PSER
LEON GREENBERG, ESQ., SBN 8094
DANA SNIEGOCKI, ESQ., SBN 11715
Leon Greenberg Professional Corporation
2965 South Jones Blvd- Suite E3
Las Vegas, Nevada 89146
Tel (702) 383-6085
Fax (702) 385-1827
leongreenberg@overtimelaw.com
dana@overtimelaw.com

Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL SARGEANT, Individually and on behalf of others similarly situated, Plaintiff, vs. HENDERSON TAXI, Defendant.	Case No.: A-15-714136-C Dept.: XVII **PROOF OF SERVICE**

The undersigned certifies that on October 30, 2015, she served the within:

MOTION FOR PARTIAL RECONSIDERATION OR ALTERNATIVELY FOR ENTRY OF FINAL JUDGMENT

by court electronic service to:

Anthony L. Hall, Esq.
R. Calder Huntington, Esq.
HOLLAND & HARD LLP
9555 Hillwod Drive, 2nd Fl.
Las Vegas, NV 89134

/s/ Dana Sniegocki
DANA SNIEGOCKI

EXHIBIT "A"

Electronically Filed
10/13/2015 10:02:22 AM

CLERK OF THE COURT

NEOJ
Anthony L. Hall, Esq.
Nevada Bar No. 5977
ahall@hollandhart.com
R. Calder Huntington, Esq.
Nevada Bar No. 11996
rchuntington@hollandhart.com
HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134
(702) 669-4600
(702) 669-4650 –fax

Attorneys for Defendant Henderson Taxi

DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL SARGEANT, individually and on behalf of others similarly situated, Plaintiff, v. HENDERSON TAXI, Defendant.	CASE NO.: A-15-714136-C DEPT. NO.: XVII **NOTICE OF ENTRY OF ORDER**

PLEASE TAKE NOTICE that the attached **ORDER DENYING PLAINTIFF'S MOTION TO CERTIFY CLASS, INVALIDATE IMPROPERLY OBTAINED ACKNOWLEDGEMENTS, ISSUE NOTICE TO CLASS MEMBERS, AND TO MAKE INTERIM AWARD OF ATTORNEY'S FEES AND ENHANCEMENT PAYMENT TO REPRESENTATIVE PLAINTIFF**

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HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 • Fax: (702) 669-4650

was entered by the Court on October 8, 2015.

DATED this 13th day of October, 2015.

HOLLAND & HART LLP

Anthony L. Hall, Esq.
Nevada Bar No. 5977
R. Calder Huntington, Esq.
Nevada Bar No. 11996
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134
Attorneys for Defendant Henderson Taxi

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of October, 2015, a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER** was served by the following method(s):

☒ Electronic: by submitting electronically for filing and/or service with the Eighth Judicial District Court's e-filing system and served on counsel electronically in accordance with the E-service list to the following email addresses:

Leon Greenberg, Esq.
Dana Sniegocki, Esq.
Leon Greenberg Professional Corporation
2965 South Jones Blvd., Suite E3
Las Vegas, Nevada 89146

Leon Greenberg: leongreenberg@overtimelaw.com
Dana Sniegocki: dana@overtimelaw.com

An Employee of Holland & Hart LLP

8138902_1

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 ◆ Fax: (702) 669-4650

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CLERK OF THE COURT

ORDD
Anthony L. Hall, Esq.
Nevada Bar No. 5977
ahall@hollandhart.com
R. Calder Huntington, Esq.
Nevada Bar No. 11996
rchuntington@hollandhart.com
HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134
(702) 669-4600
(702) 669-4650 – fax

Attorneys for Defendant Henderson Taxi

DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL SARGEANT, individually and on behalf of others similarly situated, Plaintiff, v. HENDERSON TAXI, Defendant.	CASE NO.: A-15-714136-C DEPT. NO.: XVII **ORDER DENYING PLAINTIFF'S MOTION TO CERTIFY CLASS, INVALIDATE IMPROPERLY OBTAINED ACKNOWLEDGEMENTS, ISSUE NOTICE TO CLASS MEMBERS, AND TO MAKE INTERIM AWARD OF ATTORNEY'S FEES AND ENHANCEMENT PAYMENT TO REPRESENTATIVE PLAINTIFF**

This matter came before the Court for hearing on August 12, 2015 on Plaintiff Michael Sargeant's *Motion to Certify Class, Invalidate Improperly Obtained Acknowledgements, Issue Notice to Class Members, and To Make Interim Award of Attorney's Fees and Enhancement Payment to Representative Plaintiff* (the "Motion"). Leon Greenberg and Dana Sniegocki of Leon Greenberg Professional Corporation appeared on behalf of Plaintiff. Anthony L. Hall and R. Calder Huntington of Holland & Hart LLP appeared on behalf of Defendant Henderson Taxi.

The Court, having considered Plaintiff's Motion, Defendant's Opposition, Plaintiff's Reply, along with the relevant pleadings and papers on file herein, and having considered the oral argument of counsel, and good cause appearing, the Court finds as follows:

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 ♦ Fax: (702) 669-4650

A. Any Minimum Wage Claims were resolved by an accord and satisfaction with the Union

In June of 2014, the Nevada Supreme Court decided the case *Thomas v. Nev. Yellow Cab Corp.*, 130 Nev. Adv. Op. 52, 327 P.3d 518, 522 (2014) and found that the Minimum Wage Amendment to Nevada's Constitution, Nev. Const. Art. 15, § 16, eliminated the exemption from minimum wage for taxicab drivers that had been provided by statute. Thereafter, the ITPEU/OPEIU Local 4873, AFL-CIO (the "Union"), which the Court finds to be the exclusive representative of Henderson Taxi cab drivers as regards their employment with Henderson Taxi, grieved the issue of minimum wage to Henderson Taxi (the "Grievance"). Through negotiation, Henderson Taxi and the Union settled the Grievance by agreeing that in addition to changing pay practices going forward, Henderson Taxi would give drivers an opportunity to review Henderson Taxi's time and pay calculations and pay its current and former cab drivers the difference between what they had been paid and Nevada minimum wage over the two years prior to the *Yellow Cab* decision. This settlement agreement for the Grievance acted as a complete accord and satisfaction of the grievance and any claims to minimum wage Henderson Taxi's cab drivers may have had.

Also as part of this settlement of the Grievance, Henderson Taxi agreed to provide acknowledgements to its current and former cab drivers for them to sign, though the drivers were not required to do so. The Court finds that there was no imbalance in bargaining power between the Union and Henderson Taxi when they negotiated a settlement of the Grievance and that there is no evidence of coercion regarding any of the acknowledgements signed by Henderson Taxi cab drivers. Further, the Court finds that a bona fide dispute existed as to whether the *Yellow Cab* decision is to be applied retroactively. As such, it is unclear whether Henderson Taxi's cab drivers were or were not entitled to back pay prior to the settlement of the Grievance or whether they would be entitled to back pay absent the settlement of the Grievance. Accordingly, the settlement of the Grievance resolved a bona fide dispute regarding wages and did not necessarily act as a waiver of minimum wage rights.

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B. Plaintiff Has Failed to Present Evidence Supporting Class Certification

In addition, and in part based on the preceding findings, the Court further finds that Plaintiff has not established the factors necessary to maintain a class action under NRCP 23(a). A class action "may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *General Tel. Co., of the S.W. v. Falcon*, 457 U.S. 147, 161 (1982); *accord Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 847, 124 P.3d 530, 538 (2005). This rigorous analysis will generally overlap with the merits of the underlying case. *Wal-Mart Stores, Inc. v. Dukes*, 546 U.S. ___, 131 S.Ct. 2541, 2551 (2011). "If a court is not fully satisfied [after conducting the rigorous analysis], certification should be refused." *Kemp v. Supercuts, Inc.*, 252 F.R.D. 641, 643 (N.D. Cal. 2008) (citing *Falcon*, 457 U.S. at 161).

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. Thus, for the Court to certify this case as a class action, Sargeant must satisfy all requirements of NRCP 23(a), which provides in full:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Thus, under NRCP 23(a), Plaintiff must demonstrate that the proposed class is so numerous that joinder of all members is impracticable. Here, as the Union and Henderson Taxi have resolved and settled the Grievance regarding unpaid minimum wages related to the Nevada Supreme Court's *Yellow Cab* decision, Plaintiff has not demonstrated that there is a class of individuals so numerous that joinder of all members is impracticable. Thus, Plaintiff has failed to demonstrate numerosity under NRCP 23(a)(1).

Under NRCP 23(a)(2), Plaintiff 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 General Tel. Co., of the S.W. v. Falcon*, 457 U.S. 147, 155 (1982) (questions of law and fact must be applicable in the same manner as to the

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 • Fax: (702) 669-4650

entire class). Further, determining the common questions' "truth or falsity" must resolve "in one stroke" an issue that is "central to the validity of each one of the claims in one stroke." *Dukes*, 131 S.Ct. at 2551. 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.* (internal 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).

Here, the majority of Henderson Taxi cab drivers have acknowledged that they have no claim against Henderson Taxi and that they have been paid all sums owed to them. Further, the Union negotiated a settlement of the minimum wage claim Plaintiff seeks to assert against Henderson Taxi. Thus, Plaintiff has not demonstrated that there are common questions of law or fact for the proposed class. Further, the determination of the minimum wage issue, had it not already been resolved, would require individual analysis not proper for a class action. For example, the Court would need to determine which minimum wage tier applied to each driver through an analysis of his income (including potentially unreported tips under NAC 608.102-608.104) and the cost of insuring his or her dependents, including an analysis of the number of dependents each driver actually had during different time frames because the cost of insurance changes based on the number of dependents a driver has.

Under NRCP 23(c), "'Typicality' demands that the claims or defenses of the representative parties be typical of those of the class." *Shuette*, 121 Nev. at 848, 124 P3d at 538. Here, Plaintiff's claims are not typical of those he seeks to represent because of the acknowledgements signed by hundreds of Henderson Taxi cab drivers. As the Court has found that these acknowledgements are valid and were not obtained through any improper act, but rather through negotiation with the Union and voluntary action of cab drivers, the acknowledgements demonstrate defenses that are unique to the hundreds of current and former taxi drivers who signed them. Further, Plaintiff's

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 • Fax: (702) 669-4650

claims are not typical because his claim of hours worked is not supported by the records, including the acknowledgements signed by much of the proposed class.

Finally, under NRCP 23(d), Plaintiff has not demonstrated that he is an adequate class representative. For instance, Plaintiff's declaration contradicts the statements of hundreds of other current and former Henderson Taxi cab drivers. *See Ordonez v. Radio Shack, Inc.*, 2013 WL 210223, *11 (C.D. Cal., Jan. 17, 2013) (no predominance where there was conflicting testimony about whether employees received rest breaks: "Unlike other cases where a defendant had a purportedly illegal rest or meal break policy and courts found that common issues predominated, there is substantial evidence in this case that defendant's actual practice was to provide rest breaks in accordance with California law, as discussed previously.").

Accordingly, the Court, having considered Plaintiff's Motion, Defendant's Opposition, Plaintiff's Reply, along with the relevant pleadings and papers on file herein, and having considered the oral argument of counsel, and good cause appearing, the Court and good cause appearing,

IT IS HEREBY ORDERED that Plaintiff's Motion is DENIED.

DATED this 8th day of October 2015.

DISTRICT COURT JUDGE

Respectfully submitted by:

By

Anthony L. Hall, Esq.
Nevada Bar No. 5977
R. Calder Huntington, Esq.
Nevada Bar No. 11996
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134
Attorneys for Defendant Henderson Taxi

5054842_1

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 ◆ Fax: (702) 669-4650

EXHIBIT "B"

DECL
LEON GREENBERG, ESQ., SBN 8094
DANA SNIEGOCKI, ESQ., SBN 11715
Leon Greenberg Professional Corporation
2965 South Jones Blvd- Suite E3
Las Vegas, Nevada 89146
Tel (702) 383-6085
Fax (702) 385-1827
leongreenberg@overtimelaw.com
dana@overtimelaw.com

Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL SARGEANT, Individually and on behalf of others similarly situated, Plaintiff, vs. HENDERSON TAXI, Defendant.	Case No.: A-15-714136-C Dept.: XVII **DECLARATION OF MICHAEL SARGEANT**

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

1. I am a former taxi driver employee of Henderson Taxi, the defendant in this case. I was employed by Henderson Taxi as a cab driver from 2003 until July of 2013. I understand that this lawsuit is seeking unpaid minimum wages from the defendant that are owed to its current and former taxi driver employees. I offer this declaration in support of my attorney's request to have this court certify this case as a partial class action.

2. It has been explained to me that the Court entered an Order on October 8, 2015 finding that the claims I have attempted to make in this case were resolved by a Grievance between the union representing the Henderson Taxi drivers and Henderson Taxi. I understand that pursuant to such Order I may have no right to have the Court in this case grant me a judgment against Henderson Taxi for an amount of money greater than what it agreed, as part of the settlement of that Grievance, to pay me.

3. I have never received the amount of money Henderson Taxi agreed it should pay me as part of its settlement of the Grievance with the Henderson Taxi drivers' union. I have also not signed any "Acknowledgment" form that Henderson Taxi requested or required its taxi drivers sign to receive the payments it agreed to make as part of its settlement of the Grievance with the Henderson Taxi drivers' union.

4. I understand that my attorneys are requesting the Court partially certify this case as a class action, in the event its Order of October 8, 2015 means the other Henderson Taxi drivers and I have no right to have the Court grant us a judgment against Henderson Taxi for any amount of money greater than what it agreed, as part of the settlement of the Grievance with the union, to pay us. While I would disagree with the Court's ruling we have no right to collect any larger amounts of money from Henderson Taxi, I do believe the Court should at least order Henderson Taxi to pay us the amount of money it has found we are owed and have not yet been paid.

5. I understand that if my attorney's request to have this case partially certified as a class action is granted I would serve as a class representative in this case. My attorney has explained to me that by serving as a class representative I will be pursuing this case not just for myself but on behalf of all of the defendant's taxicab drivers who are members of that class. I understand that if this case is certified as a class action I will have a responsibility to represent those other Henderson Taxi taxicab drivers and act in their interests and not just my own personal interest. I understand that if this case is certified as a class action I will not be able to settle my claim against the defendant without approval from the Court. I am comfortable with

serving as a class representative and support the partial class action certification of this case.

6. I am over 21 years of age and I make this statement, which I have read and declare to be true, of my own free will. I have not received any compensation or any promise of any compensation for making this statement.

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

Michael Sargeant

Michael Sargeant

10-22-2015

Date

EXHIBIT "C"

DECL
LEON GREENBERG, ESQ., SBN 8094
DANA SNIEGOCKI, ESQ., SBN 11715
Leon Greenberg Professional Corporation
2965 South Jones Blvd - Suite E3
Las Vegas, Nevada 89146
Tel (702) 383-6085
Fax (702) 385-1827
leongreenberg@overtimelaw.com
dana@overtimelaw.com
Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL SARGEANT, Individually and on behalf of others similarly situated, Plaintiff, vs. HENDERSON TAXI, Defendant.	Case No.: A-15-714136-C Dept.: XVII **DECLARATION OF LEON GREENBERG, ESQ.**

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

1. I am one of the attorneys representing the plaintiffs in this matter.

2. My office has received certain discovery from the defendant in this case, including copies of executed "Acknowledgments" from class members and copies of all letters sent by the defendant to class members soliciting those "Acknowledgments." A diligent analysis by my office of those materials has determined the following:

(A) Defendant has sent letters to 487 former taxi driver employees stating it had determined they were owed a specific amount of unpaid minimum

wages for a two year period preceding June of 2014 and requesting they execute "Acknowledgments" that they are receiving such "settlement payments."

(B) Defendant has actually received signed "Acknowledgments" from 151 of those 487 former employees from whom it requested the same. This would mean there are 336 persons who are former taxi driver employees of defendant and to whom defendant sent the foregoing letters but from whom the defendant has not received signed "Acknowledgments."

3. My office's review of the foregoing signed "Acknowledgment" forms also indicates, as best as can be determined:

(A) That every one (100%) of the defendants' current taxi driver employees signed Acknowledgment forms specifying they were agreeing the settlement payment they had received (discussed above) was for the full amount of their unpaid minimum wages; and

(B) Defendants have not produced in discovery any signed Acknowledgment form, for any current or former taxi driver, in the form they annexed as Exhibit '12' to their filing of July 15, 2015, opposing plaintiff's prior motion seeking class certification and other relief. That form of Acknowledgment (a copy is annexed to this declaration) contained no language whereby the signing taxi driver agreed they had received a payment for the full amount of their unpaid minimum wages. Allegedly all current and former taxi drivers receiving a settlement payment from defendant were eligible to receive that payment without signing *any* Acknowledgment, or only the attached form of Acknowledgment containing no statement they had received full payment of their unpaid minimum wages. Yet, again, the discovery produced by defendants in this case indicates that every single current or former taxi

driver of defendant receiving one of the afore discussed "minimum wage settlement payments" signed an Acknowledgment averring that such payment was for the full amount of any unpaid minimum wages that they were owed by the defendant.

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

Docket CV-S-05-1264 (JCM/PAL); *Leber v. Starpoint*, Docket CV-S-09-01101 (RLH/PAL); and *Brunton v. Berkeley Group*, Docket CV-S-08-1752 (PMP/PAL), United States District Court, District of Nevada, on behalf of classes of salespersons denied overtime wages, minimum wages, and commissions; *Allerton v. Sprint Nextel*, Docket CV-S-09-1325 (RLH/GWF), United States District Court, District of Nevada, on behalf of classes of telephone call center workers denied overtime wages and other wages; *Jankowski v. Castle Construction*, Docket CV-01-164, United States District Court, Eastern District of New York, on behalf of a class of construction workers denied overtime wages; *Levinson v. Primedia*, Docket 02 Civ. 2222 (DAB), United States District Court, Southern District of New York, on behalf of a class of Internet website guides for unpaid commissions due under contract; *Hallissey v. America Online*, Docket 99-CV-03785 (KTD), United States District Court, Southern District of New York, on behalf of a class of Internet "volunteers" for unpaid minimum wages; and *Elliott v. Leatherstocking Corporation*, 3:10-cv-00934-MAD-DEP, Northern District of New York, on behalf of a class of hospitality and banquet workers for improperly withheld "service charges" and unpaid overtime wages; *Phelps v. MC Communications, Inc.*, Eighth Judicial District Court, A-11-634965-C and *Kiser v. Pride Communications, Inc.*, United States District Court, District of Nevada, 2:11-CV-00165 on behalf of two separate classes of cable, phone, and internet installation technicians for unpaid overtime wages; *Socarras v. Tormar Cleaning Services Nevada, Inc.*, Eighth Judicial District Court, A-13-675189 on behalf of a class of janitorial workers for unpaid overtime wages; *Girgis v. Wolfgang Puck Catering and Events LLC*, Eighth Judicial District Court, A-13-674853 on behalf of a group of restaurant servers for unpaid minimum wages and overtime wages; and most recently in *Gemma v. Boyd Gaming Corporation*, Eighth Judicial District Court, A-14-703790-C on behalf of a class of casino workers for unpaid minimum wages under the Nevada Constitution.

5. I am also requesting that my co-counsel, Dana Sniegocki, be appointed

with me as co-class counsel. Dana Sniegocki is a *cum laude* graduate of Thomas Jefferson Law School and has been licensed to practice law for over six years, is admitted to the State Bars of Nevada and California, has been an associate attorney at my office for more than five years, and has experience in litigating class action cases, specifically wage and hour class action litigations. To date, Dana Sniegocki has been appointed co-class counsel in the following cases: *Phelps v. MC Communications, Inc.*, Eighth Judicial District Court, A-11-634965-C and *Kiser v. Pride Communications, Inc.*, United States District Court, District of Nevada, 2:11-CV-00165 on behalf of two separate classes of cable, phone, and internet installation technicians for unpaid overtime wages; *Socarras v. Tormar Cleaning Services Nevada, Inc.*, Eighth Judicial District Court, A-13-675189 on behalf of a class of janitorial workers for unpaid overtime wages; *Girgis v. Wolfgang Puck Catering and Events LLC*, Eighth Judicial District Court, A-13-674853 on behalf of a group of restaurant servers for unpaid minimum wages and overtime wages; and most recently in *Gemma v. Boyd Gaming Corporation*, Eighth Judicial District Court, A-14-703790-C on behalf of a class of casino workers for unpaid minimum wages under the Nevada Constitution.

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

Affirmed this 30th day of October, 2015

Leon Greenberg

ACKNOWLEDGMENT REGARDING MINIMUM WAGE PAYMENT

This Acknowledgment regarding minimum wage payment ("Acknowledgement") is being provided by _____ (referred to hereinafter as "Employee" or "I"). Employee hereby acknowledges receipt of $_____, less withholdings. Neither this Acknowledgment nor the payment provided hereunder shall be construed as an admission by Company of any liability whatsoever.

Employee affirms that he/she has been given an opportunity to review the accuracy of his/her time and payroll records, and the amount and calculation of the payment as it relates to Nevada minimum wage. Employee further affirms that he/she was given an opportunity to ensure that he/she reported all hours worked as of the date of this Acknowledgment. Employee declined to review such documents or to provide an alternative amount he/she believes to be due.

_____
Employee Name

_____ _____
Signature Date

EXHIBIT "D"

THE FIRST JUDICIAL DISTRICT COURT

IN AND FOR CARSON CITY, NEVADA

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

Plaintiff,

vs.

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

Defendants.

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

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

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

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

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

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

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

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

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

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

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

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

Section A of the Minimum Wage Amendment provides:

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

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

Nev. Const. art. XV, § 16(A).

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

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

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

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

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

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

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

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

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

implements the language of the Amendment.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

James Mahan
DISTRICT COURT JUDGE

Submitted by:

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP
DON SPRINGMEYER, ESQ.
Nevada State Bar No. 1021
BRADLEY SCHRAGER, ESQ.
Nevada State Bar No. 10217
3556 E. Russell Road, Second Floor
Las Vegas, Nevada 89120
Attorneys for Plaintiffs

/s/ Bradley S. Schrager
Bradley S. Schrager, Esq.

EXHIBIT "F"

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CLERK OF THE COURT

COMP
LEON GREENBERG, ESQ., SBN 8094
DANA SNIEGOCKI, ESQ., SBN 11715
Leon Greenberg Professional Corporation
2965 South Jones Blvd- Suite E3
Las Vegas, Nevada 89146
Tel (702) 383-6085
Fax (702) 385-1827
leongreenberg@overtimelaw.com
dana@overtimelaw.com

Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL SARGEANT, Individually and on behalf of others similarly situated,

Plaintiff,

vs.

HENDERSON TAXI,

Defendant.

Case No.: A-15-714136-C

Dept.: XVII

COMPLAINT

ARBITRATION EXEMPTION CLAIMED BECAUSE THIS IS A CLASS ACTION CASE

MICHAEL SARGEANT, individually and on behalf of others similarly situated, by and through his attorney, Leon Greenberg Professional Corporation, as and for a Complaint against the defendant, states and alleges, as follows:

JURISDICTION, PARTIES AND PRELIMINARY STATEMENT

1. The plaintiff, MICHAEL SARGEANT, (the "individual plaintiff" or the "named plaintiff") is a resident of Clark County in the State of Nevada and is a former employee of the defendant.

2. The defendant, HENDERSON TAXI, (hereinafter referred to as "Henderson Taxi" or "defendant") is a corporation existing and established pursuant to the laws of the State of Nevada with its principal place of business in the County of

Clark, State of Nevada and conducts business in Nevada.

CLASS ACTION ALLEGATIONS

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

4. The class of similarly situated persons consists of all persons employed by defendant in the State of Nevada since November 28, 2006 continuing until date of judgment, such persons being employed as taxi cab drivers (hereinafter referred to as "cab drivers" or "drivers") such employment involving the driving of taxi cabs for the defendant in the State of Nevada.

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

6. The named plaintiff is informed and believes, and based thereon alleges that there are at least 200 putative class action members. The actual number of class members is readily ascertainable by a review of the defendant's records through appropriate discovery.

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

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

9. A class action is superior to other available methods for the fair and efficient adjudication of the controversy. Due to the typicality of the class members'

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

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

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

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

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

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

14. Pursuant to Article 15, Section 16, of the Nevada Constitution the named

plaintiff and the class members were entitled to an hourly minimum wage for every hour that they worked for defendant and the named plaintiff and the class members were often not paid such required minimum wages.

15. The defendant's violation of Article 15, Section 16, of the Nevada Constitution involved malicious and/or fraudulent and/or oppressive conduct by the defendant sufficient to warrant an award of punitive damages for the following, amongst other reasons:

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

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

(c) Defendant, to the extent it believed it had a colorable basis to legitimately contest the applicability of Article 15, Section 16, of the

Nevada Constitution to its taxi driver employees, made no effort to seek any judicial declaration of its obligation, or lack of obligation, under such constitutional provision and to pay into an escrow fund any amounts it disputed were so owed under that constitutional provision until such a final judicial determination was made.

16. Defendant engaged in the acts and/or omissions detailed in paragraph 15 in an intentional scheme to maliciously, oppressively and fraudulently deprive its taxi driver employees of the hourly minimum wages that were guaranteed to those employees by Article 15, Section 16, of the Nevada Constitution. Defendant so acted in the hope that by the passage of time whatever rights such taxi driver employees had to such minimum hourly wages owed to them by the defendant would expire, in whole or in part, by operation of law. Defendant so acted consciously, willfully, and intentionally to deprive such taxi driver employees of any knowledge that they might be entitled to such minimum hourly wages, despite the defendant's obligation under Article 15, Section 16, of the Nevada Constitution to advise such taxi driver employees of their right to those minimum hourly wages. Defendant's malicious, oppressive and fraudulent conduct is also demonstrated by its failure to make any allowance to pay such minimum hourly wages if they were found to be due, such as through an escrow account, while seeking any judicial determination of its obligation to make those payments.

17. The named plaintiff seeks all relief available to him and the alleged class under Nevada's Constitution, Article 15, Section 16 including appropriate injunctive and equitable relief to make the defendant cease its violations of Nevada's Constitution and a suitable award of punitive damages.

18. The named plaintiff on behalf of himself and the proposed plaintiff class members, seeks, on this First Claim for Relief, a judgment against the defendant for minimum wages owed since November 28, 2006 and continuing into the future, such sums to be determined based upon an accounting of the hours worked by, and wages

actually paid to, the plaintiff and the class members along a suitable injunction and other equitable relief barring the defendant from continuing to violate Nevada's Constitution, a suitable award of punitive damages, and an award of attorneys' fees, interest and costs, as provided for by Nevada's Constitution and other applicable laws.

AS AND FOR A SECOND CLAIM FOR RELIEF PURSUANT TO NEVADA REVISED STATUTES § 608.040 ON BEHALF OF THE NAMED PLAINTIFF AND THE PUTATIVE CLASS

19. Plaintiff repeats and reiterates each and every allegation previously made herein.

20. The named plaintiff brings this Second Claim for Relief against the defendant pursuant to Nevada Revised Statutes § 608.040 on behalf of himself and the alleged class of all similarly situated employees of the defendant.

21. The named plaintiff has been separated from his employment with the defendant since in or about July 2013, and at the time of such separation was owed unpaid wages by the defendant.

22. The defendant has failed and refused to pay the named plaintiff and numerous members of the putative plaintiff class who are the defendant's former employees their earned but unpaid wages, such conduct by such defendant constituting a violation of Nevada Revised Statutes § 608.020, or § 608.030 and giving such named plaintiff and similarly situated members of the putative class of plaintiffs a claim against the defendant for a continuation after the termination of their employment with the defendant of the normal daily wages defendant would pay them, until such earned but unpaid wages are actually paid or for 30 days, whichever is less, pursuant to Nevada Revised Statutes § 608.040.

23. As a result of the foregoing, the named plaintiff seeks on behalf of himself and the similarly situated putative plaintiff class members a judgment against the defendant for the wages owed to him and such class members as prescribed by Nevada Revised Statutes § 608.040, to wit, for a sum equal to up to thirty days wages, along with interest, costs and attorneys' fees.

WHEREFORE, plaintiff demands the relief on each cause of action as alleged aforesaid.

Plaintiff demands a trial by jury on all issues so triable.

Dated this 18th day of February, 2015.

Leon Greenberg Professional Corporation

By: */s/ Leon Greenberg*

LEON GREENBERG, Esq.
Nevada Bar No.: 8094
2965 South Jones Blvd- Suite E3
Las Vegas, Nevada 89146
Tel (702) 383-6085
Fax (702) 385-1827

Attorney for Plaintiff

EXHIBIT "G"

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ORDR
Anthony L. Hall, Esq.
Nevada Bar No. 5977
ahall@hollandhart.com
R. Calder Huntington, Esq.
Nevada Bar No. 11996
rchuntington@hollandhart.com
HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134
(702) 669-4600
(702) 669-4650 –fax

Attorneys for Defendant Henderson Taxi

DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL SARGEANT, individually and on behalf of others similarly situated, Plaintiff, v. HENDERSON TAXI, Defendant.	CASE NO.: A-15-714136-C DEPT. NO.: XVII **PROPOSED ORDER DENYING PLAINTIFF'S MOTION TO STAY JUDGMENT ENFORCEMENT PENDING APPEAL**

This matter came before the Court for hearing on August 24, 2016 at 8:30 AM on Plaintiff Michael Sargeant's ("Sargeant") *Motion to Stay Judgment Enforcement Pending Appeal* (the "Motion"). Leon Greenberg, Esq., appeared on behalf of Sargeant and R. Calder Huntington, Esq. appeared on behalf of Defendant Henderson Taxi.

The Court, having considered Plaintiff's Motion, Defendant's Opposition, Plaintiff's Reply, and Defendant's Surreply, along with the relevant pleadings and papers on file herein, and having considered the oral argument of counsel presented at the hearing, and good cause appearing, the Court finds as follows:

Plaintiff failed to demonstrate that any of the factors the Court is to consider in determining whether to grant a stay pending appeal absent a full supersedeas bond set forth in *Nelson v. Heer*, 121 Nev. 832, 836, 122 P.3d 1252, 1254 (2005) weigh in favor of granting a stay. As Sargeant has failed to demonstrate that any of the *Nelson* factors weigh in favor of a stay and has otherwise

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 • Fax: (702) 669-4650

failed to demonstrate that the status quo might be maintained absent the posting of a full supersedeas bond, Sargeant's motion is denied.

IT IS HEREBY ORDERED that Plaintiff's Motion to Stay Judgment Enforcement Pending Appeal is DENIED.

DATED this 6 day of Sept, 2016.

DISTRICT COURT JUDGE

Respectfully submitted by:

By _____
Anthony L. Hall, Esq.
R. Calder Huntington, Esq.
HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134
Attorneys for Defendant Henderson Taxi

Approved as to form:

By _____
Leon Greenberg, Esq.
Dana Sniegocki, Esq.
LEON GREENBERG PROFESSIONAL CORPORATION
2965 South Jones Blvd., Suite E3
Las Vegas, Nevada 89146
Attorney for Plaintiff

9060782_1

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 ◆ Fax: (702) 669-4650

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CLERK OF THE COURT

OPPS
Anthony L. Hall, Esq.
Nevada Bar No. 5977
ahall@hollandhart.com
Andrea M. Champion, Esq.
Nevada Bar No. 13461
amchampion@hollandhart.com
HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134
(702) 669-4600
(702) 669-4650 –fax
Attorneys for Defendant Henderson Taxi

DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL SARGEANT, individually and on behalf of others similarly situated, Plaintiff, v. HENDERSON TAXI, Defendant.	CASE NO.: A-15-714136-C DEPT. NO.: XVII **DEFENDANT'S OPPOSITION TO AFFIDAVIT/MOTION TO RECUSE JUDGE MICHAEL VILLANI**

Defendant HENDERSON TAXI ("Defendant" or "Henderson Taxi"), by and through its counsel of record, Holland & Hart, LLP, hereby submits Defendant's Opposition ("Opposition") to Plaintiff's Affidavit/Motion to Recuse Judge Michael Villani (the "Motion").

This Opposition is supported by the following Memorandum of Points and Authorities, the papers and pleadings on file herein and any oral argument the Court may allow at any hearing of this matter.

DATED this 4th day of November 2016.

HOLLAND & HART LLP

/s/ Anthony L. Hall
Anthony L. Hall, Esq.
Nevada Bar No. 5977
Andrea M. Champion, Esq.
Nevada Bar No. 13461
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134
Attorneys for Defendant Henderson Taxi

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 ◆ Fax: (702) 669-4650

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 ♦ Fax: (702) 669-4650

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On July 8, 2016, judgment was issued against Plaintiff Michael Sargeant and in favor of Henderson Taxi in the amount of $26,715.00 (the "Judgment"). Notice of Entry of Order Granting Motion for Attorney's Fees, filed July 11, 2016. The Judgment was issued against Sargeant because he had maintained his affirmative claims against Henderson Taxi without reasonable ground after the court ruled that his claims had already been settled by his Union and were no longer viable. *See id.* After receiving the Judgement, Henderson Taxi issued a "Writ of Execution," seeking to execute on all of Sargeant's things in action, and provided instructions to the Clark County Sheriff's Office to serve the Writ of Execution. **Exhibit 1**. The Sherriff's Office properly served the Writ of Execution on Sargeant's counsel Dana Sniegocki on August 29, 2016. **Exhibit 2**, Affidavit of Service. Despite Henderson Taxi's initiation of the judgment execution process, Sargeant has continued to press his claims, without any legal grounds to do so. He has filed a motion to stay judgment enforcement – which his counsel admitted all factors weigh against him. He has sought a stay before the Supreme Court despite the Supreme Court's repeated approval of execution on choses in action. And he continues now with this Motion.

Upset at the well-reasoned and legally sound decisions the Honorable Michael P. Villani has made in this litigation and the consequences of his prior belligerent behavior, including Henderson Taxi's right to execute against his choses of action, Plaintiff Michael Sargeant now seeks to disqualify Judge Villani. The true purpose of this Motion is not to actually obtain recusal. The Motion lacks any substantive legal support and focuses on complaints with judicial orders which by Nevada Supreme Court precedent cannot, as a matter of law, support disqualification. Rather, the purpose of this Motion was to delay Judge Villani's ruling on Henderson Taxi Objection to Sargeant's Claim of Exemption in the (unlikely) hope that the Supreme Court will stay execution of Henderson Taxi's judgment pending appeal. While such a stay is unlikely, Sargeant has, through improper means, achieved his goal of delaying the hearing on Henderson Taxi's Objection through the filing of this Motion.

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 ♦ Fax: (702) 669-4650

Sargeant should not be rewarded for his improper conduct and his baseless Motion should be denied for lack of any legal support.

II. PROCEDURAL POSTURE

On February 19, 2015, Sargeant filed a putative class action suit against Henderson Taxi alleging that Henderson Taxi had failed to pay him the constitutionally mandated minimum wage for all hours worked. *See generally*, Compl.[1] On May 27, 2015, prior to conducting any discovery, Sargeant filed a "Motion to Certify," seeking class action certification amongst other relief because Sargeant had discovered that Henderson Taxi had begun making payments to its drivers pursuant to a settlement that had been reached with Sargeant's Union. *See* Motion to Certify, filed May 27, 2015. Henderson Taxi opposed the Motion to Certify, explaining to the Court that it had settled any and all underlying minimum wage claims with Sargeant's Union and that its payments to drivers were required by this settlement. *See* Opposition to Motion to Certify, filed July 15, 2015. After the hearing on the Motion to Certify, the Honorable Michael P. Villani took the matter under advisement to consider counsel's arguments and briefing. In a well-reasoned decision and order, Judge Villani later agreed with Henderson Taxi, denying Sargeant's Motion to Certify and holding that the underlying claims had been settled with the Union. *See* Decision, filed August 19, 2015; *see also* Order Denying Plaintiff's Motion to Certify Class, filed October 8, 2016.

Unable to accept that his claim had been settled by his Union, which was authorized to settle the claim under federal labor law and basic agency principles, and desiring to harass Henderson Taxi, Sargeant continued to litigate this baseless case. Specifically, Sargeant filed an entirely unsupported Motion for Reconsideration, seeking certification of a class that had not been pleaded in the Complaint on a claim that had not been pleaded in the Complaint (essentially,

[1] In contrast to Sargeant's standard practice of attaching prior pleadings and other documents filed in this case as exhibits, Henderson Taxi abides EDCR 2.27(e) and does not attach filings in the present case as exhibits. However, given the fact that Sargeant's Motion will not be heard by the designated judge in this matter, Henderson Taxi is prepared to submit all filings in exhibit form if it would assist the court.

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 ♦ Fax: (702) 669-4650

breach of contract alleging that Henderson Taxi had breached the settlement with the Union). *See* Motion for Partial Reconsideration, filed October 30, 2016; *see also* Opposition to Motion for Partial Reconsideration, filed December 14, 2015. In his Motion for Reconsideration, Sargeant also requested an award of attorney's fees despite the fact he had not been successful on any claim. *Id.* at 9:27-10:3. In the meantime, Henderson Taxi sought summary judgment based on the underlying settlement of Sargeant's claim with the Union. *See* Motion for Summary Judgment, filed November 11, 2015. While Sargeant filed an opposition to Henderson Taxi's Motion for Summary Judgment, he did not substantively oppose entry of summary judgment. *See* Opposition to Motion for Summary Judgment, filed Dec. 14, 2016; *see also* Findings of Fact and Conclusions of Law, filed February 3, 2016. After hearing both motions and considering the arguments of counsel, Judge Villani denied Sargeant's Motion for Reconsideration and granted Henderson Taxi's Motion for Summary Judgment. *See* Findings of Fact and Conclusions of Law, filed February 3, 2016.

Sargeant filed a notice of appeal on February 9, 2016, challenging Judge Villani's denial of class certification and grant of summary judgment. *See* Notice of Appeal, filed Feb. 9, 2016. Sargeant did not appeal the denial of reconsideration. *See id.*

On February 7, 2016, Henderson Taxi filed a Motion for Attorney's Fees, arguing that Sargeant had unreasonably maintained his claim after he became aware of the Union settlement. *See* Motion for Attorney's Fees, filed March 7, 2016. Judge Villani agreed and, on July 8, 2016, ordered judgment against Sargeant in the amount of $26,715.00, which was only a portion of Henderson Taxi's requested fees. *See* Order Granting Motion for Attorney's Fees, filed July 8, 2016. Sargeant appealed this order on July 13, 2016.

On July 22, 2016, Sargeant filed a Motion to Stay Judgment Enforcement Pending Appeal. *See* Motion to Stay Judgment Enforcement, filed July 22, 2016. Henderson Taxi opposed this motion on August 8, 2016 because Sargeant's admissions in the motion demonstrated that a stay would not preserve the status quo, the legal standard to grant a stay absent a supersedeas bond. *See* Opposition, filed August 8, 2016. At the hearing on this matter, Sargeant's counsel admitted that the factors a district court is required to consider in ruling on a stay request absent the posting of a

supersedeas bond did not weigh in Sargeant's favor and that he was only bringing the motion before the district court because it was procedurally required before moving for a stay in the Nevada Supreme Court. Judge Villani, thus, properly denied the motion to stay in an order later filed on September 12, 2016.

Henderson Taxi then began the process of executing on its Judgement, including by issuing a Writ of Execution seeking to execute on all of Sargeant's things in action, which was served on Sargeant's counsel on August 29, 2016. *See* Exhibit 1; Exhibit 2. Soon thereafter, Sargeant filed a claim of exemption asserting that his things in action are exempt from execution. *See* Claim of Exemption, filed September 7, 2016. On September 16, 2016, Henderson Taxi timely filed an Objection to Claim of Exemption (the "Objection"). *See* Objection to Claim of Exemption, filed Sept. 16, 2016. Also on September 16, 2016, Sargeant filed his motion to stay judgment enforcement before the Nevada Supreme Court, which Henderson Taxi has also opposed.[2]

On September 21, 2016, Sargeant sent Henderson Taxi a letter requesting that Henderson Taxi agree to a continuance of the hearing on the Objection for the specific purpose of having the Supreme Court decide Sargeant's most recent motion for stay pending appeal. **Exhibit 3**, Letter from Leon Greenberg dated Sept. 19, 2016. The express purpose of this request was to delay a ruling on the Objection in Sargeant's hope that the Supreme Court would stay judgment execution, not because Sargeant needed additional time to respond to the Objection or any other non-delay

[2] These documents are publicly available on the Supreme Court's Docket No. 70837. Not only did Sargeant file a motion to stay before the Supreme Court, he also filed an appeal of Judge Villani's denial of his motion to stay before the district court. It is currently unclear whether an order denying a motion to stay judgment enforcement pending appeal is proper, especially considering that the Nevada Rules of Appellate Procedure expressly allow a party to file a motion to stay judgment enforcement pending appeal with the Supreme Court if it is denied at the district court level. It is also inconceivable that the Supreme Court would both (a) deny the motion to stay brought before it and (2) overturn a district court's decision denying a stay. For example, in *Nelson v. Heer*, 121 Nev. 832, 122 P.3d 1252 (2005), though the Nevada Supreme Court modified the standard a district court is supposed to apply in these circumstances, it did so on ruling on a motion to stay brought before it, not an appeal from the district court's denial.

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 ♦ Fax: (702) 669-4650

reason. *See id.* In fact, after Henderson Taxi rejected this request for a delay, Sargeant's counsel asked for an extension on his opposition deadline, to which Henderson Taxi readily agreed because it did not see it as a delay tactic. **Exhibit 4**, Email from Calder Huntington to Leon Greenberg, dated Sept. 27, 2016. That same day, Sargeant presented an ex parte motion for a continuance of the Objection hearing (a motion Henderson Taxi was never presented). Motion, ¶ 13. Sargeant was informed that the court does not grant ex parte requests for continuance. *See id.*, ¶ 13; Affidavit of the Honorable Michael P. Villani in Response to Disqualify, filed October 17, 2016 ("Judge Villani Affidavit"), ¶ 7. Sargeant's subsequent request to have his motion for continuance heard on an order shortening time ("OST") was also denied, but he was informed the continuance request could be made at the time of the hearing. Motion, ¶ 13; Judge Villani Affidavit, ¶ 8. Thus, the motion for continuance was not denied, a ruling was merely postponed.

On September 29, 2016, Sargeant's counsel sent another letter to Henderson Taxi, this time asking whether Henderson Taxi would support a request to the district court to allow Sargeant's counsel to satisfy the judgment against Sargeant or to post a bond on his client's behalf. **Exhibit 5**, Letter from Leon Greenberg, dated Sept. 29, 2016. In this letter, Sargeant's counsel recognized that the Nevada Rules of Professional Conduct prohibited the posting of a bond or satisfaction of a judgment for a client. *Id.* After receiving this letter, Henderson Taxi's counsel consulted with the Nevada State Bar's bar counsel. Based on the advice of bar counsel, Henderson Taxi responded to Sargeant that it did not believe it could ethically support a request for an exemption to NRPC 1.8(e) and 1.8(l). **Exhibit 6**, Letter from Anthony Hall, dated October 4, 2016. Henderson Taxi also stated that it was unaware of any authority allowing a district court to waive ethical rules on an individual basis. *Id.* Nonetheless, on October 10, 2016, Sargeant filed his opposition to Henderson Taxi's Objection, in part requesting that the court waive NRPC 1.8(e) and 1.8(l) and allow his counsel to satisfy the Judgment or post a bond on his behalf. *See* Response to Defendant's Objection to Claim of Exemption, filed Oct. 10, 2016.

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 ♦ Fax: (702) 669-4650

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 ♦ Fax: (702) 669-4650

Still wanting to delay a decision on the Objection and having failed to obtain the delay he sought through proper channels, the next day Sargeant sought to have Judge Villani disqualified from hearing Henderson Taxi's Objection. *See* Motion, filed October 11, 2016.[3] As such, the hearing on Henderson Taxi's Objection has been postponed pending resolution of Sargeant's Motion. As such, Sargeant has effectively achieved, through improper means, the delay he originally sought from Henderson Taxi in the hope that the Supreme Court will stay execution of Henderson Taxi's judgment pending appeal.

On October 17, 2016, Judge Villani responded to Sargeant's Motion with a straightforward affidavit, explaining what has happened in this case, that he harbors no bias against any party in this matter, and that he believes this Motion is based on Sargeant's dissatisfaction with his prior rulings. *See* Affidavit of the Honorable Michael P. Villani in Response to Disqualify, filed October 17, 2016. Thus, Judge Villani has determined that he may not voluntarily recuse himself. *See id.* Sargeant filed a reply affidavit of his counsel that same day. *See* Affidavit in Reply to the Response to Plaintiff's Motion to Recuse Judge Michael Villani, filed October 17, 2016. Henderson Taxi now files its opposition to the Motion, explaining why Sargeant's Motion lacks any legal basis and should be denied.

III. LEGAL ANALYSIS

A. Absent a Showing of Actual Bias, Judge Villani Is Duty Bound to Preside over this Case and Sargeant Has Failed to Show Actual Bias

Judges have "a duty to preside ... in the absence of some statute, rule of court, ethical standard, or other compelling reason to the contrary." *Goldman v. Bryan*, 104 Nev. 644, 649, 764 P.2d 1296, 1299 (2007) (quotation omitted) *abrogated on other grounds by Halverson v.*

[3] It is unclear from the text of the motion whether Sargeant is simply seeking to have Judge Villani disqualified from hearing the Objection or from any further proceedings in this case. Sargeant titled the Motion "Plaintiff's Motion to Recuse Judge Michael Villani from this Case Pursuant to NRS 1.235." But, in Paragraph 1 of the supporting affidavit, Sargeant only states Judge Michael Villani should be recused from hearing defendant's motion on October 19, 2016," the date originally set for the hearing on Henderson Taxi's Objection, which has since been delayed.

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 ♦ Fax: (702) 669-4650

Hardcastle, 123 Nev. 245, 265-66, 163 P.3d 428, 442-43 (2007). In fact, "a judge has as great an obligation not to disqualify himself, when there is no occasion to do so, as he has to do so in the presence of valid reasons." *Id.* (quotation omitted); *see also City of Las Vegas Downtown Redevelopment Agency v. Eighth Judicial Dist. Court*, 116 Nev. 640, 644, 5 P.3d 1059, 1062 (2000) (reversing a district judge's decision to recuse himself and issuing writ of mandamus requiring district court judge to preside over a case).

Further, "[a] judge is presumed to be impartial, and the party asserting the challenge carries the burden of establishing sufficient factual grounds warranting disqualification." *Rippo v. State*, 113 Nev. 1239, 1248, 946 P.2d 1017, 1023 (1997). "Disqualification must be based on facts, rather than on mere speculation." *Id.* "[R]ulings and actions of a judge during the course of official judicial proceedings do not establish legally cognizable grounds for disqualification." *In re Petition to Recall Dunleavy*, 104 Nev. 784, 789, 769 P.2d 1271, 1275 (1988); *Millen v. Eighth Judicial Dist. Court,* 122 Nev. 1245, 1254–55, 148 P.3d 694, 701 (2006) ("disqualification for personal bias requires an extreme showing of bias that would permit manipulation of the court and significantly impede the judicial process and the administration of justice." (quotation and alteration omitted)).

1. Judge Villani's Determination that He Is Not Biased Is Entitled to Substantial Weight

As stated above, judges have a duty to hear the cases assigned to them. *Goldman*, 104 Nev. at 649, 764 P.2d at 1299. If judges were to recuse themselves where sufficient grounds for recusal do not exist, motions to disqualify would become litigation tools for judge shopping. *See In re Petition to Recall Dunleavy*, 104 Nev. 784, 789, 769 P.2d 1271, 1275 (1988) ("*Dunleavy*") ("To permit an allegation of bias, partially founded upon a justice's performance of his constitutionally mandated responsibilities, to disqualify that justice from discharging those duties would nullify the court's authority and permit manipulation of justice, as well as the court."). Thus, judges must carefully analyze the situation when a motion to disqualify is filed. As such, the Nevada Supreme Court has explained that where "a judge or justice determines that he may not voluntarily disqualify himself, his decision should be given 'substantial weight,' and should not be overturned

in the absence of a clear abuse of discretion." *Goldman*, 104 Nev. at 649, 764 P.2d at 1299; *see also Rivero v. Rivero*, 125 Nev. 410, 439, 216 P.3d 213, 233 (2009) ("This court gives substantial weight to a judge's decision to recuse herself and will not overturn such a decision absent a clear abuse of discretion."). Here, Judge Villani has determined that no grounds exist to voluntarily recuse himself. *See* Judge Villani Affidavit. This decision should be given substantial weight.

2. Plaintiff's Motion Is Improperly Based on Unfounded Assumptions and Conjecture

Sargeant's Motion lacks any cognizable legal support and should be denied. *Las Vegas Sands Corp. v. Eighth Judicial Dist. Court*, 2016 WL 2842901, at *4 (Nev. May 11, 2016) (explaining that summary dismissal of a motion to recuse is appropriate where the challenging party "fails to allege legally cognizable grounds supporting an inference of bias or prejudice ....") (citing *Hogan v. Warden*, 112 Nev. 553, 560, 916 P.2d 805, 809 (1996)). In Nevada, disqualification of a judge "must be based on facts, rather than mere speculation." *Rippo*, 113 Nev. at 1248, 946 P.2d at 1023 (emphasis added); *see also Hogan*, 112 Nev. at 560 n.5, 916 P.2d at 809 n.5 (quoting *United States v. Cooley*, 1 F.3d 985, 993 (10th Cir. 1993) as "concluding that '[r]umor, speculation, beliefs, conclusions, innuendo, suspicion, opinion, and similar non-factual matters' do not ordinarily satisfy the requirements for disqualification"). However, Sargeant's Motion is only supported with speculation and subjective belief, not facts. As such, it should be denied.

Sargeant's first argument as to why Judge Villani should be disqualified is that by ruling on Henderson Taxi's Objection he "will be deciding whether his [Judge Villani's] own prior decision granting defendant summary judgment should receive appellate review ...." Motion, ¶ 3 (emphasis omitted). The first problem with this argument is that it relies on speculation, making it an improper basis for disqualification. *Rippo*, 113 Nev. at 1248, 946 P.2d at 1023. Specifically, Sargeant contends that by ruling on Henderson Taxi's Objection, Judge Villani would necessarily be deciding whether Henderson Taxi purchases Sargeant's chose in action underlying this case at a sheriff's execution sale. This purchase would, in turn, allow Henderson Taxi to substitute itself into this action as the plaintiff and dismiss this case, including the related appeal (a process

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 ♦ Fax: (702) 669-4650

repeatedly approved of by the Nevada Supreme Court despite Sargeant's use of exclamation marks to show his displeasure with this fact).[4] The critical fact, dispositive of Sargeant's argument, is that no decision on the Objection guarantees Henderson Taxi's ability to purchase the underlying chose in action at a sheriff's sale. Rather, such auctions are public affairs where any person can bid on and purchase Sargeant's non-exempt property, including his choses in action. Thus, one of Henderson Taxi's competitors or some other third party could also bid at the sheriff's sale and purchase Sargeant's choses in action.[5] They could then do with the chose in action underlying this case in any way they see fit, including continuing to prosecute this action against Henderson Taxi. While Henderson Taxi will certainly bid on the chose in action at the eventual sheriff's sale, it speculation by Plaintiff's counsel that Henderson Taxi will be the buyer and further speculation what will be done with the chose in action thereafter. Thus, Sargeant's claim that if Judge Villani grants the Objection and overrules Sargeant's (bogus) claims of exemption

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9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 ♦ Fax: (702) 669-4650

[4] The Nevada Supreme Court has expressly held that all "rights of action held by a judgment debtor are personal property subject to execution in satisfaction of a judgment." *Gallegos v. Malco Enter. of Nev., Inc.*, 127 Nev. 579, 582, 255 P.3d 1287, 1289 (2011). It has also routinely held that a judgment debtor's rights of action, **including appellate rights**, are subject to execution in satisfaction of a judgment. *First 100, LLC v. Ragan*, 2016 WL 4546783, at *1 (Nev. Aug. 26, 2016) (Table) (holding that appellate rights are part of the choses in action that can be acquired through execution, stating: "Respondent has filed a motion to dismiss on the ground that appellants' assets, including their rights to the instant appeal, have been acquired by a third party and that therefore, appellants have lost standing to pursue this appeal. … we grant the motion to dismiss.") (emphasis added); *Antonio Nevada, LLC v. Rogich*, Nos. 64763, 65731, 2015 WL 3368808, at *1 (Nev. May 20, 2015) (Table) (holding that a judgment creditor could purchase a chose in action against himself, including appellate rights, stating: "Because the appeal in Docket No. 65731 arises from a dismissal of the action brought by appellant, Rogich could purchase appellant's rights in that action, and by extension, the rights in that appeal.") (emphasis added).

[5] To be clear, Nevada Rules of Professional Conduct 1.8(i) prohibits Plaintiff's counsel Mr. Greenberg, or anyone acting on his behalf, from purchasing Sargeant's non-exempt property, including his choses in action. *See* Nev. R. Prof. Conduct 1.8(i) ("A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client" except in the limited circumstances where (i) the lawyer acquires a lien authorized by law to secure the lawyer's fee or expenses or (ii) where the lawyer agrees to a reasonable contingency fee in a civil case); *see also Sieben v. Countrywide Home Loans, Inc.*, 2010 Dist. LEXIS 139030, at * n. 2 (noting that the plaintiff's relationship with counsel was unknown but that if they were husband and wife, counsel may have violated his ethical duty to avoid conflicts of interest by obtaining an economic interest in the subject matter of litigation in which he appears as an attorney) (citing Nev. R. Prof. Conduct 1.8(i)).

Henderson Taxi ***will*** be able to dismiss this action is pure speculation and cannot stand as the basis for disqualification. *Rippo*, 113 Nev. at 1248, 946 P.2d at 1023 ("Disqualification must be based on facts, rather than mere speculation."). Accordingly, Sargeant's contention that Judge Villani ruling on the Objection is similar to acting as a judge in one's own case is baseless.

3. Judge Villani Deciding the Objection Would Not Be Improper

Not only is Sargeant's claim that Judge Villani should be prohibited from ruling on the Objection because he would be choosing the appellate fate of his prior decisions pure conjecture, even if it were not conjecture it would not support disqualification. Sargeant argues that the United States Supreme Court has long held that "no man can be a judge in his own case ...." *See* Motion, ¶ 3 (citing *Williams v. Pennsylvania*, 136 S.Ct. 1899, at 1906 (2016)). While a true maxim, it finds no application here. Rather, any decision on the Objection is independent of Sargeant's appeal even if it *may* impact that appeal.

The cases Sargeant cites, *Williams* and *In re Murchison*, 349 U.S. 133 (1955) do not support his position. In *Williams*, Ronald Castille, the District Attorney for Philadelphia, officially approved seeking the death penalty against petitioner Terrence Williams. *Williams*, 136 S.Ct. at 1903. After being sentenced to death, Williams attacked his conviction multiple times, eventually discovering what he contended was undisclosed *Brady* material. *Id.* at 1904. Based on this *Brady* material, the Philadelphia Court of Common Pleas stayed Williams' execution. *Id.* The state then sought to have the stay vacated before the Pennsylvania Supreme Court. *Id.* However, in the interim, Castille had become the Chief Justice for the Pennsylvania Supreme Court. *Id.* Despite having participated in the conviction of Williams as a prosecutor, Castille did not recuse himself and participated in determining Williams' case in his role as Chief Justice. *Id.* at 1904-05. On appeal from the Pennsylvania Supreme Court, the United States Supreme Court determined that "[w]here a judge has had an earlier significant, personal involvement as a prosecutor in a critical decision in the defendant's case, the risk of actual bias in the judicial proceedings rises to an unconstitutional level." *Id.* at 1910. Thus, *Williams* stands for the proposition that an appellate judge cannot sit in a case where he prosecuted or assisted in the prosecution of the underlying case

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 ♦ Fax: (702) 669-4650

in a substantive manner. *Id.* Here, Judge Villani has done nothing remotely similar and is only called on to make decisions in the case before him.

Even worse, *In re Murchison* "involved a 'one-man judge-grand jury' proceeding, conducted pursuant to state law, in which the judge called witnesses to testify about suspected crimes." *Williams*, 136 S.Ct. at 1906 (citing *In re Murchison*, 349 U.S. 133, 134 (1955)). "During the course of the examinations, the judge became convinced that two witnesses were obstructing the proceeding." *Id.* (citing *In re Murchison*, 349 U.S. at 134). The judge then charged one of the witnesses with perjury and the other with contempt. *Id.* The same judge then tried each of the witnesses and convicted them based on his own accusations. *Id.* The Supreme Court "overturned the convictions on the ground that the judge's dual position as accuser and decisionmaker in the contempt trials violated due process: 'Having been a part of [the accusatory] process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused.'" *Id.* (quoting *In re Murchison*, 349 U.S. at 137). Here, Judge Villani has done nothing remotely similar to acting as prosecutor and judge.

Both of the cases Sargeant relies on in his effort to delay having the Objection heard[6] required recusal or disqualification because the judge in question ***had actually participated in the prosecution of a defendant and acted as a judge in that defendant's case***. Neither supports Sargeant's contention that a judge cannot rule on a motion because the decision may impact the legal basis for a party's entirely separate appeal, which will be heard by the Nevada Supreme Court, not Judge Villani. In fact, taking Sargeant's argument to its logical conclusion would require judges to recuse themselves whenever their decisions could impact—not decide, just impact—prior cases. This would prohibit appellate judges from making decisions in cases where their legal decision could impact appeals of cases they had previously decided as a district court judge. For example, if a judge made a decision at the district court level interpreting an issue of

[6] Sargeant's filing of this Motion after being denied a month-long continuance of the hearing on Henderson Taxi's Objection demonstrates that the true purpose of this Motion is mere delay.

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 ◆ Fax: (702) 669-4650

law (e.g., a statute of limitations decision), that judge would be prohibited from ruling on that same issue (though in an entirely different case) as an appellate judge because that other decision would impact the appeal of the judge's district court decision. In other words, because the judge's decision in the distinct appellate case could be dispositive of the separate appeal of the judge's district court decision, the judge could not decide a wholly separate case. This simply is not the law. A judge is only prohibited from presiding in the same case in which he previously participated, whether as a lower-court judge, prosecutor, or otherwise. Judges are not prohibited from making distinct legal decisions in the case pending before them that may affect appeals of their prior decisions. As such, Sargeant's argument fails and does not support Judge Villani's recusal.

4. Henderson Taxi's Reference To Sargeant's Request that the Supreme Court Reassign this Case on Remand Does Not Create Bias

Sargeant's second argument is that Henderson Taxi created bias in Judge Villani by stating true facts in its opposition to Sargeant's Motion to Stay. However, the "personal bias necessary to disqualify must 'stem from an extrajudicial source ...,'" not the judge's participation in the case. *Dunleavy*, 104 Nev. at 790, 769 P.2d at 1275 (quoting *United States v. Beneke*, 449 F.2d 1259, 1260-61 (8th Cir. 1971)). Thus, Henderson Taxi's recitation of a fact does not support disqualification, because it was part of Judge Villani's participation in this case.

However, beyond that, one of the factors a district court is to consider in analyzing a request to stay judgment enforcement pending appeal without the posting of a supersedeas bond is the complexity of judgment enforcement in the particular case. *Nelson*, 121 Nev. at 836, 122 P.3d at 1254. This is why Henderson Taxi referenced Sargeant's request for reassignment: it was addressing how complex it expected judgment enforcement to be in this case. *See generally*, Opposition to Motion to Stay Judgment Enforcement Pending Appeal, filed August 8, 2016. Not only was judgement enforcement likely to be difficult because of Sargeant's claim to having no assets (ignoring the choses in action he possesses and is asserting in three separate litigations), but enforcement was almost guaranteed to be complex because of Sargeant's conduct in this litigation. *See id.* Specifically, Henderson Taxi argued: "Beyond the simple facts described above,

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 ♦ Fax: (702) 669-4650

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 ♦ Fax: (702) 669-4650

Sargeant's general conduct in this litigation and on appeal show that **he will make collection of the judgment as difficult as possible (*Nelson* Factor No. 1)**." *Id.* at 9:19-21. Henderson Taxi further explained that Sargeant had continued to harass Henderson Taxi and force it to incur unnecessary attorney fees throughout this litigation. *Id.* And as part of this, Henderson Taxi pointed out that Sargeant had requested the Supreme Court assign the case to a different district court judge if remanded because he believed Judge Villani's decision lacked "even a patina of rationalization." *Id.* But this was not the ad hominem attack Sargeant suggests, it was an explanation of how Sargeant has acted in this case and how complex judgment enforcement would be—one of the questions before the court.

In fact, this Motion seeking to prohibit Judge Villani from ruling on Henderson Taxi's Objection further supports the position Henderson Taxi took in that opposition: Sargeant will do anything to make judgment enforcement difficult, complex, and costly for Henderson Taxi, regardless of whether he has any legal support for doing so. Sargeant's own improper conduct (such as filing this Motion) is not a basis for disqualifying Judge Villani, especially when Sargeant can point to no actual facts supporting disqualification. *Dunleavy*, 104 Nev. at 790, 769 P.2d at 1275.

5. Judge Villani's Post-Judgment Decisions Do Not Support Disqualification or Recusal

Finally, Sargeant argues that Judge Villani's post-judgment decisions in this matter demonstrate bias supporting disqualification. However, "rulings and actions of a judge during the course of official judicial proceedings do not establish legally cognizable grounds for disqualification." *Dunleavy*, 104 Nev. at 789, 769 P.2d at 1275; *Millen v. Eighth Judicial Dist. Court*, 122 Nev. 1245, 1254–55, 148 P.3d 694, 701 (2006) ("[D]isqualification for personal bias requires an extreme showing of bias that would permit manipulation of the court and significantly impede the judicial process and the administration of justice." (quotation and alteration omitted)). Rather, the "personal bias necessary to disqualify must 'stem from an extrajudicial source ...,'" not the judge's participation in the case. *Dunleavy*, 104 Nev. at 790, 769 P.2d at 1275 (quoting *United States v. Beneke*, 449 F.2d 1259, 1260-61 (8th Cir. 1971)). As such, Judge Villani's post-

judgment rulings cannot, as a matter of law, be used to support recusal. *Dunleavy*, 104 Nev. at 789; 769 P.2d 1275.

Here, while Sargeant contends that he does not base his Motion to disqualify on Judge Villani's summary judgment decision, This is exactly what he is doing. Specifically, he expressly bases his request for disqualification on Judge Villani's 1) attorney fee award, Motion at ¶¶ 6-10; 2) denial of Sargeant's Motion to Stay, Motion at ¶¶ 11-12; and 3) purported refusal to grant a continuance of the hearing on Henderson Taxi's Objection, Motion at ¶¶ 13-14. Each of these decisions constitutes "rulings and actions of a judge during the course of official proceedings" and "do not establish legally cognizable grounds for disqualification" regardless of Sargeant's opinion of their merits or otherwise. *Id.* Rather, Sargeant was required in his Motion to present ***facts*** demonstrating bias arising "from an extrajudicial source," which he has not done, either in his Motion or his Reply. *See generally*, Motion; *see also* Affidavit in Reply, filed October 17, 2016.[7]

Beyond Judge Villani's decisions in this case being barred from being a basis from disqualification, Sargeant's false description of Judge Villani's "refusal" to grant a continuance of the hearing on Henderson Taxi's Objection demonstrates the weakness of his Motion generally. First, as explained above, Henderson Taxi refused Sargeant's request for a continuance because the express purpose was to delay a decision on the Objection, not to provide Sargeant additional time to respond or some other legitimate purpose. *See* Exhibit 3, (requesting continuance to delay a ruling until the Supreme Court ruled on Sargeant's Motion to Stay). Thus, Sargeant's comparison of this denial to Henderson Taxi's earlier request for a continuance to allow it to

[7] Sargeant's counsel's reply affidavit only addresses Sargeant's argument that "Judge Villani's post-judgment proceedings in this case demonstrate a course of conduct that creates a **reasonable belief** that he has acted with an improper bias towards the plaintiff." *See* Affidavit in Reply, Filed October 17, 2016, at ¶ 2. Sargeant entirely ignores the Nevada Supreme Court's binding precedent that such official conduct or personal belief, without supporting independent and extra-judicial facts showing bias, cannot be the basis for disqualification. In fact, he "implore[s] the Court to look beyond the facial 'findings' of the July 8, 2016 Order," and determined that Judge Villani is both irrational and illogical. *Id.* at ¶ 5. And he presents no facts demonstrating bias. *See generally*, *id.*

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 ♦ Fax: (702) 669-4650

prepare an opposition is improper and inapposite, and, has nothing to do with judicial bias. Second, Judge Villani first only refused to grant Sargeant's request for a continuance on an ex parte basis, as is his general practice. *See* Motion, ¶ 13; Judge Villani Affidavit, ¶ 7. Of course, this practice comports with EDCR 2.25: "Ex Parte motions for extension of time will not ordinarily be granted." Further, Sargeant's contention that his request for a continuance was subsequently denied is flat out false. After being informed Judge Villani does not grant motions for continuances on an ex parte basis, Sargeant requested that his motion for continuance be heard on OST. While Judge Villani rejected the OST request, his clerk expressly informed Sargeant's counsel he could make the continuance request at the Objection hearing. Motion, ¶ 13. This is not a denial of a continuance, just a delay in when such a decision would be made because there were no exigent circumstances warranting an OST. *Id.*; *see also* Judge Villani Affidavit, ¶ 8. Further, Sargeant's request for a continuance, again, is not proper because it is admittedly for the purpose of delay—not to provide additional time to respond due to scheduling conflicts or any other legitimate reason. *See* Exhibit 3.[8] As such, none of Sargeant's arguments regarding Judge Villani's decisions in this case, or theoretical future decisions, support disqualification.

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[8] Again, Henderson Taxi did stipulate to grant Sargeant additional time to respond to the Objection, a stipulation Judge Villani granted.

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 ♦ Fax: (702) 669-4650

IV. Conclusion

As demonstrated above, Sargeant has failed to demonstrate a valid reason for disqualifying Judge Villani and Sargeant's Motion should be denied.

DATED this 4th day of November 2016.

HOLLAND & HART LLP

/s/ Anthony L. Hall
Anthony L. Hall, Esq.
Nevada Bar No. 5977
Andrea M. Champion, Esq.
Nevada Bar No. 13461
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134
Attorneys for Defendant Henderson Taxi

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 ♦ Fax: (702) 669-4650

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of November, 2016, a true and correct copy of the foregoing **DEFENDANT'S OPPOSITION TO AFFIDAVIT/MOTION TO RECUSE JUDGE MICHAEL VILLANI** was served by the following method(s):

☒ Electronic: by submitting electronically for filing and/or service with the Eighth Judicial District Court's e-filing system and served on counsel electronically in accordance with the E-service list to the following email addresses:

Leon Greenberg, Esq.
Dana Sniegocki, Esq.
Leon Greenberg Professional Corporation
2965 South Jones Blvd., Suite E3
Las Vegas, Nevada 89146

Leon Greenberg: leongreenberg@overtimelaw.com
Dana Sniegocki: dana@overtimelaw.com

☐ U.S. Mail: by depositing same in the United States mail, first class postage fully prepaid to the persons and addresses listed below:

☐ Email: by electronically delivering a copy via email to the following e-mail address:

☐ Facsimile: by faxing a copy to the following numbers referenced below:

/s/ Yalonda Dekle
An Employee of Holland & Hart LLP

9213179_1

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 ♦ Fax: (702) 669-4650

EXHIBIT 1

ORIGINAL

WTEX
Anthony L. Hall, Esq.
Nevada Bar No. 5977
ahall@hollandhart.com
R. Calder Huntington, Esq.
Nevada Bar No. 11996
rchuntington@hollandhart.com
HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134
(702) 669-4600
(702) 669-4650 –fax

Attorneys for Defendant Henderson Taxi

DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL SARGEANT, individually and on behalf of others similarly situated, Plaintiff, v. HENDERSON TAXI, Defendant.	CASE NO.: A-15-714136-C DEPT. NO.: XVII **WRIT OF EXECUTION** ☐ **Earnings** ☒ **Other Property** ☐ **Earnings, Order of Support**

TO THE STATE OF NEVADA - TO THE CLARK COUNTY SHERIFF- GREETINGS:

This Writ of Execution is in furtherance of collection of a judgment, for the recovery of money for Defendant HENDERSON TAXI (the "Judgment Creditor").

On July 8, 2016, an Order Granting Motion for Attorneys' Fees (the "Judgment") was entered by the above-entitled court in the above entitled action in favor of Judgment Creditor and against Plaintiff MICHAEL SARGEANT (the "Judgment Debtor"), as follows:

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///

///

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 ◆ Fax: (702) 669-4650

JUDGMENT BALANCE	
Principal	($ 0.00)
Awarded Attorneys' Fees	$26,715.00
Post-Judgment Interest	($ 0.00)
Final Judgment	$26,715.00
Less Any Satisfaction Received to Date	($ 0.00)
Sub-Total	$26,715.00
NET BALANCE	**$26,715.00**

AMOUNTS TO BE COLLECTED BY LEVY	
NET BALANCE	**$26,715.00**
For this Writ	
Garnishment Fee	
Mileage	
Levy Fee	
Advertising	
Storage	
Interest from Date of 03/10/2016	
Issuance	
SUB-TOTAL	
Commission	
TOTAL LEVY	$

NOW THEREFORE, you are commanded to satisfy the Judgment for the total amount due out of the following described personal property (choses in action) of Judgment Debtor to wit:

All claims for relief, causes of action, things in action, and choses in action in any lawsuit pending in Nevada, including, but not limited to, Eighth Judicial District Court Case No. A-15-714136-C and the rights of Appellant Michael Sargeant, in the appeal of actions filed in the Supreme Court of the State of Nevada, Case Numbers 69773 and 70837.

EXEMPTIONS WHICH APPLY TO THIS LEVY

Except that for any workweek, 75 percent of the disposable earnings of the debtor during that week or 50 times the minimum hourly wage prescribed by section 6(a)(1) of the federal Fair Labor Standards Act of 1938, 29 U.S.C. § 206(a)(1), and in effect at the time the earnings are payable, whichever is greater, is exempt from any levy of execution pursuant to this writ, and if sufficient personal property cannot be found, then out of the real property belonging to the debtor in the aforesaid county, and make return to this writ within not less than 10 days or more than 60 days endorsed.

_X_ Property Other Than Wages. The exemption set forth in NRS 21.090 or in other applicable Federal Statutes may apply. Consult an attorney.

_____ Earnings

The amount subject to garnishment and this writ shall not exceed for any one pay period the lessor of:

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 • Fax: (702) 669-4650

A. 25% of the disposable earnings due the judgment debtor for the pay period, or

B. the difference between the disposable earnings for the period and $100.50 per week for each week of the pay period.

_____ Earnings (Judgment or Order for Support)

A Judgment was entered for amounts due under a decree or order entered on ____ day of _____, 20___, by the _____, for the support of _____ for the period from _____, 20___, through _____, 20__, in _____ installments of $_____.

The amount if disposable earnings subject to Garnishment and this writ shall not exceed for any one pay period: (check appropriate box)

☐ A maximum of 50 percent of the disposable earnings of such judgment debtor who is supporting a spouse or dependent child other than the dependent named above;

☐ A maximum of 60 percent of the disposable earnings of such judgment debtor who is not supporting a spouse or dependent child other than the dependent named above;

☐ Plus an additional 5 percent of the disposable earnings of such judgment debtor if an to extent that the judgment is for support due for a period of time more than 12 weeks prior to the beginning of the work period of the judgment debtor during which the levy is made upon the disposable earnings.

NOTE: Disposable earnings are defined as gross earnings less deductions for Federal Income Tax Withholding, Federal Social Security Tax and Withholding for any State, County or City Taxes.

You are required to return this Writ from date of issuance not less than 10 days or more than 60 days with the results of your levy endorsed thereon.

Issued at the direction of:
HOLLAND & HART LLP

_____
Anthony L. Hall, Esq. (Bar No. 5977)
R. Calder Huntington, Esq. (Bar No. 11996)
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134
Attorneys for Defendant Henderson Taxi

STEVEN D. GRIERSON,
CLERK OF COURT

AUG 19 2016

WALTER ABREGO-BONILLA

_____
DEPUTY CLERK DATE

RETURN

I hereby certify that I have this date returned the foregoing Writ of Execution with the results of the levy endorsed thereon.

CLARK COUNTY SHERIFF

_____
SHERIFF DATE

_____ Not satisfied $_____
_____ Satisfied in the sum of $_____
_____ Costs retained $_____
_____ Commission Retained $_____
_____ Costs incurred $_____
_____ Commission Incurred $_____
_____ Costs received $_____

REMITTED TO JUDGMENT CREDITOR $_____

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 • Fax: (702) 669-4650

EXHIBIT 2

Electronically Filed
08/31/2016 03:24:17 PM

CLERK OF THE COURT

OFFICE OF THE SHERIFF
CLARK COUNTY DETENTION
CIVIL PROCESS SECTION

MICHAEL SARGEANT)
)
PLAINTIFF) CASE No. A-15-714136-C
Vs) SHERIFF CIVIL NO.: 16005688
HENDERSON TAXI)
)
DEFENDANT) **AFFIDAVIT OF SERVICE**

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

ALAN GHASSERANI, being first duly sworn, deposes and says: That he/she is, and was at all times hereinafter mentioned, a duly appointed, qualified and acting Deputy Sheriff in and for the County of Clark, State of Nevada, a citizen of the United States, over the age of twenty-one years and not a party to, nor interested in, the above entitled action; that on **8/29/2016**, at the hour of **10:15 AM**, affiant as such Deputy Sheriff served a copy/copies of **WRIT OF EXECUTION - PERSONAL PROPERTY** issued in the above entitled action upon the plaintiff **MICHAEL SERGEANT** named therein, by delivering to and leaving with **DANA SNIEGOCKI, ESQ.** for said plaintiff **MICHAEL SARGEANT**, personally, at **C/O LEON GREENBERG, ESQ & DANA SNIEGOCKI, ESQ; LEON GREENBERG, P.C. 2965 S JONES BOULEVARD SUITE E3 LAS VEGAS, NV 89146** within the County of Clark, State of Nevada, said copy/copies of **WRIT OF EXECUTION - PERSONAL PROPERTY**

I, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAW OF THE STATE ON NEVADA THAT THE FOREGOING IS TRUE AND CORRECT.

DATED August 30, 2016.

SERVICE FEES - $29.00

Joseph M. Lombardo, Sheriff

By: _____ 9570
ALAN GHASSERANI
Deputy Sheriff

EXHIBIT 3

LEON GREENBERG
Professional Corporation
Attorneys at Law
2965 South Jones Boulevard • Suite E-4
Las Vegas, Nevada 89146
(702) 383-6085

Leon Greenberg
Member Nevada, California
New York, Pennsylvania and New Jersey Bars

Dana Sniegocki
Member Nevada and California Bars

Fax: (702) 385-1827

September 19, 2016

Holland & Hart LLP
9555 Hillwood Drive - 2nd Fl.
Las Vegas, Nevada 89134
Attention: Anthony Hall, Esq.
R. Calder Huntington, Esq.

Via Email and First Class Mail

Re: Sargeant v. Henderson Taxi, A-15-714136-C
Hearing (Chambers) of October 19, 2016
on judgment execution

Dear Counsel:

I am in receipt of your objections to Michael Sargeant's claim of exemption from judgment execution, filed by your office late on September 16, 2016 and now scheduled for the above hearing. I write to request your consent to a continuance or stay of that hearing.

As you are aware, on September 15, 2016 I filed a motion with the Nevada Supreme Court seeking a stay of these proceedings pending the resolution of the two pending appeals. It would advance judicial efficiency to allow the Supreme Court to hear and decide that motion before burdening the district court (and the parties) with further briefing, and a decision on, the issues raised in the objections your office has filed. If the Supreme Court grants such a stay until it reaches the merits of those appeals your office's objections will be rendered moot and there will be no need for the district court to decide the issues raised by your office's

objections. If it denies that stay the district court will then consider, and resolve, the issues presented by your office's objections.

We can agree to a continuance for a specified limited period of time, perhaps 30 days, to await a decision from the Supreme Court on the pending motion. Or we can agree upon some broader form of continuance or stay. I am open to suggestions.

Please be kind enough to provide a response to this request by 5:00 p.m. tomorrow, Tuesday, September 20, 2016. If defendant is unwilling to consent to any such continuance or stay, on any terms, I would appreciate the same being confirmed, which can be done via a brief email or phone call. I thank you in advance for the courtesy of providing such a prompt response.

I remain,

Very truly yours,

Leon Greenberg

EXHIBIT 4

Calder Huntington

From: Calder Huntington
Sent: Tuesday, September 27, 2016 1:45 PM
To: 'Leon Greenberg'; Anthony Hall
Subject: RE: Sargeant v. Henderson Taxi

Leon,

We have no problem stipulating to an extended briefing schedule such that your opposition is due on 10/10, with an email copy to us by 5pm on 10/10, and our reply being due 10/17.

R. Calder Huntington
Holland & Hart LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89135
Phone (702) 222-2508
Mobile (702) 743-0119
Fax (702) 823-0335
E-mail: rchuntington@hollandhart.com

-----Original Message-----
From: Leon Greenberg [mailto:wagelaw@hotmail.com]
Sent: Tuesday, September 27, 2016 1:02 PM
To: Anthony Hall; Calder Huntington
Subject: Sargeant v. Henderson Taxi

You have already confirmed your refusal to consent to any continuance of the 10/19 hearing.
I am now requesting your consent to a continuance of responsive papers from 10/3/16 to 10/10/16. I will have a copy of the same sent by email
to you directly by 5 p.m. on 10/10/16. Please advise if you will so
consent.

--
Leon Greenberg
Attorney at Law
2965 South Jones Boulevard #E-3
Las Vegas, Nevada 89146
(702) 383-6085
website: overtimelaw.com

Member of Nevada, California, New York,
New Jersey and Pennsylvania Bars

EXHIBIT 5

LEON GREENBERG
Attorney at Law
2965 South Jones Boulevard • Suite E-3
Las Vegas, Nevada 89146
(702) 383-6085

Leon Greenberg
Member Nevada, California
New York, Pennsylvania and New Jersey Bars
Admitted to the United States District Court of Colorado

Dana Sniegocki
Member Nevada and California Bars

Fax: (702) 385-1827

September 29, 2016

Holland & Hart LLP
9555 Hillwood Drive - 2nd Fl.
Las Vegas, Nevada 89134
Attention: Anthony Hall, Esq.
R. Calder Huntington, Esq.

Via Email and First Class Mail

Re: Sargeant v. Henderson Taxi, A-15-714136-C
Offer to satisfy judgment of your client
Henderson Taxi subject to approval by the court.

Dear Counsel:

I write to advise that I am willing, subject to approval by the court, to satisfy (or post a bond for) the judgment rendered by the district court in favor of your client in this matter and against my client, Michael Sargeant. As you are aware, in light of the relevant provisions of NRPC, I cannot properly perform such actions, and would not attempt to do so, without approval from the Court.

Please advise me whether your client would support my request that the district court approve of such actions which would assure your client of payment, in full, of its judgment (or at least do so unless it is modified or reversed on appeal).

I remain,

Very truly yours,

Leon Greenberg

EXHIBIT 6

HOLLAND&HART
THE LAW OUT WEST

Anthony L. Hall
Phone (775) 327-3000
Fax (775) 786-6179
ahall@hollandhart.com

October 4, 2016

VIA E-MAIL (wagelaw@hotmail.com)

Leon Greenberg, Esq.
Leon Greenberg Professional Corporation
2965 South Jones Boulevard- Suite E3
Las Vegas, NV 89146

Re: Sargeant v. Henderson Taxi (A-15-714136-C) – Letter of September 29, 2016

Dear Counsel:

We are in receipt of your letter dated September 29, 2016 ("September 29 Letter"), in which you inform us that you are willing, subject to court approval, to either satisfy or post a supersedeas bond for your client in relation to the judgment Henderson Taxi obtained against him in the above referenced matter. In this September 29 Letter, you requested that we advise you whether Henderson Taxi would support your request to the district court to approve your satisfying the judgment or posting a bond on your client's behalf.

It seems you are aware that Nevada Rule of Professional Conduct 1.8(e) and (l) prohibit you from satisfying Sargeant's judgment and from posting a bond on his behalf. (Other ethical rules may also prohibit such conduct as well.) Thus, given your request's unique nature, we reviewed and went so far as to contact bar counsel for advice. Based on bar counsel's advice and our analysis, we do not believe we can ethically agree to support any request you make to the court in this regard. Further, while we recognize you are proposing asking the court to waive these ethical rules (and any other applicable ethical rules), we are unaware of any authority allowing the court to waive rules of ethics. Thus, we do not believe such a request would be appropriate, but you are, of course, free to make your own analysis of that issue. Nonetheless, based on the ethical rules, we cannot ethically support any request for permission to violate ethics rules.

Sincerely,

/s/ Anthony L. Hall

Anthony L. Hall
of Holland & Hart LLP

ALH:RCH/mf

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ORDR

CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

MICHAEL SARGEANT, Individually and on behalf of others similarly situated,

Plaintiff,

vs.

CASE NO. A714136
DEPT NO. XVII

HENDERSON TAXI,

Defendant.

/

ORDER DENYING PLAINTIFF'S MOTION TO RECUSE JUDGE MICHAEL VILLANI FROM THIS CASE PURSUANT TO NRS 1.235

The Court, having reviewed Plaintiff's Motion to Recuse Judge Michael Villani from this Case Pursuant to NRS 1.235, and all related pleadings, finds the matter is appropriately decided on the pleadings and without oral argument pursuant to EDCR 2.23.

Plaintiff asserts disqualification of Judge Villani is appropriate for the following reasons: (1) the act of deciding Defendant's objection to Plaintiff's claim for exemption from execution puts Judge Villani in a position to decide whether his prior decision granting Defendant summary judgment should receive appellate review, "violating the maxim that no one can ever be a judge in

DAVID BARKER
CHIEF DISTRICT JUDGE
DEPARTMENT 18

his own cause"[1]; (2) Defendant has acted to cultivate Judge Villani's hostility towards Plaintiff by "gratuitously and unnecessarily" advising Judge Villani Plaintiff's appeal brief seeks reassignment of this case upon remittitur[2]; and (3) Judge Villani's course of conduct in post-judgment proceedings "evidences a level of irrational bias and prejudice against the plaintiff that requires his recusal under the Nevada Code of Judicial Conduct."[3]

NRS 1.230 provides the statutory grounds for disqualifying district court judges. A judge shall not act as such in an action or proceeding when the judge entertains actual or implied bias.[4] The Revised Nevada Code of Judicial Conduct ("NCJC") provides substantive grounds for judicial disqualification.[5] Pursuant to NCJC 2.11(A) a judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned. The test for whether a judge's impartiality might reasonably be questioned is objective and courts must decide whether a reasonable person, knowing all the facts, would harbor reasonable doubts about a judge's impartiality.[6]

A judge is presumed to be impartial and the burden is on the party asserting the challenge to establish sufficient factual grounds warranting disqualification.[7] The Nevada Supreme Court has stated that "rulings and actions of a judge during the course of official judicial proceedings do not establish legally cognizable grounds for disqualification," and "[t]he personal bias necessary to disqualify must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case."[8] Disqualification must

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[1] Pl.'s Mot. to Recuse Judge Michael Villani from this Case Pursuant to NRS 1.235 2:10 (Oct. 11, 2016) (internal quotes omitted).
[2] *Id.* at 3:10-15.
[3] *Id.* at 3:25-27.
[4] NRS 1.230(1)-(2).
[5] *Ybarra v. State*, 127 Nev. 47, 50 (2011).
[6] *Ybarra*, 127 Nev. at 51.
[7] *State v. Rippo*, 113 Nev. 1239, 1248 (1997).
[8] *In re Pet. to Recall Dunleavy*, 104 Nev. 784, 789-90 (1988) (internal quotes omitted).

be based on facts and not on mere speculation.[9] "Rumor, speculation, beliefs, conclusions, innuendo, suspicion, opinion, and similar nonfactual matters do not ordinarily satisfy the requirements for disqualification."[10]

The Court finds that Plaintiff's grounds for disqualification lack merit. The issue of Judge Villani ruling on an objection to a claim of exemption from execution does not put him in a situation similar to sitting as an appellate judge over his own lower court decision, and it does not put Judge Villani in a position of directly deciding whether there will be appellate review of his decision to grant summary judgment in favor of Defendant. The facts set forth by Plaintiff for this ground are simply too speculative to support disqualification.

Plaintiff presents no evidence Judge Villani has a personal bias against him which resulted in decisions on some basis other than what Judge Villani learned from participation in this case. Plaintiff's counsel acknowledges the claim of improper bias or hostility "arises solely from [Judge Villani's] exceptional and unprecedented, post-judgment order of July 8, 2016, where, without oral argument he granted [D]efendant's post-judgment motion for attorney's fees of $26,715 pursuant to NRS 18.010(2)(b)."[11] Plaintiff's counsel also contends that Judge Villani's order of July 8, 2016, "is only reasonably explained as the product of some form of irrational or illogical bias or prejudice towards the plaintiff and/or his claims, irrespective of whether Judge Villani harbors any overt or conscious partiality or personal bias in these proceedings."[12]

Although the Nevada Supreme Court has repeatedly held that under these types of circumstances rulings and actions of a judge do not establish legally cognizable grounds for disqualification, Plaintiff asks this Court to find "a level of irrational bias and prejudice against

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[9] *Rippo*, 113 Nev. at 1248.
[10] *Id.*
[11] Aff. in Reply to the Response to Pl.'s Mot. to Recuse Judge Michael Villani from this Case Pursuant to NRS 1.235 2:9-12 (Oct. 17, 2016).
[12] *Id.* at 4:7-10.

Plaintiff that requires recusal under the Nevada Code of Judicial Conduct."[13] The Court finds no legal basis for disqualification of Judge Villani based on his rulings and actions during the course of official judicial proceedings in this case. The Court further finds that Judge Villani's knowledge that Plaintiff seeks reassignment of this case as part of his appeal to the Nevada Supreme Court is not a legally cognizable ground for disqualification.

Judge Villani states he has no actual or implied bias or prejudice for or against either party in this matter and his decisions in this case have been the result of critical legal and factual analysis based on the evidence before him and not as a result of partiality or personal bias in favor of any party.[14] Judge Villani also states that if he believed he could not be fair and impartial to any litigant or attorney in this matter he would voluntarily recuse himself.[15] When a judge determines not to voluntarily disqualify himself, as is the situation here, the decision should be given substantial weight and should not be overturned in the absence of a clear abuse of discretion.[16]

The Court finds that a reasonable person, knowing all the facts, would not harbor reasonable doubts about Judge Villani's impartiality. The Court further finds that Plaintiff states no legally cognizable grounds justifying the disqualification of Judge Villani.

Now, therefore, it is hereby ORDERED that Plaintiff's Motion to Recuse Judge Michael Villani from this Case Pursuant to NRS 1.235 is DENIED.

DATED this 22nd day of November, 2016.

DAVID BARKER
CHIEF DISTRICT COURT JUDGE

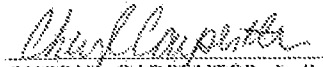
[13] Pl.'s Mot. to Recuse Judge Michael Villani from this Case Pursuant to NRS 1.235 at 3:25-27.
[14] Aff. of Michael P. Villani in Response to Request to Disqualify Pursuant to NRS 1.235(5)(b) 3:8-12 (Oct. 17, 2016).
[15] *Id.* at 3:13-14.
[16] *See generally* Aff. in Reply to the Response to Pl.'s Mot. to Recuse Judge Michael Villani from this Case Pursuant to NRS 1.235. *See also Dunleavy*, 104 Nev. at 788.

I hereby certify that on the date filed, a copy of this Order was electronically served through the Eighth Judicial District Court EFP system or hand delivered.

Leon Greenberg, Esq.
Dana Sniegocki, Esq.

Anthony Hall, Esq.
Andrea Champion, Esq.

The Honorable Judge Michael P. Villani



CHERYL CARPENTER, Judicial Assistant

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

Dated: July 27, 2016

Respectfully submitted,
/s/ Leon Greenberg
Leon Greenberg, Esq. (Bar # 8094)
A Professional Corporation
2965 S. Jones Blvd., Suite E-3
Las Vegas, Nevada 89146
(702) 383-6085
Attorney for Appellant

NRAP RULE 17 ROUTING STATEMENT

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

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TABLE OF AUTHORITIES

U. S. Supreme Court Cases

Nevada Supreme Court Cases

Federal Cases

Federal Statutes

State Rules

Other Authorities

JURISDICTIONAL STATEMENT

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

STATEMENT OF ISSUES PRESENTED

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

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

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

certification and other relief requested under NRCP Rule 23.

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

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

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

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

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

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

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

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

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

STATEMENT OF THE CASE

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

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

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

STATEMENT OF FACTS

Summary of Facts

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

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

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

Detailed Statement of Facts

Sargeant was employed by Henderson as a taxi driver until approximately

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

SUMMARY OF ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

APPLICABLE STANDARD OF REVIEW

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The district court found:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. The district court erroneously denied class certification.

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

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

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

The superiority of class resolution is also overwhelmingly apparent in this case. Each class member's claim for minimum wages is small, meaning prosecution of those claims individually will not be attractive to contingency fee compensated counsel. *See, Amchem Prod. Inc. v. Windsor*, 521 U.S. 591, 617 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.") Many or most class members are current employees of Henderson and unlikely to bring litigation against their current employer out of fear of retaliation. *See, Leyva v. Medline Industries Inc.*, 716 F.3d 510, 515 (9th Cir. 2013) (Abuse of discretion to find class certification was not superior for class of approximately 500 workers owed wages "[i]n light of the small size of the putative class members' potential individual monetary

recovery, class certification may be the only feasible means for them to adjudicate their claims."); *Scott v. Aetna Services, Inc.*, 210 F.R.D. 261, 268 (D. Conn 2002) (Class resolution superior for minimum wage and overtime claims as "class members may fear reprisal and would not be inclined to pursue individual claims.") and *Noble v. 93 University Place Corp.*, 224 F.R.D. 330, 346 (S.D.N.Y. 2004) (Class resolution of employee overtime pay claims superior given their fear of reprisal and lack of familiarity with the legal system).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"accord and satisfaction" it found.

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

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

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

CONCLUSION

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

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

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

Dated: July 27, 2016

Respectfully submitted,

/s/ Leon Greenberg

Leon Greenberg, Esq. (Bar # 8094)
A Professional Corporation
2965 S. Jones Blvd., Suite E-3
Las Vegas, Nevada 89146
(702) 383-6085
Attorney for Appellant

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

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

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

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

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

Dated this 27th day of July, 2016.

/s/ Leon Greenberg

Leon Greenberg, Esq. (Bar # 8094)
A Professional Corporation
2965 S. Jones Blvd., Suite E-3
Las Vegas, Nevada 89146
(702) 383-6085
Attorney for Appellant

EXHIBIT "C"

ORDR
Anthony L. Hall, Esq.
Nevada Bar No. 5977
ahall@hollandhart.com
R. Calder Huntington, Esq.
Nevada Bar No. 11996
rchuntington@hollandhart.com
HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134
(702) 669-4600
(702) 669-4650 –fax
Attorneys for Defendant Henderson Taxi

DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL SARGEANT, individually and on behalf of others similarly situated, Plaintiff, v. HENDERSON TAXI, Defendant.	CASE NO.: A-15-714136-C DEPT. NO.: XVII **ORDER GRANTING MOTION FOR ATTORNEYS' FEES**

Defendant Henderson Taxi's ("Defendant" or "Henderson Taxi") Motion for Attorneys' Fees (the "Motion") came before the Court on Chamber's Calendar on May 4, 2016.

The Court, having read and considered Henderson Taxi's Motion, Plaintiff Michael Sargeant's ("Plaintiff" or "Sargeant") Opposition, Henderson Taxi's Reply, all exhibits attached thereto, and good cause appearing, hereby grants Henderson Taxi's Motion in the amount of $26,715.00 for the reasons set forth below:

FINDINGS OF FACT

1. Sargeant filed this action on February 18, 2015, alleging that Henderson Taxi failed to pay its taxicab drivers the minimum wage required by the Nevada Constitution.

2. On May 27, 2015, Sargeant filed a motion seeking to certify this case as a class action ("Motion to Certify").

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 ♦ Fax: (702) 669-4650

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 • Fax: (702) 669-4650

3. On or about July 8, 2015, Henderson Taxi produced correspondence and a settlement agreement between it and the ITPEU/OPEIU Local 4873, AFL-CIO (the "Union"), the Union representing Henderson Taxi's taxicab drivers. This settlement agreement with the Union extinguished any claim by Sargeant and the putative class for unpaid minimum wages.

4. Shortly thereafter, Henderson Taxi filed its opposition to Sargeant's Motion to Certify, wherein it fully explained how it had settled Mr. Sargeant's claim with the Union.

5. On October 8, 2015, this Court found that the agreement between Henderson Taxi and the Union "acted as a complete accord and satisfaction of the [Union's minimum wage] grievance and any claims to minimum wage Henderson Taxi's cab drivers may have had."

6. On October 30, 2015, Sargeant filed a Motion for Partial Reconsideration or Alternatively for Entry of Final Judgment ("Motion for Reconsideration"). This Motion for Reconsideration sought certification of a class that was not pleaded in Plaintiff's Complaint and judgment on a claim that was both unsupported and had not been pleaded in Plaintiff's Complaint.

7. On November 11, 2015, Henderson Taxi filed a Motion for Summary Judgment. Sargeant opposed this Motion for Summary Judgment by again attempting to relitigate the accord and satisfaction and settlement issue the Court had already clearly decided. Sargeant failed to even attempt to present facts that might have contradicted the granting of summary judgment in this opposition.

8. To the extent any of the forgoing Findings of Fact are properly construed as Conclusions of Law, they will be interpreted as Conclusions of Law.

CONCLUSIONS OF LAW

I. Recoverability of Attorneys' Fees

1. "[A]ttorney's fees are not recoverable absent a statute, rule or contractual provision to the contrary." *Rowland v. Lepire*, 99 Nev. 308, 315, 662 P.2d 1332, 1336 (1983).

2. NRS 18.010(2)(b) provides that attorneys' fees should be awarded to a prevailing party "when the court finds that the claim ... was brought **or maintained** without reasonable ground or to harass the prevailing party." (Emphasis added.)

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 ♦ Fax: (702) 669-4650

3. Furthermore, "it is the intent of the Legislature that the court award attorney's fees pursuant to [NRS 18.010(2)(b)] … in all appropriate situations to punish for and deter frivolous or vexatious claims and defenses because such claims and defenses overburden limited judicial resources, hinder the timely resolution of meritorious claims and increase the costs of engaging in business and providing professional services to the public." NRS 18.010(2)(b).

4. Here, the Court held on October 8, 2015, that Sargeant lacked any cognizable claim for minimum wage against Henderson Taxi because such claim had been settled by the Union. This order made clear that Sargeant lacked any claim against Henderson Taxi for unpaid minimum wages.

5. After receipt of this Order, Sargeant and his counsel were on notice that Sargeant's claim had no factual or legal basis.

6. Sargeant's continued litigation of this case after October 8, 2015, including filing an entirely unsupported Motion for Reconsideration (seeking judgment on an unpleaded claim and certification of an unpleaded class) and Opposition to Motion for Summary Judgment, demonstrate that he maintained this action "without reasonable ground" because the Court had ruled he had no cognizable claim. This is the exact type of situation wherein the Legislature intended a fee award under NRS 18.010(2)(b): where a plaintiff will not let go of their alleged claim regardless of the evidence, law, and prior judicial orders stacked against them.

7. ~~This case did not present novel issues of law.~~ It is well-settled that unions may act on behalf of their members and that agents may settle claims for their principals. *See, e.g.*, *May v. Anderson*, 121 Nev. 668, 674-75, 119 P.3d 1254, 1259-60 (2005) ("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."); *see also, e.g.*, *St. Vincent Hospital*, 320 NLRB 42, 44-45 (1995) ("as 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, unless the evidence sufficiently establishes that the parties intended otherwise."); *see also Certified Corp. v. Hawaii Teamsters and Allied Workers, Local 996, IBT*, 597 F.2d 1269, 1272 (9th Cir. 1979) (approving a union's and an employer's oral modification of a CBA); *International Union v. ZF Boge Elastmetall LLC*, 649 F.3d 641 (7th Cir. 2011) (recognizing mid-term modification to a CBA by a union and an employer).

8. ~~Further, even had these issues been novel (which they were not), they~~ Plaintiff's issues were settled by the Court's October 8, 2015 Order holding that Sargeant had no cognizable claim based on the Union's settlement thereof.

9. Sargeant's Motion for Reconsideration was made without reasonable ground. A motion for reconsideration seeking judgment on an unpleaded claim and certification of an unpleaded class is not a motion for reconsideration and inherently has no merit.

10. Sargeant's Opposition to Motion for Summary Judgment was also made without ground. In his Opposition, Sargeant failed to even attempt to present facts that might stave off summary judgment, but rather sought to re-litigate the accord and satisfaction issue previously decided.

11. For these reasons, the Court finds that Sargeant's claim was maintained without reasonable ground after October 8, 2015.

II. Reasonableness of Fees

12. When awarding attorney's fees, the Court must consider the following factors: (1) the qualities of the advocate; (2) the character of the work to be done; (3) the work actually performed by the advocate; and (4) the result achieved. *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969). While the Court need not make explicit findings for each factor, the Court must demonstrate that it considered the required factors and an award of attorneys' fees must be supported by substantial evidence. *Logan v. Abe*, 131 Nev. Adv. Op. 31, 350 P.3d 1139 (2015).

13. Henderson Taxi's attorneys' fees are reasonable and justified under *Brunzell*.

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 • Fax: (702) 669-4650

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 • Fax: (702) 669-4650

14. First, Holland & Hart LLP and the attorneys involved in this case possess extensive experience in commercial, labor, and employment litigation and provided high-quality work for Henderson Taxi.

15. Second, Plaintiff brought this lawsuit as a putative class action and raised contractual and other issues under the Nevada Constitution which Henderson Taxi (and, thereby, Holland & Hart) had to defend.

16. Third, the work performed by Holland & Hart and Holland & Hart's hourly rates were reasonable in light of all the circumstances and as demonstrated by their submissions to the Court.

17. Fourth, and finally, Henderson Taxi was ultimately successful defending this matter with the aid of Holland & Hart.

18. Accordingly, Henderson Taxi is entitled to an award of attorneys' fees for the time after this Court issued its October 8, 2015, Order holding that Plaintiff and the putative class had no viable claim in the amount of $26,715.[1]

19. Plaintiff's claim became frivolous at this time and any maintenance of the claim after this date was unreasonable as a matter of law.

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[1] Henderson Taxi sought fees either from the date it filed its Opposition to Plaintiff's Motion to Certify in the amount of $47,739.50 or after the issuance of the October 8, 2015, Order holding that Plaintiff and the putative class had no viable claim in the amount of $26,715.

20. To the extent any of the forgoing Conclusions of Law are properly construed as Findings of Fact, they will be interpreted as Findings of Fact.

ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Henderson Taxi's Motion for Attorneys' Fees is GRANTED in the amount of $26,715.00.

DATED this 21 day of June 2016.

for J Boulware
DISTRICT COURT JUDGE
Sr J Boulware IV

Respectfully submitted by:

HOLLAND & HART LLP

By
Anthony L. Hall, Esq.
Nevada Bar No. 5977
R. Calder Huntington, Esq.
Nevada Bar No. 11996
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134
Attorneys for Defendant Henderson Taxi

Approved as to form:

By Refused to Sign
Leon Greenberg, Esq.
Dana Sniegocki, Esq.
LEON GREENBERG PROFESSIONAL CORPORATION
2965 South Jones Blvd., Suite E3
Las Vegas, Nevada 89146
Attorney for Plaintiff

8396349_1

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 • Fax: (702) 669-4650

EXHIBIT "D"

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CLERK OF THE COURT

NEOJ
Anthony L. Hall, Esq.
Nevada Bar No. 5977
ahall@hollandhart.com
R. Calder Huntington, Esq.
Nevada Bar No. 11996
rchuntington@hollandhart.com
HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134
(702) 669-4600
(702) 669-4650 –fax

Attorneys for Defendant Henderson Taxi

DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL SARGEANT, individually and on behalf of others similarly situated, Plaintiff, v. HENDERSON TAXI, Defendant.	CASE NO.: A-15-714136-C DEPT. NO.: XVII **NOTICE OF ENTRY OF ORDER**

PLEASE TAKE NOTICE that the attached **ORDER DENYING PLAINTIFF'S MOTION TO CERTIFY CLASS, INVALIDATE IMPROPERLY OBTAINED ACKNOWLEDGEMENTS, ISSUE NOTICE TO CLASS MEMBERS, AND TO MAKE INTERIM AWARD OF ATTORNEY'S FEES AND ENHANCEMENT PAYMENT TO REPRESENTATIVE PLAINTIFF**

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HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 ♦ Fax: (702) 669-4650

was entered by the Court on October 8, 2015.

DATED this 13th day of October, 2015.

HOLLAND & HART LLP

Anthony L. Hall, Esq.
Nevada Bar No. 5977
R. Calder Huntington, Esq.
Nevada Bar No. 11996
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134
Attorneys for Defendant Henderson Taxi

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of October, 2015, a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER** was served by the following method(s):

☒ Electronic: by submitting electronically for filing and/or service with the Eighth Judicial District Court's e-filing system and served on counsel electronically in accordance with the E-service list to the following email addresses:

Leon Greenberg, Esq.
Dana Sniegocki, Esq.
Leon Greenberg Professional Corporation
2965 South Jones Blvd., Suite E3
Las Vegas, Nevada 89146

Leon Greenberg: leongreenberg@overtimelaw.com
Dana Sniegocki: dana@overtimelaw.com

An Employee of Holland & Hart LLP

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 ♦ Fax: (702) 669-4650

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CLERK OF THE COURT

ORDD
Anthony L. Hall, Esq.
Nevada Bar No. 5977
ahall@hollandhart.com
R. Calder Huntington, Esq.
Nevada Bar No. 11996
rchuntington@hollandhart.com
HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134
(702) 669-4600
(702) 669-4650 –fax

Attorneys for Defendant Henderson Taxi

DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL SARGEANT, individually and on behalf of others similarly situated, Plaintiff, v. HENDERSON TAXI, Defendant.	CASE NO.: A-15-714136-C DEPT. NO.: XVII **ORDER DENYING PLAINTIFF'S MOTION TO CERTIFY CLASS, INVALIDATE IMPROPERLY OBTAINED ACKNOWLEDGEMENTS, ISSUE NOTICE TO CLASS MEMBERS, AND TO MAKE INTERIM AWARD OF ATTORNEY'S FEES AND ENHANCEMENT PAYMENT TO REPRESENTATIVE PLAINTIFF**

This matter came before the Court for hearing on August 12, 2015 on Plaintiff Michael Sargeant's *Motion to Certify Class, Invalidate Improperly Obtained Acknowledgements, Issue Notice to Class Members, and To Make Interim Award of Attorney's Fees and Enhancement Payment to Representative Plaintiff* (the "Motion"). Leon Greenberg and Dana Sniegocki of Leon Greenberg Professional Corporation appeared on behalf of Plaintiff. Anthony L. Hall and R. Calder Huntington of Holland & Hart LLP appeared on behalf of Defendant Henderson Taxi.

The Court, having considered Plaintiff's Motion, Defendant's Opposition, Plaintiff's Reply, along with the relevant pleadings and papers on file herein, and having considered the oral argument of counsel, and good cause appearing, the Court finds as follows:

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 • Fax: (702) 669-4650

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 • Fax: (702) 669-4650

A. Any Minimum Wage Claims were resolved by an accord and satisfaction with the Union

In June of 2014, the Nevada Supreme Court decided the case *Thomas v. Nev. Yellow Cab Corp.*, 130 Nev. Adv. Op. 52, 327 P.3d 518, 522 (2014) and found that the Minimum Wage Amendment to Nevada's Constitution, Nev. Const. Art. 15, § 16, eliminated the exemption from minimum wage for taxicab drivers that had been provided by statute. Thereafter, the ITPEU/OPEIU Local 4873, AFL-CIO (the "Union"), which the Court finds to be the exclusive representative of Henderson Taxi cab drivers as regards their employment with Henderson Taxi, grieved the issue of minimum wage to Henderson Taxi (the "Grievance"). Through negotiation, Henderson Taxi and the Union settled the Grievance by agreeing that in addition to changing pay practices going forward, Henderson Taxi would give drivers an opportunity to review Henderson Taxi's time and pay calculations and pay its current and former cab drivers the difference between what they had been paid and Nevada minimum wage over the two years prior to the *Yellow Cab* decision. This settlement agreement for the Grievance acted as a complete accord and satisfaction of the grievance and any claims to minimum wage Henderson Taxi's cab drivers may have had.

Also as part of this settlement of the Grievance, Henderson Taxi agreed to provide acknowledgements to its current and former cab drivers for them to sign, though the drivers were not required to do so. The Court finds that there was no imbalance in bargaining power between the Union and Henderson Taxi when they negotiated a settlement of the Grievance and that there is no evidence of coercion regarding any of the acknowledgements signed by Henderson Taxi cab drivers. Further, the Court finds that a bona fide dispute existed as to whether the *Yellow Cab* decision is to be applied retroactively. As such, it is unclear whether Henderson Taxi's cab drivers were or were not entitled to back pay prior to the settlement of the Grievance or whether they would be entitled to back pay absent the settlement of the Grievance. Accordingly, the settlement of the Grievance resolved a bona fide dispute regarding wages and did not necessarily act as a waiver of minimum wage rights.

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HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 • Fax: (702) 669-4650

B. Plaintiff Has Failed to Present Evidence Supporting Class Certification

In addition, and in part based on the preceding findings, the Court further finds that Plaintiff has not established the factors necessary to maintain a class action under NRCP 23(a). A class action "may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." *General Tel. Co., of the S.W. v. Falcon*, 457 U.S. 147, 161 (1982); *accord Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 847, 124 P.3d 530, 538 (2005). This rigorous analysis will generally overlap with the merits of the underlying case. *Wal-Mart Stores, Inc. v. Dukes*, 546 U.S. ___, 131 S.Ct. 2541, 2551 (2011). "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 *Falcon*, 457 U.S. at 161).

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. Thus, for the Court to certify this case as a class action, Sargeant must satisfy all requirements of NRCP 23(a), which provides in full:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Thus, under NRCP 23(a), Plaintiff must demonstrate that the proposed class is so numerous that joinder of all members is impracticable. Here, as the Union and Henderson Taxi have resolved and settled the Grievance regarding unpaid minimum wages related to the Nevada Supreme Court's *Yellow Cab* decision, Plaintiff has not demonstrated that there is a class of individuals so numerous that joinder of all members is impracticable. Thus, Plaintiff has failed to demonstrate numerosity under NRCP 23(a)(1).

Under NRCP 23(a)(2), Plaintiff 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 General Tel. Co., of the S.W. v. Falcon*, 457 U.S. 147, 155 (1982) (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 "in one stroke" an issue that is "central to the validity of each one of the claims in one stroke." *Dukes*, 131 S.Ct. at 2551. 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.* (internal 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).

Here, the majority of Henderson Taxi cab drivers have acknowledged that they have no claim against Henderson Taxi and that they have been paid all sums owed to them. Further, the Union negotiated a settlement of the minimum wage claim Plaintiff seeks to assert against Henderson Taxi. Thus, Plaintiff has not demonstrated that there are common questions of law or fact for the proposed class. Further, the determination of the minimum wage issue, had it not already been resolved, would require individual analysis not proper for a class action. For example, the Court would need to determine which minimum wage tier applied to each driver through an analysis of his income (including potentially unreported tips under NAC 608.102-608.104) and the cost of insuring his or her dependents, including an analysis of the number of dependents each driver actually had during different time frames because the cost of insurance changes based on the number of dependents a driver has.

Under NRCP 23(c), "'Typicality' demands that the claims or defenses of the representative parties be typical of those of the class." *Shuette*, 121 Nev. at 848, 124 P3d at 538. Here, Plaintiff's claims are not typical of those he seeks to represent because of the acknowledgements signed by hundreds of Henderson Taxi cab drivers. As the Court has found that these acknowledgements are valid and were not obtained through any improper act, but rather through negotiation with the Union and voluntary action of cab drivers, the acknowledgements demonstrate defenses that are unique to the hundreds of current and former taxi drivers who signed them. Further, Plaintiff's

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 ◆ Fax: (702) 669-4650

claims are not typical because his claim of hours worked is not supported by the records, including the acknowledgements signed by much of the proposed class.

Finally, under NRCP 23(d), Plaintiff has not demonstrated that he is an adequate class representative. For instance, Plaintiff's declaration contradicts the statements of hundreds of other current and former Henderson Taxi cab drivers. *See Ordonez v. Radio Shack, Inc.*, 2013 WL 210223, *11 (C.D. Cal., Jan. 17, 2013) (no predominance where there was conflicting testimony about whether employees received rest breaks: "Unlike other cases where a defendant had a purportedly illegal rest or meal break policy and courts found that common issues predominated, there is substantial evidence in this case that defendant's actual practice was to provide rest breaks in accordance with California law, as discussed previously.").

Accordingly, the Court, having considered Plaintiff's Motion, Defendant's Opposition, Plaintiff's Reply, along with the relevant pleadings and papers on file herein, and having considered the oral argument of counsel, and good cause appearing, the Court and good cause appearing,

IT IS HEREBY ORDERED that Plaintiff's Motion is DENIED.

DATED this 8th day of October 2015.

DISTRICT COURT JUDGE

Respectfully submitted by:

By
Anthony L. Hall, Esq.
Nevada Bar No. 5977
R. Calder Huntington, Esq.
Nevada Bar No. 11996
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134
Attorneys for Defendant Henderson Taxi

804842_1

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 • Fax: (702) 669-4650

EXHIBIT "E"

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CLERK OF THE COURT

MRCN

LEON GREENBERG, ESQ., SBN 8094
DANA SNIEGOCKI, ESQ., SBN 11715
Leon Greenberg Professional Corporation
2965 South Jones Blvd - Suite E3
Las Vegas, Nevada 89146
Tel (702) 383-6085
Fax (702) 385-1827
leongreenberg@overtimelaw.com
dana@overtimelaw.com

Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL SARGEANT, Individually and on behalf of others similarly situated, Plaintiff, vs, HENDERSON TAXI, Defendant.	Case No.: A-15-714136-C Dept.: XVII **MOTION FOR PARTIAL RECONSIDERATION OR ALTERNATIVELY FOR ENTRY OF FINAL JUDGMENT**

Plaintiffs, through their attorneys, Leon Greenberg Professional Corporation, hereby move this Court for an Order:

(1) Granting partial reconsideration of this Court's Order entered on October 8, 2015 (Ex. "A") but only to the extent of certifying this case as a partial class action pursuant to NRCP Rule 23(b)(3) and/or NRCP 23(b)(2) for:

> A portion of defendants' former taxi drivers that the Court's Order of October 8, 2015 found had their claims for unpaid minimum wages under Article 15, Section 16, of the Nevada Constitution completely resolved through the settlement agreement for the Grievance (the "Grievance")

between defendant Henderson Taxi and the ITPEU/OPEIU Local 4873, AFL-CIO (the "Union"). Such class would be limited to such persons who have not actually received the payment they are entitled to receive pursuant to such Grievance and have not executed the Acknowledgment form provided for by that Grievance. Such class is to be so certified to have such unpaid funds placed under the jurisdiction of the Court for the purpose of having appropriate efforts made to have those funds actually paid to such class members or a suitable *cy pres* beneficiary.

(2) In the alternative, in the event that the Court holds that the foregoing requested partial class certification should not be granted because the Court's Order of October 8, 2015 does not prohibit the proposed class members specified in (1) from collecting unpaid minimum wages under Article 15, Section 16, of the Nevada Constitution in a lawsuit against defendant in an amount greater than that provided to them under Grievance, *i.e.*, that the Grievance does not fully settle such persons' claims for unpaid minimum wages owed to them by the defendant prior to July 15, 2014:

> Granting leave to have the Court rehear, with full briefing, on another date, the branch of its October 8, 2015 Order finding that class certification would not be proper for such proposed class members because "individual analysis" would be necessary "to determine which minimum wage tier applied to each driver through an analysis of his income (including potentially unreported tips under NAC 608.102-608.104) and the cost of insuring his or her dependents, including an analysis of the number of dependents each driver actually had."

(3) In the alternative, if the Court declines to grant rehearing as requested in (1) or (2), entering a final judgment in this case for plaintiff Michael Sargeant for

$107.23, the amount it is asserted by counsel for Henderson Taxi that he is entitled to pursuant to the settlement agreement for the Grievance and/or for such other relief the Court deems he should be awarded and/or entering an appropriate Order specifying whatever other and different relief he remains entitled to seek in this case pursuant to the Court's Order entered on October 8, 2015.

PURPOSE OF THIS MOTION

THIS MOTION SEEKS RELIEF CONSISTENT WITH WHATEVER ISSUES THE COURT DEEMS REMAIN PENDING IN LIGHT OF ITS ORDER OF OCTOBER 8, 2015

Rehearing is not sought on the October 8, 2015 Order's denial to the plaintiff of relief in the form plaintiff previously requested.

Plaintiffs' motion that resulted in the Court's October 8, 2015 Order sought broad relief, including, among other things, class certification of a class consisting of *all* of defendant's taxi drivers for unpaid minimum wages owed under Article 15, Section 16, of the Nevada Constitution. It also sought a determination that the "Acknowledgments" that defendant had gathered from a large number of those taxi drivers were void. The Court denied those two items of relief to plaintiff and all other relief requested by plaintiff at that time. Plaintiff does *not* seek rehearing on the Courts' denial of the relief plaintiff previously requested, as the Court has clearly decided not to grant such relief.

Rehearing is sought to effectuate the October 8, 2015 Order's apparent finding, as best understood by plaintiff's counsel, that the only relief the alleged class members are entitled to is a payment specified in the Grievance resolution.

As discussed, *infra*, plaintiff's counsel understands the Court's Order as holding that *all claims* for all minimum wages under Article 15, Section 16, of the Nevada Constitution owed to *all members* of the alleged class (defendants' taxi drivers) have been fully settled by the Grievance through an "accord and satisfaction." This would include such persons who have *not* signed Acknowledgments as provided for under the Grievance. Yet, as discussed, *infra*, it can colorably be argued that the "non-Acknowledgment" signers under the Order's language retain a legal right to prosecute

claims for something *besides* the payment provided for under the Grievance resolution. Plaintiff's counsel advocates for no specific interpretation of the Court's Order on this point, seeking only clarification.

In the event there is nothing for the "non-Acknowledgment" signers to litigate, and all they are entitled to is the amount provided to them by the Grievance resolution, plaintiff seeks to have such amounts paid. Partial class certification is sought *just* for those "non-Acknowledgment" signers, *only* for the amounts they are owed under the Grievance resolution but never paid, and *only* for the purpose of locating and paying such persons such monies or directing them to a suitable *cy pres* beneficiary. Such funds should not be retained by the defendant.

Rehearing is sought in the event the October 8, 2015 Order did *not* fully resolve the minimum wage rights of the "non-Acknowledgment" signers, with further briefing, on the portion of the Order finding class certification would be improper because of issues requiring individual analysis.

In the event that plaintiffs' counsel's understanding of the Court's Order is in error, and the "non-Acknowledgment" signers do retain a legal right to litigate minimum wage claims for something *besides* what is provided for them under the Grievance, rehearing with further briefing is sought. Such rehearing would be limited solely to the Order's findings, discussed *infra*, that the prosecution of such "non-Acknowledgment" signers claims "would require individual analysis not proper for class certification."

The Court is also asked to enter final judgment or direct the pursuit of whatever relief remains available to the plaintiff if it denies all requested rehearing relief.

In the event that the Court both denies the requested partial class action certification and all requested rehearing relief plaintiff's counsel is unsure what further relief remains to be secured to the plaintiff and the putative class by this litigation. If the Court holds that the named plaintiff's claim has been fully resolved by the Grievance, that he possesses no rights to sue for any other relief as alleged in the complaint, and has made a final ruling that no class certification of any form is

warranted, it would appear that the plaintiff is only entitled to a judgment of $107.23. That is the amount asserted by counsel for Henderson Taxi that he is entitled to pursuant to the Grievance resolution. If such is the case plaintiff requests entry of a suitable final judgment in such amount along with an award (if the Court will grant it) of attorney's fees, interest and costs. Or, alternatively, direction from the Court as to what other relief remains to be sought in this case and/or such other final judgment that the Court deems appropriate.

ARGUMENT

I. A GROUP OF UNPAID "NON-ACKNOWLEDGMENT" SIGNERS EXIST WHO SHOULD BE GRANTED CLASS WIDE RELIEF UNDER THE COURT'S OCTOBER 8, 2015 ORDER

The understanding that plaintiffs' counsel has garnered from the Court's October 8, 2015 Order, which was drafted by defendant's counsel, is that:

(A) The claims at issue in this case have been fully resolved by the company/union grievance referenced in the Order. Such Order recites: "This settlement agreement for the Grievance acted as a complete accord and satisfaction of the grievance and any claims to minimum wage Henderson Taxi's cab drivers may have had."

(B) To the extent any "live" legal dispute exists between the named plaintiff and the putative class alleged in this Complaint on the one hand, and the defendant on the other hand, it is limited to the enforcement of the "settlement agreement for the Grievance" referred to in the Order.

In congruence with the foregoing understanding, plaintiff's counsel asks that the Court enforce the remaining legal rights existing under the "settlement agreement for the Grievance." This would be limited to certifying a class of *just* those Henderson Taxi Cab drivers who are entitled to settlement amounts pursuant to that "settlement

agreement" but have not yet received those amounts. The named plaintiff Michael Sargeant is one such person. Ex. "B." Information produced by the defendants indicates there are approximately 336 other such persons, "non-Acknowledgment" signers, all of whom are former taxi drivers who have not received the settlement payment they are entitled to under the settlement agreement. Ex. "C," ¶ 2. It appears 100% of defendants' current taxi driver employees have signed Acknowledgment forms expressly agreeing that they have received all of the unpaid minimum wages they are owed by defendants. *Id.*, ¶ 3.

Assuming, *arguendo*, that plaintiffs' counsel's understanding of the Court's Order is correct, the partial class certification of the "Non-Acknowledgment" signers should be granted under NRCP Rule 23(b)(2) and/or 23(b)(3). Such class certification would be for the purposes of effectuating the findings of the Court's Order and the settlement agreement it has recognized. Defendant concedes that these over 300 persons are owed money pursuant to such settlement agreement. Defendant, having secured an "accord and satisfaction" (the term repeatedly used in the Court's Order that they drafted) of the dispute giving rise to this litigation, should have to fulfill the "satisfaction" (payment obligation) of that "accord" (settlement agreement) they secured. It would be unjust and inappropriate to allow the defendant to retain any portion of the funds, the "satisfaction," it is obligated to pay under such "accord" it having received, through this Court's Order, the benefit of such "accord."

Accordingly, it is requested that the funds promised by the defendant under the settlement agreement, but not paid, be deposited with the Court. The Court should then direct a suitable process (perhaps through the appointment of a Special Master) whereby appropriate efforts will be made to locate the persons owed such funds and pay them such funds. After some passage of time the Court may also, in the interests of justice, direct that unclaimed and unpaid funds be paid over to a suitable *cy pres* beneficiary.

Such proposed class certification is appropriate and just because, again,

defendant should not be allowed to retain any portion of the funds it promised to pay, the "satisfaction" it gave for the "accord" it received. In addition, while defendant may not be refusing to actually pay such funds to such persons, it has no incentive to locate such persons and pay them those monies if it is allowed to otherwise retain such funds. Nor can defendant pay those funds to such persons who cannot be located or who may no longer be reachable.

In respect to the prerequisites for class certification under NRCP Rule (b)(2) and/or Rule (b)(3) it is readily apparent that they are satisfied. While the purpose of the class certification would be to collect and pay over money damages to the proposed class of approximately 336 "Non-Acknowledgment" signers, such certification is not a true "damages" class under NRCP Rule 23(b)(3). That is because, as plaintiff's counsel understands the Court's Order, there remains no "damages" to determine or award. There is only a settlement agreement specifying "satisfaction" amounts to *enforce*, rendering class certification more appropriate in this case per NRCP Rule (b)(2) for equitable relief.

Numerosity is satisfied, as there are over 300 class members. Commonality, indeed a complete identity, of issues exists, since the class is certified solely to enforce the settlement agreement recognized by the Court's Order. Plaintiff Sargeant's claim is typical, as he has not signed an Acknowledgment form and not received any settlement payment under such settlement. *See,* Ex. "B." He is an adequate representative and will represent the class appropriately. *Id.* Class counsel is experienced and adequate. *See,* Ex. "C." Superiority of class resolution is apparent as what is sought is equitable relief equally applicable to all of the class members.

Class certification under NRCP Rule 23(b)(2) does not require notice to the class, but if the Court believes certification under NRCP Rule 23(b)(3) is more appropriate it can direct such certification and notice to the class.

II. IN THE EVENT THE UNPAID "NON-ACKNOWLEDGMENT" SIGNERS CAN PURSUE MINIMUM WAGE AWARDS BEYOND THOSE PROVIDED BY THE GRIEVANCE SETTLEMENT LEAVE SHOULD BE GRANTED TO REHEAR WHETHER CLASS CERTIFICATION IS POTENTIALLY PROPER

The partial class action certification requested in Part I is based upon the understanding that the non-Acknowledgment signers cannot litigate minimum wage claims against the defendant that predate July 14, 2014, the date of the Grievance settlement. Plaintiff's counsel is concerned whether that understanding is correct.

The Court's Order (Ex. "A") finds that the defendant and its union's Grievance resolution "acted as a complete accord and satisfaction of the grievance and any claims to minimum wages Henderson Taxi' cab drivers may have had." It also goes on to find that "the settlement of the Grievance resolved a bona fide dispute regarding wages and did not necessarily act as a waiver of minimum wage rights." The conclusion of plaintiffs' counsel is that the Order finds that there are no disputed issues remaining to be litigated in this case with only enforcement of the Grievance resolution (settlement) remaining at issue. But the foregoing language, reciting that "the settlement of the Grievance" has not "necessarily" acted "as a waiver of minimum wage rights," makes plaintiffs' counsel concerned about the accuracy of their foregoing conclusion.

In the event the 336 "non-Acknowledgment" signers retain rights to pursue claims in this Court for minimum wages predating the July 14, 2014 Grievance resolution, in amounts greater than provided for by that Grievance resolution, class certification of such claims should be considered by the Court. No request is made that the Court grant such class certification at this time. All that is sought under such circumstance is an opportunity, upon full briefing, to have the Court rehear that portion of its Order stating the following:

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

frames because the cost of insurance changes based on the number of dependents a driver has. Ex. "A" page 4.

This finding is in error, as the foregoing individual analysis of income and dependent status and insurance cost would be irrelevant to a partial class certification of a class of "non-Acknowledgment" signing former employees under only the lower, $7.25, "health insurance provided" minimum wage. In addition, the regulations referred to in the Order have, in relevant part, been ruled invalid. *See*, Ex. "D." Nor has any factual record been developed supporting these conclusions.

Plaintiff does not burden the Court with further arguments as to why the Court should strike these findings from its Order since plaintiff's counsel understands the Order's as rendering such findings moot and irrelevant. Such mootness arises from the Order's holding a complete settlement of the class claims has occurred through the union Grievance resolution. If there are no contested claims to litigate in this case (only claims for enforcement of the Grievance settlement) then the Court should not consider this issue. But otherwise, it should grant plaintiff an opportunity have these findings reviewed at rehearing, with full briefing, at a date specified by the Court.

III. IN THE EVENT THE OTHER RELIEF REQUESTED IS DENIED THE COURT SHOULD ADVISE PLAINTIFF WHAT RELIEF IS STILL AVAILABLE IN THIS CASE AND, IF APPROPRIATE, ENTER A FINAL JUDGMENT

It is plaintiffs' counsel's understanding that the Court has held the only rights still possessed by the plaintiff, and over which he brought this lawsuit, are confined to whatever relief ("satisfaction") he is entitled to from the Grievance resolution. Based upon that understanding, plaintiff's counsel has requested the partial class certification relief specified in Part I. Alternatively, plaintiff's counsel has requested the relief specified in Part II if that understanding is incorrect.

In the event that the Court declines to grant plaintiff the relief specified in either Part I or Part II, plaintiff requests that the Court clarify what relief the plaintiff can still pursue in this litigation. If the Court believes the only such available relief is an award of the $107.23 that defendant's counsel has represented the plaintiff is owed in unpaid

minimum wages pursuant to the Grievance settlement, a request is made for entry of a final judgment, along with an award of attorney's fees, interest and costs (or a determination that the plaintiff is not entitled to such things), in such an amount. If the Court believes some other form or item of relief remains available to plaintiff in this litigation, plaintiff requests an Order so specifying the same along with an opportunity to pursue an award of such relief.

CONCLUSION

Wherefore, the motion should be granted.

Dated this 30th day of October, 2015.

Leon Greenberg Professional Corporation

By: */s/ Leon Greenberg*
LEON GREENBERG, Esq.
Nevada Bar No.: 8094
2965 South Jones Blvd- Suite E3
Las Vegas, Nevada 89146
Tel (702) 383-6085
Fax (702) 385-1827
Attorney for Plaintiff

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL SARGEANT, Individually and on behalf of other similarly situated, M.D., Appellant, v. HENDERSON TAXI, Respondent.	Supreme Court Case No. 69773 District Case No. A-15-714136-C

Appeal from Eighth Judicial District Court, State of Nevada,
County of Clark,

The Honorable Michael P. Villani, District Judge

RESPONDENT'S APPENDIX TO ANSWER TO PETITION FOR REHEARING

VOL 1 OF 1

(RAA 1-281)

Anthony L. Hall, Esq., Nevada Bar No. 5977
ahall@hollandhart.com
Ricardo N. Cordova, Esq., Nevada Bar No. 11942
rncordova@hollandhart.com
Erica C. Smit, Esq., Nevada Bar No. 13959
ecsmit@hollandhart.com
HOLLAND & HART LLP
5441 Kietzke Lane, Second Floor
Reno, Nevada 89511
Phone: (775) 327-3000
Facsimile: (775) 786-6179

Attorneys for Respondent

APPENDIX

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3.	11/28/2016	Order Denying Plaintiff's Motion to Recuse Judge Michael Villani	I	RAA0278–RAA0281

PROOF OF SERVICE

I, the undersigned, hereby certify that I electronically filed the forgoing APPENDIX TO **ANSWER TO PETITION FOR REHEARING** with the Clerk of Court for the Supreme Court of Nevada by using the Supreme Court of Nevada's E-filing system on March 27, 2017.

I further certify that all participants in this case are registered with the Supreme Court of Nevada's E-filing system, and that service has been accomplished to the following individuals through the Court's E-filing System:

Leon Greenberg, Esq.
Dana Sniegocki, Esq.
Leon Greenberg Professional Corporation
2965 South Jones Blvd., Suite E3
Las Vegas, Nevada 89146

Leon Greenberg: leongreenberg@overtimelaw.com
Dana Sniegocki: dana@overtimelaw.com
Attorneys for Petitioner

/s/ Marcia Filipas

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CLERK OF THE COURT

MOT
LEON GREENBERG, ESQ., SBN 8094
DANA SNIEGOCKI, ESQ., SBN 11715
Leon Greenberg Professional Corporation
2965 South Jones Blvd - Suite E3
Las Vegas, Nevada 89146
Tel (702) 383-6085
Fax (702) 385-1827
leongreenberg@overtimelaw.com
dana@overtimelaw.com
Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL SARGEANT, Individually and on behalf of others similarly situated, Plaintiff, vs. HENDERSON TAXI, Defendant.	Case No.: A-15-714136-C Dept.: XVII **PLAINTIFF'S MOTION TO RECUSE JUDGE MICHAEL VILLANI FROM THIS CASE PURSUANT TO NRS 1.235** **Hearing to be recused from: October 19, 2016 at 8:30 a.m.**

Plaintiff, through his attorneys, Leon Greenberg Professional Corporation, hereby moves this Court for an Order recusing Judge Michael Villani from hearing this case, including in respect to the current hearing scheduled for October 19, 2016.

AFFIDAVIT PURSUANT TO NRS 1.235

Leon Greenberg, being duly sworn, hereby affirms and states that:

NATURE OF CURRENT MOTION TRIGGERING RECUSAL REQUEST

1. I am an attorney duly licensed to practice law in the State of Nevada and the attorney for plaintiff Michael Sargeant. I am filing this affidavit in compliance with NRS 1.235 to explain why Judge Michael Villani should be recused from hearing defendant's motion on October 19, 2016. That motion seeks to allow defendant to use a judgment execution to "attach" Sargeant's appeal **of the very same judgment from which that execution was issued** ***and then allow Henderson Taxi to terminate that appeal as the rightful "owner" of the appeal!*** Ex. "A," motion with Exhibits thereto. Such machinations would fundamentally abridge Sargeant, and all other indigents', appeal rights, as only wealthy defendants able to post *supersedeas* bonds could ever be

assured of appellate review of adverse money judgments.

WHY RECUSAL IS SOUGHT

2. Even though it is inconceivable that what Henderson Taxi is seeking can be allowed under our system of justice, there are substantial reasons for Judge Michael Villani to be recused from hearing such motion.

Allowing Judge Villani to determine the proper scope, if any, of the appellate review Sargeant will receive is improper and violates the Nevada Code of Judicial Conduct.

3. By hearing this motion Judge Villani will be deciding whether *his own prior decision granting defendant summary judgment should receive appellate review*, violating the maxim that "no one can ever be a judge in his own cause," *nemo unquam judicet in se*. This is a fundamental principle of law that disqualifies judges from sitting in judgment of their own prior decisions in a case. *See, Williams v. Pennsylvania,* 136 S.Ct. 1899 (2016) (Error, and violation of due process protections of the United States Constitution, for appeals court justice to participate in review of death sentence they had prosecuted and reverse lower court decision granting new penalty hearing, reciting maxim); *In re Murchison*, 349 U.S. 133, 136-37 (1955) (Judge sitting as grand jury cannot, under due process clause of the United States Constitution, also convict witness of contempt for perjury in grand jury testimony, reciting maxim) and other cases. Judge Villani would also be disqualified if he was sitting in the Nevada Court of Appeals or Supreme Court from determining what, if any, appellate review and relief Sargeant should receive. *See*, Nevada Code of Judicial Conduct Rule 2.11(A)(6)(d).

4. As *Murchison* observed, what constitutes an interest by a judge that requires his recusal to ensure he is not acting as "a judge in his own case" is something that "cannot be defined with precision." 349 U.S. at 136. In determining when such recusals are needed courts must remain mindful that "justice must satisfy the appearance of justice." *Id*, citing and quoting *Offutt v. United States,* 348 U.S. 11, 14 (1954). Such need to maintain a proper "appearance" that judicial decision making is

occurring free of bias or prejudice is also recognized by NCJC Rule 2.11(A) which directs the disqualification of any judge from hearing a matter in which his "impartiality might reasonably be questioned." Allowing Judge Villani to determine whether his own prior decisions are subject to appellate review constitutes a situation where regardless of his actual bias his "impartiality" is subject to being "reasonably questioned" and he should be disqualified from ruling on that issue.

Defendant has purposefully acted, without any valid reason, to effectuate hostility from Judge Villani towards the plaintiff and allowing Judge Villani to continue to rule under such circumstances would violate the Nevada Code of Judicial Conduct.

5. Defendant has intentionally acted to cultivate a retaliatory hostility from Judge Villani towards plaintiff. It has done so by gratuitously and unnecessarily advising Judge Villani that plaintiff's appeal brief with the Nevada Supreme Court also seeks reassignment of this case upon remittitur because of the manifest irrationality, and bias, of Judge Villani's decision awarding post-judgment attorney's fees to Henderson pursuant to NRS 18.010(2)(b). Ex. "B," defendants' opposition to plaintiff's motion to stay judgment enforcement, p. 10, l. 24 - p. 11, l.8, *ad hominem* attack by defendant on plaintiff's counsel, referencing such appeal brief. Such appeal brief had nothing to do with the motion to stay judgment enforcement and was introduced by defendant in these proceedings solely to inflame Judge Villani against the plaintiff. This poisoning of the presumptive impartiality and fairness of the court by defendant creates a circumstance where Judge Villani's "impartiality might reasonably be questioned" pursuant to NCJC Rule 2.11(A) and requiring his disqualification from hearing such matter.

Judge Villani's course of conduct in the post-judgment proceedings in this case evidences a level of irrational bias and prejudice against the plaintiff that requires his recusal under the Nevada Code of Judicial Conduct.

6. Judge Villani's grant of summary judgment to defendant, which I believe

is wrong on the law and the subject of Sargeant's appeal, is not a basis for his recusal. At issue is his post-judgment conduct. It is his unprecedented order imposing "vexatious conduct" attorney's fees against Sargeant, **based on Sargeant's presentation of a timely motion for reconsideration requesting clarification of Judge Villani's prior order or alternatively seeking entry of final judgment,** combined with his other post-judgment conduct, that requires Judge Villani's recusal.

7. Via an Order entered on July 8, 2016, Judge Villani, without oral argument, granted defendant's post-judgment motion for attorney's fees pursuant to NRS 18.010(2)(b). Ex. "C." That Order found Sargeant improperly maintained this litigation after Judge Villani's prior decision entered on October 13, 2015 by seeking reconsideration of that prior order. Ex. "C," p. 5, ¶ ¶ 4-6 and Ex. "D" October 13, 2015 Order. Yet nowhere did the prior October 13, 2015 Order (Ex. "D" drafted by defendant) state this litigation was concluded by entry of a final judgment or that the Court would entertain no further request for relief from Sargeant in this case.

8. Sargeant, in seeking reconsideration, did not dispute that the language of the October 13, 2015 Order could reasonably be interpreted as finding that Henderson's "grievance resolution" with its union constituted a "settlement" of the claims he asserted individually and on behalf of an alleged class. Ex. "E" reconsideration motion, p. 3, l. 9 to p. 4., l. 20. He admitted he was unsure any claims remained to be litigated in this case in light of such order. *Id.* He asked Judge Villani, if the Court deemed it possible, to enforce that grievance resolution on behalf of Sargeant and hundreds of other class members who had never received the settlement payments promised under that grievance resolution. The October 13, 2015 Order was completely silent on whether the Court would consider granting such "settlement enforcement" relief. Ex. "E", motion, p. 4, l. 4 - l. 10. **Alternatively, if no such relief was available for Sargeant in the district court he requested an order entering final judgment.** Ex. "E," motion, p. 4., l. 24 - p. 5, l. 7.

9. Despite the foregoing, Judge Villani found Sargeant's actions after

October 13, 2015, in respect to his motion for reconsideration and his failure to properly oppose defendant's summary judgment motion, were abusive and subject to a $26,715 award of attorney's fees in favor of Henderson. Ex. "C," p. 5, ¶ ¶ 4-6. Judge Villani cited no precedent supporting his findings (drafted by the defendant) that such reconsideration request was "without reasonable ground" because it involved improperly "seeking judgment on an unpleaded claim and certification of an unpleaded class." Such order does not explain what is meant by that "unpleaded claim and class" finding and, to the extent that finding is intelligible, it is untrue. Sargeant's complaint sought "...all relief available to him and the alleged class under Nevada's Constitution, Article 15, Section 16 [Nevada's minimum wage provisions]..." Ex. "F", complaint, ¶ 17. If the only relief available in this Court to Sargeant, in respect to the payment of minimum wages, was enforcement of the settlement payments promised under the grievance resolution's terms, as he proposed in his motion for reconsideration, it was properly "pleaded" in Sargeant's complaint. *Id.*

10. Judge Villani's finding Sargeant's opposition to defendant's summary judgment motion was abusive is nonsensical and unexplained. There was no need for that summary judgment motion or any opposition. Sargeant already requested, in his motion for reconsideration, that final judgment be entered if the Court clarified its October 13, 2015 order by finding nothing remained to be litigated in this case. Given that circumstance, he could offer no separate substantive "opposition" to the summary judgment motion.

11. Even though Judge Villani agrees his decision granting summary judgment to defendant was ***not*** based on well settled law, and presumably this case does involve unsettled legal issues (he struck out defendant's proposed findings that "[t]his case did not present novel issues of law", Ex. "C" ¶ 7 and ¶ 8), he refused to grant Sargeant a stay of execution from judgment pending appeal. Ex. "G." That refusal by him also strongly supports a conclusion that he lacks impartiality towards Sargeant, in that if his ruling on those novel issues is reversed the $26,714 post

judgment award under NRS 18.010 will also have to be reversed. *See, Lehrer McGovern v. Bullock Insulations*, 197 P.3d 1032, 1043 (Nev. Sup. Ct. 2008) ("...in light of this opinion [reversing final judgment and remanding for further proceedings] we necessarily vacate the [post judgment] award of attorney fees.").

12. Three days after receiving the Ex. "G" order I filed a motion with the Nevada Supreme Court to stay judgment enforcement in this case pending appeal (that motion could not be filed until the Ex. "G" order was entered, as per NRAP Rule 8). That motion was fully submitted on September 30, 2016.

13. Further evidence of Judge Villani's lack of impartiality in this case is his refusal to grant any continuance of the motion to turn over to Henderson Taxi Sargeant's appeal rights ("attach" through an execution issued from its unsatisfied judgment Sargeant's appeal of that very same judgment!). That motion was filed on September 13, 2016 and scheduled for hearing on October 19, 2016. Henderson refuses to consent to any continuance of that hearing. My office presented an *ex parte* application to Judge Villani for a 30 day continuance of that hearing to await action by the Nevada Supreme Court on Sargeant's stay motion. I was advised on September 27, 2016 by Judge Villani's Law Clerk via email that such a request would not be granted on an *ex parte* application but could be sought via an OST, which I submitted that day. The next day, September 28, 2016, I was advised via a phone call from Judge Villani's Law Clerk that no such OST would be granted. I was further advised the continuance request could be made at the time of the hearing.

14. Judge Villani's refusal to consider my request for a "first time" continuance prior to the October 19, 2016 motion hearing is unprecedented in my 23 years as a practicing attorney. It is particularly incongruous with the custom and practice for such things in the Eighth Judicial District Court where I have been practicing for the last 13 years. I have never heard of a judge in any case, in any Court, refusing a "first time" continuance request (absent some sort of emergency situation). And certainly never in this Court. Such conduct by Judge Villani is also contrary to his

treatment of defendant in this case regarding continuance requests where he previously *did* sign an OST to consider a motion hearing continuance request by defendant's counsel. Ex. "G" OST from June 2015 (that continuance dispute was ultimately resolved by the parties' agreement without a ruling by Judge Villani). That refusal by Judge Villani to grant my continuance request has burdened me with fully briefing the motion for hearing on October 19, 2016. I can only conclude, and submit there is no other reasonable conclusion, that Judge Villani's conduct in respect to refusing to consider, or grant, prior to the motion hearing my continuance request demonstrates a hostility and bias towards my client.

15. In compliance with NRS 1.235(1) I certify that this affidavit, and request for recusal, is filed in good faith and not interposed for the purpose of delay. I further state that in 23 years of practice, litigating literally hundreds of cases, and appearing before a large number (I would estimate over 100) different state court and federal court judges, in different states and courts, I have never, ever, sought recusal of any judge.

I have read the foregoing and swear that the same is true and correct

Affirmed this 11th day of October, 2016.

Leon Greenberg, Esq.

STATE OF NEVADA
COUNTY OF CLARK ss.:

On October 11, 2016 before me appeared Leon Greenberg, known to me to be such person and who swore to the truth of the foregoing statements and made the above signature.

NOTARY PUBLIC

DANA SNIEGOCKI
Notary Public, State of Nevada
Appointment No. 11-5109-1
My Appt. Expires Jul 1, 2019

PSER
LEON GREENBERG, ESQ., SBN 8094
DANA SNIEGOCKI, ESQ., SBN 11715
Leon Greenberg Professional Corporation
2965 South Jones Blvd- Suite E3
Las Vegas, Nevada 89146
Tel (702) 383-6085
Fax (702) 385-1827
leongreenberg@overtimelaw.com
dana@overtimelaw.com

Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL SARGEANT, Individually and on behalf of others similarly situated, Plaintiff, vs. HENDERSON TAXI, Defendant.	Case No.: A-15-714136-C Dept.: XVII **PROOF OF SERVICE**

The undersigned certifies that on October 11, 2016, she served the within:

Plaintiff's Motion to Recuse Judge Michael Villani from this Case Pursuant to NRS 1.235

by court electronic service and first class mail to:

Anthony L. Hall, Esq.
R. Calder Huntington, Esq.
HOLLAND & HARD LLP
9555 Hillwood Drive, 2nd Fl.
Las Vegas, NV 89134

/s/ Dana Sniegocki
Dana Sniegocki

EXHIBIT "A"

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CLERK OF THE COURT

OBJ
Anthony L. Hall, Esq.
Nevada Bar No. 5977
ahall@hollandhart.com
R. Calder Huntington, Esq.
Nevada Bar No. 11996
rchuntington@hollandhart.com
HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134
(702) 669-4600
(702) 669-4650 –fax
Attorneys for Defendant Henderson Taxi

DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL SARGEANT, individually and on behalf of others similarly situated, Plaintiff, v. HENDERSON TAXI, Defendant.	CASE NO.: A-15-714136-C DEPT. NO.: XVII **OBJECTION TO MICHAEL SARGEANT'S CLAIM OF EXEMPTION FROM EXECUTION**

Defendant HENDERSON TAXI ("Defendant" or "Henderson Taxi"), by and through its counsel of record, Holland & Hart, LLP, hereby objects to the claim of exemption filed by Plaintiff/Judgment Debtor Michael Sargeant ("Sargeant" or "Plaintiff"). Henderson Taxi's objection is based on the following Memorandum of Points and Authorities, the papers and pleadings on file, and any oral argument the Court may allow at the hearing of this matter, which should be held within seven judicial days of the filing of this objection pursuant to NRS 21.112(6).

DATED this 16th day of September 2016.

HOLLAND & HART LLP

/s/ R. Calder Huntington
Anthony L. Hall, Esq.
Nevada Bar No. 5977
R. Calder Huntington, Esq.
Nevada Bar No. 11996
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134
Attorneys for Defendant Henderson Taxi

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 ♦ Fax: (702) 669-4650

NOTICE OF MOTION

PLEASE TAKE NOTICE the undersigned will bring the foregoing **OBJECTION TO MICHAEL SARGEANT'S CLAIM OF EXEMPTION FROM EXECUTION** on for a hearing in Department XVII of the above-entitled Court, on the 19 day of October, 2016, at In Chambers or as soon thereafter as counsel may be heard, which date is within seven judicial days of the filing of this objection as required by NRS 21.112(6).

DATED this 16th day of September 2016.

HOLLAND & HART LLP

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Anthony L. Hall, Esq.
Nevada Bar No. 5977
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Nevada Bar No. 11996
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134

Attorneys for Defendant Henderson Taxi

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 • Fax: (702) 669-4650

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 • Fax: (702) 669-4650

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HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 ♦ Fax: (702) 669-4650

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On July 8, 2016, judgment was entered against Plaintiff Michael Sargeant and in favor of Henderson Taxi in the amount of $26,715.00 (the "Judgment"). Notice of Entry of Order Granting Motion for Attorney's Fees, filed July 11, 2016. The Judgment was entered against Sargeant because he had maintained his claims against Henderson Taxi without reasonable ground after he discovered his underlying claim had been settled by his Union. *See id.*

Henderson Taxi issued a "Writ of Execution," seeking to execute on all of Sargeant's things in action, and provided instructions to the Clark County Sheriff's Office. **Exhibit 1**. The Sherriff's Office properly served the Writ of Execution on Sargeant's counsel Dana Sniegocki on August 29, 2016. **Exhibit 2**, Affidavit of Service. Lacking any legitimate basis to stop the execution on his things or choses in action (i.e., legal claims). Sargeant now asserts exemptions in the choses in action in the three legal actions he acknowledges exist (against Henderson Taxi, against Western Cab, and against A-Cab and Creighton J. Nady). In essence, Sargeant makes the following six arguments to contend that his various claims are exempt from execution: 1) that each of his three claims combine to a value of less than $1,000, making them exempt under NRS 21.090(1)(z); 2) that his claim in this litigation is no longer a chose in action subject to execution because a final judgment was entered; 3) that his claim against Henderson Taxi is now a defense not subject to execution; 4) that because his three claims each arise under Nevada's Constitution, Nevada's judgment enforcement statutes do not apply and that execution would deprive him of due process of law; 5) that because he has been designated as a class representative in one case and is seeking class representative status in another case, NRCP 23 trumps Nevada's judgment enforcement statutes; and 6) that his choses in action constitute disposable earnings under NRS 21.090(1)(g). Not a single one of these arguments has any merit. As further explained below: 1) his claims are worth a minimum of $4,500, with the Henderson Taxi claim being worth a

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 • Fax: (702) 669-4650

minimum of $2,500;[1] 2) the Nevada Supreme Court has approved the process of executing on choses in action on appeal, demonstrating that they are still choses in action after final judgment at the district court; 3) Sargeant's affirmative chose in action did not become a defense because it is on appeal; 4) the underlying constitutional nature of his choses in action does not make them exempt from execution; 5) class action certification does not make his choses in action exempt from execution; and 6) his choses in action are just that, choses in action, not disposable earnings.

II. FACTUAL BACKGROUND AND PROCEDURAL POSTURE

On February 19, 2015, Sargeant filed a putative class action suit against Henderson Taxi alleging that Henderson Taxi had failed to pay him the constitutionally mandated minimum wage for all hours worked. Included with this claim, Sargeant asserted a right to collect Attorney's fees (Complaint, ¶¶ 18 and 23), 30 days wages as waiting time penalties under NRS 608.040 (Complaint, ¶ 22), and punitive damages (Complaint, ¶¶ 17-18). On May 27, 2015, prior to conducting any discovery, Sargeant filed a "Motion to Certify," seeking class action certification amongst other relief. *See* Motion to Certify, filed May 27, 2015. Included in the relief Sargeant sought was an interim award of $5,000 to himself for acting as a class representative and an interim award of $20,000 in attorney's fees. *Id.* at 21:24-23:21. Henderson Taxi opposed the Motion to Certify, explaining to the Court that it had settled any and all underlying minimum wage claims with Sargeant's Union. *See* Opposition to Motion to Certify, filed July 15, 2015. The Court agreed with Henderson Taxi and denied Sargeant's Motion to Certify, holding that the underlying claims had been settled with the Union. *See* Decision, filed August 19, 2015; *see also* Order Denying Plaintiff's Motion to Certify Class, filed October 8, 2016.

Unable to accept that his claim had been settled and desiring to harass Henderson Taxi, Sargeant continued to litigate this case, filing an entirely unsupported Motion for Reconsideration,

[1] As explained below, there are multiple bidders intending to bid in excess of $1,000 for Sargeant's claims against A-Cab and Western Cab and Henderson Taxi will bid a minimum initial bid of $2,500 for the claim against Henderson Taxi. Thus, at $1,000 + $1,000 + $2,500, the claims are aggregately worth at least $4,500.

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 ◆ Fax: (702) 669-4650

seeking certification of a class that had not been pleaded in the Complaint on a claim that had not been pleaded in the Complaint. *See* Motion for Partial Reconsideration, filed October 30, 2016; *see also* Opposition to Motion for Partial Reconsideration, filed December 14, 2015. In his Motion for Reconsideration, Sargeant also asserted a right to and requested an award of attorney's fees. *Id.* at 9:27-10:3. In the meantime, Henderson Taxi sought summary judgment based on the underlying settlement of Sargeant's claim with the Union. *See* Motion for Summary Judgment, filed November 11, 2015. While Sargeant filed an opposition to Henderson Taxi's Motion for Summary Judgment, he did not substantively oppose entry of summary judgment. *See* Findings of Fact and Conclusions of Law, filed February 3, 2016. The Court denied Sargeant's Motion for Reconsideration and granted Henderson Taxi's Motion for Summary Judgment. *Id.*

Sargeant filed a notice of appeal on February 9, 2016, challenging this Court's denial of class certification and grant of summary judgment.

On February 7, 2016, Henderson Taxi filed a Motion for Attorney's Fees, arguing that Sargeant had unreasonably maintained his claim after he became aware of the Union settlement. The Court agreed and, on July 8, 2016, entered judgment against Sargeant in the amount of $26,715.00. *See* Order Granting Motion for Attorney's Fees, filed July 8, 2016. Henderson Taxi has since begun the process of executing on this judgment, including by issuing a Writ of Execution, seeking to execute on all of Sargeants things in action. *See* Exhibit 1; Exhibit 2. Sargeant now claims exemptions in the choses in action in three legal actions he acknowledges exist.

III. LEGAL ARGUMENT

The Nevada Constitution, in its Declaration of Rights, provides that "[t]he privilege of the debtor to enjoy the necessary comforts of life shall be recognized by wholesome laws, exempting a reasonable amount of property from seizure or sale for payments of any debts or liabilities. …" Nev. Const. art. 1 § 14. To fulfill this constitutional mandate, the Nevada Legislature enacted what is now NRS 21.090. However, the exemptions set forth in NRS 21.090 are expressly limited to those stated therein. "'[A]ll personal property and salable real estate owned by a judgment debtor is subject to execution ***unless specifically exempted by statute***.'" *Sportsco Enter. v. Morris*, 112

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 ♦ Fax: (702) 669-4650

Nev. 625, 630, 917 P.2d 934, 937 (1996) (emphasis added) (quoting *Krysmalski v. Tarasovich*, 424 Pa.Super. 121, 622 A.2d 298, 310 n. 7, *appeal denied*, 535 Pa. 675, 636 A.2d 634 (1993)). Further, "[s]tatutes permitting execution against specified kinds of property must be **liberally construed for the benefit of creditors**." *Id.* (emphasis added).

Amongst his multitude of arguments, Sargeant only points to two subsections as theoretically exempting his legal claims from execution: NRS 21.090(1)(z) and NRS 21.090(1)(g). All of his remaining arguments are without statutory basis or citation and should be rejected out of hand. *Sportsco*, 112 Nev. at 630, 917 P.2d at 937 ("All personal property and salable real estate owned by a judgment debtor is subject to execution ***unless specifically exempted by statute***.") (emphasis added, quotation marks omitted). As no statutory basis exists for these other exemption arguments, they simply cannot succeed. *Id.*[2] Nonetheless, Henderson Taxi will first address Sargeant's statutory arguments and will then address Sargeant's non-statutory, and thus unsupported, arguments.

A. Sargeant's Claims Against Henderson Taxi, Western Cab, and A-Cab Are Not Statutorily Exempt from Execution

1. NRS 21.090(1)(z) Does Not Exempt Sargeant's Claim against Henderson Taxi

NRS 21.090(1)(z), the wildcard exemption, provides that "[a]ny personal property not otherwise exempt from execution pursuant to this subsection belonging to the judgment debtor, … **not to exceed $1,000 in total value**, to be selected by the judgment debtor" is exempt. (Emphasis added.) The purpose of this exemption is to allow a judgment debtor to maintain a limited amount of cash and/or personal property, amounting to no more than $1,000 in total value. Here, each of Sargeant's legal claims is worth more than $1,000. Thus, NRS 21.090(1)(z) does not exempt any of Sargeant's claims from execution.

[2] In other words, Sargeant's arguments are for the creation of new and unprecedented exemptions. Such arguments are more of the same frivolous pleading filed by Sargeant throughout this case. The exemptions are, by statute and case law, limited to those expressly stated in the statute.

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 • Fax: (702) 669-4650

Sargeant's chose in action against Henderson taxi is worth more than $1,000. Sargeant contends that because Henderson Taxi has argued that he is only entitled to payment of approximately $107.23, his claim against Henderson Taxi can be valued at no more than that sum. This argument fails to understand what Henderson Taxi has previously argued in this case, fails to acknowledge Sargeant's actual claims and statements in this case, and entirely misunderstands basic valuation principles. Sargeant's claim against Henderson Taxi in this matter (and thus in his appeal) is indisputably valued at more than $1,000 for the following simple reasons:

- In his Complaint, Sargeant asserts a right to 30 days wages as waiting time penalties based on alleged non-payment of minimum wage. At the minimum wage of $7.25 per hour at eight hours per day, that equates to $1,740, which alone makes Sargeant's claim against Henderson Taxi worth in excess of $1,000. (If calculated using the $8.25 minimum wage Sargeant contends he is entitled to, it amounts to $1,980.)
- In his Complaint, Sargeant asserts an additional right to an award of attorney's fees, which he contended amounted to a minimum of $20,000 in May 27, 2015, approximately 16 months ago. *See* Motion to Certify, filed May 27, 2015. Given that Plaintiff claims includes a mandatory right to attorney's fees, *see* Nev. Const., art. 15, § 16, this claim for attorney's fees is a part of the value of the chose in action, making it worth in excess of $20,000.
- As part of his Motion to Certify, Sargeant requested a $5,000 enhancement payment, showing that he values his claim at a minimum of $5,000 for himself personally. *See* Motion to Certify, filed May 27, 2015.
- In his Complaint, Sargeant also asserts a right to punitive damages. While Henderson Taxi contends that such damages would be improper, some amount must be added to the value of the claim for a potential punitive damages award. Even heavily discounting such potential award due to the difficulty of obtaining punitive damages would still place a punitive damages award at a value greater than $1,000, making the chose in action worth more than $1,000.

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9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 • Fax: (702) 669-4650

- On May 5, 2015, Henderson Taxi offered to settle this matter with a payment substantially in excess of $1,000 to Sargeant plus a substantial amount in attorney's fees to his counsel. **Exhibit 3**, Declaration of Anthony L. Hall, Esq. ("Hall Decl."). On January 1, 2016, Henderson Taxi offered to settle Sargeant's claim again for and amount substantially in excess of $1,000 plus relinquishment of any right to attorney's fees and costs. *Id.* Further, during the Supreme Court mediation process, Henderson Taxi offered to settle the claim for substantially more than $1,000. *Id.* Sargeant rejected all of these settlement offers, demonstrating that he values his claim at greater than $1,000. *Id.*
- Most definitively, what absolutely determines a thing's value is not what its owner claims the value is (whether high or low), but what a buyer is willing to pay. *See Citizens Nat. Bank v. Dixieland Forest Products, LLC*, 935 So.2d 1004, 1010 (Miss. 2004) (approving sheriff's sale of judgment debtor's chose in action and stating: "As with any other personal property, a chose in action's value-for purposes of levy and execution-is determined at a sheriff's execution sale."); *see also Saucier v. Eighth Judicial Dist. Court*, 124 Nev. 1506, *1 n.6, 238 P.3d 852, *1 n.6 (Nov. 14, 2008) (Table) ("Petitioner also suggests that because including his abuse of process cause of action within the writ of execution prevents its adjudication, the value of his claim for purposes of satisfying real party in interest's judgment against him cannot be determined. But the value of his abuse of process cause of action will be determined at the sheriff's execution sale.").[3] This is basic economics. As shown above, Sargeant was not willing to settle for either $2,500 or

[3] Obviously the Court need not accept Sargeant's valuation of his chose in action without substantive evidence. If this were the case, a judgment debtor could keep any valuable asset by claiming it is worth less than $1,000. This simply is not how it works. Sargeant must prove the value is less than $1,000 and he does not even attempt to do so. *See* NRS 21.112(6) ("The judgment debtor has the burden to prove that he or she is entitled to the claimed exemption at such a hearing.").

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 • Fax: (702) 669-4650

$25,000, demonstrating that the value is greater than $1,000. In addition, now that Sargeant's chose in action will be up for auction, Henderson Taxi will make an initial bid for Sargeant's chose in action in this matter of $2,500. Exhibit 3, Hall Decl. There are also other bidders who will bid in excess of $1,000 separately for each of Sargeant's choses in action. **Exhibit 4**, Declaration of Creighton J. Nady ("Nady Decl."). As Henderson Taxi will bid no less than $2,500 (and is willing to pay more if others bid higher), there is no rational argument that the value of the claim is less than that amount. This fact alone conclusively establishes that Sargeant's claim against Henderson Taxi is worth a minimum of $2,500, the amount a buyer is willing to pay for it.

For all of these reasons, Sargeant's argument that his claim against Henderson Taxi in this case (and the ancillary appeals) is worth less than $1,000 is not just wrong, but blatantly so.

However, beyond these listed reasons for why Sargeant's claim against Henderson Taxi is worth more than $1,000, Henderson Taxi **has never claimed that Sargeant's "claim" is only worth $107.23**. Sargeant, rather, misses the critical distinction between the value of his claim as he asserts it versus what Henderson Taxi settled the claim for with the Union.[4] The Union and Henderson Taxi agreed to a settlement requiring Henderson Taxi to pay the difference between minimum wage and what was paid *to each taxi driver going back two years*. Under this rubric, the settlement amount Sargeant is owed (and refuses to accept) is $107.23. However, Sargeant argues that he is additionally owed 1) waiting time penalties, 2) punitive damages, 3) attorneys' fees, 4) minimum wages going back either four years or to the passage of the Minimum Wage Amendment (rather than the two years settlement value), and more and has refused settlement offers of up to $25,000. This shows that Sargeant is seeking more than $1,000 in damages

[4] In fact, Henderson Taxi originally argued that Sargeant was not owed any money because the Supreme Court's *Yellow Cab* case should not be applied retroactively. And as a general matter, all defendants argue that a plaintiff's claim is worth $0. This is not what determines a claim's worth. It is what a plaintiff alleges it is worth, or the settlement value, at least through final resolution.

regardless of the settlement with the Union. As such, the value of the claim is not what Henderson Taxi settled it for (or contended it was worth), but the amount Sargeant seeks or what a buyer is willing to pay, which is far in excess of $1,000. For all of these multiple reasons, NRS 21.090(1)(z) does not exempt Sargeant's claim against Henderson Taxi from execution.

2. NRS 21.090(1)(z) Does Not Exempt Sargeant's Claim against Either A-Cab or Western Cab

Sargeant has also asserted minimum wage and other claims against two other cab companies (and one owner)—A-Cab and Creight J. Nady, Case No. A-12-669926 (the "A-Cab Case") and Western Cab, Case No. A-14-707425 (the "Western Cab Case")—which claims he now contends are exempt as valued at less than $1,000. Not only does he contend that each of these claims is valued at less than $1,000, but that they are valued at less than $1,000 in the aggregate along with his claim against Henderson Taxi. As shown above, the claim against Henderson Taxi is worth far in excess of $1,000 and so are the claims against A-Cab and Western Cab. Thus, NRS 21.090(1)(z) does not exempt these claims from execution either.

a) The A-Cab Claim Is Worth More than $1,000

The A-Cab claim is worth more than $1,000 for many of the same reasons as the Henderson Taxi claim is worth more than $1,000. First, Henderson Taxi will initially bid no less than $1,000 for the A-Cab claim. Exhibit 3, Hall Decl. And at least one other bidder will bid in excess of $1,000. Exhibit 4, Nady Decl. As there will be multiple parties bidding more than $1,000, one of the bidders will have to bid higher than the other, increasing the price further beyond $1,000. Thus, as at least two buyers are willing to pay in excess of $1,000, there is no dispute that the chose in action is worth at least what those buyers are willing to pay for it. Second, Sargeant asserts a right to waiting time penalties in the case, which would amount to either $1,740 ($7.25/hour minimum wage) or $1,980 ($8.25/hour minimum wage). **Exhibit 5**, at ¶¶ 17-21. This too, standing alone, makes Sargeant's claim worth more than $1,000. Third, Sargeant seeks

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 • Fax: (702) 669-4650

attorney's fees and punitive damages, both of which are clearly more valuable than a mere $1,000.[5] *Id.*, at ¶¶ 15-16. Each of these reasons demonstrates that the A-Cab claim is worth more than $1,000 and is, thus, not exempt from execution—whether aggregated with the other choses in action or on its own.

b) The Western Cab Claim Is Worth More than $1,000

The Western Cab claim is also worth more than $1,000 for many of the same reasons as the Henderson Taxi and A-Cab claims are worth more than $1,000. First, Henderson Taxi will initially bid no less than $1,000 for the Western Cab claim. Exhibit 3, Hall Decl. And at least one other bidder will bid in excess of $1,000. Exhibit 4, Nady Decl. As there will be multiple parties bidding more than $1,000, one of the bidders will have to bid higher than the other, increasing the price further beyond $1,000. Thus, as at least two buyers are willing to pay in excess of $1,000, there is no dispute that the chose in action is worth at least what those buyers are willing to pay for it. Second, Sargeant asserts a right to waiting time penalties in the case, which would amount to either $1,740 ($7.25/hour minimum wage) or $1,980 ($8.25/hour minimum wage). **Exhibit 6**, at ¶¶ 19-23. This too, standing alone, makes Sargeant's claim worth more than $1,000. Third, Sargeant seeks attorney's fees and punitive damages, both of which are clearly more valuable than a mere $1,000.[6] *Id.* at ¶¶ 17-18, 23. Each of these reasons demonstrates that the Western Cab claim is worth more than $1,000 and is, thus, not exempt from execution.

However, additionally, Sargeant filed a declaration in the Western Cab case demonstrating that he too believes his claim is worth more than $1,000. *See* **Exhibit 7**. In this declaration, Sargeant contends that Western Cab wrongfully made him pay for $28-35 of gas each shift he worked (¶ 5); made him work 12-hour shifts without breaks but did not pay him for all of that time (¶¶ 6-7); and did not pay him for "show up" time (¶ 7). As Sargeant contends he was owed the

[5] At Sargeant's counsel's claimed lodestar rate, $1,000 would be approximately two hours work. And no one can reasonably believe he would claim less than that in attorney's fees.
[6] At Sargeant's counsel's claimed lodestar rate, $1,000 would be approximately two hours work. And no one can reasonably believe he would claim less than that in attorney's fees.

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 • Fax: (702) 669-4650

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 ♦ Fax: (702) 669-4650

minimum wage of $8.25/hour and is alleging that Western Cab wholly failed to pay him for these hours, it would not take that many weeks of employment to equal more than $1,000 in alleged unpaid wages entirely leaving out waiting time penalties, attorney's fees, and punitive damages. Thus, there is no basis to contend the claim is worth less than $1,000. *See* NRS 21.112(6) ("The judgment debtor has the burden to prove that he or she is entitled to the claimed exemption at such a hearing.").

3. Sargeant Has Presented No Support for Maintaining a Portion of His Claims

In a "Hail Mary" act of desperation, Sargeant claims to elect $333.33 of each of these three claims against Henderson Taxi, A-Cab, and Western Cab to keep the aggregate amount claimed exempt under $1,000. However, Sargeant presents no support for this argument that a chose in action is divisible into individual dollars owed, whether legally or practically. The simple fact is that each of Sargeant's choses in action are indivisible wholes, each of which is worth a minimum of $1,000 because that is what bidders are willing to bid for each individual chose in action (with the chose in action against Henderson Taxi being worth at least $2,500). Exhibit 3, Hall Decl.; Exhibit 4, Nady Decl. There is no legal or practical way to divide such a claim.[7] As such, and as it is Sargeant's obligation to prove entitlement to an exemption, NRS 21.090(1)(z) cannot be used to withhold any part of any of his choses in action. *See* NRS 21.112(6) ("The judgment debtor has the burden to prove that he or she is entitled to the claimed exemption at such a hearing.")

4. Sargeant's Chose in Action Is Not Disposable Earnings Exempt from Execution under NRS 21.090(1)(g)

In Nevada, "statutes specifying the kinds of property that are subject to execution 'must be liberally construed' for the judgment creditor's benefit", not the judgment debtor's. *Gallegos v. Malco Enter. of Nev., Inc.*, 127 Nev. 579, 582, 255 P.3d 1287, 1289 (2011) (quoting *Sportsco*, 112

[7] Sargeant may be attempting to compare the claims to funds in a bank account, where an amount up to $1,000 may be withheld (though not more than $1,000 aggregated with other assets under this exemption). However, a claim is a single asset, not individual dollars that can be easily separated and accounted.

Nev. at 630, 917 P.2d at 937). NRS 21.090(1)(g) provides: "For any workweek, 75 percent of the disposable earnings of a judgment debtor during that week, or 50 times the minimum hourly wage" under the FLSA, whichever is greater.[8] The question, thus, is whether Sargeant's chose in action against Henderson Taxi constitutes "disposable earnings" exempt or partially exempt from execution. The answer is no.

Here, Sargeant is not in the possession of wages, whether deposited in a bank account or otherwise. He has a "chose in action" in which he alleges (nothing more than alleges) that Henderson Taxi failed to pay him the proper wage. As his claim is not liquidated, it is nothing more than that: a chose, thing, or right in action. The Nevada Supreme Court has "conclude[d] that rights of action held by a judgment debtor are personal property subject to execution in satisfaction of a judgment." *Gallegos*, 127 Nev. at 582, 255 P.3d at 1289. Henderson Taxi is not seeking to execute on a weekly paycheck or have Sargeant's earnings garnished. It is not seeking to execute on earnings that have been deposited into a bank account. It is seeking to execute on a chose in action—an item expressly **NOT** exempt from execution. *Id.* As such, Sargeant's contention that his chose in action is anything other than a chose in action is incorrect and no exemption exists for his chose in action against Henderson Taxi. Moreover, Sargeant cites no authority for such a mutation—because none exists.

Further, even if Sargeant's argument that his chose in action could be considered disposable earnings (which it cannot), the exemption provided by NRS 21.090(1)(g) is expressly limited to earnings in a particular workweek. NRS 21.090(1)(g) ("For any workweek, …."). Here, Sargeant has not identified any sum that would be related to any particular workweek or that any sum would be outside of the exemption's limitations: "75 percent of disposable earnings" or 50 times the minimum wage for the workweek as defined by the FLSA. As the exemption incorporates the FLSA definition of minimum wage rather than the Nevada definition of minimum

[8] The statute defines "disposable earnings" as the earnings after any legally required deductions. NRS 21.090(1)(g).

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 • Fax: (702) 669-4650

wage, tips would be included in any analysis of earnings. Thus, Sargeant would have to prove that the funds he contends do not exceed 75% of what he was already paid or 50 times the minimum wage—including all tips he received. NRS 21.112(6) ("The judgment debtor has the **burden to prove** that he or she is entitled to the claimed exemption at such a hearing.") (emphasis added). Beyond this, though, the subsection begins "For any workweek, 75 percent of the disposable earnings of a judgment debtor during that week …," clearly referring to attaching particular weekly earnings, not a chose in action for wages. NRS 21.090(a)(g) (emphasis added).[9] Further, the penalties, attorney's fees, and punitive damages cannot be considered exempt earnings. Sargeant has not even attempted to provide evidence that this exemption applies. As such, the Court should not apply this exemption regardless of whether it considers the chose in action to be wages, which it should not.

B. Sargeant's Claim Against Henderson Taxi Is Still A Chose In Action Subject to Execution

In ¶ 5 of his Claim of Exemption, Sargeant contends that his claim against Henderson Taxi: 1) "no longer constitutes a 'chose in action' … since it has been concluded by a final judgment" and 2) that the appeals are now defenses not subject to execution under *Butwinick v. Hepner*, 291 P.3d 119, 122 (2012). Neither of these arguments has any merit.

1. Sargeant's Claim Remains a Chose in Action After Judgment in the District Court

To argue that Sargeant's claim is no longer a chose in action because it is on appeal is directly contradicted by Nevada case law approving of execution on choses in action pending on appeal. As previously described to Sargeant in Henderson Taxi's Opposition to Motion to Stay Judgment Enforcement Pending Appeal, the Nevada Supreme Court has expressly held that all

[9] Notably, in Sargeant's Motion to Stay Judgment Enforcement Pending Appeal, filed July 22, 2016, Sargeant claimed that he has no income other than social security disability, demonstrating that Sargeant is not working and, thus, has no applicable workweek. This exemption is meant to protect a limited amount of a working person's income from that work. As Sargeant is not working, it does not apply here.

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 • Fax: (702) 669-4650

"rights of action held by a judgment debtor are personal property subject to execution in satisfaction of a judgment." *Gallegos*, 127 Nev. at 582, 255 P.3d at 1289. Because of this, the Nevada Supreme Court has routinely held that a judgment debtor's rights of action, **including appellate rights**, are subject to execution in satisfaction of a judgment. *See, e.g.*, *First 100, LLC v. Ragan*, 2016 WL 4546783, at *1 (Nev. Aug. 26, 2016) (Table) (holding that appellate rights are part of the choses in action that can be acquired through execution, stating: "Respondent has filed a motion to dismiss on the ground that appellants' assets, **including their rights to the instant appeal,** have been acquired by a third party and that therefore, appellants have lost standing to pursue this appeal. … we grant the motion to dismiss.") (emphasis added); *Antonio Nevada, LLC v. Rogich*, Nos. 64763, 65731, 2015 WL 3368808, at *1 (Nev. May 20, 2015) (Table) (holding that a judgment creditor could purchase a chose in action against himself, including appellate rights, stating: "Because the appeal in Docket No. 65731 arises from a dismissal of the action brought by appellant, **Rogich could purchase appellant's rights in that action, and by extension, the rights in that appeal.**") (emphasis added); *Butwinick v. Hepner*, 128 Nev. Adv. Op. 65, 291 P.3d 119, 121 (2012) (recognizing that a judgment creditor may purchase a judgment debtor's rights and interests in a counterclaim at an execution sale); *Crenshaw v. Conrad*, No. 49746, 2008 WL 6102109, at *1 (Nev. Sept. 12, 2008) (holding that when respondent purchased appellant's rights in the underlying action, he also obtained the appellate rights, stating: "respondent validly purchased appellant's rights in the underlying civil action, and by extension, this appeal."); *Brandstetter v. Boyd*, 126 Nev. 696, 367 P.3d 752, 2008 WL 6102109 at *1 (table) (Nev. Nov. 12, 2010) (dismissing appeal arising from execution of chose in action because execution on a chose in action included the appellate rights). In sum, "a chose in action embraces in one sense ***all*** rights of action," including appellate rights. *See Brown v. Fletcher*, 235 U.S. 589, 595-96 (1915) (emphasis added, quotation omitted). Given the extensive amount of Nevada case law upholding and approving of a judgment creditor's statutory right to execute on a chose in action and explaining that such execution also encompasses the judgment creditor's appellate rights, Sargeant has no basis for his contention that his claim is no longer a chose in action simply because it is on appeal.

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 • Fax: (702) 669-4650

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 ♦ Fax: (702) 669-4650

2. Sargeant's Chose in Action Is an Affirmative Claim, not a Defense

Sargeant's claim against Henderson Taxi is just that, a claim, not a defense. As such, Sargeant's citation to *Butwinick* is entirely misplaced and misunderstands that case. In *Butwinick*, Hepner had asserted claims against Butwinick and Butwinick had asserted counterclaims against Hepner. *Butwinick*, 128 Nev. Adv. Op. 85, 291 P.3d at 121-22. Butwinick's counterclaims were adjudicated at the district court level and not appealed to the Nevada Supreme Court. *Id.* Rather, only Hepner's claim against Butwinick was on appeal *Id.* In this circumstance, the Nevada Supreme Court determined that Hepner could not execute on Butwinick's defenses against Hepner's claim because they were not things in action or other personal property. *Id.* Specifically, in contrast to things in action, the Nevada Supreme Court explained "Nevada's judgment execution statutes do not contemplate executing on defensive appellate rights as property …." *Id.* 291 P.3d at 122. In other words, unlike a chose in action, a defense simply is not property. *See id.* Here, Sargeant is asserting a claim (chose in action) against Henderson Taxi, both before this Court and the Nevada Supreme Court, not defenses. He brought the action and that is what it remains, an affirmative action. Sargeant cites no authority for the absurd proposition that a chose in action goes through a metamorphosis on appeal and becomes a defense. And all Nevada case law points to the opposite. *See, e.g.*, *First 100*, 2016 WL 4546783, at *1; *Antonio Nevada*, 2015 WL 3368808, at *1; *Butwinick*, 128 Nev. Adv. Op. 65, 291 P.3d at 121; *Crenshaw*, 2008 WL 6102109, at *1; *Brandstetter*, 126 Nev. 696, 367 P.3d 752, 2008 WL 6102109 at *1.

C. Execution on Sargeant's Chose in Action and Related Appeal Rights Does Not Violate Due Process or the Nevada Constitution

Sargeant incorrectly argues that his claim against Henderson Taxi is exempt under the Nevada constitution for two reasons (despite no statutory basis): 1) his rights under the Minimum Wage Amendment are absolute and cannot be acquired by judgment execution, and 2) that execution on his claim would violate the Nevada Constitution's guarantee of due process because "a party's right to appellate review of an adverse judgment cannot be attached by the party possessing such judgment." Both of these arguments fail for the reasons set forth below, first addressing the due process argument.

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Las Vegas, NV 89134
Phone: (702) 669-4600 • Fax: (702) 669-4650

1. Execution on Sargeant's Claim Does Not Violate Due Process

In arguing that the process of execution on his chose in action, along with corresponding appellate rights, violates due process, Sargeant demonstrates that he fundamentally misunderstands what due process is. The Nevada Constitution provides: "No person shall be deprived of life, liberty, or property, without due process of law." Nev. Const. art. 1, § 8(5). The Nevada Constitution also provides that there should be certain laws exempting property from execution allowing the "debtor to enjoy the necessary comforts of life …." Nev. Const. art. 1, § 14. "Nevada's 'Legislature enacted what is now NRS 21.090 to fulfill the mandate set forth in Nevada's Constitution.'" *In re Fox*, 129 Nev. Adv. Op. 39, 302 P.3d 1137, 1139 (2013) (quoting *Savage*, 123 Nev. at 90, 157 P.3d at 700). The Nevada Legislature also set up the ***judgment execution process*** so as to provide ***due process*** to judgment debtors. *See* NRS 21.112 (providing for claims of exemption, objections, hearings, etc.). It is due process allowing Sargeant to assert exemptions and requiring this Court to hold a hearing within seven judicial days of Henderson Taxi filing objecting thereto (unless the hearing is continued for good cause). NRS 21.112(6). Thus, if this process results in Sargeant's claim being sold, it is not a violation of due process, but the result of due process. *See* Nev. Const. art. 1, § 14; *In re Fox*, 129 Nev. Adv. Op. 39, 302 P.3d at 1139.[10]

Further, as explained in Section III(B) above, the process of executing on a chose in action is not new to the Nevada Supreme Court. It has addressed this issue many times in the past and has consistently approved of the process of executing on a chose in action and appellate rights. *See, e.g.*, *First 100*, 2016 WL 4546783, at *1 ("Respondent has filed a motion to dismiss on the ground that appellants' assets, **including their rights to the instant appeal**, have been acquired by a third party and that therefore, appellants have lost standing to pursue this appeal. …

[10] The same is generally true of all due process protections. While the state cannot deprive a person of life, liberty, or property, without due process, it may still imprison and take property when it engages in the due process required. It is no different here and Henderson Taxi is engaging in the proper process provided for by statute.

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 ♦ Fax: (702) 669-4650

we grant the motion to dismiss.") (emphasis added); *Antonio Nevada*, 2015 WL 3368808, at *1 (holding that a judgment creditor could purchase a chose in action **against himself**, including appellate rights, and dismiss those claims and the appeal); *Butwinick*, 128 Nev. Adv. Op. 65, 291 P.3d at 121 (recognizing that a judgment creditor may purchase a judgment debtor's rights and interests in a counterclaim at an execution sale); *Crenshaw*, 2008 WL 6102109, at *1 ("respondent validly purchased appellant's rights in the underlying civil action, and by extension, this appeal."); *Brandstetter*, 126 Nev. 696, 367 P.3d 752, 2008 WL 6102109 at *1 (upholding a defendant's purchase of claim **against itself** and granting defendant's motion to dismiss appeal). Not once has the Nevada Supreme Court implied any concern that the execution statutes or the right of a party to execute on a claim, whether against itself or otherwise, violates due process of law. *See Antonio Nevada*, 2015 WL 3368808 (approving such action); *Brandstetter*, 126 Nev. 696, 367 P.3d 752, 2008 WL 6102109 at *1 (same) *see also, e.g., Applied Med. Tech., Inc. v. Eames*, 44 P.3d 699, 701 (Utah 2002) ("Given that choses in action are amenable to execution under rule 69(f), it follows that a defendant can purchase claims, i.e., choses in action, **pending against itself** and then move to dismiss those claims.") (emphasis added, cited with approval in *First 100* and *Brandstetter*). Rather, this execution process ***is the due process of law required by the Constitution***, not a denial thereof. As such, Sargeant's claim that his due process rights would be violated by Henderson Taxi purchasing his chose in action is entirely baseless under Nevada Law. *See, e.g., id.*; *see also Gallegos*, 127 Nev. at 582, 255 P.3d at 1289 (approving of execution on choses in action).

2. Sargeant's Chose in Action Is Not Exempt Because It Relates to a Constitutional Right

Sargeant also argues that his claims against Henderson Taxi, A-Cab, and Western Cab are exempt from execution because they are absolute rights under Nevada's constitution and not subject to execution as provided by Nevada statute. Sargeant presents no support for this argument and it is contradicted by substantial Nevada law. As stated above, "all personal property and salable real estate owned by a judgment debtor is subject to execution ***unless specifically exempted by statute***." *Sportsco*, 112 Nev. at 630, 917 P.2d at 937 (emphasis added, quotation

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Las Vegas, NV 89134
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omitted). Here, Sargeant points to no exemption for choses in action based on constitutional rights. Rather, the only Nevada authority on point states that choses in action are subject to execution as personal property as stated in NRS 21.080 and NRS 10.045. *Gallegos*, 127 Nev. at 582, 255 P.3d at 1289 ("Based on the above statutory authority, we conclude that rights of action held by a judgment debtor are personal property subject to execution in satisfaction of a judgment."). The legal basis (statutory, common law, or constitutional) is not relevant to whether the chose in action is personal property subject to execution. As such, Sargeant's choses in action against Henderson Taxi, A-Cab, and Western Cab are each subject to execution. *Id.*; NRS 21.112(6) ("The judgment debtor has the burden to prove that he or she is entitled to the claimed exemption at such a hearing.").

However, beyond the fact that choses in action are not exempt from execution based on the underlying legal theory, Henderson Taxi is not executing on Sargeant's underlying Constitutional rights as such rights are not personal property. *See* 21.080, 21.090, and 10.045. Rather, it is only the individual choses in action on which Henderson Taxi is executing. NRS 10.045. The underlying Constitutional right and the thing or chose in action are distinct. Just because Sargeant may lose his chose in action against particular entities does not mean the Constitution does not still protect him. Any employer for which Sargeant works (assuming no exemption applies) will still have to pay Sargeant the minimum wage in the future. Thus, his Constitutional rights are not impacted by this execution.[11] The only thing impacted by execution is his personal property right to bring an action against Henderson Taxi, A-Cab, and Western Cab, which is simply an item of personal property subject to execution. *Gallegos*, 127 Nev. at 582, 255 P.3d at 1289.

D. Sargeant's Class Representative Status Does Not Exempt His Choses in Action

Finally, Sargeant contends that his choses in action in the A-Cab case and the Western Cab case are not subject to execution because he has been appointed a class representative or has a

[11] It bears repeating, Henderson Taxi settled the claim with the Union and has offered to pay to Sargeant the proceeds from this settlement. He refuses to accept them.

pending motion for class certification in which he seeks appointment as a class representative. Sargeant is incorrect that this has any relevance as to whether his choses in action are exempt from execution. First, there is no exception to choses in action in class action proceedings. Thus, as substantive statutory law governs over conflicting procedural rules, *see State v. Connery*, 99 Nev. 342, 345, 661 P.2d 1298, 1300 (1983); NRS 2.120, even if Sargeant is correct that Rule 23 conflicts with the execution statutes, then the execution statutes govern. As such, and because there is no exemption for class action choses in action, Sargeant's choses in action in the A-Cab case and Western Cab case are not exempt from execution. *Sportsco*, 112 Nev. at 630, 917 P.2d at 937 ("all personal property and salable real estate owned by a judgment debtor is subject to execution ***unless specifically exempted by statute***.") (emphasis added, quotation omitted).

Second, Sargeant is not the only class representative or putative class representative in either of these cases. In the A-Cab case, Sargeant is not even a named party. *See* **Exhibit 8**, Notice of Entry of Order Granting Class Certification in A-Cab Case. Rather, he is simply an additional class representative named in addition to the two named plaintiffs. *Id.* at 11:1-4 ("named plaintiffs Michael Murray and Michael Reno, and class member Michael Sargeant, are appointed as class representatives."). As Sargeant is only one of three class representatives, the loss of his claim will have no substantive impact on the class action against A-Cab as a whole, just his individual claim. This shows Sargeant's concern about the class action being compromised in a way inconsistent with NRCP 23(e) is a red herring as that class action will proceed regardless of what happens to Sargeant's claim. Similarly, Sargeant is one of only three named plaintiffs in the Western Cab case. Exhibit 6. As such, if class certification is granted in that case, it could proceed as a class action with the other two named plaintiffs as class representatives without Sargeant. Thus, here too, execution on Sargeant's claim would not cause the class action as a whole to be impaired or settled inconsistent with NRCP 23(e). Moreover, if Sargeant contends these class actions need additional class representatives, there is no need for that representative to be Sargeant. Rule 23 allows for the substitution of class representatives and if the courts in these cases so desire, they can allow for substitution. *See, e.g., Hernandez v. Balakian*, 251 F.R.D. 488, 490-91 (E.D. Cal.

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9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 • Fax: (702) 669-4650

2008). In fact, Sargeant's contrary implication to the Court further demonstrates his bad faith conduct in this litigation.[12]

Finally, to the extent the Court accepts Sargeant's argument that his position as an appointed class representative, along with two other class representatives, makes his claim exempt from execution (despite there being no exception for class action claims), this argument would only impact Sargeant's claim the A-Cab case. Sargeant's Motion to Certify was denied in this case and has not been ruled on in the Western Cab case.

IV. CONCLUSION

Based on the foregoing, Henderson Taxi respectfully requests that this Court reject Defendant/Judgment Debtor Sargeant's claims of exemption in their entirety.

DATED this 16th day of September 2016.

HOLLAND & HART LLP

/s/ R. Calder Huntington
Anthony L. Hall, Esq.
Nevada Bar No. 5977
R. Calder Huntington, Esq.
Nevada Bar No. 11996
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134
Attorneys for Defendant Henderson Taxi

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 ♦ Fax: (702) 669-4650

[12] To the extent the Western Cab case is currently stayed, this in no way impacts execution on Sargeant's chose in action. At most it would impact the buyer of Sargeant's chose in action and what actions they may take after acquiring such action.

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 • Fax: (702) 669-4650

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of September, 2016, a true and correct copy of the foregoing **OBJECTION TO MICHAEL SARGEANT'S CLAIM OF EXEMPTION FROM EXECUTION** was served by the following method(s):

☒ Electronic: by submitting electronically for filing and/or service with the Eighth Judicial District Court's e-filing system and served on counsel electronically in accordance with the E-service list to the following email addresses:

Leon Greenberg, Esq.
Dana Sniegocki, Esq.
Leon Greenberg Professional Corporation
2965 South Jones Blvd., Suite E3
Las Vegas, Nevada 89146

Leon Greenberg: leongreenberg@overtimelaw.com
Dana Sniegocki: dana@overtimelaw.com

☐ U.S. Mail: by depositing same in the United States mail, first class postage fully prepaid to the persons and addresses listed below:

☐ Email: by electronically delivering a copy via email to the following e-mail address:

☐ Facsimile: by faxing a copy to the following numbers referenced below:

/s/ Marie Twist
An Employee of Holland & Hart LLP

9106237_1

Exhibit 1

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 ♦ Fax: (702) 669-4650

WTEX

Anthony L. Hall, Esq.
Nevada Bar No. 5977
ahall@hollandhart.com
R. Calder Huntington, Esq.
Nevada Bar No. 11996
rchuntington@hollandhart.com
HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134
(702) 669-4600
(702) 669-4650 –fax

Attorneys for Defendant Henderson Taxi

DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL SARGEANT, individually and on behalf of others similarly situated, Plaintiff, v. HENDERSON TAXI, Defendant.	CASE NO.: A-15-714136-C DEPT. NO.: XVII **WRIT OF EXECUTION** ☐ **Earnings** ☒ **Other Property** ☐ **Earnings, Order of Support**

TO THE STATE OF NEVADA - TO THE CLARK COUNTY SHERIFF- GREETINGS:

This Writ of Execution is in furtherance of collection of a judgment, for the recovery of money for Defendant HENDERSON TAXI (the "Judgment Creditor").

On July 8, 2016, an Order Granting Motion for Attorneys' Fees (the "Judgment") was entered by the above-entitled court in the above entitled action in favor of Judgment Creditor and against Plaintiff MICHAEL SARGEANT (the "Judgment Debtor"), as follows:

///

///

///

9951002_1

JUDGMENT BALANCE	
Principal	($ 0.00)
Awarded Attorneys' Fees	$26,715.00
Post-Judgment Interest	($ 0.00)
Final Judgment	$26,715.00
Less Any Satisfaction Received to Date	($ 0.00)
Sub-Total	$26,715.00
NET BALANCE	**$26,715.00**

AMOUNTS TO BE COLLECTED BY LEVY	
NET BALANCE	**$26,715.00**
For this Writ	
Garnishment Fee	
Mileage	12.00
Levy Fee	15.00
Advertising	2.00
Storage	
Interest from Date of 03/10/2016	
Issuance	
SUB-TOTAL	26,744.00
Commission	
TOTAL LEVY	$

NOW THEREFORE, you are commanded to satisfy the Judgment for the total amount due out of the following described personal property (choses in action) of Judgment Debtor to wit:

All claims for relief, causes of action, things in action, and choses in action in any lawsuit pending in Nevada, including, but not limited to, Eighth Judicial District Court Case No. A-15-714136-C and the rights of Appellant Michael Sargeant, in the appeal of actions filed in the Supreme Court of the State of Nevada, Case Numbers 69773 and 70837.

EXEMPTIONS WHICH APPLY TO THIS LEVY

Except that for any workweek, 75 percent of the disposable earnings of the debtor during that week or 50 times the minimum hourly wage prescribed by section 6(a)(1) of the federal Fair Labor Standards Act of 1938, 29 U.S.C. § 206(a)(1), and in effect at the time the earnings are payable, whichever is greater, is exempt from any levy of execution pursuant to this writ, and if sufficient personal property cannot be found, then out of the real property belonging to the debtor in the aforesaid county, and make return to this writ within not less than 10 days or more than 60 days endorsed.

__X__ Property Other Than Wages. The exemption set forth in NRS 21.090 or in other applicable Federal Statutes may apply. Consult an attorney.

_____ Earnings

The amount subject to garnishment and this writ shall not exceed for any one pay period the lessor of:

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A. 25% of the disposable earnings due the judgment debtor for the pay period, or

B. the difference between the disposable earnings for the period and $100.50 per week for each week of the pay period.

_____ Earnings (Judgment or Order for Support)

A Judgment was entered for amounts due under a decree or order entered on ____ day of _____, 20___, by the _____, for the support of _____ for the period from _____, 20___, through _____, 20__, in _____ installments of $_____.

The amount if disposable earnings subject to Garnishment and this writ shall not exceed for any one pay period: (check appropriate box)

☐ A maximum of 50 percent of the disposable earnings of such judgment debtor who is supporting a spouse or dependent child other than the dependent named above;

☐ A maximum of 60 percent of the disposable earnings of such judgment debtor who is not supporting a spouse or dependent child other than the dependent named above;

☐ Plus an additional 5 percent of the disposable earnings of such judgment debtor if an to extent that the judgment is for support due for a period of time more than 12 weeks prior to the beginning of the work period of the judgment debtor during which the levy is made upon the disposable earnings.

NOTE: Disposable earnings are defined as gross earnings less deductions for Federal Income Tax Withholding, Federal Social Security Tax and Withholding for any State, County or City Taxes.

You are required to return this Writ from date of issuance not less than 10 days or more than 60 days with the results of your levy endorsed thereon.

Issued at the direction of:
HOLLAND & HART LLP

Anthony L. Hall, Esq. (Bar No. 5977)
R. Calder Huntington, Esq. (Bar No. 11996)
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134
Attorneys for Defendant Henderson Taxi

STEVEN D. GRIERSON,
CLERK OF COURT

AUG 19 2016

WALTER ABREGO-BONILLA

DEPUTY CLERK DATE

RETURN

I hereby certify that I have this date returned the foregoing Writ of Execution with the results of the levy endorsed thereon.

CLARK COUNTY SHERIFF

SHERIFF DATE

_____ Not satisfied $_____
_____ Satisfied in the sum of $_____
_____ Costs retained $_____
_____ Commission Retained $_____
_____ Costs incurred $_____
_____ Commission Incurred $_____
_____ Costs received $_____

REMITTED TO JUDGMENT CREDITOR $_____

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9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 ♦ Fax: (702) 669-4650

Exhibit 2

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08/31/2016 03:24:17 PM

CLERK OF THE COURT

OFFICE OF THE SHERIFF
CLARK COUNTY DETENTION
CIVIL PROCESS SECTION

MICHAEL SARGEANT)
)
PLAINTIFF) CASE No. A-15-714136-C
Vs) SHERIFF CIVIL NO.: 16005688
HENDERSON TAXI)
)
DEFENDANT) AFFIDAVIT OF SERVICE

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

ALAN GHASSERANI, being first duly sworn, deposes and says: That he/she is, and was at all times hereinafter mentioned, a duly appointed, qualified and acting Deputy Sheriff in and for the County of Clark, State of Nevada, a citizen of the United States, over the age of twenty-one years and not a party to, nor interested in, the above entitled action; that on **8/29/2016**, at the hour of **10:15 AM**, affiant as such Deputy Sheriff served a copy/copies of **WRIT OF EXECUTION - PERSONAL PROPERTY** issued in the above entitled action upon the plaintiff **MICHAEL SERGEANT** named therein, by delivering to and leaving with **DANA SNIEGOCKI, ESQ.** for said plaintiff **MICHAEL SARGEANT**, personally, at **C/O LEON GREENBERG, ESQ & DANA SNIEGOCKI, ESQ; LEON GREENBERG, P.C. 2965 S JONES BOULEVARD SUITE E3 LAS VEGAS, NV 89146** within the County of Clark, State of Nevada, said copy/copies of **WRIT OF EXECUTION - PERSONAL PROPERTY**

I, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAW OF THE STATE ON NEVADA THAT THE FOREGOING IS TRUE AND CORRECT.

DATED August 30, 2016.

SERVICE FEES - $29.00

Joseph M. Lombardo, Sheriff

By: _____ 9570
ALAN GHASSERANI
Deputy Sheriff

Exhibit 3

DECL
Anthony L. Hall, Esq.
Nevada Bar No. 5977
ahall@hollandhart.com
R. Calder Huntington, Esq.
Nevada Bar No. 11996
rchuntington@hollandhart.com
HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134
(702) 669-4600
(702) 669-4650 – fax

Attorneys for Defendant Henderson Taxi

DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL SARGEANT, individually and on behalf of others similarly situated, Plaintiff, v. HENDERSON TAXI, Defendant.	CASE NO.: A-15-714136-C DEPT. NO.: XVII **DECLARATION OF ANTHONY L. HALL IN SUPPORT OF DEFENDANT HENDERSON TAXI'S OBJECTION TO PLAINTIFF'S CLAIM OF EXEMPTION FROM EXECUTION**

I, Anthony L. Hall, Esq., declare as follows:

1. I am a partner with the law firm of Holland & Hart, LLP, attorneys for Defendant Henderson Taxi, in the above-captioned matter. I am duly admitted to practice law in the State of Nevada. I have personal knowledge of the matters set forth in this declaration, except as to those matters stated upon information and belief, and I believe those matters to be true. I execute this Declaration in support of Henderson Taxi's Objection to Plaintiff's Claim of Exemption from Execution (the "Objection").

2. On May 5, 2015, I made an offer to settle for substantially in excess of $1,000 to Plaintiff Michael Sargeant ("Sargeant"), through his counsel, Leon Greenberg, Esq., Sargeant's counsel, rejected this offer on his client's behalf. I also made an additional offer to settle for for substantially more than $1,000, plus a relinquishment of any right to costs and attorney's fees, on

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January 1, 2016. Mr. Greenberg rejected this offer as well. I also offered to settle this claim on behalf of Henderson Taxi during the Nevada Supreme Court mediation process for substantially more than $1,000. Sargeant rebuffed all of these offers, which demonstrates he values the claim in excess of $1,000.

3. Henderson Taxi has authorized and directed me to attend any sheriff's sale on Sargeant's choses in action.

4. I have been authorized and directed to place an initial bid of $2,500 for Sargeant's chose in action in this matter (Eighth Judicial District Court Case No. A-15-714136-C), including the related appellate rights. I have also been authorized and directed to bid in excess of that amount if other bidders bid higher.

5. I have been authorized and directed to bid in excess of $1,000 for Sargeant's chose in action against A-Cab and Creighton J. Nady (Eighth Judicial District Court Case No. A-12-669926).

6. I have been authorized and directed to bid in excess of $1,000 for Sargeant's chose in action against Western Cab (Eighth Judicial District Court Case No. A-14-707425).

I declare under the penalty of perjury that the foregoing is true and correct.

EXECUTED this 16th day of September, 2016, in Clark County, Nevada.

By: _____
Anthony L. Hall, Esq.

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 • Fax: (702) 669-4650

Exhibit 4

DECLARATION OF CREIGHTON J. NADY

1. I intend to attend any Sheriff's Sale to be held on Michael Sargeant's Choses In Action.

2. At such sale, I intend to bid in excess of $1,000.00 on Michael Sargeant's claim against A Cab, LLC arising in the Eighth Judicial District Court, Clark County, Nevada.

3. At such sale, I intend to bid in excess of $1,000.00 on Michael Sargeant's claim against Henderson Taxi Company arising in the Eighth Judicial District Court, Clark County, Nevada.

4. At such sale, I intend to bid in excess of $1,000.00 on Michael Sargeant's claim against Western Cab Company arising in the Eighth Judicial District Court, Clark County, Nevada.

AFFIRMED this 6th day of September, 2016.

By: _____
CREIGHTON J. NADY

Exhibit 5

CIVIL COVER SHEET

Clark County, Nevada

Case No. _____
(Assigned by Clerk's Office)

A-12-669926-C
XXVIII

I. Party Information

Plaintiff(s) (name/address/phone): Michael P. Murray, 3555 Stober Blvd., Apt. 111, Las Vegas, NV 89103, Michael Reno, 811 E. Bridger Avenue, #363, Las Vegas, NV 89101 Attorney (name/address/phone): Leon Greenberg, 2965 S. Jones Blvd., Suite E-4, Las Vegas, NV 89146, 702-383-6085	Defendant(s) (name/address/phone): A Cab Taxi Service, LLC, 3730 Pama Lane, Las Vegas, NV 89120 Attorney (name/address/phone): Unknown

II. Nature of Controversy (Please check applicable bold category and applicable subcategory, if appropriate)

☐ **Arbitration Requested**

Civil Cases

Real Property

- ☐ **Landlord/Tenant**
  - ☐ Unlawful Detainer
- ☐ **Title to Property**
  - ☐ Foreclosure
  - ☐ Liens
  - ☐ Quiet Title
  - ☐ Specific Performance
- ☐ **Condemnation/Eminent Domain**
- ☐ **Other Real Property**
  - ☐ Partition
  - ☐ Planning/Zoning

Torts

Negligence
- ☐ **Negligence – Auto**
- ☐ **Negligence – Medical/Dental**
- ☐ **Negligence – Premises Liability** (Slip/Fall)
- ☐ **Negligence – Other**

- ☐ **Product Liability**
  - ☐ Product Liability/Motor Vehicle
  - ☐ Other Torts/Product Liability
- ☐ **Intentional Misconduct**
  - ☐ Torts/Defamation (Libel/Slander)
  - ☐ Interfere with Contract Rights
- ☐ **Employment Torts** (Wrongful termination)
- ☐ **Other Torts**
  - ☐ Anti-trust
  - ☐ Fraud/Misrepresentation
  - ☐ Insurance
  - ☐ Legal Tort
  - ☐ Unfair Competition

Probate

Estimated Estate Value: _____
- ☐ **Summary Administration**
- ☐ **General Administration**
- ☐ **Special Administration**
- ☐ **Set Aside Estates**
- ☐ **Trust/Conservatorships**
  - ☐ Individual Trustee
  - ☐ Corporate Trustee
- ☐ **Other Probate**

Other Civil Filing Types

- ☐ **Construction Defect**
  - ☐ Chapter 40
  - ☐ General
- ☐ **Breach of Contract**
  - ☐ Building & Construction
  - ☐ Insurance Carrier
  - ☐ Commercial Instrument
  - ☐ Other Contracts/Acct/Judgment
  - ☐ Collection of Actions
  - ☐ Employment Contract
  - ☐ Guarantee
  - ☐ Sale Contract
  - ☐ Uniform Commercial Code
- ☐ **Civil Petition for Judicial Review**
  - ☐ Foreclosure Mediation
  - ☐ Other Administrative Law
  - ☐ Department of Motor Vehicles
  - ☐ Worker's Compensation Appeal

- ☐ **Appeal from Lower Court** *(also check applicable civil case box)*
  - ☐ Transfer from Justice Court
  - ☐ Justice Court Civil Appeal
- ☐ **Civil Writ**
  - ☐ Other Special Proceeding
- ☒ **Other Civil Filing**
  - ☐ Compromise of Minor's Claim
  - ☐ Conversion of Property
  - ☐ Damage to Property
  - ☐ Employment Security
  - ☐ Enforcement of Judgment
  - ☐ Foreign Judgment – Civil
  - ☐ Other Personal Property
  - ☐ Recovery of Property
  - ☐ Stockholder Suit
  - ☒ Other Civil Matters

III. Business Court Requested (Please check applicable category; *for Clark or Washoe Counties only.*)

☐ NRS Chapters 78-88	☐ Investments (NRS 104 Art. 8)	☐ Enhanced Case Mgmt/Business
☐ Commodities (NRS 90)	☐ Deceptive Trade Practices (NRS 598)	☐ Other Business Court Matters
☐ Securities (NRS 90)	☐ Trademarks (NRS 600A)	

October 8, 2012
Date

Signature of initiating party or representative

See other side for family-related case filings.

CLERK OF THE COURT

COMP

LEON GREENBERG, ESQ., SBN 8094
DANA SNIEGOCKI, ESQ., SBN 11715
Leon Greenberg Professional Corporation
2965 South Jones Blvd- Suite E4
Las Vegas, Nevada 89146
(702) 383-6085
(702) 385-1827(fax)
leongreenberg@overtimelaw.com
dana@overtimelaw.com

Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL MURPHY and MICHAEL RENO, Individually and on behalf of others similarly situated, Plaintiffs, vs. A CAB TAXI SERVICE LLC and A CAB, LLC, Defendants.	Case No.: A-12-669926-C Dept.: XXVIII **COMPLAINT** **ARBITRATION EXEMPTION CLAIMED BECAUSE THIS IS A CLASS ACTION CASE**

MICHAEL MURPHY and MICHAEL RENO, Individually and on behalf of others similarly situated, by and through their attorney, Leon Greenberg Professional Corporation, as and for a Complaint against the defendants, state and allege, as follows:

JURISDICTION, PARTIES AND PRELIMINARY STATEMENT

1. The plaintiffs, MICHAEL MURPHY and MICHAEL RENO, (the "individual plaintiffs" or the "named plaintiffs")

are residents of the State of Nevada and during all relevant times were residents of Clark County, Nevada, and all plaintiffs are current employees of the defendants.

2. The defendants A CAB TAXI SERVICE LLC and A CAB, LLC, (hereinafter referred to as "A CAB" or "defendants") are limited liability companies or corporations existing and established pursuant to the laws of the State of Nevada with their principal place of business in the County of Clark, State of Nevada and conduct business in Nevada.

CLASS ACTION ALLEGATIONS

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

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

5. The common circumstance of the cab drivers giving rise to this suit is that while they were employed by defendants they were not paid the minimum wage required by Nevada's Constitution, Article 15, Section 16 for many or most of the days that they worked in that their hourly

compensation, when calculated pursuant to the requirements of said Nevada Constitutional Provision, did not equal at least the minimum hourly wage provided for therein.

6. The named plaintiffs are informed and believe, and based thereon allege that there are at least 200 putative class action members. The actual number of class members is readily ascertainable by a review of the defendants' records through appropriate discovery.

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

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

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

10. The individual plaintiffs will fairly and

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

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

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

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

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

Constitution.

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

15. The named plaintiffs seek all relief available to them and the alleged class under Nevada's Constitution, Article 15, Section 16 including appropriate injunctive and equitable relief to make the defendants cease their violations of Nevada's Constitution and a suitable award of punitive damages.

16. The named plaintiffs on behalf of themselves and the proposed plaintiff class members, seek, on this First Claim for Relief, a judgment against the defendants for minimum wages, such sums to be determined based upon an accounting of the hours worked by, and wages actually paid to, the plaintiffs and the class members, a suitable injunction and other equitable relief barring the defendants from continuing to violate Nevada's Constitution, a suitable award of punitive damages, and an award of attorney's fees, interest and costs, as provided for by Nevada's Constitution and other applicable laws.

AS AND FOR A SECOND CLAIM FOR RELIEF PURSUANT TO NEVADA REVISED STATUTES § 608.040 ON BEHALF OF THE NAMED PLAINTIFFS AND THE PUTATIVE CLASS

17. Plaintiffs repeat and reiterate each and every allegation previously made herein.

18. The named plaintiffs bring this Second Claim for Relief against the defendants pursuant to Nevada Revised Statutes § 608.040 on behalf of themselves and those members of the alleged class of all similarly situated employees of the defendants who have terminated their employment with the defendants.

19. The named plaintiffs have been separated from their employment with the defendants and at the time of such separation were owed unpaid wages by the defendants.

20. The defendants have failed and refused to pay the named plaintiffs and numerous members of the putative plaintiff class who are the defendants' former employees their earned but unpaid wages, such conduct by such defendants constituting a violation of Nevada Revised Statutes § 608.020, or § 608.030 and giving such named plaintiffs and similarly situated members of the putative class of plaintiffs a claim against the defendants for a continuation after the termination of their employment with the defendants of the normal daily wages defendants would pay them, until such earned but unpaid wages are actually paid or for 30 days, whichever is less, pursuant to Nevada Revised Statutes § 608.040.

21. As a result of the foregoing, the named plaintiffs seek on behalf of themselves and the similarly situated putative plaintiff class members a judgment against the defendants for the wages owed to them and such class members as prescribed by Nevada Revised Statutes § 608.040, to wit, for a sum equal to up to thirty days

wages, along with interest, costs and attorneys' fees.

WHEREFORE, plaintiffs demand the relief on each cause of action as alleged aforesaid.

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

Dated this 8th day of October, 2012.

Leon Greenberg Professional Corporation

By: */s/ Leon Greenberg*

LEON GREENBERG, Esq.
Nevada Bar No.: 8094
2965 South Jones Blvd- Suite E4
Las Vegas, Nevada 89146
(702) 383-6085

Attorney for Plaintiff

Exhibit 6

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CLERK OF THE COURT

ACOM
LEON GREENBERG, ESQ., NSB 8094
DANA SNIEGOCKI, ESQ., NSB 11715
Leon Greenberg Professional Corporation
2965 South Jones Blvd- Suite E3
Las Vegas, Nevada 89146
Tel (702) 383-6085
Fax (702) 385-1827
leongreenberg@overtimelaw.com
dana@overtimelaw.com

Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

LAKSIRI PERERA, IRSHAD AHMED, and MICHAEL SARGEANT Individually and on behalf of others similarly situated, Plaintiffs, vs. WESTERN CAB COMPANY, Defendant.	Case No.: A-14-707425-C Dept.: V **THIRD AMENDED COMPLAINT** **ARBITRATION EXEMPTION CLAIMED BECAUSE THIS IS A CLASS ACTION CASE**

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

JURISDICTION, PARTIES AND PRELIMINARY STATEMENT

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

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

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

CLASS ACTION ALLEGATIONS

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

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

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

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

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

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

claims are typical of those of the class.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

WHEREFORE, plaintiffs demand the relief as alleged aforesaid.

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

Dated this 2nd day of December, 2015.

Leon Greenberg Professional Corporation

By: */s/ Leon Greenberg*

LEON GREENBERG, Esq.
Nevada Bar No.: 8094
2965 South Jones Blvd- Suite E3
Las Vegas, Nevada 89146
Tel (702) 383-6085
Fax (702) 385-1827

Attorney for Plaintiff

IAFD

DISTRICT COURT

CLARK COUNTY, NEVADA

Laksiri Perera et al. Plaintiff(s), -vs- Western Cab Company Defendant(s).	CASE NO. A-14-707425-C DEPT. NO. V

INITIAL APPEARANCE FEE DISCLOSURE (NRS CHAPTER 19)

Pursuant to NRS Chapter 19, as amended by Senate Bill 106, filing fees are submitted for parties appearing in the above entitled action as indicated below:

New Complaint Fee	**1st Appearance Fee**
☐ $1530 ☐ $520 ☐ $299 ☐ $270.00	☐ $1483.00 ☐ $473.00 ☐ $223.00

Name:	
Michael Sargeant	☒ $30
	☐ $30
	☐ $30
	☐ $30
☐ Total of Continuation Sheet Attached	☐ $____
TOTAL REMITTED: (Required) Total Paid	$ 30

DATED this 2nd day of December, 2015.

/s/ *Leon Greenberg*
Leon Greenberg

Exhibit 7

DECL
LEON GREENBERG, ESQ., NSB 8094
DANA SNIEGOCKI, ESQ., NSB 11715
Leon Greenberg Professional Corporation
2965 South Jones Blvd- Suite E4
Las Vegas, Nevada 89146
Tel (702) 383-6085
Fax (702) 385-1827
leongreenberg@overtimelaw.com
dana@overtimelaw.com

Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

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

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

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

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

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

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

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

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

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

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

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

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

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

Michael Sargeant

7-15-2015
Date

Exhibit 8

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CLERK OF THE COURT

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LEON GREENBERG, ESQ., SBN 8094
DANA SNIEGOCKI, ESQ., SBN 11715
Leon Greenberg Professional Corporation
2965 South Jones Blvd- Suite E3
Las Vegas, Nevada 89146
(702) 383-6085
(702) 385-1827(fax)
leongreenberg@overtimelaw.com
dana@overtimelaw.com
Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL MURRAY, and MICHAEL RENO, Individually and on behalf of others similarly situated,

Plaintiffs,

vs.

A CAB TAXI SERVICE LLC, and A CAB, LLC,

Defendants.

Case No.: A-12-669926-C

Dept.: I

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that the Court entered the attached Order in this matter on June 7, 2016.

Dated: June 7, 2016

LEON GREENBERG PROFESSIONAL CORP.

/s/ Leon Greenberg

Leon Greenberg, Esq.
Nevada Bar No. 8094
2965 S. Jones Boulevard - Ste. E-3
Las Vegas, NV 89146
Tel (702) 383-6085
Attorney for the Plaintiffs

CERTIFICATE OF MAILING

The undersigned certifies that on June 7, 2016, she served the within:

Notice of Entry of Order Granting Plaintiffs' Motion to Certify Class Action Pursuant to NRCP Rule 23(b)(2) and NRCP Rule 23(b)(3) and Denying Without Prejudice Plaintiffs' Motion to Appoint a Special Master Under NCRP Rule 53 as Amended by this Court in Response to Defendants' Motion for Reconsideration heard in Chambers on March 28, 2016.

by court electronic service to:

TO:

Esther C. Rodriguez, Esq.
RODRIGUEZ LAW OFFICES, P.C.
10161 Park Run Drive, Suite 150
Las Vegas, NV 89145

/s/ Dana Sniegocki

Dana Sniegocki

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CLERK OF THE COURT

ORDR
LEON GREENBERG, ESQ.
Nevada Bar No.: 8094
DANA SNIEGOCKI, ESQ.
Nevada Bar No.: 11715
Leon Greenberg Professional Corporation
2965 South Jones Boulevard - Suite E-3
Las Vegas, Nevada 89146
(702) 383-6085
(702) 385-1827(fax)
leongreenberg@overtimelaw.com
dana@overtimelaw.com
Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

Defendants.

Case No.: A-12-669926-C

DEPT.: I

Order Granting Plaintiffs' Motion to Certify Class Action Pursuant to NRCP Rule 23(b)(2) and NRCP Rule 23(b)(3) and Denying Without Prejudice Plaintiffs' Motion to Appoint a Special Master Under NCRP Rule 53 as Amended by this Court in Response to Defendants' Motion for Reconsideration heard in Chambers on March 28, 2016

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

hearing on November 3, 2015, with appearances by Leon Greenberg, Esq. and Dana Sniegocki, Esq. on behalf of all plaintiffs, and Esther Rodriguez, Esq., on behalf of all defendants, and the Court, having heard in Chambers on March 28, 2016 the defendants' motion for reconsideration of the Order entered by this Court on February 10, 2016, granting in part and denying in part such motion by the plaintiffs, following the arguments of such counsel, and after due consideration of the parties' respective briefs, and all pleadings and papers on file herein, and good cause appearing, therefore

THE COURT FINDS:

That it had previously issued an Order on the aforesaid motion made by plaintiffs, which Order was entered on February 10, 2016 and which Order is now superseded and replaced by this Order as a result of the Court granting in part Defendants' Motion for Reconsideration of the February 10, 2016 Order which Motion for Reconsideration was heard in Chambers on March 28, 2016 and an Order on the same entered on April 28, 2016.

In Respect to the Request for Class Certification

Upon review of the papers and pleadings on file in this matter, and the evidentiary record currently before the Court, the Court holds that plaintiffs have adequately established that the prerequisites of Nev. R. Civ. P. 23(b)(3) and 23(b)(2) are met to certify the requested classes seeking damages and suitable injunctive relief under Article 15, Section 16 of the Nevada Constitution (the "Minimum Wage Amendment") and NRS 608.040 (those are the First and Second Claims for Relief in

the Second Amended and Supplemental Complaint) and grants the motion in respect to those claims. The Court makes no determinations of the merits of the claims asserted nor whether any minimum wages are actually owed to any class members, or whether any injunctive relief should actually be granted, as such issues are not properly considered on a motion for class certification. In compliance with what the Court believes is required, or at least directed by the Nevada Supreme Court as desirable, the Court also makes certain findings supporting its decision to grant class certification under NRCP Rule 23. *See, Beazer Homes Holding Corp. v. Eighth Judicial Dist. Court.*, 291 P.3d 128, 136 (2012) (En Banc) (Granting writ petition, finding district court erred in failing to conduct an NRCP Rule 23 analysis, and holding that "[u]ltimately, upon a motion to proceed as a class action, the district court must "thoroughly analyze NRCP 23's requirements and document its findings."" *Citing D.R. Horton v. Eighth Judicial Dist. Court ("First Light II")*, 215 P.3d 697, 704 (Nev. Sup. Ct. 2009).

As an initial matter, the nature of the claims made in this case are of the sort for which class action treatment would, at least presumptively, likely be available if not sensible. A determination of whether an employee is owed unpaid minimum hourly wages requires that three things be determined: the hours worked, the wages paid, and the applicable hourly minimum wage. Once those three things are known the minimum wages owed, if any, are not subject to diminution by the employee's contributory negligence, any state of mind of the parties, or anything else of an

individual nature that has been identified to the Court. Making those same three determinations, involving what is essentially a common formula, for a large group of persons, is very likely to involve an efficient process and common questions. The minimum hourly wage rate is set at a very modest level, meaning the amounts of unpaid minimum wages likely to be owed to any putative class member are going to presumptively be fairly small, an additional circumstance that would tend to weigh in favor of class certification.

In respect to granting the motion and the record presented in this case, the Court finds it persuasive that a prior United States Department of Labor ("USDOL") litigation initiated against the defendants resulted in a consent judgment obligating the defendants to pay $139,834.80 in unpaid minimum wages to the USDOL for distribution to 430 taxi drivers under the federal Fair Labor Standards Act (the "FLSA") for the two year period from October 1, 2010 through October 2, 2012. The parties dispute the *collateral estoppel* significance of that consent judgment in this litigation. The Court does not determine that issue at this time, inasmuch as whether the plaintiffs are actually owed minimum wages (the "merits" of their claims) is not a finding that this Court need make, nor presumably one it should make, in the context of granting or denying a motion for class certification. The USDOL, as a public law enforcement agency has a duty, much like a prosecuting attorney in the criminal law context, to only institute civil litigation against employers when credible evidence exists that such employers have committed violations of the FLSA. Accordingly,

whether or not the consent judgment is deemed as a binding admission by defendants that they owe $139,834.80 in unpaid minimum wages under the FLSA for distribution to 430 taxi drivers, it is appropriate for the Court to find that the Consent judgment constitutes substantial evidence that, at least at this stage in these proceedings, common questions exist that warrant the granting of class certification. The Court concludes that the record presented persuasively establishes that there are at least two common questions warranting class certification in this case for the purposes of NRCP Rule 23(b)(3) ("damages class" certification) that are coextensive with the period covered by the USDOL consent judgment and for the period prior to June of 2014.

The first such question would be whether the class members are owed additional minimum wages, beyond that agreed to be paid in the USDOL consent judgment, and for the period covered by the consent judgment, by virtue of the Minimum Wage Amendment imposing an hourly minimum wage rate that is $1.00 an hour higher than the hourly minimum wage required by the FLSA for employees who do not receive "qualifying health insurance." The second such question would be whether the class members are owed additional minimum wages, beyond that alleged by USDOL for the period covered by the consent judgment, by virtue of the Minimum Wage Amendment not allowing an employer a "tip credit" towards its minimum wage requirements, something that the FLSA does grant to employers in respect to its minimum wage requirements. It is unknown whether the USDOL consent judgment

calculations include or exclude the application of any "tip credit" towards the FLSA minimum wage deficiency alleged by the USDOL against the defendants.

In respect to the "tip credit" issue plaintiffs have also demonstrated a violation of Nevada's Constitution existing prior to June of 2014. Plaintiff has provided to the Court payroll records from 2014 for taxi driver employee and class member Michael Sargeant indicating that he was paid $7.25 an hour but only when his tip earnings are included. Defendant has not produced any evidence (or even asserted) that the experience of Michael Sargeant in respect to the same was isolated and not common to many of its taxi driver employees. The Nevada Constitution's minimum wage requirements, unlike the FLSA, prohibits an employer from using a "tip credit" and applying an employee's tips towards any portion of its minimum wage obligation. The Sargeant payroll records, on their face, establish a violation of Nevada's minimum wage standards for a certain time period and strongly support the granting of the requested class certification.

The Court makes no finding that the foregoing two identified common questions are the only common questions present in this case that warrant class certification. Such two identified issues are sufficient for class certification as the commonality prerequisite of NRCP Rule 23(a) is satisfied when a "single common question of law or fact" is identified. *Shuette v.Beazer Homes Holdings Corp.*, 121 Nev. 837, 848 (2005). In addition, there also appear to be common factual and legal issues presented by the claims made under NRS 608.040 for statutory "waiting time"

penalties for former taxi driver employees of defendants.. Such common questions are readily apparent as NRS 608.040 is a strict liability statute..

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

over 430 class members in a single proceeding.

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

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

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

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

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

entirety of the financial burden of such a process upon the defendants. Accordingly, the Court denies that request without prejudice at this time.

Therefore

IT IS HEREBY ORDERED:

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

Corporation are appointed as class counsel and the named plaintiffs Michael Murray and Michael Reno, and class member Michael Sargeant, are appointed as class representatives. The Court will allow discovery pertaining to the class members and the class claims.

IT IS FURTHER ORDERED:

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

IT IS FURTHER ORDERED:

(1) Defendants' counsel is to produce to plaintiffs' counsel, within 10 days of the service of Notice of Entry of this Order, the names and last known addresses of all persons employed as taxicab drivers by any of the defendants in the State of Nevada from July 1, 2007 through December 31, 2015, such information to be provided in an Excel or CSV or other agreed upon computer data file, as agreed upon

by counsel for the parties, containing separate fields for name, street address, city, state and zip code and suitable for use to mail the Notice of Class Action ;

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

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

(4) Class members seeking exclusion from the class must file a written statement with the Court setting forth their name, address, and election to be excluded from the class, no later than 55 days after the mailing of the Notice of Class Action as provided for in (2), above.

IT IS FURTHER ORDERED:

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

IT IS FURTHER ORDERED:

That the stay issued by this Court pending the Court's Reconsideration of Prior Order, such stay entered via the Court's Order of April 6, 2016, is dissolved.

IT IS SO ORDERED.

Dated this 3rd day of June, 2016.

Hon. Kenneth Cory
District Court Judge

Submitted:

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

EXHIBIT "A"

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

Defendants.

Case No.: A-12-669926-C

Dept.: I

NOTICE OF CLASS ACTION CERTIFICATION

You are being sent this notice because you are a member of the class of current and former taxi drivers employed by A CAB TAXI SERVICE LLC and A CAB, LLC ("A-Cab") that has been certified by the Court. Your rights as a class member are discussed in this notice.

NOTICE OF CLASS ACTION CERTIFICATION

On [date] this Court issued an Order certifying this case as a class action for all taxi driver employees of A-Cab (the "class members") who were employed at anytime from July 1, 2007 to December 31, 2016. The purpose of such class action certification is to resolve the following questions:

(1) Does A-Cab owe class members any unpaid minimum wages pursuant to Nevada's Constitution?

(2) If they do owe class members minimum wages, what is the amount each is owed and must now be paid by A-Cab?

(3) What additional money, if any, should A-Cab pay to the class members besides unpaid minimum wages?

(4) For those class members who have terminated their employment with A-Cab since October 8, 2010, what, if any, additional money, up to 30 days unpaid wages, are owed to them by A-Cab under Nevada Revised Statutes 608.040?

The class certification in this case may also be amended or revised in the future which means the Court may not answer all of the above questions or may answer additional questions.

NOTICE OF YOUR RIGHTS AS A CLASS MEMBER

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

You are not required to have your claim for unpaid minimum wages and other possible monies owed to you by A Cab decided as part of this case. If you wish to exclude yourself from the class you may do so by filing a written and signed statement to this Court's file on this case with the Clerk of the Eighth Judicial District Court, which is located at 200 Lewis Avenue, Las Vegas, Nevada, 89101 no later than [insert date 55 days after mailing] setting forth your name and address and stating that you are excluding yourself from this case. If you do not exclude yourself from the class you will be bound by any judgment rendered in this case, whether favorable or unfavorable to the class. If you remain a member of the class you may enter an appearance with the Court through an attorney of your own selection. You do need not get an attorney to represent you in this case and if you fail to do so you will be represented by class counsel.

THE COURT IS NEUTRAL

No determination has been made that A-Cab or Nady owes any class members any money. The Court is neutral in this case and is not advising you to take any particular course of action. If you have questions about this notice or your legal rights against A-Cab you should contact class counsel at 702-383-0085 or by email to leongreenberg@overtimelaw.com or consult with another attorney. The Court cannot advise you about what you should do.

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

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

IT IS SO ORDERED

Date:
/s/ Hon. Kenneth Cory, District Court Judge

EXHIBIT "B"

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CLERK OF THE COURT

OPP
Anthony L. Hall, Esq.
Nevada Bar No. 5977
ahall@hollandhart.com
R. Calder Huntington, Esq.
Nevada Bar No. 11996
rchuntington@hollandhart.com
HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134
(702) 669-4600
(702) 669-4650 –fax
Attorneys for Defendant Henderson Taxi

DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL SARGEANT, individually and on behalf of others similarly situated, Plaintiff, v. HENDERSON TAXI, Defendant.	CASE NO.: A-15-714136-C DEPT. NO.: XVII **DEFENDANT'S OPPOSITION TO MOTION TO STAY JUDGMENT ENFORCEMENT PENDING APPEAL**

Defendant HENDERSON TAXI ("Defendant" or "Henderson Taxi"), by and through its counsel of record, Holland & Hart, LLP, hereby submits Defendant's Opposition ("Opposition") to Plaintiff's Motion to Stay Judgment Enforcement Pending Appeal ("Motion").

This Opposition is supported by the following Memorandum of Points and Authorities, the papers and pleadings on file herein and any oral argument the Court may allow at any hearing of this matter.

DATED this 8th day of August 2016.

HOLLAND & HART LLP

/s/ R. Calder Huntington
Anthony L. Hall, Esq.
Nevada Bar No. 5977
R. Calder Huntington, Esq.
Nevada Bar No. 11996
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134
Attorneys for Defendant Henderson Taxi

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 ♦ Fax: (702) 669-4650

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 • Fax: (702) 669-4650

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

We are here because of Plaintiff Michael Sargeant's ("Sargeant"), unreasonable conduct during the litigation of this case. Had Sargeant behaved reasonably, there would be no attorneys' fees award for him to request be stayed or to appeal. Here, prior to conducting any substantive discovery, Sargeant filed a Motion to Certify Class, Invalidate Improperly Obtained Acknowledgments, Issue Notice to Class Members, And Make Interim Award of Attorney's Fees and Enhancement Payment to Representative Plaintiff ("Motion to Certify"). The Court denied this Motion to Certify because Henderson Taxi had settled the underlying claim with Sargeant's Union. This Court already specifically ruled that, after receiving this decision, Plaintiff knew he had no remaining claim to prosecute. Despite the Court expressly holding that his claim had been resolved, Sargeant maintained his claim without reasonable ground—as this Court has already determined in its Order Granting Motion for Attorneys' Fees dated July 8, 2016. He repeats his unreasonable conduct here with the filing of yet one more baseless brief that does nothing more than cost Henderson Taxi additional fees.

In this Motion, Sargeant requests the Court stay execution of the attorneys' fees award and judgment entered against him without the requirement he post a supersedeas bond solely on the claimed basis that he "has no assets, of any form, that could be used to satisfy this judgment." Thus, claims Sargeant, the "status quo" will be maintained through a stay of the judgment. Sargeant is wrong on both points. Sargeant has at least one valuable asset: his claim or "thing in action" against Henderson Taxi, a temporarily valuable asset on which Henderson Taxi has every right to execute during the limited time it holds value. In fact, because this asset will only have value during the pendency of Sargeant's appeals, assuming Sargeant's claim of poverty is truthful, a stay of execution would not maintain the status quo but substantially harm Henderson Taxi. Right now, Sargeant has this asset, which has at least some value. But once he loses his appeal, and again assuming his honesty, he will no longer have any assets against which Henderson Taxi can execute. Thus, granting a stay will not maintain the status quo but place Henderson Taxi in a much worse position than it is in now.

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 • Fax: (702) 669-4650

Further, despite citing to the relevant case, Sargeant entirely ignores the five factors the Nevada Supreme Court requires district courts analyze in deciding whether anything less than a full supersedeas bond may be used as security to stay execution of a judgment pending appeal. Sargeant likely failed to address these factors because each of them weighs against staying execution of the judgment. In fact, his failure to address these factors in his opening brief should act as an admission that they are against him and he should be prohibited from addressing them for the first time on appeal because it was his duty to address them in the first place. Thus, Sargeant should be required to either post a full supersedeas bond or his requested stay should be denied.

II. LEGAL ANALYSIS

A. The Court Should Deny Sargeant's Requested Stay

NRCP 62(d) governs stays pending appeal and provides:

> (d) Stay Upon Appeal. When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal. The stay is effective when the supersedeas bond is filed.

Nelson v. Heer, 121 Nev. 832, 834, 122 P.3d 1252, 1253 (2005). The Nevada Supreme Court has explained, "[h]owever, a supersedeas bond should not be the judgment debtor's sole remedy, particularly *where other appropriate, reliable alternatives exist.*" *Id.*, 121 Nev. at 835, 122 P.3d at 1254 (emphasis added). In determining whether *alternative security* should be accepted in lieu of a supersedeas bond under NRCP 62(d), "the focus is properly on what security will maintain the status quo *and protect the judgment creditor pending an appeal.*" *Id.*, 121 Nev. at 835-36, 122 P.3d at 1254 (emphasis added). "The purpose of security for a stay pending appeal is to protect the judgment creditor's ability to collect the judgment if it is affirmed by preserving the status quo and preventing prejudice to the creditor arising from the stay." *Id.* Thus, the "status quo" to which *Nelson* refers is the judgment creditor's ability to collect assuming the judgment creditor's victory on appeal, not protection for the judgment debtor if he obtains reversal. *See id.*

Before staying execution of a judgment absent a full supersedeas bond, the Nevada Supreme Court has directed district courts to consider five factors in determining if "a *full* supersedeas bond may be waived" or if "alternate security" may be substituted for such a bond. *Id.*, 121 Nev. at 836, 122 P.3d at 1254 (emphasis added). These factors are as follows:

> (1) the complexity of the collection process;
>
> (2) the amount of time required to obtain a judgment after it is affirmed on appeal [which includes taking "into account the length of time that the case is likely to remain on appeal"];
>
> (3) the degree of confidence that the district court has in the availability of funds to pay the judgment;
>
> (4) whether the defendant's ability to pay the judgment is so plain that the cost of a bond would be a waste of money; and
>
> (5) whether the defendant is in such a precarious financial situation that the requirement to post a bond would place other creditors of the defendant in an insecure position.

Id. ("when confronted with a motion to reduce the bond amount or for alternate security, the district court should apply these factors."). Where these factors do not weigh in favor of allowing alternative security, no stay should be granted. *See id.*, 121 Nev. 835-37, 122 P.3d at 1254-55.

Rather than request he be permitted to provide a reduced supersedeas bond or alternative security as *Nelson* permits, Sargeant requests that he be *wholly exempted* from providing any security to protect Henderson Taxi and stay execution of the judgment entered against him. Further, despite citing directly to *Nelson v. Heer*, showing a knowledge of the Supreme Court's mandate that the Court consider specific factors before approving a lesser bond or alternative security, Sargeant entirely fails to address any one of the required factors required. *See generally*, Mot. Regardless of Sargeant's hubris in failing to address any of the proper factors, Sargeant's request should be denied for two reasons: First, he is simply incorrect that he has no assets. He has one asset—however, that asset is only valuable temporarily. Thus, a stay would worsen Henderson Taxi's position, not maintain the status quo as Sargeant erroneously contends. Second, each of the five factors set forth in *Nelson* weigh against staying execution of the judgment. For this reason too, the stay should be denied.

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 • Fax: (702) 669-4650

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 ♦ Fax: (702) 669-4650

1. Granting a Stay Will Not Maintain the Status Quo Because Sargeant's Only Known Asset Will Only Hold Value through the Pendency of his Appeal

Sargeant's motion is entirely based on his claim that he lacks any assets on which Henderson Taxi can execute. Thus, he claims, a stay of execution of the judgment will maintain the status quo. In other words, Sargeant contends that Henderson Taxi will be in no worse position after appeal if a stay is granted than if it is not. While Sargeant fails to address the factors the Supreme Court requires the Court to address in making this decision, which Henderson Taxi analyzes below, Sargeant is simply wrong that he lacks any assets against which Henderson Taxi can execute and that a stay would maintain the status quo.

Sargeant possesses his "thing in action" or claim against Henderson Taxi, an asset of temporary value. The Nevada Supreme Court has explained "that rights of action held by a judgment debtor are personal property subject to execution in satisfaction of a judgment." *Gallegos v. Malco Enter. of Nev., Inc.*, 127 Nev. 579, 582, 255 P.3d 1287, 1289 (2011). Specifically, NRS 21.080(1) "provides that: all goods, chattels, money and other property, real and personal, of the judgment debtor, or any interest therein of the judgment debtor not exempt by law, and all property and rights of property seized and held under attachment in the action, are liable to execution." *Id.*, 127 Nev. at 582, 255 P.3d at 1289 (internal quotation marks and alterations omitted). NRS 10.045 then "defines personal property as including money, goods, chattels, *things in action* and evidences of debt." *Id.* (internal quotation marks and alterations omitted, emphasis in *Gallegos*). A "thing in action" is also a "chose in action" or a "'right to bring an action to recover a debt, money, or thing.'" *Id.* (quoting *Black's Law Dictionary* 1617, 275 (9th Ed. 2009)). Thus, Sargeant's claim against Henderson Taxi is an asset he possesses against which Henderson Taxi has a statutory right to execute. *Id.*; *see also Buovinick v. Hepner*, 128 Nev. Adv. Op. 65, 291 P.3d 119, 121 (2012) (citing *Gallegos* and reaffirming that claims can be executed on, but holding that

defenses to claims cannot be executed on);[1] *Nevada Direct Ins. Co. v. Fields*, 2016 WL 797048, at *3 (Nev. Feb. 26, 2016) (citing *Gallegos*).

Importantly, however, Sargeant's claim against Henderson Taxi is valuable only for a temporary duration. As stated above, the "status quo" that must be protected by a stay is a judgment creditor's ability to collect on a judgment if affirmed on appeal. *Nelson*, 121 Nev. at 835, 122 P.3d at 1254. Thus, the circumstances regarding whether the judgment is overturned on appeal are irrelevant to the Court's analysis. *See id.* When the judgment is affirmed on appeal, Sargeant's claim against Henderson Taxi will no longer exist and Henderson Taxi may have an entirely uncollectable judgment. Thus, it is only during this period of time between award of the judgment and a decision on appeal that Sargeant's claim holds value against which Henderson Taxi can execute so as to collect anything. As such, not only is Sargeant wrong that he lacks any valuable asset, he is wrong that granting a stay of execution would maintain the "status quo". Right now, if a stay is conditioned on a supersedeas bond, Henderson Taxi will either be protected by a supersedeas bond or have the right to execute on Sargeant's claim (as well as conduct a judgment debtor exam to determine for itself whether Sargeant as any other assets on which it can execute).[2] If, however, the Court grants a stay without requiring a bond or other security, as Sargeant requests, Sargeant's one known asset will become non-existent before Henderson Taxi is permitted to execute on it. Thus, because granting a stay would harm Henderson Taxi's position

[1] In a footnote, the *Butwinick* Court noted that the appellants complained that they lacked the financial ability to bid at the sheriff's sale or to post a bond. *Butwinick*, 128 Nev. Adv. Op. 65 at n.2, 291 P.3d 119, 121 n.2. This claim of poverty did not impact the Supreme Court's decision and otherwise went unremarked upon.

[2] Sargeant is not in a position to complain about any inequity in Henderson Taxi executing on his claim. First, this Court has already determined Sargeant frivolously forced Henderson Taxi to incur substantial attorneys' fees by maintaining his claim unreasonably. Second, as *Gallegos* and *Butwinick* show, the Nevada Legislature has provided that claims can be executed on and the Nevada Supreme Court has approved this process. Thus, the Nevada Legislature has given express statutory authorization to engage in this process and any purported inequity would be irrelevant.

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 • Fax: (702) 669-4650

rather than maintain the status quo as *Nelson* requires, the Court should deny Sargeant's requested stay absent the posting of a full supersedeas bond.[3] *Id.*

2. The *Nelson* Factors Weigh Against Staying Execution on the Judgment

Not only is Sargeant incorrect that he has no assets and that the granting of a stay would maintain the status quo, he entirely failed to address the factors the Nevada Supreme Court requires the district court analyze in determining whether to grant a stay. *See Nelson*, 121 Nev. at 836, 122 P.3d at 1254.[4] This is likely because each of the factors weighs against the granting of a stay and, thus, Sargeant did not want the Court to apply the proper test. A review of the *Nelson* factors demonstrates the following:

- Complexity of Collection – Sargeant contends and declares that he has no assets and that his only income is exempt from execution. Rather than supporting a stay of judgment execution as Sargeant contends, this demonstrates that collection of the judgment in this case will be complex, difficult, and potentially impossible if the Court does not permit Henderson Taxi to proceed with execution efforts now while it can execute against Sargeant's claim against Henderson Taxi, the only (though only temporarily valuable) asset he may have. Thus, the complexity factor weighs against a stay.
- Time Required to Obtain Judgment after Affirmance – The Supreme Court has stated that in considering this factor "the district court should take into account the length of time that the case is likely to remain on appeal." *Nelson*, 121 Nev. at 836,

[3] Sargeant presented no argument for alternative security or a reduced bond. Thus, he should be prohibited from making such requests on reply. Rather, his request is that ***no*** security be required.

[4] As set forth above: "(1) the complexity of the collection process; (2) the amount of time required to obtain a judgment after it is affirmed on appeal [which includes taking "into account the length of time that the case is likely to remain on appeal"]; (3) the degree of confidence that the district court has in the availability of funds to pay the judgment; (4) whether the defendant's ability to pay the judgment is so plain that the cost of a bond would be a waste of money; and (5) whether the defendant is in such a precarious financial situation that the requirement to post a bond would place other creditors of the defendant in an insecure position."

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 • Fax: (702) 669-4650

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 • Fax: (702) 669-4650

122 P.3d at 1254. Given the docket of the Nevada Supreme Court, this case is likely to remain on appeal for a minimum of two years. If the matter were first assigned to the Court of Appeals and a discretionary appeal thereafter filed with the Supreme Court, such an additional appeal will greatly increase the duration of the requested stay. Moreover, although Henderson Taxi already has a judgment in its favor, once successful in defending Sargeant's appeal, that judgment may 1) become uncollectable, and 2) need to be amended to include Henderson Taxi's fees and costs incurred on appeal. Again, this factor weighs against a stay.

- Degree of Confidence in Availability of Funds to Pay the Judgment – This factor weighs greatly against a stay. As detailed above, Sargeant claims that he has no assets and that his only income is immune from execution. Thus, if the motion is believed, the only asset against which Henderson Taxi might be able to execute is his claim against Henderson Taxi. However, there is only value in his claim against Henderson Taxi during the pendency of his appeal. Once Sargeant loses his appeal, he will have no more claim. As such, assuming Sargeant's honesty, if Henderson Taxi is not permitted to execute now, there will be no assets against which to execute after Sargeant's appeal concludes. Thus, rather than helping him, Sargeant's claim of poverty should doom his request for a stay of execution of the judgment.
- Whether Defendant's Ability to Pay the Judgment Is So Plain that the Cost of a Bond Would Be a Waste of Money – Here, Sargeant has taken a backwards approach and attempted to reverse the actual standard set forth by the Nevada Supreme Court in *Nelson*. Rather than claim that he has the ability to pay and that a bond would be wasteful, Sargeant has affirmatively attempted to show that he has no funds from which to pay the judgment. While Henderson Taxi has demonstrated that he has at least one asset, his general lack of ability to satisfy the judgment actually runs afoul his request. Accordingly, this factor too weighs against granting a stay.

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 • Fax: (702) 669-4650

- Whether the Judgment Debtor's Financial Situation Is So Precarious That Requiring a Bond Would Create Insecurity for Other Creditors Sargeant brought this Motion and cited to *Nelson v. Heer*, affirmatively demonstrating knowledge that these are the factors this Court is required to consider in granting a stay of execution of a judgment. Nonetheless, Sargeant's counsel made the calculated decision not to address a single one of the five factors, including setting forth any other creditors Sargeant may have or how they might be harmed. If Sargeant has any creditors which may be harmed by the requiring Sargeant to post a bond, Sargeant has occulted them from the Court's view and prevented Henderson Taxi from addressing them. As such, he should be considered to have waived this argument. As it stands, the Court can only assume Sargeant has no other substantial creditors. Further, assuming Sargeant's honesty, he is essentially insolvent and so any requirement he post a bond puts any other creditors, if they exist, in no worse position than they are in already. Accordingly, this factor too weighs against a stay.

Sargeant cannot show that any of the *Nelson* factors weigh in favor of his request. In fact, any analysis of the factors shows that a stay in these circumstances, absent the posting of a supersedeas bond, would be improper and unwarranted. Thus, to preserve the status quo, Henderson Taxi's current position, any stay should be conditioned on the posting of a full supersedeas bond.

Beyond the simple facts described above, Sargeant's general conduct in this litigation and on appeal show that he will make collection of the judgment as difficult as possible (*Nelson* Factor No. 1). Throughout this litigation, Sargeant has been intransigent in his efforts to harass Henderson Taxi and force it to incur unnecessary attorneys' fees despite Henderson Taxi having settled with the Union. Sargeant's filings before the Supreme Court show that he will continue to do the same: litigate without reason and solely to force Henderson Taxi to incur additional fees. In fact, in his Opening Brief before the Supreme Court, Sargeant requests that if this Court's decision is reversed and the case remanded, that this Court be disqualified from further proceedings and the case reassigned. Amongst other claims made earlier in the brief disparaging the Court, Sargeant states: "Judge Villani [is] **unfit** to handle further proceedings in this case." **Exhibit A**, Opening

Br. at 55 (emphasis added).[5] He continues and concludes his brief claiming that the fee award: "was punitive and lacking any reason or **even a patina of rationalization**. It is strong evidence of an unfounded, and unacceptable, level of **bias and hostility by Judge Villani** towards Sargeant." *Id.* at 57 (emphasis added). Such aspersions on the Court are uncalled for, and completely without basis. This kind of argument and tactic are representative of Sargeant and his counsel's general conduct in this litigation. As this shows that Sargeant will stoop to any tactics, including disparaging this Court, to harm Henderson Taxi and make collection of the judgment complex and difficult, any stay should be conditioned on a full supersedeas bond.

III. Conclusion

A stay would not maintain the status quo as Sargeant contends. It would put Henderson Taxi in a worse position because Sargeant's only known asset is his claim against Henderson Taxi, which will no longer exist post appeal. Thus, to preserve the status quo, and as the *Nelson* factors demonstrate, the Court should deny Sargeant's motion and condition any stay on a full supersedeas bond.

DATED this 8th day of August 2016.

HOLLAND & HART LLP

/s/ R. Calder Huntington
Anthony L. Hall, Esq.
Nevada Bar No. 5977
R. Calder Huntington, Esq.
Nevada Bar No. 11996
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134
Attorneys for Defendant Henderson Taxi

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 ♦ Fax: (702) 669-4650

[5] This is a public record needing no authentication and is publicly available on the Nevada Supreme Court's website for Case No. 69773.

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134
Phone: (702) 669-4600 • Fax: (702) 669-4650

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of August, 2016, a true and correct copy of the foregoing **DEFENDANT'S OPPOSITION TO MOTION TO STAY JUDGMENT ENFORCEMENT PENDING APPEAL** was served by the following method(s):

☒ Electronic: by submitting electronically for filing and/or service with the Eighth Judicial District Court's e-filing system and served on counsel electronically in accordance with the E-service list to the following email addresses:

Leon Greenberg, Esq.
Dana Sniegocki, Esq.
Leon Greenberg Professional Corporation
2965 South Jones Blvd., Suite E3
Las Vegas, Nevada 89146

Leon Greenberg: leongreenberg@overtimelaw.com
Dana Sniegocki: dana@overtimelaw.com

☐ U.S. Mail: by depositing same in the United States mail, first class postage fully prepaid to the persons and addresses listed below:

☐ Email: by electronically delivering a copy via email to the following e-mail address:

☐ Facsimile: by faxing a copy to the following numbers referenced below:

/s/ Marie Twist
An Employee of Holland & Hart LLP

8999801_1

Exhibit A

IN THE SUPREME COURT OF NEVADA

Sup. Ct. No. 69773

MICHAEL SARGEANT, Individually and on behalf of others similarly situated,

Petitioners,

vs.

HENDERSON TAXI,

Respondents,

Dist. Ct No.: A-15-714136-C

APPELLANT'S OPENING BRIEF

Leon Greenberg, NSB 8094
A Professional Corporation
2965 S. Jones Boulevard - Suite E-3
Las Vegas, Nevada 89146
Telephone (702) 383-6085
Fax: 702-385-1827

Attorney for Appellants

IN THE SUPREME COURT OF NEVADA

Sup. Ct. No. 69773

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

NRAP RULE 26.1 DISCLOSURE STATEMENT

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

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