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IN THE SUPREME COURT OF NEVADA

Sup. Ct. No. 69773

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

APPELLANT'S REPLY BRIEF

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SUMMARY

As appellee Henderson Taxi ("Henderson") extensively discusses in its brief, Henderson's employees' union has the power to waive and settle the minimum wage claims of Henderson's employees. That is not the issue. The issue is whether the union did so "explicitly" in "clear and unambiguous terms" and "in a bona fide collective bargaining agreement," ("CBA") as required by Article 15, Section 16, of the Nevada Constitution (the Minimum Wage Amendment or "MWA").[1] Neither the district court in its decision, nor Henderson in its brief, explain how the "grievance resolution" with Henderson's union, upon which the district court's decision is based, complies with the MWA's requirements. The MWA gives employees a right to bring lawsuits for unpaid minimum wages unless their union explicitly, clearly, and unambiguously limits that right in a CBA. The grievance resolution, entered into after Sargeant filed his lawsuit, does not mention his lawsuit. Nor does it state the union is limiting the right of Sargeant or any other employees to prosecute MWA lawsuits. Nor is it part of a CBA or state it is amending any CBA. As a result, it did not, and could not, limit Sargeant's MWA

[1] Subpart (B) of the MWA provides in relevant portion: "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."

rights. The district court's contrary finding renders the MWA's explicit waiver requirement meaningless and creates the opposite presumption: that when an employer agrees with a union to address MWA violations, such an agreement, even if it makes no mention of waiving the rights of individual employees to bring legal actions under the MWA, will also waive those rights. The district court's adoption of such a default "election of remedies" rule waiving the state law rights of union members violates the plain language of the MWA and is also prohibited by federal labor law.

IN REPLY TO HENDERSON'S STATEMENT OF THE CASE

Henderson's statement of the case contains many incorrect factual assertions. The most prominent ones are discussed below if the Court wishes to examine them. None are germane since the grievance resolution does not comply with the waiver requirements of the MWA.

Henderson states "Henderson and the Union agreed the CBAs provisions covered minimum wage" and that their grievance resolution "includ[ed] Union members' minimum wage claims." RAB[2] 4. These were just Henderson's assertions to the district court, they are not established by the portions of the record cited, AA 191-93, the declaration of Henderson's employee, Cheryl Knapp, and

[2] Respondent's answering brief is referenced as "RAB."

AA 272, the grievance resolution. Knapp's declaration references the grievance resolution and states "[b]y the Resolution, Henderson Taxi agreed to pay Nevada minimum wage on a going forward basis, a practice it has previously implemented but was now made part of the CBA..." But the grievance resolution does not state the CBA was being changed to have its "provisions cover minimum wage." Nor does the grievance resolution state, as Knapp claims and Henderson's brief asserts, it was "including Union members' minimum wage claims," such as Sargeant's pending MWA lawsuit, within the scope of its resolution.

Henderson states "[t]he [grievance] Resolution required Henderson to provide acknowledgments to the drivers confirming payment." RAB 5. It again references the Knapp declaration and the grievance resolution to imply it was required by the grievance resolution to provide each class member with the acknowledgments the district court refused to void. That is untrue. What the grievance resolution actually says is "Henderson Taxi shall also make reasonable efforts to obtain acknowledgments of the payments to employees..." but specifies no form of "acknowledgment." AA 272. Nor is there any evidence in the record that the union ever approved of, or knew the contents of, the "acknowledgment" form. Such form did not just acknowledge a receipt of a "payment" made by Henderson but included the class member acknowledging they had been paid all

minimum wages they are owed. AA 274.

Henderson claims that "[d]uring the time period in which Henderson negotiated the Grievance with the Union" Sargeant filed his lawsuit. RAB 5. There is no evidence such "negotiations" were ongoing when Sargeant filed his lawsuit. Or that Henderson would have paid anything to its drivers towards its MWA liability if Sargeant had not filed his lawsuit. The record indicates that Henderson manufactured the "grievance resolution" with the union in response to Sargeant's class action case.

The grievance resolution was entered into by the union and delivered to Henderson on June 5, 2015 (it bears no signature date but the fax transmission date "06/05/2015," and the phone number appears at the top of the page with "ITPE," the union's initials[3], and Henderson does not assert it was entered into on any other date). AA 272. The immediately previous communication between the union and Henderson was a letter by Cheryl Knapp on August 21, 2014. AA 270. That letter made no promise to pay the drivers any unpaid minimum wages. It promised to calculate the "alleged arrears owed" and asked the union to "hold this matter in

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[3] The listed phone number, (702) 384-4939, is identified in online information directories as being the fax number of the Las Vegas office of the ITPEU. *See,* https://us-organization.com/company-itpeu-afl-cio-in-las-vegas-nv-81921 and http://www.dbcomp.co/number-address/itpeu-afl-cio-lasvegas-clark.

abeyance" until this Court ruled on a motion to reconsider *Thomas*. *Id.* That motion was denied on September 24, 2014. Sargeant filed his lawsuit on February 19, 2015. AA 1. During the five months between the date reconsideration was denied in *Thomas* and the filing of Sargeant's lawsuit, Henderson took no steps to pay the "alleged arrears owed" to the taxi drivers. Six weeks after Sargeant filed his lawsuit, and two weeks after its answer to the same, Henderson commenced its "acknowledgment" gathering program from the class members in exchange for payments that it calculated in an unknown fashion. AA 19. Two months later, after it had already secured those signed "acknowledgments" from 100% of its current taxi drivers, it secured the union's execution of the grievance resolution. AA 339-340, 279.

ARGUMENT

I. THE GRIEVANCE RESOLUTION DID NOT "EXPLICITLY" AND IN "CLEAR AND UNAMBIGUOUS TERMS" WAIVE SARGEANT'S RIGHT TO SUE FOR UNPAID MINIMUM WAGES UNDER THE MWA

Henderson does not explain how the grievance resolution's language satisfied the Nevada Constitution's "explicit" and "clear and unambiguous terms" requirement for waiving employees' rights under the MWA. It just quotes, with many ellipses, the grievance resolution's language and concludes that "...the

Resolution expressly resolves any minimum wage claim Henderson's drivers may have had" and that "the Resolution shows a clear meeting of the minds between Henderson and the Union" sufficient to extinguish Sargeant's MWA rights. RAB 14, 17.

The district court also offered no explanation of how the grievance resolution's language complied with the waiver requirements of the MWA.

A. A constitutional right is not waived in an "explicit" and "unambiguous" manner by a "meeting of the minds" sufficient to establish an assent to a contract.

The MWA does not authorize labor unions to make implicit or "by conduct" waivers or releases of the rights the MWA grants to employees. Nor could it. *See*, *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693, 70, fn 11 (1985) and *Lingle v. Norge,* 486 U.S. 399, 409, fn 9 (1988) (Unions may waive state law rights of members only if they do so "explicitly" and in a "clear and unmistakable" manner).

It is black letter law that a "meeting of minds" and "assent" sufficient to form a contract requires neither explicit nor unambiguous terms and can be established through extrinsic evidence of the parties' understanding. *See*, *Carlson, Collins Gordon & Bold v. Banducci,* 257 Cal. App. 2d 212, 222 (Cal. Ct. App. 1967) and *Restatement of Contracts Second* § 19 ("...manifestation of assent may be made wholly or partly by written or spoken words or by other acts or by failure to act").

Allowing a waiver of Sargeant's MWA rights to occur under Henderson's "meeting of the minds" standard would violate the MWA's requirement that such waivers always be "explicit" and in "clear" and "unambiguous" terms in a written[4] "collective bargaining agreement."

B. Even if Henderson's improper "meeting of the minds" standard was utilized the record before the district court did not establish any "meeting of the minds."

Henderson does not explain why this Court should conclude there was a "meeting of the minds" between the union and Henderson to have the grievance resolution settle Sargeant's MWA lawsuit. It fails to do so because the record before the district court was insufficient to establish such a "meeting of the minds" between the union and Henderson.

As discussed in detail, *infra*, the grievance resolution's language is reasonably interpreted to resolve just the union's grievance and claims arising under the CBA and not the MWA lawsuit brought by Sargeant. The CBA imposes no obligation to pay minimum wages; it prohibits the parties from resolving claims arising at law (and not under the CBA) through its grievance procedure; and it prohibits the

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[4] The MWA does not include the word "written" in its waiver requirements and specifies that a waiver be in a CBA. There are no "unwritten" CBAs as federal labor law requires labor unions to provide copies of CBAs to union members. *See*, 29 U.S.C. § 414.

retroactive use of a grievance resolution in any other case such as Sargeant's earlier filed MWA lawsuit.[5] The grievance resolution does not say anything about MWA lawsuits by Henderson's taxi drivers or imposing any limits on such lawsuits. There is no evidence that the union was aware of Sargeant's pending MWA lawsuit when it executed and returned the grievance resolution. Nor is there any evidence that the union was advised by Henderson, prior to the grievance resolution's execution, that Henderson intended its language to settle Sargeant's lawsuit and preclude MWA lawsuits by individual taxi drivers. Henderson's failure to advise the union of such intended meaning would, if the union attached a different meaning to the grievance resolution's language, preclude the "meeting of the minds" finding urged by Henderson. *See*, *Restatement of Contracts Second* § 20 (No assent can be found when parties attach "materially different meanings" to their manifestations of assent).

It is unknown what meaning the union attached to the grievance resolution's language. Henderson apparently drafted the grievance resolution (it is on

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[5] The CBA at § 15.8 states: "The resolution of a grievance shall not be precedential, nor have retroactive effect in any other case." AA 255. Henderson misreads this language as only meaning "that there is no case law (precedent) that arises from interpreting the CBA." RAB 20, fn 16. But the provision speaks not just of "precedent" for the future but of "retroactive" effect in "any other" case, which by its plain language would include Sargeant's earlier filed case.

Henderson's letterhead) and omitted from it any language stating that the union was waiving the right of Sargeant and other employees to pursue MWA lawsuits. Presumably the union, which cannot bring a MWA lawsuit, would not agree to that language since the CBA does not limit the MWA rights of employees and prohibits a grievance resolution from doing so or retroactively settling Sargeant's pending MWA lawsuit. The language of the grievance resolution, as signed by the union, is reasonably understood to constitute a resolution of only claims by the union that are created by the CBA, not claims by Sargeant or others under the MWA. There is no basis to find on the record before the district court that a "meeting of minds" took place between the union and Henderson to settle Sargeant's MWA lawsuit.

C. The grievance resolution does not meet the MWA's requirement that a waiver of MWA rights by a labor union be in explicit, clear and unambiguous terms.

1. The lack of any express language in the grievance resolution waiving the right of employees to bring MWA lawsuits requires reversal of the judgment.

Neither Henderson nor the district court discussed what language a collective bargaining agreement must contain to comply with the MWA's "explicit," "clear" and "unambiguous terms" waiver requirement. Under the common law, tort and contract rights can be waived in writing but the standards to establish those waivers differ. *See, Anderson v. Century Products Co.,* 943 F. Supp. 137, 150-51 (Dist. N.H.

1996) (Waivers of contractual rights "need not be clear and unambiguous to be given effect, but rather a lower threshold of clarity is applicable" but waivers of tort rights are only operative if made "clearly and unambiguously"). Waivers of certain statutory or constitutional rights have significantly heightened requirements. *See, Atalese v. US Legal Services Group, L.P.*, 99 A.3d 306 (Sup. Ct. N.J. 2012) (Requiring a contractual waiver of statutory or constitutional rights to "clearly and unambiguously signal" that such rights were being waived); *Golden Pac. Bancorp v. FDIC*, 273 F.3d 509, 516 (2nd Cir. 2001) (New York requires a release of liability to unambiguously specify the claims and conduct released); *City of New Orleans v. Mun. Admin. Servs.,* 376 F.3d 501, 504 (5th Cir. 2004) (Contractual waiver of right to remove a lawsuit to federal court must be "clear and unequivocal") and other cases.

A "clear and unambiguous" or "explicit" waiver of legal rights cannot be stated in general terms. It must contain a precise reference that unquestionably establishes from the language of the waiver itself that the legal right has been given up. *Compare*, *Cannon v. Cannon,* 514 S.E. 2nd 204, 205 (Sup. Ct. Ga. 1999) and *Fech v. Fech*, 247 S.E. 2d 79 (Sup. Ct. Ga. 1978) (Waiver of statutory right to seek future alimony modification is enforceable when it expressly references the statute providing such right, waiver is invalid when agreement states it is a "full and final settlement of any and all questions of property division, alimony, maintenance and

support" but makes no reference to a waiver of such statutory right). *See, also*, *Golden Pac. Bancorp*, 273 F.3d at 516 (Language of release running to receiver in respect to damages caused by its decision "to close the bank" does not unambiguously extend to damages caused by "its management of the receivership of the bank" and release limited accordingly); *City of New Orleans,* 376 F.3d at 504 (Contract stating party "consent[s] and yield[s] to the jurisdiction of the State Civil Courts of the Parish of Orleans and does hereby formally waive any pleas of jurisdiction on account of the residence elsewhere of the undersigned contractor" does not create a "clear and unequivocal waiver" of the right to remove a lawsuit to federal court) and other cases.

The grievance resolution's language, being completely silent on the right of Sargeant or other employees to bring lawsuits under the MWA, cannot constitute an explicit, clear and unambiguous waiver of those rights. This Court need go no further and should, on that basis, reverse the district court.

2. The language of the grievance resolution is reasonably understood to resolve only the union's right to pursue a CBA grievance and not Sargeant's right to bring an MWA lawsuit or is at least ambiguous on that point.

The grievance resolution's termination of the union's right to seek relief under the CBA does not automatically waive Sargeant's right to pursue a lawsuit under the

MWA. The only thing the grievance resolution "expressly" and "unambiguously" resolved by its language was the grievance itself and claims relying upon the CBA. Henderson's unexplained assertion, and the district court's similarly unexplained holding, that the grievance resolution expressly, clearly and unambiguously waived Sargeant's right to pursue a MWA lawsuit has no support in its language. The grievance resolution says nothing about the right to pursue such lawsuits, its operative language in respect to its scope being:

> 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:**
>
> [Statement of actions to be performed by Henderson]
>
> 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 bargaining agreement. Pursuant to Article XV, Section 15.7**, this resolution is final and binding on all parties.
> (Emphasis provided).

The first sentence of the grievance resolution recites the union grieved the "issue" of a failure to pay minimum wages "pursuant to Sections V (Wages) and XV

(Grievance)" of the CBA. The second sentence then recites certain actions by Henderson will "resolve the grievance pursuant to Section XV of the CBA," It makes clear twice in its first two sentences that it is reciting the resolution of a grievance pursuant to the Article XV of the CBA. In its second to last sentence it reiterates, for a third time, the express qualification that whatever it is resolving is pursuant to the CBA by stating "this matter [is] formally settled under the CBA" and "state law as implemented through such CBA." It concludes by reciting its "final and binding status" is also "pursuant to Article XV, Section 15.7"of the CBA.

The grievance resolution can, by its terms, only resolve disputes within the scope of ("pursuant to") Article XV of the CBA which defines a grievance "...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. Pursuant to this language, the issues resolved by the grievance resolution involved rights (an "interpretation or application") arising out of the CBA itself and as limited by the CBA. The CBA, at § 18.3, expressly excludes all disputes involving "violations" of "all laws which properly apply to the employer-employee relationship" from resolution by any Article XV grievance. AA 260-61. It further compels that such disputes "be decided only by a court of law of competent jurisdiction."

Henderson notes that § 18.3 specifically mentions discrimination type claims as part of its "including but not limited to" coverage but does not expressly mention statutory wage claims. RAB 18 fn 14. It then argues, without citation to any authority, that wage claims, because wages are "mandatory" subjects for bargaining under the National Labor Relations Act (the "NLRA"), do not come within the scope of § 18.3. Yet discrimination claims are *also* "mandatory" subjects of bargaining under the NLRA and are also subject to § 18.3, rendering such argument nonsensical. *See*, *Star Tribune v. Newspaper Guild,* 295 NLRB 543, 548 (1989) citing *Emporium Co. v. Western Addition Community Organization*, 420 U.S. 50, 66 (1975).

The manifest ambiguities in the grievance resolution's language also render it incapable of effectuating a wavier of Sargeant's MWA rights. It limits the grievance to a resolution "pursuant to Article XV" of the CBA instead of stating it was a resolution for all purposes and within the fullest extent of the parties' powers. It purports to grieve a failure to pay the "state minimum wage" even though Article XV limits the grievance process to claims involving the "interpretation" or "application" of the CBA and the CBA prohibits the resolution of any legal claims, including MWA claims, by an Article XV grievance. It limits its resolution of any state law issues to "state law as implemented through such collective bargaining agreement,"

meaning the portions of "state law" that are "implemented" outside of the CBA, such as through Sargeant's lawsuit, are not resolved. These conflicting and unclear terms create, at a minimum, a lack of clarity and an ambiguity in the grievance resolution that prevents it from limiting Sargeant's right to pursue his own MWA lawsuit.

3. Henderson's argument that the union agreed to waive the CBA's limitations on what could be resolved by a grievance has no support in the record and would create an improper "election of remedies" rule.

Henderson claims that the union, by filing its grievance, was "waiving any limitation on the grievance process" contained in the CBA. RAB 20. It cites cases holding that "CBAs are interpreted according to ordinary contract principles" and argues that the union and Henderson, just like any parties to a contract, can agree to a contract modification that supercedes a prior contract's limitation. RAB 19. Yet there is nothing in the record indicating such a modification agreement was made, much less that it was made in the explicit, clear and unambiguous fashion needed to create a waiver of MWA rights.

The union's grievance was, under § 18.3 of the CBA, beyond the jurisdiction of the CBA's grievance process. Henderson had no obligation to adjust the grievance and refused to do so. AA 267. The union did not seek arbitration of the grievance after it remained unadjusted, presumably because it understood the

drivers' MWA claims were not within the scope of the CBA's grievance and arbitration process. As discussed at pages 3-4, Henderson only took action to resolve the grievance in response to Sargeant's lawsuit, and only after it had completed its acknowledgment gathering campaign from 100% of its current employees. Nor did it secure any explicit, clear and unambiguous agreement from the union to amend the CBA and preclude MWA lawsuits by the drivers, presumably because the union would not so agree.

Henderson's insistence that the union, by filing the grievance, also consented to have the grievance override § 18.3's requirement that MWA claims only be resolved in a court case,[6] has no support. The union and Henderson were *in pari delicto* and engaging in bluster and deception. The union filed a grievance that was *ultra vires* to the CBA and that it could never successfully pursue in arbitration. Henderson unilaterally gathered "acknowledgments" from the taxi drivers in an attempt to defeat Sargeant's lawsuit and secured a *post-facto* and non-specific "resolution" of such *ultra vires* grievance in an attempt to ratify such actions.

Henderson is arguing for an "election of remedies" rule that would contravene

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[6] Presumably Henderson would argue that the union, by entering into the grievance resolution, also waived or amended § 15.8 of the CBA barring the grievance resolution from retroactively applying to Sargeant's earlier filed lawsuit. But it does not intelligibly address that issue, instead misreading § 15.8 in a footnote and arguing it is a "red herring." RAB 20, fn 16.

the MWA. Such a rule, which was adopted by the district court, results in any union CBA grievance resolution addressing unpaid minimum wages in any fashion acting as a complete waiver of an employee's right to bring an MWA lawsuit. That waiver would flow automatically from the mere fact such a CBA grievance was filed and resolved. It would do so irrespective of the grievance's silence on its extinction of such rights or even if, as in this case, the resolution of MWA rights was specifically excluded by the CBA from the grievance resolution process.

II. THE GRIEVANCE RESOLUTION COULD NOT LIMIT SARGEANT'S MWA RIGHTS SINCE IT WAS NOT PART OF A COLLECTIVE BARGAINING AGREEMENT

The MWA's requirement that a union's waiver MWA rights be set forth in a CBA ensures that union members, who have a legal right to a copy of their CBA, are informed about any union negotiated limits on their MWA rights. *See,* 29 U.S.C. § 414. There is no requirement union grievances, or agreements to resolve grievances, be provided to union members. This "waiver must be in the CBA" requirement of the MWA is dictated by, or at least fully congruent with, the requirement under federal labor law that any waiver of state law rights by a union be explicit, under *Metropolitan Edison, Lingle* and their progeny. An "explicit" waiver by a union of the state law rights of its members is impossible when such a waiver is *not* part of a CBA and is unknown to the union members. The district court never addressed

Sargeant's argument that the grievance resolution could not waive any of his MWA rights because it was not part of a CBA. AA 283.

Henderson only addresses this issue peripherally. It insists, citing *St. Vincent Hospital*, 320 N.L.R.B. 42, 44-45 (1995), that the union had the power to amend the CBA and did so. But the issue is not whether the union could have amended the CBA to limit Sargeant's MWA rights but whether it did so, as did a different Nevada taxi drivers' union in their CBA. AA 309-310. Yet no similar CBA amendment exists between Henderson and its union. Nor does the grievance resolution say anything about amending the CBA. Henderson, without explaining why *St. Vincent* supports such a conclusion, insists a CBA amendment took place in this case through the grievance resolution.

There is nothing in *St. Vincent's* holding or factual situation that supports Henderson's claim. The CBA terms modified in *St. Vincent* concerned the health insurance provided by the employer. *Id.* No waiver of state law rights was involved nor did the union waive any other legal right that required an "express" or "clear and unambiguous" waiver. The CBA modification found to have been agreed upon in *St. Vincent* was expressly invited by the CBA, which required certain health insurance "except as otherwise....mutually agreed....." 320 NLRB at 44. There is no comparable term in Henderson's CBA as § 18.3 does not exclude legal claims,

including those arising under the MWA, from the CBA's grievance resolution process "except as otherwise agreed." *St. Vincent's* application is also limited to NLRA enforcement actions. It was opining on the existence of a CBA amendment in a proceeding to determine whether an employer had violated the NLRA. There is no basis to extend its CBA amendment finding to other situations.

The failure of the CBA to contain the waiver of MWA rights found by the district court requires reversal. Henderson offers no reason for this Court to hold otherwise.

III. SARGEANT'S MWA CLAIM WAS NOT PREEMPTED BY FEDERAL LABOR LAW

Henderson argues that the federal Labor Management Relations Act ("LMRA") preempts Sargeant's MWA claim because it rests upon "an interpretation of the underlying CBA." RAB 21-24. Henderson alleges such a CBA interpretation is needed to determine the "minimum wage tier" applicable to Sargeant (a/k/a the "health insurance" issue) and his "hours of work." That is untrue. No CBA interpretation is needed to resolve those questions, the district court never ruled upon this issue, and there is no basis to find the LMRA preemption claimed by Henderson.

All employees must be paid at least $7.25 an hour even if MWA compliant health insurance is available. If a CBA interpretation is needed to resolve the health

insurance issue Sargeant still has a right to sue under the MWA for the "non-CBA involved" $7.25 an hour wage. There is also nothing in the record supporting Henderson's claim a CBA interpretation is needed to resolve the health insurance issue.

In *MDC Rests. v. Eighth Judicial Dist. Ct.*, 132 Nev. Adv. Op. 76 (October 27, 2016), this Court, at pages 8-9, found that the "lower tier" minimum wage provided by the MWA was proper when the employee had the "option" to receive the health benefits specified in the MWA. The MWA requires that those "MWA compliant" health benefits not cost the employee a premium contribution that exceeds 10% of their wages. Henderson does not dispute it determined if Sargeant and every other taxi driver had the "option" to participate in its health insurance plan and the cost (deduction from gross wages) the driver had to pay if they exercised such "option." Whether those determinations by Henderson complied with the CBA is irrelevant for MWA purposes. The only question, as in *MDC*, is what Henderson made available to Sargeant in respect to the health insurance, not what the CBA may have required it to do.

Henderson's claim determining Sargeant's "hours of work" requires a CBA interpretation ignores that the MWA imposes its own "hours of work" and other standards for minimum wage purposes. *See*, *Terry v. Sapphire Gentlemen's Club*,

336 P.3d 951, 958-960 (Nev. Sup. Ct. 2014) (Parties' "agreement" that workers were independent contractors not controlling, their status as employees under Nevada's minimum wage laws is determined under the "economic realities" test used by those laws.) While the CBA could have, if it did so explicitly, clearly and unambiguously, waived the MWA's standard for determining hours of work, it does not do so. Accordingly, the CBA does not determine Sargeant's "hours of work" for minimum wage purposes.

IV. CLAIMS UNDER THE MWA CANNOT BE RELEASED BY A NON-JUDICIALLY SUPERVISED SETTLEMENT

A. There is no basis to find the MWA only bars "prospective" waivers by employees and Nevada's statutory minimum wage scheme prohibits any waiver of minimum wages.

Henderson repeatedly insists that the MWA "only prohibits its prospective waiver" by employees and not the ability of individual employees to settle "disputed" minimum wage claims. RAB 27. It cites no support for that claim, except the MWA's language,[7] and erroneously insists "Nevada's wage and hour statutory scheme" is "silent" on the "private settlement" issue. *Id.* Nevada's minimum wage statute, NRS 608.260, after authorizing an action by an aggrieved

[7] The MWA's relevant language is at the first sentence of Subpart (B): "The provisions of this section may not be waived by agreement between an individual employee and an employer."

employee for minimum wage violations, states: "A contract between the employer and the employee ***or any acceptance of a lesser wage by the employee*** is not a bar to the action." (emphasis provided). Such language does not, as Henderson claims, only prohibit "prospective" (by contract) waivers of minimum wages for yet to be performed work. It also prohibits an employee's "acceptance of a lesser wage" (an employee can only "accept" wages for work they have completed) from barring such a lawsuit. Such a bar to the release of MWA claims should also be found, as this Court uses NRS 608.260 to determine the parameters of the MWA when the MWA's language does not address the issue. *Compare*, *Thomas v. Nevada Yellow Cab*, 327 P.3d 518 (2014) (Statutory minimum wage exemptions superceded by the MWA's expansive coverage language) with *Perry v. Terrible Herbst*, 132 Nev. Adv. Op. 75 (Oct. 27, 2016) (Statute of limitations under NRS 608.260 applies to MWA claims since the MWA is silent on that issue).

B. No precedents support Henderson's claim that a release of an employee's minimum wage rights obtained by an employer without judicial or administrative oversight is enforceable.

Henderson does not cite a decision, from any jurisdiction, enforcing a minimum wage settlement obtained by an employer directly from an employee without judicial or administrative supervision. That is because no such decisions exist. Every state court, and the federal courts, that have examined that issue have

consistently refused to enforce such releases. Statutory schemes, to the extent they address the issue, such as NRS 608.260, also uniformly prohibit those releases. Henderson argues that Nevada should diverge from the FLSA on this point but gives no substantive rationale for such a divergence. It does so even though *Terry* resolved the Nevada minimum wage law issue before it by adopting an FLSA standard. It found it had "no substantive reason to break with the federal courts" on such issue and there is a strong interest in maintaining jurisdictional uniformity in this area of the law. 336 P.3d 957.

Henderson alternatively argues that Nevada should recognize such releases based upon *Chindarah v. Pick Up Stix, Inc.*, 171 Cal. App.4th 796, 803 (Cal. Ct. App. 2009) and the other cases it cites. None of those cases involved minimum wage claims and the unique issues those claims pose.

C. <u>There was no union approval of the releases.</u>

Henderson alternatively argues that the union's grievance resolution made the releases enforceable. While the union could have authorized releases by employees of MWA rights, it had to do so explicitly, clearly and unambiguously in the CBA. It did not and the releases are unenforceable.

V. HENDERSON IMPROPERLY COMMUNICATED WITH THE CLASS MEMBERS AND SHOULD BE SANCTIONED

Henderson extensively discusses that there is no *per se* prohibition on a defendant engaging in pre-class certification communications, and even settlements, with putative class members. RAB 37-40. Yet the issue, as recognized in the cases it cites, is whether Henderson engaged in misleading communications and coerced waivers from its employees. Henderson insists that no such coercion or improper conduct could have taken place because there was a union representing the taxi drivers and its contact was "by agreement with the union." RAB 42. Neither conclusion is supported by any citation to the record or anything except Henderson's insistence.

The existence of a union does not, *per se*, make an employer's non-judicially approved communications with employee/class members "non-wrongful." Henderson cites no precedent supporting that conclusion. Nor is there anything in the record supporting its claim the union "agreed" to its communications. As discussed at pages 3-4 the record indicates the union had no knowledge of those communications, undertaken by Henderson prior to the grievance resolution, or their contents.

Henderson adamantly insists it had a first amendment right to denigrate

Sargeant's counsel to the class members as someone "bringing case after case trying to get settlements" so they could "line their own pockets rather than truly benefit individuals like you." AA 54. It also insists that there is no evidence it coerced its drivers into signing releases (even though 100% of the currently employed drivers did so). AA 339-340. Yet it offers no explanation as to why it failed to ask, in advance, for permission from the Court to communicate its proposed settlement to the class members, as was done in *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) and every other leading case addressing this issue. It failed to do so to avoid having the district court impose appropriate safeguards on those communications that would foil its efforts to coerce releases from 100% of its current employees. AA 339-340.

VI. THE DISTRICT COURT IMPROPERLY DENIED CLASS CERTIFICATION

A. Sargeant properly presented his argument for class certification in his opening brief.

Sargeant's opening brief indirectly references, at page 49, the portions of the record establishing that the class certification prerequisites of numerosity, adequacy of representation, and typicality of claims were demonstrated to the district court. Such reference is to AA 21-35, 288-295 which are portions of Sargeant's briefs in the district court that in turn reference various motion exhibits: AA 50-55 (there

were 1000 letters sent by Henderson to class members) demonstrating numerosity; AA 316-17 (Declaration) demonstrating Sargeant's situation is typical of over 300 drivers who did not sign "acknowledgments"; AA 62-63 (Letter from Henderson's counsel) confirming Sargeant's claim is typical by setting forth its value as calculated by Henderson; AA 64-73 (Letters from Henderson to class members and proposed class representatives Zeccarias, Woldemicael and Alba) confirming typicality of their claims and Sargeant's; and AA 74-78 (Declaration) detailing adequacy of proposed class counsel.

Sargeant was not proposing any argument "by incorporation" of his district court briefs in his reference at page 49 of his opening brief. There is no need for "argument" as to the numerosity, typicality and adequacy of counsel issues, which are not actually disputed by Henderson and were not ruled upon by the district court, except as otherwise discussed in Sargeant's opening brief. *See*, AOB at p. 40-49 discussing the district court's erroneous findings on the class certification issue.

B. The commonality of claims requirement for class certification was properly met.

Henderson asserts that the Rule 23 commonality requirements were not met and class certification was properly denied. Such assertions are specious.

It asserts the claims were settled so there are no claims to certify. But no

settlement has taken place.

Henderson asserts the signed acknowledgments demonstrate a lack of commonality since many class members state they have been fully paid. But those acknowledgments were coercively and improperly obtained and are void. Alternatively, the subclass of non-acknowledgment signers share commonality.[8]

It asserts the "letters sent to the Henderson drivers [setting forth calculations of unpaid minimum wages] pursuant to the [grievance] Resolution" do not present a common issue as to whether such calculations were performed properly. That argument rests upon Henderson's insistence that those letters were part of a contract between it and the union, something not established by, and contrary to, the record. As discussed at pages 3-4, those letters were not sent pursuant to the grievance resolution but prior to it and unilaterally by Henderson. The letters present a common issue as to how those calculations were made and whether they were

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[8] Henderson asserts that Sargeant's failure to appeal from the district court's order denying partial reconsideration, and seeking upon such partial reconsideration certification of a class of only the "non-acknowledgment signers," bars such a class certification upon remittitur. RAB 48-49. That is incorrect, as the district court's order denying partial reconsideration made no findings on the suitability of such a "non-acknowledgment signers" only class certification. AA 409-410. It denied reconsideration because in the district court's view there was no claims, of any sort, before it to certify for class treatment since Sargeant's and the class members' MWA rights were fully settled by the union. AA 414.

correct, Henderson having offered no explanation about those calculations.

Henderson asserts the individualized proof needed to determine the class members' "off the clock" claims precludes class certification. But there are also minimum wage claims that do not involve "off the clock" time and which Henderson allegedly determined from its records, such determinations forming the basis for its letters and payments to the class members. The class can be certified for those "non-off the clock" claims. Nor is it established that such "off the clock claims" require individual proof. They may well be identical for all of the class members, such as a universal 15 minute prior to shift start "show up" time requirement claimed by Sargeant. AA 81. The district court can also later amend the class certification and decline to resolve such "off the clock" claims if it finds upon a full pre-trial record they are not properly resolved on a class basis. *See*, NRCP Rule 23(c)(1)

Henderson asserts the minimum wage tier or health insurance issue requires individualized determinations preventing class certification. That is not true as to a claim just for the "lower tier" $7.25 an hour minimum wage. And even if health insurance availability is based upon varying costs to employees with or without dependents there is no evidence such circumstances prevent class certification of "higher tier" minimum wage claims. Henderson never demonstrated it was unaware of the "dependent" status of the class members or that such information is not easily

obtainable. Nor has the well established rule that varying damages calculations do not bar class certification, discussed in *Yokoyama v. Midland Life Ins.*, 594 F.3d 1087 (9th Cir. 2010), been overturned. Henderson's citation to *Stiller v. Costco*, 298 F.R.D. 611, 627 (S.D. Cal. 2014) for the proposition that *Comcast v. Behrend*, 133 S.Ct. 1426 (2013) has overruled *Yokoyama* is in error. *Stiller* denied class certification because there was no proof that any formula existed upon which any portion of the class damages could be calculated. *Id.* In this case a uniform formula at least exists to calculate damages at the "lower tier" $7.25 an hour rate.

Henderson asserts individualized inquiries must be made as to each driver's tip income to determine the health insurance availability issue. This Court in *MDC Rest.* invalidated NAC 608.104(2), the basis for this argument, and rendered it moot.

C. The Court should at least reverse the district court's findings on the class certification issues even if it does not direct class certification upon remittitur.

There was never any reason for the district court to make findings on class certification issues once it found Sargeant and the class members possessed no actionable MWA claims. Nor did it explain why it granted Henderson's request to make such findings. Presumably Henderson was pleased to have those gratuitous findings made by the district court and burden Sargeant's counsel with seeking their

reversal by this Court. To the extent that this Court does not believe it should direct class certification as part of its decision, it should at least vacate those findings on the class certification issues. It should do so if only because those findings were largely or completely dependent upon the district court's erroneous findings that Henderson's actions in gathering releases were proper, that such "acknowledgments" were valid, and that the union settled Sargeant's MWA lawsuit.

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

Henderson opposes reassignment of this case upon remittitur. It claims that Sargeant failed to obtain any transcripts of the hearings before Judge Villani "likely because they show Judge Villani treated Sargeant and his counsel respectfully and considered their arguments." RAB 57. Sargeant's request for reassignment is based solely upon Judge Villani's punitive and irrational post-judgment award granting Henderson's motion for $26,715 in attorney's fees pursuant to NRS § 18.010(2)(b). Judge Villani made that award without taking oral argument and there is no hearing transcript relative to the same to obtain.

CONCLUSION

Wherefore, for all the foregoing reasons, the Order and Judgment appealed from should be reversed in its entirety.

Dated: November 18, 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 6845 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 23rd day of November, 2016.

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CERTIFICATE OF MAILING

The undersigned certifies that on November 23, 2016, she served the within:

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