IN THE SUPREME COURT OF THE

STATE OF NEVADA

MICHAEL SARGEANT, Individually and on behalf of others similarly situated. Appellant, v. HENDERSON TAXI, Respondent.	SUPREME COURT NO. 69773 District Court Case No. A704236

Appeal from the Eighth Judicial District Court, State of Nevada, County of Clark, The Honorable Michael P. Villani, District Court Judge

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RESPONDENT'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

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

Respondent Henderson Taxi has no parent corporations.

Respondent Henderson Taxi has only been represented by one law firm in this case: Holland & Hart LLP.

DATED this 28th day of September, 2016

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NRAP RULE 17 ROUTING STATMENT

Henderson concurs with Sargeant's routing statement.

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STATEMENT OF JURISDICTION

Defendant Henderson Taxi ("Henderson") adopts Sargeant's jurisdictional statement.

STANDARD OF REVIEW

The Nevada Supreme Court "reviews class action certification decisions under an abuse of discretion standard." *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 846, 124 P.3d 530, 537 (2005) (reversing class certification).[1]

Henderson agrees with Sargeant that this Court's review of denial of the other relief Sargeant sought in his Motion for Class Certification should be reviewed under an abuse of discretion standard.

The standard of review for an order granting summary judgment is de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

ISSUES ON REVIEW

1. Is a retrospective settlement the same as a prospective waiver?

2. Does a settlement between a union, lawfully elected by a majority of drivers to be their agent, and an employer regarding minimum wage claims constitute an impermissible waiver under Article 15, Section 16, of the Nevada Constitution (the "MWA")?

[1] In his opening brief, Sargeant argues the legal standard for certification in the standard of review section. This is improper. Henderson Taxi will properly address these issues in its argument sections.

3. May Nevada wage claims be settled without court supervision?

4. May this Court review the Union's settlement or is such review preempted by federal labor law?

5. Did the District Court act within its discretion in refusing to invalidate putative class members' payment acknowledgements?

6. Did the District Court act within its discretion in denying class certification?

STATEMENT OF THE CASE

I. Minimum Wage History

Historically, Nevada exempted limousine and taxicab drivers from minimum wage and overtime. *See* NRS 608.018(3)(j); NRS 608.250(2)(e). In 2006, Nevada voters amended the state constitution to add the MWA, Section 16 of Article 15 of the Nevada Constitution. The MWA did not expressly repudiate minimum wage exemptions in NRS 608.250. *Compare* MWA, *with* NRS 608.250(2). Nevada state and federal district courts, thus, repeatedly held that limousine and cab drivers remained exempt from minimum wage requirements. *See, e.g.*, *Lucas v. Bell Trans*, No. 2:08-cv-01792-RCJ-RJ, 2009 WL 2424557 (D. Nev. June 24, 2009). Specifically, *Lucas* held that the MWA "did not repeal NRS 608.250 or its exceptions." *Id.* at *8 (citing NRS 608.250(2)(e)). Other courts followed this

analysis. *See, e.g.*, Respondent's Appendix ("RA") 1-12;[2] RA 13-17. Given Henderson's executives' experience with *Lucas*,[3] the pay methodology negotiated directly in the collective bargaining agreements ("CBA") (which may override state minimum wage), and general knowledge of cases following *Lucas*, Henderson maintained its policy of paying federal minimum wage. Appellant's Appendix ("AA") 188, ¶¶ 2-3.

II. The Grievance

In June 2014, this Court issued *Thomas v. Nevada Yellow Cab Corp.*, 130 Nev., Adv. Op. 52, 327 P.3d 518 (2014) ("*Yellow Cab*"). The Court held the MWA impliedly repealed all minimum wage exemptions not included therein, including the cab driver exemption. *Id.* at 521. After *Yellow Cab*, and "[o]n behalf of all affected drivers" the ITPEU/OPEIU Local 4873, AFL-CIO (the "Union"), the exclusive representative for Henderson drivers, grieved Henderson's alleged "failure to pay at least the minimum wage under the amendments to the Nevada Constitution ...." AA 195 (the "Grievance"). The Union filed the Grievance pursuant to the collective bargaining agreements between Henderson and the Union, which specifically cover driver wages. *See* AA 197-229 ("2009 CBA"); AA

[2] Sargeant's counsel failed to confer with Henderson' counsel in an "attempt to reach agreement concerning a possible joint appendix" as required by NRAP 30(a).

[3] Brent Bell, the president of Henderson, is the president of Presidential Limousine and Bell Trans, defendants in the *Lucas* case. AA 188, ¶ 1. Bell became intimately familiar with the *Lucas* decision in this role. *Id.*, ¶ 2.

231-64 ("2013 CBA") (jointly, "CBAs"). Further, the grievance sought "back pay and an adjustment of wages going forward." *Id*.[4]

The Union and Henderson discussed the Grievance, including potential remedies. *See* AA 266-72. As part of these discussions, Henderson offered to settle the Grievance by changing its pay practices going forward to pay Nevada minimum wage. AA 266-67. Henderson had hoped that paying minimum wage going forward would resolve the Grievance. *Id*. The Union rejected this. After further discussion and negotiation with the Union regarding its Grievance, Henderson and the Union agreed the CBAs provisions covered minimum wage and that Henderson would pay its current and former drivers any wage differential between what the drivers earned and the Nevada minimum wage going back two years to resolve the Grievance, including Union members' minimum wage claims. AA 191-93, 272.[5] Henderson and the Union memorialized this agreement of the settlement of the Grievance brought on behalf of "all affected drivers" in the "Resolution": "Accordingly, the ITPEU/OPEIU considers this matter **formally <u>settled</u> under the collective bargaining agreement** between Henderson and the

[4] This Grievance clearly contemplated re-opening CBA for negotiation regarding future pay practices (e.g., "wages going forward").

[5] Sargeant argues that there is no evidence the Union threatened arbitration. But Sargeant conducted no discovery in this case. AA 122. Further, this is irrelevant, because it was resolved pursuant to the grievance procedure (which was intended to avoid arbitration when possible). AA255.

ITPEU/OPEIU **and state law** as implemented through such collective bargaining agreement. Pursuant to Article XV, Section 15.7, this resolution is **final and binding** on all parties." AA 272 (emphasis added). [6]

The Resolution required Henderson to provide acknowledgements to the drivers confirming payment. AA 191-93, 272. Henderson created two acknowledgements: 1) if the driver agreed that Henderson's calculation was correct and 2) if the driver disagreed. AA 274-76. The acknowledgement that the calculation was correct expressly stated: "Employee understands that his/her receipt of the aforementioned Payment is **not** conditioned on the execution of this Acknowledgement." AA 274 (emphasis in original); AA 57. A substantial majority of drivers accepted these payments and acknowledged that, including the settlement payment, they had been paid minimum wage for all hours worked for the prior two years including this payment. AA 191-93, 274.

During the time period in which Henderson negotiated the Grievance with the Union and six months after it had begun "working on a program [to] recalculate minimum wage rates without applying the tip credit on a weekly basis for the two years prior to [*Yellow Cab*]," AA 271, Sargeant filed the instant case,

[6] Sargeant argues that the Resolution was not entered until June 5, 2015. This issue was never presented to the District Court and is unsupported by admissible evidence. The fax date is just that, a fax date. It does not purport to represent a signing date. As Sargeant did not address this issue below or seek discovery on it, it is waived for purposes of appeal. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

see AA 1-7. Notwithstanding this suit, Henderson had a duty to continue negotiating with the Union, which (unlike Sargeant's counsel) represented Henderson's drivers.[7] Based on the Resolution with the drivers' actual representative, Henderson was under an obligation to make these payments.

III. Post Settlement Litigation

After Henderson began making these payments on April 8, 2015, AA 19, Sargeant skipped discovery and filed his Motion for Class Certification and other relief, essentially seeking certification by sanction ("Motion for Certification"), AA 16-43. Henderson opposed both on the grounds that the underlying claim had been settled and Sargeant failed to support certification. AA 122-86. The District Court agreed with Henderson, ruling both that Sargeant's claim had been resolved with the Union and that Sargeant had not demonstrated class certification was proper. AA 318-22. Notwithstanding this, Sargeant continued litigating, filing a Motion for Reconsideration that did not request reconsideration, but requested new and unsupported relief. AA 323-32. Henderson requested summary judgment. AA 355-68. After the District Court denied reconsideration and awarded summary judgment to Henderson, Henderson moved for attorney fees. The District Court granted this motion in part, awarding Henderson a portion of its fees. AA 419-26.

[7] Failure to address the Grievance could have been an unfair labor practice under federal law and a violation of the CBA, which includes three separate steps at which it is legally required to attempt to settle or resolve grievances. AA 254-55.

Sargeant appealed the denial of his Motion for Certification and grant of summary judgment, but not the motion for reconsideration. *See* Notice of Appeal. Sargeant later appealed the award of attorney fees.

SUMMARY OF ARGUMENT

The District Court properly denied class certification and awarded summary judgment to Henderson because Henderson settled Sargeant's minimum wage claim with the Union. The Union grieved the issue of minimum wage on behalf of all affected Henderson drivers, including Sargeant. As the drivers' elected representative under federal law, the Union was empowered to settle the minimum wage Grievance without input from Sargeant. In doing so, the Union entered a new and binding agreement with Henderson, which may only be challenged under federal labor law. If Sargeant disagrees with the Union's activity, his remedy is a claim against the Union for violation of its duty of fair representation under the National Labor Relations Act ("NLRA"), not this action. Not only was the Union entitled to settle the minimum wage Grievance as a matter of preemptive federal labor law, nothing in Nevada law prohibits the settlement of minimum wage claims. The Union's actions, as the authorized representative/agent of the drivers, in settling the Grievance and resulting communications, were proper and binding.

The District Court also properly denied class certification because Sargeant failed to demonstrate the factors required by NRCP 23(a). First, Sargeant failed to

address many of the elements required for class certification in his Opening Brief: numerosity, typicality, and adequacy. Second, while Sargeant argues commonality, he misconstrues it. The common questions of law or fact Sargeant manufactures are either insufficient to support class certification or do not actually support class certification.

ARGUMENT

I. The Union Properly and Effectively Settled Sargeant's MWA Claim Prohibiting Certification and Warranting Summary Judgment

Despite the fact that the Union settled all Henderson drivers' minimum wage claims on their behalf through the Grievance and Resolution, Sargeant contends that settlement was improper and void under the MWA. Sargeant is incorrect. As Union members' authorized representative, the Union was fully empowered to settle claims on their behalf and did so. Nothing in Nevada law prohibited such action. Further, as the Union took this action, the Resolution has been made part of the CBA. Thus, Sargeant's claim is preempted by federal labor law. And under federal labor law, the Union and Henderson acted properly.

A. The MWA's "Waiver" Language Is Prospective and Does not Apply Here

The MWA prohibits prospective waiver of its provisions by individual employees, not settlement of accrued claims. The MWA specifically provides: "The provisions of this section may not be waived by agreement between an

individual employee and an employer." MWA Subsection B. The following sentence states: "All of the provisions of this section, or any part hereof, may be waived in a bona fide collective bargaining agreement …." *Id.* This sentence following the waiver prohibition demonstrates that the prohibited waiver is prospective, not retrospective. Employees simply cannot validly agree to work for amounts less than the minimum wage. But, unions can on behalf of employees for whom the union is an authorized agent.[8] *Id.* Moreover, nothing in the MWA prohibits the settlement of disputed past claims, which is different from prospective waiver. *See e.g., Chindarah v. Pick Up Stix, Inc.*, 90 Cal. Rptr. 3d 175, 180 (Ct. App. 2009) (acknowledging that wage rights are not waivable but holding that disputed wage claims may be settled: "The releases here settled a dispute over whether Stix had violated wage and hour laws in the past; they **did not purport to exonerate it from future violations**." (emphasis added)).

Sargeant, however, argues that that settlement is prohibited—at least without judicial approval. But judicial approval is nowhere to be found in the MWA. Rather, if the Court accepts Sargeant's contention that the MWA's 'no-waiver' language is a prohibition on settlement, the result is that MWA claims simply cannot be settled, whether with judicial supervision or not. The practical result of

[8] The MWA recognizes the authorized representative nature and special authority of unions. If a union can waive minimum wages prospectively, it can also settle past MWA claims.

this is that any MWA claim, whether asserted individually or as a class, would have to proceed to judgment—with no possible interim resolution. There is no basis for this in Nevada law. In fact, there are many unwaivable rights where the claims are regularly settled. For example, rights under NRS 616A are unwaivable, but people settle disputed worker's compensation claims all the time. This is no different. Here, there was no waiver of prospective rights; the Union, Henderson's drivers' authorized agent, settled past claims. Nevada law does not prohibit such settlement.

And, if Sargeant backtracks and contends that MWA claims can be settled through the class action mechanism, settlement with the Union (his agent) through the CBA process simply represents an alternative settlement procedure. There is no basis in the MWA to allow plaintiff attorneys to settle MWA claims, but not lawfully elected unions, especially when unions can waive the MWA entirely but no individual's attorney can.[9] Indeed, past MWA claims can be settled in numerous ways. For example, an individual could settle his claim by retaining an attorney to represent him individually, he could hire an attorney to represent him and a class via Rule 23, or his union/agent could settle the claim on his behalf. The point is that these are all just different procedures, none of which is more or less favored by

[9] It should also be noted putative class counsel is "one and done" in these circumstances whereas the Union has an ongoing relationship with class members and is truly incentivized to look out for union member rights on a continuous basis.

the MWA. The only reason this case continues is that the Union's settlement deprived Sargeant's counsel of his desired fees, not that the Union lacked authority to do the same thing Sargeant is trying to do as a class representative: resolve the claim.

B. The MWA Only Prohibits an Individual Employee from Waiving the MWA, not a Union

While the MWA "may not be waived by agreement between an individual employee and an employer," no such individual waiver occurred here. Throughout his argument, Sargeant presents this Court with false choices regarding employee waiver. Sargeant argues that if this Court allows *an individual* to settle his own MWA claims (not prospectively waive their rights) without judicial supervision, employers will force employees into routine individual settlement agreements that effectively waive the MWA. While Sargeant has no statutory or case support for such an extraordinary limitation on an individual's right to settle his own claims in Nevada, in this case ***no individual settlement/waiver occurred***. Sargeant's Union settled the past claim of every Union member through the collective bargaining process mandated by the NLRA and Labor Management Relations Act ("LMRA"). Further, the MWA expressly permits a Union to waive the MWA entirely. *See* MWA. There is nothing in the MWA which limits this authority to only a future waiver. Thus, even if the MWA's language applies to past and future claims,

unions could waive both. And, in this case, the Union at most waived past WMA rights as part of the clear and unambiguous Resolution.

C. The Union Was Sargeant's Authorized Representative and Had the Power to Settle Claims on his Behalf

1. The Union Resolution Is Part of the CBA

The Union is "the exclusive representative for all taxicab drivers employed by [Henderson] in accordance with the certification of the National Labor Relations Board Case # 31-RC-5197." AA 199, 231, § 1.1; *see also Garcia v. Zenith Elecs. Corp.*, 58 F.3d 1171, 1175-76 (7th Cir. 1995) ("A union has broad authority as the exclusive bargaining agent for a class of employees."). The CBAs between the Union and Henderson completely govern "matters of wages, hours, and other conditions of employment" provided therein. AA 201, 233, § 2.1. The Union is, thus, obligated to negotiate wages with Henderson on behalf of all drivers. *Garcia*, 58 F.3d at 1175-76. In fact, the NLRA provides that it "shall be an unfair labor practice for an employer…(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title." 29 U.S.C. § 158(a) (2012). Section 159(a) of the NLRA provides that elected unions have the right to "collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment …." 29 U.S.C. § 159(a) (2012). At the same time, this right and responsibility "entails 'a concomitant duty of fair representation to each of [a union's] members.'" *Garcia*, 58 F.3d at 1176.

After *Yellow Cab*, the Union exercised its right and responsibility by filing the Grievance. AA 196.[10] Pursuant to Sections 8 and 9 of the NLRA, Henderson was obligated to address the Grievance. 29 U.S.C. §§ 158-59. While Henderson denied the substance of the Grievance (*i.e.*, it denied the merits), AA 266-67, Henderson processed the Grievance and bargained with the Union as statutorily required, AA 269-70. Through the grievance process provided for in the CBA, AA 219-20, the Union and Henderson eventually came to a fair and equitable Resolution which "formally settled" and resolved the Grievance and any minimum wage issues. AA 272; *see also Stiles v. Chem. & Prod. Workers' Union, Local No. 30, AFL-CIO*, 658 F. Supp. 2d 310, 325 (D.N.H. 2009) ("[A] union does not need to obtain plaintiff's consent before settling a grievance.").

As the exclusive bargaining agent, the Union was fully authorized to negotiate settlements and CBA modifications. *See St. Vincent Hosp.*, 320 NLRB 42, 44-45 (1995) ("[A]s a matter of law, when the parties by mutual consent have modified at midterm a provision contained in their collective-bargaining agreement, that lawful modification becomes part of the parties' collective-bargaining agreement …."); *Int'l Union v. ZF Boge Elastmetall LLC,* 649 F.3d 641 (7th Cir. 2011) (recognizing mid-term modification to a CBA); *Shane v. Greyhound Lines, Inc.*, 868 F.2d 1057, 1061 (9th Cir. 1989) ("When employees

[10] Wages are a mandatory subject of union bargaining. *See* 29 U.S.C. § 158(d), also known as Section 8(d) of the NLRA.

make their union the sole bargaining representative with the employer, they relinquish the right to control the settlement of their grievances. Unions are free to negotiate and accept settlements even without the grievants' approval.");[11] *Mahon v. N.L.R.B.*, 808 F.2d 1342, 1345 (9th Cir. 1987) ("We agree with the Board that the union was empowered to conclusively bind the employees to the terms of the settlement agreement. … [W]e hold that the petitioners are bound by the terms of the settlement agreement."); *Ramos v. Tacoma Cmty. Coll.*, No. C06-5241 FDB, 2007 WL 2193746, at *3 (W.D. Wash. July 27, 2007), *aff'd*, 304 F. App'x 564 (9th Cir. 2008) (holding that settlement agreement between union and employer was binding on employee despite employee arguing she had not signed and was not a party to the agreement). Here, the Resolution expressly stated that it settled the minimum wage claim grieved. AA 272. As the authority above demonstrates the Union's authority to settle such a claim, even over member objections, the Resolution settled the grievance and modified pay requirements under the CBA. *See St. Vincent Hosp.*, 320 NLRB at 44-45; *Shane*, 868 F.2d at 1061. As the Resolution expressly resolves any minimum wage claim Henderson's drivers may have had, the minimum wage claims have been settled by a binding agreement between the drivers' authorized and exclusive bargaining agent and Henderson.

[11] Here, the court points out that the settlement involved did not waive employees "other claims," just the ones involved in the grievance. So, too, here. The Resolution was not a general release, only a settlement of drivers' past minimum wage claims.

AA 272 ("ITPEU/OPEIU considers this matter formally settled under the collective bargaining agreement between Henderson and the ITPEU/OPEIU and state law **as implemented** through such collective bargaining agreement. … [T]his resolution is **final and binding** on all parties." (emphasis added)); *Shane*, 868 F.2d at 1061.

Another way to look at this is in the context of another employee having an attorney settling his claim. If "Driver A" had hired counsel to assert an MWA claim against Henderson with authority to settle, Driver A would have been fully entitled and able to settle his claim with Henderson regardless of the actions of Sargeant and his counsel.[12] This is no different. Here, Henderson drivers elected the Union to represent them by majority vote under federal labor law and the Union did its job; it represented them and settled a claim on their behalf just as an individual attorney-agent could have. Any argument that Driver A's counsel could not settle a claim for Driver A is absurd. Yet that is exactly what Sargeant argues to this Court.

a) The Resolution Is a Binding Contract Prohibiting Sargeant's Claim

The next question is whether the Resolution accomplished settlement; it did. A valid contract requires an offer and acceptance, meeting of the minds, and

[12] Of course, unlike a union, Driver A's counsel would not be able to waive future claims, demonstrating that the MWA provides a union more authority than an employee's attorney.

consideration. *See May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005). Here, all of the elements of a valid contract exist: the Union grieved the minimum wage issue "[o]n behalf of all affected drivers," AA 195; Henderson offered a resolution to resolve the Grievance, the Union accepted it, and both parties provided consideration (payment and release). *See* AA 266-72. Thus, the Resolution was a binding contract executed between the drivers' lawful representative and Henderson, fully and formally settling and resolving the Grievance of minimum wage claims. AA 272. As such, Sargeant's claim is barred. *See May*, 121 Nev. at 674-75, 119 P.3d at 1259-60 ("**Schwartz had authority to negotiate on behalf of the Mays and accepted the offer in writing**. … The fact that the Mays refused to sign the proposed draft release document is inconsequential to the enforcement of the documented settlement agreement. **The district court … properly compelled compliance by dismissing the Mays' action**." (emphasis added)); *Shane*, 868 F.2d at 1061 ("Unions are free to negotiate and accept settlements even without the grievants' approval."). As such, Sargeant's claim cannot proceed at all, much less as a class action.

b) The Resolution Acts as an Accord and Satisfaction

An "accord and satisfaction" is an agreement whereby one party to a dispute performs or provides something to the other party to a dispute in satisfaction of a claim. *See Walden v. Backus*, 81 Nev. 634, 636-37, 408 P.2d 712, 713 (1965);

Advanced Countertop Design, Inc. v. Second Judicial Dist. Court, 115 Nev. 268, 270, 984 P.2d 756, 758 (1999) ("We have consistently held that an injured employee's acceptance of a final SIIS award acts as an accord and satisfaction of common law rights, thereby extinguishing *any* common law right the employee may have had against his employer." (citation omitted)). "A finding of an accord and satisfaction requires a 'meeting of the minds' of the parties on the terms of the agreement." *Morris DeLee Family Tr. v. Cost Reduction Eng'g, Inc.*, 101 Nev. 484, 486, 705 P.2d 161, 163 (1985) (citing *Pederson v. First Nat'l Bank of Nev.*, 93 Nev. 388, 392, 566 P.2d 90, 91 (1977)).

Here, the Resolution shows a clear meeting of the minds between Henderson and the Union. The Grievance grieves the issue of "minimum wage under the amendments to the Nevada Constitution" "[o]n behalf of **all affected drivers**." AA 195. The Resolution then states: "Accordingly, the [Union] considers this matter formally settled under the collective bargaining agreement … **and state law** …. Pursuant to [the CBA], this resolution is **final and binding on all parties**." AA 272 (emphasis added). And, as the authorized representative of Henderson drivers under the NLRA, the Union was able to settle claims on their behalf, even over their objection. *See Shane*, 868 F.2d at 1061; *see also May*, 121 Nev. at 674-75, 119 P.3d at 1259-60. Thus, the Resolution combined with the payments offered is a complete accord and satisfaction of any minimum wage claim that might have

existed and Sargeant's minimum wage claim necessarily fails.[13] Thus, denial of class certification and summary judgment for Henderson were appropriate.

2. The CBAs Did Not Prohibit the Union's Action

a) The Union and Henderson Were Not Barred from Resolving the Grievance

Sargeant contends that the Union was contractually prohibited from settling MWA claims because Section 18.3 of the CBAs stated that violation of employment laws are not subject to the grievance and arbitration provisions of the CBA. AA 260-61.[14] Sargeant, however, is wrong as to the import of this section in these circumstances.

Sargeant's out of context reading of Section 18.3 is inconsistent with the parties own understanding. Sargeant's counsel, a third-party, cannot substitute his thoughts regarding the interpretation of a contract for the meaning agreed to by the

[13] None of the cases Sargeant cites dispute this as they did not involve claims that were settled. This is not a situation where an employee fails to obtain an award through CBA-arbitration and is, thus, permitted to pursue a remedy in court. *See 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 261-64 (2009). Here, the Union was authorized to grieve this issue and resolved the claim. Thus, it has elected a remedy for drivers and they are estopped from seeking another. *Cf. Taylor v. Burlington N. R.R.*, 787 F.2d 1309, 1317 (9th Cir. 1986) ("A plaintiff may prosecute actions on the same set of facts against the same defendant in different courts …. But as soon as one of those actions reaches judgment, the other cases must be dismissed.").

[14] It should be noted that the only claims explicitly referenced in Section 18.3 are "laws prohibiting discrimination on the basis of race, creed, color, religion, sex, national origin or age," not wage and hour laws. AA 260-61. Given that wages and hours are mandatory subjects of collective bargaining and covered by the CBA, exclusion of these claims from the CBA is nonsensical.

actual parties.[15] But even if Sargeant's argument were accepted, "CBAs are interpreted according to ordinary contract principles." *Hall v. Live Nation Worldwide, Inc.*, 146 F. Supp. 3d 1187 (C.D. Cal. 2015) (citing *M&G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926, 937 (2015), as "applying ordinary contract principles in interpreting a collective bargaining agreement"); *Adair v. City of Kirkland*, 16 F. App'x 644, 646 (9th Cir. 2001) (holding that district "properly applied state law contract principles" in interpreting a CBA). In Nevada, parties to a contract are free to orally or through conduct modify a contract at any time. *Silver Dollar Club v. Cosgriff Neon Co.*, 80 Nev. 108, 111, 389 P.2d 923, 924 (1964) ("Parties may change, add to, and totally control what they did in the past. They are wholly unable by **any contractual action in the present, to limit or control what they may wish to do contractually in the future**." (emphasis added)); *Principal Invs. v. Harrison*, 132 Nev., Adv. Op. 2, 366 P.3d 688, 698 (2016) (explaining "a no-waiver clause can itself be waived"); *MacKenzie Ins. Agencies, Inc. v. Nat'l Ins. Ass'n*, 110 Nev. 503, 507-08, 874 P.2d 758, 761 (1994) (explaining that parties may modify a contract by their conduct); *Clark Cty. Sports Enter., Inc. v. City of Las Vegas*, 96 Nev. 167, 172, 606 P.2d 171, 175 (1980) [hereinafter *Sports Enter.*] ("Similarly, consent to a modification may be implied

[15] It would be truly bizarre for a court to disagree with both parties to a contract's agreed to interpretation of their contract. Particularly when Sargeant presents no evidence that his interpretation is controlling or should supersede the parties own interpretation.

from conduct consistent with an asserted modification."). Here, regardless of Section 18.3 the Union grieved minimum wage, waiving any limitation on the grievance process. Henderson, too, negotiated the Grievance, waiving any limitation. Thus, the parties to the CBA agreed that the Grievance should proceed through the grievance process and came to a settlement. *See Principal Invs.*, 132 Nev., Adv. Op. 2, 366 P.3d at 698; *Sports Enter.*, 96 Nev. at 172, 606 P.2d at 175. Unions and employers do this all the time through Memorandums of Understanding and grievance settlements—just like they did here. *See, e.g.*, AA 309-10. As such, even if Section 18.3 applied, the parties mutually waived it.[16]

In comparing the Union's and Henderson's actions to that of an arbitrator's decision going beyond the CBA, Sargeant demonstrates his misunderstanding of union and contract law. Arbitrators are not parties to the CBA and lack authority to modify it. This is exactly what Sargeant's case law says. *See, e.g., United Steelworkers of Am. v. Enter. Wheel & Carriage Corp.*, 363 U.S. 593, 597 (1960) (explaining labor arbitrators are bound to interpret and apply the [CBA] as drafted). This, however, says nothing of what parties to a CBA can do, as they can renegotiate and modify a CBA at any time they jointly decide to. *See St. Vincent*

[16] Sargeant's argument that Section 15.8 prohibiting a grievance resolution from having retroactive or precedential affect is a red herring. All this means is that there is no case law (precedent) that arises from interpreting the CBA to make grievance resolution simpler. A settlement is still binding. Sargeant is grasping at straws. If his novel interpretation were correct, then the Union could never resolve past CBA violations. This is clearly not the case or intent.

Hosp., 320 NLRB at 44-45 As such, this comparison is wholly without merit. Thus the Union validly settled any minimum wage claims on behalf of Henderson drivers.

3. Sargeant's Claims Are Preempted By Federal Labor Law

The LMRA preempts Sargeant's claims because they "rest on interpretations of the underlying collective bargaining agreement." *Vadino v. A. Valey Eng'rs*, 903 F.2d 253, 266 (3d Cir. 1990) (stating LMRA preempted FLSA claim where it was dependent on interpretation of the correct wage rate under CBA); *Martin v. Lake Cty. Sewer Co., Inc.*, 269 F.3d 673, 679 (6th Cir. 2001) (affirming dismissal of Fair Labor Standards Act ("FLSA") claim based on LMRA preemption).

Here, Sargeant's claim for unpaid minimum wage is preempted by the LMRA because the claims require interpretation of the operative CBA and how the CBA language, including the Resolution's modification thereof, interacts with the MWA. The MWA provides two separate minimum wage rates, depending on whether an employee is or is not provided health insurance meeting certain requirement. MWA Subsection A. It also states:

> The provisions of this section may not be waived by agreement between an individual employee and an employer. All of the provisions of this section, or any part hereof, may be waived in a bona fide collective bargaining agreement ….

MWA Subsection B. Both of these subsections require interpretation of the CBAs in the circumstances of this case. Indeed, the Union argued that the CBA covered this issue and filed the Grievance. Henderson agreed and resolved the Grievance with the Union. Sargeant's contrary interpretation of the CBA cannot prevail over the parties' interpretation. This fact, standing alone, should end the inquiry because the parties agreed the CBA applied to the issue of past MWA rights and settled them.

a) The Tier of Minimum Wage to Which Any Individual Driver Is Entitled Is Dependent on Interpretation of the CBAs

The MWA provides a unique two-tier minimum wage structure. What minimum wage an employee is entitled to depends on whether they receive health insurance benefits from their employer, the type of health insurance benefits they receive from their employer, and the cost of those benefits to the employee. *See* MWA; *see also* NAC 608.102-608.104. Henderson provides its taxi drivers health insurance benefits. AA 208-11, 245-47. Specifically, Henderson provides employee-only coverage to its cab drivers and pays a certain amount toward dependent care coverage. AA 245; *see also* RA 18-19. If the cost of insurance changes, those costs are covered through increased "trip charges" as provided in

Section 5.2(c) of the CBAs.[17] The CBA further complicates the situation for employees who do not work a full 18 shifts for five-day workweek schedules or 15 full shifts for four-day workweek schedules. These employees have to reimburse Henderson various percentage amounts of the cost of Henderson-paid coverage depending on how many shifts they work. AA 245-46. Further, what qualifies as a shift is entirely dependent on other provisions in the CBA, *e.g.*, vacation, medical leave, etc. *See id.* § 7.7; AA 241 §§ 4.6(b)-4.8. Thus, what insurance costs Henderson cab drivers in any month is dependent on an analysis of the CBA, and how changing health care costs affect the minimum wage analysis will require more than a casual glance at the CBA. Rather, the claim is inextricably intertwined with the CBA and "substantially dependent on analysis of" the CBA. *Adkins v. Mireles*, 526 F.3d 531, 539 (9th Cir. 2008) (quoting *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985)). Thus, Sargeant's minimum wage claim is preempted by the LMRA. *Vadino*, 903 F.2d at 266 (holding FLSA overtime claim was preempted by LMRA where it was dependent on interpretation of the CBA).

In this regard, this Court should also consider the fact that the MWA recognizes the special power of unions and allows them to completely opt-out of the MWA. Given a CBA's ability to entirely avoid the application of the MWA, a

[17] How this trip charge impacts a driver's book, upon which wages are based, is also a matter requiring analysis of the CBA. *See* AA 242-47, art. V, cross-referencing Section 7.1.

CBA preempting a minimum wage claim under particular factual circumstances is utterly unsurprising. *See* MWA, Subsection B; *see also Atchley v. Heritage Cable Vision Assoc.*, 101 F.3d 495, 500-02 (7th Cir. 1996) (holding that claims for unpaid wages under the Indiana Wage Payment Act were preempted by § 301 because interpretation of a CBA was necessary); *Gelb v. Air Con Refrigeration & Heating*, 826 N.E.2d 391, 399 (Ill. App. Ct. 2005) (holding a state wage law claim was preempted by § 301 of the LMRA because adjudication would require the court to interpret terms of a CBA). Here, analysis of Sargeant's entitlement to state law rights under that state law (the applicable minimum wage) *requires* interpretation of the CBA, including how the Resolution amended the CBA and resolved past claims. Thus, Sargeant's claims are preempted and cannot proceed.

b) Determining a Driver's Hours of Work Requires Interpretation of the CBA

Sargeant claims that the issue of whether all putative class members were paid the compensation required by the MWA can be resolved by a simple review of the number of hours they worked in each applicable pay period, the compensation they were paid, and the applicable minimum wage rate. Defendant has already established that the applicable minimum wage rate is entirely dependent on interpretation of the CBA above. In addition, however, the number of hours putative class members worked is also dependent on interpretation of the CBA. For example, pursuant to Section 4.4, Henderson may require drivers to

"report for work not more than fifteen minutes prior to the shift time of each, and an employee who fails to report by the required time forfeits any right to work on that day, although the Company shall be entitled to utilize him as an extra." AA 241. Whether this time constitutes hours worked or whether an employee had any hours worked if he waited around to be used as an extra requires interpretation of the CBA. This necessary interpretation preempts Sargeant's claim.

As Sargeant's claims are preempted, both denial of class certification and summary judgment were proper.

D. No Nevada Law, Doctrine, or Policy Limits MWA Settlements, and Sargeant's Claim Was Settled, Future Rights Were Not Waived

Even if this case involved individual settlements, which it does not, no Nevada law or policy prohibits individuals from settling a disputed wage claim. *See, e.g.*, *Chindarah*, 90 Cal. Rptr. 3d at 180; *Nordstrom Comm'n Cases*, 112 Cal. Rptr. 3d 27, 38 (Ct. App. 2010). Sargeant's reliance on inapplicable federal law and attack on *Chindarah* is unavailing regarding his **state law claim**.

1. The FLSA's Limitations on Settlement Do Not Apply

The FLSA's requirement that a court or the Department of Labor ("DOL") approve wage claim settlements finds no application in Nevada law. "[T]he purpose of the FLSA is to establish a national *floor* under which wage protections cannot drop, not to establish absolute uniformity in minimum wage and overtime

standards nationwide at levels established in the FLSA." *Pac. Merch. Shipping Ass'n v. Aubry*, 918 F.2d 1409, 1425 (9th Cir. 1990) (holding California can extend wage protections to employees exempt from the FLSA). This federal policy of setting a wage law floor rather than ceiling has allowed states like Nevada to provide greater protections to its citizens, such as higher minimum wages with fewer exemptions and distinct overtime protections, including daily overtime. *See* MWA; NRS 608.018. However, it is this national wage floor with which cases such as *D.A. Shulte, Inc. v. Gangi*, 328 U.S. 108 (1946) and *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945) are concerned, not the greater protections provided by distinct state laws. Certainly, states are free to also follow the federal policy of requiring approval of settlement agreements. But Nevada has not chosen to do so.

a) The MWA's Language Does Not Compel a Different Result

Nevada regularly refuses to follow federal wage and hour policy, both in providing greater protections, *see* MWA; NRS 608.018, and in rejecting federal expansions of liability. For example, the FLSA provides for individual liability for wage and hour violations. *See, e.g.*, *Boucher v. Shaw*, 572 F.3d 1087, 1091 (9th Cir. 2009) [hereinafter *Boucher I*]. In contrast, when the Ninth Circuit certified the question of individual liability under Nevada law to this Court, it determined "that had the Nevada Legislature intended to qualify individual managers as employers

and thus expose them to personal liability, it would have done so explicitly." *Boucher v. Shaw*, 124 Nev. 1164, 1169-70, 196 P.3d 959, 963 (2008) [hereinafter *Boucher II*]. This Court refused to infer abandonment of traditional principals and policies based on ambiguous statutes. *Id.* at 1166-69, 196 P.3d at 961-63. It should follow course here.

The MWA only prohibits its prospective waiver by individual employees, but allows it by unions. *See* MWA. It does not reference court supervision of settlement agreements or grant or deny permission to the Nevada Labor Commissioner's office to supervise settlement of wage claims. *Id.* It is silent on private settlement, just like Nevada's wage and hour statutory scheme. *Compare id.*, *with* NRS Chapter 608.[18] As such, this Court should not read into the MWA a prohibition on individual settlement of disputed claims or, pertinent here, **union settlement of claims**. *Boucher II*, 124 Nev. at 1170, 196 P.3d at 963 (holding that because the Legislature had "not unequivocally indicated its intent to" move from the common law definition of "employer" it would not read such intent into the statute); *Trs. of Plumbers & Pipefitters Union Local 525 Health & Welfare Tr. Plan v. Developers Sur. & Indem. Co.*, 120 Nev. 56, 62, 84 P.3d 59, 62 (2004) (demonstrating Nevada's public policy in favor of settlement).

[18] Notably, NRS 607.170 provides the Labor Commissioner authority to settle statutory wage claims. However, because the MWA does not incorporate this grant of power, under Sargeant's argument, all MWA settlements supervised by the Labor Commission would be void. The Court should not endorse this result.

Here, especially, union action is different than individual action and does not need the same protection. Unions are required by federal law to act in the interest of those they represent. *See, e.g.*, *14 Penn Plaza*, 556 U.S. at 255-56. The entire purpose of their existence is to protect employees and improve working conditions by increasing employees' bargaining power with their employers. The Union did just that: it bargained for and achieved a fair resolution regarding the issue of whether Henderson was required to pay minimum wages prior to *Yellow Cab*. It then settled the claim with Henderson. AA 272. Thus, the policy behind *Gangi* and similar decisions does not apply where a union already provides that bargaining power. *Gangi*, 328 U.S. at 115 (discussing concern regarding uneven bargaining power between individual employees and employers).

b) Sargeant's Citations to Other State Law Is Irrelevant Here

In support of his argument that the Court should require judicial approval of the settlement of any MWA claim, Sargeant cites to cases out of Alaska, Illinois, and a federal decision in North Carolina. These cases do not support application of *Gangi* in Nevada.

In *McKeown v. Kinney Shoe Corp.*, the Alaska Supreme Court explained the mandatory nature of liquidated damages under Alaska law. 820 P.2d 1068, 1070 (Alaska 1991). It was mandatory liquidated damages that the Alaska Supreme Court determined compelled a prohibition of Alaska wage and hour settlements,

similar to the U.S. Supreme Court's concern with liquidated damages. *Id.* at 1070-71 (quoting *O'Neil*, 324 U.S. at 710). Nevada law, however, does not even permit liquidated damages in wage claims. *See* MWA; NRS Chapter 608. As such, Alaska's concern, mandatory liquidated damages, is not present in Nevada.

Similarly, in *Lewis v. Giordano's Enterprises, Inc.*, the Illinois Court of Appeals relied on federal law and specific Illinois statutory language to hold that settlements of minimum wage claims were against Illinois public policy. Specifically, Illinois law provided: "*Any contract, agreement or understanding for or in relation to such unreasonable and oppressive wage for any employment covered by this Act is void*." *Lewis v. Giordano's Enters., Inc.*, 921 N.E.2d 740, 744 (Ill. App. Ct. 2009) (quoting 820 Ill. Comp. Stat. 105/2 (2004)). Further, it provides: "The acceptance by an employee of a disputed paycheck shall not constitute a release as to the balance of his claim and any release or restrictive endorsement required by an employer as a condition to payment shall be a violation of this Act and shall be void." *Id.* (quoting 820 Ill. Comp. Stat. 115/9 (2006)). The MWA only prohibits prospective *individual* waiver and does not reference settlement at all. *See* MWA; NRS Chapter 608.[19]

[19] Additionally, the releases in *Lewis* were each for $10 and bore no relation to the specific amounts alleged to have been underpaid. Here, the Resolution required Henderson Taxi to pay the difference between what drivers were paid and the state minimum wage going back two years, tying payments directly to claims.

In *Rehberg v. Flowers Baking Co. of Jamestown*, a federal trial court in North Carolina followed North Carolina regulations stating that "judicial and administrative interpretations and rulings established under the federal law [shall serve] as a guide for interpreting the North Carolina Law." No. 3:12-cv-00596-MOS-DSC, 2016 WL 626565 (Feb. 16, 2016) (internal quotation omitted). While it is not uncommon for Nevada to follow federal law in the interpretation wage law, that is when the statutory language between the statutes is not materially different. *See Terry v. Sapphire Gentlemen's Club*, 130 Nev., Adv. Op. 87, 336 P.3d 951, 956 (2014) (adopting the FLSA's "economic realities" test while recognizing Nevada's willingness to part ways with the FLSA). Even where this Court has adopted doctrines from the FLSA, such as in *Terry*, the Legislature has, on occasion, rejected that adoption. *See* NRS 608.0115 (rejecting "economic realities" test by creating a statutory presumption of independent contractor status in certain circumstances).[20] Thus, *Rehberg* is unhelpful.

[20] Sargeant's citations to cases discussing minimum wage laws governing public employees are also inapposite. In *Anderson v. City of Jacksonville*, 41 N.E.2d 956 (Ill. 1942), the defendant city had employees sign releases on a monthly basis so as to avoid any liability. There is no evidence of such conduct here and the Union settlement actually requires state minimum wage payments going forward. AA 272-73. In *Kucera v. City of Wheeling*, 215 S.E.2d 216, 219 (W.V. 1975), the city required employees to sign waivers in order to be paid amounts concededly due, which did not occur here. *State ex rel. Rothrum v. Darby*, 137 S.W.2d 532, 537 (Mo. 1940) involved a prospective waiver of a right to a full statutory salary, which is not at issue here. *Allen v. City of Lawrence*, 61 N.E.2d 133, 136 (Mass. 1945). In *Malcolm v. Yakima County Consolidated School District No. 90*, 159

Finally, Sargeant's citation to *Clark v. Columbia/HCA Information Services, Inc.*, 25 P.3d 215, 224 (2001), for the proposition that public policy considerations can bar enforcement of settlement agreements is inapposite. In *Clark*, this Court refused to apply a settlement agreement to bar claims that did not arise until three years after Clark signed the release. *Id.* As such, the release simply did not apply to claims that were not contemplated at the time of signing. *Id.* Here, the Union only settled pre-existing claims and, thus, *Clark* is entirely inapplicable.

2. Nevada Law Should Follow *Chindarah* and its Progeny

In 2009, the California Court of Appeals explained that the public policy against waiver of wage claims "is not violated by a settlement of a bona fide dispute over wages already earned." *Chindarah*, 90 Cal. Rptr. 3d at 180. Courts have roundly accepted the *Chindarah* analysis since its issuance. *See, e.g.*, *Aleman*

P.2d 394, 396 (Wash. 1945), defendants entered a contract with a teacher for $100/month on the basis that the teacher rent a room from the school for $40/month. The court determined that this was subterfuge to violate the minimum wage law then in effect. Thus, this too was an ongoing waiver of prospective minimum wage rights, not a settlement of a disputed claim and has no relevance here. As such, none of these cases is relevant to the issues before this Court. In fact, in a much more analogous case, where a union settled FLSA claims for its members, the Federal Circuit determined that the *Brooklyn Savings* and *Gangi* cases did not apply. *See O'Connor v. United States*, 308 F.3d 1233, 1242-43 (Fed. Cir. 2002). While noting that cases governing the private sector did not necessarily apply, the court explained that, because the employees were represented by a union, the inequality concern in *Brooklyn Savings* and *Gangi* was inapplicable. *Id.* Rather, the disparity in bargaining power had been resolved by the union and the CSRA (the analog to the NLRA and LMRA for federal employees). *Id.* Thus, the court approved the Union's settlement of FLSA claims because of the union's involvement.

v. AirTouch Cellular, 146 Cal. Rptr. 3d 849, 862-63 (Ct. App. 2012) (following *Chindarah*); *Watkins v. Wachovia Corp.*, 92 Cal. Rptr. 3d 409, 416-17 (Ct. App. 2009) ("[B]ona fide dispute can be voluntarily settled with a release …."); *Sanchez v. Martha Green's Doughlectibles, Inc.*, D069677, 2016 WL 3099405, at *3 (Cal. Ct. App. May 26, 2016) (following *Chindarah* stating "the purpose of the provision is to prevent employers from coercing a settlement of contested wages by withholding wages that the *employer concedes are owed*" not to prevent settlement); *Hawthorne v. Italian Fashion By Suzie, Inc.*, B254211, 2015 WL 3955498, at *2 (Cal. Ct. App. June 29, 2015) ("Hawthorne asserts Labor Code section 206.5 prohibits the settlement and release of wage claims under any circumstances. This argument has been rejected by several courts in this state."); *Aguilar v. Zep Inc.*, No. 13-cv-00563-WHO, 2014 WL 1900460, at *4-6 (N.D. Cal. May 12, 2014) (holding non-waivable rights may be released through settlement of disputed claim); *Kline v. United Parcel Serv., Inc.*, No. C 09-00742 SI, 2010 WL 1461626, at *4 (N.D. Cal. Apr. 7, 2010) (explaining that prohibition on state wage claim waiver only covers prospective claims, not existing disputes).

Here, there is no question that there was a bona fide dispute as to whether Henderson's drivers were owed minimum wage for the time prior to *Yellow Cab*'s issuance and what the statute of limitations period is. *See* AA 138-53, 162-64 (arguing that *Yellow Cab* should not be applied retroactively; arguing that even if

Yellow Cab is retroactive, it should not be applied retroactively to Henderson because of its reliance on specific case decisions; the statute of limitations on MWA claims is two years, not longer; and tip income must be included to determine health care costs to determine proper minimum wage rate).[21] Whether or not Henderson would have ultimately prevailed on any of these arguments is not determinative of whether there was a bona fide dispute. There is a bona fide dispute because Henderson **believed** its arguments would prevail. Further, the fact that this Court is faced with several of these issues in other appeals demonstrates that there were bona fide disputes. *See* Docket Nos. 68523 and 67631 (statute of limitations), 68523 and 68770 (tip income), and *Greene v. Executive Coach & Carriage*, 591 F. App'x 550 (9th Cir. 2015) (rejecting retroactivity argument without stating it lacked a good faith basis); *see also* AA 196, 267-72 (communications with Union showing dispute as to the retroactive application of *Yellow Cab* and the appropriate statute of limitations). As Henderson disputed any minimum wages were owed prior to *Yellow Cab*, a settlement of such claim, even with individual Union members, would not have been barred. *See, e.g.*, *Chindarah*, 90 Cal. Rptr. 3d at 180. As such, this Court should let the Resolution stand and bar Sargeant's claim.

[21] While Sargeant improperly incorporated argument from briefs before the District Court into his Opening Brief, Henderson merely cites its briefs to show that there was a bona fide dispute, not to incorporate the arguments into this Answering Brief.

To the extent Sargeant argues that Henderson should have spontaneously paid any mounts it conceded were due to its drivers, Sargeant points to no evidence that Henderson conceded any amounts were due prior to settlement. *See generally* AOB. Thus, there were no undisputed sums owed that would need to be paid in order to settle the Union's Grievance.

Finally, Sargeant's claim that Nevada's public policy of encouraging voluntary settlements would not be violated by requiring wage claims to be settled with court supervision is flat wrong. Employers will not simply pay whatever minimum wage a claimant contends he is owed, as Sargeant claims, if the employer cannot get a release or must hire counsel to go through a judicial process, particularly when that employee can later seek additional attorney fees or punitive damages as Sargeant claims. Further, Sargeant is incorrect that this would be a "minor burden." Nevada courts are already overwhelmed with cases, as this Court well knows with its recent push to expand Nevada's court system to include a Court of Appeals. Adding additional and pointless cases simply to approve settlements would place substantial additional strains on an already overtaxed system.

E. The Acknowledgements Were Not Settlements or Waivers, Nor Are They Improper

1. The Acknowledgements are Just Acknowledgments

To begin, the acknowledgements were required by the Resolution. *See* AA 274-76. Failure to requeste them would have breached the agreement that Henderson reached with the Union. In addition the acknowledgements were voluntary for the drivers. *Id*. Specifically, each explained, "Payment is **not** conditioned on the execution of this Acknowledgement." *Id.* In the accompanying letters, Henderson requested that if the driver had questions, disagreed with Henderson's calculations, or simply wanted to review payroll records, they should contact Cheryl Knapp. RA 20-27. If someone disagreed with the amount, they would still receive their Resolution settlement proceeds. AA 276. Finally, the acknowledgments do not contain any general release or waiver language. As such, it is a fiction created by Sargeant that the Acknowledgements are waivers.

2. The District Court Properly Denied an Award of Sanctions Against Henderson for Obtaining Acknowledgements

Beyond seeking to void the Union's Resolution with Henderson, Sargeant contends the payment acknowledgments provided to drivers in accord with the Resolution and signed by the majority of drivers should be declared invalid. They should not.

a) Communications With Putative Parties Were Not Limited

In *Gulf Oil Co. v. Bernard*, the United States Supreme Court held that "an order limiting communications between parties and potential class members should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties." 452 U.S. 89, 100 (1981). By implication, communications between parties and potential class members prior to such an order are not prohibited. *See id.* Further, "such a weighing—identifying the potential abuses being addressed—should result in a carefully drawn order that limits speech as little as possible, consistent with the rights of the parties under the circumstances." *Id.* at 101-02. The Court must also give "explicit consideration to the narrowest possible relief which would protect the respective parties." *Id.* at 102. At the time Henderson communicated with drivers, no order limiting communications was in place and there was no basis for such an order.[22]

Without certification, Sargeant's counsel did not represent those with whom he did not have an agreement. ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 07-445 (2007) ("As to persons who are potential members of a class if it is certified, however, no client-lawyer relationship has been established.").

[22] At this time, Henderson was simply fulfilling its obligation with the Union to make settlement payments, finalizing the Resolution.

Simply filing a "class" complaint creates no attorney-client relationship with potential class members. *Id.*; *see also Parks v. Eastwood Ins. Servs., Inc.*, 235 F. Supp. 2d 1082, 1084 (C.D. Cal. 2002) ("[P]re-certification communication is permissible because no attorney-client relationship yet exists.").

b) Defendant's Conduct Was Not Wrongful

Sargeant contends Henderson acted wrongfully by communicating with **unrepresented** putative class members and offering to pay them pursuant to the Resolution and requesting an acknowledgment of payment. Sargeant also contends that the District Court abused its discretion by not invalidating these waivers and sanctioning Henderson. Not once in all of this discussion does Sargeant acknowledge that at the time of the communications he did **not** represent them or that they were represented by the Union and that the Resolution required Henderson to request the acknowledgements.

Even had Henderson not sent the letters pursuant to the Resolution, its communication with the unrepresented putative class members would have been permissible. Specifically, prior to class certification, there is no rule preventing Henderson from communicating with or seeking out settlements, much less acknowledgements of payment, with ***putative*** class members. *See, e.g.*, *Christensen v. Kiewit-Murdock Inv. Corp.*, 815 F.2d 206, 213 (2d Cir. 1987) ("**[D]efendants do not violate Rule 23(e) by negotiating settlements with**

potential members of a class."); *Weight Watchers of Phila., Inc. v. Weight Watchers Int'l, Inc.*, 455 F.2d 770, 773 (2d Cir. 1972) (allowing defendant to negotiate settlements with potential class members); *Soto v. Castlerock Farming & Transp., Inc.*, No 1:090-cv-00701-AWI-JLT, 2013 WL 6844398 (E.D. Cal. Dec. 23, 2013) (denying motion to strike class member declarations: "Defendant did not misrepresent issues in the action. … [I]t does not appear declarations were obtained through a coercive or misleading procedure, and *Belt* is not instructive."); *Austen v. Catterton Partners V, LP*, 831 F. Supp. 2d 559, 567 (D. Conn. 2011) ("**[N]amed plaintiffs and their counsel do not always act in the best interests of absent class members, and not all defendants and defense counsel engage in abusive tactics**. District courts thus must not interfere with any party's ability to communicate freely with putative class members, unless there is a specific reason to believe that such interference is necessary." (emphasis added)); *Wu v. Pearson Educ. Inc.*, 2011 WL 2314778, *6 (S.D.N.Y. 2011) ("[D]efendants can even negotiate settlement of the claims of potential class members."); *Bayshore Ford Truck v. Ford Motor Co.*, No. 99-741(JLL), 2009 WL 3817930, *10 (D.N.J. 2009) ("[B]efore a class action is certified, it will ordinarily not be deemed inappropriate for a defendant to seek to settle individual claims."), *rev'd in part on other grounds* 540 F. App'x 113 (3d Cir. 2013); *Jones v. Jeld-Wen, Inc.*, 250 F.R.D. 554, 563 (S.D. Fla. 2008) ("[A] defendant has a right to communicate settlement offers

directly to putative class members."); *In re Baycol Prods.*, No. MDL 1431MJD/JGL, 2004 WL 1058105, *3 (D. Minn. 2004) (same); *Cox Nuclear Med. v. Gold Cup Coffee Servs., Inc.*, 214 F.R.D. 696, 699 (S.D. Ala. 2003) (same); *Parks v. Eastwood Ins. Services, Inc.*, 235 F. Supp. 2d 1082, 1084 (C.D. Cal. 2002) (describing "**majority view**": "The Second Circuit, state and federal district courts in California, and a leading treatise conclude Rule 23 pre-certification communication is permissible because no attorney-client relationship yet exists." (emphasis added)); *Hammond v. Junction City*, 167 F. Supp. 2d 1271, 1286 (D. Kan. 2001) (same); *Bublitz v. E.I. duPont de Nemours & Co.*, 196 F.R.D. 545, 548 (S.D. Iowa 2000) ("A defendant-employer has the right to communicate settlement offers directly to putative class member employees."); *Manual for Complex Litigation* § 21.12, at 249 ("Defendants and their counsel generally may communicate with potential class members in the ordinary course of business, including discussing settlement before certification …."); *Burrell v. Crown Cent. Petroleum, Inc.*, 176 F.R.D. 239, 244-45 (E.D. Tex. 1997) ("With no evidence of coercion, abuse, or even potential abuse, an order limiting contact [with putative employee class members] is inappropriate.").

In fact, some courts expressly encourage pre-certification settlement attempts between employers and individual employees because the only negative of such a settlement is that class counsel will not receive fees. *McLaughlin v.*

Liberty Mut. Ins. Co., 224 F.R.D. 295, 299 & n.11 (D. Mass. 2004) (denying motion precluding ex-parte interviews with putative class members and stating that if "during the course of frank and non-coercive interviews, the employer and employee resolve their potential disputes, all the better. One can hardly gainsay the notion that there is nothing inherently wrong—and, indeed, it is inherently better—that putative litigants resolve their beefs and disputes short of full-scale litigation and all that litigation entails. Apart from the fact that the coffers of class action counsel receives less than expected, a *de minimum* matter in this court's view, informal resolution of such disputes is a win-win proposition.").

Of course, as stated above, courts do have the authority to sanction coercive communications and to limit communication with putative class members where specific facts demonstrate that such orders are warranted. *See Gulf Oil*, 452 U.S. at 100-02; *Kleiner v. First Nat'l Bank of Atlanta*, 751 F.2d 1193 (11th Cir.1985). However, the cases Sargeant cites in support of invalidating the acknowledgements are not persuasive given the facts of this case. Nor do they support the argument that the District Court abused its discretion by not invalidating the acknowledgements.

First, none of the plaintiffs, classes, or putative classes in the cases Sargeant cites were represented by a union. Here, the Union adequately represented the putative class's interest through the grievance process and the communications

Henderson sent out were sent by agreement with the Union. *See* AA 195, 266-73. Indeed, the Union obtained a reasonable settlement for its members. AA 272.

Second, cases where the courts issued sanctions or strict orders limiting communication involved actual misrepresentations and bad conduct not present here. For example, in *Belt v. Emcare Inc.*, the "letter suggested that the current action was an attack on the potential plaintiffs' status as professionals," misrepresented potential damages and attorney fees, equated the wage and hour action to a medical malpractice suit (feared by the medical community), and "suggested that this suit could endanger the potential class members' job stability[.]" 299 F. Supp. 2d 664, 666-67 (E.D. Tex. 2003). Unlike in *Belt*, Henderson's communication did not threaten retaliation, mischaracterize the case, or contain other material worthy of sanctions or demonstrating a need to limit Henderson's ability to communicate with putative class members. RA 20-27. *Talamantes v. PPG Indus., Inc.*, No. 13-cv-04062-WHO, 2014 WL 4145405, *5-6 (N.D. Cal. Aug. 21, 2014) (noting that the communications in that case did not raise issues like those in *Belt* and other cases, and thus refusing to issues sanctions or a "corrective" notice). Further, here, the putative class members were represented by a Union, meaning that they could speak with Union representatives and could have challenged any retaliation, or abusive conduct, alleviating any power disparity between individual putative class members and Henderson.

Sargeant also cites *Urtubua v. B.A. Victory Corp.* 857 F. Supp. 2d 476, 484-85 (S.D.N.Y. 2012), claiming it stands for the proposition that the employment relationship makes communications inherently coercive. Not only was a union not involved, *Urtubua* does not stand for this proposition. Rather, *Urtubua* involved allegations of actual coercion: that current employees "were **forced** by Defendants to sign sworn affidavits about their wages." *Id.* at 485-86 (emphasis added). No such facts exist here. Nor, with the Union, could Henderson have coerced its drivers.

In *Kleiner v. First National Bank of Atlanta*, the court dealt with a certified and represented class and communications with that class ***after the district court had ordered the defendant not to communicate with the class***. 751 F.2d 1193, 1196-97, 1207 (11th Cir. 1985). Additionally, the defendant expressly chose to conduct its communications at a time coinciding with the district judge's vacation. *Id.* at 1197. This underhanded conduct and disobedience of express court orders is a fundamentally different factual situation than that present here, where no court order prohibited contact with putative class members and Henderson made the contact by agreement with the Union. While Sargeant considers these distinctions without a difference, this only shows his willingness to ignore facts, as *Kleiner*'s facts are simply inapposite.

Other cases Sargeant cites also do not support his request. In *Keystone Tobacco Co. v. U.S. Tobacco Co.*, while the Court prohibited any party or its representative from making "misleading or inaccurate statements" or "attempt to coerce class members through threats or misrepresentations," the Court refused to prohibit settlement discussions between the defendant and putative class members. 238 F. Supp. 2d 151, 157, 159-60 (D.D.C. 2002) ("After examining the written settlement materials, the Court concludes that while the Kessler Letter, the Memorandum and the Kessler Complaint Letter contain some self-servicing advocacy for defendants' position, it cannot find that the statements therein are inaccurate or misleading. The correspondence itself does not appear to contain any incorrect assertions of fact regarding the current class action or the terms of the settlement agreement."). In *Ralph Oldsmobile, Inc. v. General Motors Corp.*, No. 99 Civ. 4567(AGS), 2001 WL 1035132, *6 (S.D.N.Y. 2001), the Court declined to void releases and only allowed dealers to petition the court to void the release if they wanted to. In *Longcrier v. HL-A Co.*, 595 F. Supp. 2d 1218, 1225 (S.D. Ala. 2008), the court recognized that getting declarations from potential opt-ins was permissible but determined that these declarants had been affirmatively deceived and intimidated into signing. *Compare Kerce v. W. Telemarketing Grp.*, 575 F. Supp. 2d 1354, 1367 (S.D. Ga. 2008) (declining to strike employee declarations collected by employer in the absence of any showing that employer

"misrepresented facts about the lawsuit, discouraged participation in the suit, or undermined the class' confidence in, or cooperation with, class counsel")

In order to prohibit or sanction communications between a defendant and a putative class member, the court must first determine "that the communication is abusive and threatens the proper functioning of the litigation." *Doe 1 v. Mich. Dep't of Corr.*, No. 13-14356, 2014 WL 3809419, at *5 (E.D. Mich. Aug. 1, 2014). In an attempt to show abuse, Sargeant only points to Henderson's statement that attorneys generally seek to "line their own pockets rather than truly benefit individuals like you." This statement was not deceptive, but Henderson's honest opinion—and the opinion of many people. In fact, Sargeant's counsel has demonstrated his desire to line his own pocket by making attorney fees requests for just filing a Motion to Certify and for filing this appeal, without actually being successful on any claim. Sargeant's counsel is only potentially entitled to fees if he is successful, not for filing motions and appeals. AA 37 (request for $20,000 in fees); AOB 53-54 (request for $20,000 plus additional fees).[23] However, in addition to this statement, Henderson directed all recipients to look up and contact Sargeant's counsel and form their own opinion—if they chose not to do so, that was their choice. AA 51-55 ("In fact, we encourage you to look up the attorneys who have brought this lawsuit, Leon Greenberg Professional Corporation."). These

[23] Sargeant's use of a settlement offer to attempt to prove liability, both for sanctions and to support class certification, is knowingly improper. NRS 48.105.

letters simply were not coercive or deceptive and are protected speech. A Defendant does not lose its First Amendment rights because it has been sued and any order limiting those rights has to be supported by a specific record of abuse and very narrowly tailored. *Gulf Oil*, 452 U.S. at 102.

While some cases have invalidated releases or declarations and others have either accepted or even encouraged settlement with putative class members, the cases show that what they do is within the district court's discretion. *Longcrier*, 595 F. Supp. 2d at 1227 (recognizing that courts exercise their discretion regarding communications with putative class members in different ways). Here, the District Court did not abuse its discretion in refusing to invalidate the waivers where the putative class members were protected by a Union with whom they could discuss the letter and where the letter was not deceptive and identified putative class counsel. As such, the Court should uphold the District Court's discretionary decision.

II. The District Court Properly Denied Class Certification

"The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011).[24] To warrant a "departure" from this rule, the

[24] The irony of this fact should not be lost on the Court. Sargeant argues that the Union, elected by majority vote under the NLRA, cannot represent drivers and settle a claim on their behalf, but that **he and the attorney he alone chose** can.

plaintiff must first satisfy Rule 23(a)'s requirements of "numerosity, commonality, typicality, and adequate representation." *Id.* Rule 23 "does not set forth a mere pleading standard." *Id.*; *accord Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 846, 124 P.3d 530, 537 (2005). Rather, it is a plaintiff's burden to prove that class treatment is proper, *Shuette*, 121 Nev. at 846, 124 P.3d at 537, and he must "'be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact,' typicality of claims or defenses, and adequacy of representation as required by Rule 23(a).'"[25] *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) (quoting *Dukes*, 564 U.S. at 350). This rigorous analysis will generally overlap with the merits of the underlying case. *Dukes*, 546 U.S. at 351. "If a court is not fully satisfied [after conducting the rigorous analysis], certification should be refused." *Kenny v. Supercuts, Inc.*, 252 F.R.D. 641, 643 (N.D. Cal. 2008) (citing *General Tele. Co of Sw. v. Falcon*, 457 U.S. 147, 161 (1982)). The burden rests with plaintiff to establish that the case is fit for class treatment. *Shuette*, 121 Nev. at 846, 124 P.3d at 537; *Sobel v. Hertz Corp.*, 291

[25] In asserting commonality before the District Court, Sargeant only attached a few declarations and sample letters from Henderson regarding the Resolution and acknowledgements. This was entirely insufficient evidence to support class certification and an independent reason to uphold the District Court's decision. *See e.g.*, *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 774 (7th Cir. 2013) (affirming decertification of wage and hour class where plaintiffs offered to present testimony from 42 "representative" class members out of 2,341, because "[c]lass counsel has not explained … how these 'representatives' were chosen–whether for example they were volunteers, or perhaps selected by class counsel after extensive interviews and handpicked to magnify the damages sought by the class.").

F.R.D. 525, 541 n.23 (D. Nev. 2013) ("Factual determinations supporting a Rule 23 finding must be made by a preponderance of *admissible* evidence.").

Additionally, the party seeking certification must show 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." *See* FRCP 23(b)(3). Here, Sargeant has failed to demonstrate that the District Court abused its discretion in denying class certification.

A. Sargeant Fails to Adequately Address the Relevant Standard

In his Opening Brief, Sargeant focuses entirely on the commonality element of class certification. In fact, after arguing commonality for nine pages, Sargeant concludes his argument about class certification citing his briefing before the District Court, stating: "All of the other necessary elements to sustain the requested class certification (numerosity, adequacy of representation, typicality of claims) were overwhelmingly established." AOB 49. NRAP 28(e)(2) expressly forbids this argument by incorporation: "Parties shall not incorporate by reference briefs or memoranda of law submitted to the district court or refer the Supreme Court or Court of Appeals to such briefs or memoranda for the arguments on the merits of the appeal." As such, Sargeant has failed to address each of the NRCP 23(a) requirements and, on this basis alone, his request for certification (presuming

remand) must be denied. Further, any attempt to rectify this error on reply should not be permitted as it would be fundamentally unfair to Henderson because Sargeant failed to address these necessary elements in his Opening Brief. *Edelstein v. Bank of N.Y. Mellon*, 128 Nev., Adv. Op. 48, 286 P.3d 249, 261 n.13 (2012) (refusing to address arguments raised for the first time on reply).[26]

B. No Class Should Be Certified for a Settled Claim

Sargeant's argument for class certification relies on his argument that the Union Resolution is invalid. If this Court disagrees, as it should, then no claim can proceed, whether individually or on a class-wide basis because the Union settled the claim. *See supra* Part I. Thus, as Henderson has demonstrated that the Resolution should stand and any attack on the Resolution is preempted, *see supra* Part I(C)(3), the District Court properly denied class certification.

Similarly, Sargeant's argument for a reduced class certification fails based on preemption. Sargeant requests that if this Court does not invalidate the Resolution, the Court order certification of a class of non-acknowledgement signers. However, acknowledgements are irrelevant to whether the Union settled the claim at issue—it did. AA 273. As such, no limited class can be certified as that class would only assert a settled and preempted claim. Further, Sargeant did not appeal denial of his Motion for Reconsideration, which is where he first requested

[26] If the Court considers Sargeant's arguments below via incorporation, it should consider Henderson's as well, AA 138-74, or permit a surreply.

this relief. *See* Notice of Appeal. As such, this issue is not properly before this Court. NRAP 3(c)(1)(B).

C. Sargeant Has Not Shown Commonality Sufficient to Warrant Overturning the District Court

Sargeant also falls far short of demonstrating commonality—the only element of class certification he actually addresses. See FRCP 23(a)(2). Under NRCP 23(a)(2), Sargeant must show that there are common questions of law or fact common to each individual within the proposed class. Questions of law and fact are common to the class only if the answer to the question as to one class member holds true as to *all* class members. *Shuette*, 121 Nev. at 845, 124 P.3d at 538; *see also Falcon*, 457 U.S. at 155 (questions of law and fact must be applicable in the same manner as to the entire class). Further, determining the common questions' "truth or falsity" must resolve an issue that is "central to the validity of each one of the claims in one stroke." *Dukes*, 564 U.S. at 350. In other words, "[w]hat matters to class certification … is not the raising of common questions—even in droves—but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." *Id.* (citations omitted). "[I]f the effect of class certification is to bring in thousands of possible claimants whose presence will in actuality require a multitude of mini-trials (a procedure which will be tremendously time-consuming and costly), then the

justification for class certification is absent." *Shuette*, 121 Nev. at 847, 124 P.3d at 543 (internal quotation marks omitted).

1. The Acknowledgements Demonstrate the Putative Class Lacks Commonality

Sargeant relies on his argument that the Acknowledgements executed by a majority of those he seeks to represent are void. As discussed above, the District Court exercised its discretion and chose not to void those acknowledgments and there is no basis for this Court to overturn the District Court's use of its discretion in that fashion. *See supra* Part I(E). As such, the vast majority of drivers have affirmatively stated that they reported all hours worked and have been fully paid by Henderson. AA 191-93, 274. This alone shows that class certification would be improper because hundreds of putative class members deny that they worked off-the-clock, contrary to Sargeant's allegations in his Motion for Certification. *Compare* AA 274, *with* AA 23-24; *see also* RA 20-27 (demonstrating payments between $147.96 and $2,920.25). As such, Sargeant cannot show common questions of law or fact applicable in the same manner to the entire class. As such, certification would be improper. *Shuette*, 121 Nev. at 845, 124 P.3d at 538; *Dukes*, 564 U.S. at 350.

2. The Union-Negotiated Letters Do Not Show Commonality

Sargeant claims that the letters sent to Henderson drivers pursuant to the Resolution demonstrate common factual and legal issues, such as how did

Henderson calculate payments, what should be done with unclaimed payments, etc. However, any allegation that Henderson did not properly calculate settlement payments would be a claim possessed by the Union, not Sargeant, and would be preempted by the LMRA as alleging breach of the Resolution (a contract between the Union and Henderson). *Shane*, 868 F.2d at 1060 (holding that claim alleging breach of a CBA are preempted). Similarly, the Resolution did not require all drivers be paid, but only required Henderson engage in "reasonable efforts to compensate all former taxi drivers." AA 272. If Sargeant contends this settlement was unfair, he can assert a duty of fair representation claim against the Union. Thus, these letters only support the District Court's decision to deny class certification.[27]

3. Resolution of the Claim Would Require Individualized Analysis

a) Off-the-Clock Claims Require Individualized Analysis

Sargeant entirely fails to address the question of how his off-the-clock work allegations demonstrate that the individualized analysis of each class member's claims would be necessary. AA 24, 81-82. In this case, Sargeant alleges that he and others were not paid for "show-up" time and that they worked through breaks

[27] Sargeant's arguments regarding unclaimed funds from a judgment escheating to the state or going to a *cy pres* beneficiary do not apply in a settlement setting like this, only where judgment was entered.

without compensation. AA 24, 81-82. Such off-the-clock work is not just a question of damages, but goes to the heart of liability. And courts routinely deny certification because off-the-clock work claims, by their very nature, are often overwhelmed by individual inquiries. *See, e.g., In re Wal-Mart Wage & Hour Litig.*, No. 2:06-CV-00225-PMP-PAL, 2008 WL 3179315, at *19 (D. Nev. June 20, 2008) (noting off-the-clock claims "would involve an examination of the particular instances of alleged unpaid work to determine if in fact the employee worked but was not paid"); *Basco v. Wal-Mart Stores, Inc.*, 216 F. Supp. 2d 592, 596 (E.D. La. 2002) (recognizing "individualized issues will arise from the myriad of possibilities that could be offered to explain why any one of the plaintiffs worked off-the clock," and are subject to individualized defenses); *Pryor v. Aerotek Sci. LLC*, 278 F.R.D. 516, 533 (C.D. Cal. 2011) (stating off-the-clock claims would entail "determining on an individual basis how much time the employee worked compared to the time for which he or she was compensated"). So, too, here. Any off-the-clock work claims would require substantial individualized inquiry and support the District Court's exercise of discretion to deny class certification. At the very least, remand with mandated class certification would be improper as Henderson should at least be able to explore this issue in discovery prior to certification.

b) Which Wage Tier Applies to Each Driver Requires Individual Analysis

The "two-tiered" minimum wage provided by the MWA requires a district court to determine whether a driver has dependents and what his earnings (including tips) are, which are individual questions.[28]

(1) Applicable Coverage Depends on Actual Number Dependents

Sargeant contends that the only relevant insurance cost figure is the cost of family coverage. There is no basis for this in the MWA or its regulations. NAC 608.102 and 608.104 provide that to qualify for the lower tier wage, a "health insurance plan must be made available to the employee and ***any*** dependents of the employee" that costs no more than 10% of the **gross taxable income attributable to the employer**, which includes tips earned. (emphasis added). Thus, pursuant to the MWA and its regulations, the cost of family coverage is only relevant if a taxi driver has a family of dependents. *See* MWA; NAC 608.102. If a driver has no dependents, the cost of family coverage is irrelevant as he or she has no dependents to cover. The only relevant figure to individuals without dependents is the cost of

[28] It should first be noted that Sargeant seeks to avoid the individualized question by seeking certification only on the lower minimum wage tier. While Sargeant asserts any driver could bring an individual claim asserting a claim to the higher tier, he also acknowledges elsewhere that this type of litigation would be unlikely. Thus, Sargeant admits that his counsel is more interested in getting certification to line his own pocket than actually asserting any particular class member's full rights and will walk away from part of the claim when it hurts his certification argument.

insuring themselves, *see* NAC 608.102, which is fully covered by Henderson. *See* RA 18-19; AA 245. Further, if an employee only has a single dependent, the relevant cost of insurance is the cost to insure the employee and his or her one dependent. *Id.*[29]

This is not simply a question of damages, but of whether any liability exists at all. But beyond that, even if this were only a question of damages, it is so predominant that it would bar certification. Sargeant's reliance on *Yokoyama v. Midland National Life Insurance Co.*, 594 F.3d 1087 (9th Cir. 2010), for the proposition that damages calculations supposedly cannot defeat certification is misplaced because it has been abrogated by the U.S. Supreme Court. Specifically, in *Comcast*, the Court reversed a certification order where "[q]uestions of individual damages calculations will inevitably overwhelm questions common to the class." 133 S. Ct. at 1433. And, the Court noted, "at the class-certification stage (as at trial), any model supporting a plaintiff's damages case must be consistent with its liability case." *Id.* As such, in *Stiller v. Costco*, the court rejected the "assertion that damages issues cannot defeat predominance." 298 F.R.D. 611, 627 (S.D. Cal. 2014). Indeed, "[t]he Supreme Court's decision in *Comcast* makes clear

[29] Whether a driver must enroll to be subject to the lower minimum wage is currently being decided by this Court in Docket No. 68523. Further, Sargeant did not address subclasses based on whether they received insurance in his Motion for Certification or reply in support thereof. Thus, such subclass questions are not properly before the Court.

that individualized damages determinations ***can*** defeat Rule 23(b)(3)'s predominance requirement." *Id.* (emphasis added). Thus, the court recognized, "*Comcast* abrogates … *Yokoyama* in this regard." *Id.*

(2) A Driver's Amount of Income Requires Individualized Inquiry

After determining which insurance rate is relevant to an individual employee, another individual determination is also necessary: What is the drivers' "gross taxable income"? Sargeant contends this is an easily retrievable number as it is expressed on their IRS Form W-2s. This is incorrect. Gross income is defined as "all income from whatever source derived" and includes tips, whether or not they are reported to an employer. *See* 26 U.S.C. § 61; *see also* IRS Pub. 531, Reporting Tip Income. It is common knowledge that not all individuals who receive tips report all of their tips either to their employer or to the IRS. Here, because the MWA incorporates the IRS definition of income by referring to "gross taxable income," the actual amount of tips a driver receives, not just what he reports, determines what his gross taxable income is. This will require Henderson Taxi to inquire as to each individual driver's actual tip income, not what he reported. Sargeant's argument that this tip income is irrelevant ignores the IRS definition of "gross taxable income" and attempts to use a person's misreporting of tax income to help them earn a higher minimum wage. This is unsupported by the

MWA. If their claims were not already settled, Henderson would be entitled to have a jury assess each individual's credibility regarding tip reporting.

4. Generic Legal Questions Are Not "Common" Legal Questions

Henderson does not contend that there are not some common legal questions, *e.g.*, the proper statute of limitations. However, these legal issues may be determined prior to certification and do not directly relate to the ultimate question of liability for Sargeant's claims. Rather, these are ancillary questions that are not sufficient to support class certification. *Dukes*, 131 S. Ct. at 2551 ("What matters to class certification … is not the raising of common questions—even in droves—but, rather the capacity of a classwide proceeding to generate common answers ***apt to drive the resolution of the litigation***." (emphasis added)). As such, the majority of common questions Sargeant asserts do not support certification.

III. Judicial Reassignment Is Not Warranted

Reassignment, is only proper in "rare and extraordinary circumstances" and is not proper "where a judge treated the parties evenhandedly and with respect." *Krechman v. Cty. of Riverside*, 723 F.3d 1104, 1112 (9th Cir. 2013) (internal quotations omitted). Though Sargeant mentioned *Krechman* and the fact it set out factors to consider regarding reassignment, he failed to discuss any one of them because they do not support his position. Rather, he simply claims that Judge Villani's award of attorney fees demonstrates bias and hostility. This is simply

unsupported and untrue. Sargeant failed to obtain any transcripts from the multitude of hearings in this matter, likely because they show Judge Villani treated Sargeant and his counsel respectfully and considered their arguments. He simply disagreed, found they were without merit, and decided that Sargeant's Motion for Reconsideration and other conduct was improper and maintained without reasonable ground to harass Henderson. Judge Villani's decision that Sargeant should have dropped his claim after he decided it had been settled was not unreasonable and was within his discretion. As such, even if this Court disagrees, with Judge Villani's decision, reassignment is unwarranted.

IV. Conclusion

For all the foregoing reasons, the District Court should be affirmed in all regards.

DATED this 28th day of September, 2016

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CERTIFICATE OF COMPLIANCE

I certify that I have read this Answering 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), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. The Brief complies with the formatting requirements of NRAP 32(a)(4)-(6) and the type-volume limitation stated in NRAP 32(a)(7) because it is presented in a 14-point Times New Roman font and contains 13,882 words, including headings and footnotes, as counted by Microsoft Word—the program used to prepare this brief—excluding those portions of the Brief excluded from the word count by NRAP 32(a)(7)(C).

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.

AFFIRMATION

The undersigned does hereby affirm that the preceding document DOES NOT contain the Social Security Number of any person.

DATED this 28th day of September, 2016.

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CERTIFICATE OF SERVICE

Pursuant to N.R.A.P. 25(1)(b) and 25(1)(d), I hereby certify that on the 28th day of September, 2016, I served a true and correct copy of the foregoing **RESPONDENT'S ANSWERING BRIEF** by electronic service and/or by depositing same in the United States mail, first class postage fully prepaid to the persons and addresses listed below:

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