APPENDIX VOLUME 1

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DISTRICT COURT

CLARK COUNTY, NEVADA

PAULETTE DIAZ, an individual; and LAWANDA GAIL WILBANKS, an individual; SHANNON OLSZYNSKI, and individual; CHARITY FITZLAFF, an individual, on behalf of themselves and all similarly-situated individuals,

Plaintiffs,

vs.

MDC RESTAURANTS, LLC, a Nevada limited liability company; LAGUNA RESTAURANTS, LLC, a Nevada limited liability company; INKA, LLC, a Nevada limited liability company and DOES 1 through 100, Inclusive,

Defendants.

Case No. A-14-701633-C

Dept. No. XVI

SUPPLEMENT TO DEFENDANTS' CONTINUED MOTION TO STAY PROCEEDINGS ON APPLICATION FOR ORDER SHORTENING TIME

AND

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY REGARDING DEFENDANTS' HEALTH BENEFIT PLANS

AND

DEFENDANTS' COUNTERMOTION TO STRIKE UNDISCLOSED PURPORTED EXPERT AND FOR SANCTIONS

Hearing Date: September 25, 2015

Hearing Time: 9:30 a.m.

Defendants MDC RESTAURANTS, LLC; LAGUNA RESTAURANTS, LLC; and INKA, LLC (hereinafter "Defendants"), by and through their counsel of record, hereby supplement their continued Motion to Stay Proceedings on Application for Order Shortening Time. The continued Motion to Stay is a threshold issue and should be considered before moving forward with all other pending motions in this matter.

Alternatively, should this Court deny that stay, Defendants hereby oppose Plaintiffs PAULETTE DIAZ, LAWANDA GAIL WILBANKS, SHANNON OLSZYNSKI, and CHARITY FITZLAFF's (hereinafter "Plaintiffs") Motion for Partial Summary Judgment on Liability Regarding Defendants' Health Benefits Plans and bring their Countermotion to Strike Undisclosed Purported Expert and for Sanctions. This Supplement, Opposition and Countermotion is based on the Memorandum of Points and Authorities below, all papers and files on file herein and any oral argument permitted.

MEMORANDUM OF POINTS AND AUTHORITIES

I. SUPPLEMENT TO DEFENDANTS' CONTINUED MOTION TO STAY PROCEEDINGS ON APPLICATION FOR ORDER SHORTENING TIME.

A. Facts In Support Of Supplement To Motion To Stay.

As a preliminary and threshold matter, this Court should stay the continued class certification hearing for the reasons set forth in Defendants' Motion to Stay Proceedings on Application for Order Shortening Time filed on July 30, 2015. **Defendants' Motion to Stay Proceedings on Application for Order Shortening Time attached hereto as Exhibit A.** In addition to the unsettled question of law on the meaning of "provide" under the Minimum Wage Amendment in Nevada Constitution, Article XV, Section 16 (hereinafter the "MWA"), recent filings in this and other matters provide even more reason that the Nevada Supreme Court should clarify the pending questions of law before this Court moves forward with class certification based on Plaintiffs' interpretations of the MWA.

As this Court has repeatedly noted, the interpretations of the MWA are matters of first impression. As Defendants have noted, the lack of prejudice in waiting for the Nevada Supreme Court's guidance far outweigh Plaintiffs' legally unsupported demands to just "get on with the case." **Reporter's Transcript of Motion to Stay from August 11, 2015 on file herein and incorporated**

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by this reference at 19:9-14 and Plaintiffs Opposition to Defendants' Motion to Stay Proceedings on file herein and incorporated by this reference at 3:14-17. Throughout the extensive briefing in this matter, the issue before this Court has remained constant – can a class definition be written that properly ascertains the potential class plaintiffs in this case? Both Plaintiffs' revised class and subclass definitions hinge on three separate issues of MWA interpretation: (1) the statute of limitations, (2) the meaning of "provide", and (3) the meaning of "health insurance." **Plaintiffs' Supplemental Brief in Support of Plaintiffs' Motion for Class Certification Pursuant to N.R.C.P. 23 on file herein and incorporated by this reference at 2:6-8 and 3:18-19.** Two of these questions of law are already pending before the Nevada Supreme Court - the MWA's statute of limitations and the meaning of "provide." **Petition for Writ of Mandamus or Prohibition or, in the Alternative, Motion to Consolidate (MWA's statute of limitations) attached hereto as Exhibit B *and* Petition for Writ of Mandamus or Prohibition (MWA's meaning of "provide") attached hereto as Exhibit C.** Now Plaintiffs add a third issue – the MWA's meaning of "health insurance" – that even Plaintiffs must concede will be brought before the Nevada Supreme Court regardless of whose definition prevails at any district court level. Additionally, since the filing of these Petitions for Writ, several new developments give this Court even more compelling reasons to stay the pending continued class certification hearing.

First, on July 30, 2015, the Nevada Supreme Court sent notice that the MWA's statute of limitations is set to be argued before it in *Williams et al. v. Eighth Judicial District Court et al. (Claim Jumper Acquisition Co., LLC)*, Nevada Supreme Court case number 66629, on October 6, 2015. **Notice Scheduling Oral Argument attached hereto as Exhibit D.** Defendants in this matter have moved to consolidate their Petition for Writ in this matter with the Petition for Writ in *Williams*. ***See* Exhibit B, Petition for Writ.** Thus, there is no question that the Nevada Supreme Court will now resolve the MWA's statute of limitations even though that issue was brought before it through a discretionary Petition for Writ.

Second, on August 24, 2015, Defendants' Petition for Writ of this Court's order on the meaning of "provide" has now been joined by Amici Curiae for Claim Jumper Acquisition Co., LLC; Landry's Inc.; Landry's Seafood House – Nevada, Inc.; Landry's Seafood House – Arlington,

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Inc.; Bubba Gump Shrimp Co. Restaurants, Inc.; Morton's of Chicago/Flamingo Road Corp.; and Bertolini's of Las Vegas, Inc. **Amici Curiae's Brief in Support of Petition for Writ of Mandamus or Prohibition attached hereto as Exhibit E.** Thus, this Court's holding regarding the meaning of "provide" now has ramifications beyond just the confines of this case. Amici Curiae's briefing reinforces that the meaning of "provide" under the MWA prevents any class definition that would properly ascertain class members with standing should this Court's interpretation be incorrect.

Third, on August 21, 2015, after reviewing the ruling made by this Court along with another case challenging the Nevada Labor Commissioner's authority to promulgate regulations under the MWA, the Federal district court in *Tyus et al. v. Wendy's of Las Vegas, Inc. et al.*, United States District Court case number 2:14-cv-00729-GMN-VCF, has certified a question of law regarding the meaning of "provide" under the MWA to the Nevada Supreme Court through court order pursuant to Nevada Rule of Appellate Procedure 5. **Defendants' Request for Judicial Notice at Exhibit 1 attached hereto as Exhibit F.** In its Order, the court described the arguments regarding the meaning of "provide" in this matter:

> The parties disagree as to whether "provide" in the context of the Minimum Wage Amendment means that an employer's offer of health benefits is sufficient to pay the lower wage rate under the Minimum Wage Amendment. In support of his argument, Plaintiff has brought to the Court's attention two recent state district court decisions in support of his position. *See Diaz v. MDC Restaurants, LLC*, A-14-701633-C, Eighth Judicial Dist., Dept. XVI (July 17, 2015); *Hancock v. The State of Nevada*, 14 OC 00080 YB, First Judicial Dist., Dept. II (Aug. 14, 2015). On the other hand, Defendants cite various regulations enacted by the Labor Commissioner to support their position, which clarify and implement the Minimum Wage Amendment. See NAC § 608.102 ("To qualify to pay an employee the [lower-tier] minimum wage . . . [t]he employer *must offer* a health insurance plan . . . [and] [t]he health insurance plan *must be made available* to the employee and any dependents of the employee.") (emphasis added); see also NAC § 608.100, 106—08.

***See* Exhibit F, Request for Judicial Notice at Exhibit 1 at 10:14-25.** Thus, pursuant to Nevada Rule of Appellate Procedure 5(c)(1), the Federal district court, *sua sponte*, certified the following question to the Nevada Supreme Court based on this Court's language:

> IT IS FURTHER ORDERED that the following question of law is CERTIFIED to the Nevada Supreme Court pursuant to Rule 5 of the Nevada Rules of Appellate Procedure:

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> *Whether an employee must actually enroll in health benefits offered by an employer before the employer may pay that employee at the lower-tier wage under the Minimum Wage Amendment, Nev. Const. art. XV, § 16.*

(Emphasis in original). ***See* Exhibit F, Request for Judicial Notice at Exhibit 1 at 11:1-22.** In doing so, the Federal district court also denied without prejudice the pending Motion for Class Certification and all other motions filed in the matter to be "re-file[d] upon resolution of the Court's Certified Question to the Nevada Supreme Court." ***Id.* at 12:14-16.**

B. Argument In Support Of Supplement To Motion To Stay.

Plaintiffs agree that the Nevada Supreme Court has cited analogous federal law when making determinations for certification under Nevada Rule of Civil Procedure 23. *Beazer Homes Holding Corp. v. Eighth Judicial Dist. Court of Nev.*, 128 Nev. Adv. Rep. 66, 291 P.3d 128, 136 n. 4 (2012) citing generally *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. —, 131 S. Ct. 2541, 2558, 180 L. Ed. 2d 374 (2011); *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 847-851 (2005) (citing Rule 23 case law from the Second, Third, Fifth, Sixth, Seventh and Eleventh Circuits). Under federal law, Plaintiffs themselves have argued that courts may "take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to the matters at issue." *United States ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992); ***see also* Exhibit F, Request for Judicial Notice at Exhibit 2 at 3:3-7.** Thus, as Plaintiffs did with *Hancock*, Defendants believe that "the attached ruling [in *Tyus*] will assist the Court when considering the pending Motion in this action." ***See* Exhibit F, Request for Judicial Notice at Exhibit 2 at 2:1-2.**

In this matter, this Court should stay the continued Motion for Class Certification pending the Nevada Supreme Court's decision on (1) the statute of limitations and (2) the meaning of "provide" and (3) certify the question of what "health insurance" means under the MWA pursuant to Nevada Rule of Appellate Procedure 5. Indeed, this would be the most efficient way to ensure that the Court moves forward on a class definition that does not include plaintiffs who should never have been in the class in the first place. Further, this Court's ruling on "provide," which is integral to both Plaintiffs' class and subclass definitions, has now been independently certified by a district court *sua*

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sponte to the Nevada Supreme Court and all motions in that matter, including for class certification, have been stayed pending that decision. ***See* Exhibit F, Request for Judicial Notice at Exhibit 1.** With the Nevada Supreme Court directly asked by a Federal district court to answer this question and no prejudice or reason that has ever been cited by Plaintiffs regarding rejecting a stay other than "let's get on with it", there is no reason why this Court should continue to broadly placate Plaintiffs' unsupported demands for a quickie class certification that could be based on three erroneous interpretation of law. Accordingly, this Court should stay any further proceeding of the Motion for Class Certification on Plaintiffs' ever-evolving class-definition pending a decision on definitional terms under the MWA that all parties agree is integral to ascertain a class.

II. DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY REGARDING DEFENDANTS' HEALTH BENEFIT PLANS.

A. Plaintiffs' Motion For Partial Summary Judgment Is Improper And Should Be Stricken.

As another preliminary matter, Plaintiffs' flagrant disregard for civil procedure in regards to class certification in Phase I and initial expert disclosures are more reason than ever for this Court to step back and sort through the implications of simply moving forward with everything Plaintiffs' desire. Although the Court allowed Plaintiffs' counsel to recharacterize Defendants' Countermotion for Supplemental Briefing on Qualifying Health Insurance into a Motion for Partial Summary Judgment, there is no justification (or briefed authority) to allow Plaintiffs' to bring such a Motion when the final date to bring motions related to Phase I class certification discovery was July 28, 2015. **Scheduling Order attached hereto as Exhibit G; Notice of Entry of Stipulation and Order for Extension of Time to Complete Discovery ("Order for Extension of Discovery") filed on December 31, 2014 attached hereto as Exhibit H.** Therefore, pursuant to Nevada Rule of Civil Procedure 16.1(c)(8), Plaintiffs' Motion for Partial Summary Judgment should be stricken as non-compliant with the discovery rules and this Court's scheduling orders.

The analysis is straightforward. If Plaintiffs' Motion was truly a Phase II motion, then Plaintiffs should have no problems withdrawing this Motion for Partial Summary Judgment until Phase II commences. Plaintiffs will not do so, however, because Plaintiffs know that the definition

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of "health insurance" is now integral to the latest rendition of their class/subclass definitions which they themselves have kept changing. As such, Plaintiffs' Motion is either (1) entirely untimely under Phase I and subject to striking or (2) timely under Phase II and subject to be held in abeyance and not considered for the purposes of class certification. As the Court can see, Plaintiffs' Motion is actually improper under either scenario and this Court should not allow Plaintiffs to create their own rules when Plaintiffs had extensive extensions under Phase I to properly bring whatever motions they deemed necessary. Plaintiffs have not even cited any justification for their improper motion and move forward as if the rules do not apply to them.

In addition to the untimeliness or impropriety of the Motion, Plaintiffs have made a mockery of the discovery rules and deadlines. There is no question that Phase I discovery had an (1) initial expert deadline and a (2) discovery close deadline. ***See* Exhibit G, Scheduling Order; *see also* Exhibit H, Order for Extension of Discovery.** In fact, Phase II discovery does not even commence unless class certification is granted. ***Id.*** As with Plaintiffs' untimely and improper dispositive motion, any allowance of an undisclosed expert whose report has been converted into a declaration in support of a motion is not allowed by the Nevada Rules of Civil Procedure nor this Court's discovery orders. Further, the use of an expert to opine as to a question of law is clearly the province of the Court and now this Court risks taking an improper advisory opinion from Matthew T. Milone, an individual who has never even been certified as an expert before this or any court.

How can Plaintiffs come before this Court and be allowed to vitiate both Phase I motion deadlines and initial expert report disclosure requirements? Should this Court allow such flagrant violation of the rules, it will have modified the rules of civil procedure as follows:

> (1) Should Plaintiffs fail to make their initial expert disclosures, such disclosure shall be unnecessary and any initial expert's report can be converted into a declaration and submitted to the Court via Motion.
>
> (2) Should Plaintiffs fail to file motions by any designated deadlines, the parties can convert any supplemental briefing into a dispositive motion.

See applicable rules at Nev. R. Civ. P. 16.1(a)(2) and Nev. R. Civ. P. 16.1(c)(8). Clearly, this cannot be the case and Plaintiffs should abide by the same Nevada Rules of Civil Procedure and court orders that Defendants have been subject to.

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B. Facts In Support Of Opposition To Motion For Partial Summary Judgment.

Should the Court find grounds to overlook each reason for stay or striking the Plaintiffs' Motion for Partial Summary Judgment, then this Court should deny Plaintiffs' Motion for Partial Summary Judgment as Plaintiffs' conclusions about "health insurance" under the MWA are unsupported by the language of the MWA and the regulations in NAC 608. Pursuant to the MWA and the supporting regulations, qualifying health insurance must: (1) cover those categories of health care expenses that are generally deductible by an employee on his individual federal income tax return pursuant to 26 U.S.C. §213 if such expenses had been borne directly be the employee; (2) be made available to the employee and any dependents of the employee; (3) not have a waiting period that exceeds more than 6 months; and (4) cost the employee no more than 10% of the employee's gross taxable income attributable to the employer. Nev. Const. art. XV § 16; NAC 608.102. These four requirements are the only requirements for what constitutes qualifying health insurance under the MWA. The health insurance plans offered to Plaintiffs satisfy all four.

Plaintiff attempts to dispute this fact by setting forth page after page of a repetitive, vague, and totally unfounded assertion that that Defendant's health insurance plans are not "health insurance," based on a random compilation of laws and opinions which have no relevance to this case whatsoever. **Plaintiffs' Motion for Partial Summary Judgment on Liability Regarding Defendants' Health Benefits Plans (hereinafter "MPSJ") on file herein and incorporated by this reference.** Indeed, the allegation that Defendant's plans are not actually "health insurance" is completely absent from Plaintiffs' Amended Class Action Complaint (hereinafter "Complaint"). More egregiously, it completely contradicts the Complaint. In their Complaint, Plaintiffs alleged that the health insurance plan was not in compliance with the MWA or NAC 608.102 for exactly two reasons: (1) it allegedly did not cover those categories of health care expenses that are generally deductible by an employee on his individual federal income tax return pursuant to 26 U.S.C. §213 if such expenses had been borne directly be the employee; (2) it cost the employee more than 10% of the employee's gross taxable income attributable to the employer. **Amended Class Action Complaint on file herein and incorporated by this reference at ¶¶ 8, 9.** Plaintiffs have brought summary judgment only on the first issue of whether or not Defendants' plans meet the definition of

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"health insurance." The Plaintiffs' Complaint makes no allegations whatsoever that the company health insurance plan was not actually "health insurance." Moreover, it makes no reference whatsoever to any of the federal or state laws Plaintiff is now asserting are case-determinative.

However, Plaintiffs' case fails under this new argument as well. The federal laws Plaintiffs rely upon have no bearing whatsoever on the Nevada Constitution and the state laws they reference were preempted by ERISA decades ago. As such, the real gravamen of Plaintiffs' argument is that qualified health insurance should be more than what is set forth in the MWA – essentially asking the Court to legislate from the bench – and that employers should have guessed how much insurance coverage Plaintiffs' counsel envisioned is appropriate. **Plaintiffs' MPSJ.** Indeed, this entire case boils down to Plaintiffs' counsel's own personal belief system that "qualified health insurance" means more than the health insurance plans Defendants offered – regardless of what plans were actually offered.[1] Plaintiffs' own personal belief system of course is not a sufficient basis for summary judgment.

Defendants' dispute Plaintiffs' characterizations that Defendants' health insurance plans were not "health insurance" under the MWA and NAC 608. Further, Plaintiffs have included an untimely declaration from a purported expert that, for the reasons discussed in Defendant's Motion to Strike, filed concurrently herein, must be stricken and in no way establishes any issue of material fact. The evidence of this case shows that the generalities alleged by Plaintiffs will not justify their claims. Therefore, summary judgment must be denied as a matter of law.

C. Arguments In Support Of Opposition To Motion For Partial Summary Judgment.

The parties do not dispute the standard of review for summary judgment and agree that the question before the Court is a question of law. Defendants do dispute several of Plaintiffs' undisputed facts. Defendants dispute that Plaintiffs Diaz, Wilbanks, Olszynski and Fitzlaff were paid at a rate of $7.25 for the employment dates cited. As pointed out in Defendants' Opposition to

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[1] Indeed, Plaintiffs even concede in their motion that the Nevada Division of Insurance considers the plans offered by Defendants to be health insurance and it sets guidelines for those policies which Defendants follow. **Plaintiffs' MPSJ at 11:15-12:1.**

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Motion for Class Certification, the four named Plaintiffs had varying rates of pay throughout their employment with Diaz making $8.25 an hour, to $10.00 an hour, to $11.00 an hour and $7.25 an hour; Wilbanks recalling either $7.25 or $7.45 an hour; Olszynski making $7.25 an hour and then $5.13 an hour in a Colorado location; and Fitzlaff making $7.25 an hour. **Opposition to Motion for Class Certification Pursuant to Nevada Rule of Civil Procedure 23 on file herein and incorporated by this reference at 14:17-22.** Further, Defendants dispute that they simply "offered Plaintiffs" the referenced health plans as Plaintiff Fitzlaff actually enrolled in health insurance. ***Id.* at 13:19-14:3.** Subject to these corrected facts, Defendants do agree that the question of what "health insurance" means under the MWA is a question of law for this Court.

As to this question of law, Defendants' health insurance plans satisfy each and every requirement of qualified health insurance under the MWA and corresponding Nevada Labor Commissioner regulations. Plaintiffs have not set forth a single credible argument to the contrary. Accordingly, the Court should rule against Plaintiffs for four reasons: (1) Defendants' health insurance plans are compliant with the MWA; (2) Defendants' health insurance plans do not violate any operative state law; (3) Limited Benefit Plans and Fixed-Indemnity Plans both satisfy the definition of health insurance under the MWA; and (4) Plaintiffs' discussions on "Social Expectations" and a "Wage and Benefit History" are nothing more that Plaintiffs' counsels' bogus conjecture not supported by legislative history.

1. Defendants' health insurance plans are compliant with the MWA.

The MWA sets forth a two tiered minimum wage rate based upon whether an employer offers health insurance to its employees. Specifically, the MWA provides that an employer may pay the lower tier minimum wage rate to its employee if the employer offers that employee "health insurance." Nev. Const. art. XV § 16. The MWA does not elaborate on the definition of "health insurance," but it does state that, "[o]ffering health benefits ... shall consist of making health insurance available to the employee for the employee and the employee's dependents at a total cost to the employee for premiums of not more than 10 percent of the employee's gross taxable income from the employer." *Id.* Additionally, employees are defined to include full and part-time employees. *Id.* Thus, under the plain language of the MWA, the only requirement for "health

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insurance" is that it not exceed 10 percent of an employee's gross taxable income. There is no language in the MWA stating that "health insurance" must provide "comprehensive coverage" or be a "traditional major medical plan." Plaintiffs cannot cite a single authority that shows that the plain language of the MWA called for any requirements beyond the term "health insurance."

After the passage of the MWA, the Nevada Labor Commissioner established a series of regulations related to the MWA under the Nevada Administrative Code (NAC) which employers paying the lower tier minimum wage are required to follow. In regard to what "qualif[ies]" as "health insurance," NAC 608.102 provides that the "health insurance" must: (1) cover those categories of health care expenses that are generally deductible by an employee on his individual federal income tax return pursuant to 26 U.S.C. §213 if such expenses had been borne directly be the employee; (2) be made available to the employee and any dependents of the employee; (3) not have a waiting period that exceeds more than 6 months; and (4) cost of the employee no more than 10% of the employee's gross taxable income attributable to the employer. NAC 608.102. Thus, it is the Nevada Labor Commissioner's regulations that are the only other authority which interpreted what was meant by "health insurance."

Defendants' health insurance plans satisfy every requisite of "health insurance" as defined by the MWA and supporting regulations. Specifically, the plans: (1) cover those categories of health care expenses that are generally deductible by an employee on his individual federal income tax return pursuant to 26 U.S.C. §213 if such expenses had been borne directly be the employee; (2) are available to employees and any dependents of employees; (3) have a waiting period that does not exceed more than 6 months; and (4) cost the employee no more than 10% of the employee's gross taxable income attributable to the employer. MWA and NAC 608. In their Motion for Partial Summary Judgment, Plaintiffs do not dispute or bring any arguments regarding points (2) through (4) and Plaintiffs concede that the Defendants' health insurance plans comply with the MWA's requirement that health insurance is available to employees and dependents, NAC 608's requirement that the health insurance waiting period is less than 6 months and the MWA's requirement that the health insurance offered cost no more than 10% of the employee's gross taxable income. Instead, the Plaintiffs dispute whether or not Defendants' health insurance was "health insurance" under the

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MWA which goes directly to point (1) on what the plans covered.

In regard to health insurance coverage, Plaintiffs attempt to confuse the issue by presenting a disorganized narrative that ultimately requests for the Court to expand the definition of "health insurance" to encompass requirements that quite plainly do not exist. Indeed, the entire basis of Plaintiffs' argument is that the Court should create its own definition of health insurance based on a compilation of random opinion-pieces that purportedly support Plaintiff's counsel's personal opinion on health insurance plans generally. **Plaintiffs' MPSJ.** Of course, articles about the Affordable Care Act and insurance laws in Connecticut are of no actual assistance in determining whether Defendant's health insurance plans are qualified health insurance as defined by the MWA. ***Id.* at 10-11.** Moreover, tossing out a series of elementary insults about Defendant's health insurance plans (i.e. "very bad health care products" and "junk benefits") is inane and in no way changes the very clear definition of health insurance under the MWA. Defendants' plans cover those categories of health care expenses that are generally deductible by an employee on his or her individual federal income tax return pursuant to 26 U.S.C. § 213. Accordingly, Defendants' plans are health insurance for the purposes of the MWA and therefore, Plaintiffs' Motion for Partial Summary Judgment must be denied.

a. Defendants' health insurance plans covered those categories of health care expenses that are generally deductible by an employee on his individual Federal Income Tax return pursuant to 26 U.S.C. §213.

Beyond the term "health insurance" in the MWA, the only other authority defining what health insurance means under the MWA is the Nevada Labor Commissioner's regulations. Those regulations, in turn, cite health care expenses that are generally deductible pursuant to 26 U.S.C. § 213. 26 U.S.C. §213 sets forth two categories of health care that are generally deductible: (1) medical care; and (2) medicine or drugs that are a prescribed drug or insulin. 26 U.S.C. §213(a)-(b). A "prescribed drug" is defined as "a drug or biological which requires a prescription of a physician for its use by an individual." 26 U.S.C. §213(d)(3). The term "medical care" is defined as amounts paid:

> (A) for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body,

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> (B) for transportation primarily for and essential to medical care referred to in subparagraph (A),
>
> (C) for qualified long-term care services (as defined in section 7702B (c)), **or**
>
> (D) for insurance (including amounts paid as premiums under part B of title XVIII of the Social Security Act, relating to supplementary medical insurance for the aged) covering medical care referred to in subparagraphs (A) and (B) or for any qualified long-term care insurance contract (as defined in section 7702B (b)).

26 U.S.C. §213(d)(1). (Emphasis added). Additionally, amounts paid for certain lodging away from home can also be treated as paid for medical care if:

> (A) the medical care referred to in paragraph (1)(A) is provided by a physician in a licensed hospital (or in a medical care facility which is related to, or the equivalent of, a licensed hospital), and
>
> (B) there is no significant element of personal pleasure, recreation, or vacation in the travel away from home.

26 U.S.C. §213(d)(2). However, the amount paid for the above defined lodging cannot exceed $50 for each night for each individual. *Id.* The statute also makes clear that "medical care" does not include cosmetic surgery. 26 U.S.C. §213(d)(9).

These definitions are further clarified by Treasury Regulation § 1.213(e) which sets forth specific examples of appropriate lodging expenses and "medical care." 26 CFR 1.213-1. For example, the regulation states:

> Amounts paid for operations or treatments affecting any portion of the body, including obstetrical expenses and expenses of therapy or X-ray treatments, are deemed to be for the purpose of affecting any structure or function of the body and are therefore paid for medical care. Amounts expended for illegal operations or treatments are not deductible. Deductions for expenditures for medical care allowable under section 213 will be confined strictly to expenses incurred primarily for the prevention or alleviation of a physical or mental defect or illness. Thus, payments for the following are payments for medical care: hospital services, nursing services (including nurses' board where paid by the taxpayer), medical, laboratory, surgical, dental and o'her diagnostic and healing services, X-rays, medicine and drugs (as defined in subparagraph (2) of this paragraph, subject to the 1-percent limitation in paragraph (b) of this section), artificial teeth or limbs, and ambulance hire. However, an expenditure which is merely beneficial to the general health of an individual, such as an expenditure for a vacation, is not an expenditure for medical care.

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Id. (Emphasis added). Therefore, because hospital services, nursing services, medical, laboratory, surgical, dental and other diagnostic services, X-rays, medicine and drugs, artificial teeth or limbs, and ambulance hire are all examples of "medical care," they qualify as health care expenses that are general deductible by an individual on his or her individual federal income tax return pursuant to 26 U.S.C. §213 and the federal regulations relating thereto. *See id.* Moreover, it follows that if a health insurance plan covers hospital services, nursing services, medical, laboratory, surgical, dental or other diagnostic services, X-rays, medicine or drugs, artificial teeth or limbs, or ambulance hire, then it covers categories of health care expenses that are generally deductible by an employee on his individual federal income tax return pursuant to 26 U.S.C. § 213 and the federal regulations relating thereto.

Here, the health insurance plans offered to Plaintiffs covered categories of health care expenses defined as "medical care" under 26 U.S.C. §213. Additionally, the plans covered most if not all of the examples of "medical care" listed in 26 CFR 1.213-1. In their Motion, Plaintiffs have cited four plans at issue: the 2010-2012 Starbridge Limited-Benefit Health Plan (the "2010-2012 Plan", the 2013 Starbridge Limited-Benefit Health Plan (the "2013 Plan"), the 2014 TransChoice hospital indemnity insurance (the "2014 Plan") and the 2015 Key Benefits Administrators Minimum Value Plan (the "2015 Plan"). **Plaintiffs' MPSJ at Exhibits 8, 9, 10 and 11.**

The 2010-2012 Plan covered doctor office visits, outpatient care, non-emergency care in emergency room, inpatient care, accidental injuries, diagnostic tests, radiation and chemotherapy treatment, anesthesia, prosthetic devices, casts, splints, crutches, oxygen, ambulance services, and postpartum care among other health expenses. **Plaintiffs' MPSJ at Exhibit 8.**

The 2013 Plan covered doctor office visits, outpatient care, non-emergency care in emergency room, inpatient care, accidental injuries, diagnostic tests, radiation and chemotherapy treatment, anesthesia, prosthetic devices, casts, splints, crutches, oxygen, ambulance services, and postpartum care among other health expenses. **Plaintiffs' MPSJ at Exhibit 9.**

The 2014 Plan covered hospital confinement, doctor office visits, outpatient care, x-rays, diagnostic tests, surgery, anesthesia, accidental injuries, prescription drugs, exams, inpatient mental and nervous disorder treatment, inpatient drug and alcohol addiction treatment, and ambulance

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services among other health expenses. **Plaintiffs' MPSJ at Exhibit 10.**

The 2015 Plan covered doctor office visits, preventative care, x-rays and lab work, emergency room, prescription drugs, specialist visits, CT/PET scans and MRIs, preventative services, and chronic disease management including services for asthma, congestive heart failure, diabetes, epilepsy, hypertension, multiple sclerosis, Parkinson's Disease, pre-diabetes, and sleep apnea among other health expenses. **Plaintiffs' MPSJ at Exhibit 11.**

26 U.S.C. §213 sets forth two categories of health care that are generally deductible: (1) medical care; and (2) medicine or drugs that are a prescribed drug or insulin. Moreover, Treasury Regulation § 1.213(e) sets forth specific examples of "medical care" expenses that can be deducted. Defendants' health insurance plans cover these categories of health care expenses and, therefore, satisfy this requirement of qualified health insurance. All of the expenses covered by the plans offered from 2010 to 2015 clearly fall under the plain meaning of "medical care." 26 U.S.C. §213; 26 CFR 1.213-1. Thus, the health insurance plans covered health care expenses "generally deductible" by an employee on his individual federal income tax return pursuant to 26 U.S.C. § 213.

In an effort to rebut this inevitable conclusion, Plaintiffs assert that Defendants' plans were required to cover "the range" of health care expense that individuals "could" deduct on their federal tax returns, including those listed in I.R.S. Publication No. 502 for Tax Year 2013. **Plaintiffs' MPSJ at 26:1-8.** Plaintiffs assert that NAC 608.102, by stating "*those* categories of health care expenses" and specifically the word "those" does not mean "some" or "few" healthcare expenses must be covered, must mean *all* and *every* healthcare expense must be covered because "Defendant does not get to select" which categories are covered. ***Id.* at 26:3-8.** To get to this argument, Plaintiffs dispute the plain meaning of 26 U.S.C. § 213. Specifically, Plaintiffs assert that "medical care" is not a "category" and therefore the Court should look to publications like I.R.S. Publication No. 502 for Tax Year 2013 (the "IRS Publication") instead, which sets forth the dozens of "categories" of health care expenses that are deductible. ***Id.* at 25:17-22.** Relying on that list, Plaintiffs assert that Defendants' health insurance plans were required to cover "the range of categories of health care expense that individuals could deduct on their federal tax returns." ***Id.* at 26:1-3.**

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As an initial matter, there is no basis whatsoever for the Court to look past 26 U.S.C. § 213 and its supporting regulations. NAC 608.102 sets forth that 26 U.S.C. § 213 defines the categories of health expenses that are deductible. As such, it lists the categories of healthcare expenses described above. Plaintiffs provide no authority for the notion that an IRS Publication is controlling. Thus, their reliance on it is unabashedly arbitrary.

Next, simply reading the IRS Publication exemplifies just how absurd of an argument Plaintiff has set forth. ***See* I.R.S. Publication No. 502 for Tax Year 2013, attached as Exhibit 24 to Plaintiffs' MPSJ.** First, under the caption "What Are Medical Expenses?" the IRS Publication sets forth the exact same description of health care expenses as 26 U.S.C. §213 and Treasury Regulation § 1.213. ***Id.* at 2**. Next, under the captions "What Medical Expenses Are Includible?" it lists a series of examples, not "categories," of medical expenses that are deductible. ***Id.* at 5-15**. The IRS Publication even states that it "does not include all possible medical expenses" that can be deducted. ***Id.*** Therefore, by its own terms, the IRS Publication does not list the alleged "range of categories" Plaintiff asserts must be covered. In fact, it's hard to imagine that any such insurance exists. For example, the IRS Publication lists Insurance Premiums, Medicare A, Medicare B, Medicare D, Prepaid Insurance Premiums, Unused Sick Leave Used to Pay Premiums, and Qualified Long-Term Care Insurance Contracts as examples of a health care expense that can be deducted. ***Id.*** Therefore, under Plaintiffs' theory, Defendants were supposed to provide health insurance that covered all these things. This makes no sense. Other items listed in the IRS Publication are: Christian Science practitioner, lead-based paint removal costs, legal fees, televisions, trips, tuition, and medical conferences. It would require a substantial amount of musing to assume that by using the word "those," the MWA intended to have such services covered by qualified health insurance. It is clear that this portion of Plaintiffs' argument is a non-starter.

Plaintiff tries to hide from this obvious concession by citing extensively to the opinion of their purported "expert," Matthew T. Milone, who is not an authority on the issue and really does nothing more than regurgitate Plaintiff's counsel's arguments. Moreover, Mr. Milone is a former co-worker of Plaintiffs' counsel, Bradley Schrager, Esq., and his "opinions" are just as useless as those of opposing counsel. As set forth in Defendants' Countermotion to Strike filed concurrently

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herein, to the extent Plaintiffs have relied on Milone's arguments, their opposition must be discredited.

Qualified health insurance must cover those categories of health care expenses that are generally deductible by an employee on his individual federal income tax return pursuant to 26 U.S.C. § 213. Defendant's plans satisfy this requirement. Plaintiffs' assertion that the health care plans offered do not cover "all of the categories of health care expenses that are generally deductible" is not the standard. Nowhere in NAC 608.102, nor 26 U.S.C. § 213, is there a requirement for "all" health care expenses to be covered. Accordingly, Plaintiffs' summary judgment must be denied as a matter of law.

2. Defendants' health insurance plans do not violate any operative state law.

Relying heavily on their purported "expert," Plaintiffs asserts that Defendants' health insurance is "not really health insurance at all under state law." **Plaintiffs' MPSJ at 18:16-21:25.** The state laws that Plaintiffs and their "expert" rely upon, however, are preempted by the Employee Retirement Income Security Act of 1974 ("ERISA") and/or completely irrelevant to the MWA. *See* 29 U.S.C. § 1144(a). Accordingly, they have no relevance to this discussion. Indeed, it is hard to imagine that Plaintiff's "expert" is an expert at all if he blatantly overlooked the most fundamental issue regarding state laws relating to health benefits. ***See*** **Countermotion to Strike filed concurrently herein**. Finally, the Nevada Commissioner of Insurance has expressly approved for distribution in Nevada the insurance plans offered by Defendants.

a. NRS 608.1555, NRS 608.156, and NRS 608.157 are all preempted by ERISA.

"Congress enacted ERISA to 'protect ... the interests of participants in employee benefit plans and their beneficiaries,' by setting out substantive regulatory requirements for employee benefit plans, and to 'provide for appropriate remedies, sanctions, and ready access to federal courts.'" *Insco v. Aetna Health & Life Ins. Co.*, 673 F.Supp.2d 1180, 1185 (2009) (*quoting Aetna Health Inc. v. Davila*, 542 U.S. 200, 208, 124 S.Ct. 2488, 159 L.Ed.2d 312 (2004)). As part of the enactment, ERISA has "expansive preemption provisions that are intended to ensure that employee

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benefit plan regulation is 'exclusively a federal concern.'" *Id.* (*quoting Aetna Health*, 542 U.S. at 208, 124 S.Ct. 2488). "[The United States] Supreme Court has repeatedly held that the question of whether federal law preempts state law is one of congressional intent, and that Congress' purpose is the 'ultimate touchstone.'" *Brandner v. UNUM Life Ins. Co. of America*, 152 F.Supp.2d 1219, 1223 (D. Nev. 2001).

ERISA section 514(a) expressly "preempts all state laws that 'relate to' any employee benefit plan"; however, laws regulating insurance, banking, or securities are exempt. 29 U.S.C. § 1144(a); *Munda v. Summerlin Life & Health Ins. Co.*, 127 Nev. Adv. Op. 83, 267 P.3d 771, 774 (2011) (*citing Cervantes v. Health Plan of Nevada*, 127 Nev. ——, ——, 263 P.3d 261, (2011)). A law "relates to" a covered employee benefit plan if it has a "reference to" or "connection with" it. *California Div. of Labor Standards Enforcement v. Dillingham Constr. N.A. Inc.*, 519 U.S. 316, 324, 117 S.Ct. 832, 136 L.Ed.2d 791 (1997).

Here, Plaintiffs assert that NRS 608.1555 sets forth mandatory requirements for what must be included in health insurance. That statute states:

> Benefits for health care: Provision in same manner as policy of insurance. Any employer who provides benefits for health care to his or her employees shall provide the same benefits and pay providers of health care in the same manner as a policy of insurance pursuant to chapters 689A and 689B of NRS.

Thus, it is directly referencing an employee benefit plan. It is hard to imagine a more clear-cut example of a statute that is preempted by ERISA.

Next, Plaintiffs cite NRS 608.156 – NRS 608.157. **Plaintiff's MPSJ at 19-20 and at Exhibit 1.** These statutes are also preempted by ERISA. Indeed, the Nevada Attorney General expressly found as much in Attorney General, Opinion No. 84-17. **Attorney General, Opinion No. 84-17 attached hereto as Exhibit I.** Similarly, the Ninth Circuit has examined a similar statute to NRS 608.156 and its requirement that "[i]f an employer provides health benefits for his or her employees, the employer shall provide benefits for the expenses for the treatment of abuse of alcohol and drugs." In *Golden Gate Rest. Ass'n v. City & County of San Francisco*, the Ninth Circuit held:

> Consistent with these later-decided cases, in *Standard Oil Co. v. Agsalud*, 633 F.2d 760, 763 (9th Cir. 1980), *aff'd mem.*, 454 U.S. 801, 102 S. Ct. 79, 70 L. Ed. 2d 75 (1981), we struck down a Hawaii statute

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> that "require[d] employers in that state to provide their employees with a comprehensive prepaid health care plan." As the district court noted, the statute required that plan benefits include "a combination of features," and specifically "require[d] that the plans cover diagnosis and treatment of alcohol and drug abuse." *Standard Oil Co. v. Agsalud*, 442 F. Supp. 695, 696, 704 (N.D. Cal. 1977). The statute also imposed "certain reporting requirements which differ[ed] from those of ERISA." *Id.* at 696. In affirming the district court's opinion holding the Hawaii statute preempted under ERISA, we emphasized that the statute "directly and expressly regulate[d] employers and *the type of benefits they provide* employees," and that it therefore "related to" ERISA plans under § 514(a). *Agsalud*, 633 F.2d at 766 (emphasis added). That is, the Hawaii statute was preempted because it required employers to have health plans, and it dictated the specific benefits employers were to provide through those plans. Id. The statute thereby impeded ERISA's goal of ensuring that "plans and plan sponsors would be subject to a uniform body of benefits law." *Ingersoll-Rand Co.*, 498 U.S. at 142.

Golden Gate Rest. Ass'n v. City & County of San Francisco, 546 F.3d 639, 655 (9th Cir. 2008). In this matter, NRS 608.156 has the same requirement as in *Golden Gate* that health benefits cover "treatment" of "alcohol and drugs." Thus Plaintiffs' reliance on these statutes is a total misnomer as they are no longer valid.

b. NRS 681A.030 is not relevant to the MWA.

Plaintiffs assert that the definition of health insurance set forth in NRS 681A.030 is the controlling definition of "health insurance" under Nevada law. **Plaintiffs' MPSJ at 21:10-19.** In light of the fact that this entire lawsuit is about whether Defendants' health insurance plans satisfied the definition of qualified health insurance as defined by the MWA, it is hard to see how Plaintiffs can candidly make this argument. The MWA sets forth its own distinct definition for health insurance. NRS 681A.030 cannot conflict with that. *See Thomas v. Nevada Yellow Cab Corp.*, 130 Nev. Adv. Op. 52, 327 P.3d 518, 520 (2014). Thus, when determining whether insurance is "health insurance" as defined by the MWA, the definition of "health insurance" set forth in NRS 681A.030 is completely irrelevant.

Moreover, even if NRS 681A.030 were to apply, Defendants' plans satisfy its definition. NRS 681A.030 states:

> **"Health insurance" defined.** "Health insurance" is insurance of human beings against bodily injury, disablement or death by accident or accidental means, or the expense thereof, or against disablement or

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> expense resulting from sickness, and every insurance appertaining thereto, together with provisions operating to safeguard contracts of health insurance against lapse in the event of strike or layoff due to labor disputes.

As explained above, Defendants' health insurance plans are quite plainly this sort of insurance.

c. Nevada Commissioner of Insurance approves of Defendants' plans for distribution.

Finally, as the exhibits attached to Plaintiffs' Motion for Partial Summary Judgment sets forth, the plans offered by Defendants which are Limited Benefit Plans and Fixed-Indemnity Plans are expressly permitted forms of health insurance that the Nevada Commissioner of Insurance has approved for distribution in Nevada. ***See* Nevada Division of Insurance Bulletin, attached to Plaintiffs' MPSJ as Exhibit 20.** Indeed, the Commissioner sets our clear requirements for such plans, which Defendants' plans follow such as the example of Defendants' 2014 Plan. ***Id.*** Accordingly, Defendants' Plans comply with the Nevada Commissioner of Insurance's directives relating to its plans and, accordingly, Defendants were permitted to offer these commissioner-approved health insurance plans.

3. Limited benefit plans and fixed-indemnity plans both satisfy the definition of qualified health insurance under the MWA.

Plaintiffs spend a large portion of their Motion for Partial Summary Judgment discussing limited benefit plans and fixed-indemnity plans. **Plaintiffs' MPSJ at 9:11-18:15.** Plaintiffs do not, however, explain why such plans do not satisfy the MWA. Rather, Plaintiffs repeat *ad-nauseam* that limited benefit plans and fixed-indemnity plans are not "comprehensive coverage" or "traditional major medical insurance." ***Id.*** This is completely irrelevant to the current question before the Court. Neither the MWA nor its supporting regulations make any reference whatsoever to "comprehensive" or "major medical insurance." Rather, the MWA states that health insurance should be made available to employees. As discussed above, Defendants' plans do just that. Moreover, the "authority" Plaintiffs rely upon is a memorandum on the Affordable Care Act (the "ACA"). ***Id.* at 11.** The ACA was enacted six years after the MWA. Thus, it and any discussion regarding its provisions, has no relevance to what constitutes "health insurance" under the Nevada Constitution

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for purposes of paying the lower-tier minimum wage.[2]

Next, the MWA quite plainly contemplates a lower-level of insurance. It specifically states that it cannot cost more than 10% of a minimum wage employee's gross taxable income. Accordingly, Limited Benefit Plans and Fixed-Indemnity Plans make sense in light of this mandate. Further, as stated above, both Limited Benefit Plans and Fixed-Indemnity Plans are expressly permitted forms of health insurance that the Nevada Commissioner of Insurance has approved for distribution in Nevada. ***See*** **Nevada Division of Insurance Bulletins, attached to Plaintiffs' MPSJ as Exhibit 20.**

The MWA sets forth clear and defined requirements for qualified health insurance. The plans provided by Defendants satisfy those requirements. Plaintiffs' diatribe on limited benefit plans and fixed-indemnity plans does not change those requirements.

4. Plaintiffs' discussions on "Social Expectations" and "Wage and Benefits History" are nothing more than Plaintiffs' counsel's bogus conjecture.

As mentioned earlier, Plaintiffs have wasted the vast majority of her MPSJ on disorganized narratives that are not based in either law or fact. None of these rants should be given any credence. For example, Plaintiffs have spent approximately four pages on a section entitled "Wage and Benefits History" wherein Plaintiffs continue on about how Defendants' Plans are not "major medical insurance" or "comprehensive" health insurance. **Plaintiffs' MPSJ at 8:9-23**. As explained above, this is not the directive of the MWA. Defendants were instructed by the MWA to offer insurance that covers deductible healthcare expenses and that is precisely what they have done. Plaintiffs' diatribe that they should have been offered more is not based in any applicable law or regulation whatsoever.

Next, Plaintiffs ends their motion with a page discussing what Plaintiffs "believe" Nevada voters envisioned when they voted for the MWA. **Id. at 27.** Plaintiffs' belief system is not a basis

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[2] Plaintiffs keenly note that Defendants will argue that the ACA has nothing to do with this action. **Plaintiffs' MPSJ at 22:3-8.** Plaintiffs do not, however, set forth any credible argument to the contrary. ***Id.*** Instead, Plaintiffs spends a page discussing how employees are required to have insurance under the ACA. ***Id.*** **at 22**. This of course in no way changes an employer's obligations under the MWA – a statute enacted 6 years before the ACA.

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for granting relief. Moreover, it is totally irrelevant and is of no assistance in resolving the question before the Court. Accordingly, these arguments in Plaintiffs' Motion for Partial Summary Judgment Opposition are Plaintiffs' bogus conjecture and should be discarded entirely.

III. DEFENDANTS' COUNTERMOTION TO STRIKE UNDISCLOSED PURPORTED EXPERT AND FOR SANCTIONS.

A. Facts For Countermotion To Strike Undisclosed Purported Expert And For Sanctions.

In their Motion for Partial Summary Judgment, Plaintiffs have attempted to disclose a purported expert through a report-less declaration far after the expiration of the expert disclosure deadline. Such a disclosure is extremely prejudicial to Defendants and does not comport with the Rules of Civil Procedure nor the scheduling orders issued by this Court. Further, Plaintiffs' purported expert has improperly opined on legal conclusions that are the exclusive province of this Court. It is clear that Plaintiffs' attempt to proffer a purported expert's opinions at the eleventh hour is willful and has forced Defendant to bring this Countermotion to address Plaintiffs' malfeasance.

Plaintiffs filed their Class Action Complaint on May 30, 2014. **Class Action Complaint on file herein and incorporated by this reference.** On June 5, 2014, Plaintiffs filed an Amended Class Action Complaint. **Amended Class Action Complaint on file herein and incorporated by this reference.** On October 10, 2014, the Discovery Commissioner approved the Scheduling Order in which the parties agreed to an expert disclosure deadline of November 25, 2014 and a discovery cut-off date of February 23, 2015. ***See* Exhibit G, Scheduling Order.** On October 2, 2014, the Court approved the parties' stipulation to extend that discovery plan. ***See* Exhibit H, Order for Extension of Discovery.** In that Order for Extension of Discovery, the parties agreed to extend the deadline to disclose experts to April 28, 2015 and to extend the deadline to disclose rebuttal experts from to May 28, 2015. ***Id.*** Discovery cutoff was extended to June 29, 2015 and the last day to file Phase I class certification motions was extended until July 28, 2015. ***Id.***

On April 28, 2015, the deadline to disclose experts expired and Plaintiffs designated no experts and Plaintiffs did not produce any expert reports. Thus, Defendants had no need to designate any rebuttal experts on the rebuttal expert deadline of May 28, 2015. On June 29, 2015, discovery closed and no experts were designated by either party pursuant to the Nevada Rules of Civil

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Procedure or the Order for Extension of Discovery. Throughout this discovery period, however, from May 30, 2014 through June 29, 2015, Plaintiffs asserted and reaffirmed throughout all four of their discovery disclosure statements that "Plaintiffs also reserve the right to call additional expert witnesses." **Plaintiffs' Initial Disclosure and Production of Documents and Witnesses Pursuant to N.R.C.P. 16.1 served on September 8, 2014 attached hereto as Exhibit J at 3:13-14 (document disclosures omitted); Plaintiffs' Supplemental Disclosure and Production of Documents and Witnesses Pursuant to N.R.C.P. 16.1 served on February 23, 2015 attached hereto as Exhibit K at 3:8-9 (document disclosures omitted); Plaintiffs' Second Supplemental Disclosure and Production of Documents and Witnesses Pursuant to N.R.C.P. 16.1 served on May 20, 2015 attached hereto as Exhibit L at 3:15-16 (document disclosures omitted); and Plaintiffs' Third Supplemental Disclosure and Production of Documents and Witnesses Pursuant to N.R.C.P. 16.1 served on June 3, 2015 attached hereto as Exhibit M at 3:15-16 (document disclosures omitted).** Despite these assertions, Plaintiffs designated no expert witnesses.

Prior to discovery closing on June 29, 2015, Plaintiffs brought their Motion for Class Certification on June 8, 2015 and Defendant brought its Motion to Disqualify Named Plaintiffs as Class Representatives and Dismiss Class Action Claims on June 25, 2015, before the June 29, 2015 Phase I motion deadline.

On August 25, 2015, Plaintiffs, for the first time, proffered a Declaration of Matthew T. Milone as an Exhibit 2 to Plaintiffs' Motion for Partial Summary Judgment. **Plaintiffs' MPSJ at Exhibit 2 ("Milone Decl.").** In this Declaration, attorney Matthew T. Milone declared that he had "been retained by Plaintiffs' counsel as an expert witness in the matter of *Diaz, et. al. v. MDC Restaurants, LLC, et. al.*" **Milone Decl. at 1:23-25.** Further, Plaintiffs extensively relied on the opinions in Milone's Declaration in support of their arguments in summary judgment. **Plaintiffs' MPSJ at 12:13-18:15; 19:11-21:25; and 26:1-27:1.** Thus, Plaintiffs improperly backdoored an undisclosed and unqualified expert well nearly four months after the expiration of already extended deadlines to designate experts and more than two months after the extended discovery cutoff.

In support of this "retention," Plaintiffs present Milone's curriculum vitae attached to

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Milone's Declaration and his rates for "testimony" and "all other work." **Milone Decl. at 11:10 and Attachment 1.** Plaintiffs present no expert written report from Milone. Further, Plaintiffs present no list of cases in which Milone has testified as an expert or been qualified as an expert. Instead, Plaintiffs cite the same "Declaration" that the uncertified expert Milone has provided to Plaintiffs' counsel in three parallel cases. ***Id.* at 11:11-14.** Thus, Plaintiffs have proffered a Declaration to deliver improper opinions from an undesignated and unqualified expert witness. **Milone Decl.** Accordingly, this Court should strike the designation of Milone as an expert, strike the Declaration of Milone from the litigation and sanction Plaintiffs for their willful gamesmanship that has prejudiced Defendant and vexatiously exacerbated the litigation.

B. Argument For Countermotion To Strike Undisclosed Purported Expert And For Sanctions.

1. This Court should strike Plaintiffs' purported expert's declaration because it is untimely and deficient.

Nevada Rule of Civil Procedure 26 requires parties to "a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under NRS 50.275, 50.285 and 50.305." Nev. R. Civ. P. 16.1(a)(2)(A). For an expert "retained or specifically employed to provide expert testimony," the party must provide a disclosure that is accompanied by a "written report" which contains: (1) a complete statement of all opinions to be expressed and the basis and reasons therefor; (2) the data or other information considered by the witness in forming the opinions; (3) any exhibits to be used as a summary of or support for the opinions; (4) the qualifications of the witness, including a list of all publications authored by the witness within the preceding 10 years; (5) the compensation to be paid for the study and testimony; and (6) a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years. Nev. R. Civ. P. 16.1(a)(2)(B).

The Nevada Supreme Court has upheld that an untimely-designated expert should not be allowed to testify. *Hansen v. Universal Health Servs., Inc.*, 115 Nev. 24, 974 P.2d 1158, 1160-1161 (1999). In Hansen, the Nevada Supreme Court upheld such a ruling where a plaintiff submitted a second designation of experts six months after the deadline set by the district court. *Id.* The only exception to this Rule recognized by the Nevada Supreme Court is that of a treating physician for

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"opinions [that] were formed during the course of treatment." *FCH1, LLC v. Rodriguez*, 335 P.3d 183, 189 (2014) citing *Goodman v. Staples the Office Superstore, L.L.C.*, 644 F.3d 817, 826 (9th Cir. 2011); *see Rock Bay, L.L.C. v. Eighth Judicial Dist. Court*, 129 Nev. ___, n.3, 298 P.3d 441, 445 n.3 (2013) (noting that when an NRCP is modeled after its federal counterpart, "cases interpreting the federal rule are strongly persuasive"). In these "strongly persuasive" federal cases, courts in this district have noted that the reason for requiring expert reports is "the elimination of unfair surprise to the opposing party and the conservation of resources." *Elgas v. Colorado Belle Corp.*, 179 F.R.D. 296, 299 (D. Nev. 1998) (citations omitted). Further, the "test of a report is whether it was sufficiently complete, detailed and in compliance with the Rules so that surprise is eliminated, unnecessary depositions are avoided, and costs are reduced." *Id.* Additionally, the analogous Rule 26(a)(2)(B) appears "to require exact compliance in all particulars with the disclosures" requirement. *Id.* citing *Sullivan v. Glock, Inc.*, 175 F.R.D. 497, 503 (D. Md. 1997) (citation omitted) (declaring "a literal reading of Rules 37(a)(3) and 37(c)(1) would result in the application of the automatic exclusion of an expert's trial testimony if there was not complete compliance with the requirements of Rule 26(a)(2)(B), unless the court finds that there was substantial justification for the failure to make complete disclosure or that failure to disclose is harmless").

In *Goodman v. Staples the Office Superstore, LLC* cited by the Nevada Supreme Court in *FCH1*, the Ninth Circuit found that "Rule 26 [the federal counterpart to Nevada Rule of Civil Procedure 16.1] requires the parties to disclose the identities of each expert and, for retained experts, requires that the disclosure includes the experts' written reports." *Goodman v. Staples the Office Superstore, LLC*, 644 F.3d 817, 827 (9th Cir. 2011). Further, the parties must "make these expert disclosures at the times and in the sequence that the court orders." *Id.*; Fed. R. Civ. P. 26(a)(2)(D). In *Goodman*, the plaintiffs disclosed two experts a week after the expert disclosure deadline and failed to provide expert reports until four-and-a-half months after the deadline. *Id.* at 826-827. On appeal, the Ninth Circuit upheld the district court's preclusion of the two "improperly disclosed experts" and found that the failure to disclose experts in a timely manner was neither substantially justified nor harmless. *Id.* at 827. Similarly, Rule 37 allows this Court to prohibit a disobedient party who fails to identify a witness as required by Rule 16.1 from introducing designated matters in

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evidence. Nev. R. Civ. P. 37(c)(1) and Nev. R. Civ. P. 37(b)(2)(B).

Similarly, federal courts have held that expert disclosures made one day after the rebuttal expert disclosure deadline should be struck. *Belch v. Las Vegas Metro. Police Dep't*, 2012 U.S. Dist. LEXIS 33111, 6-8 (D. Nev. Mar. 13, 2012). In *Belch*, plaintiff did not timely disclose his expert by the expert disclosure deadline. *Id.* at 6-7. Additionally, plaintiff's initial expert designation did not fulfill the requirements of Rule 26(a)(2)(B). *Id.* at 7. The Court found that the defendants suffered prejudice as a result of plaintiff's late disclosures. *Id.* citing *Wong v. Regents of University of California*, 410 F.3d 1052, 1061-1062 (9th Cir. 2005)(holding that "[d]isruption to the schedule of the court and other parties [by late disclosures of expert witnesses] is not harmless," and such late disclosures warrant excluding expert witnesses). Thus, absent any showing of "substantial justification," the court found the striking plaintiff's expert's report and precluding plaintiff from utilizing his expert's opinion was warranted. *Id.* citing Fed. R. Civ. P. 37(c)(1).

Here, like in *Hansen*, *Goodman* and *Belch*, Plaintiffs failed to timely disclose its expert by April 28, 2015 as required by this Court's Order and Rule 16.1. ***See* Exhibit H, Order for Extension of Discovery.** Throughout discovery, Plaintiffs affirmed in writing on four separate occasions that they were fully aware of their right to "call additional expert witnesses." **Plaintiffs' Initial Disclosure and Production of Documents and Witnesses Pursuant to N.R.C.P. 16.1 served on September 8, 2014 attached hereto as Exhibit J at 3:13-14 (document disclosures omitted); Plaintiffs' Supplemental Disclosure and Production of Documents and Witnesses Pursuant to N.R.C.P. 16.1 served on February 23, 2015 attached hereto as Exhibit K at 3:8-9 (document disclosures omitted); Plaintiffs' Second Supplemental Disclosure and Production of Documents and Witnesses Pursuant to N.R.C.P. 16.1 served on May 20, 2015 attached hereto as Exhibit L at 3:15-16 (document disclosures omitted); and Plaintiffs' Third Supplemental Disclosure and Production of Documents and Witnesses Pursuant to N.R.C.P. 16.1 served on June 3, 2015 attached hereto as Exhibit M at 3:15-16 (document disclosures omitted).** Despite having fifteen months from the filing of their Complaint, Plaintiffs chose not to designate any experts by the expert disclosure deadline. Due to Plaintiffs' failure to designate any experts, Defendants had no cause to retain rebuttal experts on May 28, 2015 and no reason to conduct any

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additional discovery regarding expert opinions.

After the close of discovery on June 29, 2015, Defendants relied on the known universe of produced documents and deposition testimony to narrow the issues to be disposed of by motion practice. Similarly, on June 25, 2015, Defendants relied on this known universe of discovery in opposing Plaintiffs' Motion for Class Certification filed on June 8, 2015 which is now pending before this Court. Thus, Defendants have spent great time and expense throughout discovery and motion practice in developing strategies and arguments that did not involve any expert witness testimony. To now let Plaintiffs review Defendants' briefing in opposition to certification and other motions and then cite to an undisclosed expert in support of summary judgment is highly prejudicial to Defendants' strategy and litigation efforts. Such an untimely and non-compliant expert disclosure is contrary to the entire purpose of having expert disclosure deadlines, expert written reports, certification and dispositive motion deadlines and scheduling order. Further, Plaintiffs have prevented Defendants from having any opportunity to rebut Milone or depose him as to his opinions. Thus, Plaintiffs; untimely designation effectively abolishes all of the rules concerning disclosure of expert testimony under Rules 16.1 and 26.

In addition to being grossly untimely, Plaintiffs' designation of Milone as an expert fails to comply with the substantive requirements of Rules 16.1 and 26. Plaintiffs have not provided any expert's "written report" pursuant to Rule 16.1(a) or 26(b) or a "list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition" pursuant to Rule 16.1(a)(2)(B). In fact, Plaintiffs' expert "Declaration" is not even complete as Milone states "the opinions expressed in this Declaration are my preliminary opinions and are subject to the opinions in my final report." **Milone Decl. at 11:15-16.** Milone provides no further elucidation as to when this "final report" will be forthcoming or how it will supplement or supersede his Declaration. This deficient and incomplete Declaration also violates the requirements that an expert's written report contain a (1) "complete statement of all opinions to be expressed and the basis and reasons therefor"; (2) "the data or other information considered by the witness in forming the opinions;" and "any exhibits to be used as a summary of or support for the opinions." Nev. R. Civ. P. 16.1(a)(2)(B). (Emphasis added). Accordingly, Plaintiffs' Declaration from Milone should

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be struck as Plaintiffs have completely failed to comply with the requirements imposed by Nevada Rules of Civil Procedure 16.1 and 26 and the expert disclosure date of the Court's Order for Extension of Discovery.

2. This Court should strike Plaintiffs' purported expert because he is untimely, improperly designated and unqualified.

Rule 37(c)(1) provides:

> A party that without substantial justification fails to disclose information required by Rule 16.1, 16.2, or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed..

Nev. R. Civ. P. 37(c)(1). In *Goodman*, the Ninth Circuit held that the analogous Rule 37 "gives teeth" to disclosure requirements by "forbidding the use at trial of any information that is not properly disclosed." *Goodman* at 827 citing *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d at 1106 (citing Fed. R. Civ. P. 37(c)(1)). Rule 37(c)(1) is a "self-executing," "automatic" sanction designed to provide a strong inducement for disclosure. *Id.* (quoting Fed. R. Civ. P. 37 advisory committee's note (1993)). Thus, the only exceptions to Rule 37(c)(1)'s exclusion sanction apply if the failure to disclose is substantially justified or harmless. *Goodman* at 827 citing Fed. R. Civ. P. 37(c)(1).

Further, in *Belch*, the district court held that an appropriate sanction under Rule 37(c)(1) for an expert designation that does not comply with Rule 26(a)(2)(B) is to preclude a plaintiff from using an expert's opinion. *Belch* at 8. This includes precluding a plaintiff from utilizing the opinion of an expert "to supply evidence on a motion, at a hearing, or at a trial." *Belch* at 8 citing Fed. R. Civ. P. 37(c)(1).

In this matter, Plaintiffs' untimely and improper designation of purported expert Milone is subject to Rule 37's automatic exclusion sanction as Plaintiffs failed to provide information or identify a witness as required by Rule 16.1 or 26(a). As noted above, Plaintiffs' expert designation of Milone failed to comply with Rule 16.1's requirement that the expert be disclosed at the time ordered by the Court in its Order. Nev. R. Civ. P. 16.1(a)(2)(C). Further, Plaintiffs' use of a Declaration fails to comply with Rule 16.1(a)(2)(B)'s requirements for a written report that provides

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a complete statement of all opinions, the basis and reasons for those opinions, the data considered in forming those opinions and the exhibits that will be used to summarize or support those opinions. Nev. R. Civ. P. 16.1(a)(2)(B).

Additionally, Plaintiffs' purported expert Milone is not qualified to render an expert opinion because he has made no showing of a "list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition." Nev. R. Civ. P. 16.1(a)(2)(B). As such, Plaintiffs have failed to provide information or identify an expert witness as required by Rule 16.1(a) and their purported expert Milone is subject to the automatic exclusion sanction of Rule 37(c)(1). Consequently, Plaintiffs should not be allowed to use Milone to supply evidence on a motion, at a hearing or at a trial.

3. This Court should strike Plaintiffs' purported expert and declaration because the expert has opined on ultimate issues of law that are the exclusive province of the Court.

As a general rule, "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." *Nationwide Transp. Fin. v. Cass Info. Sys.*, 523 F.3d 1051, 1058 (9th Cir. 2008) citing Fed. R. Evid. 704(a). However, "[t]hat said, an expert witness cannot give an opinion as to her legal conclusion, i.e., an opinion on an ultimate issue of law. Similarly, instructing the jury as to the applicable law is the distinct and exclusive province of the court." (Emphasis added). *Id.* citing *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1016 (9th Cir. 2004) (internal citations and quotation marks omitted); *see also* Fed. R. Evid. 702 (requiring that expert opinion evidence "assist the trier of fact to understand the evidence or to determine a fact in issue").

In *Nationwide*, plaintiff Nationwide intended to introduce the expert report and testimony of Robert Zadek, an expert on the Uniform Commercial Code ("UCC") and related commercial law, to prove its legal theory that under the UCC § 9-406, defendant Cass' conduct was improper because Cass, as an agent of the shippers, stood in the shoes of the shippers and had an unconditional obligation to pay Nationwide once the shippers received a valid notice of assignment. *Nationwide* at 1056. The district court granted defendant Cass' motion to strike the portions of Zadek's report and testimony that were "inadmissible legal opinion" and sections which "cite[d] or appl[ied] the

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relevant law." (Emphasis added). *Id.* On appeal, the Ninth Circuit upheld this striking of expert and expert report finding that Zadek's legal conclusions "invaded the province of the trial judge." *Id.* at 1059.

Further, the Ninth Circuit found that Zadek's opinions on legal conclusions also "constituted erroneous statements of law" in which case "[e]xpert testimony . . . would have been not only superfluous but mischievous." *Id.* citing *United States v. Brodie*, 858 F.2d 492, 496-97 (9th Cir. 1988), overruled on other grounds by *United States v. Morales*, 108 F.3d 1031, 1033 (9th Cir. 1997). Thus, the Ninth Circuit held that the exclusion of Zadek's erroneous conclusions were harmless because Nationwide did not identify "any legal authority extending the obligations of § 9-406 to the agent of an account debtor." *Id.* at 1062-1063 and fn. 8.

Here, as this Court is aware, the parties have briefed the legal question of whether or not Defendant offered health insurance pursuant to the MWA. In response, Plaintiffs' expert Milone, through his proffered Declaration, has opined on legal conclusions that are the exclusive province of this Court. For example, Milone opines as to an ultimate question of law by stating

> It is my opinion based on what is set forth above in this affidavit and my experience with health insurance, that the 2010-12 Plan and the 2013 Plan do not cover all of the "categories of health care expenses that are generally deductible by an employee on his individual federal income tax return pursuant to 26 U .S.C. § 213 and any federal regulations relating thereto." See NAC 608.102.

Milone Decl. at 5:14-18. Further, Milone improperly opines on whether or not Defendant's plans under the MWA complies with certain laws and regulations such as NRS Chapter 608, NRS Chapter 689B, NAC Chapter 608; COBRA and 26 U.S.C. § 213. **Milone Decl. at 2:14-22; 4:18-25; 4:26-5:13; 7:10-18; 7:25-8:28; and 10:-11:9.** In this regard, Milone presents no legal authority that "health insurance" under the MWA is defined by those laws. ***Id.*** Some of these issues of law, like those concerning NAC 608.102 and 26 U.S.C. § 213, are improper for Milone to opine on as this Court should ultimately decide those issues as a matter of law. Therefore, this Court should also strike Milone and his opinions as improper opinions on legal conclusions.

4. This Court should sanction Plaintiffs because their violation was willful and prejudicial.

Under Rule 37(c)(1)(A), "in addition to" the automatic exclusion sanction, this Court may

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order payment of the reasonable expenses, including attorney's fees, caused by the failure to provide information or identify a witness under Rule 16.1. Nev. R. Civ. P. 37(c)(1). In *Belch*, the court found that the plaintiff failed to provide the court with any justification for untimely and incomplete expert disclosures. *Belch* at 7. Thus, the court found that in addition to striking a plaintiff's expert's report and precluding plaintiff from utilizing his expert's opinion, the plaintiff was required to pay the reasonable expenses, including attorney's fees, caused by the failure to comply with a court's order and the federal rules as to expert designations. *Belch* at 5.

Here, Plaintiffs have not provided any legitimate justification for their failure to make a timely designation of their purported expert. Plaintiffs gave no reason for delay in the expert's Declaration or their Motion for Partial Summary Judgment. Despite at least four opportunities to designate an expert during discovery, Plaintiffs never disclosed any experts. Only after discovery was closed did Plaintiffs provide their purported expert designation. Instead of making any actual designation of expert - in which Plaintiffs would have to concede their untimeliness - Plaintiffs have decided to slide in a Declaration as if Milone had been their designated expert all along. Thus, Plaintiffs have exhibited willful gamesmanship in trying to confuse this Court and mask their malfeasance. Plaintiffs' expert-by-ambush behavior should be sanctioned for Plaintiffs' complete disregard of civil procedure rules and the order of this Court.

This Court should sanction Plaintiffs for their untimely and improperly designated expert. Courts have held that should an award of sanctions in the form of reasonable expenses, including attorney's fees, be made under Rule 37(c), that the awarded party may submit a separate application for reasonable fees and expenses. *Daniels v. Jenson*, 2013 U.S. Dist. LEXIS 47576, 10-11 (D. Nev. Mar. 11, 2013). Accordingly, should sanctions be awarded, Defendants request leave to submit a separate application regarding their reasonable fees and expenses.

IV. CONCLUSION

For all the reasons stated above, this Court should stay all pending motions. Alternatively, Plaintiffs Motion for Partial Summary Judgment should be denied, Plaintiffs' expert stricken and Defendants should be awarded sanctions.

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Dated: September 10, 2015

Respectfully submitted,

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PROOF OF SERVICE

I am a resident of the State of Nevada, over the age of eighteen years, and not a party to the within action. My business address is 3960 Howard Hughes Parkway, Suite 300, Las Vegas, Nevada 89169. On September 10, 2015, I served the within document:

SUPPLEMENT TO DEFENDANTS' CONTINUED MOTION TO STAY PROCEEDINGS ON APPLICATION FOR ORDER SHORTENING TIME
AND
DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY REGARDING DEFENDANTS' HEALTH BENEFIT PLANS
AND
DEFENDANTS' COUNTERMOTION TO STRIKE UNDISCLOSED PURPORTED EXPERT AND FOR SANCTIONS

☒ Via **Electronic Service** - pursuant to N.E.F.C.R Administrative Order: 14-2.

Don Springmeyer, Esq.
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I declare under penalty of perjury that the foregoing is true and correct. Executed on September 10, 2015, at Las Vegas, Nevada.

Erin Melwak

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IN THE SUPREME COURT OF THE STATE OF NEVADA

MDC RESTAURANTS, LLC; LAGUNA RESTAURANTS, LLC; AND INKA, LLC,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE TIMOTHY C. WILLIAMS, DISTRICT JUDGE,

Respondents,

and

PAULETTE DIAZ; LAWANDA GAIL WILBANKS; SHANNON OLSZYNSKI; AND CHARITY FITZLAFF, ALL ON BEHALF OF THEMSELVES AND ALL SIMILARLY-SITUATED INDIVIDUALS,

Real Party in Interest.

Supreme Court Case No. 71289
District Court Case No. A-14-701633-C

APPENDIX OF AMICI CURIAE IN SUPPORT OF MDC RESTAURANTS, LLC, LAGUNA RESTAURANTS LLC, AND INKA LLC'S PETITION FOR WRIT OF MANDAMUS OR OTHER EXTRAORDINARY RELIEF

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APPENDIX

Volume	Page Numbers	Description	Date Filed
1	001-033	Defendants' Supplement to Defendants' Continued Motion to Stay Proceedings on Application for Order Shortening Time and Defendants' Opposition to Plaintiffs' Motion for Partial Summary Judgment on Liability Regarding Defendants' Health Benefit Plans and Defendants' Countermotion to Strike Undisclosed Purported Expert and for Sanctions (Sept. 10, 2015)	09/09/2015

November 14, 2016

Respectfully submitted,

/s/ Kathryn B. Blakey, Esq.
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CERTIFICATE OF SERVICE

I am a resident of the State of Nevada, over the age of eighteen years, and not a party to the within action. My business address is 3960 Howard Hughes Parkway, Suite 300, Las Vegas, Nevada, 89169. On November 14, 2016, I served the within document:

APPENDIX OF AMICI CURIAE IN SUPPORT OF MDC RESTAURANTS, LLC, LAGUNA RESTAURANTS LLC, AND INKA LLC'S PETITION FOR WRIT OF MANDAMUS OR OTHER EXTRAORDINARY RELIEF

☒ By **CM/ECF Filing** – Pursuant to N.E.F.R. the above-referenced document was electronically filed and served upon the parties listed below through the Court's Case Management and Electronic Case Filing (CM/ECF) system.

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 14, 2016, at Las Vegas, Nevada.

/s/ Erin J. Melwak

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