 14, 2015 and October 27, 2015, with appearances by Leon
25 Greenberg, Esq. on behalf of all plaintiffs, and Tamer B. Botros, Esq., on behalf of all
26 defendants, and following the arguments of such counsel, and after due consideration
27 of the parties' respective briefs, and all pleadings and papers on file herein, and good
28 cause appearing, therefore

1 THE COURT FINDS:

2 Upon review of the papers and pleadings on file in this matter, and the
3 evidentiary record currently before the Court, the Court holds that plaintiffs have
4 adequately established that the prerequisites of Nev. R. Civ. P. 23(b)(3) are met to
5 certify the requested class seeking damages under Article 15, Section 16 of the Nevada
6 Constitution (the "Minimum Wage Amendment") and grants the motion. The Court
7 makes no determinations of the merits of the claims asserted nor whether any
8 minimum wages are actually owed to any class members as such issues are not
9 properly considered on a motion for class certification. In compliance with what the
10 Court believes is required, or at least directed by the Nevada Supreme Court as
11 desirable, the Court also makes certain findings supporting its decision to grant class
12 certification under NRCP Rule 23. See, *Beazer Homes Holding Corp. v. Eighth*
13 *Judicial Dist. Court*, 291 P.3d 128, 136 (2012) (En Banc) (Granting writ petition,
14 finding district court erred in failing to conduct an NRCP Rule 23 analysis, and
15 holding that "[u]ltimately, upon a motion to proceed as a class action, the district court
16 must 'thoroughly analyze NRCP 23's requirements and document its findings.'" Citing
17 *D.R. Horton v. Eighth Judicial Dist. Court ("First Light II")*, 215 P.3d 697, 704 (Nev.
18 Sup. Ct. 2009).

19 As an initial matter, the nature of the claims made in this case are of the sort for
20 which class action treatment would, at least presumptively, likely be available if not
21 sensible. A determination of whether an employee is owed unpaid minimum hourly
22 wages requires that three things be determined: the hours worked, the wages paid, and
23 the applicable hourly minimum wage. Once those three things are known the minimum
24 wages owed, if any, are not subject to diminution by the employee's contributory
25 negligence, any state of mind of the parties, or anything else of an individual nature
26 that has been identified to the Court. Making those same three determinations,
27 involving what is essentially a common formula, for a large group of persons, is very
28 likely to involve an efficient process and common questions. The minimum hourly

1 wage rate is set at a very modest level, meaning the amounts of unpaid minimum
2 wages likely to be owed to any putative class member are going to presumptively be
3 fairly small, an additional circumstance that would tend to weigh in favor of class
4 certification.

5 In respect to granting the motion and the record presented in this case, the
6 Court finds it persuasive that a prior United States Department of Labor review of
7 defendants' records, applying a uniform methodology, concluded that over 600 current
8 or former taxicab drivers were owed varying amounts of unpaid minimum wages
9 totaling in excess of \$300,000 under the federal Fair Labor Standards Act (the
10 "FLSA") for the two year period consisting of the calendar years 2010 and 2011.
11 While that finding does not resolve the merits of the plaintiffs' claims, since it does not
12 establish that any class members are actually owed additional minimum wages under
13 the Minimum Wage Amendment, it does, in the Court's view, clearly present at least
14 two common questions warranting class certification if the methodology used to reach
15 those conclusions is later found to be correct.

16 The first such question would be whether the class members are owed additional
17 minimum wages, beyond that concluded by the United States Department of Labor, by
18 virtue of the Minimum Wage Amendment imposing an hourly minimum wage rate that
19 is \$1.00 an hour higher than the hourly minimum wage required by the FLSA for
20 employees who do not receive "qualifying health insurance." The Court concludes
21 that resolving such "qualifying health insurance" question involves issues common to
22 all of the class members and defendants have not proffered any meaningful evidence
23 tending to contradict such conclusion. The second such question would be whether
24 the class members are owed additional minimum wages, beyond that concluded by the
25 United States Department of Labor, by virtue of the Minimum Wage Amendment not
26 allowing an employer a "tip credit" towards its minimum wage requirements,
27 something that the FLSA does grant to employers in respect to its minimum wage
28 requirements. The United States Department of Labor is indicated in that agency's

1 report as having reduced its calculation of defendants' FLSA minimum wage
2 deficiency by crediting as tips towards that deficiency 9% of the customer fares
3 collected by the class members. The Court concludes that resolving whether
4 additional amounts of minimum wages are owed to the class members under the
5 Minimum Wage Amendment, beyond the amounts concluded by the United States
6 Department of Labor, because of such agency's use of a "tip credit," involves issues
7 common to all of the class members and defendants have not proffered any meaningful
8 evidence tending to contradict such conclusion.

9 The Court makes no finding that the foregoing two identified common questions
10 are the only common questions present in this case that warrant class certification.
11 Such two identified issues are sufficient for class certification as the commonality
12 prerequisite of NRCP Rule 23(a) is satisfied when a "single common question of law
13 or fact" is identified. *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 848
14 (2005).

15 The Court also finds that the other requirements for class certification under
16 NRCP Rule 23(b)(3) are adequately satisfied upon the record presented. Numerosity
17 is established as the United States Department of Labor investigation identified over
18 600 potential class members who may have claims for minimum wages under the
19 Minimum Wage Amendment. "[A] putative class of forty or more generally will be
20 found numerous." *Shuette*, 122 Nev. at 847. Similarly, adequacy of representation
21 and typicality seem appropriately satisfied upon the record presented, it being
22 undisputed that the two named plaintiffs are or have been taxi drivers employed by the
23 defendants and their counsel being experienced in the handling of class actions. The
24 Court also believes the superiority of a class resolution of these claims is established
25 by their presumptively small individual amounts, the practical difficulties that the class
26 members would encounter in attempting to litigate such claims individually and obtain
27 individual counsel, the status of many class members as current employees of
28 defendants who may be loath to pursue such claims out of fear of retaliation, and the

1 desirability of centralizing the resolution of the common questions presented by the
2 over 600 class members in a single proceeding.

3 Defendants have not proffered evidence or arguments convincing the Court that
4 it should doubt the accuracy of the foregoing findings. The Court is also mindful that
5 Shuette supports the premise that is better for the Court to initially grant class
6 certification, if appropriate, and "reevaluate the certification in light of any problems
7 that appear post-discovery or later in the proceedings." *Shuette* 124 P.3d at 544.
8 Therefore

9 IT IS HEREBY ORDERED:

10 Plaintiffs' Motion to Certify Class Action Pursuant to NRCP 23(b)(3) is
11 GRANTED. The class shall consist of the class claims of all persons employed by
12 defendants as taxi drivers in the State of Nevada at anytime from July 1, 2007 through
13 October 27, 2015, except such persons who file with the Court a written statement of
14 their election to exclude themselves from the class as provided below. The class
15 claims are all claims for damages that the class members possess against the
16 defendants under the Minimum Wage Amendment arising from unpaid minimum
17 wages that are owed to the class members for work they performed for the defendants
18 from July 1, 2007 through October 27, 2015. Leon Greenberg and Dana Sniegocki of
19 Leon Greenberg Professional Corporation are appointed as class counsel and the
20 named plaintiffs Christopher Thomas and Christopher Craig are appointed as class
21 representatives. The Court will allow discovery pertaining to the class members and
22 the class claims.

23 IT IS FURTHER ORDERED:

24 (1) Defendants' counsel are to produce to plaintiffs' counsel, within 10 days
25 of the service of Notice of Entry of this Order, the names and last known addresses of
26 all persons employed as taxicab drivers by the defendants in the State of Nevada from
27 July 1, 2007 through October 27, 2015;

1 (2) Plaintiffs' counsel, upon receipt of the names and addresses described in
2 (1) above, shall have 40 days thereafter (and if such 40th day is a Saturday, Sunday or
3 holiday the first following business day) to mail a Notice of Class Action in the form
4 annexed hereto as Exhibit "A" to such persons to notify them of the certification of
5 this case as a class action pursuant to Nev. R. Civ. P. 23(b)(3) and shall promptly file
6 with the Court a suitable declaration confirming that such mailing has been performed;

7 (3) The class members are enjoined from the date of entry of this Order, until
8 or unless a further Order is issued by this Court, from prosecuting or compromising
9 any of the class claims except as part of this action and only as pursuant to such Order;
10 and

11 (4) Class members seeking exclusion from the class must file a written
12 statement with the Court setting forth their name, address, and election to be excluded
13 from the class, no later than 45 days after the mailing of the Notice of Class Action as
14 provided for in (2), above.


15 IT IS SO ORDERED.

16 Dated this 20 day of November, 2015.


Hon. Ronald J. Israel
District Court Judge

17 Submitted:

18 By:

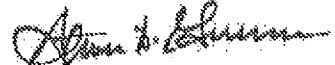

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24 Approved as to form and content:

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CLERK OF THE COURT

8
9 **DISTRICT COURT**
10 **CLARK COUNTY, NEVADA**

11 MICHAEL MURRAY and
12 MICHAEL RENO, individually and
on behalf of all others similarly
13 situated,

14 Plaintiffs,

15 vs.

16 A CAB TAXI SERVICE LLC, A
CAB, LLC, and CREIGHTON J.
17 NADY,

Defendants.

Case No.: A-12-669926-C

DEPT.: I

18
19 **Order Granting Plaintiffs' Motion to Certify Class Action Pursuant to NRCP**
20 **Rule 23(b)(2) and NRCP Rule 23(b)(3) and Denying Without Prejudice**
21 **Plaintiffs' Motion to Appoint a Special Master Under NCRP Rule 53**

22 Plaintiffs filed their Motion to Certify this Case as a Class Action Pursuant to
23 NRCP 23(b)(3) and NRCP 23(b)(2), and appoint a Special Master, on May 19, 2015.
24 Defendants' Response in Opposition to plaintiffs' motion was filed on June 8, 2015.
25 Plaintiffs thereafter filed their Reply to defendants' Response in Opposition to
26 plaintiffs' motion on July 13, 2015. This matter, having come before the Court for
27 hearing on November 3, 2015, with appearances by Leon Greenberg, Esq. and Dana
28

1 Sniegocki, Esq. on behalf of all plaintiffs, and Esther Rodriguez, Esq., on behalf of all
2 defendants, and following the arguments of such counsel, and after due consideration
3 of the parties' respective briefs, and all pleadings and papers on file herein, and good
4 cause appearing, therefore

5
6 **THE COURT FINDS:**

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8 In Respect to the Request for Class Certification

9 Upon review of the papers and pleadings on file in this matter, and the
10 evidentiary record currently before the Court, the Court holds that plaintiffs have
11 adequately established that the prerequisites of Nev. R. Civ. P. 23(b)(3) and 23(b)(2)
12 are met to certify the requested classes seeking damages and suitable injunctive relief
13 under Article 15, Section 16 of the Nevada Constitution (the "Minimum Wage
14 Amendment") and NRS 608.040 and the claims asserted against defendant Nady in
15 the Third and Fourth Claims for Relief in the Second Amended and Supplemental
16 Complaint and grants the motion. The Court makes no determinations of the merits
17 of the claims asserted nor whether any minimum wages are actually owed to any class
18 members, or whether any injunctive relief should actually be granted, as such issues
19 are not properly considered on a motion for class certification. In compliance with
20 what the Court believes is required, or at least directed by the Nevada Supreme Court
21 as desirable, the Court also makes certain findings supporting its decision to grant
22 class certification under NRCP Rule 23. *See, Beazer Homes Holding Corp. v. Eighth*
23 *Judicial Dist. Court.*, 291 P.3d 128, 136 (2012) (En Banc) (Granting writ petition,

1 finding district court erred in failing to conduct an NRCP Rule 23 analysis, and
2 holding that “[u]ltimately, upon a motion to proceed as a class action, the district
3 court must “thoroughly analyze NRCP 23’s requirements and document its findings.””
4 Citing *D.R. Horton v. Eighth Judicial Dist. Court (“First Light II”)*, 215 P.3d 697,
5 704 (Nev. Sup. Ct. 2009).
6

7
8 As an initial matter, the nature of the claims made in this case are of the sort for
9 which class action treatment would, at least presumptively, likely be available if not
10 sensible. A determination of whether an employee is owed unpaid minimum hourly
11 wages requires that three things be determined: the hours worked, the wages paid, and
12 the applicable hourly minimum wage. Once those three things are known the
13 minimum wages owed, if any, are not subject to diminution by the employee’s
14 contributory negligence, any state of mind of the parties, or anything else of an
15 individual nature that has been identified to the Court. Making those same three
16 determinations, involving what is essentially a common formula, for a large group of
17 persons, is very likely to involve an efficient process and common questions. The
18 minimum hourly wage rate is set at a very modest level, meaning the amounts of
19 unpaid minimum wages likely to be owed to any putative class member are going to
20 presumptively be fairly small, an additional circumstance that would tend to weigh in
21 favor of class certification.
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27 In respect to granting the motion and the record presented in this case, the
28 Court finds it persuasive that a prior United States Department of Labor (“USDOL”)

1 litigation initiated against the defendants resulted in a consent judgment obligating the
2 defendants to pay \$139,834.80 in unpaid minimum wages to the USDOL for
3 distribution to 430 taxi drivers under the federal Fair Labor Standards Act (the
4 "FLSA") for the two year period from October 1, 2010 through October 2, 2012. The
5 parties dispute the *collateral estoppel* significance of that consent judgment in this
6 litigation. The Court does not determine that issue at this time, inasmuch as whether
7 the plaintiffs are actually owed minimum wages (the "merits" of their claims) is not a
8 finding that this Court need make, nor presumably one it should make, in the context
9 of granting or denying a motion for class certification. The USDOL, as a public law
10 enforcement agency has a duty, much like a prosecuting attorney in the criminal law
11 context, to only institute civil litigation against employers when credible evidence
12 exists that such employers have committed violations of the FLSA. Accordingly,
13 whether or not the consent judgment is deemed as a binding admission by defendants
14 that they owe \$139,834.80 in unpaid minimum wages under the FLSA for distribution
15 to 430 taxi drivers, it is appropriate for the Court to find that the Consent judgment
16 constitutes substantial evidence that, at least at this stage in these proceedings,
17 common questions exist that warrant the granting of class certification. The Court
18 concludes that the record presented persuasively establishes that there are at least two
19 common questions warranting class certification in this case for the purposes of
20 NRCF Rule 23(b)(3) ("damages class" certification) that are coextensive with the
21 period covered by the USDOL consent judgment and for the period prior to June of
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1 2014.

2 The first such question would be whether the class members are owed
3 additional minimum wages, beyond that agreed to be paid in the USDOL consent
4 judgment, and for the period covered by the consent judgment, by virtue of the
5 Minimum Wage Amendment imposing an hourly minimum wage rate that is \$1.00 an
6 hour higher than the hourly minimum wage required by the FLSA for employees who
7 do not receive "qualifying health insurance." The Court concludes that resolving
8 such "qualifying health insurance" question involves issues common to all of the class
9 members and defendants have not proffered any meaningful evidence tending to
10 contradict such conclusion. The second such question would be whether the class
11 members are owed additional minimum wages, beyond that alleged by USDOL for
12 the period covered by the consent judgment, by virtue of the Minimum Wage
13 Amendment not allowing an employer a "tip credit" towards its minimum wage
14 requirements, something that the FLSA does grant to employers in respect to its
15 minimum wage requirements. It is unknown whether the USDOL consent judgment
16 calculations include or exclude the application of any "tip credit" towards the FLSA
17 minimum wage deficiency alleged by the USDOL against the defendants.
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24 In respect to the "tip credit" issue plaintiffs have also demonstrated, and
25 defendants do not dispute, a violation of Nevada's Constitution existing prior to June
26 of 2014. Plaintiff has provided to the Court payroll records from 2014 for taxi driver
27 employee and class member Michael Sargeant indicating that he was paid \$7.25 an
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1 hour but only when his tip earnings are included. Defendant does not dispute the
2 accuracy of those records. Nor has it produced any evidence (or even asserted) that
3 the experience of Michael Sargeant in respect to the same was isolated and not
4 common to many of its taxi driver employees. The Nevada Constitution's minimum
5 wage requirements, unlike the FLSA, prohibits an employer from using a "tip credit"
6 and applying an employee's tips towards any portion of its minimum wage obligation.
7
8 The Sargeant payroll records, on their face, establish a violation of Nevada's
9 minimum wage standards for a certain time period and strongly support the granting
10 of the requested class certification.
11
12

13 The Court makes no finding that the foregoing two identified common
14 questions are the only common questions present in this case that warrant class
15 certification. Such two identified issues are sufficient for class certification as the
16 commonality prerequisite of NRCP Rule 23(a) is satisfied when a "single common
17 question of law or fact" is identified. *Shuette v. Beazer Homes Holdings Corp.*, 121
18 Nev. 837, 848 (2005). In addition, there also appear to be common factual and legal
19 issues presented by the claims made under NRS 608.040 for statutory "waiting time"
20 penalties for former taxi driver employees of defendants and whether defendant Nady
21 can be found, personally liable, as alleged in the Third and Fourth Claims for Relief in
22 the Second Amended and Supplemental Complaint, for any monies owed to the class
23 members that would otherwise be just the responsibility of the corporate defendants.
24
25 Such common questions are readily apparent as NRS 608.040 is a strict liability
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1 statute and the conduct alleged by Nady that would impose liability upon him is
2 common to the class, as it involves his direction and control of the corporate
3 defendants and not his actions towards any class member individually.
4

5 The Court also finds that the other requirements for class certification under
6 NRCF Rule 23(b)(3) are adequately satisfied upon the record presented. Numerosity
7 is established as the United States Department of Labor investigation identified over
8 430 potential class members in the consent judgment who may have claims for
9 minimum wages under the Minimum Wage Amendment. "[A] putative class of forty
10 or more generally will be found numerous." *Shuette*, 122 Nev. at 847. Similarly,
11 adequacy of representation and typicality seem appropriately satisfied upon the record
12 presented. It is undisputed that the two named plaintiffs, who were found in the
13 USDOL consent judgment to be owed unpaid minimum wages under the FLSA, and
14 additional class representative Michael Sargeant, whose payroll records show, on their
15 face, a violation of Nevada's minimum wage requirements, are or have been taxi
16 drivers employed by the defendants. Counsel for the plaintiffs have also
17 demonstrated their significant experience in the handling of class actions. The Court
18 also believes the superiority of a class resolution of these claims is established by their
19 presumptively small individual amounts, the practical difficulties that the class
20 members would encounter in attempting to litigate such claims individually and obtain
21 individual counsel, the status of many class members as current employees of
22 defendants who may be loath to pursue such claims out of fear of retaliation, and the
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1 desirability of centralizing the resolution of the common questions presented by the
2 over 430 class members in a single proceeding.

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4 In respect to class certification under NRCP Rule 23(b)(2) for appropriate class
5 wide injunctive relief the Court makes no finding that any such relief shall be granted,
6 only that it will grant such class certification and consider at an appropriate time the
7 form and manner, if any, of such injunction. The existence of common policies by
8 defendants that either directly violate the rights of the class members to receive the
9 minimum wages required by Nevada's Constitution, or that impair the enforcement of
10 those rights and are otherwise illegal, are substantially supported by the evidence
11 proffered by the plaintiffs. That evidence includes a written policy of defendants
12 reserving the right to unilaterally deem certain time during a taxi driver's shift as non-
13 compensable and non-working "personal time." Defendants have also failed to keep
14 records of the hours worked by their taxi drivers for each pay period for a number
15 years, despite having an obligation to maintain such records under NRS 608.215 and
16 being advised by the USDOL in 2009 to keep such records. And as documented by
17 the Michael Sargeant payroll records, the defendants, for a period of time after this
18 Court's Order entered on February 11, 2013 finding that the Nevada Constitution's
19 minimum wage provisions apply to defendants' taxicab drivers, failed to pay such
20 minimum wages, such failure continuing through at least June of 2014. Plaintiffs
21 have also alleged in sworn declarations that defendants have a policy of forcing their
22 taxi drivers to falsify their working time records, allegations, which if true, may also
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1 warrant the granting of injunctive relief.

2 The Court notes that Nevada's Constitution commands this Court to grant the
3 plaintiffs "all remedies available under the law or in equity" that are "appropriate" to
4 "remedy any violation" of the Nevada Constitution's minimum wage requirements. In
5 taking note of that command the Court does not, at this time, articulate what form, if
6 any, an injunction may take, only that it is not precluding any of the forms of
7 injunctive relief proposed by plaintiffs, including Ordering defendants to pay
8 minimum wages to its taxi drivers in the future; Ordering defendants to maintain
9 proper records of their taxi drivers' hours of work; Ordering notification to the
10 defendants' taxi drivers of their rights to minimum wages under Nevada's
11 Constitution; and Ordering the appointment of a Special Master to monitor
12 defendants' compliance with such an injunction.

13 Defendants have not proffered evidence or arguments convincing the Court that
14 it should doubt the accuracy of the foregoing findings. The Court is also mindful that
15 *Shuette* supports the premise that it is better for the Court to initially grant class
16 certification, if appropriate, and "reevaluate the certification in light of any problems
17 that appear post-discovery or later in the proceedings." *Shuette* 124 P.3d at 544.

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24 In Respect to the Request for the Appointment of a Special Master

25 Plaintiffs have also requested the appointment of a Special Master under NRCF
26 Rule 53, to be paid by defendants, to compile information on the hours of work of the
27 class members as set forth in their daily trip sheets. The Court is not persuaded that
28

1 the underlying reasons advanced by plaintiffs provide a sufficient basis to place the
2 entirety of the financial burden of such a process upon the defendants. Accordingly,
3 the Court denies that request without prejudice at this time.
4

5 Therefore

6 **IT IS HEREBY ORDERED:**
7

8 Plaintiffs' Motion to Certify Class Action Pursuant to NRCP 23(b)(3) is
9 **GRANTED.** The class shall consist of the class claims as alleged in the Second
10 Amended and Supplemental Complaint of all persons employed by any of the
11 defendants as taxi drivers in the State of Nevada at anytime from July 1, 2007 through
12 December 31, 2015, except such persons who file with the Court a written statement
13 of their election to exclude themselves from the class as provided below. Also
14 excluded from the class is Jasminka Dubric who has filed an individual lawsuit
15 against the defendant A CAB LLC seeking unpaid minimum wages and alleging
16 conversion by such defendant, such case pending before this Court under Case No. A-
17 15-721063-C. The class claims are all claims for damages that the class members
18 possess against the defendants under the Minimum Wage Amendment arising from
19 unpaid minimum wages that are owed to the class members for work they performed
20 for the defendants from July 1, 2007 through December 31, 2015; all claims they may
21 possess under NRS 608.040 if they are a former taxi driver employee of the
22 defendants and are owed unpaid minimum wages that were not paid to them upon
23 their employment termination as provided for by such statute; and the claims alleged
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1 against defendant Nady in the third and fourth claims for relief in the Second
2 Amended and Supplemental Complaint. Leon Greenberg and Dana Sniegocki of
3 Leon Greenberg Professional Corporation are appointed as class counsel and the
4 named plaintiffs Michael Murray and Michael Reno, and class member Michael
5 Sargeant, are appointed as class representatives. The Court will allow discovery
6 pertaining to the class members and the class claims.
7

8
9 **IT IS FURTHER ORDERED:**

10 Plaintiffs' Motion to Certify Class Action Pursuant to NRCP 23(b)(2) for
11 appropriate equitable and injunctive relief as authorized by Article 15, Section 16 of
12 Nevada's Constitution is **GRANTED** and the named plaintiffs Michael Murray and
13 Michael Reno, and class member Michael Sargeant, are also appointed as class
14 representatives for that purpose. The class shall consist of all persons employed by
15 defendants as taxi drivers in the State of Nevada at any time from July 1, 2007
16 through the present and continuing into the future until a further Order of this Court
17 issues.
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22 **IT IS FURTHER ORDERED:**
23

24
25 (1) Defendants' counsel is to produce to plaintiffs' counsel, within 10 days
26 of the service of Notice of Entry of this Order, the names and last known addresses of
27 all persons employed as taxicab drivers by any of the defendants in the State of
28

1 Nevada from July 1, 2007 through December 31, 2015, such information to be
2 provided in an Excel or CSV or other agreed upon computer data file, as agreed upon
3 by counsel for the parties, containing separate fields for name, street address, city,
4 state and zip code and suitable for use to mail the Notice of Class Action ;
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8 (2) Plaintiffs' counsel, upon receipt of the names and addresses described in
9 (1) above, shall have 40 days thereafter (and if such 40th day is a Saturday, Sunday or
10 holiday the first following business day) to mail a Notice of Class Action in
11 substantially the form annexed hereto as Exhibit "A" to such persons to notify them of
12 the certification of this case as a class action pursuant to Nev. R. Civ. P. 23(b)(3) and
13 shall promptly file with the Court a suitable declaration confirming that such mailing
14 has been performed;
15
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17

18 (3) The class members are enjoined from the date of entry of this Order, until
19 or unless a further Order is issued by this Court, from prosecuting or compromising
20 any of the class claims except as part of this action and only as pursuant to such
21 Order; and
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25 (4) Class members seeking exclusion from the class must file a written
26 statement with the Court setting forth their name, address, and election to be excluded
27 from the class, no later than 55 days after the mailing of the Notice of Class Action as
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1 provided for in (2), above.
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4 **IT IS FURTHER ORDERED:**
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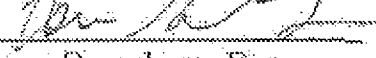
6 Plaintiffs' motion to appoint a Special Master under NRCP Rule 53 is denied
7 without prejudice at this time.
8

9 **IT IS SO ORDERED.**

10 Dated this 9 day of January, 2016.
11

12 
13 Hon. Kenneth Cory
14 District Court Judge

15 Submitted:

16 By: 
17 Leon Greenberg, Esq.
18 Dana Sniegocki, Esq.
19 LEON GREENBERG PROF. CORP.
20 2965 S. Jones Blvd., Ste. E-3
21 Las Vegas, NV 89146
22 Attorneys for Plaintiffs

23 Approved as to form and content:

24 By: Not Approved
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Fax: (702) 320-8401
info@rodriguezlaw.com
Attorney for Defendants

EXHIBIT "O"

**DISTRICT COURT
CLARK COUNTY, NEVADA**

LAKSIRI PERERA, IRSHAD AHMED,)
and MICHAEL SARGEANT,)
Individually and on behalf of others)
similarly situated,)

Plaintiff,
vs.

WESTERN CAB COMPANY,
Defendant.

Case No.: A-14-707425-C

Dept.: VII

**NOTICE OF CLASS ACTION
CERTIFICATION**

You are being sent this notice because you are a member of the class of current and former taxi drivers employed by WESTERN CAB COMPANY that has been certified by the Court. Your rights as a class member are discussed in this notice.

NOTICE OF CLASS ACTION CERTIFICATION

On [date] this Court issued an order certifying this case as a class action for all taxi driver employees of WESTERN CAB COMPANY (the "class members") who were employed at anytime from July 1, 2007 to [date of order]. The purpose of such class action certification is to resolve the following questions:

(1) Does WESTERN CAB COMPANY owe class members any unpaid minimum wages pursuant to Nevada's Constitution?

(2) If it does owe class members minimum wages, what is the amount each is owed and must now be paid by WESTERN CAB COMPANY?

The Court has previously ruled in this case that WESTERN CAB COMPANY does not have to pay punitive damages to class members as a result of any non-payment of minimum wages and is not subject to any claims under Nevada Revised Statutes 608.040 that are alleged to arise from any such minimum wage non-payment. The class certification in this case may also determine other rights that class members have under Nevada's Constitution and may be revised in the future and the Court may not answer all of the above questions or may answer other questions.

NOTICE OF YOUR RIGHTS AS A CLASS MEMBER

If you wish to have your claim as a class member decided as part of this case you do not need to do anything. The class is represented by Leon Greenberg and Dana Sniegocki (the "class counsel"). Their attorney office is Leon Greenberg Professional Corporation, located at 2965 South Jones Street, Suite E-3, Las Vegas, Nevada, 89146. Their telephone number is 702-383-6085 and email can be sent to

1 them at leongreenberg@overtimelaw.com. Communications by email instead of
2 telephone calls are preferred.

3 You are not required to have your claim for unpaid minimum wages owed to
4 you by WESTERN CAB COMPANY decided as part of this case. If you wish to
5 exclude yourself from the class you may do so by no later than [insert date 45 days
6 after mailing] properly filing with the Court, which is located at 200 Lewis Avenue,
7 Las Vegas, Nevada, a written statement setting forth your name and address and
8 stating that you are excluding yourself from this case. If you do not exclude yourself
9 from the class you will be bound by any judgment rendered in this case, whether
10 favorable or unfavorable to the class. If you remain a member of the class you may
11 enter an appearance with the Court through an attorney of your own selection. You
12 do need not get an attorney to represent you in this case and if you fail to do so you
13 will be represented by class counsel.

14 **THE COURT IS NEUTRAL**

15 No determination has been made that WESTERN CAB COMPANY owes
16 any class members any money. The Court is neutral in this case and is not advising
17 you to take any particular course of action. The Court cannot advise you about what
18 you should do.

19 **IF YOU WANT MORE INFORMATION**

20 You are encouraged to go to the website [TO BE PROVIDED] if you want
21 to find out more information about this case. Or you can contact class counsel at
22 702-383-6085 or by email to [EMAIL TO BE INSERTED] or consult with another
23 attorney

24 **NO RETALIATION IS PERMITTED IF YOU CHOOSE 25 TO PARTICIPATE IN THIS LAWSUIT**

26 Nevada's Constitution protects you from any retaliation or discharge from
27 your employment for participating in this case or remaining a member of the class.
28 You cannot be punished by WESTERN CAB COMPANY or fired from your
employment with them for being a class member. WESTERN CAB COMPANY
cannot fire you or punish you if this case is successful in collecting money for the
class members and you receive a share of that money.

IT IS SO ORDERED

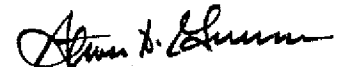
Date:

/s/

DISTRICT COURT JUDGE

EXHIBIT 7

EXHIBIT 7


CLERK OF THE COURT

MCC
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DANA SNIEGOCKI, ESQ., NSB 11715
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dana@overtimelaw.com

Attorneys for Plaintiff

**DISTRICT COURT
CLARK COUNTY, NEVADA**

LAKSIRI PERERA, IRSHAD AHMED,)
and MICHAEL SARGEANT)
Individually and on behalf of others)
similarly situated,)

Plaintiffs,

vs.

WESTERN CAB COMPANY,

Defendant.

Case No.: A-14-707425-C

Dept.: VII

**MOTION FOR INJUNCTIVE
RELIEF AND CLASS
CERTIFICATION PURSUANT
TO NRCP RULE 23(b)(2) AND
RULE 23(B)(3)**

LAKSIRI PERERA, IRSHAD AHMED and MICHAEL SARGEANT,
individually and on behalf of others similarly situated, move this Court for an Order:

Certifying this case as a class action for all of defendant's taxi drivers pursuant to NRCP Rule 23(b)(2) for injunctive and equitable relief; certifying this case as a class action for all of defendant's taxi drivers employed since July 1, 2007 through March 31, 2016 pursuant to NRCP Rule 23(b)(3) for damages that are owed to them as a result of defendant's violations of the requirements of Nevada's Constitution, Article 15, Section 16; appointing Leon Greenberg and Dana Sniegocki as class counsel; and issuing an injunction prohibiting defendant from requiring its taxi drivers to pay for the cost of the fuel consumed in the defendant's taxi cabs, to the extent requiring them to pay such cost (or any other cost for the benefit of the defendant) reduces the wage paid

1 to them by defendant below the minimum wage required by Article 15, Section 16, of
2 Nevada's Constitution. Such injunction should also order defendant to undertake
3 necessary record keeping, reporting, and enforcement protocols, including the
4 appointment of a Special Master paid by the defendant, as are necessary to vigorously
5 promote its enforcement. The Court should also award class counsel fees and costs for
6 the making of this motion and success in securing injunctive relief. This motion is
7 made based upon the Memorandum of Points and Authorities below, the annexed
8 exhibits, and the other papers and pleadings in this action.

9
10 Leon Greenberg Professional Corporation

11 By: /s/ Leon Greenberg
12 Leon Greenberg, Esq.
13 Nevada Bar No.: 8094
14 2965 South Jones Boulevard - Suite E3
15 Las Vegas, Nevada 89146
16 (702) 383-6085
17 Attorney for Plaintiffs
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Dated: March 28, 2016

By: /s/ Leon Greenberg

Leon Greenberg, Esq.
Nevada Bar No.: 8094
2965 South Jones Boulevard - Suite E3
Las Vegas, Nevada 89146
(702) 383-6085
Attorney for Plaintiffs

1 **MEMORANDUM OF POINTS AND AUTHORITIES**
2 **SUMMARY**

3 **Defendant refuses to stop engaging in a practice that this Court**
4 **has already found, if occurring, violates Nevada's Constitution.**

5 One of the allegations made in this case is that the defendant's taxi drivers are
6 required by defendant to pay for the gasoline consumed by defendant's taxi cabs and
7 such payments reduce their wages below the minimum required by Nevada's
8 Constitution. Ex. "A" Third Amended Complaint, ¶ 16. This Court has already
9 recognized that such allegations, if true, would constitute circumstances violating the
10 minimum wage requirements of Nevada's Constitution. See, Ex. "B" Order of
11 December 1, 2015, p. 9, l. 28 - p. 10, l. 2. and Ex. "C" Order of June 16, 2015, p. 12, l.
12 14 - 19, granting plaintiffs leave to make those allegations of minimum wage violations
13 in this case and rejecting defendant's contention that such allegations fail to state a
14 minimum wage violation claim. The United States Department of Labor has also
15 found that such policy by defendant violates the minimum wage requirements of
16 federal law, the Fair Labor Standards Act (the "FLSA"), and has found defendant owes
17 594 of its taxi drivers over \$877,000 in minimum wages under the FLSA as a result, at
18 least in part, of such illegal policy. Ex. "D."

19 Prior to presenting this motion plaintiffs' counsel wrote to defendant's counsel
20 and requested that defendant refrain from making its taxi drivers pay for expenses, but
21 only to the extent such forced expense payments would reduce their wages below the
22 minimum required by Nevada's Constitution. Ex. "E." Defendant's counsel
23 responded via a four page letter that at its conclusion confirmed defendant would not
24 agree to that request. Ex. "F." Accordingly, unless the Court issues the requested
25 injunction defendant will feel free to pay its taxi drivers less than the minimum hourly
26 wage required by Nevada's Constitution and will do so at its whim.

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ARGUMENT

I. AN ORDER SIMULTANEOUSLY GRANTING CLASS CERTIFICATION UNDER NRCP RULE 23(B)(2) AND ISSUING AN IMMEDIATE INJUNCTION IS PROPER

A. Immediate injunctive relief is proper as defendant refuses to conform its conduct to the requirements of Nevada's Constitution.

Defendant admits it requires its taxi drivers to pay for the gasoline consumed by defendant's taxi cabs. Defendant refuses to limit that requirement to the extent necessary to ensure that its taxi drivers receive in wages from the defendant, after accounting for the payment of those expenses, at least the minimum hourly rate required by Nevada's Constitution. Ex. "E" and "F." This Court has already found that requiring such a payment of expenses would violate the minimum wage protections of Nevada's Constitution. *See*, Ex. "B" Order of December 1, 2015, p. 9, l. 28 - p. 10, l. 2. and Ex. "C" Order of June 16, 2016, p. 12, l. 14 - 19. Such finding by this Court is consistent with the well established principle that employers cannot be allowed to subvert or evade their minimum wage obligations by forcing employees to pay the employer's necessary expenses. *See, Arriaga v. Florida Pacific Farms, LLC*, 305 F.3d 1228, 1236 (11th Cir. 2002):

The Growers contend that the FLSA [the Federal minimum wage law, the Fair Labor Standards Act] was satisfied because the Farmworkers' hourly wage rate was higher than the FLSA minimum wage rate and deductions were not made for the costs the Farmworkers seek to recover. The district court correctly stated that there is no legal difference between deducting a cost directly from the worker's wages and shifting a cost, which they could not deduct, for the employee to bear. An employer may not deduct from employee wages the cost of facilities which primarily benefit the employer if such deductions drive wages below the minimum wage. *See* 29 C.F.R. § 531.36(b). This rule cannot be avoided by simply requiring employees to make such purchases on their own, either in advance of or during the employment. *See id.* § 531.35; *Ayres v. 127 Rest. Corp.*, 12 F. Supp.2d 305, 310 (S.D.N.Y.1998).

Defendant disputes this Court's holding on this point and is currently seeking its reversal (in conjunction with its objections to other rulings by this Court) via a Writ of Mandamus. That defendant insists this Court erred in its rulings is of no moment. It is the law of the case that defendant cannot impose costs upon its taxi drivers that

1 decrease their earnings below the minimum hourly wage required by Nevada's
2 Constitution. Defendant, by refusing to agree to limit its conduct to comply with the
3 Court's finding on that issue, has rendered proper the issuance of an injunction
4 compelling defendant to so limit its conduct.

5 **B. Injunctive relief is authorized by Nevada's Constitution**
6 **and plaintiffs have standing to seek that relief.**

7 Article 15, Section 16, Subsection "B" of Nevada's Constitution provides that:

8 "An employee claiming violation of this section may bring an action against his
9 or her employer in the courts of this State *to enforce the provisions of this*
10 *section and shall be entitled to all remedies available under the law or in*
11 *equity appropriate to remedy any violation of this section, including but not*
12 *limited to back pay, damages, reinstatement or injunctive relief.* (emphasis
13 provided)

14 Employees are empowered to bring civil actions to "enforce the provisions" of
15 Article 15, Section 16 of Nevada's Constitution and this Court must grant them all
16 remedies appropriate to correct "any violation" of that section including injunctive
17 relief. Plaintiffs are not merely granted rights, individually, to damages or remedies
18 for the injuries they have suffered but a right to "enforce" the Nevada Constitution's
19 provisions against defendant and remedy all "violations" of those provisions
20 committed by defendant. Such language grants plaintiffs standing to seek the
21 requested injunction on behalf of *all* of defendant's aggrieved taxi drivers, the
22 members of the NRCP Rule 23(b)(2) class.

23 Defendant will presumably argue that under *Wal-Mart Stores, Inc. v. Dukes*, 131
24 S. Ct. 2541, 2557 (2011) and similar cases plaintiffs lack standing to seek the requested
25 class certification and injunction since they are former employees who do not,
26 individually, claim any prospect of future injury from defendant's conduct. Such
27 argument is without merit as *Wal-Mart* is grounded in the "case or controversy"
28 limitations on federal jurisdiction found in Article III of the United States Constitution.
See, *Smook v. Minnehaha County* 457 F.3d 806, 816 (8th Cir. 2006) (Reviewing federal
decisions and finding Article III deprives class of former juvenile facility inmates of
standing to secure injunctive relief against future actions by facility towards inmates).

1 This Court's jurisdiction is not restricted by Article III standing limitations. The
2 Nevada Supreme Court has held standing in this Court exists whenever rights are
3 conferred with language that is broader than the standing conferred under a general
4 constitutional standing analysis. *See, Stockmeier v. Nevada Dept. of Corrections*
5 *Psychological Review Panel*, 135 P.3d 220, 226 (Nev. Sup. Ct. 2006) (Inmate need not
6 meet Article III constitutional standing requirements of injury, causation,
7 redressability, to have standing to seek remedy for violation of Nevada's Open Meeting
8 law as such law confers standing more broadly by its own language) and
9 *Hantges v. City of Henderson*, 113 P.3d 848, 850 (Nev. Sup. Ct. 2005) (The provisions
10 of NRS 279.609, by expressly authorizing challenges to agency decisions grants
11 standing to make such challenges to all citizens, not just landowners who might
12 otherwise meet traditional constitutional standing limitations, despite statute's silence
13 on who has standing). Accordingly, cases dealing with FRCP Rule 23(b)(2) class
14 action standing limitations under federal law, such as *Wal-Mart*, are inapplicable.

15 The language of Nevada's Constitution is clear. It grants, in the broadest
16 possible terms, a right by an employee to have this Court remedy all "violations" of its
17 minimum wage requirements. Holding that a former employee lacks standing to seek
18 class wide injunctive relief to correct minimum wage violations would, as a practical
19 matter, immunize Nevada employers from *ever* being subject to such injunctive relief.
20 Any current employee bringing a class action lawsuit against defendant to restrain its
21 unconstitutional "forced expenses" policy would be summarily fired by the defendant,
22 stripping this Court of the power to issue any injunction, ever, stopping that policy. In
23 the real world no current employee is likely to ever bring such a lawsuit in the first
24 instance, fearing for their continued employment. Adopting such a "current employee
25 only" standing requirement would make it effectively impossible to secure injunctive
26 relief under Nevada's Constitution to restrain ongoing and continuing violations of its
27 minimum wage requirements.

28 Under the language of Nevada's Constitution the plaintiffs' status as employees

1 of defendant imbibes them with sufficient standing to seek the requested injunction.
2 They were also so employed during the period of time that defendant was utilizing its
3 improper "forced expense payment" policy. Ex. "G," "H," and "I," declarations.

4 **C. The requirements for class certification**
under NRCP Rule 23(b)(2) are met.

5 Plaintiffs seek class certification for injunctive purposes under NRCP Rule
6 23(b)(2). Two forms of injunctive relief are contemplated. The first is an immediate
7 injunction to prevent future injury to the class by restraining defendant's conduct,
8 going forward, in respect to its "forced expense" (fuel payment) policy. The second is
9 an injunction to remedy the injury already caused to the class by the false reporting
10 (inflated W-2 statements) the defendant has furnished to the United States Internal
11 Revenue Service that ascribe inflated, legally false, and non-existent, income to the
12 class members and increase their tax liabilities. Those inflated W-2 reports result from
13 the defendant reporting as "income" amounts that the class members were forced,
14 illegally, to pay in expenses, such expenses reducing the class members' true incomes
15 below the required minimum wage and thus below the amounts reported by defendant
16 on their W-2 forms. No injunction is sought at this time in respect to remedying the
17 injury caused by the defendant's already made, and erroneous, W-2 reports. Plaintiffs'
18 counsel believes further proceedings should be conducted to aid in the determination of
19 the form of injunction that should be fashioned to remedy that past injury.

20 The requested class certification, and immediately requested injunction, would
21 require defendant, going forward, to conform its conduct to the dictates of the law. It
22 would not facilitate, or concern, any award of damages to the class members nor
23 involve any potential compromise of their legal rights. The plaintiffs' appointment as
24 class representatives, for the purposes of NRCP Rule 23(b)(2) and the securing of the
25 requested class wide injunctive relief, would involve no actual proffering of evidence
26 at a trial by the plaintiffs or any fiduciary exercise by them. To the extent any
27 advocacy or efforts need be made on behalf of the NRCP Rule 23(b)(2) class, it will be
28 made by class counsel.

1 The requirements to certify the proposed class under Rule 23(b)(2) are met. That
2 includes the four elements of Rule 23(a), numerosity, common questions of law and
3 fact, typicality, and adequacy of representation. It is not disputed that defendant
4 employs hundreds of taxi drivers, Ex. "D" indicates over 590 taxi drivers have been
5 exposed to, and injured by, defendant's forced expense payment policy. Accordingly,
6 numerosity is established. *See, Shuette v. Beazer Homes Holdings Corp.*, 121 Nev.
7 837, 847 (2005) ("Although courts agree that numerosity prerequisites mandate no
8 minimum number of individual members, a putative class of forty or more generally
9 will be found numerous").

10 There is a common question of law presented, one already ruled upon by this
11 Court against the defendant, which is the illegality of defendant's "forced expense"
12 (pay for fuel) policy, to the extent it reduces taxi drivers' wages below the minimum
13 hourly wage amount. The issue of fact is the same for all class members and
14 undisputed, which is the actual existence of that "forced expense" (pay for fuel) policy.
15 The typicality and adequacy of representation requirements are also met by the named
16 plaintiffs, who were actually subject to the policy at issue, and their counsel, who is
17 highly experienced in the prosecution of class claims. Ex. "J" declaration. Indeed,
18 such counsel has already demonstrated its vigorous, and skilled, advocacy on behalf of
19 Nevada's taxi drivers by successfully appealing the adverse determination in *Thomas v.*
20 *Nevada Yellow Cab*, 327 P.3d 518 (Nev. Sup. Ct. 2014) and confirming the existence
21 of the minimum wage rights asserted in this case.

22 The additional requirement of NRCP Rule 23(b)(2) is established in that
23 defendant, by its own admission, "has acted" (and will continue to act) or "refused to
24 act on grounds generally applicable to the class, thereby making appropriate final
25 injunctive relief or corresponding declaratory relief with respect to the class as a
26 whole." *See*, Ex. "E" and "F" documenting defendant's refusal to conform its "forced
27 expense payment" (fuel payment) policy to the dictates of the law. The form of
28 injunction sought is common to all of the class members, which is to relieve them of

1 such illegal policy of the defendant, no individualized injunctive or other relief is
2 proposed.

3 **D. The court should fashion robust protocols, including the**
4 **appointment of a special master paid for by the defendant,**
to enforce its injunction.

5 The history of defendant's conduct is one of rank evasion of its known
6 obligations under the minimum wage laws. It has refused to modify its policy of
7 requiring taxi drivers to pay for gasoline even when those payments result in minimum
8 wage violations. In fact, it instituted that policy *precisely so it could evade the*
9 *minimum wage requirements of the law.*

10 Defendant's started its "drivers pay cash out of pocket for gas" policy in 2012,
11 after a United States Department of Labor ("USDOL") audit required defendant to pay
12 over \$200,000 in unpaid minimum wages to its taxi drivers. Ex. "K." Defendant
13 could not just simply take the gasoline costs out of the driver's "gross pay" or from the
14 taxi meter receipts. Doing so "on the books" would leave a paper trail that would show
15 taxi drivers, after those deductions/payments were made for gasoline, were receiving
16 less than the minimum hourly wage. So rather than leave such an obvious "paper trail"
17 to be found in a future audit by the USDOL defendant switched those expenses,
18 imposed upon the drivers, to a "hidden trail" of cash, out of pocket by drivers, expenses
19 that it failed to record. Such devious conduct by defendant proved unavailing, as the
20 USDOL in 2013 uncovered defendant's nefarious scheme, found it to be illegal under
21 the FLSA, and determined that defendant owed over \$877,000 to over 590 taxi drivers
22 for violating the FLSA's minimum wage provisions. Ex. "D" p. 3.

23 In light of defendant's irrefutable bad faith, there is no reason to believe it can be
24 trusted to comply with a bare injunctive directive. At a minimum, defendant must also
25 be required to maintain accurate records of the expenses it is forcing its drivers to pay
26 and those drivers' earnings and hours of work. Without such record keeping it would
27 be impossible for defendant to comply with such an injunction and be sure it is paying
28 its taxi drivers at least the minimum wage. It is also submitted that given defendant's

1 history of willful evasion of the minimum wage law, at least some form of independent
2 audit of those records, for some period of time, is also warranted. Accordingly, a
3 Special Master, paid for by the defendant, should be appointed to conduct such
4 periodic audits. In addition, defendant should be required to advise the class members
5 of the injunction's requirements and the advise the class members of the contact
6 information for the Special Master so the class members can advise the same of any
7 violations of the injunction.

8 **E. An immediate award of attorney's fees to plaintiffs'**
9 **counsel for securing injunctive relief should be made.**

10 In addition to granting equitable relief, Nevada's Constitution also grants
11 prevailing plaintiffs an award of attorney's fees. Plaintiffs' counsel should be awarded
12 fees for securing the requested equitable relief (injunction). There is no need to delay
13 such an award which has no bearing upon whether class counsel should receive a fee
14 award for recovering actual damages for the class (the NRCP Rule 23(b)(3) "damages"
15 class claims). Plaintiffs' counsel, with their reply submission, will provide a statement
16 of their hours of work upon which such a fee award should be based (currently in
17 excess of 7 hours in connection with just the preparation of this motion and
18 communications with defendant to avoid the making of this motion).
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1 **II. THE COURT SHOULD CERTIFY THIS CASE AS A CLASS**
2 **ACTION UNDER NRCP RULE 23(B)(3) FOR ALL DAMAGES**
3 **OWED TO DEFENDANT'S TAXI DRIVER EMPLOYEES AS A**
4 **RESULT OF DEFENDANT'S VIOLATIONS OF NEVADA'S**
5 **CONSTITUTION THAT HAVE OCCURRED SINCE JULY 1, 2007**

6 **A. The granting of NRCP 23(b)(3) class certification can be**
7 ***conditional* and revised prior to trial and the Court should err**
8 **in favor of granting such certification as long as the current**
9 **record supports certification and resolve any uncertainties**
10 **about the scope of the class once discovery is completed.**

11 Defendant, in opposing class certification, is likely to dispute whether all of the
12 common questions presented are truly "common" or "predominate" or can be resolved
13 in a "superior" fashion through a class proceeding. A determination that class
14 certification is appropriate is, of course, not a finding about the merits of the claims.
15 Nor does an order granting plaintiffs' motion, and certifying this case as a class action
16 under NRCP Rule 23(b)(3), have to finally determine what claims and issues will, or
17 will not, ultimately be resolved on a class action basis, as such a class certification
18 order can be "conditional."

19 The "conditional class certification" process is expressly authorized by NRCP
20 Rule 23(c)(1). Under such an approach the Court indicates it may, prior to trial,
21 revoke, limit or revise the grant of class certification. *Shuette* urged district courts to
22 utilize that conditional certification procedure, observing that "...in cases that appear
23 complex, a district court should grant conditional class action certification, if
24 appropriate, and then reevaluate the certification in light of any problems that appear
25 post-discovery or later in the proceedings." 124 P.3d at 544. Such finding in *Shuette*
26 strongly supports the granting of class certification in this case even if the record, at
27 this point in these proceedings, does not foreclose the possibility that once discovery is
28 complete the Court should narrow or limit the issues ultimately to be decided on a class
 basis.

1 **B. The necessary NRCP 23 (a) conditions for class**
2 **certification under NRCP 23 (b)(3) have been established.**

3 The typicality, numerosity, and adequacy of representation requirements of
4 NRCP 23(a) for certification of the proposed damages (Rule 23(b)(3)) class involve
5 identical considerations as the proposed equitable relief (Rule 23(b)(2)) class,
6 discussed *supra*. For the reasons discussed *supra* those conditions are also met for the
7 proposed Rule 23(b)(3) class. The only one of the Rule 23(a) requirements needing a
8 separate analysis for the purpose of the proposed Rule 23(b)(3) class certification is
9 whether “questions of fact or law common to the class” exist that warrant the granting
10 of such class certification.

11 *Shuette* explains when the “commonality” element of NRCP Rule 23(a) is
12 satisfied:

13 Questions are common to the class when their answers as to one class
14 member hold true for all class members. Commonality does not require
15 that “all questions of law and fact must be identical, but that an issue of
16 law or fact exists that inheres in the complaints of all the class members.”
17 Thus, this prerequisite may be satisfied by a single common question of
18 law or fact. 121 Nev. at 848.

19 As discussed, *infra*, there exists more than one common issue of law and fact for all of
20 the proposed class members, meaning Rule 23(a)’s “commonality” requirement is met
21 under *Shuette*.

22 The ultimate “merits” issue in this case which is common to all class members is
23 whether the compensation paid by the defendant complied with Nevada’s
24 Constitution’s minimum wage requirements. Such issue will be resolved for each class
25 member by answering three questions:

26 What were the number of hours the class member worked in each
27 applicable pay period?

28 What was the compensation the class member was paid during that pay
period?

 What was the class member’s applicable minimum wage rate during that
pay period?

1 That each class member's damages under such an examination will differ is
2 irrelevant to the predominance of common issues finding. *See, Yokoyama and*
3 *Newberg on Class Actions, Fifth Ed.*, § 4:54 (Reviewing FRCP Rule 23 advisory
4 committee notes and observing "Courts in every circuit have therefore uniformly held
5 that the 23(b)(3) predominance requirement is satisfied despite the need to make
6 individualized damages determinations."). Except for mass tort or personal injury
7 claims, cases where individualized damages issues will predominate and bar class
8 certification "rarely, if ever, come along." *See, Klay v. Humana, Inc.*, 382 F.3d 1241,
9 1260 (11th Cir. 2004)

10 The formula used to determine defendant's liability for unpaid minimum wages,
11 referencing only three relevant elements, will be identical for every class member.
12 Determining each of those three relevant elements (time worked, compensation paid,
13 and applicable minimum wage rate) involve issues of law and/or fact common to all of
14 the class members.

15 **1. There are common issues that exist in respect**
16 **to the hours worked by the class members.**

17 The USDOL found defendant did not keep accurate records of the time worked
18 by the class members. Ex. "D" p. 4. At least four common issues exist in respect to
19 determining the time worked by the class members:

- 20 ● Defendants represented to the USDOL that the taxi drivers, despite
21 their lack of accurate records, were working 12 hours per shift on
22 average. Ex. "D," p. 3 ("Total hours worked column: the agreed
23 average shift length (confirmed by ER [employer] and through
24 interviews of 12 hours multiplied by the number of shifts (shifts
25 column).") The veracity of that representation to the USDOL by the
26 defendant, which was made about the drivers as a class and not any
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1 particular driver, can be resolved on a class basis (in the event
2 defendant wishes to dispute it);

- 3
4 ● Although the USDOL found that each shift worked by a taxi driver
5 was 12 hours, the named plaintiff Perera states taxi drivers' work
6 shifts often exceeded 12 hours in length. Ex. "G," ¶ 5. According
7 to Perera, that extra time was consumed with "end of shift"
8 procedures required by defendant of its taxi drivers that often forced
9 them to work 15 minutes, or more, longer than their official 12 hour
10 shift. *Id.* The existence (or non-existence, if disputed by defendant)
11 of those procedures, which Perera alleges existed for all of the taxi
12 drivers, can be resolved on a class basis.
- 13
14 ● All of the plaintiffs assert that defendant used a "no break" policy
15 during their scheduled 12 hour shifts, meaning that all taxi drivers
16 were working, and should be paid for, at least 12 hours during each
17 shift. Ex. "G" and "I" ¶ 6 and Ex. "H" ¶ 5. To the extent that
18 defendant wishes to dispute the existence of such a "no break time"
19 policy, and assert that as a result taxi drivers were not actually
20 working at least 12 hours during their 12 hour shifts, that is a
21 common issue.
- 22
23 ● Plaintiff Sargeant, who worked for defendant during a period of
24 time that defendant was giving pay statements to taxi drivers
25 purporting to include a record of "hours worked," asserts that such
26 "hours worked" record may not include time he was required to
27 "show up" for work but never actually given a taxi to drive and
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1 after two hours sent home. Ex. "I" ¶ 7. The accuracy of the
2 defendant's working time records is a common issue.

3 2. **There are common issues that exist in respect to**
4 **the compensation that the class members were paid.**

5 Payroll records exist documenting how much each class member was paid each
6 pay period. Defendant's "forced payment of expenses" (fuel charge payment) policy
7 creates two common issues for all of the class members in respect to their "true"
8 compensation:

- 9 ● Is defendant's "forced payment of expenses" (fuel charge payment)
10 policy relevant to determining its compliance with the Nevada
11 Constitution's minimum wage requirements? Defendant insists it is
12 not and is seeking *mandamus* review of this Court's contrary
13 finding. This is a common question for all of the class members
14 and one that the defendant, presumably, may wish to appeal if the
15 merits of its *mandamus* petition are never ruled upon.
- 16 ● In the absence of any actual records of the fuel payments that the
17 class members were forced to pay "out of pocket" what is the
18 proper method of determining the amount of those payments?
19 Defendant may argue that those payments cannot be considered
20 when a driver lacks the receipts establishing the amount of each
21 such payment. Plaintiffs would argue that such amounts can be
22 suitably determined by examining defendant's records of the
23 amount of miles driven for each taxi driver, the average miles per
24 gallon of the type of vehicle each was driving, and the historical
25 record of the average per gallon fuel cost in Clark County each
26 month. The proper method of making this determination (or the
27 inability of the Court to make any such determination, as may be
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1 argued by the defendant) involves a question common to all of the
2 class members.

3 **3. There are common issues that exist in respect to**
4 **the proper minimum wage rate for the class members.**

5 Nevada's "two tiered" minimum wage rate specifies that "if the employer
6 provides health benefits" the employee may be paid an hourly minimum wage that is
7 \$1.00 an hour less (currently \$7.25 instead of \$8.25 an hour). The relevant language
8 of N.R.S. Const. Art. 15, § 16 (A) that needs to be interpreted and applied in this case
9 is the following:

10 The rate shall be five dollars and fifteen cents (\$5.15) [currently
11 \$7.25] per hour worked, if the employer provides health benefits as
12 described herein, or six dollars and fifteen cents (\$6.15) [currently
13 \$8.25] per hour if the employer does not provide such benefits.
14 Offering health benefits within the meaning of this section shall
15 consist of making health insurance available to the employee for the
16 employee and the employee's dependents at a total cost to the
17 employee for premiums of not more than 10 percent of the
18 employee's gross taxable income from the employer.

19 The foregoing language presents a threshold issue of law as to when an employer
20 is deemed to "provide health benefits" and can avail itself of paying the lower
21 minimum wage. There are two approaches to this issue, each subject to modification
22 by the view taken of the relevancy of the employee's actual "dependent or marital
23 status":

- 24 ● Does "provide" mean "actually participate" in an employer's medical
25 insurance benefit plan that meets all of the other requirements of N.R.S.
26 Const. Art. 15, § 16? If yes, this means the employee must (a) Agree to
27 enroll in the medical insurance benefit plan and (b) The medical insurance
28 plan the employee enrolls (participates) in actually "provides" such
benefits "...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."

1 This is the approach adopted by *Hancock v. State of Nevada*, First Judicial
2 District, Case No. 14 OC 00080 1B, Dept. II, Order 8/12/15, Ex. "L."

- 3
4 ● Does "provide" mean to have the "option to participate" in an employer's
5 medical insurance benefit plan that meets all of the other requirements of
6 N.R.S. Const. Art. 15, § 16? If yes, this means the employee (a) Need not
7 actually enroll (participate) in the employer's medical insurance benefit
8 plan and (b) Such medical insurance plan must, if the employee actually
9 elected to enroll (participate) in the plan "provide" such benefits "...to the
10 employee for the employee and the employee's dependents at a total cost
11 to the employee for premiums of not more than 10 percent of the
12 employee's gross taxable income from the employer."

- 13
14 ● Is the "provide" requirement met, under both the "option to participate"
15 on "actually participate" standards, if the medical benefit's premium cost
16 meets the *actually existing dependent/martial status* of the employee? If
17 yes, the "for premiums [cost to the employee] of not more than 10 percent
18 of the employee's gross taxable income from the employer" means the
19 corresponding premium required for the employee's *current* family and
20 martial status (single, married, and/or with dependent children) and not the
21 premium that would be required for *all potential* dependent (spouse and
22 children) coverage.

23 Once the Court resolves the meaning of the "to provide health benefits" issue it
24 will make a common determination as to the which, if any, of defendants' taxi drivers
25 needed to only be paid the \$7.25 an hour minimum wage. That determination will be
26 based upon the employee premium cost for the relevant coverage (either full family
27 coverage for all employees, irrespective of whether they have dependents, or based
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1 upon their "actual" status as single, married and/or with dependent children) and
2 whether such cost exceeded 10% of the wages paid to them by defendants.

3 The resolution of this question is not currently before the Court, though plaintiffs
4 will argue the minimum wage standard is \$8.25 an hour for all of defendants' taxi
5 drivers based upon the need to apply the "full family coverage" standard (and
6 associated employee premium contribution costs) irrespective of the employee's actual
7 marital or dependent status. Under that standard the employee premium contributions
8 required by defendant (in excess of \$450 a month, Ex. "G" ¶ 4) would not meet the
9 10% of wages limit imposed by N.R.S. Const. Art. 15, § 16. If the Court were to reject
10 that standard, certain taxi drivers, most likely only some of those who were single and
11 without dependents, and as a result did not have to pay any insurance premium under
12 defendants' medical plan, might qualify for the lower \$7.25 an hour minimum wage.

13 **4. Additional common questions of law and/or fact exist in**
14 **respect to the applicable statute of limitations, any toll of**
15 **that statute of limitations, and the damages that the class**
members may recover.

16 The Court has previously ruled that claims made under Nevada's Constitution
17 for unpaid minimum wages are subject to a four year statute of limitations. Ex. "C" p.
18 6-10. It has also ruled that punitive damages cannot be recovered on those claims. Ex.
19 "B" p. 8-9. Those determinations of law are common to all of the class members who
20 present identical claims and issues in respect to the applicable statute of limitations and
21 the type of damages they may be entitled to seek.

22 A common issue to be resolved exists for all of the class members who worked
23 prior to the four year statute of limitations period as to whether any statute of
24 limitations toll should apply in this case. Nevada's Courts will equitably estop the
25 statute of limitations in appropriate cases. *See, Copeland v. Desert Inn Hotel*, 637
26 P.2d 490, 493 (Nev. Sup. Ct. 1983). Such estoppel need not be pleaded in the
27 complaint. *See, Harrison v. Rodriguez*, 701 P.2d 1015, 1017 (Nev. Sup. Ct. 1985). A
28 strong basis exists to apply such an estoppel in this case and that issue should be
determined for all of the class members.

1 The minimum wage requirements of Nevada's Constitution became effective on
2 November 28, 2006, which is the earliest date on which any class members' claim may
3 have accrued. Nevada's Constitution also provides for a yearly adjustment to its
4 minimum wage rate and imposes a mandatory duty upon employers to advise
5 employees about the minimum wage rate:

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

8 The first such rate adjustment bulletin was issued by the Nevada Labor Commissioner
9 on April 1, 2007, effectuating an increase of the Nevada Constitution's minimum
10 hourly wage from \$5.15 or \$6.15 an hour to \$5.30 or \$6.33 per hour depending upon
11 whether qualifying health insurance was provided. Ex. "M." It is alleged defendant
12 never provided any such written notification of any rate adjustment, or any notice of
13 the applicable minimum wage rate, to each of the class members. Ex. "A" ¶ 15(a).

14 Defendant was required to both pay the minimum hourly wage specified by the
15 Constitution *and* provide to "each" class member "written notification" of any change
16 in that minimum hourly wage. Defendant's violation of their written notification
17 obligation should be subject to the most severe, and adverse to the defendant,
18 consequences, as such written notice was constitutionally commanded. If defendant
19 had complied with that obligation this lawsuit would have been initiated years earlier.
20 Such violation, either by itself or in conjunction with defendant's knowing violation of
21 Nevada's Constitutional requirement to pay a minimum hourly wage, should toll the
22 statute of limitations in this case from July 1, 2007, the date defendant was first
23 compelled to give such notice, until such time as they actually give that notice.

24 The defendant's "non-advisement" to the class members of their minimum wage
25 rights has been found to create an equitable statute of limitations toll in analogous cases
26 under federal law. *See, Bonham v. Dresser Industries, Inc.*, 569 F.2d 187, 193 (3rd Cir.
27 1977) (Holding, and finding support for the conclusion in other authorities, that
28 employer who fails to post statutorily required notice in workplace of employee rights
under Age Discrimination in Employment Act is subject to equitable statute of

1 limitations toll); *Kamens v. Summit Stainless, Inc.*, 586 F. Supp. 324, 328 (E.D.Pa.
2 1984) (Citing *Bonham* and recognizing such “notice violation” provides a basis to
3 impose equitable estoppel on the statute of limitations of a federal minimum wage
4 claim under the Fair Labor Standards Act (“FLSA”)); *Henchy v. City of Absecon*, 148
5 F. Supp. 2d 435, 439 (Dist. N.J. 2001)(Citing *Kamens* and reaching same conclusion)
6 and numerous other cases.

7 The need to determine whether equitable tolling of the statute of limitations is an
8 appropriate remedy for defendant’s violation of the Nevada Constitution’s minimum
9 wage “notice” requirement also supports a finding that common issues predominate
10 warranting class certification. *See, In Re Linerboard Antitrust Litigation*, 305 F.3d
11 145, 163 (3rd Cir. 2002) (Observing that a defendant’s concealment of a conspiracy
12 poses a common, predominant, issue for class certification in respect to whether a toll
13 of the statute of limitations should be imposed).

14 **C. The “predominance” of common questions and the “superiority”**
15 **of resolving those questions on a class basis, as required by**
16 **NRCP 23 (b)(3), have been established.**

17 **1. The predominance of common issues is established.**

18 *Shuette* explained the predominance of common issues requirement of NRCP
19 Rule 23(b)(3):

20 While the NRCP 23(b)(3) predominance inquiry is related to the NRCP 23(a)
21 commonality and typicality requirements, it is more demanding. The importance
22 of common questions must predominate over the importance of questions
23 peculiar to individual class members. For example, common questions
24 predominate over individual questions if they significantly and directly impact
25 each class member's effort to establish liability and entitlement to relief, and
26 their resolution “can be achieved through generalized proof.”
27 124 P.3d at 540 (citations omitted).

28 All of the above discussed common issues involve *class wide* practices and/or
policies, or issues of law, that apply to all of the class members *in the same fashion*.
The defendant’s “break time” policies; how (or if) the driver’s fuel charges should be
determined in the absence of any records; how the defendant maintained their work
time records; how the health benefits offered by the defendant either did or did not
“qualify” to allow defendant to pay a lower minimum wage under Nevada’s

1 Constitution, and so forth, all involve the *same determinations*. Liability (or lack of
2 liability) for all class members will be determined in an *identical* fashion based upon
3 those determinations. Accordingly, the predominance requirement of NRCP Rule
4 23(b) (3) is satisfied.

5 **2. The superiority of a class resolution is established.**

6 The superiority of class resolution requirement of NRCP Rule 23 (b)(3) is
7 satisfied for three reasons, although any one of those reasons would suffice.

8 **(i) The superiority of class resolution is established**
9 **by the small size of the individual claims.**

10 The class members received some pay and are only owed a portion of the very
11 modest minimum wage. Even if this Court were to impose an equitable statute of
12 limitations toll to July 1, 2007 there is no reason to conclude many, if any, of the
13 individual class members' claims are sufficiently large to make individual lawsuits by
14 the class members sensible.

15 The central purpose of the class action lawsuit is to afford justice to persons
16 holding claims too small to be sensibly sued upon individually. *See, Amchem Prod.*
17 *Inc. v. Windsor*, 521 U.S. 591, 617 (1997) ("The policy at the very core of the class
18 action mechanism is to overcome the problem that small recoveries do not provide the
19 incentive for any individual to bring a solo action prosecuting his or her rights.") The
20 class action procedure allows for the "vindication of the rights of groups of people who
21 individually would be without effective strength to bring their opponents into court at
22 all." *Id.* The small size of the claim of each class member establishes the superiority
23 of class resolution in this case. *See, also, Leyva v. Medline Industries Inc.*, 716 F.3d
24 510, 515 (9th Cir. 2013) (Abuse of discretion to find class certification was not superior
25 for class of approximately 500 workers owed wages "[i]n light of the small size of the
26 putative class members' potential individual monetary recovery, class certification may
27 be the only feasible means for them to adjudicate their claims.")

28 **(ii) The superiority of class resolution is established**
by the vulnerable class population of current
employees fearful of retaliation by the defendant.

1 The vulnerable status of the class members also establishes the superiority of
2 class resolution. Class resolution has been found superior for groups of persons with a
3 limited understanding of the law, or limited English skills, such as migrant workers or
4 prisoners, on the basis such persons are not likely or able to pursue legal action
5 individually. *See*, Newburg, 5th Ed., § 4.65 and cases cited therein. The inherent
6 difficulty employees face in vindicating their legal rights against their employer, who
7 may terminate their employment in response, is also a reason to find the class
8 resolution of claims to be superior. *See*, *Scott v. Aetna Services, Inc.*, 210 F.R.D. 261,
9 268 (D. Conn 2002) (Class resolution superior for minimum wage and overtime claims
10 as “class members may fear reprisal and would not be inclined to pursue individual
11 claims.”) and *Noble v. 93 University Place Corp.*, 224 F.R.D. 330, 346 (S.D.N.Y.
12 2004) (Class resolution of employee overtime pay claims superior given their fear of
13 reprisal and lack of familiarity with the legal system).

14 The vulnerable nature of the class, consisting of many current employees of
15 defendant who are too fearful of reprisal to pursue their individual legal claims, and
16 who also have little ability to navigate the legal system or even any awareness of their
17 legal claims, supports a finding that a class resolution is superior in this case.

18 (iii) **The superiority of class resolution is established**
19 **by the need to have effective enforcement of the**
Nevada Constitution’s minimum wage provisions.

20 Government agencies are often unable to fully enforce substantive legal
21 protections and the class action lawsuit has long been recognized as a means to fill that
22 void. *See*, *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 339 (1980) (Class
23 actions are “...an evolutionary response to the existence of injuries unremedied by the
24 regulatory action of government.”). *See, also* Newburg, 5th Ed., § 4:66, and cases cited
25 therein, noting that courts, particularly in contexts like antitrust and securities law,
26 “regularly invoke the importance of class actions in enforcing the substantive law as
27 one of the reasons that a class action is a superior method of adjudication.”

28 Article 15, Section 16, of the Nevada Constitution creates paramount legal rights
and bars any waiver of those rights by individual employees. It grants civil remedies

1 for violations of those rights, including equitable relief and attorney's fees, to the full
2 extent of this Court's power. There is, indisputably, an overwhelming public interest in
3 having those rights vigorously enforced that renders superior the class resolution,
4 whenever possible, of claims brought under Article 15, Section 16.

5 **III. THE DECISIONS RENDERED BY THIS COURT IN TWO**
6 **HIGHLY ANALOGOUS CASES STRONGLY SUPPORT THE**
7 **GRANTING OF CLASS CERTIFICATION IN THIS CASE**

8 This Court, in two other taxi driver minimum wage cases, has granted motions
9 for class certification. *See, Thomas v. Nevada Yellow Cab*, A-12-661726-C, Order of
10 Judge Israel entered November 25, 2015 and *Murray v. A-Cab*, A-12-669926-C, Order
11 of Judge Cory entered February 10, 2016 (Copies at Ex. "N"). The Court must render
12 its decision in this case based upon the record in this case and cannot blindly defer to
13 the decisions made by other jurists in other cases. But it should be noted that the
14 USDOL's investigative findings, presented to the Court in *Thomas* and *Murray*, were
15 found, either alone or based upon the other presented evidence, sufficient to warrant
16 class certification in each of those cases. Those findings by the USDOL in this case are
17 quite similar to the ones presented in *Thomas* and *Murray*.¹
18
19
20
21
22
23

24 ¹ One striking "overlap" issue from the USDOL findings that, standing alone,
25 warrants class certification is the "\$8.25 an hour," or "\$1.00 an hour difference," issue.
26 The USDOL found over \$877,000 in unpaid minimum wages was owed to 594 drivers
27 at the FLSA's \$7.25 an hour minimum wage rate. If the applicable Nevada minimum
28 wage rate is \$8.25 an hour, for the reasons discussed *supra*, and those findings by the
USDOL are accurate, all of those 594 class members are owed *additional* money
beyond what was calculated by the USDOL (the extra \$1.00 an hour the Nevada
minimum wage requires).

CERTIFICATE OF SERVICE

The undersigned certifies that on March 29, 2016, she served the within:

Motion for Injunctive Relief and Class Certification Pursuant to Nrep Rule 23(b)(2) and Rule 23(b)(3)

by court electronic service:

TO:

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

/s/ Dana Sniegocki
Dana Sniegocki

EXHIBIT "A"


CLERK OF THE COURT

1 **ACOM**
2 LEON GREENBERG, ESQ., NSB 8094
3 DANA SNIEGOCKI, ESQ., NSB 11715
4 Leon Greenberg Professional Corporation
5 2965 South Jones Blvd- Suite E3
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7 Tel (702) 383-6083
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9 leongreenberg@overtimelaw.com
10 dana@overtimelaw.com

11 Attorneys for Plaintiff

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

14 LAKSIRI PERERA, IRSHAD AHMED,)
15 and MICHAEL SARGEANT)
16 Individually and on behalf of others)
17 similarly situated,)

18 Plaintiffs,

19 vs.

20 WESTERN CAB COMPANY,)
21 Defendant.)

Case No.: A-14-707425-C

Dept.: V

**THIRD AMENDED
COMPLAINT**

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

22 LAKSIRI PERERA, IRSHAD AHMED and MICHAEL SARGEANT,
23 individually and on behalf of others similarly situated, by and through their attorney,
24 Leon Greenberg Professional Corporation, as and for a Third Amended Complaint
25 against the defendant, state and allege, as follows:
26

27 **JURISDICTION, PARTIES AND PRELIMINARY STATEMENT**

28 1. The plaintiffs, LAKSIRI PERERA, IRSHAD AHMED, and MICHAEL
SARGEANT (collectively the "individual plaintiffs" or the "named plaintiffs") during
all times employed by the defendant were residents of Clark County in the State of
Nevada and are former employees of the defendant.

2. The defendant, WESTERN CAB COMPANY, (hereinafter referred to as

1 "Western Cab" or "defendant") is a corporation existing and established pursuant to
2 the laws of the State of Nevada with its principal place of business in the County of
3 Clark, State of Nevada and conducts business in Nevada.

4 **CLASS ACTION ALLEGATIONS**

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

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

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

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

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

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

1 claims are typical of those of the class.

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

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

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

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

1 **AS AND FOR A FIRST CLAIM FOR RELIEF ON BEHALF OF THE NAMED**
2 **PLAINTIFFS AND ALL PERSONS SIMILARLY SITUATED PURSUANT TO**
3 **NEVADA'S CONSTITUTION**

4 13. The named plaintiffs repeat all of the allegations previously made and
5 bring this First Claim for Relief pursuant to Article 15, Section 16, of the Nevada
6 Constitution.

7 14. Pursuant to Article 15, Section 16, of the Nevada Constitution the named
8 plaintiffs and the class members were entitled to an hourly minimum wage for every
9 hour that they worked for defendant and the named plaintiffs and the class members
10 were often not paid such required minimum wages.

11 15. The defendant's violation of Article 15, Section 16, of the Nevada
12 Constitution also involved malicious and/or dishonest and/or oppressive conduct by
13 the defendant including the following:

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

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

1 brought against it, in avoiding paying some or all of such minimum
2 wages;

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

11
12
13 16. Defendant also engaged in the following illegal, dishonest and bad faith
14 conduct which was intended to conceal its violations Article 15, Section 16, of the
15 Nevada Constitution and caused additional injury to the plaintiffs for which they seek
16 redress:

17 In or about January of 2012, defendant started requiring the plaintiffs and
18 the class members to pay from such plaintiffs' and class members' own,
19 personal funds, 100% of the cost of the fuel consumed in the operation of
20 the taxicabs they drove for the defendant. That fuel was essential for the
21 operation of defendant's taxi cab business and plaintiffs could not work
22 for defendant unless they agreed to pay for that fuel from their personal
23 funds. By requiring the plaintiffs and the class members to personally pay
24 for the cost of such fuel, the defendant was reducing the wages it actually
25 paid the plaintiffs and the class members to an amount below the
26 minimum hourly wage required by Article 15, Section 16, of the Nevada
27 Constitution. That was because after deducting from the "on the payroll
28 records" wages paid by the defendant to the plaintiffs and the class

1 members the cost of the taxi cab fuel they were forced by the defendant to
2 pay, the resulting "true" wage paid to such persons by the defendant was
3 below the minimum hourly wage required by Article 15, Section 16, of
4 the Nevada Constitution. Defendant willfully engaged in this conduct to
5 make it appear to any otherwise uninformed person who was examining
6 its payroll records that it was paying the minimum wage required by
7 Article 15, Section 16, of the Nevada Constitution when it was not.
8 Defendant instituted this policy specifically to deceive certain
9 government agencies, including but not necessarily limited to, the United
10 States Department of Labor which had previously found the defendant in
11 violation of the minimum wage law enforced by such agency. Such
12 conduct by the defendant also resulted in the defendant issuing knowingly
13 false and inaccurate statements of the plaintiffs' and the class members'
14 income to the United States Internal Revenue Service and the Social
15 Security Administration, such statements inflating and exaggerating the
16 actual income earned by such persons and resulting in them being
17 required to pay additional taxes that they did not actually owe.
18

19 17. Defendant engaged in the acts and/or omissions detailed in paragraphs 15
20 and 16 in an intentional scheme to maliciously, oppressively and dishonestly deprive
21 its taxi driver employees of the hourly minimum wages that were guaranteed to those
22 employees by Article 15, Section 16, of the Nevada Constitution. Defendant so acted
23 in the hope that by the passage of time whatever rights such taxi driver employees had
24 to such minimum hourly wages owed to them by the defendant would expire, in whole
25 or in part, by operation of law. Defendant so acted consciously, willfully, and
26 intentionally to deprive such taxi driver employees of any knowledge that they might
27 be entitled to such minimum hourly wages, despite the defendant's obligation under
28 Article 15, Section 16, of the Nevada Constitution to advise such taxi driver

1 employees of their right to those minimum hourly wages. Defendant's malicious,
2 oppressive and dishonest conduct is also demonstrated by its failure to make any
3 allowance to pay such minimum hourly wages if they were found to be due, such as
4 through an escrow account, while seeking any judicial determination of its obligation
5 to make those payments.

6
7 18. The named plaintiffs seek all relief available to them and the alleged class
8 under Nevada's Constitution, Article 15, Section 16 including appropriate injunctive
9 and equitable relief to make the defendant cease its violations of Nevada's
10 Constitution.

11
12 19. The named plaintiffs on behalf of themselves and the proposed plaintiff
13 class members, seek, on this First Claim for Relief, a judgment against the defendant
14 for minimum wages owed for the applicable statute of limitations period, which the
15 Court has previously specified in this case is four years and would commence on
16 September 23, 2010, and continuing into the future, such sums to be determined based
17 upon an accounting of the hours worked by, and wages actually paid to, the plaintiff
18 and the class members along with an award of damages for the increased, and false,
19 tax liability the defendant has caused the plaintiffs and the class members to sustain, a
20 suitable injunction and other equitable relief barring the defendant from continuing to
21 violate Nevada's Constitution and requiring the defendant to remedy, at its expense,
22 the injury to the class members it has caused by falsely reporting to the United States
23 Internal Revenue Service and the Social Security Administration the income of the
24 class members, and an award of attorneys' fees, interest and costs, as provided for by
25 Nevada's Constitution and other applicable laws.

26
27 WHEREFORE, plaintiffs demand the relief as alleged aforesaid.
28

1 Plaintiffs demand a trial by jury on all issues so triable.

2

3 Dated this 2nd day of December, 2015.

4

Leon Greenberg Professional Corporation

5

By: /s/ Leon Greenberg

6

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Attorney for Plaintiff

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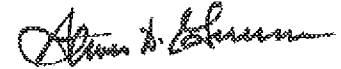
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EXHIBIT "B"

1 DAO



2 EIGHTH JUDICIAL DISTRICT COURT CLERK OF THE COURT
3 CLARK COUNTY, NEVADA
4

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

7 Plaintiff,

8 us.

9 WESTERN CAB COMPANY,

10 Defendant.

Case No. A-14-707425-C

Dep't No. VII

11
12 DECISION AND ORDER

13 This case arises from the employment relationship between Defendant Western Cab
14 Company ("Western") and its former employee taxi driver, Plaintiff Perera. The motions
15 addressed in this Order are Western's Motion for Reconsideration regarding this Courts
16 June 16, 2015 Decision and Order, Western's Motion to Dismiss Second Amended
17 Complaint, and Perera's Countermotion to Amend Complaint. The Court heard oral
18 arguments on August 27, 2015 and October 8, 2015. After consideration of all submitted
19 documents and oral arguments, the Court denies Perera's Motion for Reconsideration,
20 grants Western's Motion to Dismiss in part, and grants Perera's Motion to Amend.

21 **I. Procedural Background**

22 Perera filed his first Complaint in this case on September 23, 2014. He alleges that
23 Western violated the Minimum Wage Amendment of the Nevada Constitution by paying
24 less than the required minimum wage and violated NRS § 608.040 by not paying former
25 employees their earned but unpaid wages. Perera filed his First Amended Complaint on
26 October 20, 2014, asserting the same two causes of action. Western filed a Motion to
27 Dismiss the First Amended Complaint on December 8, 2014. Western argued that Perera
28 failed to state a claim upon which relief could be granted. Perera filed an Opposition and

1 Countermotion to Amend the Complaint on January 26, 2015. The Court issued a Decision
2 on June 16, 2015. The Court held that Perera could assert a violation of the Minimum Wage
3 Amendment against Western and that the statute of limitations to bring the action is four
4 years. The Court granted Perera's Motion to Amend "to add a claim related to cab drivers
5 being required to pay for fuel costs." (June 16, 2015 Decision and Order at 2: 12-13.)

6 Perera filed a Second Amended Complaint on June 16, 2015. The Second Amended
7 Complaint added an allegation that cab drivers were required to pay for their fuel, thus
8 decreasing the amount of their wages. It also added Irshad Ahmed as a named Plaintiff in
9 the action.

10 Western filed a Motion for Reconsideration on July 1, 2015. Western asks the Court
11 to reconsider its ruling regarding the applicable statute of limitations. Western cites to
12 several federal and lower state court cases that held that a two-year statute of limitations
13 applies in these types of cases. Western does not cite to any binding legal authority or
14 evidence that the Court had failed to consider in its Order or that had arisen after the Order
15 issued.

16 Western filed a Motion to Dismiss Second Amended Complaint on July 7, 2015.
17 Western argues that the Second Amended Complaint does not comply with the Court's
18 June 16, 2015 Order, because it adds a named Plaintiff. (Western's Mot. to Dismiss at 3: 3-
19 12.) Next, Western moves to dismiss Paragraph 19 from the Second Amended Complaint
20 because it seeks damages for minimum wages owed since 2006, four years before the four-
21 year statute of limitations period. (*Id.* at 2: 13-21.) Western also moves to dismiss Perera's
22 NRS § 608.040 claim on the grounds that Perera was paid the correct amount when he
23 stopped working for Western and Perera did not complete the statutory process for seeking
24 a remedy under NRS § 608.040. In addition, Western argues that the Minimum Wage
25 Amendment of the Nevada Constitution is preempted by the Employee Retirement Income
26 Security Act ("ERISA"), the Affordable Care Act ("ACA"), and the Due Process Clause of the
27 United States and Nevada Constitution. Finally, Western argues that Perera cannot seek
28 punitive damages in this action because his claims are based on contract law.

1 Perera filed an Opposition and Countermotion to Amend and for Sanctions on
2 August 14, 2015. Perera argues that Western's preemption claims are based on incorrect
3 readings of the law or are irrelevant. (Perera's Opp'n and Countermot. at pp. 4-9.) Perera
4 further argues that he has standing under NRS §608.040 to bring a private right of action
5 at this time. (*Id.* at pp. 10-16.) Next, Perera argues that his claims are based on the Nevada
6 Constitution rather than contract, so punitive damages are proper. (*Id.* at 16: 10-14.) Perera
7 also argues that he has agreed to withdraw the Second Amended Complaint and treat the
8 First Amended Complaint as the operative complaint in this action. (*Id.* at 3: 16-21.) This
9 would resolve the issue of adding a named plaintiff. Perera moves to amend his Second
10 Amended Complaint to add Irshad Ahmed and Michael Sargeant as plaintiffs. (*Id.* at Ex. A.)
11 Finally, Perera asks for sanctions against Western's counsel, alleging that its Motion to
12 Dismiss' only purpose was to delay the case. (*Id.* at 22: 20-21.)

13 II. Discussion

14 A. Western's Motion to Reconsider June 16, 2015 Decision and Order

15 Pursuant to EDCR 2.24, a court may reconsider a matter upon a motion filed by a
16 party and served within ten days of notice of entry of order. Reconsideration is only
17 appropriate when "substantially different evidence is subsequently introduced or the
18 decision is clearly erroneous." Masonry & Title Contractors Ass'n of S. Nev. v. Jolley, Urga
19 & Wirth, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997). Established practice does not allow
20 litigants to raise new issues on rehearing. Cannon v. Taylor, 88 Nev. 89, 92, 493 P.2d 1313,
21 1314 (1972). "Rehearings are not granted as a matter of right, and are not allowed for the
22 purposes of reargument" Geller v. McCowan, 64 Nev. 106, 108, 178 P.2d 380, 381
23 (1947). As Western has provided no basis for reconsideration other than a conflicting
24 decision from another District Court Judge (which this Court was aware of at the time of
25 the ruling), the Motion for Reconsideration is denied.

26 B. Western's Motion to Dismiss Second Amended Complaint

27 Nevada Rule of Civil Procedure 12(b)(5) authorizes dismissal of a claim if it fails to
28 state a claim upon which relief can be granted. When considering a motion to dismiss, a

1 court must accept the allegations of the complaint as true and draw all inferences in favor of
2 the non-moving party. Buzz Stew, LLC v. City of N. Las Vegas, 124 Nev. 224, 228, 181 P.3d
3 670, 672 (2008). "Dismissal is proper where the allegations are insufficient to establish the
4 elements of a claim for relief." Hampe v. Foote, 118 Nev. 405, 408, 47 P.3d 438, 439
5 (2002).

6 **1. Minimum Wages from 2006**

7 Western argues in its Motion to Dismiss that Paragraph 19 from the Second
8 Amended Complaint should be removed because it seeks damages for minimum wages
9 owed since 2006, four years before the four-year statute of limitations period. This Court
10 ruled on June 16, 2015 that the statute of limitations in this action was four years. The
11 original Complaint in this case was filed on September 23, 2014.

12 Perera does not address Western's argument regarding the statute of limitations in
13 its Opposition. The court may construe failure to oppose a motion as admission to the
14 merits or consent to grant the motion. See EDCR 2.20(e). Therefore, the Court orders that
15 Perera will issue a Third Amended Complaint. Paragraph 19 of Perera's Third Amended
16 Complaint must be amended to change the date "November 28, 2006" to "September 23,
17 2010." September 23, 2010 is the earliest date to fall within the statute of limitations in this
18 action.

19 **2. NRS § 608.040**

20 Western also argues that Perera's NRS § 608.040 claim must be dismissed
21 because Perera was paid the amount Western owed him under his employment agreement
22 when he stopped working for Western. Perera argues that he can bring suit under NRS §
23 608.040 for the wages allegedly due under the Minimum Wage Amendment.

24 Assuming Perera has a private right to action under NRS § 608.040, the Complaint
25 fails to state a cause of action. NRS § 608.140 refers to suits for "wages earned and due
26 according to the terms of...employment." NRS § 608.012 defines wages as the "amount
27 which an employer agrees to pay an employee." Perera's Second Amended Complaint does
28 not allege that Western failed to pay the amount it owed Perera under his terms of

1 employment. Perera alleges that the amount Western agreed to pay him in his terms of
2 employment violates the Nevada Constitution. Though the Second Amended Complaint
3 must be read liberally on a Motion to Dismiss, its causes of action rest on the allegation that
4 Western required its employees to pay the cost of fuel, a term of their employment, thereby
5 reducing their true minimum wage in violation of the Nevada Constitution. This allegation
6 gives evidence that Western was abiding by the terms of its wage agreement with Perera,
7 not that it was violating those terms.

8 The Second Amended Complaint fails to state a claim for a violation of NRS 608.040
9 upon which relief can be granted. Its allegations are insufficient to establish the elements
10 of that claim. Therefore, the Court orders that Perera's second cause of action pursuant to
11 NRS § 608.040 be dismissed.

12 **3. Federal Preemption**

13 In addition, Western argues that the Minimum Wage Amendment of the
14 Nevada Constitution is preempted by ERISA, the ACA, and the Due Process Clause of the
15 United States and Nevada Constitution. According to Western, ERISA and the ACA are
16 comprehensive federal statutory systems that preempt state laws that "relate to" employee
17 benefit plans (Western's Mot. to Dismiss at 8: 18) or "[pose] and obstacle to the ACA's
18 purposes and objectives (Id. at 9: 16-17). Western also states that the Minimum Wage
19 Amendment and related Nevada Administrative Code ("NAC") additions violate due
20 process "because they do not give fair notice of what is required or prohibited under them
21 or provide reasonable standards for compliance, thereby encouraging arbitrary and
22 discriminatory enforcement." (Id. at 18: 21-25.) Perera argues that the Minimum Wage Act
23 does not interfere with employer's ability to provide ERISA plans or follow the ACA and
24 that the provisions of the Minimum Wage Act and NAC are not unconstitutionally vague.
25 (Perera's Opp'n at 7: 28-8: 10, 8: 20-23.)

26 The Minimum Wage Amendment, Art. 15, Sec. 16(A) of the Nevada Constitution,
27 states:
28

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

11 The Minimum Wage Amendment does not define what is meant by "health benefits" or
12 "health insurance." The Labor Commissioner added NAC §§ 608.100-.108 to address the
13 Amendment. NAC § 608.102 lists requirements for what health insurance qualifies an
14 employer to pay the lower tier minimum wage. One type of health plan which qualifies an
15 employer for the lower tier minimum wage is a plan that provides health benefits pursuant
16 to a Taft-Hartley trust and qualifies as an employee welfare benefit plan under ERISA.

17 **a. ERISA and the ACA**

18 "ERISA section 514(a) preempts all state laws that 'relate to' any
19 employee benefit plan." Cervantes v. Health Plan of Nevada, Inc., 127 Nev. Adv. Op. 70, 263
20 P.3d 261, 265 (2011) The "basic purpose of ERISA section 514(a) was to avoid multiplicity
21 of regulation." Id. at 265. "A law references an ERISA plan when it acts immediately and
22 exclusively upon ERISA plans or where the existence of ERISA plans is essential to the law's
23 operation." Id. at 266 (internal citations omitted). "[S]tatutes that mandate employee
24 benefit structures or their administration are preempted by ERISA section 514(a)." Id.
25 (internal citations omitted).

26 The Minimum Wage Amendment and NAC § 608.102 do not act immediately or
27 exclusively upon ERISA plans, not are ERISA plans essential to the laws' operation.
28 Providing ERISA plans are one way that employers can qualify to pay the lower tier
minimum wage. Providing an ERISA plan is not the only circumstance that brings the
Minimum Wage Amendment and NAC § 608.102 into effect. Furthermore, the Minimum
Wage Amendment and NAC § 608.102 do not mandate that employers provide certain

1 employee benefit structures. The Minimum Wage Amendment and NAC § 608.102 are
2 primarily about Nevada's minimum wage. Employers can provide any health insurance
3 they deem appropriate, as long as they comply with Nevada's minimum wage laws. Making
4 health insurance a condition of minimum wage will not create a multiplicity of regulation
5 regarding health insurance. In fact, because NAC § 608.102 directly references ERISA
6 plans, it allows employers to look to ERISA for guidance and reduces the need to develop
7 different health insurance regulations.

8 The Minimum Wage Amendment and NAC § 608.102 do not implicate the ACA. The
9 consequence of not providing a qualified health insurance plan to employees under the
10 Minimum Wage Amendment and NAC § 608.102 is to pay a higher minimum wage. Is an
11 employer does not comply with the ACA, it may be required to make an Employer Shared
12 Responsibility Payment under 26 U.S.C. § 4980H. The requirements and consequences
13 under these separate laws do not conflict. The Minimum Wage Amendment and NAC §
14 608.102 do not pose an obstacle to the ACA's purposes or objectives. Employers should,
15 and must, be aware that they are required to adhere to both federal and state regulations.

16 The Minimum Wage Amendment and NAC § 608.102 do not impermissibly
17 implicate or interfere with ERISA or the ACA. The Minimum Wage Amendment and NAC §
18 608.102 are primarily concerned with the minimum wage, while ERISA and the ACA deal
19 with health insurance. Though health insurance is a condition of what minimum wage an
20 employer must pay, the Nevada laws do not seek to redefine or pose an obstacle to any
21 federal statutes. Therefore, the Minimum Wage Amendment and NAC § 608.102 are not
22 preempted by ERISA or the ACA.

23 **b. The Due Process Clause**

24 "The criterion under which we examine the assertion of vagueness is
25 whether the statute either forbids or requires the doing of any act in terms so vague that
26 men of common intelligence must necessarily guess at its meaning and differ as to its
27 application." State v. Glusman, 98 Nev. 412, 420, 651 P.2d 639, 644 (1982) (internal
28 citation omitted). "[S]tatutes are presumed to be valid, and the burden is on the challenger

1 to make a clear showing of their unconstitutionality." Douglas Disposal, Inc. v. Wee Haul
2 LLC, 123 Nev. 552, 557, 170 P.3d 508, 512 (2007).

3 The Minimum Wage Amendment does not define what is meant by "health benefits"
4 or "health insurance." NAC § 608.102 lists requirements for what health insurance qualifies
5 an employer to pay the lower tier minimum wage. It states that employers must offer plans
6 that either conform with requirements pursuant to 26 U.S.C. § 213, guidelines in the
7 Internal Revenue Service, or 29 U.S.C. § 1001 et seq.

8 Western argues that the Labor Commissioner does not have the authority to define
9 what the Minimum Wage Amendment meant by "health benefits." (Western's Mot. to
10 Dismiss 19: 5-11.) NRS § 607.160 states that the "Labor Commissioner: (a) Shall enforce all
11 labor laws of the State of Nevada...The enforcement of which is not specifically and
12 exclusively vested in any other officer...(b) May adopt regulations to carry out the
13 provisions of paragraph (a)." The Minimum Wage Amendment is a labor law of the state of
14 Nevada. As Western states, "the Minimum Wage Amendment does not authorize any
15 person, board, entity or division of the State government to enforce, administer, or regulate
16 what is meant by 'health benefits.'" (Western's Mot. to Dismiss 19: 5-7.) When the power to
17 enforce a labor law is not specifically delegated to another party, the Labor Commissioner
18 has the authority to create regulations regarding that law in order to enforce it. That precise
19 procedure has been followed in the creation of NAC § 608.102.

20 NAC § 608.102 defines what health benefits will qualify an employer for the lower
21 tier minimum wage under the Minimum Wage Amendment. NAC § 608.102 was properly
22 made into law by the Labor Commissioner. Therefore, the Minimum Wage Act is not
23 unconstitutionally vague. The Court denies Western's Motion to Dismiss on the ground of
24 preemption.

25 **4. Punitive Damages**

26 Finally, Western argues that Perera cannot seek punitive damages in this
27 action because his claims are based on contract law. NRS § 42.005 provides that "in an
28

1 action for the breach of an obligation not arising from contract," the plaintiff may recover
2 punitive damages. NRS 608.010 defines an employee as a person under a "contract of hire."

3 Perera is not claiming that Western violated the terms of its employment contract.
4 Perera is claiming that the terms violate the Nevada Constitution; however, Western's
5 obligation to pay Perera as an employee arose under an employment contract. The Nevada
6 Constitution did not create the obligation for Western to pay Perera. It merely set the
7 amount of the obligation.

8 Western's alleged wrongdoing breached an obligation arising from an employment
9 contract. Punitive damages are not available in this type of action. Therefore, the Court
10 grants Western's Motion to Dismiss on this ground. Perera's Third Amended Complaint
11 must be amended to remove all claims for punitive damages.

12 **C. Perera's Countermotion to Amend Complaint**

13 Leave to amend shall be freely given when justice so requires. See NRCP 15(a).
14 "[L]eave to amend should not be granted if the proposed amendment would be futile. A
15 proposed amendment may be deemed futile if the plaintiff seeks to amend the complaint in
16 order to plead an impermissible claim." Halcrow, Inc. v. Eighth Jud. Dist. Ct., 129 Nev. Adv.
17 Op. 42, 302 P.3d 1148, 1152 (2013), as corrected (Aug. 14, 2013) (internal citations
18 omitted).

19 Perera argues in its Countermotion to Amend that Irshad Ahmed and Michael
20 Sargeant were in situations similar to Perera: they are former employees of Western that
21 had to pay for fuel out of their personal finances. Western argues that Irshad Ahmed and
22 Michael Sargeant should not be added as plaintiffs for several reasons, all of which are
23 discussed below.

24 **1. Failure to State a Cause of Action**

25 Western argues that both Irshad Ahmed and Michael Sargeant were paid
26 above the upper tier minimum wage. Therefore, they cannot claim a violation of Nevada's
27 Minimum Wage Amendment. Western already made this argument in relation to Perera.
28 The Court rejects this argument. The proposed plaintiffs' claims is that paying for fuel

1 decreased their wages from the amount shown on Western's records. Therefore, this is not
2 a valid ground for the Court to deny Perera's Countermotion to Amend.

3 **2. Jurisdiction**

4 Article 6, Section 6(1) of the Nevada Constitution states, "The District Courts
5 in the several Judicial Districts of this State have original jurisdiction in all cases excluded
6 by law from the original jurisdiction of justices' courts." Justice Court has original
7 jurisdiction over cases seeking damages "[i]n actions arising on contract for the recovery of
8 money only" if the damages claimed does not exceed \$10,000. Nev. Rev. Stat. § 4.370(1)(b).
9 A "request for injunctive relief provide[s] an independent basis for the district court's
10 jurisdiction." Edwards v. Direct Access, LLC, 121 Nev. 929, 933, 124 P.3d 1158, 1161 (2005)
11 abrogated on other grounds by Buzz Stew, LLC v. City of N. Las Vegas, 124 Nev. 224, 181
12 P.3d 670 (2008).

13 Western argues that Laksiri Perera, Irshad Ahmed, and Michael Sargeant's claims
14 fail to meet the jurisdictional requirement of District Court. Western asserts that (1) no
15 individual's claim exceeds \$10,000.00, (2) the claims' values cannot be aggregated, and (3)
16 the plaintiffs lack standing to bring claims for injunctive relief. Thus, any amendment to
17 add the proposed plaintiffs would be futile.

18 For the purpose of his Countermotion to Amend, Perera does not argue that any
19 individual plaintiff's claim exceeds \$10,000.00. Perera argues that claim aggregation is
20 permitted to meet a jurisdictional limit. The Court does not rule on the issue of aggregation
21 and the claims' monetary value because the Court finds the issue of injunctive relief to be
22 dispositive of this issue.

23 NRS 4.370 does not grant original jurisdiction to Justice Court for actions seeking
24 injunctive relief based on breaches of contract. Generally, requests for injunctive relief are
25 properly heard in district court as stated above. "An injunction may be granted...[w]hen it
26 shall appear by the complaint that the plaintiff is entitled to the relief demanded, and such
27 relief or any part thereof consists in restraining the commission or continuance of the act
28 complained of, either for a limited period or perpetually." NRS 33.010.

Perera's Second Amended Complaint asks for:

a suitable injunction and other equitable relief barring the defendant from continuing to violate Nevada's Constitution and requiring the defendant to remedy at its expense the injury to the class members it has caused by falsely reporting to the United States Internal Revenue Service and the Social Security Administration the income of the class members...

(At ¶ 19.) For the purposes of Perera's Countermotion to Amend, an amendment to add Irshad Ahmed and Michael Sargeant as plaintiffs does not appear to be futile. Perera has stated a claim for relief that would restrain the continuance of the act at issue in Perera's complaint. Perera asserts that Western's method of calculating wages is incorrect. These calculations do not only impact Western's employees and former employees. These calculations also affect the Internal Revenue Service and the Social Security Administration. Perera seeks the Court's assistance in having Western correct any incorrect calculations that have been reported to the Internal Revenue Service and the Social Security Administration.

Perera states a facially valid injunctive relief claim in his Second Amended Complaint. This properly places the case in District Court. Adding Irshad Ahmed and Michael Sargeant with identical injunctive relief claims would not be futile. Therefore, this is not a valid ground for the Court to deny Perera's Countermotion to Amend.

3. Preemption by National Labor Relations Act

Western argues that because the AFL-CIO drafted the Minimum Wage Amendment, according to the declaration of the AFL-CIO's Executive Secretary-Treasurer in a separate case, the Minimum Wage Amendment is preempted by federal law. 29 U.S.C. § 151 states:

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective

1 bargaining and by protecting the exercise by workers of full freedom of
2 association, self- organization, and designation of representatives of
3 their own choosing, for the purpose of negotiating the terms and
4 conditions of their employment or other mutual aid or protection.

5 Assuming that the AFL-CIO completely and without any outside assistance drafted
6 the Minimum Wage Amendment, the Court does not find that it is preempted by the
7 National Labor Relations Act. The AFL-CIO's purpose may have been to help "level the
8 playing field between non-union employers and unionized employers" (Western's Opp'n to
9 Countermot. to Amend at Ex. 1, 2: 3-4); however, there is no language demonstrating this
10 intent in the Amendment itself. The Amendment applies a minimum wage to all workers.
11 "[C]ourts should not add things to what a statutory text states or reasonably implies."
12 Douglas v. State, 130 Nev. Adv. Op. 31, 327 P.3d 492, 498 (2014).

13 There is one section of the Minimum Wage Amendment that favors unionized
14 workers. The provisions of the Amendment may be waived by a collective bargaining
15 agreement. Nev. Const., Art. 15, Sec. 16(B). The provisions cannot be waived by an
16 agreement between an individual worker and employer. Id. Whether this portion of the
17 Minimum Wage Amendment is preempted by federal law is not relative to this case.

18 If any provision of [the Minimum Wage Amendment] is declared
19 illegal, invalid or inoperative, in whole or in part, by the final decision
20 of any court of competent jurisdiction, the remaining provisions and all
21 portions not declared illegal, invalid or inoperative shall remain in full
22 force or effect, and no such determination shall invalidate the
23 remaining sections or portions of the sections of this section.

24 Nev. Const., Art. 15, Sec. 16 (D). This case has no relation to collective bargaining or
25 unionized employees. If this Court were to find that Sec. 16(B) is invalid, the rest of the
26 Minimum Wage Amendment would remain in effect. Therefore, this is not a valid ground
27 for the Court to deny Perera's Countermotion to Amend.

28 4. Separation of Powers

Western again argues that the Labor Commissioner does not have the
authority to define what the Minimum Wage Amendment meant by "health benefits." Now,

1 Western asserts that the interpretation should be left to the judiciary branch "through the
2 resolution of the individual's claims." (Western's Opp'n to Countermot. to Amend 18: 26-
3 27.) As previously discussed, NRS § 607.160 states that the "Labor Commissioner: (a) Shall
4 enforce all labor laws of the State of Nevada...The enforcement of which is not specifically
5 and exclusively vested in any other officer...(b) May adopt regulations to carry out the
6 provisions of paragraph (a)." The Minimum Wage Amendment is a labor law of the state of
7 Nevada. When the power to enforce a labor law is not specifically delegated to another
8 party, the Labor Commissioner has the authority to create regulations regarding that law in
9 order to enforce it. That precise procedure has been followed in the creation of NAC §
10 608.102.

11 The Labor Commissioner has followed statutory procedures for interpreting the
12 Minimum Wage Amendment. Therefore, this is not a valid ground for the Court to deny
13 Perera's Countermotion to Amend.

14 The Court should liberally grant leave to amend when justice requires. Perera has
15 shown how granting leave to amend his Second amended Complaint to add Irshad Ahmed
16 and Michael Sargeant as plaintiffs would serve justice. Western failed to raise a valid
17 ground to deny Perera's Countermotion. Therefore, the Court grants Perera's
18 Countermotion to Amend.

19 **D. Perera's Motion for Sanctions**

20 The Court denies Perera's motion for sanctions. There is no evidence that Western
21 filed its Motion to Dismiss purely to delay the case. Western responded to the operative
22 Complaint in this action, despite Perera's argument that he was willing to withdraw it.

23 **III. Conclusion**

24 The Court denies Perera's Motion for Reconsideration. The Court grants Western's
25 Motion to Dismiss in part. The Court grants Perera's Motion to Amend Complaint. The
26 Court denies Perera's Countermotion for Sanctions against Western.
27
28

1 The Court orders Perera to file a Third Amended Complaint. The Third Amended
2 Complaint will have three individuals as named plaintiffs: Laksiri Perera, Irshad Ahmed
3 and Michael Sargeant. Paragraph 19 of Perera's Third Amended Complaint must be
4 amended to reflect the correct statute of limitations as discussed above. The Third
5 Amended Complaint must also be amended to remove any claim for punitive damages.
6 Perera's second claim for relief pursuant to NRS § 608.040 is dismissed, and it cannot be
7 included in Perera's Third Amended Complaint.

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10 DATED this 1st day of December, 2015.

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14 LINDA MARIE BELL
DISTRICT COURT JUDGE

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25 LINDA MARIE BELL
26 DISTRICT JUDGE
27 DEPARTMENT VII
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date of filing, a copy of this Order was electronically served through the Eighth Judicial District Court EFP system or, if no e-mail was provided, by facsimile, U.S. Mail and/or placed in the Clerk's Office attorney folder(s) for:

Name	Party
Leon Greenberg, Esq. Leon Greenberg Professional Corporation	Counsel for Plaintiff
Malani L. Kotchka, Esq. Hejmanowski & McCrea LLC	Counsel for Defendant

Shelby A. Dahl

SHELBY A. DAHL
LAW CLERK, DEPARTMENT VII

AFFIRMATION

Pursuant to NRS 239B.030

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

/s/ Linda Marie Bell Date 11/23/15
District Court Judge

EXHIBIT "C"

EIGHTH JUDICIAL DISTRICT COURT CLERK OF THE COURT
CLARK COUNTY, NEVADA

Defendant.

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

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

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

14 I. Discussion

15 A. Defendant's Motion to Dismiss

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

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

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

7 **1. Minimum Wage in Nevada**

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

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

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

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

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

12 **2. Application of Thomas**

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

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

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

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

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

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

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

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

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

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

17 3. Statute of Limitations

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

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

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

6 An employee claiming violation of this section may bring an action
7 against his or her employer in the courts of this State to enforce the
8 provisions of this section and shall be entitled to all remedies available
9 under the law or in equity appropriate to remedy any violation of this
10 section, including but not limited to back pay, damages, reinstatement
or injunctive relief. An employee who prevails in any action to enforce
this section shall be awarded his or her reasonable attorney's fees and
costs.

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

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

14 If any employer pays any employee a lesser amount than the minimum
15 wage prescribed by regulation of the Labor Commissioner pursuant to
16 the provisions of NRS 608.250, the employee may, at any time within 2
years, bring a civil action to recover the difference between the amount
paid to the employee and the amount of the minimum wage.

17 NRS 608.260 (emphasis added).

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

26 Under Chapter 608's statutory framework, "the Labor Commissioner shall prescribe
27 increases in the minimum wage in accordance with those prescribed by federal law, unless
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1 the Labor Commissioner determines that those increases are contrary to the public
2 interest." NRS 608.250(1). Chapter 608 affords the Labor Commissioner discretion to
3 refuse minimum wage increases prescribed by federal law if the Labor Commissioner
4 determines such minimum wage increases are "contrary to the public interest." *Id.*

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

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

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

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

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

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

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

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

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

10 **1. Plaintiff's Claims**

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

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

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

11 **2. Class Certification**

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

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

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

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

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

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

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

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

13 **1. Leave to Amend Complaint**

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

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

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

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

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

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

4 Conclusion

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

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

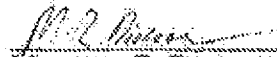
20
21 
22 _____
23 LINDA MARIE BELL
24 DISTRICT COURT JUDGE
25
26
27
28

LINDA MARIE BELL
DISTRICT JUDGE
DEPARTMENT VII

CERTIFICATE OF SERVICE

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

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


MICHAEL R. DICKERSON
LAW CLERK, DEPARTMENT VII

AFFIRMATION

Pursuant to NRS 238B.030

The undersigned does hereby affirm that the preceding Decision and Order filed in District Court case number AZ07425 DOES NOT contain the social security number of any person:

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

IN THE SUPREME COURT OF THE STATE OF NEVADA

WESTERN CAB COMPANY,

Petitioner,

vs.

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

Respondents,

and

LAKSIRI PERERA, IRSHAD
AHMED, MICHAEL SARGEANT
Individually and on behalf of others
similarly situated,

Real Parties in Interest.

Case No.: 69408

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

Electronically Filed
Mar 31 2016 04:19 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

**MOTION FOR LEAVE TO
SUPPLEMENT PETITIONER'S
RECORD AS TO MOTION FOR
STAY**

Pursuant to NRAP 27, Petitioner Western Cab Company ("Western Cab") seeks this Court's leave to supplement the record in support of Petitioner's March 9, 2016, Motion for Stay with a copy of an additional document filed by Real Parties in Interest Laksiri Perera ("Perera"), Irshad Ahmed ("Ahmed") and Michael Sargeant ("Sargeant") in the District Court.

When Western Cab filed its Motion for Stay in this Court, Petitioners Perera, Ahmed and Sargeant, all **former drivers** of Western Cab, had threatened to file a

motion for an injunction and the appointment of a special master to run Western Cab's business. On March 29, 2016, Perera, Ahmed and Sargeant actually filed their motion for injunctive relief, attached hereto as Exhibit 7. Western Cab requests that this Court consider the motion for injunctive relief filed by the three **former** employees (and no **current** employees) when considering Western Cab's Motion for Stay.

HEJMANOWSKI & McCREA, LLC



MALANI L. KOTCHKA

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Email: mlk@hmlawlv.com

Attorneys for Petitioner


CERTIFICATE OF SERVICE

The undersigned does hereby certify that pursuant to NRAP 25(c), a true and correct copy of the foregoing **MOTION FOR LEAVE TO SUPPLEMENT PETITIONER'S RECORD AS TO MOTION FOR STAY** was filed electronically with the Nevada Supreme Court Electronic Filing System, and a copy was served electronically on this 31st day of March, 2016, to the following:

Leon Greenberg, Esq.
GREENBERG, P.C.
2965 S. Jones Blvd., Suite E4
Las Vegas, NV 89146
Telephone: (702) 383-6085
Facsimile: (702) 385-1827
Email: leongreenberg@overtimelaw.com

And a true and correct copy of the foregoing **MOTION FOR LEAVE TO SUPPLEMENT PETITIONER'S RECORD AS TO MOTION FOR STAY** was served via first class, postage-paid U.S. Mail on this 31st day of March 2016, to the following:

The Honorable Linda Marie Bell
District Court Judge
Eighth Judicial District Court of Nevada
200 Lewis Avenue, #3B
Las Vegas, NV 89101



An Employee of Hejmanowski & McCrea LLC