IN THE SUPREME COURT OF THE STATE OF NEVADA

WESTERN CAB COMPANY,
Petitioner,
vs.
THE 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; AND MICHAEL SARGEANT, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,
Real Parties in Interest.

No. 69408

SUPPLEMENT TO THE RECORD IN SUPPORT OF THE MOTION TO STAY

EXHIBIT 7

EXHIBIT 7

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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

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

Leon Greenberg Professional Corporation

By: */s/ Leon Greenberg*
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NOTICE OF MOTION

PLEASE TAKE NOTICE THAT the plaintiff, by and through her attorneys of record, will bring the foregoing **MOTION FOR INJUNCTIVE RELIEF AND CLASS CERTIFICATION PURSUANT TO NRCP RULE 23(b)(2) AND RULE 23(B)(3)**, which was filed in the above-entitled case for hearing before this Court on May 3, 2016, at the hour of 9:00am.

Dated: March 28, 2016

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By: /s/ *Leon Greenberg*

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MEMORANDUM OF POINTS AND AUTHORITIES
SUMMARY

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

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

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

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

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

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

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

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

Defendant will presumably argue that under *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2557 (2011) and similar cases plaintiffs lack standing to seek the requested class certification and injunction since they are former employees who do not, individually, claim any prospect of future injury from defendant's conduct. Such argument is without merit as *Wal-Mart* is grounded in the "case or controversy" 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).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In addition to granting equitable relief, Nevada's Constitution also grants prevailing plaintiffs an award of attorney's fees. Plaintiffs' counsel should be awarded fees for securing the requested equitable relief (injunction). There is no need to delay such an award which has no bearing upon whether class counsel should receive a fee award for recovering actual damages for the class (the NRCP Rule 23(b)(3) "damages" class claims). Plaintiffs' counsel, with their reply submission, will provide a statement of their hours of work upon which such a fee award should be based (currently in excess of 7 hours in connection with just the preparation of this motion and communications with defendant to avoid the making of this motion).

II. THE COURT SHOULD CERTIFY THIS CASE AS A CLASS ACTION UNDER NRCP RULE 23(B)(3) FOR ALL DAMAGES OWED TO DEFENDANT'S TAXI DRIVER EMPLOYEES AS A RESULT OF DEFENDANT'S VIOLATIONS OF NEVADA'S CONSTITUTION THAT HAVE OCCURRED SINCE JULY 1, 2007

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

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

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

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

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

Shuette explains when the "commonality" element of NRCP Rule 23(a) is satisfied:

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

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

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

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

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?

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

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

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

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

- Defendants represented to the USDOL that the taxi drivers, despite their lack of accurate records, were working 12 hours per shift on average. Ex. "D," p. 3 ("Total hours worked column: the agreed average shift length (confirmed by ER [employer] and through interviews of 12 hours multiplied by the number of shifts (shifts column).") The veracity of that representation to the USDOL by the defendant, which was made about the drivers as a class and not any

particular driver, can be resolved on a class basis (in the event defendant wishes to dispute it);

- Although the USDOL found that each shift worked by a taxi driver was 12 hours, the named plaintiff Perera states taxi drivers' work shifts often exceeded 12 hours in length. Ex. "G," ¶ 5. According to Perera, that extra time was consumed with "end of shift" procedures required by defendant of its taxi drivers that often forced them to work 15 minutes, or more, longer than their official 12 hour shift. *Id.* The existence (or non-existence, if disputed by defendant) of those procedures, which Perera alleges existed for all of the taxi drivers, can be resolved on a class basis.

- All of the plaintiffs assert that defendant used a "no break" policy during their scheduled 12 hour shifts, meaning that all taxi drivers were working, and should be paid for, at least 12 hours during each shift. Ex. "G" and "I" ¶ 6 and Ex. "H" ¶ 5. To the extent that defendant wishes to dispute the existence of such a "no break time" policy, and assert that as a result taxi drivers were not actually working at least 12 hours during their 12 hour shifts, that is a common issue.

- Plaintiff Sargeant, who worked for defendant during a period of time that defendant was giving pay statements to taxi drivers purporting to include a record of "hours worked," asserts that such "hours worked" record may not include time he was required to "show up" for work but never actually given a taxi to drive and

after two hours sent home. Ex. "I" ¶ 7. The accuracy of the defendant's working time records is a common issue.

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

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

- Is defendant's "forced payment of expenses" (fuel charge payment) policy relevant to determining its compliance with the Nevada Constitution's minimum wage requirements? Defendant insists it is not and is seeking *mandamus* review of this Court's contrary finding. This is a common question for all of the class members and one that the defendant, presumably, may wish to appeal if the merits of its *mandamus* petition are never ruled upon.

- In the absence of any actual records of the fuel payments that the class members were forced to pay "out of pocket" what is the proper method of determining the amount of those payments? Defendant may argue that those payments cannot be considered when a driver lacks the receipts establishing the amount of each such payment. Plaintiffs would argue that such amounts can be suitably determined by examining defendant's records of the amount of miles driven for each taxi driver, the average miles per gallon of the type of vehicle each was driving, and the historical record of the average per gallon fuel cost in Clark County each month. The proper method of making this determination (or the inability of the Court to make any such determination, as may be

argued by the defendant) involves a question common to all of the class members.

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

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

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

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

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

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

- Does "provide" mean to have the "option to participate" in an employer's medical insurance benefit plan that meets all of the other requirements of N.R.S. Const. Art. 15, § 16? If yes, this means the employee (a) Need not actually enroll (participate) in the employer's medical insurance benefit plan and (b) Such medical insurance plan must, if the employee actually elected to enroll (participate) in the plan "provide" 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."

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

Once the Court resolves the meaning of the "to provide health benefits" issue it will make a common determination as to the which, if any, of defendants' taxi drivers needed to only be paid the $7.25 an hour minimum wage. That determination will be based upon the employee premium cost for the relevant coverage (either full family coverage for all employees, irrespective of whether they have dependents, or based

upon their "actual" status as single, married and/or with dependent children) and whether such cost exceeded 10% of the wages paid to them by defendants.

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

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

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

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

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

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

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

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

The defendant's "non-advisement" to the class members of their minimum wage rights has been found to create an equitable statute of limitations toll in analogous cases under federal law. *See, Bonham v. Dresser Industries, Inc.*, 569 F.2d 187, 193 (3rd Cir. 1977) (Holding, and finding support for the conclusion in other authorities, that 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

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

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

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

1. The predominance of common issues is established.

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

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

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

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

2. The superiority of a class resolution is established.

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

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

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

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

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

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

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

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

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

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

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

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

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

---

[1] One striking "overlap" issue from the USDOL findings that, standing alone, warrants class certification is the "$8.25 an hour," or "$1.00 an hour difference," issue. The USDOL found over $877,000 in unpaid minimum wages was owed to 594 drivers at the FLSA's $7.25 an hour minimum wage rate. If the applicable Nevada minimum 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).

IV. SUITABLE NOTICE SHOULD BE DISPATCHED MOST PROMPTLY TO THE CLASS MEMBERS

A proposed notice of class certification is annexed as Ex. "O." Plaintiffs' counsel will assume the costs of printing and mailing that notice. The Court is urged to direct the defendants to most promptly, within 10 days of its Order, produce the names and addresses of the class members so that plaintiffs' counsel can have such notice mailed within 30 days thereafter.

CONCLUSION

Wherefore, for all the foregoing reasons, the plaintiffs' motion should be granted in its entirety together with such other further and different relief that the Court deems just and proper.

Dated this 28th day of March, 2016.

Leon Greenberg Professional Corporation

By: */s/ Leon Greenberg*

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Attorney for Plaintiff

CERTIFICATE OF SERVICE

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

Motion for Injunctive Relief and Class Certification Pursuant to Nrcp 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"

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CLERK OF THE COURT

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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.: V **THIRD AMENDED COMPLAINT** **ARBITRATION EXEMPTION CLAIMED BECAUSE THIS IS A CLASS ACTION CASE**

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

JURISDICTION, PARTIES AND PRELIMINARY STATEMENT

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

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

CLASS ACTION ALLEGATIONS

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

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

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

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

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

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

claims are typical of those of the class.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

19. The named plaintiffs on behalf of themselves and the proposed plaintiff class members, seek, on this First Claim for Relief, a judgment against the defendant for minimum wages owed for the applicable statute of limitations period, which the Court has previously specified in this case is four years and would commence on September 23, 2010, and continuing into the future, such sums to be determined based upon an accounting of the hours worked by, and wages actually paid to, the plaintiff and the class members along with an award of damages for the increased, and false, tax liability the defendant has caused the plaintiffs and the class members to sustain, 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, and an award of attorneys' fees, interest and costs, as provided for by Nevada's Constitution and other applicable laws.

WHEREFORE, plaintiffs demand the relief as alleged aforesaid.

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

Dated this 2nd day of December, 2015.

Leon Greenberg Professional Corporation

By: */s/ Leon Greenberg*

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EXHIBIT "B"

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DAO

EIGHTH JUDICIAL DISTRICT COURT

CLERK OF THE COURT

CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

WESTERN CAB COMPANY,

Defendant.

Case No. A-14-707425-C

Dep't No. VII

DECISION AND ORDER

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

I. Procedural Background

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

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

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

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

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

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

II. Discussion

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

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

B. Western's Motion to Dismiss Second Amended Complaint

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

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

1. Minimum Wages from 2006

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

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

2. NRS § 608.040

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

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

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

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

3. Federal Preemption

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

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

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

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

a. ERISA and the ACA

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

The Minimum Wage Amendment and NAC § 608.102 do not act immediately or exclusively upon ERISA plans, not are ERISA plans essential to the laws' operation. 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

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

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

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

b. The Due Process Clause

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

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

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

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

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

4. Punitive Damages

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

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

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

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

C. Perera's Countermotion to Amend Complaint

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

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

1. Failure to State a Cause of Action

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

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

2. Jurisdiction

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

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

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

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

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

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

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

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

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

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,

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

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

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

D. Perera's Motion for Sanctions

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

III. Conclusion

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

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

DATED this 1st day of ~~November~~ December, 2015.

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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
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

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EXHIBIT "C"

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CLERK OF THE COURT

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

WESTERN CAB COMPANY,

Defendant.

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

DECISION AND ORDER

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

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)

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

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

I. Discussion

A. Defendant's Motion to Dismiss

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

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

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

1. Minimum Wage in Nevada

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

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

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

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

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

2. Application of Thomas

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

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

> There is no bright-line rule for determining whether a rule is new, but there are basic guidelines to follow . . . "When a decision merely interprets and clarifies an existing rule . . . and does not announce an altogether new rule of law, the court's interpretation is merely a restatement of existing law." Similarly, a decision is not new if "it has 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

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

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

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

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

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

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

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

3. Statute of Limitations

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

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

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

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

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

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

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

NRS 608.260 (emphasis added).

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

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

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

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

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

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

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

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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

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

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

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

1. Plaintiff's Claims

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

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

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

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

2. Class Certification

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

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

> [C]lass allegations may be stricken at the pleading stage, [but] the granting of motions to dismiss class allegations before discovery has commenced is rare. Indeed, while there is little authority on this issue within the Ninth Circuit, decisions from courts in other jurisdictions 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.' "

In re Wal-Mart Stores, Inc. Wage & Hour Litig., 505 F. Supp. 2d 609, 615 (N.D. Cal. 2007) (quoting Myers v. MedQuist, Inc., No. 05-4608, 2006 WL 3751210, *4 (D.N.J.2006) (also citing Abdallah v. Coca-Cola Co., No. Civ.A. 1:98CV3679-RW, 1999 WL 327835 (N.D.Ga.1999) (dismissal of class allegations prior to discovery is premature); 7AA Charles

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

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

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

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

1. Leave to Amend Complaint

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

2. Leave to Conduct NRCP 56(f) Discovery

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

Nevada Rule of Civil Procedure 56(f) provides,

> Should it appear from the affidavits of a party opposing the motion [for summary judgment] that the party cannot for reasons stated present by affidavit facts essential 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.

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

Conclusion

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

DATED this 15th day of June, 2015.

LINDA MARIE BELL
DISTRICT COURT JUDGE

LINDA MARIE BELL
DISTRICT JUDGE
DEPARTMENT VII

CERTIFICATE OF SERVICE

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

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

MICHAEL R. DICKERSON
LAW CLERK, DEPARTMENT VII

AFFIRMATION

Pursuant to NRS 2388.030

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

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

LINDA MARIE BELL
DISTRICT JUDGE
DEPARTMENT VII

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; Marylin 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-
2012-

(See Exhibit C-2)

EXEMPTIONS

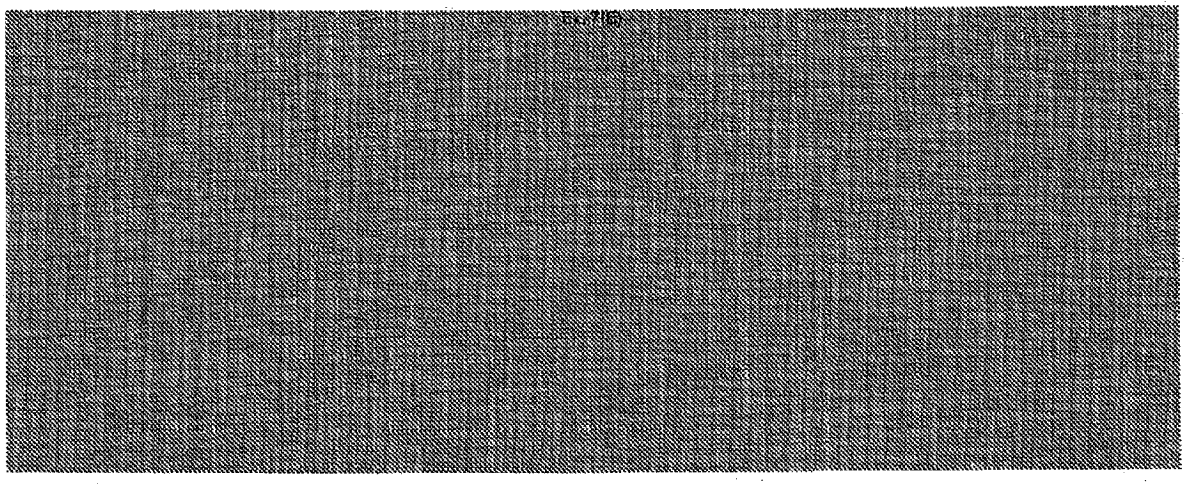
13 (b)(17) Applicable to: Taxicab drivers are exempt from overtime provisions

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 [redacted] 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 he 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 (30% 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 drivers. 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 fuil 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, WH[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.

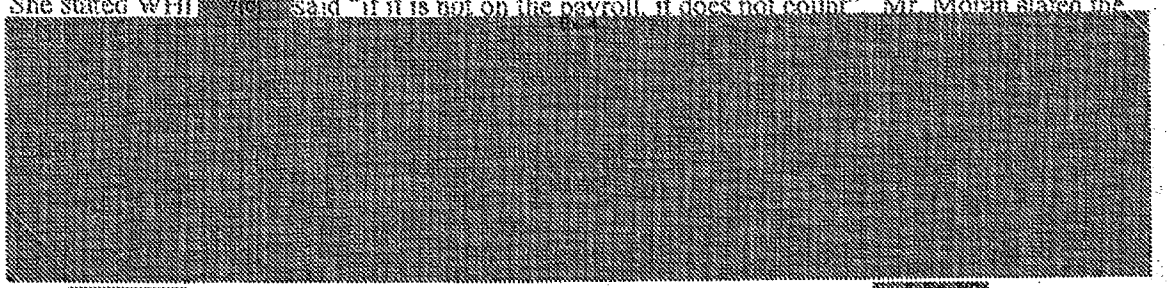
The firm was notified there were no Section 12 child labor violations found as the firm does not employ any drivers under the age of 21.

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. WH[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] now 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



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 CFR531.59, 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 informed them 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 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 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 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 there would not be a subsequent investigation after the back wages were paid. Ms. Sarver stated during the final conference with WHI 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 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 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.

[redacted]

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.

[redacted] Date: April 26, 2013

Wage and Hour Investigator

EXHIBIT "E"

LEON GREENBERG
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Leon Greenberg
Member Nevada, California
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Admitted to the United States District Court of Colorado

Dana Sniegocki
Member Nevada and California Bars

Fax: (702) 385-1827

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: Perera 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 then 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
& McCREA LLC
ATTORNEYS AT LAW

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MALANI L. KOTCHKA
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702.834.7645

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.

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.' *Szillagyi v. Testa*, 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:

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 'adventuresome 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

> 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

Malani L. Kotchka

MLK:rg

EXHIBIT "G"

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Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

WESTERN CAB COMPANY,

Defendant.

Case No.: A-14-707425-C

Dept.: V

DECLARATION OF LAKSIRI PERERA

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

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

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

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

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

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

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

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

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

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

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

Laksiri Perera

12/16/14
Date

EXHIBIT "A"

EXHIBIT "H"

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Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

LAKSIRI PERERA, Individually and on behalf of others similarly situated, Plaintiff, vs. WESTERN CAB COMPANY, Defendant.	Case No.: A-14-707425-C Dept.: V **DECLARATION OF IRSHAD AHMED**

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

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

2. I was employed by Western Cab Company for more than one year, until 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

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

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

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

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

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

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

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

Irshad Ahmed

Jan 27th 2015
Date

EXHIBIT "I"

DECL
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Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

LAKSIRI PERERA, Individually and on behalf of others similarly situated, Plaintiff, vs. WESTERN CAB COMPANY, Defendant.	Case No.: A-14-707425-C Dept.: V **DECLARATION OF MICHAEL SARGEANT**

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

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

2. I was employed by Western Cab Company for approximately 3 or 4 months, until approximately June 2014 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

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

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

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

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

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

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

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

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

Michael Sargeant

7-15-2015
Date

EXHIBIT "J"

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Attorneys for Plaintiff

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

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

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

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

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

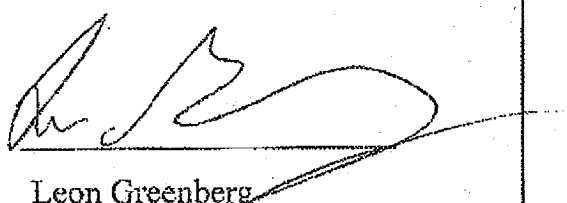
wages and other wages; *Jankowski v. Castle Construction*, Docket CV-01-164, United States District Court, Eastern District of New York, on behalf of a class of construction workers denied overtime wages; *Levinson v. Primedia*, Docket 02 Civ. 2222 (DAB), United States District Court, Southern District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

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

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

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

Affirmed this 28th day of March, 2016.



Leon Greenberg

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
[redacted]

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.

[redacted]

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

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

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

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

[redacted]

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

MODO Office: LVDO is MODO office.

EXEMPTIONS

213(a)(1) applicable to:
(1) Helen Tobman Martin, Director
541.100 Exemption
Manages business, hires & fires staff, and does the employee scheduling
[redacted]
(2) Martha Sarver, General Manager
541.100 Exemption

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

(3) Marylin 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: Per Martha Sarver and Helen Tobman the office staff only work 40 hours per week, no overtime.

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 mininmum 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 the added the payroll records and made the changes to the back wage computations, the results were: $285,229.89 due 431 employees. On Tuesday, December 13, 2011 I dropped off the new computations sheets and Summary of Unpaid Wages (WH-56) to Martha Sarver, General Manager at employers' establishment. She explained the owners Helen Tobman and Marylin Tobman as well as Attorney John Moran were all on vacation and would not return until after Christmas. I told her I needed to have the Summary of Unpaid Wages back and signed before the end of the year. She agreed to have it to me by Wednesday, December 28th.

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

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.

[redacted] **Date:** _____

Wage Hour Investigator

[redacted]

EXHIBIT "L"

THE FIRST JUDICIAL DISTRICT COURT

IN AND FOR CARSON CITY, NEVADA

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

Plaintiff,

vs.

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

Defendants.

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

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

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

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

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

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

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

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

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

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

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

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

Section A of the Minimum Wage Amendment provides:

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

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

Nev. Const. art. XV, § 16(A).

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

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

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

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

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

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

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

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

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

implements the language of the Amendment.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

James Shirley
DISTRICT COURT JUDGE

Submitted by:

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EXHIBIT "M"

STATE OF NEVADA
Department of Business & Industry
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Carson City, Nevada 89701
Telephone (775) 687-4850 Fax (775) 687-6409

Jim Gibbons
Governor

Mendy Elliott
Director

Michael Tancheff
Labor Commissioner

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 QUALIFIYING 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)

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

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

or

555 East Washington, Suite 4100
Las Vegas, Nevada 89101
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EXHIBIT "N"

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CLERK OF THE COURT

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Attorneys for Plaintiffs

DISTRICT COURT
CLARK COUNTY, STATE OF NEVADA

CHRISTOPHER THOMAS, and CHRISTOPHER CRAIG, Individually and on behalf of others similarly situated,

Plaintiffs,

vs.

NEVADA YELLOW CAB CORPORATION, NEVADA CHECKER CAB CORPORATION, and NEVADA STAR CAB CORPORATION,

Defendants.

Case No.: A-12-661726-C

Dept.: XXVIII

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

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

11/13/15 (28)

THE COURT FINDS:

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

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

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

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

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

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

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

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

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

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

IT IS HEREBY ORDERED:

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

IT IS FURTHER ORDERED:

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

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

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

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

IT IS SO ORDERED.

Dated this 20 day of November, 2015.

Hon. Ronald J. Israel
District Court Judge

Submitted:
By:

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

Defendants.

Case No.: A-12-669926-C

DEPT.: I

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

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

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

THE COURT FINDS:

In Respect to the Request for Class Certification

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

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

As an initial matter, the nature of the claims made in this case are of the sort for which class action treatment would, at least presumptively, likely be available if not sensible. A determination of whether an employee is owed unpaid minimum hourly wages requires that three things be determined: the hours worked, the wages paid, and the applicable hourly minimum wage. Once those three things are known the minimum wages owed, if any, are not subject to diminution by the employee's contributory negligence, any state of mind of the parties, or anything else of an individual nature that has been identified to the Court. Making those same three determinations, involving what is essentially a common formula, for a large group of persons, is very likely to involve an efficient process and common questions. The minimum hourly wage rate is set at a very modest level, meaning the amounts of unpaid minimum wages likely to be owed to any putative class member are going to presumptively be fairly small, an additional circumstance that would tend to weigh in favor of class certification.

In respect to granting the motion and the record presented in this case, the Court finds it persuasive that a prior United States Department of Labor ("USDOL")

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

2014.

The first such question would be whether the class members are owed additional minimum wages, beyond that agreed to be paid in the USDOL consent judgment, and for the period covered by the consent judgment, by virtue of the Minimum Wage Amendment imposing an hourly minimum wage rate that is $1.00 an hour higher than the hourly minimum wage required by the FLSA for employees who do not receive "qualifying health insurance." The Court concludes that resolving such "qualifying health insurance" question involves issues common to all of the class members and defendants have not proffered any meaningful evidence tending to contradict such conclusion. The second such question would be whether the class members are owed additional minimum wages, beyond that alleged by USDOL for the period covered by the consent judgment, by virtue of the Minimum Wage Amendment not allowing an employer a "tip credit" towards its minimum wage requirements, something that the FLSA does grant to employers in respect to its minimum wage requirements. It is unknown whether the USDOL consent judgment calculations include or exclude the application of any "tip credit" towards the FLSA minimum wage deficiency alleged by the USDOL against the defendants.

In respect to the "tip credit" issue plaintiffs have also demonstrated, and defendants do not dispute, a violation of Nevada's Constitution existing prior to June of 2014. Plaintiff has provided to the Court payroll records from 2014 for taxi driver employee and class member Michael Sargeant indicating that he was paid $7.25 an

hour but only when his tip earnings are included. Defendant does not dispute the accuracy of those records. Nor has it produced any evidence (or even asserted) that the experience of Michael Sargeant in respect to the same was isolated and not common to many of its taxi driver employees. The Nevada Constitution's minimum wage requirements, unlike the FLSA, prohibits an employer from using a "tip credit" and applying an employee's tips towards any portion of its minimum wage obligation. The Sargeant payroll records, on their face, establish a violation of Nevada's minimum wage standards for a certain time period and strongly support the granting of the requested class certification.

The Court makes no finding that the foregoing two identified common questions are the only common questions present in this case that warrant class certification. Such two identified issues are sufficient for class certification as the commonality prerequisite of NRCP Rule 23(a) is satisfied when a "single common question of law or fact" is identified. *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 848 (2005). In addition, there also appear to be common factual and legal issues presented by the claims made under NRS 608.040 for statutory "waiting time" penalties for former taxi driver employees of defendants and whether defendant Nady can be found, personally liable, as alleged in the Third and Fourth Claims for Relief in the Second Amended and Supplemental Complaint, for any monies owed to the class members that would otherwise be just the responsibility of the corporate defendants. Such common questions are readily apparent as NRS 608.040 is a strict liability

statute and the conduct alleged by Nady that would impose liability upon him is common to the class, as it involves his direction and control of the corporate defendants and not his actions towards any class member individually.

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

desirability of centralizing the resolution of the common questions presented by the over 430 class members in a single proceeding.

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

warrant the granting of injunctive relief.

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

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

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

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

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

Therefore

IT IS HEREBY ORDERED:

Plaintiffs' Motion to Certify Class Action Pursuant to NRCP 23(b)(3) is **GRANTED**. The class shall consist of the class claims as alleged in the Second Amended and Supplemental Complaint of all persons employed by any of the defendants as taxi drivers in the State of Nevada at anytime from July 1, 2007 through December 31, 2015, except such persons who file with the Court a written statement of their election to exclude themselves from the class as provided below. Also excluded from the class is Jasminka Dubric who has filed an individual lawsuit against the defendant A CAB LLC seeking unpaid minimum wages and alleging conversion by such defendant, such case pending before this Court under Case No. A-15-721063-C. The class claims are all claims for damages that the class members possess against the defendants under the Minimum Wage Amendment arising from unpaid minimum wages that are owed to the class members for work they performed for the defendants from July 1, 2007 through December 31, 2015; all claims they may possess under NRS 608.040 if they are a former taxi driver employee of the defendants and are owed unpaid minimum wages that were not paid to them upon their employment termination as provided for by such statute; and the claims alleged

against defendant Nady in the third and fourth claims for relief in the Second Amended and Supplemental Compliant. Leon Greenberg and Dana Sniegocki of Leon Greenberg Professional Corporation are appointed as class counsel and the named plaintiffs Michael Murray and Michael Reno, and class member Michael Sargeant, are appointed as class representatives. The Court will allow discovery pertaining to the class members and the class claims.

IT IS FURTHER ORDERED:

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

IT IS FURTHER ORDERED:

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

Nevada from July 1, 2007 through December 31, 2015, such information to be provided in an Excel or CSV or other agreed upon computer data file, as agreed upon by counsel for the parties, containing separate fields for name, street address, city, state and zip code and suitable for use to mail the Notice of Class Action ;

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

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

(4) Class members seeking exclusion from the class must file a written statement with the Court setting forth their name, address, and election to be excluded from the class, no later than 55 days after the mailing of the Notice of Class Action as

provided for in (2), above.

IT IS FURTHER ORDERED:

Plaintiffs' motion to appoint a Special Master under NRCP Rule 53 is denied without prejudice at this time.

IT IS SO ORDERED.

Dated this 9 day of January, 2016.

Hon. Kenneth Cory
District Court Judge

Submitted:

By: _____
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Dana Sniegocki, Esq.
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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

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

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

THE COURT IS NEUTRAL

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

IF YOU WANT MORE INFORMATION

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

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

Nevada's Constitution protects you from any retaliation or discharge from your employment for participating in this case or remaining a member of the class. 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