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IN THE SUPREME COURT OF NEVADA

Sup. Ct. No. 69773

MICHAEL SARGEANT, , Individually and on behalf of others similarly situated, Petitioners, vs. HENDERSON TAXI, Respondents,	Dist. Ct No.: A-15-714136-C

APPELLANT'S OPENING BRIEF

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Petitioners,	)	
vs.	)	
HENDERSON TAXI,	)	
Respondents,	)	

NRAP RULE 26.1 DISCLOSURE STATEMENT

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that the following are persons and entities described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

This undersigned's client in this case, Appellant Michael Sargeant, is an individual and is not a corporation. Michael Sargeant is not using a pseudonym in this case. The only counsel appearing for Michael Sargeant in this case, and

expected to appear for him in the future in this case, are Dana Sniegocki and Leon Greenberg of Leon Greenberg Professional Corporation.

Dated: July 27, 2016

Respectfully submitted,
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NRAP RULE 17 ROUTING STATEMENT

This appeal, in compliance with NRAP Rule 17, is to be heard and decided by the Nevada Supreme Court pursuant to NRAP Rule 17 (a) (13) as it raises as its principal issue at least two questions of first impression involving the Nevada Constitution. Specifically, this appeal concerns Subpart (B) of Article 15, Section 16 of the Nevada Constitution (the "Minimum Wage Amendment" or "MWA") conferring on Nevada employees the right to receive certain minimum wages and restricting the waiver of that right. It raises a question of what conduct by a labor union can constitute a valid waiver of those minimum wage rights. It also raises a question of whether a non-judicially supervised settlement between an employee and an employer of an MWA claim is valid or is void as a waiver of minimum wage rights prohibited by the MWA. Neither of those questions have previously been addressed by the Nevada Supreme Court.

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal because it is an appeal of a final judgment. The Order granting summary judgment and constituting a final judgment was entered by the District Court in this case on February 3, 2016 and Notice of Entry of the same served by electronic delivery on February 15, 2016. The Notice of Appeal was served and filed on February 9, 2016.

STATEMENT OF ISSUES PRESENTED

Article 15, Section 16, of the Nevada Constitution (the Minimum Wage Amendment or "MWA") guarantees a minimum wage to Nevada employees. This appeal concerns the district court's application of the first two sentences of Subpart (B) of the MWA which state:

> The provisions of this section [the MWA] may not be waived by agreement between an individual employee and an employer. All of the provisions of this section, or any part hereof, may be waived in a bona fide collective bargaining agreement, but only if the waiver is explicitly set forth in such agreement in clear and unambiguous terms.

If the district court erred in applying the foregoing requirements of the MWA this Court will also have to consider whether the district court erred in denying class

certification and other relief requested under NRCP Rule 23.

The specific questions this Court is called upon to answer are:

(1) Can a collective bargaining agreement's ("CBA's") grievance resolution process terminate an employee's right to bring a MWA lawsuit for minimum wages even though the CBA does not waive any MWA rights?

If the Court answers question (1) in the affirmative, it must also answer the following question:

(2) Can such a CBA grievance resolution terminate an employee's right to prosecute their earlier filed MWA lawsuit when (a) The CBA states that disputes involving the employer's compliance with any law must be "decided only by a court of law of competent jurisdiction" and not through the CBA's grievance process; (b) The CBA states that no grievance resolution shall "have retroactive effect in any other case;" and (c) The grievance resolution does not mention any waiver of, or change to, either of those CBA provisions?

If the Court answers questions (1) and (2) in the affirmative, it must also answer the following question:

(3) Did the CBA grievance resolution in this case, pursuant to its terms, fully settle the MWA claims of Henderson Taxi's ("Henderson's") taxi driver employees and also deprive them of any right to have the district court enforce that settlement?

If the Court answers any of the foregoing three questions in the negative it must also answer one or both of the following two questions:

(4) Was the district court correct in holding that the acknowledgments Henderson secured from some of its taxi drivers, stating they had been fully compensated for any unpaid minimum wages owed to them, were valid?

(5) Was the district court correct in denying class certification and other relief under NRCP Rule 23?

STATEMENT OF THE CASE

The appellant, Michael Sargeant ("Sargeant"), filed this case on February 19, 2015 in the Eighth Judicial District Court, alleging in his class action complaint that Henderson failed to compensate him and a class of similarly situated taxi drivers with the minimum wage required by the MWA. AA 1-7.[1]

On March 19, 2015 Henderson answered Sargeant's complaint and denied all allegations that it owed Sargeant or any of its taxi drivers unpaid minimum wages. AA 8-15. On May 27, 2015 Sargeant filed a motion for class certification and other relief which was opposed by Henderson. AA 16-276. On October 8, 2015 the district court entered an Order denying that motion. AA 318-322. On November 11, 2015 Henderson filed a motion for summary judgment which was opposed by Sargeant. AA 355-368, 392-402. On February 3, 2016 the district court entered an Order granting Henderson's motion for summary judgment. AA 413-418.

[1] Referenced page numbers of Appellant's Appendix are referred to as "AA."

STATEMENT OF FACTS

Summary of Facts

Approximately one month after answering Sargeant's class action complaint Henderson began a coordinated campaign to bypass Sargeant's counsel, and the judicial system, and secure direct settlements of the class claims by the over 1000 taxi driver class members. It did so under the direction of its attorneys and without any advance advisement to Sargeant's counsel or the district court. It did so by sending the class members letters mentioning this case and stating it was brought by attorneys seeking "to line their own pockets rather than to truly benefit individuals like you." AA 51. It asked each class member, in exchange for a payment calculated by it in an unknown manner, to execute an acknowledgment stating they had been fully paid all of the minimum wages they may have been owed by Henderson. AA 51-52, 57. A substantial majority of the class members executed those acknowledgments. AA 192-193.

Henderson, when advised by Sargeant's counsel that its actions were improper, ignored such counsel's request that it engage in a transparent, and

judicially approved, process to resolve the class members' minimum wage claims. AA 59-61. Instead it offered Sargeant, in exchange for a dismissal with prejudice of this case, a $5,000 damages payment, an amount greatly in excess of the $107.23 in unpaid minimum wages Henderson claimed Sargeant was owed, along with a payment to his attorney of $20,000 in fees. AA 63. One month later, after Sargeant declined that settlement and dismissal proposal, Henderson secured a "resolution" with its taxi drivers' union of a "grievance" that it had rejected 11 months earlier. AA 272,[2] 267. The district court later granted Henderson summary judgment, finding the grievance resolution settled all MWA claims of Henderson's taxi drivers, including those of Sargeant and the other taxi drivers who never signed any acknowledgment or accepted any payment from Henderson. AA 413-418.

Detailed Statement of Facts

Sargeant was employed by Henderson as a taxi driver until approximately

[2] AA 272, the grievance resolution, bears no execution date but the fax transmission record at the top of the page indicates it was faxed from the union on June 5, 2015.

July of 2013. AA 80. On June 26, 2014 this Court issued its opinion in *Thomas v. Nevada Yellow Cab*, 327 P.3d 518 (2014) and found that taxi drivers in Nevada were covered by the MWA. In response to the *Thomas* decision the Industrial Technical & Professional Employees Union, Local 4873 (the "ITPEU"), the union representing Henderson's taxi drivers, filed a grievance with Henderson on July 16, 2014 pursuant to its CBA with Henderson. AA 195, 254-256. On July 30, 2014 Henderson denied that grievance. AA 267.

The Henderson CBA's grievance procedure grants the ITPEU the right to have any grievance not cooperatively resolved to its satisfaction determined by an arbitrator. AA 256-258. There is no evidence that the ITPEU either threatened to or attempted to proceed with arbitration of its grievance after it was denied by Henderson.

On February 19, 2015 Sargeant filed his class action lawsuit for minimum wages with Henderson answering the same on March 19, 2015. AA 1-15.

On April 8, 2015 Henderson, presumably under the advice of its counsel but without notice to Sargeant's counsel or the district court, mailed or delivered by

hand letters to over 1000 of its current and former taxi drivers, the putative class members. AA 19.[3] Those letters acknowledged, without naming Sargeant, the existence of this lawsuit. AA 51. They also stated that "[i]n these types of lawsuits, the attorneys are the ones who win, not employees or companies, and they bring case after case trying to get settlements to line their own pockets rather than to truly benefit individuals like you." *Id.* The April 8, 2015 letters do not mention any grievance with the ITPEU, only mentioning that Henderson had "discussed" the minimum wage issue with the union and was "on the verge of a policy change" when this lawsuit was filed. *Id.*

Henderson's April 8, 2015 letters state that it had determined the class member would be owed a specified amount of unpaid minimum wages, if this Court's decision in *Thomas* made the MWA applicable to taxi drivers for a two

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[3] This is recited in Sargeant's brief to the district court and was not disputed by Henderson. Sargeant's counsel's declaration to the district court discussed a review of letters sent to 487 former drivers and that 336 of those drivers did not sign acknowledgment forms, while 100% of the current drivers had signed those acknowledgments. AA 338-339. Henderson affirmed that a "substantial majority" of all drivers had signed acknowledgments in response to its letters. AA 192-193. If a "substantial majority" is at least 67% Henderson attempted to obtain acknowledgments from over 1000 taxi drivers.

year period prior to June of 2014. *Id.* Henderson did ***not*** make those payments to its currently employed taxi drivers by adding them to its normal payroll payments. It prepared separate checks that it gave to its current, and former, taxi drivers only after they signed "acknowledgments" that they were receiving all minimum wages owed to them. AA 57. Its former taxi driver employees were told in the letters mailed to them "[i]f you wish to receive the check, please sign and date the enclosed acknowledgment and return it to us using the self-addressed, postage-prepaid envelope (also enclosed)." AA 68-69.

The "acknowledgments" Henderson secured from the taxi drivers included an "affirmation" that the signing taxi driver "....including this payment, has been paid all compensation, including wages (including minimum wage)" that they "may have been entitled" from Henderson. AA 57. Henderson alleged in its brief to the district court, but did not corroborate through any declaration, that class members could sign a different "acknowledgment" containing no such "paid all minimum wages" affirmation. AA 127-128, 276. No executed "non-affirmation" acknowledgments exist and "a substantial majority" of the class members signed

acknowledgments affirming they had been paid all minimum wages owed to them. AA 338-339, 192-193.

On April 17, 2015 Sargeant's counsel, upon becoming aware of Henderson's April 8, 2015 letters, wrote to Henderson's counsel. AA 59-61. It advised Henderson it was acting improperly, and could be subject to sanctions, by securing non-judicially supervised releases of the class members' minimum wage claims. *Id.* Sargeant's counsel invited Henderson, in lieu of facing a motion for sanctions, to work cooperatively to remedy its improper conduct and undertake a transparent, and judicially supervised, process to resolve those minimum wage claims. *Id.*

On May 5, 2015, Henderson's counsel corresponded with Sargeant's counsel. AA 63. Henderson did not accept Sargeant's counsel's invitation of April 17, 2015. Instead Henderson offered Sargeant, individually, a settlement of $5,000 (while also stating he was only actually owed $107.23 in unpaid minimum wages) and his counsel $20,000 in attorney's fees and costs, in exchange for a "dismissal with prejudice of the pending action." *Id.*

On May 27, 2015 Sargeant filed his motion for class certification, sanctions,

and other relief. AA 16-121. On June 5, 2015,[4] Henderson secured from the ITPEU a written agreement (the "grievance resolution") confirming that it was entering into a resolution with the ITPEU of the grievance Henderson had denied in July of 2014. AA 272. The grievance resolution states, in its entirety:

> On July 16, 2014, pursuant to Sections V (Wages) and XV (Grievance) of the collective bargaining agreement between the ITPEU/OPEIU Local 487 AFL-CIO and Henderson Taxi, the ITPEU/OPEIU grieved the issue of Henderson Taxi's failure to pay at least the state minimum wage under the amendments to the Nevada Constitution on behalf of the Bargaining Unit. After discussion with the Company, the ITPEU/OPEIU agree that the following actions by Henderson Taxi resolve the grievance pursuant to Section XV of the CBA:
>
> > Henderson Taxi shall pay at least the state minimum wage on a going forward basis, and;
> > Henderson Taxi shall compensate all of its current taxi drivers, and make all reasonable efforts to compensate all former taxi drivers employed during the prior two year period, the difference between wages paid and the state minimum wage going back two years. Henderson Taxi shall also make reasonable efforts to obtain acknowledgements [sic] of the payments to employees and former employees and give them an opportunity to review records if the individual driver questions the amount calculated by Henderson Taxi.
>
> Accordingly, the ITPEU/OPEIU considers this matter formally settled under the collective bargaining agreement between Henderson Taxi and the ITPEU/ OPEIU and state law as implemented through such collective

[4] The one page grievance resolution, presumably drafted by Henderson, contains no signature date or execution date. The fax transmission history at the top indicates it was transmitted from the ITPEU on 06/05/2015.

bargaining agreement. Pursuant to Article XV, Section 15.7, this resolution is final and binding on all parties.

Section V (Wages) of the CBA makes no mention of any obligation by Henderson to pay minimum wages under Nevada law. AA 242-243. It is solely concerned with the amount (percentage) of the taxi driver's "book" (fares collected from customers) that the driver must be paid by Henderson Taxi. *Id.*

Section XV (Grievance) of the CBA sets forth a process for resolving grievances and defines a grievance as follows:

> 15.1 A grievance is defined as a claim or dispute by an employee, or the Union, concerning the interpretation or the application of this Agreement, except those relating to the no strike/no lockout provisions. AA 254.

It also limits the scope of any grievance resolution by providing that:

> 15.8 The resolution of a grievance shall not be precedential, nor have retroactive effect in any other case. AA 255.

The CBA also excludes from its grievance procedure disputes that are based upon any law, as Section XVIII (Miscellaneous) of the CBA provides:

> 18.3 COMPLIANCE WITH LAW: The parties shall comply with all laws which properly apply to the employer-employee relationship, including but not limited to, laws prohibiting discrimination on the basis of race, creed, color, religion, sex, national origin or age. Any violation of such laws, and any dispute over the meaning and interpretation of such laws, shall

> not be subject to resolution through articles XV [Grievance] and XVI [Arbitration] of this Agreement, but shall be decided only by a court of law of competent jurisdiction. AA 260-261.

The CBA contains no term waiving any rights granted by the MWA. Other Las Vegas taxi companies, as part of a CBA with another union and not the ITPEU, have secured CBA language that in clear and unambiguous terms waives their drivers' rights under the MWA. AA 309-310. No comparable agreement between Henderson and the ITPEU exists.

SUMMARY OF ARGUMENT

The district court's accord and satisfaction finding was in error as the CBA did not "clearly and unambiguously" allow the taxi drivers' MWA rights to be limited by a CBA grievance resolution.

The MWA grants employees a right to sue for unpaid minimum wages in Nevada's courts and prohibits agreements between individual employees and employers that waive any right granted by the MWA. It only allows such a waiver of MWA rights, in full or in part, including the right of employees to prosecute MWA claims in Nevada's courts, to be made in "clear and unambiguous terms" in a CBA. The Henderson CBA contains no wavier, much less one "in clear and

unambiguous terms," of any MWA rights. Nor did the CBA authorize the resolution of MWA claims, or Sargeant's previously filed MWA lawsuit, through its grievance and arbitration process. It expressly prohibited the resolution through that process of any claims arising under any law, such as claims under the MWA. As a result, no "accord and satisfaction" and settlement of the taxi drivers' MWA claims, or Sargeant's earlier filed lawsuit, could arise from the Henderson Taxi/ITPEU grievance resolution and the district court's contrary finding was erroneous.

The district court's accord and satisfaction finding is not supported by the terms of the grievance resolution upon which it was based.

Assuming, *arguendo,* that under the CBA the ITPEU could have entered into an accord and satisfaction of the Henderson taxi drivers' MWA rights, the district court erred by concluding that the grievance resolution constituted such a settlement. The grievance resolution is silent on the MWA claims that any individual Henderson taxi drivers might bring, or in Sargeant's case had already elected to bring, in Nevada's courts. It states the ITPEU was considering "this matter formally settled under the collective bargaining agreement" pursuant to

"state law as implemented through such collective bargaining agreement." It then refers to such resolution as "final and binding" pursuant to the grievance resolution provisions of the CBA.

The grievance resolution was between the ITPEU and Henderson as to whatever rights, if any, arise under, or are "implemented" by, the CBA and the CBA's grievance procedure. It is completely silent on resolving any legal rights possessed by the taxi drivers individually and not through or as a result of the CBA. Such silence cannot be construed as a settlement terminating the right of Henderson's taxi drivers to bring suit under the MWA in Nevada's Courts (or as a settlement of Sargeant's lawsuit filed *prior* to that grievance resolution).

The district court erred in failing to void the class member "acknowledgments" and in denying class certification and the other relief requested by Sargeant.

The district court erred in denying Sargeant's request to void the "paid all minimum wages owed" acknowledgments Henderson secured from the class members. The MWA, by prohibiting individual employee and employer agreements waiving its protections, renders such coercive and non-judicially

supervised "paid in full" agreements void. If the MWA does not render all non-judicially supervised releases void it must at least do so, as in this case, when there is no *bona fide* settlement of a disputed MWA claim. Henderson's releases are also void because they were obtained through misleading, and non-judicially approved, coercive communications with the potential class members after Sargeant's class action MWA lawsuit had been filed.

The district court erred in finding that the need to make individualized determinations required a denial of Sargeant's motion for class certification and other relief. Such finding, to the extent it was based upon the class member acknowledgments secured by Henderson, is in error as those acknowledgments are void and without legal effect. Such finding, to the extent it was based upon a need to make individualized determinations of each class member's health benefits status is in error for four reasons: a class action could proceed for all Henderson taxi drivers just as to claims under the "lower tier" and "health benefits provided" minimum wage rate; common questions of law sufficient for class certification exist as to how the class members' health benefit status should be determined; there

is no evidence that a class resolution involving the higher tier "no health benefits provided" minimum wage would require individualized determinations; and Henderson has already, using the information in its possession and under its own calculations, determined that over 1,000 of its taxi drivers are owed minimum wages for a two year period.

APPLICABLE STANDARD OF REVIEW

The district court's decision granting summary judgment to Henderson is reviewed by the Supreme Court under a *de novo* standard without any deference to the district court's findings. *Wood v. Safeway, Inc.,* 121 Nev. 724, 729; 121 P.3d 1026, 1029 (2005). Summary judgment is only appropriate when the pleadings and other evidence indicates there is no genuine dispute as to any issues of material fact and the moving party is entitled to a judgment as a matter of law. *Id.* When reviewing a decision granting summary judgment, the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party. *Id.*

The district court's denial of Sargeant's motion for class certification is

reviewed for an abuse of discretion. *Shuette v. Beazer Homes Holdings Corp.*, 124 P.3d 530, 537 (Nev. Sup. Ct. 2005). The district court in exercising such discretion must "pragmatically determine" whether plaintiffs "have shown that 'it is better to proceed as a single action, [than as] many individual actions[,] to redress a single fundamental wrong.' " *Id.*, citing and quoting *Deal v. 999 Lakeshore Association*, 579 P.2d 775, 778–79 (Nev. Sup. Ct. 1978). In analyzing whether class action certification should be granted the district court should "generally accept the allegations of the complaint as true" and "[a]n extensive evidentiary showing is not required." *Meyer v. Eighth Judicial Dist. Court*, 885 P.2d 622, 626 (Nev. Sup. Ct. 1994). The existence of a common question of law *or* fact, standing alone, is sufficient to warrant class certification. *Id.*, 885 P.2d at 627. In complex cases the district court should exercise its discretion to grant conditional class certification, if appropriate, and "then reevaluate the certification in light of any problems that appear post discovery or later in the proceedings." *Shuette*, 124 P.3d at 544. The United States Ninth and Second Circuit Courts of Appeals have held that they will grant a district court "notably more deference" in

reviewing a decision to grant class certification than when they review a denial of class certification. *Parsons v. Ryan,* 754 F.3d 657, 673 (9th Cir. 2014) and *Levitt v. J.P. Morgan Securities, Inc.*, 710 F.3d 454, 464 (2nd Cir. 2013).

It is submitted that the denial of the other relief sought by Sargeant, all of such relief seeking to remedy Henderson's conduct subverting the NRCP Rule 23 class certification process, should be reviewed under the same standard as its denial of Sargeant's request for class certification.

ARGUMENT

I. THE DISTRICT COURT ERRED IN FINDING THAT THE MINIMUM WAGE CLAIMS OF ALL HENDERSON TAXI DRIVERS WERE SETTLED AND FULLY RESOLVED BY HENDERSON AND THE ITPEU

A. Henderson's taxi drivers cannot individually waive their right under the MWA and none of their MWA rights have been waived in full or in part by a CBA.

The rights granted under the MWA, including the right of an employee to bring a lawsuit in Nevada's courts to remedy MWA violations, "may not be waived by agreement between an individual employee and an employer." Nevada Constitution, Article 15, Section 16, Subpart (B). Those rights may be waived, in

full or in part, in a collective bargaining agreement "....but only if the waiver is explicitly set forth in such agreement in clear and unambiguous terms." *Id.* It is undisputed that the CBA entered into between Henderson and the ITPEU contains no such waiver.

B. The district court erred in finding that employees may waive or settle claims under the MWA involving bona fide disputes without judicial supervision.

The district erroneously court held that "...individuals and groups are fully entitled to waive or settle state minimum wage claims [arising under the MWA] with or without judicial or administrative review when there exists a *bona fide* dispute," citing *Chindarah v. Pick Up Stix, Inc.*, 171 Cal. App.4th 796, 803 (Cal. Ct. App. 2009) and *Nordstrom Commission Cases*, 186 Cal. App.4th 576, 590 (Cal. Ct. App. 2010). AA 416.

D.A. Shulte, Inc. v. Gangi, 328 U.S. 108, 116 (1946) ("*Gangi"*), relying upon *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945) ("*O'Neil")*, held that minimum wage claims under the federal Fair Labor Standards Act (the "FLSA"), involving *bona fide* disputes over FLSA coverage, could *not* be settled without

court approval, as the FLSA's purpose "...to secure for the lowest paid segment of the nation's workers a subsistence wage, leads to the conclusion that neither wages nor the damages for withholding them are capable of reduction by compromise for controversies over coverage." *Id.* Nevada has similarly recognized that public policy considerations can bar the enforcement of a contract to release or forego legal claims. *See, Clark v. Columbia/HCA Information Services, Inc.,* 25 P.3d 215, 224 (Nev. Sup. Ct. 2001) (Denying enforcement of release for various reasons, including its violation of the public policy of encouraging employee whistleblowing).

The prohibition on non-judicially supervised settlements of federal minimum wage claims has been applied to a state minimum wage law by the only state court of final appeals to consider the issue. *See*, *McKeown v. Kinney Shoe Corp.*, 820 P.2d 1068, 1069-71 (Sup. Ct. Alaska 1991) (Alaska law). Decisions in other jurisdictions are in accord with that view. *See*, *Lewis v. Giordano's Enterprises, Inc.*, 921 N.E.2d 740, 749-751 (App. Ct. Ill. 2009) (Illinois law) and *Rehberg v. Flowers Baking Company of Jamestown LLC*, ___ F. Supp. 3d ____, 2016 Westlaw

626565, February 16, 2016 (W.D.N.C.2016) (North Carolina law). Waivers or releases of rights under state minimum wage laws governing public employees have also been held void on public policy grounds. *See, Anderson v. City of Jacksonville*, 41 N.E. 2d 956 (Sup. Ct. Illinois 1942); *Kucera v. City of Wheeling*, 215 S.E.2d 216, 219 (Sup. Ct. West Virginia 1975); *State Ex. Rel. Rothrum v. Darby*, 137 S.W. 2d 532, 537 (Sup. Ct. Missouri 1940); *Allen v. City of Lawrence*, 61 N.E.2d 133, 136 (Sup. Jud. Ct. Massachusetts 1945); and *Malcolm v. Yakima County Consol. School Dist. No. 90*, 153 P.2d 394, 396 (Sup. Ct. Washington 1945).

The rule created by *Gangi* and *O'Neal* was modified by an amendment of the FLSA granting the United States Department of Labor authority to supervise the out of court release of FLSA claims. *See*, 29 U.S.C. § 216(c). At least one state, Alaska, has followed that model, authorizing the Alaska Department of Labor to approve binding out of court settlements of unpaid overtime wages. *See*, Alaska Stat. § 23.10.110. Nor should a state's failure to provide an administrative mechanism to approve out of court minimum wage settlements be construed as

legislative intent to allow non-judicially supervised minimum wage settlements. *See, Lewis*, 921 N.E.2d at 750.

The district court relied on *Chindarah* and *Nordstrom* without discussion or any analysis of the legal issues presented. *Nordstrom* did not involve an out of court settlement and cites *Chindarah* in *dicta* in overruling objections to a judicially approved class settlement. 186 Cal. App. 4th at 590.

Chindarah found that though California Labor Code Section 1194 made overtime pay unwaivable no statute prohibited the non-judicially supervised settlement of a bona fide overtime pay dispute. 171 Cal. App. 4th at 803. It examined the public policy underlying Section 1194, to "spread employment throughout the work force by putting financial pressure on the employer" by requiring overtime pay, and found, in a conclusory manner, that such policy was not violated by the releases at issue. *Id.* *Chindarah* did not involve minimum wage claims and the more economically distressed employees who bring those claims. Nor did it examine the public policy that minimum wage laws advance, which is "...to secure for the lowest paid segment of the nation's workers a

subsistence wage." *Gangi*, 328 U.S. at 116

Gangi correctly recognized that allowing the unsupervised release of minimum wage claims, even when *bona fide* disputes existed, would do irreparable harm. Without settlement supervision by a court (or the Department of Labor under the FLSA's later amendment) minimum wage standards would, as *Gangi* observed, no longer remain "minimum" measures of compensation but become subject to "adjustments to bargaining at the worst between employers and individual employees or at best between employers and the employees' chosen representatives." 328 U.S. at 116.

Failing, as did the district court, to apply the approach used by *Gangi* to claims arising under the MWA would, as a practical matter, *always* make MWA rights subject to waiver by an individual employee agreement with an employer. Employees possessed of minimum wage claims, and fearful of losing their jobs, will almost always "choose" to accept whatever "settlement" of those claims they may be offered by their employer. This Court has recognized the problems inherent with affording legal significance in the minimum wage context to the

"choices" that an employer gives an employee. *See*, *Terry v. Sapphire Gentlemen's Club*, 336 P.3d 951, 959 (Nev. Sup. Ct. 2014) ("Choices" given to exotic dancers by strip club did not confer "...the freedom it [the club] suggests these choices allow; the performers are, for all practical purposes, 'not on a pedestal but in a cage.' ") (Citation omitted).

The MWA expressly provides its provisions "may not be waived" by an individual employee. The FLSA contains no such "anti-waiver" language, yet *Gangi's* holding was required to make the FLSA' minimum wage requirement effective. Given the express language in the MWA, and its status as a constitutional, and not merely statutory, right, no basis exists for the district court's failure to follow *Gangi.*

This Court is "properly informed" about the "broad questions of public policy" it must consider in interpreting Nevada's minimum wage laws by examining the "divergent acts of foreign jurisdictions dealing with similar subject matter." *Terry,* 336 P.3d at 956. Compelling reasons exist for this Court's interpretations to conform to those of the FLSA, including the desirability of

having Nevada employers subject to a single standard of conduct and judicial efficiency. *Id.*, 336 P.3d 956-57. This Court should hold, consistent with *Terry*, *Gangi*, *McKeown* and *Lewis,* that non-judicially supervised releases of MWA claims are *void ab initio.*

Such a holding will not contravene the public policy of encouraging voluntary settlements of legal disputes. Employers can always pay whatever unpaid minimum wages they owe, they do not need any "release" from their employees to do so. They can also ask Nevada's courts to grant a formal review, approval, and release, of their MWA liabilities in connection with any such payments they wish to make. The minor burden such a process would pose to employers, and Nevada's courts, cannot displace the need to enforce the MWA's constitutional mandate and its "no waiver" protection.

C. The district court erred in finding that any bona fide dispute was actually settled by Henderson.

If this Court were to find that MWA claims subject to bona fide disputes could be waived or settled without judicial supervision, the district court erred in finding that any such bona fide dispute existed. The district court based such bona

fide dispute finding on its order of October 8, 2015 and Exhibits 8, 9 and 10 of Henderson's summary judgment motion. AA 318-322, 370-376. The only dispute as to Henderson's minimum wage liability identified in those items was whether this Court's decision in *Thomas* was purely prospective.[5] That "dispute" was not "bona fide" as this Court has *never* issued a purely prospective decision in a civil case for compensatory damages. *Cf.*, *Hansen v. Harrahs*, 675 P.2d 394 (Nev. Sup. Ct. 1984) (Recognizing new tort of wrongful discharge from employment and authorizing award of compensatory damages, with punitive damages only being authorized prospectively).

Nor was there any dispute that the compensatory payments Henderson made were *at least* the minimum wage amounts owed to the taxi drivers. Those payments were made by Henderson relying upon its own records and pursuant to a formula it endorsed. AA 54-55. It should have spontaneously and without condition paid such

[5] "Further, the Court finds that a bona fide dispute existed as to whether the *Yellow Cab* [*Thomas*] decision is to be applied retroactively. As such, it is unclear whether Henderson Taxi's cab drivers were or were not entitled to back pay prior to the settlement of the Grievance or whether they would be entitled to back pay absent settlement of the Grievance. Accordingly, the settlement of the Grievance resolved a bona fide dispute regarding wages and did not necessarily act as a waiver of minimum wage rights." AA 319.

amounts which it concedes it owed its taxi drivers. As recognized by *Chindarah* the payment of amounts concededly owed by an employer does *not* create a bona fide dispute as to wages owed that can support an employee's release. 171 Cal. App. 4th at 800, *citing Reid v. Overland Machined Products* (1961) 55 Cal.2d 203, 207 (Cal. Sup. Ct. 1961) ("[I]n a dispute over wages the employer may not withhold wages concededly due to coerce settlement of the disputed balance.") and *Sullivan v. Del Conte Masonry Co*. 238 Cal.App.2d 630, 634 (1965) (Citing *Reid* and stating a compromise of a claim for wages is binding "....only if made after wages concededly due have been unconditionally paid.").

D. The district court's finding the grievance resolution amended the CBA was erroneous.

Henderson argued to the district court that the grievance resolution acted as an "amendment" of the CBA authorizing the binding settlement of the taxi drivers' MWA claims through the grievance resolution. AA 129-130. The district court erroneously agreed with that claim. AA 421-422.

The grievance resolution does not mention amending the CBA. It contains pledges by Henderson to perform acts it had *already* undertaken by its own

initiative. One was to pay the minimum wages required by Nevada law on a "going forward" basis. The other was to make unspecified "reasonable efforts" to pay, through an unspecified manner of calculation, the unpaid minimum wages owed to its taxi drivers for a prior two year period.

Even assuming, *arguendo*, the grievance resolution's terms were considered "amendments" to the CBA, despite the lack of any statement in the grievance resolution to that effect, its terms are irrelevant to this case. They say nothing about limiting Henderson's taxi drivers' rights to bring MWA lawsuits or authorizing the ITPEU to fully settle their MWA claims, much less saying such things "explicitly" and in "clear and unambiguous terms."

Henderson and the ITPEU were capable of amending their CBA to "explicitly" state in "clear and unambiguous terms" that Henderson's taxi drivers rights to sue under the MWA were being limited. Or that Henderson's taxi drivers' right to pursue any, all, or certain, MWA lawsuits were being settled by the ITPEU. Such a CBA amendment has been agreed to by another taxi industry labor

union that Henderson's principals have apparently dealt with.[6] AA 309-310. No such "explicit" and "clear and unambiguous" amendment of the CBA was agreed to by the ITPEU and the district court erred in finding that such an amendment had taken place.

E. The ITPEU had no authority, under Nevada's law of agency or as a matter of federal labor law, to settle Henderson's taxi drivers' MWA claims unless it secured a CBA amendment that "explicitly" and in "clear and unambiguous terms" authorized such a settlement.

The district court found the ITPEU settled the MWA claims of Hendersons' taxi drivers' as their agent under Nevada law or as a result of the ITPEU's status as the taxi driver's "exclusive representative" under the National Labor Relations Act (the "NLRA"). Both of those findings are erroneous.

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[6] The Whittlesea Blue taxi company, controlled like Henderson by the Whittlesea Bell group, is publicly reported as having a union contract with the USW which entered into the MWA waiver CBA amendment at AA 309-310. *See*, http://lasvegassun.com/news/2012/oct/17/taxi-drivers-reject-labor-agreement-authorize-stri/

1. The district court erred in finding that the ITPEU's actions constituted a settlement of Henderson's taxi drivers' MWA claims pursuant to the National Labor Relations Act.

The district court found:

> Further, the National Labor Relations Act gives the Union authority to resolve disputes regarding the terms and conditions of Henderson Taxi's drivers' employment as those drivers' exclusive representative.
>
> Henderson Taxi validly settled all minimum wage claims that may have been held by its drivers prior to the settlement thereof with the Union - the exclusive representative of such drivers - via the Grievance settlement and no contrary evidence has been presented. AA 416-417.

The district court cited no authority for the foregoing conclusion. The ITPEU's status as the taxi drivers' labor union under the NLRA does *not* mean it acted to, or even could have acted to, settled the taxi driver's MWA claims. Whatever power the ITPEU had to settle the MWA claims of Henderson's taxi drivers is controlled by the terms of the MWA and the CBA.

The United States Supreme Court's opinions on the power of labor unions, under the NLRA and as a matter of federal law supremacy to waive otherwise non-waivable state labor law protections, are not a model of clarity. *Compare, Metropolitan Edison Co. v. NLRB,* 460 U.S. 693, 705, fn 11 (1985) ("...the

National Labor Relations Act contemplates that individual rights may be waived by the union....") *with Allis-Chalmers v. Lueck,* 471 U.S. 202, 212 (1985) (Federal labor law does not allow "...unions and unionized employers the power to exempt themselves from whatever state labor standards they disfavored...") *and Lingle v. Norge,* 486 U.S. 399, 409, fn 9 (1988) (Recognizing a question exists as to whether a union "may *waive* its members' individual, nonpre-empted state-law rights" and declining to decide the issue). But they agree any such waiver must be "explicitly stated" in "clear and unmistakable" language, *Metro Edison*, 460 U.S. at 708, *Lingle*, 486 U.S. at 409, fn 9 and *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 272 (2009) (Rejecting argument that CBA did not "clearly require" individual employees to arbitrate their age discrimination claims and enforcing CBA waiver of right to a judicial forum for such claims). *See, also*, *Burnside v. Kiewit Pacific Corp.*, 491 F.3d 1053, 1069-70 (9th Cir. 2007) (Reviewing Supreme Court precedents and finding that a state law right "remains with the employee unless and until it is expressly given away" by a labor union.)

There is no substantive difference between what the NLRA and the MWA

require for the ITPEU to have waived the MWA rights of Henderson's taxi drivers: either an "explicitly stated" waiver in "clear and unmistakable" language (the NLRA standard) or an "explicit" waiver in "clear and unambiguous" language (the MWA standard). The grievance resolution relied upon by the district court (1) Obligated Henderson to make certain vaguely defined payments to its taxi drivers to compensate them for unpaid minimum wages; and (2) Obligated the ITPEU to consider the minimum wage issue resolved under the CBA and not subject to any further CBA grievance. The grievance resolution did not "explicitly" or "clearly" or "unmistakably" or "unambiguously" waive *any* rights of the taxi drivers under the MWA. It did not, "expressly give away," the terminology used in *Burnside*, their right to bring MWA lawsuits for whatever minimum wages they might still be owed *in addition* to the payments discussed in the grievance resolution.

Henderson could have negotiated with the ITPEU an "explicit" and "clear and unambiguous" waiver by Henderson's taxi drivers of their right to bring any further lawsuits under the MWA for unpaid minimum wages as part of its settlement of the ITPEU's grievance. Such a waiver would also need to have been

in the form of a CBA amendment. It did not do so, presumably because the ITPEU would not agree to such a CBA amendment. The district court erred in finding such a waiver in the grievance resolution in the face of its complete silence (or at least ambiguity) as to whether such a waiver was agreed upon.

2. The district court erred in finding the ITPEU acted as Henderson's taxi drivers' agent under Nevada law and validly settled their MWA claims.

The district court also cited *May v. Anderson*, 119 P.3d 1254, 1259-60 (Nev. Sup. Ct. 2005) as further support, under Nevada law, for its holding that the ITPEU had settled the Henderson taxi drivers' MWA claim. The portion of *May* cited by the district court states that an agent acting with the actual authority of its principal binds the principal.[7] That rule of law is irrelevant to this case. The ITPEU had no authority to resolve or limit the taxi drivers' MWA claims and rights without a

[7] Nor did the ITPEU have "apparent authority" to settle the taxi drivers' claims, which only exists when the principal's conduct "...has clothed the agent with apparent authority to act." *See*, *Tsouras v. Southwest Plumbing & Heating*, 587 P.2d 1321, 1323 (Nev. Sup. Ct. 1978), citing and quoting *Ellis v. Nelson*, 233 P.2d 1072, 1076 (Nev. Sup. Ct. 1951). Sargeant was pursuing litigation via his attorney, he engaged in no conduct clothing the ITPEU with "apparent authority" to settle his MWA claim. The ITPEU was also expressly denied any authority by the CBA to resolve its principals', the taxi drivers', MWA claims through the grievance procedure relied upon by the district court.

"clear and unambiguous" grant of such authority in a CBA, which did not exist.

F. The CBA expressly prohibited any settlement of the taxi drivers' MWA claims or Sargeant's lawsuit through its grievance process.

Article XVIII, § 18.3 of the Henderson Taxi/ITPEU CBA states:

> COMPLIANCE WITH LAW: The parties shall comply with all laws which properly apply to the employer-employee relationship, including but not limited to, laws prohibiting discrimination on the basis of race, creed, color, religion, sex, national origin or age. Any violation of such laws, and any dispute over the meaning and interpretation of such laws, shall not be subject to resolution through articles XV [Grievance] and XVI [Arbitration] of this Agreement, but shall be decided only by a court of law of competent jurisdiction. AA 260-261.

The district court does not discuss this clear and unambiguous CBA language requiring disputes involving a law such as the MWA be resolved by a court and not by the CBA's grievance and arbitration process. Henderson and the ITPEU were free to agree, through a grievance or otherwise, to have Henderson make payments to the taxi drivers towards Henderson's liability for unpaid minimum wages. But unless the CBA was amended to revoke § 18.3, no CBA grievance or arbitration could terminate the right of Sargeant and the taxi drivers to have the district court determine what, if any, minimum wages remained unpaid to them under the MWA. The CBA at § 15.8 also provided that "[t]he resolution of a

grievance shall not be precedential, nor have retroactive effect in any other case," meaning the grievance resolution could not, as the district court found, have the "retroactive effect" of terminating Sargeant's previously filed "other case" under the MWA. AA 255.

The district court's decision, in the same fashion as an arbitrator's award under the CBA reaching the same result, was invalid as it extended the CBA's grievance procedure to subjects expressly excluded by the CBA from its reach. *See*, *United Steelworkers of America v. Enterprise Wheel & Carriage Corp.,* 363 U.S. 593, 597 (1960) (Labor arbitrator's award must draw "its essence from the collective bargaining agreement" and courts will refuse to enforce arbitration awards that "manifest an infidelity" to such obligation); *Steelworkers v. American Mfg Co.,* 363 U.S. 564, 567-68 (1960) (Labor arbitration must involve "....a claim which on its face is governed by the contract."); *Leed Architectural Products Inc., v. United Steelworkers Local 6674*, 916 F.2d 63, 65 (2nd Cir 1990) (Refusing to enforce arbitration award that exceeded or ignored express CBA terms); *Torrington Co. v. Metal Prods Workers Union Local 1645*, 362 F.2d 677, 680, n.5 (2nd Cir.

1966) (Same); *Delta Queen Steamboat Co. v. District 2 Marine Engineers Beneficial Ass'n,* 889 F.2d 599, 602-03 (5th Cir. 1989) (Labor arbitrator's decision exceeding the jurisdiction of the CBA is *ultra vires* and will not be enforced); *Bruno's Inc. v. United Food and Commercial Workers,* 858 F.2d 1529, 1531-32 (11th Cir. 1988) (Labor arbitrator's remedy contradicted express CBA term and could not be enforced) and other cases. This Court has opined similarly. *See*, *City of Reno v. Reno Police Protective Ass'n*, 59 P.3d 1212, 1216 (Nev. Sup. Ct. 2002) (Broad deference to labor arbitration findings "is not limitless" as such findings "must be based upon the collective bargaining agreement.").[8]

[8] Henderson would argue the grievance resolution was an agreement to supercede CBA § 15.8 and § 18.3 and have a binding resolution of all MWA disputes through the CBA's grievance process, citing *Ficek v. Southern Pacific Co.* 338 F.2d 655, 656 (9th Cir. 1964) and similar cases. That argument is without merit since the grievance resolution makes no mention, much less any "explicit" mention in "clear and unambiguous terms," of displacing those CBA provisions. The grievance, pursuant to its language, was resolving the concurrent minimum wage rights, if any existed, under the CBA section it referenced, "Article V (Wages)." Nor is issue preclusion or an election of remedies triggered when a CBA grievance concerns the same subject matter as a lawsuit. *See, Hawaiian Airlines v. Norris*, 512 U.S. 246, 249 (1994), and *Lingle*, 486 U.S. at 401-402, recognizing that employees properly pursued both CBA grievance remedies and lawsuits under state law for their wrongful discharge. Nor did *Ficek* and similar cases involve express and unambiguous CBA grievance jurisdiction restrictions such as §18.3 and § 15.8.

G. Henderson, once this putative class action lawsuit was commenced, could not validly settle the uncertified class members' claims without proper judicial oversight.

Defendants who seek to settle the claims of individual putative class members prior to class certification must (1) Engage in non-coercive settlement communications that are free of misrepresentations; and (2) Have that communication process approved of in advance by the court in which the putative class case was filed. *See, Weight Watchers of Philadelphia v. Weight Watchers Int'l*, 455 F.2d 770, 773 (2nd Cir. 1972) and 55 F.R.D. 50 (E.D.N.Y. 1971) (When the district court authorized, in advance, settlement negotiations, and plaintiffs' counsel was advised of those negotiations and allowed to be present during all such negotiations, defendant in uncertified class action could negotiate and enter into individual settlements with putative class members). *Hinds County Miss. v. Wachovia Bank, N.A.,* 790 F. Supp 2d 125, 132-34 (S.D.N.Y. 2011) (Discussing authorities, agreeing that while pre-class certification settlements by alleged class members do not require judicial approval the trial court has an independent obligation to supervise communications by defendants seeking such settlements to

"...ensure that potential class members receive accurate and impartial information regarding the status, purposes and effects of the class action." *citing Kleiner v. First Nat'l Bank of Atlanta*, 751 F.2d 1193, 1203 (11th Cir.1985)); *Sorrentino v. ASN Roosevelt Center LLC*, 584 F. Supp 2d 529, 533 (E.D.N.Y. 2008) (Court orders procedure to be followed by defendant to communicate about settlement with uncertified class members, procedure to include contemporaneous letter from plaintiff's counsel). *See*, *also*, *Cada v. Costa Line, Inc.*, 93 F.R.D. 95, 99-100 (N.D. Ill. 1981) (Declining to void settlements when defendant advised the court of its efforts to secure settlements with individual class members prior to class certification and the court ensured the class members were "fully informed" about the pending putative class case as part of defendant's settlement efforts). *Cf., Urtubia v. B.A. Victory Corp.*, 857 F. Supp. 2d 476, 484-85 (S.D.N.Y. 2012) (Recognizing inherently coercive nature of pre-certification communications between employer and putative class of employees).

When a defendant fails to secure advance judicial approval of its settlement communications with the individual members of an uncertified class action any

settlements it secures are, if not void, at least voidable at the class members' option. *See*, *Keystone Tobacco Co., Inc v. U.S. Tobacco Co.*, 238 F. Supp. 2d 151, 157-58, 160 (D.D.C.2002) (Defendant did not seek prior judicial approval of its pre-certification communications and settlement efforts with the putative class members; defendant was not, *per se*, prohibited from communicating with and entering into settlements with the "sophisticated business people" class members but had made misrepresentations in such communications and the putative class members were not suitably informed about the class case; directing corrective communications to the putative class members and granting a right to those who had entered into settlement a right to void their settlements). *See, also, Ralph Oldsmobile, Inc. v. General Motors Corp.*, 2001 Westlaw 1035132 (S.D.N.Y. 2001) (Misleading communications by defendant that resulted in defendant securing releases from some class members prior to class certification required corrective notice to the class; notice to also advise putative class members who signed releases that the district court has granted them leave to apply to the court to have their release voided, cited by *Keystone Tobacco*,). Similarly, non-judicially

approved pre-certification agreements or communications that do not release or settle putative class members' claims but restrict their remedial rights are also void. *See, In Re Currency Conversion Fee Antitrust Litigation*, 224 F.R.D 555, 569-570 (S.D.N.Y. 2004) (Arbitration agreements secured from putative class members after initiation of class action case void) and *Longcrier v. HL-A Co., Inc.*, 595 F.Supp.2d 1218, 1225-1230 (Dist. Ala. 2008) (Striking 245 affidavits gathered from putative collective action members by employer defendant in FLSA case for unpaid wages; affidavits were gathered without the employees being advised they "might compromise and waive their rights" by executing the same).

Assuming, *arguendo*, that a non-judicially supervised settlement of an MWA claim can be valid, Henderson has improperly secured settlements from the individual members of the putative MWA class. Its communications with the class members were misleading, stating that Sargeant's counsel was acting "to line their own pockets rather than to truly benefit individuals like you" while not disclosing Henderson was responsible under the MWA for paying Sargeant's counsel's fees *in addition* to whatever monies Henderson was found to owe the class members. *See,*

Belt v. Emcare, Inc., 299 F. Supp. 2d 664, 668-670 (E.D. Tex. 2003) (Defendant employer's communication discouraging participation by employees in FLSA overtime wage collective action was misleading for, among other things, representing that plaintiffs' counsel's fees would be deducted from the employees' recovery and failing to disclose that those fees were an additional item of recovery for the court to award; defendant sanctioned and corrected notice ordered).

The putative class members responding to Henderson's communications, and signing settlement agreements, were acting without any proper advisement of the status of this case. *See, Keystone Tobacco*, 238 F. Supp 2d at 159 (requiring class members be provided with a copy of case complaint and be advised of allegations that defendant made improper and false representations in attempt to secure settlements). Henderson's actions in securing the class members "acknowledgments" without any proper advisement to the class members of the ramifications of signing those acknowledgments requires they be voided. *See, Longcrier*, 595 F.Supp.2d at 1225-1230. Such a voiding of those acknowledgments is particularly appropriate as Henderson could have properly

paid the class members the wages it believed they were owed without such acknowledgments and resolved its MWA liability to that extent.[9] *See, Craft v. North Seattle Community College Foundation,* 2009 Westlaw 424266, p. 2 (M.D. Geo. 2009) (No improper pre-certification communication as "[i]n its letters to potential class members, AFS [the putative class defendant] did not make any reference to this lawsuit, did not make a lopsided presentation of the facts, did not explain the basis for the refund (or even call the check a "refund"), and did not elicit a release of any claims.").

II. THE DISTRICT COURT ERRED IN DENYING SARGEANT'S REQUEST FOR CLASS CERTIFICATION AND OTHER RELIEF

A. The district court erroneously found that Sargeant's MWA claims could not be properly subject to class certification.

The district court also held that class certification, even if the class members' MWA claims had not been settled by the ITPEU, would be denied. One reason it gave for such holding was that most taxi drivers admitted, unlike Sargeant, they

[9] Henderson claimed in its brief to the district court it offered to make those payments without the *quid pro quo* of such an executed acknowledgment. AA 127-128, 276. It produced no proof it actually made such an offer or made any payments *except* in exchange for an executed acknowledgment by a taxi driver that they were no longer owed any minimum wages. AA 338-340.

were not owed any minimum wages by executing the acknowledgments solicited from them by Henderson. AA 321-311. For the reasons discussed in Part I, those acknowledgments are void and without legal effect, rendering such holding by the district court erroneous. But even if those acknowledgments were valid, a class certification limited to Sargent and the taxi drivers who had *not* signed those acknowledgments would be proper, an issue never addressed by the district court. Sargeant, in a motion for partial reconsideration, asked the district court to certify such a more limited class of at least 300 taxi drivers who had *not* signed those acknowledgments and had been paid *nothing* by Henderson, at least for the purpose of enforcing the terms of the "accord and satisfaction" found by the district court.[10] AA 323-354. The district court summarily denied that motion without any substantive discussion. AA 409-410.

The district court, in discussing why Sargeant's motion for class certification had to be denied, also erroneously found that:

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[10] In his reply on the initial motion for class certification Sargeant also pointed out to the district court the existence of this class of over 300 "non-acknowledgment" signers. AA 291.

> Further, the determination of the minimum wage issue, had it not already been resolved, would require individual analysis not proper for a class action. For example, the Court would need to determine which minimum wage tier applied to each driver through an analysis of his income (including potentially unreported tips under NAC 608.102-608.104) and the cost of insuring his or her dependents, including an analysis of the number of dependents each driver actually had during different time frames because the cost of insurance changes based on the number of dependents a driver has. AA 321.

This finding of the district court is referring to the differing "minimum wage tier" (wage rate) that the MWA applies to employees receiving health insurance ($7.25 an hour) and those who do not receive health insurance ($8.25 an hour).

Assuming, *arguendo,* that an "individual analysis" would be required to determine whether each class member received health insurance, such circumstances do not preclude granting relief to the class for taxi drivers who were paid less than the "lower tier" $7.25 an hour minimum wage. All taxi drivers, whether or not they received health insurance, are entitled to at least that minimum wage. This was raised to the district court which ignored it. AA 268, 293-294.

Nor is there any evidence that determining the health insurance status of each class member would involve an unwieldily process rendering class treatment of the higher tier $8.25 an hour claims inappropriate. For health insurance to

comply with the MWA, and allow the employer to pay only $7.25 an hour, the insurance cannot cost the employee more than 10% of their income from the employer. NAC 608.104, relied upon by the district court, requires such 10% amount be determined from the "amount specified on the Form W-2 issued by the employer to the employee." It does *not* authorize a determination of that 10% amount from an employee's "income" from all sources including "unreported tips," as held by the district court.[11] The W-2 forms issued by Henderson to the class members are in its possession and determining this 10% amount involves no "individualized" determination but a simple and uniform calculation taking only a few minutes and done by a spreadsheet or computer payroll program based upon those W-2 amounts.

The district court's conclusion that the need to make individual determinations of the number of dependents of each taxi driver bars *any* class

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[11] This Court is currently considering an appeal in *Hancock v. State of Nevada ex rel The Office of the Labor Commissioner*, Case No. 68523, argued and submitted *en banc* April 4, 2016, where the district court held that NAC 608.104 violates the MWA by allowing tips listed on an employee's W-2 to be included in determining the 10% insurance cost threshold under the MWA. The validity of NAC 608.104 was a common issue of law also justifying class certification, another issue improperly ignored by the district court.

certification is erroneous for four reasons. First, class certification is proper for *all* taxi drivers in respect to the $7.25 an hour rate. Class certification would also be proper as to one or more limited *subclasses* of taxi drivers on their claims under the $8.25 an hour rate depending upon whether such subclass(es) can be managed appropriately.

Second, Henderson already has a record of the number of dependants of the subclass of taxi drivers who have enrolled their dependents in Henderson's health insurance plan. An analysis of that subclass's entitlement to an $8.25 an hour wage, based upon the status of their dependents as already known to Henderson, is easily performed.

Third, a subclass of taxi drivers exist who did not receive *any* health insurance benefits from Henderson, either because they declined to enroll in Henderson's insurance plan (perhaps receiving health insurance from medicare or a spouse's plan) or because they did not qualify for Henderson's plan, owing to a lack of seniority or because they were part time employees. This Court is currently deciding *Hancock v. State of Nevada ex rel The Office of the Labor Commissioner*,

Case No. 68523, argued and submitted *en banc* April 4, 2016. The district court in *Hancock* held only employees who actually are enrolled in an employer health insurance plan can, potentially, be paid $7.25 an hour. If this Court affirms *Hancock* no individual issues would bar the certification of a subclass of taxi drivers who were not enrolled in Henderson's medical plan and were not paid the $8.25 an hour minimum wage.

Fourth, determining if certain class members have dependents would not require "individualized findings" preventing the class certirication of the taxi drivers' claims. The facts to be proven in this case are the hours the taxi drivers worked each week (or other pay period interval) for Henderson and the wages Henderson paid them for those hours. Those same facts will need to be determined for each class member, irrespective of their hourly minimum wage rate ($7.25 or $8.25) under the MWA. In resolving the class claims the Court would determine the damages owed to all class members for each week or pay period under *both* the $7.25 and $8.25 an hour rates, since they involve proof of identical facts. Class members who assert an entitlement to the $8.25 an hour rate, and who need to

prove the existence of dependents to establish they are so entitled, would present certified copies of marriage, birth or adoption certificates to the Court or a special master (or failing to do so would only receive the $7.25 an hour rate award).[12] This would be a post-judgment claims process involving no fact finding and is no different than requiring class members to show some sort of identification (in this case certified marriage/birth/adoption records) to prove their identity as a class member and collect their share of the class judgment.[13]

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[12] This issue is one of individual and differing *damages* entitlement, not *individual issues* determinations that bear on the appropriateness of class certification. *See*, *Yokoyama v. Midland National Life Insurance Co.*, 594 F. 3d 1087, 1089 (9th Cir. 2010) ("Our court long ago observed that 'the amount of damages is invariably an individual question and does not defeat class action treatment.'" citing *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975))

[13] An additional issue of law common to the class members is whether employer offered health insurance must be available at the family coverage level (for all of the "employee's dependents" as stated in the MWA) at a cost not exceeding 10% of the employee's earnings even if the employee has no current spouse or dependents. A strong argument exists that the MWA requires employers to provide qualified health insurance benefits to all employees and their families, not just those currently without dependents, if they are going to pay *any* employees the lower $7.25 an hour rate. The district court ignored this common issue of law meriting resolution on a class basis.

B. The district court erroneously denied class certification.

Henderson admits, under its own calculations, the basis of which it has not disclosed, that it owes over 1000 of its taxi drivers *some* amount of minimum wages for the two year period preceding June of 2014. Given those circumstances, it is irrefutable that numerous questions of fact and law common to all of the class members exist, including: Did Henderson correctly calculate the minimum wages it determined were owed and were Henderson's underlying assumptions (which are unknown) in making those calculations correct? What should be done with the monies Henderson concedes it owes over 300 class members and that it has not paid them because they have failed to come forward and execute "acknowledgments"?[14] Does the statute of limitations on the MWA claims of the class members exceed the two years that Henderson calculated and does any basis

[14] Even if Henderson's calculations are correct it cannot, given the purpose underlying the MWA and the need to encourage compliance with the MWA, retain unclaimed funds owed to the class members. *See*, *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1309 (9th Cir. 1990) (Class judgment properly entered against defendant for violating labor statutes protecting farm workers, damages unclaimed by class members cannot be retained by the defendant given the purpose of those statutes and must either be directed to a *cy pres* beneficiary or should escheat to the government).

exist to toll that statute of limitations? Are terminated class members, such as Sargeant, eligible to receive penalties under NRS 608.040? Are class members entitled to punitive damages under the MWA? Does any basis exist to grant the class equitable and injunctive relief to prevent further violations of the MWA?

The superiority of class resolution is also overwhelmingly apparent in this case. Each class member's claim for minimum wages is small, meaning prosecution of those claims individually will not be attractive to contingency fee compensated counsel. *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.") Many or most class members are current employees of Henderson and unlikely to bring litigation against their current employer out of fear of retaliation. *See*, *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."); *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).

All of the other necessary elements to sustain the requested class certification (numerosity, adequacy of representation, typicality of claims) were overwhelmingly established. AA. 21-35, 288-295. This Court should direct that the district court grant class certification upon remitter.

C. The district court erroneously denied Sargeant's request for an award of attorney's fees, sanctions and an interim class representative service award to Sargeant personally.

The conduct of Henderson and its counsel exceeded all bounds of propriety. They engaged in a concerted campaign to mislead the class members and coerce them into releasing their claims. They also attempted to pay off both Sargeant and

his counsel so they would abandon their duty to honestly prosecute the class claims (offering Sargeant $5,000 and his counsel $20,000 to do so). AA 63. There was no colorable basis for such conduct. If Henderson wanted to fully and properly settle the class members' claims it could have approached the Court (with or without the support of Sargeant's counsel) and secured approval of its settlement efforts, as in every other case where such pre-class certification settlements were found proper, as discussed in Part I(G). If it wanted to pay what it believed it owed the class members, and reserve its right to litigate any additional liability, it could have made those payments (and for its current employees by just adding them to their paychecks with a suitable note) without requiring "acknowledgments" in exchange for those payments.

Nor did Henderson's dealings with the ITPEU provide any colorable basis for its actions. It sent its misleading settlement letters to the class members, and started collecting acknowledgments in exchange for settlement payments, two months *prior* to entering into the "grievance resolution" with the ITPEU. AA

272.[15] Henderson's improper actions were not authorized by or the result of a grievance resolution with the ITPEU but vice versa: the resolution of the grievance, previously denied by Henderson, was engineered by Henderson as an *ex post facto* ratification for the improper acts *it had already committed.*

The actions of Henderson and its counsel were coldly calculated to avoid and undermine the class action process; defeat and evade the enforcement of the MWA; and were grossly unethical and an affront to the judicial system. They are akin to the conduct that occurred in *Kleiner*, where a class action defendant, with the active assistance of its counsel, engaged in a mass campaign to individually contact class members and secure their "opt out" exclusions from the class. 751 F.2d at 1197-98. Counsel for the defendant in *Kleiner* was sanctioned $50,000 which was paid to the court, such counsel was disqualified from further representation of the defendant, and the defendant was required to pay over $58,000 in costs and attorney's fees. 751 F.2d at 1198.

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[15] The grievance resolution document, apparently drafted by Henderson, is undated in its body but the fax transmission record on the top indicates it was faxed by the ITPEU to Henderson on June 5, 2015.

While Henderson will distinguish *Kleiner* as involving improper post-class certification conduct by a defendant and its counsel, that is a distinction of no significance. No court has approved of a defendant engaging in misleading communications and interactions with class members similar to that engaged in by Henderson and its counsel. That is true whether after class certification as in *Kleiner* or pre-certification as in this case. Every decision examining the issue, most relying upon *Kleiner*, have strongly condemned such conduct and recognized the need to remedy and sanction it, as in *Belt*, where corrective notice and other curative measures, including an award of attorney's fees to plaintiffs' counsel, was ordered. 299 F. Supp. 2d at 670.

The damage Henderson has caused to the class members, and the fair administration of justice, cannot be fully remedied. The circulation of corrective notice will not erase the understanding of at least some class members that they have now released their claims. Irrespective of the sanctions that may be imposed, it is reasonable to presume Henderson will still reap a substantial benefit from its misconduct, as certain class members will fail to claim any amounts found owed to

them out of the false belief they fully released their claim. The cultivation of that belief, and the benefit Henderson would secure from the same, being the precise goal of Henderson's improper conduct.

Sargeant's counsel requested that the district court declare the executed acknowledgments void, prohibit further contact by Henderson with the class members about their MWA claims, and require Henderson to pay for corrective notice to the class members. AA 32-36 It also requested an award to Sargeant of $5,000 for his service to the class and an award to his counsel of no less than $20,000 in fees. AA 36-38. Sargeant had an overwhelming personal interest in taking Henderson's $5,000 settlement offer (Henderson asserts he is actually owed $107.23 in unpaid minimum wages) and if he had done so the prosecution of the class members' claims would have been greatly frustrated. His steadfast commitment to the class members' interests should be appropriately recognized by such an award. His counsel's fee claim, with the time now expended upon this appeal, is greatly in excess of $20,000 and it would be appropriate for this Court to direct an award upon remitter of that amount with the district court to determine the

fees to be awarded in addition to that $20,000.

III. THE COURT SHOULD DIRECT ASSIGNMENT OF THIS CASE TO A DIFFERENT DISTRICT COURT JUDGE

Sargeant's counsel is unable to locate any opinions from this Court discussing what circumstances will cause it to direct the reassignment of a case to a different district court judge upon remitter.[16] Presumably this Court would be guided by the approach used by other courts. *See*, *Krechman v. County of Riverside*, 723 F.3d 1004, 1112 (9th Cir. 2013) (Discussing relevant factors to be considered on whether to order reassignment in the district court and recognizing that such an order is rarely appropriate). Reassignment of this case is not sought because Judge Villani erred in dismissing Sargeant's case and disregarding (and not even discussing) the MWA's provision that the rights it affords could only be waived through the "explicit" and "clear and unambiguous" terms of a CBA. Reassignment is warranted based upon Judge Villani's post-judgment award of $26,715 in attorney's fees to Henderson under NRS § 18.010(2)(b) for Sargeant's

[16] Sargeant's counsel has located two unpublished decisions by the Court where it ordered district judge reassignment as part of an appeal reversal. Neither decision opines on the standard that the Court will use in issuing such orders and neither is cited to the Court as per the Court's rules.

frivolous prosecution of this case.[17] AA 419-426. That order was a manifest abuse of discretion rendering Judge Villani unfit to handle further proceedings in this case.

Judge Villani's attorney's fee award to Henderson was for the continuation of the district court proceedings after the district court's order, drafted by Henderson, was entered on October 13, 2015. AA 318-322. The October 13, 2015 order did **not** direct the entry of a final judgment, did not state that the district court would entertain no further requests for any sort of relief from Sargeant (either individually or on behalf of the class) and made a number of findings that were unclear on whether any issues remained to be litigated. It stated that the ITPEU/Henderson grievance resolution "did not necessarily act as a waiver of minimum wage rights" but did act as an "accord and satisfaction." AA 319. Most crucially, it was silent on the right, if any, of the "non-acknowledgment" signers, such as Sargeant, to secure relief in the district court to enforce the terms of the

[17] That post judgment order, minute order at AA 425-426 indicating decided by Judge Villani but signed in final form at AA 419-424 by the available senior judge, is the subject of a separate appeal to this Court under case number 70837.

"accord and satisfaction" it found.

Sargeant's conduct after October 13, 2015 giving rise to Judge Villani's award of $26,715 in attorney's fees was his motion to reargue and his admission, in response to Henderson's motion for summary judgment, that depending on the reargument motion decision there might be no reason for the district court case to continue. Sargeant did not challenge the findings of the October 13, 2015 order in his reargument motion and asked for clarification as to whether any issues remained to be litigated or, in the alternative, for entry of final judgment if no such issues remained. AA 323-332. He asked for the district court to certify a class seeking relief for Sargeant and the over 300 "non-acknowledgment" signers who had not received the funds owed by Henderson under the"accord and satisfaction" found by the October 13, 2015 order. AA 327-329. The October 13, 2015 order's silence on whether the district court would enforce that "accord and satisfaction" gave Sargeant reasonable grounds to continue the district court proceedings to determine if any such enforcement would be granted.[18]

[18] Judge Villani's order denying reargument does not discuss Sargeant's inquiry about the availability, if any, of judicial relief for the "non-

Judge Villani's post-judgment order awarding Henderson $26,715 in attorney's fees was not just an abuse of discretion. It was punitive and lacking any reason or even a patina of rationalization. It is strong evidence of an unfounded, and unacceptable, level of bias and hostility by Judge Villani towards Sargeant. Accordingly, it is requested that the Court direct reassignment of this case upon remitter.

CONCLUSION

Wherefore, for all the foregoing reasons, the Order and Judgment appealed from should be reversed in its entirety with instructions that the district court upon remitter shall assign this case to a different district court judge and enter an order granting class certification and related relief, including an award of attorney's fees,

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acknowledgment" signers who never received any payments from Henderson. AA 409-410. In his order granting attorney's fees to Henderson (drafted by Henderson's counsel) he obliquely dismisses Sargeant's request for such relief by stating "[a] motion for reconsideration seeking judgment on an unpleaded claim and certification of an unpleaded class is not a motion for reconsideration and inherently has no merit." AA 422, 426. He cites no authority for that conclusion and none exists. Sargeant's complaint seeks all appropriate relief class relief, including equitable relief, available under the MWA. AA 5-6. If the only relief available to Sargeant and the other "non-acknowledgment" signers under the MWA was enforcement of the "accord and satisfaction" found by the district court the complaint adequately stated a demand for that relief.

a class representative service award, and impose sanctions, as requested in Sargeant's motion previously heard and denied by the district court.

Dated: July 27, 2016

Respectfully submitted,

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Certificate of Compliance With N.R.A.P Rule 28.2

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using 14 point Times New Roman typeface in wordperfect.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 12,255 words.

Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix

where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 27th day of July, 2016.

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