

As consideration of the additional expense transferred to the Contractor through subsection (a), an amount of 36 cents per service hour shall be added to the base service hour rate for each of the remaining years of the Contract, starting with Contract Year 3, including Option Period 1 (Two Years) and, if exercised by the RTC, Option Period 2 (Two Years).

SECTION 5 TECHNICAL CHANGES

(a) First Transit Info-Manager Software and Support

a. Revise Section 2 (d) (6) to add

(I) Contractor will supply RTC with access to and training in First Transit's Info-Manager software component for enhanced dispatching and reporting analysis for Trapeze Software.

b. Revise Section 2 (d) (6) (G) to add,

"Assure compliance with RTC's Internet Usage policy by Contractor employees who utilize RTC's directly-connected host computer system."

(b) Liquidated Damages -

a. Apply Exhibit 2 of the Amendment (Trip Edit Accuracy Standards) to Section 9 (c) (9) (B) of the Contract.

b. Add to Section 9 (c) a new subsection, described as follows:

(13) Failure to Report a Vehicle Camera System Malfunction

(A) For any Revenue Vehicle in which the RTC installed Camera System is not in working condition during or at the end of a Vehicle Operator's run and the Vehicle Operator does not provide a same day report of the malfunction to Contractor IT staff, the RTC will assess liquidated damages in the amount of \$250.00 for each occurrence.

(B) The Contractor IT staff will have 3 days in which to report the Camera system malfunction to the RTC. Failure to report the malfunction as prescribed will result in a liquidated damage of \$100.00 per day of non-compliance.

(c) Radio Dispatcher Training - Section 17 (b) shall be amended to add,

(b) (8) First Transit Info-Manager dispatching and reporting analysis software.

(d) Customer Service Inquiry -- Section 17A will be added to the Contract.

SECTION 17A CUSTOMER SERVICE REPRESENTATIVES

(a) In General. -- The Contractor shall employ personnel in sufficient numbers and with an adequate mix of skills to answer customer inquiries on ride status and to work with the Specialized Services reservation, scheduling and dispatch software. Customer Service Representatives (CSR) shall work closely with RTC Reservation Center personnel to satisfactorily resolve same day trip modifications, schedule same day trip requests, and shall provide prompt and accurate responses to trip inquiries of each day's scheduled passengers.

(b) Training. -- All CSR personnel are required to complete the Contractor's Training Program and shall also maintain ongoing training requirements for passenger inquiry staff. Training programs shall contain, at a minimum, the following components:

- (1) CATCOM radio communications and Specialized Services reservation, scheduling and dispatch software.
- (2) Local geography familiarization.
- (3) RTC rider and operations policies.
- (4) Customer courtesy and problem resolution.
- (5) ADA sensitivity and legal requirements
- (6) First Transit's Info-Manager software

(c) Drug and Alcohol Testing. -- All CSRs shall be subject to testing in accordance with the regulatory requirements referenced in Section 15(h) of the Contract

(e) Spare Ratio -- Revise the scheduling spare ratio in Section 22 (p) to 20%.

SECTION 6 APPLICABILITY OF TERMS

Except as otherwise specifically modified by the amendments made herein, all terms and conditions of the Contract shall continue in full force and effect and be binding on the parties as expressed in the time periods outlined in the Contract dated March 8, 2007.

IN WITNESS WHEREOF, the parties have caused this Second Amendment to be duly executed on September 10, 2009.

REGIONAL TRANSPORTATION COMMISSION
OF SOUTHERN NEVADA

By: Lawrence L. Brown III
Lawrence L. Brown III
Chairman

Date: 9/10/09

Approved as to Form:

By: Zev Kaplan
Zev Kaplan
General Counsel

FIRST TRANSIT, INC.

By: Nick Promponas
Nick Promponas
Senior Vice President

Date: _____

Attest:

By: Lisa Magnusson
Lisa Magnusson
Executive Assistant

EXHIBITS

Exhibit 1- Vehicle Operator Training Hours
Exhibit 2- Trip Edit Accuracy Standards

**First Transit Second Amendment
Exhibit 1**

Classroom Training Hours			
Topic	First Transit Required Minimum	Las Vegas Current Time	Amended Training Time
FT Introduction	0.50	1.00	0.50
IP & Risk Assessment	1.00	1.50	1.00
Substance Abuse	1.00	1.00	1.00
Basics of Safety	1.00	1.50	1.00
Defensive Driving/Smith System	4.00	5.00	4.00
Pre-Trip/DVI Process	0.50	1.00	0.50
Customer Service	1.00	4.00	4.00
ADA / Sensitivity	4.00	9.00	4.00
Workplace Violence/Harassment Prevention	0.00	2.00	1.00
Security Awareness	0.50	2.00	1.00
Emergency Procedures	1.00	2.00	1.00
Map Reading	2.00	2.50	2.00
Safe Work Methods	0.50	0	0.50
Hazardous Communication	0.50	2.00	0.50
Required Paperwork	0.00	2.00	2.00
MDT/Radio Communication	0.50	4.00	3.50
Code of Conduct	0.00	0.50	0.50
	Total Hours: 18	Total Hours: 41	Total Hours: 28
Behind the Wheel Training Hours			
Closed Course/Skills	8.00	8.00	8.00
Road Training Day 1	8.00	9.00	7.00
Road Training Day 2	8.00	9.00	7.00
	Total Hours: 20	Total Hours: 24	Total Hours: 22
Cadet Training Hours			
In Service/Cadet Training Day 1	4.00	10	6
In Service/Cadet Training Day 2	0.00	10	8
	Total Hours: 4	Total Hours: 20	Total Hours: 12
	Total Training Hours: 42	Total Training Hours: 85	Total Training Hours: 62

RTC000128

**First Transit Second Amendment
Exhibit 2
Trip Edit Accuracy Standards**

The categories and accuracy rates are listed in the table below:

Category	Description	Accuracy Rate
Vehicle Assignment	The correct vehicle is assigned to the run. A missing vehicle number or incorrect vehicle number would count as an error.	95%
Arrive / Depart Times	The Actual Arrive and Actual Depart times must match the times recorded on the manifest. Missing or incorrect times will count as an error.	99%
Odometer Readings	The odometer field must match the odometer reading recorded on the manifest. Missing or incorrect odometer values will count as an error.	99%
Passenger Counts	The number of passengers loaded must match what is recorded on the manifest. For example, if the manifest lists a Client and a PCA at a pickup but only the Client boards the vehicle, the PCA must be removed from trip itinerary to match what is recorded. Incorrect passenger counts will result in an error.	98%
Trip Status (P / NS / CD / NM)	The trip must reflect the correct scheduling status as recorded on the manifest. For NS and CD trips where the driver arrived outside the on-time window, the trip must be marked as a Missed Trip (NM). A trip that is marked incorrectly or is missing their scheduling status will result in an error.	98%
Fare Errors	Trip Edit staff are responsible for inputting the Fare Collected and changing Fare Types when operator notes such on the manifest. Each trip will be checked to insure the fare type for each passenger and fare collected are recorded correctly. Incorrect or missing information will result in an error. If multiple errors occur on a single trip, only one error will be counted for the trip.	98%

RTC000129

THIRD AMENDMENT TO THE CONTRACT FOR SPECIALIZED SERVICES

This third Amendment to the Contract for Specialized Services is made and entered into on July 14, 2011 by and between the Regional Transportation Commission of Southern Nevada (RTC) and First Transit, Inc. (Contractor), a corporation authorized to do business in the State of Nevada.

RECITALS

WHEREAS, the RTC and the Contractor entered into a Contract for Operation and Maintenance of Specialized Services (Contract) on March 8, 2007, and entered into amendments to the Contract dated December 11, 2008 and September 10, 2009;

WHEREAS, the current economic circumstances facing the RTC, have made it urgent for the RTC to find ways and means to reduce the costs of its specialized services system;

WHEREAS, to address this situation, the RTC and the Contractor have agreed to amend the Contract to make certain reductions in the base service hour rate billed by the Contractor; and

WHEREAS, the Parties also desire to make certain technical and conforming changes to the Contract:

NOW, THEREFORE, in consideration of the above and mutual promises hereinafter set forth, the RTC and the Contractor have agreed as follows:

SECTION 1 TERM OF CONTRACT

(a) Invoices and Payments. – The RTC agrees to pay the Contractor for Option Period 1 Contract Year 5 the price stated in Section 3 of this Amendment.

SECTION 2 REDUCTION IN MONTHLY CONTRACT COST

(a) Revised Service Hour Rate. – For Contract Year 5, beginning July 1, 2011, through June 30, 2012, the Contractor agrees that the amount of each monthly invoice submitted to the RTC under the Contract will be calculated on a revised service hour rate.

(b) Suspension of Certain Requirements. – In consideration for the service hour rate reduction under Section 1(a) of the Amendment, the Contractor shall, for the period of such reduction, be relieved of certain program elements and requirements set forth in the Contract or in the Contractor's plans and programs, as follows:

- (1) **Administrative and Operations Staffing:** Remove the position of Recruiter and assign one Road Supervisor position to a newly created Operations Supervisor position.
- (2) **Sunset Maintenance Facility:** Eliminate the position of Terminal Manager and remove the costs associated with facility maintenance.
- (3) **Training Program:** Adjust the hours of Vehicle Operator training to 62 hours, as defined in the Second Amendment dated September 10, 2009.
- (4) **Tool Allowance:** Reduce the amount of budgeted maintenance tool allowance by the sum of \$7,000.00 annually.
- (5) **Liquidated Damages:**
 - a. RTC will comply with Section 9 as set forth in the Contract, but agrees to only deduct assessments for liquidated damages from the Contractor's invoice after the assessment value for the Contract year has exceeded an amount of \$67,000.00 annually in all categories except Section 9 (c)(4) (B). All valid liquidated damages for Preventive Maintenance Inspections (PMI) will be assessed and do not count towards the exception assessment value.
 - b. Section 9(c)(4)(B) of the Contract will reflect that Preventive Maintenance Inspections (PMI) are still required every 3,000 miles as per the stated Contractor's maintenance plan, but RTC will only assess vehicles where mileage exceeds 3,300 miles between PMI.

(c) Reservation -- Nothing in this Section shall be construed as affecting the right of the RTC to include any of the suspended standards or requirements listed in subsection (b) into a future RFP for Specialized Services or into any future agreement with the Contractor or any other provider.

SECTION 3 REVISED COST OF SERVICE

(a) Rate of Compensation -- The rate of compensation schedule in Section 4(a) of the Contract is amended to read as follows:

OPTION PERIOD 1 (TWO YEARS)

ASSUMED ANNUAL SERVICE HOURSCOST PER SERVICE HOURCONTRACT YEAR 5 -July 1, 2011 to June 30, 2012

600,000 to 651,186

\$55.79

SECTION 4 CONTINUATION OF SECOND AMENDMENT

(a) Section 4 PROVISION OF TIRES and Section 5 TECHNICAL CHANGES of the Second Amendment dated September 10, 2009 will remain in effect through the active contract period as outlined in Section 3 TERM OF CONTRACT of the original contract dated March 8, 2007.

SECTION 5 APPLICABILITY OF TERMS

Except as otherwise specifically modified by the amendments made herein, all terms and conditions of the Contract shall continue in full force and effect and be binding on the parties as expressed in the time periods outlined in the Contract dated March 8, 2007.

IN WITNESS WHEREOF, the parties have caused this Third Amendment to be duly executed on July 14, 2011.

REGIONAL TRANSPORTATION COMMISSION
OF SOUTHERN NEVADA

By: _____
Lawrence L. Brown III
Chairman

Date: _____

Approved as to Form:

By: _____
Zev Kaplan
General Counsel

008-06 Amendment 3 Page 3

FIRST TRANSIT, INC.

By: _____
Nick Promponas
Senior Vice President

Date: 7/1/11

Attest:

By: _____
Jecia Hutchinson
Executive Assistant

RTC000132

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 CLERK OF THE COURT

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 2 JOEL D. HENRIOD
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 10 LSanders@AlversonTaylor.com
 11

12 *Attorneys for Defendants*
First Transit, Inc. and Jay Farrales

13 DISTRICT COURT
 14 CLARK COUNTY, NEVADA

15 JACK CHERNIKOFF and ELAINE
 16 CHERNIKOFF,

Case No. A-13-682726-C
 Dept. No. XXIII

17 Plaintiffs,

18 *vs.*

NOTICE OF APPEAL

19 FIRST TRANSIT, INC.; JAY FARRALES;
 20 DOES 1-10; and ROES 1-10, inclusive,

21 Defendants.

22 Please take notice that defendants First Transit, Inc. and Jay
 23 Farrales hereby appeal to the Supreme Court of Nevada from:

- 24 1. All judgments and orders in this case;
- 25 2. "Judgment Upon the Jury Verdict," filed March 8, 2016, notice
- 26 of entry of which was served electronically on March 9, 2016 (Exhibit A);
- 27 and

1 3. All rulings and interlocutory orders made appealable by any of
2 the foregoing.

3 Dated this 8th day of April, 2016.

4 LEWIS ROCA ROTHGERBER CHRISTIE LLP

5
6 BY: /s/ Joel D. Henriod

7 DANIEL F. POLSENBERG (SBN 2376)
8 JOEL D. HENRIOD (SBN 8492)
9 3993 Howard Hughes Pkwy, Suite 600
10 Las Vegas, Nevada 89169
11 (702) 949-8200

12 LEANN SANDERS (SBN 390)
13 ALVERSON, TAYLOR, MORTENSEN & SANDERS
14 7401 West Charleston Boulevard
15 Las Vegas, Nevada 89117
16 (702) 384-7000

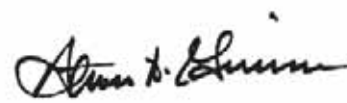
17 *Attorneys for Defendants First Transit, Inc.*
18 *and Jay Farrales*

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001959

EXHIBIT A

EXHIBIT A


CLERK OF THE COURT

1 **NEO**
2 BENJAMIN P. CLOWARD, ESQ.
3 Nevada Bar No. 11087
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5 721 South 6th Street
6 Las Vegas, NV 89101
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9 Beloward@chblawyers.com
10 *Attorneys for Plaintiffs*

11 **DISTRICT COURT**
12 **CLARK COUNTY, NEVADA**

13 JACK CHERNIKOFF and ELAINE
14 CHERNIKOFF,

15 Plaintiffs,

16 vs.

17 FIRST TRANSIT, INC. JAY
18 FARRALES; DOES 1-10, and ROES 1-10
19 inclusive,

20 Defendants.


CASE NO. A-13-682726-C
DEPT. NO. XXIII

NOTICE OF ENTRY OF ORDER

21 YOU WILL PLEASE TAKE NOTICE that the attached **JUDGMENT UPON THE JURY**
22 **VERDICT** was entered by this Court in the above-entitled matter on the 8th day of March, 2016.

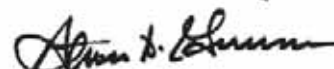
23 DATED THIS 9th day of March, 2016.

CLOWARD HICKS & BRASIER, PLLC


BENJAMIN P. CLOWARD, ESQ.
Nevada Bar No. 11087
721 South Sixth Street
Las Vegas, Nevada 89101
Attorneys for Plaintiffs

An employee of the CLOWARD HICKS & BRASIER, PLLC

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CLERK OF THE COURT

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Fax (866) 639-0287
Attorney for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

**JACK CHERNIKOFF and ELAINE
CHERNIKOFF,**

Plaintiffs,

vs.

**FIRST TRANSIT, INC. JAY
FARRALES; DOES 1-10, and ROES 1-10
inclusive,**

Defendants.

CASE NO. A-13-682726-C
DEPT. NO. XXIII

JUDGMENT UPON THE JURY
VERDICT

This action came on for trial before the court and the jury, the Honorable Stefany A. Miley, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict.¹

¹ **Exhibit 1: Jury Verdict**

<input type="checkbox"/> Non-Jury Disposed After Trial Start	<input type="checkbox"/> Jury Disposed After Trial Start
<input type="checkbox"/> Non-Jury Judgment Reached	<input checked="" type="checkbox"/> Jury Verdict Reached
<input type="checkbox"/> Transferred before Trial	<input type="checkbox"/> Other - _____

1 IT IS ORDERED AND ADJUDGED that Plaintiffs, JACK CHERNIKOFF and ELAINE
2 CHERNIKOFF, have and recover of Defendant, FIRST TRANSIT, INC., the following sum:

3 Pain and suffering, by Harvey Chernikoff: \$7,500,000.00
4
5 Greif, sorrow, loss of companionship, society,
6 Comfort, and loss of relationship suffered
7 by Plaintiffs, JACK CHERNIKOFF and
8 ELAINE CHERNIKOFF: + \$7,500,000.00
9
10 **Total Damages** \$15,000,000.00

11 IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff's past damages shall bear Pre-
12 Judgment interest in accordance with Lee v. Ball, 116 P.3d 64, (2005) at the rate of 3.25% per annum
13 plus 2%² from the date of service of the Summons and Complaint³ on June 7, 2013, through the date
14 of the verdict on February 29, 2016, as follows:

15 **PRE-JUDGMENT INTEREST ON PAST DAMAGES: 15,000,000.00**

16 06/07/13 through 02/29/16 = \$2,149,631.70
17 [(997 days) at (prime rate (3.25%) plus 2 percent = 5.25%)]
18 [Interest is approximately \$2,156.10 per day]

19 NOW, THEREFORE, Judgment Upon the Verdict in favor of the Plaintiffs are as follows:


20 JACK CHERNIKOFF and ELAINE CHERNIKOFF is hereby given Seventeen Million One
21 Hundred Forty-Nine Thousand, Six Hundred Thirty-One Dollars and 70/100 (\$17,149,631.70), which
22 shall bear interest at the current rate of 5.25% per day, until satisfied.

23 DATED THIS 8 day of March, 2016.

24 
DISTRICT COURT JUDGE

25 JUDGE STEFANY A. MILEY

26 Respectfully submitted:

27 
CLOWARD HICKS & BRASIER, PLLC

28 BENJAMIN P. CLOWARD, ESQ.

² Exhibit 2: Prime Rate as of January 1, 2013

³ Exhibit 3: Affidavit of Service upon the Defendant

EXHIBIT “1”

**DISTRICT COURT
CLARK COUNTY, NEVADA**

JACK CHERNIKOFF and ELAINE
CHERNIKOFF,

Plaintiffs,

vs.

FIRST TRANSIT, INC. JAY
FARRALES; DOES 1-10, and ROES 1-10
inclusive,

Defendants.

CASE NO. A-13-682726-C
DEPT. NO. XXIII

VERDICT FORM

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT

FEB 29 2016

5:21 pm

3Y. 
KATHERINE STREUBER, DEPUTY

VERDICT FORM

1
2 1. Do you find from a preponderance of the evidence that Defendant Jay Farrales
3 was negligent and that such negligence was a proximate cause of the death of Harvey
4 Chernikoff?

5 ANSWER: Yes ☒ No ☐

6
7 2. Do you find from a preponderance of the evidence that Defendant First Transit,
8 Inc. was negligent and that such negligence was a proximate cause of the death of Harvey
9 Chernikoff?

10 ANSWER: Yes ☒ No ☐

11 If you have answered "No" to questions #1 and #2 above, stop here, answer no further
12 questions, and have the foreperson sign and date this form.

13 3. Do you find from a preponderance of the evidence that Plaintiff Jack Chernikoff
14 was negligent and that such negligence was a proximate cause of the death of Harvey
15 Chernikoff?

16 ANSWER: Yes ☐ No ☒

17
18 4. Do you find from a preponderance of the evidence that Plaintiff Elaine
19 Chernikoff was negligent and that such negligence was a proximate cause of the death of
20 Harvey Chernikoff?

21 ANSWER: Yes ☐ No ☒

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1 5. Using one hundred percent (100%) as the total combined negligence which
2 acted as a proximate cause of the injuries complained of by Plaintiffs Jack Chernikoff and
3 Elaine Chernikoff, what percentage of the total combined negligence do you find from the
4 evidence is attributable to:

5	Jay Farrales	<u>0</u> %
6	First Transit, Inc.	<u>100</u> %
7	Jack Chernikoff	<u>0</u> %
8	Elaine Chernikoff	<u>0</u> %
9		
10	Totaling	100%

11 7. Without regard to the above answers, we find that the total amount of the
12 Plaintiffs' damages are divided as follows:

13
14 Pain and suffering by HARVEY CHERNIKOFF

\$ 7.5 million

15 Grief, sorrow, loss of companionship,
16 Society, comfort, and loss of relationship
17 suffered by Plaintiffs JACK CHERNIKOFF
18 and ELAINE CHERNIKOFF:

\$ 7.5 MILLION

19 TOTAL

\$ 15,000,000

20
21 Dated this 29 day of FEBRUARY, 2016.

22
23 Fredy A. Garcia
24 FOREPERSON
25
26
27
28

EXHIBIT “2”

PRIME INTEREST RATE

NRS 99.040(1) requires:

"When there is no express contract in writing fixing a different rate of interest, interest must be allowed at a rate equal to the prime rate at the largest bank in Nevada, as ascertained by the Commissioner of Financial Institutions, on January 1, or July 1, as the case may be, immediately preceding the date of the transaction, plus 2 percent, upon all money from the time it becomes due, . . ."

Following is the prime rate as ascertained by the Commissioner of Financial Institutions:

January 1, 2015	3.25%	July 1, 2014	3.25%
January 1, 2014	3.25%	July 1, 2013	3.25%
January 1, 2013	3.25%	July 1, 2012	3.25%
January 1, 2012	3.25%	July 1, 2011	3.25%
January 1, 2011	3.25%	July 1, 2010	3.25%
January 1, 2010	3.25%	July 1, 2009	3.25%
January 1, 2009	3.25%	July 1, 2008	5.00%
January 1, 2008	7.25%	July 1, 2007	8.25%
January 1, 2007	8.25%	July 1, 2006	8.25%
January 1, 2006	7.25%	July 1, 2005	6.25%
January 1, 2005	5.25%	July 1, 2004	4.25%
January 1, 2004	4.00%	July 1, 2003	4.00%
January 1, 2003	4.25%	July 1, 2002	4.75%
January 1, 2002	4.75%	July 1, 2001	6.75%
January 1, 2001	9.50%	July 1, 2000	9.50%
January 1, 2000	8.25%	July 1, 1999	7.75%
January 1, 1999	7.75%	July 1, 1998	8.50%
January 1, 1998	8.50%	July 1, 1997	8.50%
January 1, 1997	8.25%	July 1, 1996	8.25%
January 1, 1996	8.50%	July 1, 1995	9.00%
January 1, 1995	8.50%	July 1, 1994	7.25%
January 1, 1994	6.00%	July 1, 1993	6.00%
January 1, 1993	6.00%	July 1, 1992	6.50%
January 1, 1992	6.50%	July 1, 1991	8.50%
January 1, 1991	10.00%	July 1, 1990	10.00%
January 1, 1990	10.50%	July 1, 1989	11.00%
January 1, 1989	10.50%	July 1, 1988	9.00%
January 1, 1988	8.75%	July 1, 1987	8.25%
January 1, 1987	Not Available		

* Attorney General Opinion No. 98-20:

If clearly authorized by the creditor, a collection agency may collect whatever interest on a debt its creditor would be authorized to impose. A collection agency may not impose interest on any account or debt where the creditor has agreed not to impose interest or has otherwise indicated an intent not to collect interest. Simple interest may be imposed at the rate established in NRS 99.040 from the date the debt becomes due on any debt where there is no written contract fixing a different rate of interest, unless the account is an open or store accounts as

EXHIBIT “3”

55

55


CLERK OF THE COURT

1 OPP
2 BENJAMIN P. CLOWARD, ESQ.
3 Nevada Bar No. 11087
4 **CLOWARD HICKS & BRASIER, PLLC**
5 4101 Meadows Lane, Suite 210
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8 Facsimile: (702) 960-4118
9 Bcloward@chblawyers.com
10 *Attorneys for Plaintiffs*

11 **DISTRICT COURT**
12 **CLARK COUNTY, NEVADA**

13 JACK CHERNIKOFF and ELAINE
14 CHERNIKOFF,

15 Plaintiffs,

16 vs.

17 FIRST TRANSIT, INC. JAY
18 FARRALES; DOES 1-10, and ROES 1-10
19 inclusive,

20 Defendants.

21 CASE NO. A-13-682726-C
22 DEPT. NO. XXIII

23 **OPPOSITION TO MOTION TO ALTER**
24 **OR AMEND JUDGMENT**

25 COME NOW Plaintiffs, by and through their counsel of record, and hereby oppose the Motion
26 TO Alter or Amend Judgment, filed herein on March 23, 2016. This opposition is based upon the
27 accompanying memorandum of points and authorities, as well as all matters properly of record.

28 **I. FIRST TRANSIT IS NOT AN ARM OF THE STATE ENTITLED TO A CAP**
ON THE DAMAGES AWARD

1 First Transit contends that it was acting as an arm of the State of Nevada and is therefore
2 entitled to the limitation on damages set forth in the sovereign immunity statutes, i.e., the \$100,000
3 limitation on damages set forth in NRS 41.035. This assertion lacks merit. Defendants place heavy
4 reliance on the inapposite decision in *Simonian v. Univ. & Cmty. Coll. Sys.*, 122 Nev. 187, 128 P.2d
5 1057 (2006). There, the court held that the University and Community College System was a state
6 entity which was not subject to liability under the False Claims Act (NRS 357.010, et seq.). In so
7 holding the court said:

9 UCCSN is comprised of the system of universities, colleges, administrative
10 services, research facilities, and departments within the public service division, and it is
11 administered by the Board of Regents – the group of persons constitutionally authorized
12 to control and manage the state university system. At least to the extent that other funds
13 are inadequate, the Legislature must “provide for [the] support and maintenance” of the
14 system. To obtain maintenance and support from the state, UCCSN must apply for
15 “direct legislative appropriation from the general fund, upon the presentation of budgets
in the manner required by law.” The Board of Regents must biennially present a four-
year plan to the Legislature, and the Governor must be supplied with minutes of the
Board’s meetings. The Board members function as trustees over the system’s funds but
are subject to specific rules governing university securities.

16 Based on the decisional law of this state and other jurisdictions, UCCSN is a
17 state entity. In *Northern Nevada Association of Injured Workers v. SIIS*, 107 Nev. 108,
18 112-113, 807 P.2d 778, 731 (1990)], this court concluded that the former State Industrial
19 Insurance System was a state agency because it (1) was “subject to the approval and
20 control of the Governor, the legislature, and other agencies of government;” (2) was
“treated as the State or a state agency throughout the Nevada Revised Statutes;” and (3)
possessed certain sovereign powers. Similarly, UCCSN is: (1) subject to the approval
and control of the state government; (2) at least in some limited fashion, treated as a
state entity within the Nevada Revised Statutes; and (3) through its Board, in possession
of some sovereign powers.

21 Moreover, although we have not previously examined UCCSN’s state entity
22 status, federal district courts in Nevada have concluded that UCCSN, UNR, and the
23 Board of Regents are “state instrumentalities” for Eleventh Amendment purposes.
24 Other courts have also concluded that state universities are part of the state government
25 under the Eleventh Amendment. Because the analysis for determining an entity’s status
26 for Eleventh Amendment purposes is similar to the distinctions made for FCA purposes
– i.e., state entities are entitled to immunity while local governments are not –
27 determinations made for Eleventh Amendment purposes are germane to determinations
28 in FCA cases. Thus, these determinations strongly support the view that UCCSN has
state entity status for FCA liability purposes.

1 122 Nev. at 193-95; footnotes omitted. Obviously, none of the foregoing indicia of
2 pervasive legislative control exists with respect to First Transit.

3 First Transit also cites *Falline v. GNLV Corp.*, 107 Nev. 1004, 823 P.2d 888 (1991).
4 But *Falline* was a plurality decision, which does not establish precedent. *State v. Mohi*, 901
5 P.2d 991, 996 n. 4 (Utah 1995). And *Filarsky v. Delia*, ___ U.S. ___, 132 S.Ct. 1657 (2012),
6 also cited by First Transit, did not concern state sovereign immunity. Further, the Nevada
7 Supreme Court is not bound to apply a decision of the U.S. Supreme Court to claims arising
8 under state law. *Otis Elevator Co. v. Reid*, 101 Nev. 515, 522 n. 3, 206 P.2d 1378 (1985).
9

10 Defendants' reliance on *Gordon v. H.N.S.Mgmt.*, 861 A.2d 1160 (Conn. 2004), is also
11 woefully misplaced. *Gordon* has been legislatively overruled as stated in *Town of Rocky Hill*
12 *v. Secure Care Realty*, 105 A.3d 857, 868 n. 13 (Conn. 2015):
13

14 Despite the narrowness of our holding in *Gordon*, the General Assembly
15 responded by overruling it legislatively. Specifically, in the following year, the
16 legislature enacted No. 05-220, § 1, of the 2005 Public Acts, which amended General
17 Statutes § 13b-34 (a), a provision that authorizes the Commissioner of Transportation to
18 contract for transportation services to add the following language: "Any person
19 contracting with the state pursuant to this section for the provision of any transportation
20 service shall not be considered an arm or agent of the state. Any damages caused by the
21 operation of such transportation service by such person may be recovered in a civil
22 action brought against such person in the superior court and such person may not assert
23 the defense of sovereign immunity in such action."

24 The court in *Rocky Hill* explained the "narrowness" of its holding in *Gordon* as
25 follows:

26 Notably, the case presented a unique and rather extreme set of facts. The state,
27 pursuant to an expressly articulated legislative policy, essentially had taken over a
28 formerly privately owned bus system, then hired management companies such as the
defendant to run that system for the benefit of the public. *Id.*, at 85, 861 A.2d 1160. The
defendant was entirely dependent on the state because the state owned all of the assets
required to run the system, including the buses, the buildings in which the defendant had
its offices and everything in those buildings, and further, the defendant was required to
turn all fare revenue over to the state as soon as it was collected. *Id.*, at 103, 861 A.2d
1160. Moreover, the defendant's operating budget was financed entirely by the state on a
month to month basis, requiring close monitoring and regular approval, and the state
contractually was required to purchase liability insurance for the defendant and to
indemnify it for any tort claims on which it became liable. *Id.*, at 86, 103, 861 A.2d
1160. The overall system was subject to oversight through the Department of
Transportation, thus making "all major issues of policy, planning and operations" within
the control of the state. *Id.*, at 103, 861 A.2d 1160. Finally, a judgment against the
defendant would have had the same practical effect as a judgment against the state,
because the state ultimately would have had to reimburse the defendant for any damages

1 award pursuant to the indemnification requirement, and additionally, it would have had
2 to purchase uninsured/underinsured motorist coverage for its entire fleet of buses. *Id.*, at
3 104, 861 A.2d 1160. As should be clear from its context, our holding in *Gordon* was not
4 intended to apply broadly to all private entities providing contractual services to the
5 state, but rather, was narrowly confined to situations presenting an extraordinary level of
6 state dependency and control.

7 *Id.* at 867-68 (footnotes omitted).¹

8 In the present case, First Transit has failed to demonstrate the same type of the overwhelming
9 extent of state control that existed in *Gordon*. See motion, pp. 4-5. In fact Defendants demonstrate a
10 lack of candor in failing to acknowledge that the judgment in Plaintiffs' favor in this case will not be
11 paid by the state and that state responsibility for the judgment was one of the factors relied upon by the
12 court in *Gordon*. 861 A.2d at 1175. Furthermore, Defendants' argument that First Transit is an arm of
13 the state is refuted by section 40 of the contract (exhibit A to motion, p. 90), which provides:

14 INDEPENDENT CONTRACTOR

15 Under the terms of the Contract, the Contractor is an independent contractor and has and
16 retains full control and supervision of the services performed by and full control over the
17 employment and direct compensation and discharge of all persons, other than RTC
18 employees or representatives, assisting in the performance of its services. The
19 Contractor agrees to be solely responsible for all matters relating to wages, hours of
20 work, and working conditions and payment of employees (including the negotiation of
21 labor agreements, if applicable), and for compliance with social security, all payroll
22 taxes and withholdings, unemployment compensation, and all other requirements
23 relating to such matters. The Contractor agrees to be responsible for its own acts and
24 those of its subordinates, employees, and any and all subcontractors during the terms of
25 the Contract. The Contractor is required to comply fully with the workers'
26 compensation laws of the State of Nevada as applied to the Contractor and its employees
27 and is required to indemnify and hold RTC harmless for any failure to comply with such
28 laws. [Emphasis added.]

¹ After stating the foregoing, the court in *Rocky Hill* held that a group of private entities who had contracted with the state to provide nursing home services to state prisoners was not an arm of the state entitled to assert sovereign immunity. 105 A.3d at 869-75.

1 That First Transit is not an arm of the state is also demonstrated by the failure of the Nevada
2 Legislature to enact S.B. 478 (2015), which would have amended NRS 277A.280(2) to add the
3 italicized language:
4

5 2. A commission may lease vehicles to or from or enter into other contracts with a
6 private operator for the provision of such a system. If a commission enters into a
7 contract with a private operator who is an independent contractor for the provision of
8 such and system and an action is brought against the private operator, arising out of the
9 operation of the system, that would, if brought against the commission, be subject to the
10 provisions of NRS 41.0305 to 41.039, inclusive:

11 (a) Except as otherwise provided in paragraph (b), the private operator is liable for
12 damages in such an action only if and to the extent that the commission would have
13 been liable if the action had been brought against the commission.

14 (b) The provisions of NRS 41.035 do not limit the liability of the private operator
15 for medical expenses.

16 See Exhibits 1 and 2 annexed hereto, which are true copies of SB 478 (2015) and the
17 legislative record showing it was not enacted.

18 Finally, Defendants' reliance on CFR 37.23 is also futile. Motion, pp. 5-6. That First
19 Transit may "stand in the shoes" of the public entity does not mean it is an arm of the state for
20 purposes of sovereign immunity. As stated in 49 CFR § 37.23, Subpart B – Applicability, at
21 p. 445:

22 This section requires private entities to "stand in the shoes" of public entities with whom
23 they contract to provide transportation services. It ensures that, while a public entity
24 may contract out its service, it may not contract away its ADA responsibilities. The
25 requirement applies primarily to vehicle acquisition requirements and to service
26 provision requirements. [Emphasis supplied.]

27 **II. THE AWARD OF PRE-JUDGMENT INTEREST WAS PROPER**

28 First and foremost, Defendants' failure to object to a verdict form that fails to apportion
damages is a waiver of the issue for purposes of appeal. *State ex. Rel. Dep't of Transp. V. Hill*,

1 114 Nev. 810, 817 n.3 (1998) (overruled on other grounds). Defendant waived this issue by
2 not objecting to the verdict form at the time of trial.

3
4 Second, even if the jury instructions state that the jury is to consider any damages the
5 plaintiff might suffer in the future and no evidence of future damages was presented to the
6 jury, an award of prejudgment interest on the entire verdict amount is proper. *Hazelwood v.*
7 *Harrah's*, 109 Nev. 1005, 1011 (1993) (overruled on other grounds). Thus, when it clearly
8 appears that all of the damages were "past" damages, prejudgment interest will be awarded on
9 the entire judgment. *Farmers Home Mut. Ins. v. Fiscus*, 102 Nev. 371, 375 (1986).


10
11 In the case at hand, the damages presented were past damages, i.e. that of the
12 relationship between Harvey and his parents. There was no evidence of future damages that
13 was even presented, therefore Defendants' argument fails.

14
15
16 **CONCLUSION**

17 For all the foregoing reasons, it is respectfully submitted that Defendants' motion to
18 alter or amend the judgment should be denied in its entirety.

19
20
21 DATED THIS 11th day of April, 2016

22
23 **CLOWARD HICKS & BRASIER, PLLC**

24
25 
26 BENJAMIN P. CLOWARD, ESQ.
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of CLOWARD HICKS & BRASIER, PLLC and that on the 11 day of April 2016, I caused the foregoing OPPOSITION TO MOTION TO AMEND OR ALTER THE JUDGMENT to be served as follows:

- ☐ by placing a true and correct copy of the same to be deposited for mailing in the U.S. Mail at Las Vegas, Nevada, enclosed in a sealed envelope upon which first class postage was fully prepaid; and/or
- ☐ pursuant to EDCR 7.26, by sending it via facsimile; and/or
- ☒ pursuant to N.E.F.C.R. 9 by serving it via electronic service

to the attorneys listed below:

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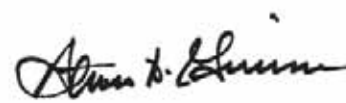
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CLERK OF THE COURT

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8 **DISTRICT COURT**

9 **CLARK COUNTY, NEVADA**

10 JACK CHERNIKOFF and ELAINE
11 CHERNIKOFF,

12 Plaintiffs,

13 vs.

14 FIRST TRANSIT, INC. JAY
15 FARRALES; DOES 1-10, and ROES 1-10
16 inclusive,

17 Defendants.

CASE NO. A-13-682726-C

DEPT. NO. XXIII

**OPPOSITION TO MOTION FOR
NEW TRIAL; REQUEST TO
SUPPLEMENT OPPOSITION WHEN
TRANSCRIPTS ARE COMPLETE**

18
19
20 COME NOW Plaintiffs, by and through their counsel of record, and hereby oppose the Motion
21 for New Trial, filed herein on March 23, 2016. This opposition is based upon the accompanying
22 memorandum of points and authorities, as well as all matters properly of record.

23 **I. THE COURT PROPERLY EXCLUDED DECEDENT FROM THE JURY VERDICT**
24 **FORM BECAUSE, DUE TO DEFENDANTS' CONSCIOUS DECISION MAKING,**
25 **THE ESTATE WAS NO LONGER A PARTY**

26 When this action was originally filed, the Estate of Harvey Chernikoff was included as a
27 named Plaintiff and the complaint contained a claim for punitive damages. Defendants moved to
28 dismiss the Estate and later moved for summary judgment as to the claim of punitive damages. As a

1 result, the Estate of Harvey Chernikoff was dismissed as a party Plaintiff. Under NRS
 2 41.141(2)(b)(2), fault is to be allocated only as it is "attributable to each *party remaining in the*
 3 *action.*" [Emphasis added.] It is error to allow the jury to apportion the fault of non-parties.
 4 *Warmbrodt v. Blanchard*, 100 Nev. 703, 708-9, 692 P.2d 1282, 1286 (1984) (The "plain language"
 5 of NRS 41.141 provides for apportionment of fault only among the plaintiff and other parties to the
 6 action against whom recovery is sought.)

7
 8 In seeking the dismissal of the Estate of Harvey Chernikoff, Defendants were clearly
 9 motivated by the desire to avoid exposure to punitive damages, which are recoverable only by the
 10 personal representative of the decedent. See 41.085(5)(b). Whatever their motivations, when
 11 Defendants secured the dismissal of Harvey Chernikoff's Estate by dismissing his personal
 12 representative, they forfeited any right to include Harvey on the special verdict form by which the
 13 jury allocated fault amongst the remaining parties to the action.¹

14
 15
 16 **II. DECEDENT WAS CORRECTLY EXCLUDED FROM THE JURY VERDICT**
 17 **FORM AND INSTRUCTION NO. 29 BECAUSE, AS A MATTER OF LAW,**
 18 **THERE WAS NO BONA FIDE ISSUE OF HIS COMPARATIVE FAULT**

19 In their motion for new trial, Defendants, relying on NRS 41.141(1), assert as follows:

20 The Court erred by excluding Harvey Chernikoff from the
 21 apportionment of fault on the verdict form. The comparative negligence of
 22 the decedent is relevant in a wrongful death case, regardless of whether the
 23 decedent himself is technically a party. There is no exception for defendants
 24 with mental disabilities. And there was certainly a bona fide issue of
 25 comparative negligence in this case.

26 The Court erred by excluding Harvey [sic] comparative negligence
 27 from the jury's apportionment of fault. The error of law is manifest in both
 28 the verdict form and the jury instruction regarding comparative negligence
 (Instruction No. 29), which did not even mention the decedent's negligence.
 This prejudicial error requires a new trial because a reasonable jury could
 have found that Harvey was more than 50% at fault for his own death.

¹ It is anticipated that Defendants will note that the Estate had not been properly set up in time to allow its joinder as a plaintiff prior to the expiration of the statute of limitations. This is no answer, however. Defendants were free to file a third-party complaint for contribution and/or indemnity against the Estate, at which point the personal representative would have been a party remaining in the action against whom recovery was sought. They did not do so.

1
2 See, Defs.' Motion, page 3. To the contrary, case law fully supports the Court's decision.

3 **A. Defendants Are Incorrect in Their Contention that, Notwithstanding Harvey**
4 **Chernikoff's Mental Disability, He Would Have Been Held to the Same Standard**
5 **of Care as Any Other Reasonable Person**

6 One of the lynchpins of Defendants' contention that Harvey Chernikoff's comparative fault
7 was a bona fide issue in this case, is the argument that "Harvey is held to the standard of 'ordinary
8 and reasonable care' regardless of his mental impairment." Motion, p. 5. This assertion is misleading
9 in that it does not acknowledge the majority rule is to the contrary. As stated in 2 Best, Comparative
10 Negligence, Law and Practice, § 10.30, p. 10-66 (rev'd ed. 2005):

11 In determining whether a mentally disabled adult plaintiff has been
12 contributorily or comparatively negligent, most jurisdictions require that
13 the plaintiff's conduct be reasonable in light of the plaintiff's own mental
14 capacity and the circumstances of the particular case. This subjective
15 standard differs from the objective "reasonable person" standard, applicable
16 to an adult who is not mentally disabled, which compares a plaintiff's
conduct to that of a "reasonable" person who is not mentally impaired.
[Emphasis added.]

17 Additionally, even in the minority of jurisdictions which hold the mentally disabled to a
18 standard measured objectively against the "reasonable person," there is an exception where a special
19 relationship exists between the plaintiff and defendant. *Hofflander v. St. Catherine's Hosp.*, 664
20 N.W.2d 545, 558 (Wis. 2003). Here, Defendants make money from transporting people with
21 disabilities, and hold themselves out as having special expertise in doing so. Accordingly, it would
22 be shocking to start the analysis from the premise that all their customers, despite their individual
23 disabilities, would have to fend for themselves under standard of conduct well beyond their reach.

24 The evidence showed that Harvey had an IQ in the 60s. This means that he functioned at
25 about the level of a third grade boy. The Court may recall that the video evidence revealed Harvey
26 was unable even to consistently buckle his own seatbelt. Thus, the notion that Harvey was guilty of
27 comparative fault because the bite he took from his sandwich was too large, or because he did not
28

1 self-enforce the rule against eating on the bus (which even Defendants not only did not enforce, but
2 actually assisted Harvey to violate) reveals itself as a contention that is far less than a bona fide issue
3 in the case. Anyone who has raised a young boy knows that a third-grader cannot reasonably be
4 expected to self-enforce a no-eating-on-the-bus rule or to eat a sandwich by taking only appropriate-
5 sized bites.
6

7 What is more telling however, are the lengths Defendants went to, in order to convince the
8 jury that choking *had nothing to do with Harvey's death*. Throughout the trial, Defendants' entire
9 contention was that Harvey died of something *other than* choking. Specifically, Ms. Sanders stated
10 in opening statement the following:
11

12 Harvey Chernikoff died on a bus that was being driven by Jay
13 Farrales of a medical event and Jay could do nothing to stop it. I will call
14 it a medical event because we're not absolutely clear on what caused
15 Harvey to die.

16 We do not know that the coroner found a large chunk of what he
17 thought it was partially chewed food that smelled of peanut butter. It was
18 so tightly impacted in his airway, it took the coroner 10 minutes to remove
19 it and he had to use a special tool to do it.

20 Now, based on those findings, the coroner concluded that Harvey
21 [died] as a result of choking. And maybe he did. But on the other hand,
22 *and as you will see as the case progresses*, the reactions that Harvey had
23 at the time, the way he reacted were not consistent with when – with what
24 one might expect to see with choking.

25 The things we all expect to see are universal signs of choking.
26 There wasn't any panic moves, there wasn't any clutching of the throat,
27 there wasn't any voice.

28 Instead, what you will hear in the testimony of what happened with
29 Harvey *was much more consistent with a sudden fatal event much like a*
30 *heart attack or stroke.....*

31 *See, Uncertified Rough Draft Transcript, attached hereto as Exhibit 1 (emphasis added).*

32 Defendants' opening statement was consistent with the way Defendants presented the
33 evidence. Dr. Michael MacQuarrie, Defendants' expert testified that Harvey did not choke on a

sandwich but rather he died of a stroke or heart attack. Yet now, Defendants completely reverse course and for the first time admit affirmatively that Harvey died from choking to *create a bona fide issue* for the purpose of this Motion.

B. Cite No Authority for the Proposition That Liability for Negligence in Rendering Aid Can Be Reduced by the Aided Person's Negligence That Triggered the Need for Aid, in This Case Harvey's Alleged "Negligent Eating"

Defendants stand the issue of comparative fault on its head by operating from the premise that the fact pattern requires that the case be analyzed as a "lost chance" case. They contend as follows:

This is a "lost chance" case, and the jury improperly allocated 100% of the causation to defendant. Because Harvey's clogged airway was the cause of his death², the jury should have allocated to defendant responsibility only after and above the preexisting condition. Defendant's liability would be limited to any small likelihood that Farrales would have succeeded in clearing Harvey's bolus had he attempted to do so and the mere possibility that Harvey could have survived without major brain damage.

See, Defs.' Motion, p. 7. Defendants cite *Perez v, Las Vegas Med. Ctr.*, 107 Nev. 1, 805 P.2d 589 (1991), in support of this argument. Perez is inapposite. In that case, the court said:

Of course, the plaintiff or injured person [in a "lost chance" case] cannot recover merely on the basis of a decreased chance of survival or of avoiding a debilitating illness or injury; the plaintiff must in fact suffer death or debilitating injury before there can be an award of damages. Additionally, the damages are to be discounted to the extent that a preexisting condition likely contributed to the death or serious debilitation.

107 Nev. at 6, 805 P.2d at 592. The preexisting condition in Perez was an aneurism or congenital defect in a brain artery. He dies of a massive brain hemorrhage after his medical providers had made no attempt to diagnose the cause of persistent headaches of which the plaintiff complained. The evidence showed that if he had been given proper medical care, he "might" have

² It is important to note that this is the first time Defendants affirmatively acknowledge that Harvey died from choking. Until this point, the closest Defendants got to an acknowledgment that Harvey died from choking was Ms. Sanders' statement in opening that "maybe he did." However, all of the evidence developed by Defendants through Dr. MacQuarrie the doctor retained by Defendants was that this was *not a choking event*. This explains why Defendants failed, until now to argue the "lost chance" doctrine – wanting instead to argue that Harvey died from a heart attack or other medical event.

lived. *Id.* at 3, 805 P.2d at 590.

Contrary to Defendants' contention (made, incidentally, for the first time in their new trial motion and, thus, waived³), this is not a "lost chance" case. There was overwhelming evidence that Defendants violated their own standards of conduct in several respects, and that this negligence played a causative role in Harvey's choking. As previously noted, the evidence showed that Defendants negligently failed to enforce their own rule against eating on the bus and actually assisted Harvey in violating this important rule – which Defendants explained was admittedly intended to prevent mentally disabled passengers from choking. As also previously noted, the driver also failed to scan the interior of the bus every five seconds, as required. Had he done so, he would have spotted Harvey eating and stopped him from doing so. Instead, the driver actually facilitated Harvey's violation of the rule by opening his water bottle for him. Thus, this is not a "lost chance" case such as *Perez*, where the doctor merely failed to diagnose a preexisting medical condition which he played absolutely no role in causing.

III. THERE WAS NO ERROR IN INSTRUCTING THE JURY REGARDING A COMMON CARRIER'S HEIGHTENED DUTY TO ITS PASSENGERS AND ANY SUCH ERROR WOULD BE HARMLESS, IN ANY EVENT

Defendants contend that the Court erred in instructing the jury that a common carrier owes the highest duty of care to its passengers because the duty to render aid is only a duty of reasonable care. Motion, pp. 8-10. Defendants, however, overlook *Forrester v. Southern Pac. Co.*, 36 Nev. 247, 134 P. 753 (1913). There, a passenger on defendant's train was ejected at Montello, Nevada, after railway employees incorrectly concluded the passenger had not paid his fare. At the time of the ejection he was ill, and defendant's employees were aware of his sickness. He also did not bring enough funds to purchase a second ticket. Given his circumstances, the passenger was compelled to

³ Defendants never previously contended that this was a "lost chance" case, much less requested a jury instruction on the issue. Thus, the assertion is waived. See, e.g., *State v. Shockley*, 410 S.W.3d 179, 195 (Mo. 2013) (en banc) (raising an issue for the first time in a motion for new trial, when an objection could have been made at trial, is insufficient to preserve the claim of error); *Kaliano v. Darland*, 252 N.W.2d 732, 737 (Iowa 1977) (same).

1 proceed to Reno, traveling in exposed train cars in inclement weather. As a result, he contracted
 2 pneumonia. The passenger sued the railway and obtained a favorable judgment. On appeal, the
 3 defendant contended that the trial court erred in giving the following instruction:

4
 5 No. 5—The jury is instructed that the law requires a common carrier of
 6 passengers to exercise the highest practicable degree of care that human
 7 judgment and foresight are capable of, to make its passenger's journey safe.
 8 Whoever engages in the business of a common carrier impliedly promises
 9 that its passengers shall have this degree of care.

10 *Id.* at 307, 134 P. at 773. The Nevada Supreme Court rejected the defendant's contention, stating:

11 No. 5 follows closely the decision of this court in the Sherman⁴ case
 12 regarding injuries resulting from an accident. We need not determine
 13 whether, in regard to the degree of care, it would be applicable in the case
 14 suggested in the brief of a passenger who might be injured by stumbling over
 15 a suit-case in the aisle. We do conclude that a high degree of care ought to be
 16 required before a passenger who is ill and without sufficient means to buy
 17 another ticket is expelled from the train hundreds of miles from his
 18 destination under the circumstances shown in this case.

19 *Id.* at 308, 134 P. at 773.

20 The present case is analogous to *Forrester* in several respects. Defendants' failure to enforce
 21 their own rule against eating on the bus created the conditions in which Harvey choked on his food.
 22 Additionally, after Harvey's emergent condition arose, Defendants were or should have been aware
 23 of his problem but did not render or summon aid in a timely manner, essentially leaving him
 24 helpless. The instruction was properly given.

25 Even assuming *arguendo* that error occurred, it would be harmless. It is fundamental that a
 26 common carrier's duties include the following:

- 27 (1) A common carrier is under a duty to its passengers to take reasonable
 28 action
- (a) to protect them against unreasonable risk of physical harm, and

⁴ *Sherman v. Southern Pacific Co.*, 33 Nev. 385, 111 P. 416 (1910).

1 (b) to give them first aid after it knows or has reason to know that they are ill
2 or injured, and to care for them until they can be cared for by others.

3 Restatement (Second) of Torts, § 314A. The duty to render aid and give care to one in need
4 of help was discussed in *Lee v. GNLV Corp.*, 117 Nev. 291, 22 P.3d 209 (2001), in the context of a
5 restaurant customer who choked to death. The court in *Lee* summarized this duty as follows:
6

7 In Nevada, as under the common law, strangers are generally under
8 no duty to aid those in peril. See *Sims v. General Telephone & Electric*,
9 107 Nev. 516, 525, 815 P.2d 151, 157 (1991). This court, however, has
10 stated that, where a special relationship exists between the parties, such as
11 with an innkeeper-guest, teacher-student or employer-employee, an
12 affirmative duty to aid others in peril is imposed by law. See *id.* at 526, 815
13 P.2d at 157-58 (citing Keeton et al., § 56, at 376). Likewise, we have held
14 that a party who is in "control of the premises" is required to take
15 reasonable affirmative steps to aid the party in peril." *Id.* at 526, 815 P.2d
16 at 158 (quoting Keeton et al., § 56, at 376). Finally, while this court has no
17 so held, other jurisdictions have expressly stated that restaurant owners and
18 their employees owe an affirmative duty to come to the aid of patrons who
19 become ill or are otherwise in need of medical attention. See *Breaux v.*
20 *Gino's, Inc.*, 200 Cal.Rptr. 260, 261 (Ct. App. 1984) ("It is well established
21 that restaurants have a legal duty to come to the assistance of their
22 customers who become ill or need medical attention . . ."); *Drew v.*
23 *LeJay's Sportsmen's Café, Inc.*, 806 P.2d 301, 306 (Wyo. 1991) ("A
24 restaurant whose employees are reasonably on notice that a customer is in
25 distress and in need of emergency medical attention has a legal duty to
26 come to the assistance of that customer.").

27 ...

28 The law is clear that if a legal duty exists, reasonable care under the
circumstances must be exercised. See *Sims*, 107 Nev. at 526-27, 815 P.2d
at 157-58; Keeton et al., § 37, at 237 and § 56, at 377-78. Whether a
defendant's conduct was "reasonable" under a given set of facts is
generally an issue for the jury to decide. See *Sims*, 107 Nev. at 527, 815
P.2d at 158.

117 Nev. at 395-96, 22 P.3d at 212. After setting forth the duty, the court in *Lee* held that the
restaurant was not required to administer the Heimlich maneuver to the customer and that it acted
reasonably under the circumstances in coming to his aid, explaining:

1 Nevada imposes a duty on GNLV to take "reasonable affirmative
2 steps" to aid patrons in need of medical attention. In this case, GNLV's
3 employees examined and assessed Sturms' condition immediately upon
4 being summoned by Sturms' dining companion. GNLV employees
5 diligently continued to monitor Sturms' condition until his condition
6 worsened. Upon realizing that Sturms' medical condition was
7 deteriorating, GNLV's employees summoned professional medical
8 assistance. Thus, we cannot say that the behavior of GNLV's employees in
9 these circumstances was anything other than "reasonable." We perceive no
10 breach of the duty owed to Sturms in failing to perform the Heimlich
11 maneuver. Accordingly, although GNLV's employees owed a duty to
12 Sturms to act reasonably, we are able to conclude as a matter of law that
13 GNLV's employees did not breach this duty.

14 *Id.* at 298, 22 P.3d at 213.

15 It is clear from the foregoing that if the restaurant had not acted diligently in monitoring the
16 customer's condition and summoning medical assistance, it would have breached a duty of
17 reasonable care. This exactly what Defendants failed to do in this case, but Defendants also failed to
18 act with reasonable care in many, many other aspects – not just this one. Defendants want to create
19 the impression that this issue was the focus of Plaintiffs' allegations of unreasonableness. However,
20 this cannot be further from the truth, as evidenced by the fact that Plaintiffs never even argued or
21 attempted to argue for a jury instruction that Defendants were mandated to administer the Heimlich
22 maneuver. Rather, Plaintiffs argued to the jurors that reasonableness requires a company like First
23 Transit to simply follow its own safety policies and procedures – only one of which was to follow
24 First Transit employee manual, page 70, which instructed employees on the Heimlich maneuver.
25 First Transit through testimony in discovery made the choice to tell its employees in Las Vegas that
26 this page of the employee manual did not apply and could be ignored.

27 This among many other things was the evidence of First Transits departure from
28 reasonableness that Plaintiffs argued was breached by First Transit. Accordingly, since the evidence
established numerous failures to exercise reasonable care by the Defendants it is not probable that

1 the verdict would have been different if the jury had been instructed as Defendants contend.
2 Therefore, the error, if any, was harmless and nonprejudicial and Defendants have not shown
3 otherwise. *See Truckee-Carson Irr. Dist. v. Wyatt*, 84 Nev. 662, 666-67, 448 P.2d 46 (1968)
4 (judgment cannot be reversed by reason of erroneous instruction unless upon consideration of entire
5 proceedings it shall appear that such error has resulted in miscarriage of justice; prejudice is not
6 presumed; if giving of instruction was error, it was harmless because upon considering entire record,
7 it was not probable that different result would ensue at new trial free of contested instruction; burden
8 is upon party contesting instruction to show probability of different result); *Otterbeck v. Lamb*, 85
9 Nev. 546, 461, 456 P.2d 855 (1969) (if instruction is erroneous, it must also constitute prejudicial
10 error for reversal to be warranted).

11
12
13 **IV. SIMILARLY, THERE WAS NO ERROR IN GIVING INSTRUCTION NO. 34**

14 Defendants also claim it was error to give Instruction No. 34 concerning the duty of additional
15 care to a mentally disabled person. They contend:
16

17 The instruction did not apply to the facts in this case. First, the
18 danger of choking insufficiently chewed food is universal, independent of
19 the "hazards of travel." Second, even assuming that Harvey's mental
20 disability impaired his ability to eat normally, there is not evidence that
21 Farrales knew of that weakness. In other words, the type of harm in this
22 case (choking on a sandwich) does not derive from a hazard of travel that
23 poses a unique danger to a typical mentally disabled person, for which the
24 transportation company accepted a special responsibility.

25 The evidence, moreover, established that First Transit and its
26 drivers are not social workers nor care givers. The special responsibilities
27 imposed under the "Americans With Disabilities Act" are limited to the
28 boarding, securing of assistive devices, and disembarking of paratransit
buses. The company expressly informs in its guidelines that driver [sic] not
responsible for personal care. (Exhibit A, at 9.) While competent driving
requires scanning mirrors, this does not create a duty on the driver to
monitor for medical events. The company made clear that personal
attendants are welcome to attend to a passenger's en route personal needs
and make accommodation for them. Drivers must watch road.

Motion, pp. 12-13; footnote omitted. This argument is devoid of merit.

1 In the first place, there *is* evidence that Harvey's mental disability impaired his ability to eat
2 as a non-disabled adult would. And there is evidence that Defendants were aware of this. Ms.
3 McKibbons testified that the reason for the rule against eating or drinking on the bus was that
4 mentally disabled people choke when they eat. Mr. Farrales acknowledged that this was one of the
5 reasons for the policy and that he was trained regarding the same. And also contrary to the
6 statements made in the quoted passage, the bus drivers were required by rule to scan the interior of
7 the bus every five seconds – one of the reasons for *this policy* was to ensure that the mentally
8 disabled passengers were not doing things they should not be doing – per Mr. Farrales' testimony.
9 So, while it is certainly true that "[d]rivers must watch road," it is also true that they must also keep
10 themselves apprised of what was happening in their buses. The drivers were also required to check
11 on and secure, if necessary, the safety of the passengers each time they stopped and, again, each time
12 they left a stop. Defendants' argument proceeds as though this evidence and these standards did not
13 exist.

14
15
16
17 Secondly, insofar as Defendants' liability arises from the failure to come to Harvey's aid or to
18 summon assistance of others, this particular duty did not arise until after he began choking. Further,
19 Defendants cannot disclaim responsibility by simply adopting self-serving policies because the duty
20 to come to decedent's aid arises from the common law. Nor is it accurate for Defendants to claim
21 that "the company expressly informs . . . that the driver [is] not responsible for personal care." To
22 the contrary, Defendants' Exhibit A, page 2, states:

23
24
25 Americans with Disabilities Act of 1990 (ADA) Paratransit Services is a
26 shared-ride, public transportation service for people with disabilities, as
27 required by federal law, who are functionally unable to independently use the
RTC fixed route services.

28 *The RTC strives to provide safe and reliable services to all members of the community*, and is committed to providing commuters with the most up-to-date information. [Emphasis supplied.]

Further, Defendants' Exhibit A, page 8 provides:

The RTC's goal is to provide a safe, comfortable commute for individuals traveling on RTC vehicles. To assure a pleasant commute for all, please observe the following rules:

...

No eating is allowed on the vehicle, and drinks must be in spill-proof covered containers. [Emphasis added.]⁵

V. THE \$15 MILLION VERDICT IS NOT EXCESSIVE, NOR DOES IT DEMONSTRATE PASSION OR PREJUDICE

The jury was properly instructed that, "No definite standard or method of calculation is prescribed by law by which to fix reasonable compensation for pain and suffering." See Instruction No. 23. This is consistent with Nevada case law. For example, in *Stackiewicz v. Nissan Motor Corporation*, 100 Nev. 443, 686 P.2d 925 (1984), the court explained that the mere fact a verdict is "unusually large" is not dispositive as to whether it is the result of passion and prejudice. The court explained:

In reversing a district court's order granting a new trial on the issue of damages, we recently noted that the mere fact that a verdict is large is not in itself "conclusive that it is the result of passion or prejudice." *Beccard v. Nevada National Bank*, 99 Nev. 63, 66 n. 3, 657 P.2d 1154, 1156 n. 3 (1983), quoting *Miller v. Schnitzer*, 78 Nev. 301, 309, 371 P.2d 824, 828 (1962). Similarly, in *Automatic Merchandisers, Inc. v. Ward*, 98 Nev. 282, 646 P.2d 553 (1982), although we found the award "unusually high," we did not find it so "flagrantly improper" as to suggest jury passion, prejudice or corruption. In *General Electric Co. v. Bush*, 88 Nev. 360, 368, 498 P.2d 366, 371 (1972), this Court refused to set aside an award of \$3,000,000 when the evidence of special damages went uncontroverted at trial. We refused to "substitute our opinion of damages for that of the jury," when the award, in view of the extent of personal injuries to the victim, did not "shock our judicial conscience."

⁵ Defendants' reliance on 49 C.F.R. § 37.123(e)(1) is disingenuous. Motion, page 12, line 5. This provision does not concern "accommodations." Rather, it states which persons are eligible for ADA paratransit services.

1 *Id.* at 455, 686 P.2d at 932. With these principles established, we will now address what Defendants
2 erroneously contend are the indicia of passion and prejudice.

3 **A. The Award of \$7.5 Million for Harvey's Pre-Death Pain and Suffering is Not Excessive**

4
5 The standard for assessing an award of damages against a challenge of excessiveness was
6 summarized in *Guaranty National Insurance Company v. Potter*, 112 Nev. 199, 206-207, 912 P.2d
7 267, 272 (1996), as follows:

8
9 Generally, this court will affirm an award of compensatory damages unless
10 the award is so excessive that it appears to have been "given under the
11 influence of passion or prejudice." NRCP 59(a)(6); *Miller v. Schnitzer*, 78
12 Nev. 301, 308, 371 P.2d 824, 828 (9162), abrogated in part on other grounds
13 by *Ace Truck & Equip. Rentals v. Kahn*, 103 Nev. 503, 746 P.2d 132 (1987).
14 The size of the award alone is not conclusive evidence that it was the result of
15 passion or prejudice. *Miller*, 78 Nev. At 309, 371 P.2d at 828. Rather, "[t]he
16 core of the matter seems to be that an appellate court will disallow or reduce
17 the award if its judicial conscience is shocked." *Id.*, at 309, 371 P.2d at 829
18 (footnote omitted).

19
20 Defendants contend that \$7.5 million for 45 seconds of pain and suffering is "outrageous."
21 Motion, page 16, lines 3-4. First, Plaintiffs do not accept the premise that Harvey was choking for
22 45 seconds. The undersigned's recollection is that it was more like 2-4 minutes. But whatever the
23 actual time span was, the Court will recall that Defendants' own expert testified that choking is the
24 most horrific way to die. It is also worth noting that, in the context of the death penalty – reserved
25 for society's most abhorrent individuals who have committed unspeakably atrocious crimes –
26 enormous resources are expended to find ways to administer the sentence as humanely as possible.
27 Quite probably, if the method selected produced the result endured by Harvey Chernikoff, it would
28 be deemed tantamount to torture and struck down as cruel and unusual punishment in violation of
the Eighth Amendment to the United States Constitution. *See Baze v. Rees*, 553 U.S. 35, 128 S.Ct.
1520, 1522 (2008) (upholding constitutionality of lethal injection of three particular chemicals as
means of carrying out capital punishment, but noting that capital punishment is unconstitutional

1 when it involves “torture or lingering death.”). Thus, it is astonishing that Defendants would be so
 2 glib as to contend that Harvey was in utter agony for ‘only’ 45 seconds.

3 Defendants also argue that, “[i]f such a short period of time can justify any award at all, it
 4 would have to be in the hundred, not millions.” Motion, page 17, lines 8-9. While Plaintiffs have
 5 not had sufficient time to perform an exhaustive survey of damages awards for the pain and suffering
 6 of an asphyxiated plaintiff, it is clear that Defendants’ assessment is misguided. Just by way of
 7 example, in *Clark v. University Hospital*, 914 A.2d 838 (N.J.A.D. 2006), an award of \$2 million
 8 dollars was affirmed against an assertion that it was a “staggering number” for the amount of time
 9 involved. There, the plaintiff’s decedent choked for approximately 4 minutes. But he died in a
 10 hospital bed, not on public transportation.
 11

12 We recognize the \$7.5 million is substantially greater than \$2.5 million. However, we also
 13 note that as recently as 2010 and as long ago as 1947, the Nevada Supreme Court has flatly rejected
 14 the idea that awards of general damages can validly be measured by reference to awards made in
 15 other cases. In fact, most recently the court cautioned – in a unanimous and en banc decision – that
 16 it would be an abuse of discretion to undertake such a comparative approach to general damages.⁶
 17

18 **B. Nor Is the Award of \$7.5 Million to Jack and Elaine Chernikoff Excessive**

19 In this portion of their motion, Defendants proceed on the premise that any argument they
 20 make must be accepted as true. They cite no legal authority, yet they contend that the award is
 21 “unprecedented.” Moreover, Defendants argue that the award has “no connection to the factors set
 22 forth in law for evaluating this element of damages,” and then proceed to give their own
 23

24
 25
 26
 27 ⁶ *Wyeth v. Rowatt*, 126 Nev. 446, 472 n. 10, 244 P.3d 765, 783 n. 10 (2010), citing *Wells, Inc. v. Shoemaker*, 64 Nev. 57, 74,
 28 177 P.2d 452, 460 (1947). For other thoughtful and persuasive rejections of this one-size-fits-all approach to general
 damages, see *Washburn v. Beatt Equipment Co.*, 840 P.2d 860, 871-872 (Wash. 1992) (en banc), and *Bertero v. National
 General Corp.*, 529 P.2d 608, 624 n. 12 (Cal. 1975) (en banc) (“For a reviewing court to upset a jury’s factual
 determination on the basis of what other juries awarded to other plaintiffs for other injuries in other cases based on
 different evidence would constitute a serious invasion into the realm of fact-finding.”).

1 undocumented and self-serving accounts as to what the evidence showed.

2 The Court will recall that there is substantial evidence in the record to support a combined
3 award of \$7.5 million to the two Plaintiffs. If and when Defendants secure copies of the trial
4 transcript and document their contentions, Plaintiffs will supplement this opposition as well.
5

6 **C. Respectfully, the Court Should Reject Defendants' Argument that Plaintiffs' Counsel**
7 **"Improperly Argued for Recovery Based on the Loss of Harvey's Life"**

8 Assertions of improper argument by counsel are governed by the standards set forth in *Lioce*
9 *v. Cohen*, 124 Nev. 1, 18-19, 174 P.3d 970 (2008). There are two separate standards, depending on
10 whether the party asserting error made a contemporaneous objection to the allegedly improper
11 argument. These standards were articulated in *Lioce*, as follows:
12

13 When a party objects to purported attorney misconduct but the
14 district court overrules the objection and the jury is not admonished, the
15 party moving for a new trial based on the purported attorney misconduct
16 must first demonstrate that the district court erred by overruling the party's
17 objection. If the district court concludes that it erred by overruling the
18 objection, the district court must then consider whether an admonition to
19 the jury would likely have affected the verdict in favor of the moving party.
20 In this, the court must evaluate the evidence and the parties' and the
21 attorneys' demeanor to determine whether a party's substantial rights were
22 affected by the court's failure to sustain the objection.

23 ...

24 [t]he proper standard for the district courts to use when deciding a motion
25 for a new trial based on unobjected-to attorney misconduct is as follows:
26 (1) the district court shall first conclude that the failure to object is critical
27 and the district court must treat the attorney misconduct issue as having
28 been waived, unless plain error exists. In deciding whether there is plain
error, the district court must then determine (2) whether the complaining
party meet its burden of demonstrating that is case is a rare circumstance in
which the attorney misconduct amounted to irreparable and fundamental
error. In the context of unobjected-to attorney misconduct, irreparable and
fundamental error is error that results in a substantial impairment of justice
or denial of fundamental rights such that, but for the misconduct, the
verdict would have been different. [Footnotes omitted; emphasis supplied.]

Here, Defendants concede that they failed to lodge a contemporaneous objection by making a

1 vague reference *Lioce* and “plain error” in the last sentence of their laborious argument. Motion,
2 page 21, lines 4-5. In other words, Defendants’ argument is circular. They argue the verdict was
3 excessive because of attorney misconduct and that the failure to object is excused because the
4 verdict was excessive. This is not an adequate way of discharging their burden of establishing that
5 improper argument occurred, or that this purported misconduct was so fundamental that it resulted in
6 a substantial impairment of justice.
7

8 In any event, the Defendants have mischaracterized the nature of trial counsel’s arguments.
9 He did not suggest to the jury that it should base a “recovery on Harvey’s loss of his own life.”
10 Rather, he argued to the jury that all lives matter and that, notwithstanding Harvey’s mental
11 disability, his parents loved him dearly and valued his life just as much as any other parent would his
12 or her son. Once again, the Court will no doubt recall the events at trial but, if and when Defendants
13 product a trial transcript, we will demonstrate further that their assertions of attorney misconduct are
14 without merit.
15
16

17 **D. Defendants’ “Other Indicators of Passion and Prejudice” Are Without Substance**

18 **1. The Identity of the Awards Does Not Give Rise to an Inference of Error**

19 Citing *Nevada Cement Company v. Lemler*, 89 Nev. 447, 514 P.2d 1180 (1973), Defendants
20 contend that the jury’s award of the same amount for the parents’ combined damages as it awarded
21 for Harvey’s pain and suffering is evidence that the jury was motivated by passion and prejudice.
22 *Lemler* is completely dissimilar to the instant case. *Lemlar* was a nuisance case in which 85
23 plaintiffs sued Nevada Cement Company for spewing particular matter into the air. The jury decided
24 awarded \$5,000 in general damages to each of the 85 plaintiffs. The court explained the absurdity of
25 the situation as follows:
26
27

28 It is entirely proper to order the payment of damages to compensate
for discomfort and annoyance caused by a temporary nuisance. [Citations
omitted.] In this case, however, the record is clear that some of the

1 plaintiffs were considerably annoyed, while others were only minutely
2 disturbed. Some of them lived near the cement plant, and others were miles
3 distant. Some were within prevailing wind patterns and others were not.
Some incurred special damages and others did not.

4 *Id.* at 450, 514 P.2d at 1182. On this basis, the court in *Lemler* held that the evidence
5 established that the level of "annoyance and discomfort could not have been the same" for every
6 single one of the 85 plaintiffs. The analogy to *Lemler* simply does not hold where, as here, there are
7 only two awards and, while each is to compensate for different elements of damages, both are so
8 subjective in nature that mathematical precision is not an option.
9

10 **2. The Failure to Allocate Fault to Farrales**

11 The jurors were instructed in Jury Instruction Number 30 the following:

12 Defendant FIRST TRANSIT is legally responsible for the actions of its
13 employee, Defendant JAY FARRALES, at all times when Defendant JAY
14 FARRALES is acting within the scope of his employment with Defendant
15 FIRST TRANSIT.

16 See Jury Instruction No. 30. This means that if the jurors felt that Jay Farrales was negligent, that
17 negligence would be imputed to First Transit. The jurors were also instructed on the following:

18 In order to establish a claim for negligent training and supervision, plaintiff must prove the following
19 elements:

- 20 1. Defendant FIRST TRANSIT owed a duty of care to plaintiffs and to the
21 deceased, HARVEY CHERNIKOFF, to reasonable train and supervise its
22 employee, Defendant JAY FARRALES, to ensure that he was fit for his
23 position;
- 24 2. Defendant FIRST TRANSIT breached that duty by failing to reasonably
25 train and supervise its employee, Defendant JAY FARRALES, to ensure
that he was fit for his position;
- 26 3. That Defendant First Transit's breach of this duty was the cause of
27 HARVEY CHERNIKOFF's death; and
- 28 4. Plaintiff JACK CHERNIKOFF and Plaintiff ELAINE CHERNIKOFF
suffered damages.

1 See Jury Instruction No. 36. It does not take a strained analysis to determine that the jurors found that
2 Jay Farrales was negligent but assigned First Transit 100% at fault for that negligent based on the two
3 jury instructions listed above. Using this framework, it is clear that the jury verdict was entirely
4 consistent and that Defendants' argument is without merit.

5
6 **3. The Assertion that the Jury Was Required to Allocate Fault to Plaintiffs, as a**
7 **Matter of Law, is Frivolous**

8 Defendants contend that the jury's failure to allocate any percentage of fault to the Plaintiffs is
9 further evidence that it was swept away by passion and prejudice. This assertion is frivolous. It is
10 merely Defendants' attempt to substitute their opinion for that of the jury.

11 **4. Because Defendants Fail to Specify the "Trial Tactics" They Contend Inflamed**
12 **Passion and Prejudice. This Assertion Should Be Summarily Rejected**

13 Next on the laundry list is the naked assertion that Plaintiff engaged in nefarious "trial tactic,"
14 which had the result of inflaming passion and prejudice in the jury. None of these trial tactics is
15 identified. Thus, Defendants' sparse citations are untethered to the case and amount to nothing more
16 than abstract legal propositions.

17
18 **5. There Was Nothing Improper in Conducting Voir Dire to Explore the Panel**
19 **Members' Predispositions Concerning Litigation in Which Substantial Sums of**
20 **Money Are Sought**

21 Defendants next complain that Plaintiffs' counsel improperly referred to the action in voir dire
22 as a multi-million dollar case. The right to conduct voir dire free of unreasonable restrictions is
23 secured by statute. NRS 16.030(6) provides that, "[t]he judge shall conduct the initial examination
24 of prospective jurors and the parties or their attorneys are entitled to conduct supplemental
25 examinations which must not be unreasonably restricted." The importance of participation by the
26 parties or their attorneys was emphasized in Whitlock v. Salmon, 104 Nev 24, 752 P.2d 210 (1988).
27 In Whitlock, the trial judge completely precluded either party's counsel from participating directly in
28 voir dire. Instead, over objection, he required the attorneys to submit their questions to him and he,

1 in turn, asked the questions of the prospective jurors. *Id.* at 25, 752 P.2d at 211. In reversing the
2 ensuing defense verdict, this court reasoned as follows:

3 The importance of a truly impartial jury, whether the action is
4 criminal or civil, is so basic to our notion of jurisprudence that its necessity
5 has never really been questioned in this country. *United States v. Bear*
6 *Runner*, 502 F.2d 908, 911 (8th Cir.1974). The voir dire process is designed
7 to ensure—to the fullest extent possible—that an intelligent, alert and
8 impartial jury which will perform the important duty assigned to it by our
9 judicial system is obtained. *De La Rosa v. State*, 414 S.W.2d 668, 671
10 (Tex.Crim.App.1967). The purpose of voir dire examination is to determine
11 whether a prospective juror can and will render a fair and impartial verdict
12 on the evidence presented and apply the facts, as he or she finds them, to
13 the law given. *See Oliver v. State*, 85 Nev. 418, 422, 456 P.2d 431, 434
14 (1969). We are convinced that prohibiting attorney-conducted voir dire
15 altogether may seriously impede that objective.

16 Usually, trial counsel are more familiar with the facts and nuances
17 of a case and the personalities involved than the trial judge. Therefore, they
18 are often more able to probe delicate areas in which prejudice may exist or
19 pursue answers that reveal a possibility of prejudice. Moreover, while we
20 do not doubt the ability of trial judges to conduct voir dire, there is concern
21 that on occasion jurors may be less candid when responding with personal
22 disclosures to a presiding judicial officer. Finally, many trial attorneys
23 develop a sense of discernment from participation in voir dire that often
24 reveals favor or antagonism among prospective jurors. The likelihood of
25 perceiving such attitudes is greatly attenuated by a lack of dialogue
26 between counsel and the individuals who may ultimately judge the merits
27 of the case. In that regard, we expressly disapprove of any language or
28 inferences in *Frame v. Grisewood*, 81 Nev. 114, 399 P.2d 450 (1965)] that
tend to minify the importance of counsel's voir dire as a source of
enlightenment in the intelligent exercise of peremptory challenges.

22 *Id.* at 27-28, 752 P.2d at 212-13; footnote omitted. In the omitted footnote, the court referenced a
23 study which “suggests that the judge’s presence evokes considerable pressure among jurors toward
24 conforming to a set of perceived judicial standards and that this is minimized when an attorney
25 conducts voir dire.” *Id.* at 28 n. 6, 752 P.2d at 212 n. 6.

27 Since Plaintiffs were seeking an award of more than a million dollars, they had a right to
28 inquire of the panel members regarding their attitudes toward litigation in which large awards are

1 sought.

2 In *DeYoung v. Alpha Construction Co.*, 542 N.E.2d 859 (Ill. App. 1989), a woman who
3 survived a gas explosion and the estate of her mother, who perished in it, brought suit and were
4 awarded \$4,224,694.89. On appeal, one of the defendant's contentions was that a voir dire question,
5 asking whether prospective jurors would be willing to return a verdict "in the millions," was an
6 "improper attempt to indoctrinate the jury" *Id.* at 764, quoting defendant's argument. The
7 appellate court flatly rejected this assertion, holding that it was entirely proper "to inquire whether
8 potential jurors have fixed ideas about awards of specific sums of money." *Id.*
9

10 In support of its holding, the court in *DeYoung* cited *Kinsey v. Kolber*, 431 N.E.2d 1316
11 (Ill.App. 1982). In *Kinsey*, plaintiff's counsel, on four occasions, asked whether prospective jurors
12 would have any trouble returning a verdict of over \$2 million, if that amount was supported by the
13 evidence and the law. In support of his contention that these questions constituted an improper
14 attempt to indoctrinate the jurors and to elicit a pledge from them, the defendant also noted that
15 plaintiff's counsel reminded the jurors of their answers during his closing argument. In rejecting the
16 defendant's contention, the court in *Kinsey* noted that acceptance of his position would require the
17 court to overrule long-standing Illinois law:
18
19

20
21 Defendant urges that this remark [in closing argument] supports the
22 indoctrination purpose of the questions asked during voir dire. In advancing
23 this argument defendant is asking us to overrule *Scully v. Otis Elevator*
24 *Company* (1971), 2 Ill.App.3d 185, 275 N.E.2d 905, *Jines v. Greyhound*
25 *Corporation* (1964), 46 Ill.App.2d 364, 197 N.E.2d 58, rev'd on other
26 grounds (1965), 33 Ill.App.2d 83, 310 N.E.2d 562, and *Murphy v. Lindahl*
27 (1960), 24 Ill.App.2d 461, 165 N.E.2d 340, all cases where the court has held
28 that questions concerning a specific verdict amount tended to uncover jurors
who might have a bias or prejudice against large verdicts.

Id. at 946-47.

But the recognition that it is proper to ask prospective jurors on voir dire about any fixed
beliefs they may have about large verdicts is not limited to Illinois. The parties' counsel submitted

1 voir dire questions to the court in *City of Cleveland v. Cleveland Electric Illuminating Co.*, 538
2 F.Supp. 1240 (N.D. Ohio 1980). The City of Cleveland submitted the following question:

3 You are each to be aware of the fact that the City of Cleveland is seeking a
4 judgment of millions of dollars from CEI. If the evidence supports the
5 judgment sought by the City of Cleveland, would you have any hesitancy in
6 awarding a judgment of millions of dollars for the City and against CEI?

7 *Id.* at 1249-50. In deciding the question was proper, the court cited cases from several jurisdictions
8 and concluded that its propriety was supported by the "prevailing weight of authority." *Id.* at 1250.

9 Among the cases cited in *City of Cleveland* is the Seventh Circuit's opinion in *Geehan v.*
10 *Monahan*, 382 F.2d 111 (7th Cir. 1967). There, plaintiff's counsel asked prospective jurors whether
11 they would "have any hesitancy of returning a verdict commensurate with the injuries you find she
12 has, even though it might run many thousands of dollars." *Id.* at 115. Defense counsel objected on
13 the theory that his opponent was attempting to secure a pledge from the jury. The trial court
14 overruled the objection and the Seventh Circuit sustained this ruling, noting that "[s]uch a question is
15 generally in the discretion of the court." *Id.* See also *Bunda v. Hardwick*, 138 N.W.2d 305 (Mich.
16 1966).

17
18
19 Defendants cite nothing but psychological journals in support of their assertion. These are a
20 poor substitute for relevant legal authority.

21
22 Defendants also contend that Plaintiffs' counsel improperly sought a commitment from jurors
23 to "give me what I ask for." No details are provided and no indication is given as to whether
24 Defendants objected when this allegedly occurred. Once again, a thorough response will have to
25 await something more than the three sentences that Defendants have tendered in this portion of their
26 motion.
27
28

experience.

(5) CATCOM Systems Specialist. – The CATCOM Systems Specialist shall have sufficient skills to supervise Contractor support staff's performance of all CATCOM and camera recording systems operator functions, including, but not limited to, administration of data within the CATCOM systems and incident/accident form options; creation of special route and block data; report creation; systems performance monitoring; vehicle information updating; performance of routine maintenance on associated hardware components; and data management of recorded information from the camera system. The CATCOM Systems Specialist will also manage the security elements of the Contractor's system and any requirements directed by RTC in connectivity with RTC's network, communicating to RTC additions and deletions of names of Contractor staff with authorized CATCOM/Trapeze access.

(6) With the exception of the Contractor General Manager, two key personnel positions may be combined, provided that the individual proposed can demonstrate through a resume and interview process that they have the required qualifications for each position.

(d) Availability. – The Contractor will provide the telephone numbers of at least two (2) members of management with the authority and responsibility to make binding decisions, acting as agent for the Contractor. These management individuals will also respond in person to any emergency or accident involving extensive property damage or injuries.

(e) Media Interaction. – The Contractor will provide the telephone number of a member of management with the authority and responsibility to speak to the news media regarding issues pertinent to Contractor responsibilities and actions. This person will be expected to be available by phone at any time of the day. He or she will also be responsible for

coordinating media activities and inquiries with the RTC's Communication Department staff prior to interviews taking place, to ensure accurate and consistent information is being disseminated.

(f) Contract Compliance. -- The Contractor General Manager will insure that key personnel manage the project in compliance with the submitted plans and all contractual agreements.

SECTION 15. GENERAL REQUIREMENTS FOR PERSONNEL

(a) In General. -- The Contractor will provide qualified personnel capable of performing the services required under this Contract. The total number of personnel necessary for operations and services has been determined by the Contractor and is reflected in the Staffing and Personnel Program (Appendix S). At all times during the term of the Contract, the Contractor shall adhere to the staffing levels stated in its Staffing and Personnel Program. The Contractor will be responsible for the payment of all employee wages and benefits.

(b) Training. -- All employees of the Contractor will have completed the Contractor's Employee Training Program, as outlined in the Contractor's proposal in Appendix A, Program and the Contractor will also maintain ongoing training for employees. Training program, for all classifications, will include a section on transit security approved by the RTC Project Manager of his or her designee.

(c) Mapping. -- Each vehicle operator released from training must be able to determine the location of any address and arrive on time by use of a map or written instructions (lefts and rights). The Contractor must issue each new vehicle operator an appropriate Las Vegas map book, to be determined with RTC approval, with the vehicle

))

operator's name marked on the book. The map book is to be shown to the RTC upon request. The Contractor must ensure that each paratransit vehicle operator maintains possession of the approved map book that is no more than two years old throughout employment. The Contractor must ensure that each Silver-STAR vehicle operator maintain possession of the Silver-STAR route design.

(d) Manifest Submission. -- The Contractor must require vehicle operators and dispatchers to accurately complete and submit the required completed manifests and all other data requested by RTC in a form approved by the RTC Project Manager and within the time frame specified by the RTC Project Manager.

(e) Priority in Hiring. -- The Contractor will afford a priority in hiring to employees of the preceding service provider of CAT Specialized Services. Such a priority shall not require the hiring of any such employee if the Contractor determines that the employee is not qualified for the position (under the terms of the Contractor's employment standards and personnel policies), or the Contractor determines that the employee should not be hired because of past employment history (such as documented disciplinary actions, habitual absenteeism, etc.). The priority in hiring will not extend to any individual who was dismissed from his or her employment for cause. Nothing in this section will require the Contractor to recognize any union that represented the workforce of the preceding service provider, or to assume or otherwise apply the terms and conditions of any collective bargaining agreement between the preceding service provider and any union.

(f) Uniforms. -- The Contractor will cause all vehicle operators, dispatchers and personnel available to the public to be attired in such uniforms or clothing as approved by the RTC Project Manager. Such clothing will display the service logo or name. The cost of such uniforms will be borne by the Contractor. The Contractor will submit for RTC approval a

sample of any modification to the uniforms to be worn by each uniformed job category.

(g) Attitude. -- All project personnel will maintain a professional, courteous manner with passengers, including answering to the best of their ability all passenger questions; refraining from disparaging RTC or the Contractor to passengers or the media; and performing other tasks as directed. Vehicle operators are specifically prohibited from showing the manifest to a passenger or customer.

(h) Drug and Alcohol Testing. -- FTA's requirements relating to the testing of employees who perform safety-sensitive functions are set forth in Parts 653 and 654 of title 49 of the Code of Federal Regulations (C.F.R.). The Contractor shall agree to establish and implement a drug and alcohol testing program that complies with 49 C.F.R. Parts 653 and 654, produce any documentation necessary to establish its compliance, and permit any authorized representative of the U.S., Department of Transportation or its operating administrations, the State Oversight Agency of Nevada, or the RTC to inspect the facilities and records associated with the implementation of the drug and alcohol testing program. A summary report of drug and alcohol testing results (exclusive of individual test results) will be provided to RTC. Any safety-sensitive employee who does not pass the medical examination or whose drug/alcohol screening tests show evidence of alcohol dependency or drug abuse will not be permitted to perform work under the Contract.

(i) Employee Removal. -- RTC reserves the right to require the Contractor to immediately remove an employee from CAT Specialized Services for any of, but not limited to, the following items:

- (1) Committing unsafe or inappropriate acts while providing Specialized Services.
- (2) Revocation or non-renewal of a valid Nevada driver's license.
- (3) Distributing any unauthorized materials while performing services under this Contract.

- (4) Soliciting a gratuity from a passenger.
- (5) Failure to notify the Contractor of an arrest or conviction of a criminal offense of a Class A or Class B misdemeanor or felony; or placement on probation or deferred adjudication for the same; or a driving while intoxicated (DWI) charge, before the end of the business day following the day the employee receives notice of such action.
- (6) Incurring excessive customer complaints due to discourtesy, rudeness, use of profanity or any other act deemed unacceptable.
- (7) Failing or refusing to take a drug or alcohol test.

(j) Employee Retention. – The Contractor will maintain personnel and compensation plans that are designed to encourage employee retention and longevity and minimize employee turnover. Such plans shall include employee incentives and rewards and provide fair and reasonable wage and benefit packages for employees.

(k) Requirements. – The Contractor's Staffing and Personnel Program and/or Employee Training Program shall incorporate the requirements of this Section as well as the requirements of Sections 16, 17, 18 and 19 of this Contract. The Contractor will be in breach of this Contract and subject to termination for default should any personnel not meeting the requirements of the Staffing and Personnel or Employee Training Programs be employed by the Contractor for the purpose of performing duties pursuant to the Contract.

SECTION 16. VEHICLE OPERATORS

(a) Licensure. – Each Vehicle Operator will have a valid Nevada Commercial Driver's License, Class C or above with passenger endorsement as well as any other licenses required by applicable local, State, and Federal laws and regulations. Medical testing related to drug and alcohol use will be conducted by the Contractor in accordance with applicable Federal laws and regulations. A summary report of test results will be provided to the RTC Project Manager. Any Vehicle Operator who does not pass the medical examination or whose drug/alcohol screening tests do not comply with applicable standards for alcohol or drug use

will not be permitted to operate any vehicle used to provide service under this Contract.

(b) Driving Ability. -- Each Vehicle Operator will be alert, careful, and competent in terms of driving ability and habits.

(1) Vehicle Operators are prohibited from using personal cell phones or entertainment devices while operating in revenue service.

(2) Vehicle Operators are prohibited from using tobacco products inside any RTC vehicle, in proximity to any RTC vehicle or RTC building, near fuel tanks or pumps, or in any restricted areas.

(c) Vehicle Operator Courtesy. -- Each Vehicle Operator will be courteous to all passengers and be expected to deal with difficult passenger situations in a caring and professional manner. Vehicle Operators are required to enforce Specialized Services rider guidelines.

(d) Vehicle Operator Appearance. -- Each Vehicle Operator will wear a regulation uniform and be neat and clean in appearance at all times while in Revenue Service.

(e) Driving Records. -- The Contractor shall not employ any person as a vehicle operator whose driving record is not acceptable as defined in this Subsection or who has been convicted of a felony involving a crime of violence or committed in the use of a commercial vehicle, or a committed serious traffic violation (as defined in the Commercial Driver's License standards, requirements, and penalties). An unacceptable driving record is defined as a record that includes more than three (3) moving violations and/or chargeable accidents within the previous two (2) year period at time of hire.

(f) Vehicle Operator History. -- Prior to employing any person as a vehicle operator, the Contractor shall obtain from each applicant detailed information concerning such applicant's employment experience, driving record, professional driving experience, motor

vehicle violations and accidents, criminal history, personal and character reference, and complaints filed against such persons in the course of any employment as a professional driver, whether by any bus service provider or otherwise. The Contractor shall investigate and verify the accuracy of the information obtained from all job applicants.

(g) Background Checks. -- To comply with subsections (e) and (f), the Contractor shall perform a background check of each applicant prior to hiring the applicant as required to become a vehicle operator. The background check shall include, at a minimum, a Motor Vehicle Record (MVR) report and a report from a third party organization experienced at searching for any record of criminal convictions. The Contractor is required to conduct a re-check every three (3) years for continuing employees.

(h) Drug and Alcohol Testing. -- Vehicle Operators shall be subject to testing in accordance with the regulatory requirements referenced in Section 15(h) of this Contract.

(i) Training. -- All Vehicle Operators are required to complete the Contractor's Training Program and be fully trained in defensive driving and vehicle handling in accordance with an approved defensive driving program. The Contractor shall also maintain ongoing training for Vehicle Operators.

(1) Training programs must contain, at a minimum, the following components:

- (A) Nevada Commercial Driver's License, Class C or above, driving and testing preparation.
- (B) ADA Sensitivity
- (C) Blood Born Pathogen procedures
- (D) Local geography familiarization
- (E) Map reading and interpretation
- (F) Customer courtesy and problem resolution
- (G) Safety, defensive driving and accident procedures
- (H) Transit security and incident command system procedures
- (I) RTC history and ADA Paratransit Eligibility Determination (1 hour)

(2) With regard to ADA Sensitivity, RTC requires Vehicle Operator training

through community partnerships to better prepare Vehicle Operators to work with persons who experience a disability. This training should emphasize situations relating to persons experiencing cognitive or psychiatric impairments.

(3) With regard to the training element referred to in subsection (i)(1)(B), RTC will provide a qualified staff person to conduct the RTC ADA Paratransit and Eligibility Determination process section of the training, which will include information relating to RTC's expectations on customer relations, including sensitivity to working with passengers with disabilities. RTC will participate in one (1) refresher training meeting annually for veteran drivers to cover relevant matters pertaining to RTC policies and procedures and customer relations.

(4) Prior to implementation, the RTC Project Manager must approve the initial training program and any subsequent changes to the training format that was initially submitted in the proposal and approved by RTC and approval shall not be unreasonably withheld.

(j) CAT Specialized Services Training. -- Vehicle Operators will be trained in, and be cognizant of, all operational procedures relating to Specialized Services, including but not limited to, a thorough knowledge of the CATCOM system and the service area and street network. The Contractor is responsible for updating on a regular basis the knowledge of its Vehicle Operators regarding new or extended streets, new developments or complexes, and points of interest.

(k) Notices. -- Vehicle Operators will, pursuant to requests by RTC Project Manager, hand out notices to passengers or otherwise render assistance in RTC's monitoring and supervising operations.

(l) Fares. -- Vehicle Operators will honor special passes, collect tickets, issue fare

non-payment forms as determined by RTC.

(m) Timepieces. - Vehicle Operators will have available at all times during operation of any Revenue Vehicle in connection with these services a timepiece having an accuracy of +/- one (1) minute per month and the accuracy of the timepiece will be verified based on Standard Naval Observatory time each day by the Contractor's on-duty supervisor(s).

(n) Backup Operators. - The Contractor shall have adequate numbers of fully qualified Vehicle Operators available as backup operators during all operating hours to ensure consistent and reliable service.

(o) Accident Reporting. - Vehicle Operators must immediately report any traffic accidents, passenger accidents, or other non-routine event to the Contractor's dispatcher and follow both RTC and Contractor procedures for proper handling of accident reporting and passenger assistance.

(p) Required Documentation. - Vehicle Operators must have in their possession at all times while on duty, valid Nevada CDLs, U.S. Department of Transportation Medical Cards, and CAT Specialized Services employee identification cards.

(q) CATSTAR Deployment. - In any contract year, the Contractor shall not conduct more than two (2) deployments of CATSTAR Vehicle Operators unless RTC provides prior written authorization for additional deployment(s).

SECTION 17. VEHICLE DISPATCHERS & RADIO DISPATCHERS

(a) In General. -- The Contractor shall employ personnel in sufficient numbers and with an adequate mix of skills to dispatch vehicles and operate the RTC CATCOM communication system and Specialized Services scheduling and dispatch software.

Dispatchers shall work closely with RTC Reservation Center personnel to accommodate same day trip modifications and shall provide prompt and accurate responses to trip inquiries of each day's scheduled passengers.

(b) Training. -- All radio dispatch personnel are required to complete the Contractor's Training Program and shall also maintain ongoing training requirements for dispatchers. Training programs shall contain, at a minimum, the following components:

- (1) CATCOM radio communications and Specialized Services scheduling and dispatch software.
- (2) Local geography familiarization.
- (3) RTC rider and operations policies.
- (4) DOT and RTC emergency action plan implementation strategies.
- (5) Customer courtesy and problem resolution.
- (6) Accident/incident procedures.
- (7) Transit security and incident command system procedures.

(c) Passenger Inquiry Training. -- All Dispatchers shall be required to receive proper training in passenger inquiries. The Contractor shall receive RTC's approval prior to initiating passenger inquiry training.

(d) Drug and Alcohol Testing. -- All Dispatchers shall be subject to testing in accordance with the regulatory requirements referenced in Section 15(l) of the Contract.

SECTION 18. ROAD SUPERVISORS

(a) In General. -- The Contractor shall designate specific personnel as "Road Supervisors" and shall establish the responsibilities and accountability of those employees. The Contractor shall require Road Supervisors to be available on duty during all shifts. Road Supervisors shall monitor revenue operations and shall, in limited circumstances, be available to transport passengers.

- (1) Road Supervisors shall be deployed in the field during all service hours of

operation, have use of Contractor-provided non-revenue vehicles, and be able to respond quickly during all hours of revenue service to Vehicle Operator requests for assistance, emergency conditions, or to transport passengers, if necessary, due to vehicle service interruptions. The Contractor-provided non-revenue vehicles used by Road Supervisors must be wheelchair accessible.

(2) The Road Supervisors shall be responsible, at minimum, for:

- (A) Ensuring timely pull-out of Revenue Vehicles.
- (B) Ensuring adherence to schedule pick-up and drop off times.
- (C) Assisting with passengers' concerns and comments.
- (D) Responding to accidents and incidents.
- (E) Assisting Vehicle Operators with new and/or modified schedules.
- (F) Managing responses to Revenue Vehicle and equipment failures by dispatching additional vehicles or equipment, as necessary, and arranging for a mechanical response to the failure.
- (G) Maintaining communications with the base facility, the Vehicle Operators of CAT Specialized Service Revenue Vehicles, and with other on-duty Road Supervisors.

(b) Licensure. – The Contractor shall require all Road Supervisors to maintain a valid Nevada CDL, Class C or above, and require that all Road Supervisors be prepared to drive Revenue Vehicles as may be warranted.

(c) Drug and Alcohol Testing. – All Road Supervisors shall be subject to testing in accordance with the regulatory requirements referenced in Section 15(h) of this Contract.

(d) Training. – In addition to the components identified in Section 16(i) of this Contract, the Employee Training Program for Road Supervisors shall include the following components:

- (1) Maintaining Schedules
- (2) Incident and Accident Management
- (3) Operational Communications
- (4) Management Training and Decision making
- (5) Vehicle and Equipment Familiarization
- (6) Transit Security and Incident Command Procedures

(e) **Pull-Out.** -- The Contractor shall require Road Supervisors to be in the yard during peak hour, pull-out periods to coordinate the timely and orderly assignment and departure of vehicles.

SECTION 19. VEHICLE MECHANICS

(a) **In General.** -- The Contractor shall employ personnel in sufficient numbers and with an adequate mix of skills to maintain and service Revenue Vehicles on-site. The mechanical workforce must include personnel capable of repairing and maintaining all systems of the CAT Specialized Services vehicle fleet including lifts, air conditioners, heating units, engines and transmissions. The mechanics assigned to this Contract must meet the requirements for vehicle maintenance as follows:

(1) **Knowledge of:**

- (A) Diesel and Gasoline Engines;
- (B) Drivetrains;
- (C) Hydraulic, Air and Electromagnetic Braking Systems (Brake Retarders);
- (D) Suspension/Steering;
- (E) Electrical/Electronic Systems;
- (F) Heating, Ventilation, and Air Conditioning;
- (G) Wheelchair Lifts;
- (H) Alternative Fuel Systems;
- (I) Preventive Maintenance Inspections.

(2) **Ability to:**

- (A) Complete reliable and safe preventive maintenance inspections;
- (B) Independently diagnose and repair defects on systems as necessary;
- (C) Use automotive test equipment and specialized tools effectively;
- (D) Obtain precision measurements as required;
- (E) Diagnose and perform repairs on systems related to automotive, light-duty trucks, paratransit vehicles;
- (F) Diagnose, repair, and maintain vehicle powertrains, including but not limited to engines, transmissions, driveshaft, differentials, grade retarders and related sub components;
- (G) Diagnose, repair, and maintain vehicle brake systems, suspension/steering, electrical/electronic systems, and related sub components;

- (H) Diagnose, repair, and maintain electrical systems. Must be able to read and understand electrical schematics;
- (I) Diagnose, repair, and maintain air conditioning/heating/ventilation systems and certified to perform repairs and handle refrigerant incidental to repairs;
- (J) Adjust, repair, or replace damaged body parts and window glass;
- (K) After on-the-job training, diagnose, repair, and maintain wheelchair lifts, and alternatively-fueled engines; and
- (L) Read and understand parts and repair manuals, and electrical/vacuum schematics; complete the necessary paperwork associated with the job.

(b) **Skills and Availability.** -- The Contractor will ensure that the skills, capability, and availability of maintenance personnel are adequately matched to the type of maintenance and repairs needed for the CAT Specialized Services at the time they are needed.

(1) Maintenance activities will be carried out at times that do not interfere with scheduling of Revenue Vehicles to meet peak period service demands.

(2) Competent, experienced vehicle mechanics shall be available during all hours of CAT Specialized Services to respond to any in-service failures or Revenue Vehicle or equipment problems that arise in the yard during the pre-trip vehicle inspections.

(c) **Training.** - Training for all maintenance personnel must contain, at a minimum, the following components:

(1) All Maintenance Personnel

- (A) Security and emergency preparedness training.
- (B) Hazmat and storm water training.
- (C) OSHA and DOT compliance, health and safety training.
- (D) Hazardous waste operations and emergency response training.
- (E) Lockout/tagout training.
- (F) Forklift or loading equipment training (as required).
- (G) Maintenance safety training.
- (H) Transit Security and Incident Command Procedures

(2) Maintenance Management and Mechanic Personnel

- (A) Vendor provided training.
- (B) Brake Inspection Certification training.
- (C) Electromagnetic braking systems (brake retarder) training.

- (D) Wheelchair lifts manufacturers training.
- (E) Alternative fuel system training.
- (F) Air Conditioning and refrigerant training.
- (G) Material handling and storage requirements training.

In addition to above, Contractor will provide incentive to encourage and reward mechanics and maintenance management personnel who possess ASE Certification per Contractor's published ASE bonus Program, included as Appendix V and provided under separate cover. The Contractor will cooperate with RTC to provide space for and schedule all vehicle mechanics for new vehicle service training, as needed with the receipt of either expansion or replacement vehicles.

(d) Fueling and Cleaning. -- The Contractor shall also have on duty a sufficient quantity of maintenance personnel to fuel and clean the required number of Revenue Vehicles for pull-out as required in Section 22.

(1) Maintenance personnel are required to have knowledge of vehicle fueling procedures and vehicle cleaning/detailing programs as required by Contract

(2) Maintenance personnel are required to have the ability to:

- (A) Accurately inspect vehicle fluid levels and add fluids as needed.
- (B) Operate vehicles to facilitate a weekly safety brake inspection procedure.
- (C) Maintain up-to-date, accurate records of vehicle fueling and vehicle cleanliness requirements.

(e) Licensure. -- The Contractor shall require all Vehicle Mechanics to maintain a valid Nevada CDL, Class C or above.

(f) Drug and Alcohol Testing. -- All Vehicle Mechanics shall be subject to testing in accordance with the regulatory requirements referenced in Section 15(h) of this Contract.

SECTION 20. USE OF EQUIPMENT

(a) Use of RTC-Provided Property. – The Contractor shall use RTC-provided Revenue Vehicles and the Facilities only for services contracted for by RTC.

(b) Use of Contractor-Provided Property. – Contractor-provided Revenue Vehicles may be used in conjunction with non-RTC contracted services provided that the use of the vehicle does not impede the quality of service supplied to RTC and does not negatively impact the maintenance of the Revenue Vehicles.

(1) The Contractor-provided Revenue Vehicles must clearly be identifiable to passengers as being in service for the CAT Specialized Services designated service, but that identification may not be visible if in use for non-RTC contracted service.

(2) The Contractor presentation, application and location for the service logo must receive written approval from RTC before being affixed to any vehicles used in CAT Specialized Services revenue service.

(c) New Facility. – RTC is in the process of planning for a new Bus Maintenance Facility located on Sunset Road to replace the facilities used on Tompkins Avenue.

(1) The Contractor will have space available at the Tompkins Bus Maintenance Facility for up to 40 vehicles and will have use of the CNG fueling pumps. There is no RTC-provided office space for the Contractor at the Tompkins facility and, consequently, the Contractor shall have no facility maintenance responsibility for the Tompkins facility unless the Contractor chooses to add temporary office facilities within its designated space at its expense.

(2) When the Sunset Bus Maintenance Facility is operational, the Contractor will have Administrative, Vehicle Maintenance and Vehicle parking space for sixty (60) vehicles (See Appendix G). The Tompkins facility will no longer be used once the equipment at the Tompkins facility has been moved to the Sunset Bus Maintenance Facility. The Contractor

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shall be responsible for costs associated with moving any Contractor-owned equipment, furniture or supplies from the Tompkins facility. The Contractor shall relocate the vehicles used to contract services from the Tompkins facility to the Sunset Bus Maintenance Facility without additional charge to RTC.

SECTION 21. VEHICLE FUELING

(a) **In General.** -- RTC expects its Contractor to manage the fueling of vehicles in the most efficient and cost-effective manner possible. RTC will provide fuel for all Revenue Vehicles in accordance with this Section.

(b) **Designated Sites.** -- Revenue Vehicles used for the services described in this Contract, where RTC provides the fuel, will be fueled by the Contractor at the designated fueling sites (Refer to Appendix J). RTC will not reimburse the Contractor for fuel provided from unauthorized fueling sites.

(c) **Fueling.** -- RTC has CNG and diesel fuel contracts for its fueling sites at the IBMF, Sunset Bus Maintenance Facility, and at the Tompkins facility that provide the least-cost fuel available. RTC also owns public fueling sites for CNG fuel with a different contract for fuel purchased. (The Sunset Henderson public fueling site is included in this later group of fueling sites. Refer to Appendix J) RTC will reimburse the Contractor for fuel provided from the Sunset Henderson public fueling site only to the extent that the fuel from Sunset Henderson public fueling site does not exceed five (5) percent of the total fuel paid for by RTC.

SECTION 22. VEHICLE MAINTENANCE

(a) **In General.** -- The Contractor shall maintain all vehicles in accordance with all local, State, and Federal requirements for safety and in accordance with all manufacturer's

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recommendations and warranties. The Contractor shall have responsibility to establish and maintain a comprehensive program to perform maintenance on all Revenue Vehicles to be used for contracted services described in this Contract. All maintenance and repairs of vehicles shall be in accordance with RTC specified standards, whether performed by the Contractor or authorized sub-contractors.

(1) Revenue Vehicles will not be operated with defects that make them unsafe to operate. The Contractor will make necessary repairs, adjustments, or additions prior to placing any Revenue Vehicle in service.

- (A) The Contractor is required to use quality materials when doing any repairs to the vehicles.
- (B) Contractor shall ensure that all mechanical parts and materials meet or exceed O.E.M. specifications. The Contractor shall supply all fluids, additives, oil, lubricants, refrigerants and software (nuts, bolts, springs, bulbs, etc.) as well as replacement of fire extinguisher, first aid kits, wheelchair tie-down straps, lap belts, hydraulic pump handles, and lift covers and these items are vehicle-related costs.
- (C) The lubricants used shall meet or exceed the standards recommended by the vehicle manufacturer.

(2) The Contractor shall maintain vehicles and schedule maintenance activities to assure that the maximum number of vehicles is available for Revenue Service during peak hours. The Contractor will not remove vehicles from Revenue Service during peak periods except to conduct emergency repairs, and will minimize the amount of time needed to conduct preventive maintenance. It is not the intent of this requirement to preclude necessary maintenance during normal hours. This requirement is intended only to ensure that the maximum number of vehicles shall be available for service during the service day.

(b) Specifications, Standards and Cost-Inclusivity. -- All maintenance and repair of vehicles will be completed, including the routine replacement of components, within the Contract price, and to the manufacturer's specifications and standards, at a minimum.

(1) All maintenance will meet the standard specified in the Contractor's Maintenance Program.

(2) Contractor's responsibility includes, but is not limited to:

- (A) Body and glass damage due to accident;
- (B) Any damage due to vandalism including body and glass damage;
- (C) Excessive wear and tear on vehicle (due to Contractor error/negligence);
- (D) Rim and Tire damage from misuse, abuse, damaged or worn due to poor alignment shall be the responsibility of the Contractor;
- (E) Any damage due to improper, lack of or delayed preventive maintenance;
- (F) Lost articles and replacements such as fire extinguisher, wheelchair securement straps, lap belts, hydraulic pump handles, and lift covers. These shall be part of the vehicle's operating costs and shall be supplied by Contractor;
- (G) Interior damage;
- (H) Any damage due to Operator or Contractor negligence;
- (I) Wheelchair lift damage due to negligence;
- (J) Fluids, additives, oil, lubricants, refrigerants and software (nuts, bolts, springs, bulbs, etc.);
- (K) Vehicle transition expenses.

(c) Pre-Trip Inspection. -- Each Vehicle Operator, prior to beginning revenue service, shall inspect his or her assigned vehicle daily before pulling out of the yard in accordance with State requirements and Contractor procedures. If there are any defects, the Vehicle Operator must enter the defect on a Contractor provided Defect Report notice and report the defect to Contractor Operations staff for determination of usability of the vehicle. If there are no defects, the Vehicle Operator must sign and date the notice prior to leaving the bus yard. Defect Report notices are to remain with the vehicle during that day and shall be replaced on a daily basis. The pre-trip inspection procedure must be approved by the RTC Project Manager.

(1) The following items, at a minimum, must be found to be adequate in amount, in operable condition, and otherwise functioning correctly:

- (A) Turn signals, emergency flashers, and any other electrically illuminated signs
- (B) Headlights, on both high and low beams
- (C) Brake lights
- (D) Inside lights
- (E) Windshield wipers
- (F) Door operation
- (G) Horn
- (H) Brakes, foot and hand
- (I) Oil level and pressure
- (J) Battery charging by generator or alternator
- (K) Steering
- (L) Communications equipment, including Mobile Data Terminal
- (M) Heater(s), all
- (N) Air conditioning system
- (O) Safety equipment
- (P) Amount of all fuel and other fluid levels
- (Q) Wheelchair lifts or ramps
- (R) Wheelchair securement straps and tie-downs
- (S) Cleanliness, interior and exterior
- (T) Security walk-through

(2) Any defects identified by the Vehicle Operator, either during the pre-trip or during revenue service, and/or the inspector will be noted on a Defect Report notice. The Contractor shall take appropriate action to correct defective items noted in a Defect Report notice prior to re turning the vehicle to revenue service.

(d) Weekly Inspection. -- Each Revenue Vehicle will receive a regular weekly inspection to ensure its proper operating condition. In addition to the items of the pre-trip inspection, the weekly inspection will include: (1) Engine operation, and (2) Transmission function.

(e) Record of Inspection. -- A written record (preferably in electronic format) of all inspections will be kept by the Contractor. A summary report will be furnished to the RTC

Project Manager monthly, with respect to the RTC-owned Revenue Vehicles, with other scheduled operations reports.

(f) Preventive Maintenance. -- Preventive maintenance on RTC vehicles must be performed in accordance with vehicle manufacturer's recommended Preventive Maintenance Inspection (PMI) intervals. The Contractor shall develop a Preventive Maintenance plan and maintain records which detail the work performed for each vehicle inspection. These records must be available for review by RTC's Maintenance Administrator.

(1) A Preventive Maintenance Inspection (PMI) shall be performed on each RTC-owned vehicle at 3,000 mile intervals. The 3,000 mile interval shall not be exceeded. It is recommended that the Contractor establish a window of 500 miles prior to the 3,000 mile limit to ensure the interval is not exceeded (not less than 2,500 or more than 3,000 miles between PMI's). The minimum work performed for each inspection is to be reported to RTC on documents developed by Contractor and approved by the RTC Maintenance Administrator.

(2) An RTC vehicle shall not be placed in service if it has traveled more than 3,000 miles since the last PMI. If a vehicle has not met preventive maintenance standards, it shall be removed from service and be subject to liquidated damages as outlined in Section 9.

(3) RTC will periodically inspect vehicles and generate the RTC Inspection Report to identify items that require action by the Contractor. After RTC submits the Inspection Reports to the Contractor, the Contractor shall address all noted open items to RTC's satisfaction within fifteen (15) days or at the next PMI, whichever comes first, unless repair item(s) is safety related, in which case the vehicle shall not be permitted to re-enter service until completed. The Contractor shall return the completed Inspection Report to the RTC Maintenance Administrator or his or her designee upon completion. RTC will consider

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the PMI and the Inspection Report to be incomplete if items identified on the discrepancy sheets have not been addressed to RTC's satisfaction within the prescribed period.

(g) Warranty Work. -- The Contractor shall be responsible for the conduct of all warranty work on RTC vehicles assigned to the Contractor and the administration of all warranty paperwork with manufacturer. The Contractor shall obtain manufacturer authorization to perform warranty maintenance or shall transport vehicles at the Contractor's cost to an authorized warranty service provider.

(h) Components. -- All components of each Revenue Vehicle's body, appurtenances, and frame will be sound and undamaged while the vehicle is in revenue service.

(i) RTC Inspections. -- The RTC's Maintenance Administrator or his or her designee may conduct announced and unannounced inspections of the vehicles at any time either at the Contractor's location or while the vehicle is in service. The Contractor shall maintain RTC vehicles at all times in such a way as to protect RTC's investment. This requires prompt response to ensure that repairs are done at the point where they shall require the least expenditure.

(1) Examples of prompt response are:

- (A) Repairing an engine miss promptly to avoid a dropped valve or severely scored cylinder wall;
- (B) Routine oil sampling of engines to avoid catastrophic failures;
- (C) Identifying and responding to trends which affect vehicle reliability; and
- (D) Repairing body damage or graffiti, which affects vehicle appearance.

(2) In addition to the Contractor's maintenance efforts, RTC shall periodically conduct oil sampling/analysis as a quality assurance measure.

(j) Vehicle Management Software. -- The Contractor shall utilize the RTC-provided Ron Turly Associates vehicle management software, or other approved program to

record the labor, parts and materials required each time preventive maintenance and repairs are performed on an RTC vehicle. This information shall be used by the Contractor to maintain and prepare required maintenance reports for submission to RTC and shall be retained in the permanent vehicle file for each assigned vehicle.

(k) Maintenance Personnel Capabilities. -- All repair work will be performed by maintenance personnel who have demonstrated experience and documented training in the work to be done. Maintenance personnel will have the necessary equipment and tools to perform any authorized work.

(l) Accident Repair Vendors. -- It shall be the responsibility of the Contractor to secure a reputable accident damage repair vendor or vendors.

(m) Off-Property Repairs. -- The Contractor shall be responsible for the movement of vehicles within Southern Nevada. If repairs, maintenance or warranties are to be performed at locations other than the Contractor's premises, the Contractor shall provide transportation to and from the repair location.

(1) The Contractor shall perform quality control inspections on vehicles returning from off property repairs ensuring vehicles are safe to return into service.

(2) The Contractor shall also provide transportation of replacement parts and equipment from selected vendors.

(3) As new vehicles are added to the fleet and retired vehicles are removed, it is the Contractor's responsibility to provide Vehicle Operators or a drive-a-way service to relocate vehicles as needed.

(n) Uniformed Vehicle Usage. -- The Contractor will utilize all vehicle types in the fleet provided by RTC on an equal and consistent basis, and will maintain all vehicle types as uniformly as possible.

(o) Tires. -- RTC shall supply tires for RTC-owned vehicles. Contractor shall comply with RTC's tire supplier's tire control procedures, tire service report and vehicle tire inventory.

(1) Abused, damaged or alignment-worn tires shall be charged to the Contractor.

(2) It shall be the responsibility of the Contractor to ensure that all wheels are properly maintained. Damaged rims shall be the responsibility of the Contractor.

(3) The Contractor shall also be responsible for maintaining the appearance of wheels. Both steel and aluminum wheels shall be sent out for polishing on a regular basis.

(p) Spare Ratio. -- For purposes of scheduling Revenue Vehicles, RTC and the Contractor will maintain a spare ratio of 15% of the total fleet of Revenue Vehicles required at peak utilization as calculated under FTA guidelines.

(q) Shop Equipment and Tools. -- The Contractor is required to provide adequate and appropriate shop equipment and special tools as necessary to perform the necessary maintenance tasks required to meet RTC's standards and requirements as described herein. (Examples of such tools include, but are not limited to, opacity meters, electronic testing equipment and torque wrenches). The Contractor is required to calibrate and maintain tools to equipment manufacturer's specifications.

(r) Research and Demonstration Projects. -- The Contractor shall, at the instruction of the RTC Project Manager, participate in ongoing research or demonstration projects for the purpose of field testing various components, systems, or vehicles.

(s) Red Tagged Vehicles. -- If, in the opinion of RTC, a vehicle does not meet RTC safety standards as outlined in this Contract, the vehicle may be "red tagged." A vehicle that has been "red tagged" shall not go into service and/or shall be immediately removed from service.

(1) A vehicle that has been disallowed to pull-out from bus yard during a pull-out inspection conducted by RTC shall be put on hold for any of the following conditions (the list is representative, but not all inclusive).

- (A) Safety equipment missing (per Vehicle Code requirements);
- (B) Wheelchair lift inoperative;
- (C) Wheelchair lift brake interlock inoperative;
- (D) Wheelchair lift restraint missing or inoperative;
- (E) Tires: Flat, worn, embedded objects or bald;
- (F) Passenger door interlock inoperative;
- (G) Headlights out;
- (H) Taillights out;
- (I) Turn signals out or inoperative;
- (J) Horn not working;
- (K) Windshield wipers not working;
- (L) Engine smoking excessively;
- (M) Brake lining too thin;
- (N) Fluid leaks;
- (O) Coolant leaks;
- (P) Air conditioning, heating, and ventilation systems inoperative;
- (Q) Exhaust system leaking or damaged;
- (R) Steering with excessive play;
- (S) Loose or missing lug nuts;
- (T) Vehicles with body damage in excess of \$500.00 damage may be red-tagged by RTC; and
- (U) Any noncompliance with Federal Motor Safety Standards and other governing agency safety, vehicle operation regulations.

(2) A "red tagged" vehicle may not be released for service until such time as the problems associated with it have been rectified by the Contractor and verified by RTC.

(t) Road Failures. -- In the event of a vehicle failure while in revenue service, the Contractor shall require the Vehicle Operator to contact Radio Dispatch immediately with details of the vehicle failure. Upon notice of the vehicle failure from the Vehicle Operator, the Contractor shall deploy a vehicle immediately to replace the failed vehicle to ensure the continuation of service. Contractor's Dispatch staff shall document the Service Interruption Log each time the Contractor responds to a road failure whether or not a vehicle has to be exchanged or replaced due to a malfunction or a mechanical problem. The Contractor shall

either make the affected Revenue Vehicle fit for passenger service or provide a replacement vehicle within thirty (30) minutes of the Vehicle Operator's notice to Radio Dispatch of the vehicle failure.

(u) Accident Reporting. -- In the event of a traffic accident, a passenger accident, an emergency or other non-routine event involving a Revenue Vehicle in which vehicle damage, property damage or personal injury (including death) results, the Contractor shall notify the RTC Project Manager within one hour of receipt of such information. The Contractor must follow up with specific details from the accident or incident investigation within three (3) hours from the time RTC was originally notified. The Contractor shall prepare all reports required by the Contract. The Contractor shall comply with all applicable laws and regulations in the case of any accident.

(v) Fuel Management Equipment. -- The Contractor shall utilize and maintain all fuel management equipment (ORPAC FuelOmat) hardware included, but not limited to the fueling facilities and on board vehicle equipment. This includes, but is not limited to, the proper calibration of all vehicle identification units (VIU's) and troubleshooting, resetting, and required repairing of any malfunction, repair and/or replacement of any necessary parts.

SECTION 23. VEHICLE CLEANING AND APPEARANCE STANDARDS AND REQUIREMENTS

(a) In General. -- The Contractor shall maintain the cleanliness of all Revenue Vehicles in accordance with established performance standards. The Contractor shall steam clean the engine and the under carriage of each Revenue Vehicle once every six (6) months.

(b) Interior Cleaning. -- The Contractor shall ensure that vehicle interiors are swept or vacuumed daily to remove all dirt and debris and that mopping is carried out as necessary, but no less often than twice weekly. Under no condition will RTC accept a cleaning

plan that would permit Revenue Vehicle interiors to be cleaned with water and a hose.

(c) Exterior Cleaning. -- The Contractor shall ensure that vehicle exteriors are washed and scrubbed every other day, provided, however, that vehicles shall be washed and scrubbed as soon as practicable during or following every rain day in order to maintain RTC's standards for vehicle appearance.

(d) Insect Extermination. -- The Contractor shall ensure that all Revenue Vehicles undergo insect extermination as necessary to eliminate the presence of insects. The extermination process shall be applied while vehicles are out of service. The Contractor shall not place any vehicle in revenue service while any noxious fumes or detectable odors remain in the vehicle.

SECTION 24. FACILITY MAINTENANCE AND OPERATIONS STANDARDS AND REQUIREMENTS

(a) In General. -- The Contractor shall be responsible for maintaining the IBMF in accordance with all local, State and Federal requirements for safety. The Contractor shall ensure that sufficient qualified personnel, supplies, parts, and equipment are available at all times to ensure timely maintenance of all RTC provided Facilities and equipment. The Sunset Maintenance Facilities, when operational, will be maintained by RTC. Notwithstanding the previous sentence, RTC may determine, in consultation with the Contractor, that maintenance of the Sunset Maintenance Facilities shall be transferred to the Contractor. Prior to any such transfer, RTC and the Contractor shall negotiate specific line items to determine the appropriate cost adjustment for such Contractor provided maintenance. For purpose of this Section, the term "Facilities" only refers to the Facilities for which the Contractor has maintenance responsibilities.

(b) Potential Re-evaluation. -- Notwithstanding the preceding paragraph, RTC

may in the future, chose to re-evaluate its Facility Maintenance Plan to include taking over at the IBMF a portion or all of the identified maintenance tasks, either directly or by third-party contracting. In the event that RTC determines to assume responsibility for the IBMF, RTC will provide the Contractor advance notice of this intent, and negotiate adjustments to the service hour rate to reduce the rate for costs associated with Facility Maintenance at the IBMF.

(c) Facilities Maintenance Plan. -- The Contractor shall develop a Facilities Maintenance Plan (FMP) that clearly identifies how it intends to accomplish facilities and auxiliary equipment maintenance. The plan shall include a Preventive Maintenance Program/Plan (PMP) to, meet or exceed the standards listed in the Regional Transportation Commission IBMF Paratransit Preventive Maintenance Task Lists dated May 10, 2006, which is included as Appendix H to this Contract. The Contractor's PMP will clearly identify the daily, weekly, monthly and yearly preventive maintenance tasks, inspections, and schedules.

(1) The FMP shall include the proposed reporting forms, schedules and procedures for all maintenance activities. The Contractor must receive the approval of the RTC Facilities Manager or his or her designee prior to the implementation of the FMP, and RTC will approve a FMP, which may reflect modifications to the plan submitted by the Contractor, prior to the commencement of service on July 1, 2007.

(2) In compliance with the Contractor's FMP, the Contractor shall maintain a written and/or electronic record, in a format approved by RTC, of all maintenance and repairs to the Facilities. In addition, the Contractor shall immediately notify the RTC Project Manager or his or her designee in writing of any necessary major repairs to the Facilities, or associated equipment or systems, that the Contractor intends to undertake, and of any potential environmental or structural concerns with the Facilities, or associated equipment or systems.

(3) RTC requires that the Contractor provide, within its PMP, a notification process by which the Contractor identifies how it will notify RTC of (A) any deficiencies in the Facilities or (B) any elements of the PMP that are not being accomplished in the time scheduled; and/or (C) the explanation for failing to meet PMP timeframes. If there is a delay to any scheduled preventive maintenance task, RTC requires a written and verbal (e-mail and phone) notification to the RTC Project Manager or his or her designated representative within a maximum of 72 hours of any scheduled PMP. In the case of an emergency, immediate notification to the RTC Project Manager or his or her designee is required. In all cases the Contractor will ensure that contact is made with the appropriate RTC representative.

(d) Standards. -- In compliance with RTC standards and the Contractor's FMP, the Contractor shall maintain the Facilities in a clean and orderly condition and shall operate the Facilities in a safe and efficient manner. The Contractor shall be responsible for all preventive and routine maintenance of the Facilities and associated equipment and systems. Such maintenance will be conducted in accordance with industry standards and with applicable builders' or manufacturers' manuals, standards, specifications and instructions for proper maintenance, repair and operation. Maintenance and repair of the Facilities and associated equipment and systems will be performed at the Contractor's expense, provided however, that major structural modifications or major repairs to the Facilities, and/or replacement of major systems or major equipment will be the responsibility of RTC, unless the need for such modification, repair or replacement was due to inaction, the negligent act or omission of the Contractor. RTC will assume responsibility for all costs associated with maintenance and repair of the Emergency Generator. The Contractor shall use the Facilities only for contracted Specialized Services work.

(e) Environmental Obligations. --

(1) During the term of this Contract, the Contractor will be responsible for the proper handling, use, storage, and disposal of all waste oil and hazardous materials produced at the Facilities, and for all other environmental requirements specified in Section 56 of this Contract. The Contractor will develop an environmental program to properly manage all RTC Facilities. As part of the environmental program, the Contractor will also develop a plan for the containment and clean up of spilled fuel, oil, and any hazardous materials consistent with the obligations of Section 56, and will be responsible for carrying out all such containment and clean up activities. Such program and plan will be submitted to RTC for review and approval.

(2) RTC will provide Facilities for use by the Contractor in a condition that complies, at the time the Contractor assumes occupancy, with all Federal, State and local environmental laws and regulations. The Contractor will return the Facilities to RTC at the conclusion of this Contract in a condition that complies with all Federal, State and local laws and regulations, and will take and be financially responsible for all remedial actions necessary to remove any hazardous materials from the Facilities generated by Contractor, its employees, or subcontractors, including any actions identified in the audit conducted under paragraph (3) below.

(3) An environmental audit will be conducted by RTC (or a consultant of RTC) at the conclusion of this Contract to assess the environmental condition of the Facilities, and to assist in determining the Contractor's compliance with the requirements of this Section and Section 56 of this Contract. RTC may also, in its discretion, periodically conduct environmental audits during the term of this Contract. In this Section, the term "hazardous materials" includes flammable, explosive, or radioactive materials, chemicals, hazardous

wastes, toxic wastes or materials, or similar substances, and any petroleum products or derivatives deemed hazardous by Federal, State, or local law.

(f) Permits. -- The Contractor will be responsible for obtaining and maintaining a Class I Waste Water Discharge Permit for the Facilities, which permit will be renewed annually. RTC has obtained a storm water pollution prevention permit for the North Las Vegas Facility from the Nevada Division of Environmental Protection, and the Contractor will be responsible for the annual renewal of such permits.

(g) Repair Standards. -- All maintenance of and repair work to the Facilities shall be performed by personnel of the Contractor (or any RTC-approved subcontractor) who have demonstrated experience and documented training in the work to be done. The Contractor shall ensure that Facility Maintenance personnel have the necessary equipment and tools to perform all work efforts.

(h) Telephone and Utilities. -- The Contractor shall be responsible for the monthly telephone bills, monthly telephone rental equipment costs, and utilities (i.e., gas, water and electric), including the electricity costs of compression of gas at the Facilities.

(i) Manuals, Instruction and Repairs. -- RTC shall provide the Contractor with written manuals and instruction in the proper use, operation, care and maintenance of the systems and equipment at the Facilities. The Contractor shall comply with such manuals and instruction and shall properly use, operate, and maintain the systems and equipment. RTC shall provide the Contractor with all available information regarding any applicable warranties for such systems, equipment, and Facilities. The Contractor shall notify the RTC Project Manager or his or her designee of any necessary repairs, failures or problems with systems, equipment, or Facilities covered by applicable warranties. RTC shall be responsible for all direct dealings with manufacturers and other entities concerning any necessary repairs

or replacement of equipment, systems, and Facilities during the coverage period of applicable warranties. The Contractor is responsible for returning all RTC provided warranty and instruction manuals.

(j) Emergency Notification. -- In the event any work operations that are Contractor's responsibility result in an accident, safety hazard, or problem of an emergency nature, Contractor staff shall notify the RTC Project Manager or his or her designee by telephone within one hour. It shall be Contractor's responsibility to initiate immediate corrective action and inform the RTC Project Manager of the final disposition of the particular problem.

(k) Unauthorized Use. -- No Contractor personnel shall take or make unauthorized use of any of the RTC properties, buildings, equipment or materials. The removal of any property of RTC or unauthorized use of the RTC properties, buildings, equipment or materials shall be considered as theft by RTC and RTC shall have the right to, without prior written notice to the Contractor, pursue any remedies at law or inequity. The RTC shall retain the right to withhold from payment any expenses incurred as a result of the Contractor's removal of any of the RTC property that is considered theft by RTC.

(l) Additional Training. -- Technical training of facility maintenance personnel, beyond Contractor employee orientation, is required and should include appropriate certification training, vendor provided training, and maintenance safety training. The Contractor shall provide training for facility maintenance personnel for all new or replacement items over the course of the Contract.

SECTION 25. OPERATING PERFORMANCE STANDARDS

(a) Operation of Vehicles. -- The Contractor shall operate Revenue Vehicles in

accordance with all applicable local, State, and Federal laws and regulations with regard to safety, comfort, and convenience of passengers and the general public.

(b) Service Characteristics. -- The Contractor shall provide service in accordance with Appendix C, Service Characteristics and according to any adjusted schedule established by the RTC Project Manager. The Contractor shall implement schedule changes as directed by the RTC Project Manager in order to adjust schedules to meet varying ridership demands.

(c) CATCOM System. --

(1) CATCOM Workstations. -- RTC will provide the Contractor, over the course of the Contract as needs are identified, six (6) fully functional CATCOM workstation systems to be used in the operations center by Contractor Dispatch and operations staff. There are three (3) CATCOM workstations in operation as of the execution of this Contract.

- (A) A fully functional workstation system will include all hardware, peripherals, and software comparable with the current configuration, or upgraded configuration if such upgrades occur prior to the start of the Contract.
- (B) If during the course of the Contract, the Contractor determines it needs more than the six (6) CATCOM workstations, the Contractor shall be required to provide written justification to the RTC Project Manager for the additional workstation(s).
 - (i) If RTC approves the additional workstation(s) and determines a sufficient business need exists, RTC will purchase the additional workstation(s) and software. RTC will install and maintain the additional workstation(s).
 - (ii) If RTC approves the additional workstation(s), but determines that there is not a sufficient business need for the workstation(s), the additional workstation(s) will be the financial responsibility of the Contractor. RTC will install and maintain the additional workstation(s).

At the close of the Contract, the additional CATCOM workstation(s) purchased by the Contractor will remain the property of the Contractor.

- (C) For network and system integrity and security, RTC may not permit any third party user to own or control devices that attach to the RTC network.

(2) In the event that the CATCOM system malfunctions, the Contractor shall ensure that a paper manifest is generated and properly completed by the Vehicle Operator(s). The Contractor shall ensure the validity of all system data through final trip edit/audit in accordance with Section 2 of this Contract as further described in Appendix P.

(d) Data. - RTC provides Revenue Vehicles with sophisticated radio and diagnostic capabilities which are dependent on the Vehicle Operators' proper activation of the system by correctly logging into the CATCOM Advanced Mobile Data Terminal (AMDT) on vehicles at the start of each shift. The Contractor shall ensure that all data required by the RTC is correctly entered into the RTC scheduling and dispatch system. All required information is critical to system reporting and its level of accuracy is of great importance in whatever form the data is entered whether by the Vehicle Operator marking the manifest and having it manually entered at the end of the service day or as a result of the Vehicle Operator notifying dispatch via the communication system and the Radio Dispatcher logging it into the system; or the Vehicle Operator using the AMDT. Failure to log into the system hinders the flow of information necessary to manage the service day, the receiving of information for Federal reporting requirements, and assisting in quick response to safety and security incidents. Accordingly, such failures may result in assessments of liquidated damages pursuant to Section 9(c)(9)(A) of this Contract.

(1) In order to properly gauge the level of accuracy of the Contractor manifest information, RTC and the Contractor will cooperatively develop, within 120 days of the Notice to Proceed, an accuracy formula by which to measure compliance with this provision. RTC will determine an acceptable level of accuracy, once the formula is applied.

in consultation with the Contractor.

(2) The Contractor shall report the accuracy level on the monthly operation's report.

(3) Performance below the acceptable level of accuracy will require immediate attention by the Contractor to correct the information and to insure that the process of data collection is improved to within the acceptable level of accuracy. An unacceptable level of accuracy, as determined in accordance with paragraph (1) above, could result in a partial withholding of payment of Contractor invoice.

SECTION 26. GENERAL REPORTING REQUIREMENTS

(a) In General. -- The Contractor shall submit all monthly reports on operational performance, maintenance performance, and safety to the RTC Project Manager or his or her specified designee with the monthly invoice(s), as specified in Section 5(c) of this Contract. The Operational report should stipulate by Revenue Vehicle and Revenue Vehicle fleet, vehicle hours, revenue miles, and accidents per 100,000 miles of service. The list below includes the minimum data requirements of the monthly report of the Contractor. The Contractor shall submit required information in a format approved by RTC.

(b) Daily Reports. -- Data Needs for Daily Reports

(1) Operational Data

(A) Service Interruption Log

(B) Route Closure Report

(2) Fleet Maintenance Data

(A) Out of Service Report

(c) Monthly Reports. -- Data Needs for Monthly Report

(1) Operating Data

- (A) Trips completed/missed; ratio
- (B) Analysis of factors impacting on-time performance ratio if below 94%
- (C) Summary of drug and alcohol testing results for all safety-sensitive employees
- (D) Year-to-Date Vehicle Operator turnover rate
- (E) Certified driver list
- (F) Monthly list of all Contractor employees authorized to access the RTC network. This report is due separately on the 20th of each month to reflect access requests for the following month.

(2) Fleet Maintenance Data

- (A) Updated fleet listing
- (B) Overview of maintenance activities
 - (i) Preventive Maintenance Inspection and major repair work
 - (ii) Vehicle down time
 - (iii) Warranty activity on Revenue Vehicles, equipment, and other property owned by RTC.
 - (iv) Fleet availability
 - (v) (Non-fuel) Fluids consumption RTC-owned Revenue Vehicles
 - (vi) Fuel consumption for all Revenue Vehicles (by vehicle and fleet)
 - (vii) Air conditioning maintenance (by vehicle and fleet)
 - (viii) Lift maintenance
 - (ix) Tire usage on RTC-provided tires
 - (x) Miles traveled by all revenue vehicles
 - (xi) Number of accidents (preventable and non-preventable)
 - (xii) Average mileage between PM's
 - (xiii) Number of PM's
 - (xiv) Number of road calls (maintenance and non-maintenance)
 - (xv) Mileage between maintenance road calls

(3) Facility Maintenance Data

- (A) The Contractor shall provide all reports necessary to document the following facility maintenance activities:
 - (i) Equipment failures and any down time associated with the failure
 - (ii) All facility maintenance activity and repairs
 - (iii) All Facility Maintenance warranty activity
- (B) By request and within 72 hours of notice by the RTC Project Manager or his or her designee, the Contractor shall produce reports that reflect a designated reporting period for system and equipment maintenance history on any specified equipment or system. The report should be electronically generated by RTC approved software or as otherwise requested by RTC.

- (d) Monthly Meetings. -- The Contractor should be aware that meetings to discuss

the Contractor's operation and maintenance of the RTC vehicles and facilities will be held at least once a month with the Contractor and RTC key staff designated by the RTC Project Manager. The Contractor will insure that the appropriate Contractor's personnel will be present at these meetings. In addition, a representative of the Contractor shall be present at the regular public meetings of the RTC, and at meetings of other specified RTC advisory committees.

(e) EEO and Drug and Alcohol Testing Forms. -- The Contractor is responsible for completing EEO and Drug and Alcohol Testing forms required for submission to FTA.

SECTION 27. SYSTEM SECURITY AND EMERGENCY PREPAREDNESS

(a) In General. -- The Contractor is responsible for the safety and security of the passengers and capital resources assigned to it by RTC. RTC requires the Contractor to work cooperatively with RTC staff, other Contractors, local, State and Federal representatives in developing, implementing and following security procedures.

(b) Requirements. -- The Contractor will adhere to all local, State and Federal requirements for transit system safety, security, and emergency preparedness.

(c) Personnel Assignment and Certification. -- The Contractor, as part of its personnel staffing plan, will assign its Manager of Driver Development and Safety (DDS Manager) the responsibilities associated with safety, system security and emergency preparedness. In addition, the Contractor will assign one additional qualified person on its staff to act as a back-up to the DDS Manager in the event of the DDS Manager's absence or inability to perform such task.

(1) The individual(s) serving in the safety, system security and emergency preparedness position shall have sufficient training and experience to assist RTC in

coordination of emergency preparedness activities, write and amend the Contractor's supplement to the RTC's System Security and Emergency Preparedness plan, and generate required reports.

- (A) For purposes of this Section, "sufficient training" requires the successful completion of qualification as a Certified Safety Specialist (CSS) based on the U.S. Department of Transportation (USDOT) Transportation Safety Institute (TSI) program.
- (B) The Contractor may assign at the start of the Contract a DDS Manager who has not yet begun the certification process; however, the individual must complete the certification process within twelve (12) months of the Notice to Proceed. Contractor will assure the designated back-up to the DDS Manager receives the Certified Security Specialist Training within eighteen (18) month of the Notice to Proceed.
- (C) Contractor agrees to the certification requirements for any employees who replace the DDS Manager and his/her back-up during the term of the Contract.

(2) The staff person dedicated to system security and emergency preparedness shall attend monthly security group meetings and special meetings with the RTC staff, on behalf of the Contractor, or meetings with the RTC at the request of staff.

(d) Receptionist(s). -- The Contractor shall provide a receptionist at each public entrance to the Contractor's facility capable of screening visitors and trained to respond to security and emergency situations.

(e) Emergency Preparedness. -- The Contractor shall participate in activities and exercises in support of the multi-jurisdictional efforts in Clark County to meet and prepare for local emergencies. The Contractor's dedicated system security and emergency preparedness staff person shall coordinate these events with the RTC's designated security staff person.

(f) Emergency Response. -- Upon verbal or written authorization from the RTC Project Manager, the Contractor shall respond to emergency situations with Contractor personnel and RTC-owned vehicles.

(1) The Contractor is responsible for the safety of its personnel and for any worker's compensation claims that might result from performance of emergency service.

(2) The Contractor will not be responsible for damage to RTC-owned vehicles that results directly from any incident outside of the control of the Contractor while in performance of emergency service.

(3) RTC and the Contractor shall negotiate any reimbursement costs associated with emergency responses under this subsection which are not compensated by the Contract Service Hour rate.

(g) Key or Badge Control. -- RTC will provide keys to the Facilities assigned to the Contractor and will provide security access control badge equipment to all Contractor employees.

(1) The Contractor is responsible for key and badge control and shall maintain a written key and badge control log.

(2) Expenses resulting from inadequate key or badge control that requires the RTC to re-key or replace access control items shall be the responsibility of the Contractor.

(h) Self Audit. -- The Contractor shall conduct a self-audit on safety, security and emergency preparedness on any annual basis and shall participate annually in an RTC audit, based upon the APTA Bus Safety Management Program checklist included at Appendix O to this Contract. The Contractor shall assist RTC during any local, State or Federal audits.

(i) Reporting. -- The Contractor shall meet requirements for the regular reporting of information relating to system safety and security. The following is a list of required reports and the frequency of the reports. RTC will notify the Contractor of its responsibility to provide information as other reports are required by local, State or Federal agencies.

(1) Monthly

- (A) Security and Emergency Incident Report
- (B) NTD Safety and Security Report
- (C) Safety meeting agenda and minutes, including corrective actions taken as a result of items identified through the safety committee.

(2) Quarterly

- (A) Safety and Security incident trend analysis
- (B) Training sessions completed related to transit security
Classify training as either Contractor required or a Federal/State requirement

(3) Annually

- (A) Results of annual self audit
- (B) OSHA Hazard analysis
- (C) Year end trending analysis covering a three year period. (The Contractor shall report year one, and then add one year at a time through year three. After year three of the Contract, the Contractor shall report the three most current years.)

(j) RTC Notice. – In the event that RTC, in its sole discretion, determines that the Contractor has failed to meet requirements of this Section, RTC will provide written notice to the Contractor of such failure. The Contractor shall respond to RTC's written notice within five (5) calendar days with an action plan for immediate correction of the noted deficiency(ies). Failure of the Contractor to respond within five (5) calendar days to RTC's written notice may result in the assessment of liquidated damages pursuant to Section 9(c)(10).

SECTION 28. PASSENGER INQUIRIES

(a) In General. – The Contractor will receive calls from the general public regarding the day of service ride status for all contract services except Senior Transportation service.

(b) Staffing Levels. – The Contractor shall maintain, at a minimum, a staffing level in accordance with its Staffing and Personnel Plan.

- (1) The Contractor shall maintain a quality standard of an acceptance rate of at

minimum 95% of calls and an average hold time not to exceed one minute.

(2) Maintaining the quality standards outlined above is the responsibility of the Contractor. If the Contractor's staffing proposal does not achieve the standards, the Contractor is required to staff up, at no additional cost to RTC, until the staffing level successfully maintains the quality standard.

(c) Call Redirection. - If callers mistakenly contact the Contractor's passenger inquiry line with the intention of registering a complaint, the Contractor's staff shall, in a professional and courteous manner, refer the caller to the RTC Customer Service Call Center. For the infrequent occasion where referral may reach a point of contention with the caller, the requirements set out in Section 29(c) will apply.

SECTION 29. CUSTOMER COMPLAINT REPORTING

(a) In General. - The RTC Customer Service unit will notify the Contractor of customer complaints that RTC receives directly. The Contractor shall address the complaints as outlined in the RTC Passenger Complaint Process set out as Appendix Q to this Contract. The Contractor shall develop an internal process to properly research, record and respond to RTC in a timely manner regarding customer complaints. RTC Customer Service staff will remain responsible for notifying customers of the resolution of complaints. The Contractor will not respond directly to the customer, unless provided expressed direction from the RTC Project Manager or his or her designee.

(b) Contractor Responsiveness. - The Contractor shall investigate, document and submit to RTC any justification regarding customer complaints. RTC will review the Contractor's response and make the final decision concerning the resolution of the complaint. The Contractor shall be responsible for making changes to procedures, retraining of operators,

and reassignment of personnel necessary to correct any actions identified through the Passenger Complaint Process.

(c) Contractor-received Complaints. -- Should Contractor personnel receive complaints from customers, the Contractor shall forward to the RTC Customer Service unit all passenger complaints within 24 hours of the Contractor's receipt of the complaint on a form approved by the RTC Project Manager. The Contractor's logging of complaints shall include a written description of the complaint and any resolution of the complaint by the Contractor.

(d) Complaint Validity. -- For purposes of this Section and the liquidated damage provision of Section 9(c)(7), RTC will consider a customer complaint valid unless RTC determines that the Contractor has sufficiently documented that the complaint is not valid.

(e) Administrative Hearing. -- In cases in which the customer complaint is unable to be resolved, RTC may conduct an Administrative Hearing in which the customer and Contractor may present their positions.

SECTION 30. NO-SHOW PROCEDURES

(a) In General. -- For the Contractor, a No-Show occurs when a Revenue Vehicle arrives on time for a pick-up and the passenger decides not to board the vehicle (No-Show at the Door), is not present at the address listed on the manifest (No-Show), or has called in to cancel the ride within a timeframe specified in the RTC's No-Show Policy (Appendix R). A Vehicle Operator who arrives within the 30 minute on-time window is required to wait for five minutes before departing and recording the trip as a No-Show.

(b) Enforcement. -- RTC enforces a No-Show Suspension Policy that requires accurate recording of No-Show occurrences. The Contractor is responsible for making every reasonable effort to verify that the ride is a valid No-Show before proceeding with the next trip

identification, and for accurately documenting the trip as a No-Show. The Vehicle Operator shall fill out and leave a No-Show Door Hanger and retrieve a copy to be reconciled with the Contractor with the manifest. The Contractor shall forward the copy to RTC.

(c) Standard Practice. – It has been standard practice to return to pick up a passenger who has been listed as a No-Show only if the passenger is at a location other than the home address except for individuals who have entered a disruptive customer status of no-pay, no-ride. The No-Show remains on the record, and the passenger is sequenced into the schedule based on the first available efficient ride.

(d) Disputes. – Disputes regarding No-Shows are processed based on the RTC Passenger Complaint Process (Appendix Q).

SECTION 31. INSURANCE

(a) Required Insurance. – Contractor shall carry and pay premiums for insurance of the types and with the limits of liability not less than stated below. Such insurance shall be maintained in effect during the term of the Contract and shall cover all events occurring during the term of the Contract (commonly known as tail coverage).

(1) Workers' Compensation Insurance covering all of Contractor's employees engaged in work under the Contract as required under the Workers' Compensation Act of the State of Nevada and/or any applicable law or laws of any other state or states. Employer's Liability Insurance with limits of liability of not less than \$100,000 per accident, \$100,000 per employee for disease, and \$500,000 policy total for disease.

(2) General Liability Insurance covering RTC's premises used for storage and maintenance of vehicles used in performance of the Contract with limits of liability of not less than \$500,000 each occurrence combined single limit and \$1,000,000 general policy

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aggregate if applicable. Such liability insurance shall also include coverage for Personal Injury Liability, Contractual Liability and Liability for Independent Contractor.

(3) Automobile Liability Insurance covering all Revenue and Support Vehicles used in connection with the work performed under the Contract with limits of not less than \$5,000,000 each occurrence combined single limit for bodily injury and property damage.

(4) Automobile Physical Damage Insurance on all RTC-owned Revenue Vehicles covering collision and fire, theft, combined additional coverage with limits of liability not less than the actual cash value of the vehicle at time of loss or the cost to repair or replace with like kind and quality with deduction for depreciation. Deductibles shall not exceed \$10,000 for each loss and RTC shall be named Loss Payee under the policy. Contractor shall be responsible for payment of any loss under the deductible amount.

(b) RTC Coverage. - RTC will be named as an additional insured for all commercial coverage for all RTC-owned or leased assets and for all liability coverage for claims arising under this Contract.

(c) Notice. - All such policies required above shall be endorsed to provide a sixty (60) day written Notice of Cancellation, renewal, or material change to the RTC Project Manager or designee.

(d) Umbrella Policy. - The limits of liability as required under this Section may be provided by a single policy of insurance or a combination of policies including the so-called umbrella liability policy. Self-insurance or the use of deductibles or self-insured retentions shall not be considered as complying with these requirements unless approved in writing by the RTC Project Manager.

(e) Minimum Insurance Requirements. - The types of insurance and limits of liability stated in this Section are the minimum acceptable to RTC and shall in no way be

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construed as a limitation of Contractor's liabilities and obligations arising out of the performance of the Contract.

(f) Subcontractors. -- The Contractor shall require any and all subcontractors performing work under the Contract to carry insurance to the types and with limits of liability as the Contractor shall deem appropriate and adequate. The Contractor shall obtain and make available for inspection by the RTC Project Manager upon request Certificates of Insurance evidencing insurance coverages carried by such subcontractors.

(g) RTC Approval. -- All insurance required to be maintained or provided by the Contractor and subcontractors shall be with companies and through policies approved by the RTC Project Manager. The RTC Project Manager has the right to inspect in person, prior to commencement of the work, all of the Contractor's insurance policies in regard to required insurance coverages. All such Insurance Companies shall carry a Best's rating of A+ (or equivalent) and be licensed by the State of Nevada.

(h) Copies of Policies. -- Proof that such insurance coverage exists as required above shall be furnished to the RTC in the form of certificates of insurance within fifteen (15) calendar days following notice of award. Renewal or replacement policies shall be furnished fifteen (15) days prior to the expiration date or termination date of any policy furnished in compliance with the requirements of the Contract.

(i) RTC Purchase of Insurance. -- If at any time during the Contract term the Contractor fails to provide proof of insurance required above, RTC reserves the right, but not the obligation, to purchase other insurance to protect the RTC's interests and to withhold from Contractor's payments the cost of such insurance.

SECTION 32. **AUDIT AND INSPECTION OF RECORDS**

(a) In General. -- The Contractor agrees that RTC, the Comptroller General of the United States, and the U.S. Secretary of Transportation, or any of their duly authorized representatives, shall, for the purpose of audit and examination, be permitted to inspect all work, materials, payrolls, and other data and records, and to audit the books, records, and accounts relating to the performance of the Contract.

(1) Inspection of records will be conducted during regular business hours and on site at the local administrative offices of the Contractor. If the Contractor retains records in a location other than its local administrative offices, the Contractor will have five (5) calendar days in which to return the records to its local administrative office.

(2) The Contractor is further required to maintain all required records on site in a location(s) in the Las Vegas metropolitan area for at least three (3) years after RTC has made final payment and all other pending matters are closed, provided, however, that the Contractor may destroy paper manifests by shredding once RTC informs the Contractor that the manifests in question are no longer needed due to the completion of an FTA Triennial Review.

(b) RTC Audits. -- The RTC Project Manager may, at any time, conduct an audit of any and/or all records kept by the Contractor that are directly or indirectly related to the services provided under the Contract. Appropriate financial adjustments shall be made by the RTC Project Manager based upon any inconsistency, irregularity, discrepancy or unsubstantiated billing revealed as a result of such audit and for the amount of any liquidated damages assessed under Section 9 of this Contract. Any overpayment uncovered in such an audit may be charged against the Contractor's future invoices.

SECTION 33. OWNERSHIP OF DOCUMENTS

The Contractor agrees that any and all information, in oral or written form, whether obtained from RTC, its agents or assigns, or other sources, or generated by the Contractor pursuant to the Contract, shall not be used for any purpose other than fulfilling the requirements of the Contract. Any documents, reports, or data generated by the Contractor in connection with the performance of the Contract shall become the sole property of RTC, subject to any rights asserted by the FTA. The Contractor may retain copies of such items for its files. The Contractor shall not release any documents, reports, or data from this project without prior written consent of RTC.

SECTION 34. CONTINUITY OF SERVICES

(a) In General. – The Contractor recognizes that the services under the Contract are vital to RTC and must be continued without interruption and that, upon Contract termination, another entity, either RTC or another provider, may continue those services. The Contractor agrees to:

- (1) Furnish phase-in training; and
- (2) Exercise its best efforts and cooperate to effect an orderly and efficient transition to the subsequent provider.

(b) Transition Requirements. – The Contractor shall, upon the RTC Project Manager's written notice:

- (1) Furnish phase-in, phase-out services for up to 120 days after the Contract terminates;
- (2) Work with the RTC Project Manager and the subsequent Service Provider to

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develop a plan to transfer responsibilities for the RTC Facilities and vehicle operations. The plan shall specify a training program and a date for transferring responsibilities for each division of work described in the plan, and shall be subject to the RTC Project Manager's approval; and

(3) Provide sufficient experienced personnel during the phase-in, phase-out period to ensure that the services called for by the Contract are maintained at the required level of proficiency.

(c) Compensation. - The Contractor shall be reimbursed for all reasonable RTC approved phase-in, phase-out costs that are incurred and not compensated by the RTC in the Service Hour method of compensation, within the agreed period of time after Contract termination that directly result from phase-in, phase-out operations.

SECTION 35. PERFORMANCE REQUIREMENT

The Contractor shall, at all times during the term of the Contract, perform all work diligently, carefully, and in a professional manner; and shall furnish all labor, supervision, machinery, equipment, material and supplies necessary therefore. Notwithstanding the provision of drawings, technical specifications or other data by the RTC, the Contractor shall have the responsibility of supplying all items and details required to perform the services specified in this Contract. The Contractor shall conduct all work in the Contractor's own name and as an independent contractor (as provided in Section 40), and not in the name of, or as an agent for, RTC.

SECTION 36. HOLD HARMLESS

The Contractor agrees to protect, defend, indemnify and hold RTC, its officers,

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employees and agents, free and harmless from and against any and all losses, penalties, damages, settlements, costs, charges, professional fees or other expenses or liabilities of every kind and character arising out of or relating to any and all claims, liens, demands, obligations, actions, proceedings or causes of action of every kind and character (hereinafter collectively "claims") in connection with or arising directly or indirectly from the Contractor's failure to perform in accordance with the terms of this Contract, or a failure to perform in accordance with the terms of this Contract by any subcontractor of the Contractor. Without limiting the generality of the foregoing, any and all such claims, relating to personal injury, infringement of any patent, trademark, copyright (or application for any thereof) or of any other tangible or intangible personal or property right, other than for software provided by RTC, or actual or alleged violation of any other tangible or intangible personal or property right, or actual or alleged violation of any applicable statute, ordinance, administrative order, rule or regulation, except for violations caused by compliance with RTC's procedures or policy following a judicial or Federal administrative finding that such RTC procedure or policy violate applicable statute, ordinance, administrative order, rule, or regulation or decree of any court, shall be included in the indemnity hereunder. The Contractor further agrees to investigate, handle, respond to, provide defense for, and defend any such claims, at its sole expense and agrees to bear all other costs and expenses related thereto, whether or not it is alleged or determined that the Contractor was negligent, and without regard to whether such claim is groundless, false, or fraudulent.

SECTION 37. DISCLAIMER OF LIABILITY

RTC will not hold harmless or indemnify the Contractor for any liability whatsoever.

SECTION 38. DISPUTES

(a) **In General.** -- Any dispute between the Contractor and RTC relating to the implementation, interpretation, or administration of this Contract shall be resolved in accordance with this Section.

(b) **Informal Resolution.** -- The parties shall first attempt to resolve the dispute informally in meetings or communications between the Contractor and the RTC Project Manager. If the dispute remains unresolved fifteen (15) days after it first arises, the Contractor may request the RTC General Manager to issue a recommended decision on the matter in dispute. The RTC General Manager shall issue the recommended decision in writing and provide a copy to the Contractor.

(c) **Review by RTC Governing Body.** -- The recommended decision of the RTC General Manager shall become final unless, within fifteen (15) days of receipt of such recommended decision, the Contractor submits a written request for review to the RTC Governing Body. In connection with any such review, the Contractor and the RTC General Manager shall be afforded an opportunity to be heard and to offer evidence on the issues presented. If the dispute remains unresolved to the satisfaction of either party after review by the RTC Governing Body, either party may seek judicial resolution of the dispute in the Eighth Judicial District Court of Nevada or in a Federal District Court in Nevada.

(d) **Contractor Responsibility.** -- Pending final resolution of a dispute under this Section, the Contractor shall proceed diligently with performance in accordance with the Contract and the RTC General Manager's recommended decision.

SECTION 39. SUBCONTRACTING OF CONTRACT AND TRANSFER OF INTERESTS

(a) In General. -- This Contract or any portion thereof shall not be assigned, subcontracted nor the interests, rights, duties or responsibilities of the Contractor transferred unless RTC, in its sole discretion, grants prior written approval. The prohibitions of this provision extend to any merger, acquisition, or consolidation involving the Contractor which would cause its responsibilities under the Contract to be transferred to or be assumed by a new, different, or restructured entity. In any case in which the Contractor desires to subcontract, it shall provide RTC with all proposed subcontracting agreements and documents (including scope of work and terms of compensation). If permitted to subcontract, the Contractor shall be fully responsible for all work performed by the subcontractors.

(b) Effect of Subcontracting. -- The Contractor may not, by subcontract, modify its obligation to perform in full accordance with its Proposal and its BAFO, change its key personnel, alter its maintenance, training or safety programs, or otherwise modify the basis upon which the Contractor was selected and Contract award made. Any action of the Contractor in violation of the preceding sentence shall constitute a breach of the Contract and an act of default. Further, the entering into of a subcontract shall not, under any circumstances, relieve the Contractor of its liability and obligations under the Contract, and all transactions with RTC must be through the Contractor.

(c) Privity. -- Any approval of a subcontract shall not be construed as making RTC a party of such subcontract, giving the subcontractor privity of contract with RTC, or subjecting RTC to liability of any kind to any subcontractor.

(d) Incorporations. -- The Contractor shall incorporate in each subcontract provisions of Sections 42 through 57 of this Contract in full, with the same conditions being imposed upon subsequent subcontractors.

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SECTION 40. INDEPENDENT CONTRACTOR

Under the terms of the Contract, the Contractor is an independent contractor and has and retains full control and supervision of the services performed by and full control over the employment and direct compensation and discharge of all persons, other than RTC employees or representatives, assisting in the performance of its services. The Contractor agrees to be solely responsible for all matters relating to wages, hours of work, and working conditions and payment of employees (including the negotiation of labor agreements, if applicable), and for compliance with social security, all payroll taxes and withholdings, unemployment compensation, and all other requirements relating to such matters. The Contractor agrees to be responsible for its own acts and those of its subordinates, employees, and any and all subcontractors during the term of this Contract. The Contractor is required to comply fully with the workers' compensation laws of the State of Nevada as applied to the Contractor and its employees and is required to indemnify and hold RTC harmless for any failure to comply with such laws.

SECTION 41. LICENSING, PERMITS, AND TAXES

The Contractor shall be properly licensed for the services required as a result of the Contract. The cost for any required licenses or permits shall be the responsibility of the Contractor. The Contractor is liable for any and all taxes due as a result of performance of services under the Contract.

SECTION 42. CONFLICT OF INTEREST

(a) **Requirement.** — No member of the RTC Governing Body or employee, officer or agent of the RTC shall participate in the selection, or in the award or administration, of the

Contract if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when one of the following has a financial or other interest in any firm proposing on or selected for the award:

- (1) The Governing Body member or the employee, officer or agent;
- (2) Any member of the Governing Body member's, employee's officer's or agent's immediate family;
- (3) The Governing Body member's, employee's, officer's or agent's business partner;
or
- (4) an organization which employs, or is about to employ, any of the above.

(b) Prohibition on Gratuities. – Members of RTC's Governing Body and/or employees, officers, or agents shall neither solicit, demand, nor accept gratuities, favors, or anything of monetary value from contractors, potential contractors, subcontractors, or other parties to sub-agreements whereby the intent could reasonably be inferred as influencing the individual in the performance of his or her duties or as intended as a reward for any official act on his or her part.

SECTION 43. ORGANIZATIONAL CONFLICT OF INTEREST

(a) In General. – RTC seeks to eliminate and avoid actual or perceived conflicts of interest and unethical conduct by current or former RTC employees in transactions with RTC.

- (1) Consistent with this concept, no current or former RTC employee may Contract with, influence, advocate, advise, or consult with a third party about an RTC transaction, or assist with the preparation of Proposals submitted to RTC while employed by RTC or within one (1) year after leaving RTC's employment if he or she was substantially

involved in determining the work to be done or process to be followed while an RTC employee.

(2) All bidders, Proposers, vendors, or Contractors who anticipate contracting with RTC must identify in their proposal submission, such current or former RTC employees involved in preparation of bids or proposals or the anticipated performance of work or services if awarded the Contract. Failure to identify former RTC employees involved in this transaction may result in RTC denying or terminating this Contract.

(b) **Required Notice.** -- Prior to entering into this Contract, the Contractor is (was) required to inform RTC of any real or apparent organizational conflict of interest. Such organizational conflict of interest exists when the nature of the work to be performed under a contract may, without some restriction on future activities, result in an unfair competitive advantage to the Contractor, or may impact the Contractor's objectivity in performing the Contract work.

SECTION 44. INTERESTS OF MEMBERS OF, OR DELEGATES TO, CONGRESS

In accordance with 18 U.S.C. Section 431, no member of, or delegate to, the Congress of the United States shall be admitted to any share or part of the Contract or to any benefit arising therefrom.

SECTION 45. INSPECTION OF WORK

(a) **Right to Inspect.** -- All work (which term in this Section includes services performed, material furnished or utilized in the performance of services, and workmanship in the performance of services) shall be subject to inspection and test by RTC to the extent practicable at all times and places during the term of this Contract. All inspections by RTC shall be made in such a manner as to not unduly delay the work. RTC shall have the right to

enter the premises used by the Contractor for the purpose of inspecting and auditing all data and records that pertain to the Contractor's performance under the Contract. RTC shall also have the right to enter the premises used by the Contractor for the purpose of inspecting vehicles that are used to provide services under the Contract.

(b) Corrections and Adjustments. – If any work performed is not in conformity with the requirements of this Contract (excluding performance of service hours), RTC shall have the right to require the Contractor to perform the work again in conformity with such requirements at no increase in the total Contract amount. In the event the Contractor fails promptly to perform the work again or take necessary steps to ensure future performance of the work in conformity with the requirements of the Contract, the RTC shall have the right, either by contract or otherwise, to have the work performed in conformity with the Contract requirements and charge to the Contractor any costs to RTC that are directly related to the performance of such work, or terminate the Contract for default as provided in Section 61 of this Contract. When the work to be performed is of such a nature that the defect cannot be corrected by re-performing the work, RTC shall have the right to (1) require the Contractor to immediately take all necessary steps to ensure future performance of the work in conformity with the requirements of the Contract, and (2) reduce the Contract price to reflect the reduced value of the work performed.

SECTION 46. DEBARMENT AND SUSPENSION STATUS

The Contractor shall provide RTC with a certification addressing its debarment and suspension status and that of its principals. The Contractor shall inform RTC of any change in the suspension or debarment status of the Contractor or its principals during the term of the Contract within ten (10) days of any such change.

SECTION 47. ANTI-DISCRIMINATION CLAUSE

The Contractor shall not in any way, directly or indirectly, in the performance of the Contract, discriminate against any person because of age, race, color, disability, sex, national origin, or religious creed.

SECTION 48. EQUAL EMPLOYMENT OPPORTUNITY

With respect to the employees of the Contractor involved in the performance of the Contract whose regular place of employment is located in Clark County in the State of Nevada, the Contractor shall comply with the equal opportunity provisions of the Civil Rights Act of 1964, as amended, and, with respect to such employees, shall adopt an affirmative action plan that complies with Executive Orders Numbers 11375 and 11246 as amended as supplemented in the Department of Labor Regulations 41 C.F.R. Part 60 and of the rules, regulations, and relevant orders of the Secretary of Labor. In connection with the performance of the Contract, the Contractor shall not discriminate against any employee or applicant for employment because of race, religion, color, age, disability, sex or national origin. The Contractor shall take affirmative action to ensure that applicants are employed and treated during their employment without regard to their race, religion, color, age, disability, sex or national origin. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation and selection for training, including apprenticeship. The Contractor further agrees to insert a similar provision in all subcontracts.

SECTION 49. AMERICANS WITH DISABILITIES ACT

The Contractor shall comply with all provisions of the Americans with Disabilities Act

of 1990 (P.L. No. 101-336) and Section 504 of the Rehabilitation Act of 1973 (P.L. No. 93-112).

SECTION 50. ENERGY EFFICIENCY

The Contractor shall recognize the mandatory standards and policies relating to energy efficiency that are contained in the State Energy Conservation Plan issued in compliance with the Energy Policy and Conservation Act (42 U.S.C. §6321 et seq.).

SECTION 51. CONTRACT WORK HOURS AND SAFETY STANDARDS ACT

The Contractor shall comply with the provisions under the Contract Work Hours and Safety Standards Act (40 U.S.C. §327-330) as supplemented by Department of Labor regulations (29 C.F.R. Part 5).

SECTION 52. BUY AMERICA

The Contractor shall comply with the applicable Buy America requirements set forth in 49 U.S.C. §5323(j) and the applicable regulations in 49 C.F.R. Part 661, as amended. If the Contractor procures any capital items with Federal funds, it is the Contractor's responsibility to obtain the Buy America certification required under such regulations.

SECTION 53. DISADVANTAGED BUSINESS ENTERPRISE (DBE)

(a) **Federal Policy.** – It is the policy of RTC that DBEs as defined in 49 C.F.R. Part 26 shall have the maximum opportunity to participate in the performance of contracts financed in whole or in part with Federal funds under this Contract. Consequently, the DBE requirements of 49 C.F.R. Part 26 may apply to the Contract.

(b) Agreement. -- The Contractor agrees to ensure that DBEs as defined in 49 C.F.R. Part 26 have the maximum opportunity to participate in the performance of contracts and subcontracts financed in whole or in part with Federal funds provided under the Contract. In this regard, the Contractor shall take all necessary and reasonable steps in accordance with 49 C.F.R. Part 26 to ensure that DBEs have the maximum opportunity to compete for and perform contracts.

(c) Nondiscrimination. -- The Contractor shall not discriminate on the basis of race, color, national origin, physical or mental disability, or sex in the award and performance of contracts assisted by the U.S. Department of Transportation.

(d) Compliance. -- The Contract shall be performed in accordance with the RTC's Disadvantaged Business Enterprise Program adopted August 12, 1999, as amended through February 14, 2002.

SECTION 54. SECTION 13(c) OBLIGATIONS

(a) In General. -- Except as provided in subsection B of this Section, RTC shall be administratively and financially responsible for obligations under Section 13(c) of the Federal Transit Act (49 U.S.C. §5333(b)).

(b) Contractor Obligations. -- The Contractor shall have financial liability for any 13(c) claims or obligations that are created by acts or omissions of the Contractor that are not directed by RTC, and shall also be obligated to comply with any applicable preference in hiring obligations imposed under Section 13(c). In addition, the Contractor shall cooperate with RTC (including the provision of payroll records and other information) in the resolution or defense of any 13(c) claims or disputes for which RTC has responsibility.

(c) Prohibition. -- The Contractor shall not assist or encourage any employee to file

or otherwise pursue a 13(c) claim against RTC, or take any action which is contrary to the interests of RTC under 13(c) or its 13(c) arrangements or agreements, relating to the termination of services under the Contract, any future transition from the Contractor to another service provider, or any other action or event relating to the Contract. If the Contractor fails to comply with this obligation, the Contractor shall be financially liable for all costs incurred by RTC (including attorneys' fees) associated with any 13(c) claims or delays in the receipt of Federal grants.

(d) Future Transitions. -- In the event of a future transition to another service provider, the employees employed by the Contractor for the performance of work under this Contract shall not have any right to guaranteed jobs with that subsequent service provider, nor shall that service provider have any obligation to assume the existing terms and conditions of employment or to recognize the existing union.

SECTION 55. FTA TITLE VI SERVICE STANDARDS

The Contractor agrees to meet RTC's service standards developed in compliance with FTA Circular 4702.1 implementing Title VI of the Civil Rights Act of 1964. Title VI service standards include a minimum of five elements: (1) Vehicle Load; (2) Vehicle Assignment; (3) Vehicle Headway; (4) Distribution of Transit Amenities; and (5) Transit Access.

SECTION 56. ENVIRONMENTAL REQUIREMENTS

The Contractor agrees to comply with any Federal environmental and resource conservation requirements that are in effect during the term of the Contract. The Contractor shall report any violation of standards, orders or regulations issued under the Clean Air Act (42 U.S.C. §7401 *et seq.*) or the Federal Water Pollution Control Act (33 U.S.C. §1251 *et seq.*)

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resulting from any activity of the Contractor in connection with the performance of the Contract to FTA and to the appropriate U.S. EPA Regional Office. The Contractor shall be responsible for the disposal of hazardous materials, including, but not limited to, waste oil, grease, automatic transmission fluid, diesel fuel and detergents, in accordance with applicable Federal, State and local law and regulations.

SECTION 57. COMPLIANCE WITH LAWS AND PERMITS

The Contractor shall give all notices and comply with all existing and future Federal, State, and local laws, ordinances, rules, regulations, and orders of any public authority bearing on the performance of the Contract, including, but not limited to, the laws referred to in these provisions of the Contract and in the other contract documents. If the Contract documents are at variance therewith in any respect, any necessary changes shall be incorporated by appropriate modification. Upon request, the Contractor shall furnish to the RTC Project Manager certificates of compliance with all such laws, orders, and regulations.

SECTION 58. CANCELLATION OF CONTRACT

In any of the following cases, RTC shall have the right to cancel this Contract without expense to RTC: (1) the Contractor is guilty of misrepresentation; (2) this Contract was obtained by fraud, collusion, conspiracy, or other unlawful means; or (3) this Contract conflicts with any statutory or constitutional provision of the State of Nevada or the United States. This Section shall not be construed to limit RTC's right to terminate this Contract for convenience or default, as provided in Sections 59 and 61, respectively.

SECTION 59. TERMINATION FOR CONVENIENCE

(a) In General. -- The performance of work under this Contract may be terminated by RTC in accordance with this Section whenever the RTC Governing Body determines, upon recommendation of the RTC General Manager, that such termination is in the best interest of RTC. Any such termination shall be effected by delivery to the Contractor of a notice of termination specifying the extent to which performance of work under the Contract is terminated and the date upon which such termination becomes effective.

(b) Actions Following Notice. -- Upon receipt of a notice of termination, and except as otherwise directed by the RTC Project Manager, the Contractor shall: (1) stop work under the Contract on the date and to the extent specified in the notice of termination; (2) place no further orders or subcontracts for materials, services, or Facilities, except as may be necessary for completion of such portion of the work under the Contract as is not terminated; (3) terminate all orders and subcontracts to the extent that they relate to the performance of work terminated by the notice of termination; (4) assign to RTC in the manner, at the times, and to the extent directed by the RTC Project Manager, all of the right, title and interest of the Contractor under the orders and subcontracts so terminated; (5) settle all outstanding liabilities and all claims arising out of such termination of orders and subcontracts, with the approval or ratification of RTC, to the extent the RTC Project Manager may require, which approval or ratification shall be final for all the purposes of this Section ; (6) transfer title to RTC and deliver in the manner, at the times, and to the extent, if any, directed by the RTC Project Manager, supplies, equipment, and other material produced as a part of, or acquired in connection with the performance of, the work terminated, and any information and other property which, if the Contract had been completed, would have been required to be furnished to RTC; (7) complete any such part of the work as shall not have been terminated by the notice of termination; and (8) take such action as may be necessary, or as the RTC Project

Manager may direct, for the protection and preservation of the property related to the Contract which is in the possession of the Contractor and in which RTC has or may acquire an interest. Payments by RTC to the Contractor shall be made by the date of termination but not thereafter. Except as otherwise provided, settlement of claims by the Contractor under this Section shall be in accordance with the provisions set forth in 48 C.F.R. Part 49, as amended.

SECTION 60. TERMINATION BY MUTUAL AGREEMENT

This Contract may be terminated by mutual agreement of the parties. Such termination shall be effective in accordance with a written agreement by the parties. Any other act of termination shall be in accordance with the termination by convenience or default provisions contained in Sections 59 and 61, respectively.

SECTION 61. TERMINATION FOR DEFAULT

(a) In General. -- Subject to the provisions of subsection (c) of this Section, RTC may, by thirty (30)-day advance written notice of default to the Contractor, during which time the Contractor shall have the opportunity to cure the default in accordance with the provisions of subsection (c), terminate the Contract in any one of the following circumstances:

(1) If the Contractor fails to provide the services in the manner required by this Contract or in accordance with the performance standards articulated herein;

(2) If the Contractor fails to perform any of the provisions of this Contract in accordance with its terms; or

(3) If the Contractor fails to make progress in the prosecution of the work under this Contract so as to endanger such performance.

(b) Procurement by RTC. -- In the event that RTC terminates this Contract in

whole or in part as provided in subsection (a) of this Section, RTC may procure, upon such terms and in such manner as the RTC General Manager may deem appropriate, supplies or services similar to those so terminated. The Contractor shall be liable to RTC for costs associated with the termination of this Contract, the procurement of replacement services by RTC, any excess costs of such similar supplies or services, and any increase in the total Contract cost or the hourly rate as a result of the reprocurement of services from the date of termination to the expiration date of the original Contract. The Contractor shall continue the performance of this Contract to the extent not terminated under the provisions of this section. Any disputes arising under this Section that cannot be resolved by the Contractor and RTC are subject to resolution pursuant to Section 38.

(c) Opportunity to Cure. -- The Contractor will be given the opportunity to cure any such default within thirty (30) day advanced written notice period, or such other longer period as the RTC General Manager, or his designee, may authorize in writing, after receipt of notice from RTC specifying the occurrence of such default.

(d) Claims. -- Except as otherwise provided, settlement of claims by the Contractor under this section shall be in accordance with the provisions set forth in 48 C.F.R. Part 49, as amended.

SECTION 62. FORCE MAJEURE

The Contractor shall not be liable for any failure to perform if convincing evidence has been submitted to RTC that failure to perform this Contract was due to causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include acts of God, civil disturbances, fire, war, or floods, but do not include labor-related incidents, such as strikes or work stoppages.

SECTION 63. REPLACEMENT SERVICES

(a) **RTC Option.** – In the event that the Contractor is unable, due to a strike, work stoppage, or other event not caused by RTC and not covered by Section 62, to provide services in full compliance with the requirements for the Contract, the RTC may, in lieu of finding the Contractor in default, obtain the services of a replacement operator or provide the services with its own resources (collectively referred to as "replacement services"). RTC may utilize such replacement service as a substitute for all or any part of the Contractor's services, and may maintain such replacement services in effect until the Contractor is able to resume performance in full compliance with the Contract. Prior to implementing replacement services, RTC shall notify the Contractor in writing and provide the Contractor with three (3) days to cure its noncompliance.

(b) **Costs.** – If RTC utilizes replacement services under this Section, the Contractor shall be liable to RTC for the actual amount by which the cost of such services exceeds the amount that would have been payable under this Contract for comparable services, including any expenses (including internal administrative costs) incurred by RTC in soliciting and obtaining those services. In addition, the only compensation payable to the Contractor by RTC during any period in which replacement services are being provided shall be for any hours of service actually provided by the Contractor.

(c) **Default.** – Any actions taken by RTC pursuant to this section relating to the Contractor's failure to perform shall not preclude RTC from subsequently finding the Contractor in default for the same or any related failure to perform.

SECTION 64. LACK OF FUNDS CLAUSE

(a) In General. -- The entering into of the Contract by RTC is subject to its receipt of local and Federal funds adequate to carry out the provisions of the Contract in full.

(b) Cancellation or Reductions. -- RTC may cancel or reduce the amount of service to be rendered if the RTC Project Manager determines that such action is in RTC's best interests, or that there will be a lack of funding available for the service. In such event, RTC will notify the Contractor in writing thirty (30) days in advance of the date such cancellation or reduction is to be effective. In the event of a termination under this subsection, Contractor's claims shall be dealt with in accordance with Section 59.

SECTION 65. WAIVER OF TERMS AND CONDITIONS

The failure of RTC or the Contractor to enforce one or more of the terms or conditions of this Contract or to exercise any of its rights or privileges, or the waiver by RTC of any breach of such terms or conditions, shall not be construed as thereafter waiving any such terms, conditions, rights, or privileges, and the same shall continue and remain in force and effect as if no waiver had occurred.

SECTION 66. INTERPRETATION, JURISDICTION, AND VENUE

All contractual agreements shall be subject to, governed by, and construed and interpreted solely according to the laws of the State of Nevada. The Contractor hereby consents and submits to the jurisdiction of the appropriate courts of Nevada or of the United States having jurisdiction in Nevada for adjudication of any suit or cause of action arising under or in connection with the Contract documents, or the performance of such Contract, and agrees that any such suit or cause of action may be brought in any such court.

SECTION 67. SEVERABILITY

In the event any provision of this Contract is declared or determined to be unlawful, invalid, or unconstitutional, such declaration shall not affect, in any manner, the legality of the remaining provisions of the Contract and each provision of the Contract will be and is deemed to be separate and severable from each other provision.

SECTION 68. OFFICIAL RECEIPT

Communications shall be considered received at the time actually received by the addressee or designated agent. Communications to RTC should be addressed to RTC Project Manager, as follows:

Susan S. Joseph
RTC Project Manager
Regional Transportation Commission
600 S. Grand Central Parkway
Las Vegas, Nevada 89106-4512

Communications to the Contractor shall be addressed as follows:

Susan Spry
West Area Vice President
Laidlaw Transit Services, Inc.
15260 West Ventura Blvd., Suite 1050
Sherman Oaks, CA 91403

Notices or communications related to Sections 36, 38, 41, 54, 57 and 59-64 shall also be address to:

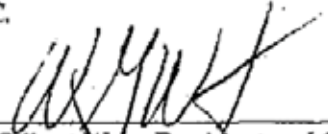
Linda Polling
Senior Purchasing Analyst
Regional Transportation Commission
600 S. Grand Central Parkway
Las Vegas, Nevada 89106-4512

Beverly Wyckoff
Vice-President and General Counsel
Laidlaw Transit Services, Inc.
55 Shuman Blvd., Suite 400
Naperville, IL 60053

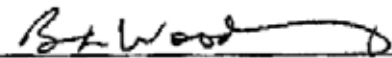
IN WITNESS WHEREOF, the parties have executed this Contract on the day and year

first above written.

LAIDLAW TRANSIT SERVICES,
INC.


W. Gilbert West, President and CEO

REGIONAL TRANSPORTATION
COMMISSION OF SOUTHERN NEVADA


Bruce L. Woodbury, Chairman

APPROVED AS TO FORM:


Zev Kuperman, General Counsel

ATTEST:


Toni Michener, Executive Assistant

SECOND AMENDMENT TO THE CONTRACT FOR SPECIALIZED SERVICES

This second Amendment to the Contract for Specialized Services is made and entered into on September 10, 2009 by and between the Regional Transportation Commission of Southern Nevada (RTC) and First Transit, Inc. (Contractor), a corporation authorized to do business in the State of Nevada.

RECITALS

WHEREAS, the RTC and the Contractor entered into a Contract for Operation and Maintenance of Specialized Services (Contract) on March 8, 2007, and entered into an amendment to the Contract December 11, 2008;

WHEREAS, the current economic circumstances facing the RTC, particularly the decline in sales tax revenues, have made it urgent for the RTC to find ways and means to reduce the costs of its specialized services system;

WHEREAS, to address this situation, the RTC and the Contractor have agreed to amend the Contract to make certain reductions in the base service hour rate billed by the Contractor and to approve exercising, through this Amendment, Option Period 1 (Two Years), as outlined in Sections 3 (b) and 4 (c) of the contract; and

WHEREAS, the Parties also desire to make certain technical and conforming changes to the Contract:

NOW, THEREFORE, in consideration of the above and mutual promises hereinafter set forth, the RTC and the Contractor have agreed as follows:

SECTION 1 TERM OF CONTRACT

(a) Option Period 1. – The RTC and the Contractor agree to exercise the first 2-year option period which shall commence July 1, 2010 and end on June 30, 2012. This options period shall represent Contract Year 4 (July 1, 2010- June 30, 2011) and Contract Year 5 (July 1, 2011- June 30, 2012).

(b) Invoices and Payments. – The RTC agrees to pay the Contractor for Option

Period 1 the price stated in Section 3 of this Amendment.

SECTION 2 REDUCTION IN MONTHLY BASE CONTRACT COST

(a) Revised Service Hour Rate. -- For Contract Year 3, beginning July 1, 2009, through six additional months of Contract Year 4 (December 31, 2010), the Contractor agrees that the amount of each monthly invoice submitted to the RTC under the Contract will be calculated on a revised base service hour rate equal to the service hour rate in effect in Contract Year 2. After the 18 month period, wherein the service hour rate has remained at the Contract Year 2 rate, the Contract Year 2 rate will be increased by 3% for the balance of Contract Year 4 (January 1, 2011 to June 30, 2011). The service hour rate in Contract Year 5 will revert to the original Contract rate for Contract Year 5 as stated in Section 4 (a) of the Contract.

(b) Suspension of Certain Requirements. -- In consideration for the base service hour reduction under Section 1(a) of the Amendment, the Contractor shall, for the period of such reduction, be relieved of certain program elements and requirements set forth in the Contract or in the Contractor's plans and programs, as follows:

- (1) **Administrative Staffing:** Remove the position of Recruiter and eliminate 1.5 full time equivalents Trip Editor Personnel by transferring responsibility for CATSTAR trip edit to the RTC.
- (2) **Sunset Maintenance Facility:** Eliminate the position of Terminal Manager and remove the costs associated with facility maintenance.
- (3) **Training Program:** Adjust the hours of Vehicle Operator training to 62 hours, as defined in Exhibit 1.
- (4) **Tool Allowance:** Reduce the amount of budgeted maintenance tool allowance by the sum of \$7,000.00 annually.
- (5) **Liquidated Damages:**
 - a. RTC will comply with Section 9 as set forth in the Contract, but agrees to only deduct assessments for liquidated damages from the Contractor's invoice after the assessment value for the Contract year has exceeded an amount of \$67,000.00 annually.

b. Section 9(c)(4)(B) of the Contract will reflect that Preventive Maintenance Inspections (PMI) are still required every 3,000 miles as per the stated Contractor's maintenance plan, but RTC will only assess vehicles where mileage exceeds 3,300 miles between PMI.

(c) Vehicle Replacement Adjustment -- If RTC is unable to meet its original vehicle replacement schedule as outlined in its Request for Proposal (RFP), a variable service hour rate adjustment will be applied to the service hour rate by vehicle series range. The adjusted service hour rate by vehicle series range will be:

<u>VEHICLE RANGE</u>	<u>YEAR 3</u>	<u>YEAR 4</u>	<u>YEAR 5</u>
1500-1592	\$53.71	\$53.72	No adjustment
1600-1614	\$53.64	\$53.66	No adjustment
1400-1450	No adjustment	\$53.70	No adjustment

(d) Reservation -- Nothing in this Section shall be construed as affecting the right of the RTC to include any of the suspended standards or requirements listed in subsection (b) into a future RFP for Specialized Services or into any future agreement with the Contractor or any other provider.

(e) Reversal of Cost Adjustments -- The Cost Adjustments outlined in subsection (b) will terminate in Year 5 of the Contract. Any early adjustment to the reduced base service hour rate defined in Section 2 (a) of the Amendment, due to improvements in the economic environment, shall be accompanied by the re-instatement, as appropriate, of the standards and requirements suspended under subsection (b).

SECTION 3 REVISED COST OF SERVICE

(a) Rate of Compensation -- The rate of compensation schedule in Section 4(a) of the Contract is amended to read as follows:

CONTRACT YEAR 3 -- July 1, 2009 to June 30, 2010

<u>ASSUMED ANNUAL SERVICE HOURS</u>	<u>COST PER SERVICE HOUR</u>
527,771 to 579,806	\$53.19

OPTION PERIOD 1 (TWO YEARS)

<u>ASSUMED ANNUAL SERVICE HOURS</u>	<u>COST PER SERVICE HOUR</u>
<u>CONTRACT YEAR 4 -</u>	<u>July 1, 2010 to December 31, 2010</u>
558,815 to 613, 995	\$53.19
	<u>January 1, 2011 to June 30, 2011</u>
	\$54.79
<u>CONTRACT YEAR 5 -</u>	<u>July 1, 2011 to June 30, 2012</u>
592,651 to 651,186	\$56.79

(b) In the event that RTC activates into the Specialized Services fleet vehicles returned by the City of Las Vegas City Ride program, RTC agrees to open discussions on the service hour rate adjustment outlined in Section 1 (c) of this Amendment.

SECTION 4 PROVISION OF TIRES

(a) RTC has determined that it is in the public interest to transfer the responsibility for provision of tires to the Contractor. Section 22 (o) of the Contract shall be replaced in its entirety with the following language:

(o) **Tires** - Contractor shall supply vehicle manufacturer specified (or approved equal) tires for RTC-owned vehicles. Contractor shall comply with its tire supplier's tire control procedures.

(1) Re-treads or re-manufactured tires are not permitted. The Contractor will only use new tires.

(2) Abused, damaged or alignment-worn tires shall be identified and immediately changed by the Contractor.

(3) It shall be the responsibility of the Contractor to ensure that all wheels are properly maintained. Damaged rims shall be the responsibility of the Contractor.

(4) The Contractor shall also be responsible for maintaining the appearance of wheels. Both steel and aluminum wheels shall be polished on a regular basis.

Paperless Fare

Paper passes are no longer issued to clients when they purchase a monthly pass. The RTC will make a notation in the client's file that a monthly pass was purchased, and all drivers will be notified that the client is eligible to ride for that paid month. If omissions occur, please pay the fare and then immediately contact Customer Service at 228-4800. Please note that the fare will be updated to the client file the day after the purchase is processed. No payment will be required for each ride scheduled during this month. Please remember that it will take at least one day for the clients file to be updated after processing the purchase. Please allow 5-7 days for all mail and internet sales, and one day for purchases made at one of the transit terminals or administrative building.

A Paratransit monthly pass and pre-pay card can be purchased on the Internet at:

rtcsonv.com

or by mailing a check or money order to:

RTC ADA Paratransit Services
600 S. Grand Central Pkwy., Ste. 350
Las Vegas, NV 89106

If you have any questions regarding fare sales, please call Customer Service at (702) 228-4800.

Sony, we cannot accept out-of-state checks or third-party checks. Checks must be pre-printed with the rider's name, phone number and I.D. number.

Fares must be paid at the time of boarding a vehicle.

Reservations

Reservations can be made seven days a week between the hours of 7 a.m. and 6 p.m., by calling Customer Service at (702) 228-4800 or (702) 676-1834 (TDD) for hearing impaired. Reservations may be made from one day to three days in advance of the day of travel. Please note - there are special reservation policies for travel, including travel within the supplemental service zone and for non-ADA eligible customers.

Please Have the Following Available:

- ▶ Your name
- ▶ The day and date of your trip
- ▶ The exact street address, building or facility name, including the apartment, building, or suite numbers, for both pick-up and drop-off locations, and if you have it, a phone number for your destination and gate code

- ▶ The type of mobility aide(s) you will be using*
- ▶ The number of people traveling - will you be taking a companion or Personal Care Attendant?
- ▶ The time you wish to be picked up, or in the case of a work, school or medical appointment, the time you need to be at your destination

* Passengers cannot travel using a mobility device unless it has been approved and your file is updated

Please note:

- ▶ Trips may originate from any location within the ADA Paratransit service area. Rides may be one-way, round trip or multiple rides.
- ▶ Once a ride has been scheduled, additional people cannot be added.
- ▶ No changes can be made to any trips on the day of your scheduled ride.

The RTC's Customer Service Representatives will do their best to accommodate the times you desire; however, alternate times may be offered. The RTC may negotiate the times of your trip by one hour. For example, if you would like to be picked up at 10 a.m. and that time is not available, we may offer you a trip as early as 9 a.m. or as late as 11 a.m.

The interval between pick-up times on the same day is recommended to be at least two hours. For example, if your scheduled pick-up time is 10 a.m., it is recommended that you do not schedule your next ride until 12 p.m. This will help to ensure you have arrived at your first destination with enough time to travel on your second or return ride.

Subscription Service

Subscription service is available for trips that are considered as being consistent and repetitive where continuation will extend over a period of at least 90 days. Once subscription service goes into effect, there is no need for additional reservation calls.

There are three categories of subscription requests, each with different criteria:

- 1 Weekly trips - will occur at least three (3) times over a seven day period
- 2 Weekday trips - will occur at least two (2) times, Monday through Friday
- 3 Weekend trips - will occur at least one (1) time on Saturday and/or Sunday

To be considered for subscription service, a person must demonstrate a pattern of no excessive cancellations or no-shows. Requests may be made by contacting a RTC Customer Service Representative.

The RTC offers subscription services as an optional component of service. Subscription services are allowed under the Americans with Disabilities Act (ADA) of 1990 but not mandated. Your request may be placed on a waiting list. When a space becomes available, the individual will be notified. Requests are maintained for four months, after which, you may re-apply.

Arrivals & Late Arrivals

Passengers should be ready to depart when the vehicle arrives. The drivers are instructed to wait no longer than five minutes after the scheduled time. If your vehicle has not arrived within the 25 minute late window, you may then elect to cancel/decline the ride with no cancellation points penalty. Please remember to call and cancel the late ride and/or any return rides you may have scheduled. Vehicles arriving within five minutes before or 25 minutes after the scheduled pick-up time are considered within the window for service. While the RTC strives to provide on-time service, many factors may result in a delayed pick-up. If your vehicle has not arrived within the window for service, please call the Inquiry Office, open 24 hours a day, seven days a week at (702) 228-4800 and press 3 at the voice prompt or (702) 676-1834 (TDD). Please refer to page 13 for the points policy.

Gated Communities

If a pick-up location is within a gated community, it is the customer's responsibility to arrange entry for the vehicle. When you schedule a trip, please confirm the gate code. Any changes should be reported to RTC ADA Paratransit Services at (702) 228-4800 or (702) 676-1834 (TDD). If a vehicle is unable to enter the pick-up area or the customer fails to meet the vehicle outside of the community, the customer's trip will be designated as a NO SHOW. Please note that some gated communities may have designated pick-up/drop-off location(s). Please check with customer service when you are scheduling a ride.

RTC Paratransit Same-Day-Service

A new pilot program offering same-day-service requests will become available to RTC Paratransit riders in January 2010. This pilot program will offer ADA certified riders an option for non-emergency, unplanned medical needs and is made possible through Federal "New Freedom" funds. Using the same-day-service request program, RTC Paratransit riders can schedule non-life threatening medical trips only. Trips can be for any medical reason, for example, pharmacy, therapy, etc. The same-day-service is provided to ADA certified riders within the ADA service area. There is no additional charge for a same-day-service ride; the fare is the same as ADA Paratransit service. Same-day-service ride hours are Monday through Friday, 8 a.m. to midnight. No weekends or holidays. To schedule a same-day-service request, call 228-4800 and select "Same-Day-Service Request" to schedule your ride. Reservations can be made Monday through Friday from 7 a.m. to 8 p.m.

Contacting Customer Service

RTC uses an automated phone system to assist in efficiently routing customers' calls. The service is available 24 hours a day, 7 days a week.

When you call **228-4800**, you will hear the following prompts.

Interactive Voice Response (IVR)
(702) 228-4800

- 1 Confirm or cancel a ride
- 2 Schedule a ride
- 3 Inquire on a current ride or schedule a same day medical trip
- 4 Certification or eligibility
- 5 Verify customer information
- 6 General information
- 7 System Comments
- 0 Speak to a representative
- * Repeat menu choices

Customers can confirm or cancel their rides for the next three days without having to speak to a customer service representative. Please contact Customer Service for your access code required to use the automated system.

Ride Check

Paratransit users now have the ability to check the status or cancel a previously scheduled Paratransit ride. Log onto the RTC's Web site, rtcsmv.com for step-by-step instructions. Or you can call our Paratransit Customer Service office at (702) 228-4800.

Shared Rides

RTC ADA Paratransit Services is a public transportation service. Whenever possible, the RTC will schedule rides with multiple passengers. This means you will be sharing rides with other persons with disabilities. Please be a courteous rider. Riders who require medication or oxygen at regular intervals should be advised that their travel time could be approximately 90 minutes depending on the distance traveled.

Destinations

A destination may not be changed after 6 p.m. the day before your trip is scheduled. Travel arrangements with more than one destination will be treated as separate trips and must be scheduled and cancelled separately.

Vehicles

RTC ADA Paratransit Services may contract with other providers for transportation service. The Customer Service Representative is unable to tell you what type of vehicle will be used for your trip.

All vehicles used through this service are required to display a RTC sign on their vehicle. If you do not see the sign, ask the operator to show it to you.

Cancellations & No Shows

To cancel a scheduled trip, call Paratransit Reservations at (702) 228-4800 or (702) 676-1834 (TDD). Trips must be canceled no later than 6 p.m. the day prior to the scheduled pick-up to ensure no points are assessed. This call can be made 24 hours a day using the IVR phone system.



The following point system is used to determine penalties for recurring **NO SHOWS**.

RTC NO SHOW Categories

Limited Notice - any ride canceled between the hours of 6 p.m. and 7 p.m. the day prior to the scheduled pick-up. **ONE**

Early Notice - any ride canceled after 7 p.m. the day prior to the scheduled pick-up until four hours prior to the pick-up time. **TWO**

Late Notice - any ride canceled from within four hours to 30 minutes prior to the beginning of the pick-up window [five minutes before the pick-up time]. **THREE**

Notice at Door - any ride canceled by notice from the customer to the driver within the 30 minute pick-up window [five minutes before to 25 minutes after the pick-up time]. **FIVE**

No Notice - any ride canceled by telephone from 30 minutes prior to the beginning of the pick-up window [five minutes before the pick-up time]. **FIVE**

No Show - any ride for which an authorized paratransit service vehicle arrives at the designated pick-up location, waits the prescribed five minute period from the scheduled time, and the passenger is not present to board the vehicle. **FIVE**

In the event you are a NO SHOW for a ride, the return ride or any additional ride(s) scheduled for that day will not be automatically canceled. Please call (702) 228-4800 or (702) 676-1834 (TDD) and select option 1 to cancel any return/additional rides you had scheduled that will no longer be needed.



The NO SHOW category points will accumulate and are used to determine suspension of service. Riders are notified by mail when they cause a NO SHOW that qualifies for points being assessed. Suspension of service may result from points accumulated as follows:

No Show Point Value	Within Period of	Suspension Period
18	30 Days	15 Days
36	60 Days	30 Days
54	120 Days	90 Days
90	180 Days	6 Months

Right of Appeal

Anyone affected by this policy is entitled to request an appeal.

The RTC complies with the Americans with Disabilities Act of 1990, available for review at fta.dot.gov.

Contact the RTC comment team at (702) 228-4800, option 7 if you need further assistance. The comment team is available 7 a.m. to 6 p.m., seven (7) days a week.

Rider Rules

The RTC's goal is to provide a safe, comfortable commute for individuals traveling on RTC vehicles. To assure a pleasant commute for all, please observe the following rules:

- ▶ Seatbelts are required by passengers on vehicles.
- ▶ No eating is allowed on the vehicle, and drinks must be in spill-proof covered containers.
- ▶ Smoking is prohibited on the vehicle.
- ▶ Proper attire, including shirts and shoes or appropriate foot coverings, is required on the vehicle.
- ▶ Personal musical devices are allowed with head phones as long as the sound is not audible to others.
- ▶ Please do not distract the driver while the vehicle is in motion.
- ▶ Medication(s) and other personal belongings are the responsibility of the rider to plan for when riding paratransit.

Wheelchairs & Mobility Devices

All vehicles used for service in the RTC system are 100 percent ADA accessible.

Vehicle operators will assist customers in boarding and debarking the Paratransit vehicle as needed.

All mobility devices such as wheelchairs, scooters and three-wheel carts must be secured in the vehicle and conform to the ADA definition of a "common wheelchair." A "common wheelchair" is such device that does not exceed 30 inches in width and 48 inches in length, measured two inches above the ground, and does not weigh more than 600 pounds when occupied. The RTC offers mobility device users a free and voluntary program designed to identify securement locations to assist drivers in quickly and safely securing the equipment on the bus. Please contact 676-1815 or TDD 676-1834 for more information and reference the S.A.F.E. program.



If your condition changes in a manner that requires you to use an assistive mobility device or change the type of mobility device used during your initial functional assessment, it must be reported to the RTC Certification Office at (702) 228-4800 or 676-1815 within 15 days. Due to this change in your condition, you may be required to undergo an additional functional assessment to determine what effect this change may have on your functional ability. Your current eligibility status may be altered as a result of your new functional assessment.

Service Animals

- ▶ Service animals are welcome and ride free-of-charge.
- ▶ A disruptive service animal will be treated according to the Illegal and Disruptive Behavior Policy. (pg. 19)
- ▶ Service animals must sit on the floor or on the passenger's lap. They may not occupy a passenger seat. All other animals must be in a secure cage in order to board the Paratransit vehicle.

Children

- ▶ Children under six years old must be accompanied by a responsible party.
- ▶ Children under six years old or who weigh less than 60 pounds must be secured in an approved child safety seat provided by the customer.
- ▶ Strollers must be collapsed to fit between the seat and the customer. Non-collapsible strollers are prohibited.
- ▶ For safety reasons, children capable of sitting on their own must sit in a seat and not on an adult's lap.

Personal Care Attendants & Companions

A Personal Care Attendant (PCA) may ride free-of-charge when accompanying an individual certified by the RTC Certification Office as requiring a PCA. The need for a PCA will be determined during your evaluation appointment.

One companion may also accompany an eligible rider. A companion will be charged the same fare as the eligible rider. Let the Customer Service Representative know at the time the reservation is made if you will be traveling with a companion, a PCA or both.

Unattended Passenger Policy

Customers determined as unable to be left unattended (based on age, cognitive limitations or special request of the responsible party) may schedule rides and ride unattended; however, arrangements must be made to have a responsible party meet the Paratransit vehicle at each location.

The "unattended passenger" form must be completed and on file. Please contact the RTC Certification Office at 228-4800 or 676-1815 if this service is required.

The driver will only wait five minutes for the responsible party to meet the Paratransit vehicle. If no one arrives, the driver will notify the RTC and continue on his/her route. The RTC will attempt to reach the designated emergency contact person. If the customer is not met by the end of the route, he/she will be returned to the bus yard. The responsible party will be required to pick up the customer at the bus yard and must show proper identification. The customer will not be left unattended, and the police will be notified to assist in locating a responsible party.

Failure to have a responsible party meet the vehicle is a violation of RTC's Disruptive Behavior Policy, and customers are subjected to suspension and/or a fine may be assessed for expenses incurred by the RTC for violation of this policy.



Carry-on Bag Policy

Customers are permitted to carry on only the number of bags that they are able to manage independently without the assistance of the driver. Due to space limitations and the time it takes to board the vehicle, the number of shopping bags is restricted to those that can be easily handled by the customer and carried aboard without delaying the vehicle. The carry-on items must fit within a certain space either on your lap or in front of your area. If a customer brings more than he/she is able to manage independently, it will be the customer's choice on whether to board with a manageable amount of items and find alternative transportation to carry the remaining packages, or decline the trip.

Shopping Cart Policy

Shopping carts or any type of equipment used to assist with transporting packages, groceries, clothing or other items are allowed on a limited basis. When space is limited, priority must be given to RTC ADA Paratransit wheelchair passengers. Carts can be no larger than 28.5" high by 12" deep by 15.5" wide. The customer must bring a securement device (for example a bungee cord) to secure his/her cart. It will cost an additional \$.50 cents for each ride with a cart. Rides with carts are on a standby basis and will be notified between 6 p.m. and 8 p.m. on the evening prior to service if space is available for the cart trip. The trip must be reserved and approved with the cart, or the driver will be unable to transport the customer with his/her shopping cart.

If your cart is declined due to space availability you may cancel the ride with no cancellation penalty.

Illegal & Disruptive Behavior Policy

The RTC established an Illegal and Disruptive Behavior Policy to address the safety and well-being of customers, passengers, and staff of the RTC and its contractors. The policy defines categories of illegal and disruptive behavior and the consequences for such behavior. It's in effect in and around vehicles and facilities owned and/or operated by or on behalf of the RTC, including all RTC fixed route service, the Metropolitan Area Express (MAX) service, the Deuce service, ACE, ACEXpress, RTC ADA Paratransit Services, CAT STAR specialized service, Silver STAR senior transportation service, FDR, and other services.

The RTC recognizes that an individual's disability or medical condition may cause a passenger to unknowingly and/or unintentionally violate the Illegal and Disruptive Behavior Policy. For this reason, the RTC looks at each violation individually.



Driver Services

Drivers will assist passengers who are unable to maneuver themselves from their door or designated pick-up location to the vehicle, provided it is safe for them to do so.

Drivers are Allowed to:

Maneuver your manual wheelchair if you need assistance from outside your door to the vehicle

Lend a steady arm if you need assistance

Provide directions or act as a sighted guide to/from vehicle if you are visually impaired. If you feel you need this type of assistance, please notify the driver.

Drivers are Not Allowed/Required to:

Operate or push your electric mobility device (for example, electric wheelchair or scooter)

Operate or push your equipment or shopping cart up or down stairs or steep inclines

Cross residential thresholds

Lift or carry riders

Carry packages or other items

Drivers are trained not to perform these activities. Please do not make these requests of your driver.

Please keep your information current and notify the RTC of any change of address, phone number, emergency contact information, etc.



Door-to-Door

RTC ADA Paratransit Services provides "door-to-door" service. The driver will come to your door to let you know the bus has arrived. Please attempt to keep an eye out for the vehicle. However, there will be some locations and/or situations where the driver cannot leave the vehicle. When picking-up or dropping off on private property, there are often designated areas where a driver is permitted to stop. In order for us to serve you, it is necessary for you to wait for the vehicle at the marked stop.

Questions & Comments

We want to hear from you. Please contact Customer Service at (702) 228-4800 option 7 or (702) 676-1834 (TDD) to ask a question or leave us your comments, complaints, suggestions or recommendations. Or if you prefer, you can write to:

RTC Paratransit Services,
600 S. Grand Central Pkwy., Ste. 350
Las Vegas, NV 89106
Attn: Customer Service or
e-mail us through our Web site at
rtcsnv.com.

When making a comment, please try to provide as much detail as possible so we can properly address your concern. For example, if you're reporting a situation involving a Paratransit vehicle, the exact date is necessary.

Important Numbers

RTC ADA Paratransit Customer Service

Scheduling

(702) 228-4800 option 2 or

TDD (702) 676-1834

7 Days a week 7 a.m. to 6 p.m.

Same Day Reservations

(702) 228-4800 option 3 or

TDD (702) 676-1834

Mon. - Fri. 7 a.m. to 8 p.m.

Inquiry/Same Day Cancellations

(702) 228-4800 option 3 or

TDD (702) 676-1834

7 Days a week 24 hours a day

Certification Office/Lost I.D. Cards

(702) 676-1815 or

TDD (702) 676-1834

Mon. - Fri. 8 a.m. - 4:30 p.m.

Comments

(702) 228-4800 option 7 or

TDD (702) 676-1834

7 Days a week 7 a.m. to 6 p.m.

RTC Administrative Offices

(702) 676-1500 or TDD (702) 676-1834

Mon. - Thurs. 7 a.m. to 6 p.m.

RTC Fixed Route Customer Service

(702) 228-7433 or

TDD 676-1834

7 Days a week 7 a.m. to 7 p.m.

Holidays 7 a.m. to 6 p.m.

Closed Christmas and Thanksgiving

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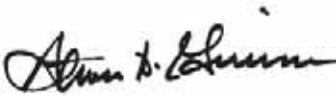
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CLERK OF THE COURT

MAMJ

DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
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*Attorneys for Defendants
First Transit, Inc. and Jay Farrales*

DISTRICT COURT
CLARK COUNTY, NEVADA

JACK CHERNIKOFF and ELAINE
CHERNIKOFF,

Plaintiffs,

vs.

FIRST TRANSIT, INC.; JAY FARRALES;
DOES 1-10; and ROES 1-10, inclusive,

Defendants.

Case No. A-13-682726-C

Dept. No. 23

**DEFENDANTS' MOTION TO ALTER
OR AMEND THE JUDGMENT**

Hearing Date:
Hearing Time:

Defendants move to reduce the judgment in light of sovereign immunity
and to correct the award of prejudgment interest on future damages. NRCP
59(e).

NOTICE OF MOTION

Please take notice that the undersigned will bring the foregoing "MOTION
TO ALTER OR AMEND THE JUDGMENT" before the Court on May 31, _____,
2016 at 9:30^a .m. in Department 23 of the Eighth Judicial District Court, 200
Lewis Avenue, Las Vegas, Nevada 89155.

POINTS AND AUTHORITIES

For the reasons stated in defendants' motion for a new trial, this case needs to be tried anew. In the alternative, however, this Court should reduce the judgment in light of sovereign immunity and correct the award of prejudgment interest.

I.

FIRST TRANSIT IS ENTITLED TO THE \$100,000 CAP ON DAMAGES BECAUSE IT WAS OPERATING AS AN ARM OF THE STATE IN THE FULFILLMENT OF RTC'S PUBLIC RESPONSIBILITIES

The Nevada legislature has enacted a \$100,000 cap on tort damages that extends to political subdivisions of the state and to any entity that functions as an arm of the state. That cap on damages applies to claims against First Transit because the Regional Transportation Commission of Southern Nevada (RTC) is a covered political subdivision, and First Transit is an arm of the state in helping RTC fulfill its responsibilities under state and federal law.

The cap on damages is also mandatory as a matter of federal law because federal regulations implementing the Americans with Disabilities Act (ADA) treat First Transit as an arm of the state that shares Nevada's responsibilities under that act.

A. First Transit is an Arm of the State Entitled to the Statutory Cap on Damages

1. *The State's Political Subdivisions Enjoy Sovereign Immunity*

Tort claims against a political subdivision for an employee's conduct are capped at \$100,000. NRS 41.035(1). Beyond that amount, the employee and the subdivision are immune. *Id.*

Counties and the entities that they operate are political subdivisions for purposes of sovereign immunity. *See Cnty. of Clark ex rel. Univ. Med. Ctr. v. Upchurch*, 114 Nev. 749, 751, 961 P.2d 754, 756 (1998) (recognizing immunity

for UMC); *see also Clark Cnty. Sch. Dist. v. Richardson Const., Inc.*, 123 Nev. 382, 389, 168 P.3d 87, 92 (2007) (recognizing immunity for CCSD). That includes a regional transportation commission such as the Regional Transportation Commission of Southern Nevada (RTC), which is created and operated by the county. *See* NRS 277A.170; NRS 41.0307(1) (defining “employee” to include an employee of a “commission” of “a political subdivision of the State which is created by law”).

2. *An Entity that Carries out an Integral Government Function is an Arm of the State Entitled to Sovereign Immunity*

Sovereign immunity extends to an “arm of the state,” too. *See Graham v. State*, 956 P.2d 556, 562 (Colo. 1998), *cited with approval in Simonian v. Univ. & Cmty. Coll. Sys.*, 122 Nev. 187, 194 n.29, 128 P.3d 1057, 1062 n.29 (2006). Factors that Nevada has considered include whether the entity is (1) subject to the approval and control of the government; (2) mentioned as a state entity within the Nevada Revised Statutes, and (3) “in possession of some sovereign powers,” which the Court has interpreted to mean that the entity carries out “sovereign functions.” *Simonian v. Univ. & Cmty. Coll. Sys.*, 122 Nev. 187, 193–95 & n.32, 128 P.3d 1057, 1061–62 & n.32 (2006) (footnotes omitted) (extending immunity to a community college).

The U.S. Supreme Court recently confirmed that immunity extends to private groups hired to perform public services. In *Filarsky v. Delia*, the Court held that a private attorney hired to interview an city employee suspected of malingering was immune from a § 1983 action. 132 S Ct. 1657, 1665–66 (2012).¹ The Court rejected the argument that only full-time government em-

¹ The Nevada Supreme Court has held that federal precedents on sovereign immunity under the Federal Tort Claims Act are relevant to the interpretation of NRS 41.032. *Scott v. Dep’t of Commerce*, 104 Nev. 580, 583, 763 P.2d 341, 343 (1988). In similar fashion, it has looked to other jurisdictions’ interpreta-

1 ployees deserved such immunity, noting that distinguishing between full-time
 2 and ad-hoc government employment “creates significant line-drawing problems”
 3 and leads to the perverse result that private groups working in tandem with
 4 government will “be left holding the bag—facing full liability for actions taken
 5 in conjunction with government employees who enjoy immunity for the same
 6 activity.” *Id.*

7 The *Filarsky* decision echoes the Nevada Supreme Court’s concern in
 8 *Falline v. GNLV Corp.*, where the Court held that denying statutory immunity
 9 to self-insured employers—who perform for their employees the functions of the
 10 State Industrial Insurance System—“would constitute an unwarranted, dis-
 11 criminatory source of liability against” those private employers. *Falline v.*
 12 *GNLV Corp.*, 107 Nev. 1004, 1009, 823 P.2d 888, 891 (1991) (plurality opinion).

13 **3. First Transit is an Arm of the State in**
 14 **Carrying out Nevada’s Duties under the ADA**
 15 **to Provide Transport for Disabled Persons**

16 The Connecticut Supreme Court held that a First Transit subsidiary was
 17 an arm of the state entitled to sovereign immunity. *Gordon v. H.N.S. Mgmt.*
 18 *Co., Inc.*, 861 A.2d 1160, 1174–75 (2004). That court relied on factors similar to
 19 those Nevada has considered, including the fact that First Transit (1) operates
 20 to carry out public transportation, an integral government function, (2) is finan-
 21 cially dependent on government, (3) is subject to control and oversight by the
 22 government agency, and (4) requires government approval for expenditures.
 23 *Id.*; see also *Town of Rocky Hill v. SecureCare Realty, LLC*, 105 A.3d 857, 867
 24 (Conn. 2015).

25 First Transit is an arm of the state here, too. RTC contracted with First
 26 Transit to perform RTC’s sovereign function—satisfying its public duties to
 27 Clark County’s disabled population, specifically:

28 tions of state action under § 1983. *Simonian v. Univ. & Cmty. Coll. Sys.*, 122
 Nev. 187, 194 n.29, 128 P.3d 1057, 1062 n.29 (2006).

To assist RTC in complying with the paratransit services provisions of Title II of the Americans with Disabilities Act (ADA), and to enhance the provision of public transportation generally in RTC's service area.

(Contract, Ex. A, § 2(a)(1).) *See generally* 42 U.S.C. § 12143; 49 C.F.R.

§§ 37.121(a), 37.123. RTC and First Transit share the task of complying with these federal statutes and regulations, which are required government services. (Contract § 2(c), (d).) They expressly agreed to collaborate on the creation and submission of the federally mandated paratransit plan. (Contract § 11.) *See* 49 C.F.R. § 37.135. First Transit also operates vehicles owned by RTC, uses offices owned by RTC, enforced RTC's rules, transports passengers based on RTC's reservation, collaborates with RTC on marketing and service planning, and provides reports to satisfy RTC's requirements. *Id.*

Beyond all that, First Transit depends on RTC for its income: First Transit only "retain[s] custody of fares," which then RTC uses to pay First Transit's invoices. (Contract §§ 2(d), 12.) First Transit also faces a rigorous audit and oversight process for its expenditures and invoices. (Contract §§ 2(d)(1)(G), 5(c), 7.)²

All of these acts, as part of the contract with RTC, entitle First Transit to share in RTC's sovereign immunity and the \$100,000 damages cap under NRS 41.035.

B. Denying First Transit the Damages Cap would Conflict with Federal Regulations

Here, it is especially important to respect the First Transit's immunity as an arm of the state because to find otherwise would interfere with federal law. Federal law, including the ADA is supreme in Nevada courts. *See generally* U.S. CONST. art. VI. The federal regulations implementing the ADA require

² As the *Gordon* court noted, the fact that First Transit "derives a profit from the enterprise does not affect" the immunity analysis. *Gordon v. H.N.S. Mgmt. Co., Inc.*, 861 A.2d 1160, 1174 (Conn. 2004).

1 First Transit to “stand in the shoes” of the state for purposes of ensuring Neva-
 2 da’s ADA compliance. 49 C.F.R. § 37.23; App’x D to Part 37: Construction and
 3 Interpretation of Provisions of 49 CFR Part 37, at 465–66 (2007). Because First
 4 Transit is an arm of the state for the discharge of Nevada’s duties under the
 5 ADA, it must also be an arm of the state for purposes of immunity in the dis-
 6 charge of those federal obligations.

7 II.

8 PREJUDGMENT INTEREST ON 9 THE LOSS-OF-CONSORTIUM 10 CLAIM MUST BE VACATED

11 “[W]hen a general verdict form does not distinguish between past and
 12 present damages, a trial court cannot award prejudgment interest.” *Shuette v.*
 13 *Beazer Homes Holdings Corp.*, 121 Nev. 837, 865, 124 P.3d 530, 549-50 (2005);
 14 *Stickler v. Quilici*, 98 Nev. 595, 597, 655 P.2d 527, 528 (1982). Although the ju-
 15 ry’s verdict for Harvey Chernikoff’s pain and suffering represents just past
 16 damages, the award for Jack and Elaine Chernikoff’s loss of consortium in-
 17 cludes both past and future damages but makes no allocation between the two.
 18 In this situation, prejudgment interest on the loss-of-consortium award is im-
 19 proper and must be vacated.

20 CONCLUSION

21 For the foregoing reasons, the judgment should be reduced to impose the
 22 statutory damages cap and vacate the prejudgment interest on plaintiffs’ loss-
 23 of-consortium claim.

24 Dated this 23rd day of March, 2016.

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EXHIBIT A

EXHIBIT A

**REGIONAL TRANSPORTATION COMMISSION
OF SOUTHERN NEVADA**

CONTRACT WITH

LIDLAW TRANSIT SERVICES, INC.

**Dated
March 8, 2007**

RTC000013

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RTC000015

AGREEMENT

THIS AGREEMENT (hereinafter referred to as the "Contract"), made and entered into on March 8, 2007, by the Regional Transportation Commission of Southern Nevada (hereinafter referred to as "RTC") and Laidlaw Transit Services, Inc. authorized and existing under the laws of Delaware, and authorized to do business in the State of Nevada (hereinafter referred to as the "Contractor"), provides for the Contractor to supply paratransit services in the Clark County area, as described below.

WITNESSETH

WHEREAS, RTC conducted a competitive procurement process to select a provider of paratransit services compliant with the complementary paratransit requirements of the Americans with Disabilities Act of 1990 (ADA) for the RTC's public transportation system, known as the Citizens Area Transit System (hereinafter referred to as "CAT System");

WHEREAS, pursuant to that process, RTC selected the Contractor to provide core Americans with Disabilities Act complementary paratransit services for the CAT System, as described herein (hereinafter referred to as "CAT ADA Paratransit Services");

WHEREAS, through the competitive procurement process referenced above, RTC also selected the Contractor to provide certain transportation services designed to meet the needs of senior citizens (Senior Transportation) and certain other non-ADA paratransit services (CATSTAR);

WHEREAS, the CAT ADA Paratransit Services, Senior Transportation and CATSTAR are collectively referred to as "Specialized Services"; and

WHEREAS, the Contractor is competent to perform the services described herein and desires to enter into this Contract with RTC for the provision of such services;

NOW THEREFORE, in consideration of the mutual promises hereinafter given, it is

mutually agreed by and between the Contractor and RTC as follows:

SECTION 1. DEFINITIONS

As used in this Contract:

(a) Americans with Disabilities Act of 1990 (ADA). The term "Americans with Disabilities Act of 1990" or "ADA" means the statute enacted by the United States Congress as Public Law Number 101-336.

(b) Assumed Annual Service Hours. The term "Assumed Annual Service Hours" means the range of service hours (with an identified floor and ceiling) on an annual basis that is anticipated by RTC to meet the requirements of the Contract. The Assumed Annual Service Hour range for each year of the Contract and for each option year is set out in Section 4 of this Contract.

(c) Best and Final Offer. The term "Best and Final Offer" or "BAFO" means the final, written proposal made by the Contractor in response to a written request by RTC after the conclusion of discussions with proposers, and submitted by the date and time specified in RTC's written request.

(d) CAT ADA Paratransit Services. The term "CAT ADA Paratransit Services" has the meaning set forth in the Recitals to this Contract.

(e) CATCOM. The term "CATCOM" refers to the Citizens Area Transit (CAT) Communication system used by RTC in support of radio dispatch activities. The CATCOM paratransit system integrates the Specialized Services scheduling and dispatching software (currently Trapeze PASS) with Global Positioning System (GPS)-based Automatic Vehicle Locator (AVL) functions (currently Orbital TMS Orbcad). It includes data transmissions from equipment, and emergency alarm systems. All information interfaces with other RTC

computer systems.

(f) CATSTAR. The term "CATSTAR" refers to specialized non-ADA services provided through subscription trips for individuals traveling to and from social service agencies that provide sheltered workshop employment opportunities.

(g) Contract. The term "Contract" means this agreement between RTC and the Contractor.

(h) Contractor. The term "Contractor" means the firm, company, corporation, partnership, or association executing this Contract as an entity providing the services specified herein.

(i) Contractor General Manager. The term "Contractor General Manager" means the person identified by the Contractor and approved by RTC, responsible for carrying out the Contractor's duties under the Contract.

(j) Days. The term "days" means calendar days recognized by RTC, unless otherwise specifically noted.

(k) Deadhead. The term "Deadhead" means movement of a Revenue Vehicle, without passenger(s), from the garage or yard to the origin point of the first trip identified on the daily trip manifest, and from the destination point of the last trip identified on the daily trip manifest to the garage or yard.

(l) Deadhead Time. The term "Deadhead Time" means the period of time a Revenue Vehicle is engaged in a Deadhead movement.

(m) Deployment Plan. The term "Deployment Plan" means the organization plan indicating the specific start and stop times on each day for each Revenue Vehicle.

(n) Dispatch. The term "Dispatch" means the function of assigning, including through radio communication, Revenue Vehicles and operators to cover scheduled paratransit

trips and Senior Transportation services.

(o) Facilities. The term "Facilities," in general, means RTC provided buildings, structures, and grounds identified in Appendix E and buildings' related equipment listed in Appendix H. Where sections and subsections in this Contract specifically identify exclusions of Contractor responsibility for actual facility portions, those sections and subsections will control the definition of "Facilities" as it relates to those sections and subsections.

(p) Facility Maintenance. Facility Maintenance is the work required to preserve or restore buildings, grounds, utilities, systems, and equipment to original condition or such condition that it can be effectively and efficiently used for its intended purpose.

(q) Federal Transit Administration (FTA). The term "Federal Transit Administration" or "FTA" means the Federal Transit Administration of the United States Department of Transportation or its successor entity.

(r) Flexible Demand Response (FDR). The term "Flexible Demand Response" or "FDR" refers to an advanced reservation community service demand response provided to eligible seniors.

(s) Governing Body of the Regional Transportation Commission of Southern Nevada. The term "Governing Body of the Regional Transportation Commission of Southern Nevada" or "RTC Governing Body" refers to the elected representatives of the entities of Clark County, Nevada, including the County of Clark and the cities of Las Vegas, North Las Vegas, Henderson, Boulder City, and Mesquite, who make up the voting membership of the Regional Transportation Commission of Southern Nevada.

(t) Holiday Schedule. The term "Holiday Schedule" means a modified schedule to provide a different level of transit service on designated days.

(u) Late Trip. A "Late Trip" is any one-way leg of a trip where the Revenue

Vehicle does not arrive at the passenger's pick-up address by the end of the on-time window.

(v) Manifest. The term "Manifest" means the list of passenger trips provided by RTC staff to the Contractor to be carried out on CAT Specialized Services, and includes, at a minimum, the following information: customer name, pick-up and drop-off addresses, pick-up time, trip identification number, equipment used by the passenger, authorization for Personal Care Attendant (PCA), number of guests, payment status, and special instructions (such as directions or conditions). The manifest may be either electronic or printed.

(w) Missed Trip. A "Missed Trip" occurs when a vehicle does not arrive to pick-up a passenger within 30 minutes of the end of the on-time window.

(x) On-time Performance. The term "On-time Performance" for paratransit services means the performance of passenger trip pick-ups within the On-Time Window as defined by RTC. "On-Time Performance" for Silver-STAR means arriving at a time point within one minute of the scheduled time.

(y) On-Time Window. The term "On-Time Window" means the allowable deviation from the scheduled passenger pick-up time, defined in minutes. The scheduled passenger pick-up time is the time appearing on a Manifest, that RTC indicated to the passenger that the passenger is scheduled to be picked up. For purposes of Specialized Services allowable deviation will be from five (5) minutes before to twenty-five (25) minutes after the scheduled pick-up time stated on the Manifest.

(z) Proposal. The term "Proposal" refers to the written document submitted by the Contractor in response to the Request for Proposals (RFP).

(aa) Public Hearing. The term "Public Hearing" means an open forum in which the opinions and concerns of the public community are solicited.

(bb) Regional Transportation Commission (RTC). The terms "Regional

Transportation Commission," "RTC," and "Commission" shall refer to the Regional Transportation Commission of Southern Nevada, the designated Metropolitan Planning Organization for Clark County, Nevada.

(cc) Revenue Vehicle. The term "Revenue Vehicle" means any vehicle utilized to provide Specialized Services carrying fare-paying passengers in RTC's transportation service area in accordance with this Contract.

(dd) RTC General Manager. The term "RTC General Manager" means the General Manager of the RTC or the person designated in writing by the RTC General Manager to carry out his or her duties under this Contract.

(ee) RTC Project Manager. The term "RTC Project Manger" means the individual designated by the RTC General Manager to administer the RTC's responsibilities under the Contract or the person designated by the RTC Project Manager to carry out his or her responsibilities under the Contract.

(ff) Run. The term "Run" for Silver-STAR means the work assignment for a specified vehicle assigned to one fixed route.

(gg) Run Time. The term "Run Time" for Silver-STAR refers to the time in revenue service for a specified vehicle assigned to one fixed route.

(hh) Schedule. The term "Schedule" means the sequence of the manifest, which instructs the vehicle operator regarding required pick-up and drop-off times.

(ii) Senior Transportation. The term "Senior Transportation" means non-ADA services marketed to passengers 62 and older and provided through Silver-STAR and FDR.

(jj) Service Hours. The term "Service Hours" means the time that begins when a Revenue Vehicle arrives at the first pick-up location on a manifest for ADA Paratransit, CATSTAR and FDR or time point for Silver-STAR and that ends when the Revenue Vehicle

completes the last drop-off on the manifest or time point for Silver-STAR, provided, however, that Service Hours do not include those times when a Revenue Vehicle is out of service for vehicle operator lunch, refueling, mechanical breakdown, or other operational variation which would remove a vehicle from availability for revenue service.

(kk) Service Operation Date. The term "Service Operation Date" refers to the date on which service operations under this Contract begins, which is specified in Section 3(a) as July 1, 2007.

(ll) Silver-STAR. The term "Silver-STAR" refers to a community service one-way loop provide for Senior Transportation.

(mm) Solicitation. The term "Solicitation" means an Invitation to Bid, Request for Proposals, or other form of document used to procure equipment or services.

(nn) Specialized Services. The term "Specialized Services" means a combination of services offered by the Regional Transportation Commission of Southern Nevada to address the specialized transportation needs generally met through regular fixed route transportation, for individuals such as some persons with disabilities and/or some senior citizens.

(oo) Support Vehicle. The term "Support Vehicle" means any vehicle needed to support the operation and maintenance of Specialized Services provided in accordance with this Contract, including, but not limited to, cars, vans, tow trucks, lift-equipped vans, and service trucks.

(pp) System. The term "System" means a complete and organized sum of integral parts that make up a working unit such as hardware, software, mechanical, electrical and structural systems. Examples include, but are not limited to, bus washers, building structures, flooring, fire/life safety, plumbing, mechanical, electrical, pneumatic, HVAC and lighting systems.

(qq) Time Point. The term "Time Point" will be used in reference to Silver-STAR service and means a fixed geographic point where a vehicle is designated to depart in Revenue Service at a specified time.

(rr) Trip. The term "Trip" means the one-way movement of a passenger on CAT Paratransit Services from that passenger's pick-up location to his or her drop-off location as designated on the vehicle operator's manifest.

(ss) Trip Time. The term "Trip Time" means the amount of time scheduled for one Revenue Vehicle to complete a trip.

SECTION 2. STATEMENT OF WORK

(a) In General.

(1) To assist RTC in complying with the paratransit services provisions of Title II of the Americans with Disabilities Act (ADA), and to enhance the provision of public transportation generally in RTC's service area, RTC selected the Contractor through a competitive procurement process, to operate Citizen Area Transit (CAT) ADA Paratransit Services, Specialized non-ADA CATSTAR services, and Specialized Senior Transportation, collectively referred to as CAT Specialized Services. The CAT ADA Paratransit Services system provides door-to-door paratransit to ADA-eligible passengers in a service area that includes the urbanized greater Las Vegas Valley area of Clark County as outlined in Appendix C, Service Characteristics. As set out more fully in subsection (d) of this Section, the Contractor's responsibilities will include the hiring and training of personnel adequate for the operation and maintenance of RTC-provided facilities as well as RTC-provided and/or Contractor-provided Specialized Services vehicles and the dispatching of those vehicles based upon passenger scheduling performed jointly by the Contractor and RTC

and upon manifests generated by RTC. The Contractor will also be responsible for assisting RTC in the development and maintenance of policy direction and standards for the day-to-day administration of Specialized Services provided under this Contract.

(2) The Contractor's performance shall be in accordance with the Contractor's Proposal (attached hereto as Appendix A), as modified by the Contractor's BAFO (attached hereto as Appendix B), and the obligations of this Contract, including the Appendices hereto. However, in the event of a conflict between the Contractor's Proposal or BAFO and the requirements stated in this Contract, the latter shall prevail.

(3) This Contract and the RFP, all addenda to the RFP, and Contractor's response thereto, which are all incorporated herein in their entirety by this reference, shall constitute the entire agreement between the parties hereto with respect to the subject matter hereof, and shall supersede all prior discussions between the parties. Except as set forth herein this Contract may only be modified by mutual written agreement of the parties. The terms and conditions of the Contract or a subsequent written agreement shall control in the instance of any conflicts between this Contract and the RFP, all addenda to the RFP, and contractor's response thereto.

(b) Project Organization. -- A clearly defined allocation of responsibility for all services is critical to the successful administration of this Contract.

(c) Responsibilities of RTC. -- RTC's responsibilities shall be as follows:

(1) Administration

- (A) Establish operating and maintenance requirements for the Contractor in this Contract, including any amendments or supplemental agreements to this Contract.
- (B) Identify and plan for new and revised services and development of service scopes for competitive procurement in accord with the Transportation Improvement Program/Short Range Transit Plan.

- (C) Providing continuing service planning and capital planning, short and long range planning, in accordance with the Planning Policies and Procedures adopted by the Commission.
 - (D) Develop and implement policies on issues related to RTC's public transportation services, including, but not limited to, service area, hours of service, and fares.
 - (E) Coordinate informational reports.
 - (F) Carry out marketing activities, including the publication of informational brochures, and materials that increase the accessibility for visually and hearing impaired persons in accordance with the ADA.
 - (G) Administer a vehicle advertising program for RTC-owned vehicles.
 - (H) Pay the Contractor for services properly rendered.
 - (I) Administer and monitor this Contract and inspect the performance of the Contractor for compliance with the Scope of Service and the Contract.
 - (J) Audit all of the Contractor's records, including but not limited to, cost, performance and compliance with contractual requirements.
 - (K) Comply with Federal, State and local laws and regulations.
 - (L) Provide Contractor with official notice and direction for all meetings, at which the Contractor is responsible for the presentation of information.
- (2) Fares
- (A) Establish and evaluate fare policies and the fare structure.
 - (B) Audit reporting processes for accuracy of data and calculations.
- (3) Operations
- (A) Provide (either directly or by contract) a certification service to determine eligibility of applicants for ADA paratransit services.
 - (B) Maintain a current record of clients eligible for its ADA, non-ADA and, where applicable, senior transportation services. Provide information from such records as may be necessary for the Contractor to perform its responsibilities under the Contract.

- (C) Develop and maintain parameters for use in the deployment, scheduling, and trip manifest development in cooperation with the Contractor.
 - (D) Provide (either directly or by contract) a complete customer service information and reservation telephone line, including customer voice phone and TDD service.
 - (E) Investigate unsafe practices.
 - (F) Provide (either directly or by contract) facility security systems at the Integrated Bus Maintenance Facility (IBMF) to include building access control, camera systems and alarms.
 - (G) Provide (either directly or by contract) facility security systems at the Sunset Maintenance Facility to include access gate control, building access control, camera systems and alarms.
 - (H) Provide cellular telephones for Road Supervisors for communication with Radio Dispatch.
- (4) Facilities, Maintenance, and Rolling Stock
- (A) Install and maintain facilities in accordance with Barrier Free Design Standards issued in the September 6, 1991, Federal Register, 49 C.F.R. Parts 27, 37 and 38, "Transportation for Individuals with Disabilities; Final Rule," as amended.
 - (B) Provide administrative and operations office space, vehicle storage, and vehicle maintenance facilities as specified in Appendix E for use by the Contractor in connection with the performance of Contract services.
 - (C) Provide the Revenue Vehicles used for CAT Specialized Services for use in provision of the service components described in this RFP, mark those Revenue Vehicles with appropriate logos and paint schemes, and equip those Revenue Vehicles with tires, radios, fareboxes and a camera recording system. The current fleet of Revenues Vehicles is listed in Appendix F.
 - (D) Provide Compressed Natural Gas (CNG) and diesel fuel dispensing and monitoring equipment, CNG and diesel fuel and appropriate back-up fueling points as identified in Appendix J. Maintain the CNG fueling sites.
 - (E) Maintain the standby generator(s).
 - (F) Determine six (6) months in advance of the opening of the Sunset

Maintenance Facility whether RTC will assume the full facility maintenance responsibilities, amend the Contract to accept the Best and Final Offer (BAFO) cost submitted by the Contractor regarding the Contractor assuming the maintenance responsibilities for the Paratransit portion of the Sunset Maintenance Facility, or conduct further negotiations with the Contractor to assume a limited portion of the maintenance responsibilities at the Sunset Maintenance Facility.

(5) Technology Equipment

- (A) Provide and maintain access to various computer software programs which are appropriate for performing the operational functions listed below. The software listed below is currently in use by RTC:
 - (i) Trapeze PASS 4.71: Maintaining eligibility information, generating and revising manifests, and conducting radio dispatch functions within the Specialized Services scheduling and dispatch software.
 - (ii) ORPAC FuelOmat: Performing fuel and fluid management. (Formerly Raypac Network, Inc. (RNI)).
 - (iii) Ron Turly Associates (RTA): For the purpose only of Revenue Vehicles provided by the RTC, coordinating vehicle maintenance for the useful lives of those Revenue Vehicles.
 - (iv) MP2: Maintaining RTC-provided Facilities maintenance tracking.
 - (v) Orbital TMS ORBCAD: Radio communications, vehicle tracking through GPS based and AVL, and mobile data terminal interface for manifest dissemination.
 - (vi) Security Management System: The system primarily comprised of closed circuit television (CCTV), access control, intrusion detection, and duress buttons.
- (B) Provide licenses, both portal access and system specific, for given operational business use for software items identified in subsection (A) above.
 - (i) Review requests from the Contractor for access to system software beyond that already in use and render decision(s) regarding the requests based on business need as determined by RTC.
 - (ii) Charge the Contractor, through a one time deduction from the monthly invoice payment, for additional portal and software licenses for access to Trapeze, ORPAC or TMS ORBCAD beyond

the level that RTC determines is necessary to perform the services.

- (C) Provide for any changes to CATCOM equipment and procedures, and offer Train-the-Trainer enhancement training.
- (D) Provide and maintain host computer hardware and infrastructure associated with the CATCOM radio dispatch systems.
- (E) Over the course of the contract term, if RTC implements any changes to any of its designated software, the Contractor will be required to participate in scheduled training and to make any necessary adjustments to implement the new software program.
- (F) Purchase, install and maintain required CATCOM radio, automated mobile data terminal (AMDT) and automatic vehicle locator (AVL) equipment for use in Contractor-provided vehicles.
- (G) Provide maintenance to equipment associated with the CATCOM system and for other equipment installed on RTC owned vehicles, including the digital surveillance system and fareboxes.

(d) Responsibilities of the Contractor. — The Contractor's responsibilities shall be as follows:

(1) Administration

- (A) Provide qualified personnel having transit management, paratransit operation, safety/security, and facility/vehicle maintenance experience, including CNG fuel maintenance experience, necessary to operate the CAT Specialized Services transportation systems.
- (B) Provide and maintain all office equipment and supplies needed for operation of the contracted CAT Specialized Services transportation system including, but not limited to, all computers, including hardware, software required by the Contractor to perform its own administrative functions, and peripherals, all furniture, and all copiers and facsimile equipment.
- (C) Pay monthly telephone bills, utility bills, and other associated expenses for contracted CAT Specialized Services.
- (D) Assist RTC in marketing in accordance with RTC's marketing plans and other marketing activities as determined by the RTC Project Manager.
- (E) Refer all RTC-related media inquiries to RTC, and cooperate in providing public information through RTC.

- (F) Provide all required reports in a timely manner and maintain written and verbal communications with the RTC to the satisfaction of the RTC Project Manager.
- (G) Comply and/or assist with RTC's monitoring and auditing programs including, but not necessarily limited to, Section 5335 (a) filings and Title VI submittals.
- (H) Assist RTC staff in developing improvements to the services contracted. Cooperate and assist with RTC's programs, including but not limited to ridership or customer satisfaction surveys that may be periodically undertaken.
- (I) Attend regularly-scheduled and special meetings with the RTC staff or with RTC at the request of staff.
- (J) Respond promptly and precisely to RTC staff requests for information.
- (K) File operating, financial, and performance reports and invoices in a timely manner in order to allow RTC to review their content or incorporate the data into reports and plans as appropriate for timely delivery to the final user.
- (L) Promptly notify RTC of any deficiencies in proposed CAT Specialized Services system expansion, alterations, and/or service reductions.
- (M) Provide insurance coverage as required in this Contract.
- (N) Submit quarterly reports outlining compliance with the Contractor's Disadvantaged Business Enterprise (DBE) Plan.
- (O) Assure compliance and enforcement of all RTC passenger rules as well as RTC policies and procedures as provided by RTC.

(2) Fares

- (A) Collect fares, retain custody of fares, and tabulate fare receipts in a manner that complies with RTC's established fare policy. Refer to Appendix C for list of fares.
- (B) For passengers who do not pay the full fare, notify RTC through the Fare Non-Payment Acknowledgement form process (Refer to Appendix R).

(3) Operations

- (A) Provide Specialized Services as specified in the corresponding Service Characteristics, Appendix C of this Contract.
- (B) Assign a dedicated full-time Contractor Project Manager who will be responsible for managing all aspects of the Contractor's performance of Contract activities and responsibilities.
- (C) Provide radio dispatch service in accordance with the RTC's trip reservation booking process and manifest development by means of a system that is compatible with the RTC's practice and software.
- (D) Receive and respond to calls on the day-of-service from passengers checking on the status of pre-scheduled trips.
- (E) During business hours, and where not contractually provided by RTC, provide adequately trained staff or sub-contractor personnel to access control points where the general public may otherwise access the facility unchallenged, for example the administrative lobby.
- (F) Supervise CAT Specialized Services with Road Supervisors dedicated to Specialized Services in accordance with the Staffing and Personnel Program included as Appendix S. The on-road, dedicated Road Supervisors will respond to and take corrective action with respect to passenger incidents and in-service failures such as accidents, vehicle breakdowns, equipment failures, and jammed fareboxes.
- (G) Meet or exceed all operations, equipment, and maintenance requirements established in the Contract.
- (H) Meet or exceed performance and safety standards as described in the submitted proposal and the Safety, Security and Emergency Preparedness Plan included as Appendix L to this Contract and provided under separate cover.
- (I) Meet or exceed employee hiring, retention, and training standards specified in this Contract and proposed by the Contractor in the plan submittals.
- (J) Investigate accidents and unsafe practices.
- (K) Cooperate with law enforcement agencies with respect to security activities on-board buses and elsewhere.
- (L) Report immediately to the RTC Project Manager or designee, all accidents (including passenger related accidents). In addition, report any other non-routine event or operational deviation that results in consequences to a CAT Specialized Services customer or to a RTC-

provided Revenue Vehicle.

- (M) Provide information necessary for the RTC to file Section 5335(a) reports to the National Transit Database (NTD) for the FTA.
- (N) Utilize RTC-owned and/or operated fuel facilities identified in Appendix J for the fueling of Revenue Vehicles or absorb the costs of fueling Revenue Vehicles at alternate sites without prior approval from the RTC Project Manager or designee. RTC will not provide fuel nor reimburse the Contractor for the fueling of Support Vehicles.
- (O) Maximize productivity of Specialized Services resources (both Contractor and RTC resources) in a manner consistent with RTC direction, and where applicable, ADA regulations and guidelines.
- (P) Assist in developing processes for optimizing trip manifests generated by RTC using the Specialized Services resources (both Contractor and RTC resources) in a manner consistent with RTC direction, and where applicable, ADA regulations and guidelines.
- (Q) Provide recommendations to RTC staff regarding demand management, and assist RTC in the identification and implementation of "nontraditional" transit services designed to manage demand.
- (R) Assist in developing processes for optimizing trip manifests generated by RTC using the Specialized Services scheduling and dispatch software (Trapeze PASS).
- (S) Assist in expanding the knowledge base and extending the expertise of RTC scheduling staff, and train Contractor dispatch staff to optimize productivity.
- (T) Assist RTC with provision of same day service.
- (U) Assign staff to perform data entry of the manifests to assure that all data required by RTC are correctly entered into the Trapeze system. Refer to Appendix P for the Trip Edit/Trip Audit Process.

(4) Facilities

- (A) Maintain the RTC-provided Facilities dedicated to CAT Specialized Services at the paratransit portion of the IBMF and maintain all related integrated systems including the automatic bus washer(s).
- (B) Develop a Facilities Maintenance Plan (FMP) (to be included as Appendix G of this Contract) that identifies the factors to accomplish the

maintenance of the facilities, equipment, and systems. The FMP will include the following:

- (i) Reporting forms, schedules and procedures for all maintenance activities.
 - (ii) Preventive Maintenance Program/Plan (PMP) identifying the daily, weekly, monthly and yearly preventive maintenance tasks and inspections; including an inventory of all facility fixed assets, task lists, frequencies, and schedules for preventive maintenance.
 - (iii) Notification process to RTC of any deficiencies in the Facilities or any elements of the PMP that are not being accomplished in the time scheduled.
- (C) Develop a fire and emergency evacuation plan in accordance with State and local ordinances of the applicable jurisdictions in which the maintenance facilities are located.
- (D) Share, with other user(s) of the IBMF, maintenance costs for:
- (i) Commercial Driver's License (CDL)/Rodeo course, including costs for paving, landscaping any related expenses.
 - (ii) The two IBMF access roads.
 - (iii) Security booth at the Simmons Road vehicle access gate and the personnel cost for staffing this booth.
- (E) Accurately maintain the data in the RTC specified facilities maintenance software (currently using MP2).
- (F) Submit a storm water pollution prevention plan in accordance with Appendix M, as required by the Nevada Department of Environmental Protection, and renew the plan annually, as required.
- (G) Administer the data within the Security Management System located in facilities under the control of the Contractor.
- (5) Maintenance and Rolling Stock
- (A) Maintain all Revenue Vehicles and equipment, whether RTC-provided or Contractor-provided, necessary for performance of the Contract; repair or replace any RTC-provided Revenue Vehicles and equipment that are damaged, lost or stolen during the duration of the Contract; and mark all Contractor-provided Revenue Vehicles with appropriate logos and paint schemes

- (B) Provide, maintain, fuel and repair all Support Vehicles used in supporting the Specialized Services specified in this Contract. The Support vehicles and all associated expense, including insurance, parts and repair, are the sole responsibility of the Contractor and are subject to audit by RTC.
- (C) Provide adequate and appropriate shop equipment and special tools as necessary to perform the necessary maintenance tasks of Revenue Vehicles except for those normally and permanently affixed to the building or grounds at the IBMF or the Sunset Bus Maintenance Facility. A list of the tools permanently affixed to the IBMF is set out in Appendix H.
- (D) Acquire and maintain a parts inventory adequate for the type and number of Revenue Vehicles in the fleet.
- (E) Promptly notify RTC of any deficiencies in RTC-provided Revenue Vehicles, or of any deficiencies with Contractor-provided vehicles that would result in not meeting the daily provision of service.
- (F) Promptly notify RTC of any problems with delivery of fuel required to keep the Revenue Vehicles in operation as described in Appendix C, Service Characteristics.
- (G) Provide on-road, dedicated Road Supervisors to respond to and take corrective action with respect to incidents and in service failures such as equipment breakdowns, accidents, jammed fareboxes, and passenger incidents.
- (H) Provide, and replace if necessary during the life of the Contract, non-revenue wheelchair accessible vehicles for use by Road Supervisors.
- (I) In the event that RTC's vehicle level no longer adequately supports ridership demand, provide sufficient vehicles to meet the excess demand, either by purchase, lease or from its existing corporate inventory.
 - (i) The Contractor and RTC agree to work cooperatively to determine the most cost effective and fastest method of providing vehicles.
 - (ii) Contractor and RTC will work together to evaluate the appropriate method of payment to the Contractor for the actual vehicles used. Payment may include, but is not limited to, an adjustment to the hourly service rate; a one-time payment for the Contractor purchase price; a short term payment plan based on manufacturing deadlines; or a monthly lease agreement

- (iii) Contractor will obtain approval from the RTC Project Manager, or designee, prior to activating in Revenue Service the vehicles referenced above.
- (iv) Compliance with this subsection may qualify as an exception to the Prohibition of Pass-Through Payments under Section 7.

(6) Technology Equipment

- (A) Provide Information Technology infrastructure for normal business operations to include, but not limited to, an appropriate network, internet access, Email, etc.
- (B) Maintain all Contractor computer hardware, infrastructure, software, and peripherals, including an appropriate computer systems security and antivirus program.
- (C) Provide appropriate computer hardware and a computer modem (Refer to Appendix I) to interface with the RTC host computer system and to operate the dispatch software provided by and used by RTC, RTA vehicle management software, and ORPAC fuel management software.
- (D) Maintain and upkeep of RTC-required computer hardware and RTC-provided software, including, but not limited to, the RTA fleet management, ORPAC fuel management equipment, and MP2 (or other approved) facilities maintenance software. (All RTC computer hardware is identified in Appendix I.)
- (E) Over the course of the contract term, if RTC implements any changes to its designated software, the Contractor will be required to participate in scheduled training and to make any necessary adjustment to implement the new software program.
- (F) Provide a telephone system that will accommodate the business needs of the Contractor, and provides the infrastructure to receive, place in queue, and record calls from passengers checking on the status of pre-scheduled trips.
 - (i) The Contractor will need to provide automated reporting capabilities to validate the acceptance rate and the hold time levels.
- (G) Comply with RTC Information Technology requirements as set out in Appendix K of this Contract.
- (H) Pay for portal and software licenses for access to Trapeze, ORPAC, or

TMS ORBCAD beyond those licenses for which RTC has determined there to be a business need.

SECTION 3. TERM OF CONTRACT

(a) **Contract Term.** -- The term of this Contract is for a period of three (3) years with two (2) two (2) year options as described below in subsection (b). Service under the Contract will commence on July 1, 2007 at 12:01 a.m.

(b) **Options.** -- RTC will have the option of extending this Contract for two (2) additional two (2) year periods commencing respectively the day after Year 3 of the Contract and the day after Option Period 1 of the Contract. RTC will provide the Contractor with notice of whether it intends to exercise an option at least 120 days before the end of the Contract year then in effect (Year 3 or Option Period 1).

(c) **Extension of Contract.** -- During Year 3 of the Contract and Option Periods 1 and 2 of the Contract, the RTC will have the right to exercise an extension of the Contract of up to 120 days by providing the Contractor at least sixty (60) days' advance written notice. In the event that RTC exercises the right to extend the Contract, the Contractor shall perform all Contract services at the same rates as are applicable for the Contract year during which the extension is exercised.

(d) **Transition.** -- At the completion of this Contract term, or in the event of a termination of this Contract prior to the completion of its term, the Contractor shall reasonably cooperate in any procurement process conducted by RTC and in any transition to a new contractor to manage and operate Specialized Services (including, but not limited to, the provision of access to RTC-owned vehicles and the Facilities, coordination of equipment transfers, and related actions).

SECTION 4. COST OF SERVICE

(a) Rate of Compensation. -- The cost of service to be paid by RTC to the Contractor shall include all services identified in the Contract based upon the combined service hour ranges as follows:

CONTRACT YEAR 1

<u>ASSUMED ANNUAL SERVICE HOURS</u>	<u>COST PER SERVICE HOUR</u>
470,490 to 516,921	\$52.18

CONTRACT YEAR 2

<u>ASSUMED ANNUAL SERVICE HOURS</u>	<u>COST PER SERVICE HOUR</u>
497,584 to 546,693	\$53.19

CONTRACT YEAR 3

<u>ASSUMED ANNUAL SERVICE HOURS</u>	<u>COST PER SERVICE HOUR</u>
527,771 to 579,806	\$54.14*

OPTION PERIOD 1 (TWO YEARS)

<u>ASSUMED ANNUAL SERVICE HOURS</u>	<u>COST PER SERVICE HOUR</u>
<u>Contract Year 4</u>	
558,815 to 613,995	\$55.75
<u>Contract Year 5</u>	
592,651 to 651,186	\$56.79

OPTION PERIOD 2 (TWO YEARS)

<u>ASSUMED ANNUAL SERVICE HOURS</u>	<u>COST PER SERVICE HOUR</u>
<u>Contract Year 6</u>	
624,602 to 686,305	\$58.31

Contract Year 7

666,266 to 742,098

\$59.76

* In the event that Sunset Maintenance Facility is available for Contractor use, the rate as of the month of Contractor occupancy shall be \$54.47 for Contract Year 3.

(b) Base Contract Period. -- Year 1 of the Contract shall commence on July 1, 2007, and shall end one year thereafter. Year 2 shall commence on July 1, 2008, and shall end one year thereafter. Year 3 shall commence on July 1, 2009, and shall end one year thereafter.

(c) Option Periods. -- In the event that RTC exercises the first Option, Year 4 of the Contract shall commence on July 1, 2010, and shall end one year thereafter, and Year 5 of the Contract shall commence on July 1, 2011, and shall end one year thereafter. In the event that RTC exercises the second Option, Year 6 of the Contract shall commence on July 1, 2012, and shall end one year thereafter, and Year 7 of the Contract shall commence on July 1, 2013, and shall end one year thereafter.

SECTION 5. INVOICES AND PAYMENTS

(a) Rate and Scope of Compensation. -- The Contractor shall be compensated by RTC for the services performed under this Contract solely on the basis of the service hour rate (as provided in Section 4 of this Contract) provided however, that start-up costs shall be treated separately. This compensation covers all of the Contractor's costs associated with this Contract, including the cost of operating services, acquiring, maintaining, repairing, and replacing Revenue Vehicles (including parts and components) and other equipment, and maintaining and repairing the Facilities.

(b) Start-Up Costs. The Contractor shall submit separate monthly invoices for start-up costs in an amount not to exceed the start-up cost estimate of \$279,050 provided in the

BAFO. The start-up period shall begin on the date of the Notice to Proceed and continue through July 31, 2007.

(c) Invoice Submittal. -- The Contractor will submit a monthly invoice to RTC for the hours of service provided under this Contract. Prior to submittal of the invoice, the Contractor is required to have completed the trip edit and audit process as established by RTC and set out in Appendix P. The invoice must be accompanied by all of the reports required by Section 26 of this Contract. RTC may withhold payment if all required reports do not accompany the Contractor's invoice.

(d) Marking of Invoices. -- Invoices for payment will be so marked, to include a reference to the Contract number and a purchase order number, and will be consecutively numbered. The Contractor shall provide a separate invoice for each of the services provided and shall forward the invoices to:

Accounts Payable
Regional Transportation Commission
600 S. Grand Central Parkway
Las Vegas, Nevada 89106-4512

(e) Reservation by RTC. -- RTC reserves the right to request any and all information to support any charges submitted in the invoice. The RTC Project Manager may withhold payment for services that he or she believes were improper, failed to meet service specifications, or were otherwise questionable, and may offset liquidated damages, to the extent chargeable under Section 9, against any payment due.

(f) Payment Period. -- Payment will be made within thirty (30) days of verification and acceptance of the invoices by the RTC Project Manager.

(g) Final Payment. -- RTC may withhold from the monthly payment for the last month of the Contract an amount which RTC believes, in good faith, to be sufficient to address

any potential overpayments that need to be reconciled in connection to the Contractor's final invoice and any outstanding payment issues in connection with Contract close out. Upon termination of the Contract, the Contractor shall submit to RTC a final invoice accompanied by all of the reports required by Section 26 of this Contract and including any other financial or accounting information needed for Contract close out. RTC shall pay all amounts in such final invoice not in dispute within thirty (30) days of verification and acceptance of the invoice by the RTC Project Manager. The Contractor and the RTC Project Manager shall meet promptly to attempt to resolve any remaining disputed costs or charges or other outstanding issues.

SECTION 6. ADJUSTMENTS FROM ASSUMED ANNUAL SERVICE HOURS RANGES

(a) **Rate of Compensation.** -- Section 4(a) of this Contract includes the Contractor's rates of compensation based on service hours. Section 4(a) also includes the range of service hours to which the rates apply.

(b) **Lack of Service Hours.** -- In the event that the total number of service hours during any Contract year is less than the floor number of service hours as set out in the applicable Assumed Annual Service Hours range, either party may request a renegotiation of the rate applicable to those hours that are less than the number of such floor hours.

(c) **Excess of Service Hours.** -- In the event that the total number of service hours provided during any Contract year is in excess of the ceiling number of service hours as set out in the applicable Assumed Annual Service Hours range, either party may request a renegotiation of the rate applicable to those hours that are in excess of the number of such ceiling hours.

(d) **Modification of Scope of Work.** -- In the event RTC substantially modifies the

scope of work, including but not limited to, the expansion of the service area, hours of service; significant changes in policy, maintenance requirements and performance standards; provision of facilities; or if Federal, State or local legislation or regulations are passed which mandate increased costs to Contractor in providing services hereunder, RTC and Contractor shall renegotiate in good faith rates set forth in Section 4.

(e) Negotiation of Rate Adjustments. -- Any adjustment in rates resulting from this Section shall be negotiated on an annual basis. Any rate increase sought by the Contractor shall be supported by full documentation of costs.

(f) Temporary Modifications. -- Notwithstanding the preceding provisions of this Section, RTC may direct the Contractor to make temporary modifications in the services provided or the schedules in order to address short term operating problems or issues.

SECTION 7. PROHIBITION OF PASS THROUGH PAYMENTS

(a) General Rule. -- The Contractor will only be paid by RTC based on the rate of compensation specified within Section 4 of this Contract. If the Contractor determines that it needs new or additional equipment or property that RTC is contractually obligated to provide under Section 2(c), it will submit a written request for such items to RTC.

(b) Provision by RTC. -- If RTC determines that it is obligated to provide such property or equipment or determines, in its reasonable discretion, that such property or equipment is otherwise necessary for the provision of services, RTC may obtain such needed property or equipment for the Contractor.

(c) Acquisition by Contractor. -- RTC may, in exigent circumstances, permit the Contractor to purchase needed property or equipment directly, but only with prior written approval of RTC.

(d) Contractor Responsibility. -- Property or equipment purchased by the Contractor in a manner that does not comply with the process in this Section will be at the sole expense of the Contractor.

SECTION 8. INVENTORY

(a) In General. -- An Initial Inventory and list of all equipment, tools, Revenue Vehicles, and other property of CAT Specialized Services, as compiled pursuant to the closeout inventory conducted with the preceding service provider of CAT Specialized Services is set forth in Appendix T. The Contractor may, in its discretion, negotiate the purchase of any property owned by the preceding service provider necessary for CAT Specialized Services operations.

(b) Use of Equipment, Materials and Other Property. -- The existing equipment, materials, and other property owned or leased by RTC may be utilized by the Contractor during the term of the Contract for the provision of CAT Specialized Services, provided that the Contractor will be responsible for returning any RTC-owned equipment, tools, Revenue Vehicles, and other property in accordance with subsection (c) of this Section at the termination of this Contract. In the event any property that the Contractor is obligated to supply under Section 2(d) of this Contract requires replacement during the Contract term, such replacement will be at the cost of the Contractor.

(c) Return of RTC-Owned Property. -- The Contractor will be responsible for returning to RTC, at the termination of this Contract, all RTC-owned equipment, tools, Revenue Vehicles, and other property of equivalent type, value, and condition as that identified in the Initial Inventory, normal wear and tear excluded, other than property that was acquired by the Contractor at its own expense and for which it was not reimbursed by

RTC. In the event that RTC and the Contractor have made a written agreement(s) over the life of the Contract for RTC to retain permanently Contractor-purchased items, those items so identified will not be removed.

(d) Final Inventory. -- RTC will conduct a final inventory during the last month of the Contract.

(1) If any RTC-owned equipment, tools or other property is determined, on the basis of a comparison to the Initial Inventory, to be missing, damaged, or otherwise unavailable for use, the Contractor will be responsible for either replacing such equipment, tools or other property or compensating RTC for its replacement value. RTC may deduct any amounts due to RTC for the replacement of RTC-owned equipment, tools, or other property from the final monthly payment due to the Contractor.

(2) If any RTC-owned Revenue Vehicle is determined, on the basis of a comparison to the Initial Inventory to be missing, damaged, or otherwise unavailable for use, the Contractor will be responsible for repairing such Revenue Vehicle to the satisfaction of RTC (both with respect to time and quality of repair), or either replacing such Revenue Vehicle or compensating RTC for its replacement value. RTC may deduct any amounts due to RTC for the replacement of RTC Revenue Vehicles from the final monthly payment due to the Contractor.

(e) Property Disposition. -- During the term of the Contract, the Contractor will, in consultation with RTC, identify any RTC-owned equipment, tools, Revenue Vehicles or other property that the Contractor believes to be obsolete or no longer needed for project services. RTC may sell or otherwise dispose of such property in accordance with any applicable Federal or State law. The proceeds of such sale will be the property of RTC.

SECTION 9. LIQUIDATED DAMAGES

(a) In General. -- RTC may assess liquidated damages for inadequate performance as set forth in subsection (c) below that are not caused by RTC's failure to perform any of its obligations under this Contract. Notwithstanding the previous sentence, RTC will not assess any liquidated damages for inadequate performance which is caused by events beyond the control of Contractor as defined by Section 62 Force Majeure.

(b) Assessment. -- RTC may, in its discretion, assess such damages on a monthly basis and deduct such amounts from the monthly payments due to the Contractor. RTC agrees to assess no damages for the first 90 days of this Contract. RTC will provide the Contractor prior notice of the liquidated damages to be assessed in accordance with the Liquidated Damages Assessment Process Procedure set out in Appendix R. RTC will consider documented information from the Contractor that provides evidence that the inadequate performance did not occur or was beyond the Contractor's control.

(c) Categories of Liquidated Damages. -- The performance failures set forth below may result in an assessment of liquidated damages to the Contractor:

(1) Late Trips. For any service day in which the actual calculated on-time performance is below 92.0% (no rounding), RTC will assess liquidated damages in the amount of \$50.00 for each trip for that service day that exceeds the on-time window by more than five (5) minutes. Note that on-time performance is determined by the performance of passenger pick-ups within the On-Time Window as defined in Section 1(y). The five minute grace period provided by this paragraph for the assessment of liquidated damages for late trips does not extend to the calculation of on-time performance.

(2) Missed Trips.

(A) The Contractor will reimburse RTC for the dollar equivalency, based on

the most current base rate, for the free ride coupons sent to individuals who experience a missed trip.

- (B) In addition to the reimbursement required by subparagraph (A) above, in the event that the Contractor's actual calculated on-time performance on any given service day is below 94.0% (no rounding), RTC will assess liquidated damages in the amount of \$125.00 for each trip on that service day that exceeds the on-time window by more than thirty (30) minutes.

(3) Improper Vehicle Cleaning and Appearance.

- (A) If RTC determines that the Contractor has failed to maintain the cleanliness of a Revenue Vehicle in compliance with Section 23 of this Contract, Vehicle Cleaning and Appearance Standards and Requirements, RTC will assess liquidated damages in the amount of \$100.00 for each vehicle in non-compliance for each day the situation exists.
- (B) If RTC determines that the Contractor has failed to maintain the vehicle appearance standard of a Revenue Vehicle in compliance with Section 23 of this Contract, RTC will assess liquidated damages in the amount of \$100.00 for each vehicle in non-compliance for each day the situation exists.

(4) Below Standard Vehicle Maintenance Performance. The following Vehicle Maintenance failures have been identified as having significant impact to the effective and efficient operation of Specialized Services. Failure to perform to specified standards may result in the assessment of these amounts:

- (A) If a Vehicle Operator fails to properly complete a pre-trip inspection,

RTC will assess liquidated damages in the amount of \$100.00 per occurrence.

- (B) If the Contractor fails to conduct 100% of Performance Maintenance Inspections (PMI) within the required 3,000 mile interval, RTC will assess liquidated damages in the amount of \$100.00 per day for each vehicle operated after the scheduled PMI. The assessment for this failure will increase to \$200.00 per day per vehicle operated more than three (3) days or 500 miles past the scheduled PMI.
- (C) If the Contractor fails to provide effective maintenance to sustain the standard of 10,000 miles or more between valid mechanical road calls, RTC will assess liquidated damages in the amount of \$100.00 for each valid mechanical road call prior to the 10,000 miles measure in a monthly reporting period. For purposes of this provision, road call mileage is calculated by dividing the number of valid mechanical road calls by the total mileage of revenue fleet vehicles traveled in a monthly reporting period. For example, 500,000 miles traveled per month with 50 valid road calls equals 10,000 miles between road calls.

(5) Failure to Report Mechanical Breakdowns or Respond to In-service Failures in a Timely Manner.

- (A) If the Contractor fails to report a valid mechanical breakdown resulting in a service failure in accordance with Section 22(t) of this Contract, RTC will assess liquidated damages in the amount of \$100.00 per occurrence.
- (B) If the Contractor fails to respond, in accordance with Section 22(t) of this Contract, to an in-service failure or interruption, such as the breakdown

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of a Revenue Vehicle, an accident involving a Revenue Vehicle, or any other incident causing a delay in service, so as either to fail to make the affected Revenue Vehicle fit for passenger service or to fail to provide a replacement vehicle within thirty (30) minutes of the time the Vehicle Operator reports, or should have reported, the in-service failure or interruption, in accordance with the procedures set out in subsection (t) of Section 22 of this Contract, RTC will assess liquidated damages in the amount of \$100.00 per incident of non-compliance.

- (C) In the event that a Vehicle Operator does not notify Radio Dispatch of an in-service failure which results in delay to passengers of RTC's Specialized Services, the impact to the passenger is compounded as the Contractor will not have the opportunity to respond within thirty (30) minutes. For this type of egregious failure, RTC will assess liquidated damages in the amount of \$500.00 per occurrence.

(6) Below Standard Facility and Equipment Maintenance Performance.

- (A) If the Contractor fails to comply with scheduled Facility maintenance in accordance with Section 24(c) of this Contract, RTC will assess liquidated damages in the amount of \$250 per day for each delayed preventive maintenance task that preventive maintenance is delayed beyond the applicable schedule. If the Contractor allows the delay of any preventive maintenance task to go beyond thirty (30) days, liquidated damages will be raised to \$500.00 per day.
- (B) If RTC-provided facility equipment is out of service, due to any failure by the Contractor to provide supplies, parts, equipment etc., RTC will

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assess liquidated damages in the amount of \$250 per day for each piece of equipment out of service. If the Contractor allows any equipment to remain out of service, due to these issues, beyond thirty (30) days, liquidated damages will be raised to \$500.00 per day.

(7) Failure to Provide Acceptable Customer Service.

- (A) If the Contractor permits any employee who is the subject of five (5) or more valid customer complaints during any consecutive three (3) month period to remain in a public contact position for Contract services, RTC will assess liquidated damages in the amount of \$100.00 per day for every day that the employee was in contact with the public after receipt of the fifth customer complaint.
- (B) If the Contractor exceeds a ratio of 1.5 complaints for every 1,000 passenger trips in any single month, RTC will assess liquidated damages in the amount of \$75.00 for each valid complaint in excess of the 1 complaint for every 1,000 passenger trips.
- (C) If the Contractor does not respond in a timely manner to a customer comment, as outlined in the Customer Comment Process in Appendix Q, RTC will assess liquidated damages in the amount of \$100.00 per comments per day that the comment remains unanswered.

(8) Failure of Vehicle Operators to Maintain Approved Uniform Appearance. If a Vehicle Operator of the Contractor is found to be out of uniform during revenue service or in violation of the Contractor's written standards for appearance, RTC will assess liquidated damages in the amount of \$100.00 for each incident.

(9) Failure of Vehicle Operators to Log into the CATCOM System.

- (A) For any Revenue Vehicle in which the Advanced Mobile Data Terminal (AMDT) is in working condition and the Vehicle Operator fails to properly log into the system prior to leaving the designated bus yard, RTC will assess liquidated damages in the amount of \$500.00.
- (B) If the Contractor fails to meet the accuracy standards set out in Appendix P for trip edit and audit for three (3) consecutive months, RTC will assess liquidated damages in the amount of \$10,000.00 and liquidated damages in the amount of \$5,000.00 per month for any additional consecutive month that such failure continues.

(10) Failure to Meet Security Requirements. Failure by the Contractor to meet the security requirements as required in Section 27 of this Contract constitutes a serious breach of confidence between RTC and its Contractor.

- (A) If the Contractor fails to respond within the five (5) days to written notice of a failure to meet security requirements, RTC will assess liquidated damages in the amount of \$100.00 per day beginning from the date of notice of the failure.
- (B) Upon written notice of any additional failure of the same nature, RTC will assess liquidated damages in the amount of \$500.00 per day that the deficiency remains uncorrected.

(11) Failure to Report an Accident in a Timely Manner. If the Contractor fails to follow the prescribed time period in Section 22(v) for notification of an accident involving an RTC-owned vehicle, RTC will assess liquidated damages in the amount of \$5,000.00 per incident of non-notification. In addition, if the Contractor fails to follow the prescribed time periods for notification of an accident involving a Contractor-owned vehicle used in

revenue service or in training for revenue service, and such accident results in property damage (other than vehicle damage) or personal injury (including death), RTC will assess liquidated damages in the amount of \$5,000.00 per incident of non-notification.

(12) Failure to Maintain the Personnel Plan.

- (A) If the Contractor fails to provide a replacement for a key personnel position(s) within sixty (60) days, as required by Section 14(c), RTC will deduct the monthly salary and benefits of the vacant position for each full month that the position is vacant and assess liquidated damages in the amount of \$100.00 per day that the position(s) remains unfilled.
- (B) If the Contractor fails to provide for the replacement of vacant non-key personnel position(s) within thirty (30) days of the date the position becomes vacant in compliance with the Staffing and Personnel Program included as Appendix S, RTC will assess a liquidated damages in the amount of \$100.00 per day that the position(s) remains unfilled.

(d) Notice and Assessment. -- After the conclusion of each month, RTC will calculate and notify the Contractor in writing of any liquidated damages to be imposed for that month.

(1) If the Contractor disagrees with any of the liquidated damages assessed, the Contractor may respond to RTC in writing within five (5) days of receipt of the notice and provide an explanation or rationale for the Contractor's disagreement. Unless rescinded based on information from the Contractor, all amounts of liquidated damages imposed will be deducted by RTC from the payment for service otherwise due to the Contractor, however, not to exceed the maximum allowable liquidated damages assessment set out below in paragraph (2). If the Contractor continues to contest the

assessment of liquidated damages, the dispute is subject to resolution pursuant to Section 38 of this Contract.

(2) The maximum allowable liquidated damages assessment in any given month will be limited to five (5) percent of the monthly invoice amount.

SECTION 10. HOLIDAY SCHEDULES

(a) Regularly Planned Holidays. – RTC reserves the right to require the Contractor to operate modified schedules on holidays as the RTC Project Manager deems appropriate. Regularly planned holiday schedules will be operated on the following holidays:

New Years Day
Memorial Day
Independence Day
Labor Day
Thanksgiving Day
Christmas Day

(b) Additional Holidays. – Other holidays that may be deemed appropriate based upon customer demand are:

Martin Luther King Day
President's Day
Veteran's Day
Family Day (the day following Thanksgiving)

(c) CATSTAR and Silver-STAR. – CATSTAR will operate in accordance with the social service agencies' work schedules. RTC will provide the Contractor with no less than two (2) weeks advance notice of CATSTAR social service agency holidays. Silver-STAR will follow CAT Fixed Route holiday schedules.

SECTION 11. DEVELOPMENT OF DEPLOYMENT PLAN

(a) RTC Cooperation. – RTC intends to work cooperatively with its Contractor in

development of the vehicle deployment plan and the Silver-STAR route schedule used for purposes of scheduling Specialized Services trips by means of the Specialized Services scheduling and dispatching software. RTC is responsible for determining the allowable service hours, the route starting and ending times, and the route designations.

(b) Contractor Cooperation. -- The Contractor is expected to work cooperatively with RTC in development of the vehicle deployment plan and the establishment of time points for the Silver-STAR route schedule used for purposes of scheduling Specialized Services trips by means of the Specialized Services scheduling and dispatching software. The Contractor is responsible for determining employee bid packages for provision of service.

(c) Joint RTC/Contractor Scheduling Team. -- RTC, in an effort to maintain a cooperative environment, will establish a joint RTC/Contractor Scheduling Team to work together on reaching an efficient, cost-effective and high quality deployment plan and to discuss other scheduling issues that arise throughout the course of any given month.

SECTION 12. FARE COLLECTION

(a) Fare Recording. -- The Contractor's vehicle operators will record each boarding by type of fare, including recording of non-fare boarding and free-rides coupons. The Contractor will maintain all data necessary for the operation of the farebox and data reporting system to the satisfaction of RTC. Failure to pay a fare is considered a violation of RTC policy as defined in the RTC Disruptive Passenger Policy and Fare Non-Payment Procedure, also located in Appendix R.

(b) Fare Retention and Documentation. -- The Contractor will retain the fares collected as partial payment of the monthly invoice. The RTC Specialized Services scheduling and dispatching software system will be the documentation for the dollar value of the required

fares collected. Each month, RTC will deduct the total fares actually collected from the amount invoiced by the Contractor.

SECTION 13. FARE STRUCTURE

(a) In General. - RTC has determined the fare structure for CAT Specialized Services and incorporated that structure into Appendix C. RTC retains the right to make any fare adjustments it deems appropriate. The fare structure determined by RTC will be incorporated into this Contract between the RTC and the Contractor by reference.

(b) Methods of Payment. - The Contractor will accept all means of payment approved by RTC, including, but not necessarily limited to, cash, passes, tickets, transit punch cards, and electronic transit fare cards. All methods of payment will be recorded. The Contractor will ensure that passengers are required to show proper identification, where applicable, to qualify for CAT Specialized Services. Examples of proper identification include the CAT ADA Paratransit Services Identification Card, Reduced Fare Identification Card, or program specific identification cards (e.g., FDR or Division of Aging Services identification). RTC will provide samples of each of these examples to the Contractor.

SECTION 14. PROJECT MANAGEMENT

(a) Management Structure and Key Personnel Plan. - The Contractor shall comply with its Management Structure and Key Personnel Plan for CAT Specialized Services set out as Appendix U to this Contract.

(b) Contractor General Manager. - The Contractor has designated a full-time Contractor General Manager dedicated to services performed under this Contract who will supervise the day-to-day operation of the service, as well as the management of the project's

accounts and operating records. The Contractor General Manager shall be based out of the Specialized Services Administrative offices at the IBMF. The Contractor General Manager must have a minimum of five (5) years management and supervisory experience in public transportation with at least three (3) years of ADA paratransit operations experience. The Contractor General Manager or his or her designee will be available by telephone or in person during all hours of operation to make decisions as necessary at the request of RTC.

(c) Key Personnel. - RTC reserves the right to approve the selection of the Contractor General Manager and to direct the removal of the Contractor General Manager during the term of the Contract. The Contractor must notify the RTC Project Manager at least thirty (30) days prior to any contemplated changes to key personnel, and the RTC Project Manager must provide written approval of changes to key personnel prior to the action being taken excluding employee resignation and termination for cause. No key personnel position is to remain vacant for longer than sixty (60) days. While the Contractor conducts an extensive search, the Contractor may fill a vacant key personnel position temporarily provided that the individual filling the position meets the qualifications of the position. Key personnel include the following positions or their equivalents: Contractor General Manager; Managers of Operations, Quality Assurance, Vehicle Maintenance, Facilities Maintenance, Driver Development and Safety; and CATCOM Systems Specialist; and a staff person assigned to system security and emergency preparedness.

(1) Manager of Operations. - The Manager of Operations shall have a minimum of five (5) years management and supervisory experience in public transportation with at least three (3) years of ADA paratransit operations experience, as well as sufficient technical expertise of the Trapeze Pass Software operating system to effectively interact with RTC on the joint RTC/Contractor Scheduling Team and to oversee the dispatch functions.

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(2) Manager of Quality Assurance. - The Manager of Quality Assurance shall have a minimum of three (3) years management/supervisory experience in public transportation.

(3) Manager of Vehicle Maintenance. - The Manager of Vehicle Maintenance shall have a minimum of five (5) years journey level mechanic experience with full knowledge and extensive experience in diesel engine repair, CNG engine repair, automotive electrical, and air conditioning repair. He or she should also have an educational background consisting of, at minimum, an associate's degree, possess ASE automotive/truck certifications (preferably Master Certified), and have prior experience in transit maintenance (additional experience may be substituted for an associate's degree). Strong managerial and training experience with a minimum of three (3) years experience in maintenance supervision of ten or more mechanics is required. The Maintenance Manager must be legally licensed to operate a bus in the State of Nevada with a valid Class C license with Passenger ["P"] and Air Brake endorsements as well as maintain a valid medical certificate and any other licenses or certificates required by applicable Federal, state, or local regulations.

(4) Manager of Facilities Maintenance. - The Manager of Facilities Maintenance shall have at minimum five (5) years experience in the maintenance and repair of major commercial, industrial or public facilities, including three (3) years of supervisory/management experience. This position may be combined with the Manager of Vehicle Maintenance provided the Manager has the requisite

Case No. 70164

In the Supreme Court of Nevada

FIRST TRANSIT, INC.; and JAY
FARRALES,

Appellants,

vs.

JACK CHERNIKOFF; and ELAINE
CHERNIKOFF,

Respondents.

Electronically Filed
Oct 20 2017 03:03 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable STEFANY A. MILEY, District Judge
District Court Case No. A-13-682726-C

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65	Reply Brief on Motion to Alter or Amend the Judgment	07/26/16	11	2540–2544
6	Scheduling Order	08/28/13	1	34–36
15	Second Order Re-Setting Civil Jury Trial and Calendar Call	01/13/15	1	85–86
63	Stipulation and Order Extending Plaintiffs' Time to File Supplemental Briefing	07/12/16	10	2483–2484
67	Substitution of Attorney	03/24/17	11	2589–2591
60	Supplemental Motion for New Trial	05/25/16	10	2270–2300
21	Third Order Re-Setting Civil Jury Trial and Calendar Call	06/29/15	1	133–134
48	Verdict	02/29/16	7	1718–1720

INSTRUCTION NO. 30

Defendant FIRST TRANSIT is legally responsible for the actions of its employee, Defendant JAY FARRALES, at all times when Defendant JAY FARRALES is acting within the scope of his employment with Defendant FIRST TRANSIT.

001751

INSTRUCTION NO. 31

“Common carrier” means any person or operator who is held out to the public as willing to transport by vehicle from place to place, either upon fixed route or on-call operations, passengers or property, including a common motor carrier of passengers.

Defendant FIRST TRANSIT is a “common carrier.”

001752

INSTRUCTION NO. 32

At the time of the occurrence in question, the Defendant FIRST TRANSIT was a common carrier. A common carrier has a duty to its passengers to use the highest degree of care consistent with the mode of conveyance used and the practical operation of its business as a common carrier by paratransit bus. Its failure to fulfill this duty is negligence.

INSTRUCTION NO. _____

INSTRUCTION NO. 33

“Disability” means, with respect to an individual, a physical or mental impairment that substantially limits one or more of the major life activities of such individual, such as, caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and work.

HARVEY CHERNIKOFF was disabled.

001754

INSTRUCTION NO. 34

When a carrier is aware that a passenger is mentally disabled so that hazards of travel are increased as to him, it is the duty of the carrier to provide that additional care which the circumstances reasonably require. The failure of the defendant to fulfill this duty is negligence.

001755

INSTRUCTION NO. 35

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4 The plaintiff seek to establish liability on one or more different legal bases. One of the
5 plaintiffs' claims is negligent training and supervision. I will now instruct on the law relating to this
6 claim.
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001756

INSTRUCTION NO. 36

In order to establish a claim for negligent training and supervision, plaintiff must prove the following elements:

1. Defendant FIRST TRANSIT owed a duty of care to plaintiffs and to the deceased, HARVEY CHERNIKOFF, to reasonably train and supervise its employee, Defendant JAY FARRALES, to ensure that he was fit for his position;
2. Defendant FIRST TRANSIT breached that duty by failing to reasonably train and supervise its employee, Defendant JAY FARRALES, to ensure that he was fit for his position;
3. That Defendant First Transit's breach of this duty was the cause of HARVEY CHERNIKOFF's death; and
4. Plaintiff JACK CHERNIKOFF and Plaintiff ELAINE CHERNIKOFF suffered damages.

INSTRUCTION NO. 37

1
2
3 The court has given you instructions embodying various rules of law to help guide you to a just
4 and lawful verdict. Whether some of these instructions will apply will depend upon what you find to
5 be the facts. The fact that I have instructed you on various subjects in this case, including that of
6 damages, must not be taken as indicating an opinion of the court as to what you should find to be the
7 facts or as to which party is entitled to your verdict.
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INSTRUCTION NO. 38

Now you will listen to the arguments of counsel who will endeavor to aid you to reach a proper verdict by refreshing in your minds the evidence and by showing the application thereof to the law; but, whatever counsel may say, you will bear in mind that it is your duty to be governed in your deliberation by the evidence, as you understand it and remember it to be, and by the law as given you in these instructions, and return a verdict which, according to your reason and candid judgment, is just and proper.

INSTRUCTION NO. 39

1
2
3 It is your duty as jurors to consult with one another and to deliberate with a view toward
4 reaching an agreement, if you can do so without violence to your individual judgment. Each of you
5 must decide the case for yourself, but should do so only after a consideration of the case with your
6 fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous.
7 However, you should not be influenced to vote in any way on any question submitted to you by the
8 single fact that a majority of the jurors, or any of them, favor such a decision. In other words, you
9 should not surrender your honest convictions concerning the effect or weight of evidence for the mere
10 purpose of returning a verdict or solely because of the opinion of the other jurors. Whatever your
11 verdict is, it must be the product of a careful and impartial consideration of all the evidence in the case
12 under the rules of law as given you by the court.
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INSTRUCTION NO. 40

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4 If, during your deliberation, you should desire to be further informed on any point of law or
5 hear again portions of the testimony, you must reduce your request to writing signed by the foreman.
6 The officer will then return you to court where the information sought will be given to you in the
7 presence of the parties or their attorneys.

8 Readbacks of testimony are time consuming and are not encouraged unless you deem it a
9 necessity. Should you require a readback, you must carefully describe the testimony to be read back so
10 that the court reporter can arrange his notes. Remember, the court is not at liberty to supplement the
11 evidence.
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INSTRUCTION NO. 41

When you retire to consider your verdict, you must select one of your number to act as foreperson, who will preside over your deliberation and will be your spokesperson here in court. During your deliberation, you will have all the exhibits which were admitted into evidence, these written instructions and forms of verdict which have been prepared for your convenience. In civil actions, three-fourths of the total number of jurors may find and return a verdict. This is a civil action. As soon as six or more of you have agreed upon a verdict, you must have it signed and dated by your foreperson, and then return with it to this room.

001762

INSTRUCTION NO: 42

1 When you retire to consider your verdict, you must select one of your number to act as
2 foreman, who will preside over your deliberation and will be your spokesman here in court.
3
4

5 During your deliberation, you will have all the exhibits which were admitted into
6 evidence, these written instructions and forms of verdict which have been prepared for your
7 convenience.
8
9

10 The percentage of negligence attributable to the plaintiffs, if any, shall reduce the
11 amount of his recovery by the proportionate amount of his negligence.
12

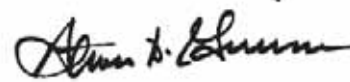
13 In civil actions, three-fourths of the total number of jurors may find and return a verdict.
14 This is a civil action. As soon as six or more of you have agreed upon the general verdicts and
15 six or more of you have agreed upon a special verdict, you must have the verdicts signed and
16 dated by your foreman, and then return with them to this room.
17
18

19 GIVEN THIS 26 day of February 2016

20
21 
22 DISTRICT COURT
23
24
25
26
27
28

50

50


CLERK OF THE COURT

JGJV
BENJAMIN P. CLOWARD, ESQ.
Nevada Bar No. 11087
CLOWARD HICKS & BRASIER, PLLC
721 South 6th Street
Las Vegas, NV 89101
Telephone: (702) 628-9888
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Bcloward@chblawyers.com
Attorneys for Plaintiffs

CHARLES H. ALLEN, ESQ. (*Pro Hac Vice*)
Georgia Bar No. 009883
ALLEN LAW FIRM
400 West Peach Tree Street, Unit 3704
Atlanta, GA 30308
Fax (866) 639-0287
Attorney for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

JACK CHERNIKOFF and ELAINE
CHERNIKOFF,

Plaintiffs,

vs.

FIRST TRANSIT, INC. JAY
FARRALES; DOES 1-10, and ROES 1-10
inclusive,

Defendants.

CASE NO. A-13-682726-C
DEPT. NO. XXIII

JUDGMENT UPON THE JURY
VERDICT

This action came on for trial before the court and the jury, the Honorable Stefany A. Miley, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict.¹

¹ Exhibit 1: Jury Verdict

<input type="checkbox"/> Non-Jury Disposed After Trial Start	<input type="checkbox"/> Jury Disposed After Trial Start
<input type="checkbox"/> Non-Jury Judgment Reached	<input checked="" type="checkbox"/> Jury Verdict Reached
<input type="checkbox"/> Transferred before Trial	<input type="checkbox"/> Other - _____

IT IS ORDERED AND ADJUDGED that Plaintiffs, JACK CHERNIKOFF and ELAINE CHERNIKOFF, have and recover of Defendant, FIRST TRANSIT, INC., the following sum:

Pain and suffering, by Harvey Chernikoff: \$7,500,000.00

Greif, sorrow, loss of companionship, society,
Comfort, and loss of relationship suffered
by Plaintiffs, JACK CHERNIKOFF and
ELAINE CHERNIKOFF: + \$7,500,000.00

Total Damages **\$15,000,000.00**

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff's past damages shall bear Pre-Judgment interest in accordance with Lee v. Ball, 116 P.3d 64, (2005) at the rate of 3.25% per annum plus 2%² from the date of service of the Summons and Complaint³ on June 7, 2013, through the date of the verdict on February 29, 2016, as follows:

PRE-JUDGMENT INTEREST ON PAST DAMAGES: 15,000,000.00

06/07/13 through 02/29/16 = \$2,149,631.70
[(997 days) at (prime rate (3.25%) plus 2 percent = 5.25%)]
[Interest is approximately \$2,156.10 per day]

NOW, THEREFORE, Judgment Upon the Verdict in favor of the Plaintiffs are as follows:

JACK CHERNIKOFF and ELAINE CHERNIKOFF is hereby given Seventeen Million One Hundred Forty-Nine Thousand, Six Hundred Thirty-One Dollars and 70/100 (\$17,149,631.70), which shall bear interest at the current rate of 5.25% per day, until satisfied.

DATED THIS 8 day of March, 2016.

DISTRICT COURT JUDGE

cc JUDGE STEFANY A. MILEY

Respectfully submitted:

CLOWARD HICKS & BRASIER, PLLC

BENJAMIN P. CLOWARD, ESQ.

² Exhibit 2: Prime Rate as of January 1, 2013

³ Exhibit 3: Affidavit of Service upon the Defendant

EXHIBIT “1”

**DISTRICT COURT
CLARK COUNTY, NEVADA**

JACK CHERNIKOFF and ELAINE
CHERNIKOFF,

Plaintiffs,

vs.

FIRST TRANSIT, INC. JAY
FARRALES; DOES 1-10, and ROES 1-10
inclusive,

Defendants.

CASE NO. A-13-682726-C
DEPT. NO. XXIII

VERDICT FORM

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT

FEB 29 2016

BY 
KATHERINE STREUBER, DEPUTY

VERDICT FORM

1
2 1. Do you find from a preponderance of the evidence that Defendant Jay Farrales
3 was negligent and that such negligence was a proximate cause of the death of Harvey
4 Chernikoff?

5 ANSWER: Yes ☒ No ☐

6 2. Do you find from a preponderance of the evidence that Defendant First Transit,
7 Inc. was negligent and that such negligence was a proximate cause of the death of Harvey
8 Chernikoff?
9

10 ANSWER: Yes ☒ No ☐

11 If you have answered "No" to questions #1 and #2 above, stop here, answer no further
12 questions, and have the foreperson sign and date this form.

13 3. Do you find from a preponderance of the evidence that Plaintiff Jack Chernikoff
14 was negligent and that such negligence was a proximate cause of the death of Harvey
15 Chernikoff?
16

17 ANSWER: Yes ☐ No ☒

18 4. Do you find from a preponderance of the evidence that Plaintiff Elaine
19 Chernikoff was negligent and that such negligence was a proximate cause of the death of
20 Harvey Chernikoff?

21 ANSWER: Yes ☐ No ☒
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1 5. Using one hundred percent (100%) as the total combined negligence which
2 acted as a proximate cause of the injuries complained of by Plaintiffs Jack Chernikoff and
3 Elaine Chernikoff, what percentage of the total combined negligence do you find from the
4 evidence is attributable to:

5 Jay Farrales 0 %
6 First Transit, Inc. 100 %
7 Jack Chernikoff 0 %
8 Elaine Chernikoff 0 %
9 Totaling 100%

11 7. Without regard to the above answers, we find that the total amount of the
12 Plaintiffs' damages are divided as follows:

13
14 Pain and suffering by HARVEY CHERNIKOFF \$ 7.5 million
15
16 Grief, sorrow, loss of companionship,
17 Society, comfort, and loss of relationship
18 suffered by Plaintiffs JACK CHERNIKOFF
19 and ELAINE CHERNIKOFF: \$ 7.5 million
20
21 TOTAL \$ 15,000,000

22
23 Dated this 29 day of FEBRUARY, 2016.

24 Fredy A. Acuna
25 FOREPERSON
26
27
28

EXHIBIT “2”

PRIME INTEREST RATE

NRS 99.040(1) requires:

"When there is no express contract in writing fixing a different rate of interest, interest must be allowed at a rate equal to the prime rate at the largest bank in Nevada, as ascertained by the Commissioner of Financial Institutions, on January 1, or July 1, as the case may be, immediately preceding the date of the transaction, plus 2 percent, upon all money from the time it becomes due, . . ."

Following is the prime rate as ascertained by the Commissioner of Financial Institutions:

January 1, 2015	3.25%	July 1, 2014	3.25%
January 1, 2014	3.25%	July 1, 2013	3.25%
January 1, 2013	3.25%	July 1, 2012	3.25%
January 1, 2012	3.25%	July 1, 2011	3.25%
January 1, 2011	3.25%	July 1, 2010	3.25%
January 1, 2010	3.25%	July 1, 2009	3.25%
January 1, 2009	3.25%	July 1, 2008	5.00%
January 1, 2008	7.25%	July 1, 2007	8.25%
January 1, 2007	8.25%	July 1, 2006	8.25%
January 1, 2006	7.25%	July 1, 2005	6.25%
January 1, 2005	5.25%	July 1, 2004	4.25%
January 1, 2004	4.00%	July 1, 2003	4.00%
January 1, 2003	4.25%	July 1, 2002	4.75%
January 1, 2002	4.75%	July 1, 2001	6.75%
January 1, 2001	9.50%	July 1, 2000	9.50%
January 1, 2000	8.25%	July 1, 1999	7.75%
January 1, 1999	7.75%	July 1, 1998	8.50%
January 1, 1998	8.50%	July 1, 1997	8.50%
January 1, 1997	8.25%	July 1, 1996	8.25%
January 1, 1996	8.50%	July 1, 1995	9.00%
January 1, 1995	8.50%	July 1, 1994	7.25%
January 1, 1994	6.00%	July 1, 1993	6.00%
January 1, 1993	6.00%	July 1, 1992	6.50%
January 1, 1992	6.50%	July 1, 1991	8.50%
January 1, 1991	10.00%	July 1, 1990	10.00%
January 1, 1990	10.50%	July 1, 1989	11.00%
January 1, 1989	10.50%	July 1, 1988	9.00%
January 1, 1988	8.75%	July 1, 1987	8.25%
January 1, 1987	Not Available		

*** Attorney General Opinion No. 98-20:**

If clearly authorized by the creditor, a collection agency may collect whatever interest on a debt its creditor would be authorized to impose. A collection agency may not impose interest on any account or debt where the creditor has agreed not to impose interest or has otherwise indicated an intent not to collect interest. Simple interest may be imposed at the rate established in NRS 99.040 from the date the debt becomes due on any debt where there is no written contract fixing a different rate of interest, unless the account is an open or store accounts as

EXHIBIT “3”

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06/11/2013 09:54:24 AM

1 AFFT
2 Richard Harris Law Firm
3 Benjamin P. Cloward, Esq.
4 801 S. 4th St
5 Las Vegas, NV 89101
6 State Bar No.: 11087
7 Attorney(s) for: Plaintiff(s)

Alana Duggan
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY NEVADA

8
9 The Estate of Harvey Chernikoff, Deceased; by Jack Chernikoff as
10 personal representative, individually and as heir; et al.

11 vs

Plaintiff(s)

12 First Transit, Inc. Laidlaw Transit Services, Inc dba First Transit, et al.

13 Defendant(s)

Case No.: A-13-682726-C

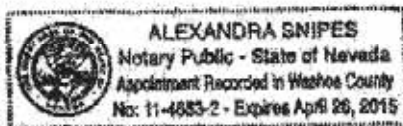
Dept. No.: XXIII

Date:

Time:

AFFIDAVIT OF SERVICE

15 I, Kelly Danner, being duly sworn deposes and says: That at all times herein affiant was and is a citizen of the
16 United States, over 18 years of age, licensed to serve civil process in the State of Nevada under license #604, and
17 not a party to or interested in the proceeding in which this affidavit is made. The affiant received 1 copy(ies) of the:
18 Summons: Complaint; Civil Cover Sheet; Initial Appearance Fee Disclosure on the 7th day of June, 2013 and
19 served the same on the 7th day of June, 2013 at 2:35pm by serving the Defendant(s), First Transit, Inc. Laidlaw
20 Transit Services, Inc dba First Transit by personally delivering and leaving a copy at Registered Agent: The
21 Corporation Trust Company of Nevada, 311 South Division Street, Carson City, Nevada 89703 with
22 Alana Duggan, Administrative Assistant pursuant to NRS 14.020 as a person of suitable age and discretion at
23 the above address, which address is the address of the registered agent as shown on the current certificate of
24 designation filed with the Secretary of State.



33 State of Nevada, County of Washoe

34 SUBSCRIBED AND SWORN to before me on this

35 11th day of June 2013

36 *Alexandra Snipes*
Notary Public Alexandra Snipes

Kelly Danner
Affiant Kelly Danner

R-057577

Legal Process Service

License # 604

Work Order No 1304659

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

Legal Process Service 105 Mary Street Reno, Nevada 89509

001773

51

51


CLERK OF THE COURT

1 NEO
2 BENJAMIN P. CLOWARD, ESQ.
3 Nevada Bar No. 11087
4 CLOWARD HICKS & BRASIER, PLLC
5 721 South 6th Street
6 Las Vegas, NV 89101
7 Telephone: (702) 628-9888
8 Facsimile: (702) 960-4118
9 Bcloward@chblawyers.com
10 *Attorneys for Plaintiffs*

11 DISTRICT COURT
12 CLARK COUNTY, NEVADA

13 JACK CHERNIKOFF and ELAINE
14 CHERNIKOFF,

15 Plaintiffs,

16 vs.

17 FIRST TRANSIT, INC. JAY
18 FARRALES; DOES 1-10, and ROES 1-10
19 inclusive,

20 Defendants.


CASE NO. A-13-682726-C
DEPT. NO. XXIII

NOTICE OF ENTRY OF ORDER

21 YOU WILL PLEASE TAKE NOTICE that the attached JUDGMENT UPON THE JURY
22 VERDICT was entered by this Court in the above-entitled matter on the 8th day of March, 2016.

23 DATED THIS 9th day of March, 2016.

24 CLOWARD HICKS & BRASIER, PLLC

25 
26 BENJAMIN P. CLOWARD, ESQ.
27 Nevada Bar No. 11087
28 721 South Sixth Street
Las Vegas, Nevada 89101
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of CLOWARD HICKS & BRASIER, PLLC and that on the 9 day of March 2016, I caused the foregoing NOTICE OF ENTRY OF ORDER to be served as follows:

- ☐ by placing a true and correct copy of the same to be deposited for mailing in the U.S. Mail at Las Vegas, Nevada, enclosed in a sealed envelope upon which first class postage was fully prepaid; and/or
- ☐ pursuant to EDCR 7.26, by sending it via facsimile; and/or
- ☒ pursuant to N.E.F.C.R. 9 by serving it via electronic service

to the attorneys listed below:

LEANN SANDERS, ESQ.
ALVERSON, TAYLOR, MORTENSEN & SANDERS
7401 W. Charleston Blvd.
Las Vegas, Nevada 89117
Attorneys for Defendants


An employee of the CLOWARD HICKS & BRASIER, PLLC

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03/08/2016 12:09:58 PM


CLERK OF THE COURT

JGJV
BENJAMIN P. CLOWARD, ESQ.
Nevada Bar No. 11087
CLOWARD HICKS & BRASIER, PLLC
721 South 6th Street
Las Vegas, NV 89101
Telephone: (702) 628-9888
Facsimile: (702) 960-4118
Bcloward@chblawyers.com
Attorneys for Plaintiffs

CHARLES H. ALLEN, ESQ. (Pro Hac Vice)
Georgia Bar No. 009883
ALLEN LAW FIRM
400 West Peach Tree Street, Unit 3704
Atlanta, GA 30308
Fax (866) 639-0287
Attorney for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

**JACK CHERNIKOFF and ELAINE
CHERNIKOFF,**

Plaintiffs,

vs.

**FIRST TRANSIT, INC. JAY
FARRALES; DOES 1-10, and ROES 1-10
inclusive,**

Defendants.

CASE NO. A-13-682726-C
DEPT. NO. XXIII

JUDGMENT UPON THE JURY
VERDICT

This action came on for trial before the court and the jury, the Honorable Stefany A. Miley,
District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its
verdict.¹

¹ **Exhibit 1: Jury Verdict**

<input type="checkbox"/> Non-Jury Disposed After Trial Start	<input type="checkbox"/> Jury Disposed After Trial Start
<input type="checkbox"/> Non-Jury Judgment Reached	<input checked="" type="checkbox"/> Jury Verdict Reached
<input type="checkbox"/> Transferred before Trial	<input type="checkbox"/> Other - _____

1 IT IS ORDERED AND ADJUDGED that Plaintiffs, JACK CHERNIKOFF and ELAINE
2 CHERNIKOFF, have and recover of Defendant, FIRST TRANSIT, INC., the following sum:

3 Pain and suffering, by Harvey Chernikoff: \$7,500,000.00
4
5 Greif, sorrow, loss of companionship, society,
6 Comfort, and loss of relationship suffered
7 by Plaintiffs, JACK CHERNIKOFF and
8 ELAINE CHERNIKOFF: + \$7,500,000.00
9
10 **Total Damages** **\$15,000,000.00**

11 IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff's past damages shall bear Pre-
12 Judgment interest in accordance with Lee v. Ball, 116 P.3d 64, (2005) at the rate of 3.25% per annum
13 plus 2%² from the date of service of the Summons and Complaint³ on June 7, 2013, through the date
14 of the verdict on February 29, 2016, as follows:

15 **PRE-JUDGMENT INTEREST ON PAST DAMAGES: 15,000,000.00**

16 06/07/13 through 02/29/16 = \$2,149,631.70
17 [(997 days) at (prime rate (3.25%) plus 2 percent = 5.25%)]
18 [Interest is approximately \$2,156.10 per day]

19 NOW, THEREFORE, Judgment Upon the Verdict in favor of the Plaintiffs are as follows:

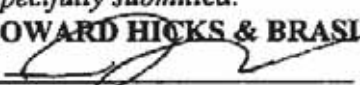
20 JACK CHERNIKOFF and ELAINE CHERNIKOFF is hereby given Seventeen Million One
21 Hundred Forty-Nine Thousand, Six Hundred Thirty-One Dollars and 70/100 (\$17,149,631.70), which
22 shall bear interest at the current rate of 5.25% per day, until satisfied.

23 DATED THIS 8 day of March, 2016.

24 
DISTRICT COURT JUDGE

25 JUDGE STEFANY A. MILEY

26 Respectfully submitted:

27 
CLOWARD HICKS & BRASIER, PLLC

28 BENJAMIN P. CLOWARD, ESQ.

² Exhibit 2: Prime Rate as of January 1, 2013

³ Exhibit 3: Affidavit of Service upon the Defendant

EXHIBIT “1”

**DISTRICT COURT
CLARK COUNTY, NEVADA**

JACK CHERNIKOFF and ELAINE
CHERNIKOFF,

Plaintiffs,

vs.

FIRST TRANSIT, INC. JAY
FARRALES; DOES 1-10, and ROES 1-10
inclusive,

Defendants.

CASE NO. A-13-682726-C
DEPT. NO. XXIII

VERDICT FORM

FILED IN OPEN COURT
STEVEN D. GRIERSON
CLERK OF THE COURT

FEB 29 2016

5:21 PM

BY 
KATHERINE STREUBER, DEPUTY

VERDICT FORM

1
2 1. Do you find from a preponderance of the evidence that Defendant Jay Farrales
3 was negligent and that such negligence was a proximate cause of the death of Harvey
4 Chernikoff?

5 ANSWER: Yes ☒ No ☐

6
7 2. Do you find from a preponderance of the evidence that Defendant First Transit,
8 Inc. was negligent and that such negligence was a proximate cause of the death of Harvey
9 Chernikoff?

10 ANSWER: Yes ☒ No ☐

11 If you have answered "No" to questions #1 and #2 above, stop here, answer no further
12 questions, and have the foreperson sign and date this form.

13 3. Do you find from a preponderance of the evidence that Plaintiff Jack Chernikoff
14 was negligent and that such negligence was a proximate cause of the death of Harvey
15 Chernikoff?

16 ANSWER: Yes ☐ No ☒

17
18 4. Do you find from a preponderance of the evidence that Plaintiff Elaine
19 Chernikoff was negligent and that such negligence was a proximate cause of the death of
20 Harvey Chernikoff?

21 ANSWER: Yes ☐ No ☒

22

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5. Using one hundred percent (100%) as the total combined negligence which acted as a proximate cause of the injuries complained of by Plaintiffs Jack Chernikoff and Elaine Chernikoff, what percentage of the total combined negligence do you find from the evidence is attributable to:

Jay Farrales	<u>0</u> %
First Transit, Inc.	<u>100</u> %
Jack Chernikoff	<u>0</u> %
Elaine Chernikoff	<u>0</u> %
Totaling	100%

7. Without regard to the above answers, we find that the total amount of the Plaintiffs' damages are divided as follows:

Pain and suffering by HARVEY CHERNIKOFF

\$ 7.5 million

Grief, sorrow, loss of companionship,
Society, comfort, and loss of relationship
suffered by Plaintiffs JACK CHERNIKOFF
and ELAINE CHERNIKOFF:

\$ 7.5 MILLION

TOTAL

\$ 15,000,000

Dated this 29 day of FEBRUARY, 2016.

Fredy A. Acosta
FOREPERSON

EXHIBIT “2”

PRIME INTEREST RATE

NRS 99.040(1) requires:

"When there is no express contract in writing fixing a different rate of interest, interest must be allowed at a rate equal to the prime rate at the largest bank in Nevada, as ascertained by the Commissioner of Financial Institutions, on January 1, or July 1, as the case may be, immediately preceding the date of the transaction, plus 2 percent, upon all money from the time it becomes due, . . ."

Following is the prime rate as ascertained by the Commissioner of Financial Institutions:

January 1, 2015	3.25%	July 1, 2014	3.25%
January 1, 2014	3.25%	July 1, 2013	3.25%
January 1, 2013	3.25%	July 1, 2012	3.25%
January 1, 2012	3.25%	July 1, 2011	3.25%
January 1, 2011	3.25%	July 1, 2010	3.25%
January 1, 2010	3.25%	July 1, 2009	3.25%
January 1, 2009	3.25%	July 1, 2008	5.00%
January 1, 2008	7.25%	July 1, 2007	8.25%
January 1, 2007	8.25%	July 1, 2006	8.25%
January 1, 2006	7.25%	July 1, 2005	6.25%
January 1, 2005	5.25%	July 1, 2004	4.25%
January 1, 2004	4.00%	July 1, 2003	4.00%
January 1, 2003	4.25%	July 1, 2002	4.75%
January 1, 2002	4.75%	July 1, 2001	6.75%
January 1, 2001	9.50%	July 1, 2000	9.50%
January 1, 2000	8.25%	July 1, 1999	7.75%
January 1, 1999	7.75%	July 1, 1998	8.50%
January 1, 1998	8.50%	July 1, 1997	8.50%
January 1, 1997	8.25%	July 1, 1996	8.25%
January 1, 1996	8.50%	July 1, 1995	9.00%
January 1, 1995	8.50%	July 1, 1994	7.25%
January 1, 1994	6.00%	July 1, 1993	6.00%
January 1, 1993	6.00%	July 1, 1992	6.50%
January 1, 1992	6.50%	July 1, 1991	8.50%
January 1, 1991	10.00%	July 1, 1990	10.00%
January 1, 1990	10.50%	July 1, 1989	11.00%
January 1, 1989	10.50%	July 1, 1988	9.00%
January 1, 1988	8.75%	July 1, 1987	8.25%
January 1, 1987	Not Available		

* Attorney General Opinion No. 98-20:

If clearly authorized by the creditor, a collection agency may collect whatever interest on a debt its creditor would be authorized to impose. A collection agency may not impose interest on any account or debt where the creditor has agreed not to impose interest or has otherwise indicated an intent not to collect interest. Simple interest may be imposed at the rate established in NRS 99.040 from the date the debt becomes due on any debt where there is no written contract fixing a different rate of interest, unless the account is an open or store accounts as

EXHIBIT “3”

Alvin D. Brown

Kelly Danner
Affiant Kelly Danner # R-057577
Legal Process Service License # 604
Work Order No 1304659
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*Attorneys for Defendants
 First Transit, Inc. and Jay Farrales*

DISTRICT COURT

CLARK COUNTY, NEVADA

JACK CHERNIKOFF and ELAINE
 CHERNIKOFF,

Case No. A-13-682726-C
 Dept. No. XXIII

Plaintiffs,

vs.

FIRST TRANSIT, INC.; JAY FARRALES;
 DOES 1-10; and ROES 1-10, inclusive,

Defendants.

MOTION FOR NEW TRIAL

(and Motion for Leave to Supplement)

Defendants First Transit, Inc. and Jay Farrales move for a new trial or, in
 the alternative, for remittitur, and to alter or amend the judgment. NRCP
 59(a); NRCP 59(e).

1 Transcripts of the trial are not yet complete. Defendants request leave to
2 supplement the attached points and authorities when the complete record
3 becomes available.

4 NOTICE OF MOTION

5 Please take notice that the undersigned will bring the above and
6 foregoing "MOTION FOR NEW TRIAL OR, IN THE ALTERNATIVE, FOR REMITTITUR
7 AND MOTION TO ALTER OR AMEND" on for hearing before the Court on the 31
8 day of May, 2016 at 9:30a.m. in Department XXIII of the above-
9 entitled court, located at the Regional Justice Center, 200 Lewis Avenue, Las
10 Vegas, Nevada 89155.

11 MEMORANDUM OF POINTS AND AUTHORITIES

12 Rule 59(a) provides:

13 **(a) Grounds.** A new trial may be granted to all or any
14 of the parties and on all or part of the issues for any of the
15 following causes or grounds materially affecting the
16 substantial rights of an aggrieved party: (1) Irregularity in
17 the proceedings of the court, jury, master, or adverse party,
18 or any order of the court, or master, or abuse of discretion by
19 which either party was prevented from having a fair trial;
20 (2) Misconduct of the jury or prevailing party; (3) Accident or
21 surprise which ordinary prudence could not have guarded
22 against; (4) Newly discovered evidence material for the party
23 making the motion which the party could not, with
reasonable diligence, have discovered and produced at the
trial; (5) Manifest disregard by the jury of the instructions of
the court; (6) Excessive damages appearing to have been
given under the influence of passion or prejudice; or, (7)
Error in law occurring at the trial and objected to by the
party making the motion. On a motion for a new trial in an
action tried without a jury, the court may open the judgment
if one has been entered, take additional testimony, amend
findings of fact and conclusions of law or make new findings
and conclusions, and direct the entry of a new judgment.

24 A new trial is necessary here due to errors of law that materially affected
25 the outcome and because the jury's verdict is excessive, demonstrating passion,
26 prejudice, lack of serious analysis, disregard for this Court's instructions and
27 the influence of misconduct and improper and misleading argument. The
28 verdict is irredeemably tainted and unreliable.

I.

**OMITTING THE DECEDENT FROM THE APPORTIONMENT
OF FAULT ON THE VERDICT FORM REQUIRES A NEW TRIAL**

The Court erred by excluding Harvey Chernikoff from the apportionment of fault on the verdict form. The comparative negligence of the decedent is relevant in a wrongful death case, regardless of whether the decedent himself is technically a party. There is no exception for defendants with mental disabilities. And there was certainly a bona fide issue of comparative negligence in this case.

A. The Jury Must Apportion the Comparative Negligence of “the Plaintiff’s Decedent” in a Wrongful Death Case

The Court erred by excluding Harvey comparative negligence from the jury’s apportionment of fault. The error of law is manifest in both the verdict form and the jury instruction regarding comparative negligence (Instruction No. 29), which did not even mention the decedent’s negligence. This prejudicial error requires a new trial because a reasonable jury could have found that Harvey was more than 50% at fault for his own death.

The language Nevada Revised Statute § 41.141(1) is clear and unambiguous:

*In any action to recover damages for **death** or injury to persons or for injury to property in which comparative negligence is asserted as a defense, the comparative negligence of the plaintiff or his **decedent** does not bar a recovery if that negligence was not greater than the negligence or gross negligence of the parties to the action against whom recovery is sought.*

NRS 41.141(1) (emphasis added). The statute bars recovery to an heir where the comparative negligence of the decedent is greater than the defendant’s. NRS 41.141(2)(a).¹ In this sense—interpreting the statute to be in harmony

¹ Prior to the enactment of this statute, any negligence on the part of a plaintiff would bar recovery. *Café Moda, LLC v. Palma*, 128 Nev. __, 272 P.3d 137

1 with itself—the decedent is treated as “a party” for purposes of fault allocation
 2 under NRS 41.141(2)(b), as it is necessarily required to determine whether the
 3 “comparative negligence ...of the plaintiff’s decedent is greater than the
 4 negligence of the defendant.” NRS 41.141(2)(a).

5 Under NRS 41.141, “a plaintiff may not recover if the comparative
 6 negligence of the plaintiff’s decedent is greater than the negligence of the
 7 defendant.” *Rich v. Taser Int’l, Inc.*, 2012 WL 1080281, at *14 (D. Nev. Mar. 30,
 8 2012) (interpreting NRS 41.141); *Moyer v. United States*, 593 F. Supp. 145, 147
 9 (D. Nev. 1984) (“Since Plaintiffs’ decedent was 50% contributorily negligent,
 10 each of said awards must be diminished by 50%.”).²

11 While this court relied on *Banks ex. rel. Banks v. Sunrise Hospital* to
 12 exclude Harvey from the special verdict on apportionment, this court’s
 13 interpretation conflicts with the controlling statute. *Banks* is not even on point,
 14 as the comparative fault of a plaintiff’s decedent was not an issue in that case.
 15 The “nonparties” in that case were settling co-defendants. 120 Nev. 822, 844-
 16 45, 102 P.3d 52, 67 (2004). There is not even dicta in the *Banks* opinion that
 17 suggests that the Supreme Court was rejecting a plain reading of NRS

18 (2012); *Anderson v. Baltrusaitis*, 113 Nev. 963, 967 n. 3, 944 P.2d 797 (1997).
 19 This statute now requires that the fact-finder weigh the negligence of the two
 20 parties and if the plaintiff was more negligent than the defendant, recovery is
 21 barred.

22 ² While Nevada Supreme Court has never had cause to articulate the
 23 uncontroversial proposition that a decedent’s comparative negligence is
 24 considered in a wrongful death case, its opinions regarding exceptions to the
 25 rule reinforce the existence of the rule. *See Young’s Mach. Co. v. Long*, 100
 26 Nev. 692, 693, 692 P.2d 24, 25 (1984) (decedent’s comparative negligence
 27 irrelevant only because claim arose in product defect, an exception to NRS
 28 41.141); *Davies v. Butler*, 95 Nev. 763, 771, 602 P.2d 605, 610 (1979) (Decedent’s
 comparative negligence would have required apportionment but for defendant’s
 willful and wanton misconduct); *Fennell v. Miller*, 94 Nev. 528, 531, 583 P.2d
 455, 457 (1978) (decedent’s contributory negligence precluded any recovery by
 the heirs in action filed before enactment of NRS 41.141, which would have
 allowed for apportionment between decedent and defendants).

1 41.141(1), which requires comparative negligence “of the plaintiff’s decedent” be
2 weighed against the fault of the defendant.

3 This statutory result, including the plaintiff’s decedent in the assessment
4 of comparative fault, makes more sense. Otherwise, for example, a drunk and
5 reckless driver could be 99% responsible for his own death in an accident, but
6 under plaintiff’s interpretation, the driver’s heirs would be entitled to a full
7 recovery from a defendant who was comparatively only 1% responsible. The
8 defendant should bear only his equitable share compared to the fault of the
9 decedent. *Moyer v. United States, supra*.

10 **B. Harvey is Held to the Standard of “Ordinary and**
11 **Reasonable Care” Regardless of his Mental Impairment**

12 It may be emotionally tempting to assume that Harvey’s mental disability
13 rendered him incapable of comparative negligence, but that is not the law.
14 “Unless the actor is a child, the actor’s mental or emotional disability is not
15 considered in determining whether conduct is negligent.” RESTATEMENT
16 (THIRD) OF TORTS § 9 (1999); *see also* RESTATEMENT (SECOND) OF TORTS § 283B
17 (1965) (“Unless the actor is a child, his insanity or other mental deficiency does
18 not relieve the actor from liability for conduct which does not conform to the
19 standard of a reasonable man under like circumstances.”); RESTATEMENT
20 (THIRD) OF TORTS: § 11 (“An actor’s mental or emotional disability is not
21 considered in determining whether conduct is negligent, unless the actor is a
22 child.”). Indeed, even children may be comparatively negligent, as recognized in
23 the so-called “rules of sevens.” *Galloway v. McDonalds Restaurants of Nevada,*
24 *Inc.*, 102 Nev. 534, 537-38, 728 P.2d 826,828-29 (1986). In Nevada, it is for the
25 jury to decide whether “the particular child has the capacity to exercise that
26 degree of care expected of children of the same age.” *Id.*

27 The public policy behind this doctrine is understandable. If mentally
28 disabled people are unable to function in the world without exercising ordinary

care, they should be assisted. Here, First Transit expressly stated that it would not act as a medical agent. And its obligations to provide special assistance to disabled persons pursuant the ADA regard only boarding, safely securing the passengers in their seats, and helping them disembark. *See* 49 C.F.R. § 37.121 (holding that each public entity operating a fixed route system shall provide paratransit . . . to individuals with disabilities that is comparable to the level of service provided to individuals without disabilities.”) Indeed, it is because of First Transit’s limited capabilities and responsibilities that it allows PCA’s to accompany disabled passengers.

C. Evidence of Harvey’s Comparative Negligence Is Considerable

Even assuming that Harvey’s comparative negligence had to be “a bona fide issue” to necessitate apportionment, *Stapp v. Hilton Hotels Corp.*, 108 Nev. 209, 211 n.3, 826 P.2d 954, 956 n.3 (1992), it was an issue that should have been presented to the jury.³

Harvey was disobeying an express rule not to eat on the bus, which was posted prominently both on the bus itself and included in the rider’s guide. Moreover, the inherent hazard of choking after failing to adequately chew food is obvious. Based on the size of the bolus in Harvey’s throat, Harvey must have been gobbling the sandwich. And Harvey did so rapidly and while hunched over in his seat, based on video image from an on-board camera. He may have done this to evade the driver’s vision because he was aware of the rule prohibiting food on the bus. Regardless of his motive, however, his crouched position hindered any chance the driver may have had to see him eating and remind him that it was disallowed—assuming the driver even had a duty to do so.

³ In the range of mental and physical disability, Harvey’s impairment was not extreme. He had sufficient capacity to work, to merit a California driver’s license and drive under his parents supervision, and to live away from his parents semi-independently, etc.

1 It is clear that defendant cannot be 100% responsible for Harvey's death.
2 Even though plaintiff's claim is based on the alleged breach of a claimed duty
3 (discussed later) to clear Harvey's throat and resuscitate him, this does not
4 account for complete causation of the death. First, as mentioned above,
5 defendant did not cause the boils to lodge in the throat. Second, even if
6 measures had been undertaken, there remains the factual issue whether they
7 would have been successful. At most, defendant's fault can correspond only to
8 the "lost chance" of saving Harvey from the preexisting, life-threatening peril.
9 In medical cases, for example, where a defendant is charged with failing to
10 discovery and prevent a condition he did not create, the plaintiff must still
11 persuade the jury of the percentage of the decedent's lost opportunity to cure
12 the condition. The recovery is not for the death itself, but rather the "decreased
13 chance of survival" caused by the negligence. *Perez v. Las Vegas Med. Ctr.*, 107
14 Nev. 1, ___, 805 P.2d 589, 592 (1991); *see also* 4 JAMES LOCKHART, CAUSES OF
15 ACTION 2D § 36 (2008) ("[t]he injured party should not be entitled to recover the
16 full amount of damages normally payable for loss of life or limb, but only a
17 proportion of such damages calculated by multiplying the value of life or limb
18 by the percentage of chance of survival or recovery proven to have been lost.").

19 This is a "lost chance" case, and the jury improperly allocated 100% of the
20 causation to defendant. Because Harvey's clogged airway was the cause of his
21 death, the jury should have allocated to defendant responsibility only after and
22 above that preexisting condition. Defendant's liability would be limited to any
23 small likelihood that Farrales would have succeeded in clearing Harvey's bolus
24 had he attempted to do so and the mere possibility that Harvey could have
25 survived without major brain damage.

26 This is not a harsh result. In any case, the jury must determine the
27 result. It was error for the district court to exclude the factual issue from the
28 jury. Notions of "last clear chance" and other concepts like "assumption of the

1 risk” have simply been assumed into comparative fault. Harvey bore a role in
2 the causation in this case, and the jury should have determined these issues.

3 Because defendants were entitled to have Harvey included in the
4 apportionment of fault, and his fault was certainly a bona fide issue in the case,
5 new trial is necessary.

6 II.

7 **IT WAS ERROR TO INSTRUCT THE JURY REGARDING** 8 **HEIGHTENED DUTIES THAT WERE IRRELEVANT TO THE INJURY**

9 Although First Transit is a common carrier and Harvey was disabled, the
10 heightened duties of care related to those statuses were not relevant to the type
11 of injury that occurred. The instructions, therefore, were misleading.

12 **A. Courts Must Define Duty in Light of the Foreseeability** 13 **of the Harm – “Negligence in the Air” is Not Enough**

14 Courts, not juries, are responsible for defining the legal standard of
15 reasonable conduct in a negligence case, and they must do so “*in the light of the*
16 *apparent risk.*” *Ashwood v. Clark County*, 113 Nev. 80, 84, 930 P.2d 740, 742
17 (1997) (emphasis in original). Foreseeability of harm is a predicate to
18 establishing the duty element of a negligence claim.⁴ *Ashwood v. Clark County*,
19 113 Nev. 80, 85, 930 P.2d 740, 743 (1997). In other words, mere “negligence in
20 the air” cannot serve as a standard of care in Nevada.

21 **B. Harvey’s Death Did Not Relate to the Type of Harm that** 22 **a Common Carrier Has a Heightened Duty to Prevent**

23 In light of the nature of Harvey’s injury, choking on a sandwich, it was
24 error to instruct the jury that First Transit and Farrales owed Harvey “the
25 highest degree of care.” See Instruction No. 32 (“A common carrier has a duty
26

27 ⁴ A cause of action for negligence consists of five elements: (1) duty; (2) breach;
28 (3) actual causation; (4) proximate causation; and (5) damages. *Perez*, 107 Nev.
at ___, 805 P.2d at 590-91 (1991).

to its passengers to use the highest degree of care consistent with the mode of conveyance.”)

1. *Heightened duty of care applies to the manner of driving, the provision of safe embarking and debarking, and protection from fellow passengers*

A common carrier’s heightened duty applies only to the types of actions and circumstances that are inherent to the transportation itself. Thus, the duty applies to the carrier’s obligation to carry the passenger safely and properly, to provide for safe embarking and debarking, and protection from the torts and misconduct of third persons, including other passengers. 1 MODERN TORT LAW: LIABILITY AND LITIGATION § 3:57 (2d ed.) That makes sense, because it is only in those activities and circumstances that the plaintiff has surrendered a degree of autonomy and control and has reason to be reliant on the superior position of knowledge and control of the carrier.

2. *No heightened duty to prevent a passenger from exposing himself to a commonplace risk*

Undersigned counsel finds no authority that a carrier is under a heightened duty of care to prevent a passenger from exposing himself to a known, common risk. Here, the possibility of *choking on insufficiently chewed food* does not fall within the types of danger that arise because of the mode of transportation. Thus, the carrier has no “highest duty of care” to protect the passenger from himself merely because he is in the carrier’s vehicle.

3. *The duty of a carrier to render emergency aid involves only a common reasonableness standard*

While a common carrier has a “special relationship” with its passenger, which raises an affirmative duty to render aid when the passenger becomes ill or injured, that does not mean that the degree of care required is special. It only means that there is a duty where there otherwise would be none:

The term ‘special relationship’ has no independent significance. It merely signifies that courts recognize an

affirmative duty arising out of the relationship where otherwise no duty would exist at all.

RESTATEMENT (THIRD) OF TORTS § 40 cmt. h. The extent of a common carrier's the duty to render aid is only a "duty of reasonable care." *Id.* ("An actor in a special relationship with another," including "a common carrier with its passengers," owes "a duty of reasonable care"); *Abraham v. Port Auth. of New York & New Jersey*, 29 A.D.3d 345, 346 (N.Y. 2006) ("A common carrier is subject to the same duty of care as any other potential tortfeasor, *i.e.*, reasonable care under the circumstances, and is not subject to a higher standard because of this status"); 13 C.J.S. *Carriers* § 520 ("While a carrier must give aid to an individual who becomes ill, however, the carrier need only exercise reasonable care under the circumstances, regardless of whether the carrier is a common carrier.")

"In Nevada, as under the common law, strangers are generally under no duty to aid those in peril." *Lee v. GNLV Corp.*, 117 Nev. 291, 295, 22 P.3d 209, 212 (2001). There is no general duty to be a "Good Samaritan." Put simply, the "special relationship" does not create a heightened duty, but rather only a duty to render reasonable care where there otherwise would be none at all.

4. Our Supreme Court held that the "duty of reasonable care" in "a special relationship" does not include an obligation to administer the Heimlich maneuver

The case of *Lee v. GNLV Corp.*, 117 Nev. 291, 22 P.3d 209 (2001), is particularly instructive, which involved the duty to render aid within the analogous "special relationship" of innkeeper and patron. In *Lee*, the Nevada Supreme Court found that the relationship between a business proprietor and its patrons justifies an exception to the general no-duty rule, but the exception is limited to providing basic first aid and summoning expert medical assistance to a patron in need. *Id.* at 298–99, 22 P.3d at 213–14. Thus, in *Lee*, the Supreme Court affirmed the district court's grant of summary judgment in

1 favor of the Golden Nugget in a case in which an inebriated restaurant *patron*
 2 *choked on food and died*. 117 Nev. at 299, 22 P.3d at 214. In *Lee*, as here,
 3 the resort attended to its patron and immediately summoned an ambulance; it
 4 did not perform the Heimlich maneuver to clear the decedent's airway, however,
 5 an omission his widow alleged amounted to negligence. *Id.* at 293–94, 22 P.3d
 6 at 210–11. While recognizing that “‘reasonableness’ is usually an issue for the
 7 jury,” the Supreme Court held that, “in some clear cases, the nature and extent
 8 of the defendant's duty is properly decided by the court,” *id.* at 296, 22 P.3d at
 9 212, and that “GNLV's employees acted reasonably as a matter of law by
 10 rendering medical assistance to [the decedent] and summoning professional
 11 medical aid within a reasonable time.” *Id.* at 299, 22 P.3d at 214 (emphasis
 12 added). In so holding, the *Lee* court rejected the argument that Golden
 13 Nugget's duty required it to do more than provide basic aid and summon
 14 professional medical help: “In this case, GNLVs *employees were under no*
 15 *legal duty to administer the Heimlich maneuver* to [the decedent].” *Id.*; see
 16 also *Campbell v. Eitak, Inc.*, 2006 PA Super 26, 893 A.2d 749 (2006)
 17 (Restaurant met its legal duty to choking patron when it promptly summoned
 18 medical assistance for patron); *Drew v. LeJay's Sportsmen's Cafe, Inc.*, 806 P.2d
 19 301 (Wyo. 1991) (same).

20 Thus, in light the nature of the alleged negligence and injury at issue, it
 21 was error to instruct the jury that First Transit and Farrales owed Harvey “the
 22 highest degree of care.” That general rule did not apply to particular
 23 circumstances of the alleged tort.

24 **C. Harvey's Impairment Did Not Warrant the Jury Instruction**
 25 **Regarding Additional Care to Disabled Persons**

26 Similarly, it was misleading, and therefore legal error, to instruct the jury
 27 on the sweeping principle that:
 28

1 When a carrier is aware that a passenger is mentally disabled so
2 that hazards of travel are increased as to him, it is the duty of the
3 carrier to provide that additional care which the circumstances
necessarily require.

4 Instruction No. 34. "Any greater duty of care to a handicapped passenger . . .
5 may only be imposed when the carrier knows or reasonably should know of the
6 particular handicap." *Washington Metro. Area Transit Auth. v. Reading*, 109
7 Md. App. 89, 109-11, 674 A.2d 44, 53-54 (1996).

8 The instruction did not apply to the facts in this case. First, the danger of
9 choking insufficiently chewed food is universal, independent of the "hazards of
10 travel." Second, even assuming that Harvey's mental disability impaired his
11 ability to eat normally, there is no evidence that Farrales knew of *that*
12 weakness. In other words, the type of harm in this case (choking on a
13 sandwich) does not derive from a hazard of travel that poses a unique danger to
14 a typical mentally disabled person, for which the transportation company
15 accepted a special responsibility.

16 The evidence, moreover, established that First Transit and its drivers are
17 not social workers or care givers. The special responsibilities imposed under
18 the "Americans With Disabilities Act" are limited to the boarding, securing of
19 assistive devices, and disembarking of paratransit busses.⁵ The company

20
21 ⁵ See 49 C.F.R. § 37.123(e) ("(1) Any individual with a disability who is unable,
22 as the result of a physical or mental impairment (including a vision
23 impairment), and without the assistance of another individual (except the
24 operator of a wheelchair lift or other boarding assistance device), to board, ride,
25 or disembark from any vehicle on the system which is readily accessible to and
26 usable individuals with disabilities.") This wording in the regulation indicates
27 the precise accommodations provided by the paratransit are limited to the
28 boarding, securing of assistive devices, and disembarking of paratransit busses.
As a complement to the fixed route system, the only additional accommodations
provided are in the boarding and alighting of the bus. There is no promise of
additional supervision, first aid training or assistance with medical events. See
id.

1 expressly informs in its guidelines that driver not responsible for personal care.
2 (Exhibit A, at 9.) While competent driving requires scanning mirrors, this does
3 not create a duty on the driver to monitor for medical events. The company
4 made clear that personal attendants are welcome to attend to a passenger's *en*
5 *route* personal needs and make accommodation for them. Drivers must watch
6 road.

7 **D. Plaintiffs' Counsel Abused the Instructions**
8 **to Argue that they Combined to Create a**
9 **Super-Heightened "Derek Jeter" Duty**

10 The instructions cannot be deemed harmless error. Plaintiffs' counsel
11 repeatedly relied on the concept of heightened duty during his closing
12 argument. Plaintiffs' counsel argued that the common carrier duty of care was
13 heightened, the equivalent of a standard major league baseball player – better
14 than the ordinary person, but not necessarily the best of the best. Instead of
15 this standard, though, counsel argued that common carriers had a super-
16 heightened duty to the mentally disabled, more like Derek Jeter – the best of
17 the best. He encouraged the jury to apply this super-heightened standard,
18 arguing that First Transit, Inc., as a common carrier, had a super heightened
19 duty to monitor disabled passengers while operating the bus.

20 The result was an utterly false impression to the jury about the applicable
21 standard of care. "An erroneous instruction as to the duty or standard of care
22 owing by one party to the other is substantial error requiring another trial."
23 *Otterbeck v. Lamb*, 85 Nev. 456, 463, 456 P.2d 855, 860 (1969)

24 **1. Company Rules Did Not Create Special Legal Duties**

25 The duty of "reasonable care" also is not altered by First Tansit's rules or
26 instructions to its drivers. For instance, First Transit's rule against eating—
27 which is merely an extension of RTC's rule applicable to all RTC vehicles
28 alike—did not create a duty, much less a heightened one. That rule in all RTC
vehicles is implemented for cleanliness. Choking is not a particular

“consequence against which the regulation was intended to protect.” *O’Leary v. Am. Airlines*, 475 N.Y.S.2d 285, 288 (N.Y. App. Div. 1984). Nor can the inclusion of CPR instructions within employee manuals give rise to a heightened duty, “since internal rules and manuals, to the extent they impose a higher standard of care than is imposed by law are irrelevant to establish a failure to exercise reasonable care.” *Abraham v. Port Auth. of New York & New Jersey*, 815 N.Y.S.2d 38, 40-41 (N.Y. App. Div. 2006); *Cooper v. Eagle River Mem. Hosp., Inc.*, 270 F.3d 456, 462 (7th Cir. 2001) (“[t]he internal procedures of a private organization do not set the standard of care applicable in negligence cases.”) “As a policy matter, it makes no sense to discourage the adoption of higher standards than the law requires by treating them as predicates for liability.” *De Kwiatowski v. Bear, Stearns & Co., Inc.*, 306 F.3d 1293, 1311 (2nd Cir. 2002). Thus, assuming arguendo that the rule against eating on the bus and the inclusion of resuscitation in the company’s manuals are even admissible to inform the meaning of “reasonable care” under the circumstances, they do not establish any duties beyond reasonable care. (Exhibit A.)

A new trial is necessary because the jury was so misguided on the relevant standard of care. It is impossible to say that it did not “substantially affect the [defendants’] rights” to a fair trial. *Cook v. Sunrise Hosp. & Med. Ctr.*, 124 Nev. 997, 194 P.3d 1214, 1220 (2008). In light of the above, First Transit has demonstrated that “but for the error, a different result might have been reached.” *Carver v. El-Sabawi*, 121 Nev. 11, 14-15, 109 P.3d 1283, 1285 (2005).

III.

THE \$15 MILLION VERDICT IS EXCESSIVE AND DEMONSTRATES PASSION AND PREJUDICE

The \$15 million verdict constitutes “excessive damages appearing to have been given under the influence of passion and prejudice.” NRCP 59(a)(6). Not

only is the amount unjustifiable, but the jury's apportionment of fault and even the short time spent deliberating also exhibit the jury's passion, prejudice and lack of seriousness. Much of that passion is explained, moreover by the improper arguments of plaintiff's counsel.

Under NRCP 59(a)(6), a district court may grant a new trial when it appears that "excessive damages have been given under the influence of passion or prejudice." NRCP 59(a)(6); *see also Hazelwood v. Harrah's*, 109 Nev. 1005, 1010, 862 P.2d 1189, 1192 (1993), *overruled on other grounds by Vinci v. Las Vegas Sands, Inc.*, 115 Nev. 243, 984 P.2d 750 (1999) (citing *Stackiewicz v. Nissan Motor Corp.*, 100 Nev. 443, 686 P.2d 925 (1984)). Although "excessiveness" and "passion and prejudice" are elusive standards,⁶ if the amount of the award is so great that it "shocks the judicial conscience," a new trial should be ordered.⁷ Among the factors this Court has considered in determining the excessiveness of an award are: (1) the reasonableness of the award in light of the evidence,⁸ (2) the size of the award relative to other awards in comparable cases,⁹ (3) the relationship of the special damages to the general damages,¹⁰ and (4) inappropriate conduct at trial designed to arouse passion or prejudice in the jury favorable to the plaintiffs.¹¹ In determining whether an award "shocks the judicial conscience," no single factor is dispositive. The

⁶ *Harris v. Zee*, 87 Nev. 309, 486 P.2d 490 (1971).

⁷ *See Guaranty Nat'l Ins. Co. v. Potter*, 112 Nev. 199, 207, 912 P.2d 267, 272 (1996); *Hazelwood*, 109 Nev. at 1010, 862 P.2d at 1192.

⁸ *K-Mart Corp. v. Washington*, 109 Nev. 1180, 1196-97, 866 P.2d 274, 284-85 (1993); *Nevada Indep. Broad. Corp. v. Allen*, 99 Nev. 404, 419, 664 P.2d 337, 347 (1983).

⁹ *Nevada Indep. Broad. Corp.*, 99 Nev. at 419, 664 P.2d at 347; *Drummond v. Mid-West Growers Coop. Corp.*, 91 Nev. 698, 712-13, 542 P.2d 198, 208 (1975).

¹⁰ *Drummond*, 91 Nev. at 713, 542 P.2d at 208.

¹¹ NRCP 59(a)(2); *Born v. Eisenman*, 114 Nev. 854, 962 P.2d 1227, 1231-32 (1998); *DeJesus v. Flick*, 116 Nev. 812, 7 P.3d 459 (2000).

amount of the award itself can also demonstrate passion and prejudice. *See Guaranty Nat'l*, 112 Nev. at 207, 912 P.2d at 272.

A. Awarding \$7.5 Million for 45 Seconds of Conscious Pain and Suffering is Outrageous

The jury awarded \$7.5 million for the pain and suffering experienced by Harvey. Even construed in a light most favorable to plaintiffs, the evidence shows that Harvey would not have been conscious for more the 45 seconds after he began to choke. A \$7.5 million award for such a short moment of time proves that the jury was not thinking coolly and rationally.

Damages for pain and suffering are recoverable only where the victim was consciously aware of her pain and suffering. *See Banks ex rel. Banks v. Sunrise Hosp.*, 120 Nev. 822, 843, 102 P.3d 52, 66 (2004) (nurse's testimony that victim responded to his environment presented sufficient evidence for the jury to consider "whether [the victim] was conscious of his pain and suffering"); *Pitman v. Thorndike*, 762 F. Supp. 870, 872 (D. Nev. 1991) (opining that "a Nevada court would follow the majority of other jurisdictions, and require pain and suffering to be consciously experienced").¹²

¹² As the court in *Pitman* explained:

The vast majority of jurisdictions require pain and suffering to be consciously experienced. *See, e.g., Luna v. Southern Pac. Transp. Co.*, 724 S.W.2d 383, 385 (Tex. 1987); *Harrell v. Empire Fire & Marine Ins. Co.*, 449 So.2d 1177 (La. Ct. App. 1984). This comports with the ordinary meanings of the terms "pain" and "suffering," which assume conscious awareness. Indeed, most of the cases that have held that hedonic damages are a part of pain and suffering have also explicitly required that they be consciously experienced. *See, e.g., McDougald*, 538 N.Y.S.2d at 375, 536 N.E.2d at 940 ("cognitive awareness is a prerequisite to recovery for loss of enjoyment of life"); *Willinger*, 393 A.2d at 1190 ("compensation for the loss of life's amenities is recoverable only if the victim survives the accident").

Pitman v. Thorndike, 762 F. Supp. 870, 872 (D. Nev. 1991). Chief Judge Reed also noted that the legislative history of NRS 41.085 made reference to "conscious pain and suffering." *Id.* (citing *Hearings on S. 99 before the Nevada*

1 While defendant does not dispute that the physical pain, panic, and fear
2 involved in choking are horrible, awarding \$7.5 million for 45 seconds of pain
3 and suffering¹³ is simply untethered from reality and justice. According to the
4 video image from the bus, Harvey began to slump slowly into the aisle over the
5 course of less than one minute. Plaintiffs' expert Dr. Stein agreed to the
6 sequence of events that establish that time of consciousness would have been no
7 more than 45 seconds—certainly less than three minutes.

8 If such a short period of time can justify any award at all, it would have to
9 be in the hundreds, not millions. While courts do not apply a stop-watch
10 approach to the length of conscious pain and suffering, there must be an
11 appreciable time of consciousness in order to justify an award. The Ninth
12 Circuit has held that 10 seconds of consciousness is insufficient to warrant any
13 award. *See Ghotra by Ghotra v. Bandila Shipping, Inc.*, 113 F.3d 1050 (9th Cir.
14 1996). Assuming one additional minute of pain and suffering would cross the
15 legal threshold into a justifiable basis to award damages, it could only be
16 nominal.¹⁴

17
18 *State Senate Judiciary Comm.* (Jan. 31, 1979) (Attachment C, Letter of Peter
19 Neumann)).

20 ¹³ In fact, it is not clear that Harvey experience any pain and suffering
21 associated with choking. The video images do not reveal any significant
22 struggle involving the standard signs of choking leading up to Harvey's death.
23 Harvey does not cough, attempt to cough, try to get out of his seat, clutch his
24 throat or panic in any way. Plaintiffs' expert Dr. Stein admitted that these
25 signs of choking did not occur.

26 ¹⁴ No award of pain and suffering is appropriate at all unless the jury found
27 that Farrales breached a duty of care before Harvey passed out. Plaintiff's
28 presented two theories of duty, breach and causation. The first involved
Farrales' "failure" to stop Harvey from eating or to notice any distress before he
passed out. The second theory of liability criticized Farrales for not doing
enough to rescue Harvey after he lost consciousness. Legally, the award of
conscious pain and suffering could only be justified by the first theory.

1 **B. The Award of \$7.5 Million to the Parents is Also Excessive**

2 An award of \$7.5 million to elderly heirs of an adult-child decedent, who
3 lived apart from them, and who provided them no financial support, is
4 unprecedented. It is also unconscionable.

5 The award has no connection to the factors set forth in law for evaluating
6 this element of damages, on which this Court instructed the jury—*e.g.*, the ages
7 of the deceased and heirs, respective life expectancies, the probability of
8 financial support, etc. (See Jury Instruction No. 22.) First, the family's
9 remaining time together would not have been long anyway. Jack and Elaine
10 Chernikoff are both in their late seventies. Harvey was in his fifties and had
11 numerous co-morbidities, such as a history of cancer, hypertension,
12 hypercholesterolemia, diabetes, and history of transient ischemic attack.

13 Second, while defendants do not doubt that plaintiffs' had kind affection
14 for Harvey, and vice-a-versa, they did not spend a lot of time together. Harvey
15 did not live with his parents, and had not lived with them permanently since
16 the age of 18. He lived in California until 2010, while his parents lived in
17 Nevada. The parents travelled ever summer without him.

18 Third, Harvey did not provide financial support. (That is not an
19 aspersion on Harvey. But it must be pointed out because lost financial support
20 is a major reason for this element of damages.)

21 The award is inconsistent with the evidence of the degree of grief and
22 sorrow. There has been no psychiatric treatment, no counseling, or resulting
23 illness.

24 **C. Plaintiff Improperly Argued for Recovery**
25 **Based on the Loss of Harvey's Life**

26 In this case, plaintiff improperly argued for damages that would reflect the
27 value of Harvey's life and basing recovery on Harvey's loss of his own life. The
28 Nevada wrongful death statute, NRS 41.085, allows only certain particular
elements of damage, such as conscious pain and suffering of the decedent or the

1 heir's grief and sorry. It was improper for plaintiffs to argue that the value of
2 Harvey's life could be recovered at all, and certainly not in those elements of
3 recovery.

4 Recovery for wrongful death is determined by statute, and the Nevada
5 wrongful death statute does not allow recovery of damages based on the
6 principles argued by plaintiffs at trial.

7 Modern wrongful-death statutory schemes, like Nevada's, adopt the
8 approach from England's Lord Campbell's Act. SPEISER, RECOVERY OF
9 WRONGFUL DEATH § 1:11. Before that breakthrough, "personal actions die[d]
10 with the person." *Id.*

11 As progeny of that act, wrongful death law allows recovery for two separate
12 and distinct types of harm: (1) the decedent's claims for the *decedent's damages*
13 incurred *up until the time of death* (along with special damages for actual costs
14 incurred because of the death) and (2) the harm suffered by heirs for *their*
15 individual losses. The loss of the decedent's life is not an element of either of
16 those categories.

17 The Supreme Court of Pennsylvania articulated the rationale for excluding
18 hedonic damages of the decedent in wrongful death cases:

19 Unlike one who is permanently injured, one who dies as
20 a result of injuries is not condemned to watch life's
21 amenities pass by. Unless we are to equate loss of life's
22 pleasures with the loss of life itself, we must view it as
23 something that is compensable only for a living plaintiff
24 who has suffered from that loss. It follows that [hedonic
25 damages] that may flow from the loss of life's pleasures
26 should only be recovered for the period of time between
27 the accident and the decedent's death.

28 *Willinger*, 393 A.2d at 1191.

Similarly, the decedent's theoretical loss of life's pleasures is not one of the
harms which the heirs suffer. SPEISER, RECOVERY OF WRONGFUL DEATH §

1 6:45. In *Brereton v. U.S.*, 973 F.Supp. 752, 754 (E.D. Mich. 1997), the court
2 opined:

3 The intrinsic value of the decedent's life is an unfit measure of the
4 value of his relationship with the surviving plaintiffs; it is like
5 comparing apples to oranges. To make that valuation the factfinder
6 will need to consider the characteristics of the relationship, not the
7 value society might place on the safety and health of a statistically
8 average individual.

9 *Id.*; cf. *Kurncz*, 166 F.R.D. 386, 388 (W.D. Mich. 1996).

10 The great majority of courts that have confronted this issue also interpret
11 their wrongful death statutes to disallow damages for the loss of life itself
12 (either by limiting them to the period between injury and death, or else properly
13 concluding that hedonic damages as a subset of pain and suffering necessarily
14 requires conscious awareness).¹⁵ In other words, "the overwhelming majority of
15 decisions...have rebuffed efforts to expand wrongful death damages to include

16 ¹⁵ See, e.g., *Choctaw Maid Farms, Inc. v. Hailey*, 822 So.2d 911, 931 (Miss.
17 2002) (gathering cases); see also *Sterner v. Wesley Coll., Inc.*, 747 F. Supp. 263,
18 273 (D. Del. 1990); *Brown v. Seebach*, 763 F. Supp. 574, 583 (S.D. Fla. 1991);
19 *Kemp v. Pfizer, Inc.*, 947 F. Supp. 1139 (E.D. Mich. 1996); *Pitman v. Thorndike*,
20 762 F. Supp. 870, 872 (D. Nev. 1991); *Livingston v. United States*, 817 F. Supp.
21 601 (E.D. N.C. 1993); *Garcia v. Superior Court*, 49 Cal. Rpt. 2d 580, 581 (Cal.
22 Ct. App. 1996); *Southlake Limousine & Coach, Inc. v. Brock*, 578 N.E.2d 677,
23 680 (Ind. App. 1991); *Poyzer v. McGraw*, 360 N.W.2d 748, 753 (Iowa 1985)
24 (evaluating "enjoyment of life" damages for wrongful death action); *Shirley v.*
25 *Smith*, 933 P.2d 651, 691 (Kan. 1997) ("Loss of enjoyment of life is a component
26 of pain and suffering but not a separate category of nonpecuniary damages");
27 *Phillips v. Eastern Me. Med. Ctr.*, 565 A.2d 306, 309 (Me. 1989); *Smallwood v.*
28 *Bradford*, 720 A.2d 586 (Md. 1998); *Anderson/Couvillon v. Neb. Dep't of Soc.*
Servs., 538 N.W.2d 732, 739 (Neb. 1995); *Smith v. Whitaker*, 734 A.2d 243, 246
(N.J. 1999); *Nussbaum v. Gibstein*, 536 N.E.2d 618 (N.Y. 1989); *First Trust Co.*
v. Scheels Hardware & Sports Shop, Inc., 429 N.W.2d 5, 13 (N.D. 1988);
Willinger v. Mercy Catholic Med. Ctr., 393 A.2d 1188, 1190-91 (Pa. 1978);
Spencer v. A-1 Crane Serv., Inc., 880 S.W.2d 938, 943 (Tenn. 1994); *Bulala v.*
Boyd, 389 S.E.2d 670, 677 (Va. 1990); *Tait v. Wahl*, 987, P.2d 127, 131 (Wash.
Ct. App. 1999); *Prunty v. Schwantes*, 162 N.W.2d 34, 38 (Wis. 1968).

1 loss of life's pleasures." STUART M. SPEISER, RECOVERY OF WRONGFUL DEATH §
2 6:45 (4th ed. updated July 2014).

3 It was misconduct to encourage the jury to base their award on principles
4 that are contrary to the law. *See Lioce v. Cohen*, 124 Nev. 1, 18, 174 P.3d 970,
5 981 (2008). This is plain error, as it is the explanation for the jury's excessive
6 verdict.

7 **D. Other Indicators of Passion and Prejudice**

8 **1. *The Jury Awarded Identical***
9 ***Amounts for Dissimilar Claims***

10 It is clear that the jury here did not bring real thought and individual
11 analysis to these claims. Jurors are charged to thoughtfully, carefully and
12 impartially consider the evidence before deciding upon a verdict. Nev. J.I. 11.01
13 ("Whatever your verdict is, it must be the product of a careful and impartial
14 consideration of all the evidence in the case under the rules of law as given you
15 by the court.") As this court has recognized, "Since the purpose of a general
16 damage award is to compensate the aggrieved party for damage actually
17 sustained, an identical award to multiple plaintiffs who are dissimilarly
18 situated is erroneous on its face." *Nevada Cement Co. v. Lemler*, 89 Nev. 447,
19 450-51, 514 P.2d 1180, 1182 (1973). That claims are tried together does not
20 make them worth the same amount.

21 Here, the jury awarded the same amount for Harvey's few minutes of
22 alleged pain and suffering as they did for the parents remaining years. And
23 there was no distinction between the parents. This identity of awards shows
24 that the jury failed to sufficiently analyze the claims. It reflects a lack of real
25 deliberation and the influence of passion and prejudice.

1 2. ***The Jury's Allocation of Fault Defies the Evidence,***
2 ***Reflecting Passion, Prejudice and a Lack of Seriousness***

3 The indicia of passion and prejudice may be evident in the jury's
4 allocation of fault, as well as in the amount of the award. *See, e.g., Scott v.*
5 *County of Los Angeles*, 32 Cal. Rptr.2d 643, 655 (Ca. App. 1994). In this case,
6 the allocation is nonsensical.

7 The jury checked boxes on the verdict form indicating that the jurors
8 found Farrales to be negligent and that his negligence was (at least technically)
9 a cause of Harvey's death. Nevertheless, the jury then found that Farrales'
10 negligence did not amount to even one percentage point among the contributing
11 causes.

12 On one hand, after having found that Farrales was negligent and that his
13 negligence was a cause of the damages, the jury's allocation of 0% to him
14 demonstrates either a complete misunderstanding of the instructions or blatant
15 disregard for them.¹⁶ Jurors are not at liberty to find a defendant at fault and a
16 cause of an injury and then disregard that determination in order to direct all
17 liability only to his "deep pocket" co-defendant.¹⁷ *That exemplifies prejudice.*

18 On the other hand, if the jurors did understand the instructions and did
19 follow them then they necessarily concluded that Farrales' negligence was *de*
20 *minimis*—it amount to less than one percent of all causes of Harvey's death.
21 And, if that is the case then the judgment against First Transit must be vacated

22
23 ¹⁶To be clear, First Transit maintains that neither Farrales nor First Transit
24 were negligent. The issue is whether the verdict is rational assuming that
either defendant was negligent.

25 ¹⁷ In evaluating the propriety of the jury's deliberation, it makes no difference
26 how the legal doctrine of *respondeat superior* may come to bear outside of the
27 jurors' purview. Indeed, if the jurors made their determination based on their
28 intuition of the law, instead of the Court's instructions, that would constitute
misconduct by the jury, which would also necessitate a new trial. NRCP
59(a)(2).

1 as a matter of law pursuant to NRCP 50(b). Judgment would have to be
2 entered in favor of First Transit.

3 The gravamen of plaintiffs' allegation is that Farreles failed to prevent
4 Harvey from eating his sandwich and then he came to Harvey's aid
5 inadequately. Plaintiffs' causes of action against First Transit rest on (1)
6 vicarious liability for the negligence acts of Farrales *to the extent* that Farrales'
7 omissions contributed to the death, and (2) the theory that Farrales' omissions
8 resulted from inadequate training. If the extent of Farrales' contribution to the
9 injury is *de minimis*, First Transit's resulting vicarious liability would be *de*
10 *minimis*. And if Farrales' negligence was not a bona fide issue in the case, it
11 does not matter how he was trained.

12 **3. *The Allocation of Zero Fault to Jack and Elaine*** 13 ***Chernikoff is Inconsistent with the Evidence***

14 Weighing the relative fault of the persons listed on the verdict
15 dispassionately would have resulted in some allocation to Jack and Elaine.
16 They knew of Harvey's capabilities and weaknesses better than anyone. They
17 knew he took the bus. They apparently never counseled with him about the
18 importance of following the rules of the bus, what precautions he should take
19 for his own safety, nor exercised their influence to ensure that a PCA
20 accompany him. The jurors' choice to ignore those facts because they
21 emotionally *wanted* to focus only on First Transit also demonstrates their
22 passion, prejudice and dereliction of their duty to follow the law.

23 **4. *Plaintiffs' Trial Tactics*** 24 ***Inflamed Passion and Prejudice***

25 A new trial is appropriate in the case of misconduct of the prevailing
26 party. NRCP 59(a)(2), (5). In addition, one of the factors that this court
27 considers in assessing the excessiveness of a verdict is inappropriate conduct at
28 trial designed to arouse passion or prejudice in the jury. NRCP 59(a)(2); *Born v.*
Eisenman, 114 Nev. 854, 962 P.2d 1227, 1231-32 (1998); *DeJesus v. Flick*, 116

1 Nev. 812, 7 P.3d 459 (2000). Plaintiffs' conduct in this case rose to the level
2 that necessitates a new trial.

3 While counsel are permitted some latitude in drawing allusions,
4 analogies, deductions and inferences from the evidence, such argumentative
5 devices are improper where they are not supported by the evidence and where
6 their employment is calculated to arouse prejudice or mislead the jury. *Durst v.*
7 *Van Grady*, 455 N.E.2d 1319, 1323 (Ohio Ct. App. 1982).

8 **5. Counsel Suggested that Jurors Had Committed**
9 ***During Voir Dire to Award \$15 Million if they***
10 ***Believed Plaintiffs Satisfied their Prima Facie Case***

11 The courtroom is no place for the sales techniques like "pre-closing." The
12 practice of conditioning potential jurors to dollar amounts (or "anchoring")
13 during *voir dire* is problem to begin with. But later implying to jurors during a
14 closing argument that they had essentially committed to a multi-million dollar
award during *voir dire* crosses the line into misconduct.

15 a. REFERRING TO THIS AS A
16 MULTI-MILLION CASE IN VOIR DIRE

17 During voir dire, plaintiffs' counsel improperly made statements, asked
18 questions of jurors, and otherwise referenced that this was a "\$___ million"
19 case. Plaintiff's counsel knew full well that, by doing so, he was implanting a
20 numerical value in the minds of the jury to represent plaintiffs' damages before
21 any evidence was ever admitted. This tactic is prejudicial and improper. See
22 generally Adam D. Galinsky & Thomas Mussweiler, *First Offers as Anchors:*
23 *The Role of Perspective-Taking and Negotiator Focus*, JOURNAL OF PERSONALITY
24 AND SOCIAL PSYCHOLOGY, 657-669 (2001) (hereinafter "*First Offers as Anchors*");
25 Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask For, the More*
26 *You Get: Anchoring in Personal Injury Verdicts*, 10 Applied Cognitive Psychol.
27 519 (1996) (defining anchoring as ""the bias in which individuals' numerical
28 judgments are inordinately influenced by an arbitrary and irrelevant

number”);¹⁸Chopra, *The Psychology of Asking a Jury for a Damage Award*, at 1 (as recognized by the plaintiffs’ bar, “[a]nchoring can sway decisions even when the anchor provided is completely arbitrary”); see also John Malouff & Nicola Shutte, *Shaping Juror Attitudes: Effects of Requesting Different Damage Amounts in Personal Injury Trials*, 129 J. SOC. PSYCHOL. 491 (1989) (mock juries awarded damages largely based upon what plaintiff’s counsel requested).

The resulting prejudice is evident in the jury’s decision to actually award \$15 million. This award is too coincidental considering the fact that plaintiff’s counsel never admitted evidence to substantiate the \$15 million figure, in particular.

b. TELLING THE JURY THAT IT WAS REQUIRED
TO GIVE PLAINTIFF’S COUNSEL WHAT HE
ASKED FOR AS LONG AS HE MADE HIS CASE

During closing arguments, plaintiff’s counsel referred back to voir dire and argued to the jury that they were obligated to give plaintiffs \$15 million by saying something to the effect of, “you told me that if I proved my case, you would give me what I asked for.” By doing so, plaintiff’s counsel encouraged the jury to disregard the merits of the claim and to issue a verdict based on their

¹⁸ See also W. Kip Viscusi, *The Challenge of Punitive Damages Mathematics*, 30 J. LEGAL STUD. 313, 329 (June 2001) (describing a mock juror study, which showed that allowing plaintiff’s attorney to suggest a punitive damages range produced awards highly concentrated within the suggested range because jurors “base[d] their judgments largely on the anchoring influence [of counsel’s suggested amounts]”); Reid Hastie et al., *Juror Judgments in Civil Cases: Effects of Plaintiff’s Requests and Plaintiff’s Identity on Punitive Damage Awards*, 23 LAW & HUM. BEHAV. 445 (Aug. 1999) (demonstrating “anchor-and-adjust” phenomenon whereby jurors use award suggested by plaintiff’s counsel as starting point and set punitive awards at a compromise figure based on the suggested amount); cf. Chris Janiszewski & Dan Uy, *Precision of the Anchor Influences the Amount of Adjustment*, PSYCHOLOGY SCIENCE, Vol. 19, No. 2, 121-127 (2008) (noting that anchoring effects account for a wide variety of numerical judgments, ranging from appraisal of homes, to estimates on risk and uncertainty, and estimates of future performances); Mollie W. Marti & Roselle L. Wissler, *Be Careful What You Ask For: Anchoring Effects in Personal Injury Damages Awards*, 6 J. Experimental Psychol. Applied 91-103 (June 2000) (describing mock juror study in which exaggerated requests for pain-and-suffering damages produced exaggerated awards and concluding that counsel’s award recommendations alter jurors’ beliefs about what constitutes an acceptable award).

1 “promise” to plaintiffs’ counsel. *See e.g. Lioce v. Cohen*, 174 P.3d 982-83 (“an
2 attorney may not encourage jurors to disregard the merits of the claims before
3 them and issue a verdict because the jury wants to send a message about some
4 social issue that is larger than the case itself or because the result dictated by
5 law is contrary to the jury’s sense of justice, morality, or fairness.”)

6 IV.

7 **THE EXCESSIVE VERDICT ALSO MANIFESTS THE JURY’S**
8 **DISREGARD FOR THE COURT’S INSTRUCTIONS**

9 The verdict shows a “disregard by the jury of the instructions of the
10 Court.” NRCP 59(a)(5). That too calls for a new trial.

11 **A. The Jury Disregarded the Limitation on Harvey’s**
12 **Damages to Conscious Pain and Suffering**

13 Instruction No. 22 informed the jury that it could award for “[a]ny
14 damages for pain, suffering, or disfigurement of the decedent.” For that
15 element of damages, the jury awarded \$7.5 million for the 1-to-2 minutes that
16 Harvey actually experienced pain and suffering. That exorbitant amount not
17 only reflects the jury’s passion and prejudice (*see above*), it also shows a
18 disregard of this jury instruction.

19 It is important to note that if any part of the \$7.5 million relates to the
20 alleged failures of Farrales after Harvey passed out, the judgment must be
21 vacated and a new trial conducted. That is because we cannot know on which
22 factual theory the jury relied in reaching its conclusions as to liability and
23 damages. *FGA, Inc. v. Giglio*, 128 Nev. ___, 278 P.3d 490, 496 (2012) (“general
24 verdict rule” does not apply where a party raises overlapping factual theories in
25 support of one single claim.)

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1 clearly excessive, this court can remit the award. *Lee v. Ball*, 116 P.3d 64, 66
2 (2005) (citing *Evans v. Dean Witter Reynolds*, 116 Nev. 598, 5 P.3d 1043
3 (2000).) At risk of understatement, the damages are excessive in this case. An
4 appropriate award would be \$100,000 or less.

5 Dated this 23rd day of March, 2016.

6 LEWIS ROCA ROTHGERBER CHRISTIE LLP

7
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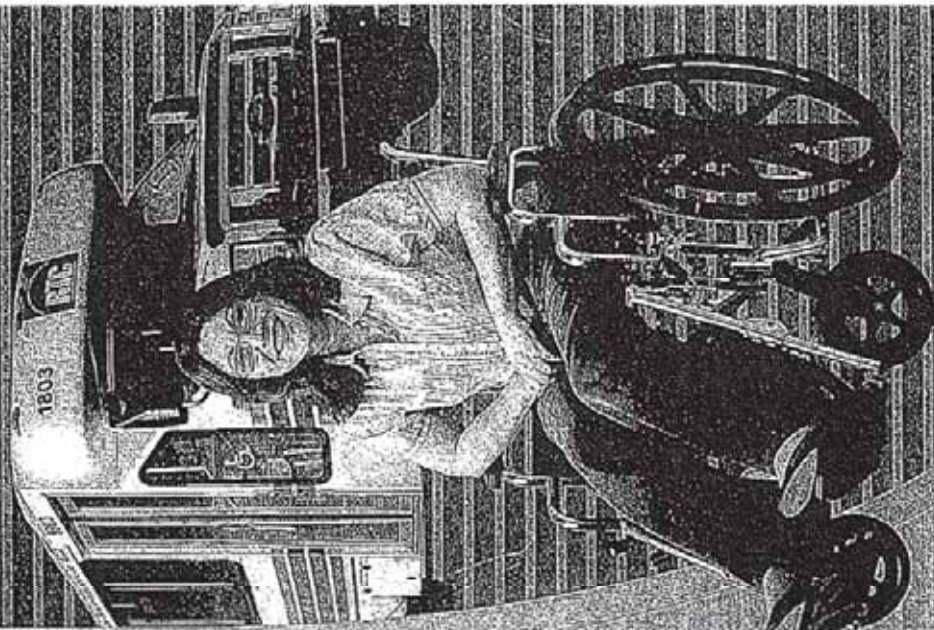
16 *Attorneys for Defendants First Transit, Inc.*
17 *and Jay Farrales*
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EXHIBIT A

EXHIBIT A

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Paratransit Guide



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Regional Transportation Commission

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rtcnev.com



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Welcome to RTC ADA Paratransit Services

Americans with Disabilities Act of 1990 (ADA) Paratransit Services is a shared-ride, public transportation service for people with disabilities, as required by federal law, who are functionally unable to independently use the RTC fixed route services.

The RTC strives to provide safe and reliable service for all members of the community, and is committed to providing commuters with the most up-to-date information available.

You will find within this guide information you will need to use the RTC ADA Paratransit Services.

Please review this information carefully. If you have any questions, please feel free to call Customer Service at (702) 228-4800 or for the hearing impaired (702) 676-1834 (TDD).

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Hours of Operation and Service Area

RTC ADA Paratransit Services operates 24 hours a day, 365 days per year.

The system operates within the urbanized area of Clark County as required under the ADA. Areas that are not serviced by RTC fixed route services may not have service through RTC ADA Paratransit Services.

A supplemental service zone exists outside of the service area required by the ADA. The supplemental service area is determined by the current RTC fixed route bus system. Special fares and reservation policies apply to travel within, into or out of this area. You were informed as to whether you live in the supplemental service area when your eligibility was determined.

Nellis Air Force Base permits drop off and pick up at designated areas only. Please ask the Customer Service Representative when you are scheduling your reservation where you may be dropped off at the base. Customers must have a valid military identification card in their possession.

Call Before You Move

The RTC's goal is to provide the best customer service possible. As a suggestion to help serve its riders, the RTC would like to remind customers to call RTC before changing residences to verify that public transportation is available where they are moving. This preventative step is similar in concept to the Public Utility agencies wanting people to call before they dig. The RTC understands that transportation and mobility are critical to our special services clients, and that it is just as important to others on our fixed route service. Don't leave yourself without a ride. One call is all it takes to RTC Customer Service at 228-4800.

Fares

RTC ADA Paratransit Services fare is broken down into various categories. The following outlines the rate schedule for a one-way trip.

RTC ADA Paratransit Fares Effective January 10, 2010

Amount	Type
\$2.75	Base cash (one-way)
\$3	Peak period (6 a.m. - 9 a.m. & 1 p.m. - 4 p.m.) Mon. - Fri.
\$6.00	Strip zone
\$4.00*	Supplemental fare zone
\$80	Unlimited RTC ADA Paratransit monthly pass (expires at end of calendar month)
\$150	Supplemental zone pass (expires at end of calendar month)
\$.50*	Shopping carts (one-way)
Free	Personal care attendant
\$5.50	Pre-paid punch card (10 fifty-cent and two (2) twenty-five denomination spots) No expiration date
\$16.50	Pre-paid punch card (30 fifty-cent and six (6) twenty-five denomination spots) No expiration date

NOTE: Passengers are responsible for paying their fare at the time of boarding. Failure to do so may result in the customer not being transported.

Companions are charged at the same fare amount as the ADA passenger.

Please have the exact fare ready. Drivers do not make change, or accept checks or credit cards.

* Plus fare