IN THE SUPREME COURT OF NEVADA

NEVADA YELLOW CAB CORPORATION, NEVADA CHECKER CAB CORPORATION, and NEVADA STAR CAB CORPORATION' Petitioners, vs. THE EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, in and For the County of Clark, and THE HONORABLE RONALD J. ISRAEL District Judge, Respondents, and CHRISTOPHER THOMAS, and CHRISTOPHER CRAIG, Real Parties in Interest.	Sup. Ct. No. Case No.: A-12-661726-C Dept. No.: XXVIII

PETITIONERS' APPENDIX

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INDEX **Bates No.**

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DISTRICT COURT

CLARK COUNTY, NEVADA

CHRISTOPHER THOMAS, and CHRISTOPHER CRAIG, Individually and on behalf of others similarly situated,

Plaintiffs,

vs.

NEVADA YELLOW CAB CORPORATION, NEVADA CHECKER CAB CORPORATION, and NEVADA STAR CAB CORPORATION,

Defendants.

Case No.: A-12-661726-C

Dept.: XXVIII

PLAINTIFFS' MOTION ON AN OST TO STRIKE AFFIRMATIVE DEFENSES

The plaintiffs, through their above attorneys, hereby move this Court on an OST for the expedited issuance of an Order striking, in full or in part, the defendants' Sixth, Tenth, Thirteenth, Fourteenth and Twenty-Seventh affirmative defenses and/or granting other appropriate relief in respect to those affirmative defenses.

The plaintiffs' motion is made and based upon the annexed declaration of class counsel Leon Greenberg and the Memorandum of Points and Authorities submitted with this motion.

9/19/17 (8)

Dated: September 18, 2017

LEON GREENBERG PROFESSIONAL CORP.

/s/ Leon Greenberg
Leon Greenberg, Esq.
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Attorney for the Plaintiffs

ORDER SHORTENING TIME

It is hereby ordered, that the foregoing **MOTION OF THE PLAINTIFFS ON AN OST TO STRIKE AFFIRMATIVE DEFENSES** shall be heard on the 3rd day of October, 2017, at the hour of 9:00 am/pm or as soon as the matter may be heard by the Court in Dept. XXVIII.

Dated this 20 day of September, 2017.

Hon. Ronald Israel
A-12-664726-C

DECLARATION OF COUNSEL IN SUPPORT OF AN OST

This case is set for the February 5, 2018 trial stack and the Court has declined to grant the parties' request for a continuance of the trial. As a result, this motion needs to be heard in a expedited fashion.

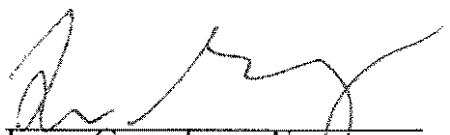
1. Plaintiffs' Counsel brings this Motion on an OST because the parties, pursuant to the Court's instructions, are working to complete all outstanding discovery and have this case fully ready to proceed to trial on the February 5, 2018 trial stack. On September 14, 2017, the parties appeared before the Court on their joint OST seeking a continuance of that trial setting. The Court declined to grant such a continuance request.

2. The parties need to know what issues (in respect to this motion what affirmative defenses) will be before the Court when trial commences. They further need to complete their pre-trial disclosures, and pre-trial discovery, armed with that knowledge. Accordingly, having this motion filed and heard in the normal course (approximately 30 days from its filing) would not grant the parties such necessary knowledge within a time period sufficiently in advance of the February 5, 2018 trial stack to be meaningful.

3. I apologize to the Court for the burden that hearing this matter on an OST imposes. I am presenting this motion in this fashion out of necessity and to safeguard the interests, and rights, of the approximately 5,000 class members I have been appointed to represent. Denying an expedited hearing on this motion will work to deny those class members the sort of proper, and fair, presentation of their claims at trial that they deserve.

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

Affirmed this 18th day of September, 2017



Leon Greenberg, Esq.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

This is a class action lawsuit for unpaid minimum wages, and other damages (if any be allowed) owed pursuant to the Nevada Constitution's Minimum Wage Amendment (the "MWA"). Via its Order entered November 25, 2015 the Court granted class action certification to such claims.

This motion addresses five different affirmative defenses (Ex. "A" Answer) that defendants claim they are entitled to prove at trial and if successful will establish that the class members cannot recover any unpaid minimum wages, or should recover a lesser amount of damages, because:

(1) The defendants "followed the law [in respect to the payment of minimum wages] that was being enforced by the Nevada Labor Commissioner" (Twenty-Seventh Affirmative Defense). **As discussed, *infra*, this defense should be stricken because claims brought under the MWA are strict liability claims and the Nevada Labor Commissioner's policies regarding MWA enforcement cannot**

relieve any employer of MWA liability;

(2) The defendants "at all times had a good faith and reasonable belief that they had compensated Plaintiffs in accordance with Nevada law" and as a result no award of punitive damages should be allowed (Tenth Affirmative Defense). **As discussed, *infra*, this defense should be stricken either (A) In its entirety because defendants refuse to disclose their knowledge of the MWA or what they were advised about the MWA (including advice from legal counsel) during the time period that pre-dates this lawsuit; or (B) Partially, for the period after June 26, 2014, the date when the Nevada Supreme Court in this case ruled that the defendants are subject to the MWA;**

(3) The defendants assert the Nevada Supreme Court's decision in this case applying the MWA to taxi cab drivers only has prospective application (Sixth Affirmative Defense); that the plaintiffs "were never entitled to the monies to which they assert at right (Thirteenth Affirmative Defense); and that the "plaintiffs were employed in a position that was exempt from minimum wage under Nevada law" (Fourteenth Affirmative Defense). **These defenses should be stricken since the Nevada Supreme Court has found that the class members are entitled to minimum wages under the MWA and such finding is not prospective.**

ARGUMENT

I. THE MWA IMPOSES UPON EMPLOYERS A STRICT LIABILITY FOR UNPAID MINIMUM WAGES AND THE NEVADA LABOR COMMISSIONER'S MINIMUM WAGE ENFORCEMENT POLICIES ARE IRRELEVANT TO THAT LIABILITY

Defendants's Twenty-Seventh Affirmative Defense states:

> Defendants followed the law that was being enforced by the Nevada Labor Commissioner.

This is not an affirmative defense. The MWA, Article 15, Section 16 of the Nevada Constitution, states, in its very first sentence, that:

> Each employer shall pay a wage to each employee of not less than the hourly

rates set forth in this section.

Nowhere does the MWA authorize employers to pay an hourly wage in a minimum amount approved by the Nevada Labor Commissioner. Nor does it specify, anywhere, that an employer is relieved of their legal liability for failing to pay such minimum wages based upon instructions they receive from, or their reliance upon policies implemented by, the Nevada Labor Commissioner. Indeed, the MWA does not provide **any form of good faith or other affirmative defense, of any sort, to employers.** An employer's knowledge (or lack of knowledge) of the MWA, their good faith, bad faith, animus, lack of animus, are all irrelevant in respect to the minimum wage liability imposed by the MWA. This is absolutely clear from the MWA's language.

The federal minimum wage imposed under the Fair Labor Standards Act (the "FLSA") is subject, via the later enacted Portal to Portal Act, to a very narrow "safe harbor" defense. Under that defense employers can be relieved of their FLSA minimum wage liability if they "plead and prove" they acted "in good faith" and "in reliance" on a written administrative regulation, order, ruling or interpretation of the U.S. Department of Labor or a policy of that agency towards a "class of employers" to which they belong. *See*, 29 U.S.C. § 259. This statute was enacted 11 years after the FLSA was enacted for the express purpose of limiting the otherwise absolute liability imposed by the FLSA for unpaid federal minimum wages. The MWA does not, for the purposes of Nevada law, provide for any analogous sort of limitation on its liability.

Defendants' Twenty-Seventh Affirmative Defense (Answer, Ex. "A"), seeking to relieve defendants from liability based upon the acts or omissions of the Nevada Labor Commissioner, should be stricken.

II. DEFENDANTS' GOOD FAITH DEFENSE TO THE PLAINTIFFS' PUNITIVE DAMAGES CLAIM SHOULD BE STRICKEN

Defendants's Tenth Affirmative Defense states:

> Defendants at all times had a good faith and reasonable belief that they had compensated Plaintiffs in accordance with Nevada law and, therefore, no liquidated or punitive damages are due to Plaintiffs.

A. Defendants' affirmative defense to punitive damages based upon their "good faith and reasonable belief" of their legal obligations be stricken in its entirety as defendants refuse to disclose the nature of such understanding and their efforts to secure the same.

Defendants, by asserting that they had a "good faith and reasonable belief" that they were compensating the plaintiffs "in accordance with Nevada law," and on that basis any award of punitive damages should be denied,[1] are placing their actions in obtaining such "reasonable belief" at issue. They are also making germane the issue of whether they acted in "good faith" in seeking to acquire such "reasonable belief" and whether they chose to ignore any information that they received (such as that the MWA either might, or did, cover its taxi drivers).

Defendants have advised they will not furnish a deposition witness to answer questions pursuant to NRCP Rule 30(b)(6) about the legal advice they received, prior to the commencement of this lawsuit, about their obligations under the MWA. Ex. "B" ¶ 14 and 16, deposition notice, topics refused by defendants for testimony to the extent they concerned communications with counsel.

Defendants, if they choose to maintain that position, and refuse to provide such discovery, should be prohibited from raising this affirmative defense at trial. The attorney client-privilege in this situation cannot serve as both a shield and sword. This affirmative defense requires a determination of the defendants' knowledge of, diligence in ascertaining, and good faith beliefs about, the *legal requirements* of the

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[1] This Court, in its Order entered on September 21, 2015 declined to dismiss plaintiffs' punitive damages claim under the MWA but noted the sufficiency of that claim (its ability to go forward to trial) could be reviewed when discovery concluded.

MWA. Defendants, having elected to prove these issues, cannot now refuse to disclose what they actually communicated about or attempted to communicate about such legal requirements with their attorneys. Those communications go to the very heart of defendants' claims that they acted in good faith and with due diligence in ascertaining and complying with their legal obligations. Fairness requires that having raised these defenses they disclose such communications. *See, Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162,(9th Cir. 1992), which stated:

> The privilege which protects attorney-client communications may not be used both as a sword and a shield. *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991). Where a party raises a claim which in fairness requires disclosure of the protected communication, the privilege may be implicitly waived. *Id.* In *Bilzerian* the defendant's intent was in issue because he thought his actions were legal, and had discussed the allegedly fraudulent transactions with his attorney. According to the Second Circuit this "would have put his knowledge of the law and the basis for his understanding of what the law required in issue. His conversations with counsel regarding the legality of his schemes would have been directly relevant in determining the extent of his knowledge and, as a result, his intent." *Id.* at 1292.

Chevron went on to hold that the communications sought in that case, regarding tax advice from counsel, must be disclosed, as the defendant asserted it had properly proceeded with the disputed investments at issue based upon "tax considerations." 974 F.2d at 1163. As the Ninth Circuit observed, it would be unfair to allow a defendant, under the cloak of attorney-client privilege, to deny a plaintiff "access to the very information" that they must refute to prove their case. *Id.*

The United States District Court for the District of Nevada is in accord on this point, requiring defendants who raise "good faith" defenses based upon their understanding of the law to waive their attorney-client communication privilege, and disclose those communications, to maintain such defenses. *See, United States ex rel. Calilung v. Ormat Indus.*, 2016 U.S. Dist. LEXIS 100292 and *Phelps v. MC Communs., Inc.*, 2013 U.S. Dist. LEXIS 101965, copies at Ex. "C."

B. In lieu of striking this affirmative defense the Court can give defendants the option of providing discovery.

In lieu of striking this affirmative defense, the Court can compel the defendants to submit to a deposition, within 15 days, of an NRCP Rule 30(b)(6) witness, as set forth in Ex. "B" ¶ 14 and ¶ 16.

C. Defendants' "good faith and reasonable belief" of their legal obligations as an affirmative defense should at least be stricken in respect to their conduct after June 25, 2014.

It is impossible for the defendants to have had a "good faith and reasonable belief" that the conduct after June 25, 2014, in failing to pay minimum wages required by the MWA, was "in accordance with Nevada law." The Nevada Supreme Court had, as of that date, advised defendants that such minimum wages had to be paid. Accordingly, this affirmative defense must at least be stricken for the time period after June 25, 2014.

III. DEFENDANTS' AFFIRMATIVE DEFENSES ALREADY RESOLVED BY THESE PROCEEDINGS SHOULD BE STRICKEN

The Nevada Supreme Court has resolved, against defendants, their assertions that the MWA applies to taxi cab drivers only prospectively (Sixth Affirmative Defense); that the plaintiffs "were never entitled to the monies to which they assert at right," *e.g.*, that the plaintiffs have no right to minimum wages under the MWA (Thirteenth Affirmative Defense); and that the "plaintiffs were employed in a position that was exempt from minimum wage under Nevada law" (Fourteenth Affirmative Defense). These affirmative defenses should be stricken.

CONCLUSION

WHEREFORE, plaintiffs' motion should be granted in its entirety.

Dated this 18th day of September, 2017

Leon Greenberg Professional Corporation

By: /s/ *Leon Greenberg*
LEON GREENBERG, Esq. NSB 8094
Attorney for Plaintiff
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(702) 383-6085

PROOF OF SERVICE

The undersigned certifies that on September 20, 2017, she served the within:

> Plaintiffs' Motion on an OST to Strike Affirmative Defenses

by court electronic service to:

TO:

Marc C. Gordon, Esq.
Tamer Botros, Esq.
General Counsel
Yellow Checker Star Transportation Co.
Legal Dept.
5225 W. Post Road
Las Vegas, NV 89118

/s/*Sydney Saucier*

SydneySaucier

EXHIBIT “A”

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DISTRICT COURT

CLARK COUNTY, NEVADA

CHRISTOPHER THOMAS, and CHRISTOPHER CRAIG, Individually and on behalf of others similarly situated, Plaintiffs, vs. NEVADA YELLOW CAB CORPORATION, NEVADA CHECKER CAB CORPORATION, and NEVADA STAR CAB CORPORATION Defendants.	Case No.: A-12-661726-C Dept. No.: XXVIII

DEFENDANTS' ANSWER TO PLAINTIFFS' SECOND AMENDED COMPLAINT

Defendants, NEVADA YELLOW CAB CORPORATION, NEVADA CHECKER CAB CORPORATION and NEVADA STAR CAB CORPORATION, by and through their undersigned attorneys, MARC C. GORDON, ESQ., and TAMER B. BOTROS, ESQ., and as for their Answer to Plaintiffs' Second Amended Complaint on file herein, admit, deny, and allege as follows:

JURISDICTION, PARTIES AND PRELIMINARY STATEMENT

1. Defendants are without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations contained in Paragraph 1 of Plaintiffs' Second Amended Complaint on file herein, and therefore deny them.

2. Defendants admit the allegations contained in Paragraph 2 of Plaintiffs' Second Amended Complaint on file herein.

CLASS ACTION ALLEGATIONS

3. Defendants are without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations contained in Paragraphs 3, 4, 5, 6, 7, 8 and 11 of Plaintiffs' Second Amended Complaint on file herein, and therefore deny them.

4. Defendants deny the allegations contained in Paragraphs, 9, 10 and 12 of Plaintiffs' Second Amended Complaint on file herein.

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

5. With respect to the allegations contained in Paragraph 13, Defendants, repeat and reallege their earlier responses to the allegations contained in Paragraphs 1 through 12 of Plaintiffs' Second Amended Complaint on file herein.

6. Defendants deny the allegations contained in Paragraphs 14, 15, 15 sub-paragraphs (a), (b), and (c), of Plaintiffs' Second Amended Complaint on file herein.

7. Defendants deny the allegations contained in Paragraphs 16 and 17 of Plaintiffs' Second Amended Complaint on file herein.

8. Defendants are without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations contained in Paragraphs 18 and 19 of Plaintiffs' Second Amended Complaint on file herein, and therefore deny them.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

The Second Amended Complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

All of the damages being claimed in this matter are barred by the doctrine of laches.

THIRD AFFIRMATIVE DEFENSE

All of the damages being claimed in this matter are barred by the statute of limitations.

FOURTH AFFIRMATIVE DEFENSE

All of the damages being claimed in this matter are subject to the two (2) years statute of limitations pursuant to NRS 608.260.

FIFTH AFFIRMATIVE DEFENSE

Defendants performed a Fair Labor Standards Act (FLSA) minimum wage self-audit that resulted in a finding of a minimum wage underpayment for the years 2010 and 2011, which was reviewed and approved by the United States Department of Labor Wage and Hour Division. A settlement agreement was entered on May 9, 2012 between Defendants and all of Defendants' current and former drivers in the amount $386,000.00, which Plaintiffs received payments and signed releases, thus Defendants are entitled to a set-off for said amount.

SIXTH AFFIRMATIVE DEFENSE

The Nevada Supreme Court decision in Thomas vs. Nevada Yellow Cab, 130 Nev., Advance Opinion 52, (Nev., 2014), only applies prospectively from June 26, 2014.

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SEVENTH AFFIRMATIVE DEFENSE

If the actions of former or current employees are found to be wrongful in any way, then those actions cannot be attributed to Defendants, that Defendants are not liable under concepts of Respondeat Superior, nor are Defendants vicariously liable.

EIGHTH AFFIRMATIVE DEFENSE

Plaintiffs have failed to exhaust their administrative, statutory, arbitration and/or contractual remedies.

NINTH AFFIRMATIVE DEFENSE

Plaintiffs' Second Amended Complaint and each cause of action asserted therein, are subject to the doctrine of accord and satisfaction and therefore, any remedy or recovery to which Plaintiffs might have been entitled to must be denied or reduced accordingly.

TENTH AFFIRMATIVE DEFENSE

Defendants at all times had a good faith and reasonable belief that they had compensated Plaintiffs in accordance with Nevada law and, therefore, no liquidated or punitive damages are due to Plaintiffs.

ELEVENTH AFFIRMATIVE DEFENSE

If Plaintiffs are adjudged to be entitled to any recovery, then Defendants are entitled to a set-off for any compensation, including without limitation to, unemployment compensation, wages, salaries, and/or social security payments, received by Plaintiffs.

TWELEVTH AFFIRMATIVE DEFENSE

There exists a bona fide dispute as to whether any further compensation is actually due to Plaintiffs, and if so, the amount thereof.

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THIRTEENTH AFFIRMATIVE DEFENSE

Plaintiffs were never entitled to the monies to which they assert a right in the Second Amended Complaint.

FOURTEENTH AFFIRMATIVE DEFENSE

Plaintiffs were employed in a position that was exempt from minimum wage under Nevada law.

FIFTEENTH AFFIRMATIVE DEFENSE

The requirements for a class action have not been satisfied in this matter for reasons, including, but not limited to, impracticability, lack of common interest, lack of typicality, lack of numerosity and/or inadequate representation.

SIXTEENTH AFFIRMATIVE DEFENSE

Defendants are entitled to a set-off for any amounts overpaid to Plaintiffs in the course of their employment. This credit or set-off includes, but is not limited to, amounts erroneously overpaid to Plaintiffs.

SEVENTEENTH AFFIRMATIVE DEFENSE

This action is barred because Plaintiffs' claims are subject to final and binding neutral arbitration pursuant to contract, the National Labor Relations Act, and/or applicable state law.

EIGHTEENTH AFFIRMATIVE DEFENSE

Plaintiffs' Second Amended Complaint fails to state facts sufficient to justify an award of punitive damages.

NINETEENTH AFFIRMATIVE DEFENSE

Punitive damages are unconstitutional in general and as applied to Defendants.

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TWENTIETH AFFIRMATIVE DEFENSE

Punitive damages constitute excessive fines prohibited by the United States and Nevada Constitutions. The relevant statues do not provide adequate standards or safeguards for their application and they are void for vagueness under the due process clause of the Fourteenth Amendment of the United States Constitution and in accordance with Article I, Section 8 of the Nevada Constitution.

TWENTY-FIRST AFFIRMATIVE DEFENSE

Plaintiffs are not entitled to punitive damages because Defendants did not engage in any conduct warranting punitive damages.

TWENTY-SECOND AFFIRMATIVE DEFENSE

It has been necessary for the Defendants to employ the services of attorneys to defend this action and a reasonable sum should be allowed to Defendants as and for attorneys' fees, together with their costs expended in this action.

TWENTY-THIRD AFFIRMATIVE DEFENSE

Plaintiffs failed to state a claim against Defendants upon which attorneys' fees and costs can be awarded.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

Plaintiffs have an adequate remedy at law; thus, injunctive relief is inappropriate.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

Plaintiffs fail to state a claim against Defendants upon which declaratory or injunctive relief can be awarded.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

Nevada Attorney General opinions do not constitute binding legal authority or precedent.

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TWENTY-SEVENTH AFFIRMATIVE DEFENSE

Defendants followed the law that was being enforced by the Nevada Labor Commissioner.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

Pursuant to N.R.C.P. 11, as amended, all possible affirmative defenses may not have been alleged herein, insofar as sufficient facts were not available after reasonable inquiry. Therefore, Defendants reserve the right to allege additional affirmative defenses if subsequent investigation warrants.

WHEREFORE, Defendants pray that Plaintiffs take nothing by way of Plaintiffs' Second Amended Complaint on file herein, and that Defendants recover all costs and attorneys' fees incurred in defending this action.

DATED this 22nd day of December, 2015.

YELLOW CHECKER STAR TRANSPORTATION CO. LEGAL DEPT.

/s/ Tamer Botros

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NEVADA CHECKER CAB CORPORATION and
NEVADA STAR CAB CORPORATION

CERTIFICATE OF ELECTRONIC SERVICE

Pursuant to Rule 9 of Nevada Electronic Filing and Conversion Rules, I hereby certify that on the 22nd day of December, 2015, service of the foregoing **DEFENDANTS' ANSWER TO PLAINTIFFS' SECOND AMENDED COMPLAINT** made this date by electronic service as follows:

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/s/ Tamer Botros
For **Yellow Checker Star Transportation Co. Legal Dept.**

EXHIBIT “B”

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DISTRICT COURT

CLARK COUNTY, NEVADA

CHRISTOPHER THOMAS, and CHRISTOPHER CRAIG, Individually and on behalf of others similarly situated, Plaintiffs, vs. NEVADA YELLOW CAB CORPORATION, NEVADA CHECKER CAB CORPORATION, and NEVADA STAR CAB CORPORATION, Defendants.	Case No.: A-12-661726-C Dept.: XXVIII **NOTICE TO TAKE DEPOSITION**

PLEASE TAKE NOTICE that pursuant to Nevada Rules of Civil Procedure § 26 and § 30(b)(6), plaintiffs, by their attorneys, Leon Greenberg Professional Corporation, will take the deposition of all defendants by a person(s) that it designates as possessing and having acquired prior to such deposition the best knowledge of such corporate defendants as to the following specified subjects.

TIME FRAME TO BE COVERED BY REQUESTED TESTIMONY

The testimony requested for the below subjects concerns the time frame from July 1, 2007 through October 27, 2015.

TESTIMONY REQUESTED

1. The length of the work shifts to which taxi drivers employed by defendants were assigned, meaning the length of time from the beginning of the work shift to the end of the work shift, irrespective of whether the taxi driver may have been "off duty" or "on break" or "on personal time" during one or more periods of time between the beginning and the end of the work shift. In the event defendants did not assign all taxi drivers to shifts of the same length during any particular chronological period, the witness produces shall testify as to the contents, existence, form and location of all records containing information on such varying assigned shift lengths.

2. The average amount of time taxi drivers employed by the defendants worked each shift to which they were assigned. This means the amount of time from the beginning of their shift to the end of their shift that each taxi driver was, on average, working and not on a break (a break being a period of time during which the taxi driver was not working and was fully relieved of all work responsibilities). This includes defendant's knowledge of the amount of break time taxi drivers employed by defendants usually, on average, took each work shift and how defendants have acquired that knowledge.

3. The time(s) of day taxi drivers were expected by defendants to be present at the defendant's place of business prior to beginning their work shift (the term "prior to beginning their work shift" meaning the amount of time *prior* to the expected start time of a taxi driver actually commencing driving a taxi cab or prior to the time considered the "start time" of their taxi driving shift for purposes of complying with the relevant regulations prohibiting taxi drivers from driving a taxi for a shift of more than 12 consecutive hours) each day and the time restrictions imposed on their ability to return to such premises with their assigned taxi cabs and end their work shifts, including but not limited to as specified in defendant's document entitled "Taxi Driver Basic Court Manual & Company Policies.PDF" and the Collective Bargaining Agreement(s) produced in discovery.

4. The time(s) each day taxi drivers were expected by defendants to end their work shift by returning their assigned taxi cab to defendants.

5. The amount of time during each assigned work shift that taxi driver employees of defendants were allowed under defendants' policies to take as break time, including but not limited to the taking of lunch or other meal breaks. Such testimony will include all policies that defendant had as to the taking of lunch breaks by taxi drivers and all other breaks from work that taxi drivers were authorized by defendants to take during their work shift. Such testimony will include all policies requiring taxi drivers to use their radios or cell phones to report to defendants that they were going to, or sought permission to, commence a break. The witness produces shall testify as to the contents, existence, form and location of all records containing information on the break times taken by taxi

drivers.

6. Defendants' break time policies in respect to what drivers were required to do or refrain from doing during their break times, including but not limited to whether they were required to or allowed to park and get out of their taxi cabs and required to interrupt, or prohibited from interrupting, their breaks by accepting customers, and whether they were required to be available for customer assignments by radio calls or cell phones during their break times.

7. All safety meetings taxi drivers were encouraged or required to attend including the frequency and length of such meetings and if compensation was ever paid by defendants to taxi drivers for attending such meetings and if so in what amounts and how that compensation was calculated and the records kept of the attendance at all safety meetings and the payment of any compensation for attending such meetings. Such testimony will include what actions defendant took or did not take in response to taxi drivers failing to attend safety meetings.

8. All systems used by defendants, including computer systems, to keep track of the hours worked by their taxi drivers and/or their compensation paid. Such witness shall testify about how those systems recorded such information, what such historic information is currently in the defendants' possession, custody or control, and how such information and systems were used by the defendant. Such testimony shall include all details of defendants' "Aleph" data produced in discovery in this case, including where and how such Aleph data is created and where such data originates (including if from a computer system log on/off entry, a taxi meter, or

some other either automated or manual entry or actions) and how it calculates the daily time periods associated with each taxi driver in that data. Such testimony will include whether the Aleph time recorded is measured from a driver's "report time" (meaning the time during a work day that they arrive at defendants' premises ready and able to be given a taxi cab to drive or perform other assigned work) or from some other time (such as a time a taxi driver is in an assigned taxi cab and initializes the taxi meter) to the driver's "release time" (meaning the time the driver has finished with all required tasks for his workday, including submitting his collected taxi fares and paperwork to the defendants) or from some other time (such as the time the taxi driver returns the taxi cab to defendants' premises and/or logs off the taxi's meter).

9. All record keeping systems and records (including computer ones) utilized by defendants that were identified to the United States Department of Labor, including any discussed in documents Bates CRAIG 19 to 30 produced by plaintiffs in discovery in this case. Such testimony will include all records or information created and/or collected in connection with or in response to any investigation of that agency and full knowledge of the "software program" built to retrieve time information as stated at Bates CRAIG 28 and elsewhere.

10. All procedures implemented by defendants as result of, or in connection with, or upon which they based, their representation to the United States Department of Labor at Bates CRAIG 29 and elsewhere that they "agreed to comply ensuring drivers are paid at least $7.25 per hour and if not, they would be compensated the difference on a bi-weekly basis." Such witness shall testify about all records maintained by defendants in

connection with, or as a result of, those procedures, including such records that defendants currently still have under the possession, custody or control. Such witness shall identify by name the unnamed software at Bates CRAIG 29-30 and be fully knowledgeable as to how it is used by defendants to assist them in complying with their obligations to pay either federal or state law required minimum wages, what information it records or utilizes, how that information is stored, and what historic information from that software is currently in the possession, custody or control of the defendants and all forms, including computer data file forms, in which it can be produced.

11. All records maintained by the defendants of the hours worked during each pay period by each of defendant's taxi driver employees and the compensation they were paid and/or earned or were reported as earning for tax purposes. Such witness shall also testify as to whether defendants use any computerized time keeping system to record the hours their taxi drivers work and if they do not why they do not maintain any record of the hours their taxi drivers work separate and apart from the information that may be recorded on those taxi drivers' trip sheets; why they do not furnish their taxi drivers with any statements or record of the hours they have worked each week or other pay period; and why, if they have not done so, they have not instituted any computerized (punch clock or other) time keeping system to keep track of the hours of work of their taxi drivers.

12. All records maintained by the defendants of the hours worked during each workday by each of defendants taxi driver employees. This includes all records of the break time that taxi drivers

employed by defendants took during their work shifts.

13. All computer systems and software used by defendants that recorded the activities of their taxi cabs and taxi drivers, including whether such computer systems and software created records of the dates and times that taxi cabs and their drivers were engaged in any specific activities, and if so, what records of such activities were created and whether such records still exist and if they do so exist for what time frame. Such testimony will include all uses that defendants made of such computer systems and software. Such testimony will include knowledge of where all computer data files are stored that contain information from, or used by, defendants' computer software and systems, the time period covered by such computer data files, the ability to copy such computer data files, the existence of any archives or backup copies of such computer data files and defendants' practices and procedures on preserving its computer data files and making backup or archive copies of the same, and whether any such computer data files or information stored in them has been lost or destroyed and if so what computer data files or information stored in them has been lost or destroyed.

14. All facts known by defendants that relate to, bear upon, or support or dispute the plaintiffs' entitlement to an award of minimum wages and/or that support defendants' Tenth, Nineteenth, Twentieth, and Twenty-First affirmative defenses and/or upon which they base such affirmative defenses. Such witness shall be fully prepared to demonstrate defendant's relevant knowledge and/or lack of knowledge and alleged "good faith" state of mind and actions as raised by such affirmative defenses. Such witness shall be fully knowledgeable as to the basis upon

which defendants have denied the allegations in the plaintiffs' Second Amended Complaint paragraphs 14 to 17. Such witness shall also testify as to the following:

(A) When defendants first became aware that Nevada's Attorney General had in 2005 issued a public opinion that taxi drivers would be subject to the minimum wage provided for in the proposed amendment to Article 15, Section 16 of the Nevada Constitution if such constitutional amendment was approved by the voters of Nevada in 2006; what actions defendants elected to take to pay taxi drivers minimum wages after such constitutional amendment was passed in November of 2006 in respect to paying the minimum wage or, if they elected not to take any such actions, why they decided to take no such actions;

(B) Why defendants failed to advise each of their taxi drivers, individually and in writing, of the changes in the minimum wage required by Article 15, Section 16 of the Nevada Constitution on July 1st of the years 2007 through 2010;

(C) Why defendants, upon becoming aware of the foregoing 2005 Opinion of the Nevada Attorney General, and after the Nevada Constitution was amended with Article 15, Section 16 by the voters of Nevada in November of 2006, made no effort to seek any judicial declaration of defendants' obligation, or lack of obligation, to pay the minimum wage specified in Article 15, Section 16 to its taxi driver

employees. Such witness shall also be knowledgeable about why defendants, despite asking the labor union representing their taxi driver employees to enter into a collective bargaining agreement waiving any minimum wage rights of those taxi drivers under Article 15, Section 16 of the Nevada Constitution, still did not seek any such judicial declaration. Such witness shall also be knowledgeable about why defendants continued to believe, if they claim they so believed, that their taxi drivers had no entitlement to minimum wages under Article 15, Section 16 of the Nevada Constitution even though they had made the foregoing request to the taxi driver's labor union to waive those rights and during the time period prior to the June 23, 2009 decision issued in *Lucas v. Bell Trans,* 2009 U.S. Dist. Lexis 72549.

(D) What advice defendants received, including the advice they received from their counsel, about whether they were required to pay their taxi driver employees minimum wages as specified by Article 15, Section 16 of the Nevada Constitution after it became part of Nevada's Constitution in November of 2006. The witness shall also be fully knowledgeable about what advice defendants received about the potential liability and costs they faced for failing to pay such minimum wages to their taxi drivers after Article 15, Section 16 became part of Nevada's Constitution. The witness shall also be fully knowledgeable about what advice defendants received and what analysis or consideration

defendants' performed about the cost of paying those minimum wages compared to the possible cost to defendants in the future of failing to pay those minimum wages and facing litigation over such failure. The witness shall also be fully knowledgeable about any determination that defendants made that it would be more economically advantageous to the defendants, meaning less costly to the defendants, to not start paying minimum wages to their taxi drivers immediately and/or voluntarily after Article 15, Section 16 became part of Nevada's Constitution and wait until litigation was commenced, if it was ever commenced, over such a failure to pay minimum wages.

(E) What steps defendants took to inform themselves of the requirements of Nevada Law in respect to the payment of minimum wages, including all advice they sought and received from any attorneys.

(F) Whether defendants, or their counsel, were aware of, and when they become so aware of, the contents of the opinion letter (copy at Bates 1 to 4 of Plaintiffs' Second Supplemental Disclosures) issued by the Littler Mendelson firm in November of 2006 discussing the Nevada Constitutional Minimum Wage.

15. All written statements defendant has given to each of its taxi driver employees since June 1, 2007 advising the taxi driver employees of the minimum hourly wage set forth in Nevada's Constitution. Such

testimony will include when those written statements were given, their contents, how they were distributed including if they (it) were (was) posted in one or more locations for an intended viewing by such taxi driver employees collectively or if given to each taxi driver employee individually in writing. Such witness shall also testify as to the current existence or preservation of such written statements including their location and the defendants' ability to produce copies of the same and all records that exist regarding the dissemination of such written statements.

16. All efforts defendant has made to ascertain what obligations it has under the law to maintain records of the hours worked by its employees, including but not limited to its taxi driver employees, and including the form of such records. This shall include all communications it had with legal counsel about such topic both prior to and after the commencement of this litigation and all changes, if any, it has made to its keeping of such records since the commencement of this lawsuit.

17. Whether there exist any subsequent, prior, superceding or amended versions of any documents that set forth the defendants' company policies and rules for its taxi drivers besides the "Taxi Driver Basic Course Manual & Company Policies.PDF" document produced in discovery by defendants (not bates numbered by defendants) that appears to bear a date of 6/6/12. Such witness shall testify about the existence of all such documents and defendants' ability to produce copies of the same.

18. How defendants compiled and collected all of the electronic data files they have produced in discovery in this litigation and provided on the various CDs which are detailed as production of documents items 6, 7, 8,

9, 12, 13, 14 and 15. Such witness shall testify as to the sources of the various data provided (payroll, aleph), whether the materials so provided on those CDs are complete copies of the source materials or only selected portions of those source materials (detailing what portions) and how those selected portions were copied.

19. Defendants' use of Cab Manager software and the information stored by that software about the activities of the defendants' taxi drivers and the defendants' custody, control and/or possession of such information.

20. Defendant's knowledge of the minimum wage requirements of the Fair Labor Standard Act prior to the commencement of this lawsuit and all efforts, if any, that it has made prior to and after the commencement of this lawsuit to comply with the same. Such testimony is to include all records, procedures or policies defendant has implemented, used, or relied upon any time in an attempt to monitor or ensure its compliance with those requirements.

21. The health insurance benefits, if any, defendant's taxi driver employees were eligible to participate in by virtue of their status as employees of the defendant. Such information shall include:

> (A) The amounts taxi drivers had to pay to secure coverage, including the differing amounts, if any, required for them to secure coverage just for themselves, for just themselves and their spouse, for themselves and their dependent children, and for themselves, their spouse, and their dependent children (the latter being "family coverage");

(B) All qualifications that the defendant's taxi drivers had to fulfill to be eligible to participate in the health insurance plan(s) made available by defendant. This would include any waiting period after the commencement of their first day of employment for them to be eligible to receive such insurance or any requirement that they continue to work a minimum number of shifts or hours in any month or other specified period. This would include the amounts defendant's taxi drivers had to pay to continue to receive such insurance, after they had started receiving such insurance, if they failed to meet a minimum number of shifts or hours of work requirement. This would include how defendants determined if a particular taxi driver failed to meet a minimum number of work shifts requirement to qualify for the maximum payment by defendants towards their health insurance (*e.g.*, whether such qualification examination was conducted monthly, for example in the month of April for qualification in May, or quarterly, for example the entire 1st quarter of the year for qualification in the 2nd quarter, etc.). This would include how a taxi driver could "re-qualify" to receive the maximum payment by defendants towards their health insurance (*e.g.*, whether to "re-qualify" a driver would have to work a month or a quarter of a year to regain, based upon their shifts worked during that time, qualification to receive the maximum payment by defendants towards their health insurance). If the standards that defendants used for taxi drivers to remain qualified and/or re-qualify for insurance changed or were different during different periods

of time the witness shall provide testimony as to those standards for all periods of time since July 1, 2007.

(C) The nature of the health insurance provided, including the coverage limitations (if any) expressed in dollars and whether such insurance provided coverage for hospital costs, physician costs, and surgical costs, and the amounts (percentages and dollar amounts) of all deductibles and co-payments required by taxi driver employees participating in such health insurance.

(D) The records defendants maintained, including computerized records, indicating when taxi drivers qualified to receive health insurance benefits (meaning the particular date they had the option to enroll in the medical insurance program provided by defendants if the required premium was paid for their participation in that program). Such witness shall also be familiar with the defendants' computerized records setting forth the amount a taxi driver had to pay to secure such health insurance benefits each month or pay period. Such witness shall also be familiar with defendants' ability to produce such computerized records.

The witness(es) is to be produced on the 15th day of September, 2017 at the hour of **10:00 a.m.** or another agreed data and time at the law office of Leon Greenberg, 2965 South Jones Blvd- Suite E3, Las Vegas, Nevada 89146 and will continue day to day until completed. Such witness(es) will be examined as to the foregoing and all

facts and circumstances bearing upon any and all issues in this litigation. Such deposition shall be recorded by audio and/or video and/or stenographically.

Dated this 5th day of September, 2017.

Leon Greenberg Professional Corporation

By: /s/ *Leon Greenberg*

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Attorney for Plaintiffs

EXHIBIT “C”

United States ex rel. Calilung v. Ormat Indus.

United States District Court for the District of Nevada

August 1, 2016, Decided; August 1, 2016, Filed

3:14-cv-00325-RCJ-VPC

Reporter
2016 U.S. Dist. LEXIS 100292 *; 2016 WL 4107682

UNITED STATES OF AMERICA ex rel. TINA CALILUNG & JAMIE KELL, Plaintiffs/Relators, v. ORMAT INDUSTRIES, LTD., et al., Defendants.

Prior History: *United States ex rel. Calilung v. Ormat Indus., 2015 U.S. Dist. LEXIS 37874 (D. Nev., 2015)*

Core Terms

Relators, communications, documents, attorney-client, waived, consultant, third party, attorneys, asserting, affirmative defense, requirements, privileged, employees, good faith, plant, functional equivalent, privilege log, legal advice, court finds, geothermal, company's, defenses, parties, energy, advice of counsel, grant application, circumstances, at-issue, implied waiver, confidential

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For United States of America, ex rel., Plaintiff: Roger W. Wenthe, U.S. Attorney's Office, Las Vegas, NV.

For Ormat Technologies, Inc., Ormat Nevada, Inc., Orni 18, LLC, Defendants: Mark Troy, Nimrod H. Aviad, LEAD ATTORNEYS, PRO HAC VICE, Crowell & Moring, Los Angeles, CA; Matthew C. Addison, LEAD ATTORNEY, Jessica L Woelfel, John J Frankovich, McDonald Carano Wilson LLP, Reno, NV; Charlotte

E. Gillingham, PRO HAC VICE, Crowell & Moring, Washington, DC; Megan Weisgerber, PRO HAC VICE, Crowell **[*2]** & Moring, Los Angeles, CA.

For Puna Geothermal Venture II, L.P., Defendant: Matthew C. Addison, LEAD ATTORNEY, Jessica L Woelfel, John J Frankovich, McDonald Carano Wilson LLP, Reno, NV; Charlotte E. Gillingham, PRO HAC VICE, Crowell & Moring, Washington, DC; Megan Weisgerber, PRO HAC VICE, Crowell & Moring, Los Angeles, CA.

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Judges: Valerie P. Cooke, UNITED STATES MAGISTRATE JUDGE.

Opinion by: Valerie P. Cooke

Opinion

MEMORANDUM AND ORDER

This dispute concerns documents withheld on the basis of privilege by defendants Ormat Technologies, Inc., Ormat Nevada, Inc., ORNI 18, LLC, and Puna Geothermal Venture GP (collectively, "Ormat"). Plaintiffs Tina Calilung and Jamie Kell ("Relators") filed a motion to compel on June 17, 2016 (ECF No. 241), arguing that privilege had been waived as to two categories of documents. Ormat **[*3]** opposed (ECF No. 246), Relators replied (ECF No. 247), Ormat filed a surreply (ECF No. 249), and Relators filed a notice of supplemental authority (ECF No. 250). The matter fully briefed, this court conducted a hearing on July 15, 2016 to discuss the parties' positions. (*See* ECF No. 254.) Having considered the arguments set forth in the papers and hearing, the court hereby grants Relators' motion to compel consistent with the following.

I. BACKGROUND AND PROCEDURAL HISTORY

This *qui tam* action, brought under the *False Claims Act ("FCA"), 31 U.S.C. § 3729 et seq.*, arises from Ormat's allegedly fraudulent actions in connection with federal grant money received pursuant to § 1603 of the American Recovery and Reinvestment Act of 2009 ("ARRA"). *Section 1603* temporarily provided cash

grants to specified energy properties in lieu of tax credits. Only individuals and projects meeting certain conditions qualified:

> First, the individual or entity applying for the grant must be eligible. Second, the property must be a "specified energy property." Under Section 1603, specified energy property "consists of two broad categories of property—certain property that is part of a facility described in *IRC [S]ection 45* (Qualified Facility Property) and certain other property **[*4]** described in *IRC [S]ection 48*." *Section 45 of the IRC* includes a geothermal energy facility as a "qualified facility" if it uses geothermal energy to produce electricity. "Specified energy property," as used in Section 1603, further includes "geothermal property," as described in *Section 48(a)(3)(A) of the IRC*, and "geothermal heat pump property," as described in *Section 48(a)(3)(A) of the IRC.* The Secretary has explained that these encompass "[e]quipment used to produce, distribute, or use energy derived from a geothermal deposit . . . ." Third, the qualified property must be "placed in service" in 2009, 2010, or 2011 (or construction must begin during one of those years).
>
> If these three requirements are met, then the ARRA provides a reimbursement of 30 percent of the basis of the property.

(ECF No. 220 at 4-5 (internal citations omitted).)

Relators contend that Ormat knowingly and purposefully submitted false or fraudulent grant applications, certifications of compliance, reports, and claims to the federal government, thereby obtaining grant payments to which it was not entitled. (ECF No. 27 at 5-6, 19.) Broadly speaking, Relators' claims can be divided into those arising from misrepresentations related to the North Brawley Geothermal Power Plant ("Brawley") in Imperial County, California, and **[*5]** those arising from misrepresentations related to the Puna Geothermal Power Plant ("Puna") on the island of Hawaii. (*Id.* at 7.) With regard to Brawley, Relators allege that Ormat (1) misrepresented the date on which the plant was placed in service on a 2010 grant application; (2) consistently misrepresented the plant's eligible basis; and (3) applied for and received a second grant in 2013 based on false information regarding the plant's expansion. (*Id.* at 42.) As for Puna, Relators maintain that Ormat (1) improperly applied for and received a § 1603 grant by misrepresenting the project as a stand-alone facility rather than an expansion of a nonqualified property; and (2) misrepresented the plant's eligible basis. (*Id.* at 61-62, 70.)

To prevail, Relators must prove that Ormat knowingly submitted the false claims alleged with intent to violate the law. *31 U.S.C. § 3729(a)*. "Violations of laws, rules, or regulations alone do not create a cause of action under the FCA." *United*

States ex rel. Hopper v. Anton, 91 F.3d 1261, 1266 (9th Cir. 1996). In answer to Relators' amended complaint, Ormat denies scienter and "affirmatively asserts that, at all times, Ormat and its officers acted reasonably and in good faith in light of all circumstances and in compliance with all applicable legal requirements. All accusations of **[*6]** intent to defraud the Treasury or to obtain grants to which Ormat was not entitled are specifically rejected." (ECF No. 127 at 2.) Likewise, Ormat states in its eighth affirmative defense that "any statements made by Defendants regarding legal matters cannot as a matter of law constitute a false statement of fact required for FCA liability, and . . . disagreements on legal or regulatory matters are not FCA violations," and in its ninth affirmative defense that "the United States had actual or constructive knowledge of the relevant facts regarding the Section 1603 grant applications . . . , and therefore Relators' claims are not false or knowingly false . . . ." (*Id.* at 49.)

On May 16, 2016, Relators served Ormat with interrogatories inquiring after the factual basis for its eighth affirmative defense, among other things. (ECF No. 241-1 at 4.) Ormat responded that it had not yet completed its factual investigation and would supplement its response at a later date. (ECF No. 241-2 at 4.) Relators have informed the court that during a June 16, 2016 meet and confer, "Ormat's counsel confirmed that it was unwilling to provide any further response to the Interrogatories or to provide any additional information **[*7]** on its affirmative defenses at this time." (ECF No. 241 at 3.)

To characterize the number of documents implicated by this case as "voluminous" appears a gross understatement. The original privilege log, produced by Ormat on March 11, 2016, contained 41,290 entries and was some 4,300 pages long. (ECF No. 241 at 4 n.2.) The revised version, produced April 4, 2016, contains over 19,000 documents and spans over 760 pages. (*Id.*) The parties previously stipulated to a protocol by which Relators could challenge the log's contents in waves of 250 documents at a time. (*See* ECF No. 222 at 1-2.) Ormat would provide Relators' counsel with the challenged documents, marked "Attorneys' Eyes Only," and the parties would meet and confer in an attempt to resolve the privilege dispute. (*Id.* at 2.) If unsuccessful, the parties would submit the documents for *in camera* review. (*Id.*) Through this protocol, Relators have challenged approximately 2,250 documents in nine waves over the last handful of months. (ECF No. 246 at 2.)

Relators now suggest that the Attorneys' Eyes Only protocol is burdensome, inefficient, and prejudicial in light of the deposition schedule and their belief that privilege has been waived with **[*8]** respect to many of the documents withheld. As a consequence, they ask the court to find blanket waivers of privilege for

communications implicated by Ormat's good faith defenses and communications disclosed to third parties. (ECF No. 241 at 2.)

II. DISCUSSION

A. At-Issue Waiver of Attorney-Client Privilege

The attorney-client privilege protects confidential communications between a client and his or her attorney for the purpose of obtaining or dispensing legal advice. *United States v. Chen, 99 F.3d 1495, 1501 (9th Cir. 1996)*. "Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States, 449 U.S. 383, 389, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981)*. Federal privilege law applies where the court's jurisdiction is based on a federal question. *Nat'l Labor Relations Bd. v. N. Bay Plumbing, Inc., 102 F.3d 1005, 1009 (9th Cir. 1996)* (citing *Fed. R. Evid. 501*)).

The burden of establishing the attorney-client relationship and the privileged nature of each communication lies with the party claiming privilege. *United States v. Bauer, 132 F.3d 504, 507 (9th Cir. 1997)*. "One of the elements that the asserting party must prove is that it has not waived the privilege." *Weil v. Inv./Indicators, Research & Mgmt., Inc., 647 F.2d 18, 25 (9th Cir. 1981)*. Waiver may be express or implied. *Bittaker v. Woodford, 331 F.3d 715, 719 (9th Cir. 2003)*.

A party may not use the doctrine of attorney-client privilege "to prejudice his opponent's case or to disclose some selected communications **[*9]** for self-serving purposes." *United States v. Bilzerian, 926 F.2d 1285, 1292 (2d Cir. 1991)*. Put another way, the privilege is not to be "'used both as a sword and a shield.'" *Kaiser Found. Health Plan, Inc. v. Abbott Labs., Inc., 552 F.3d 1033, 1042 (9th Cir. 2009)* (quoting *Chevron Corp. v. Pennzoil Co., 974 F.2d 1156, 1162 (9th Cir. 1992)*); *see also Bilzerian, 926 F.2d at 1292*. Thus, the privilege may be implicitly waived "'[w]here a party raises a claim which in fairness requires disclosure of the protected communication.'" *Kaiser, 552 F.3d at 1042* (quoting *Chevron, 974 F.2d at 1162*). The Ninth Circuit determines the existence of an implied waiver by considering whether:

> (1) assertion of the privilege was the result of some affirmative act, such as filing suit, by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his defense.

Hearn v. Rhay, 68 F.R.D. 574, 581 (E.D. Wash. 1975); *see also United States v. Amlani, 169 F.3d 1189, 1195 (9th Cir. 1999)* (citing *Home Indem. Co. v. Lane Powell Moss & Miller, 43 F.3d 1322, 1326 (9th Cir. 1995)*). Because the party asserting privilege must put its communications at issue by some affirmative act, the mere denial of scienter is insufficient to waive privilege. *Genentech, Inc. v. Insmed Inc., 236 F.R.D. 466, 469 (N.D. Cal. 2006)*.

Relators argue in their motion to compel that Ormat affirmatively placed attorney-client communications at issue by asserting a good faith belief that its conduct was lawful. (ECF No. 241 at 4.) As a consequence, fairness requires that Relators be able to access otherwise-privileged **[*10]** communications to determine whether the legal advice Ormat sought or received in connection with the Brawley and Puna grants supports the FTCA claims. (*Id.* at 8-9.) Alternatively, if no waiver is found, Relators request an order that would prevent Ormat from asserting reliance on the advice of counsel or other professional advisers. (*Id.* at 12.)

Ormat responded to the motion by voluntarily waiving privilege over communications related to the Brawley placed-in-service subject matter, noting that it may affirmatively rely on those communications as part of its defense. (ECF No. 246 at 3.) Ormat also opposed the notion that privilege was implicitly waived for other subject matters, including Puna's grant applications. Because the motion to compel only identified documents relating to Brawley's placed-in-service date, no other subject matter is before the court. (*Id.* at 3-4.) In effect, Ormat's voluntary waiver rendered Relators' motion moot. (*Id.*)

In reply, Relators maintain that the question of implicit waiver is not moot so long as Ormat preserves the right to rely on communications with counsel in connection with any good faith defense. (ECF No. 247 at 1-2.) Relators note, for example, that Ormat could "at some **[*11]** undefined point in the future" waive privilege as to Puna if it locates attorney-client communications which support its defense, and express concern for the effect such a waiver would have on the depositions currently under way. (*Id.* at 2.)

Both in surreply and during the July 15 hearing, Ormat emphasized that Relators have yet to identify specific documents on the privilege log that are related to the Puna claims. (ECF No. 249 at 3.) It argues that the cases Relators cite contemplate a preliminary showing by the party challenging privilege that the disputed communications actually exist, and, therefore, that Relators should proceed with any challenges through the Attorneys' Eyes Only protocol. (*See id.*) "[P]rivilege is not waived the abstract." (*Id.*)

The court first considers whether Ormat placed its attorney-client communications at issue by asserting its good faith defenses. The "quintessential example" is a defendant who raises an affirmative defense that he relied on the advice of counsel, and is thereby deemed to have waived the attorney-client privilege with respect to that advice. *In re Kidder Peabody Secs. Litig., 168 F.R.D. 459, 470 (S.D.N.Y. 1996)*; *see also* Chevron, 974 F.2d at 1162-63 (finding implied waiver of privilege where defendant claimed its tax position was reasonable based on **[*12]** advice of counsel, thereby putting the tax advice received directly at issue). As Relators have argued, however, at-issue waivers are not limited to situations in which the advice of counsel is expressly relied upon. (ECF No. 241 at 6-7.) In *Bilzerian*, on which the Ninth Circuit relied in deciding *Chevron*, the defendant argued that the evidence "he sought to introduce regarding his good faith attempt to comply with the securities laws would not have disclosed the content or even the existence of any privileged communications . . . ." 926 F.2d at 1291. Nevertheless, the Second Circuit concluded that an affirmative defense grounded in the defendant's good faith belief "that he thought his actions were legal would have put his knowledge on the law and the basis for his understanding of what the law required in issue. His conversations with counsel regarding the legality of his schemes would have been directly relevant in determining the extent of his knowledge and, as a result, his intent." *Id. at 1292*. Plaintiff was entitled to discover those at-issue communications. *Id. at 1293-94*.

Consistent with *Bilzerian*, courts "have found implied waiver of attorney-client privilege in instances in which the magic words 'advice of counsel' **[*13]** are not used but where the circumstances underlying an affirmative defense necessarily rely on otherwise privileged material." *Olvera v. Cnty. of Sacramento, No. CIV. 10-550 WBS CKD, 2012 U.S. Dist. LEXIS 10842, 2012 WL 273158, at *3 (E.D. Cal. Jan. 30, 2012)*. The asserting party need not make actual use of the privileged communications. *In re Kidder Peabody Secs. Litig., 168 F.R.D. at 470*. On this point, ***Phelps v. MC Communications, No. 2:11-cv-00423-PMP-VCF, 2013 U.S. Dist. LEXIS 101965, 2013 WL 3944268 (D. Nev. July 22, 2013)***, an unpublished decision from this district, is instructive. There, in defending against the plaintiff's *Fair Labor Standards Act ("FLSA")* claims, the defendants raised two affirmative defenses: that they "at all times had a good faith and reasonable belief that [they] had compensated plaintiff in accordance with the FLSA," and that "any alleged violation of the FLSA was not willful." ***2013 U.S. Dist. LEXIS 101965, [WL] at *13***. Although defendants conceded to discussing the legal requirements of the FLSA with their attorneys they refused to answer questions regarding those communications, arguing that privilege had not been waived because their

defenses did not expressly rely on advice of counsel. ***2013 U.S. Dist. LEXIS 101965, [WL] at *16***. The court disagreed:

> Defendants, through these affirmative defenses, put their state of mind and their knowledge regarding the FLSA, its requirements, and their **[*14]** obligations "at issue." Any communication between defendants and counsel regarding conduct relating to the allegations in this action which could arguabl[y] form the basis for defendants' "reasonable belief" that they were acting in "good faith" and did not intentionally violate the FLSA, would have a direct bearing on the viability of defendants' affirmative defenses. The court finds, therefore, that the "at issue" exception applies.

2013 U.S. Dist. LEXIS 101965, [WL] at *19.

Similarly here, Ormat's affirmative defenses go beyond mere denial of scienter to put its state of mind and knowledge of the § 1603 requirements at issue. *See* *Cox v. Adm'r U.S. Steel & Carnegie, 17 F.3d 1386, 1419 (11th Cir. 1994)* (defendant "injected the issue of its knowledge of the law into the case" by affirmatively asserting good faith, rather than simply denying intent). Ormat maintains that it "acted reasonably and in good faith in light of all the circumstances and in compliance with all applicable legal requirements," that its statements regarding legal matters cannot constitute "false statements of fact," and that it did not make "false or knowingly false" statements of fact to the federal government. (ECF No. 127 at 2, 49.) Because such good faith defenses are asserted "with respect to [Ormat's] understanding and compliance with **[*15]** the law, '[Ormat's] knowledge about the law is vital, and the advice of counsel is highly relevant to the legal significance of [its] conduct.'" *Hamilton v. Yavapai Cmty. Coll. Dist., No. CV-12-08193-PCT-GMS, 2016 U.S. Dist. LEXIS 102480, *6 (D. Ariz. June 29, 2016)* (quoting *Everest Indem. Ins. Co. v. Rea, 236 Ariz. 503, 342 P.3d 417, 419 (Ariz. App. 2015))* (filed at ECF No. 250-1). Moreover, while Ormat has not confirmed that it plans to rely on attorney-client communications in proving its defenses (with the possible exception of communications about Brawley's placed-in-service date), it wishes to retain its option to do so. (*See* ECF No. 247 at 1-2; ECF No. 249 at 3.) The court finds this posture untenable in light of the deposition schedule and document-intensive nature of this case.

Ormat emphatically states that Relators must identify specific privileged communications related to Puna before an implied waiver for that subject matter may be considered. (ECF No. 246 at 2-3; ECF No. 249 at 3.) As Ormat has noted, some of the cases cited in Relators' briefing do discuss implied waivers in the context of specific documents. *See* *Hernandez v. Creative Concepts, No. 2:10-*

CV-02132-PMP, 2013 U.S. Dist. LEXIS 34612, 2013 WL 1182169, at *3 (D. Nev. Mar. 19, 2013) (discussing waiver as to certain categories of documents identified on the privilege log); Favors v. Cuomo, 285 F.R.D. 187, 212 (E.D.N.Y. 2012) (deferring a ruling on waiver until documents reviewed *in camera* **[*16]**); Roehrs v. Minn. Life Ins. Co., 228 F.R.D. 642, 647 (D. Ariz. 2005) (finding that plaintiff failed to show privilege was waived "*vis a vis* the subject documents" identified in the exhibits). Ormat takes particular note of *Hernandez*, which purportedly describes "the appropriate procedure for raising a claim of at-issue waiver [as] requir[ing] a party to make an initial showing that the privilege log contains attorney-client communications and work product dealing with the issues in the case so that the court can conduct an *in camera* review of the documents to make a ruling on at-issue waiver." (ECF No. 246 at 4 (citing Hernandez, 2013 U.S. Dist. LEXIS 34612, 2013 WL 1182169, at *3).)

The court is not convinced that *Hernandez*, nor any other case cited, states a hard and fast rule; rather, the matter appears largely left to the court's discretion. In *Hernandez*, for example, the court concluded that *in camera* review of the allegedly privileged documents was necessary, but expressly described the procedure as proper "in the circumstances of this case."[1] *Id. See also* In re Consol. Litig. Concerning Int'l Harvesters Disposition of Wis. Steel, 666 F. Supp. 1148, 1157-58 (D. Ill. 1987) (noting that "[f]or the most part, the parties have not focused on individual documents" in discussing whether privilege had been waived). Considering the circumstances of *this case*, the court finds it would be unduly burdensome to require Relators to identify specific **[*17]** documents on the privilege log before raising the question of at-issue waiver.

The court therefore concludes that Ormat waived privilege over attorney-client communications, with the following caveats. First, the waiver does not entitle Relators to discover "everything Ormat knew . . . ." (ECF No. 241 at 7.) "The court must impose a waiver no broader than needed to ensure the fairness of the proceedings." Bittaker, 331 F.3d at 720. The waiver's scope must be "closely tailored . . . to the needs of the opposing party in litigating the claim in question." *Id.* Considering Relators' claims and Ormat's affirmative defenses, the waiver is limited to communications between Ormat and its attorneys regarding the requirements of § 1603 or the § 1603 grant applications, as pertaining to Brawley's placed in service date, eligible basis, and expansion project, **[*18]** and Puna's expansion project and eligible basis. Notably, its scope does not include the

[1] The court also notes that, in describing *Hernandez*, Ormat seems to flip the parties' respective burdens. The court there ordered the party claiming privilege to identify the particular documents it wished to withhold and to explain how attorney-client privilege applied. Hernandez, 2013 U.S. Dist. LEXIS 34612, 2013 WL 1182169, at *3. There is no indication the party arguing in favor of an at-issue waiver was asked to do the same. *See id*.

placed-in-service determinations or other subject matters for Ormat's other plants and projects.[2] The period of waiver shall be up to May 14, 2014, the date Relators' filed their amended complaint. (*See* ECF No. 27.)

Second, in accordance with Ninth Circuit precedent and consistent with Relators' motion, the court finds it appropriate to give Ormat a choice. *See* *Bittaker, 331 F.3d at 720*. Ormat may proceed with its good faith defenses and produce the relevant documents, in accordance with the discussion above, or preserve the communications' confidentiality by abandoning the defenses that giving rise to the waiver. *See id*. Should Ormat opt for production of the withheld documents, the parties are to meet and confer to determine the appropriate procedures for doing so in a timely manner.

B. Disclosure of Privileged Communications to Third Parties

As a general **[*19]** rule, the voluntary disclosure of privileged documents or communications to third parties waives attorney-client privilege. *In re Pac. Pictures Corp., 679 F.3d 1121, 1126-27 (9th Cir. 2012)*. The rationale for the waiver rule "is that, if clients themselves divulge such information to third parties, chances are that they would also have divulged it to their attorneys, even without the protection of the privilege." *Id.* (internal quotation omitted). Relators contend that Ormat waived privilege for communications that were disclosed to third parties, including RLR Consultants, LLC ("RLR"), Capstar Capital Partners, LLC ("Capstar"), PricewaterhouseCoopers ("PwC"); and BDO Use LLP ("BDO"), because it has not met its burden of showing that an exception to the waiver rule applies. (ECF No. 241 at 13-18.) More specifically, Relators insist that Ormat has not shown the third parties to be the functional equivalent of employees or agents to its attorneys. (*Id.*)

In opposition, Ormat argues that the communications disclosed to its third-party consultants remain privileged because they "helped it understand and structure complex financial transactions and perform sophisticated cost-accounting tasks, thereby allowing its lawyers to provide sound advice about related **[*20]** legal matters." (ECF No. 246 at 4.) In addition, waiver based on disclosure requires an *in camera* review of the documents at issue, and Relators' motion improperly attempts to bypass the parties' Attorneys' Eyes Only protocol. (*Id.* at 5.) The need for Relators to identify specific documents is "especially important" in this case because Ormat claims 7,000 privilege log entries are protected work product, and

[2] Similarly, and contrary to Relators' arguments, the court finds that Ormat's express waiver of privilege as to Brawley's placed-in-service date does not waive privilege for communications related to determinations made at other plants. (*See* ECF No. 2473-4; ECF No. 249 at 4.)

the standard for waiver differs between attorney-client privilege and work-product claims. (*Id.*)

Relators' reply disputes Ormat's application of the "functional equivalent" and "agent of an attorney" exceptions and, further, suggests that adherence to the Attorneys' Eyes Only protocol would require Relators to bear the burden to disproving privilege, contrary to established law. (ECF No. 247 at 4-6.) Still, Ormat reasserts in its surreply that it cannot respond to the privilege challenge until Relators specifically identify documents on the privilege log that were disclosed to third parties. (ECF No. 249 at 2.)

In *Upjohn Co. v. United States, 449 U.S. 383, 394, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981)*, the Supreme Court held that a corporation's attorney-client privilege extends to communications between its employees and counsel as long as the communications are made "at the **[*21]** direction of corporate superiors in order to secure legal advice," concern "matters within the scope of the employees' corporate duties," and the employees were "sufficiently aware that they were being questioned in order that the corporation could obtain legal advice." Interpreting *Upjohn*, the Eight Circuit applied the privilege to extend to communications between a partnership's counsel and an independent contractor. *In re Bieter Co., 16 F.3d 929, 937-38 (8th Cir. 1994)*. The court reasoned that "too narrow a definition of 'representative of the client' will lead to attorneys not being able to confer confidentially with nonemployees who, due to their relationship to the client, possess the very sort of information that the privilege envisions flowing most freely." *Id.* Because the contractor in question interacted on a daily basis with the partnership's principals and was "intimately involved" in the transaction that gave rise to the suit, there was "no principled basis to distinguish [his] role from that of an employee." *Id. at 933-34, 938*. The Ninth Circuit adopted *Bieter*'s "functional employee" principles in *United States v. Graf, 610 F.3d 1148, 1159 (2010)*. *Graf* held that a consultant who "regularly communicated with insurance brokers and others on behalf of [the company], marketed the company's **[*22]** insurance plans, managed its employees, and was the company's voice in its communications with counsel" was a functional employee and, therefore, the communications between him and corporate counsel were privileged. *Id. at 1158-59*.

As this district discussed in *Fosbre v. Las Vegas Sands Corp., Case No. 2:10-cv-00765-APG-GWF, 2016 U.S. Dist. LEXIS 5422, 2016 WL 183476, at *3-*4 (D. Nev. Jan. 14, 2016)*, courts have adopted varying constructions of the functional equivalent doctrine. Relators, unsurprisingly, prefer the narrower approach set forth in *Export-Import Bank of the United States v. Asia Pulp & Paper Co., 232 F.R.D. 103 (S.D.N.Y. 2005)*. (*See* ECF No. 241 at 14; ECF No. 248 at 5.) Under

that test, a court determines whether a consultant is the functional equivalent of an employee by looking to whether he or she was responsible for a key corporate job, the nature of the working relationship between the consultant and the principals, whether the relationship was critical to the company's position in litigation, and whether the consultant possessed information not held by others in the company. *Ex.-Imp. Bank, 232 F.R.D. at 113*. However, the *Fosbre* court expressly rejected *Export-Import Bank* in favor of a "broad practical approach in applying the functional equivalent doctrine" that better fit "today's marketplace." *2016 U.S. Dist. LEXIS 5422, 2016 WL 183476, at *4* (discussing *In re Flonase Antitrust Litig., 879 F. Supp. 2d 454, 459 (E.D. Pa. 2012)*; *Stafford Trading, Inc. v. Lovely, No. 05-C-4868, 2007 U.S. Dist. LEXIS 13062, 2007 WL 611252, at *5 (N.D. Ill. Feb. 22, 2007))*. The dispositive question, *Fosbre* reasoned, was "whether the consultant performs **[*23]** duties similar to those performed by an employee and whether by virtue of that relationship, he or she possesses information about the company that would assist the company's attorneys in rendering legal advice." *2007 U.S. Dist. LEXIS 13062, [WL] at *5*. Because "Goldman Sachs acted in the role of financial advisor to the upper echelon of [the company's] management" attended Board of Directors meetings, and made recommendations as to financing alternatives, among other things, the relationship between Goldman Sachs and the company was "not an 'arms-length' negotiation" but rather "that of a financial advisor developing [the company's] complex financing strategy." *2007 U.S. Dist. LEXIS 13062, [WL] at *5*. In sum, Goldman Sachs personnel were functionally equivalent to employees. *Id.*

It makes little difference which approach the court adopts in this case, as Ormat has failed to make the "detailed factual showing" required by the functional equivalent doctrine. *See Energy Capital Corp. v. United States, 45 Fed. Cl. 481, 492 (2000)* (noting that "a detailed factual showing is necessary to establish the relationship between a third party that is sought to be included within the protection of the attorney-client privilege," and describing the affidavits considered in *Bieter* as "very detailed"); *Horton v. United States, 204 F.R.D. 670, 672 (D. Colo. 2002)* (same). In its opposition, Ormat describes **[*24]** the roles of its third party consultants as follows:

> Capstar was hired to help Ormat understand the monetization of available tax benefits related to the Brawley plant, including assisting Ormat's counsel in developing equity investor sheets. RLR Consultants helped Ormat organize and acquire financing for its projects. BDO performed an accounting of Ormat's cost basis for the Puna 8 MW 1603 grant application. And [PwC] performed general accounting audits and an accounting of Ormat's cost basis for the Brawley 1603 grant application.

(ECF No. 246 at 4) (internal citations, quotations, and alterations omitted). This cursory statement of responsibilities is insufficient to show the court that any of the four consulting companies performed duties similar to those performed by Ormat employees or that they possessed information that would assist in rendering legal advice.

Relatedly, Ormat failed to demonstrate that any individuals within the consulting companies who were party to the communications qualify as functional employees of Ormat. As *Fosbre* noted, *Upjohn* requires that the privilege be applied to communications with corporate employees on a case-by-case basis. *2016 U.S. Dist. LEXIS 5422, 2016 WL 183476, at *6* (citing *Upjohn, 449 U.S. at 394*). Therefore, **[*25]** where communications are disclosed to numerous employees of third parties, the party asserting privilege must provide the court with enough information to establish not just that the functional equivalent doctrine is met, but also that the individuals in question "were involved in the performance of services with which the attorney communications were concerned, that the employees were aware that the communications were for the purposes of providing or obtaining legal advice, and that the employees understood the communications were intended to be confidential." *Id.*; *see also Phillips v. C.R. Bard, Inc., 290 F.R.D. 615, 633 (D. Nev. 2013)* (the court must make an "individual determination" as to whether each consultant meets the functional equivalent test). Based on the current record the court cannot conclude Ormat has met its burden.

Still, a second exception to the waiver rule may apply. Ormat cites *Ferko v. National Association for Stock Car Auto Racing*, a case in which the district court held that the disclosure of confidential documents to consultants hired to help "translate complicated financial information" and perform audits concerning potential litigation did not waive attorney-client privilege where the purpose for which they were hired **[*26]** "relate[d] significantly to the documents and communications at issue." *218 F.R.D. 125, 139-140 (E.D. Tex. 2003)*. The decision was based on a test set forth by the Second Circuit in *United States v. Kovel, 296 F.2d 918 (2d Cir. 1961)*. *Id. at 138*. Thereunder, attorney-client communications remain privileged if they are shared with an accountant retained by the attorney "as a listening post," and who "is necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit."[3] *Kovel, 296 F.2d at 922*; *see also United States v. Judson, 322 F.2d 460, 462 (9th Cir. 1963)*. *Kovel* extends the attorney-client privilege to certain "representatives of the attorney, such as accountants;

[3] There is no stand-alone accountant-client privilege under federal law. *Ferko, 218 F.R.D. at 138* (citing *Couch v. United States, 409 U.S. 322, 335, 93 S. Ct. 611, 34 L. Ed. 2d 548 (1973)*).

administrative practitioners not admitted to the bar; and non-testifying experts." *U.S. Postal Serv. v. Phelps Dodge Refining Corp., 852 F. Supp. 156, 161 (E.D.N.Y. 1994)*.

In applying *Kovel*, courts have found that to meet the exception, "third-party communications must be interpretive and serve to translate informative information between the client ant he attorney." *Cohen v. Trump, No. 13-CV-2519-GPC (WVG), 2015 U.S. Dist. LEXIS 74542, 2015 WL 3617124, at *14 (S.D. Ca. June 9, 2014)* (collecting cases). "*Kovel* explicitly excludes the broader scenario in which the accountant is enlisted merely to give his or her own *advice* about the client's situation." *United States v. ChevronTexaco Corp., 241 F. Supp. 2d 1065, 1072 (N.D. Cal. 2002)* (emphasis in original) (finding privilege waived where PwC assisted **[*27]** Chevron attorneys to evaluate the legal merits of a transaction but did not serve in a "'translator' function"). Further, "under *Kovel*, 'the available case law indicates that the "necessity" element means more than just useful and convenient. The involvement of the third party must be nearly indispensable or serve some specialized purpose in facilitating the attorney-client communications.'" *Cavallaro v. United States, 284 F.3d 236, 249 (1st Cir. 2002)* (quoting E.S. Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine* 187 (4th ed. 2001)) (accounting services provided by Ernst & Young which "benefit[ted] the quality of the legal advice" given were not enough to show Ernst & Young's involvement was necessary or highly useful).

Of the four consultants Ormat discusses in its opposition, only Capstar appears to approach the contemplated role: "Capstar was hired to *help Ormat understand* the monetization of available tax benefits related to the Brawley plant, including assisting Ormat's counsel in developing equity investor sheets." (ECF No. 246 at 5 (emphasis added).) Based on this description, as well as on the engagement letter attached to Relators' motion (ECF No. 241-10), the court can certainly imagine circumstances in which Capstar's involvement **[*28]** meets the exception; however, circumstances in which they do not are equally plausible. "[T]his ambiguity is troublesome," and counsels against a finding of privilege. *FTC v. TRW, Inc., 628 F.2d 207, 213, 202 U.S. App. D.C. 207 (D.D.C. 1980)*. Nor is the court persuaded by Ormat's assertion that Relators must identify specific documents on the privilege log before it can address the possibility of waiver. (ECF No. 246 at 7; ECF No. 249 at 4-5.) As the party asserting privilege, it is Ormat's burden—not Relators'—to show the court that attorney-client privilege is both established and has not been waived. *Bauer, 132 F.3d at 507*; *Weil, 647 F.2d at 25*. Ormat was provided ample time and opportunity to apprise the court of the specific roles its third-party consultants played, and yet it declined to do so.

For the reasons set forth above, the court finds that Ormat waived attorney-client privilege by disclosing the confidential communications to third parties. Still, the finding does not necessarily compel Ormat to produce the relevant documents, many of which may be protected work product. (*See* ECF No. 246 at 6.) The work product doctrine offers broader protection than the attorney-client privilege, *Hickman v. Taylor, 329 U.S. 495, 508, 67 S. Ct. 385, 91 L. Ed. 451 (1947)*, and extends "to investigators and consultants" employed by attorneys so long as the documents were created **[*29]** in anticipation of litigation. *Phillips, 290 F.R.D. at 634-35*. Work-product protection is not "waived by disclosure to a third party who does not share a common legal interest." *Ferko, 218 F.R.D. at 136*. The court suggests that Ormat weigh the extent and limitations of the work product doctrine, and take stock of its privilege log accordingly. To the extent that there are documents appearing on the log for which Ormat has not claimed work product protection and which this court has deemed not privileged, they must be produced. Ormat and Relators are to meet and confer to determine the appropriate procedures and a timeline for doing so.

III. CONCLUSION

Consistent with the above, the court finds that Ormat has waived attorney-client privilege by affirmatively asserting its good faith belief in the lawfulness of its conduct. It may either abandon those defenses and maintain its privilege or produce those attorney-client communications that fall within the scope of the implied waiver. In addition, because Ormat failed to show that an exception applies, the court finds Ormat also waived privilege for those communications that were disclosed to third parties. Therefore, the court **GRANTS** Relators' motion to compel (ECF No. 241).

IT IS SO ORDERED [*30] .

DATED: August 1, 2016.

/s/ Valerie P. Cooke

UNITED STATES MAGISTRATE JUDGE

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Phelps v. MC Communs., Inc.

United States District Court for the District of Nevada

July 19, 2013, Decided; July 22, 2013, Filed

2:11-cv-00423-PMP-VCF

Reporter
2013 U.S. Dist. LEXIS 101965 *; 2013 WL 3944268

MICHAEL PHELPS, individually and on behalf of others similarly situated, Plaintiffs, vs. MC COMMUNICATIONS, INC., JOHN WEHRMAN and ROBERT HAYES, Defendants.

Prior History: *Phelps v. MC Communs., Inc., 2013 U.S. Dist. LEXIS 57348 (D. Nev., Apr. 19, 2013)*

Core Terms

installers, communications, discovery, defendants', attorney-client, documents, overtime, asserts, attorneys', affirmative defense, initial disclosure, waived, payroll records, good faith, motion to compel, residential, parties, argues, costs, deposition, notice, circulation, days, overtime wages, Plaintiffs', responses, advice, court finds, damages, reply

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For shauna howington, Brandon Hull, Stephen Burleson, Florian Rojas, Jeffrey Dunn, William Williams, Joseph Benjamin Polier, William J. Polier, Andrew Alderman, Delgado Andrew, Nathan Smith, Plaintiffs: Leon Marc Greenberg, Leon Greenberg Professional Corporation, Las Vegas, NV.

For MC Communications, Inc., John Wehrman, Robert Hayes, Defendants: Anthony L. Hall, LEAD ATTORNEY, Holland and Hart LLP, Reno, NV; Deanna Brinkerhoff, LEAD ATTORNEY, Holland & Hart LLP, Las Vegas, NV; Krystal J Gallagher, Holland and Hart, Las Vegas, NV.

Judges: CAM FERENBACH, UNITED STATES MAGISTRATE JUDGE.

Opinion by: CAM FERENBACH

Opinion

ORDER

[Motion To Find Defendants in Violation of Order #63, Motion To Compel Proper Discovery Responses #64, Motion To Compel Production of Documents and Modify Discovery Schedule #65, and Motion To Compel Defendants to Answer at a Deposition Questions Relating to Certain Attorney-Client Communications #66]

Before the Court is Plaintiff's Motion To Find Defendants in Violation of Order. (#63). Defendants Robert Hayes, MC Communications, Inc., **[*2]** and John Wehrman filed an Opposition (#70), and plaintiff filed a Reply (#83).

Also before the court is defendants' Motion To Compel Proper Discovery Responses. (#64). Plaintiff filed an Opposition (#81), and defendants filed a Reply (#87).

Also before the court is plaintiff's Motion To Compel Production of Documents and Modify Discovery Schedule. (#65). Defendants filed an Opposition (#80), and plaintiff filed a Reply (#85).

Also before the court is plaintiff's Motion To Compel Defendants to Answer at a Deposition Questions Relating to Certain Attorney-Client Communications. (#66). Defendants filed an Opposition (#79), and plaintiff filed a Reply (#86). The court held a hearing on July 18, 2013. (#90).

A. Background

Plaintiff filed his complaint in the Eighth Judicial District Court, Clark County, Nevada on February 11, 2011. (#7-2). Plaintiff sought the following forms of relief: (1) unpaid overtime wages pursuant to the Fair Labor Standards Act ("FLSA"); (2) compensation for overtime pursuant to *Nevada Revised Statute 608.018*; and (3) failure to pay wages upon separation pursuant to *NRS 608.040*. *Id.* On March 21, 2011, defendants removed the action to this court based on federal question **[*3]** pursuant to *28 U.S.C. § 1331*. (#1). On April 4, 2011, defendants filed a motion to dismiss or stay in favor of pending prior litigation. (#11).

On April 8, 2011, plaintiff filed a motion to remand to state court. (#14). On May 16, 2011, defendants filed a notice of partial withdrawal without prejudice of the motion to dismiss or stay (#11). (#21). On August 1, 2011, the court entered an order (1) denying the motion to dismiss (#11) as moot without prejudice to renew following remand to state court; (2) granting the motion to sever (#13) and the motion to remand to state court (#14); (3) denying the motion to file a supplement

of new authority (#30) as moot; and granting the motion for circulation (#12). (#35). The court declined to exercise supplemental jurisdiction over the state law claims. *Id.* The only claim remaining before this court is the FLSA claim. *Id.*

On August 18, 2011, defendants filed an answer. (#36). On September 8, 2011, the parties filed a stipulation to stay the case (#42), which the court signed (#43). On October 31, 2012, defendants filed a motion to lift the stay (#51), which the court granted (#52). Per court order (#54), the parties submitted their proposed discovery **[*4]** plan/scheduling order on December 13, 2012. (#55). On December 18, 2012, the court entered the scheduling order, in which the expert designation date was scheduled for February 18, 2013 and completion of discovery was scheduled for April 18, 2013. (#56). On February 15, 2013, plaintiffs filed a motion to compel production of documents and modify the discovery schedule. (#58). On March 5, 2013, defendants filed an opposition to the motion to compel (#58). (#61). On March 15, 2013, plaintiffs filed a reply to the defendants' opposition (#61). (#62).

On April 3, 2013, plaintiff filed a motion to find defendants in violation of this court's order (#35). (#63). On April 17, 2013, defendants filed a motion to compel proper discovery responses (#64), and on April 18, 2013, plaintiff filed a motion to compel production of documents and modify discovery schedule (#65) and a motion to compel defendants to answer at a deposition questions relating to certain attorney-client communications (#66). On April 19, 2013, the court issued an order granting in part and denying in part the motion to compel production of documents (#58). (#67). On April 22, 2013, the parties filed a stipulation for extension **[*5]** of time regarding plaintiff's motion (#63). (#68). The court signed the stipulation on the same day. (#69). On April 26, 2013, defendants filed an opposition to the plaintiff's motion (#63). (#70).

The parties filed several stipulations for extensions of time regarding responding to pending motions (#71, #72, #73, and #74), which the court signed (#75, #76, #77, and #78). On May 20, 2013, defendants filed oppositions (#79 and #80) to plaintiff's motions to compel, and plaintiff filed an opposition (#81) to defendants' motion to compel and a reply in support of his motion to find defendants' in violation (#83). On May 29, 2013, the court issued a minute order scheduling a hearing on the pending motions (#63, #64, #65, and #66) for June 27, 2013. (#84). On May 30, 2013, plaintiff filed replies in support of his motions to compel. (#85 and #86). On May 31, 2013, defendants filed a reply in support of their motion to compel. (#87). On June 25, 2013, the court issued a minute order rescheduling the hearing for July 18, 2013. (#90).

B. Motion To Find Defendants in Violation of Order (#63)

1. Relevant Facts

On August 1, 2011, the court issued an order on several pending motions (#11, #12 #13, **[*6]** #14, and #30), and, as it relates to the instant motion, the court held that it "will conditionally certify the putative collective action and require notice be given to *all* cable, internet, or telephone service installers who were employed by MC Communications, Inc. in Las Vegas, Nevada who performed such work after February 11, 2008, and who were paid on a piece rate or point system basis." (#35)(emphasis added). The court also ordered that defendants "provide to Plaintiff's counsel the names, addresses, telephone numbers, and email addresses for *all* putative collective class members, to the extent Defendants have such information, within ten (10) days." *Id* (emphasis added).

Plaintiff alleges that on "March 6, 2013, at a deposition of defendant Wehrman, the defendants revealed, for the first time, that defendants had intentionally failed to disclose certain names and addresses directed by such Order [#35]," and that "[a]s a result, such persons have not received the notice of pendency directed by the Court." (#63). During the deposition, Wehrman testified that "defendants since 2008 have employed "commercial technicians" to install cable ("video"), telephone, and internet ("data") **[*7]** services," and that "[s]uch persons are compensated on a "traditional" piecework system but not by a "point" piecework system." *Id* (Exhibit B Transcript). He also testified that there were approximately 8-12 "commercial technicians." *Id.*

When asked if defendants provided the names of the "commercial technicians," Wehrman stated that he did not know, and testified that he did not provide payroll records for such persons as part of the litigation. *Id.* On March 7, 2013, the day after the deposition, plaintiff's counsel wrote defense counsel asking them to address defendants' failure to disclose the names and comply with the court's order. *Id* (Exhibit C). Defense counsel responded on March 11, 2013, by refusing to provide such names, and claiming as follows:

> (1) was taking a "newly asserted" position that "commercial installers" should be part of this case;
>
> (2) That defendants have determined that "commercial installers" constitute a different "class" of persons who are outside the Court's Order. Defendants have also determined if plaintiff had stated in their motion seeking a Notice of Pendency that the relevant "class" should "include commercial installers" the Court would have never granted **[*8]** that relief;
>
> (3) That plaintiff's counsel was "trying to play [games] to pressure our clients into settlement, but it is a bad faith game."

(4) That plaintiff's counsel was "welcome to file your threatened motion for sanctions, but please be advised that we will seek fees and costs should you do so, as this newly asserted argument is made in bad faith."

Id (Exhibit D). Plaintiff asserts that he attempted to resolve this issue with defendants, but defendants have "refused...to remedy their aforementioned violation." *Id.*

2. Plaintiff's Arguments

Plaintiff argues that "[a]t no time prior to March 11, 2013, did defendants ever communicate their belief "commercial installers" constituted a separate "class" that was outside of, and not subject to, the Court's Order," "[n]or did defendants ever assert a Notice of Pendency should not extend to such persons prior to the issuance of such Order." (#63). Plaintiff also argues that defendants' opposition to the original motion (#22) did not mention this other class of commercial installers. *Id.* Plaintiff asserts that his motion clearly sought circulation of a notice of pendency to "all" installers, the court's order was clear that "all" installers in **[*9]** Las Vegas, Nevada, were to receive notice, and that ""commercial installers" met the criteria specified in the Order." *Id.*

Plaintiff asks this court to "remedy defendants' evasion of its Order by directing a suitable new and revised Notice of Pendency circulate to the persons omitted by the defendants from the prior Notice of Pendency circulation," and asserts that "[s]uch persons should have 90 days from the mailing of that Notice to "opt in" to this case." *Id.* Plaintiff states that "[t]he Court should also toll the statute of limitations and have any responses to that new Notice of Pendency deemed filed, for FLSA statute of limitation purposes, as of August 30, 2011, which is ten days after the original Notice of Pendency was to be circulated," and grant plaintiff an additional 120 days to conduct discovery. *Id.* Plaintiff contends that "[i]n the event any new Notice of Pendency is returned as undeliverable by the postal service, defendants should pay the plaintiff's counsel $35.00 to perform a detailed computer trace on each such person to locate a current address." *Id.* Plaintiff also asks this court to enter sanctions against defendants for violating the court's order. *Id.*

3. Defendants' [*10] Opposition

Defendants assert that the motion should be denied because (1) plaintiff's own declarations, "upon which he heavily relied in seeking conditional certification, and upon which this Court explicitly relied in granting conditional certification, contain detailed factual assertions which by their very terms exclude Commercial

Installers," (2) "Residential and Commercial Installers are two completely different classes of employees, and at all times during his employment with MCC, Plaintiff was employed as a Residential Installer," (3) "Plaintiff does not even have a class representative for Commercial Installers," and (4) the timing of Plaintiff's Motion for Sanctions, made only after Defendants refused to accede to Plaintiff's unreasonable settlement demands, and which Plaintiff repeatedly threatened to file if Defendants would not settle or agree to a stay of the case, shows that Plaintiff has filed this Motion purely as an improper settlement pressure tactic." (#70).

a. Alleged Differences

Defendants state that there is a difference between residential installers, such as plaintiff, and commercial installers, and that the defendants consider them to be "two separate and distinct **[*11]** groups of employees." *Id.* Defendants assert that the differences include, but are not limited to, (a) "[e]ach of these departments have different Managers and Supervisors who manage and supervise the Installers within their department," (b) "[t]he Commercial and Residential departments at MCC also report to entirely different departments at Cox Communications ("Cox"), the company for which MCC performs installations," (c) "Residential Installers have weekly department meetings, but no such weekly meetings are held for Commercial Installers," (d) "Residential and Commercial Installers also have very different work day schedules," (e) "Residential Installers are assigned jobs based on two-hour time slots," (f) Commercial Installers have an 8:00 a.m.-12:00 p.m. time slot, a 1:00-5:00 p.m. time slot, and a 8:00 a.m.-5:00 p.m. time slot, (g) "Residential Installers are generally required to come back to MCC's office at the end of the day, Commercial Installers do not come back to MCC's office at the end of the day," (h) "Commercial Installers...do not input any information into TOA, and job reassignments during the day are much less frequent," and (I) "Residential Installers are paid on **[*12]** a piece-rate basis," while "Commercial Installers are sometimes paid on a piece-rate basis and sometimes paid on an hourly basis." *Id.*

Defendants also assert that plaintiff's declaration in support of the motion for circulation (#12), defendants' opposition (#22), and plaintiff's declaration attached to his reply in support of the motion for circulation (#27) included several statements that are specific to residential installers, and that the court relied on those statements in its ruling (#35). *Id.* Defendants argue that plaintiff is improperly trying to include the commercial installers as a way to force the defendants to settle the claims. *Id.*

4. Plaintiff's Reply

Plaintiff argues in his reply that he had no reason to "conceal" his intentions, and that it has been clear that he has always sought to certify a class of *all* installers. *Id.* Plaintiff asserts that he is "not tasked with keeping track of the names of every installer employed by the defendants within a three year time frame," and that he "had no basis to suspect, or even question, whether defendants were acting in full compliance with Judge Pro's Order granting the circulation of notice under the FLSA to all installers." *Id.* **[*13]** Plaintiff asserts that his settlement negotiations are irrelevant and "improperly interjected in these proceedings," as "confidential settlement communications are a tradition in this country." *Id* (quoting *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc., 332 F.3d 976, 980 (6th Cir. Ohio 2003))*.

Plaintiff argues that the "record in this case, which so far has been developed without any knowledge of defendants' claim their "commercial" installers are outside of the "all installers" class certified by the Court, does not support [the defendants'] assertion" that no basis exists for commercial installers to be included in the collective action. *Id.* Plaintiff contends that there is no reason to differentiate between the types of installers, as "[t]here is every reason to believe defendants' documented policy of ignoring the actual recorded time worked by their installers, and by doing so not paying for overtime hours actually worked, extended to all of their installers." *Id.*

At a minimum, plaintiff asserts, such evidence establishes that there was a good basis for "all" installers to receive notice of the pendency of this action and be part of the conditionally certified class." *Id.* **[*14]** Plaintiff states that the defendants have not provided the daily tick sheets and weekly reconciliations for its "commercial" installers, and that without those documents, it is impossible to determine if the same sort of "willful violations" of the FLSA were occurring for the commercial installers. *Id.* Plaintiff rebuts several of the defendants' alleged differences between the commercial and residential installers, and argued during the hearing that the defendants should have raised the argument regarding the alleged differences between the residential and commercial installers two years ago when the parties were briefing the motion for circulation. (#90).

5. Discussion

The court's order specifically stated that "[t]he Court therefore will conditionally certify the putative collective action and require notice be given to all cable, internet, or telephone service installers who were employed by MC Communications, Inc. in Las Vegas, Nevada who performed such work after

February 11, 2008, and who were paid on a piece rate or point system basis." (#35). Defense counsel admitted to the court during the hearing that the commercial installers were "employed by MC Communications, Inc," installed **[*15]** "cable, internet, or telephone service," and were sometimes paid on a "piece rate or point system basis," and that the there is approximately fifty (50) commercial installers who performed such work after February 11, 2008. (#90). Plaintiff's counsel stated that he was not aware that the defendants drew a distinction between the commercial and residential installers until the deposition of defendant Wehrman (#63 Exhibit B). *Id.* Defense counsel stated during the hearing that defendants believed that plaintiff's intention was to include residential installers only, as plaintiff himself was a residential retailer and made no mention of commercial installers. *Id.* Based on the representations of counsel, the court finds that neither party acted in bad faith regarding the court's order including commercial installers and will not enter sanctions.

The court finds that, despite minor differences between the commercial and residential installers, both types of installers are "similarly situated" for purposes of *29 U.S.C. § 216(b)* of the FLSA, and the court's order (#35) encompassed the commercial installers for purposes of conditional certification and circulation of the notice of pendency of **[*16]** this action. [1] Within ten (10) days from the date of this order, defendants must provide to plaintiff the names, addresses, telephone numbers, and email addresses of all *commercial* cable, internet, or telephone service installers who were employed by MC Communications, Inc. in Las Vegas, Nevada who performed such work after February 11, 2008, and who were paid on a piece rate or point system basis. Counsel for plaintiff will have ten (10) days from receipt of the names and addresses of the putative class members in which to circulate the notice by first class mail and email to the proposed class members at Plaintiff's counsel's expense. Counsel for plaintiff will use the form of notice plaintiff attached to his motion for circulation of notice of the pendency of this action pursuant to *29 U.S.C. § 216(b)* and for other relief (Doc. #12), with the following revisions:

a. change the opt in period to **60 days**,
b. advise potential plaintiffs that by joining the action they may have to participate in discovery, including written discovery, a deposition, and/or testify at trial, and
c. fix the typographical errors identified in the court's August 1, 2011, Order (#35).

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[1] This order is not intended **[*17]** to make a ruling on appropriate members of the class for class certification purposes under *Rule 23*.

The court finds that an extension of discovery is needed in light of the inclusion of the commercial installers, and extends discovery for one hundred and fifty (150) days from the entry of this order. The court will address the scope of permitted discovery below. During the hearing, plaintiff's counsel raised the issue of staying the instant action as the state court action is currently deciding a very similar issue of whether the commercial installers are part of the Rule 23 class in that action. (#90). Defendants asserted that they do not agree that a stay is necessary. *Id.* Plaintiff may file a motion to stay the instant action if he deems necessary. The parties also addressed the issue of the statute of limitations regarding the commercial installers. The parties may stipulate as to the tolling of the statute of limitations, or the plaintiff may file a motion with the court.

C. Motion To Compel Proper Discovery Responses (#64)

1. Relevant Facts

Defendants assert that they served plaintiff with requests for production of documents on January 14, 2013, and that plaintiff failed to provide **[*18]** responses by the February 19, 2013, deadline. (#64). During a meet and confer on the plaintiff's failure to timely respond to the requests, defense counsel raised the additional issue of plaintiff failing to provide defendants with his initial disclosures, including a computation of damages. *Id.* Plaintiff's counsel represented that the failure to respond to discovery was an oversight, and asserted that counsel would not provide the computation of attorneys fees at this time (referring counsel to response to Request No. 11 and asserting that "A computation of attorneys' fees cannot be ascertained at this time, and such fees are only proper if the plaintiffs prevail in this matter."). *Id* (Exhibit C).

Defendants' Request No. 11 states the following:

> Please provide all documents that support, refute, or quantify Plaintiffs' request for attorney's fees and costs, including any document that will be used to quantify or establish the amount of fees and costs to be requested to be paid by Defendants. This request includes, but is not limited to any fee agreements between Plaintiffs and their attorneys, as well as correspondence, billing statements, ledgers, and time records, in either paper **[*19]** or electronic format, that demonstrate the amount of time Plaintiffs' attorneys spent in representing Plaintiffs and the value of the services provided. (Note: This document request specifically contemplates that the responses will be redacted to exclude information about the substance of the attorney-client relationship, litigation strategy, or the specific nature of the services provided.).

Id (Exhibit A).

Plaintiff's response to No. 11 is as follows:

> OBJECTION: The amount of attorney's fees or costs owed to plaintiffs counsel is only properly determined at such time. a request for attorney's fees or costs is presented to the Court and/or it is only after it is determined by the Court such fees or costs should be awarded and a request is made in respect to the amount of such fees or costs to be awarded. Until such time there is no basis or reason for determining such fees or costs and plaintiff s counsel declines to do so as such demand is unduly burdensome, harassing, and not made in good faith. RESPONSE: Plaintiffs will provide no response pursuant to the objections above.

Id (Exhibit D).

During a second meet and confer, plaintiff's counsel maintained the argument that he "is not required **[*20]** to provide any information or documents regarding Plaintiffs' attorneys' fees incurred until after a request for attorneys' fees had been presented to the Court." *Id* (Exhibit F). Plaintiff's counsel also stated that he would provide the computation of damages no later than April 12, 2013. *Id.* As of the date of filing the motion, defendant had not received the plaintiff's initial disclosures. *Id.*

2. Defendants' Arguments

Defendants argue that plaintiff has failed to provide initial disclosures or to timely respond to Request No. 11, and ask this court to compel plaintiff to do so. *Id.* Defendants assert that plaintiff waived any objections by not timely providing responses to the requests for production of documents. *Id.* Defendants argue that since plaintiff has "alleged entitlement to their attorneys' fees and costs, they have put this information directly at issue" and must provide discovery related thereto. *Id.* Defendants also argue that "fee arrangements between a client and his attorney are discoverable and are not protected by attorney-client privilege or the attorney work-product doctrine. *Montgomery Cty. v. Micro Vote Corp., 175 F.3d 296, 304 (3d Cir. 1999)*," and "billing statements **[*21]** that provide only a generalized description of work performed are discoverable. *Clarke v. Am. Commerce Nat'l Bank, 974 F.2d 127, 129 (9th Cir. 1992)*." *Id.*

Defendants assert that "the amount of their attorneys' fees and costs are needed to, among other things, calculate an offer of judgment and evaluate settlement. *See FRCP 68(a)* (providing that a defendant "may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued."); *see also*

Norris v. Sysco Corp., 191 F.3d 1043, 1052 (9th Cir. 1999) ("It is the obligation of the party who seeks fees to document 'the appropriate hours expended and hourly rates' and he 'should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims. '")" *Id.*

3. Plaintiff's Arguments

Plaintiff asserts that the portion of defendants' motion seeking plaintiff to supplement the initial disclosures is moot, as plaintiff provided defendants with a supplemental initial disclosure statement after the motion was filed. (#81). Plaintiff first addresses the issue of waiver of objections, and asserts that "[w]hile it is true that generally objections are deemed waived if not timely asserted, **[*22]** Courts in this District have viewed such rule as implicitly a matter of discretion of the District Court." *Id.* Plaintiff states that the responses were untimely due to counsel's oversight, and that counsel promptly drafted and sent responses once he was notified of the failure to do so. *Id.* Plaintiff argues the court should view this as "good faith remedial actions" as the court did in *Solorzano v. Shell Chemical Co., 2001 U.S. App LEXIS 30166, at *17 (5th Cir. 2001)*. *Id.*

Plaintiff next addresses the issue of attorneys' fees as damages for the purposes of *Rule 26*, and argues that "[d]efendants cite to no statute or court decision supporting their claim, nor attempt to explain why attorneys' fees under the FLSA are considered a category of damages." *Id.* Plaintiff contends that "[d]amages are "Money claimed by, or ordered to be paid to, a person as compensation for a loss or injury." Black's Law Dictionary, Ninth Ed," and that "[p]laintiff's attorney's fees do not represent a "loss" or "injury" to the plaintiff." *Id.* Plaintiff represents to the court that "[h]is attorneys are retained on a contingency basis, so he has incurred, and will incur, no out of pocket costs or "loss" or "injury" **[*23]** or damages as a result of their services that he will seek to collect from defendants." *Id.* Plaintiff contends that the right to be awarded attorneys' fees under the FLSA has yet to accrue, and that such a right is purely "derivative." *Id.*

4. Defendants' Reply

Defendants argue that the court should grant their motion, as (1) plaintiff has failed to demonstrate good cause for his untimely responses, and thus waived the objections, (2) the defendants are entitled to production of documents quantifying plaintiff's attorney fees and costs incurred thus far for which plaintiff intends to seek reimbursement, (3) that the production may require time and energy does not excuse plaintiff from compliance, (4) plaintiff misstates defendants' argument and combined two arguments, (5) the cases cited are not distinguishable as plaintiff contends, and (6) the plaintiff did not "supplement" his initial disclosures, rather he

provided for the first time his initial disclosures, and needs to supplement them. (#87).

Defendants contend that "[b]ased on the minimal amount of information provided in Plaintiffs' Initial Disclosures and the small number of opt-in plaintiffs in this case, Plaintiffs' attorneys' **[*24]** fees are certain to greatly exceed any alleged unpaid wages or overtime this Court may ultimately award," and that "[d]efendants need to know the amount of attorneys' fees incurred up to this point for which Plaintiffs or their counsel will seek reimbursement should they ultimately prevail." *Id.*

Defendants address the plaintiff's "supplemental initial disclosures," and assert that "what Plaintiffs served was their Initial Disclosures - not a supplement - and they did not do so until April 18, 2013: the very last day of the discovery period." *Id.* Defendants argue that the request for a computation of damages is not moot, as plaintiff contends, because the statement of damages in Plaintiffs' Initial Disclosures is grossly deficient and blame their failure to provide an appropriate damages computation on Defendants, claiming they still require some unspecified additional documents from Defendants before they can give an accurate and complete damages estimate." *Id* (Exhibit D).

Defendants contend that "[p]rior to Plaintiffs' belated service of the Initial Disclosures, Defendants had produced numerous timesheets, ADP payroll records, electronic payroll records, and the personnel files for **[*25]** Plaintiffs. Additionally, on April 18 and May 2, Defendants produced additional W-2s, time sheets, electronic payroll records, and ADP payroll records." *Id.* Even after receiving these documents, plaintiffs have not supplemented their initial disclosures. *Id.* Defendants argue that "[p]laintiffs have a duty to supplement their damages calculation" and that this court "should order Plaintiffs to supplement their damages calculation so that it complies with *FRCP 26*." *Id.*

5. Discussion

a. Computation of Damages

Pursuant to *Federal Rule of Civil Procedure 26(a)(1)(A)(iii)*, "[a] party must, without awaiting a discovery request, provide to the other parties: ... a computation of each category of damages claimed by the disclosing party - who must also make available for inspection and copying as under *Rule 34* the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extend of injuries suffered ..." *Rule 26(a)(1)(E)* provides that "[a] party must make its initial disclosures based on the information then reasonably available to it. A party is not

excused from making its disclosures **[*26]** because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures." *Fed. R. Civ. P. 26(a)(1)(E)*. *Rule 26(e)* requires a party supplement its initial disclosures "in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or as ordered by the court." *Fed. R. Civ. P. 26(e)(1)(A)* and *(B)*.

Plaintiff's initial disclosures state, among other things, that (1) "[p]laintiffs' computation of damages cannot be accurately performed until they are in possession of all necessary and accurate and relevant payroll and time record from defendants," (2) "plaintiffs can generally respond that they are seeking unpaid overtime wages under the FLSA and liquidated damages on such overtime wages," (3) for each week that each plaintiff was employed by defendants with the relevant time period, their "unpaid overtime wages do not exceed $750.00 for each week," (4) "[i]t is estimated that the amount **[*27]** of unpaid overtime wages owed for each such week probably does not exceed $462.00," and (5) "Plaintiffs are unable to state how many weeks they are owed any overtime wages or provide a more accurate statement at this time of unpaid overtime wages owed to them as a result of defendants' failure to comply with plaintiffs' discovery requests." (#81 Exhibit D).

These initial disclosures are dated April 18, 2013. *Id.* Since this date, defendants have provided plaintiff with additional W-2s, time sheets, electronic payroll records, and ADP payroll records (#87), and the court has ruled on plaintiff's motion to compel documents (#58 and #67). Plaintiff has an obligation under *Rule 26(e)* to supplement his initial disclosures when he obtains information during the discovery process. *See Fed. R. Civ. P. 26(e)*. The court recognizes that the defendants must be provided with this information in order to appropriately engage in settlement negotiations and/or to prepare an offer of judgment.

As plaintiff has an obligation to supplement his computation of damages under *Rule 26(e)*, and the sufficiency of plaintiff's computation of damages (#81 Exhibit D) is not fully briefed before the court because defendants' **[*28]** motion to compel sought to compel the initial disclosures (#64) and the opposition simply argued that the request was moot in light of plaintiff serving the initial disclosures (#81), the court will not order plaintiff to supplement the computation of damages at this time. If, after a good faith meet and confer in an attempt to obtain a supplemental computation of damages, the defendants take the position that plaintiff has not satisfied his obligation under *Rule 26(e)*, defendants may file a motion with the

court. Defendants may also serve plaintiff with an interrogatory requesting information relating the computation of damages.

b. Request Regarding Attorneys' Fees

As an initial matter, the court finds that plaintiff did not waive his objection to the request in dispute. Rule 34(b)(2)(A) provides that "[t]he party to whom the request is directed must respond in writing within 30 days after being served," and sub-section (c) states that "[a]n objection to part of a request must specify the part and permit inspection of the rest." Fed. R. Civ. P. 34(b)(2)(A) and (C). Although Rule 34 does not include a provision that states that the failure to timely object is a waiver, courts that have **[*29]** considered the issue generally agree that there is no reason to treat waiver under Rule 34 any different than Rule 33. *See* Liguori v. Hansen, 2:11-CV-00492-GMN, 2012 U.S. Dist. LEXIS 30076, 2012 WL 760747 at *11(D. Nev. Mar. 6, 2012). [2] Rule 33(b)(4) provides that "[a]ny ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure." Fed. R. Civ. P. 33(b)(4). "[T]he Court retains broad discretion in determining whether there is good cause. Zivkovic, 302 F.3d at 1087 (citing Mammoth Recreations, 975 F.2d at 607)." Liguori, 2012 U.S. Dist. LEXIS 30076, 2012 WL at *11.

Plaintiff's responses to requests for production of documents were due on February 19, 2013. (#64 Exhibit A). On March 11, 2013, defense counsel sent a letter to plaintiff's counsel inquiring about the discovery responses. *Id* (Exhibit B). The next day, on March 12, 2013, plaintiff's counsel responded that the failure to provide the discovery responses was due to an oversight and attached the discovery responses to the letter. *Id* (Exhibit C). The court has an interest in the "just, speedy, and inexpensive" determination of this action. Fed. R. Civ. P. 1. It is "entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities." Foman v. Davis, 371 U.S. 178, 181, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962). Based on the foregoing interests of this court, and the plaintiff's prompt responses once the defendants contacted counsel regarding the discovery requests, the court finds that good cause exists to hold that plaintiff did **[*31]** not waive his objections.

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[2] *See* Fifty—Six Hope Roade Music, Ltd. v. Mayah Collections, Inc., 2007 U.S. Dist. LEXIS 43012, 2007 WL 1726558 (D.Nev.) (applying good faith standard to determine whether to relieve party from waiver under Rule 34); *see also* Brown v. Stroud, 2010 U.S. Dist. LEXIS 94492, 2010 WL 3339524 (N.D.Cal.); ("Although Rule 34 does not expressly provide for any relief from a waiver of objections as does Rule 33, courts have granted such relief upon a showing of good cause."); (EEOC v. Kovacevich "5" Farms, 2007 U.S. Dist. LEXIS 43672, 2007 WL 1599772 (E.D.Cal.) ("Failure to respond to a Rule 34 request within the time permitted waives all objections ... absent an extension of time to respond or a showing of good cause.") (citing Richmark, 959 F.2d at 1473); **[*30]** Blumenthal v. Drudge, 186 F.R.D. 236, 240 (D.D.C.1999) (applying to Rule 34(b) requests for production the principle set forth in Rule 33(b)(4) that a court may excuse a failure to timely object for good cause).

With regard to the request for "all documents that support, refute, or quantify Plaintiffs' request for attorney's fees and costs, including any document that will be used to quantify or establish the amount of fees and costs to be requested to be paid by Defendants," this court recognizes both the importance of this information to defendants with regard to settlement negotiations and preparing an offer of judgment and the interest in maintaining the confidential nature of this information.

The court finds that the engagement letter between the plaintiff and his counsel will provide defendants with information regarding the fee arrangement that will assist defendants in determining proper settlement amounts and/or offers of judgment. Plaintiff must provide defendants the engagement letter on or before July 29, 2013. During the hearing, the court discussed the production of the engagement letter between plaintiff's counsel and plaintiff, and the parties agreed that if the court ordered production of the letter, redactions of settlement information would be required and that the letter would be subject to a protective order. [3] The engagement letter may be appropriately **[*32]** redacted as discussed during the hearing and will be subject to a stipulated protective order.

The court also finds that in order to protect attorney-client communications and to avoid unnecessary expenses as a result of extensive redactions, defendants may serve plaintiff with interrogatories seeking detailed answers as to which attorney performed work on the action, their hourly rate, how many hours they have billed to date, and an estimate of how many hours plaintiff's counsel anticipates billing. This written discovery is included in the discovery permitted during the extended discovery period ordered above.

D. Motion To Compel Production of Documents and Modify Discovery Schedule (#65)

1. Discovery Requests

Plaintiff's motion asks this court to compel the production of the following: (1) All "weekly reconciliations" in their possession for the three year period preceding **[*33]** each plaintiffs' joinder in this case," (2) All W-2 forms issued to all plaintiffs for the three year period preceding each plaintiffs' joinder in this case, (3) All payroll records, showing actual amounts of gross wages or other compensation paid each payroll period and how those amounts were calculated, and (4) Responses to Plaintiffs' Second Set of Interrogatories. (#65).

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[3] The court notes that the parties do not currently have a stipulated confidentiality/protective order on the docket, and that if the parties enter into one, the stipulation must comply with this court's Local Rules and the Ninth Circuit's directives in *Kamakana v. City and County of Honolulu, 447 F.3d 1172 (9th Cir. 2006)*.

In plaintiff's reply, he asserts that *after* the motion was filed, defendant provided supplemental disclosures, and that "[b]ased upon a review of defendants' Fifth and Sixth supplemental disclosures and the representations made in defendants' opposition, it appears as though defendants' supplemental production have rendered moot the following items sought to be compelled in plaintiff's motion: (1) W-2 records and (2)weekly reconciliation records." (#85). Plaintiff also asserts in his reply that the "portion of plaintiff's motion seeking payroll records for the three years preceding the filing of each opt-in plaintiff's consent to join this action under the FLSA has not been cured," but that defendants' counsel "has confirmed that such records will be produced for all opt-in plaintiffs for the full three year statute **[*34]** of limitations period on each opt-in plaintiff's claims." *Id.* Plaintiff states that he "is satisfied that this portion of his motion may be rendered moot upon production, but reserves his right to renew this portion of his motion should defendants fail to produce fully responsive payroll records." *Id.* The reply only addresses the (1) Responses to Plaintiff's Second Set of Interrogatories; (2) Request to Modify the Discovery Schedule; and (3) Award of Costs. *Id.* As such, the court limits its discussion to these issues.

2. Responses to Plaintiff's Second Set of Interrogatories

Plaintiff's interrogatory No 3. requests the defendants to "[s]et forth the name, last known address, and last known telephone numbers of all managers, assistant managers, and supervisors formerly employed by the defendants, such persons have been so employed by the defendants any time after February 11, 2008." (#80 Exhibit H). Defendants responded by providing the contact information for the "former manage[r]s, assistant managers, or supervisors for the residential department..." *Id.* As the court finds that commercial installers are included in the group of "cable, internet, or telephone service installers" at this **[*35]** stage of the litigation and have ordered herein for notice of this action to be sent to the commercial installers, the court finds that the contact information of commercial installers' managers, assistant managers, and supervisors is relevant and discoverable in this action. *See Fed. R. Civ. P. 26(b)*(providing that a party is entitled to discovery of information that is "relevant to any party's claim or defense..." or, for good cause shown, "relevant to the subject matter involved in the action."); *See* *Oppenheimer Fund v. Sanders, 437 U.S. 340, 351, 98 S. Ct. 2380, 57 L. Ed. 2d 253 (1978)*(holding that relevance within the meaning of *Rule 26(b)(1)* is considerably broader than relevance for trial purposes, and that for discovery purposes, relevance means only that the materials sought are reasonably calculated to lead to the discovery of admissible evidence).

On or before July 29, 2013, defendants must provide the name, last known address, and last known telephone numbers of *all commercial* installers' managers, assistant managers, and supervisors formerly employed by the defendants, such persons have been so employed by the defendants any time after February 11, 2008.

3. Extension of Discovery

With regard to the request **[*36]** to extend discovery, plaintiff argues that even though "defendants have pledged to provide electronic payroll records for a three year statute of limitations period for each plaintiff in this case," and "defendants are now working diligently on securing such records from their third-party payroll provider, the fact remains that such records have yet to be produced to plaintiff's counsel." (#85). Plaintiff contends that the extension of discovery deadline to June 18, 2013, is "insufficient to allow for a full analysis of such payroll records," and that "such deadline, which is less than three weeks from the filing of this Reply, does not even allow plaintiff to conduct further discovery after being provided with the payroll records." *Id.* Defendants argue that the request to modify the discovery schedule is moot, and that "nowhere within the Motion is there any discussion of a proposed discovery schedule modification." *Id.*

As the court stated herein, extending discovery is warranted in light of the inclusion of commercial installers. The court recognizes that additional follow-up discovery may be needed regarding defendants' document production of payroll records. The request to extend **[*37]** discovery is partially granted as follows: Discovery is extended one hundred and fifty (150) days from the entry of this order, and is limited to (1) commercial installers, (2) follow-up on documents relating to pay-roll, and (3) the attorney-client issue discussed below.

E. Motion To Compel Defendants to Answer at a Deposition Questions Relating to Certain Attorney-Client Communications (#66)

1. Relevant Facts

Plaintiff conducted the defendants' Rule 30(b)(6) deposition on April12, 2013, and sought testimony regarding the defendants' affirmative defenses Nos. 9 and 11 (#36):

> (9) Defendants allege, assuming arguendo there is an unpaid wage violation, that Defendants at all times had a good faith and reasonable belief that it had compensated Plaintiff in accordance with the FLSA and that, therefore, no liquidated damages are due Plaintiff; and

(11) Defendants allege that any alleged violation of the FLSA was not willful and that Plaintiff's claims are therefor limited to two years. *29 U.S.C. § 255*.

(#66). Plaintiff contends that counsel "objected to any questions concerning defendants' pre-litigation communications with their attorneys and directed that such questions not be answered." *Id.* **[*38]** Plaintiff's counsel advised counsel why the questions are relevant to affirmative defenses 9 and 11, but after a break to consider the argument, defense counsel refused to withdraw the objections and such questioning did not proceed. *Id.*

On April 16, 2013, plaintiff's counsel contacted defense counsel and provided counsel with relevant precedents regarding the issue, but defendant refused to withdraw the objections and would not allow the deposition to continue. *Id.* Plaintiff filed the instant motion on April 18, 2013. *Id.*

2. Plaintiff's Arguments

Plaintiff argues that since the affirmative defenses "involve proof of defendants' state of mind," "they render highly relevant the defendants' knowledge of their legal obligations under the FLSA, their inquiries about those legal obligations, and the decisions they made in respect to such legal obligations." (#66). Plaintiff contends that "[i]t is not disputed that defendants, prior to the time period at issue in this case, engaged in communications with their attorneys about the FLSA and state wage and hour laws that are similar to the FLSA," and that the attorney-client privilege cannot shield discovery into such discussions. *Id.*

Plaintiff **[*39]** relies on the case of ***Wang v. Hearst Corp., 2012 U.S. Dist. LEXIS 179609 (S.D.N.Y. December 19, 2012)***, where the court "recently opined on whether the sort of FLSA affirmative defenses at issue in this case create an attorney client privilege waiver even when the defendant is *not* claiming "reliance upon advice of counsel" as part of such defenses." *Id* (emphasis in original). The *Wang* court held that such FLSA defenses "...undoubtedly raises the possibility of implied waiver, and the question before this Court is "[w]hether fairness requires disclosure" in the "specific context in which the privilege is asserted." ***2012 U.S. Dist. LEXIS 179609 at p. 7***, citing and quoting *In re County of Erie, 546 F.3d 222, 229 (2d Cir. 2008)*, quoting in turn *In re Grand Jury Proceedings, 219 F.3d 175, 183 (2d Cir. 2000)*.

The plaintiff argues that fairness requires disclosure in this case, as the "affirmative defenses being raised require a determination of the defendants' knowledge of, diligence in ascertaining, and good faith beliefs about, the legal requirements of the FLSA," and "[d]efendants, having elected to prove these

issues, cannot now refuse to disclose what they actually communicated about **[*40]** or attempted to communicate about such legal requirements with their attorneys." *Id.* Plaintiff also relies on the case of *Chevron Corp. v. Pennzoil Co., 974 F.2d 1156, 1162,(9th Cir. 1992)*, which stated:

> The privilege which protects attorney-client communications may not be used both as a sword and a shield. *United States v. Bilzerian, 926 F.2d 1285, 1292 (2d Cir. 1991)*. Where a party raises a claim which in fairness requires disclosure of the protected communication, the privilege may be implicitly waived. *Id.* In *Bilzerian* the defendant's intent was in issue because he thought his actions were legal, and had discussed the allegedly fraudulent transactions with his attorney. According to the Second Circuit this "would have put his knowledge of the law and the basis for his understanding of what the law required in issue. His conversations with counsel regarding the legality of his schemes would have been directly relevant in determining the extent of his knowledge and, as a result, his intent." *Id. at 1292*.

Id. Plaintiff argues that this case is "undistinguishable from *Chevron*," as "[d]efendants in this case claim they acted with a proper, diligent, and good faith, awareness and scrutiny **[*41]** of their legal obligations under the FLSA," "[y]et they refuse to disclose the information obtained from their attorneys about such legal obligations." *Id.*

Plaintiff asks this court to award attorneys' fees and costs for having to bring this motion because defendants "simply ignore that [they], through their affirmative defenses, have placed at issue their pre-litigation knowledge of the FLSA's legal requirements, including knowledge obtained from communications with attorneys." *Id.* Plaintiff asserts that, at a minimum, defendants should bear the court reporter costs for a continued Rule 30(b)(6) deposition on the subject matter. *Id.*

3. Defendants' Opposition

Defendants contend that their affirmative defenses "are not based at all upon communications with counsel, but rather, upon communications with the Department of Labor," and as such, they have not placed their attorney-client communications at issue in this litigation. (#79). Defendants assert that counsel permitted the Rule 30(b)(6) deponent to be deposed regarding communications with the Department of Labor, and that "[a]t no point did Plaintiffs' counsel ask whether Plaintiffs ninth or eleventh affirmative defenses were at all **[*42]** based on communications with counsel that occurred prior to the initiation of this lawsuit." *Id.*

The 30(b)(6) deponent answered "No," when asked if "MC Communications ever ma[d]e any attempt to hire an attorney to review the manner in which MC Communications paid their technicians to make sure that it complies with FLSA?" *Id* (Exhibit C). Defendant argues that "Plaintiffs either (a) did not ask proper deposition questions, which would have revealed that Defendants were not basing their affirmative defenses on attorney- client communications, or (b) were seeking a carte blanche waiver of all attorney-client communications." *Id.*

Defendants stress to the court that their affirmative defenses **are not based on attorney-client communications.** *Id.* Defendants contend that "[n]umerous courts have recognized that the affirmative defenses of good faith and lack willfulness under the FLSA may be established based on information other than the advice of counsel, [4] " and that "nothing in the text of the FLSA requires that these defenses be based on advice of counsel. See *29 U.S.C. §§ 255*,*260*." *Id.* The court in *Harter v. Univ. of Indianapolis, 5 F.Supp.2d 657, 664 (S.D. Ind. 1998)*, held that "[t]he **[*43]** better-reasoned cases hold, however, that when a client files a lawsuit in which his or her state of mind (such as good faith or intent) may be relevant, the client does not implicitly waive the attorney-client privilege as to all relevant communications unless the client relies specifically on advice of counsel to support a claim or defense." Defendants argue that this seems to be the majority view, and cite several cases for this position. [5] *Id.*

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[4] *See e.g.,* *Mireles v. Frio Foods, Inc., 899 F.2d 1407, 1416 (5th Cir. 1990)* ("Simply failing to seek legal advice concerning its pay practice does not evidence a willful violation of the statute."); *Phillips v. CR. Bard, Inc., 290 F.R.D. 615, 2013 U.S. Dist. LEXIS 45647, 2013 WL 1333790, *23-24 (D.Nev., Mar. 29, 2013)* ("Plaintiff is asking the court to make a leap between the assertion of broad affirmative defenses by Bard and various documents that Plaintiff speculates Bard will rely on in proving these defenses .... it is not readily apparent at this point in time that Bard will be relying on any specific documents it has withheld to support its defenses. In other words, the court cannot conclude at this point that Bard has affirmatively put those documents 'at-issue.' ... In sum, **[*44]** the court declines to enter a blanket ruling at this time that Bard has waived the assertion ofthe attorney-client privilege or work product doctrine as to a broad category of documents by placing them 'at issue.'"); *Abbe v. City of San Diego, 2007 U.S. Dist. LEXIS 87501, 2007 WL 4146696, *17 (S.D.Cal., Nov. 9, 2007)* ("Plaintiffs argue by asserting a good faith defense [to FLSA claim], Defendant has waived its attorney-client privilege because Defendant in fact is asse11ing the advice of counsel defense ... Defendant's answer does not reveal reliance upon defense of advice of counsel, nor may such be presumed. Accordingly, the Court declines to rule that Defendant has implicitly waived the attorney-client privilege in its Answer."); *Zachary v. Rescare Okla., Inc., 471 F.Supp.2d 1183, 1190 (N.D.Okla. 2006)* (finding lack of willfulness under FLSA established based on employer's letter from Department of Labor issued after investigation, stating that conduct did not violate FLSA); *Herman v. Hogar Praderas de Amor, Inc., 130 F.Supp.2d 257, 267-68 (D.P.R. 2001)* (finding good faith under FLSA based on information employer received from Department of Labor and employer's prompt revision of rates once notified by Department **[*45]** of Labor that there was an issue with pay rates); *Nelson v. Alabama Inst. for Deaf & Blind, 896 F.Supp. 1108, 1115 (N.D.Ala. 1995)* (finding good faith under FLSA based on employer's attendance of seminars, studying statutes, regulations, and agency opinions, and meeting with Department of Labor officials); *Clay v. City of Winona, Miss., 753 F.Supp. 624, 630 (N.D.Miss. 1990)* (finding good faith under FLSA established based on employer's communications with and seeking of advice from Department of Labor and review of the Fair Labor Standards Handbook in attempt to comply with FLSA).

[5] *See also* *Gerawan Farming, Inc. v. Prima Bella Produce, Inc., 2011 U.S. Dist. LEXIS 67254, 2011 WL 2531072, *8 (E.D.Cal., Jun. 23, 2011)* (finding privilege not waived where plaintiffs had not sought to use counsel as witnesses and stated they would not assert that actions were based in good faith reliance on attorney advice); *Sorensen v. Black & Decker Corp., 2007 U.S. Dist. LEXIS 26335, 2007 WL 1976652, *2 (S.D.Cal., Apr. 9, 2007)* ("The privilege is waived when a party chooses to utilize the

Defendants distinguish the *Chevron* case relied upon by the plaintiff, and assert that the defendants there "asserted a defense that it's conduct was reasonable because "this position was taken pursuant to the advice of its lawyers", and was attempting to use its attorneys' advice both as a sword (by asserting its tax position was reasonable because it was based on advice of counsel) and as a shield (by claiming the attorney-client privilege for that advice from counsel)." *Id.* Here, defendants are not relying on the advice of counsel and are not trying to **[*48]** use the information as a sword and shield. *Id.*

Defendants argue that they have not waived their attorney-client privilege by asserting their 9th and 11th affirmative defenses, and that "[w]hen assessing a claim of waiver, "a court should begin its analysis with a presumption in favor of preserving the privilege." *Greater Newburyport Clamshell Alliance v. Public Servo Co. of NH, 838 F.2d 13,20* (lst Cir. 1988) (cited with approval in *Bittaker, 331 F.3d at 720-21*)." *Id.*

Defendants state that the Ninth Circuit "employs a three-part test to determine whether an implied waiver has occurred. First, the court evaluates whether the party is invoking a "privilege as the result of some affirmative act, such as filing suit." *Home Indem. Co. v. Lane Powell Moss & Miller, 43 F.3d 1322, 1326 (9th Cir. 1995)*. Second, the court considers whether, "through this affirmative act, the asserting party puts the privileged information at issue." *Id.* Finally, the court assesses whether "allowing the privilege would deny the opposing party access to information vital to its [case]." *Id.* The "overarching consideration" in analyzing these factors "is whether allowing the privilege to protect against disclosure **[*49]** of the information would be 'manifestly unfair' to the opposing party." *Id.* (emphasis added) (quoting *Hearn v. Rhay, 68 F.R.D. 574, 581 (E.D. Wash. 1975))*. As discussed above, Defendants' have not put their communications with counsel at issue." *Id.*

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information to advance a claim or defense. B & D does not assert advice of counsel as a defense, and it has not used attorney-client communications to prove this defense."); **[*46]** *Genentech, Inc. v. Insmed, Inc., 236 F.R.D. 466, 469 (N.D.Cai. 2006)* ("Advice is not in issue merely because it is relevant, and does not necessarily become in issue merely because the attorney's advice might affect the client's state of mind in a relevant manner."); *Beneficial Franchise Co., Inc. v. Bank One, NA., 205 F.R.D. 212,216-17 (N.D.Ill. 2001)* ("we do not believe that merely asserting a defense or a claim is sufficient, without more, to waive the privilege. Were it otherwise, then any party asserting a claim or defense on which it bears the burden of proof would be stripped of its privilege and left with the draconian choice of abandoning its claim and/or defense or pursuing and protecting its privilege. The impracticality of such a rule is revealed when viewed in reverse: waiver of the privilege would apply not only to assertions of affirmative defenses but also by parity of reasoning to claims raised by a plaintiff that require proof of a mental state - such as a fraudulent inducement claim. Such a rule would exact too stiff a price for the assertion of commonly-pled claims and defenses."); *N River Ins. Co. v. Philadelphia Reinsurance Corp., 797 F.Supp. 363, 370 (D.N.J., 1992)* **[*47]** (finding "in issue" doctrine only resulted in waiver where a "party has asserted a claim or defense that he intends to prove by disclosure of an attorney-client communication."); *Remington Arms Co. v. Liberty Mut. Ins. Co., 142 F.R.D. 408, 415 (D.Del. 1992)* ("the party can still make its choice explicitly and assume the risk for failing to disclose materials claimed to be necessary to determine the truth where the party has the burden of proof. ... The Court cannot justify finding a waiver of privileged information merely to provide the opposing party information helpful to its cross-examination or because information is relevant.").

Defendants argue that since the defenses do not rely on the attorney-client communications, they cannot be deemed "vital" to the plaintiff's ability to contest defendants' affirmative defenses, and denying the discovery would not be "manifestly unfair." *Id.* Defendants assert that permitting an unlimited waiver would create a "chilling effect" that "not only frustrates the purposes of the attorney-client privilege, but also the very goals of the FLSA by discouraging employers from seeking out legal advice to ensure that they take appropriate steps to remedy alleged wage and hour violations." *Id.*

4. Plaintiff's Reply

The plaintiff asserts in his reply that " [t]he affirmative defenses raised by defendants rest upon their claims that (1) They acted with appropriate diligence to ascertain the legal requirements of the FLSA and (2) That they acted in a good faith fashion to comply with those legal requirements," and that the defendants "do not **[*50]** deny they discussed the legal requirements imposed by the FLSA with their attorneys, but insist because they are not relying upon the advice given by their attorneys they need not disclose their communications with such counsel." (#86). Plaintiff argues that the affirmative defenses "require findings be made about the defendants' knowledge of the FLSA's legal requirements and their good faith efforts to obtain such knowledge." *Id.* Plaintiff contends that defendants cannot assert that they acted based upon knowledge of the law acquired in good faith, and then refuse to disclose the knowledge they obtained from counsel with whom they consulted with. *Id.*

Plaintiff asserts that the court should consider the ruling in *Clark v. United States, 289 U.S. 1, 15, 53 S. Ct. 465, 77 L. Ed. 993 (1933)*, where the court held:

> There is a privilege protecting communications between attorney and client. The privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told.

Id. Plaintiff clarifies for the court that he does not seek a broad waiver of the attorney-client privilege, rather seeks discovery **[*51]** of communications "(1) Involving compliance with the FLSA or state laws governing overtime pay and minimum wage requirements (state laws and the FLSA are substantially analogous in many respects on those issues); and (2) That took place with counsel prior to the commencement of this lawsuit." *Id.*

Plaintiff argues that the "minority approach" relied upon by defendants is not the approach adopted by the Ninth Circuit, and that the Ninth Circuit has adopted the majority "fairness principle," which does not limit waiver to circumstances where

the party expressly claims reliance upon the privileged communications sought to be disclosed. *Id.* [6] Plaintiff also argues that the defendants misrepresent and ignore the actual holdings of several cases. [7] *Id.*

Plaintiff relies on *Lambright v. Ryan, 698 F.3d 808, 818-19 (9th Cir. 2012)*, where "the Ninth Circuit revisited the "in fairness" implied waiver doctrine" and held that in the Ninth Circuit it is the assertion of a claim, not reliance on any privileged communication, **[*53]** that creates a potential "in fairness" waiver. *Id.* Plaintiff asserts that defendants' argument regarding the "vital" communications and the "manifestly unjust" result misconstrues the relevant standard and the actual holding in *Hearn v. Rhay, 68 F.R.D. at 581*. *Id.* Plaintiff argues that "[t]he use of the word "vital" ...must be construed within the overall "fairness" framework. It does not impose some sort of rarified, seldom met, level for waiver to be found. Rather, it refers to disclosures that go to the very heart of the claims being raised by defendant, not peripheral, collateral, or secondary issues." *Id.*

Plaintiff states that defendants have been sued under the FLSA before, and that "[w]hat efforts they made in response to those matters to obtain legal knowledge of their FLSA obligations, and the information they were provided about those legal obligations in response to those matters, is highly relevant." *Id.* Since defendants are seeking to establish that they "diligently inquired about the FLSA's legal requirements and acted in good faith to comply with those legal requirements, it is relevant what an attorney actually told them. *Id.* If defendants did not **[*54]** consult a legal professional, plaintiff argues, it "would certainly undermine defendants' claim that they acted with due diligence in ascertaining what their legal obligations were under the FLSA." *Id.*

5. Discussion

During the hearing, the court discussed whether the parties could stipulate that the defendants did not rely on the advice of counsel and will not introduce evidence of

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[6] Plaintiff relies on the following cases: *Bittaker v. Woodford, 331 F.3d 715, 719 (9th Cir. 2003)*(En Banc)("In practical terms, this [fairness principle] means that parties in litigation may not abuse the privilege by asserting claims the opposing party cannot adequately dispute unless it has access to the privileged materials."); *United States v. Amlani, 169 F.3d 1189, 1195 (9th Cir. 1999)*(This "fairness" examination, and potential privilege **[*52]** waiver, is triggered when a party makes a claim in the litigation that "puts the privileged information at issue.");*Hernandez v. Creative Concepts, 2:10-cv-02132-PMP-VCF, 2013 U.S. Dist. LEXIS 34612*, March 13, 2013 (discussed herein).

[7] Plaintiff argues that in*Tennenbaum v. Deloitte & Touche, 77 F.3d 337, 340-41 (9th Cir. 1996)*, the party "did not raise any claims that implicated its legal knowledge or efforts to obtain knowledge of the law;" and that in *Chevron Corp. v. Pennzoil Co., 974 F.2d 1156, 1162 (9th Cir. 1992)*, "[w]hile the defendant did assert it received specific advice from counsel on the tax issues, the reason for the waiver was not an express reliance upon any communications with such counsel identified in the Chevron decision. Waiver resulted from the defendant's assertion its actions were motivated by tax considerations, raising a question of what information it actually received about those tax considerations."

such communications at trial in support of their affirmative defenses at issue here. (#90). The plaintiff stated that he would accept such a stipulation, and defense counsel stated that the stipulation would have to be narrowly tailored as to the case specific facts. *Id.* Plaintiff argued to the court that previous FLSA litigations involving the defendants demonstrate that there is no question that defendants received advice of counsel regarding defendants' obligations under FLSA. *Id.* Defense counsel argued that the allegations in those actions were different from those allegations here, which defendant asserts is the narrow issue of plaintiff and other installers performing "off the clock" work in violation of FLSA. *Id.*

As this court has previously found in *Hernandez v. Creative Concepts, 2:10-cv-02132-PMP-VCF, 2013 U.S. Dist. LEXIS 34612*, **[*55]** March 13, 2013:

> "Where a party raises a claim which in fairness requires disclosure of the protected communication, the privilege may be implicitly waived." *Kaiser Found. Health Plan, Inc. v. Abbott Laboratories, Inc., 552 F.3d 1033, 1042 (9th Cir. 2009)*(quoting *Chevron Corp. v. Pennzoil Co., 974 F.2d 1156, 1162 (9th Cir.1992)* (citing *United States v. Bilzerian, 926 F.2d 1285, 1292 (2d Cir.1991)*). Where a client's state of mind or knowledge, such as whether the client acted negligently or deceptively, is at issue, "the attorney-client privilege with respect to attorney-client communications that have bearing on that state of mind or knowledge may be waived." *King-Fisher Company v. United States, 58 Fed.Cl. 570, 572 (2003)*. A defendant waives the attorney-client privilege where its good faith defense places knowledge of the law and its communications with counsel directly at issue. *United States v. Bilzerian, 926 F.2d 1285, 1292 (2nd Cir.)* (*Circ. Denied, 502 U.S. 813, 112 S. Ct. 63, 116 L. Ed. 2d 39 (1991)*. "Even if the privilege holder does not attempt to make use of the privileged communication, he may waive the privilege if he makes factual assertions, the truth of which can only **[*56]** be assessed by examination of the privileged communications." *In re: Kidder Peabody Sec. Litig., 168 F.R.D. 459, 470 (S.D.N.Y. 1996)* (emphasis added).

Plaintiff's remaining claim in the complaint alleges violations of *29 U.S.C. § 206* and *§ 207*. (#7-2). Plaintiff asserts the following factual allegations against defendants:

> The compensation system used by the defendants for the plaintiff and those similarly situated was a *de facto* "piecework no overtime" system, meaning such employees were being paid a certain amount for each "piece" of work they performed pursuant to a schedule, the plaintiffs not being paid time and one-half their "regular hourly rate" for work in excess of 40 hours a week as required by the FLSA and Nevada law based upon the hours they actually

> worked each week and the total basic "piece rate" they were paid, such de facto compensation system existing even though defendants would produce certain false and misleading payroll records indicating that either proper overtime Or some measure of overtime was being paid to the plaintiff and those similarly situated when, in fact, no such overtime was being paid whatsoever, or, alternatively, defendants utilized a compensation **[*57]** system that did pay some measure of overtime wages upon a designated hourly rate but failed to pay any overtime wages on the additional and substantial portion of the earnings of the plaintiff and those similarly situated that were paid by the defendants solely on a piece rate basis.
>
> Defendants, in furtherance of their "piecework no overtime" pay scheme would falsely list certain "overtime hours" and "overtime compensation" on the plaintiff's and the putative class member's pay stubs, such listings being inaccurate in terms of hours actually worked and not reflecting any attempt to pay time and one-half the employees' "regular rate" as required by the FLSA and Nevada law, such purported "overtime" payments being based upon completely fictitious and knowingly false "regular rates" that were concocted by the defendants.

Id. Plaintiff also alleges that the defendants' actions were willful and that defendants knew from previous issues with the FLSA that their conduct violated the FLSA:

> Defendants' violations of the FLSA were willful in that defendants were aware the method they were purporting to pay overtime under was illegal and violated the FLSA; such violations were also willful because **[*58]** defendants were aware their "piecework no overtime" pay scheme had been the subject of prior lawsuits by private parties alleging such scheme violated the FLSA and prior investigations and settlements supervised by the United States Department of Labor based upon such compensation system's violation of the FLSA; defendants also evidenced their willful violation of the FLSA by concocting a false payroll record as to overtime pay and hours worked that had no relationship to the overtime hours actually worked or the actual payment of overtime, such false record being manufactured by the defendants in an attempt to conceal their knowing and willful violation of the FLSA.

Id.

Defendants assert two affirmative defenses that are the topic of plaintiff's motion: (9) "Defendants allege, assuming arguendo there is an unpaid wage violation, that Defendants at all times had a good faith and reasonable belief that it had compensated Plaintiff in accordance with the FLSA and that, therefore, no

liquidated damages are due Plaintiff;" and (11) "Defendants allege that any alleged violation of the FLSA was not willful and that Plaintiff's claims are therefor limited to two years. *29 U.S.C. § 255*." (#36). **[*59]** Defendants, through these affirmative defenses, put their state of mind and their knowledge regarding the FLSA, its requirements, and their obligations "at issue." Any communication between defendants and counsel regarding conduct relating to the allegations in this action which could arguable form the basis for defendants' "reasonable belief" that they were acting in "good faith" and did not intentionally violate the FLSA, would have a direct bearing on the viability of defendants' affirmative defenses. The court finds, therefore, that the "at issue" exception applies. *See King-Fisher Company, 58 Fed.Cl. at 572*.

As the court recognizes, however, that privilege is a very important concept in our judicial system, the court will narrow the scope of communications that are discoverable and the means of discovery permitted. Plaintiff may serve defendants with interrogatories seeking information regarding communications between defendants and counsel, and may ask (1) if defendants and counsel communicated *prior* to this litigation about the type of conduct that forms the basis for the allegations in the complaint (#7-2), and (2) if so, what was communicated regarding the legalities of and **[*60]** defendants' obligations relating to:

(A) The "piecework no overtime" system described in the complaint (#7-2);

(B) The installers allegedly not being paid time and one-half their "regular hourly rate" for work in excess of 40 hours a week as required by the FLSA based upon the hours they actually worked each week and the total basic "piece rate" they were paid;

(C) Defendants allegedly producing certain false and misleading payroll records indicating that either proper overtime or some measure of overtime was being paid to the plaintiff and those similarly situated when, in fact, no such overtime was being paid;

(D) Defendants alleged use of a compensation system that did pay some measure of overtime wages upon a designated hourly rate but failed to pay any overtime wages on the additional and substantial portion of the earnings of the installers that were paid by the defendants on a piece rate basis; and

E) Defendants allegedly falsely listing certain "overtime hours" and "overtime compensation" on installers' pay stubs, such listings being inaccurate in terms of hours actually worked and not reflecting any attempt to pay time and one-half the employees' "regular rate" as required by the **[*61]** FLSA, such purported "overtime" payments being based upon untrue "regular rates".

The court finds that "the truth of [defendants' 9th and 11th affirmative defenses] can only be assessed by examination" of communications demonstrating defendants' knowledge of the legalities of its alleged actions and of its obligations relating thereto under the FLSA, and that the "at issue" exception applies to these communications outlined above only. *See In re: Kidder Peabody Sec. Litig., 168 F.R.D. at 470*; *Bilzerian, 926 F.2d at 1292*. The court finds that fairness requires disclosure of the content of these communications. *Kaiser Found. Health Plan, Inc., 552 F.3d at 1042*. As the court is limiting the discovery sought regarding the attorney-client communications, and recognizes defense counsel's interest in maintaining the confidential nature of attorney-client communications, the court finds that entering sanctions is not appropriate.

Accordingly, and for good cause shown,

IT IS HEREBY ORDERED that Plaintiff's Motion To Find Defendants in Violation of Order (#63) is GRANTED in part and DENIED in part, as discussed above.

IT IS THEREFORE ORDERED that within ten (10) days from the date of this order, **[*62]** defendants must provide to plaintiff the names, addresses, telephone numbers, and email addresses of all *commercial* cable, internet, or telephone service installers who were employed by MC Communications, Inc. in Las Vegas, Nevada who performed such work after February 11, 2008, and who were paid on a piece rate or point system basis. Counsel for plaintiff will have ten (10) days from receipt of the names and addresses of the putative class members in which to circulate the notice by first class mail and email to the proposed class members at Plaintiff's counsel's expense. Counsel for plaintiff will use the form of notice plaintiff attached to his motion for circulation of notice of the pendency of this action pursuant to *29 U.S.C. § 216(b)* and for other relief (Doc. #12), with the following revisions:

a. change the opt in period to **60 days**,
b. advise potential plaintiffs that by joining the action they may have to participate in discovery, including written discovery, a deposition, and/or testify at trial, and
c. fix the typographical errors identified in the court's August 1, 2011, Order (#35).

IT IS FURTHER ORDERED that plaintiff's request for sanctions is DENIED.

IT IS FURTHER ORDERED **[*63]** that defendants' Motion To Compel Proper Discovery Responses (#64) is GRANTED in part and DENIED in part, as discussed above.

IT IS THEREFORE ORDERED that plaintiff must provide defendants the engagement letter between plaintiff and plaintiff's counsel on or before July 29, 2013. The engagement letter may be appropriately redacted as discussed during the hearing and will be subject to a stipulated protective order. Defendants may serve plaintiff with interrogatories seeking detailed answers as to which attorney performed work on the action, their hourly rate, how many hours they have billed to date, and an estimate of how many hours plaintiff's counsel anticipates billing.

IT IS FURTHER ORDERED that plaintiff's Motion To Compel Production of Documents and Modify Discovery Schedule (#65) is GRANTED in part and DENIED in part, as discussed above.

IT IS THEREFORE ORDERED that, on or before July 29, 2013, defendants must provide the name, last known address, and last known telephone numbers of *all commercial* installers' managers, assistant managers, and supervisors formerly employed by the defendants, such persons have been so employed by the defendants any time after February 11, 2008.

IT **[*64]** IS THEREFORE ORDERED that Discovery is extended one hundred and fifty (150) days from the entry of this order, and is limited in scope to (1) commercial installers, (2) follow-up on documents relating to pay-roll, and (3) the attorney-client issue discussed herein.

IT IS FURTHER ORDERED that plaintiff's Motion To Compel Defendants to Answer at a Deposition Questions Relating to Certain Attorney-Client Communications (#66) is GRANTED in part and DENIED in part, as discussed above.

IT IS THEREFORE ORDERED that plaintiff may serve defendants with interrogatories seeking information regarding communications between defendants and counsel, and may ask (1) if defendants and counsel communicated *prior* to this litigation about the type of conduct that forms the basis for the allegations in the complaint (#7-2), and (2) if so, what was communicated regarding the legalities of and defendants' obligations relating to:

(A) The "piecework no overtime" system described in the complaint (#7-2);

(B) The installers allegedly not being paid time and one-half their "regular hourly rate" for work in excess of 40 hours a week as required by the FLSA based upon the hours they actually worked each week and the **[*65]** total basic "piece rate" they were paid;

(C) Defendants allegedly producing certain false and misleading payroll records indicating that either proper overtime or some measure of overtime

was being paid to the plaintiff and those similarly situated when, in fact, no such overtime was being paid;

(D) Defendants alleged use of a compensation system that did pay some measure of overtime wages upon a designated hourly rate but failed to pay any overtime wages on the additional and substantial portion of the earnings of the installers that were paid by the defendants on a piece rate basis; and

(E) Defendants allegedly falsely listing certain "overtime hours" and "overtime compensation" on installers' pay stubs, such listings being inaccurate in terms of hours actually worked and not reflecting any attempt to pay time and one-half the employees' "regular rate" as required by the FLSA, such purported "overtime" payments being based upon untrue "regular rates".

DATED this 19th day of July, 2013.

/s/ Cam Ferenbach

CAM FERENBACH

UNITED STATES MAGISTRATE JUDGE

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DISTRICT COURT

CLARK COUNTY, NEVADA

CHRISTOPHER THOMAS, and CHRISTOPHER CRAIG, Individually and on behalf of others similarly situated, Plaintiffs, vs. NEVADA YELLOW CAB CORPORATION, NEVADA CHECKER CAB CORPORATION, and NEVADA STAR CAB CORPORATION Defendants.	Case No.: A-12-661726-C Dept. No.: XXVIII Date of Hearing: October 3, 2017 Time of Hearing: 9:00 am.

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION ON AN OST TO STRIKE AFFIRMATIVE DEFENSES

COMES NOW, NEVADA YELLOW CAB CORPORATION, NEVADA CHECKER CAB CORPORATION, and NEVADA STAR CAB CORPORATION, (hereinafter "YCS") by and through their undersigned counsel of record, MARC C. GORDON, ESQ., and TAMER B. BOTROS, ESQ., and hereby respectfully file their Opposition to Plaintiffs' Motion On An OST To Strike Affirmative Defenses.

This Opposition is made and based upon the pleadings and papers on file herein, and such oral argument of counsel as may be heard.

DATED this 25th day of September, 2017.

YELLOW CHECKER STAR TRANSPORTATION CO. LEGAL DEPT.

/s/ Tamer B. Botros
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Attorneys for Defendants
NEVADA YELLOW CAB CORPORATION
NEVADA CHECKER CAB CORPORATION and
NEVADA STAR CAB CORPORATION

I.

FACTS

1. On September 20, 2017, YCS filed the following motions: Motion to Decertify Class Action, Motion to Dismiss Punitive Damages Claim, and Motion that Plaintiffs' Claim is Subject to the 2 Year Statute of Limitations.
2. On September 20, 2017, Plaintiffs filed Motion On An OST To Strike Affirmative Defenses.
3. There are numerous depositions that will be taking place including of Governor Brian Sandoval, Plaintiffs, Mr. Thomas and Mr. Craig, former labor and current Labor Commissioners.
4. Deputy Labor Commissioner, Keith Sakelhide stated that "Upon information and belief, the Labor Commissioner's directive was based upon the divergent views concerning the validity of exceptions to minimum wage laws expressed in Nevada Attorney General Opinion 2005-05 (March 2, 2005) and Lucas v. Bell Trans, 2009 WL 2424557 (D. Nev. 2009). See Affidavit of Keith Sakelhide attached hereto as Exhibit **1.**
5. After the Thomas v. Nevada Yellow Cab decision was rendered by the Nevada Supreme Court in 2014, the Nevada Labor Commissioner's Office issued "Minimum Wage Guide for Nevada Employer," and stated the following:

> "While the constitutional amendment **did not directly conflict with the exemptions outlined in NRS 608.250**, its passage created some uncertainty. It was this uncertainty that the Nevada Supreme Court addressed in *Thomas v. Nevada Yellow Cab*, 130 Nev. Adv. Op. 52 (2014)." See The Business Advocate Winter 2014 A publication of the Nevada Department of Business and Industry titled "A Minimum Wage Guide for Nevada Employers." Attached hereto as Exhibit **2.**

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II.

LEGAL ARGUMENT

A. There is No Strict Liability That is Imposed in the Minimum Wage Amendment (MWA)

Plaintiffs' counsel is erroneously interpreting the MWA as imposing strict liability when it does not mention anything remotely close to what he is asserting. Plaintiffs' Motion seeks to have this Honorable Court impose punitive damages against Defendants, when this matter has not yet proceeded to trial. Plaintiffs' counsel did not cite to a single quote from the Thomas v. Nevada Yellow Cab decision in support of his position that Defendants are strictly liable and hence punitive damages should be awarded to Plaintiffs. Furthermore, Plaintiffs' Motion should be denied because on October 24, 2017 this Honorable Court will hear arguments on Defendants' Motion to Decertify the Class, Motion to Dismiss Punitive Damages Claim, and Motion that Plaintiffs' Claim is Subject to the 2 Year Statute of Limitations which will make Plaintiffs' motion moot. Also, it would be extremely and unfairly prejudicial for this Honorable Court to strike Defendants' affirmative defenses when no depositions have yet taken place. Plaintiff is engaged in a concerted effort to deny and prevent Defendants of their due process right to fully defend and conduct discovery by now seeking to strike their properly asserted affirmative defenses before any depositions have taken place. Defendants are in the process of scheduling the following depositions in defending this matter:

1. Christopher Thomas (Plaintiff)
2. Christopher Craig (Plaintiff)
3. Keith Sakelhide (Former Deputy Nevada Labor Commissioner)
4. Thoran Towler (Nevada Labor Commissioner in 2014)
5. Shannon Chambers (Nevada Labor Commissioner since 2014)
6. Governor Brian Sandoval (Attorney General in 2005 who authored the AG Opinion about NRS 608.250(2) and the MWA)
7. Kristin Rossiter and Jered McDonald (Legislative Counsel Bureau who drafted a Fact Sheet about Minimum Wage)
8. JoAnna Tonini (U.S. DOL Wage & Hour Investigator who oversaw the self-audit and found no intentional wrong doing by YCS to not pay minimum wage)

9. Sam Moffit (Signed an Affidavit stating that in 2013 YCS was aggressively negotiating not to pay minimum wage which caused the strike that year)
10. Ruthie Jones (ITPE Executive Board Member who signed the 2008 CBA)

There has never been a case like the instant matter with similar facts along with the vastly novel issues of law in all of American Jurisprudence. Defendants are diligently working to ensure that the above listed depositions take place in a timely manner. Defendants respectfully request that this Honorable Court deny Plaintiffs' Motion to Strike Defendants' Affirmative Defenses, since numerous depositions will be scheduled in October and November of 2017, including of Governor Brian Sandoval and the former and current Nevada Labor Commissioners. Also, Defendants have filed a Motion to Decertify the Class Action, that will be heard on October 24, 2017, which may render Plaintiffs' Motion to Strike Affirmative Defenses as moot and hence reduce the case to only two (2) Plaintiffs.

B. Nevada Still Has a Labor Commissioner under Nevada Law

In support of Plaintiffs' flimsy and rather bizarre legal position that Defendants' affirmative defense should be stricken because claims of minimum wage are strict liability claims, Plaintiffs' counsel argues that the Nevada Labor Commissioner in effect no longer exists in the state of Nevada. Plaintiffs' counsel stated in his motion "Nowhere does the MWA authorize employers to pay an hourly wage in a minimum amount approved by the Nevada Labor Commissioner." (Page 6, lines 2-3 of Plaintiffs' Motion). That is an outrageous position that Plaintiffs' counsel has taken. As stated in Article 15, Section 16 of the MWA, "The Governor or the State agency designated by the Governor shall publish a bulletin by April 1 of each year announcing the adjusted rates, which shall take effect the following July 1." In Nevada, the Governor has designated the Labor Commissioner to publish a bulletin regarding minimum wage rates. See attached Labor Commissioner published bulletin dated March 30, 2017 attached hereto as Exhibit 3.

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Furthermore, under NRS 607.160

1. The Labor Commissioner:

(a) Shall enforce all labor laws of the State of Nevada:
(1) Without regard to whether an employee or worker is lawfully or unlawfully employed; and
(2) The enforcement of which is not specifically and exclusively vested in any other officer, board or commission.
(b) May adopt regulations to carry out the provisions of paragraph (a).

2. If the Labor Commissioner has reason to believe that a person is violating or has violated a labor law or regulation, **the Labor Commissioner may take any appropriate action against the person to enforce the labor law or regulation whether or not a claim or complaint has been made to the Labor Commissioner concerning the violation.**

3. Before the Labor Commissioner may enforce an administrative penalty against a person who violates a labor law or regulation, the Labor Commissioner must provide the person with notice and an opportunity for a hearing as set forth in NRS 607.207.

4. In determining the amount of any administrative penalty to be imposed against a person who violates a labor law or regulation, the Labor Commissioner shall consider the person's previous record of compliance with the labor laws and regulations and the severity of the violation.

5. All money collected by the Labor Commissioner as an administrative penalty must be deposited in the State General Fund.

6. The actions and remedies authorized by the labor laws are cumulative. If a person violates a labor law or regulation, the Labor Commissioner may seek a civil remedy, impose an administrative penalty or take other administrative action against the person whether or not the person is prosecuted, convicted or punished for the violation in a criminal proceeding. The imposition of a civil remedy, an administrative penalty or other administrative action against the person does not operate as a defense in any criminal proceeding brought against the person.

7. If, after due inquiry, the Labor Commissioner believes that a person who is financially unable to employ counsel has a valid and enforceable claim for wages, commissions or other demands, the Labor Commissioner may present the facts to the Attorney General. The Attorney General shall prosecute the claim if the Attorney General determines that the claim is valid and enforceable.

[Part 4:203:1915; A 1919, 67; 1921, 218; 1931, 55; 1935, 224; 1937, 419; 1941, 87; 1931 NCL § 2751] — (NRS A 1967, 621; 1971, 1189; 1997, 195; 2001, 562; 2003, 793, 1517)

Plaintiffs' argument that the MWA does not authorize employers to pay an hourly wage in a minimum amount approved by the Nevada Labor Commissioner is erroneous as proven by the Labor Commissioner bulletin of March 30, 2017 and NRS 607.160. Therefore, Plaintiffs' Motion to Strike Defendants' Affirmative Defenses must be denied and Defendants must be allowed to take the necessary depositions as outlined above.

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III.

CONCLUSION

Based on the foregoing points and authorities, Defendants respectfully request that this Honorable Court deny Plaintiffs' Motion on An OST To Strike Affirmative Defenses.

DATED this 25th day of September, 2017.

YELLOW CHECKER STAR TRANSPORTATION CO. LEGAL DEPT.

/s/ Tamer B. Botros
MARC C. GORDON, ESQ.
GENERAL COUNSEL
Nevada Bar No. 001866
TAMER B. BOTROS, ESQ.
SENIOR LITIGATION COUNSEL
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Las Vegas, Nevada 89118
Attorneys for Defendants
NEVADA YELLOW CAB CORPORATION
NEVADA CHECKER CAB CORPORATION and
NEVADA STAR CAB CORPORATION

CERTIFICATE OF ELECTRONIC SERVICE

Pursuant to Rule 9 of Nevada Electronic Filing and Conversion Rules, I hereby certify that on the 25th day of September, 2017, service of the foregoing **DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION ON AN OST TO STRIKE AFFIRMATIVE DEFENSES** was made this date by electronic service as follows:

Leon Greenberg, Esq.
Dana Sniegocki, Esq.
Leon Greenberg Professional Corporation
2965 South Jones Blvd, Suite E4
Las Vegas, Nevada 89146
leongreenberg@overtimelaw.com
dana@overtimelaw.com
Attorneys for Plaintiffs
CHRISTOPHER THOMAS
CHRISTOPHER CRAIG

/s/ Tamer Botros
For **Yellow Checker Star Transportation Co. Legal Dept.**

EXHIBIT 1

AFFIDAVIT OF KEITH SAKELHIDE

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

I, KEITH SAKELHIDE, being duly sworn, states:

1. I am the former Deputy Labor Commissioner for the State of Nevada Office of the Labor Commissioner for the Las Vegas office.

2. I served as Deputy Labor Commissioner from approximately 2007 to 2013.

3. The position of Deputy Labor Commissioner is subordinate to the Labor Commissioner.

4. During my time as Deputy Labor Commissioner I received a directive from Labor Commissioner Michael Tanchek regarding minimum wage claims concerning taxi and limousine drivers.

5. The aforementioned directive was to follow the standard initial intake procedures in that that upon receipt of such complaints, staff was to inform the employer of the complaint and offer the employer the opportunity to resolve the complaint. In the event that the complaint was not resolved at this stage, it was to be held in abeyance until such time that a court of competent jurisdiction issued a final ruling.

6. Upon information and belief, the Labor Commissioner's directive was based upon the divergent views concerning the validity of exceptions to minimum wage laws expressed in Nevada Attorney General Opinion 2005-05 (March 2, 2005) and Lucas v. Bell Trans, 2009 WL 2424557 (D. Nev. 2009).

7. The aforementioned directive coincided with the litigation before the US District Court in Lucas v. Bell Trans.

8. I directed staff in the Labor Commissioner's Las Vegas office to follow the aforementioned directive.

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9. I declare under the penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

FURTHER AFFIANT SAYETH NAUGHT

KEITH SAKELHIDE

SUBSCRIBED AND SWORN to before me this 1st day of October, 2015

NOTARY PUBLIC
RITA BROWNAWELL
STATE OF NEVADA - COUNTY OF CLARK
MY APPOINTMENT EXP. DEC. 22, 2016
No: 09-8972-1

Notary Public

EXHIBIT 2

THE BUSINESS ADVOCATE

WINTER 2014

A publication of the Nevada Department of Business and Industry

A Minimum Wage Guide for Nevada Employers

Increasing the minimum wage has been a hot topic since President Obama proposed raising the federal minimum wage from $7.25 to $10.10 per hour in his 2014 State of the Union Address. While the President and his supporters claim that increasing the minimum wage would ultimately benefit the economy, with no associated job loss, opponents of the plan refute those claims and declare an increase would harm small business and result in the loss of hundreds of thousands of jobs.

The debate is likely to move closer to home this spring if a bill, currently being deliberated, is indeed introduced for consideration during the upcoming state legislative session. While those discussions and debates will be taking place in Carson City, and around dinner tables and places of business throughout the state, the Office of the Labor Commissioner continues to implement existing statutes and regulations governing Nevada's minimum wage and overtime.

A recent Supreme Court ruling issued earlier this year clarified who is entitled to receive minimum wage. In order to help employers avoid the pitfalls and potential penalties associated with noncompliance, we've outlined a few of the basics concerning minimum wage in Nevada. For specific issues or questions not covered, we recommend contacting the Labor Commissioner's Office, referring directly to the language of applicable statutes and regulations or consulting with an attorney familiar with wage and hour laws.

Unique Two-Tiered System

In 2006, Nevada voters gave final approval for an amendment to the Nevada Constitution which permitted employers to pay one dollar less than the minimum wage indexed for inflation if they provided qualified health insurance to their employees. The result was a unique two-tiered minimum wage system.

Each year, at the direction of the Governor, Nevada's Labor Commissioner conducts an annual review of the minimum wage to determine if an increase is required. The wage is adjusted by the amount of increases in the federal minimum wage, or, if greater, by the cumulative increase in the cost of living. A bulletin is published each year on April 1 outlining any changes to the minimum wage to be in effect the following July.

The current minimum wage in Nevada, which was put into effect July 2010, is $7.25 per hour if an employer offers qualified health benefits, $8.25 per hour if they do not.

Minimum Wage Exclusions

In addition to a two-tiered system, the Constitutional amendment provided that individuals under the age of 18, those employed by a nonprofit for after-school or summer employment and those employed as trainees for a period of not more than 90 days were not entitled to receive minimum wage.

Prior to the amendment, Nevada law provided for other exemptions to the payment of minimum wage, specifically, NRS 608.250 exempted

Continued, page 7

ACCESS TO CAPITAL CORNER:

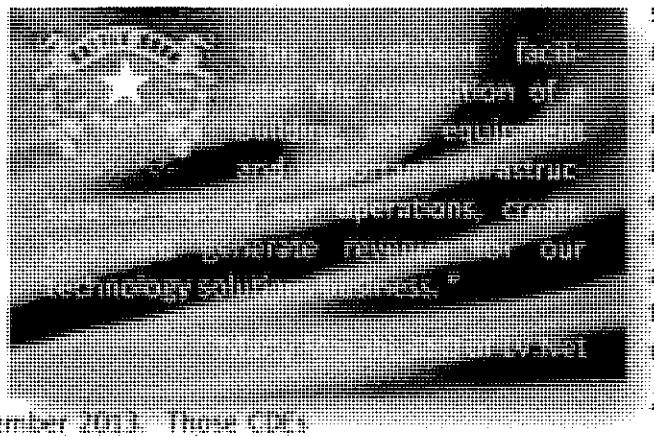
Nevada New Markets Tax Credit Program

What is the Nevada New Market Tax Credit (NMTC) program and how can it help businesses with their capital needs?

In June 2013, the Nevada Legislature passed the Nevada New Markets Jobs Act, which created the Nevada NMTC program. This alternative financing complement to conventional capital sources can fill a gap in a capital stack for businesses in low-income areas. The program is used to assist financing companies with projects that have a total financing need between $3 - $10 million. It provides below market interest loans that are approximately 15% - 20% of the allocation amount. For example, an $8 million project that used an $8 million NMTC allocation can anticipate approximately $2 million in subsidized financing.

How does it work?

The Nevada NMTC program is patterned after the Federal NMTC program. A domestic corporation or partnership acting as an intermediary for loan provisions and investments applies to be a federally certified Community Development Entities (CDEs). Several CDEs applied and were allocated a total of $200 million in Nevada NMTC authority in November 2013. These CDEs then sold their allocation of tax credits to insurance companies to raise funds that will be loaned and invested. The insurance companies receive a 58% tax credit on their insurance premium taxes over the next seven years.



The CDEs must have a primary mission of investing in low-income communities and persons. Typically, the CDEs use the money they raised from the sale of their tax credit allocation to buy down the interest rate on a loan to a business or leverage a loan from a bank.

For example, on a leveraged loan, a business needs $8 million to expand their business. The bank will loan them $6 million and the CDE adds $2 million in NMTC equity. This NMTC equity is at below-market interest rates and can be forgiven at the end of seven years.

To qualify for a Nevada NMTC deal, a business must be located in a Federal Low-Income Census tract and meet Federal NMTC requirements. The business also needs to meet Small Business Association size standards.

As of the end of October, one company has received an $8 million NMTC investment. LV.Net is a Las Vegas-based, multi-service, Internet Service Provider (ISP) of High Speed Internet and Data Centers. The company supplies fiber, licensed microwave, wireless and Wi-Fi to its commercial and residential customer base. With the help of Nevada NMTC, LV.Net will be doubling their number of employees and expect significant growth in their revenue.

In a partnership with the City of Las Vegas, LV.Net provides free Wi-Fi Internet in the downtown redevelopment area. With the NMTC funding, LV.Net is installing fiber throughout that area, upgrading the Wi-Fi services. This will provide LV.Net High Speed internet over a broader area of the downtown corridor. The company is also expanding its Data Centers to accommodate more colocation services for small to midsize businesses.

"This investment facilitates the acquisition of a building, new equipment and important infrastructure to expand our operations, create jobs and generate revenue for our technology solutions business," said Marty Mizrahi, CEO of LV.Net.

Can my business still apply?

It is not too late to apply for a Nevada New Markets Tax Credit (NMTC) deal. The CDEs must have nearly all of their allocation (85%) invested by December 14, 2014 but there may still be some Nevada NMTC money available after that. The Federal NMTC program has a later deadline and may also have funds available. To learn more, visit http://business.nv.gov.

ACCESS TO CAPITAL DIRECTORY

The **Access to Capital Directory** is a comprehensive listing of products and resources available to Nevada businesses.
View online at http://business.nv.gov/Business/Access_to_Capital/Access_to_Capital/

STATEWIDE CALENDAR OF EVENTS

For event details, registration information and more, please visit http://governorsoffice.nv.gov/Statewide_Event_Calendar/

LAS VEGAS

DEC 3,10,17 9:30am	**1 Million Cups** Work in Progress 317 S. 6th Street, Las Vegas
DEC 4 9:00 am	**Intro. To Gov't Contracts Workshop** NMI/WBC 550 E. Charleston Blvd, Ste. E, Las Vegas
DEC 9 9:00 am	**Community Outreach/ Info. Meeting** Office of the Labor Commissioner 555 E. Washington Ave., Ste. 4401, LV
DEC 9 12:00 pm	**Business Health Retirement Workshop** NMI/WBC 550 E. Charleston Blvd, Ste. E, Las Vegas
DEC 10 8:00 am	**Grow Your Business w/ Social Media** Microsoft Store– Fashion Show Mall 3200 S. Las Vegas Blvd., Suite 1045, LV
DEC 11 2:00 pm	**Start a Business for Under $2,500** NMI/WBC 550 E. Charleston Blvd, Ste. E, Las Vegas
DEC 16 10:00 am	**Physical Health Workshop** NMI/WBC 550 E. Charleston Blvd, Ste. E, Las Vegas
DEC 17 9:00 am	**Women/Minority Owned Certification** Urban Chamber of Commerce 1951 Stella Lake Street, Las Vegas
DEC 18 12:00 pm	**Lunch and Learn Marketing Series** Urban Chamber of Commerce 1951 Stella Lake Street, Las Vegas
JAN 7* 9:30 am	**1 Million Cups** Work in Progress 317 S. 6th Street, Las Vegas
FEB 4* 9:30 am	**1 Million Cups** Work in Progress 317 S. 6th Street, Las Vegas
MAR 4* 9:30 am	**1 Million Cups** Work in Progress 317 S. 6th Street, Las Vegas

* 1 Million Cups in Las Vegas and Reno meet at the same time, same location every Wednesday unless a cancellation has been announced.

RENO

DEC 3,10,17 9:00 am	**1 Million Cups** Swill Coffee and Wine 3366 Lakeside Court, Reno
DEC 17 2:00 pm	**NCET Drop-In/ Co-Working, Networking** Swill Coffee and Wine 3366 Lakeside Court, Reno
JAN 7* 9:00 am	**1 Million Cups** Swill Coffee and Wine 3366 Lakeside Court, Reno
FEB 4* 9:00 am	**1 Million Cups** Swill Coffee and Wine 3366 Lakeside Court, Reno
FEB 28	**Northwest Women's Money Conference** **TBD**
MAR 4* 9:00 am	**1 Million Cups** Swill Coffee and Wine 3366 Lakeside Court, Reno

WEBINARS

DEC 4	**Future of State Sales Tax Revenue** 11:00 am– 12:00 pm
DEC 17	**Writing a Winning RFP Response** 2:00– 3:00 pm
JAN 14	**Government Contracting 101: How To Do Business with the Government** 2:00- 3:00 pm
JAN 29	**Opportunities and Resources for Veteran-Owned Businesses in Nevada** 2:00- 3:30 pm
FEB 11	**SAM– Registration and Updates for Federal Government Contracting** 2:00– 3:00 pm
MAR 11	**Nevada State and Local Government Vendor Registration Databases** 2:00– 3:00 pm

Free Small Business & Nonprofit Legal Clinic to Open

The William S. Boyd School of Law at UNLV is offering an exciting new resource for small businesses and nonprofit organizations in Nevada. Under the close supervision of licensed attorneys, law students at the Small Business and Nonprofit Legal Clinic assist in forming businesses or nonprofit organizations; reviewing and negotiating contracts; assisting nonprofit organizations with tax-exempt applications and maintenance of tax-exempt status; working with federal, state, and local government agencies; and providing advice concerning intellectual property issues.

The Clinic does not charge for legal services, but clients are responsible for any administrative fees associated with the representation such as state filing or licensing fees. As an educational program, Clinic faculty take advantage of every opportunity to teach the students. The practical result of this is that the Clinic is unable to accept projects or client matters that must be resolved within a short time frame. Further, Clinic services are limited to transactional matters. As such, the Clinic does not provide assistance in initiating or defending litigation.

The Clinic is currently accepting applications for clients. If you are interested, please submit a Request for Legal Services Form (http://www.law.unlv.edu/clinic/sbncform). Questions? Contact Professor Eric Franklin at eric.franklin@unlv.edu.

New Mircrolender Opens Doors to Financing Opportunities in Nevada

CPLC Préstamos CDFI, LLC (Préstamos) is now available in Nevada promoting business and community development. As a lending agency, Préstamos provides technical assistance, access to business capital, and commercial real estate loans. Préstamos is an affiliate of CPLC Southwest, a provider of first time homebuyer and foreclosure prevention services in Las Vegas for the last four years.

Why Préstamos? Préstamos helps build stronger communities by providing entrepreneurs with access to capital through nontraditional financing resources for startups and existing businesses. Préstamos supports small business owners who face barriers to securing credit from traditional lending institutions due to smaller loan requests; a greater need for flexible underwriting; or help meeting underwriting standards. By coupling small business loans with technical assistance and small business development services, Préstamos guides aspiring entrepreneurs and small business owners through every stage of the loan process.

Loans are provided for working capital, machinery or equipment, inventory or supplies, furniture or fixtures, and commercial real estate. Loan products include: Micro Enterprise Loans (up to $50,000), Small Business Loans ($50,000 - $500,000), and Commercial Real Estate ($500 - $10 Million). For more information, please contact Albert Delgado at (702)207-1614 or visit their office at 2685 Pecos McLeod, Las Vegas, NV 89121.

Secure Equal Opportunity in Business

Funded through the U.S. Department of Transportation (USDOT), the federal Disadvantaged Business Enterprise (DBE) program helps businesses classified as small, woman-owned or disadvantaged to compete in a fair, competitive environment right alongside larger corporations. In an effort to eliminate inequalities, each state's Department of Transportation administers the DBE program with one DBE officer presiding as a liaison officer. In Nevada, Yvonne Shuman and her staff are dedicated to help eligible businesses become DBE-certified so they can become part of the Nevada Unified Certification Program and bid on federally funded highway construction and other projects.

Any industry qualifies for certification. There are three qualifying factors used to determine eligibility for DBE certification: gross receipts, control-ownership and personal net worth. When you are certified in Nevada with NDOT, you will also be certified with the Regional Transportation Commissions of Washoe and Clark counties as well as airport authorities in Las Vegas and Reno—hence, the Nevada Unified Certification Program (NUC).

Not all projects up for bid are highway construction related. Other project types could include right-of-way services (buying land to put highways on), demolition, property appraisals to estimate value on land, consulting services or graphic/web design.

(continued)

Nevada Department of Transportation (NDOT) also offers free training opportunities to DBE-certified firms via the Nevada Small Business Development Center. For information, please visit the DBE Program website at www.nevadadot.com/NevadaDBE/DBE_Program.aspx. Broaden your business opportunities. Apply for your DBE certification today.

Protect your Business this Holiday Season from Hackers and Cyber Criminals

All too often, small businesses are easy prey for Hackers and Cyber criminals. Now that the holiday season is upon us, cyber criminals may be increasing their activity, and your business may very well be their next target. Unfortunately, there is a common misconception amongst small business owners that they are too small or insignificant to be a target of such sophisticated attacks and that these criminals are only interested in attacking large institutions.

This false sense of security is exactly why many cyber criminals may be

focusing on businesses just like yours this holiday season. Simply put, you are an easier target. These cyber criminals are very sophisticated. They simply create programs to scan and attack numerous vulnerabilities across thousands of websites every day. This results in thousands of small business owners' websites being compromised daily.

What can you do now to help prevent hackers from gaining access to your website, bank accounts, and customer data?

1. Change Your Passwords: Hackers now use sophisticated programs that can attempt to log into your website, email, and other sensitive accounts. These programs can process thousands of passwords in the blink of an eye. Having a password that is a minimum of 8 characters that uses a combination of upper and lowercase letters, numbers and symbols make your password much more secure.

2. Use Different Passwords for Different Sites: This one is quite obvious. If you use the same password across all of your sites and the criminal gains access to one. It's like giving him the access to them all.

3. Make Sure Your Website is up to Date: Most websites use third party software to allow them to perform properly. Updates usually patch known security vulnerabilities.

4. Update your Internet Browser: Out of date Internet browsers are often preferred targets for cyber criminals to gain entry to your data.

5. Use Antivirus Software: These programs constantly scan your computer, emails, and software for malicious attacks. Anti-Virus is important, even for Mac users. There has been an increase in attacks on the Mac platform due to its increasing popularity.

Stormie Andrews is founder of Yokel Local in Las Vegas, an Internet Marketing Services firm. Please visit their website at www.yokellocal.com.

ask an EXPERT

Cheryl Thode
Solutions Provider
All About Marketing Solutions
info@AllAboutMarketingSolutions.com
(702) 525-5079

Q: How can social media help my business?

A: Social Media is here to stay! If you are sitting on the bench, I encourage you to jump in, the water's warm. For your business to be successful, social media needs to be part of your marketing plan in 2015. Here are 4 ways a small business will benefit from social media marketing.

1. Extend Your Reach. Social Media will introduce you to people outside your circle. It delivers worldwide exposure to countless daily users. Studies have shown that interacting regularly and consistently will build connections that provide business opportunities.

2. Build Relationships. We do business with people we know, like and trust. These relationships promote repeat business and word-of-mouth referral leads, the best kind! Connecting with customers, sharing your experience and being a trusted source of valuable information develops your business community. This sense of community creates a loyal following for your company.

3. Reputation Management. Use social media to monitor and actively respond to online mentions about your company. Immediately address any positive or negative customer comments. Build credibility, show readers that you're responsive to their needs.

4. Cost Effective. You don't need a marketing department or agency to advertise with social media, it's a do-it-yourself model with professional results. There is no cost to set up your profile pages. Attend our free seminars for best practices, content tips and scheduling suggestions.

Don't get left behind, join the conversations, get noticed, boost sales and manage your brand with effective, affordable social media tools. Your next prospect could come from social media.

Have a question for one of our guest experts?
Email cfoley@business.nv.gov.

RESOURCE ORGANIZATION SPOTLIGHT:
RURAL NEVADA DEVELOPMENT CORPORATION

The Rural Nevada Development Corporation (RNDC) is a non-profit CDFI formed in 1992 to serve the fifteen rural counties and the twenty-seven Native American tribes of Nevada. RNDC provides small business loans to businesses that do not meet bank underwriting thresholds. RNDC offers the bank the right of first refusal as to not compete. The goal for the RNDC is to get the borrower from non-bankable to bankable in a reasonable amount of time.

As a lender of last resort, RNDC serves start-up and existing businesses that want to grow and expand in order to fuel industrial and commercial growth in the rural communities throughout the state. We can do stand alone deals or partner with other agencies/lenders that require gap financing including wholesale, retail, manufacturing, and service industries that are essential but lacking in these communities. Our goal is to generate quality jobs and tax revenues, to provide essential services to our communities, and to provide our borrowers with affordable capital and quality technical assistance.

RNDC has two programs. Rates and fees are based on financial risk and collateral. The interest rate charged to an ultimate recipient would not be less than 6% and no more than 12%. We can lend for up to 25 years.

Small Business Loans between $50,000 and $250,000 to purchase equipment or other fixed assets, to finance working capital, to acquire a business, and to refinance higher interest debt if there is sound economic justification to start-ups and existing businesses. Our loans may be subordinated to induce bank financing and participations.

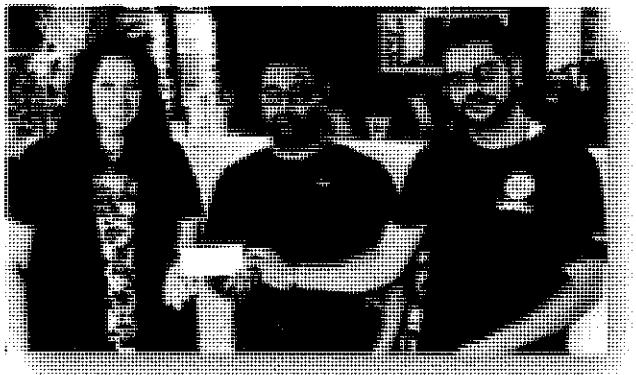
Microloans between $500 - $50,000 to purchase equipment or other fixed assets and to finance working capital. We will lend for up to ten years, but we prefer to keep it under seven. Our Microloan program is funded by USDA (RMAP).

CONTACT RNDC

1320 E. Aultman Street in Ely, NV 89301
toll free: 866-404-5204
www.rndcnv.org
Mary Kerner, Lending Administrator- mary@rndcnv.org.

RNDC Helps Bring Pizza Factory Franchise to Ely

A family decided they wanted quality pizza available in the White Pine County area. Harwinder Singh, Jaswinder Pal Singh and Harvarinderjit Chahal put their heads together and with a lot of hard work, dedication and monumental backing from the community, the Pizza Factory opened. The guys initially leased the building and set forth on a giant task of retrofits, upgrades and health inspections. They had a bank in place to do the permanent financing on the building, however timing was an issue and they needed a short term bridge loan to secure the option to purchase. With an RNDC loan, they were able to do so. They are open every day of the week and busy every day as well. They employ 17 people in the small rural community. They opened in mid-August and have doubled the projections they initially prepared with the assistance of the franchisor. They are grateful to the community for their support!



Lisa R. Mary Kerner, RNDC Lending Administrator, Harvarinderjit Chahal and Harwinder Singh, owners of the Pizza Factory – Ely.

six categories of individuals: (1) casual babysitters; (2) domestic service employees who reside in the household; (3) outside salespersons whose earnings are based on commissions; (4) certain agricultural employees; (5) taxicab and limousine drivers; and (6) certain persons with severe disabilities.

While the constitutional amendment did not directly conflict with the exemptions outlined in NRS 608.250, its passage created some uncertainty. It was this uncertainty that the Nevada Supreme Court addressed this past summer in *Thomas v. Nevada Yellow Cab*, 130 Nev. Adv. Op. 52 (2014). In its opinion, the Nevada Supreme Court found that exemptions outlined in the Nevada Constitution supersede the exemptions previously provided for in NRS 608.250. The only individuals who are exempt from the payment of minimum wage, according to the Nevada Supreme Court, are those specifically outlined in the constitutional amendment.

What does this decision mean for Nevada's employers? It means that employers who have previously relied on the exemptions outlined in NRS 608.250 will be mandated to pay minimum wage to individuals not specifically exempted in the Nevada Constitution.

"Qualified" Heath Insurance

State law outlines what is required of health insurance provided by an employer to be considered "qualified" in order to pay the lower tier minimum wage to their employees. Among other requirements outlined in NAC 608.102, including coverage for certain health care expenses, the cost of the premium for the health insurance plan paid by the employee must not exceed 10 percent of the gross taxable income of the employee paid by an employer. In addition, the insurance must be made available to the employee's dependents and the waiting period cannot exceed 6 months.

If an employer does not offer a health insurance plan, or the health insurance plan is not available or not provided within 6 months, the employee must be paid at least minimum wage until the employee is eligible or the plan become available. An employer is required to maintain documentation in the event that an employee declines qualified health insurance.

The passage and implementation of the Affordable Care Act, a federal health insurance mandate outside of Nevada's jurisdiction, adds an additional burden on employers related to offering health insurance benefits to employees. Although it is likely that an employer offering a qualifying plan under the Affordable Care Act will often also qualify to pay the lower minimum wage rate, a separate analysis under Nevada law and the Act should be done to ensure compliance with the requirements under both.

Regulatory Review

Rulemaking workshops were conducted earlier this year to solicit comments on Nevada's unique minimum wage structure and give the public an opportunity to provide input on existing regulation to ensure the best interest of Nevada's workers. Testimony provided at the initial workshops and any workshops that may be conducted in the future will assist the Labor Commissioner in determining if an amendment to the existing regulations should be proposed. Until that formal process concludes, one thing is clear: a little education will go a long way to ensure Nevada's employers are familiar with their obligations and responsibilities to their employees under law.

Minimum Wage Resources

Statutes and regulations governing minimum wage
NRS 608- www.leg.state.nv.us/NRS/NRS-608.html
NAC 608- http://www.leg.state.nv.us/NAC/NAC-608.html

2014 Minimum Wage Bulletin
www.laborcommissioner.com/min_wage_overtime/2014%20Annual%20Bulletin%20-%20Minimum%20Wage.pdf

Supreme Court Advisory Opinion
www.leg.state.nv.us/division/legal/weblawcd/SCop/130/130NevAdvOpNo52.html

Nevada Office of the Labor Commissioner
www.laborcommissioner.com

New Statewide Housing Locator Tool Now Available

This fall, the Nevada Housing Division introduced a statewide service to help Nevadans find and fill rental vacancies. **NVHousingSearch.org** is free to list and search for all types of rental housing, including affordable, accessible, subsidized and assisted-living units as well as market-rate rentals. To ensure maximum access to housing information, the service is available both online and through a live, toll-free, multilingual call center.

This resource can be a useful tool for employers seeking to provide relocation resources and information to prospective employees.

NVHousingSearch.org keeps listings up to date, which means that the detailed rental data generated by NVHousingSearch.org stays current. Currently, 23,000 Nevada rental units are listed on NVHousingSearch.org, a number that continues to increase as word of the service reaches across the state. An influential advisory board made up of housing professionals who serve across the housing continuum meets quarterly to help drive the service and make sure its goal to connect Nevadans with the housing they need is consistently met across the state.

Data from NVHousingSearch.org will paint a comprehensive picture of existing rental housing stock in Nevada, as well as how effectively housing needs are being met, especially among populations with special housing requirements. Other initiatives, such as disaster preparedness and raising awareness of Fair Housing law, can be addressed by NVHousingSearch.org, which now features links and contact information for regional Fair Housing resources. Future projects include creating an online inventory of all accessible housing units in Nevada.

Housing providers can add unlimited listings at no charge. NVHousingSearch.org offers a good mix of large, multifamily properties and privately owned, "mom'n'pop" units, including single family houses. Tenants search for housing based on specific need, meaning they can more easily identify housing opportunities that they qualify for.

"Thousands of people each month are already searching NVHousingSearch.org for housing. That number will continue to grow as awareness of NVHousingSearch.org expands," said NHD administrator CJ Manthe. "Property owners or landlords can fill their vacancies more quickly, and tenants can find housing that fits their specific needs. It's a win-win for Nevada communities."

State of Nevada
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EXHIBIT 3

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Teri Williams, Public Information Officer, (702) 486-0407, twilliams@business.nv.gov
For Immediate Release: March 30, 2017

Nevada's minimum wage and daily overtime rates will not increase in 2017

Carson City, NV — The Office of the Labor Commissioner released the annual bulletins for Nevada's minimum wage and daily overtime requirements that will take effect July 1, 2017. The rates for the upcoming year will remain unchanged from last year.

The minimum wage for employees who are offered qualified health benefits from their employers will remain at $7.25 per hour and the minimum wage for employees who are not offered health benefits will remain $8.25 per hour.

The 2006 Minimum Wage Amendment to the Nevada Constitution requires the minimum wage to be recalculated each year based on increases in the federal minimum wage or if greater by the cumulative increase in the cost of living.

The rate for daily overtime will also remain the same because the minimum wage rate is not changing. Nevada is one of a few states with a daily overtime requirement in addition to the requirement to pay overtime for more than 40 hours in a workweek.

Employees who are offered qualified health benefits from their employers and earn less than $10.875 per hour, and employees earning less than $12.375 per hour who are not offered qualified health benefits must be paid overtime whenever they work more than 8 hours in a 24-hour period. Employees that are exempt from overtime under Nevada state law are not subject to these requirements.

Additional information regarding the minimum wage and daily overtime rates is available from the Office of the Labor Commissioner at: (702) 486-2650, Las Vegas; (775) 684-1890, Carson City. The Annual Bulletins containing the rates are available on-line from the Office of the Labor Commissioner's website at www.labor.nv.gov or in hard copy form by request to the Office of the Labor Commissioner.

About the Office of the Labor Commissioner

The Office of the Labor Commissioner is a division of the Department of Business and Industry. The Labor Commissioner strives to ensure that all workers are treated fairly under the law by investigating complaints of non-payment of wages, State minimum wage, overtime, and prevailing wage disputes. The office also monitors youth employment standards, including work hours and safe, non-hazardous working conditions.

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Steven D. Grierson
CLERK OF THE COURT

RPLY

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Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

CHRISTOPHER THOMAS, and CHRISTOPHER CRAIG, Individually and on behalf of others similarly situated, Plaintiffs, vs. NEVADA YELLOW CAB CORPORATION, NEVADA CHECKER CAB CORPORATION, and NEVADA STAR CAB CORPORATION, Defendants.	Case No.: A-12-661726-C Dept.: XXVIII **PLAINTIFFS' REPLY TO DEFENDANTS OPPOSITION TO PLAINTIFFS' MOTION ON AN OST TO STRIKE AFFIRMATIVE DEFENSES**

The plaintiffs, through their above attorneys, hereby submit this reply to the defendants' opposition to plaintiffs' motion on an OST for the expedited issuance of an Order striking, in full or in part, the defendants' Sixth, Tenth, Thirteenth, Fourteenth and Twenty-Seventh affirmative defenses and/or granting other appropriate relief in respect to those affirmative defenses.

This reply is made and based upon the annexed Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

ARGUMENT

I. NEITHER THE NEVADA LABOR COMMISSIONER, THE GOVERNOR, NOR THE LEGISLATURE CAN GRANT AN EMPLOYER A RIGHT TO PAY A MINIMUM WAGE LOWER THAN THE AMOUNT SPECIFIED IN THE MWA

A. The MWA imposes a *mandatory* minimum wage requirement, an employer who fails to pay the minimum wage must pay the deficiency, there is no defense to that liability.

Defendants insist that the MWA "does not mention anything remotely close to" the imposition of the strict liability discussed in the moving papers. Defendants offer no explanation of that assertion, apparently not bothering to read either the MWA or the Nevada Supreme Court's decision in this case. The MWA states, in its very first sentence, that:

> Each employer shall pay a wage to each employee of not less than the hourly rates set forth in this section.

The MWA uses mandatory "shall" language ("each employer shall pay") in imposing its minimum wage payment obligation in its very first sentence. It does not, in any of its subsequent language, excuse employers from that obligation because they relied upon the advice or rulings of the Governor or the Nevada Labor Commissioner. Nor does it authorize the Governor, the Nevada Labor Commissioner, or Nevada's Legislature, to vary that obligation in any fashion.

The Nevada Supreme Court, in this case, acknowledged the obvious by stating that the MWA "....imposes a mandatory minimum wage pertaining to all employees..." except as the MWA itself otherwise provides. 327 P.3d at 520. Nowhere does the MWA vary the "mandatory minimum wage" that must be paid to an employee when the employer proves they failed to pay such minimum wage because they relied upon the Nevada Labor Commissioner's or the Governor's advice, enforcement policy, or interpretation of the MWA's requirements. Such facts are wholly irrelevant to an employer's liability for any MWA minimum wage deficiencies.

B. The Nevada Labor Commissioner's designation as the Executive Branch official required to "publish" the MWA's minimum wage rate does not grant them the power to "approve" any minimum wage rate or excuse an employer's compliance with the MWA's specified minimum wage rate.

Defendant equates the MWA's command that "[t]he Governor or the State agency designated by the Governor shall publish...." a yearly bulletin announcing the MWA's minimum wage rate for the forthcoming year with a power to set that minimum wage rate. No such minimum wage rate setting power, or compliance power, is conferred by the MWA on either the Governor or his designee (the Nevada Labor Commissioner). Their obligation to "publish" the MWA's minimum wage rate is purely ministerial and non-discretionary. The minimum wage rates required by the MWA are contained in, and set by, the MWA itself. That minimum wage rate started in 2006 at $5.15 for employees with health insurance, $6.15 for employees without health insurance, and would increase each year based upon any increase in the federal minimum wage or the consumer price index. *See*, Nev. Const. Art. 15, § 16 Subpart "A."

C. The Nevada Labor Commissioner's broad statutory powers do not extend to excusing compliance with the MWA.

In resolving the appeal in this case, the Nevada Supreme Court relied upon the supremacy of the Nevada Constitution. That Nevada's statutes, NRS 608.250, expressly excluded taxi drivers from Nevada's statutory minimum wage scheme is irrelevant to the minimum wage liability imposed by the MWA. The Nevada Constitution, being the supreme law of the State of Nevada, controls. Similarly, that the Nevada Labor Commissioner is conferred, by statute, with the power to enforce, or not enforce, Nevada's statutory labor laws is irrelevant to the MWA. The MWA confers no such power upon the Nevada Labor Commissioner. That defendants may have faithfully followed the Nevada Labor Commissioner's enforcement policies, or even the express advisement of that office that they need not pay MWA minimum wages to the class members, is irrelevant.

II. THE PLAINTIFFS DO NOT ASSERT THAT THE DEFENDANTS ARE STRICTLY LIABLE FOR PUNITIVE DAMAGES AND DEFENDANTS CANNOT ALLEGE A "GOOD FAITH" DEFENSE TO PUNITIVE DAMAGES WITHOUT PROVIDING DISCOVERY BEARING UPON SUCH ALLEGED "GOOD FAITH"

A. Strict liability exists for MWA minimum wage payment deficiencies and the Twenty-Seventh Affirmative Defense must be stricken.

The MWA imposes a strict liability for any minimum wage deficiencies. If those deficiencies exist an employer must pay those unpaid minimum wages to the aggrieved employees. An employer's responsibility to pay those minimum wage deficiencies are not subject to any defense, in whole or in part. Whatever MWA minimum wage payment failures occurred, and that are established at trial, must be paid by the defendants. It is for that reason the Twenty-Seventh Affirmative Defense, alleging a complete defense to any liability in this case, based upon defendants' claim it "followed the law that was being enforced by the Nevada Labor Commissioner," must be stricken.

B. Defendants' state of mind and knowledge are germane to the punitive damages issue, but unless defendants provide discovery on those topics their Tenth Affirmative "good faith" punitive damages defense must be stricken in its entirety.

Plaintiffs' punitive damages claim requires a finding of some heightened level of improper behavior by the defendants. Plaintiffs do not allege such a liability can be strictly imposed simply by establishing that defendants were deficient in paying the MWA proscribed minimum wage. It is unfortunate that defendants assert, falsely, that plaintiffs are making such a claim.

As explained in the moving papers, defendants' Tenth Affirmative Defense requires proof of their state of mind, their knowledge of the MWA, of their potential obligations under the MWA, and their attempts to determine what those obligations were. The legal advice defendants received, or attempted to receive, about the MWA is highly germane. Defendants, if provided with opinions from counsel explaining that they may be liable for minimum wages under the MWA, may have difficulty

convincing a jury they acted in a "good faith" sufficient to excuse them from punitive damages. Similarly, the defendants' failure to even inquire with legal counsel about their potential liability under the MWA, if it is established that they were aware of the MWA, may also undermine their claim of "good faith."

Defendants do not dispute, as explained in the moving papers and held in the precedents discussed therein, that their good faith punitive damages defense requires discovery of the legal advice they received and attempted to receive prior to the commencement of this lawsuit. Unless defendants provide discovery on such matters, which they have refused, such defense must be stricken in its entirety.

B. Defendants' Tenth Affirmative "good faith" punitive damages defense must be stricken for the period after June 26, 2014.

Defendants do not dispute it is impossible for them to have acted in "good faith" in failing to pay minimum wages *after* the Nevada Supreme Court's decision on June 26, 2014. No such affirmative defense to punitive damages should be allowed for the period after such date, as the defendants were aware they had to pay MWA minimum wages during such period of time. The striking of their affirmative defense for this period of time does not mean defendants will be liable for any punitive damages. It only prohibits them from proving as an affirmative defense that after June 26, 2014 they were still acting in good faith in failing to pay MWA minimum wages, something impossible since as of that date they were aware that they *must* pay such minimum wages.

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CONCLUSION

WHEREFORE, plaintiffs' motion should be granted in its entirety.

Dated this 26th day of September, 2017

Leon Greenberg Professional Corporation

By: /s/ *Leon Greenberg*
LEON GREENBERG, Esq. NSB 8094
Attorney for Plaintiff
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PROOF OF SERVICE

The undersigned certifies that on September 26, 2017, she served the within:

PLAINTIFFS' REPLY TO DEFENDANTS OPPOSITION TO PLAINTIFFS' MOTION ON AN OST TO STRIKE AFFIRMATIVE DEFENSES

by court electronic service to:

TO:

Marc C. Gordon, Esq.
Tamer Botros, Esq.
General Counsel
Yellow Checker Star Transportation Co.
Legal Dept.
5225 W. Post Road
Las Vegas, NV 89118

/s/*Sydney Saucier*

SydneySaucier

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DISTRICT COURT

CLARK COUNTY, NEVADA

CHRISTOPHER THOMAS, Plaintiff, vs. NEVADA YELLOW CAB CORP, Defendant.	CASE NO. A-12-661726-C DEPT. XXVIII

BEFORE THE HONORABLE RONALD J. ISRAEL, DISTRICT COURT JUDGE

TUESDAY, OCTOBER 3, 2017

TRANSCRIPT OF PROCEEDINGS

PLAINTIFF'S MOTION ON AN OST TO STRIKE AFFIRMATIVE DEFENSES

APPEARANCES:

For the Plaintiff: LEON GREENBERG, ESQ.
ROYI MOAS, ESQ.
BRADLEY S. SCHRAGER, ESQ.

For the Defendant: TAMER B. BOTROS, ESQ.

RECORDED BY: JUDY CHAPPELL, COURT RECORDER

TUESDAY, OCTOBER 3, 2017 AT 9:18 A.M.

THE CLERK: Case Number A661726, Christopher Thomas versus Nevada Yellow Cab.

THE COURT: Good morning. Counsel, state your appearance.

MR. GREENBERG: Good morning, Your Honor. Leon Greenberg for plaintiff.

MR. SCHRAGER: Your Honor, Bradley Schrager and Royi Moas for plaintiff as well.

MR. BOTROS: Good morning. Tamer Botros on behalf of defendants, Nevada Yellow Cab Corporation, Nevada Checker Cab Corporation, Nevada Star Cab Corporation.

THE COURT: Good morning. This is plaintiff's motion to strike several of the affirmative defenses. Do you have anything to add?

MR. GREENBERG: Your Honor, I would just note that there was this question raised in the response that somehow the Labor Commissioner's duty to publish this minimum wage rate somehow is germane to the issue here, was not discussed in my reply which I noticed looking at the language of the amendment itself. The language of the amendment actually says that if an employer doesn't get notice of those published rates, it's not a defense. And that language in the amendment itself just further illustrates the point that I've raised to the Court regarding the inadequacy of this affirmative defense of reliance on enforcement policy and so forth, which is that there is no defense to a deficiency in this case. I mean, if there's a deficiency in paying the minimum wage rate, there is strict liability.

There are defenses in respect to punitive damages. That's a different

issue. That is discussed in my moving papers. And the affirmative defense there is a question of whether defendants want to affirmatively put before the Court this question of their knowledge and their good faith in diligence in ascertaining their legal duties. And that is discussed in the moving papers.

But there's nothing additional that I would add unless the Court has questions about what was raised.

THE COURT: No. I've read it all. Thank you.

Go ahead.

MR. BOTROS: Good morning, Your Honor. With respect to the minimum wage amendment, there is no strict liability that is imposed inside – in the minimum wage amendment. The *Thomas versus Nevada Yellow Cab* decision does not indicate anything about strict liability. In terms of the affirmative defenses, they were appropriately and properly and timely documented and plaintiffs were put on notice.

Also, Your Honor, we have motions that are set on calendar in about two to three weeks in terms of motions to decertify the class action which makes this particular motion quite moot because we haven't had the motion for, you know, hearing yet.

Also, Your Honor, we have depositions that are set. We are full steam ahead as Your Honor indicated last time we were here. Trial is set for February 5th, 2018 so hence we have been working very diligently scheduling all the depositions of plaintiffs as well as germane witnesses in this case, Your Honor. And, hence, we believe that it would violate defendant's due process rights for them to – without having had any of the depositions take place yet, meaning the depositions that we'll be taking, for plaintiffs to basically get a free pass where it allows them to go to trial without defendants having any defenses to these

allegations, which are very serious allegations, including punitive damages.

Also, Your Honor, in terms of the – plaintiff's Counsel mentioned something about the Labor Commissioner's office and what is its efficacy. Their position that they maintain is that when the minimum wage amendment passed that it got rid of the Office of Labor Commissioner and hence the Office of Labor Commissioner does not set the minimum wage amounts. We disagree with that, Your Honor, because if you look at the Article 15, Section 16 of the minimum wage amendment, it mentions: the Governor or the State agency designated by the Governor shall publish a bulletin by April 1st of each year announcing the adjusted rates, which shall take effect the following July 1st.

Well we attached, Your Honor, the actual bulletin of this year that the Office of Labor Commissioner had published to the public in terms of all of the minimum wage rates. So the position that they're taking is against what the evidence states, number 1. Number 2, it's against what the minimum wage amendment says. And, also, Your Honor, we will be taking the deposition of the Labor Commissioner on this particular issue because it is now being contested by plaintiff's Counsel and also we'll be taking deposition of the governor because of what they have alleged in the complaint regarding his attorney general opinions back in 2005.

Considering all that, Your Honor, we respectively request, considering that we have so many depositions that are scheduled this month alone, that you deny the motion and allow my clients their due process right of actually having a defense when they go to trial on February 5th, 2018.

And with that, I'll submit it, Your Honor. Thank you.

…

THE COURT: All right. Thank you.

Do you want to add anything?

MR. GREENBERG: Your Honor, I believe we addressed this fully and, again, there's a difference between a strict liability for a deficiency in paying the minimum wage and the issues that are raised defending against the punitive damage claims. They are different issues, Your Honor. And this is a strict liability situation in respect to the minimum wage itself. This has been settled in this case. This is what --

THE COURT: Yes.

MR. GREENBERG: -- Supreme Court decided. Your –

THE COURT: Yes.

MR. GREENBERG: -- Honor understands.

THE COURT: I agree.

All right. Plaintiff's Motion to Strike the Affirmative Defenses is granted and here's why. These affirmative defenses all relate to the amount of the minimum wage and the defenses that, for one, the Supreme Court addressed. Although I wouldn't necessarily characterize it as strict liability, it is clear that now, after *Thomas,* that the Supreme Court has said that the constitutional amendment supersedes almost everything. The fact that they addressed the issue of the Labor Commissioner regarding adjustments that would be done in the future, has no basis for a defense in this case. And certainly for the amounts that are now clear from the Supreme Court.

As far as defenses to punitive damage, those are going to remain in place. They can certainly claim advice of counsel, that the issues, and I put this on the record before, obviously they're going to say, well, even this court was – sided with the Federal District Court that said that they should be, and so as far as punitive

damages, blah, blah, blah. That's not the case here. These issues are not regarding – these defenses are not regarding the punitive damages. They brought out the fact that if you want to address the advice of counsel, you need to waive for that limited purpose, your attorney-client privilege.

At this point, they haven't filed a motion, well, they're not going to file a motion to compel because if you don't raise that issue or address that issue, certainly they're going to suggest that it's waived. But they, in their opposition, they clearly are stating that these, and I agree, these affirmative defenses are not regarding the punitive damage issue.

So that's why I'm striking them. Plaintiff to prepare the order and pass it by the defendants.

MR. BOTROS: Thank you, Your Honor.

MR. GREENBERG: Your Honor, just to make clear, in respect to the affirmative defense on the punitive damage issues, if they are willing to discuss and put on the record and allow an examination of what advice they sought about their legal requirements, then that defense doesn't need to be stricken. And I think Your Honor was stating that. So I would posture the order –

THE COURT: Right. I'm not going to strike that specific defense regarding the punitive damages on advice of counsel. Although they have, according to you, they haven't cooperated and haven't waived it for that limited purpose, and so it can't be addressed. But if you intend to waive it for that limited purpose to answer their interrogatories, et cetera, I assume that's what you're going to be claiming at the time of trial, regarding the defense on the punitive damage issue. But the punitive – the actual wage loss, loss wage amount issue is separate from the punitive damage issue.

And you guys all know they're going to be separate trials or at least a second part of the initial trial. And at the point, you'll present your evidence, you'll present your defense, but you haven't allowed them to get into that as far as providing answers to interrogatories, et cetera, regarding your defense, then it's going to be stricken also. You have to provide them the basis of your defense. That's what 16.1 requires.

MR. GREENBERG: I will make that clear in the order as Your Honor has –

THE COURT: All right. Thank you.

MR. GREENBERG: -- just explained to us. I just wanted --

THE COURT: Pass it by --

MR. GREENBERG: -- to clarify that issue, Your Honor.

THE COURT: Pass it by defense Counsel.

MR. GREENBERG: Of course, Your Honor. Thank you for your help.

MR. BOTROS: Thank you, Your Honor.

MR. SCHRAGER: Your Honor, may I be heard on one short request?

THE COURT: What's that?

MR. SCHRAGER: My office, along with Mr. Moas, has a motion pending before the Court for appointment as co-class Counsel with Mr. Greenberg for the purposes of from now through the trial.

THE COURT: Yeah, there was no opposition, correct?

MR. SCHRAGER: There was no opposition. That was my point.

MR. BOTROS: I did not oppose it, Your Honor. I know it was going to be heard in chambers. So.

THE COURT: Right. Do you have an order? Is that what you --

MR. SCHRAGER: I do, Your Honor. May I approach?

THE COURT: Okay. Approach.

Did we already sign the order?

THE LAW CLERK: No.

MR. SCHRAGER: I think it was scheduled for tonight, overnight in chambers, Your Honor.

THE COURT: Okay. All right.

So take that off. I'm signing the order.

THE CLERK: It's granted?

THE COURT: Yes.

MR. SCHRAGER: Counsel, fine?

THE COURT: It's to associate the –

MR. BOTROS: Yes.

THE COURT: And have you seen this? The order.

MR. BOTROS: I have just now, Your Honor.

THE COURT: Okay. Thank you.

MR. SCHRAGER: Thank you very much, Your Honor.

THE COURT: All right. Have a good day.

MR. GREENBERG: Thank you, Your Honor.

MR. BOTROS: Thank you, Your Honor.

[Proceeding concluded at 9:30 a.m.]

ATTEST: I hereby certify that I have truly and correctly transcribed the audio/visual recording in the above-entitled case.

Judy Chappell

Judy Chappell
Court Recorder

ORIGINAL

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IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF CLARK

CHRISTOPHER THOMAS, and CHRISTOPHER CRAIG, Individually and on behalf of others similarly situated, Plaintiffs, v. NEVADA YELLOW CAB CORPORATION, NEVADA CHECKER CAB CORPORATION, AND NEVADA STAR CAB CORPORATION, Defendants.	CASE NO.: A-12-661726-C DEPT. NO.: XXVIII **MOTION ON ORDER SHORTENING TIME FOR PROTECTIVE ORDER AND TO QUASH SUBPOENA** October 18, 2017 9:30 am

Labor Commissioner Shannon Chambers, Division of Business and Industry, and Thoran Towler, former Labor Commissioner, through their counsel, Attorney General Adam Paul Laxalt and Deputy Attorney General Melissa Flatley, hereby move this court for a protective order to stop them from being deposed in this matter, and to quash the subpoena served upon Commissioner Chambers.

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This motion is made pursuant to NRCP 26(c) and NRCP 45(c), and supported by the following points and authorities, and any arguments of counsel that the court may consider.

Dated this 3rd day of October 2017.

ADAM PAUL LAXALT
Attorney General

By: _____

MELISSA L. FLATLEY (Bar No. 12578)
Deputy Attorney General
100 North Carson Street
Carson City, Nevada 89701
(775) 684-1218 - Telephone
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Attorneys for Office of the Labor Commissioner

ORDER SHORTENING TIME

It appearing to the satisfaction of the Court, and good cause appearing therefore,

IT IS HEREBY ORDERED that the foregoing Motion on Order Shortening Time for Protective Order and to Quash Subpoena shall be heard on the 18 day of October, 2017, at 9:30 a.m./p.m., before the Discovery Commissioner.

Dated this 3 day of October, 2017.

DISCOVERY COMMISSIONER

DECLARATION OF MOVING COUNSEL PER EDCR 2.34(d), AND IN SUPPORT OF AN ORDER SHORTENING TIME

1. I am a Deputy Attorney General for the Nevada Attorney General's Office. I am licensed to practice law in all courts in the State of Nevada. I represent the Office of the Labor Commissioner in this matter, including Commissioner Shannon Chambers and former Commissioner Thoran Towler. I am competent to testify, and I make this Declaration upon personal knowledge, except in those statements identified as being made upon information and belief.

2. I bring this Motion on an Order Shortening Time because the deposition of Commissioner Chambers is currently set for October 25, 2017, and Mr. Towler's deposition will likely be scheduled at a similar time.

3. I have made a good faith effort to confer with Defendants' counsel regarding these depositions, and have been unable to resolve the matter. I spoke with Tamer Butros, counsel for Defendants, by telephone on September 26, 2017, to discuss the scope of the requested discovery and to discuss possible alternatives to deposition of Commissioner Chambers and Mr. Towler. Mr. Butros, however, found all alternatives unsatisfactory and insisted that they must depose Commissioner Chambers, Mr. Towler, and other government officials regarding their understanding and interpretations of Nevada labor law. The emails between Mr. Butros and I are attached to this Motion as Exhibit 3.

///

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

Affirmed this 3rd day of October 2017.

Melissa L. Flatley, Esq.

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTS

The Office of the Labor Commissioner is one division of the Department of Business and Industry and is responsible for enforcing the labor laws of the State of Nevada.[1] Thoran Towler was the Labor Commissioner from October 1, 2011, until September 1, 2014. Shannon Chambers, the current Labor Commissioner, assumed the role on December 29, 2014. Neither Mr. Towler nor Commissioner Chambers have relevant knowledge of the facts that give rise to this lawsuit.

On September 29, 2017, Defendants served Commissioner Chambers with a subpoena to appear at deposition.[2] Within the deposition notice, the scope of the deposition was identified as "the 2006 Minimum Wage Amendment, NRS 608.250(2)(e), NRS 607.160, NAC 608.104, Thomas v. Nevada Yellow Cab, 130 Nev. Adv. op. 52 (2014)[sic]., Business and Industry Newsletter Titled 'A Minimum Wage Guide For Nevada Employees' that was published in the winter of 2014 on page 7 and 2017 Minimum Wage Press Release."[3] Although Mr. Towler has not yet been served, he has been contacted to schedule his deposition, presumably upon the same subjects.[4]

Counsel has reviewed some documents provided in this matter, specifically the Second Amended Complaint, the Answer to the Second Amended Complaint, and Plaintiffs' Motion to Strike Affirmative Defenses, the opposition, *and the reply*. Based on these records it appears that the issues upon which Defendants seek to depose Commissioner Chambers and Mr. Towler are privileged, are

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[1] NRS 607.020; 607.160(1).

[2] Exhibit 1.

[3] Id.

[4] Exhibit 2, email from Sheila Robertson and Thoran Towler, page 1.

unlikely to lead to the discovery of admissible evidence, and would be likely to result in an unauthorized advisory opinion pursuant to NAC 607.650 and 607.660.

II. ARGUMENT

1. Commissioner Chambers and Mr. Towler are Entitled to a Protective Order Because the Information Sought is Privileged, Irrelevant, and Not Reasonably Calculated to Lead to the Discovery of Admissible Evidence.

A person from whom discovery is sought may make a motion for an order to prevent the discovery from being had.[5] Because the discovery sought here is privileged, irrelevant, and not likely to lead to the discovery of admissible evidence, a protective order is appropriate.

A. The Subpoena Seeks Privileged Information

The information sought by this subpoena is protected by the deliberative process, or executive, privilege. The deliberative process or "executive privilege" protects the deliberative and decision-making process of the executive branch of government.[6] To qualify as part of "deliberative" process, the materials requested must consist of opinions, recommendations, or advice about agency policies.[7]

The plain language of the subpoena, and the representations of Defendants' counsel, indicate that they are seeking such protected information. In an email to counsel for the Labor Commissioner, Defendants' attorney Mr. Tamer Butros said the following:

> **Purpose of Labor Commissioner's Deposition:** To seek admissible testimony under oath about the validity of NAC 608.140 as the law employers must follow determined by Ms. Chambers . . . . Also, we will question the Labor Commissioner about her understanding of the Thomas v. Nevada Yellow Cab (2014) Nevada Supreme Court decision prior and after being appointed to her position on December 30, 2014 and how the MWA interacted with NRS 608.250(2)(e) concerning the taxi driver exemptions that existed prior to the *Thomas* decision . . . .
>
> * * *

---

[5] NRCP 26(c)(1).

[6] *DR Partners v. Board of County Com'rs of Clark County*, 116 Nev. 616, 622-23, 6 P.3d 465, 469 (2000).

[7] *Id.*

> Unfortunately, any statements or announcements by the Labor Commissioner about the topics discussed above that are outside of deposition testimony under oath, will be inadmissible in court at trial and useless in defending the case.[8]

Not only is it incorrect that the official publications of the Office of the Labor Commissioner would be inadmissible at trial without testimony from the Labor Commissioner, but the notice and the explanation provided by counsel clearly identify that the information sought are pre-decisional deliberations, or possibly even attorney-client privileged information. Any testimony that Commissioner Chambers or Mr. Towler could give in the deposition which is not privileged would be irrelevant and not reasonably calculated to lead to the discovery of admissible evidence.

B. The Discovery Sought is Irrelevant

The information sought from the deponents is not relevant to the issues raised in this complaint. Information is relevant if it is reasonably calculated to lead to the discovery of admissible evidence.[9] The party resisting the discovery has the burden to establish facts justifying its objections by demonstrating that the requested discovery does not come within the scope of relevance; however, when relevancy is not apparent, the burden is on the party seeking discovery to show the relevance of the request.[10] Further, relevant, admissible evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.[11] The evidence sought through depositions of Mr. Towler and Commissioner Chambers is inadmissible because it goes to the Defendants' legal arguments and not to the probability of any particular fact.

The *Second Amended Complaint* and the *Answer to the Second Amended Complaint* raise issues

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[8] *See* email from Tamer Botros to Melissa Flatley, Ex. 3, pages 3 and 4. Similar language is included in the email to Mr. Towler, see Ex. 2, pages 5 and 6.

[9] NRCP 26.

[10] *AFSCME Council 79 v. Scott*, 277 F.R.D. 474, 477 (S.D. Fl. 2011); federal cases interpreting a rule of civil procedure that contains similar language to an analogous Nevada rule are strong persuasive authority in the interpretation of the Nevada rule, *Vanguard Piping v. Eighth Jud. Dist. Ct.*, 129 Nev. __, 309 P.3d 1017, 1020 (Adv. Op. 63, Sept. 19, 2013).

[11] NRS 48.015.

of fact about what the Defendants knew regarding their obligation to pay the Nevada minimum wage to their employees, and a legal question of whether the Defendants' reliance on that knowledge was reasonable. There are no facts alleged against the Office of the Labor Commissioner or any individual Labor Commissioner. Further, neither Mr. Towler nor Commissioner Chambers have personal knowledge of any facts which may be at issue because they were not the Labor Commissioners at the time that the Defendants argue they received advice upon which they relied.[12] To the extent that the documents identified in the deposition notice must be authenticated, Defendants have several means available other than a deposition (i.e., a public records request, certified copies of official documents, subpoena duces tecum).[13]

Any testimony from Mr. Towler or Commissioner Chambers on their interpretation of the statutes or regulations identified in the notice is irrelevant as opinion, legal conclusion, or as an unauthorized advisory opinion. The statutes, regulations, and announcements of the Office of the Labor Commissioner speak for themselves.

C. The Subpoena Seeks an Inadmissible Oral Advisory Opinion

To the extent that the deposition will seek an interpretation or hypothetical application of the statutes and regulations identified in the notice, the Defendants are asking for an advisory opinion. The Labor Commissioner has adopted clear regulations pursuant to NRS 233B.120 and NRS 607.126 regarding the procedures to request an advisory opinion.[14] First, a person may not request an advisory opinion concerning a question or matter that is an issue in a pending civil proceeding in which the person is a party.[15] Second, an official opinion may not be given orally.[16] A deposition would never be

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[12] *See Answer to Second Amended Complaint*, twenty-seventh affirmative defense; and email from Mr. Boutros to Ms. Flatley that they intend to depose Commissioner Chambers on her understanding of NRS 607.160(2).

[13] *See* NRS 52.085 (public records and reports), NRS 52.125 (Certified copies of public records), and NRS 52.135 (official publications) as a few examples of methods to authenticate public and official records.

[14] "Except as otherwise provided in subsection 3, a person may request that the [Labor] Commissioner issue an advisory opinion concerning the applicability of a statute, regulation or decision of the Commissioner." NAC 607.650(1).

[15] NAC 607.650(3).

the proper mechanism upon which to seek the interpretation or application of any statute or regulation.

2. The Subpoena to Commissioner Chambers Must be Quashed Because it Seeks Disclosure of Protected Information and is Defective in Form

A. The Subpoena Seeks Information Protected by the Deliberative Process Privilege

As set forth above, section 1A, the subpoena seeks privileged information from Commissioner Chambers. A subpoena which seeks the disclosure of privileged or other protected matter must be quashed.[17]

B. The Subpoena is Defective because it was not Accompanied by the Required Fees and Mileage

Pursuant to NRCP 45(b)(1), service is accomplished by delivering a copy of the subpoena and tendering the fees for one day's attendance and the mileage allowed by law. In this case, service of the subpoena was defective because the subpoena was not accompanied by the fees for attendance or mileage.

3. Certification of Counsel Required Per NRCP 26(c), EDCR 2.34

The undersigned counsel certifies that she has in good faith conferred with the Defendants requesting the discovery in an effort to resolve the dispute without court action, and was unable to do so. Thus, the movants have demonstrated good cause for this Court to issue an order that the discovery not be had in order to protect Commissioner Chambers and Mr. Towler from undue burden and expense.

III. CONCLUSION

Commissioner Chambers and Mr. Towler seek a protective order that they not be deposed in this case. The discovery sought is privileged, irrelevant, and not reasonably calculated to lead to the discovery of admissible evidence. Further, the subpoena that Defendants served on Commissioner Chambers must be quashed because the necessary witness and mileage fees did not accompany it, and it seeks the disclosure of privileged information. These factors demonstrate good cause for a protective

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[16] NAC 607.660.

[17] NRCP 45(c)(3)(A)(iii).

order to issue.

AFFIRMATION

Pursuant to NRS 239B.030, the undersigned affirms that this **Motion on Order Shortening Time for Protective Order and to Quash Subpoena,** filed in case A-12-661726-C, does not contain the personal information of any person.

Dated this 3rd day of October 2017.

ADAM PAUL LAXALT
Attorney General

By: _____

MELISSA L. FLATLEY (Bar No. 12578)
Deputy Attorney General
100 North Carson Street
Carson City, Nevada 89701
(775) 684-1218 - Telephone
(775) 684-1108 - Facsimile
Attorneys for Respondent
Office of the Labor Commissioner

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on this 4th day of October 2017, I electronically served a true and correct copy of the **Motion on Order Shortening Time for Protective Order and to Quash Subpoena** at the e-mail addresses listed below:

Leon Greenberg, Esq.
leongreenberg@overtimelaw.com
Dana Sniegocki, Esq.
dana@overtimelaw.com
Leon Greenburg Professional Corporation
2965 South Jones Blvd, Suite E4
Las Vegas, NV 89146

Don Springmeyer, Esq.
dspringmeyer@wrslawyers.com
Bradley Schrager, Esq.
bschrager@wrslawyers.com
Royi Moas, Esq.
rmoas@wrslawyers.com
Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP
3556 E. Russel Road, Second Floor
Las Vegas, NV 89120

Marc C. Gordon, Esq.
mgordon@ycstrans.com
Tamer B. Botros, Esq.
tbotros@ycstrans.com
Jere McBride
jmcbride@ycstrans.com
5225 W. Post Road
Las Vegas, NV 89118

/s/ Anne Goldy
An Employee of the
Office of the Attorney General

LIST OF EXHIBITS

to

Motion on Order Shortening Time for Protective Order and to Quash Subpoena

Exhibit Number	Exhibit Description	Number of Pages in each Exhibit [includes cover sheet[
1	Subpoena to appear at deposition served on Commissioner Chambers by Defendants, dated September 29, 2017,	10
2	Email from Sheila Robertson and Thoran Towler, page 1	7
3	Emails between Mr. Butros and Melissa Flatley	6

EXHIBIT 1
to
Motion on Order Shortening Time for Protective Order and to Quash Subpoena

EXHIBIT 1
to
Motion on Order Shortening Time for Protective Order and to Quash Subpoena

SUB
MARC C. GORDON, ESQ.
GENERAL COUNSEL
Nevada Bar No. 1866
TAMER B. BOTROS, ESQ.
SENIOR LITIGATION COUNSEL
Nevada Bar No. 12183
YELLOW CHECKER STAR TRANSPORTATION CO. LEGAL DEPT.
5225 W. Post Road
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tbotros@ycstrans.com
Attorneys for Defendants
NEVADA YELLOW CAB CORPORATION
NEVADA CHECKER CAB CORPORATION and
NEVADA STAR CAB CORPORATION

DISTRICT COURT

CLARK COUNTY, NEVADA

CHRISTOPHER THOMAS, and CHRISTOPHER CRAIG, Individually and on behalf of others similarly situated, Plaintiffs, vs. NEVADA YELLOW CAB CORPORATION, NEVADA CHECKER CAB CORPORATION, and NEVADA STAR CAB CORPORATION Defendants.	Case No.: A-12-661726-C Dept. No.: XXVIII **SUBPOENA- CIVIL** **X REGULAR ___DUCES TECUM**

THE STATE OF NEVADA SENDS GREETINGS TO:

LABOR COMMISSIONER SHANNON CHAMBERS
1818 College Parkway, Suite 102
Carson City, Nevada 89706

YOU ARE HEREBY COMMANDED that all and singular, business and excuses set aside, you appear and attend, before a notary public, or before some other officer authorized by law to administer oaths, at the office of Litigation Services, located at: 123 W. Nye Lane, Suite 707,

Carson City, Nevada, 89706, on the 25th day of October, 2017 at the hour of 10:00 a.m., then and there for deposition on the part of the Defendants.

Your attendance is required to give testimony pertaining to the above-referenced matter.

Please see Exhibit "A" attached hereto for information regarding the rights of the person subject to this Subpoena.

DATED this 29th day of September, 2017.

YELLOW CHECKER STAR
TRANSPORTATION CO. LEGAL DEPT.

MARC C. GORDON, ESQ.
GENERAL COUNSEL
Nevada Bar No. 001866
TAMER B. BOTROS, ESQ.
SENIOR LITIGATION COUNSEL
Nevada Bar No. 012183
5225 W. Post Road
Las Vegas, Nevada 89118
Attorneys for Defendants
NEVADA YELLOW CAB CORPORATION
NEVADA CHECKER CAB CORPORATION and
NEVADA STAR CAB CORPORATION

AFFIDAVIT OF SERVICE

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

_____, being duly sworn says: That at all times herein affiant was over 18 years of age, not a party to or interested in the proceeding in which this affidavit is made. That affiant received the Subpoena on the _____ day of _____, 2017 and served the same on the _____ day of _____, 2017 by delivering a copy to the witness at (state address)_____
_____.

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

EXECUTED this _____ day of _____, 2017.

_____
Signature of Affiant

SUBSCRIBED AND SWORN to before me this
_____ day of _____, 2017.

_____
NOTARY PUBLIC in and for
said County and State.

ITEMS TO BE PRODUCED

_____

_____

_____

_____

_____

EXHIBIT "A"

NEVADA RULES OF CIVIL PROCEDURE

Rule 45

(c) Protection of Persons Subject to Subpoena.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

ELECTRONICALLY SERVED
9/29/2017 9:59 AM

NOTC
MARC C. GORDON, ESQ.
GENERAL COUNSEL
Nevada Bar No. 1866
TAMER B. BOTROS, ESQ.
SENIOR LITIGATION COUNSEL
Nevada Bar No. 12183
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NEVADA YELLOW CAB CORPORATION
NEVADA CHECKER CAB CORPORATION and
NEVADA STAR CAB CORPORATION

DISTRICT COURT

CLARK COUNTY, NEVADA

CHRISTOPHER THOMAS, and CHRISTOPHER CRAIG, Individually and on behalf of others similarly situated, Plaintiffs, vs. NEVADA YELLOW CAB CORPORATION, NEVADA CHECKER CAB CORPORATION, and NEVADA STAR CAB CORPORATION Defendants.	Case No.: A-12-661726-C Dept. No.: XXVIII Date: October 25, 2017 Time: 10:00 a.m.

NOTICE OF TAKING DEPOSITION OF NEVADA LABOR COMMISSIONER, SHANNON CHAMBERS

TO: SHANNON CHAMBERS, Nevada Labor Commissioner;

TO: CHRISTOPHER THOMAS, Plaintiff;

TO: CHRISTOPHER CRAIG, Plaintiff; and

TO: LEON GREENBERG, ESQ., Plaintiffs' counsel

Case Number: A-12-661726-C

TO: DANA SNIEGOCKI, ESQ., Plaintiffs' counsel

TO: DON SPRINGMEYER, ESQ., Plaintiffs' co-counsel (Pending Court Order)

TO: BRADLEY SCHRAGER, ESQ., Plaintiffs' co-counsel (Pending Court Order)

TO: ROYI MOAS, ESQ., Plaintiffs' co-counsel (Pending Court Order)

PLEASE TAKE NOTICE that on **October 25, 2017 at 10:00 a.m.**, the deposition of Nevada Labor Commissioner, SHANNON CHAMBERS, will be conducted at the offices of Litigation Services, located at: 123 W. Nye Lane, Suite 707, Carson City, Nevada, 897061. Defendants, NEVADA YELLOW CAB CORPORATION, NEVADA CHECKER CAB CORPORATION AND NEVADA STAR CAB CORPORATION, will take the deposition of Nevada Labor Commissioner, SHANNON CHAMBERS, via videography, upon oral examination, pursuant to NRCP Rules 26 and 30, before a notary public or some other officer authorized by law to administer oaths regarding the 2006 Minimum Wage Amendment, NRS 608.250(2)(e), NRS 607.160, NAC 608.104, Thomas v. Nevada Yellow Cab, 130 Nev. Adv. op.52 (2014), Business and Industry Newsletter Titled "A Minimum Wage Guide For Nevada Employees" that was published in the winter of 2014 on page 7 and 2017 Minimum Wage Press Release.

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Oral examination will continue from day to day until completed. You are invited to attend and cross examine.

DATED this 29th day of September, 2017.

YELLOW CHECKER STAR
TRANSPORTATION CO. LEGAL DEPT.

/s/ Tamer B. Botros
MARC C. GORDON, ESQ.
GENERAL COUNSEL
Nevada Bar No. 001866
TAMER B. BOTROS, ESQ.
SENIOR LITIGATION COUNSEL
Nevada Bar No. 012183
5225 W. Post Road
Las Vegas, Nevada 89118
Attorneys for Defendants
NEVADA YELLOW CAB CORPORATION
NEVADA CHECKER CAB CORPORATION and
NEVADA STAR CAB CORPORATION

CERTIFICATE OF ELECTRONIC SERVICE

Pursuant to Rule 9 of Nevada Electronic Filing and Conversion Rules, I hereby certify that on the 29th day of September, 2017, service of the foregoing **NOTICE OF TAKING DEPOSITION OF NEVADA LABOR COMMISSIONER, SHANNON CHAMBERS** was made this date by electronic service as follows:

Shannon Chambers
NEVADA OFFICE OF THE LABOR COMMISSIONER
1818 College Parkway, Suite 102
Carson City, Nevada 89706

Leon Greenberg, Esq.
Dana Sniegocki, Esq.
Leon Greenberg Professional Corporation
2965 South Jones Blvd, Suite E4
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Attorneys for Plaintiffs
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CHRISTOPHER CRAIG

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Bradley Schrager, Esq.
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Attorneys for Plaintiffs (Pending Court Order)
CHRISTOPHER THOMAS
CHRISTOPHER CRAIG

/s/ Tony Fera
For Yellow Checker Star
Transportation Co. Legal Dept.

EXHIBIT 2
to
Motion on Order Shortening Time for Protective Order and to Quash Subpoena

EXHIBIT 2
to
Motion on Order Shortening Time for Protective Order and to Quash Subpoena

Melissa L. Flatley

From: Thoran Towler <towler@nevadaemployers.org>
Sent: Friday, September 29, 2017 10:52 AM
To: Melissa L. Flatley
Subject: FW: Deposition
Attachments: 2nd Amended Complaint.pdf

Thoran Towler
Chief Executive Officer
Nevada Association of Employers
(775) 329.4241 Phone
8725 Technology Way, Ste. A
Reno, NV 89521

NAE
NEVADA ASSOCIATION of EMPLOYERS
www.nevadaemployers.org

From: Sheila Robertson [mailto:Sheilar@ycstrans.com]
Sent: Thursday, September 28, 2017 3:11 PM
To: Thoran Towler <towler@nevadaemployers.org>
Subject: RE: Deposition

Hi Mr. Towler:

We have the following days available:

Oct 10 & 11
Oct 17
Oct 19
Oct 23
Oct 27
Nov 7 & 8
Nov 14 – 16
Nov 21
Nov 27 & 28

Please give me at least two choices for 10:00 am.

Thanks.

Sheila Robertson, Sr. Paralegal to
Marc C. Gordon, General Counsel,
Compliance Officer & Executive Committee Member
Tamer B. Botros, Senior Litigation Counsel
and
Executive Secretary to the Board of Directors
Yellow-Checker-Star Transportation

5225 W. Post Road
Las Vegas, NV 89118
Off: (702) 873-8012 x 223
Fax: (702) 365-7864
legal@ycstrans.com
sheilar@ycstrans.com

The ultimate measure of a man is not where he stands in moments of comfort and convenience, but where he stands at times of challenge and controversy.

Martin Luther King, Jr.

From: Sheila Robertson
Sent: Wednesday, September 27, 2017 12:37 PM
To: 'Thoran Towler' <towler@nevadaemployers.org>
Subject: RE: Deposition

Thanks for getting back to me so quickly, unfortunately this does not change anything. Your time as Commissioner in 2014 is relevant and regarding the Minimum Wage Guide "we may ask you questions on your *understanding* of the guide". We do not anticipate the depo taking more than one hour, it that long.

Please let me know if you are available on October 25th at 11:00 am or later that day, if not please give me dates and times of availability.

Have a great day!

Sheila Robertson, Sr. Paralegal to
Marc C. Gordon, General Counsel,
Compliance Officer & Executive Committee Member
Tamer B. Botros, Senior Litigation Counsel
and
Executive Secretary to the Board of Directors
Yellow-Checker-Star Transportation
5225 W. Post Road
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Fax: (702) 365-7864
legal@ycstrans.com
sheilar@ycstrans.com

The ultimate measure of a man is not where he stands in moments of comfort and convenience, but where he stands at times of challenge and controversy.

Martin Luther King, Jr.

From: Thoran Towler [mailto:towler@nevadaemployers.org]
Sent: Wednesday, September 27, 2017 11:58 AM
To: Sheila Robertson <Sheilar@ycstrans.com>
Subject: RE: Deposition

Hi Sheila.

Based on the pleadings I think there may be a misunderstanding. You assert I was the labor commissioner in 2014. That is partially true. I was labor commissioner until September 1, 2014. It is my understanding that Soonhee Bailey was the acting labor commissioner from September, 2014 through December, 2014. I've attached her application for a judicial appointment to show that fact.
http://nvcourts.gov/uploadedFiles/courtsnvgov/Content/AOC/Committees_and_Commissions/Judicial_Selection/Documents/Applications/PUBLIC%20Soonhee%20Bailey%20Application.pdf

It seems you believe I drafted the "Minimum Wage Guide for Nevada Employers". I think that would've been Ms. Bailey. I don't see her on your deposition list.

Not sure if this information changes anything.

Thoran Towler
Chief Executive Officer
Nevada Association of Employers
(775) 329.4241 Phone
8725 Technology Way, Ste. A
Reno, NV 89521

NAE
NEVADA ASSOCIATION of EMPLOYERS

From: Sheila Robertson [mailto:Sheilar@ycstrans.com]
Sent: Wednesday, September 27, 2017 10:16 AM
To: Thoran Towler <towler@nevadaemployers.org>
Subject: Deposition

Dear Mr. Towler:

We need to take your deposition in this matter and as a courtesy we are not asking you to travel to Las Vegas instead we will come to you. We are asking for days and times of availability and if we can't conduct the depo in your office we will find a comfortable convenient meeting facility. We will be in Carson on October 25th so if 11:00 am is doable please let me know otherwise please send your days and times.

Our Senior Litigation Counsel, Tamer Botros and General Counsel, Marc Gordon are representing and defending Nevada Yellow Cab Corporation, Nevada Checker Cab Corporation and Nevada Star Cab Corporation ("YCS") in the class action matter, Thomas and Craig vs. Nevada Yellow Cab, Case No. A-12-661726-C in the Eighth Judicial District Court in Clark County, Nevada. It is the largest class action matter dealing with employment law in the history of Nevada with punitive damages being alleged.

It is alleged by Plaintiffs that YCS violated the 2006 Minimum Wage Amendment ("MWA") by not ensuring that the drivers' health insurance premium does not exceed 10 percent **per pay period**. YCS is following NAC 608.104 which permits that the specific calculation for the 10% health insurance premium is calculated based on a yearly basis.

> **NAC 608.104 Minimum wage: Determination of whether employee share of premium of qualified health insurance exceeds 10 percent of gross taxable income.** (Nev. Const. Art. 15, § 16; NRS 607.160, 608.250)
>
> 1. To determine whether the share of the cost of the premium of the qualified health insurance paid by the employee does not exceed 10 percent of the gross taxable income of the employee attributable to the employer, an employer may:
>
> (a) For an employee for whom the employer has issued a Form W-2 **for the immediately preceding year**, divide the gross taxable income of the employee paid by the employer into the projected share of the premiums to be paid by the employee for the health insurance plan for the current year;
>
> (b) For an employee for whom the employer has not issued a Form W-2, but for whom the employer has payroll information for the four previous quarters, divide the combined total of gross taxable income normally calculated from the payroll information from the four previous quarters into the projected share of the premiums to be paid by the employee for qualified health insurance for the current year;
>
> (c) For an employee for whom there is less than 1 aggregate year of payroll information:
>
> (1) Determine the combined total gross taxable income normally calculated from the total payroll information available for the employee and divide that number by the number of weeks the total payroll information represents;
>
> (2) **Multiply the amount determined pursuant to subparagraph (1) by 52**; and
>
> (3) Divide the amount calculated pursuant to subparagraph (2) into the projected share of the premiums to be paid by the employee for qualified health insurance for the current year; and
>
> (d) For a new employee, promoted employee or an employee who turns 18 years of age during employment, use the payroll information for the first two normal payroll periods completed by the employee and calculate the gross taxable income using the formula set forth in paragraph (c).
>
> 2. As used in this section, "gross taxable income of the employee attributable to the employer" means the amount specified on the Form W-2 issued by the employer to the employee and includes, without limitation, tips, bonuses or other compensation as required for purposes of federal individual income tax.
>
> (Added to NAC by Labor Comm'r by R055-07, eff. 10-31-2007)

It is further alleged that the MWA in effect eliminated the Labor Commissioner's powers to set and enforce minimum wage laws in the State of Nevada. I have attached the 2017 Minimum Wage Press Release along with a recent filing of Plaintiffs' Motion and our Opposition. We obviously disagree with Plaintiffs' position and will need your testimony so we can use it at trial in front of the jury.

Purpose of Labor Commissioner's Deposition: To seek admissible testimony under oath about the validity of NAC 608.104 as the law employers must follow. Since YCS is defending allegations of punitive damages for following NAC 608.104, it is imperative that we take the depositions of the Labor Commissioners. We may ask about your understanding of the Thomas v. Nevada Yellow Cab (2014) Nevada Supreme Court decision and how the MWA interacted with NRS 608.250(2)(e) concerning the taxi driver exemptions that existed prior to the *Thomas* decision. We may also ask questions on your understanding of the attached Business and Industry Newsletter titled "A Minimum Wage Guide For Nevada Employers" that was published in the Winter of 2014 on page 7 where it states:

> While the constitutional amendment **did not directly conflict with the exemptions outlined in NRS 608.250**, its passage created some **uncertainty**. It was this **uncertainty** that the Nevada Supreme Court addressed in *Thomas v. Nevada Yellow Cab*, 130 Nev. Adv. Op. 52 (2014).

Furthermore, we may ask about your duties, responsibilities and obligations since it is the position of Plaintiffs that the Labor Commissioner in effect has no function when it comes to enforcing the labor laws or setting the minimum wage in the State of Nevada. Again, we disagree with Plaintiffs. In particular, we will questioning the Labor Commissioner about NRS 607.160.

Under NRS 607.160

1. The Labor Commissioner:

(a) Shall enforce all labor laws of the State of Nevada:
(1) Without regard to whether an employee or worker is lawfully or unlawfully employed; and
(2) The enforcement of which is not specifically and exclusively vested in any other officer, board or commission.
(b) May adopt regulations to carry out the provisions of paragraph (a).

2. **If the Labor Commissioner has reason to believe that a person is violating or has violated a labor law or regulation, the Labor Commissioner may take any appropriate action against the person to enforce the labor law or regulation whether or not a claim or complaint has been made to the Labor Commissioner concerning the violation.**

3. Before the Labor Commissioner may enforce an administrative penalty against a person who violates a labor law or regulation, the Labor Commissioner must provide the person with notice and an opportunity for a hearing as set forth in NRS 607.207.

4. In determining the amount of any administrative penalty to be imposed against a person who violates a labor law or regulation, the Labor Commissioner shall consider the person's previous record of compliance with the labor laws and regulations and the severity of the violation.

5. All money collected by the Labor Commissioner as an administrative penalty must be deposited in the State General Fund.

6. The actions and remedies authorized by the labor laws are cumulative. If a person violates a labor law or regulation, the Labor Commissioner may seek a civil remedy, impose an administrative penalty or take other administrative action against the person whether or not the person is prosecuted, convicted or punished for the violation in a criminal proceeding. The imposition of a civil remedy, an administrative penalty or other administrative action against the person does not operate as a defense in any criminal proceeding brought against the person.

7. If, after due inquiry, the Labor Commissioner believes that a person who is financially unable to employ counsel has a valid and enforceable claim for wages, commissions or other demands, the Labor Commissioner may present the facts to the Attorney General. The Attorney General shall prosecute the claim if the Attorney General determines that the claim is valid and enforceable.

[Part 4:203:1915; A 1919, 67; 1921, 218; 1931, 55; 1935, 224; 1937, 419; 1941, 87; 1931 NCL § 2751] — (NRS A 1967, 621; 1971, 1189; 1997, 195; 2001, 562; 2003, 793, 1517)

Since this matter is set for a jury trial on **February 5, 2018**, we need admissible testimony in preparation for trial. Unfortunately, any statements or announcements by the Labor Commissioner about the topics discussed above that are outside of deposition testimony under oath, will be inadmissible in court at trial and useless in defending the case.

If you need any additional information and/or documents I will be happy to send them promptly to your attention.

Thank you,

Sheila Robertson, Sr. Paralegal to
Marc C. Gordon, General Counsel,
Compliance Officer & Executive Committee Member
Tamer B. Botros, Senior Litigation Counsel
and
Executive Secretary to the Board of Directors
Yellow-Checker-Star Transportation
5225 W. Post Road
Las Vegas, NV 89118
Off: (702) 873-8012 x 223
Fax: (702) 365-7864
legal@ycstrans.com
sheilar@ycstrans.com

The ultimate measure of a man is not where he stands in moments of comfort and convenience, but where he stands at times of challenge and controversy.

Martin Luther King, Jr.

EXHIBIT 3
to
Motion on Order Shortening Time for Protective Order and to Quash Subpoena

EXHIBIT 3
to
Motion on Order Shortening Time for Protective Order and to Quash Subpoena

Melissa L. Flatley

From: Tamer B. Botros <TBotros@ycstrans.com>
Sent: Wednesday, September 27, 2017 4:00 PM
To: Melissa L. Flatley
Cc: Marc C. Gordon; Jere McBride; Sheila Robertson; Tamer B. Botros
Subject: RE: Deposition of Labor Commissioner Shannon Chambers
Attachments: Second Amended Complaint.pdf; FW_ Minimum Wage question re 10% threshold for qualified health plan premium_Redacted.pdf

Ms. Flatley:

Our office contacted Ms. Chambers and she gave October 25, 2017 at 10:00 am as her availability for the deposition. Please follow-up and let me know as soon as possible of Ms. Chambers' availability as we are currently finalizing the subpoena and deposition notice for Ms. Chambers. Also, we intend on taking the deposition at Litigation Services facility in Carson City to have sufficient space for the deposition and for convenience purposes for your office and Ms. Chambers.

Yes, I will keep you posted on the outcome of any pertinent hearings in this matter. In terms of the complaint, attached is the Second Amended Complaint along with the email from Ms. Chambers to our Senior Litigation Paralegal, Jere McBride regarding the 10% issue contained in NAC 608.104.

Thank you,

Tamer B. Botros, Esq.
Senior Litigation Counsel
Yellow Checker Star
Transportation Co. Legal Dept.
5225 W. Post Road
Las Vegas, Nevada 89118
Phone: (702) 873-6531
Fax: (702) 251-3460
Email: tbotros@ycstrans.com

From: Melissa L. Flatley [mailto:MFlatley@ag.nv.gov]
Sent: Tuesday, September 26, 2017 3:08 PM

To: Tamer B. Botros <TBotros@ycstr...s.com>
Subject: RE: Deposition of Labor Commissioner Shannon Chambers

Mr. Botros-

Could you please send the operative version of the complaint and the email that you referenced that explained the calculation of the premium cap?

Also, we did not discuss the date and time that you intend to take the deposition of Commissioner Chambers so I don't know if she is available or if her office has a conference room of sufficient size to host a deposition. I'll follow-up on that with the Office of the Labor Commissioner.

Please correct me if I'm wrong, but if I read the Plaintiffs' Motion correctly, most of what you seek to depose Commissioner Chambers about would be moot if the court grants the motion on October 3? If you could please provide me the outcome of that hearing next week, I would appreciate it.

I will be out of the office Oct 3-6, but will follow up with you on my return.

Melissa Flatley, Deputy Attorney General
Phone: (775) 684-1218

From: Tamer B. Botros [mailto:TBotros@ycstrans.com]
Sent: Tuesday, September 26, 2017 2:04 PM
To: Melissa L. Flatley <MFlatley@ag.nv.gov>
Cc: Marc C. Gordon <MGordon@ycstrans.com>; Jere McBride <JMcBride@ycstrans.com>; Sheila Robertson <Sheilar@ycstrans.com>; Tamer B. Botros <TBotros@ycstrans.com>
Subject: Deposition of Labor Commissioner Shannon Chambers

Dear Ms. Flatley:

It was a great pleasure speaking with you earlier today on the telephone regarding taking the deposition of Labor Commissioner, Shannon Chambers on October 25, 2017 at 10:00 am at her office in Carson City. As discussed, myself and the General Counsel, Marc C. Gordon are representing and defending Nevada Yellow Cab Corporation, Nevada Checker Cab Corporation and Nevada Star Cab Corporation ("YCS") in the class action matter, Thomas and Craig vs. Nevada Yellow Cab, Case No. A-12-661726-C in the Eighth Judicial District Court in Clark County, Nevada. It is the largest class action matter dealing with employment law in the history of Nevada with punitive damages being alleged.

It is alleged by Plaintiffs that YCS violated the 2006 Minimum Wage Amendment ("MWA") by not ensuring that the drivers' health insurance premium does not exceed 10 percent per pay period. YCS is following NAC 608.104 which permits that the specific calculation for the 10% health insurance premium is calculated based on a yearly basis.

> **NAC 608.104 Minimum wage: Determination of whether employee share of premium of qualified health insurance exceeds 10 percent of gross taxable income.** (Nev. Const. Art. 15, § 16; NRS 607.160, 608.250)
> 1. To determine whether the share of the cost of the premium of the qualified health insurance paid by the employee does not exceed 10 percent of the gross taxable income of the employee attributable to the employer, an employer may:
> (a) For an employee for whom the employer has issued a Form W-2 for the immediately preceding year, divide the gross taxable income of the employee paid by the employer into the projected share of the premiums to be paid by the employee for the health insurance plan for the current year;
> (b) For an employee for whom the employer has not issued a Form W-2, but for whom the employer has payroll information for the four previous quarters, divide the combined total of gross taxable income

normally calculated ... in the payroll information from the four p... ...ous quarters into the projected share of the premiums to be paid by the employee for qualified health insurance for the current year;

(c) For an employee for whom there is less than 1 aggregate year of payroll information:

(1) Determine the combined total gross taxable income normally calculated from the total payroll information available for the employee and divide that number by the number of weeks the total payroll information represents;

(2) **Multiply the amount determined pursuant to subparagraph (1) by 52**; and

(3) Divide the amount calculated pursuant to subparagraph (2) into the projected share of the premiums to be paid by the employee for qualified health insurance for the current year; and

(d) For a new employee, promoted employee or an employee who turns 18 years of age during employment, use the payroll information for the first two normal payroll periods completed by the employee and calculate the gross taxable income using the formula set forth in paragraph (c).

2. As used in this section, "gross taxable income of the employee attributable to the employer" means the amount specified on the Form W-2 issued by the employer to the employee and includes, without limitation, tips, bonuses or other compensation as required for purposes of federal individual income tax. (Added to NAC by Labor Comm'r by R055-07, eff. 10-31-2007)

It is further alleged that the MWA in effect eliminated the Labor Commissioner's powers to set and enforce minimum wage laws in the State of Nevada. I have attached the 2017 Minimum Wage Press Release along with a recent filing of Plaintiffs' Motion and our Opposition. We obviously disagree with Plaintiffs' position and we will need Ms. Chambers' testimony so we can use it at trial in front of the jury.

Purpose of Labor Commissioner's Deposition: To seek admissible testimony under oath about the validity of NAC 608.104 as the law employers must follow determined by Ms. Chambers. Since YCS is defending allegations of punitive damages for following NAC 608.104, it is imperative that we take the deposition of the Labor Commissioner. Also, we will question the Labor Commissioner about her understanding of the Thomas v. Nevada Yellow Cab (2014) Nevada Supreme Court decision prior and after being appointed to her position on December 30, 2014 and how the MWA interacted with NRS 608.250(2)(e) concerning the taxi driver exemptions that existed prior to the *Thomas* decision. Specifically, we will question her on her understanding of the attached Business and Industry Newsletter titled "A Minimum Wage Guide For Nevada Employers" that was published in the Winter of 2014 on page 7 where it states:

> While the constitutional amendment **did not directly conflict with the exemptions outlined in NRS 608.250**, its passage created some **uncertainty**. It was this **uncertainty** that the Nevada Supreme Court addressed in *Thomas v. Nevada Yellow Cab*, 130 Nev. Adv. Op. 52 (2014).

Furthermore, we will be questioning the Labor Commissioner about her duties, responsibilities and obligations since it is the position of Plaintiffs that the Labor Commissioner in effect has no function when it comes to enforcing the labor laws or setting the minimum wage in the State of Nevada. Again, we disagree with Plaintiffs. In particular, we will questioning the Labor Commissioner about NRS 607.160.

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[Part 4:203:1915; A 1919, 67; 1921, 218; 1931, 55; 1935, 224; 1937, 419; 1941, 87; 1931 NCL § 2751] — (NRS A 1967, 621; 1971, 1189; 1997, 195; 2001, 562; 2003, 793, 1517)

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Please let me know if you need any additional information and/or documents and I will be happy to send them promptly to your attention. My phone number is (702) 873-6531.

Thank you,

Tamer B. Botros, Esq.
Senior Litigation Counsel
Yellow Checker Star
Transportation Co. Legal Dept.
5225 W. Post Road
Las Vegas, Nevada 89118
Phone: (702) 873-6531
Fax: (702) 251-3460
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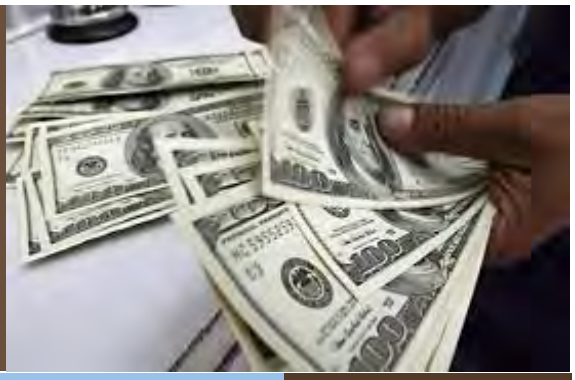
Yellow Checker Star
TRANSPORTATION
www.YCStrans.com

WINTER 2014

THE BUSINESS ADVOCATE

A publication of the Nevada Department of Business and Industry

A Minimum Wage Guide for Nevada Employers



Increasing the minimum wage has been a hot topic since President Obama proposed raising the federal minimum wage from $7.25 to $10.10 per hour in his 2014 State of the Union Address. While the President and his supporters claim that increasing the minimum wage would ultimately benefit the economy, with no associated job loss, opponents of the plan refute those claims and declare an increase would harm small business and result in the loss of hundreds of thousands of jobs.

The debate is likely to move closer to home this spring if a bill, currently being deliberated, is indeed introduced for consideration during the upcoming state legislative session. While those discussions and debates will be taking place in Carson City, and around dinner tables and places of business throughout the state, the Office of the Labor Commissioner continues to implement existing statutes and regulations governing Nevada's minimum wage and overtime.

A recent Supreme Court ruling issued earlier this year clarified who is entitled to receive minimum wage. In order to help employers avoid the pitfalls and potential penalties associated with noncompliance, we've outlined a few of the basics concerning minimum wage in Nevada. For specific issues or questions not covered, we recommend contacting the Labor Commissioner's Office, referring directly to the language of applicable statutes and regulations or consulting with an attorney familiar with wage and hour laws.

Unique Two-Tiered System

In 2006, Nevada voters gave final approval for an amendment to the Nevada Constitution which permitted employers to pay one dollar less than the minimum wage indexed for inflation if they provided qualified health insurance to their employees. The result was a unique two-tiered minimum wage system.

Each year, at the direction of the Governor, Nevada's Labor Commissioner conducts an annual review of the minimum wage to determine if an increase is required. The wage is adjusted by the amount of increases in the federal minimum wage, or, if greater, by the cumulative increase in the cost of living. A bulletin is published each year on April 1 outlining any changes to the minimum wage to be in effect the following July.

The current minimum wage in Nevada, which was put into effect July 2010, is $7.25 per hour if an employer offers qualified health benefits, $8.25 per hour if they do not.

Minimum Wage Exclusions

In addition to a two-tiered system, the Constitutional amendment provided that individuals under the age of 18, those employed by a nonprofit for after-school or summer employment and those employed as trainees for a period of not more than 90 days were not entitled to receive minimum wage.

Prior to the amendment, Nevada law provided for other exemptions to the payment of minimum wage, specifically, NRS 608.250 exempted

Continued, page 7

ACCESS TO CAPITAL CORNER:

Nevada New Markets Tax Credit Program

What is the Nevada New Market Tax Credit (NMTC) program and how can it help businesses with their capital needs?

In June 2013, the Nevada Legislature passed the Nevada New Markets Jobs Act, which created the Nevada NMTC program. This alternative financing complement to conventional capital sources can fill a gap in a capital stack for businesses in low-income areas. The program is used to assist financing companies with projects that have a total financing need between $3 - $10 million. It provides below market interest loans that are approximately 15% - 20% of the allocation amount. For example, an $8 million project that used an $8 million NMTC allocation can anticipate approximately $2 million in subsidized financing.

How does it work?

The Nevada NMTC program is patterned after the Federal NMTC program. A domestic corporation or partnership acting as an intermediary for loan provisions and investments applies to be a federally certified Community Development Entities (CDEs). Several CDEs applied and were allocated a total of $200 million in Nevada NMTC authority in November 2013. Those CDEs then sold their allocation of tax credits to insurance companies to raise funds that will be loaned and invested. The insurance companies receive a 58% tax credit on their insurance premium taxes over the next seven years.

The CDEs must have a primary mission of investing in low-income communities and persons. Typically, the CDEs use the money they raised from the sale of their tax credit allocation to buy down the interest rate on a loan to a business or leverage a loan from a bank.

For example, on a leveraged loan, a business needs $8 million to expand their business. The bank will loan them $6 million and the CDE adds $2 million in NMTC equity. This NMTC equity is at below-market interest rates and can be forgiven at the end of seven years.

To qualify for a Nevada NMTC deal, a business must be located in a Federal Low-Income Census tract and meet Federal NMTC requirements. The business also needs to meet Small Business Association size standards.

As of the end of October, one company has received an $8 million NMTC investment. LV.Net is a Las Vegas-based, multi-service, Internet Service Provider (ISP) of High Speed Internet and Data Centers. The company supplies fiber, licensed microwave, wireless and Wi-Fi to its commercial and residential customer base. With the help of Nevada NMTC, LV.Net will be doubling their number of employees and expect significant growth in their revenue.

In a partnership with the City of Las Vegas, LV.Net provides free Wi-Fi Internet in the downtown redevelopment area. With the NMTC funding, LV.Net is installing fiber throughout that area, upgrading the Wi-Fi services. This will provide LV.Net High Speed Internet over a broader area of the downtown corridor. The company is also expanding its Data Centers to accommodate more colocation services for small to midsize businesses.

"This investment facilitates the acquisition of a building, new equipment and important infrastructure to expand our operations, create jobs and generate revenue for our technology solutions business," said Marty Mizrahi, CEO of LV.Net.

Can my business still apply?

It is not too late to apply for a Nevada New Markets Tax Credit (NMTC) deal. The CDEs must have nearly all of their allocation (85%) invested by December 14, 2014 but there may still be some Nevada NMTC money available after that. The Federal NMTC program has a later deadline and may also have funds available. To learn more, visit http://business.nv.gov.

ACCESS TO CAPITAL DIRECTORY

The **Access to Capital Directory** is a comprehensive listing of products and resources available to Nevada businesses.

View online at http://business.nv.gov/Business/Access_to_Capital/Access_to_Capital/

STATEWIDE CALENDAR OF EVENTS

For event details, registration instructions and cost, please visit http://business.nv.gov/Business/Event_Calendar

LAS VEGAS

DEC 3,10,17 — **1 Million Cups**
9:30am
Work in Progress
317 S. 6th Street, Las Vegas

DEC 4 — **Intro. To Gov't Contracts Workshop**
9:00 am
NMI/WBC
550 E. Charleston Blvd, Ste. E, Las Vegas

DEC 9 — **Community Outreach/ Info. Meeting**
9:00 am
Office of the Labor Commissioner
555 E. Washington Ave., Ste. 4401, LV

DEC 9 — **Business Health Retirement Workshop**
12:00 pm
NMI/WBC
550 E. Charleston Blvd, Ste. E, Las Vegas

DEC 10 — **Grow Your Business w/ Social Media**
8:00 am
Microsoft Store– Fashion Show Mall
3200 S. Las Vegas Blvd., Suite 1045, LV

DEC 11 — **Start a Business for Under $2,500**
2:00 pm
NMI/WBC
550 E. Charleston Blvd, Ste. E, Las Vegas

DEC 16 — **Physical Health Workshop**
10:00 am
NMI/WBC
550 E. Charleston Blvd, Ste. E, Las Vegas

DEC 17 — **Women/Minority Owned Certification**
9:00 am
Urban Chamber of Commerce
1951 Stella Lake Street, Las Vegas

DEC 18 — **Lunch and Learn Marketing Series**
12:00 pm
Urban Chamber of Commerce
1951 Stella Lake Street, Las Vegas

JAN 7* — **1 Million Cups**
9:30 am
Work in Progress
317 S. 6th Street, Las Vegas

FEB 4* — **1 Million Cups**
9:30 am
Work in Progress
317 S. 6th Street, Las Vegas

MAR 4* — **1 Million Cups**
9:30 am
Work in Progress
317 S. 6th Street, Las Vegas

* 1 Million Cups in Las Vegas and Reno meet at the same time, same location every Wednesday unless a cancellation has been announced.

RENO

DEC 3,10,17 — **1 Million Cups**
9:00 am
Swill Coffee and Wine
3366 Lakeside Court, Reno

DEC 17 — **NCET Drop-In/ Co-Working, Networking**
2:00 pm
Swill Coffee and Wine
3366 Lakeside Court, Reno

JAN 7* — **1 Million Cups**
9:00 am
Swill Coffee and Wine
3366 Lakeside Court, Reno

FEB 4* — **1 Million Cups**
9:00 am
Swill Coffee and Wine
3366 Lakeside Court, Reno

FEB 28 — **Northwest Women's Money Conference**
TBD

MAR 4* — **1 Million Cups**
9:00 am
Swill Coffee and Wine
3366 Lakeside Court, Reno

WEBINARS

DEC 4 — **Future of State Sales Tax Revenue**
11:00 am– 12:00 pm

DEC 17 — **Writing a Winning RFP Response**
2:00– 3:00 pm

JAN 14 — **Government Contracting 101: How To Do Business with the Government**
2:00- 3:00 pm

JAN 29 — **Opportunities and Resources for Veteran-Owned Businesses in Nevada**
2:00- 3:30 pm

FEB 11 — **SAM– Registration and Updates for Federal Government Contracting**
2:00– 3:00 pm

MAR 11 — **Nevada State and Local Government Vendor Registration Databases**
2:00– 3:00 pm

News You Can Use

Free Small Business & Nonprofit Legal Clinic to Open

The William S. Boyd School of Law at UNLV is offering an exciting new resource for small businesses and nonprofit organizations in Nevada. Under the close supervision of licensed attorneys, law students at the Small Business and Nonprofit Legal Clinic assist in forming businesses or nonprofit organizations; reviewing and negotiating contracts; assisting nonprofit organizations with tax-exempt applications and maintenance of tax-exempt status; working with federal, state, and local government agencies; and providing advice concerning intellectual property issues.

The Clinic does not charge for legal services, but clients are responsible for any administrative fees associated with the representation such as state filing or licensing fees. As an educational program, Clinic faculty take advantage of every opportunity to teach the students. The practical result of this is that the Clinic is unable to accept projects or client matters that must be resolved within a short time frame. Further, Clinic services are limited to transactional matters. As such, the Clinic does not provide assistance in initiating or defending litigation.

The Clinic is currently accepting applications for clients. If you are interested, please submit a Request for Legal Services Form (http://www.law.unlv.edu/clinic/sbncform). Questions? Contact Professor Eric Franklin at eric.franklin@unlv.edu.

New Mircrolender Opens Doors to Financing Opportunities in Nevada

CPLC Préstamos CDFI, LLC (Préstamos) is now available in Nevada promoting business and community development. As a lending agency, Préstamos provides technical assistance, access to business capital, and commercial real estate loans. Préstamos is an afíliate of CPLC Southwest, a provider of first time homebuyer and foreclosure prevention services in Las Vegas for the last four years.

Why Préstamos? Préstamos helps build stronger communities by providing entrepreneurs with access to capital through nontraditional financing resources for startups and existing businesses. Préstamos supports small business owners who face barriers to securing credit from traditional lending institutions due to smaller loan requests; a greater need for flexible underwriting; or help meeting underwriting standards. By coupling small business loans with technical assistance and small business development services, Préstamos guides aspiring entrepreneurs and small business owners through every stage of the loan process.

Loans are provided for working capital, machinery or equipment, inventory or supplies, furniture or fixtures, and commercial real estate. Loan products include: Micro Enterprise Loans (up to $50,000), Small Business Loans ($50,000 - $500,000), and Commercial Real Estate ($500 - $10 Million). For more information, please contact Albert Delgado at (702)207-1614 or visit their office at 2685 Pecos McLeod, Las Vegas, NV 89121.

Secure Equal Opportunity in Business

Funded through the U.S. Department of Transportation (USDOT), the federal Disadvantaged Business Enterprise (DBE) program helps businesses classified as small, woman-owned or disadvantaged to compete in a fair, competitive environment right alongside larger corporations. In an effort to eliminate inequalities, each state's Department of Transportation administers the DBE program with one DBE officer presiding as a liaison officer. In Nevada, Yvonne Shuman and her staff are dedicated to help eligible businesses become DBE-certified so they can become part of the Nevada Unified Certification Program and bid on federally funded highway construction and other projects.

Any industry qualifies for certification. There are three qualifying factors used to determine eligibility for DBE certification: gross receipts, control-ownership and personal net worth. When you are certified in Nevada with NDOT, you will also be certified with the Regional Transportation Commissions of Washoe and Clark counties as well as airport authorities in Las Vegas and Reno—hence, the Nevada Unified Certification Program (NUC).

Not all projects up for bid are highway construction related. Other project types could include right-of-way services (buying land to put highways on), demolition, property appraisals to estimate value on land, consulting services or graphic/web design.

(continued)

Nevada Department of Transportation (NDOT) also offers free training opportunities to DBE-certified firms via the Nevada Small Business Development Center. For information, please visit the DBE Program website at www.nevadadot.com/NevadaDBE/DBE_Program.aspx. Broaden your business opportunities. Apply for your DBE certification today.

Protect your Business this Holiday Season from Hackers and Cyber Criminals

All too often, small businesses are easy prey for Hackers and Cyber criminals. Now that the holiday season is upon us, cyber criminals may be increasing their activity, and your business may very well be their next target. Unfortunately, there is a common misconception amongst small business owners that they are too small or insignificant to be a target of such sophisticated attacks and that these criminals are only interested in attacking large institutions.

This false sense of security is exactly why many cyber criminals may be focusing on businesses just like yours this holiday season. Simply put, you are an easier target. These cyber criminals are very sophisticated. They simply create programs to scan and attack numerous vulnerabilities across thousands of websites every day. This results in thousands of small business owners' websites being compromised daily.

What can you do now to help prevent hackers from gaining access to your website, bank accounts, and customer data?

1. Change Your Passwords: Hackers now use sophisticated programs that can attempt to log into your website, email, and other sensitive accounts. These programs can process thousands of passwords in the blink of an eye. Having a password that is a minimum of 8 characters that uses a combination of upper and lowercase letters, numbers and symbols make your password much more secure.

2. Use Different Passwords for Different Sites: This one is quite obvious. If you use the same password across all of your sites and the criminal gains access to one. It's like giving him the access to them all.

3. Make Sure Your Website is up to Date: Most websites use third party software to allow them to perform properly. Updates usually patch known security vulnerabilities.

4. Update your Internet Browser: Out of date Internet browsers are often preferred targets for cyber criminals to gain entry to your data.

5. Use Antivirus Software: These programs constantly scan your computer, emails, and software for malicious attacks. Anti-Virus is important, even for Mac users. There has been an increase in attacks on the Mac platform due to its increasing popularity.

Stormie Andrews is founder of Yokel Local in Las Vegas, an Internet Marketing Services firm. Please visit their website at www.yokellocal.com.

ask an EXPERT

Cheryl Thode
Solutions Provider
All About Marketing Solutions
info@AllAboutMarketingSolutions.com
(702) 525-5079

Q: How can social media help my business?

A: Social Media is here to stay! If you are sitting on the bench, I encourage you to jump in, the water's warm. For your business to be successful, social media needs to be part of your marketing plan in 2015. Here are 4 ways a small business will benefit from social media marketing.

1. Extend Your Reach. Social Media will introduce you to people outside your circle. It delivers worldwide exposure to countless daily users. Studies have shown that interacting regularly and consistently will build connections that provide business opportunities.

2. Build Relationships. We do business with people we know, like and trust. These relationships promote repeat business and word-of-mouth referral leads, the best kind! Connecting with customers, sharing your experience and being a trusted source of valuable information develops your business community. This sense of community creates a loyal following for your company.

3. Reputation Management. Use social media to monitor and actively respond to online mentions about your company. Immediately address any positive or negative customer comments. Build credibility, show readers that you're responsive to their needs.

4. Cost Effective. You don't need a marketing department or agency to advertise with social media, it's a do-it-yourself model with professional results. There is no cost to set up your profile pages. Attend our free seminars for best practices, content tips and scheduling suggestions.

Don't get left behind, join the conversations, get noticed, boost sales and manage your brand with effective, affordable social media tools. Your next prospect could come from social media.

Have a question for one of our guest experts?
Email cfoley@business.nv.gov.

RESOURCE ORGANIZATION SPOTLIGHT:
RURAL NEVADA DEVELOPMENT CORPORATION

The Rural Nevada Development Corporation (RNDC) is a non-profit CDFI formed in 1992 to serve the fifteen rural counties and the twenty-seven Native American tribes of Nevada. RNDC provides small business loans to businesses that do not meet bank underwriting thresholds. RNDC offers the bank the right of first refusal as to not compete. The goal for the RNDC is to get the borrower from non-bankable to bankable in a reasonable amount of time.

As a lender of last resort, RNDC serves start-up and existing businesses that want to grow and expand in order to fuel industrial and commercial growth in the rural communities throughout the state. We can do stand alone deals or partner with other agencies/lenders that require gap financing including wholesale, retail, manufacturing, and service industries that are essential but lacking in these communities. Our goal is to generate quality jobs and tax revenues, to provide essential services to our communities, and to provide our borrowers with affordable capital and quality technical assistance.

RNDC has two programs. Rates and fees are based on financial risk and collateral. The interest rate charged to an ultimate recipient would not be less than 6% and no more than 12%. We can lend for up to 25 years.

Small Business Loans between $50,000 and $250,000 to purchase equipment or other fixed assets, to finance working capital, to acquire a business, and to refinance higher interest debt if there is sound economic justification to start-ups and existing businesses. Our loans may be subordinated to induce bank financing and participations.

Microloans between $500 - $50,000 to purchase equipment or other fixed assets and to finance working capital. We will lend for up to ten years, but we prefer to keep it under seven. Our Microloan program is funded by USDA (RMAP).

CONTACT RNDC

1320 E. Aultman Street in Ely, NV 89301
toll free: 866-404-5204
www.rndcnv.org
Mary Kerner, Lending Administrator- mary@rndcnv.org.

RNDC Helps Bring Pizza Factory Franchise to Ely

A family decided they wanted quality pizza available in the White Pine County area. Harwinder Singh, Jaswinder Pal Singh and Harvarinderjit Chahal put their heads together and with a lot of hard work, dedication and monumental backing from the community, the Pizza Factory opened. The guys initially leased the building and set forth on a giant task of retrofits, upgrades and health inspections. They had a bank in place to do the permanent financing on the building, however timing was an issue and they needed a short term bridge loan to secure the option to purchase. With an RNDC loan, they were able to do so. They are open every day of the week and busy every day as well. They employ 17 people in the small rural community. They opened in mid-August and have doubled the projections they initially prepared with the assistance of the franchisor. They are grateful to the community for their support!

L to R: Mary Kerner, RNDC Lending Administrator, Harvarinderjit Chahal and Harwinder Singh, owners of the Pizza Factory – Ely.

six categories of individuals: (1) casual babysitters; (2) domestic service employees who reside in the household; (3) outside salespersons whose earnings are based on commissions; (4) certain agricultural employees; (5) taxicab and limousine drivers; and (6) certain persons with severe disabilities.

While the constitutional amendment did not directly conflict with the exemptions outlined in NRS 608.250, its passage created some uncertainty. It was this uncertainty that the Nevada Supreme Court addressed this past summer in *Thomas v. Nevada Yellow Cab*, 130 Nev. Adv. Op. 52 (2014). In its opinion, the Nevada Supreme Court found that exemptions outlined in the Nevada Constitution supersede the exemptions previously provided for in NRS 608.250. The only individuals who are exempt from the payment of minimum wage, according to the Nevada Supreme Court, are those specifically outlined in the constitutional amendment.

What does this decision mean for Nevada's employers? It means that employers who have previously relied on the exemptions outlined in NRS 608.250 will be mandated to pay minimum wage to individuals not specifically exempted in the Nevada Constitution.

"Qualified" Heath Insurance

State law outlines what is required of health insurance provided by an employer to be considered "qualified" in order to pay the lower tier minimum wage to their employees. Among other requirements outlined in NAC 608.102, including coverage for certain health care expenses, the cost of the premium for the health insurance plan paid by the employee must not exceed 10 percent of the gross taxable income of the employee paid by an employer. In addition, the insurance must be made available to the employee's dependents and the waiting period cannot exceed 6 months.

If an employer does not offer a health insurance plan, or the health insurance plan is not available or not provided within 6 months, the employee must be paid at least minimum wage until the employee is eligible or the plan become available. An employer is required to maintain documentation in the event that an employee declines qualified health insurance.

The passage and implementation of the Affordable Care Act, a federal health insurance mandate outside of Nevada's jurisdiction, adds an additional burden on employers related to offering health insurance benefits to employees. Although it is likely that an employer offering a qualifying plan under the Affordable Care Act will often also qualify to pay the lower minimum wage rate, a separate analysis under Nevada law and the Act should be done to ensure compliance with the requirements under both.

Regulatory Review

Rulemaking workshops were conducted earlier this year to solicit comments on Nevada's unique minimum wage structure and give the public an opportunity to provide input on existing regulation to ensure the best interest of Nevada's workers. Testimony provided at the initial workshops and any workshops that may be conducted in the future will assist the Labor Commissioner in determining if an amendment to the existing regulations should be proposed. Until that formal process concludes, one thing is clear: a little education will go a long way to ensure Nevada's employers are familiar with their obligations and responsibilities to their employees under law.

Minimum Wage Resources

Statutes and regulations governing minimum wage
NRS 608- www.leg.state.nv.us/NRS/NRS-608.html
NAC 608- http://www.leg.state.nv.us/NAC/NAC-608.html

2014 Minimum Wage Bulletin
www.laborcommissioner.com/min_wage_overtime/2014%20Annual%20Bulletin%20-%20Minimum%20Wage.pdf

Supreme Court Advisory Opinion
www.leg.state.nv.us/division/legal/weblawcd/SCop/130/130NevAdvOpNo52.html

Nevada Office of the Labor Commissioner
www.laborcommissioner.com

New Statewide Housing Locator Tool Now Available

This fall, the Nevada Housing Division introduced a statewide service to help Nevadans find and fill rental vacancies. **NVHousingSearch.org** is free to list and search for all types of rental housing, including affordable, accessible, subsidized and assisted-living units as well as market-rate rentals. To ensure maximum access to housing information, the service is available both online and through a live, toll-free, multilingual call center.

This resource can be a useful tool for employers seeking to provide relocation resources and information to prospective employees.

NVHousingSearch.org keeps listings up to date, which means that the detailed rental data generated by NVHousingSearch.org stays current. Currently, 23,000 Nevada rental units are listed on NVHousingSearch.org, a number that continues to increase as word of the service reaches across the state. An influential advisory board made up of housing professionals who serve across the housing continuum meets quarterly to help drive the service and make sure its goal to connect Nevadans with the housing they need is consistently met across the state.

Data from NVHousingSearch.org will paint a comprehensive picture of existing rental housing stock in Nevada, as well as how effectively housing needs are being met, especially among populations with special housing requirements. Other initiatives, such as disaster preparedness and raising awareness of Fair Housing law, can be addressed by NVHousingSearch.org, which now features links and contact information for regional Fair Housing resources. Future projects include creating an online inventory of all accessible housing units in Nevada.

Housing providers can add unlimited listings at no charge. NVHousingSearch.org offers a good mix of large, multifamily properties and privately owned, "mom'n'pop" units, including single family houses. Tenants search for housing based on specific need, meaning they can more easily identify housing opportunities that they qualify for.

"Thousands of people each month are already searching NVHousingSearch.org for housing. That number will continue to grow as awareness of NVHousingSearch.org expands," said NHD administrator CJ Manthe. "Property owners or landlords can fill their vacancies more quickly, and tenants can find housing that fits their specific needs. It's a win-win for Nevada communities."

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